ARCHEOLOGY, LANGUAGE, AND NATURE OF BUSINESS CORPORATIONS

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INTRODUCTION

The question *what is a legal person?* has received almost as many answers as *what is a human*?[1] In an era where legal persons hold wealth and power comparable to those of nation states, shedding light on their nature and mechanics as well as on fundamental questions about their rights is crucial for defining the relations between legal persons and human beings.

Corporations have existed as separate legal entities for millennia.[2] Travelling in time to when the first corporations were created helps us understand the inherent structure of current corporations.

The first corporations were not business companies but rather cities and towns.[3] These were the city of Rome and the

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[1] ROLF SERICK, FORMA E REALTÀ DELLA PERSONA GIURIDICA 83 (1966).

[2] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *468-69 (arguing that Numa Pompilius invented legal personhood for nonhumans).

[3] *See, e.g.*, PATRICK WILLIAM DUFF, PERSONALITY IN ROMAN PRIVATE LAW 62 (1938) ("If the State is the greatest of Persons and the dispenser of Personality, it is the city which is the most important unit in the history of Roman corporations."); RICCARDO ORESTANO, IL PROBLEMA DELLE PERSONE GIURIDICHE IN DIRITTO ROMANO (1968).

towns over which it had sovereignty.[4] The Romans were the first to decide that nonhuman entities could have capacity of action, proprietary capacity, and tortious capacity.[5] Roman towns and cities could contract, sue, be sued, own assets, bear liabilities, and commit and suffer torts in their own names.[6] They could act on the same footing as individuals while remaining distinct from them.[7] Thus, assets, rights, duties, liabilities, obligations, and the very existence of towns and cities were perfectly separate from those of their citizens. These nonhuman legal entities could exist and bear their rights and liabilities in perpetuity.[8] This is how the Romans made the Eternal City eternal.[9]

Unlike natural persons, who bore many rights and duties through natural law, and unlike contemporary corporations, which originate from the action of private parties, Roman corporations were created through political action. The Romans originally invented legal capacity for cities and towns and extended its application to other nonhuman entities whenever the state had an interest in making them rights-and-liabilities-bearing subjects. This is how the Romans invented corporations, which they dubbed *universitates*.[10]

Derived from the Latin "*in unum vertere*," which translates to "to turn a multitude into one," *universitas*, in contemporary language, would translate to corporation or legal person—and these terms are used interchangeably throughout this Article. However, the Romans never defined legal capacity for nonhuman entities as "legal personality" or "legal personhood," nor did they define nonhuman legal entities as "legal persons.".

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[4] *See infra* Part I.

[5] *See infra* Part I(c). For a discussion on Romans' "experience" with legal entities, *see* RICCARDO ORESTANO, *supra* note 3, at 79-81; ANTONIO GUARINO, DIRITTO PRIVATO ROMANO 206-10 (1963).

[6] *See* CARLO EMANUELE PUPO, LA PERSONA GIURIDICA 82-89 (2012), for further discussion on the importance of the use of names to identify legal persons.

[7] *See* 1 BLACKSTONE, *supra* note 2, at *467-69; *see generally* PUPO, *supra* note 6.

[8] *See infra,* Part I.

[9] *See Historic Centre of Rome, the Properties of the Holy See in that City Enjoying Extraterritorial Rights and San Paolo Fuori le Mura*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, https://whc.unesco.org/en/list/91 [https://perma.cc/KLZ8-M9CT].

[10] *See* BLACKSTONE, *supra* note 2, at *469. The singular is *universitas*.

The Romans never adopted the lexicon of personality for nonhuman entities because the Latin word "person" carried specific connotations predicated exclusively on individuals by virtue of their human nature. In Ancient Rome, every physically sound human was a person.[11] *Ius Naturale*—the branch of Roman law that recognized certain rights as inherent to humans by virtue of being living beings—afforded an array of "rights of the personality," such as religious freedom, to any "person."[12] Nonhuman legal entities were not persons and were not human; accordingly, the Romans did not bestow religious liberties on nonhuman legal entities.

As a result, nonhuman legal entities, though provided with legal capacity, did not enjoy religious liberties, whereas slaves—lacking legal capacity—did. A Roman slave could not possess property but had the liberty to practice religion and participate as a member of religious associations.[13]

In sum, the Romans drew clear boundaries between the legal capacities of their corporations and the rights and liberties that persons possessed simply by being human.

By "excavating" the language and the laws that the Romans adopted to address nonhuman legal entities and corporations since their origins, this Article provides insights and context for understanding and solving salient issues in contemporary corporate law, including the extension of rights of the personality to corporations. This Article also discusses the paramount

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[11] Deformed humans were defined as monsters ("*monstra vel prodigia*"), not as persons. *See* GUARINO, *supra* note 5, at 199.

[12] *Ius Naturale* would translate to "Natural Law" and is understood as the general law governing all living beings. Romans understood the *Ius Naturale* as a right given to all living things by nature. Richard A. Pacia & Raymond A. Pacia, *Roman Contributions to American Civil Jurisprudence*, 49 R.I. B.J. 5, 31 (2001); *see also* DIGEST OR PANDECTS OF JUSTINIAN, BOOK 1.1.1, *in* S. P. SCOTT, THE CIVIL LAW (Cincinnati, Central Trust Co. 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D1_Scott.htm#I [https://perma.cc/AW65-T69M] (translating Ulpianus) ("Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures which deduce their origin from the sea or the land, and it is also common to birds. From it proceeds the union of male and female which we designate as marriage; hence also arises the procreation of children and the bringing up of the same; for we see that all animals, and even wild beasts, appear to be acquainted with this law.").

[13] *See generally* Edgar S. Shumway, *Freedom and Slavery in Roman Law*, 49 AM. L. REG. 636 (1901).

importance of separation of ownership and control in corporate governance by highlighting the organizational necessities that this organizational *technology* has addressed since Roman times.[14]

The argument proceeds in three parts: Part I of this Article investigates the language and laws that the Romans adopted when they invented corporations, and it employs them to provide insights and context for the debate on religious rights for corporations. Part II discusses how separation of ownership and control is the mainspring of a corporation's governance mechanics, rather than its byproduct. The last part concludes.

I. ORIGINS, NATURE, AND LIMITS OF LEGAL PERSONALITY

A. The Origins of Legal Capacity for Nonhuman Legal Entities

The Romans invented legal capacity for nonhuman entities. Yet they never adopted the *legal personhood* lexicon nor referred to corporations as legal persons. As the very concept of a corporation is turning a number of people and assets into a new unit, the Romans dubbed nonhuman legal entities *universitates*, a word that literally encapsulates the process of turning multiple natural persons and things into a juridical subject. Such juridical units, just like modern corporations, bore autonomous rights, duties, and liabilities.[15] Legal capacity for nonhuman legal entities could be considered one of the most sophisticated legal technologies of all time.[16]

Initially, Rome provided legal capacity to towns and cities in order to raise them to the rank of entities in the domain of law.[17] The Romans developed the concepts of "corporate ownership" and "corporate action" to make cities and towns subjects of rights and

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[14] For an example of the relevance of Roman law and business practice to one of the most cutting-edge debates in contemporary corporate law, see Sergio Alberto Gramitto Ricci, *Artificial Agents in Corporate Boardrooms*, 105 CORNELL L. REV. (forthcoming 2020).

[15] *See* 1 BLACKSTONE, *Corporations*, *supra* note 2, at *467-85.

[16] *See* DUFF, *supra* note 3, at 62 (also arguing that cities were a paramount achievement in Roman law).

[17] RUDOLF SOHM, THE INSTITUTES OF ROMAN LAW 106 (James Crawford Ledlie trans., 1892) (clarifying the meaning of capacity of action, proprietary capacity, and delictual capacity).

duties.[18] Towns and cities were referred to as *municipia*—a word composed of the two terms "*munus*" and "*capere*." In Latin, *munus* meant "duty" or "obligation," and *capere* meant "to take." The term "*municipium*" conveys Roman towns' and cities' capacity to be subjects of rights and duties vis-à-vis their citizens and vis-à-vis Rome as a sovereign state.[19] In short, as the term suggests, *municipia* were nonhuman legal entities.[20]

The creation of rights-and-liabilities-bearing units was a groundbreaking innovation in the Roman government system.[21] The Romans then extended the use of the corporate form beyond the municipal system and legal capacity for nonhuman legal entities has become one of the legal technologies with the greatest impact on our society, economy, and political system.

The Romans regarded nonhuman legal entities as rights-and-liabilities-bearing subjects that were granted legal capacity from the State; they never theorized the transfer of the rights of individuals participating in a *universitas* to the legal entity. So, towns and cities had right and duties because the state granted them, not because they were comprised of citizens: humans were not understood to be able to transfer their political, legal, or spiritual capacities to legal entities. Different from us, the Romans never used the term "personality" to describe the legal capacity of nonhuman legal entities.[22] They kept the principle

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[18] On the legal capacity of cities and towns *see* DUFF, *supra* note 3, at 62; BASILE ELIACHEVITCH, LA PERSONNALITÉ JURIDIQUE EN DROIT PRIVÉ ROMAIN 106-08, 182-83 (1942).

[19] *See* ELIACHEVITCH, *supra* note 18, at 106-08, 182-83; GUARINO, *supra* note 5, at 207.

[20] FRANK FROST ABBOTT & ALLAN CHESTER JOHNSON, MUNICIPAL ADMINISTRATION IN THE ROMAN EMPIRE 7-8 (1926).

[21] WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 275-76 (1946); *see also* Ngaire Naffine, *Who are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 MODERN L. REV. 346, 347 (2003) (arguing that creating legal persons is the greatest political act).

[22] *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 666 n. 15 (1926) ("The admission must be made that there is no text which directly calls the *universitas* a *persona* . . . .") (quoting OTTO VON GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE xviii (Frederic William Maitland trans., 1902)); GUARINO, *supra* note 5, at 198-203, 206 (clarifying that in consideration of the human characteristics carried by the term, "persona," the Romans granted legal capacity—but never "personality"—to nonhuman legal entities). On the characteristics of *universitates*, *see* GEORGE LONG, *Universitas*, DICTIONARY OF GREEK AND ROMAN ANTIQUITIES, 1214-17 (William Smith ed., 1859).

simple: legal entities have rights and duties insofar as the State grants them.

