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THE COMMON LAW CORPORATION: THE POWER OF THE TRUST IN ANGLO-AMERICAN  
BUSINESS HISTORY

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# ESSAY

## THE COMMON LAW CORPORATION: THE POWER OF THE TRUST IN ANGLO-AMERICAN BUSINESS HISTORY

*John Morley\**

*This Essay challenges a central narrative in the history of Anglo-American business by questioning the importance of the corporate form. The Essay shows that the corporate form was not, as we have long believed, the exclusive historical source of powers such as limited liability, entity shielding, tradable shares, and legal personhood in litigation. These powers were also available throughout modern history through a little-studied, but enormously important, device known as the common law trust. The trust was widely and very effectively used to hold the property of unincorporated partnerships and associations in England and the United States both long before and long after the passage of general incorporation statutes in the mid-nineteenth century. The trust's success in wielding corporation-like powers suggests that the corporation's role in legal history was smaller than—or at least different from—the one we have long assigned to it. This Essay thus lays the groundwork for a new account of the corporate form and its place in the development of modern business.*

INTRODUCTION .....	2146
I. THE BASICS OF BUSINESS TRUSTS .....	2151
A. Medieval Origins.....	2151
B. Legal Protection of Trust Property .....	2152
C. Mechanics.....	2155
II. A THUMBNAIL HISTORY OF THE TRUST'S USE IN BUSINESS .....	2156
A. The Rise of the Business Trust in Eighteenth-Century England.....	2157
B. Regulation and Expansion in the Nineteenth Century .....	2159
C. Enduring Popularity in America .....	2163
III. THE TRUST AND THE FEATURES OF THE CORPORATE FORM.....	2166

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A. Entity Shielding and Capital Lock-In.....	2167
1. Origins .....	2168
2. Appearance in Joint-Stock Companies.....	2172
B. Limited Liability for Shareholders and Trustees.....	2174
1. The Evolution of Limited Liability .....	2175
2. Limited Liability in Historical and Commercial Perspective .....	2179
C. Legal Personhood in Litigation .....	2183
D. Tradable Shares.....	2191
1. Charitable Enterprise.....	2191
2. Commercial Enterprise.....	2192
E. Fiduciary Powers .....	2195
CONCLUSION.....	2196

### INTRODUCTION

This Essay challenges a central narrative in the history of Anglo-American business by questioning the importance of the corporate form. I argue that the corporate form was not, as we have often been told, the exclusive historical source of the legal powers that enabled modern business. I show that from the late Middle Ages to at least the middle of the twentieth century, the basic powers of the corporate form were also available through an underappreciated but enormously important legal device known as the common law trust.

Throughout modern history, the common law trust frequently allowed businesses to obtain many of the same doctrinal advantages as then-existing versions of the corporate form, including limited liability, entity shielding, capital lock-in, tradable shares, legal personhood in litigation, and a sensible scheme of fiduciary powers. And the trust offered these features in a format that was cheaper and easier to access than the corporation. The trust was never a completely perfect substitute for the corporate form, and it was occasionally burdened by legislative acts that made the trust illegal or otherwise less appealing than the corporate form. Nevertheless, as a matter of judicial doctrine, the trust was remarkably effective in offering the key features of the corporate form.

Because it was so effective as a substitute for the corporate form, the trust was widely used in England and the United States to hold the property of unincorporated partnerships and associations both long before and long after the corporate form became freely available through statutes of general incorporation in the mid-nineteenth century. Indeed, at the time general incorporation statutes first appeared, many large businesses actually preferred the trust. When the United Kingdom passed its first general incorporation statute in 1844, for example, trusts

outnumbered corporations in the United Kingdom by a ratio of more than ten to one.<sup>1</sup> And of the 882 large business trusts then in existence, only *four* chose to incorporate after the general incorporation statute made incorporation freely available.<sup>2</sup> The rest of these companies all preferred to remain as trusts. English case reports from judicial opinions in the first half of the nineteenth century thus show trustees holding the property of docks,<sup>3</sup> theaters,<sup>4</sup> spas and pleasure grounds,<sup>5</sup> fraternal organizations,<sup>6</sup> railroads,<sup>7</sup> shippers,<sup>8</sup> ferries,<sup>9</sup> distilleries,<sup>10</sup> land developers,<sup>11</sup> mines,<sup>12</sup> insurance companies,<sup>13</sup> banks,<sup>14</sup> and companies in other industries.<sup>15</sup>

The trust's role in history matters because it pushes us to reassess a central narrative in the modern understanding of the development of business law. Generations of scholars have devoted their attention to studying the rise of the corporate form because they have believed that the corporate form was the key development in the making of modern

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1. See *infra* notes 94–96 and accompanying text (discussing the prevalence of trusts among multiowner businesses).

2. See *infra* notes 105–106 and accompanying text (discussing the unpopularity of the corporate form among existing businesses).

3. See *Meux v. Maltby* (1818) 36 Eng. Rep. 621 (Ch) 622; 2 Swanst. 277, 278.

4. See *Const v. Harris* (1824) 37 Eng. Rep. 1191 (Ch) 1191; Turn. & R. 496, 496.

5. See *Schreiber v. Creed* (1839) 59 Eng. Rep. 515 (Ch) 515; 10 Sim. 9, 9.

6. See *Duke of Queensbury v. Cullen* (1787) 1 Eng. Rep. 646 (HL) 649; 1 Bro. Parl. Cas. 396, 401.

7. See *Parker v. River Dunn Navigation Co.* (1847) 63 Eng. Rep. 1028 (Ch) 1028; 1 De G. & Sm. 192, 192.

8. See *id.* at 1029; 1 De G. & Sm. At 192.

9. See *Cross v. Jackson*, 5 Hill 478, 479 (N.Y. Sup. Ct. 1843).

10. See *In re The Vale of Neath & S. Wales Brewery Joint Stock Co.* (1849) 41 Eng. Rep. 1250 (Ch) 1254; 1 Mac. & G. 225, 241; *Spears v. Murray* (1839) 7 Eng. Rep. 665 (HL) 665; 6 Cl. & F. 180, 180 (appeal taken from Scot.).

11. See *Van Vechten v. Terry*, 2 Johns. Ch. 197, 197 (N.Y. Ch. 1816); *In re Dickson* (1836) 14 S 958, 958 (Scot.).

12. See *Vigers v. Pike* (1842) 8 Eng. Rep. 220 (HL) 220; 8 Cl. & F. 562, 562 (appeal taken from Ir.).

13. See *Fenn v. Craig* (1838) 160 Eng. Rep. 680 (Ex. Ct.) 680; 3 Y. & C. Ex. 216, 216; *Long v. Yonge* (1830) 57 Eng. Rep. 827 (Ch) 827; 2 Sim. 369, 369; *Munnings v. Bury* (1829) 48 Eng. Rep. 59 (Ch) 60; Tam. 147, 148; *Beaumont v. Meredith* (1814) 35 Eng. Rep. 447 (Ch) 447; 3 Ves. & B. 180, 180; *Mildmay v. Folgham* (1797) 30 Eng. Rep. 1111 (Ch) 1111; 3 Ves. Jr. 471, 471; *Buchanan v. Lennox* (1838) 16 S 824, 824 (Scot.).

14. See *Lund v. Blanshard* (1844) 67 Eng. Rep. 540 (Ch) 541; 4 Hare 9, 9–10; *Holmes v. Henty* (1836) 7 Eng. Rep. 38 (Ch) 38; 4 Cl. & F. 99, 99–100; *Taylor v. Hughes & Hodge* (1844) 7 I. Eq. R. 529 (Ch) 530.

15. See *Benson v. Hadfield* (1842) 49 Eng. Rep. 690 (Ch) 690; 5 Beav. 546, 547 (regarding the organization of a steamship company); *Gillett v. Abbott* (1838) 112 Eng. Rep. 665 (QB) 666; 7 A. & E. 783, 783–84 (regarding the organization of a patent-cork manufacturer).

business law.<sup>16</sup> They have understood the corporation to be the exclusive historical source of important legal technologies such as, limited liability and legal personhood, and they have thus seen the invention and spread of the corporate form as an essential step in the political and technological progress that brought us to the present.<sup>17</sup> This narrative runs so deep in modern thinking that it provides the basic structure of introductory classes on corporate law in American law schools. A class on corporate law typically begins with a discussion of the common law general partnership and then moves on to show how the corporation introduced a set of doctrinal innovations, such as limited liability and tradable shares, that solved each of the partnership's many problems.<sup>18</sup>

The history of the trust suggests that we need a new account of the corporate form. By showing that the corporation was not, in fact, the exclusive source of the legal technologies we have long associated with it, the history of the trust casts doubt on the corporate form's importance—or at least forces us to ask whether the corporate form might have been important for a different set of reasons than the ones we have long supposed. If the corporate form's main innovation was not to invent a new set of legal technologies, then we must find the significance of the corporate form in some other innovation or contribution. This Essay does not take on the massive task of saying just what exactly the corporate form's historical importance actually was. I save this task for another day. But this Essay nevertheless offers something almost as

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16. Two of the most prominent recent works in this vein are: Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844*, at 167 (2000) [hereinafter Harris, *Industrializing English Law*], which traces the expansion of access to the corporate form in England and argues that English industrial enterprises had no satisfying alternative to the corporate form; and Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 *UCLA L. Rev.* 387, 419 (2003) [hereinafter Blair, *Locking in Capital*], which argues that the corporate form was the exclusive source of a feature Blair calls “capital lock-in.” Other works in this vein are too numerous to list exhaustively, but examples include Scott R. Bowman, *The Modern Corporation and American Political Thought: Law, Power, and Ideology* 1–5 (1996); Edwin Merrick Dodd, *American Business Corporations Until 1860*, at 1 (1954); John Micklethwait & Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* 56–60 (2003); Ronald E. Seavoy, *The Origins of the American Business Corporation, 1784–1855*, at 182 (1982). The idea that the corporation is equivalent to its technical features runs deep in the theoretical understanding of corporate law. See, e.g., John Armour et al., *What is Corporate Law?*, in *The Anatomy of Corporate Law* 1, 5 (Reinier Kraakman et al. eds., 2d ed. 2009) (describing the core features of the corporate form).

17. See Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* 287–312 (1977) (describing “the coming of the modern industrial corporation” as being equivalent to the rise of big business).

18. See, e.g., William T. Allen, Reinier Kraakman & Guhan Subramanian, *Commentaries and Cases on the Law of Business Organization* 33, 115, 607 (4th ed. 2012); William A. Klein et al., *Business Organization and Finance* 51, 240–41 (11th ed. 2010); D. Gordon Smith & Cynthia A. Williams, *Business Organizations* 29, 115, 190 (3d ed. 2012).

important: It does the difficult historiographical work of showing why a new account of the corporate form is necessary.

Despite its great importance, the trust's use in business has received relatively little attention from modern legal scholars and historians.<sup>19</sup> None of the leading modern casebooks on business organizations has anything to say about the business trust.<sup>20</sup> And we know far less about the law of business trusts than we do about the laws of partnerships and corporations.<sup>21</sup> Although recent historians have done important work on the history of the business trust in England before the appearance of general incorporation statutes in 1844, this work tends to focus only on England, rather than on the United States. Historical work on the history of the trust also tends to stop upon the appearance of general incorporation statutes, apparently on the assumption that this development made the trust irrelevant. Further, this recent scholarship follows the conventional wisdom about the history of business organizations, telling us primarily that the trust was a fragile, inferior alternative to the corporate form<sup>22</sup> and that it created all the same problems as the common law general partnership.<sup>23</sup> Although some

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19. The trust's use in donative transfers, by contrast, has attracted enormous historical interest. The donative trust is a central component, for example, of Professor John Langbein's history of equity in his textbook on the history of the common law. See John H. Langbein et al., *History of the Common Law* 267–334 (2009) [hereinafter Langbein et al., *History of the Common Law*].

20. See Allen et al., *supra* note 18; Klein et al., *supra* note 18; Smith & Williams, *supra* note 18.

21. Only recently have legal scholars begun to take the business trust seriously in modern law. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 *Yale L.J.* 165, 166 (1997) (discussing the large amount of funds in the United States placed in trusts as part of business deals); Robert H. Sitkoff, *Trust as "Uncorporation": A Research Agenda*, 2005 *U. Ill. L. Rev.* 31, 35 (outlining a research agenda for the statutory trust).

22. This is the thesis of Professor Ron Harris's influential book on the history of English business organization. Harris, *Industrializing English Law*, *supra* note 16, at 167 ("[T]he unincorporated company . . . could not offer most of the features inherent in the joint-stock business corporation . . ."). Historians in the early twentieth century were more enthusiastic about the trust's accomplishments. Legal historian Frederic Maitland famously declared in 1902 that by using trusts, "[i]n truth and in deed we made corporations without troubling king or parliament though perhaps we said we were doing nothing of the kind." Frederic William Maitland, *The Unincorporated Body*, in 3 *The Collected Papers of Frederic William Maitland* 271, 283 (H.A.L. Fisher ed., 1911). Maitland did not supply details, however, and he had no access to the modern economic theory that would have told him which details to study. Some recent historians have described the trust's powers in cautiously optimistic terms, though not as optimistically as I do here. See, e.g., Jonathan Silberstein-Loeb, *The Transatlantic Origins of the Business Trust*, 36 *J. Legal Hist.* 192, 209–10 (2015) (noting that "[a]lthough the Classical 'scientific' system of legal categorization posited the will of the state and that of individuals in opposition, in practice they could work in tandem").

