THE ORIGINS OF CORPORATE SOCIAL RESPONSIBILITY

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I. INTRODUCTION

Corporate social responsibility has never been more important. In recent years, the impact of corporations upon our world has become undeniable. However, the reasons that corporations should engage in socially responsible behavior remain murky. This is because the essential nature of the corporate form is not well understood.

The management of most corporations feels some obligation to undertake activities that are socially responsible. Two justifications are commonly offered by corporate managers for undertaking such behavior. First, some managers argue that engaging in such behavior is appropriate because it is good for business, and second, some managers argue that engaging in such behavior is the right thing to do.

In regard to socially responsible behavior being appropriate because it can be good for business, this justification is well established and has a strong legal basis. As held in the classic case *Dodge v. Ford Motor Co.*, for-profit corporations must be run to produce a profit.[1] Case law has established that socially responsible activities are permissible when they serve a business purpose.[2]

This fails, however, to explain why corporations *ought* to engage in such activities except when it facilitates profit maximization. For example, if management is asked to choose between two courses of action, one that is socially responsible and the other that is not, and if both courses of action would generate the same amount of profit, most corporate managers would be unable to articulate why they should

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1. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("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.").

2. *See* Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645, 650 (2002) ("[B]y and large, courts have not scrutinized business decisions to see whether directors sacrificed profit maximization to advance the interests of employees, creditors, customers, and the community. Instead, the courts almost invariably accept some rationale as to how the business decisions were in the long-range interest of the shareholders.").

choose the socially responsible course of action. In addition, most corporate managers would be unable to articulate why the corporation should err on the side of engaging in socially responsible behavior when the impact on the profitability of the corporation is uncertain.

This often leads to corporate managers claiming the second justification for engaging in socially responsible behavior, i.e., it is the right thing to do. The problem is that this rhetoric often has little theoretical foundation and is merely a resort to intuition on the part of many corporate managers that corporations fare better if they are perceived as behaving in a socially conscious way.[3] Simply put, the idea that corporations should engage in socially responsible behavior may be generally accepted, but it is far from understood.

This Essay bridges the gap between the rhetoric regarding the importance of corporate social responsibility and the obligation to engage in such behavior by clarifying the essential nature of the corporate form. By understanding the essence of these entities, corporate obligations to society become more apparent.

The literature regarding the essential nature of the corporation is substantial. This literature continues to expand because the Supreme Court of the United States' recent opinions in cases such as *Citizens United*[4] and *Hobby Lobby*[5] have reinvigorated the debate about essentialist theories of the corporation and have yielded a new wave of scholarship on the topic.[6] From the existing literature three prevailing

3. Elsewhere, I have suggested the virtues of using intuition in legal decision making, especially in making legal compliance decisions for business entities. *See*, *e.g.*, Eric C. Chaffee, *An Interdisciplinary Analysis of the Use of Ethical Intuition in Legal Compliance Decision Making for Business Entities*, 74 MD. L. REV. 497 (2015); Eric C. Chaffee, *The Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law*, 28 GEO. J. LEGAL ETHICS 323 (2015). With that said, however, I am a strong believer that whenever possible analytic justifications should be used to validate and reinforce intuitions about the law and obligations to society. The current essay provides an exploration of when and why corporations should engage in socially responsible behavior.

4. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

5. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

6. *See, e.g.*, Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999; Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785; Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015); Teneille R. Brown, *In-corp-o-real: A Psychological Critique of Corporate Personhood and* Citizens United, 12 FLA. ST. U. BUS. REV. 1 (2013); Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1 (2012); Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731 (2013); Malcolm J. Harkins III, *The Uneasy Relationship of* Hobby Lobby, Conestoga Wood, *the Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201 (2014); Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879 (2012); Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47 (2015); Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221 (2011); Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125 (2013); Joseph F.

essentialist theories of the corporation have emerged. First, the artificial entity theory, or concession theory as it is sometimes known, suggests that corporations are artificial entities that owe their existence completely to the government.[7] Second, the real entity theory, which is also referred to as the natural entity theory, provides that each corporation has an identity and existence that is separate and independent from the state and the individuals who organize, operate, and own it.[8] Third, the aggregate theory, which is also known as the nexus of contracts theory, suggests that corporations are merely collections of individuals tied together through the intersection of various obligations.[9]

Although each of these prevailing theories of the corporation has some validity, none of these theories offers a complete description of what a corporation is. The artificial entity theory understates the role of individuals in organizing, operating, and owning the corporation by arguing that corporations exist based upon the will of the state alone. This theory also underplays the identity of the corporation as a collective of individuals and the state acting together. The real entity theory underemphasizes the role of the state and individuals in organizing, operating, and owning the corporation by focusing on the corporation as a distinct entity. Finally, the aggregate theory underplays the role of the state in the creation of the corporation by focusing on the individuals who organize, operate, and own the corporation and the relationships among them. Beyond that, each prevailing theory of the corporation focuses on *how* the corporation exists without getting at *why* the corporation exists. The question of *why* a corporation exists should be part of formulating any essentialist theory of the corporation because the development of corporations is well documented, and because understanding *why* corporations exist goes to their essential nature.[10]

Morrissey, *A Contractarian Critique of* Citizens United, 15 U. PA. J. CONST. L. 765 (2013); Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831 (2013) [hereinafter Padfield, *The Silent Role of Corporate Theory*]; Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327 (2014) [hereinafter Padfield, *Rehabilitating Concession Theory*]; Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN. ST. L. REV. 1 (2013); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27 (2014); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 (2011) [hereinafter Pollman, *Reconceiving Corporate Personhood*]; 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 (2011).

7. *See infra* Section II.A (discussing the artificial entity theory).

8. *See infra* Section II.B (discussing the real entity theory).

9. *See infra* Section II.C (discussing the aggregate theory).

10. Because each of the prevailing theories of the corporation has something to like about it, some individuals have argued for embracing all of these theories at once, even though at times they may conflict. *See infra* Section II.D (discussing the argument for embracing the indeterminacy of the corporation). Although embracing the indeterminacy of the corporate form is a tempting move because

In response to the shortcoming of the prevailing essentialist theories, I have suggested elsewhere a new essentialist theory of the corporation, which I term "collaboration theory."[11] This theory suggests that corporations are collaborations among the state governments and the people who organize, operate, and own them. It provides that as a result of collaboration, a corporation assumes an existence that is separate from both the state and the individuals who organize, operate, and own the corporation because it is able to achieve things that the state and the individuals could not or have chosen not to accomplish alone. This theory explains why the government and the individuals organizing, operating, and owning the corporation have the power to control and circumscribe the actions of the corporation.

This theory also explains why the collaborating parties have an obligation to manage the corporation in a way that is socially responsible. In a representative democracy, the government represents the interests of the members of that society.[12] When the government in a representative democracy collaborates with individuals organizing, operating, and owning a corporate entity, the corporation has an obligation to engage in a socially responsible manner because the corporation is beholden for its existence to the government of that representative democracy. In addition, the individuals organizing, operating, and owning a corporate entity have the obligation to pursue socially responsible behavior because the contractual nature of a corporation creates a fiduciary duty of good faith among the collaborating parties to treat each other well within the terms of the deal that they have struck in regard to creation and operation of the business

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it avoids the difficulties associated with defining the essential nature of the corporation, this Essay advances an essentialist theory, collaboration theory, as a means of avoiding the problems associated with the prevailing essentialist theory, which means that claiming the essential nature of the corporate form is indeterminate becomes problematic and unnecessary.

11. Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719 (2016) (introducing and explaining collaboration theory as an essentialist theory of the corporation).

12. *See* C. Raj Kumar, *Corruption in Japan—Institutionalizing the Right to Information, Transparency, and the Right to Corruption-Free Governance*, 10 NEW ENG. J. INT'L & COMP. L. 1, 15–16 (2004) ("Democracy is a system of government that represents the people. . . . Any democratic system is based on the trust that people have deposed on their political leaders, the faith that they will perform in accordance with public conscience and for the welfare of the common good."); Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 1015 (2003) ("The essence of a representative democracy is that the government represents the people; and the people, therefore, must be able to express their opinions and wishes to their representatives who are expected to be responsive to them."); Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 350 (2002) ("Democracy represents a rejection of divine right . . . because the identity of its leaders represents a contingent choice by the people. The primary rationale that underlies this choice, and people's interaction with legislators and administrative agencies, is that the government is supposed to be responsive to people's preferences.").

entity.

This Essay advances the existing scholarship in three main ways. First, it clarifies the obligation of corporations to engage in socially responsible behavior by clarifying the essential nature of corporations themselves. Second, it further elucidates collaboration theory, a new theory of the corporation that the author has developed that explains both how and why corporations exist. Third, it explains the metes and bounds of corporate social responsibility in regard to for-profit corporations.

The remainder of this Essay is structured as follows. Part II contains an overview of the prevailing theories of the corporation, i.e., artificial entity theory, real entity theory, and aggregate theory. Part III discusses the need for and nature of collaboration theory. Part IV discusses why and when collaboration theory mandates that corporations engage in socially responsible behavior. Finally, Part V offers brief concluding remarks.

II. THE PREVAILING THEORIES OF THE CORPORATION

The origins of the corporate form itself should impel corporations and those organizing, operating, and owning them to feel a deep obligation to engage in socially responsible behavior. The origins of the corporate form can be traced to ancient Roman law under which the state recognized various groups as having a separate identity from those individuals who composed them.[13] These entities had a strong social aspect to them and were often organized for social purposes, such as asylums, homes for the poor, homes for the aged, hospitals, orphanages, political clubs and burial societies.[14] In fact, the term "corporation" derives from the Latin term "corpus" which means "body of the people," although these organizations under Roman law were known by other names, including "collegium" and "universitas."[15] These organizations

13. *See* Qinglan Long, *Relevancy Between Corporations and Clans: Ideologies Behind Corporate Law*, 10 ASIAN-PAC. L. & POL'Y J. 354, 364 (2009) ("Under Roman law, a corporation was conceived as a group that possessed a personality distinct from that of its particular members."); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 54 (2002) ("The concept of a corporation as a legal unit distinct from its owners traces back to Roman law.").

14. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 215 (1983) (discussing how corporations were employed under Roman law).

15. *See id.* (reporting on the various names used for corporations under Roman law); 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.

had close ties to society,[16] and they even included municipalities and the Roman state itself.[17]

This conception of the corporation as a social enterprise was extended into Anglo-American law. Modern corporate law largely grew out of English law governing universities, municipalities, and religious institutions during the Middle Ages.[18] During this period, the Crown and later parliament maintained exclusive power to issue corporate charters and create corporations.[19] Rather than forming corporations for business or commerce, these entities were created for religious, charitable, and other social purposes.[20] During the sixteenth and seventeenth centuries, corporations continued to be a vehicle for social development, and the English government chartered these entities to develop newly conquered lands and began creating corporations for overseas trading.[21]

REV. 1227, 1230 (2012) ("The term and concept 'corporation' derived from the *universitas*, *corpus*, and *collegium* of Roman law.").

16. *See* Larry D. Thompson, *The Responsible Corporation: Its Historical Roots and Continuing Promise*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 199, 205–06 (2015) ("When first conceived in Roman law two millennia ago, the corporation was a legal entity licensed by the state to further *public* purposes.").

17. *See* BERMAN, *supra* note 14, at 215 (examining how broadly the corporate form was defined under 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, . . . were known in Roman law from the earliest times.").

18. *See* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 772 (2005) ("The corporate form originated in Roman law in its classical period (the first two centuries AD), was further developed in the Middle Ages in both canon (Church) and civil law, and was adopted from civil law by the Anglo-American common law tradition."); Blair, *supra* note 6, at 789 ("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."); Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 49 (2013) ("What is undeniable is that by the Middle Ages, clear forerunners of the modern business corporation existed in the form of universities and the medieval Church.").

19. *See* Ryan Bubb, *Choosing the Partnership: English Business Organization Law During the Industrial Revolution*, 38 SEATTLE U. L. REV. 337, 340 (2015) ("Until 1844 [under British law], corporations could only be formed by an act of Parliament or a charter granted by the Crown.").

20. *See* ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS 186 (1996) ("At a very early period, England recognized the creation of corporations for eleemosynary and charitable purposes, as well as for the great universities of Oxford and Cambridge, and the City of London."); 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."); Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, 24 J. ENVTL. L. & LITIG. 75, 94 n.99 (2009) ("In the Middle Ages, the corporate form was used for universities, religious orders, and other so-called benevolent organizations providing civil services.").

21. *See* Frank René López, *Corporate Social Responsibility in a Global Economy After September 11: Profits, Freedom, and Human Rights*, 55 MERCER L. REV. 739, 744 (2004) ("To develop foreign trade, England granted charters to various trading companies, including the Russia Company

The English government exported its corporate law to the United States. During the colonial period prior to the Revolutionary War, corporations were created based upon the authority of the Crown.[22] After the Revolutionary War, state governments created corporations through bills passed by state legislatures and signed by state governors, and any alteration to a corporation's charter also had to be done through state legislation as well.[23] As a result, during this time, corporations were relatively uncommon, and those corporations that did exist served relatively social functions.[24] Legislatures commonly granted corporate charters to charities, churches, and universities.[25] Even the corporations that undertook more business-related functions accomplished activities that helped to serve society, such as the building, maintaining, and operating of roads, bridges, and canals and the running of banks and insurance companies.[26]

(chartered in 1554), the East India Company (chartered in 1600), the African Company (chartered in 1619), and the South Sea Company (chartered in 1711)."); Pollman, *Reconceiving Corporate Personhood*, *supra* note 6, at 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.").

22. *See* RICHARD D. FREER & DOUGLAS K. MOLL, PRINCIPLES OF BUSINESS ORGANIZATIONS 151 (2013) ("In the pre-revolutionary period, colonial legislatures granted corporate charters on the authority of the British Crown."); Marcantel, *supra* note 6, at 225 ("During colonial times, corporations were chartered at the will of the Crown . . . .").

23. *See* JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW 53 (3d ed. 2011) ("From the post-Revolutionary War period into the early nineteenth century, American corporations were created by the enactment of special legislative acts—that is, by acts creating a particular corporation, as distinguished from a general law allowing any persons to organize themselves into and be a corporation by complying with prescribed conditions."); FREER & MOLL, *supra* note 22, at 152 ("Originally, [in the United States,] each corporation was formed by an act of the state's legislature. In other words, people wanting to incorporate a business had to convince the state legislature to pass a statute doing so."); Gregory A. Mark, *The Court and The Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403, 409 (reporting that after the American Revolutionary War, "the state legislatures immediately took over where the crown had left off, granting charters to corporations of all varieties").

