The Property Origins of Corporations

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For much of the last five decades, legal scholars have debated and interrogated the idea that corporations are contractual in nature, and that it is useful to think of a corporation as a "nexus" of contracts. The emphasis on aspects of corporate law that are like contracts, and that are intended to solve "principal-agent" problems that arise in contractual relationships, has contributed to a neglect of aspects of corporate law that are more about holding property, and that are difficult to replicate via contract. The corporate form emerged in Europe out of feudal rules for holding property, and was originally applied to types of organizations that today we would call "non-profits," long before it began to be used to organize and hold assets used for business. The property holding role of corporations remains one of its key functions. In recent decades, the property holding and asset partitioning functions have played an increasingly important role in partitioning and manipulating assets in fields such as securitization, tax avoidance, bankruptcy, and even campaign finance.

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For much of the last five decades, legal scholars have debated and interrogated the idea that corporations are contractual in nature, that it is useful to think of a corporations as a "nexus" of contracts.[1] The emphasis on aspects of corporate law that are like contracts, and that are intended to solve "principal-agent" problems that arise in contractual relationships, has led to a neglect of aspects of corporate law that are more about holding property. The corporate form emerged in Europe out of feudal rules for holding property, and was originally applied to types of organizations that today we would call "non-profits," long before it began to be used to organize and hold assets used for business. Even after the form began to be used for business ventures, its usefulness in protecting and securing assets that were designated for a specific use made it an attractive organizational form for enterprises that had a public, or quasi-public function, as well as for ventures of a purely business nature.[2]

In this article, I tell an alternative origin story, that emphasizes this property function – the role the corporate form plays for organizing, holding, partitioning, and committing property to long-lived projects such as physical infrastructure used by an extended community, multi-year

[1] Jensen & Meckling (1976); Easterbrook & Fischel (1991).
[2] Dari-Mattiacci, et. al. (2017), at 207, include a discussion of how the first few iterations of the Dutch East India Co. were a "hybrid structure of a private commercial company with public responsibilities." See also, Ronald E. Seavoy (1982), which makes a similar argument about the development of corporations as business entities in the early US.

trade expeditions, or in modern times, factories, electrical networks, product development labs, and reputational and knowledge assets. In all of these cases, many people in addition to members, investors, or direct customers benefit from the existence of the dedicated assets. This alternative story makes it clear that the nexus of contracts story is too constrained, and that its excessive emphasis on the idea that the "contractual" duty of corporate officers and directors is to maximize the value of corporate shares, has led to a neglect of the social function of many types of dedicated assets, and the disfunction that can be associated with excessive partitioning of corporate assets and risk.

Property and Corporations in the Middle Ages.

The earliest use of the corporate form of organization was to secure assets such as land, buildings, and the contents of buildings such as artwork and books, for use as churches, monasteries, colleges, hospitals, and libraries. The default rule – the feudal property rule – in medieval Europe was that the state, in the name of a monarch, owned all the land.[3] Exceptions were carved out for lords or barons who were favored by the king, but even in such cases, if the baron died without legitimate heirs, the land would "escheat" to the king.   A further set of exceptions were carved out for organizations such as churches, monasteries, colleges, libraries, and, later, hospitals, that had "charters" from the king. Those charters created organizations that were recognized under medieval law as "persons" for the purpose of holding property and entering into contracts. Their key feature was that the chartered organizations would survive turnover in the individuals who held such roles as parish priests, abbots, and deans. This was because the organization, not any specific human person, was seen as the owner of the property.

[3] Cite to Land Tenure, Wikipedia.

The property would not escheat to the king when the abbot died, but be preserved for continued specialized use by the community.[4] This was one of the sources of tension between English kings and the Catholic Church – lands and other property held by the Church, would not revert to the king, so Church-based organizations were able to accumulate great wealth.[5] David Ciepley observes that "shifting ownership from mortal persons to perpetual legal entities . . . commits property in perpetuity to specific activities."[6]

Certain secular organizations, such as townships and guilds, also found it useful to have charters and be recognized as corporations. In the case of townships, the granting of a charter was a political device that granted and secured self-governance for some communities within a given jurisdiction or territory, and for guilds, the grant of a charter secured monopoly control of the practice of some trade within a specified territory. For these organizations, the corporate charter may have been as much about securing self-governance of a community, or monopoly control, reputational capital, and dispute resolution mechanisms as it was about accumulating dedicated assets.

Work by Dari-Mattiacci, Gelderblom, Jonker, and Perotti (2017) convincingly argues that the first business enterprise to possess all of the key features of modern business corporations

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[4] Avner Greif's historical work on the emergence of non-kin-based economic institutions in medieval Europe shows how these institutions led to the "rise of the West." "The historical research presented here suggests that the West developed distinct institutions as early as the late medieval period. The organization of society in the West was centered on intentionally created institutions. Neither the state nor kin-based social structures, such as tribes and clans were central to these institutions. Instead, the organization of society was centered on interest-based, self-governed, non-kin-based organizations. These organizations – mainly in the form of corporations – were vital to Europe's political and economic institutions during the late medieval growth period as well as the modern growth period." See Greif, (2006), at 25-26).

[5] In 1534, when Henry VIII broke with the Roman Catholic Church, monasteries owned over one quarter of all cultivated land in England. In 1536 and 1539 Parliament passed two acts that led to the confiscation and shutting down of most of the monastic wealth in the country. See Ben Johnson, Dissolution of the Monasteries, Historic UK, available at https://www.historic-uk.com/HistoryUK/HistoryofEngland/Dissolution-of-the-Monasteries/#:~:text=The%20monasteries%20were%20a%20reminder,with%20Henry's%20break%20from%20Rome.

[6] See David Ciepley, "Governance by Legal Entity: The '

were the English East India Co. (chartered in 1600) and the Dutch East India Co (VOC), chartered in 1602.[7] The Dutch East India Co., in particular pioneered the locking-in of capital in a business venture.[8]

Earlier trading companies had been organized as individual partnerships for one venture at a time, with a settling up and distribution of proceeds to happen whenever the ships or trading caravans returned from their venture. From the start in the VOC, however, capital investment was assembled for a series of trading ventures, with the first distribution and accounting to happen 10 years after the founding.[9] This time was subsequently extended to avoid the disruption and losses that would have occurred had the venture been required to liquidate and settle accounts with creditors and distribute proceeds to the equity investor according to the original schedule. In July of 1612, the Estates General suspended the charter provision that would have required the VOC to liquidate and distribute the property, substituting a provision that, in effect, gave the VOC indefinite life. The English East India Company did not adopt a permanent capital structure until 1657. Dari-Mattiacci, et. al., explain that investors in the VOC were more protected against expropriation by the Dutch Republic than the investors in the EIC would have been against expropriation by the English Crown. So, even though English traders recognized the advantage for investment purposes provided by the use of the corporate form, with full capital lock-in, they may have been concerned about expropriation, at least until after the English Civil War (1642 – 1648) "put the crown under strong parliamentary control," [10]

[7] Dari-Mattiacci, et. al., The Emergence of the Corporate Form, 33 Journal of Law, Economics, and Organization, 2 (2017).

[8] Id. Sicard (1953) reports that a group of grain mills in the Toulouse region of France in the fourteenth century had all the key legal features of modern corporations, but the legal technology did not spread from that region until the mid 17th century.

[9] Dari-Mattiacci, et. al., (2017), 210-211, note that "As early as 1606 the VOC directors realized the difficulties of liquidating in 1612" and began lobbying the Estates General to lift the obligation to liquidate in 1612, which the Estates did on July 31, 1612, giving the VOC an indefinite life.