23. See Armand Budington DuBois, *The English Business Company After the Bubble Act, 1720–1800*, at 217 (1938) (noting that a trust-based company was a "step-child of the law," leaving "serious [legal] difficulties to surmount"); Gary M. Anderson & Robert D.

recent scholarship has shown that the trust was widespread in eighteenth- and early nineteenth-century England,<sup>24</sup> even this recent scholarship does not call into question the basic premise that the trust was legally inferior.

By rediscovering the trust's effectiveness as a substitute for the corporate form, this Essay makes common cause with a larger movement in legal history that is revising the role of the corporate form and emphasizing the value of its alternatives.<sup>25</sup> This Essay goes beyond the

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Tollison, *The Myth of the Corporation as a Creation of the State*, 3 *Int'l Rev. L. & Econ.* 107, 110 (1983) ("Technically, [trusts] were subject to partnership law, meaning that every member must join in the conveyance of shares and in . . . legal actions, and that the death of a member necessitated a reorganization of the enterprise (therefore granting minority interests in the firm a dominant strategic position)."); Margaret M. Blair, *The Four Functions of Corporate Personhood*, in *Handbook of Economic Organization* 440, 441 (Anna Grandori ed., 2012) [hereinafter Blair, *Four Functions*] ("The four functions that legal entity status serves would be very difficult, if not impossible, to accomplish using only transactional contracts."); Blair, *Locking in Capital*, supra note 16, at 419 ("[T]hese 'proto-corporations' were regarded by courts as a species of partnership."); Joshua Getzler, *The Duty of Care*, in *Breach of Trust* 41, 73 (Peter Birks & Arianna Pretto eds., 2002) ("Modern historians have doubted Maitland's brilliant surmise of the utility of the trust for trading enterprise; in fact businessmen from the late eighteenth century needed the corporate form and separate legal personality in order to organize modern industrial enterprise, and they sought and won free incorporation from the state."); Timothy Guinnane et al., *Putting the Corporation in Its Place*, 8 *Enterprise & Soc'y* 687, 714 (2007) ("For all practical purposes, therefore, business people in the United States had only two choices: they could organize as partnerships or they could take out corporate charters."); Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Legal Regime and Contractual Flexibility: A Comparison of Business's Organizational Choices in France and the United States During the Era of Industrialization*, 7 *Am. L. & Econ. Rev.* 28, 43 n.8 (2005) (discussing limited American usage of trusts in the early nineteenth century due to "drawbacks that made them less attractive" than other means of "concentrating management"); Paul G. Mahoney, *Contract or Concession: An Essay on the History of Corporate Law*, 34 *Ga. L. Rev.* 873, 888 (2000) ("By the time of the Bubble Act's repeal in 1825, judges, having had nothing to do with unincorporated joint-stock companies for a century, were determined to fit them into an existing legal category (e.g., partnership) rather than see them as a different form of contract altogether."); Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form 1* (Amsterdam Ctr. for Law & Econ., Working Paper No. 2013-02, 2013), <http://ssrn.com/abstract=2223905> (on file with the *Columbia Law Review*) ("In fact, the creation of legal personality for private businesses required an active role for the legislator. As a bundle of proprietary right opposable to third parties, it could not have been entirely achieved through private contracting.").

24. See Mark Freeman et al., *Shareholder Democracies? Corporate Governance in Britain and Ireland Before 1850*, at 23 (2012) (describing the results of a survey of historical business organizational documents). See generally James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture 1800–1870* (2006) (tracing the influence of joint-stock companies in early industrial England).

25. See Larry E. Ribstein, *The Rise of the Uncorporation* 4 (2010); Ryan Bubb, *Choosing the Partnership: English Business Organization Law During the Industrial Revolution*, 38 *Seattle U. L. Rev.* 337, 339 (2015); Guinnane et al., supra note 23, at 691–96; Henry Hansmann et al., *Law and the Rise of the Firm*, 119 *Harv. L. Rev.* 1333, 1336 (2006) [hereinafter Hansmann et al., *Rise of the Firm*]. The paper that comes closest to making the argument made here is Joshua Getzler & Michael Macnair, *The Firm as an*

work in this new movement, however, by demonstrating for the first time the technical effectiveness of the common law trust. To date, even those who question the importance of the corporate form have tended either to ignore the trust or to argue merely that for various reasons business people were willing to tolerate the trust's many weaknesses.<sup>26</sup> No historian has yet shown that in fact the trust was almost as strong as the corporation as a matter of judicial doctrine.

Parts I and II of this Essay begin by showing how the trust worked in business and by demonstrating that the trust remained persistently popular in business even after the passage of general incorporation statutes. Part III then forms the heart of the Essay. It turns to previously unexamined primary legal sources such as case reports and legal treatises to show that for much of modern history, the trust offered each of the key legal features that we now associate with the modern corporate form, including entity shielding and capital lock-in, limited liability, legal personhood in litigation, and a sensible scheme of fiduciary powers.

## I. THE BASICS OF BUSINESS TRUSTS

Before examining the details of trust law doctrine, it is first useful to understand how the trust initially emerged and how it worked in the organization of a business.

### A. *Medieval Origins*

Before the trust appeared in large, corporation-like business companies, it had a long and varied career as a device for conveying real property. In the earliest kind of trust—which was originally called a “use”<sup>27</sup>—a landowner would execute a conveyance known as a “feoffment” that transferred ownership of his land to a friend or gentleman, whom we would now call a “trustee.”<sup>28</sup> The trustee would then hold the property on the original owner's behalf, with the understanding that at some future date, the trustee would convey the property back to the original owner or his wife, children, or others as the

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Entity Before the Companies Acts, *in* *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference*, Dublin, 2003, at 267, 269–70 (Paul Brand et al. eds., 2005) (arguing business firms were able to achieve entity-like status in many ways before the companies acts of the mid-nineteenth century).

26. See, e.g., Bubb, *supra* note 25, at 348–50 (arguing that various historical circumstances encouraged businesspeople to tolerate the trust's purported weaknesses). See generally Ribstein, *supra* note 25 (surveying the history of business forms with little discussion of the trust).

27. For simplicity, I generally avoid archaic terms in favor of their modern counterparts. For a description of the subtle differences between a “use” and a “trust,” see N.G. Jones, *Uses and “Automatic” Resulting Trusts of Freehold*, 72 *Cambridge L.J.* 91, 103–12 (2013).

28. For a general discussion of early trusts, see Langbein et al., *History of the Common Law*, *supra* note 19, at 299–311.



original owner instructed.<sup>29</sup> In these arrangements, the original owner was analogous to what trust law would now call a “settlor.”<sup>30</sup> The people for whose benefit the trustee held the property, such as the landowner’s wife or children, were analogous to “beneficiaries.” At first these arrangements were mere gentlemen’s agreements and were unenforceable in the courts.<sup>31</sup> They nevertheless grew in popularity in the early 1300s and spread rapidly toward the late 1300s and early 1400s.<sup>32</sup>

The basic principle behind the trust’s popularity was that by giving property to a trustee, a landowner could avoid a set of obligations that applied to himself. The most famous example is the set of death taxes and military obligations that modern historians call the “feudal incidents.” The feudal incidents essentially taxed the land a man owned when he died, and they provided the primary source of revenue for the English crown during the later stages of feudalism.<sup>33</sup> The trust helped a landowner avoid the feudal incidents by allowing him to manipulate the way the law applied. Since the tax only applied to land that a man owned in his own name at death, the tax did not apply if the land legally belonged to a trustee, rather than to the deceased.<sup>34</sup> The trust thus became a fixture of late-medieval England.

#### B. *Legal Protection of Trust Property*

Giving land to a trustee was not without risks, however. Titling property in the name of a trustee raised the prospect that the trustee and his creditors might take the property for themselves. Once the trustee became the legal owner of the property, the law courts bestowed on the trustee all the rights and responsibilities of ownership, including the right to use the property for himself and pledge the property to his creditors.<sup>35</sup>

Landowners whose trustees proved unfaithful thus demanded help from legal authorities outside of the law courts.<sup>36</sup> Church courts began

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29. *Id.*

30. When the Chancery first began enforcing trusts, a settlor was often known as a “cestui que use” or a “feoffor to uses,” and a trustee was often known as a “feoffee to uses.” See, e.g., *Brent’s Case* (1687) 74 Eng. Rep. 319 (CP) 323; 2 Leon. 15, 19. Later on, the term “cestui que use” would come to refer to beneficiaries. See F.W. Maitland, *The Origin of Uses*, 8 Harv. L. Rev. 127, 131 (1894).

31. See R.H. Helmholz, *The Early Enforcement of Uses*, 79 Colum. L. Rev. 1503, 1503 (1979) (noting the common law courts refused to enforce uses).

32. J.M.W. Bean, *The Decline of English Feudalism, 1215–1540*, at 126 (1968) (documenting the spread of uses in late-medieval England).

33. See *id.* at 5–20.

34. For descriptions of the trust as a device for avoiding the feudal incidents, see *id.* at 136; Geoffrey Gilbert, *The Law of Uses and Trusts* 72–73 (London, E. & R. Nutt & R. Gosling 1734); Maitland, *supra* note 22, at 274.

35. 4 William Holdsworth, *A History of English Law* 414–15 (1996).

36. For example, the Commons prayed in 1402 that a remedy might be provided against “disloyal feoffees” who transferred the land they held in trust. *Id.* at 417.

holding faithless trustees to account around the last quarter of the 1300s,<sup>37</sup> and the Court of Chancery began doing so in the 1390s.<sup>38</sup> With the Chancellor's enforcement, the arrangements between landowners and their trustees ceased to be mere contracts and became instead the formalized, property-like arrangements that we now know as trusts.<sup>39</sup>

The Chancellor's innovations consisted of three key doctrines that helped to control misconduct by trustees. The first was a remedy: Rather than simply suing a trustee for money damages, beneficiaries in Chancery could sue for specific enforcement and recover the actual trust property as compensation.<sup>40</sup> Crucially, this remedy reached not just a trustee who had actually breached his obligation to a settlor but also certain people to whom the trustee had conveyed the property.<sup>41</sup> Second, the Chancellor offered new procedures for discovery. Unlike common law courts, the Chancery allowed an aggrieved beneficiary to obtain sworn responses from a trustee, to require the trustee to answer questions under oath, and to compel the trustee to produce the trust instrument and related documents.<sup>42</sup> Finally, the Chancellor offered to protect trust assets not only from a trustee but also from the trustee's creditors. If a trustee went bankrupt, his creditors could seize the property he owned personally for his own benefit but not the property he held as trustee in trust for others.<sup>43</sup> The creditors could take the trustee's personal farm, for instance, but not the farm he held in trust for the

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37. Helmholz, *supra* note 31, at 1504 (surveying records from church courts in Rochester and Canterbury and finding that the church "regularly enforced feoffments to uses").

38. The beginnings of the Chancery's enforcement of uses have been well chronicled. See James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* 233–42 (1913); Bean, *supra* note 32, at 123–30; 4 Holdsworth, *supra* note 35, at 417–21; Langbein et al., *History of the Common Law*, *supra* note 19, at 305; A.W.B. Simpson, *A History of the Land Law* 175–76 (2d ed. 1986); R.W. Turner, *The Equity of Redemption: Its Nature, History and Connection with Equitable Estates Generally* 43–46 (1931).

39. It is possible that the first recorded example of the Chancery enforcing a trust took place in 1446 in *Myrfyn v. Fallan* (1446) 2 Cal. P. Ch. xxi (Eng. & Wales). See Ames, *supra* note 38, at 237 n.3.

40. Getzler & Macnair, *supra* note 25, at 272–74 (exploring the historical origins and application of this remedy).

41. A beneficiary could take property from anyone who knew that the transfer violated the terms of the trust or who received the trust property without giving equivalent value in exchange. See 4 Holdsworth, *supra* note 35, at 432; 1 Austin Wakeman Scott, *The Law of Trusts* § 1.4 (1st ed. 1939) [hereinafter Scott, *Law of Trusts*] (describing the exemption for bona fide purchasers); 1 Selden Soc'y, *Cases Concerning Equity and the Courts of Equity 1550–1660*, at 269 (W.H. Bryson ed., 2001) (exempting bona fide purchasers from a beneficiary's claims for breach of trust and referring to a similar result in a judgment roll from the reign of King Henry VI).

42. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *Yale L.J.* 522, 540 (2012) (describing the procedural innovations of the Chancery).

43. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 *NYU. L. Rev.* 434, 454–56 (1998).

beneficiaries. As Professors Henry Hansmann and Ugo Mattei have shown, this was an extraordinary innovation because it limited the rights of a trustee's creditors even if the creditors had not personally agreed to the limitations.<sup>44</sup> This rule emerged gradually over time, but its essential contours were in place by the mid-1400s.<sup>45</sup>

Together, these innovations enabled a trustee to play the same basic role as a corporation. Both a corporation and a trust offered a company the ability to securely transfer ownership of its property to a distinct legal person with a legal personality separate from any of the company's individual shareholders. In a corporation, this distinct legal person was an artificial entity created by legislation or royal charter. In a trust, this distinct legal person was a natural human being who received the special status of a trustee from judicial doctrine.

