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EXTERNAL ENTITIES AND INTERNAL AGGREGATES:
A DECONSTRUCTIONIST CONUNDRUM

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External Entities and Internal Aggregates: A Deconstructionist Conundrum

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*“[N]ihil esse rem publicam, appellationem modo sine corpore ac specie.”*²

Today the goal of many physicists, whether working with what are some of the largest machines ever built such as the newly christened Large Hadron Collider or with the rather more simple chalk and blackboard, is to develop a single unified theory that will explain the characteristics of the most elemental particles and integrating the four elemental forces, bringing together Heisenberg's Quantum Theory³ and Einstein's General Relativity. The law of business organizations lacks a similar goal of unification. Rather, we find ourselves continuously mixing, sometimes matching and sometimes not, aspects of business entity law, adding or removing features to various forms of organization without the benefit of a conceptual framework as to whether, across the range of business organization forms, we have made or are making progress. Now the question of “progress” must be distinguished from “motion,” and I submit that it, at a minimum, needs to be debated whether the mixing and recombination of features has been motion without a preconceived determination of what will be progress.

Much is made when discussing the limited liability company (the LLC), the modern partnership, and the limited partnership, the latter two being business forms driven into existence by the need to maintain relevance in a world now containing the LLC, of certain immutable characteristics of unincorporated business organizations. As a result of its being an unincorporated business organization, “an LLC must have this characteristic or that characteristic” has been oft uttered as a guiding principle. But what justification exists for the

1. The author is a Member in the Louisville, Kentucky office of Stoll Keenon Ogden PLLC. The outline of this paper was presented at *LLCs at 20*, a symposium co-chaired by the author and held at Suffolk University Law School on June 13, 2008. While the author counts each of the other presenters as a friend, his particular thanks go to his co-chairs Carter Bishop and Robert Keatinge.

2. Suetonius: *Vita Divi Juli*, http://penelope.uchicago.edu/Thayer/L/Roman/Texts/Suetonius/12Caesars/Julius*.html, ¶ 77, (last visited Mar. 22, 2009). The quotation is translated to mean, “[T]he state was nothing, a mere name without body or form.” Suetonius: *Life of Julius Caesar*, http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Julius*.html#77 (last visited Mar. 22, 2009).

3. Keeping in mind the admonition of Niels Bohr, “Anyone who is not shocked by quantum theory has not understood it.” KAREN MICHELLE BARAD, *MEETING THE UNIVERSE HALFWAY* 254 (2007) (citing *THE PHILOSOPHICAL WRITINGS OF NIELS BOHR* (1998)).

admonition made that this or that characteristic "must" be present in order that the LLC (or partnership or limited partnership) may be an "unincorporated" business organization? In fact it has been all too little, if any.⁴

At the same time, we have seen the express characterization of these new business forms as "entities," most strikingly in the statement contained in the Revised Uniform Partnership Act (RUPA) that "[a] partnership is an entity distinct from its partners."⁵ But what is the meaning of this categorization? What characteristics and attributes flow from being an "entity"? Conversely, what is the combination of characteristics and attributes that have been incorporated into the traditional structures that now justifies an "entity" categorization? As is the case with what it means to be "unincorporated," too little consideration has been given to our utilization of "entity."⁶

The objective of this essay is to investigate what, in a deconstructionist sense,⁷ are the intrinsic meanings (if any) of the terms "unincorporated" and

4. Cf. LEWIS CARROLL, *HUNTING OF THE SNARK: AN AGONY IN EIGHT FITS* 8 (Macmillan & Co. 1876) (1876) ("What I tell you three times is true.").

5. REVISED UNIF. P'SHIP ACT (RUPA) § 201 (1994). In the 1996 amendments to RUPA, which added the limited liability partnership provisions, this provision was redesignated section 201(a). The 1914 Uniform Partnership Act was predominantly based on the aggregate model for the partnership, albeit with significant entity aspects, particularly with respect to property, creditors' rights, responsibility of partners, internal financial relations, and continuity. See ALAN R. BROMBERG, *CRANE AND BROMBERG ON PARTNERSHIP* 26-27 (1968). The debate over the adoption of one model or the other was memorialized in a series of articles. See Judson A. Crane, *The Uniform Partnership Act—A Criticism*, 28 HARV. L. REV. 762, 763 (1915); Judson A. Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838, 839-40 (1916); Joseph H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for a Definition*, 15 MICH. L. REV. 609, 609-10 (1917); William Draper Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism, Part I*, 29 HARV. L. REV. 158, 160-62 (1915); William Draper Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism, Part II*, 29 HARV. L. REV. 291 (1916); William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 639 (1915); Samuel Williston, *The Uniform Partnership Act, with Some Remarks on Other Commercial Laws*, 63 U. PA. L. REV. 196, 207 (1914); see also EDWARD H. WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 293-301 (1929) (discussing various utilizations of entity and aggregate concepts in UPA). Warren concluded that "[d]rafting the Uniform Partnership Act afforded a wonderful opportunity to give a clear and ambiguous answer to that question. We think that no such answer is given by the Act, and that is a matter of profound regret." WARREN, *supra*, at 301; see also Gary S. Rosin, *The Entity-Aggregate Disputes: Conceptualization and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 399-400 (1989) (setting forth a more recent review of shortcomings of Act).

6. Put in the context of another manner of thought, what is the Aristotelian Substance versus what are the Accidents of these characterizations? I posit that a corporation is incorporated, that being its Substance from which certain accidents may be determined, but that there is nothing that is unincorporated. According to Aristotle, there are ten categories into which things naturally fall: substance and nine accidents. The nine accidents are Quantity, Quality, Relation, Action, Passion, Time, Place, Disposition, and Raiment. See generally Michael Novak, *Toward Understanding Aristotle's Categories*, 26 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 117 (1965). Our traditional choice of entity calculus has focused upon the Relation, Passion, and Disposition of the various aspects of the organizational form options. That, however, is a discussion for another day.

7. As utilized herein, deconstruction refers to "an approach which rigorously pursues the meaning of a text to the point of undoing the oppositions on which it is apparently founded, and to the point of showing that those foundations are irreducibly complex, unstable or, indeed, impossible." Alternatively, the effort may be understood under the rubric utilized by, namely:

“entity.” From there, the question will be whether those terms, applied in the law of business organizations, have substantively contributed to the development or rather served as a crutch supporting unclear thought. It is my conclusion that the latter is the case and that the identification of certain forms of organization as an “entity” has not clarified or contributed to the characteristics of those structures so labeled. Furthermore, the essential features that have distinguished unincorporated from incorporated forms have been, at minimum, narrowed. For those reasons, the purported categories have little continuing viability as means of distinction.

THE POVERTY OF MAKING ASSESSMENTS BASED UPON DEFAULT RULES

There is a certain poverty in an analysis of this nature as it is driven by the default rules of the various business organization forms, those rules that apply unless and until the participants in a venture “otherwise provide” either in a written agreement or, where permitted, by an oral or course-of-conduct agreement. The various business organizations acts impose to different degrees a requirement that departures from the statutory default rules be in writing. At one end of the spectrum is the general partnership that has not elected to be a limited liability partnership. In that instance there is no requirement that any aspect of the partnership agreement be in writing,⁸ and there is no requirement that a written instrument be filed with the state either to enable or to memorialize the formation of the partnership.⁹ The various LLC acts provide

Whenever deconstruction finds a nutshell—a secure axiom or a pithy maxim—the very idea is to crack it open and disturb this tranquility. Indeed, that is a good rule of thumb in deconstruction. *That* is what deconstruction is all about, its very meaning and mission, if it has any. One might even say that cracking nutshells is what deconstruction *is*. In a nutshell . . . [h]ave we not run up against a paradox and an aporia? . . . [T]he paralysis and impossibility of an aporia is just what impels deconstruction, what rouses it out of bed in the morning.

JACQUES DERRIDA, DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA 32 (John D. Caputo ed., 1997) (1997) (emphasis in original).

8. See RUPA § 101(7), 6 pt. 1, U.L.A. 61 (2001). RUPA defines the partnership agreement as including a written, oral, or implied agreement.

9. See William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 622 (1915) (discussing partnership agreements).

[T]he fundamental characteristic which distinguishes partnerships from every other business association [is that] . . . [a]ll other business associations are statutory in origin. They are formed by the happening of an event designated in a statute as necessary to their formation . . . Partnership is the residuum, including the forms of co-ownership, of a business except those business associations organized under a specific statute.

Id.; see also Donald J. Weidner, *RUPA and Fiduciary Duty: The Texture of Relationship*, 58 LAW & CONTEMP. PROBS. 81, 82 (1995) (discussing “dazzling array of partnership relationships”). “An association of co-owners of a business constitutes a partnership unless the owners adopt some other form of business organization . . . If the economic essence of the relationship exists, a partnership is created unless the participants choose a different form of organization.” Weidner, *supra*, at 82; see also 2 JOHN BOUVIER, A LAW

differing degrees of a statute of frauds requirement. For example, LLC acts require the filing with the Secretary of State of written articles of organization/formation, which filing is a precondition to the organization of the LLC.¹⁰ Under some of the statutory formulae employed, there exists no further requirements of a writing,¹¹ although even in that absence there is often a requirement that any additional capital contribution obligations, in order to be enforceable, be set forth in writing.¹² Various states, on an individual basis, have imposed statute of frauds provisions with respect to individual rules employed in the act, mandating that any departure therefrom be in a written instrument.¹³ Each business corporation act contemplates articles or a certificate of incorporation, the filing of which is a precondition to the organization of the corporation¹⁴ and further requires that certain departures from otherwise applicable rules be set forth in that written instrument.¹⁵ It is contemplated that each corporation will adopt by-laws, with it being either expressly provided, or at least strongly implied, that such will be set forth in a written instrument.¹⁶

Notwithstanding the differing rules as to the requirements to do so, with few exceptions, the default rules of the various acts are subject to modification by private ordering. As a general rule, there is at least the expectation that there is a greater degree of modifiability permitted in unincorporated business organizations than in business corporations. For example, in the Delaware LLC Act, it is possible to modify, or even eliminate, all of the fiduciary duties.¹⁷ The rules governing the business corporation are more restrictive;

DICTIONARY *Partnership* 11, § 4 (discussing difference between partnerships and corporations). "Partnerships are created by mere act of the parties; and in this they differ from corporations which require the sanction of public authority, either expressed or implied." BOUVIER, *supra*. To that extent, partnership "[is] a word. What matters is the connection the word implies." THE MATRIX REVOLUTIONS (Warner Bros. 2003).

10. See, e.g., DEL. CODE ANN. tit. 6, § 18-201 (2008); KY. REV. STAT. ANN. § 275.020(1)-(2) (West 2008); REVISED UNIF. LTD. LIAB. CO. ACT (RULLCA) § 201(a), 6B U.L.A. 456 (2006); UNIF. LTD. LIAB. CO. ACT (ULLCA) § 202(a)-(b), 6B U.L.A. 574 (2006).

11. See RULLCA § 102(13), 6B U.L.A. 429 (defining "operating agreement" as agreement that may be written, implied, or a combination thereof).

12. See, e.g., KY. REV. STAT. ANN. § 275.200(1) (West 2008) ("An obligation of a member to make a contribution to the [LLC] shall not be enforceable unless set forth in a writing signed by the member."). This statute of frauds rule does not appear in RULLCA.

