What Injures a Corporation?
Toward Better Understanding Corporate Personality

*By J.B. Heaton**

Understanding what injures a corporation can help us better understand corporate personality. Traditional corporate injury is injury to corporate assets or profits. This makes sense, because without defining impairment to corporate assets and profits as corporate injury, most of what we think of as "essential" about a corporation—locking assets into a protected partition—would be impossible: (1) protecting the going concern value of the corporation; (2) maintaining creditor priority; and (3) contracting through the corporate form. More recent expansions of what constitutes corporate injury, including injuries to a corporation's right to political speech (Citizens United) *and religious freedom* (Hobby Lobby)*, seem at first to fit poorly with existing corporate theory. But corporations can "lock in" and "partition" more than assets; they can partition beliefs and virtues as well. Viewed this way, existing corporate theory (and the idea of corporate injury as harm to whatever is partitioned by the corporate form) may provide more help in understanding corporate constitutional rights than previously recognized.*

Introduction

What is interesting about corporate injury is that—like the corporation itself—it is a legal creation without a sentient equivalent at the entity level. Judges and legislators decide what, if any, redress I have when someone's action breaks my leg, but no reasonable person would question whether I was injured. By contrast, a corporation's loss of asset value or profits through another's wrongful action is a pass-through event that we can trace, dollar-for-dollar, to its impact on shareholders, creditors, employees, and others, such as people who own houses in the community around the corporation's headquarters or taxing governments and the consumers of functions for which those taxes provide funding. We may not yet know for sure if a boiling lobster feels pain, but most of us would agree that Facebook Inc., the corporate entity, does not.

This article seeks to accomplish three things. First, it identifies the traditional corporate injuries described in case law. The problem is sometimes hard for courts, because virtually anything that injures a corporation also likely injures

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at least one other legal person like a shareholder, creditor, or employee. The converse is not true: injuries to those same shareholders and stakeholders do not necessarily injure the corporation. Traditional corporate injuries tend to be injuries to assets and profits: lost profits (including price erosion and increased costs), the destruction or impairment of income-producing assets, waste, looting, embezzlement, and the effects of gross mismanagement, including overpaying for assets, selling assets for too little, or simply giving assets away.

Second, it will suggest that what the case law considers to be traditional corporate injury provides support for the most important commonality among current leading theories of corporate personality. While said in somewhat different ways by different scholars, the corporate form appears to be most valuable in allowing for the creation of asset pools that are inaccessible to the creditors of the shareholders who create them (and the successors of those shareholders, where shares are salable) and "lock in" or "partition" the assets for business use. If those theories are good ones, we should expect corporate injury to play a role in making those pools possible, and it does. Without traditional corporate injury being defined as impairment to corporate assets and profits, most of what we think is "essential" about a corporation would be impossible: (1) protecting the going concern value of a corporation; (2) maintaining creditor priority; and (3) contracting through the corporate form.

Finally, I explore recent expansions of corporate injury, including expansions of corporate rights to political speech (*Citizens United*) and religious freedom (*Hobby Lobby*) that seem at first to fit poorly within corporate theory. Modern corporate theory looks at the corporation as locking in assets, but corporations can "lock in" and "partition" more than that; they can lock in beliefs and virtues as well. Viewed as such, existing corporate theory (and the idea of corporate injury to what is partitioned by the corporate form) may provide more help in understanding corporate constitutional rights than previously recognized.

I. Traditional Corporate Injuries

A. Corporations as "Separate and Distinct" Asset-Owning Profit Seekers

Corporations, we all know, are "separate and distinct" from other legal entities, including, among many possible examples, their shareholders,[1] their creditors,[2]

1. *See, e.g.*, Cent. Tablet Mfg. Co. v. United States, 417 U.S. 673, 678 (1974) ("A corporation is a taxable entity separate and distinct from its shareholders."); Smith Land & Imp. Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) ("Changes in ownership of a corporation's stock will not affect the rights and obligations of the company itself. The corporation survives as an entity separate and distinct from its shareholders even if all the stock is purchased by another corporation."); Boyle v. United States, 355 F.2d 233, 235 (3d Cir. 1965) ("The law is settled that the stockholder and the corporation are two separate and distinct entities."); Alexander v. IRS, 628 F. Supp. 433, 435 (D. Del. 1985) ("A corporation is an entity separate and distinct from its shareholders.").

2. *See, e.g.*, Am. Nat'l Ins. Co. v. JPMorgan Chase & Co., 893 F. Supp. 2d 218, 231–32 (D.D.C. 2012) ("Under the laws of the State of Washington, the Bondholders cannot sue derivatively for an injury to WaMu. The Court finds that Counts II and III make claims that belonged to WaMu under state law[.]").

and other corporations under common control.[3] Business corporations usually seek to make profits and build corporate wealth and pass wealth to their shareholders. That is, they seek to generate an excess of value over the costs that the corporation incurred in generating that value. Delaware law, in fact, generally *requires* directors of Delaware corporations to maximize the "long run interests of shareholders[.]"[4] While some disagree that this *should be* the primary purpose of the corporation, the law seems to make it so,[5] though sometimes, at least, the pursuit of non-shareholder concerns seems to aid shareholder-value maximization.[6] In any event, shareholder-value maximization usually requires that the corporation seek to generate profits, which in turn requires it to engage in production of goods or services and use productive assets. Traditional corporate injuries are in turn defined as harm to or misappropriation of these productive assets (or the cash

3. *See, e.g.*, Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., 233 F.R.D. 143, 145 (D. Del. 2005) ("Further, the separate and distinct corporate identities of a parent and its subsidiary are not readily disregarded, except in rare circumstances justifying the application of the alter ego doctrine to pierce the corporate veil of the subsidiary."); Seay v. Travelers Indem. Co., 730 S.W.2d 774, 779 (Tex. App. 1987) ("The legally distinct and separate status of two corporations will not be disregarded because they are subsidiaries or because they possess common shareholders or officers.").

4. *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 80 (Del. Ch. 2014) ("More concretely, the fiduciary relationship between the Board and Rural's stockholders required that the directors act prudently, loyally, and in good faith to maximize Rural's value over the long-term for the benefit of its stockholders."), *decision clarified on denial of reargument*, *In re* Rural Metro Corp. Stockholders Litig., 2014 WL 1094173 (Del. Ch. Mar. 19, 2014); *In re* Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 34–35 (Del. Ch. 2014) ("When evaluating, negotiating, and deciding whether to approve and recommend the merger, the Special Committee members were obligated to act loyally, prudently, and in good faith for the purpose of maximizing the long-term value of the corporation for the benefit of its residual claimants, *viz*., the common stockholders."); TW Servs., Inc. v. SWT Acquisition Corp., Civ. A. No. 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989); William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894, 896–97 (1997) ("[I]t can be seen that the proper orientation of corporation law is the protection of long-term value of capital committed indefinitely to the firm."); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) ("[T]here is today a broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable, resulting from widespread disenchantment with a privileged role for managers, employees, or the state in corporate affairs. This is not to say that there is agreement that corporations should be run in the interests of shareholders alone—much less that the law should sanction that result.").

5. For a candid analysis of the limits corporate law places on advocates of a wider view of corporate purpose, see Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 765 (2015) ("For example, one of the most important flaws in the argument that corporate boards are free under Delaware law to make the welfare of constituencies other than stockholders an equal end of corporate governance is that it ignores that the law generates focus on those persons subject to its authority in many ways.").