B. Hobby Lobby *and the Rights of the Personality*

When legal persons claim "rights of the personality"[23]—such as religious liberties—two issues come into play. First, understanding what corporations are as legal persons and whether they should enjoy "rights of the personality" is essential for both sound corporate law and a democratic political system. Second, determining whether an expansion of rights of personality for corporations restricts the ability of humans to exercise their personal rights is crucial to regulating the interplay between natural and legal persons. When corporations employ thousands of humans and impose corporately embedded religious beliefs on their employees, these humans ultimately have their religious liberty restricted. It is true that a sole proprietor could also employ thousands of individuals, but because business corporations aggregate assets and investments of myriads of persons, their power has a greater impact in restricting liberties of individuals.[24]

The last decade has seen groundbreaking developments regarding business corporations' rights of personality. In *Citizens United v. FEC*, the Supreme Court ruled that the free speech clause of the First Amendment prevents the government from restricting legal persons from independent expenditures for communications.[25] Further, in *Burwell v. Hobby Lobby*, the Supreme Court recognized that for-profit corporations can exercise religion under the Religious Freedom Restoration Act (RFRA) just as human beings can.[26]

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[23] *See* Andrea Tina, *Brief Reflections on* Burwell v. Hobby Lobby, Inc. *(Supreme Court of the United States, June 30, 2014) from an Italian Corporate Law Scholar's perspective*, 13 STATO, CHIESE E PLURALISMO CONFESSIONALE 1 (2016).

[24] In addition, if individuals could impose their religious beliefs on legal persons that they create or control, these individuals would be able to multiply their "personal rights."

[25] Citizens United v. FEC, 558 U.S. 310 (2010). For a critical analysis of the opinion, see Jonathan R. Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451 (2019).

[26] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

Hobby Lobby exists as the perfect case with which to test, both in principle and through positive law,[27] the relevance of the formula for legal personality as developed by the Romans. In *Hobby Lobby*, the Supreme Court held that for-profit corporations qualify as persons "capable of exercising religion" for three reasons.[28] First, the Religious Freedom Restoration Act does not provide context to determine the definition of the term "person." Second, the definition of "person" in the Dictionary Act includes corporations.[29] Third, the Supreme Court reasoned that extending free-exercise rights to corporate persons protects free-exercise rights of humans "associated with" a corporation, "including shareholders, officers, and employees."[30]

In addition, the Supreme Court emphasized how merchants who sincerely hold religious beliefs would suffer disparate treatment if they had to forfeit their RFRA (and free-exercise) rights when they "incorporate" the business instead of running it as sole proprietors.[31]

The disparity-of-treatment argument flies in the face of the recognized distinction between the rights of a corporation and the rights of the individuals who compose, or are "associated with," it. It is also logically incorrect. In fact, merchants do not forfeit their RFRA rights when they charter corporations; they are simply prevented from multiplying their RFRA rights by exercising them both as individuals and as "controllers" of a separate subject of rights, behind the mask of the legal person "business corporation."

The definition of "person" in RFRA and in the Dictionary Act, as well as the protection of the RFRA rights of the humans "composing" the corporation through the RFRA rights of the corporation, requires more careful analysis. The discussion that

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[27] Positive law is traditionally understood as legal rules enacted by people in a political community and can include constitutions, statutes, and regulations. *See Wex Legal Dictionary*, CORNELL LII, https://www.law.cornell.edu/wex/positive_law [https://perma.cc/HMD7-FDSW].

[28] *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting).

[29] *Id.* at 2768.

[30] *Id.* ("[P]rotecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control them."). For an analysis of the theories underlying the reasoning of the Supreme Court, see ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018); Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195 (2019).

[31] *Hobby Lobby*, 134 S. Ct. at 2759.

Hobby Lobby raised about the definition of persons who enjoy religious liberties needs to be grounded in the laws and language that the Romans employed when they invented the concept of corporation. In fact, the case is centered precisely on the definition of "person," which is the most salient term in the Latin lexicon that distinguishes human beings from corporations. In addition, the case discusses religious liberties—the most distinctive rights of personality in Roman law since slaves could exercise them notwithstanding their lack of legal capacity but nonhuman legal entities could not.

Analyzing why the Romans invented legal capacity for nonhuman legal entities, what criteria they adopted in defining its content and nature, and what language they employed to describe and regulate their corporations gives us access to an insightful interpretation of the nature and rights of modern corporations and provides historically informed answers to the questions that *Hobby Lobby* raises.

C. The Importance of Lexicon: Universitas, Corpus, and Persona

Ancient law and language offer an innovative tool to comprehend the origins of the corporate form, better understand the nature of corporations, and answer salient questions about what rights could be predicated upon contemporary business corporations. Before discussing further the origins and nature of corporations, some brief considerations about three of the most etymologically relevant terms in corporate law seem due. These three words are: *universitas*, the term that the Romans adopted to refer to nonhuman legal entities; *corpus,* from which the modern corporate nomenclature derives; and *persona*, a key concept in understanding the difference between individuals and corporations.

The term *universitas* had paramount legal connotations. A *universitas* was able to own assets, rights and duties, and bear liabilities.[32] A *universitas* had assets, rights, duties, and liabilities

[32] On the importance of names and words in conveying the idea that legal entities are juridical subjects distinct from individuals and other legal entities, see PUPO, *supra* note 6, at 82-89.

in its own name; they were separate from those of the natural persons comprising, or associated in, it.[33] A *universitas* needed human delegates to act and interact in society. Specific governance models regulated how humans formed the will of a *universitas* and determined its actions and decisions.[34]

In addition to the term "*universitas*," the Romans used the term "*corpus*" in the discourse on legal capacity for nonhuman entities. While *universitas* was a term with normative value that is understood as "corporation," *corpus* carried a more descriptive connotation. The most common translation of *corpus* is "body," but understood contextually, the word indicated a group or ensemble of things or people that was perceived as a unit.[35] For example, mountains were commonly referred to as a *corpus* as peaks stand out from a common mountainous body.[36] *Universitas* and *corpus* were interconnected notions, where *corpus* described a multitude of parts constituting a single metaphorical body, and *universitas* conveyed information about this metaphorical body as an autonomous rights-and-duties-bearing subject.

Roman jurists sometimes used both *universitas* and *corpus* to describe the features of a corporation. This poses a problem in determining the nature of some entities, including Roman business corporations—the *societates publicanorum*.[37] In fact, celebrated Roman jurist Gaius stated that *societates publicanorum* had *corpus* but did not explicitly define these organizations as *universitates*. In order to understand how Gaius not only explicitly affirmed that *societates publicanorum* had *corpus*, but also how he implicitly referred to them as *universitates*, one must consider how Gaius first asserted that *societates publicanorum* had *corpus*, held common estate (*arca*

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[33] With respect to *civitates*, Gaius explained how public assets do not belong to anyone but to the [*civitas*] legal person. *See* GAIUS, THE COMMENTARIES OF GAIUS AND RULES OF ULPIAN 78 (J. T. Abdy & Bryan Walker trans., 1885) ("*Quae publicae sunt, nullius videntur in bonis esse; ipsius enim universitatis esse creduntur.*").

[34] GEORGE LONG, *supra* note 22, at 1214-17.

[35] *See* DUFF, *supra* note 3.

[36] *Id.*

[37] On the scarcity of sources to investigate *societates publicanorum*, see ANDREAS M. FLECKNER, ROMAN BUSINESS ASSOCIATIONS (Max Planck Inst. For Tax Law & Pub. Finance, Working Paper No. 10, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472598 [https://perma.cc/6JWK-BFQZ].

communis), and acted through human delegates who ultimately represented them (*syndici*).[38] Immediately after, he described the attributes of *universitates* by listing the features that characterize *societates publicanorum*—for example, the ability of *universitates* to act through a human delegate and stand in court through an agent (*litis defensio*).[39] In other words, Gaius did not expressly refer to *societates publicanorum* as *universitates*, but the features of the *societates publicanorum* that he listed typically defined what a *universitas* was. Thus, Gaius seemingly asserted a structural connection between the two concepts by bridging the meanings of *corpus* and *universitas* with respect to *societates publicanorum*.

In Ancient Rome, *universitates* had legal capacity, but they were not "persons." The term "*persona*" was relevant in at least two fields: theater and law. In theater and literature, "*persona*" meant "mask" or "character"; it is unclear whether the term derives from the latin verb "*per-sonare*," which meant "to sound through," or from the ancient Greek word "*πρόσωπον* [prósôpon]," which meant "face." In the legal domain, the term described any physically sound human.[40] Thus physically sound humans, regardless of their civic status, were *personae*.[41] Being a *persona* meant enjoying rights and liberties that only humans had. In fact, *Ius Naturale* granted a suite of rights and liberties to every

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[38] Massimo Montanari, *La responsabilita patrimoniale nelle societa commerciali dell'antica Roma,* 32 RIVISTA DELLE SOCIETÀ 1567, 1581 (1987). Gaius tells us that the *arca communis* was a prerogative of *societates* that had *corpus*. The *arca communis* was a common fund/treasure that belonged to a *societas publicanorum* as a legal entity. It was composed of the initial contributions of the *socii* and by retained earnings. *See* GAIUS, *supra* note 33.

[39] "Where a stranger appears to defend a society, the Proconsul permits him to do so, as happens in the case of the defense of private persons; because in this way the condition of society is improved." DIGEST OR PANDECTS OF JUSTINIAN, BOOK 3.4.1.3, *in* S.P. SCOTT, THE CIVIL LAW (Cincinnati, Central Trust Co. 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D3_Scott.htm#IV [https://perma.cc/R9EM-2JAQ] (translating Gaius). The original Latin text provides: "*Et si extraneus defendere velit universitatem, permittit proconsul, sicut in privatorum defensionibus observatur, quia eo modo melior condicio universitatis fit*." *See* DUFF, *supra* note 3, at 40.