[10] Dari-Mattiacci, et.al. (2017), pp?

limiting its powers with respect to war and taxation. And, while other European countries might have enjoyed the benefits of locking capital into a firm that could compete with the VOC and the EIC, countries such as Spain and Portugal, which had been early leaders in colonial trade, did not have the legal innovations and protections for independent trading activity that made this possible.

Dari-Mattiacci, et. al. (2017) argue that the "locking-in" of capital was the critical feature that distinguishes the corporate form of organization from the partnership form. This feature is similar to what Hansmann and Kraakman (2000a and 2000b) called "entity-shielding," by which they meant that assets held in the corporation could not be seized by creditors of the investors to pay off personal loans of the investors. Blair (2003) notes that the same provisions also restrict individual investors, and heirs of investors, from withdrawing their share of the capital prematurely, labeling this feature "capital lock-in." Dari-Mattiacci, et. al. (2017) observe that this constraint on individual investors is the product of a property right by the organization, not a contractual right among the participants in the enterprise.[11] "Capital commitment implied a major step for investors, as they agreed to relinquish a fundamental individual legal right of withdrawal at will in order to create a long-term investment perspective," according to Dari-Mattiacci, et. al. (2017, at 224).

Enterprises for Organizing Colonial Exploration and Settlement

This insight about the importance of the corporate form of organization for providing permanent capital helps illuminate the evolution of the use of the corporate form for business

[11] Dari-Mattiaci et.al. (2017), at p. 200, citing Hansmann and Kraakman, (2000a), and (2000b). Armour and Whincop (2007) provide a careful analysis of the distinction between contract rights, and property rights. They question the appropriateness of analysing corporate law as "merely" a set of standard form contracts and argue that property rights play a critical role in the governance of firms.

ventures from the 17th through the 20th centuries in Europe, and later in the Americas. The VOC and the EOC both had the important features of modern corporations. But these two organizations played enormous roles in both the economies, and the foreign policies of the Netherlands and England. In this sense, they may have been perceived as arms of the state as much as they were perceived as commercial enterprises.

To understand the use of these forms in business, it is useful to consider their predecessors. From the 15th century and early 16th century, numerous "joint stock trading companies" were active in trade between Europe and Asia. These were essentially partnerships, in which merchants would pool their "stocks" of merchandise, thereby forming a "joint-stock", and contract with a ship captain (or the lead merchant of an overland trading venture) to carry their wares to some distant shore, and, investors hoped, trade for and return with treasure. When trade missions returned, the treasure traded for the goods would be divided up in proportion to the partnership shares, and the partnership would be dissolved. New partnerships would be formed for subsequent ventures. Companies of this sort may have had "charters" granted by the monarch in their country, but the role of the charters was usually the grant of monopoly over trade with certain parts of the world, rather than the grant of separate entity status with capital lock-in.

Some of these companies were used for early colonial exploration and settlement (Livermore 1939, 4).[12] The Virginia Company, for example, was chartered by James I in 1606 to establish settlements on the east coast of North America. The Virginia Company is the common name that actually refers to two separate companies with otherwise identical charters, one of

[12] Livermore (1939, 4) "the English chartered corporation as the strong Tudors and the Stuart monarchs created it – and it must be remembered that charter-granting was not really a Parliamentary function until 1689 – thus rested on a peculiar foundation. It was a political creation, as truly as the Durham palatinate or the Liberty of the Five Ports had been."

which, the Plymouth Company, established one settlement in what is now Maine in 1607, but quickly abandoned that, and became inactive. The other (the London Company, or the Virginia Company of London), established the settlement of Jamestown in 1607. The Virginia Company struggled, and Jamestown was nearly destroyed in 1622. James I dissolved the company in 1624 and made Virginia a royal colony. During its existence, the Virginia Company was recognized as a "body politic," with legal status as a separate entity that could hold property and make its own statutes to govern internal relations among the member investors or "stockholders." In other words, it was not perceived as primarily a business institution, but a governance institution. Another example was Hudson's Bay Company, chartered in 1670, which came to control most of the fur trade in North America in the 18th century. An example of an unchartered joint stock company that helped establish a colony in New England is the Mayflower Compact (Livermore 1939, 13).[13]

Although the VOC and the EOC had established the corporation as a form of organization for business activities by the mid 17th century, the joint-stock form of organization continued to be widely used in colonial settlement (Dubois 1938, 522) well into the 19th century. Prior to independence of the colonies, if such organizations could get a charter from the crown or parliament, organizers of these ventures would be recognized as separate entities that could hold property and enjoy a degree of autonomy and the possibility of continuous existence, at least as long as the organizers could get the charters renewed from time to time. But entrepreneurs also formed organizations that were similar to chartered joint stock companies in most important respects, with self-governance and tradable shares, but that did not have royal charters.

[13] Livermore (1939, 13) also mentions settlements in Rhode Island, the Connecticut Valley, and on the eastern end of Long Island as unincorporated groups "operating as they knew incorporated towns or trading companies could operate."

Bodies Corporate, vs. Wanna Be Corporate Forms

Although a large share of the European population of the colonies in North America were self-employed farmers and small tradespersons, most people were familiar with organizations such as guilds, in which participants practiced a trade, engaged in commerce together, or carried out some other enterprise or activity. In addition to business organizations, they would also encounter or participate in associations such as governmental units, and religious associations, or associations formed to provide hospitals, schools, or services for the poor or other eleemosynary purposes (Seavoy 1978, 32) (Hurst 1970, 16) (Wright 2010, 16).[14] The law governing these various types of organizations, if they did not have charters, consisted of common law, and court interpretations of contract and property law, and in some cases, trust law (Seavoy 1978, 31).[15] If the association operated under a charter granted by the king or his representatives in the colonies, then the specific charter of the association also governed.

Religious, civil, and eleemosynary organizations

Churches, religious societies, chartered townships and villages, and eleemosynary institutions were quite common in the colonies.[16] While some of these might have had common

[14] Seavoy (1978, 32) states that "By the late colonial period, numerous charters of incorporation had been passed for municipalities (towns and villages) and for benevolent organizations, and a few. . . for commercial purposes, generally large scale improvement projects." Hurst (1970, 16) says that "In the late eighteenth century the states were liberally chartering religious and philanthropic associations along with economic enterprises." Wright (2010, 219), observes that "In the 1780s, [there were] few established business corporations but the number of nonbusiness corporations such as municipal governments, churches, and voluntary associations expanded rapidly. Evidently, independence alone was sufficient to induce Americans to associate, but not until the Constitution was in place were they willing to invest significant sums of their own money in risky, large-scale enterprises."

[15] Seavoy (1978, 31) says that the English common law "bestowed a prescriptive (customary) corporate status on several varieties of municipal governments and the parishes and other units of the established church. Other kinds of corporate organizations, however, had to seek incorporation from the Crown or by acts of Parliament."

[16] A number of scholars have pointed out that, in colonial times, the distinction between religious and civil organizations was not as clear as it is today. Religious groups founded many colonial communities, and it was

law status as corporations (Seavoy 1978, 31), some had charters granted by Parliament or the king, or by royal governors of the colonies (Davis I 1917, 77).[17] On August 26, 1761, for example, King George III granted a charter to the town of Pawlett in the territory of New Hampshire, and the charter was issued by Banuing Wentworth, governor of the province of New Hampshire. The charter provided for:

"a tract of land to contain five hundred acres as marked in the plan B.W. which is to be accounted two of the within shares – one whole share for the incorporated society for the propagation of the gospel in foreign parts; one share for a glebe for the church of England as by law established; one share for the first settled minister of the gospel; one share for the benefit of a school in said town (Town of Pawlet v. Daniel Clark, and Others 1815, 22)."