6. *See generally* Bradley W. Bension & Wallace N. Davidson, *The Relation Between Stakeholder Management, Firm Value, and CEO Compensation: A Test of Enlightened Value Maximization*, 39 FIN. MGMT. 929 (2010); Bradley W. Benson, Wallace N. Davidson III, Hongxia Wang & Dan L. Worrell, *Deviations from Expected Stakeholder Management, Firm Value, and Corporate Governance*, 40 FIN. MGMT. 39 (2011); Claudio Loderer, Lukas Roth, Urs Waelchli & Petra Joerg, *Shareholder Value: Principles, Declarations and Actions*, 39 FIN. MGMT. 5 (2010). For a recent technical but quite interesting analysis of stakeholder corporations, see Michael Magill, Martine Quinzii & Jean-Charles Rochet, *A Theory of the Stakeholder Corporation*, 83 ECONOMETRICA 1685, 1721 (2015) (observing, most notably, that "[a] valid theoretical foundation for a stakeholder theory of the firm requires two preconditions: (1) decisions taken by the firms must have an external effect on stakeholders; (2) these externalities must not be readily resolved by government intervention (regulation or taxation)").

needed to buy them) or harm to the potential fruits of those assets (profits, cash flow, etc.).

B. Corporate Injury as Lost Profits and Lost Income-Producing Assets

Wrongdoing that deprives a corporation of profits it otherwise would have earned injures that corporation.[7] Thus, a corporation is injured when the price it can charge for its products or services is eroded, an issue that often arises in patent litigation and other intellectual property cases.[8] A corporation also is injured when it pays more for inputs and supplies than it should have. In *Dobry v. Yukon Electric Co.*,[9] for example, defendants were officers and directors of related companies who caused one company, a mill and grain company, to buy electricity at above-market prices from the related electricity company. The plaintiff, a shareholder in the mill and grain company, complained that the arrangement depressed the stock price and deprived him of dividends he otherwise would have received.[10] The court determined this was a corporate injury, not a direct injury to the shareholder, because his loss was merely incidental to the corporation's loss.[11] Antitrust violations injure corporations in this way by overcharge. For ex-

7. *See, e.g.*, Spanski Enters., Inc. v. Telewizja Polska, S.A., 604 F. App'x 33, 37–38 (2d Cir. 2015) (plaintiff corporation entitled to lost profits under New York law); K-TEC, Inc. v. Vita-Mix Corp., 696 F.3d 1364 (Fed. Cir. 2012) (plaintiff corporation was entitled to approximately $11 million in reasonable royalty and lost profits damages in patent infringement action); Meaux Surface Prot., Inc. v. Fogleman, 607 F.3d 161, 171 (5th Cir. 2010) ("Texas law recognizes that for enterprises with a record of profitability, records of past profits, with other relevant facts and circumstances, may support a finding of lost profits."); Structural Polymer Grp., Ltd. v. Zoltek Corp., 543 F.3d 987, 990 (8th Cir. 2008) (affirming trial court's reduction of damages awarded to plaintiff corporation for breach of contract "from $36,044,895 in lost profits to $21,138,518, finding the remainder of the award duplicative").

8. *See, e.g.,* Mylan Institutional LLC v. Aurobindo Pharma Ltd., 857 F.3d 858, 872 (Fed. Cir. 2017) ("We agree with Mylan that the district court's determinations were not clearly erroneous. On the record evidence, the court found that: (1) due to Aurobindo's infringement, Apicore has, and will continue to, suffer from lost sales, lost research and development, price erosion, and having to directly compete with an infringer[.]"). When a corporation's patent is infringed, the infringement takes profits from sales (or royalties) away from the patent owner, and also can decrease the price of the patented invention in the market through sales competition. *See, e.g.*, Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., 711 F.3d 1348, 1378 (Fed. Cir. 2013); *see generally* Greg M. Allenby, Jeff Brazell, John R. Howell & Peter E. Rossi, *Valuation of Patented Product Features*, 57 J.L. & Econ. 629, 658 (2014) ("[E]quilibrium computations take into account that if Sony were to infringe, Nikon might be forced to lower prices; this is often termed the problem of price erosion."); D. Scott Bosworth, Russell W. Mangum & Eric C. Matolo, *Corrective Advertising in Lanham Act Damages: The Use and Misuse of Past Advertising Expenditures*, 107 Trademark Rep. 760, 761 (2017) ("There are multiple types of damages potentially available to a plaintiff who has established a defendant's liability for trademark infringement or false advertising. These include lost profits, unjust enrichment, royalties, and corrective advertising.").

9. 290 P.2d 135, 136–37 (Okla. 1955).

10. *Id.*

11. *Id.* at 138 ("In the instant case the plaintiff did not allege in either cause of action, that he sustained any loss in addition to the loss sustained by the corporation. His loss was only incidental to the corporation's loss and under the rules set forth herein, his rights were derivative. His only remedy then was through a derivative action brought on behalf of the corporation."). *Dobry* was the basis for a 2015 decision of the United States Court of Appeals for the Third Circuit that directed a bankruptcy judge to permanently enjoin an action by limited partners seeking to bring claims in the multi-

ample, a coordinated price increase by suppliers of an input injures the purchasing companies.[12] Unnecessary corporate tax payments are also corporate injury,[13] as are increased costs incurred from wrongfully incurred financial distress.[14] Another way of measuring lost profits (whether from decreased prices or increased costs) is to capitalize the loss into a lost asset value.[15]

C. Corporate Injury as Waste, Gross Mismanagement, Looting, and Embezzlement

Waste occurs when a corporation's "board irrationally squanders corporate assets—for example, where [a] transaction serve[s] no corporate purpose or

billion dollar failure of SemCrude L.P. *In re* SemCrude L.P., 796 F.3d 310, 322 (3d Cir. 2015) ("[W]e conclude that the Oklahoma Plaintiffs' claims are derivative of the claims rightfully belonging to, and released by, SemCrude's Litigation Trust.").

12. *See, e.g.*, *In re* Domestic Drywall Antitrust Litig., 322 F.R.D. 188, 194 (E.D. Pa. 2017) (certifying class of direct purchasers of gypsum wallboard (drywall) after manufacturers in the United States announced large price increases around the same time).

13. *See, e.g.*, Oliveira v. Sugarman, 152 A.3d 728, 742–43 (Md. 2017) ("Presumably, iStar paid taxes on the Awards in accordance with § 162(m)(1). But this financial loss to the corporation does not give rise to a direct shareholder claim. Petitioners have not alleged any harm related to this tax cost distinct from that suffered by the corporation. In fact, Petitioners' Prayer for Relief asked for the damages sustained by the corporation.").

14. Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 349 (3d Cir. 2001) ("Even when a corporation is insolvent, its corporate property may have value. The fraudulent and concealed incurrence of debt can damage that value in several ways. For example, to the extent that bankruptcy is not already a certainty, the incurrence of debt can force an insolvent corporation into bankruptcy, thus inflicting legal and administrative costs on the corporation."). Unfortunately, this well-reasoned analysis grew into the now largely discredited "deepening insolvency" theory of damages that viewed the injury to the corporation in a deepening insolvency case as the amount of wrongfully incurred unpayable debt, an idea with no support in the relevant financial economic literature. *See, e.g.*, Lemington Home for the Aged v. Baldwin, 781 F.3d 675, 676 (3d Cir. 2015) ("As the petitioners note, however, much has changed in the acceptance of deepening insolvency since *Lafferty*. What had appeared to our Court then to be a plausible argument gaining increasing acceptance has since been widely repudiated."); *In* re Simplexity, LLC, No. 14-10569(KG), 2017 WL 65069, at *8 (Bankr. D. Del. Jan. 5, 2017) ("The Defendants argue that the Trustee's claims are in reality deepening insolvency claims, and that deepening insolvency does not state a claim upon which relief can be granted. That is the law in Delaware."); Quadrant Structured Prods. Co. v. Vertin, 115 A.3d 535, 547 (Del. Ch. 2015) ("Delaware does not recognize the theory of 'deepening insolvency.' Directors cannot be held liable for continuing to operate an insolvent entity in the good faith belief that they may achieve profitability, even if their decisions ultimately lead to greater losses for creditors."); *see also* J.B. Heaton, *Deepening Insolvency*, 30 J. Corp. L. 465, 467–68 (2005) ("The second version of deepening insolvency, the view that adopts the amount of the corporation's wrongfully-incurred unpayable debt as a measure of corporate injury, does not fit with traditional understandings of corporate injury[.]").

