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## A Theory of the Business Trust

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## A THEORY OF THE BUSINESS TRUST

*Eric C. Chaffee\**

### I. INTRODUCTION

Business trusts have played and continue to play an important role in the United States economy.<sup>1</sup> While business trusts do have some defining characteristics,<sup>2</sup> determining the exact number of these entities currently in existence is likely impossible because many trusts have business-related attributes as a result of their assets being used in business ventures.<sup>3</sup> With that said, historically, a lot of the nation's most important business entities have been organized as business trusts, which is why the United States has antitrust law, rather than monopoly or competition law, as the field is known in many foreign jurisdictions.<sup>4</sup> In addition, currently,

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\* Professor of Law, The University of Toledo College of Law; J.D., University of Pennsylvania Law School; B.A., The Ohio State University. This Article benefited from discussions with scholars too numerous to mention. I would like to offer special thanks to Professors Felix B. Chang, William E. Foster, Stefan J. Padfield, Elizabeth Pollman, Peter B. Oh, Lee Strang, and Lee-ford Tritt for providing feedback and advice that greatly contributed to this Article. I would also like to thank Christine Gall, Esq. for her encouragement while drafting this work. This project was supported by a summer research grant from The University of Toledo College of Law. The views set forth in this Article are completely my own and do not necessarily reflect the views of any employer or client either past or present.

1. See Ronald E. Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 987 (1982) (“In the late nineteenth century, the United States experienced explosive economic growth which was accompanied by the proliferation of large business trusts.”); Robert H. Sitkoff, *Trust as “Uncorporation”: A Research Agenda*, 2005 U. ILL. L. REV. 31, 31 (“Trust has long been a competitor of corporation as a form of business organization. Though corporation today dominates trust for operating enterprises, trust dominates corporation in certain specialized niches. The market value of these niches measures in the trillions of dollars.”).

2. See Ryan A. Christy, *Redefining the Juridical Person: Examining the Business Trust and Other Unincorporated Associations for Citizenship Purposes*, 6 DUQ. BUS. L.J. 137, 150 (2004) (“[A] business trust possesses many of the attributes that are fundamental to a corporation—namely, centralized control and management, free transferability of interests, limited liability, and continuity of life.”); John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2166 (2016) (“Every aspect of the corporate form that legal theorists and historians have identified as key to the corporate form’s success also existed in the [business] trust.”).

3. See Peter B. Oh, *Business Trusts*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 268, 268 (2015) (“[T]he business trust arguably is the most prominent organizational form used today. This claim is disputable essentially only insofar that no one knows the actual composition, scale, and volume of trusts used for commercial purposes.”); Takemi Ueno, Comment, *Defining a “Business Trust”: Proposed Amendment of Section 101(9) of the Bankruptcy Code*, 30 HARV. J. ON LEGIS. 499, 514 (1993) (“Unfortunately, there appear to be no statistics on how many business trusts there are in the United States and how large they are . . .”).

4. See Tom C. Hodge, *Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101*, 3 WM. & MARY BUS. L. REV. 59, 66 (2012) (“In the United States, competition law is known as ‘antitrust,’ the reason for this being that the Sherman Act had been passed specifically to combat business ‘trusts’ (or cartels).”); Faith Stevelman & Sarah C. Haan,

business trusts continue to be used regularly for pension plans, mutual funds, and asset securitization.<sup>5</sup> Notwithstanding the historic and current importance of business trusts, the existing literature on these entities is sparse, especially considering that hundreds of corporate law articles are written each year.<sup>6</sup> This has left substantial opportunities for scholarship relating to these entities.<sup>7</sup>

One such opportunity is the development of a theory of the business trust. The metaphysical inquiry into the essential nature of the corporation is well-developed. As a result, three prevailing theories of the corporation have emerged. First, the artificial entity theory, also referred to as concession theory, suggests that corporations are artificial entities created by the state.<sup>8</sup> Second, the real entity theory, or the natural entity theory, suggests that the corporation is an entity created by, but distinct from, the collective identity of the individuals organizing, owning, and operating it.<sup>9</sup> Finally, the aggregate theory, which is also

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*Board Governance for the Twenty-First Century*, 74 BUS. LAW. 329, 336 (2019) (“[A]ntitrust law emerged in the progressive era after the deleterious social effects of the big business trusts had become obvious.”); Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 670 (2017) (“The impetus for U.S. antitrust law in 1890 was the creation of organizations—‘trusts’—that bought up and held regional rivals from across the country. John Rockefeller’s Standard Oil, often depicted in cartoons of the era as an octopus whose tentacles entwined markets and state legislatures . . . , is the most famous example.”).

5. See David M. English, *The Uniform Trust Code (2000) and Its Application to Ohio*, 30 CAP. U. L. REV. 1, 4 (2000) (“Examples of commercial transactions where the use of trusts is prevalent, if not predominant, include pension funds, mutual funds for pooling investment assets, and trusts to secure repayment of corporate debt.”); David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 75 (2012) (“[T]oday, trusts hold trillions of dollars in employee pensions, mutual funds, and securitized assets.”); S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT’L L. 1157, 1173 (2012) (“[T]here are a wide variety of statutory and common law business trusts currently in use, with some of the more common types including pension trusts, investment or unit trusts (which include mutual funds, real estate investment trusts (REITs), oil and gas royalty trusts, and asset securitization trusts), and trusts relating to the issuance of bonds.”).

6. Sitkoff, *supra* note 1, at 33 (“[D]omestic business law scholars have a stunning lack of familiarity with the business trust. There is very little modern scholarship on business trusts. None of the leading casebooks on ‘business organizations’ or ‘business associations’ covers the business trust at all.”).

7. See generally *id.* (discussing the numerous opportunities to undertake groundbreaking scholarship regarding business trusts).

8. See Grant M. Hayden & Matthew T. Bodie, *Shareholder Voting and the Symbolic Politics of Corporation As Contract*, 53 WAKE FOREST L. REV. 511, 534 (2018) (“The idea of concession theory is that corporations only exist thanks to a grant—a concession—by the state . . . .”); Kayal Munisami, *The Role of Corporate Social Responsibility in Solving the Great Corporate Tax Dodge*, 17 FLA. ST. U. BUS. REV. 55, 77 (2018) (“For the artificial entity theory, the corporation owes its existence to the positive law of the state rather than to the private initiative of its members and is therefore a creature of state law and nothing else.”); J. Janewa OseiTutu, *Corporate “Human Rights” to Intellectual Property Protection?*, 55 SANTA CLARA L. REV. 1, 42 (2015) (“[T]he concession theory postulates that corporations are created by the state and have only the rights that are granted to them by the state.”).

9. See Heather M. Kolinsky, *Situating the Corporation Within the Vulnerability Paradigm: What Impact Does Corporate Personhood Have on Vulnerability, Dependency, and Resilience*, 25 AM. U. J. GENDER SOC. POL’Y & L. 51, 61 (2017) (“The real entity theory views the corporation as a separate,

commonly referred to as the nexus of contract theory, suggests that the corporation is merely the sum of the individuals composing it, who are tied together through various obligations.<sup>10</sup>

While each of these theories has some appeal, all of them are descriptively thin because although they give insight into *how* the corporation exists, they fail to give insight into *why* the corporation exists.<sup>11</sup> This is especially problematic because the development of the corporation is well-documented, and the reasons for the creation of the corporation are well understood.<sup>12</sup> Beyond that, each of the prevailing theories of the corporation fails to fully entail what a corporation is. While respecting the role of the state in corporation, the artificial entity theory underplays the role of the individuals organizing, operating, and owning the corporation and the collective identity of the group.<sup>13</sup> While respecting the collective identity of the group, the real entity theory underplays the role of the state in creating the corporation and the roles of the individuals involved in organizing, owning, and operating the entity.<sup>14</sup> Finally, while respecting the individuals organizing, owning, and operating the entity, the aggregate theory underplays the role of the state in the corporation and the collective identity of the group.<sup>15</sup> As a consequence, none of the prevailing theories fully describes what is a corporation.

Although some have argued for backing away from this debate and embracing the indeterminacy of the corporate form, I have developed a theory of the corporation—collaboration theory—that suggests that the

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distinct entity--the park in which the trees are situated, with its own specifically delineated boundaries, rather than the trees themselves.”); Sloan G. Speck, *The Social Boundaries of Corporate Taxation*, 84 *FORDHAM L. REV.* 2583, 2591 (2016) (“[T]he ‘real entity’ theory treats corporations as distinct legal persons with specific rights and obligations not linked to those of their owners.”); Celia R. Taylor, *The Inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, 85 *OR. L. REV.* 993, 1000 (2006) (“At its heart, real entity theory holds that a corporation has identity and attributes independent from its shareholders.”).

10. See Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 *U. PA. L. REV.* 579, 586 (2018) (“[A]ggregate theory views the corporation as an aggregation of natural persons.”); Gwendolyn Gordon, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a Maori Corporation Walk into a Bar*, 39 *SEATTLE U. L. REV.* 353, 368 (2016) (“Aggregate theories posit that the corporation is only and entirely the pile of human people, connected through actual or implied contractual relationships, that actually make up the firm.”); Grant M. Hayden & Matthew T. Bodie, *Larry from the Left: An Appreciation*, 8 *VA. L. & BUS. REV.* 121, 129 (2014) (“The ‘nexus of contracts’ theory holds that the firm--and by extension the corporation--is merely a central hub for a series of contractual relationships.”).

11. See *infra* Section III.D (examining the shortcomings of the prevailing theories of the corporation).

12. See *infra* Section II.A (exploring the history of the corporation).

13. See *supra* note 8 and accompanying text (discussing the artificial entity theory of the corporation).

14. See *supra* note 9 and accompanying text (discussing the real entity theory of the corporation).

15. See *supra* note 10 and accompanying text (discussing the aggregate theory of the corporation).

for-profit corporation is a collaboration among the state and individuals organizing, owning, and operating the entity for purposes of economic development and gain.<sup>16</sup> Collaboration theory better defines the corporation because it describes both how the corporation exists—i.e., as a collaboration among the state and the individuals organizing, operating, and owning it, and why the corporation exists—i.e., to pursue economic gain. As a consequence of this fuller definition, collaboration theory has a variety of normative implications relating to the corporation where the prevailing theories of the corporation fall short.<sup>17</sup>

The purpose of this Article is to develop an essentialist theory of the business trust. A useful place to begin is with the existing theories of the corporation. First, because corporations and trusts are both business entities, these entities are likely to share common features. Second, if any of the existing theories can be applied, broader implications exist for the field of business law.

All of the prevailing theories of the corporation, however, fail to adequately define business trusts. An artificial entity theory does not accurately describe business trusts because even though many states have promulgated business trust acts,<sup>18</sup> state action is not required to create business trusts generally.<sup>19</sup> A real entity theory of the business trust is not sufficiently descriptive because, similar to the real entity theory of the corporation, it fails to fully describe the business entity.<sup>20</sup> An aggregate theory comes much closer to accurately describing the business trust, but it is problematic for two reasons. First, as previously discussed, aggregate theory gives little insight into the reasons why these entities exist.<sup>21</sup> Second, as a result of the aggregate theory being reconceived as the

16. See generally Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719 (2016); Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353 (2017); Eric C. Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, 76 WASH. & LEE L. REV. 93 (2019).

17. See generally ERIC C. CHAFFEE, *THE CORPORATION DEFINED: COLLABORATION THEORY AND THE CORPORATE FORM* (Cambridge University Press, forthcoming 2021) (exploring numerous normative implications of the collaboration theory of the corporation).

18. See Wendy S. Goffe, *Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals*, 46 REAL PROP. TR. & EST. L.J. 543, 560 (2012) (“At least thirty states have enacted business trust statutes because of the many limitations of the common law business trust and the common-law limitations on fiduciaries.”); Harry J. Haynsworth, *The Unified Business Organizations Code: The Next Generation*, 29 DEL. J. CORP. L. 83, 97 (2004) (“Approximately thirty-four states have some form of business trust statute and most of these are very incomplete and inconsistent. . . . The most complete act is the Delaware Business Trust Act, enacted in 1988 and amended periodically. It has been the model for . . . business trust statutes in Nevada, New Hampshire, and Virginia . . . .”); Sitkoff, *supra* note 1, at 35 (“The existing literature, such as it is, puts the count of states with general business trust legislation anywhere from seventeen to thirty-four.”).

19. See *infra* Section III.A (describing the artificial entity theory of the corporation).

20. See *infra* Section III.B (describing the real entity theory of the corporation).

21. See *infra* Section III.C (describing the aggregate theory of the corporation).

nexus-of-contracts theory, problems exist in applying this theory to trusts because many scholars conceive of these entities as being founded upon property relationships (rather than contractual relationship)<sup>22</sup> or a hybrid of property and contractual relationships.<sup>23</sup>

This Article proposes the collaboration theory of the business trust. As my previous scholarship discusses, when applied to corporations, collaboration theory argues that for-profit corporations are collaborations among the state and the individuals organizing, operating, and owning the entity for purposes of economic development and gain. The collaboration theory of business trusts is a more narrowly focused collaboration among the settlor, trustee, and beneficiaries of the trust for the economic development and gain of the beneficiaries. Similar to the collaboration theory of the corporation, the collaboration theory of the business trust also has normative implications. For example, in the absence of the state as a part of the collaboration, the focus of business trusts is unrepentant profit maximization because of the purpose of the collaboration. In addition, collaboration theory helps to explain why the default fiduciary duties in business trusts are stronger than those in corporations because the collaboration is unflinchingly focused upon the economic development and gain of the beneficiaries.

This Article contributes to the existing literature in three main ways. First, despite the substantial literature dedicated to defining the essential nature of the corporation, this Article embodies the first attempt to develop an essentialist theory of the business trust. This deficiency is likely the result of the limited literature dedicated to business trusts,<sup>24</sup> notwithstanding their historic and continued importance,<sup>25</sup> and the fact that none of the prevailing essentialist theories of the corporation are

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22. See Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 434 (1998) (“The essential role of the trust . . . is to perform a property law-like, rather than a contract law-like, function.”); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 628 (2004) (“Trust law is most frequently classified as a species of property law.”); Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2595 (2011) (“[T]he clear majority position is that trust law is a form of property law . . .”).

23. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 669 (1995) (“Trust is a hybrid of contract and property, and acknowledging contractarian elements does not require disregarding property components whose convenience abides.”); Kent D. Schenkel, *Trust Law and the Title-Split: A Beneficial Perspective*, 78 UMKC L. REV. 181, 191 (2009) (“The unique legal genesis of trusts produced a device that resists a neat and clean categorization. Trusts have characteristics of both contracts and property interests.”); Allison Anna Tait, *Keeping Promises and Meeting Needs: Public Charities at a Crossroads*, 102 MINN. L. REV. 1789, 1792 (2018) (“[T]rust law has roots in both contract and property. In fact, a longstanding debate . . . exists about whether trust law is contract or property. Both contract and property have something to offer to trust law.”).

24. See *supra* note 6 and accompanying text (discussing the very limited literature relating to business trusts).

25. See *supra* notes 1-5 (discussing the historic and current importance of business trusts).

transferrable to business trusts.<sup>26</sup> Second, this Article represents the first application of a new theory of the corporation that I have developed, collaboration theory, to business trusts.<sup>27</sup> Third, this Article adds to a remarkably thin literature on business trusts, despite their historic and current importance.

The remainder of this Article is structured as follows. Part II explores the competing histories of corporations and trusts and demonstrates how the origins of these entities intersect and depart from each other. Part III discusses the three prevailing theories of the corporation—artificial entity theory, real entity theory, and aggregate theory—and explains the need for a fourth prevailing theory of the corporation, collaboration theory, which I have created and will more fully explain in this Article. Part IV examines the application and implications of these essentialist theories to business trusts, and it argues that a collaboration theory of the business trust should prevail, while discussing some of the potential criticisms of such a theory. Finally, Part V offers brief concluding remarks.

## II. THE COMPETING HISTORIES OF CORPORATIONS AND TRUSTS

Although for-profit corporations and business trusts currently serve similar social functions, the origins of these entities are substantially different. While corporations historically developed to achieve governmental goals and undertake social activities, trusts developed and have often been employed to circumvent the law and benefit private individuals.

### A. *A Brief History of the Corporation*

The origins of modern corporations can be traced to ancient Rome. Although other cultures had entities with similarities to the corporate form, Roman law is a proper place to start in tracing the history of the modern corporation because the term corporation derives from the Latin word *corpus*, which means “body.”<sup>28</sup> In addition to *corpus*, the

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26. See *infra* Section IV.A (analyzing why none of the prevailing theories of the corporation can or should be adapted to create a theory of the business trust).

27. See *supra* note 16 (listing a number of my publications explaining the collaboration theory of the corporation and exploring its implications).