24. *See* COX & HAZEN, *supra* note 23, at 53 ("Corporations were uncommon prior to the 1800s, and those that existed were specifically chartered by the state to operate banks, insurance companies, and companies to build and operate canals, bridges, and roads."); Stefan J. Padfield, *In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries*, 10 FORDHAM J. CORP. & FIN. L. 79, 87 (2004) (discussing that initially in the United States, state legislatures created corporations "primarily to further various public works projects . . . on a case-by-case basis").

25. *See* ALAN R. PALMITER, CORPORATIONS 7 (6th ed. 2009) (providing a historical overview of the corporate form).

26. *See* Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 56 (2008) ("[I]n the late eighteenth and early nineteenth century, many, if not most, corporations operated quasi-public facilities: banks, canals, bridges, toll roads, or, eventually, railroads and telegraph lines."); JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 32 (2d ed. 2003) (examining the use of the corporate form in the early days of the United States); Larry D. Thompson, *In-Sourcing Corporate Responsibility for Enforcement of the Foreign Corrupt Practices Ac*t, 51 AM. CRIM. L. REV. 199, 219

Modern corporate law finally began to solidify in the United States during the late 1790s and early 1800s. As a result of being overwhelmed by requests for grants of corporate status, state legislatures began passing the first general incorporate statutes, including North Carolina in 1795, New York in 1811, and Connecticut in 1837, with other states quickly following suit.[27] These statutes drew a distinction between for-profit and non-profit corporations for the first time.[28] The creation of this distinction generated new questions as to the social responsibilities of for-profit corporate entities.

Despite the importance of how corporations developed, the historical origins of the corporate form and the reasons why those origins should cause corporations to engage in socially responsible behavior is not the focus of this Essay. Not only has the story been told compellingly elsewhere,[29] but even if the origins of the corporate form suggest that corporations should engage in socially responsible behavior, one can still argue that a departure has occurred from that tradition. For example, one could claim that the adoption of general incorporation

(2014) (reporting that under the original conception of the corporate form, "[w]hether chartered by an English king to explore and settle a distant continent or by an American state to build a canal or a railroad, a corporation was a means by which the sovereign enlisted *private* capital and expertise to achieve *public* ends").

27. *See* Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 993–94 (2014) ("[G]eneral incorporation laws, which allowed firms to incorporate without the need to obtain special legislative charters and conferred no exclusive privileges, gradually became dominant after the mid-nineteenth century; by the end of the century, they were the typical basis for incorporation, rendering the corporate form easily available to entrepreneurs seeking to raise outside capital."); 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."); HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESSES 25 (3d ed. 1983) (discussing the enactment of the first general incorporation statutes in the United States).

28. *See* Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 581 n.267 (1981) ("[T]he nonprofit corporation statutes are the product of the nineteenth century . . . ."); ELIZABETH SCHMIDT, NONPROFIT LAW: THE LIFE CYCLE OF A CHARITABLE ORGANIZATION 14 (2011) ("Before the nineteenth century, there was no real distinction between nonprofit, for-profit, cooperative, or governmental organizations . . . . By the middle of the nineteenth century, . . . [m]ost states categorized corporations as for-profit, nonprofit, or cooperative).

29. *See, e.g.*, Avi-Yonah, *supra* note 18 (tracing the history of the corporate form and arguing that the requirement that corporations engage in socially responsible behavior is deeply engrained in that history); Peter Nobel, *Social Responsibility of Corporations*, 84 CORNELL L. REV. 1255, 1257 (1999) ("The history of corporate law contains plentiful evidence that society always has linked permission to create a corporate, and therefore separate, legal personality to the achievement of its social goals. Corporations are in this sense social persons."); Joe W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL'Y 334, 343 (2009) ("Today's corporations derive from ancient predecessors and have a long pedigree as instruments for collective social purpose, with CSR 'in their DNA.'").

statutes during the late 1700s and early 1800s represented a substantial break from previous corporate law because those statutes created a divide between nonprofit corporations and for-profit corporations.[30] One could also argue that this divide was widened when the seminal case of *Dodge v. Ford Motor Co.* was decided in 1919, which held that for-profit corporations must be run to produce a profit.[31]

To truly understand how and why for-profit corporations must engage in socially responsible behavior, one must focus on the essential nature of these entities. Only by understanding the essential nature of these entities can one understand the metes and bounds of their obligation to society.

The remainder of this Part will focus on the prevailing essentialist theories of the corporation, including artificial entity theory, real entity theory, and aggregate theory. It will also discuss the argument that has been made for embracing the indeterminacy of the corporate form because of the problems that each of the prevailing theories of the corporation generate. This Part will help demonstrate the need for the new theory of the corporation, collaboration theory, which is offered later in this Essay.

A. Artificial Entity Theory

Artificial entity theory, which is also commonly referred to as concession theory, suggests that corporations are artificial entities that completely owe their existence to the government.[32] Under this theory, the corporation is an entity separate and apart from the state and those who organize, operate, and own it.[33] The government is at the heart of this conception of the corporate form because the corporation would not

30. *See supra* note 27 and accompanying text.

31. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (holding that for-profit corporations must be run "for the profit of the stockholders").

32. *See* Reuven S. Avi-Yonah, *Corporate Taxation and Corporate Social Responsibility*, 11 N.Y.U. J.L. & BUS. 1, 12 (2014) ("Under the artificial entity view, the corporation owes its existence to the state and is granted certain privileges in order to be able to fulfill functions that the state would like to achieve."); Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 VA. TAX REV. 115, 130 (2013) ("Originally, corporations were thought of as 'artificial entities' existing solely as constructs of the state."); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence To Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 535 (2010) ("The 'grant' or 'concession' theory asserted that the corporation was an 'artificial entity' that owed its existence to the state, with its powers limited by its charter of incorporation.").

33. *See* Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429, 440 n.45 (1998) ("The Artificial Entity theory views the corporation as a legal person, existing separately from its shareholders."); Padfield, *The Silent Role of Corporate Theory*, *supra* note 6, at 841 ("One may then align concession theory with a view of the corporation as a distinct, separate entity that is a creature of state law serving an ultimately public function . . . .").

exist in the absence of a concession by the state, i.e., a government grant of specific rights and privileges.[34] As a result of this concession, under the artificial entity theory, the state has the power to determine the scope of corporate activity, to regulate corporate behavior, and to punish corporations that do not obey the state's mandates.[35] The state grants corporate status to achieve certain social goals that could not otherwise be achieved because of a lack of time, money, or other resources.[36]

Artificial entity theory represents the original conception of the corporation in the United States.[37] As discussed above, during the

34. *See* 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."); Stefan J. Padfield, *The Dodd-Frank Corporation: More Than a Nexus-of-Contracts*, 114 W. VA. L. REV. 209, 210 (2011) ("Concession theory focuses on the state-created nature of corporations and tends to presume states have great freedom to regulate the entities they create."); Malla Pollack, *The Romantic Corporation: Trademark, Trust, and Tyranny*, 42 U. BALT. L. REV. 81, 109 (2012) ("The artificial entity theory sees the corporation as created by the state, and therefore, having only such powers as the state chooses to grant.").

35. *See* Henry N. Butler & Larry E. Ribstein, *State Anti-Takeover Statutes and the Contract Clause*, 57 U. CIN. L. REV. 611, 619 (1988) ("An important implication of the concession theory is that it supports a much greater role for government interference in corporate affairs than would follow from other theories of the corporation."); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 803 (1996) (reporting that under artificial entity theory, "the government retain[s] extensive power over the continued operation of the enterprise"); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580 (1990) ("The 'artificial entity' theory view[s] the corporation as nothing more than an artificial creature of the state, subject to government imposed limitations and restrictions."); Padfield, *Rehabilitating Concession Theory*, *supra* note 6, at 333 ("Under concession theory, the state retains significant presumptive authority to regulate the corporate entity in exchange for granting this bundle of rights to incorporators.").