[40] Human beings who did not possess certain physical characteristics were defined as monsters ("*monstra vel prodigia*"), and were not qualified as persons. *See* GUARINO, *supra* note 5, at 199.

[41] *Id.* at 199.

person, regardless of whether they had legal capacity.[42] These rights and liberties can be defined as rights of the personality. They were considered intrinsic in the human status, not granted by the state. In Ancient Rome, rights of the personality included religious liberties.

As a result, although the Roman state did not recognize legal capacity to slaves, slaves could practice religion and worship the gods. They could congregate—the term "religion" stems from "*religare*," which translates to "to bind"—in order to pray and bind themselves to gods by vows and oaths.[43] The Romans invented the corporation, but never considered it a person; in fact, persons, even when they did not have legal capacity, enjoyed rights of the personality that were precluded to nonhuman legal entities.

D. Inherent and Granted Rights

Ius Naturale was rooted in the nature of humans as sentient, moral, rational, spiritual and religious beings.[44] It was inherent in the essence of living beings. It treated all humans as equal.[45] It did not extend to nonhuman legal entities. It could be in conflict with *Ius Gentium* and *Ius Civile*.[46]

Nonhuman entities, by design, were excluded from the rights that *Ius Naturale* recognized to living entities. Nonhuman legal entities only had the capacities that the state granted to them; the

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[42] A number of restraints applied to slaves, but during the Empire, they were at least acknowledged as persons within the sphere of *Ius Sacrum*. *See* SOHM, *supra* note 17, at 109.

[43] On the etymology of the term *religion*, *see* Sarah F. Hoyt, *The Etymology of Religion*, 32 J. OF THE AM. ORIENTAL SOC'Y 126 (1912).

[44] *See* CARL SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW WITH CATENA OF TEXTS 11-12 (E.E. Whitfield trans., 1886).

[45] "So far as the Civil Law is concerned, slaves are not considered persons, but this is not the case according to natural law, because natural law regards all men as equal." DIGEST OR PANDECTS OF JUSTINIAN, BOOK 50.17.32, *in* S. P. SCOTT, THE CIVIL LAW (Cincinnati, Central Trust Co. 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D50_Scott.htm#XVII [https://perma.cc/GV6Z-XS6B] (translating Ulpianus).

[46] "Private law is threefold in its nature, for it is derived either from natural precepts, from those of nations, or from those of the Civil Law. . . . Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures . . . ." DIGEST OR PANDECTS OF JUSTINIAN, BOOK 1.1.1, *in* S. P. SCOTT, THE CIVIL LAW (Cincinnati, Central Trust Co. 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D1_Scott.htm#I [https://perma.cc/V4EA-BQUP] (translating Ulpianus).

Romans did not extend liberties or rights typical of sentient, moral, living beings to *universitates*.[47]

Just like in Ancient Rome, under the modern conception of human rights, some rights and duties of human beings preexist political intervention and exist inherently in the human species.[48] For other rights, state action is necessary.

In short, a legislature creates some rights, duties, and liberties by political action and acknowledges others by recognizing their preexistence in nature. Humans had both inherent rights and rights granted by the state, nonhuman legal entities only had those rights that the state would grant to them.

E. Corporate Legal Capacities

The Romans granted "corporate" legal capacities to nonhuman entities when the object pursued by a group of persons could not be achieved without turning this group of persons into a subject bearing rights and duties.[49] Typical cases requiring the creation of an entity included, for instance, capital-intensive enterprises, geographically spread-out businesses, and projects whose completion would take multiple human lifespans. In other words, any projects requiring asset lock-in, centralized management, capacity to survive the death or will of transient constituencies, and ability to aggregate sufficient assets. Roman "corporate legal capacities" were functionally necessary for achieving objectives of the state, and the Roman corporate formula saw these nonhuman legal entities afforded legal capacity in the following ways: capacity of action, judicial capacity, proprietary capacity, and tortious capacity.[50]

Capacity of action is the ability to undertake acts that produce legal effects.[51] *Universitates* acted through delegates. For example, towns acted through their functionaries or special delegates: *actores*, *curatores*, and *syndici*. Through these

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[47] SALKOWSKI, *supra* note 44, at 327-28.

[48] This is one of the foundations of modern human rights.

[49] SALKOWSKI, *supra* note 44, at 327-28.

[50] SOHM, *supra* note 17, at 140-43.

[51] SALKOWSKI, *supra* note 44, at 290; *see also* SOHM, *supra* note 17, at 140-41.

delegates, *universitates* could also exercise their judicial capacity, which was the ability to stand in court, sue, and be sued.[52]

Proprietary capacity is the ability to own assets and bear rights, duties, and liabilities in one's own name.[53] The Romans carefully distinguished the property of nonhuman legal entities from that of individuals: the proprietary rights of a town were separate from those of the citizens and vice versa. Thus, citizens did not enjoy any rights—not even pro quota—over the assets of the town, and vice versa.[54]

Tortious capacity is connected to both proprietary capacity and capacity of action. Tortious (or delictual) capacity is the capacity to commit torts and potentially incur consequential liabilities.[55] In a manner that might seem familiar to contemporary corporate lawyers, liabilities that originated from any torts committed by a *universitas* did not extend to individuals who comprised, or participated in, the *universitas*.

F. The Past and the Present of Legal Personality

We typically refer to corporations as "legal persons" because state action is necessary to give them birth and make them subjects bearing rights, liberties, and duties. This lexicon implicitly places emphasis on the role of the state and aims to differentiate legal persons from natural persons, who do not need the state in order to come to light. Moreover, a legal person's legal capacity is commonly referred to as "legal personality" or "legal personhood."[56] Because the state determines what legal capacities are provided to legal persons, legal personality is not a formula

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[52] In contrast, slaves, who did not possess legal capacity, had "mere capacity of action" since their actions produced legal results for their owners when advantageous. GUARINO, *supra* note 5, at 201, 211; SOHM, *supra* note 17, at 108-09.

[53] SOHM, *supra* note 17, at 143.

[54] "Universitatis sunt non singulorum veluti quae in civitatibus sunt theatra et stadia et similia et si qua alia sunt communia civitatium. [I]deoque nec servus communis civitatis singulorum pro parte intellegitur, sed universitatis . . . ." CLIFFORD ANDO, LAW, LANGUAGE, AND EMPIRE IN THE ROMAN TRADITION 148 (2011) (quoting Gaius); *see also* EMILIO ALBERTARIO, CORPUS E UNIVERSITAS NELLA DESIGNAZIONE DELLA PERSONA GIURIDICA 112-13 (1933) (arguing that, according to Gaius and Marcianus, assets may belong to "everybody," "nobody," an "individual," or a "city as a legal person").

[55] SOHM, *supra* note 17, at 143.

[56] *See* FLORIANO D'ALESSANDRO, PERSONE GIURIDICHE E ANALISI DEL LINGUAGGIO (1989).

that attributes to nonhuman legal entities the same rights, powers, liberties, and duties that characterize a human being. Legal personhood and legal personality are linguistic symbols, whose normative power depends on the arrays of rights and duties that a state grants to nonhuman legal entities. Similarly, the term legal person is a linguistic symbol that indicates a nonhuman legal entity with legal capacity, in which the extension of its legal capacity depends on what rights and duties a state attaches to such legal entity.

Legal personality and legal persons should not be interpreted as artificial "persons" or "personalities" that reflect morals, ethics, rights, and duties typical of human beings. Legal personality is a linguistic symbol that indicates the characteristics of a legal person: autonomous existence, capability to bear rights and duties, and possession of an array of rights and duties.

The term "legal personhood" was coined relatively late. A great deal of credit is owed to Thomas Hobbes for the diffusion of current discourse into concepts such as "legal personality" or "things personated."[57] Such linguistic symbols raise a number of interpretative issues, mostly related to the appropriation of the concept of *persona*. There is often confusion in the contemporary debate over political rights and civil liberties for corporations, as the term "person" may seem to suggest that corporations possess some sort of human dimension. Such a misunderstanding, however, is inconsistent with both the origins of corporations and the precise lexical distinctions originally made by those who invented corporations, the Romans.

Two ideas have contributed significantly to the misconception of corporations as persons: first, the use of "legal person" as a semantic symbol; and second, the illusion that when a multitude of human beings are turned into one autonomous subject, this subject ought to derive rights and duties from the humans participating in the juridical subject.[58] In *Hobby Lobby*, the Supreme Court seemed to be charmed by this "aggregate theory"—which understands corporations as an aggregation of human beings—when it declared that a legal person "is simply a

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[57] *See* THOMAS HOBBES, LEVIATHAN 125 (Michael Oakeshott ed., 1962) (1651).

[58] *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

form of organization used by human beings to achieve desired ends."[59]

However, raising corporations to the level of human beings simply because they are the product of aggregations of human beings fails to consider two critical elements. First, the aggregated subjects have heterogeneous components that are not necessarily human. In fact, many of the participants in a corporation are legal persons themselves; this is evident when we look at the aggregation of shareholders in business corporations. Second, when Hobbes used the word "person" in the acclaimed *Leviathan*, he was referring to the agent acting on behalf of "inanimate things" in order to endow them with legal capacity. Hobbes explained that "inanimate things" (such as a town, for example) become "things personated" through reliance upon the authority and legal capacity of a legally capable agent who acts as the human "mask" ("*persona*") of nonhuman entities.[60]

Drawing on the etymology of the Latin word "*persona*" ("mask"), Hobbes suggested that "inanimate things" obtain legal capacity by virtue of the authority of the agent. Thus, the Hobbesian scheme of legal capacity for nonhuman entities does not stem from a delegation of authority from a principal to an agent, but rather from the transferal of the agent's legal capacity to the otherwise incapable nonhuman principal. Simply put, Hobbes constructed legal personhood for "inanimate things" on the transferal of the human attributes of the agent to the nonhuman principal. The original use of the terms "legal persons" and "legal personality" referred to the human nature of the agent who then could represent inanimate things. It did not mean that nonhuman legal entities were legal persons because they were "composed" of aggregated human beings. Nor did it mean that they were legal persons simply because they received an array of rights identical to those enjoyed by natural persons.