By the time of the Revolution in 1776, no "church of England as by law established" yet existed in Pawlett, although, from 1802 to 1811, there was a society of "Episcopalians" in Pawlett, who contracted with various individuals to "preach to the said society." The glebe land was leased to Daniel Clark (a member of the society), and later to his successors, with the rents used to provide income for the preachers.

Pawlett was located in territory that became part of Vermont after the Revolution, and the state of Vermont "succeeded to all the rights of the crown to the unappropriated as well as the appropriated glebes," according to *Town of Pawlett* case notes (Town of Pawlet v. Daniel Clark, and Others 1815, 3). In 1805, Vermont passed a statute granting to its towns "all the lands granted by the king of Great Britain to the Episcopalian church by law established" (Town of Pawlet v. Daniel Clark, and Others 1815, 2). On the basis of this statute, the town of Pawlett

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sometimes the case that voting rights in colonial towns and villages went only to men who were members of the church or religious group. Church structures were also used for meetings of the local governing bodies.

[17] Davis I (1917, 77) tells us that "In the course of the eighteenth century, churches of the Established faith were freely chartered by the royal governors of New York. . . By the end of the colonial period probably all, or nearly all, of this faith were incorporated. A few of the Dutch Reformed denominations were also chartered . . . . Other sects, on the other hand – notably the Presbyterians, the French Protestants, and the Lutherans, -- sought frequently but in vain for like advantages."

attempted to recover the land being used as a glebe. Daniel Clark and his successors argued that the grant of the land to the church of England should have taken effect at the time the "society of Episcopalians" came into existence in the town, which post-dated the Revolution, but pre-dated the state law granting church land to the states, and thus should still be maintained as a glebe.

The Supreme Court ruled that the "society of Episcopalians" were not a corporate body prior to 1805, and thus could not have accepted the grant (Town of Pawlet v. Daniel Clark, and Others 1815, 23-29). Justice Story, writing for the majority, reasoned that the Church of England was not itself a "corporate body" because it was "one of the great estates of the realm (Town of Pawlet v. Daniel Clark, and Others 1815, 23)." A parish church could be a corporate body, he said, but the society in Pawlett was not able to accept the grant of land because "no parish church. . . could have a legal existence until consecration" by a legal representative of the Church of England, such as a bishop (Town of Pawlet v. Daniel Clark, and Others 1815, 23). This had not occurred prior to the statute granting control of unclaimed glebes to the towns. To be able to accept a grant and be recognized as owning the land, a church, "must be a church recognized in law for this particular purpose," but "a mere voluntary society of Episcopalians within a town, unauthorized by the crown, could no more entitle themselves, on account of their religious tenets, to the glebe, than any other society worshiping therein (Town of Pawlet v. Daniel Clark, and Others 1815, 29)."

This case illustrates a number of important legal issues. First is the clear message that in general an organization cannot arrange to hold property using contractual tools alone if the organization does not have a charter as a corporation. It must be recognized by the law as having a legal existence separate from its members in order to own property (Seavoy 1978, 31).[18]

[18] Seavoy (1978, 31) asserts that without corporate status, "real property had to be individually or jointly owned or held in trust."

Second, a primary way that this can be done is through the grant of a charter. The town of Pawlett was a corporation by virtue of the charter granted to it by the governor of New Hampshire in August of 1761, but the "church," or the community of faithful, were not a corporation. Third, that some types of organizations, especially religious organizations, might be recognized as corporate bodies even if they did not have charters, but that there must at least have been some sort of official legal recognition of the body, such as a consecration by a bishop.

It might not have been difficult for the association of Episcopalians to get a charter, if they had been organized early enough to address the problem. In general, colonial governments granted charters to religious associations quite freely (Seavoy 1982, 77-80), and, as early as 1755, the colony of Massachusetts passed a "de jure general incorporation statute . . . for dissenting religious congregations (Seavoy 1978, 36)." After the Revolution, all American protestant denominations chartered new congregations in very large numbers, according to Seavoy (1978, 37-39). But the association of Episcopalians in Pawlett had not sought or received a charter, and had not even been formally recognized as a church by the Church of England.

Towns and other units of government

Another type of corporation that would be familiar to citizens of the colonies, and later of the new U.S. states, are corporations formed for governmental purposes. The town of Pawlett just discussed was such a corporation. In 1635, for example, to encourage settlement of the frontier, the Massachusetts legislature, which was the governing body of the colony,[19] passed a general regulatory statute for the organization of towns. The statute defined the powers that

[19] Formally, the Governor and Company of Massachusetts Bay in New England.

could be exercised by towns, but "required that each unit be incorporated by an individual act of the legislature (Seavoy 1978, 34, citing Massachusetts General Court, 1635)." The statute determined how the community would be organized and governed "until they were sufficiently populated to petition the General Court for incorporation (Seavoy 1978, 34)." A 1713 statute authorized town proprietors to organize themselves into a corporate body separate from the town that could be incorporated to hold and distribute land (Seavoy 1978, 35).[20] In 1788, soon after the Revolution, the state of New York also passed a statute recognizing townships as corporations for limited purposes (Seavoy 1982, 23 (citing (Denton v. Jackson 1817)). Townships needed corporate status to be able to hold property, and make improvements on common lands (Seavoy 1982, 23). Townships that were not incorporated ran the risk that title to real properties conveyed to the group might be voided, as happened to the people of Otsego County, NY, in 1811 (Seavoy 1982, 22).[21] Nonetheless, during colonial times, Davis tells us that many towns came into existence that did not have formal charters. "Such bodies closely resembled, if they were not identical with, those known to the English law as 'corporations of common right,' or 'corporations at the common law'" (Davis I 1917, 63).

Charters granted to form colonies, provinces, towns or other units of government have been called "public corporations" by scholars of the period such as Davis I (1917, 49).[22]

Colleges, hospitals and other eleemosynary institutions

[20] A similar statute passed in 1735 permitted incorporation by owners of wharves, water and wind-powered mills, and other public infrastructure, and in 1755, a "de jure general incorporation statute was passed for dissenting religious congregations (Seavoy 1978, 35-36)."
[21] Seavoy (1982, 22) cites *Jackson v. Corey* (1811, 385-387) in discussing this case.
[22] "For convenience," Davis I (1917, 49) says, ". . . we may somewhat arbitrarily set off the public corporations from the private ones, applying a distinction then unrecognized.")

At least 10 colleges had been established in the colonies of North America before the Revolution, including Dartmouth, Harvard, Yale, and Kings College which later became Columbia College. All of them were incorporated to allow them to "hold real property and receive gifts from colonial governments and private benefactors" (Seavoy 1978, 41).[23] From 1787 to 1817, the Regents of the University of the State of New York incorporated 39 more colleges and academies in New York alone (Seavoy 1978, 42). The Board of Regents was initially given broad powers to supervise the quality of secondary education, including the power to control endowment funds for all schools under its jurisdiction. Local residents objected to this, and in 1787, a new statute was passed that allowed local residents to elect a board of trustees for any schools they established, and each school board was designated by the Board of Regents as a corporation, so that it would be capable of owning land and other property (Seavoy 1982, 14).

The legislature of New York also passed a general incorporation statute for public libraries in 1796 (Seavoy 1978, 41). Charitable and benevolent societies such as the Society for the Relief of the Widows and Children of the Protestant Episcopal Church in the State of New York, one of the first such corporations recognized in New York, were, in the early 1800s frequently granted charters on a case by case basis, but by 1820, New York had passed a general incorporation statute for similar organizations (Seavoy 1982, 21). In New York, New Jersey, and Massachusetts medical societies were incorporated in the early decades after the Revolution, and empowered to examine and license doctors (Seavoy 1982, 24-25).

Infrastructure projects

[23] Seavoy (1978, 41), cites McAnear (1956, 24-28, and 42-44).