13. See, e.g., KY. REV. STAT. ANN. § 275.150(2) (West 2008) (member may agree, in writing, to be personally liable for LLC's obligations); *id.* § 275.170 (providing default standards of culpability and loyalty apply unless otherwise provided in writing); *id.* § 275.220 (indicating rule as to nature of distributions applies unless otherwise provided in writing).

14. See, e.g., DEL. CODE ANN. tit. 8, § 106 (2006); KY. REV. STAT. ANN. § 271B.2-030 (West 2008); MODEL BUS. CORP. ACT § 2.03 (1984).

15. See, e.g., MODEL BUS. CORP. ACT § 6.22(b) (1984) (requiring waiver of shareholder liability in articles of incorporation); see also *id.* § 2.02 cmt. 4 (cataloging options only electable in articles of incorporation).

16. See, e.g., MODEL BUS. CORP. ACT §§ 2.06, 16.01(e)(2) (2006).

17. See DEL. CODE ANN. tit. 6, § 18-1101 (2001); see also KY. REV. STAT. ANN. § 275.180 (West 2008) (permitting "elimination" of personal liability for breach of fiduciary obligations).

although it is possible, *ab initio*, to waive the duty of loyalty as embodied in the business opportunity doctrine,¹⁸ it is not possible, outside of modifying the standard of culpability permitted by the Delaware Business Corporation Act,¹⁹ to lessen or eliminate the standard of care applicable to corporate directors. Still, when we discuss and compare various forms of business organizations, the typical practice is to review them vis-à-vis their default characteristics. For example, we describe the LLC (and generally speaking, the other forms of unincorporated business organizations) as embodying the rule of “pick your partner,” meaning that the right to transfer the management interest in the venture is circumscribed by the requirement that the other participants in the venture consent to the transfer. This, however, is simply a default rule, and it is possible—and, in some applications, indeed common—to provide that the interest in the venture, including the right to participate in management, is freely transferable and does not require the approval of the other participants in the venture. Conversely, one of the hallmarks of the business corporation is that the shares therein are freely transferable by the shareholder with the transferee, merely by that private ordering between the transferor and the transferee, becoming fully vested with all rights of a shareholder including those to participate in management through the election of directors and voting on organic transactions, to inspect corporate records, and to receive the benefit of the fiduciary duties owed by the board of directors. While that may be the prototypical rule, the vast majority of all corporations are closely held, and in a substantial portion of them the shareholders have entered into a share restriction agreement limiting the ability of a stranger to become a shareholder. The substantive effect of the charging order, a creature of the law of partnership law appearing in limited partnership and LLC law,²⁰ may be achieved in the business corporation with a share restriction agreement.²¹ Consequently, any

18. See DEL. CODE ANN. tit. 8, § 122(17) (2001).

19. See DEL. CODE ANN. tit. 8, § 102(b)(7); see also KY. REV. STAT. ANN. § 271B.2-020(2)(d) (LexisNexis 2003); MODEL BUS. CORP. ACT § 2.02(b)(4) (2006).

20. RULPA § 703, 6B U.L.A. 313 (2008); ULPA § 703, 6A U.L.A. 463 (2008); Unif. P’ship Act (UPA) § 28, 6 pt. 2 U.L.A. 341 (2008); ULLCA § 504, 6B U.L.A. 605 (2006); RULLCA § 503, 6B, U.L.A. 498 (2006); RUPA § 504, 6 pt. 1 U.L.A. 160 (2001); PROTOTYPE LLC ACT § 705 (1992); see also UNIF. LTD. COOP. ASS’N ACT (ULCAA) § 102(11),(13), 6A U.L.A. 160 (2007) (defining the financial and governance rights in a cooperative). The ULCAA provides that a member’s interest in the cooperative includes both governance rights and financial rights. ULCAA § 601, 6A U.L.A. 160. It also provides that the rights of a member other than the financial interests are not transferable, while the financial rights are transferable. *Id.* § 603(b), (c). The ULCAA also permits a charging order against the financial rights. *Id.* § 605.

21. To the extent that the judgment debtor is subject to a binding share restriction agreement, the judgment creditor may find the ability to seize and exercise the rights incident to the shares to be limited. See, e.g., HOWARD M. ZARITSKY, STRUCTURING BUY-SELL AGREEMENTS: ANALYSIS WITH FORMS ¶ 7.05[1][a] (2d ed. 2000) (“The courts have also held, however, that a buy-sell agreement that does not preclude encumbrances may still prevent a creditor from obtaining the interest by foreclosure or judicial sale.”); ROBERT B. THOMPSON, O’NEAL AND THOMPSON’S CLOSE CORPORATIONS AND LLCs ¶ 7.23 (2006) (citation omitted) (“To safeguard the power of participants in a closed corporation to choose their future associates, participants will want to restrict the right of shareholders to pledge their shares, or at least the sales of the stock by the pledgee. If the

discussion of the characteristics of the corporation, the partnership, the limited liability company or any other business structure that does not, by statute, embody mandatory inalterable rules is necessarily limited.

“UNINCORPORATED”: WHAT, IF ANYTHING, DOES THAT MEAN?

Beginning with the LLC and since applied across most other significant unincorporated business organizations,²² the distinctions between the incorporated and unincorporated realms have been steadily reduced.²³ What then is left, if anything, of the distinction between “incorporated” organizations—including corporations, cooperatives, and associations²⁴—and unincorporated organizations? The 1928 Model Business Corporation Act

initial pledge is permitted, the participants may want to restrict voting power, inspection rights or other shareholder rights by the pledgee.”); 12 WILLIAM MEADE FLETCHER ET AL., *Fletcher Cyclopaedia of the Law of Private Corporations*, § 5454 (2008) (citation omitted) (share transfer restrictions “typically serve as an important device to ensure that current shareholders can control the ownership and management of the corporation and prevent outsiders from ‘invading the business.’”).

22. Unincorporated business organizations include the partnership, the limited partnership, and to a lesser degree, the business trust.

23. This discussion intentionally ignores the tax treatment following the characterization of a particular structure as being incorporated or not. An organization that is “incorporated” will be classified, for purposes of federal income taxation, as a corporation and from there be taxed, as appropriate, under Subchapter C, Subchapter S, Subchapter T, or otherwise. See Treas. Reg. § 301.7701-2(a)(3) (2008). Under the *Kintner* classification regulations adopted in 1954 and effective until December 31, 1996, entities that are formally incorporated under state law are per se taxed as corporations and are not subjected to the classification process. See *Kleinsasser v. United States*, 707 F.2d 1024, 1027 (9th Cir. 1983). “A corporation cannot be a partnership for federal income tax purposes.” *Id.* (citations omitted); I.R.S. Gen. Couns. Mem. 37,127 (May 18, 1977), as modified by I.R.S. Gen. Couns. Mem. 37,953 (May 14, 1979). In I.R.S. Private Letter Ruling 7918056 (Jan. 30, 1979), the Service reviewed the classification of a closely held corporation under the *Kintner* analysis. The Service subsequently reconsidered that ruling, stating:

An entity that is “incorporated” as that term was used at common law cannot be a partnership within the meanings . . . of the Code. An incorporated entity must be a corporation within the meaning . . . of the Code irrespective of whether it meets the standards set forth in section 301.7701-2 of the regulations for classifications as an association taxable as a corporation.

I.R.S. Priv. Ltr. Rul. 7921084 (Feb. 27, 1979).

Since January 1, 1997 and the superseding “check-the-box” classification regulations, domestic entities that are “incorporated” are classified as corporations and taxed accordingly. See Treas. Reg. 301.7701-2(b)(1) (2008). Ribstein and Keatinge have criticized the inconsistency in looking at state law characteristics to determine whether an unincorporated structure should be treated as a corporation, while relying upon a label of “incorporation” rather than analyzing the presence or absence of those same state law characteristics. See LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 16:14 (2d ed. 2008). Akin to this essay’s consideration of the innate meaning of the labels “entity” and “unincorporated,” tax treatment is consequent to the tax code’s determination, for its purposes ascribe meaning to a label utilized in the state law organizational act.

24. See, e.g., KY. REV. STAT. ANN. § 272.042 (West 2008). The Uniform Limited Agricultural Cooperative Act affirmatively categorizes a cooperative as unincorporated. See Unif. Ltd. Cooperative Ass’n Act § 104, 6A U.L.A. 166 (2003); see also James B. Dean & Thomas Earl Geu, *The Uniform Limited Cooperative Association Act: An Introduction*, 13 DRAKE J. AGRIC. L. 63, 75 (2008) (providing background of Uniform Limited Cooperative Association Act).

(MBCA) defines an “unincorporated” association as “any group of two or more persons united to carry on a business for profit except when such group is formed into a corporation under the laws of any state, territory, nation, or sovereignty. Without hereby restricting the meaning of the term, it is declared to include partnerships, limited partnerships, limited partnership associations, joint stock companies, and business trusts.”²⁵ For our purposes, it is not enough to resolve whether an organization is “incorporated” by determining whether that label is utilized in the statute; were we to do so, then deleting the term “incorporated” from the MBCA²⁶ would mean that the prototypical corporation is not incorporated. Rather, we must determine what aspects of a form of organization render it “incorporated” so as to provide information to distinguish that category from those that are unincorporated.²⁷

There is not complete agreement as to the fundamental characteristics of an “incorporated” business organization, a fact that is consequent to distinctions made over time as the law of corporations has developed, or even as to what constitutes a characteristic. With that caveat, to the extent there is agreement about, at a minimum, more crucial distinctions, it would reflect:

- Limited liability;
- The right to sue and be sued in the corporation’s own name;
- Governance by elected representatives;
- Certificated interests;
- The ability to hold and transfer property in the corporation’s name;
- Formation by state filing;
- Perpetual succession; and
- The right to contract in its own name.²⁸

25. MODEL BUS. CORP. ACT § 1 (XIV) (1928); *see also* 13 AM. JUR. 2D *Business Trust* § 1 (2008) (classifying business trust as “an unincorporated business organization”).

26. *See* MODEL BUS. CORP. ACT §§ 1.40(4), 2.03(b), 3.01(a); *see also* DEL. CODE ANN. tit. 8, § 101(a), (b) (2001).

27. Otherwise, we might find ourselves “down the rabbit hole” finding it necessary to take sides in the discussion:

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 104 (Branden Books 1983) (1872) (emphasis in original). In short, if words do not have agreed meanings we cannot communicate using them.

28. *See* Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: LLCs, LLPs, and LLLPs in Interstate Transactions*, 58 BAYLOR L. REV. 205, 237 (2006); *see also* RENIER R. KRAAKMAN, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 5 (2004) (listing as the characteristics of a corporation its separate legal personality, shareholder limited liability, transferable shares, delegated management, and investor ownership).

It is possible that other listings could be prepared providing varying levels of detail and emphasis as to a corporation's characteristics. Regardless of the list utilized, in distinguishing a corporation, a form of organization that is "incorporated" from an organization that is "unincorporated," it is necessary to determine which characteristics serve to differentiate the two classes.