Ultimately, modern corporations—just like Roman *universitates*—do not have rights and duties that preexist political

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[59] Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2768 (2014). For an analysis of what corporations are thought of in the *Hobby Lobby* opinion, *see* Macey, *supra* note 30. For a discussion on theories of the corporation, see Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999 (2010).

[60] HOBBES, *supra* note 57, at 125.

action. Legal capacity for nonhuman legal entities exists exclusively as the product of a state's creation and concession of rights and duties. A corporation's mere existence and ability to bear rights and duties necessarily depends on political action.[61] Moreover, because corporations do not possess human nature, they do not enjoy the rights and liberties provided by natural law—or, as the Romans called it, *Ius Naturale*.[62]

G. Separation from Individuals

Legal persons receive rights and duties as well as the capacity to interact with natural persons and other legal entities in the legal domain from the state, not from individuals.[63] A legal person's rights and duties are distinct from those of individuals and other legal persons that have an interest in them.[64]

The Romans specified that individuals have no property rights over a nonhuman, legal entity's assets and that individuals cannot be held liable for a nonhuman, legal entity's liabilities and vice versa.[65] Legal scholars refer to this fundamental principle of corporate law as "asset partitioning."[66] Yet, asset partitioning is just a byproduct of a nonhuman legal entity's *separateness* from individuals. All duties and rights—not only property rights over assets—of a legal person are distinct and separate from those of individuals.

Ultimately, a legal person's *separateness* can be explained through the formative mechanics of legal personhood. The state grants legal capacity to nonhuman entities and determines which rights and duties they have. The rights of human beings who comprise a nonhuman legal entity do not permeate into the legal subjectivity of the entity existing as a legal person. In other words, legal personhood is not a mechanism that aggregates the rights

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[61] *See* David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139 (2013).

[62] *See* Pacia & Pacia, *supra* note 12, at 31. In the Roman legal system, the concept of "natural law" was understood as "the law shared by all creatures, which is established by Divine providence and remains fixed and immutable." *Id.*

[63] *See* Ciepley, *supra* note 61.

[64] D'ALESSANDRO, *supra* note 56, at 59-60.

[65] *Id.* at 60.

[66] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

and duties of individuals through the formation of a new entity.[67] It follows that individuals cannot multiply their rights and exercise them twice—that is, an individual cannot exercise their rights on a personal level and then again on a legal entity level. Furthermore, the human nature of individuals in no way affects the legal capacities of nonhuman legal entities, legal persons.

Legal personhood is the *regula juris* through which a state creates new, separate subjects capable of acting in the legal domain, and it bestows rights and duties upon them. Philosophically speaking, legal persons are characterized by a form of *otherness* from the individuals participating in them. This form of otherness translates into the corporate *separateness* that plays a pivotal role in corporate law.

H. Rights of Humans and Business Corporations

The Roman formula was based on three elements. First, *universitates* were autonomous from individuals comprising them. Second, they could act in the legal domain and bore rights and duties in their own name. Third, they received a suite of powers and duties from the state that enabled them to pursue goals in which the state had a vested interest.

Viewing the facts of *Hobby Lobby* through the lens of the Roman formula leads to a fairly straightforward conclusion: *Hobby Lobby*, as a corporation, should not be entitled to RFRA (and free-exercise) rights. First, as a for-profit corporation, *Hobby Lobby* qualifies as a nonhuman legal entity, and according to the Romans, nonhuman legal entities do not enjoy the rights and liberties that humans inherently enjoy simply by virtue of their humanity.[68] Under the Roman formula, whether the entity had a for-profit or nonprofit objective and whether the legal person was a closely-held or publicly-held corporation would be irrelevant. Second, the rights and duties of individuals would be separated from those of the nonhuman legal entities "associated with [them]

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[67] D'ALESSANDRO, *supra* note 56.

[68] *See supra* Part I(d). Delaware corporate law requires for board directors to be human, natural persons; legal persons cannot be appointed. DEL. CODE. ANN. tit. 8, § 141(b) (2019). For discussion of the relevance of the human nature of board directors, see Gramitto Ricci, *supra* note 14.

. . . in one way or another."[69] The Romans always conceived nonhuman legal entities as autonomous subjects with legal capacity, wholly independent from any individual. In addition, nonhuman legal entities receive legal capacity from a state in order to pursue goals considered relevant by the state as opposed to goals that would magnify the rights and powers of individuals.

Addressing the case according to positive law requires more nuanced reflections. As mentioned, the issue in *Hobby Lobby* concerned whether for- profit corporations qualify as *persons* entitled to exercise RFRA (and free- exercise) rights.[70] RFRA does not define what the term "person" means. So the central debate revolves around the question of what "a person's exercise of religion" means. In other words, the Court wrestles with the question of whether the protection of religious liberties should extend to nonhuman legal entities. Rephrasing the question by adopting nomenclature that does not refer to the concept of *person* assists in clarifying the object at issue. In fact, doubts and confusion around the RFRA's scope of application arise from the use of the term "legal persons" to refer to nonhuman legal entities. Hence we ask: Does the RFRA apply exclusively to natural persons or does it apply to nonhuman legal entities as well? Moreover, can nonhuman legal entities even exercise religion?

In attempting to answer these questions, the Supreme Court looked to the Dictionary Act,[71] which it must consult in order to determine "the meaning of any Act of Congress, unless the context indicates otherwise."[72] As a matter of positive law, the most important legal bifurcation is deciding whether "the context indicates otherwise."[73] Justice Samuel Alito, in his majority opinion, emphasized how the Court saw "nothing in RFRA that suggest[ed] a congressional intent to depart from the Dictionary Act definition."[74] For purposes of analysis, it does not help that the Secretary of Health and Human Services (HHS), the government petitioner in the case, "ma[de] little effort to argue otherwise" and

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[69] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014). For some considerations on the language used by the Supreme Court, see Macey, *supra* note 30.

[70] *Id.* at 2759, 2766.

[71] *Id.* at 2768.

[72] 1 U.S.C. § 1 (2018).

[73] *See id.*; *see also Hobby Lobby*, 134 S. Ct. at 2768.

[74] *Hobby Lobby*, 134 S. Ct. at 2768.

explicitly "concede[d] that a nonprofit corporation can be a 'person' within the meaning of RFRA."[75]

Instead, the government emphasized the inability of a for-profit corporation to exercise religion altogether. Thus, the focus of the debate was not on the legal attributes of a nonhuman legal entity, but rather on the *abilities* of nonhuman legal entities.[76] In fact, HHS recognized RFRA protection for nonprofit corporations while denying it to for-profit corporations. In other words, the distinction offered by HHS did not affect the ontology of nonhuman legal entities but rather just the teleology of nonhuman legal entities. Such an approach has clear ramifications on the definition of the term "person." As the Court observed, the term "person" can be understood as either including exclusively natural persons or including both natural and legal persons, but it cannot include natural persons and a subcategory of legal persons.[77] A distinction based on the teleology of different legal persons misses the mark and lays the groundwork for the extension of the term "person" to nonhuman legal entities, complete with the RFRA protections that accompany the term.

I. Persons in a Religious Context

As the majority opinion points out, an accurate understanding of the term "person" requires first and foremost an

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[75] *Id.* at 2768-69 ("HHS concedes that a nonprofit corporation can be a 'person' within the meaning of RFRA. . . . This concession effectively dispatches any argument that the term 'person' as used in RFRA does not reach the closely held corporations involved in these cases. . . . [N]o conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.").

[76] *Id.* at 2769 ("The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby . . . focuses not on the statutory term 'person,' but on the phrase 'exercise of religion.' According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion.").

[77] *Id.* ("No known understanding of the term 'person' includes *some* but not all corporations. The term 'person' sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."). The Court, however, suggested a potential distinction between closely held corporations and publicly held corporations. *Id.* at 2774. This distinction would seem blatantly inconsistent with the Court's determination that either all or no corporations are "persons." *Id.* at 2769 ("No known understanding of the term 'person' includes *some* but not all corporations.").

analysis of whether "the context indicates otherwise."[78] In this case, archeology of corporate law would seem to "indicate otherwise": under the Romans' understanding, religious liberty is a right of human personality.[79] It springs from human nature and therefore would belong solely to (physically sound) humans.

If, as the Romans believed, religious liberty springs from human nature as an expression of *Ius Naturale* and cannot be considered inherent in the legal capacity of nonhuman legal entities, it might follow that the original meaning of the term *persona* (and the Roman's legal framework governing the legal capacity and rights of *personae* and *universitates*) could inform the meaning of the *person* in a religious context even today. If this inference were considered enough to provide an intrinsic definition to the term *persona* or *person* when used in any contexts concerning religion, regulation of religion and religious freedom, than regulation of religion would apply exclusively to human beings, and the term "person" would mean a natural person unless otherwise provided in the statute. If this premise were accepted, then it could be argued that, generally speaking, the application of positive law would exclude nonhuman legal entities from RFRA rights (however different considerations and conclusions would characterize the reasoning to address the specific case of nonhuman legal entities whose primary object has religious nature).

If accepted, this argument would be an Ockham's Razor for the rest of the discussion in *Hobby Lobby*, as no further arguments or assumptions would be needed.[80] Nevertheless, it is probably worth pointing out two additional flaws in the opinion. First, the majority opinion does not distinguish between the corporate form and other organizational models such as sole proprietorships or

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[78] *Id.* at 2768 ("[Because the] RFRA itself does not define the term 'person[,]' [w]e therefore look to the Dictionary Act, which we must consult 'in determining the meaning of any Act of Congress, unless the context indicates otherwise.'") (citing 1 U.S.C. § 1 (2018)).

[79] *See supra*, Part I(b).