36. *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."); Iuliano, *supra* note 6, at 57 ("Another distinct feature of the artificial entity theory is that corporations were thought to provide a primarily public, not private, benefit. Legislators did not view themselves as granting charters for the benefit of the incorporating individuals but rather believed that corporations would promote the public welfare . . . .").

37. *See* Blair, *supra* note 6, at 799 ("The earliest scholarship and legal cases on the nature of corporations emphasized that corporations were created by acts of a sovereign which granted to a group of individuals the right to act together as a single person for purposes of holding property, entering into contracts, and suing and being sued in court."); Susan W. Brenner, *Humans and Humans+: Technological Enhancement and Criminal Responsibility*, 19 B.U. J. SCI. & TECH. L. 215, 234 (2013) ("Under American law's original approach to the corporation, it was seen as an 'artificial entity' . . . ."); Dibadj, *supra* note 6, at 735 ("The original theory of the corporation was the artificial entity theory . . . ."); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 501 (2010) (declaring "the artificial entity theory [to be] the original constitutional conceptualization of corporations").

colonial period and early days of the United States, the Crown and later state governments individually granted each corporate charter.[38] The existence of each corporation could be traced to a uniquely crafted concession by the government, and the rights and privileges of that corporation could be altered only by a specific act of the state.[39]

The dominance of this theory during the late eighteenth and early nineteenth centuries is demonstrated by the Supreme Court of the United States' adoption of the artificial entity theory in *Trustees of Dartmouth College v. Woodward*.[40] In that case, writing on behalf of the Court, Chief Justice John Marshall offered the following description of the corporate form:

> 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.[41]

The Court's holding that a corporation exists "only in the contemplation of law" demonstrates just how dominant the artificial entity theory was during this period.

With the rise of general incorporation statutes during the first half of the nineteenth century, however, the dominance of the artificial entity theory began to wane as focus shifted away from the concession of the state in giving life to the corporation.[42] This created room for the rise of

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38. *See supra* notes 22–23 (discussing the chartering of corporations during the colonial period and early years of the United States).

39. *See supra* notes 23 (discussing the bespoke corporations that existed during the early years of the United States).

40. Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

41. *Id.* at 636.

42. *See* Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 297 n.125 (2015) ("The concession view declined when general incorporation became widely available."); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1065 (1994) ("[T]he concession and fiction ideas gave way to general incorporation statutes, which established a uniform, mechanical procedure for forming corporations and thus reduced the

a new theory of the corporate form, the real entity theory.

B. Real Entity Theory

The real entity theory, which is also often referred to as the natural entity theory, is another prevailing theory of the corporation. Similar to the artificial entity theory, the real entity theory suggests that the corporation has separate existence from its owners and managers.[43] However, unlike the artificial entity theory, which claims that the corporation is an artificial construct created by the state, the real entity theory is founded on the idea that the corporation takes on an identity that exists beyond the state and the individuals who organize, operate, and own the business form.[44] As a result, some advocating for the real entity theory assert that corporations take on various human qualities and are eligible for various human rights.[45]

State's role in their creation and functioning. Although the concession and fiction ideas still pervade formal corporate doctrine, they play little role in contemporary corporate theory."); Ripken, *supra* note 6, at 220 ("By the mid-nineteenth century, special chartering gave way to general incorporation statutes. . . . The idea that corporations existed only because of the concession of the state held far less force and was replaced with the belief that the corporation actually owed its existence to the individuals who formed the corporation to conduct their business.").

43. *See* Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 580 (1989) ("The real entity paradigm implied that corporations owe their existence and legitimacy to the distinct and unified purposes and wills of groups. Because group purposes and wills were unified and distinct from those of individual members, the existence of a corporate entity was deemed to be as real as the existence of its members."); 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."); Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1871 (2003) ("[T]he natural (or real) entity paradigm portrayed corporations as distinct from their individual members, though, like them, they had real existence.").

44. *See* Atiba R. Ellis, Citizens United *and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 739 (2011) ("The important implication of this real entity theory is that the corporation has a life completely separate and apart from the state; the state merely records the combination of the private parties and plays only observer of the corporation's formation."); Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 80 (2005) ("The real entity theory generally views the corporate entity as a natural creature, to be recognized apart from its owners, existing autonomously from the state."); Petrin, *supra* note 6, at 7 ("[T]he real entity view held that the firm is a distinct, autonomous being that is separate from, and more than just the sum of, its individual (human) parts.").

45. *See* Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 57 (2009) ("[T]he natural or real entity theory focused on the independence of corporate personhood under the legal fiction that corporations were considered 'real' or 'natural' entities capable of independent action and deserving of independent rights."); 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) ("[T]he real entity theory conceives a corporation to be a separate, distinct, real person that is greater than the sum of its individual parts. . . . 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."); Rubin, *supra* note 32, at 535–36 (suggesting that under the real entity

The real entity theory developed and took root during the late nineteenth and early twentieth centuries.[46] As a result of the adoption of general incorporation statutes throughout the United States, many corporate theorists were no longer comfortable with artificial entity theory because of the reduced role of the state in crafting corporations.[47] As a consequence, many corporate theorists began looking to Europe to reconceptualize their understanding of the corporation.[48]

The work of German legal theorist Otto von Gierke played a key role in the development of real entity theory.[49] Gierke posited that groups have a "collective spirit" that gives them an identity separate and apart from the individuals composing them.[50] Therefore, according to Gierke, when individuals unite, including to organize, operate, and own corporations, a real entity is created that is independent and distinct.[51]

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theory, "the corporation took on more human qualities, which advocates would later use to take advantage of certain amendments in the Bill of Rights and the Fourteenth Amendment").

46. *See* John C. Coates IV, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 823 (1989) ("[T]he natural entity theory developed as certain aspects of corporate practice began to bring into question the adequacy of the aggregate theory, which had dominated the law during the mid- to late-nineteenth century."); Dibadj, *supra* note 6, at 742 ("The natural entity theory emerged in the late nineteenth and early twentieth centuries."); 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.").

47. *See supra* note 42 and accompanying text (discussing the turn away from the artificial entity theory).

48. *See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2132 (2016) (reporting that "the 'real entity' theory [is] a late nineteenth-century theory exported from Germany to England and the United States"); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1465 (1987) ("The legal concern over the character of collectivities was by no means limited to the United States. Very sophisticated disputations, both theological and political, about the nature of associations had long been part of the intellectual disclosure of continental Europe, and their resolution had shaped law there for the better part of six centuries.").

49. *See* Joel Edan Friedlander, *Corporation and Kulturkampf: Time Culture as Illegal Fiction*, 29 CONN. L. REV. 31, 40 (1996) ("Gierke's [real entity] theory [of groups] became widely influential in American thinking about the modern corporation, largely through the efforts of Gierke's English-speaking translators and interpreters, among them Harold Laski and Ernst Freund."); Griffith, *supra* note 48, at 2132 n.273 ("The real entity theory is identified principally with German legal academic Otto von Gierke, whose influence spread through the work of Frederic William Maitland and Ernst Frend.").

50. *See* 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 possessed of a collective spirit.").