28. See Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1161 n.126 (2012) (“The etymology of the word ‘corporation’ comes from the Latin ‘corpus,’ which means ‘body,’ as in a ‘corps’ or group of people.”); Michael J. Kelly, “Never Again”? *German Chemical Corporation Complicity in the Kurdish Genocide*, 31 BERKELEY J. INT’L L. 348, 350 (2013) (“From the Latin *corpus* for body, corporations have been around since Roman times.”); Jonathan R. Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 478 (“In the West, the idea of the corporation began with the Romans. . . . The . . .

predecessors to the modern corporation under Roman law were also known by other names, including *collegium* and *universitas*.<sup>29</sup> Notably, rather than business, these entities were employed for a wide range of social purposes, including religious societies, trade guilds, political clubs, and burial societies.<sup>30</sup> Under Roman law, corporations were conceived of broadly, and even included municipalities and the Roman state itself.<sup>31</sup>

The modern corporation emerged over time. During the middle ages, England began allowing the creation of corporations for municipal, religious, and charitable purposes.<sup>32</sup> In the thirteenth century, Sinibaldo Fieschi, who went on to become Pope Innocent IV, developed the concept of *persona ficta*, which entailed the idea that non-corporeal entities could be afforded legal personhood.<sup>33</sup>

During the sixteenth and seventeenth centuries, the Crown began

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term ‘corporation’ derives from the Latin word *corpus* which translates into English as the word ‘body’ . . .”).

29. See Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 529 n.93 (2011) (“In addition to *universitas*, the corporation was also referred to by the words, *corpus* (body) and *collegium* (college.)”); Ian D. McClure, *From a Patent Market for Lemons to a Marketplace for Patents: Benchmarking IP in Its Evolution to Asset Class Status*, 18 CHAP. L. REV. 759, 765-66 (2015) (“Roman law recognized various types of municipal-led, political or religious-focused corporations under the names *universitas*, *corpus*, or *collegium*.”); Sean M. O’Connor, *Hired to Invent vs. Work Made for Hire: Resolving the Inconsistency Among Rights of Corporate Personhood, Authorship, and Inventorship*, 35 SEATTLE U. L. REV. 1227, 1230 (2012) (“The term and concept ‘corporation’ derived from the *universitas*, *corpus*, and *collegium* of Roman law.”).

30. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 216 (1983) (discussing that in Ancient Rome, “many private associations, including organizations for maintaining a religious cult, burial clubs, political clubs, and guilds of craftsmen or traders, were considered to be corporations”).

31. See *id.* at 215 (discussing the predecessors of the modern corporation under ancient Roman law); Bruce P. Frohnen, *The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups*, 107 W. VA. L. REV. 789, 807 (2005) (“Corporate entities, including municipalities, trade guilds and burial societies, were known in Roman law from the earliest times.”).

32. See Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 789 (2013) (“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.”); Roscoe Pound, *Visitation Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369, 370 (1936) (“The corporations of the Middle Ages were either religious or municipal.”); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 891 (2016) (“The first corporations chartered in Europe in the Middle Ages were not business corporations. Rather, they were religious, municipal, and benevolent corporations.”).

33. See Nicholas P. Cafardi, *The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis*, 29 SETON HALL LEGIS. J. 361, 362 (2005) (“The Canon law of the Roman Catholic Church was the first legal system in the world to develop the notion of a fictitious legal personality. . . . [T]he term *persona ficta*, meaning a fictitious or legal person, is actually used for the first time in legal history by the canonist, Sinibaldo Fieschi in the mid-thirteenth century.”); Mary Szto, *Limited Liability Morality: Fiduciary Duties in Historical Context*, 23 QUINNIPIAC L. REV. 61, 109 (2004) (“Sinibaldo Fieschi, also known as Sinibaldus Fliscus, is known as the father of modern corporations theory. In the thirteenth century he wrote about ‘*persona ficta*,’ which led to the notion of ‘legal persons.’”).



chartering companies to develop newly conquered lands.<sup>34</sup> Corporations started to appear for purposes of trading.<sup>35</sup> Joint stock ownership companies allowed individuals to become passive investors in corporations.<sup>36</sup> Throughout this entire period and up until 1844, when England passed its first general incorporation statute, corporations could only be created by a specific act of the Crown and later parliament.<sup>37</sup>

Corporations were exported to North America as well. The British

34. See Erika R. George, *Incorporating Rights: Empire, Global Enterprise, and Global Justice*, 10 U. ST. THOMAS L.J. 917, 936 (2013) (“Until the late sixteenth century, businesses were mostly comprised of partnerships, but Europe’s colonial expansion contributed to the elevation of the corporate form. . . . The corporate form proved the structure best suited for mediating the high risks associated with for-profit activities of the period primarily as overseas trade and exploration.”); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1632 (“By the late sixteenth century, several European countries had begun chartering corporations to develop foreign trade and colonies. Some of these early corporations, such as the East India Company and the Hudson Bay Company, became well-known players in American colonial times.”); Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 518 (2012) (“English joint-stock companies, from which modern American corporations trace their lineage, were the major organizational structure and authority used to colonize North America.”).

35. See Honor Keeler, *Indigenous International Repatriation*, 44 ARIZ. ST. L.J. 703, 720-21 (2012) (“The European trading companies that emerged in the sixteenth and seventeenth centuries under charters formed the basis of modern corporations today, and the practice of multi-national corporate law.”); Eric W. Orts, *War and the Business Corporation*, 35 VAND. J. TRANSNAT’L L. 549, 552 (2002) (“The modern corporate form of business organization traces its roots to the government-chartered Dutch and English trading companies in the sixteenth and seventeenth centuries and the unchartered joint-stock companies of late seventeenth century England.”); Strine & Walter, *supra* note 32, at 892 (“Business corporations first appeared in England in the late sixteenth century in the form of foreign trading ventures.”).

36. See Kelvin H. Dickinson, *Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership*, 33 AM. U. L. REV. 559, 571 (1984) (“Joint stock companies often included many passive investors similar to the typical shareholders in today’s large public corporations.”); Franklin A. Gevurtz, *The Function Of “Dysfunctional” Boards*, 77 U. CIN. L. REV. 391, 400 (2008) (“The development of the joint stock company, by setting the stage for transferable ownership interests in which voting power can depend upon the number of interests purchased and in which voting power might become widely dispersed among passive investors, obviously had tremendous implications for corporate governance . . . .”); Kristen N. Johnson, *Macroprudential Regulation: A Sustainable Approach to Regulating Financial Markets*, 2013 U. ILL. L. REV. 881, 888 n.44 (“As early as the sixteenth and seventeenth centuries, the charters of English trading companies permitted passive investors to acquire transferable ownership stakes coupled with voting interests that enabled the investors to representatively govern the business.”).

37. See Benito Arruñada, *Institutional Support of the Firm: A Theory of Business Registries*, 2 J. LEGAL ANALYSIS 525, 558-59 (2010) (“[I]n 1844 Parliament passed the Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, enabling companies to be created freely, provided they met certain requirements for registration and information disclosure, both at the time of incorporation and in subsequent reports that had to be registered every six months.”); Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 541-42 (“Prior to 1844, when the first U.K. general incorporation statute was passed, the only legitimate methods of acquiring corporate personality were by special Act of Parliament or by royal charter.”); Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 375 (2004) (“[Historically, in England,] every corporation was required to make a case to Parliament or the Crown that it fulfilled a “public purpose” in order to receive the privilege of incorporation.”).

government eventually transferred its power to create corporations to the colonial legislatures.<sup>38</sup> Continuing British traditions, in the early days of the United States, corporations could only come into existence through bills that were passed in the colonial and early state legislatures.<sup>39</sup> During this period, corporations were relatively rare,<sup>40</sup> and they often served quasi-governmental functions, such as maintaining canals, bridges, and roads.<sup>41</sup> In addition, colonial and early state legislatures chartered corporations for charitable, educational, and religious purposes.<sup>42</sup>

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38. See Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219, 228 (1995) (“The American colonies, following the experience of the English monarchy, began granting ‘special charters’ through the colonial assemblies which outlined the specific purpose of and restrictions placed upon those groups seeking incorporation.”); Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 380 (2014) (“Colonial legislatures chartered corporations as the organizational form for colleges, guilds, and municipalities, as well as for transportation projects such as canals and turnpikes.”); Christopher J. Wolfe, “‘An Artificial Being’: John Marshall and Corporate Personhood”, 40 HARV. J.L. & PUB. POL’Y 201, 204 (2017) (“Initially, colonial governments were granted this power [to create corporations] by the King’s agents; after the colonies broke away and created new state governments, the power to create corporate persons was considered part of the sovereign power of the state governments.”).

39. See Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81, 140 (1999) (“The colonial assemblies and the state legislatures assumed responsibility for chartering public corporations during America’s earliest years.”); Robert C. Hockett & Saule T. Omarova, “Special,” Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation-- and Vice Versa, 39 SEATTLE U. L. REV. 453, 467 (2016) (“The first phase in the evolution of the American corporation, commencing during the late colonial era and continuing into the early national period, saw colonial, then state, legislatures individually chartering specific corporate organizations for a quite limited number of specific purposes.”); Sarath Sanga, *A Theory of Corporate Joint Ventures*, 106 CAL. L. REV. 1437, 1444 (2018) (“Before states adopted general incorporation laws, only acts of the legislature granted corporate charters, and charters were therefore public law.”).

40. See Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 372 (2018) (reporting that in the early days of the United States, “[c]orporations were few in number”); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 276-77 (2012) (“During the colonial period, colonial legislatures had chartered a mere seven business corporations. By 1800, only about 335 business corporations had been chartered, and most were organized in just the last few years of the eighteenth century.”); Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101, 119 (2005) (“During the colonial period, there were only a tiny handful of business corporations created by the colonial legislatures . . .”).

41. See Daniel J.H. Greenwood, *Telling Stories of Shareholder Supremacy*, 2009 MICH. ST. L. REV. 1049, 1068 (“Until the general incorporation laws of the mid-nineteenth century it was generally assumed that corporations could only be formed for quasi-governmental tasks with a strong public interest, such as banking, university and secondary education, or transportation (bridges, canals, railroads.”); Hockett & Omarova, *supra* note 39, at 467 (“These first incorporated organizations were primarily municipalities, educational and charitable (a.k.a. ‘benevolent’) institutions, and certain partnerships that provided commercially salient public infrastructure like wharves.”); W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479, 505 (2018) (“Nearly two-thirds of the early commercial corporations built or maintained a bridge, turnpike, or highway; of the remaining commercial corporations, a plurality operated state-chartered banks.”).

42. See James Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 631 (1985) (“Almost all colonial corporations had charitable purposes. They

During the 1790s and 1800s, as the United States economy grew and the public embraced competition and industrialization, general incorporation statutes began to appear throughout the United States.<sup>43</sup> As a consequence, corporations quickly became the favored business form in the United States.<sup>44</sup> General incorporation statutes also created a schism between non-profit and for-profit corporations, and the modern for-profit corporation came into being.<sup>45</sup>

### B. A Brief History of the Trust

While the corporation historically was used to achieve governmental goals and to undertake social activities, trusts developed as a means of circumventing the law. The origins of trusts in Anglo-American law can be traced to the twelfth and thirteenth centuries.<sup>46</sup> During that period, the

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were churches, charities, educational institutions, or municipal corporations.”); Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 118 (1992) (“American corporation law is rooted in colonial use of the corporate device for religious congregations, charities, schools, local government units, and for large business enterprises providing public services, such as wharves and mills.”).

43. See Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMPLE L. REV. 1, 16 (2012) (“[B]y the middle of the nineteenth century, the practice of authorizing corporate charters on a case-by-case basis gave way to laws of general incorporation.”); James S. Mofsky & Robert D. Rubin, *Introduction: A Symposium on the ALI Corporate Governance Project*, 37 U. MIAMI L. REV. 169, 171 (1983) (“Industrialization prompted the enactment of the general incorporation laws in the early part of the nineteenth century. Those laws effectively eliminated the monopoly benefits and privileges afforded by special charters.”); Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 220 (2011) (“By the mid-nineteenth century, special chartering gave way to general incorporation statutes. Special incorporations for businesses were regarded as the corrupt result of legislative bribery, political favoritism, and monopolistic practices.”).

44. See Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 441 (2002) (“Though private business corporations existed in the eighteenth century, they were not popular and did not gain favor until the nineteenth century, after the advent of general incorporation laws.”); Peter V. Letsou, *The Changing Face of Corporate Governance Regulation in the United States: The Evolving Roles of the Federal and State Governments*, 46 WILLAMETTE L. REV. 149, 150 (2009) (“The use of corporations in the United States greatly expanded during the nineteenth century with the states’ adoption of general incorporation laws.”); Harwell Wells, *“Corporation Law Is Dead”: Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 313 (2013) (“[B]y late in the nineteenth century the corporate form was a commonplace frame for business organizations, its adoption made easy by the passage of general incorporation statutes during the century, and giant corporations had become an increasingly common feature of the economic landscape, beginning with the railroads.”).

45. See Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597, 619 (2016) (“States . . . passed general incorporation statutes for business corporations and began to allow businesses to incorporate for purely commercial purposes, such as manufacturing. These different general incorporation statutes evidenced the for-profit-nonprofit dichotomy that began to take shape.”).

46. See Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 804-05 (1983) (“The ‘use’ emerged during the twelfth and thirteenth centuries in England, and the trust developed over the fourteenth

government in England imposed substantial restrictions upon the ownership of property by the Roman Catholic Church.<sup>47</sup> Religious orders often imposed restrictions upon their members regarding holding property as well.<sup>48</sup> For example, during this period, Franciscan friars were prohibited from owning land, despite needing property as a place to live and worship, and to circumvent these restrictions, the “use” developed, which is a predecessor of the modern trust.<sup>49</sup> A *feoffor*, the equivalent of a settlor, conveyed land to a *feoffee*, the equivalent of a trustee, in a conveyance known as a *feoffment* for the benefit of the *cestui que use*, the equivalent of a beneficiary.<sup>50</sup> As the use gained popularity during the feudal age, it was employed as a means of avoiding restrictions on

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through seventeenth centuries.”); Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497, 502 (2014) (“The donative trust—or ‘use’ as it was first called—developed back in the thirteenth century as a mechanism for transferring real estate that otherwise was subject to various legal restrictions on transfer.”); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 73 (2005) (“Landowners arranged trust mechanisms (called ‘uses’) as early as the thirteenth century. Under these simple arrangements, landowners transferred title to ‘feoffees’ with the understanding that the feoffee would later transfer the property to a beneficiary of the owner’s choosing.”).

47. See Thomas E. Rutledge & Christopher E. Schaefer, *The Trust as an Entity and Diversity Jurisdiction: Is Navarro Applicable to the Modern Business Trust?*, 48 REAL PROP., TR. & EST. L.J. 83, 89 (2013) (“Various developments such as the Statute of Mortmain, which precluded or limited the ability of religious organizations to own real property, . . . encouraged the advancement of trusts.”).

48. See ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS & ESTATES* 386 (10th ed. 2017) (“Because the friars were forbidden to own property, benefactors conveyed land to friends of the friars, to hold to the use of the friars.”); Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 U. KAN. L. REV. 43, 57 n.65 (2007) (“Trusts were created in medieval England when grantors conveyed land to someone else to manage for the benefit of members of religious orders who had taken vows of poverty and were forbidden from owning property.”); Carla Spivack, 67 UCLA L. REV. DISCOURSE 46, 55 (“[Some] of the earliest trusts in English law were those benefitting the Franciscans, who were sworn to poverty.”).

49. See Bridget J. Crawford, *Less Trust Means More Trusts*, 75 WASH. & LEE L. REV. ONLINE 74, 80 (2019) (“[I]n the thirteenth century in England, the Franciscan order prevented its mendicant friars from owning any property. But because the monks needed stable places to live and worship, the Franciscans occasionally identified a wealthy patron who would convey land to a third party to hold the property for the benefit of the friars . . . .”); Dante Figueroa, *Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*, 24 ARIZ. J. INT’L & COMP. L. 701, 710 (2007) (“As early as the thirteenth century, Catholic monks used trusts for the implementation of their vows of poverty.”); Szto, *supra* note 33, at 92 (“The Middle Ages saw the development of the use, the forebear of the trust . . . .”).

50. See David J. Scipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1015 (2011) (reporting that in a feoffment of use, “[t]he landholder or feoffor granted or enfeoffed the land to feoffees to the use of the intended beneficiary, or *cestui que use*”); Mark A. Senn, *Shakespeare and the Land Law in his Life and Works*, 48 REAL PROP. TR. & EST. L.J. 111, 186 (2013) (“A use, which a modern lawyer would call a trust, was a conveyance by a feoffor to a feoffee for the use by the feoffee or a third party, called the *cestui que use*, according to the wishes of the feoffor . . . .”); Robert Whitman, *Resolution Procedures to Resolve Trust Beneficiary Complaints*, 39 REAL PROP. PROB. & TR. J. 829, 842 n.77 (2005) (“In the middle ages in England conveyancers of land invented the ‘use’ . . . . The owner of land enfeoffed another to the use of the feoffor or another. The transferee was called a ‘feoffee to uses’ and the intended beneficiary of the use a ‘cestui que use.’”).

transfers of wealth in the form of land within families,<sup>51</sup> and it also became a tool to avoid taxes and creditors.<sup>52</sup>

From these rebellious roots, business trusts grew. Pinpointing the first business trust is impossible, especially considering that the term “business” is notoriously difficult to define. With that said, the popularization of business trusts corresponds with the popularization of passive investing in business entities in the 1600s.<sup>53</sup> As previously discussed, during this period, corporations could only be formed through a specific grant by the government.<sup>54</sup> Because incorporating could be an onerous process, business trusts became an alternative method of seeking capital that sidestepped the legal requirements of forming a corporation.<sup>55</sup> In response to concerns about these emerging capital markets and the potential dangers that they might pose to investors and governmental control of business, the British government passed the Bubble Act of 1720, which outlawed unincorporated business entities with tradeable shares, including business trusts.<sup>56</sup> Although evidence suggests that the

51. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 165 (1997) (“The trust originated at the end of the Middle Ages as a means of transferring wealth within the family . . . .”); John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1071 (2007) (“The trust originated as a device for transferring real property, at a time when real property constituted the main form of wealth. Trust conveyancing allowed an owner to escape the medieval rule, which lasted into the seventeenth century, that freehold land was not devisable.”); Natalya Shnitzer, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 B.Y.U. L. REV. 629, 638 (“Having originated at the end of the Middle Ages as a means of transferring wealth within the family, the trust remains the characteristic device for organizing intergenerational wealth transmission . . . .”).