Projects to provide basic infrastructure in the colonies were encouraged and recognized as contributing to social welfare, but, while such projects were recognized as at least quasi-governmental, local and colony-level governments rarely had the resources to carry them out. So it was common practice for colony, and later state, governments, to encourage private citizens to undertake such projects, by granting them charters, along with franchises that protected the investors from competition from other service providers, at least for a while, with the idea that the project could provide an adequate return to the investors. The history of the Charles River Bridge, which became the object of a Supreme Court case in 1837 (Charles River Bridge v. Warren Bridge 1837), illustrates the pattern. As early as 1637, the governor of Massachusetts granted the right to establish and operate a ferry connecting Charlestown and Boston across the Charles River, to a private individual, who, in turn, leased that right to other individuals until, by 1650, the rights had expired.[24] That year, the right was granted to Harvard College, which had just been granted a charter by the Massachusetts provincial government. Harvard, in turn, leased the right to others to operate the ferry until 1785 when the legislature of Massachusetts chartered a corporation to build a bridge over the part of the river where the ferry had operated. Along with its charter, the corporation was granted the right to collect tolls and was required to pay 200 pounds per year to Harvard College for the privilege, for 40 years, after which, ownership of the bridge was to revert to the Commonwealth. This franchise was later extended, but, as was very common with these projects, the initial franchise was time limited.[25]

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[24] See Charles River Bridge (1837). A helpful syllabus of this case is available at https://supreme.justia.com/cases/federal/us/36/420/ .

[25] The Charles River Bridge (1837) case arose from action by the state of Massachusetts in 1828 (after the first franchise had expired, but long before the extension of that first franchise had expired) granting the right to another party to build a bridge across the Charles River a few hundred feet away from the Charles River Bridge, thereby destroying the value of the franchise rights. Plaintiffs attempted to extend the successful argument made in *Dartmouth College* that the grant of the franchise rights to Harvard College in 1650, and later the charter in 1785, were contracts, and that the actions of the Massachusetts Legislature to grant similar rights to another party in 1828 should be voided because it impaired the original contract in violation of the Constitution. This argument was not

Across the colonies, similar arrangements were made between local governments and local entrepreneurs to build infrastructure. These projects were rarely chartered under colonial rule, but after the Revolution, the states began liberally granting corporate charters to business people to undertake these kinds of projects. From 1780 to 1801, an estimated 319 charters were granted by the states for business ventures (Hurst 1970, 14) (Wright 2010, 221),[26] and of these 77% were for infrastructure projects of one sort or another (Wright 2010, 221).[27] These projects included water works, dams, roads, bridges, canals and other infrastructure projects (Seavoy 1982, 39-46).[28] Communities that wanted these services authorized entrepreneurs willing to invest in them to seek charters from the colonial or state governments to build and operate the facilities in exchange for the right to collect tolls or other fees. Especially after the Constitution was approved, entrepreneurs seemed to believe that their contracts and property would be more protected, "the latent energies of entrepreneurs were unleashed", and citizens began to undertake "the improvement of their respective territories, and transportation of their produce to the proper markets, by means of INLAND NAVIGATION and good ROADS"[29] Such infrastructure projects were generally regarded as having a public purpose, so legislatures were happy to grant franchises to groups of people who were willing to put up the capital necessary to carry out the projects.

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successful in this case because the court found that the charter of the Charles River Bridge gave "no exclusive privilege given to them over the waters of Charles River, above or below their bridge; no right to erect another bridge themselves, nor to prevent other persons from erecting one; no engagement from the State that another shall not be erected. . . ." (Charles River Bridge v. Warren Bridge 1837, 422). (syllabus, available at https://supreme.justia.com/cases/federal/us/36/420/).

[26] Hurst (1970, 14), estimates 317 charters, but Wright (2010, 220) counts 319.

[27] Wright's count shows that 245 of the 319 corporations chartered from 1780 to 1801 were for bridges, canals, piers or wharves, turnpikes, or water utilities (Wright 2010, 221, Table 7-). Another 62 were for banks or insurance companies.

[28] Seavoy (1982, 39-46) discusses early uses of the corporate form to organize turnpikes, canals, bridges, aqueducts, steamboat services, ferry franchises, stagecoach franchises, dams, docks and wharves.

[29] Wright (2010, 217-258), citing an anonymous 1798 document, Account of the Conewago Canal, on the river Susquehanna," Philadelphia: Whitehall Press.

Banks and Insurance Companies

The other category of business activity that colonists, and later governments of the states regarded as necessary were financial businesses such as banks and insurance companies. Banks were especially important to merchants who wanted access to credit, but they were also important to local and state governments that needed credit (Seavoy 1982, 53). During colonial times there were no laws prohibiting individuals or partnerships from carrying on banking activities such as discounting notes, issuing deposits and providing credit.[30] So individual merchants and merchant partnerships often provided credit to their customers, and sometimes organized themselves into partnerships to provide credit and issue specie-based paper to serve as currencies. Such banking activity was tolerated by the colonial governments, and later the states, because they could also make loans to the governments (Seavoy 1982, 53). Banking, however, was not always practical as a purely local activity, so the earliest government-sanctioned banks were generally state or national banks. The first bank to be chartered by the state of New York, for example, was the Bank of North America, chartered in June, 1782, but it was just reincorporating a bank previously chartered by Congress (Seavoy 1982, 53). The first state bank in New York was the Bank of New York, which operated without a charter from 1784 till 1791, when it was chartered by the state (Seavoy 1982, 53).

Banks were consistently profitable businesses (Seavoy 1982, 53-54),[31] so by the early 1800s, states were trying to regulate and control who was entitled to engage in banking activities.

[30] The New York Supreme Court in New-York v. The Utica Insurance Co. (1818, 375), notes approvingly that the Chancellor who decided this case in the lower courts asserted that "the right of banking was formerly, a common law right belonging to individuals, and to be exercised at their pleasure."
[31] Except when they weren't. The same is generally true today. The basic activity of banks – to issue deposits in exchange for promises from borrowers to repay – amounts to creating "money." Thus it tends to be a lucrative, but risky, business.

They tried limiting banking to state-controlled banks, but mostly they used the award of charters to engage in banking as political favors. During the 1790s, under Federalist control, the legislature of the state of New York issued charters for banking activities only to Federalists, for example. In 1799, under the leadership of Aaron Burr, a group of Republicans sought and were awarded a charter for the Manhattan Company to supply water to New York City. Buried in the charter was a clause that permitted the corporation to engage in banking activity. The Manhattan Company worked to elect a Republican controlled legislature and governor in 1800, which then refused to charter any Federalist controlled banks. In response, Federalist entrepreneurs became private bankers (Seavoy 1982, 57). To constrain this activity, the Republican controlled legislature passed a statute in 1804 limiting the practice of banking to chartered corporations. Massachusetts had passed a similar statute in 1799 (Seavoy 1982, 55).

On other occasions, corporations that had not explicitly been chartered to do banking began accepting deposits and discounting notes. On March 29, 1816, the New York legislature incorporated Utica Insurance Company, granting it

> "full power and authority to make contracts of insurance, with any person or persons, body corporate or politic, against losses or damages, by fire or otherwise, of any houses, or boats, ships, vessels, or buildings whatsoever, and of any goods . . . and all kinds of insurance upon the inland transportation of goods, wares, or merchandise, for such term or terms of time, and for such premium or consideration . . . as may be agreed on between the said corporation and person or persons agreeing with them; and, in general, of doing and performing, in these operations, all the business generally performed by insurance companies. . . ."[32] (New-York v. The Utica Insurance Co. 1818).