51. *See* OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 37 (Frederic William Maitland trans. 1900) (Beacon Press 1958); *see also See* Nicole Bremner Cásarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 NEB. L. REV. 689, 719 (1991) ("Corporations, Gierke said, are not just artificial creations derived from law, but rather legitimate entities that exist regardless of and separate from the law's recognition. In other words, corporations are as 'real' and 'natural' as any person and exist independently of their shareholders and the state."); john a. powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 57 (2012) ("The natural entity theory, formulated by Otto Gierke, began to eclipse the artificial entity theory of corporate

C. Aggregate Theory

The third prevailing theory of the corporation is the aggregate theory, which is also commonly referred to as the nexus of contracts theory. Under this theory, the corporation is the sum of the individuals organizing, operating, and owning it and the obligations among them.[52] Some proponents of this theory have even extended the nexus of contracts composing the corporation beyond the managers, employees, and shareholders to include such outside parties as creditors, customers, and the public.[53] Unlike under the artificial entity theory and the real entity theory, the corporation does not have a distinct identity from the individuals organizing, operating, and owning it.[54] As a result, the

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personhood. This theory asserts that corporations are wholly distinct juridical entities with rights separate from those of its creator.").

52. *See* Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 TENN. L. REV. 365, 365–66 (2008) ("In the field of corporate law, the 'nexus of contract' model is the dominant theoretical explanation of the law concerning the management of corporations. Under this view, corporations are nothing more than a network of contracts between voluntary, private actors."); Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMP. LAB. L. & POL'Y J. 97, 100 (2000) ("The dominant economic approach to corporate law is the 'nexus of contracts' approach. Under this model, the firm consists of a set of mutually dependent relationships between various corporate constituents, such as shareholders, employees, suppliers, customers and the community."); Fenner L. Stewart, *The Corporation, New Governance, and the Power of the Publicization Narrative*, 21 IND. J. GLOBAL LEGAL STUD. 513, 538 n.200 (2014) ("The aggregate contractarian theory argues that the corporation is the sum of the contractual obligations that each of its constituents (labor, management, shareholders, creditors, the community-at-large, etc.) owe to each of its other constituents.").

53. *See* Kerry Lynn Macintosh, *Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based on Business Practices?*, 38 WM. & MARY L. REV. 1465, 1479 (1997) ("Modern corporate theory, however, teaches that a corporation is nothing more than a 'nexus of contracts' formed between shareholders, managers, employees, creditors, suppliers, and customers."); 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 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)."); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 411 (1992) ("The dominant intellectual view in the corporate field holds that a corporation is best understood as a 'nexus of contracts' between the various factors of production. The 'corporation' actually is the set of contracts between the corporate entity and its suppliers of labor (employees and managers), capital (lenders, shareholders, suppliers of tools and goods), and customers.").

54. *See* 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

rights of the corporation are derivative of those individuals.[55]

Although the aggregate theory has experienced its greatest popularity during the past four decades, the history of the theory dates back to the nineteenth century.[56] A major advance for proponents of the theory occurred in 1937 when Ronald Coase published his groundbreaking article, *The Nature of the Firm*, which helped popularize the view among legal academics that a corporation is an aggregate formed from a nexus of contracts.[57] Since then, economists and legal scholars have rebranded the aggregate theory as the nexus of contract theory and refined it to allow for sophisticated economic analysis of the corporate form.[58] The aggregate theory is now the dominant theory among the

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was an atomized construct, composed of the aggregate of its relational components, the most important of which being its shareholders."); Phillips, *supra* note 42, at 1071 ("Like the aggregate theory, the nexus-of-contracts theory refuses to recognize a meaningful corporate entity distinct from the components that form the corporation."); 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.").

55. *See* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 476 (2013) ("[T]he corporation's legal status as a person is immaterial because the corporation is merely a nexus of contracts and that, as such, only the individual rights of the persons behind them really matter"); Petrin, *supra* note 6, at 9–10 ("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."); Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 291 (2008) ("The aggregate theory was also popular among corporations that wished to claim certain Constitutional rights; Attorneys could thus maintain the corporations were merely asserting the rights of the shareholders who comprised the corporation.").

56. *See* Coates, *supra* note 46, at 817 ("This view of the corporation as an aggregate developed throughout the nineteenth century . . . ."); Krannich, *supra* note 44, at 71–72 ("In addition to the artificial entity theory, the aggregate view of the corporate entity was also prevalent in corporate theory during the nineteenth century."); Petrin, *supra* note 6, at 9 ("However, during this period, the fiction theory also competed with the 'aggregate' or 'contractualist' theory, which was particularly popular in nineteenth century England and emerged more clearly in the United States during the latter half of the same century.").

57. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); *see also* Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 9 (2002) ("Building on Coase's work, modern law and economics scholars view the corporation not as an entity but as an aggregate of various inputs acting together to produce goods or services."); Matthew A. Melone, *The Section 83(b) Election and the Fallacy of "Earned Income"*, 10 BERKELEY BUS. L.J. 53, 58 (2013) ("Later scholars expanded upon Coase's work and the corporation became increasingly viewed as a 'nexus of contracts.'"); Phillips, *supra* note 42, at 1071 n.65 ("A 1937 article by Ronald Coase is almost universally regarded as the seminal work underlying the nexus-of-contracts theory.").

58. *See* Avi-Yonah, *supra* note 6, at 1025 n.142 ("The point that the nexus-of-contracts theory is a reinvention of the aggregate view has been made repeatedly."); Cupp, *supra* note 45, at 61 ("[T]he nexus-of-contracts theory has been viewed as a resurrection of the aggregate theory . . . ."); Speck, *supra* note 43, at 2591 ("In the 1970s, the law and economics movement drew on the aggregate theory to describe the corporation as a 'nexus of contracts' that coordinates production using many independent actors.").

three prevailing theories of the corporation.[59] The "revolution" that occurred in corporate law scholarship during the 1980s married legal theory and economic theory.[60] This revolution created a renewed interest in the aggregate theory because the theory was developed by economists for purposes of economic analysis, and the aggregate theory was designed to allow for complex economic analysis of the corporation.[61]

D. Indeterminacy

Each of the prevailing essentialist theories emphasizes a different aspect of the corporation. The artificial entity theory focuses on the role of the government;[62] the real entity theory focuses on the corporation as a distinct entity;[63] and the aggregate theory focuses on the individuals organizing, operating, and owning the business form.[64] All of these theories have some attractiveness, which is why each of these theories was a dominant theory at one time or another in the history of the United States.[65] However, each also has drawbacks. While the artificial entity

59. *See* Bainbridge, *supra* note 57, at 9 ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory."); 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."); Edward L. Rubin, *Images of Organizations and Consequences of Regulation*, 6 THEORETICAL INQUIRIES L. 347, 349 (2005) ("The dominant image of the corporation, in modern economics and law and economics scholarship, is that it represents a nexus of contracts.").

60. *See* Jason Scott Johnston, *The Influence of The Nature of the Firm on the Theory of Corporate Law*, 18 J. Corp. L. 213, 213 (1993) (discussing the "revolution in corporate law scholarship" that occurred in the late 1970s and early 1980s as a result of corporate law scholars focusing more on economic theory); 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.").

61. *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."); Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 895 (2012) ("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.'"); Ian B. Lee, *Corporate Law, Profit Maximization and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 46 (2005) ("Since the middle of the last century, economists have emerged as the leading theorists of the corporation, and the 'nexus of contracts,' or 'contractarian' conception has become the dominant metaphor among academic corporate lawyers.").