52. See Ignacio A. Martinez, *Trust and the Civil Law*, 42 LA. L. REV. 1709, 1713-14 (1982) (“As a legal institution, the trust enjoys a secular history dating back to the thirteenth century, and, according to historical investigations, it can be proved today, without any risk of error, that the trust was born in the pursuit of an illegal purpose: the transfer of lands to bogus intermediaries, avoiding in that way the payment of taxes and the enforcement of the laws governing *mortmain*.”); Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993, 1997 (2017) (“The trust is a direct descendant of the ‘use,’ a popular tax-and-creditor-avoidance device in feudal England.”).

53. See *supra* note 36 and accompanying text (describing the emergence of passive investing during the sixteenth and seventeenth centuries).

54. See *supra* notes 37-39 and accompanying text (discussing how corporations were formed historically in England, colonial America, and the early days of the United States).

55. See Sheldon A. Jones, Laura M. Moret & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421, 424-25 (1988) (“Due to the difficulty of obtaining Parliamentary authority or a Crown charter, many associations were voluntarily formed for the purpose of offering shares to the public without that proper authorization.”); Jared W. Speier, *Clarifying the Business Trust in Bankruptcy: A Proposed Restatement Test*, 43 PEPP. L. REV. 1065, 1067-68 (2016) (“[Historically,] corporations in England required authorization by an act of Parliament or a charter from the Crown. The process of obtaining authorization from the Crown or Parliament was rigorous, and many citizens formed voluntary associations to offer shares to the public without this proper authorization.”).

56. See Tan Cheng-Han, Jiangyu Wang & Christian Hofmann, 16 BERKELEY BUS. L.J. 140, 144 (2019) (“The British Parliament intervened to curb the gambling mania by enacting the ‘Bubble Act’ of 1720. The purpose of the Act was to prevent persons from acting as if they were corporate bodies, or to

Bubble Act was largely ignored,<sup>57</sup> regardless, business trusts flourished again after the repeal of the Act in 1825.<sup>58</sup> In 1844, England passed its first general incorporation statute that set the stage for the prominence of corporations today.<sup>59</sup>

Business trusts also migrated to North America along with the English common law. These entities provided a means of circumventing the requirement that a colonial legislature or state legislature grant a corporate charter. Even after general incorporation statutes began to be enacted at the beginning of the nineteenth century, business trusts remained popular because of the restrictions that some states placed upon the corporate form.<sup>60</sup> Massachusetts, for example, enacted its first general

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have transferable shares without any authority from the British Parliament.”); Richard W. Painter, *Forward to Symposium: Evaluation and Response to Risk by Lawyers and Accountants in the U.S. and E.U.*, 29 J. CORP. L. 217, 217 (2004) (“The Bubble Act of 1720 . . . responded to financial frauds by requiring promoters to seek a specific charter from Parliament to establish a publicly traded limited liability company.”); Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1003 (2013) (“[T]he Bubble Act of 1720 made it a criminal offense for an unincorporated company to presume to act as a corporation.”).

57. See William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 870 (1995) (“Both in America and in England, the Bubble Act’s ban on issuance of transferable shares without a charter was ignored, and interpreted as applying only in the special case of banks or other enterprises that threatened a governmental monopoly.”); Paul G. Mahoney, *Preparing the Corporate Lawyer: Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 888 (2000) (“Despite heavy penalties (including, ironically, the right of any monopolist harmed by an illegal company to recover treble damages), the Bubble Act manifestly failed to eradicate unincorporated joint-stock companies. Joint-stock companies continued to be created and operate right up to the repeal of the Bubble Act in 1825.”); Morley, *supra* note 2, at 2158 (“Modern historians have found that the Bubble Act was widely ignored and that it did not stop trusts from becoming widespread in the organization of English business in the eighteenth and early nineteenth centuries. The Act was almost never enforced from the time of its passage in 1720 up through the early nineteenth century.”).

58. See Margaret M. Blair, *Reforming Corporate Governance: What History Can Teach Us*, 1 BERKELEY BUS. L.J. 1, 10 n.27 (2004) (“In England, the Bubble Act of 1720, passed in the wake of a financial collapse and associated market scandals, made it illegal to trade in shares of unchartered joint stock companies. This greatly slowed the development of [business trusts] in England for more than a century, until the Bubble Act was repealed in 1825.”); Dickinson, *supra* note 36, at 571 (“The Bubble Act inhibited the evolution of joint stock companies until its repeal in 1825 . . . .”); Frederick H.C. Mazando, *The Taxonomy of Global Securities: Is the U.S. Definition of a Security Too Broad?*, 33 NW. J. INT’L L. & BUS. 121, 148 (2012) (“The Bubble Act of 1720 provided extensive securities regulations until its repeal in 1825.”).

59. See Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. LAW 573, 593 n.133 (1986) (“England in 1844 and France in 1867 enacted general incorporation statutes on a national level.”); Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History or a Never-Ending Story?*, 86 WASH. L. REV. 475, 484 (2011) (“England, after facilitating contractually based joint-stock companies by repealing the Bubble Act in 1825, enacted company laws providing for incorporation by registration in 1844 (without limited liability for the shareholders) and 1855 (with limited liability).”); Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 N.Y.U. J. INT’L L. & POL. 931, 974 (2003) (“The first statutory corporate law passed in England, the Companies Act of 1844, allowed for free incorporation of companies subject only to registration, but did not grant shareholders limited liability by law.”).

60. See Giacomo Rojas Elgueta, *Divergences and Convergences of Common Law and Civil Law*

incorporation statute in 1809.<sup>61</sup> Because of the onerous restrictions that Massachusetts placed upon corporations, including prohibitions in dealing with real estate, business trusts became a means of escaping these restrictions.<sup>62</sup> As a consequence, organizing business trusts became so popular in Massachusetts that “Massachusetts trust” became synonymous with business trusts nationally.<sup>63</sup>

Trusts remained a cornerstone of American business for much of the nineteenth century.<sup>64</sup> Business trusts, such as United States Steel and Standard Oil, became so successful that they gained monopolies over

*Traditions on Asset Partitioning: A Functional Analysis*, 12 U. PA. J. BUS. L. 517, 531 (2010) (“Despite the fact that many states passed general incorporation statutes during this time period, in the early twentieth century, the use of the trust—in particular, the business trust (also known as the Massachusetts trust)—was a strong competitor to the corporation . . .”); Hansmann & Mattei, *supra* note 22, at 474 (“The initial attraction of the business trust in Massachusetts was that it avoided arbitrary restrictions in that state’s corporation laws.”); Jones, Moret & Storey, *supra* note 55, at 422 (“In late nineteenth and early twentieth century Massachusetts, the business trust was widely used for street railway and electric and gas utility companies. This was a means of avoiding the statutory limitation on the amount of capital which such a utility could issue, and the uncertainty whether a corporation could own the controlling shares of other utilities.”).

61. See Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 425-26 (2003) (“In 1809, the Massachusetts legislature passed a general incorporation act for manufacturing companies.”); Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate “Conscience”*, 42 VAL. U. L. REV. 1129, 1132 (2008) (“In 1809, Massachusetts passed a general incorporation act for manufacturing companies, and New York soon followed with its own general incorporation statute in 1811.”).

62. See Stephen B. Land, *Entity Identity: The Taxation of Quasi-Separate Enterprises*, 63 TAX LAW. 99, 197 (2009) (“Business trusts were originally formed as common law trusts that were organized to carry on a business in circumstances where the corporate form was not available. They first arose in Massachusetts because corporations in that state were at one time not permitted to be organized for the purpose of developing real estate.”); Sitkoff, *supra* note 1, at 44-45 (“The standard account of the history of trust versus corporation is that trust was used in the late 1800s and early 1900s primarily as a means to escape arbitrary regulatory limits in state corporate codes. This use of the trust was especially pronounced in Massachusetts, which forbade corporate ownership of real estate.”); Alessandra Suuberg, *REIT Conversions in Context: A Case Study for the Tax Planning Initiative*, 44 REAL EST. L.J. 127, 137 (2015) (“The first recognized real estate trust ancestor to today’s REITs, called the Boston Real Estate Trust, was formed in the 1880s in response to limitations under Massachusetts law on corporate ownership of real estate. At the time, state law prohibited corporations from owning real property unless it was incidental to their business . . .”).

63. See SITKOFF & DUKEMINIER *supra* note 48, at 399 (“In the late 1800s and early 1900s, entrepreneurs used the business trust to escape the heavy regulation of the corporate form. The business trust was so common in Massachusetts, where corporate ownership of real estate was prohibited, that the term *Massachusetts trust* became synonymous with business trust.”); Kirsten Franzen & Bradley Myers, *Improving the Law through Codification: Adoption of the Uniform Trust Code in North Dakota*, 86 N.D. L. REV. 321, 325 n.20 (2010) (“Commercial trusts, also identified as ‘business trusts,’ ‘common law trusts,’ ‘Massachusetts trusts,’ and ‘statutory trusts,’ operate as business entities.”); Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1502 n.194 (1998) (“Massachusetts became the mainstay for business trusts in the nineteenth century, thus donning them with the name ‘Massachusetts trusts.’”).

64. See Langbein, *supra* note 51, at 188-89 (“To be sure, the business trust was already a prominent device for the conduct of enterprise in the nineteenth century, until the general corporation statutes made the company form easily available.”).

certain sectors of the economy.<sup>65</sup> The reason that the United States has antitrust law, rather than monopoly law or competition law, is because of the success of these entities.<sup>66</sup> The Sherman Act of 1890 is a direct response to the importance and prevalence of this business form.<sup>67</sup>

For a myriad of different types of businesses, trusts retained their popularity throughout the 1920s, until corporate law could mature in the United States.<sup>68</sup> For instance, a series of Supreme Court opinions in the 1910s relieved or removed restrictions that states could place on out-of-state corporations through the use of foreign corporation statutes,<sup>69</sup> and as

65. See Morley, *supra* note 2, at 2165 (“The most prominent examples of the trust’s enduring popularity, of course, were the huge monopoly trusts that inspired the ‘anti-trust’ movement of the 1880s, such as United States Steel and Standard Oil.”).

66. See SITKOFF & DUKEMINIER *supra* note 48, at 399 (“The prevalence of the business trust in the United States explains why in this country we have *antitrust* law, not competition or monopoly law, as such bodies of law are known abroad.”); Jonathan B. Baker, Jonathan Sallet & Fiona Scott Morton, *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916, 1916 (2018) (“Recall that the impetus for the creation of U.S. antitrust laws was the growing power of Industrial Age trusts, combinations of holdings within and across industries that dominated important economic sectors like oil, steel, and tobacco. Trusts exercised what reformers saw as outsized political power, and they were blamed for the rise of economic inequality . . . .”); Langbein, *supra* note 23, at 631 (“In the nineteenth century, when the business corporation was in its infancy, great enterprises organized themselves as business trusts, begetting the regulatory response that is still known as antitrust.”).

67. See Sean J. Griffith & Myron T. Steele, *On Corporate Law Federalism: Threatening the Thaumatrope*, 61 BUS. LAW. 1, 4 (2005) (“Congress passed the Sherman Antitrust Act in an effort to break up the business trusts and outlaw monopolization.”); Kennedy, *supra* note 1, at 987 (“The potential for abusive economic behavior associated with this concentration of market power [in business trusts during the nineteenth century] led to passage of the Sherman Act and other antitrust enactments.”); Carla Reyes, *If Rockefeller Were a Coder*, 87 GEO. WASH. L. REV. 373, 422 (2019) (“The rise of the business trust in the nineteenth century enabled business ventures to amass startling amounts of wealth and economic power. The unexpected economic prowess of the business trust and concerns regarding the effects on a market economy led to the enactment of the Sherman Antitrust Act.”).

68. See Norman P. Ho, *A Tale of Two Cities: Business Trust Listings and Capital Markets in Singapore and Hong Kong*, 11 J. INT’L BUS. & L. 311, 311 (2012) (“Business trusts have been utilized for over a hundred years in the Anglo-American legal world as an alternative business organizational form to the traditional corporation; for example, they were very strong competitors to the corporation as a way of business organization in early 20th century America . . . .”); Morley, *supra* note 2, at 2165 (“The trust remained a popular vehicle for avoiding corporate regulations up through at least the 1920s . . . .”); Rutledge & Schaefer, *supra* note 47, at 93 (referring to the early twentieth century as “a time that saw the zenith of the business trusts”).

69. See *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 27 (1910) (“[A] corporation of one State, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce.”); see also Morley, *supra* note 2, at 2164 (“Businesses could not easily escape . . . restrictive rules by incorporating in less restrictive states because many states used foreign corporation statutes to impose heavy restrictions on out-of-state corporations. The Supreme Court mostly permitted these restrictions on foreign corporations under the federal Constitution until the 1910s.”); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 271 (1987) (“[B]y 1910 the Court had actually held a discrimination against foreign corporations to be a denial of equal protection.”); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 72 n.189 (2006) (“Beginning in 1910, however, Supreme Court decisions began to characterize foreign corporations’ Fourteenth Amendment equal protection rights . . . . These cases clearly curtailed states’ power to exclude foreign corporations.”).



a result, organizers could now incorporate in states with favorable corporate law and operate elsewhere.<sup>70</sup>

Although the popularity of business trusts has likely peaked, they remain an important business form today.<sup>71</sup> They continue to be used for a variety of different business activities, including being commonly employed for mutual funds, employee pensions, real estate investment trusts (“REITs”), and asset securitization.<sup>72</sup> Many states have promulgated business trust statutes that allow for the creation of statutory business trusts, including Delaware in 1988,<sup>73</sup> and the Uniform Law Commission promulgated the Uniform Statutory Trust Entity Act in 2009.<sup>74</sup> Although these statutes provide greater clarity of the law to those

70. See Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 782 (2011) (“Because corporate promoters can avail themselves of a state’s laws without domiciling in such state or establishing even a temporary presence, states strive to provide the best legal mechanisms for formation . . . .”); Matthew G. Doré, *Déjà Vu All Over Again? The Internal Affairs Rule and Entity Law Convergence Patterns in Europe and the United States*, 8 BROOK. J. CORP. FIN. & COM. L. 317, 320-21 (2014) (“[A] corporation may incorporate in one jurisdiction in order to take advantage of its corporate law but conduct most (or all) of the corporation’s business elsewhere as a ‘pseudo-foreign’ corporation--a corporation that is foreign where its principal place of business is located, but only because the corporation happens to be incorporated under a different state’s law. Many corporations chartered in Delaware fit this description.”); David Yosifon, *Is Corporate Patriotism a Virtue?*, 14 SANTA CLARA J. INT’L L. 265, 267 n.6 (2016) (“In the United States, business promoters can purchase a corporate charter from any state they choose. Businesses need not use the corporate law of the state in which they are headquartered or where they otherwise do business.”).

71. See Oh, *supra* note 3, at 268 (“Virtually ignored by academics, the business trust arguably is the most prominent organizational form used today.”); Ho, *supra* note 68, at 312-13 (“[O]ther common law and also civil law countries have also adopted business trust statutes, at testament to the growing global popularity of business trusts.”); Tritt, *supra* note 22, at 2587 n.13 (“[B]usiness trusts carry noteworthy transactional and capital-market importance . . . .”).

72. See Oh, *supra* note 3, at 268 (“[T]rusts are the dominant form for massive employee pensions and mutual funds, as well as for a myriad of asset securitization and structured finance transactions.”); Goffe, *supra* note 18, at 561 (“[B]usiness trusts have become the preferred entity form for asset securitization and certain financial transactions related to mortgages, credit cards, and other debt, and many mutual funds, pension funds, real estate management investment companies, regulated investment companies, and real estate investment trusts, any of which could also be structured as a corporation, LLC, or partnership.”); Ho, *supra* note 68, at 312 (“In the United States, business trusts have also become a significant tool in financing debt through asset securitization trusts, and are now the primary vehicle for investing pension dollars and structuring mutual funds.”).