LIMITED LIABILITY

Limited liability is a two sided coin; an owner is not liable for the entity's debts, but only at a forgotten cost. The first side, and that most often examined, provides that the owners, qua owners, are not liable for the debts and obligations of the business organization beyond their agreed upon investments therein.²⁹ This follows from the understanding that the business organization is a separate legal debtor.³⁰ The counterbalance to this rule is the possibility of "piercing the veil," holding the shareholders liable for the obligations of an impecunious business. The second side of the coin is asset partitioning, namely that the business organization's assets are dedicated to its purposes and are generally unavailable to satisfy the shareholders' creditors.³¹ The counterbalance to this rule is the "reverse pierce," wherein the assets of the business are made available to meet the personal debts of an owner.³² This second aspect of limited liability exists for the benefit of the business organization's creditors, assisting them in the pricing of credit through the knowledge that absent distributions, which may be contractually limited, capital will be applied to satisfaction of creditors' claims. Both sides of the limited liability coin encourage efficient capital formation and economic activity through the formation of operating business entities. One side encourages equity investment, while the other undergirds the availability of debt capital to the entity and, to a lesser extent, to the individual owner.

Historically, limited liability has not been an indispensable characteristic of the corporate form.³³ Rather, early corporation statutes preserved the rule extant in the predecessor joint stock company of owner liability for the debts

29. See, e.g., ULLCA § 303(a), 6B U.L.A. 587 (2006); RULLCA § 304(a)(2), 6B U.L.A. 475 (2006); MODEL BUS. CORP. ACT § 6.22 (2006).

30. See BAYLESS MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL 6 (2d ed. 1990).

31. See, e.g., Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 427-33 (2003).

32. See generally Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33 (1990).

33. See MANNING, *supra* note 30, at 5-6 ("[T]he feature of limited liability . . . played little or no part in the development of modern corporation law."). Blackstone did not identify limited liability as a characteristic of a corporation. See 1 WILLIAM BLACKSTONE, COMMENTARIES 455 (1765); see also WILLIAM L. CLARK, JR., HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS 16 (Francis B. Tiffany ed., 2d ed. 1907) (1897) (limited liability is "not an essential attribute" of the private corporation); Wesley Newcomb Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909).

and obligations of the venture.³⁴ Certain early corporation statutes provided for double shareholder indemnity—liability for twice the amount of the subscription, at that time tied to the par value of the shares.³⁵ As early as the 1820s, however, New York provided a rule of limited liability. Over the next century the generalized distrust of the corporate enterprise faded³⁶ and acceptance of limited liability increased.³⁷ The efforts to draft a uniform business corporation act by the National Conference of Commissioners of Uniform State Laws included limited liability provisions.³⁸ Eventually, limited liability came to be lauded in terms typically reserved for motherhood, apple pie, and Fourth of July celebrations.³⁹ Today, limited liability is provided in corporate statutes and in the MBCA, the most broadly accepted model for corporation laws.⁴⁰ The provision of limited liability to shareholders has been justified in modern law and economics scholarship,⁴¹ upon the historical objective of “democratizing” investment opportunities,⁴² and as a natural conclusion of the entity treatment of the corporation.⁴³

34. See I FLETCHER ET AL., *supra* note 21, § 21; 46 AM. JUR. 2D *Joint Stock Companies* § 14 (2008) (indicating common-law joint stock company rule).

35. See, e.g., *Briggs v. Penniman*, 8 Cow. 387, 395 (N.Y. Sup. Ct. 1826). Such was the rule in Kentucky; see also RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784-1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION 69-72, 192* (Greenwood Press 1982) (discussing history of general incorporation statutes).

36. See STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1:3 (1991); Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 158-61 (1985).

37. See Morton J. Horowitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 208 (1985) (arguing “distinction between the liability of the ‘members’ of a corporation and a partnership, so clear to modern eyes, was still regarded rather as a matter of degree than of kind throughout the nineteenth century.”); Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1210 (2002) (indicating that limited liability not widely recognized until early 1900s.)

38. The Uniform Business Corporation Act was promulgated in 1928. In 1943, the Act was withdrawn as “Uniform” and renamed “Model.” Subsequently, control of the act was transferred to the Committee on Corporate Laws, Section of Business Law, American Bar Association.

39. See, e.g., I MAURICE WORMSER, *DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS* 14 (1927) (“The attribute of limited liability is regarded by most persons as the greatest advantage of incorporation . . . Indeed many immigrants doubtless possess full knowledge of this fact before coming within hailing distance of the Statue of Liberty.”).

40. The Model Business Corporation Act is the model upon which the corporation laws of a majority of the states are based. The Delaware General Corporation Act is the model upon which the corporation laws of some other states including Kansas and Nevada are based. See DEL. CODE ANN. tit. 8, §§ 101 et seq. (2001).

41. See, e.g., FRANK H. EASTERBROOK & DANIEL F. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 40-62 (1991); see also Frank H. Easterbrook & Daniel F. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 93-97 (1985) (discussing benefits of limited liability). It should be noted that Easterbrook and Fischel are writing in the context of the public, not the closely held, corporation.

42. See, e.g., Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 156 (1992).

43. See, e.g., BAYLESS MANNING, *LEGAL CAPITAL* 10 (3d ed. 1990).

History aside, the key point is not that the shareholder has been granted some special thing called limited liability. The real point is that in the case of creditor claims against an enterprise in corporate

Before 1977, a person desiring to limit exposure to a set amount of capital as the owner (as opposed to a lender) of a business venture had but two options: become a shareholder or become a limited partner. Either election carried costs, including the limited degree of participation in management that comes with either role, but came with the benefit of limited liability for the debts and obligations of the venture. Further, in the limited partnership, absent private ordering to the contrary, there existed minimal capital lock-in.⁴⁴ Today, the range of entities that provide limited liability in the investor-owner is far broader, and limited liability has become the rule, not the exception. With the exceptions of (i) the partners in a general partnership that does not make an election to be a limited liability partnership⁴⁵ and (ii) the general partners in a limited partnership that does not elect to be a limited liability limited partnership,⁴⁶ limited liability is available and is indeed the default rule in the corporation,⁴⁷ the LLC,⁴⁸ the business trust,⁴⁹ the LLP,⁵⁰ and the LLLP.⁵¹

form, *the corporation is the debtor*, not those persons who hold claim to the proprietorship capital in the enterprise. Once that conceptual step is taken, the creditor law of the corporation exactly parallels the law of individual indebtedness and of creditors of individuals.

Id.; see also 1 FLETCHER ET AL., *supra* note 21, § 14 (“The rights and liabilities of a corporation are distinct from those of its members, and thus the shareholders . . . are ordinarily not liable for the corporation’s obligations, liabilities, or debt.”) It needs to be recognized as well that, in addition to protecting the shareholders from exposure in excess of the amounts invested in the venture, the corollary of limited liability—that the assets of the venture will not be available to satisfy claims against the owners in their individual capacities—assures a defined pool of assets available to satisfy creditor claims. This aspect of limited liability has been labeled “defensive asset partitioning.” See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 394-95 (2000). See generally Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

44. See RULPA (1976) § 603, 6B U.L.A. 286 (2008) (providing that absent a different rule set forth in the certificate of limited partnership, a “limited partner may withdraw upon not less than six months written notice”); *id.* § 604, 6B U.L.A. 291 (providing that partner entitled to declared but unpaid distributions plus the fair value of partner’s interest in partnership). The limited liability enjoyed by the limited partners in a pre-ULPA (2001) limited partnership was subject to the “control rule.” See, e.g., KY. REV. STAT. ANN. § 362.437 (West 2008); RULPA (1976) § 303, 6B U.L.A. 180. Under this rule, a limited partner may be treated as a general partner and without limited liability if too involved in management and control of the limited partnership. ULP (2001) eliminated the “control rule.” See ULP (2001) § 303, 6A U.L.A. 418 (2008); see also Allan W. Vestal & Thomas E. Rutledge, *The Uniform Limited Partnership Act (2001) Comes to Kentucky: An Owner’s Manual*, 34 N. KY. L. REV. 411, 433-34 (2007).

45. See generally Thomas E. Rutledge & Elizabeth “Bitsy” Hester, *Practical Guide to Registered Limited Liability Partnerships*, 5 STATE LIMITED LIABILITY COMPANY AND PARTNERSHIP LAWS (Arthur Jacobson et al. eds., 2008).

46. See generally Thomas E. Rutledge & Thomas Earl Geu, *Practical Guide to the Limited Liability Limited Partnership*, 1 STATE LIMITED PARTNERSHIP LAWS (Arthur Jacobson et al. eds., 2008).

47. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(6) (2008); KY. REV. STAT. ANN. § 271B.6-220 (West 2008); MODEL BUS. CORP. ACT. § 6.22 (2006).

48. See, e.g., DEL. CODE ANN. tit. 6, § 18-303(a) (2008); KY. REV. STAT. ANN. § 275.150(1) (West 2008); ULLCA § 303(a), 6B U.L.A. 587 (2008); RULLCA § 304, 6B U.L.A. 475 (2006).

49. See, e.g., DEL. CODE ANN. tit. 12, § 3803 (2008); KY. REV. STAT. ANN. § 386.400 (West 2008); UNIF. STATUTORY TRUST ENTITY ACT § 102 (2008 Annual Meeting Draft) (defining “beneficial owner”).

50. See, e.g., KY. REV. STAT. ANN. § 362.555, § 362.1-306(3) (West 2008); RUPA § 306(c), 6 pt. 1

Consequently, notwithstanding its historical importance in economic development,⁵² and its pre-1977 prominence as a means of distinguishing the corporation from other business entity forms,⁵³ limited liability does not serve as a means of distinguishing incorporated from unincorporated organizations. Rather, from 1977 through the current day, limited liability seems to be on an inexorable march toward becoming the default rule among unincorporated business organizations.⁵⁴

SUE AND BE SUED IN OWN NAME

Historically, a general partnership could not sue or be sued in its common name.⁵⁵ The now archaic joint stock company, except pursuant to particular state laws to the contrary, could not sue or be sued in its own name.⁵⁶ It is long established that a business corporation has the capacity to sue and be sued in its

U.L.A. 117 (2008).

51. See, e.g., DEL. CODE ANN. tit 6, § 17-214 (2008); KY. REV. STAT. ANN. § 362.2-404(3) (West 2008); ULPA (2001) § 404(c), 6A U.L.A. 432.

52. See, e.g., HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS 6 (Callaghan & Company 1927) ("The limitation of liability has been the chief factor in facilitating large scale operations" in the corporate form).

53. In 1980, the IRS announced proposed amendments to the *Kintner* classification regulations that would have classified as a "corporation" any entity in which no member would be personally liable for the debts of organization. Prop. Treas. Reg. § 301.7701-2(a), 4 Fed. Reg. 75,709 (Apr. 4, 2008). After significant criticism of these proposed changes in the then prevailing classification regimen (see *Proposed Regulations on "Limited Liability Companies" are Criticized as Contrary to Congressional Intent and Detrimental to Overseas Investment*, 15 TAX NOTES 187 (1982)), they were withdrawn. Announc. 83-4, 1983-2 I.R.B. 31 (1983).