62. *See supra* Section II.A (discussing the artificial entity theory).

63. *See supra* Section II.B (discussing the real entity theory).

64. *See supra* Section II.C (discussing the aggregate theory).

65. *See supra* Sections II.A–C (describing the three prevailing theories of the corporation and the

theory honors the role of the government, it underplays the identity of the corporation as an entity and deemphasizes the importance of the individuals organizing, operating, and owning the business form.[66] While the real entity theory prizes the separate identity of the group, it does little to recognize the role of the government and the individuals organizing, operating, and owning the corporation.[67] Finally, while the aggregate theory celebrates the roles of the individuals organizing, operating, and owning the corporation, it ignores the role of government and the separate identity of the group.[68]

As a result, some scholars have advocated for embracing the indeterminacy of the corporation and backing away from the essentialist theory debate altogether.[69] For example, in 1926, John Dewey published *The Historic Background of Corporate Legal Personality*.[70] In that article, he wrote, "The fact of the case is that there is no clear-cut line, logical or practical, through the different theories which have been advanced and which are still advanced in behalf of the 'real' personality of either 'natural' or associated persons."[71] Because of the lack of coherence among the prevailing essentialist theories of the corporation, Dewey argued:

> 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.[72]

In Dewey's view, the existing debate over the essence of the corporate form cannot be resolved, and the best solution is simply to end the

various times during the history of the United States when each was the dominant theory).

66. *See supra* Section II.A (discussing the artificial entity theory).

67. *See supra* Section II.B (discussing the real entity theory).

68. *See supra* Section II.C (discussing the aggregate theory).

69. *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."); Fenner L. Stewart, Jr., *Indeterminacy and Balance: A Path to a Wholesome Corporate Law*, 9 RUTGERS BUS. L. REV. 81, 85 (2012) ("[T]his article recommends focusing upon the indeterminacy of corporate legal theories. . . .").

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

71. *Id.* at 669.

72. *Id.*

discussion.[73] Although the debate continued, many scholars embraced Dewey's suggestion, and as a result, the argument over the essence of the corporation remained relatively quiet for much of the twentieth century.[74]

III. COLLABORATION THEORY

Dewey's solution to the metaphysical inquiry into the essential nature of the corporation is seductive in its simplicity. Taking Dewey's advice and ignoring the issue avoids a lot of problems. As just discussed, each of the prevailing essentialist theories have strong foundations in reality and are flawed at the same time.[75] If one is willing to live with inconsistency and embrace all of the theories, one can end up with a jumble of theories that explains the importance of the state governments and individuals in organizing, operating, and owning the corporation, and that gives a rather confused explanation as to why the corporation has rights.[76]

This Essay, however, rejects Dewey's solution for three reasons. First, avoiding complexity should not justify failing to seek knowledge. Failure to understand something does not mean that one should stop trying. If humanity collectively embraced this mindset, a multitude of advancements such as flight, organ transplants, and space travel would never have been achieved. Second, understanding the essential nature of corporations has become important because it impacts how these business entities can and should interact with society. As the Supreme Court of the United States' recent opinions in cases such as *Citizens United*[77] and *Hobby Lobby*[78] evidence, understanding the essential nature of the corporation has never been more important. This is one of the main reasons that the debate over the essential nature of corporations

73. *Id.*

74. *See* Pollman, *Reconceiving Corporate Personhood*, *supra* note 6, at 1650 ("Many commentators view John Dewey's 1926 Yale Law Journal article as having put an end to the corporate personhood debate."). The debate was reinvigorated in the 1980s by the infusion of economics into corporate law scholarship, as legal scholars adopted the aggregate theory, rebranded it as the nexus-of-contract theory, and used it to do sophisticated analysis of the firm. *See supra* notes 57–61 and accompanying text (reporting that a renewed interest in the aggregate theory occurred in the past few decades because it was developed by economists and economic theory has been infused into business law scholarship).

75. *See supra* notes 62–68 (describing the strengths of the three prevailing theories of the corporation and their drawbacks).

76. *See supra* Sections II.A–C (discussing the three prevailing theories of the corporation that must be embraced if one accepts the indeterminacy of the corporate form).

77. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

78. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

has been reinvigorated.[79] Without understanding the nature of the corporate form, understanding the rights of a corporation and how it should be regulated is impossible. Third, a better essential theory of the corporation is possible. This Essay and my other work offers such a theory.

My theory, collaboration theory, views the corporation as a collaborative effort among a state government and those individuals organizing, operating, and owning the business entity. The collaborative effort may even extend beyond those entities to other entities, such as customers, debtholders, and society in general. Because of space limitations, however, this issue will be left for another day.

For purposes of this theory, collaboration is defined as a common effort between or among multiple entities to accomplish a task or a project. In regard to for-profit corporations, the common project among a state government and those individuals organizing, operating, and owning the business entity is economic development and economic gain. Interests do diverge somewhat because the state governments seek social goals while those individuals organizing, operating, and owning the business entity seek personal financial gain, but a sufficient nexus exists to consider operation of a corporation as a collaboration among the parties involved.

Collaboration theory offers a superior essentialist theory of the corporation because it provides a fuller description of the corporation, explains why corporations should be viewed as separate entities, and clarifies why the government should have the power to regulate corporations. In regard to collaboration theory providing a fuller description of the corporation, this theory explains both *how* and *why* the corporation exists. The current prevailing essentialist theories of the corporation only focus on how the corporation exists without providing deeper analysis. This is problematic because these theories fail to fully answer the metaphysical inquiry into what a corporation is.

To render this point concrete, assume that one wanted to understand the essence of a bridge. One could argue that a bridge is a structure built by the government. This would be the artificial entity theory of a bridge. One could also argue that a bridge simply is a thing. This would be the real entity theory of a bridge. Finally, one could argue that a bridge is a sum of parts that interact in various ways. This would be the aggregate theory of a bridge. The problem is that none of these descriptions really define a bridge or come close to how individuals understand these structures. To use a dictionary definition, a bridge can

79. *See supra* note 6 and accompanying text (discussing the renewed interest in the debate over the essential nature of the corporate form).

be defined as "[a] structure spanning and providing passage over an obstacle."[80] This is a superior definition of a bridge because it describes *how* a bridge exists, i.e., as a "structure," and *why* a bridge exists, i.e., as an object "spanning and providing passage over an obstacle."[81]

Collaboration theory is a superior essentialist theory of the corporation for similar reasons. Collaboration theory not only explains *how* corporations exists, i.e., as a common effort between or among multiple entities, but it also explains *why* corporations exist, i.e., to accomplish a task or a project. This theory of the corporation provides a better description of the corporate form because it fully entails what corporations are.

In addition, collaboration theory also explains why corporations should be viewed as separate entities. As previously discussed, German legal theorist Otto von Gierke argued that that groups have a "collective spirit" that gives them an identity separate and apart from the individuals composing them.[82] Gierke's work was foundational in the dominance of the real entity theory during the late nineteenth and early twentieth centuries.[83] Collaboration theory builds upon Gierke's work and helps to explain why entity status is warranted for corporations. Because collaboration usually allows individuals and entities to achieve more than they could on their own, this suggests that the collaboration, i.e., the corporation, should be viewed as having existence beyond the state government and the individuals organizing, operating, and owning it.[84] Because of the complexity of the issue, describing the exact metes and bounds of corporate personality is beyond the scope of this Essay. Collaboration theory is important, however, because it helps to explain why some sort of separate and distinct status should be afforded to corporations beyond the state governments and the individuals organizing, operating, and owning them.