73. Del. Code Ann. tit. 12, §§ 3801-63 (2019). See Hansmann & Mattei, *supra* note 22, at 476 (“Delaware in 1988 adopted a new statute governing business trusts that seeks to remove the remaining uncertainties that have inhibited the use of the form for business organizations.”); Haynsworth, *supra* note 18, at 97 (“The most complete act is the Delaware Business Trust Act, enacted in 1988 and amended periodically. It has been the model for recently adopted business trust statutes in Nevada, New Hampshire, and Virginia . . . .”); Speier, *supra* note 55, at 1075 (“The foremost statute regarding business trusts is the Delaware Statutory Trust Act of 1988.”).

74. UNIF. STAT. TR. ENTITY ACT (UNIF. LAW COMM’N 2009). See Goffe, *supra* note 18, at 560 (“[O]n July 15, 2009, the National Uniform Conference of Commissioners of Uniform State Laws (NCCUSL) approved the Uniform Statutory Trust Entity Act, which is based on the Delaware Statutory Trust but contains a number of innovations.”); Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055, 1055 (2010) (“[The Uniform Law Commission]

using trusts for business purposes, the existence of such a statute is in no way required for the use of trusts for such purposes.<sup>75</sup> As a consequence, the business trust is well entrenched in American law.

### III. FOUR ESSENTIALIST THEORIES OF THE CORPORATION

As the last Part evidences, corporations and business trusts are distinct entities with different histories and attributes. Even with that being the case, the existing theories of the corporation offer a useful place to begin the search for an essentialist theory of the business trust for at least four reasons. First, corporations and business trusts are both business entities, which suggests that commonalities should exist between the two business forms. Second, a tremendous amount of scholarship has been written on the essential nature of the corporation, and it ought to at least be considered when developing an essentialist theory of the business trust. Third, if commonalities can be drawn among business entities, or if a unified theory of business can be developed, it will have much broader normative implications for the field of business law. Fourth, collaboration theory, a theory that I have developed regarding the essential nature of nonprofit and for-profit corporations, can be applied to business trusts with thought-provoking implications for business law.

This Part provides an overview of the three prevailing theories of the corporation—artificial entity theory, real entity theory, and aggregate theory. It then offers an overview of my essentialist theory of the corporation—collaboration theory. This discussion will lay the groundwork for the application and implications of collaboration theory to business trusts, which will be discussed in the next Part.

#### *A. Artificial Entity Theory*

Artificial entity theory, which is also known as concession theory, suggests that the corporation is an artificial entity that owes its existence completely to the government.<sup>76</sup> The government creates the corporation

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approved the Uniform Statutory Trust Entity Act . . . at its 2009 Annual Meeting. The Act is an important development for statutory trusts which, to date, have not been governed in the various states by uniform or even similar statutes, and in states such as Massachusetts, have been based solely on the common law.”).

75. See Joseph A. Franco, *Commoditized Governance: The Curious Case of Investment Company Shared Series Trusts*, 44 J. CORP. L. 233, 239 (2019) (“[T]he perceived utility of common law business trusts led Delaware in recent times to adopt a statute authorizing formation of statutory trusts for business purposes which is essentially a statutory version of the common law Massachusetts business trust.”).

76. See Carliss N. Chatman, *Judgment Without Notice: The Unconstitutionality of Constructive Notice Following Citizens United*, 105 KY. L.J. 49, 58 n.48 (2016) (“The artificial entity theory envisions corporations as state approved entities, which exist at the pleasure of the government, are non-corporeal,

to achieve public goals that it does not have the time, money, or other resources to achieve.<sup>77</sup> Under this theory, by using its power to create the corporation, the government defines the rights and obligations of that entity.<sup>78</sup> As a result, the government retains the power to regulate corporate activity and punish corporations that fall short of the government's mandates.<sup>79</sup>

The artificial entity theory reached the peak of its popularity during the colonial period and the early days of the United States.<sup>80</sup> As discussed

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and may be subject to more extensive regulation than a natural person due to this privileged position.”); J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 38 (2015) (“Concession theory focuses on the grants of limited liability, transferability of ownership, and potentially permanent legal existence by the state to the corporation.”); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1570 (“At its core, the artificial entity theory posits that the corporation is a creature of positive law that owes its existence to an act of the sovereign.”).

77. See J. William Callison, *Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded*, 26 J. CORP. L. 951, 972 (2001) (“Under . . . concession theory, public policy objectives could be pursued by state regulation of corporate activities and the relationship between the corporation and its owners.”); Iris H-Y Chiu, *Institutional Shareholders as Stewards: Toward a New Conception of Corporate Governance*, 6 BROOK. J. CORP. FIN. & COM. L. 387, 408 (2012) (“The concession theory posits that corporations are creatures of statute, and hence, there is not only a sense of public purpose in their existence, but that the state is also placed in an unquestioning position to impose regulation on corporations.”); Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 332 (2014) (“[T]he concession theory of the corporation . . . views the corporation as a tremendous capital accumulation device that was only made possible by the state conveying certain privileges to incorporators for which they could not otherwise privately contract. The rationale for granting these privileges was that the state could thereby achieve goals that might otherwise fail for lack of funding.”).

78. See Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 737 (2011) (“The earliest theory of the corporation is that it is merely a creation of the state. This ‘artificial person’ or ‘concession’ theory rested on the view that a corporation effectively exists at the sufferance of the state and, therefore, is not entitled to any rights or protections not granted to it by statute.”); Jessica A. Levinson, *We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech After Citizens United*, 46 U.S.F. L. REV. 307, 323-24 (2011) (“The artificial theory--also known as the grant theory (because the state grants powers and rights to the corporation) or the fictional entity theory--provides that a corporation is a state-creation and possesses only those rights granted to it by the state and which are necessary to effectuate the purpose of the entity.”); OseiTutu, *supra* note 8, at 42 (“[T]he concession theory postulates that corporations are created by the state and have only the rights that are granted to them by the state.”).

79. See Hayden & Bodie, *supra* note 8, at 534 (“[C]oncession theory is both positive and normative: it provides a descriptive theory of corporation based on state creation and argues that the state should have a freer hand to regulate corporations because of this creative power.”); Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811, 821 (2018) (“Under the artificial entity theory, the corporation exists at the pleasure of the state, and the states have the authority to regulate corporations should they choose to do so.”); Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TRANSACTIONS: TENN. J. BUS. L. 415, 445 (2017) (“[C]oncession theory tends to take a broad view of the government's ability to regulate corporations, and views the corporation as standing more on the public, rather than private, side of citizen/state divide--at least as compared to other theories of the corporation.”).

80. See Colombo, *supra* note 43, at 15 (“[C]oncession theory’ describes the original understanding of the corporation on American soil--an understanding that reigned supreme from colonial times through the middle of the nineteenth century.”); Virginia Harper Ho, *Theories of Corporate Groups:*

above, during this time, the corporation could be created only by a specific act of the legislature.<sup>81</sup> Considering a corporation merely a concession of the state was very attractive because the legislature played a central role in the creation of that business entity.<sup>82</sup>

During this period, the Supreme Court of the United States expressly adopted the artificial entity theory. In *Trustees of Dartmouth College v. Woodward*,<sup>83</sup> Chief Justice John Marshall wrote on behalf of the Court:

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 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. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand.<sup>84</sup>

Simply put, to the Marshall Court, the corporation is an artificial entity and nothing more.

### B. Real Entity Theory

The real entity theory of the corporation, which is also known as the natural entity theory, suggests that the corporation is a real entity with an identity that is separate and apart from the individuals who organize,

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*Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 892 (2012) (“The concession theory most accurately reflects the historical origins of the corporation and was the predominant view in the United States until the late nineteenth century.”); Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 893 (2011) (“The artificial entity theory of the corporation governed American jurisprudence from the Founding to the mid-nineteenth century.”).

81. See *supra* notes 38-39 and accompanying text (explaining that during the colonial period and early days of the United States, corporate charters could be obtained only through a specific act of the legislature).

82. See Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1 (1984) (“Under the artificial entity theory, a corporation draws all of its power and legitimacy for its actions from legislative enactments.”); Sarah C. Haan, *Federalizing the Foreign Corporate Form*, 85 ST. JOHN'S L. REV. 925, 943 n.62 (2011) (“The ‘concession theory’ originated during a time when corporate charters were special acts of legislation and characterizes the corporation as a privilege granted by the legislature to the shareholders.”); Munisami, *supra* note 8, at 77 (“[Artificial entity] theory emerged in the 19th century from the practice of requiring state action, through the legislature, for the incorporation of companies.”).

83. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

84. See *id.* at 636.

operate, and own it.<sup>85</sup> This separate identity derives from the collective identity of these individuals, and it creates an identity that exists beyond the law and the government.<sup>86</sup> Because corporations have separate identities under this theory of the corporation, the corporation has certain rights and takes on certain obligations.<sup>87</sup>

The real entity theory of the corporation was the dominant theory of the corporation during the latter half of the nineteenth century and the first half of the twentieth century.<sup>88</sup> As states adopted general incorporation

85. See Elias Pete George, *Using Game Theory and Contractarianism to Reform Corporate Governance: Why Shareholders Should Seek Disincentive Schemes in Executive Compensation Plans*, 42 GOLDEN GATE U. L. REV. 349, 354-55 (2012) (“[N]atural entity theory viewed a corporation as an entity itself, with an existence separate from its shareholders and corporate managers.”); Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 222 n.7 (2011) (“Real entity theory posits that a corporation is an entity unto itself, bearing separate and distinct desires and needs from those of its shareholders.”); David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 122 n.322 (2003) (“The real entity theory may be described as the impulse to see the corporation, and other civic bodies, as social organisms in their own right, entities which are distinct from the interests of the people who participate in the corporation.”).

86. See Seema Mohapatra, *Time to Lift the Veil of Inequality in Health Care Coverage: Using Corporate Law to Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137, 162 (2015) (“The real entity theory suggests that as a corporation is separate and apart, the corporation has a ‘collective consciousness’ that is separate and apart from those who manage its operations. Therefore, it is said that a corporation may then be considered a person under the law and entitled to legal rights that would naturally flow to any person.”); Brendan (Bo) F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119, 140 (2013) (“Under the natural entity theory, corporations create their power from the individuals who make up the corporation, not the government itself, and the corporation is separate from the shareholders who create it; thus, corporations as juridical persons deserve some level of autonomy from the government.”); David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 122 n.322 (2003) (“The real entity theory views the corporation as distinct from the individuals who participate in the corporate enterprise. Real entity proponents believe the corporation is much more than the sum of its individual parts. When several people come together to form an association for some shared purpose, the group entity is larger than and different in kind from the members themselves.”).

87. See Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47, 56 (2015) (“[U]nder the real entity theory, corporations are treated as subjects in their own right. As creatures distinct from both their shareholders and the state, corporations are entitled to exercise their own set of rights.”); Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 170 (2016) (“The real entity theory posits that corporations exist independently of their constituents or the statutes authorizing them, and are thus a distinct entity entitled to all (or at least most) of the rights of natural persons.”); Pollman *supra* note 34, at 1641-42 (“[T]he natural entity or person theory . . . regarded the corporation as a real entity with a separate existence from its shareholders and from the state. . . . This view of corporations as ‘real’ and ‘natural’ suggested inherent, inviolable rights.”).

88. See Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction and Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 136 (2013) (“Beginning in the late nineteenth century, natural entity theory replaced the conception of the corporation as an artificial creation of state law.”); Gerald J. Russello, *Catholic Social Thought and the Large Multinational Corporation*, 46 J. CATH. LEGAL STUD. 107, 130-31 (2007) (“Changes in law and business practice in the early twentieth century changed the understanding of the corporation from a state-chartered entity towards a view that understood the corporation as a ‘natural entity’ established by the incorporators and shareholders, with only minimal state involvement.”); Thomas, *supra* note 41, at 511 (“As the twentieth century grew near, scholars began to develop and advocate for a ‘real entity’ conception of corporate personhood, one that understood the

statutes to facilitate greater use of the corporate form, corporate theorists became less enamored with the artificial entity theory because the role of the state was diminished in the creation of the corporation.<sup>89</sup> As a result, corporate law theorists began looking to Europe to help reconceptualize the essential nature of the corporate form.<sup>90</sup> The work of German legal theorist Otto von Gierke was especially useful in this undertaking.<sup>91</sup> Gierke suggested that groups of people, including corporations, take on separate identities from individuals composing them because of their “collective spirit,” and as a consequence, these groups have a separate entity status.<sup>92</sup>

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corporation to exist as a single agent distinct and independent from both its membership and the State—a view that came to dominate the coming decades.”).

89. See Colombo, *supra* note 43, at 11 (“General incorporation statutes sounded the death knell of concession theory . . . . Whereas in years past corporations were chartered on a case-by-case basis, with some scrutiny into their purposes and designs, by the late eighteen hundreds nearly anyone in good standing could incorporate any legitimate business by simply completing and filing the requisite forms.”); Charlie Cray & Lee Drutman, *Corporations and the Public Purpose: Restoring the Balance*, 4 SEATTLE J. FOR SOC. JUST. 305, 317 (2005) (“[A]t the same time that the chartering process was replaced by general incorporation laws, the ‘concession’ theory of corporations as artificial legal forms created by acts of the state was replaced by a theory of corporations as ‘natural entities’ . . . .”); Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 135 (1990) (“As corporations evolved from specially chartered creatures of the state with limited powers into entities with broad powers established under general incorporation laws, the theory of legal personality evolved from an artificial entity theory into a natural entity theory.”).

90. See Tara Helfman, *Transatlantic Influences on American Corporate Jurisprudence: Theorizing the Corporation in the United States*, 23 IND. J. GLOBAL LEGAL STUD. 383, 415-16 (2016) (“The rise of the modern business corporation had far outpaced the law’s ability to rationalize and harmonize its role in American life. American legal theorists attempted to fill the breach, finding in contemporary European writings, particularly those of Otto von Gierke, accounts of corporate personality ideas that seemed well suited to meet contemporary challenges.”); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580-81 (1990) (“[The real Entity] theory regards the corporation not as artificial, but as real, with a separate existence and independent rights. It is associated with continental theorists who, at the turn of the century, wrote about ‘group’ or ‘corporate’ personality in an effort to challenge individualism and to come to terms with institutions of modern society such as corporations, trade unions, universities, and professional associations.”).

91. See Joel Edan Friedlander, *Corporation And Kulturkampf: Time Culture As Illegal Fiction*, 29 CONN. L. REV. 31, 76 (1996) (“In the late nineteenth century, the eminent German legal historian Otto Gierke theorized that when individuals unite, spiritually and psychologically, for a common purpose they create a separate, living person that has a will of its own. Gierke’s theory became widely influential in American thinking about the modern corporation, largely through the efforts of Gierke’s English-speaking translators and interpreters . . . .”); John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 57 (2011) (“The natural entity theory, formulated by Otto Gierke, began to eclipse the artificial entity theory of corporate personhood.”).

92. See Martin Gelter & Genviève Helleringer, *Lift Not the Painted Veil! To Whom Are Directors’ Duties Really Owed?*, 2015 U. ILL. L. REV. 1069, 1089 n.112 (“In German law, the name of Otto von Gierke is typically associated with the “entity” theory of the corporation. Gierke understood legal personality as the reflection of social reality and argued that individuals would form fellowships that developed an autonomous existence necessary for their social fulfillment.”); Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101, 117 (2005) (“Corporations, [Otto von Gierke] argued, are the legal manifestation of communities

### C. *Aggregate Theory*

The aggregate theory, which has been rebranded as the nexus-of-contract theory, suggests that the corporation is merely the sum of the relationships among the individuals involved with the corporation.<sup>93</sup> Under this theory, the corporation is merely a collection of these individuals, and as a result, the corporation is not a separate entity.<sup>94</sup> Some proponents of this theory focus on the individuals organizing, operating, and owning the corporation, while other commentators extend the nexus-of-contract theory more broadly to include other individuals and entities interacting with the corporation, such as creditors, suppliers, and the public at large.<sup>95</sup> The rights of the corporation are the rights of

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possessed of a collective spirit.”); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 539 (2010) (“[The] ‘entity’ theory had its roots in the writings of the great German legal theorist, Otto Gierke, who sought to describe the will of the group as opposed to the individuals who comprised the group. Gierke concluded that group will is the equivalent of individual will and should be given equal recognition.”).

93. See Timothy L. Fort, *Corporate Constituency Statutes: A Dialectical Interpretation*, 15 J.L. & COM. 257, 273 (1995) (“In the aggregate approach, corporations were viewed as being a collection of individuals or groups of people bonding together for some purpose, an approach still used today in ‘nexus of contract theories’ emphasizing that actors maximize individual utility by working together.”); Catherine A. Hardee, *Who’s Causing the Harm*, 106 KY. L.J. 751, 766 (2018) (“Under the aggregate entity theory, the corporation is viewed as a collective of individuals and the corporation derives its power and rights from them.”); Nelson, *supra* note 76, at 1571 (“The aggregate theory denies that the corporation is a concession from the state, insisting instead that it is merely a collection of natural persons who join together in a business enterprise.”).