The charter was time-limited, allowing Utica to be in business "from the passing of this act until the first Tuesday of July, which will be in the year 1836. . . . (New-York v. The Utica Insurance Co. 1818)." The company began engaging in a number of activities normally

[32] Supreme Court of New York, quoting from the charter of Utica Insurance Company.

associated with banking, such as "issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may do and transact by virtue of their acts of incorporation. . . . (New-York v. The Utica Insurance Co. 1818)." The problem arose because, in 1813, the New York legislature had re-enacted the 1804 "act to restrain unincorporated banking associations" from engaging in banking activity, and the state then sought to shut Utica down, at least from engaging in the banking business. Lawyers for the state argued that the act to restrain was intended to prevent any organization from engaging in banking unless it was specifically authorized to do so by its charter. Lawyers for Utica Insurance Company argued that its charter permitted it to carry on banking by implication because it permitted Utica to invest funds not employed in the insurance business, to make loans, and to issue negotiable notes (New-York v. The Utica Insurance Co. 1818, 377). Moreover, they said, the 1813 act only prohibited unincorporated firms from engaging in banking, but did not prohibit "persons" from engaging in banking, and that, by virtue of its incorporation, Utica Insurance Company was a legal person, so it should be able to engage in banking.

The court did not accept this argument, finding that "the legislature never intended to give these defendants power to bank (New-York v. The Utica Insurance Co. 1818)." More importantly, for our purposes, it found that "a corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted (New-York v. The Utica Insurance Co. 1818)." Indeed, the court said that if an organization engages in an activity for which it had "no corporate capacity for that purpose," then it is not acting as a corporation (New-York v. The Utica Insurance Co. 1818). "They are a corporation only while they act within their corporate powers (New-York v. The Utica Insurance Co. 1818)."

The examples of chartered corporations carrying out infrastructure development projects, and engaging in banking and other financial business illustrate that courts in the U.S., in the early 19th century were moving away from the English practice of recognizing some associations as having charters "by prescription," and increasingly looking to the letter of the charters of corporations to see what privileges and franchises the legislatures intended to grant when they allowed groups to form corporations.

The Importance of Charters for Business Corporations

Joint stock companies have been called the closest relative of modern corporations that could be created by contract, without a charter from the government (Hurst 1970, 14) (Harris 1994, 610-627) (Mahoney 2000, 883).[33] In England, however, confusion about the legal status of unchartered joint stock companies reigned until well into the 19th century, even as a growing variety of businesses organized themselves in this manner. The confusion often came down to a question of whether a given unincorporated joint stock company should be regarded by a court as a partnership, in which investors could be held personally liable for business obligations, or as a separate entity, in which investors would not be held personally liable.

The Bubble Act was repealed in England in 1825, which meant that unchartered firms could legally sell shares. But that did not clear things up because Parliament continued to be reluctant to issue charters, and business people continued to seek out ways to organize to capture the benefits of incorporation even if they could not get a charter. Freeman, et al. (2012, 31)

[33] Hurst (1970, 14) calls joint stock companies the "nearest informal analogue" to the corporate form. See, generally Harris (1994); and Mahoney (2000). Freeman, et al. (2012, 21) note that there were a surprising variety of other types of business organizations created in 17th century England, including "sleeping partnerships in shipping and trade; joint-stock partnerships within craft and benefit societies; companies launched by municipal corporations; and, not least, large unincorporated partnerships with transferable shares – perhaps one hundred in England and Wales by the late 1690s."

observe that as many as 624 joint stock firms were organized in 1824-25, but then the bubble in the market in the shares of these firms collapsed in 1825-26, and as many as 500 of these firms disappeared. In the wake of the crash, Parliament still resisted issuing more charters, and English courts "were left to struggle with common-law interpretations of the problem (Freeman, Pearson and Taylor 2012, 31) (Livermore 1939, 5-6)."[34] Finally, in 1844, Parliament passed the Joint Stock Companies Act, which was, in effect, the first general incorporation statute in Britain.

In the colonies, there were some organizations that seemed to be recognized by legal authorities as "corporate bodies" even without charters, at least in the 17th and early 18th centuries. Examples included churches and religious bodies recognized by "prescription." Legislative and judicial authorities in Massachusetts found, as early as 1692, that the proprietors of the towns could act as a body corporate to make grants of land to individuals (Livermore 1939, 25).

Like Parliament in England, the colonial authorities, and later the states, were not generous in granting charters of incorporation for businesses in the late 18th century (Livermore 1939, 61) (Hurst 1970, 14).[35] But business people formed other sorts of organizations, including "a large number of unincorporated associations, partnerships, societies, groups of 'undertakers,' 'companies,' formed for a great variety of business purposes (Davis I 1917, 91)." These organizations, in some cases, had official recognition and certain privileges, but they were not

[34] Livermore (1939, 5-6) observes that the English courts, "when faced with evidence of the existence of corporate mechanisms possessing everything but charters, persisted in denying that they could be anything but partnerships."
[35] Livermore (1939, 61) asserts that "in the last half of the eighteenth century, at least in the Colonies, the corporation was not a favored form of organization in the business community." Hurst (1970) notes that the demand for forming sophisticated business organizations was not great prior to about 1780.

incorporated. "In the eye of the law all of them were probably mere partnerships or tenancies in common (Davis I 1917, 91)."

After the Revolution, as cases came into courts in the various states, the U.S. courts were considerably more consistent in deciding that organizations without charters were partnerships, and applying partnership law. And after *Dartmouth College*,[36] the issue was completely settled that firms needed to have a charter to be assured that courts would recognize them as having the full privileges of the corporate form. Even though, on its face, this policy was more restrictive because it did not allow business people to determine for themselves what rules should apply, it provided more certainty. Moreover, state legislatures began granting charters much more readily after 1800, and over the next few decades, increasingly liberalized the process of getting a charter (Wright 2010, 233-239),[37] and increasingly allowed the organizers to determine their own internal governance rules (Wright 2010, 233-239). The result on this side of the pond was that, by 1860 an estimated 20,000 chartered business corporations had been formed, with about $6 to $7 billion in total authorized capital (Wright 2010, 218).

Land Companies

One species of joint stock company that operated in the U.S. in the late 18th century and well into the 19th centuries deserves special attention. These were the "land companies," organized to promote and encourage the expansion of the population into less well-settled parts of the country (Abernethy 1932, 45).[38] Owning land was an important path to economic security,

[36] Trustees of Dartmouth College v. Woodward (17 U.S. 4 Wheat 518).
[37] Wright (2010, 233) says "In the nineteenth century, disdain for special privileges and favors dramatically reduced the cost of obtaining a charter by ushering in the age of general incorporation" (citing Hurst (1970, 30 – 34).
[38] Abernethy (1932, 45) (as cited in Livermore (1939, 7)) claimed that "Speculation in lands was the most absorbing American enterprise during the later Colonial, the Revolutionary, and the early Republican periods – in those days, the country was run largely by speculators in real estate."

and a primary requirement of citizenship in many towns, provinces, and states in the colonial and early post-Revolutionary period, so one might expect that land speculation would, in general, be a good business. But, it was more complicated to make sure that organizations engaged in this business could buy, hold, mortgage, and sell land. Organizations that were incorporated could receive, own, buy, and sell land, but partnerships, or other unincorporated associations, could not necessarily do this, not at least in the name of the partnership.[39]

In the process of promoting and selling land that had been granted to the earliest settlers, groups that did not have charters had to have legal rights to the land, and one device that developed was that the petitioners who had won grants of land for towns – the "proprietors" – would sometimes be recognized by authorities as a corporate body, able to own land, and sell or grant it to individuals (Livermore 1939, 24-29). Livermore tells us that "in the thirty years just prior to the Revolution, the proprietorship functioned as a business unit for the profitable distribution of a land grant, and not solely as a social instrument to aid settlement (Livermore 1939, 30)."[40] It was during this period that "land companies" and their organizers became prominent players in one of the most important business activities of the late 18th century. "Successfully to pre-empt huge areas of virgin territory and control its distribution required combinations of capital and unified control," Livermore observed. "Individual small-scale methods could not cope with the problem. No other country had such an asset or the hope of attracting a population which could utilize it (Livermore 1939, 7-8)."[41]

[39] See, e.g., S. Blackstone, Commentaries, I (1765), at Ch. 18, Of Corporations discussing the advantages of corporations, "if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law. . ."; see also Seavoy (1978, 31).
[40] Adams (1921, 98) (as cited in Livermore (1939, 20) says that these "semi-independent communities were entirely without **legal** authority."
[41] Sadly, there is no recognition at all in these studies of the people who were living there and using the land before English settlers arrived.