54. In 2008, New Mexico adopted the Uniform Limited Liability Partnership Act (2001), but it is non-uniform with respect to the liability rules applicable to general partners and the election of LLLP statute. ULPA provides that the general partners will be liable, jointly and severally, for the debts and obligations of the limited partnership unless the limited partnership has elected to be a limited liability limited partnership. See ULPA (2001) § 404(a), 6A U.L.A. 433; see also *id.* § 201(a)(4), 6A U.L.A. 392 (providing that, in the certificate of limited partnership, a limited partnership may elect to be a limited liability limited partnership). The New Mexico version of ULPA provides that every limited partnership will be a limited liability limited partnership. As such, as a default rule, even in a limited partnership, the general partners will enjoy limited liability. See N.M. STAT. ANN. § 54-2A-201 (2007), H.B. 184, 2007 Leg., 48th Sess. (N.M. 2007); see also N.M. STAT. ANN. § 54-2A-102, § 102(I), H.B. 184, 2007 Leg., 48th Sess. (N.M. 2007).

55. See RUPA § 307, cmt. (discussing common-law rule regarding partnership's ability to sue or be sued in own name).

At common law, a partnership, not being a legal entity, could not sue or be sued in the firm name. The UPA itself is silent on this point, so in the absence of another enabling statute, it is generally necessary to join all the partners in an action against the partnership.

Id. See generally J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE § 14.8 (2004); *Telemarketing Commc'ns v. Liberty Partners*, 798 S.W.2d 462, 463 (Ky. 1990) (holding partnership may not sue or be sued in its common name).

56. See *Spotswood v. Mooris*, 85 P. 1094 (Idaho 1906); see also HARRY G. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 81 (2d ed. 1970) (recognizing that, at common law, joint stock company recognized as legal entity); see also TEX. CIV. STAT. ANN. art. 6133 (Vernon 2008) (permitting a joint stock company or association to "sue or be sued . . . in its company or distinguishing name" without making stockholders or members parties to the suit).

own name.⁵⁷ Corporate organizational law now embodies this principle.⁵⁸ This characteristic of the corporation is not, however, limited to those organizations that are incorporated. For example, from the earliest limited liability company act—namely that in Wyoming adopted in 1977—the LLC has had express authorization to sue and be sued in its own name.⁵⁹ The ability to sue and be sued then has since become a common feature of other LLC acts.⁶⁰ Likewise, the capacity to sue or be sued in an entity's own name exists in a limited partnership,⁶¹ the business/statutory trust,⁶² and the cooperative.⁶³ The RUPA general partnership departs from the traditional rule pursuant to which, in order to sue a partnership, all partners must be sued; the new rule provides that a partnership may sue and be sued in its own name.⁶⁴

Consequently, the capacity of a business organization to sue or be sued in its name is not a basis upon which we can distinguish organizations that are incorporated from those that are unincorporated.

57. *See, e.g.*, WALTER H. ANDERSON, *LIMITATIONS ON THE CORPORATE ENTITY* 17 (1931) (indicating corporation has capacity "to sue and be sued by its corporate name and in the same manner as an individual"); BALLANTINE, *supra* note 52, at 6 ("A corporation may be regarded as a personal legal entity with rights and duties distinct from those of its members, and as such it has . . . the capacity to sue and be sued in its corporate name like an individual"); CLARK, *supra* note 33, at 12 ("the powers and facilities generally specified as creating corporate existence [include]: . . . the power . . . to sue and be sued in the corporate name"); STEWART T. KYD, *A TREATISE ON THE LAW OF CORPORATIONS* 10 (1793) ("Another characteristic of a corporation is, that it may sue and be sued in its collective capacity . . .").

58. *See, e.g.*, DEL. CODE ANN. tit. 8, § 122(2) (2008) (stating that every corporation has the power "sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitral or other proceeding, in its corporate name."); KY. REV. STAT. ANN. § 271B.3-020(1)(a) (West 2008) (stating that a corporation may "sue and be sued, complain and defend in its corporate name"); MODEL BUS. CORP. ACT § 3.02(1) (2006) (noting that a corporation has the power "to sue and be sued, complain and defend in its corporate name").

59. *See* WYO. STAT. ANN. § 17-297(a)(i) (2008). The statute provided as well that a member, as such, is not a proper party to an action against the LLC. *Id.* § 17-323.

60. *See, e.g.*, KY. REV. STAT. ANN. § 275.330 (West 2008) ("suit may be brought by or against the limited liability company in its own name."); ULLCA § 112(b)(1), 6B U.L.A. 572 (2008) (providing that an LLC may "sue and be sued, and defend in its name."); RULLCA § 105, 6B U.L.A. 438 (2008) ("a limited liability company has the capacity to sue and be sued in its own name . . ."). The Kentucky LLC Act also provides that a member of an LLC is not a proper party to a proceeding by or against an LLC unless a claim is being made against that individual member in a capacity other than as a member. KY. REV. STAT. ANN. § 275.330 (West 2008). Furthermore, it addresses who has the capacity to, on behalf of the LLC and in its name, bring suit. *Id.* § 275.335.

61. *See, e.g.*, KY. REV. STAT. ANN. § 362.2-105; ULPAA (2001) § 105, 6A U.L.A. 367 (2008).

62. *See, e.g.*, UNIF. STATUTORY TRUST ENTITY ACT § 307(a) (2008 Annual Meeting Draft) (2008).

63. *See, e.g.*, KY. REV. STAT. ANN. § 272.211(9) (West 2008); UNIF. LTD. COOP. ASS'N ACT § 106, 6A U.L.A. 169 (2008).

64. RUPA § 307(a), 6 pt. 1 U.L.A. 124 (2008) ("A partnership may sue and be sued in the name of the partnership"). It must be recognized that some states were moving to permit a partnership to be sued in its common name even before the adoption of RUPA and its tendency to treat the partnership as an entity rather than as an aggregate. *See, e.g.*, KY. REV. STAT. ANN. § 362.605 (West 2008) (amending, in 1994, the Kentucky adoption of UPA to permit a partnership to sue or be sued in its own name).

GOVERNED BY ELECTED REPRESENTATIVES

The characteristic “governed by elected representatives” signifies that managers (who may also be owners), in exercising their authority over the organization, do so in a separate capacity from that of an owner. Under both UPA and RUPA, a partner, in that role, has the right to participate in the management of the partnership and enjoys the power to bind the partnership in its ordinary course of business to third parties.⁶⁵ Stockholders of a joint stock company, however, do not have agency authority to bind the company to third parties.⁶⁶ They also cannot participate in the management of the venture, a role delegated to a board of directors/managers.⁶⁷ In the limited partnership, the authority to direct operations⁶⁸ and to bind⁶⁹ the venture are vested in the general partners qua general partners while the limited partners have neither the right to participate in management⁷⁰ nor to bind⁷¹ the limited partnership. In the corporation, the authority to direct the management of the venture is vested in a board of directors,⁷² but neither an individual director nor the board as a collective body has agency power to bind the corporation to third parties.⁷³ In the corporate form, the power to bind the entity to third parties is vested in its agents—typically the officers who are appointed by the board.⁷⁴ Unlike officers, shareholders, as shareholders, are not agents of the corporation,⁷⁵ and

65. See RUPA § 401(f), 6 pt. 1 U.L.A. 133 (participation in management); RUPA § 301(1), 6 pt. 1 U.L.A. 101 (agency authority); UPA § 18(e), 6 pt. 2 U.L.A. 101 (2008) (participation in management); UPA § 9(1), 6 pt. 1 U.L.A. 553 (2008) (agency authority).

66. See 46 AM. JUR. 2D *Joint Stock Companies* § 1 n.5 (2008) (“Individual members of a joint-stock company may not speak and act for the company.”).

67. See HENN, *supra* note 56, at 83; see also 46 AM. JUR. 2D *Joint Stock Companies* § 1 n.5 (2008).

68. See KY. REV. STAT. ANN. §§ 362.2-406(1), 362.447(1) (West 2008); ULPA (2001) § 406(a), 6A U.L.A. 434 (2008); RULPA § 403(a), 6B U.L.A. 222.

69. See KY. REV. STAT. ANN. § 362.2-402(1) (West 2008); ULPA (2001) § 402(a), 6A U.L.A. 429.

70. See KY. REV. STAT. ANN. § 362.2-406(1) (West 2008); RULPA § 303, 6B U.L.A. 222.

71. See KY. REV. STAT. ANN. § 362.2-302 (West 2008); ULPA (2001) § 302, 6A U.L.A. 419; RULPA § 303, 6B U.L.A. 222; ULPA (1916) § 9(1).

72. See MODEL BUS. CORP. ACT § 8.01(b) (2006) (“All corporate powers shall be exercised by or under the authority of the Board of Directors of the Corporation and the business of the affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its Board of Directors, subject to any limitations set forth in the Articles of Incorporation or in an agreement.”); DEL. CODE ANN. tit. 8, § 141(a) (2008) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of the board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”); KY. REV. STAT. ANN. § 271B.8-010(2) (West 2008) (“All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.”) Even where the board of directors is dispensed with, as permitted by statute (see, e.g., MODEL BUS. CORP. ACT § 6.25(1) (2006); KY. REV. STAT. ANN. § 271B.6-250(1) (West 2008)), it is still necessary that there be a person or group who will perform the duties of the board of directors.

73. 1 FLETCHER ET AL., *supra* note 21, § 392.

74. See HENN, *supra* note 56, at 432.

75. 1 FLETCHER ET AL., *supra* note 21, §§ 30, 2098.

neither are directors.⁷⁶ A limited cooperative association is required to have a board of directors that has control over the cooperative association;⁷⁷ the members of the board must be members of the cooperative association or representatives of members who are themselves business organizations.⁷⁸ The business trust, like the corporation, entirely separates ownership, which is vested in this instance in the beneficial owners,⁷⁹ and management control, which is vested in the trustees.⁸⁰

Generically, the LLC bridges the various options that have appeared as to management structure and agency power as an owner in other forms of business organizations by providing the flexibility to elect what structure better meets the needs and expectations of the venture. Generally speaking, LLCs are either member-managed or manager-managed.⁸¹ Under most statutory formulations, in a member-managed LLC, each member, as a member, has apparent authority⁸² in the ordinary course of the LLC's business to bind the LLC.⁸³ In contrast, in a manager-managed LLC, only managers, who may but need not be members,⁸⁴ have apparent authority to bind the LLC; members, as members, do not have apparent authority.⁸⁵ Most statutes require LLCs to elect the type of management in the articles of organization.⁸⁶ Furthermore, LLC

76. *Id.*

77. *See, e.g.*, KY. REV. STAT. ANN. § 272.171(1) (West 2008); ULCAA § 801(b), 6A U.L.A. 241 (2007) ("The affairs of a limited cooperative association must be managed by, or under the direction of, the board of directors.").

78. ULCAA § 803(a), 6A U.L.A. 243. There is flexibility to provide in the organizational documents that directors need not be members or representatives of members who are business organizations. *Id.* § 803(c).

79. *See, e.g.*, UNIF. STATUTORY TRUST ENTITY ACT § 102(1) (2008 Annual Meeting Draft) (2008) (defining "beneficial owner").

80. DEL. CODE ANN. tit 12, § 3806(a) (2008); UNIF. STATUTORY TRUST ENTITY ACT § 401 (2008 Annual Meeting Draft) (2008) ("The business and affairs of a statutory trust must be managed by or under the authority of its trustees.").

81. *See* Thomas E. Rutledge, *The Lost Distinction Between Agency and Decisional Authority: Unfortunate Consequences of the Member-Managed Versus Manager-Managed Distinction in the Limited Liability Company*, 93 KY. L.J. 737, 739 (2004).