94. See Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1195 (2004) (“The leading academic theory about corporations, the nexus of contracts (or contractarian) theory, posits that corporations do not really exist; they are merely a convenient connection point for a bundle of relationships between shareholders, bondholders, employees, customers, and others.”); Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 DEL. J. CORP. L. 895, 904 (1996) (“The aggregate theory did not admit the existence of a distinct corporate entity; rather, the corporation was an atomized construct, composed of the aggregate of its relational components, the most important of which being its shareholders.”); Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 110 (2009) (“The aggregate theory, also called the contractual or associational theory, holds that the corporate person has no existence or identity that is separate and apart from the natural persons in the corporation.”).

95. See Fred S. McChesney, *Economics, Law, and Science in the Corporate Field: A Critique of Eisenberg*, 89 COLUM. L. REV. 1530, 1534 n.13 (1989) (“Starting with the work of Coase, the contractarian approach has defined the corporate firm as a ‘nexus of contracts’ linking shareholders, managers, employees, creditors and others. That is, the essence of the firm is the private ordering represented by the web of contractual relationships freely entered into by the affected parties.”); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 242 (2013) (“Dominant modern corporate law theory describes a corporation as a ‘nexus of contracts’. Under this widely-accepted theory, the corporation is a nexus of a set of contracts among the firm’s constituents which include its shareholders, as providers of capital, but also its employees, creditors, suppliers, and board of directors.”); Lawrence Ponoroff, *Enlarging the Bargaining Table: Some Implications of the Corporate Stakeholder Model for Federal Bankruptcy Proceedings*, 23 CAP. U. L. REV. 441, 471-472 n.101 (1994) (“Although

the individuals composing it, and the government has the ability to regulate the corporation only to the extent that it has the ability to regulate groups of individuals.<sup>96</sup>

Aggregate theory in the form of nexus-of-contract theory is the dominant theory of the corporation today.<sup>97</sup> Although aggregate theory has existed since the nineteenth century, the emergence of this theory as the dominant essentialist theory of the corporation has taken an extended period and is related to the rise of law and economics in the legal academy.<sup>98</sup> In 1937, Ronald Coase published his seminal article, *The Nature of the Firm*, which advocates for an aggregate theory of the corporation and provides the foundation for the nexus-of-contract theory of the corporate form.<sup>99</sup> This idea gained momentum in the 1970s and

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the goals of the scholars who have developed the 'nexus of contracts' theory of the corporation are essentially wealth maximization through elimination of agency costs, they begin with the premise that the corporation represents a complex web of contractual relationships among the participants in a business enterprise (including employees, creditors, suppliers, customers, and the community where the corporation operates, as well as the players--directors and shareholders--who occupy center stage under more traditional models of corporate law).").

96. See Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and Citizens United*, 12 FLA. ST. U. BUS. REV. 1, 34 (2013) ("The aggregate theory granted no new rights to the corporation as its own entity, as the corporation was nothing more than an amalgam of the rights of individual shareholders and executives."); Jonathan A. Marcantel, *A Unified Framework to Adjudicate Corporate Constitutional Rights*, 39 U. HAW. L. REV. 115, 137-38 (2016) ("The hallmark of aggregate theories . . . is that aggregate theories view corporations as collections of individuals and perceive extending constitutional rights to corporations as a means to protect the rights of those individuals who, at least to some extent, comprise the corporation."); Martin Petrin, *Reconceptualizing the Theory of the Firm--From Nature to Function*, 118 PENN. ST. L. REV. 1, 9-10 (2013) ("The 'aggregate' or 'contractualist' theory asserted that corporations and other legal entities constituted aggregations of natural persons whose relationships were structured by way of mutual agreements. As such, both a legal entity's legal rights and duties were often seen, in an indirect or derivative manner, as simply those of its shareholders or other individuals that made up the entity.").

97. See Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 9 (2002) ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory."); OseiTutu, *supra* note 8, at 42-43 ("The currently prevailing theory of corporate personality in the United States is the contract or aggregate theory."); Ripken, *supra* note 94, at 164-65 ("[T]he nexus of contracts theory is the dominant legal academic paradigm of the corporation and corporate law . . .").

98. See Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. TRANSNAT'L L. & POL'Y 197, 209 n.46 (2007) ("Aggregate theory in the United States has been traced back to the early nineteenth century . . ."); Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 71-72 (2005) ("In addition to the artificial entity theory, the aggregate view of the corporate entity was also prevalent in corporate theory during the nineteenth century."); John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 816 (1989) ("Though the aggregate theory can be found in American jurisprudence as early as 1809, the dominant belief of the early nineteenth century was the artificial entity theory.").

99. R.H. Coase, *The Nature of the Firm*, 4 ECONMICA 386 (1937); see also Matthew A. Melone, *The Section 83(b) Election and the Fallacy of "Earned Income"*, 10 BERKELEY BUS. L.J. 53, 58 (2013) ("In 1937, Ronald Coase theorized about the nature of the firm. . . . Later scholars expanded upon Coase's work and the corporation became increasingly viewed as a 'nexus of contracts.'"); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1071 n.65 (1994)



1980s when a “revolution” occurred in business law scholarship as a result of economic theory being injected into legal theory.<sup>100</sup> The aggregate theory of the corporation became the dominant theory because this conception of the corporate entity allowed for sophisticated economic analysis of the firm.<sup>101</sup>

#### D. Collaboration Theory

Although each of the prevailing theories of the corporation has some descriptive attractiveness, each falls short of providing a full definition of the essential nature of the corporate form. While prizing the role of the state relating to the corporate form, the artificial entity theory undervalues the corporation as an entity and the roles of the individuals organizing, operating, and owning it.<sup>102</sup> The real entity theory recognizes the importance of the corporation itself, but it underplays the role of the state and the individuals involved in the corporate form.<sup>103</sup> Finally, the aggregate theory of corporation acknowledges the importance of the individuals organizing, operating, and owning the corporation, but it understates the importance of the state and the corporation itself.<sup>104</sup>

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(“A 1937 article by Ronald Coase is almost universally regarded as the seminal work underlying the nexus-of-contracts theory.”); Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1807-08 (2018) (“The nexus of contracts theory has its origins in Ronald Coase’s work in which he conceived of the firm as a range of exchanges that took place within the firm rather than in the marketplace.”).

100. See Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1033 (2012) (“Corporate law academia has an established story about the transformation of the field—a revolution, in fact—that took place in the 1970s and 1980s. According to the traditional narrative, what was once a swampy doctrinal backwater became a vibrant hub of intellectual activity through the new methodology of law and economics.”); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1692 (2018) (“The law and economics revolution of the 1970s radically shifted our understandings of antitrust, corporate law, and finance.”); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 359 (2005) (“In the 1980s, corporate law scholarship and practice were completely transformed in response to intellectual currents in finance and economics and new transactional developments, which called for comprehensive legal innovation.”).

101. See J. William Callison & Allan W. Vestal, *Contractarianism and Its Discontents: Reflections on Unincorporated Business Organization Law Reform*, 42 SUFFOLK U. L. REV. 493, 497 (2009) (“Throughout the 1980s and 1990s and into the new millennium, the ‘nexus of contracts’ conception has dominated the corporate law-and-economics academic literature, and because law-and-economics has developed a strong position in the United States academic hierarchy, ‘nexus of contracts’ theory has had a strong following in the corporate-law arena.”); Ho, *supra* note 80, at 895 (“Since the rise of the law and economics movement, dominant thinking about the nature of the corporation has coalesced around an aggregate theory of the corporation that sees the corporation as a ‘nexus of contracts.’”); Brett McDonnell, *ESOPs’ Failures: Fiduciary Duties When Managers of Employee-Owned Companies Vote to Entrench Themselves*, 2000 COLUM. BUS. L. REV. 199, 246 (“The dominant view in law and economics scholarship treats corporations as a nexus of contracts.”).

102. See *supra* Section III.A (describing the artificial entity theory of the corporation).

103. See *supra* Section III.B (describing the real entity theory of the corporation).

104. See *supra* Section III.C (describing the aggregate theory of the corporation).

This descriptive thinness of all of the prevailing theories of the corporation has led some scholars to argue for the indeterminacy of the corporate form and to advocate for ignoring the question of what is the essential nature of the corporation, in favor of simply regulating corporations as issues appear.<sup>105</sup> For example, in 1926, John Dewey wrote in *The Historic Background of Corporate Legal Personality*:

As far as the historical survey implies a plea for anything, it is a plea for disengaging specific issues and disputes which arise from entanglement with *any* concept of personality which is other than a restatement that such and such rights and duties, benefits and burdens, accrue and are to be maintained and distributed in such and such ways, and in such and such situations.<sup>106</sup>

Because of the intractable debate created when one concentrates only on the three prevailing theories of the corporation, Dewey's solution of embracing the indeterminacy of the corporation does have some appeal and muted the debate over the essential nature of the corporate form for much of the twentieth century.<sup>107</sup>

Dewey's solution, however, should be rejected for five primary reasons. First, one should not back away from a problem simply because it seems unsolvable. Otherwise, a myriad of human achievements would never have occurred, such as human air travel, the curing of numerous diseases, and landing people on the moon. Second, the prevailing theories of the corporation contradict, and as a result, embracing the indeterminacy of the corporation means embracing cognitive dissonance.<sup>108</sup> Third, as the Supreme Court's recent opinions in cases such as *Citizens United*<sup>109</sup> and *Hobby Lobby*<sup>110</sup> demonstrate, because of the current debate over

105. See William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 464 (1989) ("Whatever the future interplay of theory and power, the concepts that make up theories of the firm—entity and aggregate, contract and concession, public and private, discrete and relational—will stay in internal opposition. This tendency toward contradiction should be accepted, not feared."); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 262 ("[T]heories of the corporation have always been fundamentally indeterminate.").

106. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669 (1926).

107. See Pollman *supra* note 34, 1650 ("The direction of the legal debate about corporations and their ontological nature moved to legal realism, the view that theories of corporate personality, such as reflected in the concession, aggregate, and real entity views, were indeterminate. Many commentators view John Dewey's 1926 Yale Law Journal article as having put an end to the corporate personhood debate."); David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1527 (2004) ("[T]he debate [over the essential nature of the corporation] is often viewed as having ended when the pragmatist philosopher John Dewey published an article in this journal arguing that the various views collapsed into each other, and each could be used to support any outcome on a particular issue.").

108. See *supra* Sections III.A-C (providing an overview of the prevailing theories of the corporation).

109. *Citizens United v. FEC*, 558 U.S. 310 (2010).

110. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

corporate rights, understanding the essential nature of the corporation has never been more important. Fourth, understanding the essential nature of the corporation may help the individuals organizing, operating, and owning the corporation know how to behave prospectively, rather than waiting for retrospective punishment and regulation. Fifth, I have developed a theory of the corporation, collaboration theory, that better describes the essential nature of the corporation.

The most significant problem with the prevailing theories of the corporation is that although they describe *how* the corporation exists, they fail to describe *why* the corporation exists. Unless an essentialist theory answers both of these questions, it has failed to fully capture the essence of the corporate form. This is especially true because the development of the modern corporate form is well-known, i.e. why it exists in its current form.<sup>111</sup>

To render this issue a bit more concrete, imagine if one was trying to develop an essentialist theory of a bridge to answer the metaphysical question of what a bridge is. One could state that a bridge is an artificial object created by the government. This would be the artificial entity theory of the bridge. Even if one expanded this definition to render it more accurate, that a bridge is an artificial object created by humans, this still does not seem to capture the essential nature of a bridge. One could also state that a bridge is simply an object that exists. This would be the real entity theory of a bridge. Similar to the artificial entity theory of a bridge, however, the real entity theory also fails to capture the essence of a bridge. Finally, one could define a bridge as a collection of parts arranged in a certain order. This would be the aggregate theory of a bridge. Although this theory has more descriptive appeal, it still fails to fully define the essence of a bridge. A better, fuller definition of a bridge is a “[a] structure spanning and providing passage over an obstacle.”<sup>112</sup> This is a better definition because it captures *how* a bridge exists, i.e., as a “structure,” and *why* a bridge exists, i.e., “spanning and providing passage over an obstacle.”<sup>113</sup>

Collaboration theory provides a fuller definition of the corporation. Collaboration theory posits that a corporation is a collaborative effort among the government and the individuals organizing, owning, and operating the entity. Under this theory, the collaboration may even extend to a broader range of constituencies, including employees, creditors, customers, the community where the corporation is located or organized, and the public at large. With the space limitations of this Article, that question is left for another day.

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111. See *supra* Section II.A (providing a brief history of the corporation).

112. WEBSTER'S II NEW COLLEGE DICTIONARY 138 (providing a definition of the term “bridge”).

113. *Id.*

For purposes of this theory, collaboration is defined as a common effort between or among multiple entities to accomplish a task or a project. For for-profit corporations, the common project is economic development and gain. For purposes of this theory, the government is seeking societal economic development and gain, and the individuals organizing, operating, and owning the corporation are seeking personal economic development and gain. Obviously, this does create some tensions within the collaboration, but the existence of tensions and mixed purposes does not preclude the existence of a collaboration. The Beatles were still a collaborative effort among four musicians, even though pronounced tensions and creative differences existed between John Lennon and Paul McCartney. For non-profit corporations, the common project is to promote the public good.<sup>114</sup>

Importantly, collaboration theory also has normative implications. One of John Dewey's main reasons for advocating for embracing the indeterminacy of the corporation is that the prevailing essentialist theories offer little normative guidance in regard to how the corporation ought to behave.<sup>115</sup> Other scholars have embraced the indeterminacy of the corporation on similar grounds.<sup>116</sup> Because collaboration theory offers a more substantial explanation of the essence of the corporation, it helps to explain how corporations ought to behave in a variety of areas, such as corporate social responsibility and tax avoidance.<sup>117</sup>

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114. See generally Chaffee, *Collaboration Theory: A Theory of the Charitable Tax Exempt Nonprofit Corporation*, supra note 16 (discussing the application of collaboration theory to charitable tax exempt nonprofit corporations).

115. See supra notes 106-107 and accompanying text (discussing John Dewey's views on the indeterminacy of the corporate form); see also Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1022-23 ("In 1926, John Dewey published an article in the Yale Law Journal in which he dismisses as irrelevant the debate among the aggregate, artificial entity, and real entity views of the corporation. These views, he explains, could be deployed to suit any purpose . . . His conclusion is that theory should be abandoned for an examination of reality."); Ronit Donyets-Kedar, *Challenging Corporate Personhood Theory: Reclaiming the Public*, 11 LAW & ETHICS HUM. RTS. 61, 69 (2017) ("In 1926, Dewey argued that the debate among the various theories of the corporation is irrelevant for legal doctrine, noting that all theories are manipulable and indeterminate."); Steven Walt & Micah Schwartzman, *Morality, Ontology, and Corporate Rights*, 11 LAW & ETHICS HUM. RTS. 1, 7 n.15 (2017) ("Dewey argued, among other things, that theories of corporate personality are indeterminate as justifications for assigning legal rights and duties to corporations.").

116. See Fenner L. Stewart, Jr., *Indeterminacy and Balance: A Path to a Wholesome Corporate Law*, 9 RUTGERS BUS. L. REV. 81, 88 (2012) ("It is argued that each of these three theories [of the corporation] is indeterminate. Indeterminate, in this context, means that these essentialist theories do not support or reject any position with corporate governance until combined with additional normative claims."); Nelson, supra note 76, at 1573 ("One problem with theories of corporate personhood is that they are indeterminate. That is, abstract theories that seek to capture the essence of the corporation are not capable of producing the normative premises necessary to evaluate particular rights claims.").

117. See generally Chaffee, *The Origins of Corporate Social Responsibility*, supra note 16 (discussing the application of collaboration theory to responding to issues of corporate social responsibility); Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, supra note 16 (discussing the application of collaboration theory to deciding if corporations may engage in tax avoidance).

#### IV. THE APPLICATION AND IMPLICATIONS OF APPLYING THEORIES OF THE CORPORATION TO BUSINESS TRUSTS

Despite the substantial amount of scholarship exploring the essential nature of the corporate form,<sup>118</sup> very little has been written about business trusts generally.<sup>119</sup> This Article offers the first attempt at developing an essentialist theory of the business trust. Beyond just the academic question of what a business trust is, developing such a theory is important for at least three reasons. First, business trusts continue to play an important role in our society and are regularly used for a wide variety of business activities, including mutual funds, employee pensions, real estate investment trusts (“REITs”), and asset securitization.<sup>120</sup> As a consequence, understanding their essential nature is important to understand how they interact with society. Second, business trusts have many of the same attributes as corporations, e.g., limited liability, legal personhood, tradeable shares, and separation of ownership and control.<sup>121</sup> Understanding the essential nature of the business trust is important to understanding how these entities share certain attributes and why they are different. Third, understanding the essential nature of the corporate form provides corporate managers with normative guidance as to how the corporation ought to behave before regulation is imposed.<sup>122</sup> Similarly, understanding the essential nature of the business trust should offer trustees guidance as to how they ought to behave before regulation is imposed, and it should suggest instances in which regulation may be needed.

This Part will explore the potential application of each of the prevailing theories of the corporation and collaboration theory to business trusts. Ultimately, this Article concludes that collaboration theory offers the best answer to the metaphysical inquiry into the essential nature of the business trust, but because the state is not a required collaborator in the

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118. See Part III (exploring the prevailing theories regarding the essential nature of the corporate form).