[80] *See e.g.*, Paul Vincent & Claude Pennaccio, *William of Ockham*, *Ockham's Razor*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 16, 2002), https://plato.stanford.edu/entries/ockham/#4.1 [https://perma.cc/DZQ6-QYPR] (noting Ockham's Razor is the metaphysical, problem-solving principle that one should refrain from positing arguments or assumptions in the absence of known compelling reasons to do so).

partnerships. Second, the opinion impliedly but bluntly adopts the "aggregate theory" disregarding the corporate separateness.[81]

J. The Importance of Form and Theory

The corporate model is based on the irrelevance of its participants' qualities. In fact, the model is largely premised on separation of ownership and control, whereas a partnership model is centered on the personal characteristics of the partners, who select one another with each other's personal characteristics in mind.[82] The most extreme example of the "*intuitus personae*" partnership model is the *societas consensu contracta*, where the personal characteristics and preferences of the members were so relevant that any change in the individual or collective qualities of the partners, or in their inclination to do business, terminated the organization.[83] In contrast, the corporate form is based on the airtight separation of rights and duties of shareholders from those of the nonhuman legal entity. As such, it should be evident that the choice of organizational form matters significantly. A "personal" and "personalist" organizational model could provide enough derivation of the qualities, beliefs, and personal visions of its members so that the personal beliefs of these partners could permeate the business organization. In addition, the decision-making patterns and liability regime of a partnership seem better suited to the personal characteristics or rights that spring from the human nature of the partners.[84] This is, of course, obvious for sole proprietorships, too.

With respect to the implied but blunt adoption of the "aggregate theory," the opinion refers to three relations: the relations between merchants and "their" corporations, the relation between controlling shareholders and "their" corporations, and the relation between corporations and their natural-person stakeholders. The opinion interchangeably refers to these three

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[81] *See* Macey, *supra* note 30.

[82] *See infra* Part II (c).

[83] *Id.*

[84] As opposed to partnerships where managing partners can bear significant amounts of liability, corporations are often considered "depersonalized" and much less personal than other business forms. *See* Barbara Abatino et al., *Depersonalization of Business in Ancient Rome*, 31 OXFORD J. LEGAL STUDIES 365, 366 (2011).

relations when it considers corporations as blanket aggregations of human beings with religious liberties.

The equalization of these three distinct relations raises several issues. First, the corporation is an entrepreneur itself, distinct from the merchants and entrepreneurs participating in the corporation as shareholders. Further, controlling shareholders are erroneously defined by the Court as the "owners" of a corporation. In fact, both in Ancient Rome and in the current corporate world, nobody could own a corporation.[85] Imposing the religious beliefs of the controlling shareholders or founders on a nonhuman legal entity enacts a hegemonic pattern, which duplicates personal and, in this case, religious beliefs of a handful of powerful individuals through a legal person—something very different from considering the religious and personality rights of all the participants in the corporation. When the religious belief of the majority shareholders or the founders is imposed on the rest of the humans participating in a corporation, the religious liberties of current and future participants in the corporation get restrained. In sum, recognizing the religious belief of a nonhuman legal entity would reduce the religious liberty of numerous human beings (minority shareholders as well as other stakeholders, including employees) and it would magnify or duplicate the religious rights of one or more founders or majority shareholders.

Finally, the *Hobby Lobby* opinion is problematic for an additional reason: it seems to assume that shareholders are necessarily human beings, whereas in reality, shareholders often are nonhuman legal entities (e.g., business corporations, nonprofit corporations, pension funds, hedge funds, etc.). It is difficult to address the degrees of separation that divide a human being's beliefs from the religious beliefs of corporations controlled directly by that human being, or controlled by that human being through corporations and other legal persons. In addition, such distinctions would create an asymmetric system, where corporations controlled

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[85] *See* Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1191 (2002) ("A lawyer would know that the shareholders do not, in fact, own the corporation."). Although shareholder "ownership" language is often used as a rhetorical device to describe the position shareholders hold in relation to the corporations they hold shares in, shareholders own securities which grant rather limited rights. *Id.*

by human beings are entitled to more rights (including religious liberties) than corporations controlled by legal persons or, according to the opinion, by the public.

K. The Archeology of Legal Personality

Throughout the process of creating and regulating nonhuman legal entities, the Romans refrained from labelling these entities "persons" or "legal persons."[86] In fact, the words "person" and "personality," both of which stem from the Latin "*persona*," were exclusively used to describe human beings. This attribution had normative value because *personae* ("persons") had a set of rights and liberties of the personality that sprung from *Ius Naturale* and that defined individuals belonging to the human species.[87] The Romans never attributed these rights and liberties of the personality to corporations, as these rights and liberties were probably understood as being inconsistent with the essence of nonhuman entities.[88]

Careful consideration of these details is important because language has played a determinant role in shaping the current understanding of what legal persons are. Unfortunately, current nomenclature is at odds with that adopted when corporations were invented and first regulated. The current use of "legal person" and "legal personality" as linguistic symbols facilitates miscomprehension of what corporations are and, perhaps more importantly, what they are not. Excavating the origins of the concept of legal personality and the original Roman lexicon used to describe it allows us to contextualize terms like "person" and "legal person" according to the semantic properties they had when they were introduced to the juridical world. In fact, though it seems unlikely that we could abandon the use of the current legal personality language, it is vital for the relations between business corporations and society that the rights of corporations are not extended in a fashion inconsistent with corporations' nature and purpose, potentially harming the rights of individuals. Moreover,

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[86] *See* 1 BLACKSTONE, *supra* note 2, at *468.

[87] The two necessary conditions to enjoy such set of rights and liberties were being human and being physically sound.

[88] Such nonhuman entities lacked the common sense, moral dimension and feelings typical of human beings.

having a proper and solid understanding of the original corporate formula allows us to confidently explore innovative legal technologies in the corporate realm.

II. BUSINESS ORGANIZATIONS BORROWING SEPARATION OF OWNERSHIP AND CONTROL FROM MUNICIPALITIES

A. Private Capital, Public Services

When nation states expand, they sometimes rely on private capital and entrepreneurs to provide public services to new regions and citizens or to build the infrastructure necessary to unify people and lands. Rome and the United States of America are two prominent examples.[89]

Public services and infrastructure building that states outsource to private parties range from collecting taxes to constructing aqueducts, roads, or electric grids. In the United States, private business corporations have provided citizens with a myriad of services since the Revolution. Unlike the United States, however, Roman entrepreneurs did not at first have the corporate form available for their businesses, as the legal landscape in Rome did not offer any organizational models that allowed entrepreneurs to aggregate large amounts of assets and commit them to a project.

In fact, Roman entrepreneurs needed an organizational technology through which they could commit assets and investments to an enterprise. Further, entrepreneurs needed to

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[89] The Roman *Res Publica*, which lasted from the sixth century BC to the first century BC until the rise of Augustus as the first emperor, did not have the economic resources to finance all public works and services. *See* ERNST BADIAN, PUBLICANS AND SINNERS: PRIVATE ENTERPRISE IN THE SERVICE OF THE ROMAN REPUBLIC 15-16 (1972). According to Dionysius of Halicarnassus, in the fifth century BC, Consul Postumius contracted out the construction of the temples for Kore, Demeter, and Dionysus. *See* Ulrike Malmendier, *Roman Shares*, *in* THE ORIGINS OF VALUE: THE FINANCIAL INNOVATIONS THAT CREATED MODERN CAPITAL MARKETS 32 (William N. Goetzmann & K. Geert Rouwenhorst eds., 2005). In the fourth century BC, the censors outsourced feeding of the Geese of the Capitol. PLINY, NATURAL HISTORY, BOOK 10, CH. 26, at 325 (H. Rackham trans., 1938). "The goose also keeps a careful watch . . . ." *Id.* According to the tradition, the geese of the Capitol raised the alarm when Rome was ransacked by the Gallic troops in 390 BC. LIVY, AB URBE CONDITA, BOOK 5.47, https://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=LatinAugust2012&getid=1&query=Liv.%205.47 [https://perma.cc/9MHK-LJM2].

make these assets and enterprises independent from investors while simultaneously centralizing control over them. In short, what they needed was what we now dub separation of ownership and control. The Roman state, which had a vested interest in having entrepreneurs perform public services, possessed a legal technology that could very much make separation of ownership and control for business organizations possible: legal capacity for nonhuman legal entities, which we commonly dub legal personhood.

Legal personhood, ultimately, was the means through which the Romans obtained separation of ownership and control for business organizations and provided Roman entrepreneurs with an organizational model suitable for large-scale projects. Observing the rationales and processes that led to the creation of business corporations demonstrates how a business corporation is a legal person chartered to conduct business through separation of ownership and control. Thus, separation of ownership and control is inherent in the nature of business corporations just like legal personhood.

B. The Expansion of Rome and Private Enterprise

Roman entrepreneurs who specialized in the auction of public contracts were known as publicans—*publicani*.[90] The state granted public contracts for a variety of tasks, including infrastructure construction, army equipment supply, mine operation, and tax collection.[91] Polybius recounts that the public

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[90] BADIAN, *supra* note 89, at 15. *See also* LEONARD SCHMITZ, *Publicani*, DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 972 (William Smith ed., 1859) ("Their name is formed from *publicum*, which signifies all that belongs to the state, and is sometimes used as synonymous with vectigal."). Much of the revenue which Rome derived from conquered countries consisted of tolls, harbor duties, and other tax collection contracts that were sold to the highest bidder. *Id. Vectigal* was a form of taxes or fees. Some sources and authors refer to *societates publicanorum* as *societates vectigalis* because of the object of the business conducted by *societatas publicanorum* that were created to farm taxes (*vectigal*), *see* Montanari, *supra* note 38, at 1577-78.

[91] *See* Malmendier, supra note 89, at 32-33. Publicans provided indispensable services while generating sizeable earnings in the process; they were legally protected in their position. *See* Charles Bartlett, *The publicani during the Roman Empire: the political economy of public contracts*, SOCIETY FOR CLASSICAL STUDIES, https://classicalstudies.org/annual-meeting/148/abstract/publicani-during-roman-empire-political-economy-public-contracts [https://perma.cc/YU3T-EW9M].

works leased out to publicans inevitably changed over time.[92] Through the second century BC, the Roman state mainly contracted out the construction of infrastructures. From the first century BC on, publicans shifted their core business to tax farming.[93] Even the Bible tells of Matthew, prior to becoming one of Jesus' Apostles, serving as a publican helping Rome collect taxes.[94] In fact, since the parable of the Pharisee and the Publican, publicans had made a name for themselves as tax collectors.