To be clear, a common law trust was never a distinct juridical personality. Under the common law, a trust has always been a personal obligation of the *trustee*. The courts of common law (as distinct from the courts of equity) recognized the trustee as the legal owner of the trust property and treated the trustee as though he were the one who incurred all of the legal obligations associated with the trust.<sup>46</sup> Nevertheless, the trustee owed an obligation under the Chancery's principles of equity to manage the property for the beneficiary's benefit.<sup>47</sup>

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44. See *id.*

45. At first, the rule probably operated indirectly. Today, an unsecured creditor can seize any property—real or personal—of a debtor as long as the property is not already committed to a security interest. Cf. Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 Va. L. Rev. 515 (2007) (noting the legal implications of how a firm is structured and arguing that a creditor of an entity has a formal right to any of that entity's property). In late medieval and early modern times, however, a creditor generally could not take land (as distinct from personal property) unless the owner had specifically given the creditor a security interest in it. See Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 Harv. L. Rev. 385, 401–07 (2006) (describing limits on the alienability of land in late-medieval English law). Thus, there was no need for a rule in early trust law that protected real property from a trustee's unsecured creditors. Since no one could take real property from a trustee unless the trustee specifically pledged it, there was no point in cutting off the claims of creditors who had no pledge. It was enough simply to have a rule that protected property from the secured creditors who had received the pledges. This rule was already implicit in the remedies against a trustee's transferees and pledgees that the Chancery began enforcing in the mid-1400s. See *supra* notes 40–41 and accompanying text (discussing the use of specific performance and property recovery as remedies). In any case, Lord Chancellor Nottingham began fully protecting all forms of trust property from a trustee's unsecured creditors in the late seventeenth century. See, e.g., *Bennet v. Davis* (1725) 24 Eng. Rep. 746 (Ch) 746–47; 2 P. Wms. 316, 316–19; *Finch v. Earl of Winchelsea* (1715) 24 Eng. Rep. 387 (Ch) 387–90; 1 P. Wms. 277, 277–83; *Burgh v. Francis* (1673) 36 Eng. Rep. 971 (Ch) 971; 3 Swanst. 550, 550; Turner, *supra* note 38, at 46–48.

46. Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates* 567–69 (Richard A. Epstein et al. eds., 5th ed. 1995) (discussing the duties of a trustee).

47. *Id.* at 563 (introducing the different interests of trustees and beneficiaries in trust property).

### C. *Mechanics*

This division between equitable and legal title was most famously employed for planning estates and making family gifts. Less well known is that the trust was also widely used to organize business companies. To see how the mechanics of a business trust worked, consider the structure of a real-life water supply company that appeared at the dawn of large-scale, investor-owned business trusts in England in the late 1600s. I will return to this company many times below. The details come to us through judicial reports from the Chancery and House of Lords in the case of *Richmond v. City of London*.<sup>48</sup> To my knowledge, recent historians have never analyzed this case, presumably because previous historical work on the history of business organizations has focused on books, newspapers, and contractual documents rather than on specifically legal sources such as case law and legal treatises. The historiographical value of *City of London* is nevertheless enormous because it appears to be the first reported case ever to have involved a business company organized as a trust, and the judges who resolved the case were forced to address a number of key issues about the basic features of the company.

The reports of the case tell us about a company that came into being when the City of London agreed to lease a supply of water to an entrepreneur named Thomas Houghton.<sup>49</sup> Houghton and the city expected the water to come through a five-inch leaden pipe between a natural spring outside the city and a conduit at Cheapside and Stock's-market.<sup>50</sup> At the time of the lease, the pipe was still under construction by a contractor the city had hired.<sup>51</sup> Under the lease, Houghton received the right to use the water that was expected to flow through this pipe.<sup>52</sup> Houghton then planned to resell the water at a profit to private homes and businesses.<sup>53</sup> In exchange, Houghton agreed to pay the city a large one-time sum and then to make annual rent payments thereafter.<sup>54</sup> Houghton also agreed to invest £6,000 in infrastructure improvements and to supply water for free to prisons and other public buildings in the city.<sup>55</sup>

On the same day Houghton signed the lease with the city, he formed a company to operate the lease by creating a trust.<sup>56</sup> Houghton named

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48. *Richmond v. City of London (City of London II)* (1702) 1 Eng. Rep. 727 (HL); 1 Bro. Parl. Cas. 516; *City of London v. Richmond (City of London I)* (1701) 23 Eng. Rep. 870 (Ch); 2 Vern. 421.

49. *City of London II* 1 Eng. Rep. at 727; 1 Bro. Parl. Cas. at 516.

50. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

51. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

52. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

53. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

54. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

55. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

56. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

four trustees and assigned them the lease and all future profits that might come out of it.<sup>57</sup> The assignment required the trustees to divide the profits into 900 shares of equity and to sell these shares to the public for £10 per share.<sup>58</sup> Houghton himself bought some of the shares, as did some of the trustees, and members of the general public bought the rest.<sup>59</sup> The people who bought the shares were technically beneficiaries of the trust, but as a practical matter, they resembled stockholders of a modern corporation, with the trustees holding the property of the firm much as a corporation might hold the property of a firm.<sup>60</sup> The reports of the judges' opinions do not say exactly how many members of the public ultimately purchased these 900 shares, but the reports do say that the shareholders were numerous—so numerous, in fact, that bringing all of those shareholders before the court would have been “impossible”<sup>61</sup> and “impracticable.”<sup>62</sup>

Houghton was the moving force behind the enterprise, and he planned to use the proceeds of the stock offering to reimburse himself for the cost of purchasing the lease and then to make the improvements that the lease required.<sup>63</sup> Unfortunately, the enterprise was a failure. When the city's contractor finally finished work on the pipe, the pipe turned out to be defective, carrying only six tons of water per hour, instead of the nineteen tons the city had originally promised.<sup>64</sup> Houghton and the trustees refused to make the annual payments required by the lease, and the city sued.<sup>65</sup> The litigation that followed is a rich source of information about what the trust accomplished in structuring the company's legal affairs.

## II. A THUMBNAIL HISTORY OF THE TRUST'S USE IN BUSINESS

Before we can understand what exactly the water company case and others like it teach us, it will be useful to walk through the chronology of the trust's appearance in business over time. The broad arc is one of gradually growing popularity for the trust in England from the late seventeenth century through the early eighteenth century, followed by rapid growth in the early nineteenth century. The trust then moved over to the United States, where it remained popular up through at least the mid-twentieth century, long after general incorporation statutes

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57. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

58. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

59. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

60. See *Id.* at 727; 1 Bro. Parl. Cas. at 516.

61. *Id.* at 728; 1 Bro. Parl. Cas. at 518.

62. *City of London I* (1701) 23 Eng. Rep. 870 (Ch) 871; 2 Vern. 421, 423.

63. *City of London II*, 1 Eng. Rep. at 727; 1 Bro. Parl. Cas. at 516.

64. *Id.* at 727; 1 Bro. Parl. Cas. at 516.

65. *Id.* at 727; 1 Bro. Parl. Cas. at 517.

broadened access to the corporate form in the mid-nineteenth century.<sup>66</sup> That the trust was popular before the rise of general incorporation statutes in the nineteenth century has been well known.<sup>67</sup> That it remained popular afterward is more surprising.

A. *The Rise of the Business Trust in Eighteenth-Century England*

The first entities to be used in big businesses were corporations. They first appeared in the organization of for-profit business enterprises in the mid-1500s, a few centuries after they began to be used in the organization of charities. At first, the right to form a corporation belonged mostly to the English crown. Queen Elizabeth, King James I, and King Charles I all granted corporate charters to a variety of overseas trading businesses and domestic businesses that aimed to earn a profit.<sup>68</sup> These early charters granted not just incorporation but also the right to monopolize certain areas of trade.<sup>69</sup> The sale of these monopoly rights naturally upset the would-be competitors of the chartered businesses, and after Parliament expelled James II in the Glorious Revolution of 1688, Parliament itself became the primary source of incorporation for English businesses.<sup>70</sup>

Until 1844, Parliament had a rather cumbersome method for incorporating a business: It passed a special act of incorporation for each company it formed. The privileges of incorporation were given out one by one to a single business at a time.<sup>71</sup> This process of special acts required constant lawmaking, and because it provided so much opportunity for opposition and political maneuvering, the process was difficult, expensive, and (by modern standards) corrupt.<sup>72</sup>

Soon after the Revolution of 1688, a boom in the English economy brought the rapid proliferation of new companies.<sup>73</sup> Around this time, large businesses with many passive investors became common for the first time. Also around this time, the trust first began to appear in these new

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66. The trust also has a history in other common law jurisdictions outside the United States, such as Australia, Canada, and Scotland. I focus exclusively on England and the United States simply for the sake of brevity.

67. See Freeman et al., *supra* note 24, at 53; Harris, *Industrializing English Law*, *supra* note 16, at 22.

68. Harris, *Industrializing English Law*, *supra* note 16, at 41; see also 2 William Robert Scott, *The Constitution and Finance of English, Scottish, and Irish Joint-Stock Companies to 1720*, at 3 (1910) [hereinafter Scott, *Constitution and Finance*] (cataloging trading expeditions to Africa).

69. Freeman et al., *supra* note 24, at 45–46.

70. *Id.*

71. Taylor, *supra* note 24, at 4.

72. *Id.* at 3–8.

73. Scott, *Constitution and Finance*, *supra* note 68, at 326.

and large businesses.<sup>74</sup> Companies with large numbers of passive shareholders became known as “joint-stock companies,” with trust-based companies becoming known as “unincorporated” companies and corporation-based companies becoming known as “incorporated” companies.<sup>75</sup> Both trusts and corporations grew in popularity in the late 1600s and early 1700s, with perhaps a hundred unincorporated trust-based companies operating in England and Wales by the late 1600s.<sup>76</sup>

The incorporated and unincorporated companies together supported a flourishing market for the trading of shares, but in 1720 share prices collapsed.<sup>77</sup> The major cause was the political machination of a large financial enterprise known as the South Sea Company.<sup>78</sup> Originally chartered as an overseas trading company, the South Sea Company moved into a complicated financial business of creating a market for government-issued debt. Parliament and the South Sea Company perceived in the new unincorporated companies a source of competition for capital as well as a threat to the investing public, and so they worked together to pass the so-called Bubble Act of 1720.<sup>79</sup> This Act outlawed unincorporated trust-based companies if they had tradable shares and “presume[ed] to act as a Corporate Body.”<sup>80</sup>

Modern historians have found that the Bubble Act was widely ignored and that it did not stop trusts from becoming widespread in the organization of English business in the eighteenth and early nineteenth centuries.<sup>81</sup> The Act was almost never enforced from the time of its passage in 1720 up through the early nineteenth century.<sup>82</sup> Indeed, one historian argues that its principal effect was actually to make unincorporated companies even more common than they otherwise might have been because, after the Act, Parliament became less willing

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74. See Freeman, et al., *supra* note 24, at 14 tbl.1.1 (showing trusts in existence as of 1720); Harris, *Industrializing English Law*, *supra* note 16, at 53–58 (arguing company formation began increasing rapidly after the Glorious Revolution of 1688).

75. For a history of the term “joint-stock company,” see Paddy Ireland, *Capitalism Without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality*, 17 *J. Legal Hist.* 41 (1996).

76. Freeman et al., *supra* note 24, at 21.

77. *Id.* at 22 (explaining that the Bubble Act helped to diminish the market for shares).

78. See, e.g., Henry N. Butler, *General Incorporation in Nineteenth Century England: Interaction of Common Law and Legislative Processes*, 6 *Int'l Rev. L. & Econ.* 169, 171–73 (1986); Ron Harris, *The Bubble Act: Its Passage and Its Effects on Business Organization*, 54 *J. Econ. Hist.* 610, 610 (1994) [hereinafter Harris, *The Bubble Act*]; Margaret Patterson & David Reiffen, *The Effect of the Bubble Act on the Market for Joint Stock Shares*, 50 *J. Econ. Hist.* 163, 167–69 (1990).

79. Harris, *The Bubble Act*, *supra* note 78, at 610.

80. 6 *Geo. 1 c. 18*, § 18 (1720) (Eng.).

81. See DuBois, *supra* note 23, at 12–13 (noting that businesspeople and lawyers generally came to ignore the Bubble Act when contemplating new business enterprises).

82. Taylor, *supra* note 24, at 5–6 (discussing changes in enforcement of the Act during the nineteenth century).

than it previously had been to grant acts of incorporation, leaving the trust as the only real alternative.<sup>83</sup> The best evidence of this is a new study by Professors Mark Freeman, Robin Pearson, and James Taylor, which identified approximately 1,400 joint-stock companies formed in England, Ireland, and Scotland between 1720 and 1844.<sup>84</sup> Professors Freeman, Pearson, and Taylor coded the governance characteristics of 514 of these companies and found that nearly half of the companies—224—were unincorporated.<sup>85</sup> The great bulk of the companies were formed during the early nineteenth century, but of the seventy-three companies formed during the eighteenth century, seventeen were unincorporated.<sup>86</sup> The data show that unincorporated companies relied heavily on the trust. Of the 224 unincorporated companies in the sample, nearly all—209—held their property in the names of trustees.<sup>87</sup> Other historians working with less quantitative methods have reached similar conclusions.<sup>88</sup> To be clear, although the trust was widespread, many businesses that placed their property in trust did not expressly call themselves “trusts.” Instead, they called themselves “partnerships,” “associations,” or simply “companies.”<sup>89</sup>

#### B. *Regulation and Expansion in the Nineteenth Century*

The Bubble Act briefly returned to prominence in 1808—eighty-eight years after the Act’s passage—when the Court of King’s Bench threatened for the first time in nearly a hundred years to hold an entrepreneur liable for forming a trust in breach of the Bubble Act.<sup>90</sup> The business community reacted angrily, however, and Parliament formally repealed the Bubble Act in 1825.<sup>91</sup>

Despite this legal uncertainty, business trusts continued to proliferate. As noted above, English case reports from the first half of the

83. See DuBois, *supra* note 23.

84. See Freeman et al., *supra* note 24, at 23.

85. *Id.* at 15 tbl.1.1.