119. See *supra* notes 6-7 and accompanying text (discussing the limited amount of scholarship on business trusts, especially in contrast to the substantial amount of scholarship that is generated each year in regard to corporations).

120. See *supra* note 72 and accompanying text (discussing the various business purposes for which business trusts are used).

121. See Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1397 (2006) (“The business trust effectively represents the minimum required of law in creating a strong entity--asset partitioning and, in particular, strong entity shielding--and leaves the rest to be determined by contract.”); Morley, *supra* note 2, at 2166 (Every aspect of the corporate form that legal theorists and historians have identified as key to the corporate form's success also existed in the trust. Though the trust did not achieve all of the corporation's attributes perfectly . . . .”).

122. See generally CHAFFEE, *supra* note 17 (analyzing numerous normative implications of applying collaboration theory to corporate law).

business trust, collaboration theory operates in a different way in regard to business trusts than it operates in regard to corporations.<sup>123</sup> The implications of how collaboration theory applies to business trusts will be explored in this Part as well.

*A. The Application of the Prevailing Theories of the Corporation to Business Trusts*

Each of the prevailing theories of the corporation tells a compelling story about attributes of the corporate form.<sup>124</sup> Otherwise, these would not be prevailing theories. The problem is that although each of the prevailing theories describes attributes of the corporation, they fail to fully entail what a corporation is. Notably, as previously discussed, each of the theories describes *how* the corporation exists, but they fail to describe *why* corporations exist.<sup>125</sup> Even the descriptions under each theory of how corporations exist, however, do not seem complete. Artificial entity theory underemphasizes the role of the individuals organizing, operating, and owning the corporation and the importance of the entity itself.<sup>126</sup> Real entity theory underemphasizes the role of the state and importance of the individuals involved in the corporation.<sup>127</sup> Finally, aggregate theory underemphasizes the role of the state and the importance of the entity itself.<sup>128</sup>

Each of the prevailing theories of the corporation is unsuitable to be applied to business trusts. The artificial entity theory is appealing in regard to corporations because it respects the role of the state in creating the corporation,<sup>129</sup> and because it pays homage to a time when corporations were bespoke entities created by specific acts of the government.<sup>130</sup> In regard to business trusts, however, the state does not

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123. See *infra* Section IV.B (analyzing the application of collaboration theory to business trusts).

124. See *supra* Sections III.A-C (providing overviews of artificial entity theory, real entity theory, and aggregate theory and their application to the corporate form).

125. See *supra* Section III.D (describing the shortcomings of all three of the prevailing theories of the corporation).

126. See *supra* Section III.A (providing an overview of the artificial entity theory of the corporation).

127. See *supra* Section III.B (providing an overview of the real entity theory of the corporation).

128. See *supra* Section III.C (providing an overview of the aggregate theory of the corporation).

129. See Philip C. Berg, *The Limits of SEC Authority Under Section 14(a) of the Exchange Act: Where Federal Disclosure Ends and State Corporate Governance Begins*, 17 J. CORP. L. 311, 314 (1992) (“Corporations are thus creatures of state law and owe their very existence (and their grant of limited liability) to the corporation laws of the states that granted their charter.”); J. William Callison, *Dangling Threads: Hobby Lobby and Corporate Law Issues*, 48 U. MEM. L. REV. 447, 456 (2017) (“Business corporations are creatures of state law and derive their powers from state law.”); Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 96 (2017) (“Corporations are created by state law . . .”).

130. See *supra* Part II.A (exploring the history of the corporate form).

need to play a role in creating these entities because all that is needed to create a business trust is a settlor, a trustee, a beneficiary, property, and intent to create a trust for a business purpose.<sup>131</sup> Delaware and a number of other states have created statutes that allow for the creation of statutory business trusts through a process that is similar to incorporation.<sup>132</sup> With that said, the state is not required for the creation of a business trusts.<sup>133</sup> As previously mentioned, the term “Massachusetts Trust” has become synonymous with business trusts because of the prevalence and importance of business trusts created in that state.<sup>134</sup> Traditionally, Massachusetts trusts were common law trusts that did not require any sort of state action to organize, with statutory business trusts being created in some states much later.<sup>135</sup> The real purpose of legislatures promulgating business trust statutes is to allow those organizing business trusts to opt into a predictable body of law.<sup>136</sup> As a consequence, suggesting an

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131. See Thomas E. Plank, *The Bankruptcy Trust as a Legal Person*, 35 WAKE FOREST L. REV. 251, 258 (2000) (“The business trust . . . is an extension of the traditional trust. In a business trust, as in a traditional trust, property is conveyed pursuant to a trust agreement to one or more trustees for the benefit of a defined group of beneficiaries. . . . The business trustee uses the assets of the business trust to operate a business.”).

132. See *supra* note 18 (containing various sources reporting that more than thirty states have promulgated business trust statutes).

133. See David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 485 (1998) (“The business trust is a creature of contract; state filing is not necessary for its existence.”); Goffe, *supra* note 18, at 559 (“Generally, a common law business trust is an unincorporated business organization created by an instrument that defines how a trustee must hold and manage property for the benefit and profit of its beneficial owners. History has viewed the common law business trust as an evasion of corporate law.”); Jones, Moret & Storey, *supra* note 55, at 423-24 (“Unlike a corporation, which is a creature of state statute, a business trust is created by agreement.”); S.I. Strong, *Congress and Commercial Trusts: Dealing with Diversity Jurisdiction Post-Americold*, 69 FLA. L. REV. 1021, 1036 (2017) (“[M]any commercial trusts, including the well-known Massachusetts business trust, are created by private agreements in the form of trust deeds or declarations of trust rather than by compliance with statutory or regulatory formalities.”).

134. See note 63 and accompanying text (explaining that the term “Massachusetts Trust” is often used to describe business trusts generally).

135. See Stephen B. Land, *Entity Identity: The Taxation of Quasi-Separate Enterprises*, 63 TAX LAW. 99, 107 (2009) (“Business trusts were originally formed as common law trusts that were organized to carry on a business in circumstances where the corporate form was not available. They first arose in Massachusetts because corporations in that state were at one time not permitted to be organized for the purpose of developing real estate.”); Comment, *Massachusetts Trusts*, 37 YALE L.J. 1103, 1105 (1928) (“The term ‘Massachusetts trust,’ otherwise known as the, ‘business’ or ‘common law’ trust is used generally to denote an unincorporated organization created for profit under a written instrument or declaration of trust, the management to be conducted by compensated trustees for the benefit of persons whose legal interests are represented by transferable certificates of participation, or shares.”).

136. See Ho, *supra* note 68, at 312 (“In order to resolve . . . uncertainties and remove the disadvantages associated with common law principles of trusts, many states in the US have now passed statutes regulating business trusts; therefore, these business trusts are more accurately referred to as statutory business trusts.”); Sandra Mertens, *Series Limited Liability Companies: A Possible Solution to Multiple LLCs*, 84 CHI.-KENT L. REV. 271, 299 (2009) (“Statutory business trusts are governed by statutes

artificial entity theory of the business trust is inappropriate because business trusts do not require the state to be brought into existence.<sup>137</sup>

A real entity theory of the business trust is also not appropriate. Attempting to develop an essentialist theory of any business organization is a metaphysical inquiry into the essence of that business form. The problem with the real entity theory is that it is especially thin. All it really declares is that the business entity exists separately and apart from those organizing it.<sup>138</sup> Applying this to business trusts does little to nothing to capture the essential nature of these entities. This only reinforces the point that the real entity theory of the corporation is inadequate because it shows that real entity theories could be created about any business form that involves multiple individuals and any group of people generally. Adopting a real entity theory could settle the issue of whether trustees should be required to act on behalf of the trust in their own capacity, or if the trust should be afforded separate entity status.<sup>139</sup> However, a real entity theory of the business trust falls far short of defining the essential nature of these entities.

An aggregate theory of the business trust is also problematic. Similar to the real entity theory, the aggregate theory has little descriptive power. The aggregate theory simply claims that corporations are collections of people.<sup>140</sup> This implies that the theory could be applied to any collection of people, i.e., the aggregate theory suggests a collection of people is a collection of people. Of course, this characterization is somewhat unfair because the aggregate theory does respond to the questions of whether the corporation should have separate entity status,<sup>141</sup> and what the source of

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enacted in a majority of states as a response to the legal uncertainty of common law trusts.”); Sitkoff, *supra* note 1, at 33 (“The statutory business trust is not only exceedingly flexible, but more importantly it resolves the problems of limited liability and spotty judicial recognition that have cast a pall over the use of the common-law business trust.”).

137. See *supra* note 133 and accompanying text (stating that state action is not required for the formation of a business trust).

138. See *supra* Section III.B (providing an overview of the real entity theory of the corporation).

139. See Asalya Akhmerova & William Price, *Should Illinois Have a Statutory Business Trust Act?*, 100 ILL. B.J. 164, 164 (2012) (“A common law business trust arises from a private action. As a result, the trust must transact business, sue, and be sued in the name of the trustee and in the trustee’s capacity as such. By contrast, a statutory business trust is an entity, separate from its trustees and beneficial owners, with the capacity to sue and be sued, own property, and transact business in its own name.”); Alyson Outenreath, *Taxation of Series LLCs in Texas: Bigger Isn’t Always Better in the Lone Star State*, 45 ST. MARY’S L.J. 183, 218 (2014) (“[A] business trust may not be a separate legal entity for state law purposes.”).

140. See *supra* Section III.C (providing an overview of the aggregate theory of the corporation).

141. See Belinfanti & Stout, *supra* note 10, at 587 (“Like the aggregate theory, the nexus of contracts theory does not recognize the corporation as its own separate and real entity.”); Tara J. Radin, *700 Families to Feed: The Challenge of Corporate Citizenship*, 36 VAND. J. TRANSNAT’L L. 619, 628 n.69 (2003) (“The hallmark of this, the ‘aggregate entity’ theory, is its refusal to admit the existence of a distinct corporate entity, except, perhaps, for that created by law.”); Stephen G. Wood & Brett G. Scharffs,



the rights of the corporation is.<sup>142</sup> With that said, the aggregate theory still has little descriptive power when applied either to corporations or business trusts.

Even the more substantial version of the aggregate theory, the nexus-of-contracts theory, does not adequately capture the essential nature of business trusts. The nexus-of-contracts theory acknowledges the contractual aspects of the corporation, which is an important aspect of the corporate form.<sup>143</sup> As previously explained, however, the nexus-of-contracts theory still falls short of fully defining the corporation.<sup>144</sup> A nexus-of-contracts theory of the business trust is also inappropriate for at least two reasons. First, trusts do not require the existence of a contract.<sup>145</sup> Although business trusts will almost invariably be based upon some sort of contractual relationship, applying the nexus-of-contracts theory to define the essential nature of business trusts is problematic, if the basic entity—a trust—does not require the existence of a contract. Second, although the nexus-of-contracts theory is a more robust version of the aggregate theory, it is still a descriptively thin account of a business entity, whether it is a corporation or a trust.<sup>146</sup> The theory provides guidance as

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*Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 546 (2002) (“U.S. academic discourse is dominated by an economic and contractarian perspective that does not treat the corporation in theory as a separate entity, but rather as amalgamation or aggregation of the interests, rights, and duties of the various stakeholders in the corporation.”).

142. See Iuliano, *supra* note 87, at 60 (“Under the aggregate entity theory, corporations were only capable of possessing rights that could be attributed to a collection of individuals.”); Pons, *supra* note 86, at 140 (“The aggregate theory of corporate personhood holds that because a corporation is a group of individuals, the collective group may take on property rights, certain liberty rights, and political association rights derived from its members.”); Coates, *supra* note 98, at 815 n.50 (“Under the aggregate theory, the extent to which a corporation may be said to have ‘rights,’ especially constitutional rights, corresponds to the rights of the individuals which make it up.”).

143. See Benjamin D. Landry, *Mutual Assent in the Corporate Contract: Forum Selection Bylaws*, 18 FORDHAM J. CORP. & FIN. L. 889, 894 (2013) (“The courts and the academic community have, for many years, broadly conceptualized the relationship between the stockholders, the board of directors, and the corporation as contractual in nature.”); Ann Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 589 (2016) (“There is a long history of courts referring to a corporation’s constitutive documents as contractual in nature.”); Thomas E. Rutledge, *Shareholders Are Not Fiduciaries: A Positive and Normative Analysis of Kentucky Law*, 51 U. LOUISVILLE L. REV. 535, 548 (2013) (“The relationship between the shareholder and the corporation is contractual in nature, that contract being embodied in the corporate statute and the corporation’s articles and bylaws.”).

144. See *supra* Section III.D (discussing the shortcomings of the prevailing theories of the corporation).

145. See Huai Yuan Chia, *Keeping Trusts Out of Court: Toward Arbitrating Trust Disputes in Singapore*, 27 N.Y. INT’L L. REV. 1, 1 (2014) (“[A] trust is not a contractual undertaking; rather, a trust is borne out of a unilateral act of a person disposing of his or her assets.”); Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325, 345 (2001) (“Trust instruments, whether in a private trust or a Public Trust, do not belong to the contract category . . .”).

146. See Avi-Yonah, *supra* note 115, at 1025 n.142 (“The point that the nexus of contracts theory is a reinvention of the aggregate view has been made repeatedly.”); Phillips, *supra* note 99, at 1071

to how the entity exists without providing guidance as to why it exists.

*B. The Application of Collaboration Theory to Business Trusts*

With each of the prevailing theories of the corporation failing to provide a foundation for an essentialist theory of the business trust, the question that remains is whether collaboration theory might fulfill such a role. Similar to applying collaboration theory to corporations, a collaboration theory of the business trust should be able to explain both how and why these entities exist. In the absence of answering both questions, a different theory of business trusts should be pursued because a theory that fails to answer both questions fails to define and to capture the essence of the business entity.

Collaboration theory offers a proper foundation for a theory of the business trust because of the collaborative nature of the entity. The place to begin is to discern the nature of the collaboration within these entities, i.e., why the business trust exists. As discussed previously, a collaboration is a common effort between or among multiple entities to accomplish a task or a project.<sup>147</sup> In regard to for profit corporations, this common task or project is the economic development and gain of those involved within the corporation, i.e., the state government and those organizing, operating, and owning the corporation. For non-profit corporations, the common project is to promote the public good. In regard to business trusts, because they are profit seeking entities, one might be tempted to argue that similar to for-profit corporations, the common task or project is the economic gain of those involved with the trust. Although such a description is likely true in most cases, such a description is inadequate in three regards. First, although settlors of business trusts will often be establishing trusts at least in part for their own economic gain, a settlor could gratuitously establish a business trust for the benefit of another. As a result, a theory of the business trust defining the collaboration as entailing those individuals seeking economic gain would fail to fully describe the trust relationship. Second, although a trustee of a business trust almost invariably will be receiving compensation, a trustee could gratuitously undertake to be a trustee of a business trust. Once again, as a result, a theory of the business trust defining the collaboration as entailing those individuals seeking economic gain would

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(“Because under this definition a corporation is simply a collection of smaller units, the nexus-of-contracts theory also is an aggregate theory of the firm. Like the aggregate theory, the nexus-of-contracts theory refuses to recognize a meaningful corporate entity distinct from the components that form the corporation.”); Ripken, *supra* note 94, at 160 (“The nexus of contracts model constitutes a modern variant of the aggregate theory of corporate personhood which says the corporation is nothing more than the collection of individuals who choose to group together to conduct their business in corporate form.”).

147. See *supra* Section III.D (offering an overview of collaboration theory).

fail to fully describe the trust relationship. Third, a better, more narrowly tailored description of the common task exists. The common task or project that underlies the collaboration forming the business trust is maximizing the economic gain of the beneficiaries of the trust through the actions of the trustee.

Defining the common task or project that underlies the collaboration this way neatly captures the essential nature of business trusts. Unsurprisingly, trusts are to be run for the benefit of beneficiaries.<sup>148</sup> Equally unsurprisingly, the purpose of for-profit business trusts is to make a profit; this is their *raison d'être*.

Collaboration theory also answers how trusts exist. This theory suggests that trusts ought to be treated as separate entities because groups in general should be able to achieve more than the total of all of their constituent members acting individually.<sup>149</sup> A lot of truth is embodied in the well-worn phrase that two heads are better than one. Notably, this approach would also resolve the lengthy debates about whether business forms should have entity status, such as partnerships, and it would suggest that such forms would have entity status.<sup>150</sup> This aspect of collaboration theory obviously derives at least in part from the real entity theory,<sup>151</sup> especially the work of Otto von Gierke and his ideas regarding the

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148. See Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 QUINNIAC PROB. L.J. 261, 292-93 (2016) (“The fundamental role of a trustee is to manage trust assets, as a fiduciary, for the benefit of trust beneficiaries. Included within that role are custodial and administrative duties with respect to such matters as: taking control of trust property; managing and safeguarding it; keeping adequate records; and reporting to beneficiaries. Other important trustees’ duties include investing trust assets and making distributions to beneficiaries.”); Reyes, *supra* note 67, at 376 (“In a business trust, one or more trustees hold property on behalf of, and manage the property for the benefit of, the beneficiaries.”); Adam Hofri-Winograd, *The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts*, 68 HASTINGS L.J. 931, 940 (2017) (“Trustees are under a duty to run the trust for the benefit of its beneficiaries: to manage the assets prudently, with a view to the beneficiaries’ needs, and exercise all of their powers with strict impartiality between the beneficiaries.”).