Capital-intensive public works required investments that sole proprietors, as individuals, simply could not afford. The contract to build the Marcian aqueduct, for example, required an investment equal to the total wealth of M. Crassus, supposedly the wealthiest Roman in the age of Caesar and Cicero.[95] Accordingly, the Roman government had a quandary on its hands, as many of the activities carried out by the publicans were functionally necessary to the Roman state's operation. Publicans needed firms capable of aggregating large amounts of capital, surviving changes in the "members" basis, centralizing

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[92] In addition, according to Polybius, a significant number of individuals were stakeholders in *societates publicanorum*, which played an important role in the Roman society.

> For contracts, too numerous to count, are given out by the censors in all parts of Italy for the repairs or construction of public buildings; there is also the collection of revenue from many rivers, harbours, gardens, mines, and land—everything, in a word, that comes under the control of the Roman government: and in all these the people at large are engaged; so that there is scarcely a man, so to speak, who is not interested either as a contractor or as being employed in the works.

POLYBIUS, HISTORIES, BOOK 6.17, http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=GreekFeb2011&getid=1&query=Polyb.%206.17 [https://perma.cc/ED8H-SFMT] (translating Polybius).

[93] These firms were called *societates vectigalis*. *Vectigalia* were taxes in Ancient Rome. *See supra* note 90.

[94] Because we derive our knowledge of Roman law from the late Empire, some sources refer to *societates vectigalis* instead of to *societates publicanorum*. These sources qualify *societates publicanorum* by the object of their business. In fact, in the last part of their existence, closest in time to the Empire, *societates publicanorum* were understood as farming taxes.

[95] M. Crassus, arguably the wealthiest Roman in the age of Caesar and Cicero, had a net worth of 8,000 talents, or 48 million denarii. The contract to build the Marcian aqueduct in the mid-second century AD required an investment of approximately the same value as Crassus's total net worth. *See* BADIAN, *supra* note 89, at 68.

management, and acting with third parties on the same footing as individuals.

Prior to the adoption of the corporate form for business organizations, however, the business landscape in Rome did not offer any organizational model that could satisfy these needs.

C. The Societas Consensu Contracta and the Business Organizations Landscape before the Societas Publicanorum

The publicans needed firms that could both endure beyond the human lifespan and aggregate wealth on a greater scale than any individual citizen. They needed a type of firm that was able to own assets, bear liabilities, and even enter into contracts in its own name. None of the Roman organizational models for business offered those features at the time.

Rather, the original associative form in Ancient Rome depended completely on the qualities, fate, and will of its members; termed "*societas consensu contracta*," or *societas* in short, it was largely similar to the modern partnership in that it was an association between two or more partners—in Latin, *socii*.[96] A *societas* could be formed with the mere consent of one *socius*, and could be dissolved just as easily.[97] Unlike a contemporary partnership, the *societas consensu contracta* agreement did not entail any sort of agency: *socii* were neither agents of one another nor of the *societas*, which was not in itself an entity.[98]

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[96] *See* LONG, *supra* note 22, at 1049 ("When several persons unite for a common purpose, which is legal, and contribute the necessary means, such a union is *Societas*, and the persons are *Socii*.").

[97] *See* W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE 305 (1952); *see also* LONG, *supra* note 22, at 1049 ("The contract of *Societas* might either be made in words or by the acts of the parties, or by the consent of the parties signified through third persons: it required no particular form of agreement."). In addition, "A *Societas* . . . could be ended at the pleasure of any one of the socii: any member of the body could give notice of dissolution" at any time and immediately upon this notice, "the *Societas* was dissolved." *Id.*

[98] *See* Montanari, *supra* note 38, at 1571; MAX RADIN, HANDBOOK OF ROMAN LAW 260 (1927); LONG, *supra* note 22, at 1049 ("If a *socius* borrowed money, the other *socii* were in no case bound by his contract, unless the money had been brought into the common stock. In fact, the dealings of one partner did not bind the other partners, except in such cases as they would be bound independent of the existence of the Societas.").

The *soicetas consensu contracta* agreement did not have any legal effect on third parties; rather, it only bound *socii* to fulfill the obligations among themselves. Nevertheless, *socii* were obligated to enter into contracts brought under the *societas* agreement by other *socii*.[99]

The Romans used the term "*fraternitas*" ("brotherhood") to describe the relationship among *socii*. Consistently with meaning of *fraternitas* as well as with the importance and sensitivity of the relations among *socii*, a *societas* agreement was based on mutual trust among the *socii*.[100] For this reason, the personal qualities of each *socius* were crucial in forming and keeping alive a *societas consensu contracta*, and any corruption of the qualities of the *socii* on a personal or collective level almost invariably resulted in the end of the *societas*. This seems unsurprising for an organizational model in which partners retained control and interlaced their governance rights with those of their fellow *socii*.[101]

In Ancient Rome, a simple but effective principle placed emphasis on the role that careful selection of partners plays: "if a man chooses as his partner a careless person, he has no one to blame but himself."[102] Such a principle was particularly relevant with respect to *societates consensus contractate* for a very intuitive

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[99] By *communicatio*, *socii* could share profits by virtue of the obligations that a *societs* agreement generated among the *socii*. The importance of personal nature and characteristics of each *socius* was so inherent in the contract that an individual *socius* could not convey his membership, neither by contract among living people or by hereditary succession without the active consent of the remaining *socii* to create a binding relation with the prospect *socius*. *See* Salvo Randazzo, *The Nature of Partnership in Roman Law*, 9 AUSTL. J. LEGAL HIS. 119, 120 (2005).

[100] As a purely consensual contract, a *societas* was understood and utilized in Rome as a sort of sociological model that fostered close and enduring relationships amongst the *socii* comprising it.

[101] New Testament scholar J. Paul Sampley explains that "strong sense of community," "individual self-determination," "quasi-brotherly" relationships, and minimization of "social stratification" were all anticipated benefits of entering into *societas*. *See* J. PAUL SAMPLEY, PAULINE PARTNERSHIP IN CHRIST: CHRISTIAN COMMUNITY AND COMMITMENT IN LIGHT OF ROMAN LAW 106-08 (1980).

[102] *See* THE INSTITUTES OF JUSTINIAN 150 (J. B. Moyle trans., 5th ed. 1913); *see also* W. W. BUCKLAND AND PETER STEIN, A TEXT-BOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINIAN 509 n. 4 (Peter Stein ed., 3d rev. ed. 1966) ("Gaius . . . gives the reason that a man who takes a careless partner has himself to blame.").

reason: "the [*societas*] provided virtually no asset shielding[,] as each partner was liable . . . for the liabilities of [their *societas*]."[103]

Further, Roman law did not separate the obligations of the *societas* from the obligations of the *socii* comprising it.[104] Consequently, *socii* could only "protect" their personal assets from liabilities that might arise via the *societas* and try to safeguard governability of the *societas* through a meticulous selection of fellow *socii* based on personal, behavioral, and social features.[105]

This protection of all *socii* initial qualities engendered two pivotal consequences. First, no *socii* could be replaced. Because no one could be made partner with someone with whom they did not wish to be associated, a *socius* could not transfer his equity interest in the *societas* to third parties by contract, donation, or inheritance.[106] Second, the *societas* could not survive any changes with respect to individual and collective qualities of *socii* or to the inclination to stay bound. Causes of termination included withdrawal, legal action regarding the *societas* agreement, loss of liberty of any one *socius*, loss of *civitas* without loss of liberty, change of family position, confiscation of one's property for conviction for a crime against the state, compulsory sale, voluntary surrender of one's whole property in insolvency, and indigence.[107]

D. Governance Defects of Societates Consensu Contractae and the Pursuit of Separation of Ownership and Control

For all of the potential benefits that the structure may have carried, the *societates consensu contractae* did not offer a workable organizational model for Roman entrepreneurs who sought to centralize management and aggregate large amounts of capital. This was due in large part to the fact that the operations of any *societas consensu contracta* necessarily depended on the action of

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[103] *See* Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 531 (2011).

[104] On the principles regulating the fundamental characteristics of *societates*, see REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 454-56 (1990).

[105] *Id*.

[106] *See* RADIN, *supra* note 98; *see also* LONG, *supra* note 22, at 1049.

[107] *See* ZIMMERMAN, *supra* note 104, at 455–57.

all *socii*, as each *socius* had to provide consent with respect to any given decision. In fact, any *socius* could threaten to withdraw and terminate the *societas* at any time. This organizational arrangement created opportunistic behaviors that are commonly referred to as "holdup."[108]

In addition, *socii* could cause the termination of a *societas* even against their own will. For example, death, changes in social status, or insolvency for one *socius* were all potential causes of termination, even if unintentional. For publicans, however, these potential terminative devices were as threatening to the whole *societas* as risks of holdup. This is because the greater the number of the *socii* making up the *societas*, the greater the chance that an unforeseen event could dissolve the *societas* abruptly. Further, the greater the number of *socii* involved in a *societas*, the greater the risk of personal liability any one *socius* could suffer as a result of obligations brought under the *societas* agreement.[109]

Socii could only base their expectations and hopes of fair and collaborative behavior on the personal qualities of each other. However, the protection assured by preserving the initial personal qualities and intentions of each *socius* restricted the ability of *societates* to aggregate enough assets for capital-intensive economic activities. This ultimately made the *societas* an unsuitable business structure for long-term projects or geographically-wide business endeavors. *Societates consensu contractae* lacked a number of what are now considered to be essential structural features of scalable joint enterprises: (i) independent existence, (ii) asset lock-in, (iii) centralized management, (iv) limited liability for participants, and (iv) free transferability of equity interests.