15. *See, e.g.*, Preferred Commc'ns, Inc. v. City of Los Angeles, 13 F.3d 1327, 1333 (9th Cir. 1994) ("Preferred's claim for 'lost asset value' is based on the difference in value between a cable system constructed in 1983 and one constructed in 1988; it is merely another way of measuring lost profits."). The loss of an income-producing asset injures a corporation that owns the asset. *See, e.g.*, Anchor Sav. Bank, FSB v. United States, 597 F.3d 1356, 1370 (Fed. Cir. 2010) ("The trial court, which presided over the five-week-long trial on damages and was intimately familiar with the circumstances of the breach and the parties' competing arguments, considered the two permissible methods of calculating damages—lost asset value and lost profits."). This may include the loss of income from a licensing agreement. *See, e.g.*, Nano-Proprietary, Inc. v. Canon, Inc., 537 F.3d 394, 401 (5th Cir. 2008) ("Dr. Koch, however, was allowed to rely upon this document to testify as to the lost asset's value from Canon's perspective.").

where the corporation receive[s] no consideration at all."[16] The legal test for waste is tough. For example, it is not necessarily corporate waste to pay "$3,500,000 to settle eight [sexual harassment suits] against" a corporation's founder and chief executive officer,[17] nor is it necessarily waste to pay extravagant sums to a departing executive who may not be entitled to them under his employment agreement.[18]

Despite the tough standard, there are many ways that corporate waste can occur. For example, granting a lease of extremely valuable corporate property to a family relative for a token payment can constitute corporate waste.[19] Similarly, gross mismanagement that depletes a corporation's assets results in corporate injury.[20] Also injurious is a complete failure to implement internal reporting systems. But again the legal hurdles to recover on such a claim are high. Plaintiffs may recover only for a breach of the duty of loyalty by directors who "utterly failed to implement any reporting or information system or controls; or . . . having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[21] Looting and embezzlement of the corporation's assets are corporate injuries.[22] Such issues often arise in Ponzi scheme cases where a corporation's insiders raise funds from unwitting investors and then remove those assets to fund their lavish lifestyles.[23] Courts have held that similar misappropriations constitute corporate injury as well.[24] Unsurprisingly, for example, stealing from corporate bank accounts injures a corporation,[25] as does essentially any misappropriation of corporate cash.[26]

16. White v. Panic, 783 A.2d 543, 554 (Del. 2001) (internal quotation marks omitted).

17. *Id.* at 548.

18. Brehm v. Eisner, 746 A.2d 244, 252 (Del. 2000).

19. Alphonse Hotel Corp. v. Tran, 828 F.3d 146, 153 (2d Cir. 2016).

20. *See, e.g.*, Bokat v. Getty Oil Co., 262 A.2d 246 (Del. 1970) (finding that mismanagement which causes a decline in stock value injures the corporation and can be enforced by derivative action).

21. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

22. *See, e.g.*, Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc., 140 F.3d 898 (11th Cir. 1998) (finding that stockholders have derivative standing to sue under RICO for damages due to looting of corporation by executives); Manson v. Stacescu, 11 F.3d 1127 (2d Cir. 1993) (observing that injuries of plaintiffs, as obligors on a corporate loan, would be cured if looted assets were recovered to the corporation).

23. *See, e.g.*, Scholes v. Lehman, 56 F.3d 750, 754 (7th Cir. 1995) ("Corporations received money from unsuspecting, if perhaps greedy and foolish, investors. That money should have been used for the stated purpose of the corporations' sale of interests in the limited partnerships, which was to trade commodities. . . . [The asset transfers] removed assets from the corporations for an unauthorized purpose and by doing so injured the corporations.").

24. *See, e.g.*, Lochhead v. Alacano, 662 F. Supp. 230, 233 (D. Utah 1987) ("Courts have uniformly held that misappropriation of assets injures the corporation primarily and individual shareholders only derivatively."); Marcuccilli v. Ken Corp., 766 N.E.2d 444, 451 (Ind. Ct. App. 2002) ("The same holds true with respect to the action against Ken Corp. Count I there relates to the corporation's loaning of its reserves to directors and/or their related business entities. The alleged damage was to the corporation itself because of the misuse of corporate assets.").

25. *See, e.g.*, Dardashtian v. Gitman, No. 17 CIV. 4327 (LLS), 2017 WL 6398718, at *7 (S.D.N.Y. Nov. 28, 2017) (limited liability company).

26. *See, e.g.*, Grgurev v. Licul, 229 F. Supp. 3d 267, 297–98 (S.D.N.Y. 2017) ("[I]t is clear that Plaintiffs' alleged direct injury is not independent of any injury to the corporation, since the harm

D. Other Corporate Injuries

In addition to waste, mismanagement, looting, and embezzlement, overpaying for an asset is a corporate injury, since the corporation ends up with less asset value than it should have for the asset value it gave up.[27] The converse is a corporate injury as well: receiving fewer assets for a sale of assets than was reasonable.[28] A corporation can also suffer injury from defamation of the corporation or its product or service.[29] Defamation of a corporation includes that which impugns the basic integrity or creditworthiness of a business,[30] harming the corporation's business reputation and prospects for additional profits.[31]

E. Traditional Non-Corporate Injuries

It is useful to contrast traditional corporate injuries with traditional non-corporate injuries. For example, courts find that fraud or nondisclosure to shareholders, even if it affects all shareholders equally,[32] is non-corporate injury.[33]

done by the misappropriation of Ocinomled's funds was suffered by Ocinomled. Furthermore, any disgorgement of the allegedly misappropriated funds would inure to the benefit of Ocinomled, and Plaintiffs would benefit only indirectly in their capacities as shareholders."); Ritchie v. Rupe, 443 S.W.3d 856, 885 (Tex. 2014) ("[W]hen corporate controllers misappropriate corporate funds for their own use or pay themselves excessive salaries out of corporate coffers, they do so in violation of their fiduciary duty to the corporation, and the law affords a remedy for that misconduct."); *see generally* Lucian Ayre Bebchuck & Christine Jolls, *Managerial Value Diversion and Shareholder Wealth*, 15 J.L. Econ. & Org. 487 (1999).

27. *See, e.g.*, Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006) ("claims of corporate overpayment are treated as causing harm solely to the corporation").

28. *See, e.g.*, Int'l Bd. of Elec. Workers Local No. 129 Benefit Fund v. Tucci, 70 N.E.3d 918, 926–27 (Mass. 2017) ("As the motion judge noted, the wrong alleged by the plaintiffs, undervaluing EMC to secure the merger and sale of the federation of companies, qualifies as a direct injury to the corporation[.]").

29. *See, e.g.*, Bilinski v. Keith Haring Found., Inc., 96 F. Supp. 3d 35, 49–50 (S.D.N.Y.) ("New York law distinguishes between defamation of a person and defamation of a product."), *aff'd in part,* 632 F. App'x 637 (2d Cir. 2015).