149. See generally MORTEN T. HANSEN, *COLLABORATION: HOW LEADERS AVOID THE TRAPS, BUILD COMMON GROUND, AND REAP BIG RESULTS* (2009); EVAN ROSEN, *THE CULTURE OF COLLABORATION: MAXIMIZING TIME, TALENT AND TOOLS TO CREATE VALUE IN THE GLOBAL ECONOMY* (2009); KEITH SAWYER, *GROUP GENIUS: THE CREATIVE POWER OF COLLABORATION* (2007); LEIGH THOMPSON, *CREATIVE CONSPIRACY: THE NEW RULES OF BREAKTHROUGH COLLABORATION* (2013).

150. See Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819, 868 n.320 (2017) (“Modern partnership law is engaged in an ongoing debate as to whether a partnership is simply a collective of individuals (aggregate theory) or is an entity unto itself (entity theory). This divergence reflects a similar tension in the role of employees who participate in the firm’s governance.”); Bradley T. Borden, *Aggregate-Plus Theory of Partnership Taxation*, 43 GA. L. REV. 717, 719 (2009) (“A predominant legal question over the last century has been whether partnerships are entities separate from their members or merely an aggregate of their members.”); Richard A. Booth, *Partnership Law and the Single Entity Defense*, 18 STAN. J.L. BUS. & FIN. 1, 3 n.6 (2012) (“There is a long-standing debate about whether a partnership is an aggregate or an entity.”).

151. See *supra* Section III.B (providing an overview of real entity theory).

collective personalities of groups.<sup>152</sup> Collaboration theory, however, extends beyond real entity theory because more than just explaining that the entity should be treated as a distinct thing, collaboration theory also explains why the entity exists.<sup>153</sup>

Granting entity status in the trust context is more complex than in the corporate context, however. Trusts involve the separation of ownership of property in which the trustee holds legal ownership of the corpus and the beneficiary holds equitable ownership.<sup>154</sup> As a consequence, one can argue that trusts should not be treated as entities because of the division of ownership that exists within them. This Article takes the strong position that groups of people coming together to create business forms create separate entities because of the separate personality of the group. Importantly, even if one rejects the argument that business trusts should have separate entity status because of the way that trusts divide ownership, one can still adopt the collaboration theory of the business trust because it still captures the essential nature of the business form, i.e., maximizing the economic gain of the beneficiaries of the trust. With that said, entity status does naturally arise from the collaborative nature of business trusts.

### *C. The Implications of Applying Collaboration Theory to Business Trusts*

One of the distinct and profound failings of the prevailing theories of the corporation is that they offer little to no normative guidance on a myriad of different foundational issues of corporate law such as why corporations exist, how the corporation is to be governed, whether management should focus on the short-term gain or the long-term well-being of the entity, when the entity should engage in corporate social responsibility, whether the corporation should engage in tax avoidance, who should be punished for corporate criminality, and what are the limits

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152. See *supra* notes 91-92 and accompanying text (discussing the work of Otto von Gierke and its impact on conceptions in the United States of the corporate form).

153. See *supra* Section III.D (providing an overview of collaboration theory).

154. See Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 *FORDHAM L. REV.* 799, 805 (2014) (“Trusts divide ownership of an asset between a trustee, who holds legal title, and a beneficiary, who holds equitable title.”); Abraham Bell & Gideon Parchomovsky, *Copyright Trust*, 100 *CORNELL L. REV.* 1015, 1049 (2015) (“The creation of a trust results in the bifurcation of ownership into a legal interest and an equitable interest. The creator, or settlor, of the trust transfers her title to a trustee, who thereupon becomes the owner of the legal title. At the same time, however, the creator appoints beneficiaries, vesting in them an equitable title to the benefits to be accrued from the assets or money that were put in trust.”); Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 *IOWA L. REV.* 215, 231 (2011) (“Property that is held in trust is kept in a state of divided ownership: The trustee holds the legal title, and the beneficiaries hold the equitable title.”).

of the corporation's constitutional rights. This shortcoming is the reason that embracing the indeterminacy of the corporation and regulating the corporation in a reactionary manner has gained favor with some academics, even though such an approach fails to offer a deeper understanding of the corporation and fails to offer guidance prospectively when the law is undeveloped or uncertain.<sup>155</sup> Because collaboration theory offers a thicker definition of the corporation by answering how and why the corporation exists, the theory offers insights and provides normative guidance regarding these foundational issues of corporate law.<sup>156</sup> The same is true regarding the collaboration theory of the business trust, including that these entities must engage in wealth maximization, that all other behavior should follow from that wealth maximizing mandate, and that these entities should be governed under a trustee primacy model.

The collaboration theory of the business trust that is advanced in this Article requires that such trusts engage in unrelenting profit maximization. Corporations are often accused of unrelentingly seeking profit even in instances in which such efforts yield immoral and anti-social results.<sup>157</sup> The notion that corporations are profit maximizing beasts derives directly or indirectly from the classic case of *Dodge v. Ford Motor Co.* in which the Michigan Supreme Court admonished Henry Ford for attempting to run Ford Motor Company for the benefit of the public, rather than for the benefit of its shareholders.<sup>158</sup> Speaking for that court, Chief Judge Ostrander wrote, "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."<sup>159</sup> Even though this language

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155. See *supra* notes 115-116 (explaining that some academics have embraced the indeterminacy of the corporation because the prevailing theories fail to provide clear or any normative guidance regarding important issues of corporate law).

156. A recounting of the insights and normative guidance that the collaboration theory of the corporation provides to various foundational issues of corporate law will not be provided because of the space limitations of this Article. A discussion of these insights can be found in my forthcoming book, ERIC C. CHAFFEE, *THE CORPORATION DEFINED: COLLABORATION THEORY AND THE CORPORATE FORM* (Cambridge University Press, forthcoming 2021).

157. See F. Patrick Hubbard & Evan Sobocinski, *Crashworthiness: The Collision of Sellers Responsibility for Product Safety with Comparative Fault*, 69 S.C. L. REV. 741, 824 (2018) ("[F]or-profit corporations exhibit an immoral pathology of focusing only on profits. It is unfair to treat such entities on an equal moral basis with humans."); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 407 (2014) ("In the romantic narrative [of class actions], corporations are powerful, evil, malevolent, bad-actors intent on profit-making at the expense of the health, safety, and well-being of individuals."); Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority*, 93 MARQ. L. REV. 971, 1018 (2010) ("Corporations are not inherently evil, but they are structured to pursue profit and minimize firm costs, which is frequently accomplished by shifting those costs to others.").

158. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

159. *Id.* at 684.

requires only that the corporation be run “primarily” for the benefit of the shareholders,<sup>160</sup> which suggests that other things may be considered in the operation of the corporation, many commentators have interpreted *Dodge* to mean that corporations must engage in profit maximization, i.e., relentlessly seeking profit at all costs.<sup>161</sup> One leading scholar has argued for not teaching *Dodge* for a variety of reasons, including that the case is outdated, is not from a leading court, is not supported by existing law, and is not supported by economic theory.<sup>162</sup> Regardless, the *Dodge* mandate that the corporation must seek profit is derivable from the fiduciary duties of the directors and other managers, especially the duty of loyalty, because the duty of loyalty requires that corporate directors and other managers place the interests of the corporation and its stockholders ahead of their own.<sup>163</sup> With for profit corporations, the purpose of the corporation is obviously to seek a profit,<sup>164</sup> and as a result, the duty of loyalty requires corporate directors and other managers to engage in profit

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160. *Id.*

161. See Vincent S.J. Buccola, *Beyond Insolvency*, 62 U. KAN. L. REV. 1, 24-25 (2013) (“The managerial ideal described in *Dodge* and similar cases is that of shareholder-wealth maximization. . . . On the traditional view, managers deciding how to employ firm assets ought to privilege the common shareholders over competing constituencies.”); Daniel J.H. Greenwood, *Corporate Governance and Bankruptcy*, 13 BROOK. J. CORP. FIN. & COM. L. 99, 109 (2018) (“*Dodge* accurately reflects a widespread view that businesses ought to be managed solely to maximize profit . . . .”); Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 BUS. LAW. 337, 349 (2018) (“*Dodge v. Ford Motor Co.* is the case that just keeps on giving in corporate law. Despite concerted efforts by scholars to reexamine the case, *Dodge* is still employed for its familiar proposition that shareholder value must be maximized.”).

162. See generally Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008) (discussing a myriad of shortcomings of continuing to view *Dodge v. Ford* as a leading case).

163. See Lisa M. Fairfax, *Managing Expectations: Does the Directors’ Duty to Monitor Promise More Than It Can Deliver?*, 10 U. ST. THOMAS L.J. 416, 419 (2012) (“The duty of loyalty seeks to ensure that in those situations, directors do not place their own interests before the interests of the corporation and its shareholders.”); Yair J. Listokin & Inho Andrew Mun, *Rethinking Corporate Law During a Financial Crisis*, 8 HARV. BUS. L. REV. 349, 360 (2018) (“[D]irectors owe shareholders a duty of loyalty to avoid conduct that puts their own interests above the interests of their company and shareholders.”); Amy Deen Westbrook, *Does Banking Law Have Something to Teach Corporations Law About Directors’ Duties?*, 55 WASHBURN L.J. 397, 398 (2016) (“In fulfilling their duty of loyalty, directors must not put their own interests, or even the interests of others, ahead of those of the corporation.”).

164. See Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 293 (2015) (“By definition, for-profit corporations exist to make money; otherwise they would be non-profit.”); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1589 (2018) (“While many corporations have become more socially responsible, corporations and the laws that govern them do not focus on social externalities but on profits for shareholders. This focus will naturally constrain some of their most noble social impulses.”); Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353, 353 (2015) (“Corporations exist primarily to make profit for their shareholders. This has been the black letter rule of law and the reigning orthodoxy of American business for a century.”).

seeking before pursuing other interest that they deem important.<sup>165</sup> With that said, corporate directors and other managers have wide latitude in how they seek profit as a result of the business judgment rule, which shields business decisions from judicial review, except in very limited circumstances.<sup>166</sup> In addition, as I have explained elsewhere in my scholarship, because the corporation is a collaboration among the individuals organizing, operating, and operating the entity and the state, those individuals owe fiduciary duties to the state because it is a co-adventurer in the firm and because of the contractual nature of the firm.<sup>167</sup> These fiduciary duties should moderate the behavior of the corporation in a variety of different ways, such as requiring that the firm engage in corporate social responsibility in certain instances, and mandating that the firm not engage in aggressive tax avoidance.<sup>168</sup>

The state, however, is not a collaborator in business trusts because such

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165. See Faith Stelman Kahn, *Fiduciary Duty, Limited Liability, and the Law of Delaware: Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 525 (2000) (“Corporate managers’ duty of loyalty to shareholders does, of course, encompass a commitment to further the prescribed objectives of the corporate fiduciary enterprise in the interest of the shareholders (i.e., corporate profit maximization, as traditionally defined.); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) (“[C]orporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.”).

166. See Wulf A. Kaal & Richard W. Painter, *Initial Reflections on an Evolving Standard: Constraints on Risk Taking by Directors and Officers in Germany and the United States*, 40 SETON HALL L. REV. 1433, 1442 (2011) (“The business judgment rule in . . . the United States . . . precludes judicial review of most decisions by corporate directors and protects directors from potential liability for ‘good faith’ decisions, even if those decisions ultimately end in failure.”); Janis Sarra, *Disclosure as a Public Policy Instrument in Global Capital Markets*, 42 TEX. INT’L L.J. 875, 894 (2007) (“The business judgment rule limits judicial review of directors’ business decisions in order to limit the amount of interference in business affairs by the judiciary. Hence, the rule shields directors from personal liability and shields the decisions of corporate boards from judicial review.”); Mary Siegel, *Why Delaware Courts Should Abolish The Schnell Doctrine*, 5 AM. U. BUS. L. REV. 159, 176 (2016) (“The business judgment rule is designed to preclude judges from second-guessing directors’ business decisions by limiting initial judicial review solely to the process by which directors made their decision. In this process, directors enjoy a presumption of propriety.”).

167. See Chaffee, *The Origins of Corporate Social Responsibility*, *supra* note 16, at 375 (“In collaborations, regardless of whether they are contracts or business entities, an implied duty of good faith requires the parties to the collaboration to treat each other well. This means that individuals organizing, operating, and owning the corporation are required to treat the state government well, i.e., with good faith, because these parties have agreed to collaborate.”); Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, *supra* note 16, at 153 (“[W]ithin business forms, collaborators have an obligation to treat each other with a duty of good faith within the scope of their relationship. . . . Under collaboration theory, the parties composing the firm are bound by duties of good faith that emanate from the contractual relationship of the parties and from the business form itself.”).

168. See generally Chaffee, *The Origins of Corporate Social Responsibility*, *supra* note 16 (explaining under collaboration theory when a corporation should engage in corporate social responsibility); Eric C. Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, *supra* note 16 (explaining under collaboration theory when a corporation can engage in tax avoidance).

entities can be created without state action.<sup>169</sup> As a consequence, the collaboration within a business trusts is intensely and unwaveringly focused on wealth maximization for the beneficiaries, especially considering the very strong fiduciary duties that trustees owe to beneficiaries.<sup>170</sup> Within the corporation, the role of the state as a collaborator should have a mollifying effect on the corporation's pursuit of profit. This does not exist within a business trust. Consequently, business trusts are really the entities that the public should fear as being profit maximizing monsters, especially considering that these entities are regularly afforded limited liability.

Because of this wealth maximization mandate within business trusts, all behavior should be based upon seeking profit. For example, business trusts should only engage in socially responsible behavior when it benefits the firm. In other words, when socially responsible behavior does not benefit the firm, business trusts should undertake other legally permissible behavior when it benefits these entities, even if that behavior is harmful to society. In addition, business trusts are required to engage in aggressive tax avoidance because of their wealth maximization mandate. This result can be modified at the time a trust is created through the terms of the trust, but the default is naked and unrelenting profit maximization. Notably, efforts to control the appetites for profit and related bad behavior of corporations usually do not apply to business trusts. For example, constituency statutes that allow corporate directors and other managers to consider a wider range of constituencies beyond shareholders seeking profit in making business decisions are found within corporate codes, and as a result, do not apply to business trusts.<sup>171</sup>

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169. See *supra* note 133 and accompanying text (explaining that state action is not required for the creation of a business trust).

170. See Ann E. Conaway, *The Multi-Facets of Good Faith in Delaware: A Mistake in the Duty of Good Faith and Fair Dealing; a Different Partnership Duty of Care; Agency Good Faith and Damages; Good Faith and Trust Law*, 10 DEL. L. REV. 89, 120 (2008) (“[U]nlike any other Delaware alternative entity statute, the *default standard* in the Statutory Trust Act is the *common law of trusts*. With the common law of trusts come strict fiduciary duties and a standard of accountability that is *higher* than that seen elsewhere in Delaware’s business entity acts.”); Sitkoff, *supra* note 22, at 680 (“[T]rust fiduciary law, especially the duty of loyalty, is stricter and more prophylactic than the fiduciary law of other organizational forms.”); Lee-Ford Tritt, *Dispatches from the Trenches of America’s Great Gun Trust Wars*, 108 NW. U. L. REV. COLLOQUY 154, 163 (2013) (“In administering the trust, the trustee is held to a robust and rich concept of fiduciary duties. In fact, the concept of fiduciary duties may be one of the defining aspects of trusts. These duties function both as legal rules and moral norms.”).

171. See ALA. CODE § 10A-2-11.03(c) (2017); ARIZ. REV. STAT. ANN. §§ 10-830(D), 10-2702 (2017); ARK. CODE ANN. § 4-27-1202(c) (2017); COLO. REV. STAT. § 7-106-105(7) (2017); CONN. GEN. STAT. § 33-756(g) (West 2018); FLA. STAT. § 607.0830(3) (2017); GA. CODE ANN. § 14-2-202(b)(5) (West 2018); IDAHO CODE § 30-1702 (2017); 805 ILL. COMP. STAT. 5/8.85 (2017); IND. CODE § 23-1-35-1(d) (2017); IOWA CODE § 491.101B (2017); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2018); ME. STAT. tit. 13-C § 831(6) (2017); MASS. GEN. LAWS ch. 156B, § 65 (2017); MINN. STAT. § 302A.251(5) (2017); MISS. CODE ANN. § 79-4-8.30(f) (2017); MO. ANN. STAT. § 351.347(1) (West 2018); MONT.