82. In 2005 the American Law Institute completed, and in 2006 published, the Restatement (Third) of Agency wherein apparent agency is described in section 2.03, and its creation is addressed in section 3.03. *See* RESTATEMENT (THIRD) OF AGENCY §§ 2.03, 3.03 (2006); *see also* RESTATEMENT (SECOND) OF AGENCY § 8 (1958).

83. *See, e.g.*, KY. REV. STAT. ANN. § 275.135(1) (West 2008); 805 ILL. COMP. STAT. ANN. § 180/13-5(a) (2008); UNIF. LTD. LIAB. CO. ACT § 301(a)(1) (amended 1996), 6B U.L.A. 545 (2008); PROTOTYPE LLC ACT v. 2.01, § 301(B) (2008) [hereinafter PROTOTYPE LLC ACT].

84. *See* KY. REV. STAT. ANN. § 275.165(2)(b) (West 2008); RULLCA § 407(c)(6), 6B U.L.A. 484 (2008) (providing members in a manager-managed LLC who are not managers do not have apparent authority to bind company).

85. *See, e.g.*, ULLCA § 301(b)(1), 6B U.L.A. 585 (2008); *see also* KY. REV. STAT. ANN. § 275.135(2) (West 2008); 805 ILL. COMP. STAT. ANN. § 180/13-5(b) (2008). Certain states—namely Minnesota, North Dakota, and Tennessee—provide a third option referred to as "board managed." *See* MINN. STAT. § 322B.606 (2006); N.D. CENT. CODE § 10-32-69 (2005); TENN. CODE ANN. § 48-239-101 (2002).

86. *See, e.g.*, ULLCA § 203(a)(6), 6B U.L.A. 576 (2008); *see also* 805 ILL. COMP. STAT. ANN. § 180/5-5(a) (2008); KY. REV. STAT. ANN. § 275.025(1)(d) (West 2008); PROTOTYPE LLC ACT, *supra* note 83, § 202(d).

acts ordinarily link the internal management structure to the elected agency structure. The default rule for management in the member-managed LLC is management of the LLC by the members, qua members, voting on a pro-rata, per capita, or other basis.⁸⁷ In contrast, in a manager-managed LLC, the managers, in a collegial or unilateral manner, make decisions on behalf of the LLC.⁸⁸ Consequently, the election made with respect to apparent agency authority dictates the default rule regarding internal governance of the entity.⁸⁹

The separation of ownership and managerial control long embodied in the corporation has long existed in the joint stock company and has of late found application in those LLCs that, under the predominant paradigm, are manager-managed. While still missing from the partnership and the limited partnership, once we accept a priori the unincorporated nature of the LLC and joint stock company, this characteristic does not serve to distinguish incorporated from unincorporated organizations.

CERTIFICATED INTERESTS

The certification of shares issued by a business corporation is certainly typical, but in fact is not mandatory. For example, the MBCA provides, "Shares may *but need not* be represented by certificates."⁹⁰ In fact, the MBCA specifically addresses the circumstance of shares issued without certificates, providing that a determination to prospectively forego the issuance of certificates may be made by the board of directors⁹¹ as long as a written memorialization of the information that would otherwise be set forth in a share certificate is distributed to shareholders.⁹² Consequently, whether "certificated

87. See, e.g., KY. REV. STAT. ANN. § 275.165(1) (West 2008) ("Unless the articles of organization vest management of the [LLC] in a manager or managers, management of the business and affairs of the [LLC] shall vest in the members."); ULLCA § 404(a)(1), 6B U.L.A. 591 (2008); 805 ILL. COMP. STAT. ANN. § 180/15-1(a) (2008); PROTOTYPE LLC ACT, *supra* note 83, §§ 301(B), 403(A).

88. See, e.g., 805 ILL. COMP. STAT. ANN. § 180/15-1(b) (2008); KY. REV. STAT. ANN. § 275.165(2) (West 2008) ("If the articles of organization vest management in one (1) or more managers . . . the manager or managers shall have exclusive power to manage the business and affairs of the [LLC]."); KY. REV. STAT. ANN. § 275.175(1) (West 2008) (providing as a default rule that each manager will have a single vote); ULLCA § 404(b)(1)-(2), 6B U.L.A. 591 (2008) (providing that "each manager has equal rights in the management and conduct of the company's business"); PROTOTYPE LLC ACT, *supra* note 83, § 403(A).

89. Noteworthy exceptions are (i) the Delaware LLC Act, which (a) does not differentiate as to statutory apparent agency authority between member-managed and manager-managed LLCs and (b) does not require a designation of the LLC as member managed or manager managed in the certificate of formation (DEL. CODE ANN. tit. 6, § 18-402 (2005)) and (ii) RULLCA, which provides that a member, qua member, is not an agent of the LLC (RULLCA § 301, 6B U.L.A. 469 (2008)). See generally Thomas E. Rutledge & Steven G. Frost, *RULLCA Section 301 - The Fortunate Consequences (and Continuing Questions) of Distinguishing Apparent Agency and Decisional Authority*, 63 BUS. LAW. 37 (2008).

90. MODEL BUS. CORP. ACT § 6.25(1) (2006); see also KY. REV. STAT. ANN. § 271B.6-250(1) (West 2008).

91. MODEL BUS. CORP. ACT § 6.26(1) (2006) (emphasis added); see also KY. REV. STAT. ANN. § 271B.6-260 (West 2008) (adopting MBCA language).

92. MODEL BUS. CORP. ACT § 6.26(2) (2006).

interests” is even legitimately a typical characteristic of the corporation is open to debate. With the exception of those other forms of business organization, such as the cooperative or association, which may be “linked” to corporate law and by means of that linkage have the at minimum presumption that certificates will be issued with respect to ownership interest therein,⁹³ the certification of the ownership interest is not typical. For example, in the joint stock company and business trust, already identified as being “unincorporated,”⁹⁴ stock certificates are usually issued.⁹⁵

Despite the aforementioned examples, the certification of ownership interest in unincorporated entities is generally unknown and, where it occurs, is pursuant to private ordering. The UPA is entirely silent as respects the certification of an interest in a partnership, a silence that has been continued in RUPA. In a similar vein, the certification of interests, in limited partnerships, whether as a general or as a limited partner, is not addressed in the Uniform Limited Partnership Act (1916) (ULPA), the Revised Uniform Limited Partnership Act (RULPA), or the Uniform Limited Partnership Act (2001) (ULPA). In this realm we see, rather, a provision requiring that the organization maintain the records necessary to determine each partner’s pro rata portion of the partnership.⁹⁶ Similarly, in the LLC, while the certification of interests is certainly permissible pursuant to private ordering,⁹⁷ it is not mandatory. Rather, typically the LLC is required to maintain whatever records are necessary to determine the relative ownership interest of the various members or transferees.⁹⁸ This practice extends back to the original 1977 Wyoming LLC Act that was itself silent as to certification of interest in the LLC.

Generally, it is true that the certification of ownership interests in the unincorporated realm has been done outside the relevant organizational statutes pursuant to private ordering, even as there has been a presumption under corporate law that issued share certificates would be issued. In light of express statutory provisions in corporate law for the non-certification of corporate shares, however, it is difficult to place significant weight upon this factor as a

93. See, e.g., KY. REV. STAT. ANN. § 272.042 (West 2008) (making cooperatives subject to same certification provisions as corporations).

94. See MODEL BUS. CORP. ACT (1928) § 1.XIV (identifying joint stock companies and business trusts as unincorporated).

95. 46 AM. JUR. 2D *Joint Stock Company* § 7 (2008) (noting stock of joint stock companies ordinarily represented by certificates); 13 AM. JUR. 2D *Business Trust* § 21 (2008) (stating ownership interest in business trust generally evidenced by certificate).

96. See, e.g., KY. REV. STAT. ANN. §§ 362.1-402(1)-(2), 362.2-111(9)(a) (West 2008); RULPA § 105, 6B U.L.A. 117 (2008); ULPA (2001) § 111(I)(a), 6A U.L.A. 381 (2008).

97. See, e.g., KY. REV. STAT. ANN. § 275.255(2) (West 2008).

98. See, e.g., *id.* § 275.185(1)(e)(1) (providing that a certificate may represent a membership interest, which may also provide for assignment or transfer of the interest thereby represented); see also PROTOTYPE LLC ACT, *supra* note 83, § 704(B).

mechanism as distinguishing incorporated from unincorporated entities. The express and rather extensive provisions in the corporate law addressing uncertificated shares supports the position that the certification of ownership interests is not itself helpful in distinguishing incorporated from unincorporated business organizations.

HOLD AND TRANSFER PROPERTY IN ITS OWN NAME

The capacity of a business organization to hold and transfer property in its own name is deceptively simple, and including this characteristic in a list may too easily diminish its importance. It is axiomatic that property cannot own property. While the ownership interests in a business organization are quite often and expressly characterized as personal property,⁹⁹ the business organization is not itself only property. Rather, while from the perspective of the owners, their participatory interest therein may be property, that in which the owners hold property rights itself enjoys the ability of having property rights. The corresponding effect is that the owners of the business organization holding property in its own name do not themselves own the property; rather, the business organization itself owns the property.

The ability of a corporation, as itself, to hold and transfer property, has long been listed as one of the characteristics of a corporation¹⁰⁰ and is now embodied in the corporate acts.¹⁰¹ From the first incarnation of the LLC, it has been contemplated and provided that an LLC may hold and transfer property in its own name,¹⁰² which right has been carried forward in subsequent LLC acts.¹⁰³ It is not the case, however, that business organizations across the board have enjoyed the capacity to hold and transfer property in the name of the organization. For example, while modern business trust law provides that the trust may hold and convey property in its own name,¹⁰⁴ the traditional rule has

99. See, e.g., HORACE A. SMITH, A TREATISE ON THE LAW OF PERSONAL PROPERTY 241 (2d ed. 1908) (stock is personal property); RULLCA § 501 (2007), 68 U.L.A. 496 (2007) (transferable interest in an LLC constitutes personal property); UNIF. STATUTORY TRUST ENTITY ACT § 304(a) (2008 Annual Meeting Draft) (2008) (stating that interest of a beneficial owner in a statutory trust is personal property); UNIFORM LTD. AGRICULTURAL COOP. ACT § 601(1) (2007), 6A U.L.A. 226 (2008) (explaining membership interest in limited cooperative association is personal property).

100. See, e.g., BALLANTINE, *supra* note 52, at 6 (listing as a characteristic of a corporation “the capacity to take, hold, and convey property in its corporate name like an individual”); CLARK, *supra* note 33, at 12-13 (“the powers and facilities generally specified as creating corporation existence [include]: . . . [t]he power to purchase and hold real and personal estate.”); KYD, *supra* note 57, at 13.

101. See, e.g., KY. REV. STAT. ANN. § 271B.3-020(1)(d)-(f),(h) (West 2008); MODEL BUS. CORP. ACT § 3.02 (2006). A corporation has the authority to “acquire, hold, sale, dispose of, pledge or mortgage any such property as its purpose may require.” MODEL BUS. CORP. ACT (1928) § 11.II (d).

102. WYO. STAT. ANN. § 17-15-104 (2008).

103. See, e.g., KY. REV. STAT. ANN. § 275.250 (West 2008); PROTOTYPE LLC ACT, *supra* note 83, § 703; see also KY. REV. STAT. ANN. § 275.240(1) (West 2008) (“property transferred to or otherwise acquired by a [LLC] shall be the property of the [LLC] and not of the members individually”).