30. *See, e.g.*, Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 48 (N.Y. App. Div. 2009) ("It is well settled that where a statement impugns the basic integrity or creditworthiness of a business, an action lies and injury is conclusively presumed. Thus, the argument that the alleged statement, which disparages the Fund's solvency and possibly Advisors' honesty in business, is nonactionable opinion is without merit. The alleged statement has a precise meaning, and whether or not the Fund was solvent at the time the statement was made is a fact capable of being proven true or false by a fact-finder." (internal citation omitted)). The writer of this article argued this appeal for Amaranth LLC. *See also* Pan Am. Sys., Inc. v. Atl. Ne. Rails & Ports, Inc., 804 F.3d 59, 64 (1st Cir. 2015) ("A statement is defamatory if it tends to harm the reputation of another either by lowering the esteem in which he is held or by discouraging others from associating with him. Because for-profit corporations have 'business reputation[s],' they too can be defamed." (internal citation omitted)).

31. *See, e.g.*, Basile Baumann Prost Cole & Assocs., Inc. v. BBP & Assocs. LLC, No. CIV. WDQ-11-2478, 2012 WL 3115867, at *5 (D. Md. July 25, 2012) (allowing expert testimony about the value of goodwill).

32. *See, e.g.*, *In re* Gaylord Container Corp. S'holders Litig., 747 A.2d 71, 80 (Del. Ch. 1999) ("Therefore, why should damages be awarded to the enterprise to remedy the economic harm caused because its owners were not permitted to sell their personal property? The mere fact that such an injury is to the economic property rights of all the stockholders rather than to their voting rights does not make the injury suffered any less 'special' and non-corporate." (citation omitted)).

33. *See generally* Kurt M. Heyman & Patricia L. Enerio, *The Disappearing Distinction Between Derivative and Direct Actions*, 4 Del. L. Rev. 155, 156 (2001) ("A classic 'direct' claim is a claim for breach of

This includes challenges to poison pills as well as charter and bylaw amendments.[34] Shareholder claims for dilution are non-corporate,[35] as are claims for interference with a shareholder's right to vote or receive information,[36] and shareholder claims for breach of contracts of which they are named, individual parties.[37]

II. Corporate Injury Is "Essential" to Corporate Personality

While the nature of corporate personality has long been analyzed and contested,[38] the role of corporate injury has attracted virtually no attention. This is puzzling, because the concept of corporate injury largely determines one of

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the fiduciary duty of disclosure, which affects the stockholders directly by impairing their ability to cast an informed vote on corporate matters, but does not affect the corporation itself (which, of course, does not vote on corporate matters).").

34. *See, e.g.*, *Gaylord Container Corp.*, 747 A.2d at 84 (challenges to poison pill and charter and bylaw amendments were direct claims because injury "is to the stockholders within the corporate structure that have lost relative power, not to the corporation as an entity"); Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1189 (Del. Ch. 1998) (challenge to dead hand poison pill is direct). For the same reason, the mere fact of so-called "empty voting" does not seem to be a corporate injury, though it could lead to harms to the corporation that, separately, would constitute corporate injury. *See generally* Jordan M. Barry, John William Hatfield & Scott Duke Kominers, *On Derivatives Markets and Social Welfare: A Theory of Empty Voting and Hidden Ownership*, 99 Va. L. Rev. 1103 (2013); Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. Pa. L. Rev. 625 (2008); Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. Cal. L. Rev. 811 (2006); Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. Ill. L. Rev. 775.

35. *See, e.g.*, *In re* Tri-Star Pictures, Inc., Litig., 634 A.2d 319 (Del. 1993).

36. *See, e.g.*, *In re* J.P. Morgan Chase & Co. S'holder Litig., 906 A.2d 766, 772 (Del. 2006) (duty of disclosure violation was direct harm to shareholders); *In re* Tyson Foods, Inc. Consolidated S'holder Litig., 919 A.2d 563, 601–02 (Del. Ch. 2007) (denial of the right to a fully informed vote is a direct harm); *see also* Thompson's Point, Inc. v. Safe Harbor Dev. Corp., 862 F. Supp. 594, 599 (D.N.C. 1994); Hacienda Corp. v. White, 400 S.E.2d 323, 325 (Ga. 1991).

37. *See, e.g.*, *In re* Enron Corp., 292 B.R. 507, 511 (S.D.N.Y. 2002) ("As a matter of law, a right of action for injury to the property of a corporation or for destruction of its business is vested in the corporation, not a shareholder, even though the harm may result in loss of earnings to the shareholder. Thus, a corporate shareholder has no individual right of action for personal damages caused solely by a wrong done to the corporation. Nevertheless, Texas makes an exception to this general rule: a corporate shareholder may have an action for personal damages where the wrongdoer violates a duty arising from contract or otherwise and owing directly by him to the stockholder." (internal citations and quotation marks omitted)).

38. It may not be overstatement to say it is an example of an "essentially contested concept" as analyzed by Walter Bryce Gallie, *Essentially Contested Concepts*, 56 Proc. Aristotelian Soc'y 167, 169 (1956); *cf.* Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057, 1080 (1975) ("It is important to see, however, that the conventions run out in a particular way. They are not incomplete, like a book whose last page is missing, but abstract, so that their full force can be captured in a concept that admits of different conceptions; that is, in a contested concept."); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 7 (1997) ("The Rule of Law is what some philosophers have called an 'essentially contestable concept': it has evaluative as well as descriptive elements, and its correct application cannot be fixed simply by appeal to ordinary usage."). Alternatively, we can think of the idea of the corporation as an "incompletely theorized agreement" in the sense that Professor Sunstein has explained, where we can agree on much about a corporation without necessarily reaching agreement on all the particulars. *See* Cass R. Sunstein, Legal Reasoning and Political Conflict (1996).

the most important features of corporate life: when does the corporation, rather than another legal entity, have standing to pursue a harm in court?

A. Corporate Injury and Standing

Most all injuries to corporate assets and profits impact others as well.[39] As a result, questions requiring the delineation of a corporate injury usually arise in determining legal standing. By defining an injury to be "corporate," the law decides that it is the corporation that is adverse to the wrongdoer, and therefore the one that should be litigating the claim to redress the wrong.[40] Interestingly, the pass-through nature of the corporation—the reality that injuries to the corporation generally injure others as well—means that the standing questions involving corporate harm are generally prudential ones, not constitutional ones. Those impacted by corporate injuries typically have injuries-in-fact sufficient to meet the constitutional minimums where those are required.[41] But while injured, those who try to sue for injuries are not the "right" persons to bring the claim and, as a result, they bump up against prudential requirements.[42] Thus, corporate standing, somewhat like antitrust standing, is largely a judicial doctrine and not a minimum constitutional requirement.[43] For this reason, defendants can sometimes (typically inadvertently) waive standing deficiencies.[44] In any event, claims that are "derivative" of the corporate injury belong to the corporation and shareholders can pursue them only on its behalf; claims that are "direct" belong to shareholders or creditors or others. Under Delaware's *Tooley* test to distinguish the two, a shareholder has a direct claim only if she, and not the cor-

39. *See, e.g.*, Starr Int'l Co. v. United States, 856 F.3d 953, 970 (Fed. Cir. 2017) ("In sum, while we have no reason to doubt that Starr was affected by the Government's acquisition of AIG equity, Starr has not established any ground for direct standing under either federal or Delaware law. The alleged injuries to Starr are merely incidental to injuries to AIG, and any remedy would go to AIG, not Starr.").