86. *Id.*

87. *Id.* at 54.

88. See DuBois, *supra* note 23, at 222 (arguing that unincorporated companies were common in the eighteenth century and that “extremely rare was the 18th century unincorporated organization that did not make at least some use of trustees”).

89. Professor Paddy Ireland discusses the history of the term “company” and how it was often used independently of organizational form. Ireland, *supra* note 75, at 42–45.

90. *R v. Dodd* (1808) 103 Eng. Rep. 670 (KB) 670–72; 9 East 516, 518. For analysis, see Alceste Santuari, *The Joint Stock Company in Nineteenth Century England and France: King v. Dodd and the Code de Commerce*, 14 J. Legal Hist. 39 *passim* (1993). Lord Chancellor Eldon also suggested in a judicial opinion in 1825 that trust-based companies might be illegal under the common law, independent of the Bubble Act. *Kinder v. Taylor* (1825) 3 LJR 68 (Ch) 75 (Eng.); Ron Harris, *Political Economy, Interest Groups, Legal Institutions, and the Repeal of the Bubble Act in 1825*, 50 Econ. Hist. Rev. 675, 687–88 (1997) [hereinafter Harris, *Political Economy*].

91. Harris, *Political Economy*, *supra* note 90, at 688–91 (chronicling the development of bills to repeal the Bubble Act).



nineteenth century show trustees holding the property of companies in a vast array of industries.<sup>92</sup> In the mid-1820s and then again in the mid-1830s, England witnessed two massive booms and busts of joint-stock-company formation.<sup>93</sup> The trust played a crucial role in each of these cycles, and by 1845, the first comprehensive census of joint-stock companies in England showed that trusts vastly outnumbered corporations among multiowner businesses: Trusts prevailed by a ratio of more than ten to one.<sup>94</sup> Among the 966 business companies with more than twenty-five shareholders then in existence in England, the Registrar of Joint-Stock Companies could confidently identify only eighty-four as corporations.<sup>95</sup> The remaining 882—about ninety percent of the total—were likely organized as trusts.<sup>96</sup>

In the 1830s and 1840s, the booms in unincorporated trust-based companies greatly alarmed Parliament. A special committee of Parliament published a report showing that many of the new businesses were fraudulent or dismally failing.<sup>97</sup> In response, Parliament passed the Registration Act of 1844.<sup>98</sup> The Registration Act is widely celebrated as England's first general incorporation statute because it permitted entrepreneurs to circumvent the special legislation process in Parliament and to form a corporation by registering with a newly appointed government official known as the Registrar of Joint-Stock Companies.<sup>99</sup> Under the

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92. See *supra* notes 3–15 and accompanying text (documenting the types of industries in which trustees held property).

93. Freeman et al., *supra* note 24, at 18 fig.1.1; Taylor, *supra* note 24, at 106, 121, 131.

94. Privy Council for Trade, Report by the Registrar of Joint-Stock Companies to the Committee of Privy Council for Trade, 1845, [C. (1st series)], at 694 (UK) [hereinafter Report by the Registrar] (on file with the *Columbia Law Review*). This report was the first report published after the Registration Act of 1844 that required all companies with more than twenty-five shareholders to register with the Registrar of Joint-Stock Companies.

95. *Id.*

96. *Id.* For purposes of this analysis, I count as a corporation every business whose “constitution” was listed as having been created by an “Act of Parliament,” “Charter,” or both. I assume that everything reported as having been formed by “deed” or “deed of settlement” was a trust. I further assume that if the form of organization was unstated, a company was not organized as a corporation and that the company probably used a trust. The assumption that every unincorporated company used a trust is consistent with Professors Freeman, Pearson, and Taylor’s data showing that nearly every unincorporated company in the eighteenth century and first half of the nineteenth century used a trust. See Freeman et al., *supra* note 24, at 53.

97. Select Committee on Joint Stock Companies, First Report, 1844, HC, at 119 (UK). The report’s subsections had titles such as “The Modes of Deception Adopted,” *id.* at ix, “The Impunity of the Offenders,” *id.* at xi, “The Amount and Distribution of Plunder,” *id.* at x, and “The Circumstances of the Victims,” *id.* at xi.

98. Registration Act 1844, 7 & 8 Vict. c. 110 (UK).

99. See Harris, *Industrializing English Law*, *supra* note 16, at 282–84 (discussing the novelties of the Act and noting that “until 1844 [companies] could enjoy only some of the privileges of full incorporation and of the corporate entity”); L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 *Harv. L. Rev.* 1369, 1371 (1956) (“It was not until 1844, when a general act of Parliament provided for incor-

Act, a registering company had to disclose the names of its directors and subscribers and the contents of the deed of settlement that created the company.<sup>100</sup> The company also had to appoint an auditor<sup>101</sup> and make regular reports to the Registrar of Joint-Stock Companies about its operations and changes in shareholders.<sup>102</sup>

Recent historians widely regard this Act as a boon for English businesses,<sup>103</sup> but contemporary observers did not necessarily see it that way. It turned out to be very difficult to convince businesses to abandon the trust and adopt the corporate form in its place. The crucial fact about the Registration Act of 1844 was that unlike modern corporation statutes, the Registration Act was mandatory, rather than permissive. Under the Act, every new partnership, company, or association that was carried on for profit and had tradable shares or more than twenty-five members had to register as a corporation, regardless of whether the proprietors wanted to organize the business as a corporation.<sup>104</sup>

Rather than celebrating the availability of incorporation as a boon, contemporary businesspeople avoided it. The best evidence of the corporation's unpopularity comes from previously unexamined data on the choices of then-existing businesses. Although the Registration Act of 1844 required incorporation for all *new* businesses, it offered *existing* businesses a choice: They could either incorporate or remain as trusts.<sup>105</sup> It turned out that of the 882 unincorporated joint-stock companies with more than twenty-five stockholders in existence at the time the statute first came into force, only *four* chose to incorporate.<sup>106</sup> The remarkable apathy with which existing businesses greeted the news of free incorporation suggests that incorporation was not very valuable.

It is possible, of course, that the corporate form offered some advantages and that the only reason businesses did not grab hold of these advantages was because of the various inconveniences involved in switching to the corporate form. Existing businesses might have been

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poration by simple registration, that incorporation was made readily available in England.”). Professor James Taylor’s recent account sees the 1844 Act in more complicated terms, arguing that its purposes were as much regulatory as they were empowering. Taylor, *supra* note 24, at 137–47.

100. 7 & 8 Vict. c. 110 § 7.

101. *Id.*

102. *Id.* §§ 7, 11, 14.

103. See Harris, *Industrializing English Law*, *supra* note 16, at 282–85; Gower, *supra* note 99, at 1371 (describing the “boons of corporate personality and limited liability”).

104. 7 & 8 Vict. c. 110, §§ 2, 7.

105. *Id.* § 58. If they chose to incorporate, they had to register completely just as new companies did. If they chose to remain as trusts, they only had to register in a limited way, disclosing only their names, the nature of their businesses, and their principal addresses, while keeping other information private, such as the names of their subscribers and the contents of their deeds of settlement. *Id.* Companies that chose only the limited registration would not become corporations. *Id.*

106. See Report by the Registrar, *supra* note 94.

locked into the trust form by terms of their deeds of settlement or by the five-pound fee<sup>107</sup> and the regulatory obligations that the Registration Act imposed on corporations, which demanded the hiring of auditors and the disclosure of a company's directors, shareholders, and deed of settlement.<sup>108</sup> These inconveniences, however, effectively place an upper bound on any estimate of what the benefits of incorporation might have been. Though incorporation may have been useful, the benefits of incorporation were apparently not enough to outweigh this fairly modest set of costs.

Existing companies were not the only businesses to resist the corporate form; some newly formed companies also successfully fought in the courts to avoid it as well. The Companies Act of 1862, which replaced the Registration Act of 1844, followed the pattern set by the 1844 Act by requiring incorporation for every "Company, Association, or Partnership consisting of more than Twenty Persons."<sup>109</sup> In a series of opinions in the 1870s and 1880s, the Chancery and House of Lords decided that in applying this twenty-person threshold, they would count the number of a business's *trustees* rather than the number of its *shareholders*.<sup>110</sup> Hence, so long as a business had fewer than twenty trustees, it did not have to incorporate, even if it had hundreds of shareholders. This effectively destroyed the mandatory registration requirement, since any business could easily avoid the requirement by just appointing fewer than twenty trustees. Thus, the trust both survived and thrived in England long after the rise of the corporate form. Up through at least the middle of the 1880s, partnership-like arrangements—which were probably often based on the trust—appear to have been more common among large English businesses than was the corporation and another newly created corporation-like entity, known as a limited liability company.<sup>111</sup>

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107. 7 & 8 Vict. c. 110, § 21.

108. *Id.* § 7.

109. Companies Act 1862, 25 & 26 Vict. c. 89, § 4 (UK).

110. See *Crowther v. Thorley* (1884) 32 App. Cas. 330 (PC) 333 (appeal taken from Eng.) (holding that the "business is, in law, the business of the trustees"); *Smith v. Anderson* (1880) 15 Ch D 247, 279 (holding that the "trustees . . . are nevertheless not within the clause because they are fewer than twenty"); *Sykes v. Beadon* (1879) 11 Ch D 170, 186 (noting it was the duty of trustees to register pursuant to the Companies Act).

111. See J.B. Jefferys, *Trends in Business Organisation in Great Britain Since 1856: With Special Reference to the Financial Structure of Companies, the Mechanism of Investment, and the Relations Between the Shareholder and the Company* 104–05 (June 1938) (unpublished Ph.D. dissertation, University of London) (on file with the *Columbia Law Review*) (noting the existence of many more partnerships than corporation-like entities in the 1870s and 1880s). To be clear, I am assuming that many of the "partnerships" J.B. Jefferys refers to in fact held their property in the names of trustees, since Professors Freeman, Pearson, and Taylor's data show that the great majority of large partnerships used trustees through most of the nineteenth century. See Freeman et al., *supra* note 24, at 56.

C. *Enduring Popularity in America*

The trust also remained popular after the rise of general incorporation statutes in the United States. The trust came to the United States by virtue of the United States' inheritance of English law. And the trust remained popular in the United States even longer than it did in England because of the peculiar features of American corporation law. As in England, corporations in the United States could initially be formed only by special legislative acts passed by state legislatures.<sup>112</sup> But also as in England, most American states had adopted statutes of general incorporation by the mid-nineteenth century that made incorporation available to anyone who filed the appropriate documents with a government official.<sup>113</sup>

The trust remained popular in the United States up through the 1920s because the American general incorporation statutes offered even more reason to prefer the trust than their English counterparts did. Unlike the English general incorporation statutes, the American general incorporation statutes did not require new companies to incorporate; they merely permitted companies to do so.<sup>114</sup> This left more space for American companies to choose the trust instead of the corporation. Additionally, the American laws offered much harsher treatment of companies that chose to incorporate.<sup>115</sup> American general incorporation statutes bristled with mandatory rules that were absent in their English counterparts. American laws contained detailed shareholder voting requirements, maximum capitalization limits, par value requirements, supermajority voting requirements for mergers, preemption rights for stock issues, personal liability for directors, prohibitions on ownership of land, restrictions on dividend payments, complicated appraisal remedies in mergers, restrictions on ownership of shares in other corporations,

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112. See Blair, *Four Functions*, supra note 23, at 447; Sheldon A. Jones et al., *The Massachusetts Business Trust and Registered Investment Companies*, 13 *Del. J. Corp. L.* 421, 425–26 (1988) [hereinafter Jones et al., *The Massachusetts Business Trust*]; Ron Harris & Naomi Lamoreaux, *Contractual Flexibility Within the Common Law: Organizing Private Companies in Britain and the United States* 13 (June 2010) (unpublished manuscript), <http://economics.yale.edu/sites/default/files/files/Faculty/Lamoreaux/Contractual-Flexibility-10.pdf> [<http://perma.cc/2J8U-J9WS>].

113. Between 1836 and 1852 more than half of the states then in the Union adopted a general incorporation statute, with the rest following by 1903. See Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 *Am. U. L. Rev.* 81 app. at 178 (1999).

114. The New York Constitution of 1846, for example, indicated that “[c]orporations may be formed under general laws” but did not require businesses to incorporate. Seavoy, supra note 16, at 183.