104. See, e.g., UNIF. STATUTORY TRUST ENTITY ACT § 307 (2008 Annual Meeting Draft).

been that property of the business trust was titled in the trustee's name.¹⁰⁵ At common law, a general partnership was incapable of holding title to real property, but rather property was held in the name of one or more of the partners on behalf of the partnership.¹⁰⁶ With the adoption of the UPA, a partnership was authorized to hold legal title to property, including real property.¹⁰⁷ The change in the common law with respect to partnership property took place with somewhat less specificity than that effected by the UPA.¹⁰⁸ Still, while the UPA allowed the partnership to take title to real property, it went on to provide that the partners remained co-owners in that property, holding as a tenant in partnership.¹⁰⁹ As such, while the partnership may itself hold title to property, it remains owned by the partners even as the Act eliminates the characteristics of individual property ownership.¹¹⁰ As is discussed further below,¹¹¹ RUPA adopts an entity theory as to the partnership,¹¹² and RUPA section 203 is a continuation of that change in the law. The step back in specificity is that RUPA does not expressly incorporate UPA's statement that the partnership may acquire any estate in real property. Traditionally, the limited partnership did not independently address the ownership of real property, leaving that to be addressed by "linkage" to the law of general partnerships.¹¹³ Conversely, ULPA is entirely silent with respect to the ability of a limited partnership to hold and convey property in its own name, save and except for the open-ended powers provision.¹¹⁴ In the modern business trust, the trust may hold property in its own name,¹¹⁵ and the beneficial owners have no ownership interest in the property of the trust.¹¹⁶

At one time, it may have been possible to validly distinguish those

105. See HENN, *supra* note 56, at 87; 13 AM. JUR. 2D *Business Trust* § 44 (1964) ("In the typical Massachusetts or Business Trust title to the property is held by Trustees.").

106. See J. WILLIAM CALLISON AND MAUREEN A. SULLIVAN, *PARTNERSHIP LAW AND PRACTICE* § 7.5 (2004).

107. UPA § 8(3), (4), 6 pt. 1 U.L.A. 532 (2008); *see also* UPA § 8, 6 pt. 1 U.L.A. 532 cmt. (noting that Subsection (3) effects a change in existing law).

108. RUPA § 203 provides that "property acquired by a partnership is property of the partnership and not of the partners individually." RUPA § 203, 6 pt. 1 U.L.A. 96 (2008).

109. See UPA § 25(1), 6 pt. 2 U.L.A. 294 (2008) ("A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.").

110. See UPA § 25(2), 6 U.L.A. 294 (2008) (eliminating the possession of the property for other than partnership purposes, the ability of assignment, attachment for the benefit of the creditors of an individual partner, and inheritability by the heirs of an individual partner).

111. See *infra* notes 175-178 and accompanying text.

112. RUPA § 201(a), 6 pt. 1 U.L.A. 91 (2008).

113. See RULPA § 105, 6B U.L.A. 399 (2008) ("In any case not provided for in this [act] the provisions of the Uniform Partnership Act govern."). The same result applied under the Uniform Limited Partnership Act until amended in 1976. See ULPA § 29 (1916) (amended 1976) ("In any case not provided for in this act, the rules of law and equity, including the law merchant, shall govern.").

114. See ULPA § 105 (2001), 6A U.L.A. 367 (2008).

115. See, e.g., UNIF. STATUTORY TRUST ENTITY ACT § 308 (2008 Annual Meeting Draft).

116. See, e.g., DEL. CODE ANN. tit. 12, § 3805(c) (2008); UNIF. STATUTORY TRUST ENTITY ACT § 304 (2008 Annual Meeting Draft).

organizations that are incorporated from those that are not based upon the ability to hold and convey property in the name of the business organization. Those days are, however, now a historical footnote, as the capacity to so hold and convey property has been afforded across the menu of organizational options.

FORMATION BY A STATE FILING

The general partnership is a residual classification for business organizations that meet the statutory definition¹¹⁷ and are not organized pursuant to other organizational law.¹¹⁸ Organization of the partnership is not predicated upon any state filing or even the conscious awareness of the partners that they have created a partnership.¹¹⁹ This contrasts with the otherwise generally applicable rule that the formation of a business organization is contingent upon a filing with the Secretary of State or similar state office. This requirement is seen in corporations,¹²⁰ in the Uniform Limited Agricultural Cooperative Act,¹²¹ the limited partnership,¹²² and the limited liability company.¹²³

Although it is difficult to conceptualize how the necessary degree of specificity with respect to ownership and operation would be achieved, under the traditional formula it was possible to organize either a business trust or a joint stock company without any written instrument, including any state filing. Both existed at common law with statutes created only later to provide statutory recognition. To this day the "Massachusetts business trust," a type of business trust, may be organized in Massachusetts without any written instrument. It should be recognized, however, that the modern trend for the business trust is to provide that it will be formed pursuant to the filing of a Certificate of Trust with the Secretary of State, the organization of the venture being dependent

117. See KY. REV. STAT. ANN. §§ 362.175(1), 362.1-101(10) (West 2008); UPA § 6(1) (1997), 6 pt. 1 U.L.A. 393 ("A partnership is an association of two or more persons to carry on as co-owners a business for profit"); RUPA § 101(6) (1994), 6 pt. 1 U.L.A. 61 ("'Partnership' means an association of two or more persons to carry on as co-owners a business for profit formed under Section 202, predecessor law, or comparable law of another jurisdiction"). The RUPA provides, "Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." RUPA § 202(a) (1994), 6 pt. 1 U.L.A. 92.

118. See UPA § 6(2) (1997), 6 U.L.A. 392; RUPA § 202(b) (1994), 6 pt. 1 U.L.A. 92.

119. See RUPA § 202(c) (1994), 6 pt. 1 U.L.A. 92.

120. See, e.g., MODEL BUS. CORP. ACT § 203(1) (2006) (forming corporation accomplished by filing articles of incorporation meeting statutory requirements with secretary of state). The formation of a corporation occurs, absent a delayed effective date, upon the filing of the articles of incorporation. DEL. CODE ANN. tit. 8, § 101(a) (2007); KY. REV. STAT. ANN. § 271B.2-030(1) (West 2008); MODEL BUS. CORP. ACT § 203(1) (2006); MODEL BUS. CORP. ACT (1928) § 5.II (providing corporate existence shall begin upon issuance of certificate of corporation).

121. UNIF. LTD. AGRIC. COOP. ACT § 302(c), 6B U.L.A. 196 (2008).

122. See, e.g., KY. REV. STAT. ANN. § 362.2-201 (West 2008); ULPA (2001) § 201, 6A U.L.A. 392 (2001); ULPA § 2 (1916).

123. See, e.g., DEL. CODE ANN. tit. 6, § 18-201 (2008); KY. REV. STAT. ANN. § 274.020 (West 2008); RULLCA § 201, 6B U.L.A. 456 (2008); ULLCA § 202, 6B U.L.A. 574 (2008).

upon that filing.¹²⁴

In the modern incarnation of the various business organization forms, with the continuing exception of the general partnership,¹²⁵ where it is possible in every state for at least some general partnerships to make an LLP election, it must be recognized that it is not the filing of the statement of qualification¹²⁶ that brings about the organization of the partnership. Rather, the statement of qualification is filed by an already existing partnership.¹²⁷

The lack of a state filing requirement to bring a general partnership into existence distinguishes the general partnership from other forms of typical business organization, with the exception of those few joint stock companies and business trusts that may today be formed entirely on common law without the necessity of a state filing. That said, the requirement, or the absence of a requirement, of a state filing in order to bring about formation does not distinguish organizations that are incorporated from those that are unincorporated.

CONTRACT IN OWN NAME

The capacity of a corporation to enter into contracts in its own name, thereby binding the corporation but not the shareholders has long been recognized,¹²⁸ which rule has been carried forward and expressly acknowledged in modern business corporation acts.¹²⁹ In turn, the capacity to contract has been expressly incorporated in certain LLC Acts.¹³⁰ Curiously, however, an express grant of the power to enter into and perform contracts does not appear in many business organization acts, such being presumably incorporated into a general powers provision.¹³¹ Conversely, it appears that there has never been a

124. See, e.g., UNIF. STATUTORY TRUST ENTITY ACT § 201(a) (2008 Annual Meeting Draft).

125. In this instance we assume that the partnership is not electing to be an LLP.

126. See RUPA § 1001, 6 pt. 1 U.L.A. 239 (2008).

127. See KY. REV. STAT. ANN. § 362.1-1001 (West 2008); RUPA § 201(b), 6 pt. 1 U.L.A. 91 (1994); see also Committee on Partnerships and Unincorporated Business Organizations, *Prototype Partnership Agreement for a Limited Liability Partnership Formed Under the Uniform Partnership Act (1997)*, 53 BUS. LAW 689, 705 n. 33 (2003).

128. See, e.g., WALTER H. ANDERSON, LIMITATIONS ON THE CORPORATE ENTITY 7(1931) ("There are many things incident to a corporation, yet, to form the complete idea of a corporate aggregate, it is sufficient to suppose it vested with the following three capabilities: . . . to contract obligations.") (citation omitted); BALLANTINE, *supra* note 52, at 6 ("A corporation may be regarded as a personal or legal entity with rights and duties distinct from those of its members; and as such it has . . . [t]he capacity to enter into contracts in its corporate name like an individual."); BALLANTINE, *supra* note 52, at 20 ("When a corporation makes a contract it is a contract of the legal entity, and not of the individual members, and only binds them as a corporation.").

129. See, e.g., DEL. CODE ANN. tit. 8, § 122(13) (2008); KY. REV. STAT. ANN. § 271B.3-020(1)(g) (West 2008); MODEL BUS. CORP. ACT. § 3.02(7) (2006).

130. See, e.g., WYO. STAT. ANN. § 17-297(a)(vi) (2008).

131. See, e.g., ULPA § 105, 6B U.L.A. 117 (2008). "A limited partnership has the powers to do all things necessary or convenient to carry on its activities . . ." RULLCA § 105, 6B U.L.A. 438 (2008). RULLCA is less specific than the ULLCA on this point, as the latter provides that an LLC would have the power to "make contracts." ULLCA § 112(b)(5), 6B U.L.A. 572 (2008).

question that a partnership may enter into a contract, consequent to the rule of partner liability for obligations of the partnership.¹³² It is somewhat difficult to characterize whether it is the business organization that contracts in its own name, or whether, in contrast with the rule that applies in the corporation of the LLC, the partnership contracts in its own name and, absent private ordering to the contrary, in the name of each partner who shares in personal liability on the obligation incurred. In the case of a business trust, contracting is done in the name of the trustee(s) as the principal(s), and not in the name of the business trust.¹³³ In that instance, however, the recourse of the creditor is restricted to the assets of the trust and not the personal assets of the trustee(s).¹³⁴ The ability to contract in the name of, with the effect of binding only the business organization and its assets, is a characteristic that does not serve to distinguish organizations that are incorporated from those that are unincorporated.