To get around the rules that kept partnerships from owning land, one of the partners in, say, a small manufacturing partnership might own the land on which a factory is built in his individual capacity, and lease it to the partnership, or the partners might own the land as joint tenants, or as tenants in common (Ricks 2017, 1328-1331).[42] Ricks tells us that while only legal persons or legal entities could own real estate, if one partner held real property on behalf of the partnership, it would still be regarded as partnership property (Ricks 2017, 1330-1331). Alternatively, to avoid confusion, partnerships often used a variety of trust mechanisms to hold property on behalf of partnerships (Livermore 1939, 17). If the business organization could not get a corporate charter, which would enable it to buy, own, and sell land in the name of the business, the organizers would construct the firm as a partnership, coupled with a trust to hold the real estate on behalf of the firm. These mechanisms were especially important for organizations that were in the business of buying land or acquiring it by special grant, surveying it, dividing it up, and selling it.

Such organizations, in the business of buying and selling land with no intention of occupying and developing the land, began to appear on the scene after 1745 (Livermore 1939, 55). The land companies "were an indigenous response of American business men to a problem entirely our own," Livermore (1939, 8) observes. While, "no one of them ever secured a charter (Livermore 1939, 8)," occasionally the law would grant corporate powers to such organizations. In 1640, for example, William Bradford granted a block of land later known as the "Kennebec Purchase" in what is now Maine, to "the freemen of Plymouth,"[43], who leased this land to fisherman and traders. In 1661, the land was sold to four individuals, who held it as tenants in

[42] The distinction is not important for purposes of this article. Ricks (2017, 1328-1331) has a nice discussion of the problem of partnership property.
[43] Hanson (1852, 3), observes that after the sale, the land was renamed the "New Plymouth Grant."

common for over 100 years. In 1753, the general court of Massachusetts passed an act giving to persons holding undivided land in common what amounted to corporate powers, in effect, recognizing proprietorships as corporations in fact. The co-owners of the land promptly formed the "Proprietors of the Kennebec Purchase from the late Colony of New Plymouth," which was, in effect, a corporation (Livermore 1939, 128-129).

The land companies, assembled without charters, but utilizing trusts to hold the land, were able to achieve most of the characteristics of chartered corporations (Livermore 1939) (Mahoney 2000) (Langbein 1995) (Morley 2016). William Penn attempted to organize a chartered trading and land settlement company called The Free Society of Traders in 1682 in the Pennsylvania Colony (Davis I 1917, 41-42). The articles of association were "ratified" by the "governor and freemen of the Colony" in England in May, 1682, but in 1683, the Colonial assembly failed to confirm the charter for the organization (Davis I 1917, 44) (Livermore 1939, 48). Without a charter, the lands held by the organization were legally held by trustees (Livermore 1939, 48).

But the trust mechanism was awkward, and left the entrepreneurs with important vulnerabilities. One source of vulnerability had to do with the ability of an unincorporated company to collect the full subscription price from investors. The problem was that the company could not sue the subscribers to compel them to pay in full because the company was regarded as a partnership, and "the attitude of the law at this time was distinctly unfriendly to suits against a delinquent, because of the impossibility of one partner suing another at common law," as Livermore put it (Livermore 1939, 142).

The experience of an important land company illustrates another problem. The company was the North American Land Company (NALC), formed as a partnership in February of 1795 by Robert Morris, John Nicholson, and James Greenleaf – wealthy and prominent leaders of the Revolution and the early formation of the United States.[44] These men were very experienced business people who had been parties to earlier land companies that had made substantial amounts of money buying and reselling land in Pennsylvania (Rappleye 2010) (Livermore 1939, 162) (Kendall 2010, 171).[45] Their intention in forming NALC was to exchange properties that each had already acquired, mostly with borrowed money, for shares in the land company, and then to try to get their creditors to accept shares in the land company in payment for their debts.

Although these three men might have been able to get a charter to operate as a corporation, given that they all had political influence, there is no evidence in the historical record that they did this. Instead, they used the organizational tool that had become the norm for land speculation – the land company, which was a partnership in which the land was held in various trusts on behalf of the individual partners. The NALC was supposed to acquire over 6

[44] *Gilmore v. North American Land Co., et al*., Case No. 5448, Pet. C. C. 460, Circuit Court, D. Pennsylvania, October, 1817. Morris was a signatory of Declaration of Independence, the Articles of Confederation, and the United States Constitution. He served as a member of the Pennsylvania legislature, the Second Continental Congress, and the United States Senate, and he served as Superintendent of Finance of the United States from 1781 to 1784. Nicholson was Comptroller General of Pennsylvania; and Greenleaf was a former consulate of the United States at Amsterdam.

[45] Morris grew wealthy early from his trading and shipping activities, through the partnership of Willing, Morris & Co. This firm participated in the slave trade from 1762 to 1765, but made most of its money through trade with India, the Levant, the West Indies, Spanish Cuba, Spain, and Italy, as well as through innovations in insuring trade missions, and in buying and trading government bonds and promissory notes. Morris helped to secure supplies for the Continental army throughout the Revolutionary War (much of this on credit), and after the War, helped to refinance government loans, reform government sources of revenue, create the Bank of North America, chartered by Congress, and establish a national mint to provide for a single national coinage. George Washington offered the position as first Secretary of the Treasury to Morris, but Morris declined and recommended Alexander Hamilton. See generally, (Rappleye 2010). After 1790, Morris began actively engaging in land speculation, canal building, iron rolling and an icehouse. Livermore (1939, 162), observes that Morris's "devotion to land projects after 1789 was probably in large part the result of success in his first important 'deal' – the resale of land in central New York to the Pulteney Associates at a handsome profit, almost before he himself had taken title" (citations eliminated). John Nicholson was a land speculator and financier who became the first Comptroller General of Pennsylvania in 1782, restoring the state to fiscal stability after the Revolution (Livermore 1939, 164, note 65) (Nicholson, John, 1757-1800 n.d.). James Greenleaf, the youngest of the three men, was from a prominent and wealthy Boston family. He engaged in land speculation and was active in the development of the new capital, Washington DC. At one point, Greenleaf and his various co-investors controlled about half of all the federal government's salable land within the boundaries of the new District of Columbia (Kendall 2010, 171).

million acres of land in Pennsylvania, North Carolina, South Carolina, Virginia, Georgia, and Kentucky (Livermore 1939, 166).[46] The company was to issue 30,000 shares to investors in exchange for land that they owned and acquired for the company. The articles of association provided that if a trustee were to die, a new deed in joint tenancy would have to be executed to a new third trustee, to be selected by a board of managers (Livermore 1939, 166). Partners in the NALC sold shares in the venture to a number of other venturers, and such shares were to be freely transferable. Livermore asserts that this organization looked more like a present-day corporation than any other land company formed during the period he focuses on (Livermore 1939, 168).