As mentioned, the publicans ultimately sought centralized management, fungible investors, and *legal personality*. This is substantially the formula of the Berle and Means corporation. So, while a large part of corporate law scholarship centers its concerns on the fear of agency costs arising when corporate ownership is separated from control, archeology of Roman law tells us that separation of ownership and control was the organizational

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[108] John Armour & Michael J. Whincop, *An Economic Analysis of Shared Property in Partnership and Close Corporations*, 26 J. CORP. L. 983, 992 (2001).

[109] *See generally* Randazzo, *supra* note 99.

technology sought out by both entrepreneurs and the Roman state.[110]

E. Archeology of Separation of Ownership and Control as Technology

Hybridizing the concepts underlying private enterprise and the legal capacity afforded "municipal entities," the Romans created the *societates publicanorum*.[111] Testimonial accounts place the use of *societates publicanorum* before the third century BC, when the Romans fought the Carthaginians for control of the Mediterranean Sea in the Second Punic War.[112] When a pugnacious and more prepared enemy caused an unexpected increase in the costs of the war, the Roman state was forced to outsource the supply of armies serving in Spain to three separate *societates publicanorum*.[113]

Widespread use of the *societates publicanorum* grew significantly until the end of the *Res Publica*, before gradually losing importance at the beginning of the Empire. *Societas publicanorum* almost disappeared completely under the Antonine dynasty (96 AD–192 AD) when the Empire replaced them with imperial functionaries.[114] Because Justinian's Corpus Iuris Civilis was issued sometime between 529 AD and 534 AD, the time gap prevented such a collection of laws from providing a comprehensive set of provisions that governed the *societates*

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[110] On the agency costs debate, *see* Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129 (2009); Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. OF FIN. ECON. 305 (1976); ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[111] Blackstone pointed out that "it has been found necessary, when it is for the advantage of the public, to have particular rights kept on foot and continued, to constitute artificial persons, who may maintain perpetual succession and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations . . . ." *See* 1 BLACKSTONE, *supra* note 2, at *467.

[112] Publicans' companies, the *societates publicanorum*, are described by Roman historian Livy. In *Ab Urbe Condita*, Livy recounts how government leaseholding was a well-established business when he details the leasing of supply deliveries to the Roman army in Hispania during the Second Punic War. *See* Malmendier, supra note 89, at 31-32; Montanari, *supra* note 38, at 1578; *see also* BADIAN, *supra* note 89, at 15-17.

[113] *See* Malmendier, *supra* note 89, at 31-32.

[114] *See* Montanari, *supra* note 38, at 1578; Malmendier, supra note 89, at 33.

publicanorum.[115] In fact, available legal sources scarcely cover the regulation and economic relevance of *societates publicanorum*. Nevertheless, the *societas publicanorum* can be investigated thanks to public speeches, private correspondence, and other literature that allow us to "excavate" the most salient legal features of this organizational form.

Archeology of the regulations governing *societates publicanorum* is an essential first step before understanding how the model would become the archetype of the modern business corporation.

Although it is hard to select clearly defined criteria that would determine when an organization properly qualifies as a "business corporation," the core formula that characterizes the structural mechanics of a business corporation is simpler. A business corporation is a legal person created to conduct business through separation of ownership and control. The features typical of modern corporations include centralized management, asset lock-in, limited liability for participants, free transferability of shares, and independent existence. These features spring from the corporation having a legal personality and are possible largely because of separation of ownership and control.

Understanding the *societates publicanorum* as the archetype of the modern business corporation is not just an exercise in getting the nature of the *societates publicanorum* right. A proper comprehension of the model does more than just date the origins of the business corporation much earlier than colonial companies. Rather, understanding the *societates publicanorum* as the precursor of the modern business corporation sheds light on the role of separation of ownership and control in the corporate formula. This clarification is particularly relevant in the contemporary debate over costs and benefits of separation of ownership and control for business corporations.

Demonstrating that separation of ownership and control is the cornerstone of the business corporation model is a paramount finding in the "archeology of corporate law," as this *discovery* readdresses the ongoing debate over the costs produced by separation of ownership and control.

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[115] *See* Malmendier, supra note 89, at 33.

Acknowledging that separation of ownership and control is to the corporate model what incandescence is to the light bulb changes the understanding of the phenomenon from an effect of the corporate form to a cause of the corporate form. Separation of ownership and control, although producing agency costs, allows business corporations to function just like incandescence, while producing heat, allows a light bulb to emit light.[116] Heat and agency costs are natural side effects that come with irreplaceable advantages.

F. Societates Publicanorum as Universitates

Societates publicanorum had traits typical of legal persons. They could sue and be sued, contract, own assets, and bear liabilities in their own name. The credits and liabilities of the *societates publicanorum* were separated from any credits and liabilities of equity investors, who were apparently provided some form of limited liability. Further, *societates publicanorum* had a system of centralized management where only few individuals held governance rights. *Societates publicanorum* were also able to have, barring some legal actions or the exhaustion of the entity's purpose,[117] a longer lifespan than any investor.[118] They also were

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[116] As described by Lynn Stout, by way of analogy, the economic function of business corporations is comparable to the light emitted by a light bulb, whereas agency costs are comparable to the energy that light bulbs burn to produce light. In the case of light bulbs, the "waste" is enormous; yet the function of light bulbs justifies wasted energy. "Waste" for agency costs in the corporate sector is minimal compared to the overall benefits that the corporate form provides. *See* Lynn A. Stout, *The Corporation As a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685, 707 (2015).

[117] The *actio pro socio manente societate* allowed the *societas publicanorum* to survive notwithstanding a legal action concerning it. Paulus wrote:

> It is sometimes necessary to bring an action on partnership while the partnership is still in existence; as, for instance, where the latter was formed for the purpose of collecting taxes; if on account of various contracts it is to the advantage of neither partner to withdraw from the partnership, and one of them fails to place what he has collected in the common fund.

DIGEST OR PANDECTS OF JUSTINIAN, BOOK 17.2.65.15, *in* S. P. SCOTT, THE CIVIL LAW (Cincinnati, Central Trust Co. 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D1_Scott.htm#I [https://perma.cc/NSH7-F5GK] (translating Paulus).

[118] This distinguished *societates publicanorum* from *societates consensu contractae*.

able to issue some form of transferable equity.[119] As mentioned, *societates publicanorum* were able to own assets distinct from those of any individuals comprising it.[120] In general, the assets of a *societas publicanorum* formed the *arca communis*, which can be understood as the aggregate assets of the business organization. When contributed to the *common chest* of a *societas publicanorum* by individuals, assets ceased being the property of those individuals and instead legally became the property of the *societas publicanorum*.[121] Roman politician and lawyer Cicero reported numerous stories about the loss of property rights over assets contributed in a *societas publicanorum*.[122] Moreover, a *universitas*

> To such an extent is a partnership dissolved by death, that we cannot even admit that an heir may succeed to the partnership. Sabinus states that this applies to private partnerships, but in such as have for their object the collection of taxes, the partnership, nevertheless, continues to exist after the death of a partner; but only provided that the share of the deceased has been transferred to the heir, so that the other partner also must divide with the heir, and this also depends upon circumstances; for what if he on account of whose services the partnership was especially formed, or without whom its affairs could not be managed, should die?

DIGEST OR PANDECTS OF JUSTINIAN, BOOK 17.2.59.1, *in* S. P. SCOTT, THE CIVIL LAW (Cincinnati, Central Trust Co. 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D17_Scott.htm#II [https://perma.cc/Y2UH-JE9T] (translating Pomponius).

[119] *See* Montanari, *supra* note 38, at 1579; for Roman sources, *see infra* note 128 and accompanying text.

[120] DIGEST OR PANDECTS OF JUSTINIAN, BOOK 3.4.1.1, *in* S. P. SCOTT, THE CIVIL LAW (Cincinnati, Central Trust Co. 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D3_Scott.htm#IV [https://perma.cc/7VGY-7AAC] (translating Gaius).

> When persons are allowed to form associations under the title of a corporation, guild, or any other body of this kind, they are, like a municipality, entitled to have common property, a common treasure chest, and an agent or a syndic, and, as in the case of a municipality, whatever is transacted and done by him is considered to be transacted and done by all.

Id.

[121] "One partner is not bound for the debts contracted by another, according to the law of partnership, unless the money was deposited in the common chest." DIGEST OR PANDECTS OF JUSTINIAN, BOOK 17.2.82, *in* S. P. SCOTT, THE CIVIL LAW (Cincinnati, Central Trust Co. 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D17_Scott.htm#II [https://perma.cc/NL6Z-GQ7V] (translating Papinianus).

[122] In *In Verrem*, a collection of his most famous public speeches, Cicero recounts: "In the ease of this public money, O judges, there are three kinds of thefts. In the first place, he put it out among the companies from which it had been drawn at twenty-four per cent interest . . . ." CICERO, IN VERREM, BOOK 2.3.165, http://perseus.uchicago.edu/

had credits and liabilities separate from individuals, credits owed to the *universitas* were not owed to individuals, and individuals were not liable for the liabilities of the *universitas*: as a *universitas*, a *societas publicanorum* featured asset partitioning—owner shielding and entity shielding.[123]

G. Societates Publicanorum and Separation of Ownership and Control

Societates publicanorum featured a centralized management system where the positions of *mancipes*, *magistri*, and *pro magistri* were in charge of operating the nonhuman legal entity. *Mancipes* were the investors who obtained public contracts at the auctions.[124] *Socii* were investors who associated themselves with the *mancipes* after the latter obtained public contracts at an auction.[125] *Magistri* were those in charge of managing and directing the *societas publicanorum* during the ordinary course of business. Similar to current board directors, *magistri* decisions affected not only the participants in the *societas publicanorum* but

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perseus-cgi/citequery3.pl?dbname=PerseusLatinTexts&getid=1&query=Cic.%20Ver.%202.3.163 [https://perma.cc/CFU8-Z8C5] (translating Cicero). In *Epistulae ad Familiares*, a collection of his private correspondences with friends and family, Cicero writes: "At the same time you ought to take this into consideration. The whole sum of money legally coming to me I deposited with the publicani at Ephesus." CICERO, EPISTULAE AD FAMILIARES, BOOK 5.20, http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=PerseusLatinTexts&getid=1&query=Cic.%20Fam.%205.20 [https://perma.cc/8LEJ-U9FW]. While the two excerpts do not provide specific information about the functioning and regulation of the *arca communis*, together they suggest that investors lost control rights over any and all assets contributed to the *societates publicanorum*.