115. See Gower, supra note 99, at 1372 (noting American corporations had little flexibility in their rights or modes of action); Harris & Lamoreaux, supra note 112, at 4–5 (noting American incorporation statutes were restrictive in that they limited the size of the corporation, limited the business in which it could engage, and mandated governance structures).

and so on.<sup>116</sup> Businesses could not easily escape these restrictive rules by incorporating in less restrictive states because many states used foreign corporation statutes to impose heavy restrictions on out-of-state corporations.<sup>117</sup> The Supreme Court mostly permitted these restrictions on foreign corporations under the federal Constitution until the 1910s.<sup>118</sup>

The business trust was thus widespread in the United States as a regulation-light alternative to the corporate form. The trust remained a popular vehicle for avoiding corporate regulations up through at least the 1920s—long after general incorporation statutes had made the corporate form widely available. The most prominent examples of the trust's enduring popularity, of course, were the huge monopoly trusts that inspired the "anti-trust" movement of the 1880s, such as United States Steel and Standard Oil.<sup>119</sup> But monopoly trusts were just the tip of the iceberg, and trusts remained common in business long after the Sherman Antitrust Act of 1890 shut the monopolies down.<sup>120</sup> Judicial opinions show the trust in ordinary, nonmonopolistic companies in a wide array of industries in the late nineteenth and early twentieth centuries, including cotton mills and print works,<sup>121</sup> parcel delivery companies,<sup>122</sup> street car lines,<sup>123</sup> patent pools,<sup>124</sup> hotels,<sup>125</sup> ferries,<sup>126</sup> golf courses,<sup>127</sup> many different types of manufacturers,<sup>128</sup> building and loan associations,<sup>129</sup> foundries,<sup>130</sup> real estate development companies,<sup>131</sup>

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116. For an overview, see generally Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. Pa. J. Bus. L. 573 (2009).

117. See H.A. Haring, *Corporations Doing Business in Other States* 71–94 (1927) (describing statutory restrictions on foreign corporations).

118. Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law*, in *Harvard Studies in Jurisprudence* 110–11 (1918) (noting that a series of cases, beginning in 1910, placed "important qualifications" on a state's power to exclude or expel foreign corporations).

119. See Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 *Tex. L. Rev.* 105, 160 (1989) (discussing late-nineteenth-century monopoly cases against those trusts).

120. See Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).

121. See *Thorn v. De Breteuil*, 71 N.E. 470, 471 (N.Y. 1904).

122. See *People ex rel. Nat'l Express Co. v. Coleman*, 31 N.E. 96, 96 (N.Y. 1892).

123. See *Venner v. Chi. City Ry. Co.*, 101 N.E. 949, 950 (Ill. 1913).

124. See *Mayo v. Moritz*, 24 N.E. 1083, 1083 (Mass. 1890).

125. See *Upham v. Plankinton*, 140 N.W. 5, 6 (Wis. 1913).

126. See *Whitman v. Porter*, 107 Mass. 522, 523 (1871).

127. See *Morrissey v. Comm'r*, 296 U.S. 344, 347 (1935).

128. See *Crocker v. Malley*, 249 U.S. 223, 231 (1919) (paper); *Malley v. Bowditch*, 259 F. 809, 812 (1st Cir. 1919) (textiles); *Anderson Steam Vulcanizer Co. v. Comm'r*, 6 B.T.A. 737, 737 (1927) (vulcanized rubber); *Ricker v. Am. Loan & Tr. Co.*, 5 N.E. 284, 285 (Mass. 1885) (railroad cars); *Schenkl v. Dana*, 118 Mass. 236, 236 (1875) (armaments); *Simson v. Klipstein*, 102 A. 242, 242 (N.J. Ch. 1917) (chemicals); *In re Pittsburgh Wagon Works' Estate*, 54 A. 316, 316 (Pa. 1903) (wagons and agricultural implements).

129. See *State ex rel. Great Am. Home Sav. Inst. v. Lee*, 233 S.W. 20, 22 (Mo. 1921).

lumber and salt companies,<sup>132</sup> railroads,<sup>133</sup> railroad terminals,<sup>134</sup> real estate developers,<sup>135</sup> hospitals,<sup>136</sup> retailers,<sup>137</sup> sewing machine royalty companies,<sup>138</sup> mines,<sup>139</sup> cafeterias,<sup>140</sup> theaters,<sup>141</sup> banks, and insurance companies.<sup>142</sup> Trusts also appeared in oil production,<sup>143</sup> real estate development,<sup>144</sup> and mutual funds.<sup>145</sup> By the 1920s, a list of large business trusts included many publicly owned operating companies of massive size.<sup>146</sup> Trusts were also ubiquitous in the writings of early-twentieth-century legal practitioners and scholars. The 1910s and 1920s saw a miniature boom in writings about business trusts in law reviews,<sup>147</sup>

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130. See *In re Froelich's Estate*, 100 N.Y.S. 436, 437 (Sur. Ct. 1906).

131. See *Spotswood v. Morris*, 85 P. 1094, 1095 (Idaho 1906).

132. See *Tappan v. Bailey*, 45 Mass. (4 Met.) 529, 535 (1842); *Loud v. Winchester*, 17 N.W. 784, 784 (Mich. 1883).

133. See *Wright v. Caney River Ry. Co.*, 66 S.E. 588, 589 (N.C. 1909).

134. See *Chi., Milwaukee & St. Paul Ry. Co. v. Des Moines Union Ry. Co.*, 254 U.S. 196, 199–200 (1920).

135. See *Hart v. Seymour*, 35 N.E. 246, 247 (Ill. 1893); *Priestley v. Burrill*, 120 N.E. 100, 104–05 (Mass. 1918); *Howe v. Morse*, 55 N.E. 213, 213 (Mass. 1899); *Wehrman v. McFarlan*, 9 Ohio Dec. 400, 401 (1899).

136. See *R.I. Hosp. Tr. Co. v. Copeland*, 98 A. 273, 276 (R.I. 1916).

137. See *Connally v. Lyons*, 18 S.W. 799, 799–800 (Tex. 1891).

138. See *Gleason v. McKay*, 134 Mass. 419, 419–22 (1883).

139. See *State Nat'l Bank v. Butler*, 36 N.E. 1000, 1002 (Ill. 1894); *Swan v. Davenport*, 93 N.W. 65, 65 (Iowa 1903).

140. See *Dutton v. Comm'r*, 18 B.T.A. 1151, 1152 (1930).

141. See *Rochester Theatre Tr. Estate v. Comm'r*, 16 B.T.A. 1275, 1275 (1929).

142. See *Townsend v. Goewey*, 19 Wend. 424, 424–27 (N.Y. Sup. Ct. 1838).

143. See *Ira P. Hildebrand, The Massachusetts Trust*, 1 Tex. L. Rev. 127, 128, 153, 156, 160, 161 (1923) [hereinafter *Hildebrand, Massachusetts Trust I*] (citing cases involving trusts in the oil industry); cf. *Ira P. Hildebrand, Liability of the Trustees, Property, and Shareholders of a Massachusetts Trust*, 2 Tex. L. Rev. 139, 176 (1924) (noting the “business trust had [not] confined its operations to the oil business” but instead had “invaded the field of most of our business”).

144. See *Bank of Topeka v. Eaton*, 100 F. 8, 8–9 (C.C.D. Mass. 1900).

145. *Paul D. Cravath, Introduction to Leland Rex Robinson, Investment Trust Organization and Management*, at xv (rev. ed. 1929); *Marshall H. Williams, Investment Trusts in America 1–2* (1928).

146. *Comment, Massachusetts Trusts*, 37 Yale L.J. 1103, 1107 n.20 (1928) [hereinafter *Comment, Massachusetts Trusts*].

147. See, e.g., *Henry J. Aaron, The Massachusetts Trust as Distinguished from Partnership*, 12 Ill. L. Rev. 482 (1918); *Robert C. Brown, Common Law Trusts as Business Enterprises*, 3 Ind. L.J. 595 (1928); *William W. Cook, The Mysterious Massachusetts Trusts*, 9 A.B.A. J. 726 (1923); *Leland S. Duxbury, Business Trusts and Blue Sky Laws*, 8 Minn. L. Rev. 465 (1924); *Hildebrand, Massachusetts Trust I*, supra note 143; *Ira P. Hildebrand, Massachusetts Trust—A Sequel*, 4 Tex. L. Rev. 57 (1925); *R.J. Powell, The Passing of the Corporation in Business*, 2 Minn. L. Rev. 401 (1918); *H. Rottschaefer, Massachusetts Trust Under Federal Tax Law*, 25 Colum. L. Rev. 305 (1925); *Austin W. Scott, The Progress of the Law 1918–1919—Trusts*, 33 Harv. L. Rev. 688 (1920); *Austin W. Scott, The Trust as an Instrument of Law Reform*, 31 Yale L.J. 457 (1922); *Robert S. Stevens, Limited Liability in*

practice manuals, and treatises.<sup>148</sup>

Although legal sources show that the trust was common after the mid-nineteenth century, it is hard to find statistics to this effect. Unlike a corporation, a trust could be formed privately, without any public filings.<sup>149</sup> A trust thus did not always show up in state records of business organizations. The trust also flew under the radar of both state and federal tax records. State and federal tax law often treated a trust as a partnership or corporation, making it impossible to see trusts directly or to know which partnerships were actually using trusts.<sup>150</sup> Nevertheless, the anecdotal evidence of legal disputes and writing by legal practitioners shows that the trust remained a major force in American business up through at least the end of the 1920s.

### III. THE TRUST AND THE FEATURES OF THE CORPORATE FORM

There is no question, then, that the trust was an enormously important form of organization throughout the Industrial Revolution and into the early decades of the twentieth century on both sides of the Atlantic. But the question remains: Why? The answer is simple: Every aspect of the corporate form that legal theorists and historians have identified as key to the corporate form's success also existed in the trust. Though the trust did not achieve all of the corporation's attributes perfectly, it came close enough that businesses often preferred the trust to the corporation even when the costs of incorporating were small. This

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Business Trusts, 7 Cornell L.Q. 116 (1922); H.L. Wilgus, Corporations and Express Trusts as Business Organizations, 13 Mich. L. Rev. 71 (1914); H.F.T., Recent Cases, Trusts—The Business Trust as a Legal Entity, 9 Tex. L. Rev. 299 (1931); Comment, The Doctrine of Merger as Applied to Commercial Trusts, 29 Yale L.J. 97 (1919); Comment, Massachusetts Trusts and the Income Tax, 28 Yale L.J. 690 (1919); Comment, The Nature of Massachusetts Business Trusts, 27 Yale L.J. 677 (1918); Note, Taxation of Business Trusts, 42 Yale L.J. 270 (1932); Jasper F. Rommel, Tax Liability of Business Trusts: *Crocker v. Malley* and *Hecht v. Malley* Distinguished, 7 Nat'l Income Tax Mag. 14 (1929).

148. See, e.g., William C. Dunn, Trusts for Business Purposes (1922); Robert Gardner McClung, Representative Massachusetts Trusts (1912); Wilber A. McCoy, Business Trust Agreements and Declarations of Trust (1922); John H. Sears, Trust Estates as Business Companies (2d ed. 1921); Guy A. Thompson, Business Trusts as Substitutes for Business Corporations (1920) [hereinafter Thompson, Business Trusts]; Edward H. Warren, Corporate Advantages Without Incorporation (1929); Sydney R. Wrightington, The Law of Unincorporated Associations and Similar Relations (1916).

149. See 1 Francis Williams Sanders, An Essay on Uses and Trusts, and on the Nature and Operation of Conveyances at Common Law, and of Those, Which Derive Their Effect from the Statute of Uses 15–16 (London, W. Walker, 4th ed. 1824) (indicating that conveyances in trust had been made in secret since late medieval times).

150. See, e.g., *Morrissey v. Comm'r*, 296 U.S. 344, 360 (1935) (holding that trusts formed for business purposes should be taxed the same as corporations); *Hecht v. Malley*, 265 U.S. 144, 156–57, 161 (1924) (holding that some, but not all, trusts were to be taxed like corporations); *Hoadley v. Cty. Comm'rs*, 105 Mass. 519, 526–27 (1870) (taxing shares in a trust as though they were shares in a partnership).

Part analyzes five elements that historians and modern theorists identify as important to large, investor-owned business organization: entity shielding and capital lock-in, limited liability, legal personhood in litigation, tradable shares, and fiduciary powers and duties.

My focus here is on judicial doctrine and what it achieved. The trust, of course, existed in a larger context of laws beyond judicial doctrine that included statutes and legislative acts. Sometimes these statutes—such as the Bubble Act and the Registration Act of 1844 in England—intervened to make the trust less appealing than it otherwise might have been.<sup>151</sup> The trust's achievements in legal doctrine are nevertheless important because they challenge the notion that the corporation was the exclusive source of key doctrinal technologies. The enormous power of the trust in judicial doctrine suggests that although the corporation may have had certain advantages, these advantages did not lie in the technical doctrinal features that scholars of corporation law have tended to focus upon.