Unfortunately for the NALC organizers, this venture did not go as well as earlier ventures had gone. For one thing, only 22,365 shares were ever issued, because only 4,479,317 acres of land were actually turned over to the trustees (Livermore 1939, 168). Notes describing the collection of NALC records held by the Historical Society of Pennsylvania summarize other problems:

> "From the beginning, the North American Land Company was plagued by serious financial difficulties. First, the authenticity of many of the titles to the lands were questioned. Secondly, the land company owned more than 2 million acres in the Georgia 'Pine Barrens.' These large tracts of barren wilderness were uninhabited, covered in sandy soil, and consequently difficult to sell to land purchasers and settlers. Furthermore, Morris,. . . . sent his son-in-law, James Marshall, to Europe in order to sell shares in the company stock. Due to financial difficulties in Europe and doubts about the value of the North American Land Company's holdings, Marshall was unsuccessful (North American Land Company records n.d., Collection 1432)."[47]

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[46] Title to the 6 million acres of land that constituted the assets of NALC was held by three trustees, "Messrs. Willing, Nixon, and Barclay of Philadelphia (Livermore 1939, 166)." Sakolski, a historian of American land speculation, called the NALC the "largest land trust ever known in America (Sakolski 1966, 38) (as cited in Wikipedia entry on James Greenleaf, available at https://en.wikipedia.org/wiki/James_Greenleaf)."

[47] North American Land Company records, Historical Society of Pennsylvania Collection 1432, available at http://www2.hsp.org/collections/manuscripts/n/NACL1432.html.

Morris and his co-partners were unsuccessful at getting many of their creditors to accept shares in NALC in payment of their debts – only 8447 shares were transferred in this way. In May, 1796 – only 15 months after the formation of the company, Greenleaf sold out his position to Nicholson and Morris, accepting $1.5 million worth of one, two, three, and four-year notes in exchange for his shares. Ultimately, none of the three men were able to satisfy all their creditors, and all ended up in bankruptcy, and served time in debtors prison.[48]

Among the many lawsuits arising from this venture was one pursued in Pennsylvania by someone named Gilmore, who, unfortunately for him, bought a tract of land that turned out to have an unclear title. Thomas Stokely and John Hoge had entered into an agreement with Morris and Nicholson prior to the formation of NALC, involving warrants to purchase 120,000 acres of land in Pennsylvania. This land later became part of the holdings of NALC. Legal title to the land at issue (the 120,000 acres in Pennsylvania) was supposed to be in the hands of the NALC trustees, who would then convey the lands to any purchasers. But that tract of land was never actually conveyed to the trustees. The land was part of the property that was supposed to be transferred from Greenleaf to NALC at the formation of the company, but that had not yet happened at the point at which Greenleaf pulled out. The land was later seized by a court to pay off debts of Morris, and sold to Gilmore, the plaintiff in this lawsuit. Gilmore filed the suit in an attempt to get title to the land. Among the things that the court needed to sort out is whether Morris had ever actually gained title to the land, or whether the title still resided in the NALC trustees. The court found that the land had not been conveyed to Morris, but still belonged to NALC, and thus the effort by the court to seize the land to pay off Morris's debts was rendered null, and NALC still owned the land.

[48] Nicholson died while still in debtor's prison in 1800 (Nicholson, John, 1757-1800 n.d.).

The court regarded NALC as a partnership, so that, at best, Gilmore became merely a "tenant in common" with the other partners when he thought he had purchased the land outright (Gilmore v. North American Land Co., et al. 1817) (Collyer 1832, 169).[49] This was probably small comfort to Gilmore, who, by the time this case was settled in 1817, had been trying for two decades to get clear title to the land he thought he had purchased in 1797.[50]

The complexity of this case arises in part because NALC was not clearly a separate legal entity that could hold the land directly.

The trust mechanism for trying to achieve corporate characteristics without a charter may also have been problematic because, until late in the 19th century, rules that applied to trusts made it difficult to lock-in invested capital. This trust doctrine generally gave the beneficiaries of trusts the right to transfer their interests in trusts, and to compel termination of the trust (McDonnell 1952, 1198-1199).[51] "The collective effect of these rules was to consolidate control in the transferee and to promote the autonomy of property owners," according to Alexander, adding that "during the first two-thirds of the nineteenth century, American courts for the most part adhered both to the results of the English rules on direct restraints and to the classificatory

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[49] A general legal rule of partnerships at the time was that if a partnership is being dissolved and the assets liquidated due to bankruptcy of one or more of the partners, the partners are considered tenants in common with respect to the partnership property, as they wind up the business, with partners having fiduciary duties to each other when acting on behalf of the partnership and the other partners. See, Collyer (1832, 169). Ricks (2017, 1329) tells us that later scholars, such as Parsons (1867), and Story (1881) (as cited in Ricks), say that partners are not, in fact, tenants in common with respect to partnership property, at least not during the ordinary course of business. Parsons (1867, 223-224), asserts that each partner must "use the property for their benefit, whose property it is; that is for the benefit of the whole as one concern, or one body, for so it is owned."

[50] According to Livermore (1939, 169), NALC continued to exist for over 75 years "by reason of litigation in the courts."

[51] See Brandon v. Robinson, 18 Ves. 429, 34 Eng. Rep. 379 (1811) (holding that settlors could not use the trust form to protect life estates from being sold by beneficiaries, or pledged to creditors). Alexander (1985) provides a full discussion of the evolution of restraints in English law on the alienability of legal interests in trusts in the 19th century. So-called "spendthrift trusts," in which settlors could impose binding restraints on the beneficiaries of trusts, were not generally accepted as valid in U.S. courts until late in the 19th century. Alexander (1985, 1202 – 1208).

apparatus by which those rules were organized (Alexander 1985, 1202-1208)."[52] If the beneficiaries of the trust could undo restraints on sale or alienation of business assets held in the trust, and imposed by the business organizers, organizers could not be sure that unhappy partners, or the creditors or heirs of such partners, could not compel liquidation of the firm prematurely.

The difficulties of trying to secure property for use in a business enterprise without forming a corporation were expressed by seven promoters of the Schuylkill Coal Company in 1823, who were advocating to get the Pennsylvania legislature to issue them a charter to operate as a corporation, rather than as an unincorporated joint stock company. In a pamphlet (Eyre, Lippincott and Company 1823, 1-8), issued as part of their campaign, they stated these reasons for wanting to be incorporated:

> "1. To have the real estate of the Company, consisting of the coal lands which they hold, and such limited additional quantity as they may be allowed to acquire, with the necessary and appropriate improvements for the working of the mines, exempted from the laws of succession or inheritance, which govern the cases of natural persons or individuals. 2d. That the Company should be exempted from the ordinary laws of partnership, so far as they subject the estates of the several individuals who compose the Company to all the liabilities of the Association. 3d. To be recognized in law by a corporate name, and to be perpetuated, notwithstanding the demise or change of the members who may at any given time compose the Company (Eyre, Lippincott and Company 1823, 1-8)."

The promoters of the Schuylkill Coal Co. were aware that they could use trust law to hold the lands, and protect the assets of the enterprise from creditors, heirs, or partners wanting to withdraw, but, they observed:

"Some of these difficulties may indeed be avoided by complicated trusts, covenants, and stipulations; but these, plain men of business cannot themselves frame, nor

[52] Id., at 1195.

without difficulty understand; and when framed under the advice of the best legal abilities, they are subject nevertheless, to various constructions, and end but too frequently in vexatious and injurious controversies, which prudent men will anxiously avoid (Eyre, Lippincott and Company 1823, 1-8)."

These stories illustrate that the corporate form of organization, as it emerged over the 17th -19th industries was not just a "nexus of contracts," but was a significantly different organizational form, even in its earliest manifestations. An essential feature of this form is that it creates a separate legal entity, which exists apart from any of the individual members or shareholders or other investors involved in its creation or in its day-to-day operation. The legal standing of this entity requires recognition by a government. As corporations grew very large, and shareholders became very numerous and anonymous in the 20th century, this understanding of corporations as separate entities seemed to fit.