Finally, collaboration theory offers a superior essentialist theory of the corporation because it clarifies why the state government should have the power to regulate corporations in ways that it cannot regulate actual human beings. By viewing the corporation as a collaboration, both the state government and the individuals organizing, operating, and

80. *Bridge*,WEBSTER'S II NEW COLLEGE DICTIONARY 142 (1999).

81. *Id.*

82. *See supra* notes 49–51 (discussing the work of Otto von Gierke).

83. *See supra* Section II.B (describing the real entity theory of the corporation).

84. *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).

owning the corporation have the power to shape and steer that collaboration. This means that the rights of the individuals organizing, operating, and owning the corporation are more limited in that role than in other contexts of their lives.

For example, one of the more controversial issues regarding corporations is what sort of First Amendment rights these business entities should and do possess.[85] In *Citizens United*, the Supreme Court of the United States held that under the First Amendment, the government may regulate political speech of corporations through disclosure requirements, but the government may not completely suppress corporate political speech because corporations have free speech rights.[86] This opinion created a great deal of concern among scholars, politicians, and society at large based upon worries that corporate campaign contributions would pollute the political process in the United States.[87]

Collaboration theory provides an answer as to why the government should have the power to more aggressively regulate corporate speech because it is speech that is partially attributed to the government as a collaborator in the corporation. Under existing case law, the government speech doctrine provides that, although the government is limited by the First Amendment in its ability to restrict the speech of private individuals, the government does have the ability to restrict speech when speech can be attributed to the government itself.[88] The

85. *See* Lawrence O. Gostin, *Conceptualizing the Field After September 11th: Foreword to a Symposium on Public Health Law*, 90 KY. L.J. 791, 806 (2002) ("Government regulation of corporate speech is . . . controversial, implicating First Amendment values."); N. Douglas Wells, *Thurgood Marshall and "Individual Self-Realization" in First Amendment Jurisprudence*, 61 TENN. L. REV. 237, 283 n.359 (1993) ("Many judges and commentators viewed the extension of First Amendment protection to political speech activities of corporations as controversial.").

86. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010) ("[T]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.").

87. *See* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 64 (2012) ("This is *Citizens United*'s profound impact on campaign finance law far beyond its limited extension of corporate electioneering. . . . outside groups now can make independent expenditures on a virtually unregulated basis . . . ."); Jessica A. Levinson, *Timing Is Everything: A New Model for Countering Corruption Without Silencing Speech in Elections*, 55 ST. LOUIS U. L.J. 853, 855 (2011) ("In striking down prohibitions on corporations' use of general treasury funds to make independent expenditures, the *Citizens United* Court eliminated one of the major avenues used to limit the potentially corrupting influence of money in campaigns."); Glen M. Vogel, *Clinton, Campaigns, and Corporate Expenditures: The Supreme Court's Recent Decision in* Citizen's United *and its Impact on Corporate Political Influence*, 86 ST. JOHN'S L. REV. 183, 204 (2012) ("*Citizens United* caused an eruption of criticism about the holding's impact on the world of campaign finance and the potential corruptive influence of corporations and unions on the political process.").

88. *See, e.g.*, Pleasant Grove v. Summum, 555 U.S. 460 (2009); Garcetti v. Ceballos, 547 U.S. 410 (2006); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005); Rust v. Sullivan, 500 U.S. 173 (1991).

contours of the government speech doctrine are not well defined because the case law is limited. At minimum, however, if collaboration theory is widely adopted, it offers a much better explanation of why and how the government has power to regulate corporations, rather than under the current prevailing theory of the corporation, i.e., the aggregate theory, which treats the rights of the corporation as coexistent with only the rights of the individuals who compose it while ignoring the role of the state in creating the corporation.[89]

IV. THE APPLICATION OF COLLABORATION THEORY TO CORPORATE SOCIAL RESPONSIBILITY

In *Meinhard v. Salmon*, Benjamin Cardozo, who was serving as Chief Judge of the New York Court of Appeals at the time of the opinion, wrote: "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."[90] While this language is most commonly used to describe the fiduciary duties owed among owners and managers of unincorporated business entities, it also describes how those organizing, operating, and owning a corporation should interact with the state of incorporation. As collaboration theory reveals, the reason for this is that the state and the individuals organizing, operating, and owning a corporation are collaborating within the corporate form, i.e., they are "[j]oint adventurers" within the contractual relationship that generates the corporation.[91] As a result, the individuals organizing, operating, and owning the corporation owe the state a "punctilio of an honor the most sensitive."[92]

The issue which looms is what a "punctilio of an honor the most sensitive" means in the context of corporate social responsibility and for-profit corporations. The remainder of this Part will explore that issue and provide various scenarios to analyze when a corporation is obliged to engage in socially responsible behavior.

89. *See supra* Section II.C (discussing the aggregate theory of the corporation).

90. Meinhard v. Salmon, 164 N.E. 545, 546 (1928).

91. *Id.*

92. *Id.* Under this analysis, the state would also owe the individuals organizing, operating, and owning the corporation a "punctilio of an honor the most sensitive." Because of the space limitations of this Essay, that issue will not be explored within this paper.

A. Exploring When Corporate Social Responsibility Is Mandated Under Collaboration Theory

Based upon collaboration theory, the duties that co-adventurers owe to each other are determined by the agreement that the parties made when they decided to collaborate together, which is a contractual relationship. In regard to for-profit corporations, when these entities are incorporated, although some incorporators may choose to use the corporate charter or articles of incorporation to limit profit seeking in certain situations, the explicit agreement is that these entities will seek a profit.[93] As a result, even if an activity might be viewed as socially irresponsible, the parties who have collaborated in organizing the corporation have agreed that if the activity is profit maximizing, that it must be pursued. Often socially responsible activities and profit maximizing behavior will coalesce, but if corporate management is forced to choose, profit maximization must trump.

The question that remains is when corporate management should engage in socially responsible behavior. The analysis in the paragraph above provides one answer, i.e., when the socially responsible behavior is profit maximizing. However, other circumstances exist also. 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.[94] 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. Exploring what "treating the state government well" means, in a democracy, the government is supposed to represent the will of the people, which can be interpreted as the will of society because society is the aggregate of the people.[95] Although debatable, one can assume that society wants to be treated in a way that supports its well-being, i.e., in a way that is socially responsible. Thus, when not seeking profit maximization, those organizing, operating, and

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93. *See* Christyne J. Vachon, *Playing in the Sandbox: Moral Development and the Duty of Care in Collaborations between For-Profit and Nonprofit Corporate Persons*, 33 PACE L. REV. 1045, 1067 (2013) ("[T]he underlying constraint on the for-profit is that law restricts its goal as a cooperative enterprise to . . . profit maximization for the benefit of the corporation and its owners.").

94. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW. INST. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement."); U.C.C. § 1-203 (AM. LAW INST. & UNIF. LAW COMM'N 2015) ("Every contract . . . imposes an obligation of good faith in its performance or enforcement."); Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 4 (2006) ("The duty of good faith is well established in corporate law. To begin with, the duty has long been established in statutes. . . . The duty of good faith also has long been implicitly recognized in case law . . . .").

95. *See supra* note 12 and accompanying text (discussing the role of government in a representative democracy).

owning corporations should engage in socially responsible behavior.