In addition, the collaboration theory of the business trust provides a clear mandate as to how the entity ought to be governed, i.e., with a trustee primacy model. The intractable debate about the prevailing theories of the corporation has created an intractable debate about how the corporation ought to be governed. From this debate, three prevailing theories of governance have emerged. The director primacy model posits that control of the corporate form should lie with the directors, who should focus their efforts on wealth maximization.<sup>172</sup> The shareholder primacy model suggests control of the corporation should rest with the shareholders of the corporation, who should also focus on wealth maximization.<sup>173</sup> Finally, the team production model asserts that although control of the corporation is overseen by the board of directors, their efforts must be focused on serving and balancing the common and

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CODE ANN. § 35-1-815(3) (2017); NEV. REV. STAT. § 78.138(4) (2017); N.H. REV. STAT. ANN. § 293-A:12.02(c) (2017); N.J. STAT. ANN. § 14A:6-1(2) (West 2018); N.M. STAT. ANN. § 53-11-35(D) (West 2018); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2017); N.C. GEN. STAT. § 55-11-03(c) (2017); N.D. CENT. CODE § 10-19.1-50(6) (2017); OHIO REV. CODE ANN. § 1701.59(F) (West 2018); OR. REV. STAT. § 60.357(5) (2017); 15 PA. CONS. STAT. § 1715(a) (2017); 7 R.I. GEN. LAWS ANN. § 7-5.2-8(a) (West 2018); S.C. CODE ANN. § 33-11-103(c) (2017); S.D. CODIFIED LAWS. § 47-33-4 (2017); TENN. CODE ANN. § 48-103-204 (2017); TEX. BUS. ORGS. CODE ANN. § 21.401 (West 2018); UTAH CODE ANN. §§ 16-10a-840(5), 16-10a-1103(3) (West 2018); VT. STAT. ANN. tit. 11A, § 8.30(a)(3) (2017); VA. CODE ANN. § 13.1-718(B) (2017); WASH. REV. CODE § 23B.11.030(3) (2017); WIS. STAT. § 180.0827 (2017); WYO. STAT. ANN. § 17-16-830(g) (2017).

172. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U.L. REV. 547, 550 (2003) (“Neither shareholders nor managers control corporations—boards of directors do. [D]irector primacy claims that shareholders are the appropriate beneficiaries of director fiduciary duties. Hence, director accountability for maximizing shareholder wealth remains an important component of director primacy.”); Padfield, *supra* note 79, at 416 (“Director primacy is generally understood to argue that the board of directors is the ultimate decision-maker, and that the goal of the board’s decision-making should be shareholder wealth maximization.”); Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1002 (2013) (“The director-primacy theory of the firm arose within the last decade and posits that boards of directors—not shareholders or managers—control the corporation, and it also asserts that shareholders are the appropriate beneficiaries of director fiduciary duties, and that directors ought to be accountable for maximizing shareholder wealth.”).

173. See Matteo Gatti, *It’s My Stock and I’ll Vote If I Want to: Conflicted Voting by Shareholders in (Hostile) M&A Deals*, 47 U. MEM. L. REV. 181, 233 n.159 (2016) (“Shareholder primacy dictates that corporate management’s decision making should focus on the advancement of shareholder interests, even if those interests are in conflict with the interests of non-shareholder constituencies and represents an idea of corporate governance which allows for significant shareholder influence.”); Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. REV. 603, 605 n.2 (2019) (“Shareholder primacy can be understood in two different ways: (1) that the sole or primary objective of a business corporation is to advance the interests of its shareholders (i.e., to maximize shareholder wealth), or (2) that shareholders wield ultimate power in the governance of the corporation.”); Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1951-52 (2018) (“A foundational concept of corporate law and corporate governance is the principle of shareholder primacy. It expresses the idea that shareholders have the priority interest in both economics and governance of the corporation: shareholders are said to be the principal in a principal-agent relationship on whose behalf the corporate enterprise serves.”).

competing goals of the stakeholders of the corporation.<sup>174</sup> Notably, none of the prevailing essentialist theories of the corporation offer any meaningful guidance as to which of the prevailing theories of governance ought to be preferred over the others.

Collaboration theory suggests that the team production model of corporate governance is to be preferred because the corporation is a collaboration among the government and the individuals organizing, owning, and operating the corporation, and because the team production model acknowledges that the corporation is composed of various stakeholders, i.e. collaborators. In fact, collaboration theory even suggests the need for a new prevailing theory of corporate governance to emerge focused on collaboration. Notably, Professors Jill Fisch and Simone Sepe are currently developing such a collaborative model of governance that promises to have a profound impact on the corporate law field.<sup>175</sup>

In regards to business trusts, collaboration theory suggests that the entity ought to be governed by a trustee primacy model. At first blush, this conclusion might seem counter-intuitive, especially because the collaboration theory of the corporation suggests that a collaborative model of governance, such as team production, is the correct model of governance for the for-profit corporate form. However, despite the commonalities between the collaboration theory of the for-profit corporation and the collaboration theory of the business, differences do exist. Notably, even the collaboration theory of the for-profit corporation and the non-profit corporation vary in regard to the nature of the collaboration—i.e., to promote economic development and gain and to promote the public good respectively—which makes them substantially different entities.<sup>176</sup> The remarkably different histories of the business trusts and corporations reflects that they are different entities as well.<sup>177</sup>

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174. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999) (“The team production model provides an . . . answer to the question of why corporate law grants directors of public corporations so much leeway. . . . [B]oards exist not to protect shareholders per se, but to protect the enterprise-specific investments of all the members of the corporate ‘team,’ including shareholders, managers, rank and file employees, and possibly other groups, such as creditors.”); Brian R. Cheffins, *The Team Production Model as a Paradigm*, 38 SEATTLE U. L. REV. 397, 397 (2015) (“Margaret Blair and Lynn Stout introduced the team production theory of corporate law in a landmark 1999 article in the *Virginia Law Review*. Their team production model, as is well known, characterized the board of directors as a mediating hierarchy that balances the interests of a corporation’s various constituencies . . .”).

175. See Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. (forthcoming 2020) (offering an innovative corporate governance model based upon collaboration).

176. See *supra* Section III.D (discussing the application of collaboration theory to for profit and non-profit corporations).

177. See *supra* Part II (providing a brief overview of the histories of corporations and business trusts).

As previously mentioned, the purpose of business trusts is to maximize the economic gain of the beneficiaries of the trust through the actions of the trustee.<sup>178</sup> The essence of the trust is the trustee acting on behalf of the beneficiary, while being only subject to either the criticism of the beneficiary for breaching the trustee's fiduciary duties or to potential trustee removal.<sup>179</sup> As a result, a trustee primacy model of governance, which is similar to the director primacy model, is the correct model for business trusts.<sup>180</sup> Even though these entities are still collaborative in nature, it is a special and defined type of collaboration. One might argue that it is possible to yield a similar result regarding for-profit corporations by simply redefining the collaboration within those entities as collaborations among the state and the individuals organizing, operating, and owning the entity for purposes of economic development and gain through the actions of the board of directors. The problem is this definition of the collaboration within the for-profit corporation is simply not accurate because it underplays the roles of the state, the individuals owning the corporation, and some of the individuals operating it, which need to be acknowledged in a collaborative governance model.<sup>181</sup> A business trust is a much more defined entity with a specific role for the trustee that demands a trustee primacy model for the entity.

#### *D. Concerns About Applying Collaboration Theory to Business Trusts*

As the intractable debate among the prevailing theories of the corporation evidences, any essential theory of a business entity is going to be open to criticism. As a result, a few words ought to be offered regarding potential criticisms about applying collaboration theory to business trusts. These potential, yet unfounded, criticisms include that

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178. See *supra* notes 169-71 and accompanying text (explaining that business trusts must engage in unrelenting profit maximization).

179. See Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CAL. L. REV. 1751, 1773 (2017) ("Trust law requires the trustee to manage the property on behalf of the beneficiary with undivided loyalty and the utmost care."); Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1297 (2011) ("In the trust arrangement the trustees have significant power. The beneficiaries cannot direct the trustees nor remove them without judicial proceedings. . . . Consequently, trust law imposes on trustees far stricter rules than agency law imposes on agents."); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 467 (2008) ("The trust is generally recognized by its strict division between principal and agent, as well as the strong fiduciary duties assumed by the principal. The trust divides its relevant participants into trustees and beneficiaries (or 'beneficial owners'). Trustees manage the assets of the trust, and the beneficiaries receive the profits of this management.")

180. See *supra* note 172 and accompanying text (describing the director primacy model of corporate governance).

181. See generally CHAFFEE, *supra* note 17 (providing a comprehensive overview of the collaboration theory of the corporation).

collaboration theory may be overinclusive and fails to capture the essential nature of business trusts, fails to provide normative guidance regarding certain foundational questions involving business trusts, and fails to acknowledge the role that the state plays in statutory business trusts.

One might argue that collaboration theory is vacuous because it can be applied to a wide variety of business forms, and therefore, it fails to capture the essential nature of any particular business association. In fact, the wide applicability of collaboration theory is a strength, not a weakness. Business forms have to have some shared characteristics; otherwise they would not be grouped together in the common category of being business forms. Consequently, the collaboration theory of the for-profit corporation and the collaboration theory of the business trust must be two seemingly contradictory things: similar and unique. Collaboration theory does this by acknowledging that both entities are collaborations, and by acknowledging that the collaborations vary in their focuses. In regard to for-profit corporations, this is to promote economic development and gain of the entities involved, and in regard to business trusts, this is maximizing the economic gain of the beneficiaries of the trust through the actions of the trustee.<sup>182</sup> Because for-profit corporations and business trusts are both business entities, what this may mean is that the common elements of the theories are really helping to provide a definition of business, which is a difficult term to define. Regardless, however, the shared elements of the theories are a strength, rather than a weakness.

One might also fault the collaboration theory of the business trust for failing to provide normative guidance regarding certain foundational questions involving business trusts. As previously discussed, this theory has certain normative implications regarding how the entity ought to be operated.<sup>183</sup> With that said, one could point to numerous fundamental issues that the theory fails to resolve. For example, the theory fails to respond to a classic debate in business law as to whether the business entity is to be operated for the short-term profit of the investors or the long-term well-being of the entity.<sup>184</sup> One should remember, however,

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182. See *supra* Section III.D (providing an overview of the collaboration theory of the corporation); *supra* Section IV.B (providing an overview of the collaboration theory of the business trust).

183. See *supra* Section IV.C (discussing the normative implications of applying collaboration theory to business trusts).

184. See Robert Anderson IV, *The Long and Short of Corporate Governance*, 23 GEO. MASON L. REV. 19, 31 (2015) (“The long-and-short argument contends that short-term shareholders agitate for corporate policies and governance arrangements that ‘pump up’ the short-term prices but will cause lower long-term prices.”); K.J. Martijn Cremers & Simone M. Sepe, *Institutional Investors, Corporate Governance, and Firm Value*, 41 SEATTLE U. L. REV. 387, 393 (2018) (“The short-term versus long-term

what an essential theory of a business entity is designed to do, i.e., capture the essence of the business entity. At its heart, the search for an essential theory of the business trust is a metaphysical inquiry into what defines this business organization. The fact that responding to this question does not provide a panacea of solutions to all issues relating to the entity is unsurprising. Returning to the bridge example, understanding the essential nature of a bridge does not mean that one knows every issue associated with it, for example, where to place the bridge, how to maintain the bridge, and how much weight the bridge will support. Still, understanding the essential nature of a business entity gives greater insight into how it ought to behave and be regulated.

Finally, one might also fault collaboration theory because it fails to acknowledge the role that the state plays in statutory business trusts. In regard to the collaboration theory of the corporation, the state's role in the corporation is fully recognized and embraced.<sup>185</sup> It also creates various normative implications about how the corporation ought to behave.<sup>186</sup> While common law business trusts can be created without state action,<sup>187</sup> statutory business trusts often must be recognized by the state through filings.<sup>188</sup> Numerous states have created business trust statutes.<sup>189</sup> What this might suggest is that the state's role in the business trust should be considered in any essentialist theory, or that a need exists for two

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contention has grown today into perhaps the most controversial debate in corporate governance.”); Thomas L. Hazen, *The Short-Term/Long-Term Dichotomy and Investment Theory: Implications for Securities Market Regulation and Corporate Law*, 70 N.C. L. REV. 137, 138 (1991) (“In managing an enterprise or in establishing a strategic plan, managers must decide the extent to which they will focus on short-term rather than long-term goals.”).

185. See generally CHAFFEE, *supra* note 17 (explaining the collaboration theory of for-profit corporation, including the role of the state within the theory); Chaffee, *Collaboration Theory: A Theory of the Charitable Tax Exempt Nonprofit Corporation*, *supra* note 16 (explaining the collaboration theory of the nonprofit corporation, including the role of the state within the theory).

186. See Chaffee, *The Origins of Corporate Social Responsibility*, *supra* note 16 (explaining the normative implications of the collaboration theory of the for-profit corporation in the context of corporate social responsibility, including the role of the state in creating these normative implications); Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, *supra* note 16 (explaining the normative implications of the collaboration theory of the for-profit corporation in the context of corporate tax avoidance).

187. See *supra* note 133 and accompanying text (explaining that state action is not required for formation of a business trust).

188. See Thomas Geu & Robert Keatinge, *The Proposed Inter-Entity Transactions Act: A Proposal to Rationalize Changes in Forms of Business Organizations*, 37 REAL PROP. PROB. & TR. J. 385, 406 (2002) (“In some states . . . , a business trust is a filing entity, while in other states business trusts are recognized only by common law.”); Akhmerova & Price, *supra* note 139, at 164 (“A statutory business trust is formed by filing a certificate of trust with a public official, typically the Secretary of State.”); Reyes, *supra* note 67, at 378 n.25 (“The term ‘statutory trusts’ refers to those business trusts recognized by state statute. Some statutory trust statutes require registration of the entity; others, like the Delaware Business Trust Act, do not.”).

189. See *supra* note 18 (providing sources reporting that more than thirty states have adopted business trust statutes).

essentialist theories with one defining the essential nature of the common law business trust and the other defining the essential nature of the statutory business trust. However, this ignores the history and structure of the business form, which requires no state action.<sup>190</sup> When individuals organize as a business trusts, the individuals are not forsaking the history and structure of the form; they are merely opting for a more predictable body of law to govern those entities.<sup>191</sup> Accordingly, this Article takes the position that any essentialist theory of the business trust should put aside the role of the state. If one rejects this argument, one could easily formulate a collaboration theory of the statutory business trust that looks more similar to the collaboration theory of the corporation. With that being true, however, taking such a path is unnecessary and inappropriate based on the essential nature of business trusts.

## VI. CONCLUSION

Business trusts have played and continue to play an important role in the economy of the United States.<sup>192</sup> Despite the importance of these entities, very little legal scholarship exists focusing on this type of business form.<sup>193</sup> This Article contributes to the existing literature by offering the first attempt to develop an essentialist theory of the business trust.

Understanding the essential nature of a business form is important because it suggests how that business entity ought to be operated and regulated. A substantial body of scholarship has developed in the corporate law field that has coalesced into three prevailing theories of the corporation: artificial entity theory,<sup>194</sup> real entity theory,<sup>195</sup> and aggregate theory.<sup>196</sup> However, each of these theories fails to capture the essential nature of the corporate form because, although they describe how the corporation exists, they fail to explain why the corporation exists, despite the history of the corporation being well documented.<sup>197</sup> As a

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190. *See supra* note 136 and accompanying text (reporting that the reason that legislatures enacted business trust statutes was so that individuals organizing business trusts could opt into a predictable body of law to govern those entities).

191. *See supra* Section II.B (describing the history of the business trust, which can be viewed as often being a means of circumventing government regulation).

192. *See supra* Section II.B (explaining the historical and current importance of business trusts).

193. *See supra* note 6-7 (discussing the relatively limited amount of legal scholarship on business trusts, especially considering the large amount of scholarship generated on corporations each year).

194. *See supra* Section III.A (describing the artificial entity theory of the corporation).

195. *See supra* Section III.B (describing the real entity theory of the corporation).

196. *See supra* Section III.C (describing the aggregate theory of the corporation).

197. *See supra* Section III.D (discussing the shortcomings of each of the prevailing essentialist theories of the corporation).

consequence, I have developed a competing theory of the corporation, collaboration theory, that offers a fuller view of the business entity. Collaboration theory suggests that the for-profit corporation is a collaboration among the state and the individuals organizing, operating, and owning the corporation for economic development and gain.<sup>198</sup>

Although the prevailing essentialist theories of the corporation fall short of capturing the essential nature of business trusts, collaboration theory can and should be applied to these business entities.<sup>199</sup> The collaboration theory of business trusts suggests these entities are a narrowly focused collaborations among the individuals involved in the trust for the economic development and gain of the beneficiary through the action of a trustee.<sup>200</sup> This model has a number of normative implications, including that these entities must engage in wealth maximization; that all other behavior should follow from that wealth maximizing mandate; and that these entities should be governed under a trustee primacy model.<sup>201</sup>

Obviously, all of the questions of the collaboration theory of the business trust cannot be answered in a single article. However, this Article offers at least a start to understanding the essential nature of this business form.

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198. See *supra* Section III.D (describing the collaboration theory of the corporation).

199. See *supra* Section IV.A-B (analyzing the potential application of the artificial entity theory, real entity theory, aggregate theory, and collaboration theory to business trusts).

200. See *supra* Section IV.B (describing the collaboration theory of the business trust).

201. See *supra* Section IV.C (examining the normative implications of applying collaboration theory to business trusts).