40. Thus, corporate injuries are an exception to the general observation that "[t]here certainly are questions in tort law about whether a particular injury constitutes a violation of the injured person's legal rights, but there is usually no dispute about whose rights have been violated if it is agreed that a violation has indeed occurred." James Y. Stern, *The Essential Structure of Property Law*, 115 Mich. L. Rev. 1167, 1192 (2017).

41. The requirements of Article III standing, for example, are well known: "(1) [the plaintiff] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

42. *See, e.g.*, *Starr Int'l Co.*, 856 F.3d at 970 ("As we have already explained, though, Starr must also satisfy [the] principle of third-party standing, not just the minimum constitutional requirements.").

43. *Cf.* Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 232 n.17 (3d Cir. 2013) ("[A]ntitrust standing is based on prudential principles.").

44. *See* Cohen v. CASSM Realty Corp., 54 Misc. 3d 256, 279 (N.Y. Sup. Ct. 2016) ("Although an individual shareholder lacks standing to recover for injuries to the corporation, defendants waived any lack of standing by plaintiff when their answer omitted that affirmative defense.").

poration, suffered the alleged injury and she, and not the corporation, would receive the recovery.[45]

B. The Functions of Corporate Injury

What explains the traditional characterization of injuries as "corporate" when the injuries are to corporate assets or profits, but not otherwise? Corporations are creations of law[46] that, by their nature, are associations of other natural or legal persons, so that every injury to a corporation has a pass-through quality; every corporate injury is traceable to a financial impact on some or all of those who have associated themselves for corporate purposes.[47] Corporate law scholarship identifies a key role—perhaps the only "essential" role—of corporate law as allowing for the partitioning or locking in of assets for use in a business.[48] The

45. Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc) (whether a shareholder's claim is derivative or direct depends on: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"). *Tooley*'s standard is increasingly cited with approval as the issue makes its way up to the supreme courts of the various states. Parametric Sound Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark, 401 P.3d 1100, 1102 (Nev. 2017) ("We thus take this opportunity to clarify *Cohen* and distinguish between direct and derivative claims by adopting the direct harm test, as articulated in [*Tooley*], which allows a direct claim when shareholder injury is independent from corporate injury."); Keller v. Estate of McRedmond, 495 S.W.3d 852, 877 (Tenn. 2016).

46. For histories of the evolution of the concept of the corporation, see William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 Stan. L. Rev. 1471 (1989); David Millon, *Theories of the Corporation*, 1990 Duke L.J. 201; Eric W. Orts, Business Persons: A Legal Theory of the Firm (2013).

47. *Cf.* Scholes v. Lehman, 56 F.3d 750, 754 (7th Cir. 1995) ("[A]nything that helps a corporation helps those who have claims against its assets."). The converse is true as well.

48. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387, 392 (2003) (stressing "the role that incorporation played in establishing a pool of assets that was not subject to being liquidated or dissolved by any of the individual participants who might want to recover their investment"); Henry Hansmann & Reiner Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 390 (2000) ("In essence, we argue that the essential role of all forms of organizational law is to provide for the creation of a pattern of creditors' rights—a form of 'asset partitioning'—that could not practicably be established otherwise. One aspect of this asset partitioning is the delimitation of the extent to which creditors of an entity can have recourse against the personal assets of the owners or other beneficiaries of the entity. But this function of organizational law—which includes the limited liability that is a familiar characteristic of most corporate entities—is, we argue, of distinctly secondary importance. The truly essential aspect of asset partitioning is, in effect, the reverse of limited liability—namely, the shielding of the assets of the entity from claims of the creditors of the entity's owners or managers. This means that organizational law is much more important as property law than as contract law."); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333, 1337 (2006) ("Special legal rules, which we term rules of asset partitioning, are required to determine which entities bond which contracts, and which assets belong to which entities. Often, the asset partitioning between entities is complete: the creditors of one entity may not levy on assets held by another."); Larry E. Ribstein, *The Uncorporation and Corporate Indeterminacy*, 2009 U. Ill. L. Rev. 131, 137–38 ("Managers' power is a function of what Hansmann and Kraakman have called 'affirmative asset partitioning,' which separates the owners' assets from the firm's. While this feature inheres in firms generally, corporations have the unique characteristic of capital lock-in, or liquidation protection. This insulates corporate assets and, more importantly, managers' power from the owners' ability to force liquidation. Some scholars argue that this feature has enabled the modern firm."); Edward B. Rock & Michael L. Wachter, *Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression*

ability to cordon off a set of assets and then build value within that partition is what, in this view, gives rise to corporate personality. I argue below that, without the concept of corporate injury, it would be impossible to (1) protect the going concern value of the corporation; (2) maintain creditor priority; and (3) contract through the corporate form. That is, it would be impossible to maintain the benefits of asset partitioning and locking in capital, the essential aspects of corporate law.[49]

C. Corporate Injury Protects Going Concern Value

Crucial to the going-concern nature of the business organized through incorporation is its ability to keep control of the assets necessary for its ongoing business. Without the concept of corporate injury, however, *a de facto* exception would exist to such limitations any time there was an actionable injury to corporate assets. Suppose, in particular, that each individual corporate claimant must sue for injuries that pass through to him through the corporate form. Successful recovery for those injuries would put money in the corporate claimants' pockets in the form of a damages award. This result would create serious problems for maintaining the going concern value of the corporation. After all, the injury might have occurred because, for example, a negligent third party caused an explosion in the company's manufacturing plant that is an indispensable requirement for maintaining the firm's going concern value. To maintain the going concern value of the corporation, it would be necessary (in the absence of additional financing) that the corporate claimants grant back to the corporation the awarded compensation that they received in their actions.

Without an enforceable commitment to return court-awarded compensation to the corporation, the process of restoring the going concern value of the corporation could lead to serious *ex post* hold up problems or lead to premature liquidation of an otherwise valuable going concern. This result could happen especially where individual claimants would face a difficult bargaining problem over and over again in recommitting capital to the viable corporate enterprise. True,

in Close Corporations, 24 J. Corp. L. 913, 920 (1999) ("[T]he lock-in of the corporate form is important to creditors. In a setting of limited liability, creditors cannot be repaid from the individual wealth of the owners of a bankrupt company. In return, and in distinction to the rules of partnership, they are protected by the existence of an entity that is difficult to dissolve by the current owners. It is only with this protection that the squabbles among those who manage the company will be of limited interest to the creditors."); Lynn A. Stout, *The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 Seattle U. L. Rev. 685, 688 (2015) ("Put simply, once you use your money to purchase stock in a company, your money becomes the company's money. You have no legal power to demand it back."); Lynn A. Stout, *On the Nature of Corporations*, 2005 U. Ill. L. Rev. 253, 253 ("An emerging school has begun to explore the implications of this idea for corporate law and practice. The idea is still novel enough to lack a uniformly accepted label—in addition to the phrase 'capital lock-in,' theorists have described this aspect of incorporation as 'affirmative asset partitioning,' 'the absence of a repurchase condition,' and 'asset separation from shareholders.' Whatever label one chooses, the idea shows great promise for illuminating a variety of thorny problems that have long troubled corporate scholars and practitioners.").

49. I developed some of these ideas earlier in a similar but more particularized context. *See* Heaton, *supra* note 14.

all corporate claimants could contract with each other to return recovered assets to the corporation, but, in the absence of corporate injury, only other individual corporate claimants could sue reneging corporate claimants for failing to make the required re-contribution. Once reneging corporate claimants had the assets, could they be relied on to return them to be used by the corporation, or would other corporate claimants be right back where they started from, forced to sue the new owners of the assets for the return of those assets to use in the corporation's business?