PERPETUAL SUCCESSION

To suggest that the capacity of perpetual succession has long been recognized to be a central aspect of the corporation would unjustly minimize its importance. Ballantine,¹³⁵ Tiffany,¹³⁶ Anderson,¹³⁷ Clark,¹³⁸ Thompson,¹³⁹

132. See UPA §15, 6 pt. 1 U.L.A. § 613 (2008); RUPA § 306(a), 6 U.L.A. 117 (1994).

133. See 13 AM. JUR. 2D *Business Trust* § 44 (2008).

134. See *id.* § 74.

135. See BALLANTINE, *supra* note 52, at 6 (“A corporation may be regarded as a personal legal entity with rights and duties distinct from those of its members; and as such it has . . . [t]he capacity of succession, which is the capacity continuously to exist as the same organization, notwithstanding the death, withdrawal, or change of its members.”); *id.* at 8 (“The artificial or fictitious “personality” of the corporation is a way of describing the legal fact that the changing group is treated as a continuing unit which has rights and duties distinct from those of any or all of its members.”).

136. See CLARK, *supra* note 33, at 18 (discussing attributes of corporations).

[M]any of the incidents of a corporation are not essential, and many of the essential attributes may also exist in the case of a common partnership or unincorporated joint stock association. It is important, therefore, to find some characteristic of corporations that can be relied upon as a distinguishing mark. The only feature that can be thus relied upon is the existence of the corporation as an entity separate and distinct from the members who compose it. “The most peculiar and strictly essential characteristic of a corporate body, which makes it be such, and not some other thing, in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence.”

Id. (citation omitted).

137. WALTER H. ANDERSON, *LIMITATIONS ON THE CORPORATE ENTITY* 17 (Thomas Law Book Co. 1931), citing *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 585 (1898), observed that

There are many things incident to a corporation, yet, to form the complete idea of a corporate aggregate, it is sufficient to suppose it vested with . . . three . . . capacities [including]: . . . To have perpetual succession under a special denomination and under an artificial form.

138. CLARK, *supra* note 33, at 12 (“The powers and facilities generally specified as creating corporation existence [include] (1) the capacity of perpetual succession”); *id.* at 13 (“One of the chief attributes of a

Kyd,¹⁴⁰ and Blackstone¹⁴¹ all emphasized the centrality of perpetual succession in describing the corporation. The characteristic was shared as well by the joint stock company, in which the legal existence of the organization was not tied to the continuity of its ownership.¹⁴² Conversely, the partnership—and, by virtue of linkage,¹⁴³ the limited partnership—did not enjoy continuity of life. Rather, upon the separation of a partner, the organization's existence is violated,¹⁴⁴ and absent subsequent action by the partners, the organization must wind up and terminate.¹⁴⁵ Even where there is that intervention, the successor organization is not the same as that which preceded it, a consequence that has led to sometimes surprising results such as when the successor has sought to enforce a contract made by the predecessor but was unable to do so because there was no privity.¹⁴⁶ Today those rules have in the partnership and the limited partnership been abandoned, and the loss of a partner will no longer trigger the legal dissolution of the organization. Subject to the Rule Against Perpetuities, a business trust organized under common law has continuity of life,¹⁴⁷ while modern business trust statutes provide for continuity of life.¹⁴⁸

Early LLC Acts followed the partnership model, and an LLC would undergo

corporation, and one that is essential to corporate existence, is the power or faculty of having perpetual succession, under a special denomination, and in an artificial form, without being subject to dissolution or change of identity by reason of the death, legal disability or withdrawal of members.”).

139. SEYMOUR D. THOMPSON & JOSEPH W. THOMPSON, COMMENTARIES ON THE LAW OF CORPORATIONS 4 (3d ed. Bobbs-Merrill 1927) (“[A corporation’s] leading features are that it has a continuous succession during the term prescribed for its existence . . . and a distinct existence or legal entity separate and distinct from the natural persons composing it A characteristic is that the corporate body continues the same, notwithstanding changes in the individuals composing it.”).

140. See KYD, *supra* note 57, at 2 (identifying indefinite duration as essential characteristic of corporation).

141. See 1 BLACKSTONE, *supra* note 33, at 455 (suggesting need for structure, which was filled by corporation).

We have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same individual rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

Id.; see also *id.* at 456 (likening corporation to “a person that never dies”).

142. See HENN, *supra* note 56, at 85.

143. See RULPA § 1105, 6B U.L.A. 399 (2008) (UPA is gap filler to RULPA); UPA § 6(2), 6 pt. 1 U.L.A. 393 (2008) (UPA applies to limited partnerships).

144. See UPA § 29, 6 pt. 2 U.L.A. 349.

145. See UPA § 33, 6 U.L.A. 436.

146. See, e.g., *Fairway Dev. Co. v. Title Ins. Co.*, 621 F. Supp. 120, 125 (N.D. Ohio 1985); *Frederick C. Smith Clinic v. Lastrapes*, 170 N.E.2d 497, 501 (Ohio Ct. App. 1959).

147. See HENN, *supra* note 56, at 91.

148. See DEL. CODE ANN. tit. 12, § 3808(a) (2008); UNIF. STATUTORY TRUST ENTITY ACT § 306(a) (2008 Annual Meeting Draft); see also 13 AM. JUR. 2D *Business Trust* § 20 (2008) (business trust may have perpetual duration).

dissolution upon the loss of a member.¹⁴⁹ This mechanism was, however, significantly driven by the externality of the *Kintner* tax classification regulations¹⁵⁰ and the desire to avoid the characteristic of “continuity of life.”¹⁵¹ With the adoption of the check-the-box classification regulations¹⁵² in 1997, many of the acts were promptly amended to delete or modify those provisions calling for dissolution upon the loss of a member,¹⁵³ thereby affording LLCs continuity of life.

At one time, continuity of life was a significant, although not exclusive, factor in distinguishing organizations that were incorporated from those that were not; both the business trust and the joint stock company, neither of which was incorporated, could enjoy this same characteristic. Still, there was a bright-line division as to continuity of life between the corporation and the partnership. Since 1997 and the changes in the controlling tax classification regulations, however, continuity of life has become a characteristic of not only the partnership but the derived unincorporated limited partnership and LLC as well. Consequently, as of this point in time, continuity of life is not effective as a distinguishing characteristic between incorporated and unincorporated organizations.

TRANSFERABILITY OF OWNERSHIP INTERESTS

The ability to transfer an ownership interest may be an important factor in distinguishing between various forms of business organizations that are “unincorporated” from those that are “incorporated.” This factor, however, is not universally effective in distinguishing the two classes.¹⁵⁴

Traditionally, the law of unincorporated business organizations¹⁵⁵ has been premised upon the particular relationships between the owners. For that

149. See Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky's New Organizational Option*, 83 KY. L.J. 1, 36 (1995).

150. See *supra* note 23 (discussing *Kintner* classifications).

151. See Rutledge & Booth, *supra* note 149, at 73-79.

152. See *supra* note 23 (discussing classification of corporations since adoption of “check-the-box” regulations).

153. See, e.g., 1998 Ky. Acts ch. 341 § 38.

154. See BALLANTINE, *supra* note 52, at 14 (noting transferability of corporate shares).

As an incident to modern business corporations, the shares therein are transferable by the holders without the consent of the other holders, or of the corporation, and when a share is transferred the transferee becomes a member of the corporation in place of the transferor. Unincorporated joint stock companies and business trusts also frequently issue transferable certificates of shares of beneficial interests, so that this is not an exclusive corporate privilege.

Id.; see also CLARK, *supra* note 33, at 15-16 (indicating transferability of shares “incident” but not essential to corporate existence).

155. For purposes of this statement, the partnership, the limited partnership and, of more recent vintage, the limited liability company.

reason, while the economic rights in the venture, as a default rule, are freely transferable by an individual participant,¹⁵⁶ transference of the right to participate in management—which includes the right to vote or consent on various matters, the right to inspect records, and the obligation to both be circumscribed by and enjoy the benefit of fiduciary duties—have not been transferable absent the consent of the co-venturers.¹⁵⁷ An assignee/transferee is not a full participant in a business entity. Rather, utilizing the general partnership as an example, an assignee holds only a “transferable interest”¹⁵⁸ and not an “interest in the partnership”¹⁵⁹ and has only the right to receive distributions and perhaps limited accounting rights after dissolution. An assignee does not have inspection rights or other rights with respect to company information while the business is operating, does not have a voice in management, is not owed fiduciary obligations, and is not the beneficiary of any obligations of good faith or fair dealing.¹⁶⁰ Even more limiting is the law governing cooperatives, in which ownership rights are entirely non-transferable.¹⁶¹ In the context of unincorporated business organizations, the “charging order” has been utilized as a mechanism for addressing the rights of a judgment creditor of an individual owner.¹⁶² Conversely, in a corporation, assuming a judgment against a shareholder, the law has traditionally allowed the judgment creditor to seize the corporate stock—just as the judgment creditor may seize other assets of the judgment debtor—in full or partial satisfaction of the judgment. Upon that event, the judgment creditor became a shareholder in the venture, vested with all rights thereof, and the judgment

156. See UPA § 27, 6 pt. 2 U.L.A. 332 (2008); RUPA § 503, 6 pt. 1 U.L.A. 156 (2008); RULPA § 702, 6B U.L.A. 306 (2008); ULPA § 702, 6A U.L.A. 461 (2008); ULLCA § 502, 6B U.L.A. 602 (2008); RULLCA § 502, 6B U.L.A. 496 (2008); PROTOTYPE LLC ACT § 704.

157. UPA § 27(1), 6 pt. 2 U.L.A. 332 (the assignee of a partner's interest in the partnership is not entitled “to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.”); *id.* § 18(g), 6 pt. 2 U.L.A. 101 (“No person may become a member of a partnership without the consent of all the partners.”); RUPA § 503(a), 6 U.L.A. 156; RUPA § 401(i), 6 U.L.A. 133; RULPA § 702, 6B U.L.A. 306; RULPA § 401, 6B U.L.A. 213 (2008) (general partner admission); RULPA § 401(a)(ii), 6B U.L.A. 213 (limited partner admission); ULPA § 702(a)(3), 6A U.L.A. 461; ULPA § 401(4), 6A U.L.A. 428 (general partner admission); ULPA § 301(3), 6A U.L.A. 416 (limited partner admission); ULLCA § 502, 6B U.L.A. 602; ULLCA § 503(a), 6B U.L.A. 603; RULLCA § 502(a)(3), 6B U.L.A. 496; RULLCA § 401(d)(3); 6B U.L.A. 478 (2008); PROTOTYPE LLC ACT § 704(a)(2), § 704(a)(3), § 706(a) (1992).

158. RUPA § 502, 6 pt. 1 U.L.A. 156.

159. RUPA § 101(9), 6 pt. 1 U.L.A. 61.

160. RUPA § 503(a)(3), 6 pt. 1 U.L.A. 157.

161. See, e.g., KY. REV. STAT. ANN. § 272.201 (West 2008) (membership in a cooperative is nontransferable). *But see* UNIF. LTD. COOP. ASS'N ACT § 603(b)-(c), 6A U.L.A. 228 (2008) (providing only financial rights may be transferred).