#### A. *Entity Shielding and Capital Lock-In*

Let us first consider entity shielding and its close cousin, capital lock-in. These are perhaps the most fundamental features of organizational law. Indeed, to identify their appearance is to discover the rise of the modern firm.<sup>152</sup> Entity shielding and capital lock-in, which were first identified in an influential article in 2000 by Professors Henry Hansmann and Reinier Kraakman, are important because they help businesses hold their assets together.<sup>153</sup> Entity shielding stops the owners and creditors of a business from taking the assets of the business away before the assets have had a chance to perform their intended purpose and produce an investment return. Entity shielding does this by preventing the owners from individually demanding that the business liquidate and sell off its assets.<sup>154</sup> Entity shielding also prevents the owners' creditors from doing the same if the owners ever become bankrupt.<sup>155</sup> Thus, if I own shares in a grocery store that is organized as a modern corporation, entity shielding will stop my credit-card lenders from carting away the bread, meat, and freezer cases that belong to the grocery store if I am unable to repay my credit-card debt. The creditors of the *store* can attach these assets, but *my* creditors cannot. Entity shielding is thus the reverse of limited liability. While limited liability protects the owners of a business

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151. See *supra* notes 77–90, 97–106 and accompanying text (describing minor obstacles posed by these statutes and efforts to avoid them).

152. See Hansmann et al., *Rise of the Firm*, *supra* note 25, at 1399–401 (describing the historical development of entity shielding).

153. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *Yale L.J.* 387, 393–98 (2000) (identifying the phenomenon that later would become known as “entity shielding”). The term “entity shielding” first appeared in a subsequent article. See Hansmann et al., *Rise of the Firm*, *supra* note 25, at 1336.

154. Hansmann et al., *Rise of the Firm*, *supra* note 25, at 1338.

155. See *id.* at 1337.



from liabilities that might flow up from the business, entity shielding works in the opposite direction, protecting the business from the liabilities of the creditors and owners that might flow down.<sup>156</sup>

The strong form of entity shielding available in modern corporations offers two features: priority and liquidation protection.<sup>157</sup> That is, the creditors of a modern corporation enjoy both (a) priority of payment over the owners and their creditors and (b) the right to prevent the owners and their creditors from forcing the business to sell off its assets to pay their debts. The concept known as “capital lock-in” is an application of this principle of entity shielding.<sup>158</sup> Capital lock-in allows a business to restrict its owners, as well as the owners’ creditors, from taking away the business’s property.

Entity shielding is crucially important in two respects. First, no business with a large number of owners could survive without it. One cannot run a grocery store with a thousand owners if each of these owners and their creditors can constantly come in and pull product off the shelves. Second, the owners cannot solve the problem by contract alone. Even if the owners agree among themselves to limit their creditors’ rights to liquidate the business, this agreement will not actually bind the owners’ creditors—it will bind only the owners.

The conventional wisdom about entity shielding, famously explained by Professor Margaret Blair, is that until the last thirty years or so, the only way to achieve it in a strong form was through the corporation.<sup>159</sup> The common law of partnership is said to have offered only priority and not liquidation protection.<sup>160</sup> The creditors of individual partners could, in theory, force the breakup of a partnership and take the partnership’s property for themselves. Professor Blair argues that strong entity shielding and capital lock-in did not become freely available in England or the United States until the rise of the corporate form in the mid-nineteenth century.<sup>161</sup> Blair’s argument has become enormously influential.

In fact, however, the corporation was almost never the exclusive source of strong-form entity shielding in Anglo-American law. The trust has offered a form of entity shielding at least as strong as that offered by the modern corporation for as long as large investor-owned businesses have been common.

1. *Origins.* — An analog to entity shielding first appeared in the trust in the late Middle Ages as a direct consequence of the division between

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156. See *id.* at 1336.

157. See Hansmann & Kraakman, *supra* note 153, at 410–11 (explaining the difference between priority and liquidation protection).

158. See Blair, *Locking in Capital*, *supra* note 16, at 388–92.

159. See *id.* at 390.

160. See *id.* at 396.

161. See *id.* at 413.

legal and equitable title that characterizes the trust. The basic idea behind entity shielding in the trust was that a creditor had certain rights against a borrower's property<sup>162</sup> but these rights only extended to property that legally belonged to the borrower. Thus, if legal title belonged to the borrower's trustee, rather than to the borrower, then the borrower's creditor had no rights against the property. By giving property to a trustee, a borrower could effectively eliminate his creditor's claims to the property. Indeed, it was unclear at first whether a borrower's creditor could even take the borrower's equitable interest in the property, let alone the legal interest that formally belonged to the trustee.<sup>163</sup>

The main evidence of the trust's effectiveness in avoiding beneficiaries' creditors appears in the long string of statutes that Parliament passed in the late Middle Ages to try to limit the trust's effectiveness and prevent it from destroying the credit system. In a series of statutes passed in 1377,<sup>164</sup> 1487,<sup>165</sup> 1543,<sup>166</sup> and 1571,<sup>167</sup> Parliament created what we now know as the law of fraudulent transfers by prohibiting a person from giving his property to a friend or trustee in order to avoid his creditors. The 1571 statute, for example, prohibited a transfer for the purpose of avoiding creditors notwithstanding "[a]ny Pretence, Color, fayned

162. To be clear, creditors' rights against a borrower's land (as distinct from rights against a borrower personally) were much more limited in the late Middle Ages than they are now. See Priest, *supra* note 45, at 403.

163. R.W. Turner argued that until the end of the 1600s, English courts tended to treat a beneficial interest in trust as a chose in action—i.e., as a right to sue someone—rather than as a form of tenure in property. Turner, *supra* note 38, at 44–46. And crucially, unlike a tenure in property, a chose in action was not transferable. *Id.* at 44. It was personal to the person who held it. *Id.* at 43. This meant, by implication, that a beneficial interest in trust was probably not transferable or seizable by others—including a borrower's creditors. *Id.* at 43.

To be clear, there is some dispute about whether equitable interests in trust were assignable prior to the Chancellorship of Lord Nottingham in the late seventeenth century. See *Warmstrey v. Tanfield* (1628) 21 Eng. Rep. 498 (Ch) 498; 1 Rep. Ch. 29, 29 (“[H]owbeit a Grant of future Possibility is not good in Law, yet a Possibility of a Trust in Equity might be assigned . . .”). A substantial amount of case law suggests equitable interests were not assignable. See, e.g., *Anonymous* (1576) 145 Eng. Rep. 172 (Ex & Ch) 173; Jenk. 244, 245 (prohibiting transfer of an interest in trust); *Ogle v. Lady Shrewsbury* (1632) 118 Selden Society 636 (Ex Ct) 636 (2001) (same); Scott, *Law of Trusts*, *supra* note 41, § 132 n.5 (citing *Earl of Worcester v. Finch* (1600) 123 Eng. Rep. 600 (Ch); 2 And. 162 (prohibiting transfer of an interest in trust)). But some commentators have argued that equitable interests were assignable, including St. German in 1523 and Francis Bacon. See, e.g., Francis Bacon, *The Reading upon the Statute of Uses of Francis Bacon* 16 (London, William Henry Rowe ed., W. Stratford 1804) (1642); Christopher St. German, *Doctor and Student* 185 (London, Henry Lintot 15th ed. 1751) (1531).

164. 1 Rich. 2 c. 9 (1377); 50 Edw. 3 c. 6 (1376–1377); see also Scott, *Law of Trusts*, *supra* note 41, § 1.3.

165. 3 Hen. 7 c. 4 (1487). For a discussion of this statute, see W.J. Jones, *The Elizabethan Court of Chancery* 429 (1967).

166. 34 & 35 Hen. 8 c. 4 (1542–1543).

167. 13 Eliz. c. 5 (1571).

consideration expressing of Use [i.e., trust] or any other Matter or Thyng to the contrary . . . .”<sup>168</sup>

These statutes were only a partial solution, however. They allowed a creditor to seize an interest only in a fraudulent trust, not in a legitimate trust. Parliament thus provided a more complete solution in the Statute of Frauds in 1677.<sup>169</sup> Section 10 of the statute permitted a creditor to legally execute against almost any beneficial interest in trust, regardless of who created the trust or whether its creation was fraudulent.<sup>170</sup> Crucially, however, creditors relying on the statute could seize only a beneficiary’s *equitable interest* and not the *legal interest* that belonged to the trustee.<sup>171</sup> If a beneficiary had a life interest in property, for example, then the creditor could seize only the life interest and could not immediately seize or occupy the property as a legal owner in fee simple.

This string of statutes thus had the effect of weakening the system of entity shielding that previously protected trust property in the law of trusts. But even the resulting weakened system turned out to be extremely strong—and was actually almost exactly analogous to the entity-shielding regime that now exists in the modern corporation. Although a trust had never been a legal entity, the doctrines of Chancery, as modified by the various statutes, ensured that the assets that legally belonged to a trustee were shielded from a beneficiary’s creditors almost as though they belonged to a distinct entity. Much as the creditors of a modern corporate shareholder can seize a shareholder’s shares but not the property that legally belongs to the corporation, likewise a trust beneficiary’s creditors could seize the beneficiary’s equitable interest but not the property that legally belonged to the trustee.

The value and strength of the trust’s asset-partitioning powers are evident in the trust’s early use in secured lending and the resolution of insolvencies. In 1518, Christopher St. German observed that the trust had become ubiquitous as a security device “for Surety of divers Covenants in Indentures of Marriage and other Bargains.”<sup>172</sup> Records of the Court of Chancery also show evidence of secured lending from the early 1600s well into the eighteenth century.<sup>173</sup> To arrange a secured

168. *Id.*

169. 29 Car. 2 c. 3 (1677).

170. Scott, *Law of Trusts*, *supra* note 41, § 147, at 730.

171. See *Creed v. Colville* (1683) 23 Eng. Rep. 395 (Ch) 395; 1 Vern. 172, 174 (holding that even a run-of-the-mill interest in an inheritance trust was reachable by creditors); Maitland, *supra* note 22, at 377–78 (describing the characteristics of “ownership in equity”); Turner, *supra* note 38, at 161 (explaining that a judgment creditor has an equitable interest in the debtor’s estate under the Statute of Frauds but not a legal interest). The statute’s effect was classically summarized in *Forth v. Duke of Norfolk* (1820) 56 Eng. Rep. 791 (Ch) 791–92; 4 Madd. 503, 504–05.

172. St. German, *supra* note 163, at 184–85.

173. See 1 *Selden Soc’y*, *supra* note 41, at 229 (describing the 1600 case *Lady Burrough v. Powell & Serjeant Williams*); see also *Chetwynd v. Fleetwood* (1742) 1 Eng. Rep. 580 (HL) 581; 1 Bro. Parl. Cas. 300, 300; *Tasburgh v. Echlin* (1733) 1 Eng. Rep. 934 (HL) 938; 2 Bro.

loan, a borrower transferred his property to a trustee and then instructed the trustee to return the property only if the borrower repaid the loan to the creditor in full.<sup>174</sup> If the borrower failed to pay the loan in full, the trustee was instructed to convey the property to the creditor instead. This arrangement gave a right of priority to the secured creditor analogous to entity shielding: Once the borrower gave his property to the trustee and named a lender as a contingent beneficiary, the borrower's other lenders could no longer seize the property. If we compare the trust to a corporation, it was as though the borrower had given his money to a corporation and thus prevented the borrower's own personal creditors from reaching the property.

The trust also used its entity-shielding properties to administer debts in insolvency. Once a debtor became insolvent, the process of administering his estate posed complicated problems. Borrowers and lenders used the trust to solve these problems through arrangements that came to be known as "compositions."<sup>175</sup> The details varied, but the basics involved a promise by a set of creditors to give up some of their remedies against a debtor in exchange for a promise by the debtor to give up some of his assets to a trustee and name the creditors as beneficiaries.<sup>176</sup> The trustees would then manage or sell the assets for the benefit of the creditors, with the debtor retaining a remainder interest in anything left over.<sup>177</sup> The trustees generally distributed money on a pro rata basis to each of the creditors according to the value of their claims. Borrowers gained a discharge from their debts, setting them free from the prospect of imprisonment.<sup>178</sup> And lenders gained confident access to the debtor's property and the right to an orderly and fair liquidation process.<sup>179</sup>

These arrangements depended crucially on asset partitioning. The orderly liquidation process that creditors found so valuable in these compositions was possible only because the trust shielded a debtor's

Parl. Cas. 265, 265–66; *Paget v. Bridgewater* (1724) 1 Eng. Rep. 1190 (HL) 1190; 3 Bro. Parl. Cas. 79, 79–80; *Allibon v. A-G* (1707) 1 Eng. Rep. 341 (HL) 341; Colles 393, 393–95; *Kingsland v. Barnewall* (1706) 2 Eng. Rep. 105 (HL) 105; 4 Bro. Parl. Cas. 154, 154; *Vernon v. Jones* (1691) 24 Eng. Rep. 17 (HL) 17; Fin. Pr. 32, 32; *Seymour v. Fotherby* (1691) 24 Eng. Rep. 23 (Ch) 23; Fin. Pr. 44, 44.

174. For examples of this kind of arrangement, see *Jones v. Prior* (1674) 23 Eng. Rep. 96 (Ch) 96; Fin. 175, 175; *Foley v. Lingen* (1674) 23 Eng. Rep. 91 (Ch) 91–92; Fin. 166, 166–67; *Vaughan v. Morgan* (1674) 23 Eng. Rep. 75 (Ch) 75; Fin. 138, 138.

175. Julian Hoppitt, *Risk and Failure in English Business: 1700–1800*, at 29–30 (1987); V. Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth-Century England* 78 (1995); see Israel Treiman, *Majority Control in Compositions: Its Historical Origins and Development*, 24 Va. L. Rev. 507, 523 (1938) (describing seventeenth-century efforts to ensure that trustees were not used to favor some creditors over others in compositions).