123 "Si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent" translated to "[i]f anything is owing a corporation, it is not due each member; nor do the individuals owe what the corporation owes." JAMES A. BALLENTINE, BALLENTINE'S LAW DICTIONARY 1184 (William S. Anderson ed., 3d ed. 1969). On asset partitioning, *see* Hansmann and Kraakman, *supra* note 66.

124 The etymology of the word "*manceps*" is related to the act of buying at auctions by raising their hand (in Latin "manus"). *See* Malmendier, *supra* note 89, at 36-37.

125 "For some[] purchase the contracts from the censors for themselves; and others go partners with them; while others again go security for these contractors, or actually pledge their property to the treasury for them." POLYBIUS, HISTORIES, BOOK 6.17, http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=GreekFeb2011&getid=1&query=Polyb.%206.17 [https://perma.cc/M8XW-ZSVJ] (translating Polybius).

also determined the actions of a *societas publicanorum* toward third parties.[126]

Finally, *participes* (or *adfines*)—distinct from both *mancipes* and *socii*—were investors who did not exercise governance rights but rather only held economic interests and seemingly enjoyed limited liability for their investments.[127] *Participes* were understood as "outside" investors who were afforded the ability to trade shares. In fact, it seems that *societates publicanorum* issued transferable shares called *partes.*[128] With such an organizational structure, *societates publicanorum* provided Roman entrepreneurs with the desired separation of ownership and control.[129]

H. A Copernican Revolution in Understanding Separation of Ownership and Control

Through the archeological study of corporate law, the relationship between the separation of ownership and control and the business corporation model can be examined in an unprecedented manner. In creating the *societates publicanorum*,

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[126] PETER BLAHO, MICHAL SKREJPEK, JARMILA VANKOVA, & JAKU ZYTEK, DIGESTA SEU PANDECTA 262 (2015).

[127] "A *particeps* is different from a *socius*: as a matter of fact, a *particeps* has a certain economic interest and does not participate otherwise, contrary to how a *socius* participates." CICERO, ÓPERA QUAE SUPERSUNT OMNIA AC DEPERDITORUM FRAGMENTA, VOL. 5.2, at 197 (Johann Caspar von Orelli ed., 1833) ("Aliud enim *socius*, aliud *particeps*, qui certam habet partem, non divise agit, ut socius.") (Author translation).

[128] *See* CICERO, PRO LEGE MANILIA, PRO CAECINA, PRO CLUENTIO, PRO RABIRIO PERDUELLIONIS REO, BOOK II, VOL. IV. In his second speech in *In Verrem*, Cicero provides information about the *participes*. CICERO, IN VERREM, BOOK 2.1.143, http://artflsrv02.uchicago.edu/cgi-bin/perseus/citequery3.pl?dbname=LatinSept18&getid=1&query=Cic.%20Ver.%202.1.143 [https://perma.cc/8U73-3PR3] ("Admit not as a partner in this work any one who has taken a contract for Lucius Marcius and Marcus Perperna the censors; give him no s[h]are in it; and let him not contract for it.") (translating Cicero). It has also been inferred that "shares were often traded between *participes* after the contract had been assigned to a *societas publicanorum*." *See* Malmendier, *supra* note 89, at 38. According to Polybius, in the second century BC, nearly every Roman had an interest in a *societates publicanorum*. *See* POLYBIUS, HISTORIES, BOOK 6.17, http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=GreekFeb2011&getid=1&query=Polyb.%206.17 [https://perma.cc/U5PQ-FL8L] (translating Polybius). Ancient historian Rostovtzeff theorized that it was possible that the Romans developed some form of financial market. *See* MICHAEL ROSTOVTZEFF, 1 THE SOCIAL AND ECONOMIC HISTORY OF THE ROMAN EMPIRE 31 (P.M. Fraser ed., 2d rev. ed.1957).

[129] Montanari, *supra* note 38, at 1580.

the Romans fashioned a model principally structured around legal personality and separation of ownership and control. So too did seventeenth-century Dutch businessmen when they created the Dutch East India Company in direct response to what they believed to be the primary problems of corporate governance at the time. In fact, the creation and subsequent regulation of the Dutch East India Company exist as the quintessential example of the importance of separation of ownership and control.[130] Its shareholders were powerless investors, with control centralized in the board of directors.

Excavating corporate law provides evidence that separation of ownership and control is essential for the corporate form. Separation of ownership and control is the mainspring (and not a byproduct) of business corporations as legal persons—quite a Copernican revolution for the way we understand corporations and separation of ownership and control.

I. The Inherent Separation of Ownership and Control

Citizens do not exercise direct control over cities, and shareholders in publicly-held business corporations do not exercise direct control over the business corporations in which they have their investments. Distinguishing those who make decisions on behalf of a corporate entity from those who have a stake in a corporate entity is a feature of the corporate entity organizational model. True business corporations are created to conduct business. True shareholders have an economic interest directly linked to the

[130] Ciepley recounts that at the time of creation of the Dutch East India Company, shareholders lacked governance rights, and their investments were locked in for ten years. *See* David Ciepley, *Member Corporations, Property Corporations, and Constitutional Rights*, 11 LAW & ETHICS HUM. RIGHTS 31, 48 (2017). Shareholders could sell their shares on the secondary market if they were unsatisfied with the management or needed money. *Id.* This structure was based on a perfect separation of ownership and control. However, the board of directors of the company perhaps did not consider such a form of separation of ownership and control sufficient. *Id.* Right before the term for restitution of equity contributions, the board of directors of the Dutch East India Company decided that equity contributions of shareholders would be transformed into permanent capital and would not be refundable to shareholders. *Id.* Shareholders probably refrained from protesting as the board of directors declared a dividend of 162.5%—essentially refunding each shareholder's contribution in addition to paying a 6.25% annual return on their initial investments for ten years. *Id.*

performance of the business corporation. True shareholders do not directly control the business in which they have a stake.

But citizens do not directly control cities either, and they too have a stake in how the cities in which they live, raise their kids, and work are run. Arguably citizens' stake in the cities they live, raise their kids, and work in is not less significant than shareholders' stake in business corporation in which they invest. *Participants* in corporate entities, including shareholders and citizens, typically do not have direct control over the corporate entity they have a stake in. Separation of ownership and control in business corporation is a typical feature of corporate entities.

Once again, however, the lexicon might not help clarify what separation of ownership and control actually means. The concept of separation of ownership and control seems to refer to a phenomenon in which "owners" of some goods are deprived of their "ownership rights." Yet the concept of ownership over a legal person which is afforded legal capacity is logically flawed. In fact, since the invention of nonhuman legal entities in Ancient Rome, separation and distinction from individuals has been a characterizing feature of corporate entities. Separate assets, separate liabilities, and delegated decision making are key features of the *separateness* that characterizes the nature of corporate entities. Moreover, ownership over a corporation appears to be unreconcilable with a corporation's legal capacity—how could a legally capable entity be owned by another legally capable subject?

Not only is the separation of ownership and control typical of the general structure of corporate entities since the origins of nonhuman legal entities, but separation of ownership and control can also be considered as an organizational technology.

First, separation of ownership and control allows corporations to survive humans: shareholders can leave and change, but the corporation continues to exist. Second, separation of ownership and control facilitates the aggregation of capital derived from a myriad of individuals and entities. Third, separation of ownership and control allows shareholders to select a corporation's decision-makers. If shareholders had control of the corporation, they could not select through an election the individuals in charge of running the corporations.

In fact, to some extent that is the phenomenon that we witness when a shareholder gains control over a corporation. Different from other legal persons, business corporations allow some of their constituents to gain operational control, by acquiring shares in their stocks, without any process of selection and specific appointment to that task, a shareholder can take control of a corporation. When a controlling shareholder takes control over a corporation, something unusual, at least in the case of traditional legal persons, happens: ownership and control cease being separated. Remaining shareholders, as well as the nonhuman legal entity itself, become subject to the control of a (natural or legal) *person* neither selected nor elected for such a role, whereas board directors are.

An analogous situation would happen if a citizen was permitted to run a town on the grounds that that citizen paid more taxes than all the other citizens, without being elected to any such position in municipal government. Such a phenomenon would somehow be in contrast with the nature and purpose of legal persons; it would also be inconsistent with the governance structure that was conceived for towns and cities organized as legal entities. In fact, the Romans incorporated towns and cities to make them separate and independent from transient constituents. Likewise, the Romans designed processes for delegating control over towns and cities to specifically selected individuals.

Without separation of ownership and control there would be no selection of decision-makers; any investors could gain more governance power by buying shares; investors would be subject to decisions of other investors.

Moreover, in systems as complex as business corporations, where heterogeneous interests and investments intertwine, separation of ownership and control could facilitate the protection of firm-specific investments. In fact, separation of ownership and control allows *super-partes* decision-makers to attract and retain firm-specific investments as well as to make them coexist and work together.[131]

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[131] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

CONCLUSION

Bridging ancient law and contemporary law offers answers to some of the most sophisticated and salient questions in corporate law. Excavating laws and language adopted to address the first corporations allows us to recognize the nature of modern corporations and to trace the origins of corporations' rights and duties.

This is helpful in the current debate over rights for corporations on one hand, and it is crucial in understanding the role of separation of ownership and control in the business corporation formula on the other. Studying the origins of corporations allows us to conclude that *separateness* from human beings is the key element of the corporate formula—it is inherent in the corporate nature.

The corporate form was invented exactly to distinguish a legal entity from the individuals participating in it. The assets and liabilities of a monastery—many monasteries are indeed organized in the corporate form—are separate and distinct from the assets and liabilities of the monks who populate and work in it. Often monasteries own rare books and priceless paintings, while monks are poor. Similarly, a business corporation's existence, rights, and liability are separate from those of its shareholders. So are a business corporation's actions; and this makes separation of ownership and control a paramount feature of the business corporation's governance model.