As a result, beyond engaging in socially responsible behavior when it supports profit maximization, those organizing, operating, and owning corporations should engage in such behavior in two additional circumstances to fulfill their implied duty of good faith. First, in instances in which the socially responsible behavior neither financially benefits nor financially harms the corporation, which means it is cost neutral, the corporation should engage in socially responsible behavior to fulfill the implied duty of good faith within the collaboration. Second, in instances in which the financial benefit to the business entity is uncertain, the corporation should engage in socially responsible behavior to fulfill the implied duty of good faith within the collaboration. Because the future is often uncertain, this means that in many instances corporations should engage in the socially responsible course of action.

B. Exploring Four Scenarios to Understand When Corporate Social Responsibility Is Mandated

To render the discussion in the previous section more concrete, four scenarios should be explored. In the first scenario, a corporation is considering whether to engage in an activity that is considered socially responsible, and that will benefit the corporation financially. In the second scenario, a corporation is considering whether to engage in an activity that is considered socially responsible, but that will cause harm to the corporation financially. In the third scenario, a corporation is considering whether to engage in an activity that is considered socially responsible and that is financially neutral to the corporation. And, in the fourth scenario, a corporation is considering whether to engage in a socially responsible activity, and uncertainty exists as to whether it is financially beneficial or harmful to the corporation. Each of these scenarios will be examined in turn.

In the first scenario in which a corporation is considering whether to engage in an activity that is both socially responsible and profit maximizing, the corporation is obligated to engage in the socially responsible behavior. For example, if a corporation is contemplating engaging in a new recycling program that would actually save the corporation $10,000 per year, the corporation would be required to undertake the new recycling program. As previously explained, for-profit corporations are required to seek profit.[96] Corporations are also

96. *See supra* note 93 and accompanying text (reporting that the primary purpose of for-profit corporations is to seek profit).

collaborations between the government and the individuals organizing, operating, and owning the corporation,[97] which means that these individuals owe a duty of good faith to the government and the society it represents. This means that if the socially responsible course of action and the ability of the corporation to make a profit coalesce that the corporation is obligated to engage in socially responsible behavior.

In the second scenario in which a corporation is considering whether to engage in an activity that is socially responsible but will be financially detrimental, the corporation must decline to engage in the socially responsible activity. This is because the individuals organizing, operating, and owning the corporation have expressly collaborated with the government as representatives of society to unflinchingly seek profit as a means of promoting economic growth. In fact, this is the scenario found in the classic case *Dodge v. Ford Motor Co.*[98] In that case, Henry Ford had declared that he planned to run Ford Motor Company for the benefit of public and employ the wealth of the corporation to benefit society.[99] John F. Dodge and Horace E. Dodge brought suit because they objected to this course of action.[100] Chief Judge Ostrander, speaking for the Supreme Court of Michigan, 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."[101] In short, because of the collaboration forged with the government to promote economic growth, a for-profit corporation has an obligation to seek profit, even if it involves acting in a socially irresponsible manner.

This reality is disturbing, but it demonstrates the importance of regulators in policing corporations. Through regulation, regulators can change the cost–benefit analysis that leads corporations to engage in socially reprehensible behavior and transform many real world situations into examples of scenario one, rather than examples of scenario two. For instance, a great deal of environmental regulation transforms what would be circumstances in which corporations would consider engaging in cost-effective pollution into circumstances in which corporations operate more cleanly because of the costs imposed for failing to comply with the law.

In addition, scenario two assumes that determining the cost-effective

97. *See supra* Part III (explaining collaboration theory as an essentialist theory of the corporation).

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

99. *Id.* at 671 ("'My ambition,' declared Mr. Ford, 'is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.'").

100. *Id.* at 668.

101. *Id.* at 684.

course of action is possible. In many instances, because the future is hard to predict, the possible costs of corporate activity will be difficult to determine. As a result, scenario two reflects the exceptional case in which the consequences of corporate behavior are clear. How corporations should behave in instances in which the costs of certain behavior are unclear will be discussed in scenario four below.

In scenario three in which a corporation is considering whether to engage in a socially responsible activity that has no cost to the corporation, the corporation is obligated to engage in the socially responsible behavior. For example, if a state government has created a new program to reduce greenhouse emissions that will cost a corporation $100,000 per year, and the state government has agreed to provide tax subsidies worth $100,000 per year to offset this cost, a corporation should engage in the greenhouse emissions reduction program. This is because the corporation is a collaboration between the state government and the individuals owning, operating, and organizing the corporation, and as a result, those individuals have a duty to support the well-being of the state government as part of being co-adventurers in the collaboration that is the corporation.

Finally, in scenario four in which the corporation is considering engaging in a socially responsible activity, and it is uncertain whether it will be financially beneficial or harmful to the corporation, the corporation should engage in the socially responsible activity. Consider the following hypothetical: A motorcycle manufacturer is considering whether to undertake a product recall after its lawyers have attempted to do a cost–benefit analysis and concluded that it is impossible to determine whether it is more cost-effective to recall the product or pay the tort judgments and other legal penalties. In this hypothetical, the manufacturer has the obligation to undertake the recall because the corporation is a collaboration and the individuals organizing, operating, and owning the corporation have a duty to treat well the state government and the society it represents within that collaboration.

Choosing the socially responsible action in scenario four is not uncontroversial. Some would likely argue that a for-profit corporation should unrelentingly seek profit even in situations in which the benefit or harm to the corporation is unclear, even if socially irresponsible behavior is involved. With that being said, the collaboration entered into among the state government and the individuals organizing, operating, and owning the corporation is to create a for-profit entity for promoting economic growth. One would have a hard time arguing that the state's goal in this collaboration is to create a monster and unleash it upon society. As a result, the strong argument is that when doubt exists, corporations should behave in a socially responsible way.

V. CONCLUSION

Although most corporate managers agree that engaging in socially responsible behavior is the correct thing for corporations to do, few can articulate a strong analytical foundation for this belief. The fact that engaging in this type of behavior may help to make corporations more profitable offers a partial reason for engaging in such behavior. However, profit-seeking fails to explain if or why corporations should engage in socially responsible behavior in circumstances in which no financial benefit to the corporation exist or the financial consequences are uncertain.

The reason for this confusion over the obligation to engage in corporate responsibility rests on the fact that the essential nature of the corporation is not well understood. Each of the prevailing theories of the firm, i.e., concession theory, real entity theory, and aggregate theory, describe part of *how* the corporate form exists, but they fail to explain *why* the corporation exists. Because these theories are at times contradictory, yet each has some foundation in reality, some have argued for simply backing away from the question and embracing the indeterminacy of the corporation by embracing all three theories. Although this is tempting, resolving the essential nature of the corporation is necessary to help resolve a myriad of legal issues.

As a result, this Essay and my other works introduce a new theory of the firm, collaboration theory. This theory views the corporation as a collaborative effort among a state government and those individuals organizing, operating, and owning the business entity to pursue economic development and economic gain. This theory is superior to the prevailing essentialist theories of the corporation because it explains both *how* and *why* the corporation exists.

Under this theory, corporations are obligated to seek profit based on the deal struck among the state and individuals owning, operating, and organizing the corporation, but the co-adventurers in the corporation are obligated to treat each other in good faith whenever possible. This means corporations should only engage in socially irresponsible ways in which the financial benefit to the corporation is clear. Because of the uncertainty of life, this is only going to be the rarest of circumstances. In these rare circumstances, to control bad behavior on the part of the corporation, the government must engage in affirmative lawmaking and regulation to alter the cost–benefit analysis to force corporations to be ethical.