176. See Hoppitt, *supra* note 175, at 29–30.

177. *Id.*

178. Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. Legal Hist. 153, 163 (1982).

179. Peter J. Coleman, *Debtors and Creditors in America* 4–5 (1999).

property from any of the debtor's creditors who did not become beneficiaries of the trust. Once the property belonged to a trustee, rather than to a debtor, entity shielding prevented the debtor's creditors from seizing the assets through the ordinary judicial process. Instead, these creditors had to go through the process administered by the trustee.<sup>180</sup> By the late 1600s, it was thus clear that the trust had developed a very powerful system of asset partitioning.

2. *Appearance in Joint-Stock Companies.* — When the trust first appeared in joint-stock companies in the late 1600s, it brought its asset-partitioning features along with it. The evidence for this is somewhat hard to see at first, but it grows increasingly clear over time, becoming unambiguous by the early nineteenth century.

The reason the phenomenon is somewhat difficult to see in early joint-stock companies is that very few unincorporated joint-stock companies appeared in the Court of Chancery during the eighteenth century, presumably because of the incompleteness of Chancery reporting.<sup>181</sup> There is, however, circumstantial evidence to suggest that entrepreneurs expected to lock in their capital and prevent withdrawals. Consider the water supply company from the important 1701 case discussed above.<sup>182</sup> The company had as many as 900 shareholders,<sup>183</sup> but it clearly did not expect these shareholders to be able to liquidate the business at any time: The company had entered a lease for fifteen years.<sup>184</sup> The company had also committed under the lease to make a huge up-front investment in the form of a lump-sum payment and extensive infrastructure improvements.<sup>185</sup> These investments would presumably have taken years to produce a return, suggesting the company's entrepreneurs expected to stay in business for a while. The existence of this company and many others like it around the time<sup>186</sup>

180. The fraudulent-transfer statutes discussed above would allow a creditor who did not participate in the composition to void the debtor's transfers to the trust. For many centuries, the central function of bankruptcy law was to undo the effect of these fraudulent-transfer statutes in certain circumstances by making private compositions binding even on the creditors who did not agree to them.

181. This claim is based on extensive digital searching of the English reports. The only cases involving a company organized as a trust between 1722 and 1800 were *Lynch v. Dalzell* (1729) 2 Eng. Rep. 292 (HL); 4 Bro. Parl. Cas. 431, and *Horsley v. Bell* (1778) 27 Eng. Rep. 494 (Ch); *Amb. 770*. The most likely explanation for the dearth of reports is simply that Chancery reporting was inconsistent during this period, recording only a fraction of the cases decided.

182. See *supra* section I.C (discussing *City of London II* (1702) 1 Eng. Rep. 727 (HL); 1 Bro. Parl. Cas. 516, the first reported case involving a business company organized as a trust).

183. *City of London II*, 1 Eng. Rep. at 727; 1 Bro. Parl. Cas. at 516 (explaining that the business had been divided into 900 shares).

184. *City of London I* (1701) 23 Eng. Rep. 870 (Ch) 870; 2 Vern. 421, 421–22.

185. *Id.* at 870; 2 Vern. At 421–22.

186. See Scott, *Constitution and Finance*, *supra* note 68, §§ 1D, 1E, 5A, 5C, 5E (listing trust-based joint-stock companies from the late seventeenth and early eighteenth

suggests that even from the very dawn of trust-based joint-stock companies, something like entity shielding was widely expected. Additional evidence comes from Professors Freeman, Pearson, and Taylor's recent survey of eighteenth- and early-nineteenth-century joint-stock companies. They find that the vast majority of trust-based companies declared in their deeds of settlement that they would exist indefinitely.<sup>187</sup>

By the early nineteenth century, the evidence that unincorporated companies could lock in their capital becomes more direct. The clearest evidence comes from the earliest treatises on partnership. In the first half of the nineteenth century, partnership treatise writers uniformly agreed that although the default rules of partnership allowed a partner to withdraw his capital and dissolve the partnership at any time, this rule could easily be changed by agreement. The partners merely had to specify that their partnership would continue indefinitely or for a fixed period of time. The Collyer treatise, for instance, observed that by default "[a] partnership at will may be dissolved at the express desire, or by the bankruptcy, outlawry, felony, or death of any of the parties."<sup>188</sup> Notwithstanding this default, however, John Collyer said, "[T]he law . . . has allowed [the partners], except in cases of bankruptcy . . . or felony, to qualify the causes of its dissolution. For instance, in the case of the death of a partner, the partnership may . . . continue[] beyond the legal period of dissolution, in the hands of his children or representatives."<sup>189</sup> Further, Collyer explained, a partnership could be created for a term, in which case it would be dissolved only "by effluxion of time."<sup>190</sup> Niel Gow took a similar position in his treatise, arguing that even "[i]n the absence of an express [contract], there may be an implied, contract, as to the time for which a partnership shall endure . . . ; and where that is the case, the partnership cannot be destroyed by the act of the party until the contemplated period arrives."<sup>191</sup> Other partnership treatise writers agreed.<sup>192</sup>

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centuries); see also Freeman et al., *supra* note 24, at 23–28 (describing the growth of joint-stock companies in the eighteenth century).

187. Freeman et al., *supra* note 24, at 55.

188. John Collyer, *A Practical Treatise on the Law of Partnership* 58 (London, S. Sweet 1832).

189. *Id.* at 62.

190. *Id.*

191. Niel Gow, *A Practical Treatise on the Law of Partnership* 278 (London, Charles Hunter 1823).

192. Andrew Bisset, *A Practical Treatise on the Law of Partnership* 55 (Harrisburg, Pa., I.G. McKinley & J.M.G. Lescure 1847) ("Where, as is frequently the case, a precise time is fixed for the duration of the partnership, it is dissolved by the expiration or effluxion of that time, if it do[es] not meet with an earlier legal termination."); Joseph Story, *Commentaries on the Law of Partnership* 403 (Bos., Charles C. Little & James Brown 1841) [hereinafter Story, *Commentaries on the Law of Partnership*] ("[A] partnership

A further obstacle to premature dissolution was the difficulty of litigating over a dissolution. This became clear in *Van Sandau v. Moore*, an 1826 decision by Lord Chancellor Eldon.<sup>193</sup> In *Van Sandau*, a shareholder sought to withdraw his capital by dissolving the company that held it.<sup>194</sup> The shareholder argued that the company had specified no term of existence and thus could be dissolved at will by any of the partners.<sup>195</sup> The court held, however, that the shareholder could only force this dissolution by serving process on each one of the company's 300 shareholders.<sup>196</sup> For practical reasons, locating each one of these hundreds of shareholders and serving process on them turned out to be impossible, and so the company was allowed to continue in operation.<sup>197</sup>

*Van Sandau* has sometimes been held up as a symbol of dysfunction in the English court system,<sup>198</sup> but in fact the doctrine behind it served an important practical purpose: It locked in a company's capital. As we will see below, the requirement that every shareholder be joined was unique to dissolution proceedings—in most other proceedings the joinder of every one of a business trust's stockholders was not required.<sup>199</sup> The functional logic of *Van Sandau* was thus to recognize dissolution as a unique problem and to make capital difficult to withdraw. It thus appeared, for all intents and purposes, that unincorporated companies were able to lock in their capital as effectively as incorporated companies.

#### B. *Limited Liability for Shareholders and Trustees*

The trust also offered limited liability. The form of limited liability the trust offered varied throughout history and was not always exactly like the limited liability we now know in modern corporations. Nevertheless, limited liability in the business trust was often at least as strong as in corporations of the same periods, and sometimes stronger. Limited liability in the trust was also almost always much stronger than it was in the general partnership.

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may expire by the mere efflux of the time, which limits and bounds its duration under the terms of the original contract, by which it is created.”)

193. *Van Sandau v. Moore* (1826) 38 Eng. Rep. 171 (Ch); 1 Russ. 441.

194. *Id.* at 171; 1 Russ. at 441.

195. *Id.* at 172; 1 Russ. at 443.

196. *Id.* at 173; 1 Russ. at 447.

197. *Id.* at 183; 1 Russ. at 474.

198. See, e.g., Bd. of Trade, Report on the Law of Partnership, HC, in 530 Parliamentary Papers 2, 3 (1837); Mahoney, *supra* note 23, at 888–89 (noting difficulties that arose out of the court's view in *Van Sandau*).

199. Joseph Story, Commentaries on Equity Pleadings § 132 (Bos., Charles C. Little & James Brown 2d ed. 1840) [hereinafter Story, Equity Pleadings] (describing partnership dissolution as an exception to the general principle that partners did not all have to be joined where they were too numerous). Lord Redesdale reached a similar conclusion, saying that dissolution was one of only a small handful of circumstances in which numerous partners actually had to be joined. John Mitford, A Treatise on the Pleadings in Suits in the Court of Chancery 416–17 (London, J. & W.T. Clarke 5th ed. 1827).

1. *The Evolution of Limited Liability.* — The extent of limited liability in the trust was uncertain before trust-based joint-stock companies first appeared in the early 1700s because limited liability was simply not an issue in early trust law. In the prototypical family gift trust of medieval England, the trustee held only land, rather than active businesses, and so the trustee rarely took on the sorts of liabilities that could spill onto beneficiaries and necessitate limitations on their liabilities.<sup>200</sup>

When the trust first appeared in joint-stock companies, however, limited liability appeared almost immediately. At first, limited liability was not the product of any deliberate policy decision. Rather, it was simply implicit in the way trust property was deeded and titled. Recall from section I.B that the central logic of trust law was that legal title belonged to a trustee.<sup>201</sup> Thus, a trustee was expected to contract in the trustee's own name, rather than in the name of the trust or the beneficiaries. This implied something rather extraordinary: The trustee—rather than the beneficiaries—was personally liable for the trust's debts. Since the trustee was both the owner of the trust's property and the signatory on its contracts, it was the trustee who bore the liability for the trust's debts.<sup>202</sup> The U.S. Supreme Court would explain this logic in 1884: "When a trustee contracts as such, unless he is bound no one is bound, for he has no principal."<sup>203</sup> In other words, since a trustee contracts in his own name, he is the only one bound by a contract entered on a trust's behalf. Trustee personal liability remained the rule in the United States until well into the twentieth century.<sup>204</sup>

Although this system of personal liability was unfortunate for trustees, it was a gift to beneficiaries because it gave them the functional equivalent of limited liability. Basically, because the trustee was liable, the beneficiaries were not. This became evident at the dawn of the joint-stock-company era, as demonstrated in *City of London*, the water supply case from 1701 discussed above.<sup>205</sup> In that case, the named defendants were the trustees, not the trust or the shareholders.<sup>206</sup> And the plaintiff

200. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *Yale L.J.* 625, 640–42 (1995) [hereinafter Langbein, *Contractarian Basis*] (discussing the passive nature of early trustees and the disabling character of early trust fiduciary powers).

201. See *supra* note 46 and accompanying text (explaining that a trustee owned legal title, while a beneficiary owned equitable title).

202. For an early example, see *Duke of Queensbury v. Cullen* (1787) 1 *Eng. Rep.* 646 (HL) 652; 1 *Bro. Parl. Cas.* 396, 404–05.

203. *Taylor v. Davis*, 110 U.S. 330, 335 (1884). For another classic articulation of the doctrine, see *Hussey v. Arnold*, 70 N.E. 87, 88 (Mass. 1904) ("Actions at law upon [trustees'] contracts must be brought against them, and judgments run against them . . . because the relations of the cestui que trustent to their contracts are only equitable, and do not subject them to proceedings in a court of common law . . ."); see also Scott, *Law of Trusts*, *supra* note 41, §§ 261–263.

204. Scott, *Law of Trusts*, *supra* note 41, §§ 261–263.

205. *City of London I* (1701) 23 *Eng. Rep.* 870 (Ch); 2 *Vern.* 421; see *supra* section I.C.

206. *City of London I*, 23 *Eng. Rep.* at 871; 2 *Vern.* at 423.



sued the trustees personally.<sup>207</sup> The trustees tried to sidestep this liability by saying that the shareholders should be liable instead. "Equity ought to decree against the *Cestuy que trust* [i.e., the shareholders]," they argued, "and not against the trustees."<sup>208</sup> The courts, however, disagreed. To the Lord Keeper in Chancery, the trustees' personal liability was self-evident. In response to the trustees' argument that the beneficiaries rather than the trustees should be personally liable, the Lord Keeper said simply, "*Sed non allocatur*"—"It is not allowed."<sup>209</sup> The report on appeal in the House of Lords was more specific. The Lords agreed that the city's claim was against the trustees, rather than the shareholders for whom the trustees had acted because it was the trustees who held the lease.<sup>210</sup> Thus, while the trustees faced personal liability, the shareholders lost nothing, allowing them the de facto equivalent of limited liability.