Requiring corporations to recover for injury to assets and profits solves this problem. The going concern value of the corporation derives from its assets, including, of course, its reputation and its rights (to the extent they exist) in its relationships with employees, customers, and suppliers. Injuries to interests that do not affect the going concern value of the corporation are unlikely to satisfy this rationale, and those interests are likely going to be those that are unconnected to declines in the value of corporate assets. Similarly, to the extent that an interest is affected that does not impact the going concern value of the corporation, the injury is unlikely to be corporate in nature. This helps explain why injuries to interests that never were vital to the corporation's going concern value, for example, the protection of shareholders and creditors from the corporation's fraud or nondisclosure, are not traditional corporate injuries.

Rules against withdrawal of corporate assets prevent corporate claimants from effecting premature liquidation of the corporation's assets. Corporate injury extends this protection to situations where those assets have been wrongfully removed from the corporation or otherwise destroyed. Corporate injury requires that third-party wrongdoers give assets (or their value in remedy) back to the corporation, and not to the corporate claimant. Note also that if this explanation is true, it falls aside when the debtor corporation has been liquidated.

D. Corporate Injury Maintains Creditor Priority

To the extent that debt financing is attractive for a firm, and it often is,[50] it is necessary to establish a system of creditor priority. "Debt financing" refers not just to borrower-lender agreements, but more broadly to any transaction or event where a firm delays payment for services, goods, or even tort liabilities inflicted on other persons. Thus, if a firm lacks meaningful debt capacity, it lacks the ability to bond itself to asset-dependent future performance of any type, con-

50. The standard view in financial economics is that the agency and tax benefits of debt are traded off against potential costs of financial distress. Professor Jensen famously identifies the role that debt can play in controlling the agency costs of free cash flow and disciplining managers. Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance and Takeovers*, 76 Am. Econ. Rev. 323 (1986). As for tax benefits, Professor Ross observed "[s]ince debt payments are excluded from income in computing corporate income tax, the value of the firm should increase with the substitution of debt for equity financing. Unless, however, there are offsetting costs, this has the awkward implication that the firm should be wholly debt financed." Stephen Ross, *The Determination of Financial Structure: The Incentive-Signaling Approach*, 8 Bell J. Econ. 23, 24 (1977). Both Jensen and Ross recognize that full debt financing likely would not qualify for the same tax treatment.

tractually and in tort. At a minimum, debt capacity requires that even *pari passu* creditors be able to obtain the corporation's assets in payment of their debt before shareholders can remove assets from the firm, and also that creditors can have a reasonable expectation of fair treatment when the firm is insolvent.[51] Allowing individual creditor and shareholder lawsuits for corporate injuries could destroy creditor priority. Individual suits by shareholders or creditors might exhaust the assets of a wrongdoer who injured the assets otherwise intended to generate returns to repay debt.[52] This risk is particularly severe if individual claimants are allowed to seek punitive damages against wrongdoers to the corporation's interests.[53]

E. Corporate Injury Facilitates Corporate Contracting

The corporation would be of little use as a method for organizing business if it was impossible to contract through the corporate form. Suppose, however, that when one of the corporation's contractual counterparties breached the contract, the injury was only actionable through individual shareholder lawsuits. This would limit the incentive of potential counterparties to enter contracts in the first place. Potential contractual counterparties (e.g., suppliers to the corporation) would face the prospect of numerous individual lawsuits by the corporation's stockholders and creditors.[54] Worse, there is little reason to believe that the corporation's individual claimants would agree on the existence of breach

51. As Judge Easterbrook once put it: "Recovery by the firm, followed by division according to entitlements, is especially important when the firm has landed in bankruptcy. Suits by shareholders, guarantors, and the like may well be efforts to divert the debtor's assets to pay off one set of creditors . . . while keeping the proceeds out of the hands of the firm's other creditors." Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chi., 877 F.2d 1333, 1336 (7th Cir. 1989).

52. *See, e.g.*, Nicholson v. Ash, 800 P.2d 1352, 1356 (Col. Ct. App. 1990) ("Finally, by requiring the suit to be maintained for the corporation's benefit, any proceeds resulting from the litigation will be treated as corporate assets and available to satisfy both creditors' and other stockholders' claims."); Simmons v. Miller, 544 S.E.2d 666, 674 (Va. 2001) (stating one reason for requiring corporation to bring lawsuits for its injuries is "it protects corporate creditors by putting the proceeds of the recovery back in the corporation").

53. *See, e.g.*, Manson v. Stacescu, 11 F.3d 1127, 1132 (2d Cir. 1993) (requiring derivative standing for a corporation's looting claim prevents some claimants from diverting the corporation's assets from other creditors whose claims have priority. "This is a particularly important concern in the context of a RICO action brought by a shareholder, where a treble damage award under RICO would impair the rights of prior claimants to the corporation's assets." (citations omitted)).

54. *See, e.g.*, Citibank, N.A. v. Data Lease Fin. Corp., 828 F.2d 686, 692–93 (11th Cir. 1987) ("A more difficult issue is whether Data Lease has a direct cause of action against members of the Miami National board of directors. It is an established rule that whenever a plaintiff sues in a stockholder capacity for corporate mismanagement, he must bring the suit derivatively in the name of the corporation. The reason for this rule is that each shareholder suffers relatively in proportion to the number of shares he owns and each will be made whole if the corporation obtains compensation or restitution from the wrongdoer. If each shareholder could sue individually for his losses, the wrongdoer would be subject to as many suits. . . as there were stockholders in the corporation." (citations omitted)); *Nicholson*, 800 P.2d at 1356 ("In addition, however, the rule requiring that such a claim be pursued on behalf of the corporation and for its benefit prevents a multiplicity of suits by the various stockholders and assures that the corporation will be bound by the result of the litigation."); *Simmons*, 544 S.E.2d at 674 (One reason for requiring corporation to bring lawsuits for its injuries is "it prevents a multiplicity of lawsuits by shareholders.").

and injury, and the doctrines of claim preclusion and issue preclusion would wreak havoc on inconsistent efforts to obtain relief for the corporation.[55] Moreover, even the tiniest injuries best left unlitigated might precipitate costly lawsuits by at least some corporate claimants.[56]

Facing the prospects of such lawsuits, it is not difficult to imagine that many potential contractual counterparties would choose not to contract with a corporation. In addition, the presence or absence of particularly litigious corporate claimants among the corporation's shareholders or creditors would necessarily affect the willingness of counterparties to contract with the corporation. This would both increase investigation costs for potential counterparties (who would want to know whether the corporation had claimants likely to sue at the drop of a hat) and would probably lead to voluntary but costly restrictions on alienability of corporate interests in the interest of avoiding the presence of such litigious parties among the corporation's claimants. Requiring corporations to recover for injury to assets and profits solves this problem. Corporate injury cabins the set of interests that may suffer injury from conduct by the corporation's counterparty, allowing a third party considerable comfort in contracting with the corporation.[57]

Allowing corporations to recover for contractual breaches that injure assets and profits brings another benefit to shareholders and creditors. The concept of corporate injury allows the corporation to consolidate litigation on behalf of affected corporate claimants in a way that helps those claimants achieve litigation

55. *See, e.g.*, Paramount Pictures Corp. v. Allianz Risk Transfer AG, No. 16, 2018 WL 942329, at *4 (N.Y. Feb. 20, 2018) ("The preclusive effect of a judgment is determined by two related but distinct concepts—issue preclusion and claim preclusion—which collectively comprise the doctrine of res judicata . . . . Issue preclusion, also known as collateral estoppel, bars the relitigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment. As a result, the determination of an essential issue is binding in a subsequent action, even if it recurs in the context of a different claim. While issue preclusion applies only to issues actually litigated, claim preclusion (sometimes used interchangeably with 'res judicata') more broadly bars the parties or their privies from relitigating issues that were or could have been raised in that action. The doctrine encompasses the law of merger and bar—it precludes the relitigation of all claims falling within the scope of the judgment, regardless of whether or not those claims were in fact litigated. As such, claim preclusion serves to bar not only every matter which was offered and received to sustain or defeat the claim or demand, but also any other admissible matter which might have been offered for that purpose. In other words, claim preclusion may foreclose litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." (internal citations and quotations omitted)).