162. UPA § 28, 6 pt. 2 U.L.A. 341 (2008); RUPA § 504, 6 pt. 1 U.L.A. 160 (2008); RULPA § 703, 6B U.L.A. 313 (2008); ULPA § 703, 6A U.L.A. 463 (2008); RULLCA § 503, 6B U.L.A. 498 (2008); PROTOTYPE LLC ACT (1992) § 705.

debtor ceased to be a shareholder.¹⁶³

Conversely, it has been the law of corporations that a share of stock is freely transferable personal property and, absent an agreement to the contrary binding upon the transferor, a transferee of that share succeeds to all rights encompassed therein. This includes rights that are purely economic, such as the right to receive interim and liquidating dividends/distributions, and the right to participate in management via, for example, voting with respect to the election of directors, voting on organic transactions such as merger and voluntary liquidation, and record inspection.¹⁶⁴ To this extent, there is a clear demarcation between the incorporated and unincorporated realms.

The suggested distinction breaks down, however, when we look beyond the most typical unincorporated forms. In both the business trust and the joint stock company, the rights of ownership, both as to financial rights and the right to participate in management, have been freely transferable by the unilateral action of the owner.¹⁶⁵

If we restrict our universe of consideration to the predominant forms of business organizations—defining that class as the corporation, the partnership, the limited partnership and the LLC—we can distinguish between those organizations that are incorporated and those that are incorporated based upon the rules governing transferability of interest. Further, looking beyond the range of the typical unincorporated entities to include the cooperative, we find that this distinction still holds true. As the adage goes, however, every rule has an exception. The viability of the transferability of an interest as a factor distinguishing incorporated from unincorporated organizations fails when we include in the latter class the business/statutory trust or the joint stock

163. Of course, to the extent that the judgment debtor is subject to a binding share restriction agreement, the judgment creditor may find the ability to seize and exercise the rights incident to the shares to be limited. See, e.g., ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCs ¶ 7.23 (2006) ("To safeguard the power of participants in a closed corporation to choose their future associates, participants will want to restrict the right of shareholders to pledge their shares, or at least the sales of the stock by the pledgee."); HOWARD M. ZARITSKY, STRUCTURING BUY-SELL AGREEMENTS: ANALYSIS WITH FORMS ¶ 7.05[1][a] (2d ed. 2000) ("The courts have also held, however, that a buy-sell agreement that does not preclude encumbrances may still prevent a creditor from obtaining the interest by foreclosure or judicial sale."). If the initial pledge is permitted, the participants may want to restrict voting power, inspection rights or other shareholder rights by the pledgee."); Thompson, *supra*, § 7.23; see also 12 FLETCHER ET AL., *supra* note 21, § 5454 (share transfer restrictions "typically serve as an important device to ensure that current shareholders can control the ownership and management of the corporation and prevent outsiders from 'invading the business'"). Recently, Nevada sought to alter this rule by incorporating into its business corporation act, applicable only to certain closely held corporations, the charging order concept. See NEV. REV. STAT. § 78.746 (2006). Ultimately, however, this effort was unsuccessful. See Thomas E. Rutledge, *Nevada's Corporate Charging Order: Less Than Meets the Eye*, 11 J. PASSTHROUGH ENTITIES 21 (Mar./Apr. 2008).

164. MODEL BUS. CORP. ACT §§ 6.27, 14.30(2).

165. See DEL. CODE ANN. tit. 12, § 3805(d) (2008) (interest in statutory trust is freely transferable); HENN, *supra* note 56, at 85 (absent private ordering, shares in joint stock company are freely transferable); 46 AM. JUR. 2D *Joint Stock Companies* § 8 (2008); 13 AM. JUR. 2D *Business Trust* § 26 (2008) ("one of the distinctive features of the business trust, as compared to an ordinary trust or a partnership, is the transferability of its shares.").

company, each of which provides full transferability of the ownership interest equivalent to that seen in the corporation.

Ultimately, it must be noted that, describing an organization as “incorporated” or “unincorporated” fails to provide any meaningful information regarding the structure and characteristics of the form of business under consideration. Rather, we must conclude that the oppositions intended by incorporated versus unincorporated are undone.

“ENTITY”: WHAT, IF ANYTHING, DOES THAT MEAN?

A corporation is an entity. The statement is at first glance so axiomatic as that it would appear to be without need of explanation; first glances, however, can be deceiving. An entity is distinct and has an independent existence.¹⁶⁶ But here we find that a significant question goes begging: distinct and independent from what? Once we conclude whether the corporation is distinct (i.e., has a recognizable legal personhood) from its shareholders and directors, thereby justifying the entity label, we must ask what consequences flow from treatment as an entity. As matters currently stand, it appears that while the term “entity” is often employed, there is no defined consequence of that definition. Rather, even as we define various structures as being entities, uncertainty as to the effect and consequences of having done so leads us elsewhere in the organizational acts that recite attributes that we expressly intend the organization, as an “entity,” to enjoy.¹⁶⁷ In the end, declaring an organization to be an entity accomplishes little, if anything.¹⁶⁸

This lack of specificity as to what is meant by “entity” is currently being examined in an effort to define the characteristics of a series of a limited partnership, LLC, or business trust. In the Illinois LLC Act, we see that an individual series may elect to be treated as an entity, but the statute does not define the effect on either the LLC, its relations with its members, or its relations with third parties consequent to making (or not making) that election.¹⁶⁹ Conversely, the current draft of the series provision of the Uniform Statutory Trust Act expressly provides that a series is not an entity distinct from a business trust, but there is an absence of explanation as to the consequences of that categorization. Under the most recent amendments to the series provisions to the Delaware LLC and Limited Partnership Acts, both now provide that a series affords limited liability and may sue and be sued in its own

166. OXFORD ENGLISH DICTIONARY 300 (2d ed., vol. 5 1989).

167. See, e.g., KY. REV. STAT. ANN. § 271B.3-020(1) (West 2008) (setting forth general powers of corporation unless articles of incorporation provide otherwise); MODEL BUS. CORP. ACT § 3.02 (2006) (listing corporation’s general powers).

168. See KY. REV. STAT. ANN. § 275.010(2) (West 2008) (noting amendment of Kentucky LLC Act). The Act was amended in 2007, at the author’s request, to provide expressly that an LLC “is a legal entity distinct from its members.” *Id.*

169. 805 ILL. COMP. STAT. ANN. 180/37-40(b) (2008).

name and hold property in its own name, each of which are classic indicia of entity status.¹⁷⁰ To that extent, the statutes seem to imply that a series walks like a duck and quacks like a duck, but the statutes are unwilling to say that it is a duck.

“It’s a duck” is, however, exactly the issue before us. “Duck” is a label for a category of birds, and whenever any of us hears “duck” we think of a bird that is comfortable swimming, whose feathers shed water, and whose feet are webbed.¹⁷¹ The problem with “entity” is that its utterance does not generate an agreed-upon menu of characteristics that follow from that label. Consequently, labeling a business organization as an “entity” conveys no useful information.

As noted above, corporations, LLCs,¹⁷² partnerships,¹⁷³ and statutory trusts are considered to be legal entities.¹⁷⁴ There is, however, no further information conveyed by this categorization. For example, does the designation of a business organization as an entity indicate that it may sue and be sued in its own name? Generally speaking, we presume that result, though do we presume it because of an understanding of the entity label, or do we understand it because the various forms of business organization that are identified as entities may as well, pursuant to express statutory declarations, sue and be sued in their own name?¹⁷⁵ Similarly, if we understand that the entity, with respect to its debts and obligations, is itself the debtor,¹⁷⁶ and appreciate that the RUPA partnership continues the rule of partner liability for partnership obligations,¹⁷⁷ even with a declaration of entity status, we see express rules of owner limited liability contained in the various acts.¹⁷⁸ If the entity characterization is

170. See DEL. CODE ANN. tit. 6, § 18-215(b)-(c) (2008) (series of LLC may hold property in its own name); *id.* § 18-215(c) (series of LLC may sue and be sued); *id.* § 17-218(c) (series of limited partnership may in its own name contract, hold title to property, and sue and be sued).

171. We may as well think of a Warner Bros. character and recall as well that a duck weighs as much as a witch, but those are matters for other days. See *MONTY PYTHON AND THE HOLY GRAIL* (Columbia Tristar Home Entertainment 2001).

172. See, e.g., KY. REV. STAT. ANN. § 275.010(2) (West 2008); RULLCA § 104(a), 6B U.L.A. 437 (2008). The original LLC Act, adopted in Wyoming in 1997, did not describe an LLC as an entity or even utilize that term in the Act.

173. See, e.g., KY. REV. STAT. ANN. § 362.201(1) (West 2008); RUPA § 201(a), 6 U.L.A. 91 (2008).

174. See, e.g., DEL. CODE ANN. tit. 12, § 3801(a) (2008); UNIFORM STATUTORY TRUST ENTITY ACT § 301 (2008 Annual Meeting Draft). Prior to the statutory declarations of entity status, there existed a difference of opinion as to whether a business trust itself constituted a legal entity. See 13 AM. JUR. 2D *Business Trust* § 4 (2008).

175. See, e.g., RUPA § 307(a), 6 pt. 1 U.L.A. 124 (2008) (a partnership may sue and be sued in its own name); RULLCA § 105, 6B U.L.A. 438 (2008) (an LLC may sue and be sued in its own name); UNIF. STATUTORY TRUST ENTITY ACT § 307(a) (2008 Annual Meeting Draft) (a statutory trust may sue and be sued in its own name); MODEL BUS. CORP. ACT § 3.02(1) (2006) (a corporation may sue and be sued in its own name).

176. See *supra* note 43.

177. KY. REV. STAT. ANN. § 362.1-306(1) (West 2008); RUPA § 306(a), 6 U.L.A. 117 (2008).

178. See, e.g., KY. REV. STAT. ANN. § 362.2-303 (West 2008) (limited partners have limited liability for the debts and obligations of the limited partnership); MODEL BUS. CORP. ACT § 6.22 (1984) (providing shareholders have limited liability from the debts and obligations of the corporation); ULPA (2001) § 303, 6A

intended to convey the rule of limited liability, why then has it been substantively recited in the body of the law? In the case of RUPA, with its movement to an entity theory of the partnership—as contrasted with the predominant aggregate theory utilized in the UPA¹⁷⁹—the designation of a partnership as an “entity” serves the salutary purpose of cutting RUPA adrift from prior partnership law that was itself dependent upon the aggregate concept.¹⁸⁰ No similar benefit, however, follows for corporate, LLC, or other organizational forms that are not tied to a historical aggregate (i.e., non-entity) treatment. Rather, designation of these organizations as an “entity” serves only to ascribe a label that conveys no substantive information.

CONCLUSION

Labels are valuable when they serve to differentiate. A bicycle, having two wheels, is different and distinct from a unicycle, having one, and from a tricycle, having three, although all are means of locomotion. Consequently, bicycle, unicycle, and tricycle are useful distinctions because they convey information about that which is labeled. As has been explored herein, neither “unincorporated” nor “entity” are similarly successful in conveying information about the business organization to which the label may be affixed. This conclusion is rather disturbing in light of the great weight placed upon these terms. However, it must be concluded that this weight has been misplaced, as the relied upon categories, with the implicit assumption of distinctive characteristics flowing therefrom, is unjustified.

U.L.A. 418 (2008) (limited partners are not liable for the debts and obligations of the limited partnership); UNIFORM STATUTORY TRUST ENTITY ACT § 303 (2008 Annual Meeting Draft) (granting limited liability to beneficial owners and trustees).

179. See *supra* note 5.

180. See RUPA § 201, cmt. 6 pt. 1 U.L.A. 91 (2008).