Theorizing the Separateness of Corporations

The separateness of the corporate form from its managers, directors, investors, and employees has been the basis of a substantial literature on the "theory of the firm" in the law, going back to the 19th century. The legal theory debate, which evolved over the last half of the 19th century and well into the 20th century, addressed whether a corporation should be considered a "real" thing, which has an existence apart the existences of the persons who formed it, or a "reification" – "a construction of the minds of the persons connected with the firm" (Bratton, 1989, 1475). Another version of the question was whether it should be regarded as a separate "entity" or an "aggregate" (Bratton, 1989, 1475). The distinction was important in considering whether the corporation should be thought to have human characteristics in itself,[53] that were recognized by the state that granted a charter, or, alternatively, whether the corporation was a contractual construction whose characteristics were only those granted by the parties to that contract. In other words, is a corporation a product of private contract, or a product of the state? This debate was active in the legal literature until about 1930. Bratton observes that around that time, the debate in the law died out because a "management-centered conception of large corporate entities" had taken hold (Bratton, 1989, 1476). The large corporations that came to dominate the U.S. economy in the 20th century did not seem like the product of contracts between investors and managers. Rather, they seemed like massive and powerful institutions, which had a clear existence apart from their investors, managers, employees, or other humans involved with the corporation, and that controlled provision of important consumer goods, from transportation, to food, to electric power. Management seemed completely in control, interactions with other groups of stakeholders, from employees, to customers, to environmentalists, had become much more important, and shareholders had become dispersed and faceless.

In the 1970s and 1980s, however, this debate arose again in response to the "New Economic Theory of the Firm" that came out of ideas developed by microeconomists and finance theorists. It showed up in the finance literature as the "nexus of contracts" theory of the firm in the 1980s (Jensen and Meckling, 1976)) and very quickly was picked up by legal scholars advocating for a free market in hostile takeovers as a mechanism for disciplining corporate managers (Easterbrook and Fischel, 1982). These theories once again emphasized the

[53] This idea resurfaced in the U.S. in debate about a 2014 U.S. Supreme Court decision (Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682 (2014)) in which the finding of the Court was that, like human beings, corporations can have valid religious objections to providing coverage for contraceptives in health care benefits it provides for its employees.

contractual nature of corporations, focusing in particular on the problem of agency costs in the relationship between shareholders and managers of large publicly-traded corporations.

This new version of the theory offered to explain and justify new capital market practices which were collectively referred to as transactions in the “market for corporate control.”[54] Hostile takeovers facilitated the rapid turnover of control of corporations through tender offers, and other transactions that gave the acquiror voting control. The contractualist justification for these transactions was simple: corporate shareholders are the “owners,” managers are hired by shareholders and can be “fired” by shareholders if their performance is inadequate.

These arguments were used to defend governance rules that made it relatively easy for outside investors to make a “tender offer” to buy up a sufficient number of outstanding shares to get voting control over a corporation, then use their control rights to force the corporation to sell off assets and pay out the proceeds of such sales to the outside investors, who could then pay off the debt that they took on to buy shares in the tender offer. When the contractualist view of the target corporations in these transactions was combined with a belief in the inerrancy of stock price information as an indicator of the true value of corporate shares, the result was a set of a policy prescriptions that said stock investors like these deals (stock prices go up), and everyone else is protected by contracts, so the law should not impede hostile takeovers. Any concern about whether the corporation as an institution was providing any social value beyond what was captured by shareholders was brushed aside.

Separation of Assets of a Corporation from Investors in a Corporation

[54] There is a huge volume of legal and financial literature on these ideas. See, for example, Easterbrook & Fischel (1982); Fama & Jensen (1983); Manne (1965); Macey (1988).

Meanwhile, the actual transactions involved in takeovers and other modern corporate finance and restructuring make extensive use of a key feature of corporations that cannot be constructed with contracts alone: the ability of the corporate entity to buy, sell, and hold property, to subdivide and pledge that property to different investors, and generally to engage in capital raising transactions on behalf of the corporate entity itself, and separately from the investors who hold their shares.

In the four decades since the takeover wave of the 1980s, corporations and their capital market investors have learned to make creative and extensive use of tools requiring the ability to buy, sell, and partition assets. A few examples of these are:

Securitization. This is the process by which assets are partitioned so that securities can be issued and sold based on the performance of bundles of assets, apart from the performance of the corporation as a whole. At any time, corporations can designate a subset of their assets to provide the collateral for such securities, without necessarily dividing the operations of the corporation along the same lines. The market performance of these securities, thus, can be almost completely untethered from the performance of the corporation as a whole.[55]

Credit default swaps. These securities nearly brought down the entire banking sector of the developed world in 2008. A CDS is a financial swap agreement that the seller of the swap will compensate the buyer in the event of a debt default or other credit event involving some underlying reference asset. Swap buyers and sellers thereby partition the risk associated with the reference asset, even as neither of them are necessarily required to hold the underlying reference asset.

[55] In fact, parties who are not even affiliated with a corporation can create, buy, and sell, securities such as call options and put options, whose value is tied to the performance of the underlying corporation.

Tax avoidance. Over the last 30 years, hundreds of corporations have acquired post office boxes in countries like Ireland, with low corporate income tax rate. Those post office boxes can then become the "location" where billions of dollars of intangible assets such as patents, copyrights, AI software, and other IP property reside for tax purposes. Some corporations have even put their official corporate headquarters at the addresses of these mailboxes. Dublin is now home to 9 of the world's top 10 pharmaceutical companies, and 9 of the top 10 global ITC companies.[56] The operating divisions of these companies (where the actual research and product development occur) can then reside anywhere in the world, while these divisions pay royalties to the Dublin "office," so that most of the profits of these companies is now, for tax purposes "in" Ireland.

"Texas Two-Step Bankruptcy."[57] This is "a legal strategy in which a company creates a corporate entity, transfers liability to it and places it into bankruptcy, thereby obtaining a pause on litigation" (U.S. Law Week, May 13, 2024.). Johnson & Johnson, for example, has been fighting huge tort liabilities over concerns that its baby talcum powder contained asbestos, and may have contributed to ovarian cancer or mesothelioma in women who used the powder extensively. J&J has attempted to form a subsidiary, put some assets into the subsidiary, along with all of the talc product-related liabilities, then place the subsidiary into bankruptcy. This strategy is popularly referred to as the "Texas Two-Step Bankruptcy." To date, Texas-based bankruptcy courts have not permitted J&J to do this, and so far, the U.S. Supreme Court has avoided taking a case that could settle the question of whether this is a legal strategy.

Campaign Finance. The U.S. Supreme Court held in 2010 that the freedom of speech clause of the First Amendment of the U.S. Constitution prohibits the government from restricting

[56] Jasmine Business Directory, 2024.
[57] See Fernando, et. al., 2025.

independent expenditures for political campaigns by corporations, non-profit organizations, labor unions, and other associations. Under current U.S. laws, corporations may not make direct contributions to campaign committees of candidates. But they can make contributions in any amounts to “Political Action Committees” (PACs) that are “independent” of the candidates. Individuals are also subject to limitations on the amount that they can contribute to candidate campaigns, but they may “invest” unlimited amounts of money into corporations that, in turn, can make unlimited contributions to PACs. PACs are not required to reveal the parties who contribute to them. It’s easy to see where this goes. The corporate form of organization is being used to hide who the real actors are behind the massive amounts of cash that flow into candidate campaigns.

These examples illustrate the many important ways that the separate entity legal status of corporations matters. Assets held in a corporation are separate and distinct from assets held by investors in a corporation in ways that cannot be replicated with contracts alone.

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