56. Minor breaches that individual counterparties often overlook in the interests of longer term contractual gains might be sued upon by individual claimants with less interest in capturing such gains or, more likely, with insufficient information to recognize their existence. Further, the amount of injury would generally differ depending on the claimants' placement in the capital structure. Determining the existence of an injury could be especially difficult near insolvency when it becomes hard to determine who the residual claimant is. *See generally* Lynn M. LoPucki, *The Myth of the Residual Owner: An Empirical Study*, 82 WASH. U. L.Q. 1341 (2004) (providing evidence on the difficulty of determining the identity of a corporation's true residual claimant in bankruptcy).

57. The extent of this comfort may often be minimal, especially for professionals like auditors, with the decline of the privity concept. *See, e.g.*, Greycas, Inc. v. Proud, 826 F.2d 1560, 1564 (7th Cir. 1987) (discussing the decline of the privity limitation); John A. Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929, 1930 (1988) (stating that tort reform has contributed to the decline of the privity limitation).

economies of scale. Litigation costs typically increase slower than linearly in the number of similar claims because certain costs (lawyers, experts, etc.) do not rise one-for-one with the number of claims. Therefore, corporations have economies of scale in pursuing a single source of injury to its assets or profits.

The concept of corporate injury also reduces the costs of detecting injuries to corporate assets and profits. The corporation's directors and officers are probably in the best position to detect injuries to corporate assets and profits. For that reason, it makes sense for shareholders, creditors, employees, etc. to delegate to the corporation's officers and directors the task of monitoring harm to corporate assets and profits.[58]

Economies of scale in litigation have another desirable effect as well. Aggregating claims increases the corporation's "trial threat." That is, because the corporation finds it cheaper to take a case to trial (relative to the total value of its claim) than would an individual corporate claimant, its reservation price to settle a case (that is, the minimum amount that a party injuring the corporation must pay to settle the case) is higher. This may act as a deterrent against contractual counterparties inflicting injuries on the firm's assets and profits, because potential wrongdoers must consider the possibility that a corporation is likely to require higher settlement offers than individual claimants.[59]

III. Corporate Injury and Corporate Constitutional Rights

Few things have challenged our understanding of corporate personality like the expanding jurisprudence of the U.S. Supreme Court regarding the constitutional rights of corporations. In *Citizens United*,[60] a case involving a nonprofit corporation, the Court held that the government could not, under the First Amendment, suppress political speech simply because the speaker was a corporation.[61] In *Hobby Lobby*,[62] the Court did not recognize an explicit corporate right to the free exercise of religion, but it did hold that certain regulations requiring corporations to provide health-insurance coverage for methods of contraception in contradiction to the religious beliefs of the companies' owners substantially burdened the owners' exercise of religion without being the least restrictive means of serving a compelling government interest.[63]

58. That said, however, while reduction of monitoring costs can explain why the role of detecting corporate harm is delegated to the corporation's directors and officers, it would not necessarily, without more, explain why enforcement is not still delegated to individual claimants.

59. *See generally* J.B. Heaton, *Settlement Pressure*, 25 Int'l Rev. L. & Econ. 264 (2005). Note, however, that this justification for corporate injury is seemingly redundant to the class action device, which might also provide for collective litigation (and resulting economies of scale) in a world without corporate injury. Corporate injury is probably superior to the class action device, however. First, the concept of corporate injury puts the burden on corporate officers and directors to pursue litigation that otherwise might require a costly payment to class action lawyers to organize the class. Second, the concept of corporate injury prevents opt-outs, which would raise the possibility of multiple claimants analyzed above.

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

61. *Id.* at 336–65.

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

63. *Id.* at 2758–59.

To say the decisions in *Citizens United* and *Hobby Lobby* have been unpopular with corporate law scholars would be an understatement.[64] Scholars have asserted that one or both of the decisions (1) are based on "an inherently flawed conceptualization of corporations,"[65] (2) rest on inconsistent understandings of corporate theory,[66] and (3) will wreak havoc on the relationship between state and federal law.[67]

But are these decisions as at odds with modern corporate theory as they at first seem? More to the point, is the essence of the corporation the partitioning or locking in of assets only, or is the essence potentially broader? There is no obvious reason why corporate personality, once created by law to facilitate asset partitioning, must be limited only to partitions of money. Perhaps the corporation can partition ideas and virtues as well. For example, Professors Margaret Blair and Elizabeth Pollman suggest that "[i]f the Court is going to recognize a corporate right, it should be able to identify the specific group of natural persons from whom the corporate right is derived."[68] This contention aligns well with the Court's approach in *Hobby Lobby*.[69] Further, they argue that "the natural persons said to be represented by the corporation must have associated for purposes related to the rights at issue in the case."[70] That assertion is not so different from saying that the Court should determine what beliefs and virtues the corporation's founders or their successors placed into the corporate partition. Following this approach in *Hobby Lobby*, the Court would have considered whether the founders of the company intended to partition religious beliefs into the corporation at the outset. Elsewhere, Professor Pollman suggests "the need for the Court to better understand the diversity of corporations in existence and the need for line drawing between corporations in rights determinations. The Court's own derivative rights logic does not support granting protections to all corporations."[71] It seems a small step to recognize that some corporation founders

64. There are some defenders. *See, e.g.*, Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 Iowa L. Rev. 499, 503 (2016) ("[T]he Court holds that corporations can exercise a given right otherwise attributable to natural persons if denying it would penalize entrepreneurs' decision to integrate productive activity into an incorporated entity.").

65. Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 Case W. Res. L. Rev. 497, 550 (2010).

66. Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. Ill. L. Rev. 785, 820; Martin Petrin, *Reconceptualizing the Theory of the Firm from Nature to Function*, 118 Penn St. L. Rev. 1, 17 (2013).

67. Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 Vand. L. Rev. 639, 692 (2016).

68. Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 Wm. & Mary L. Rev. 1673, 1679–80 (2015).

69. Likewise, in *Citizens United*, the majority ruled that the freedom of the press clause of the First Amendment (1) protects associations of individuals in addition to individual speakers and (2) does not allow prohibitions of speech based on the identity of the speaker. Thus, corporations, as associations of individuals, have free speech rights under the First Amendment. Because spending money is essential to disseminating speech, limiting a corporation's ability to spend money was unconstitutional because it limits the ability of its members to associate effectively and to speak on political issues. Like in *Hobby Lobby*, the Court derived the corporation's rights from its owners.

70. *See supra* note 68.

71. Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DePaul L. Rev. 597, 634 (2016).

may lock in more than assets, and that having done so, their choices should be respected subject to the rules of the game for changing them.[72] But, to Professor Pollman's point, one may not simply assume (certainly with respect to religious beliefs) that the particular corporation has those beliefs.

Such "corporatized" beliefs and virtues, like assets, could be considered as shielded from the changes that legally distinct shareholders and creditors might otherwise want to make. It is at least plausible that a corporation might be an efficient and competent mechanism for advancing beliefs and virtues (witness the efficacy of many long-lived charitable entities), and that corporate promotors and their successors might find a market for commitment of resources to that effort, resources that include beliefs and virtues that make sense to "partition" and protect like assets. As the Court stated in *Citizens United*, "Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials."[73]

The Court's decision in *Hobby Lobby* describes companies that appear to have been imbued with values and belief systems as much as with assets. The Court describes one set of shareholders as believing "that they are required to run their business in accordance with their religious beliefs and moral principles. To that end, the company's mission, as they see it, is to operate in a professional environment founded upon the highest ethical, moral, and Christian principles.[74] The shareholders run businesses that (1) "refuse to engage in profitable transactions that facilitate or promote alcohol use; (2) contribute profits to Christian missionaries and ministries; and (3) buy hundreds of full-page newspaper ads inviting people to know Jesus as Lord and Savior."[75] And while the Court in *Hobby Lobby* expressly declined to address "publicly traded corporations," even asserting that "it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims,"[76] there is little reason to doubt that shareholders could not agree on such or similar things even in a very large public corporation.

Shareholders who seek to partition a set of beliefs in their corporation have a similar interest as analyzed above in defining injury to its ability to implement those beliefs to be corporate. If each individual corporate claimant must sue for injuries that pass through to him through the corporate form, then the ability to create a corporation embodying such beliefs would be frustrated. A recovery to any given corporate stakeholder would not help the corporation. This result, as analyzed in Part II, would create serious problems for maintaining the going-concern value of the belief-partitioning corporation. To maintain the going-

72. Importantly, however, this is not the case in *Hobby Lobby*. There, the owners did not argue that they locked in their beliefs, but rather that their personal rights as owners were violated. Here, we raise the possibility that a corporation's founders could create a "Christian" corporation, with religious views separate and apart from those of their owners, much as charitable organizations are set up to pursue specified charitable purposes.

73. *Citizens United*, 558 U.S. at 365.

74. *Hobby Lobby*, 134 S. Ct. at 2764 (internal citations and quotations omitted).

75. *Id.* at 2766 (internal quotations omitted).

76. *Id.*

concern value of that part of the corporate reason for existence, it would be necessary that the corporate claimants grant back to the corporation the awarded compensation they received in their actions. But that is likely impossible for injunctive relief that may be quite important in remedying injury to non-monetary values and beliefs in the corporation. As above, this also could result in an ex post bargaining problem among shareholders who might change their minds about what the belief partition should contain but be otherwise unable to change the corporate direction.[77] Allowing corporations to recover for injury to the partitioned beliefs and virtues solves this problem in essentially the same way as requiring it for injury to corporate assets. Protecting a corporation's rights of expression and belief also allows the corporation to enter contracts with like-minded consumers who value those expressions and beliefs. And, of course, matters can be different for entities set up under laws designed to allow for goals other than pure shareholder-wealth maximization.[78]

The main objection to this view seems to be that the partitioning of beliefs easily could result in a corporation being owned by shareholders, none of whom actually share the "belief" of the corporation. Professor Sepper cleverly calls these "zombie religious institutions," institutions that were founded by religious believers who are no longer associated with the enterprise.[79] I take this objection seriously, but I suspect it tells us more about differing conceptions of what a corporation "is" than it does about the suitability of the "lock in" or "asset partitioning theory to the problem of corporate constitutional rights. For example, Professor Sepper appears to adopt the largely abandoned or always-criticized (at least among legal scholars) "nexus of contracts" view of the corporation that grew up among financial economists in the 1970s.[80] In that view, there is no separate corporate personality of any substance, merely a fiction that represents explicit and implicit agreements among stakeholders.[81] But that is not the view of modern corporate theory, and probably never captured enough of what a corporation is legally *and* economically. And the transferability of corporate shares

77. Of course, changing the partitioned beliefs would presumably be possible through amendment of the corporation's bylaws.

78. *See generally* Jacob E. Hasler, *Contracting for Good: How Benefit Corporations Empower Investors and Redefine Shareholder Value*, 100 VA. L. REV. 1279 (2014); Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 102 (2010) ("Not only might an organizational form designed specifically for for-profit social enterprise have advantages in comparison to nonprofit social enterprise, but there may also be additional advantages to society. The mere existence of the form, complete with an implicit state endorsement, could attract founders who might otherwise form a conventional for-profit business."); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007 (2013).

79. Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929 (2018).

80. *Id.* at 931. To be fair, Professor Sepper is a prominent health law scholar, not a corporate specialist. My point is merely that one's view of the corporation can easily drive one's view of her religious zombies.

81. As Professor Sepper notes, the classic reference is Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structures*, 3 J. FIN. ECON. 305, 311 (1976) (the corporation is a "nexus of contracts").

has (almost) always been a hallmark of the corporate form.[82] We never expect any given shareholder—especially shareholders of publicly traded corporation—to agree with all aspects of the corporate policies of the firm in which she owns shares. While portioned corporate beliefs may complicate the ownership decision for some shareholders, this is no different from decisions already necessary (or ignored) about whether to own "sin" stocks of firms that sell tobacco or alcohol or, depending on one's views, firearms or obesity-associated foods.

In the end, the objection that a given corporation's shareholders may not agree with the partitioned belief systems seems weak as an argument against protecting those beliefs. This is not to say we must protect such beliefs. We can always draw a line that says that corporations are for assets and profits only. But that line is nothing more than a statement about the limits of corporate personality. It need not, and should not, depend on an arbitrary connection to shareholder beliefs we do not require in other aspects of corporate law.

Conclusion

Corporate personality remains a fascinating problem. Here, I offer the suggestion that corporate injury can shed some light on it. The law chooses what are corporate injuries to facilitate the functions of the corporation. That, at least, is consistent with traditional corporate injuries and the dominant view of what a corporation is from a legal perspective: a separation of assets from claims by and against the corporation's shareholders. Traditional corporate injuries tend to be injuries to assets and profits: waste, looting, embezzlement, and the effects of gross mismanagement, overpaying for assets, selling assets for too little, lost profits (including price erosion and increased costs), and the destruction or impairment of income-producing assets. Without these corporate injuries, most of what we think is "essential" about a corporation would be impossible: (1) protecting the going concern value of a corporation; (2) maintaining creditor priority; and (3) contracting through the corporate form.

Moreover, the perspective of corporate injury suggests that we might better understand (or at least better tolerate) recent developments in corporate constitutional rights not by throwing out our successful theories of corporate personality, but by relying on them more heavily. Corporations can "lock in" and "partition" more than assets; they can lock in and partition beliefs and virtues as well. Viewed as such, existing corporate theory (and the idea of corporate injury to what is partitioned by the corporate form) may provide more help in understanding corporate constitutional rights than previously recognized. The Court has not yet explicitly said that a corporation can lock in religious beliefs, and to date the cases depend on the corporation's current owners. That may change. Both *Citizens United* and *Hobby Lobby* were cases brought in the names of the respective corporations, and given the law's strict adherence to the separation of

82. *See generally* John Armour, Henry Hansmann & Reiner Kraakman, *What Is Corporate Law?*, *in* Reiner Kraakman et al., The Anatomy of Corporate Law 1 (3d ed. 2017).

the corporation from its owners in other matters, we may soon find ourselves living in a world with corporations that—regardless of their current ownership—enjoy rights to political speech and the exercise of religious views that rest on a purely legal creation and not the views of any current shareholders. To argue otherwise is to confront a vast legal framework of corporate personhood and rights that may now be too well-developed to limit outcomes merely because they violate common-sense intuitions.