Eventually, however, the trust would lose this feature before partially regaining it again in the early twentieth century. In the early nineteenth century, courts began treating joint-stock-company trusts as though they were partnerships for purposes of limited liability.<sup>211</sup> The basic logic was that partnership law treated all contractual arrangements that resembled partnerships as though they were partnerships, and a business trust was a contractual arrangement that resembled a partnership. This was an important move, because partnership law held each of a business's partners personally liable for the business's debts. Indeed, the whole point of treating a business as a partnership was usually to make the partners personally liable for the partnership's debts. This doctrinal shift probably first appeared around the 1820s, since this was the time when courts in England and the United States first began treating contractual arrangements as partnerships even when the partners did not want to do so.<sup>212</sup>

Shareholders of business trusts would not lose their limited liability for long, however. Starting in 1856, the same year that Parliament gave general limited liability to English corporations through the Limited

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207. *Id.* at 871; 2 Vern. at 423.

208. *Id.* at 871; 2 Vern. at 423.

209. *Id.* at 871; 2 Vern. at 423.

210. *City of London II* (1702) 1 Eng. Rep. 727 (HL) 728; 1 Bro. Parl. Cas. 516, 518.

211. See, e.g., *Taylor v. Davis*, 110 U.S. 330, 337 (1884); *Hussey v. Arnold*, 70 N.E. 87, 88 (Mass. 1904); *Wells-Stone Mercantile Co. v. Grover*, 75 N.W. 911, 916 (N.D. 1898); *Duke of Queensbury v. Cullen* (1787) 1 Eng. Rep. 646 (HL) 651–52; 1 Bro. Parl. Cas. 396, 404–05.

212. See 3 James Kent, *Commentaries on American Law* 26 (N.Y.C., O. Halsted 2d ed. 1832); Naomi R. Lamoreaux, *Constructing Firms: Partnerships and Alternative Contractual Arrangements in Early Nineteenth-Century American Business*, 24 *Bus. & Econ. Hist.* 43, 53 (1995). For English sources, see *Holmes v. Higgins* (1822) 107 Eng. Rep. 28 (KB) 29; 1 B. & C. 74, 76; Charles Wordsworth, *The Law of Joint Stock Companies* 226–39 (Phila., John S. Little 3d ed. 1843). In any case, the doctrine was clearly in place by the 1850s. See *Cox v. Hickman* (1860) 11 Eng. Rep. 431 (HL) 450; 8 H.L. Cas. 268, 314; *Re Stanton Iron Co.* (1855) 52 Eng. Rep. 821 (Ch) 825; 21 Beav. 164, 173–74.

Liability Act,<sup>213</sup> the English Chancery court and House of Lords began returning limited liability to business trusts in the case of *Cox v. Hickman*.<sup>214</sup> In that case, the owners of an insolvent ironworks company assigned all of their equity interest to a group of trustees, naming the creditors of the business as the trust's beneficiaries.<sup>215</sup> This was simply a standard bankruptcy trust of the kind that had already been popular in England for centuries. A question arose about limited liability, however, because after the original owners assigned the business to the trustees, the trustees did not liquidate the business but chose instead to continue operating it for the benefit of the lenders.<sup>216</sup> And in the process of operating it, the trustees took on new lenders.<sup>217</sup> The business continued to struggle, however, and eventually became capable of paying neither the new lenders nor the old ones for whose benefit the trust was originally established.<sup>218</sup> The new lenders thus sued the old ones, arguing that by continuing to operate the business, the old lenders had become not just trust beneficiaries but partners in the enterprise, with personal liability for the partnership's new debts.<sup>219</sup>

The judges who received the case were flummoxed. They were forced to draw a line between the rules of conventional trust law, which clearly protected beneficiaries from liability, and the rules of partnership or so-called "business trust" law, which did not. The line between ordinary trusts and business trusts had blurred in bankruptcy, and it was unclear which set of rules should apply. After much debate, the House of Lords came down in favor of giving the original creditors limited liability.<sup>220</sup>

The rule of limited liability that emerged from this case soon jumped beyond trusts that had been organized specifically for insolvencies and began spreading to ordinary businesses that had been organized as trusts originally. The spread was most pronounced on the American side of the Atlantic. One of the first cases to establish the doctrine of limited liability in business trusts in America was *Mayo v. Moritz*, an 1890 decision by the Supreme Judicial Court of Massachusetts.<sup>221</sup> In

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213. Limited Liability Act 1855, 18 & 19 Vict. c. 133. This act was superseded a year later by the Joint Stock Companies Act 1856, 19 & 20 Vict. c. 47. Limited liability was available prior to 1855 but only by special act or charter. The 1855 Act offered limited liability to all businesses registered as corporations. 18 & 19 Vict. c. 133, § II.

214. 11 Eng. Rep. at 431; 8 H.L. Cas. at 268. *Cox* built on a related decision, *Re Stanton Iron Co.* (1855) 52 Eng. Rep. 821; 21 Beav. 164.

215. *Cox* 11 Eng. Rep. at 432; 8 H.L. Cas. at 268–70.

216. *Id.* at 432; 8 H.L. Cas. at 268–70.

217. *Id.* at 432; 8 H.L. Cas. at 268–70.

218. *Id.* at 432; 8 H.L. Cas. at 268–70.

219. *Id.* at 433; 8 H.L. Cas. at 271.

220. *Id.* at 445; 8 H.L. Cas. at 278.

221. See 24 N.E. 1083, 1083 (Mass. 1890); see also *Wells-Stone Mercantile Co. v. Grover*, 75 N.W. 911, 912–13 (N.D. 1898) (citing *Mayo*, 24 N.E. at 1083).

that case, the court held that the shareholders of a patent trust had limited liability for its debts.<sup>222</sup> The Massachusetts court then clarified the requirements for obtaining limited liability a few years later in *Williams v. Inhabitants of Milton* in 1913 and in *Frost v. Thompson* in 1914, holding that a business organized in trust was to be treated as a trust, rather than as a partnership—and was thus to receive limited liability for its shareholders—if the trust limited its shareholders' control.<sup>223</sup> So long as control belonged to the trustees, rather than to the shareholders, the rules of trust law rather than partnership law applied. Commentators thus began to say that a business trust with limited shareholder control was a "true" or "pure" trust, capable of using the true rules of trust law, while a business trust that gave shareholders significant control was actually a partnership, subject to the rules of partnership law.<sup>224</sup> The rule of limited liability soon traveled beyond Massachusetts. Within a few years, the courts of California,<sup>225</sup> Illinois,<sup>226</sup> Rhode Island,<sup>227</sup> and Arkansas<sup>228</sup> had adopted it.

Some historians have read the limited-control requirement as a harsh restriction that stripped shareholders of voting rights and have concluded that the control requirement was, thus, unworkable.<sup>229</sup> But this was not actually so. In the doctrine's mature form in Massachusetts, it merely required the same centralization of management that prevails in a modern corporation. In a modern corporation, the authority to make decisions and enter contracts in the regular course of business belongs to the board of directors, rather than to the stockholders.<sup>230</sup> The stockholders have the right to elect the directors, but it is the directors who ultimately hold control.<sup>231</sup> This sets a modern corporation in contrast to a modern partnership, in which the authority to manage the business belongs to the partners, rather than to an elected board.<sup>232</sup>

The mature version of the Massachusetts business-trust doctrines merely required business trusts to adopt the same board-centered control scheme as a modern corporation. In order to qualify for limited

222. *Mayo*, 24 N.E. at 1083.

223. *Frost v. Thompson*, 106 N.E. 1009, 1010 (Mass. 1914); *Williams v. Inhabitants of Milton*, 102 N.E. 355, 359 (Mass. 1913).

224. See, e.g., *Hecht v. Malley*, 265 U.S. 144, 147 (1924).

225. See *Goldwater v. Oltmann*, 292 P. 624, 629 (Cal. 1930).

226. See *Schumann-Heink v. Folsom*, 159 N.E. 250, 253 (Ill. 1927).

227. See *R.I. Hosp. Tr. Co. v. Copeland*, 98 A. 273, 279 (R.I. 1916).

228. See *Betts v. Hackathorn*, 252 S.W. 602, 604–05 (Ark. 1923).

229. See Guinnane et al., *supra* note 23, at 695 n.15 ("In Britain and the United States firms could also organize as joint stock companies and trusts . . . . In the latter investors had so completely to relinquish managerial authority to the trustees that they were more vulnerable to oppression than in any other form."); Silberstein-Loeb, *supra* note 22, at 205.

230. See, e.g., Del. Code Ann. tit. 8, § 141(a) (2016).

231. See *id.* § 141(b).

232. See Del. Code Ann. tit. 6, § 15-202 (2016).

shareholder liability, a trust simply had to place the authority to manage its business in a board of trustees. The shareholders of a Massachusetts business trust could still retain a large measure of control by keeping the right to elect the board, just as the shareholders might do in a modern corporation. This became clear by 1925 in the case of *Greco v. Hubbard*.<sup>233</sup> In that case, the court explicitly compared a trust to a corporation, observing that if the trust at issue “had been a corporation, no one would contend that the relation of the defendants to it by electing new officers after they became the stockholders would render them personally liable for its debts.”<sup>234</sup> The court said it was the same for a trust: “Every intendment of the law,” the court insisted, “is toward the protection of *cestuis que trust* [i.e., shareholders] under a valid trust.”<sup>235</sup> The Supreme Court of California reached the same result five years later.<sup>236</sup> By the 1920s, therefore, a business trust in Massachusetts enjoyed the same limited liability as a business corporation in every American state today.

The principal weakness of the Massachusetts limited liability doctrine was that it did not apply consistently across all of the states. Although Massachusetts and California offered limited liability to both a trust and a corporation, a number of state courts in the South refused to honor the Massachusetts doctrine, including the courts of Florida,<sup>237</sup> Kentucky,<sup>238</sup> Louisiana,<sup>239</sup> and, most prominently, Texas.<sup>240</sup>

2. *Limited Liability in Historical and Commercial Perspective.* — The trust’s ability to offer limited liability in the early-twentieth-century United States was thus somewhat inferior to that of modern corporations, but we should keep this inferiority in perspective and be cautious not to overstate it. The corporation’s superiority in terms of limited liability is a phenomenon of rather recent vintage. For most of modern history, the weakness of limited liability in the trust form did not put the trust at a serious disadvantage to the corporation because limited liability was weak in the corporation, too. Limited liability would not become a common feature of special parliamentary acts of incorporation until the

233. 147 N.E. 272, 274–75 (Mass. 1925).

234. *Id.* at 275.

235. *Id.*

236. See *Goldwater v. Oltmann*, 292 P. 624, 629–30 (Cal. 1930).

237. See *Willey v. W.J. Hoggson Corp.*, 106 So. 408, 411–12 (Fla. 1925) (holding that a common law trust “is nothing but a veiled and futile effort to avoid the liabilities of a copartnership and acquire the privileges and immunities of a corporation without complying with the corporation laws of the state”).

238. See *Ing v. Liberty Nat’l Bank*, 287 S.W. 960, 961 (Ky. 1926) (“It is a well settled rule in this state that these unincorporated syndicates are simply partnerships and that each member of the syndicate is liable personally for the debts of the syndicate.”).

239. See *Am. Nat’l Bank of Shreveport v. Reclamation Oil Producing Ass’n of La.*, 101 So. 10, 12 (La. 1924).

240. See *Thompson v. Schmitt*, 274 S.W. 554, 559 (Tex. 1925).

late eighteenth or early nineteenth century,<sup>241</sup> and it would not become a feature of England's general incorporation statutes until 1856<sup>242</sup>—almost the same year that limited liability began to return to the trust form in *Cox v. Hickman*.<sup>243</sup> Additionally, there was a very long period—the entire eighteenth century—during which the trust may have actually offered a stronger form of limited liability than the corporation did. The water supply case from 1702, for example, provided stockholders in a trust with a form of limited liability that the corporate form would not widely achieve until a hundred years later.<sup>244</sup>

Note also that the tendency of trustees—as well as shareholders—to become personally liable did not make the trust obviously inferior because trustee liability had an analogue in contemporary corporations. During the eighteenth and early nineteenth centuries, corporate directors in both England and the United States were often personally liable for the debts of a corporation just as trustees were liable for the debts of a trust.<sup>245</sup> Further, the trust's limited liability protections could be strengthened contractually. If a trustee could convince a creditor to contractually waive its right to recover against the personal assets of the trustee and shareholders, then the creditor could not seize those assets.<sup>246</sup> This practice was already available in the United States by the early nineteenth century, when trust shareholders were first being held liable for business debts.<sup>247</sup> And by the early twentieth century, it was standard.<sup>248</sup> Deeds of trust commonly required a trustee to obtain a waiver of shareholder and trustee liability in all of the contracts the trustee signed.<sup>249</sup>

Contractual waivers of trustee liability were so common in business trusts in the early-twentieth-century United States that a whole genre of

241. K.G. Davies, *Joint-Stock Investment in the Later Seventeenth Century*, 4 *Econ. Hist. Rev.* 283, 293–94 (1952).

242. See *Limited Liability Act 1855*, 18 & 19 *Vict. c.* 133.

243. (1860) 11 *Eng. Rep.* 431; 8 *H.L. Cas.* 268.

244. See *City of London II* (1702) 1 *Eng. Rep.* 727 (HL); 1 *Bro. Parl. Cas.* 516.

245. 3 Seymour D. Thompson, *Commentaries on the Law of Private Corporations* § 4163, at 3059 (S.F., Bancroft-Whitney Co. 1895) (observing that there existed in the United States a “large body of statutes making directors or trustees of corporations . . . liable to pay the debts of the corporation which have been contracted by them during the period of certain official defaults”); Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 *J. Legal Stud.* 129, 146 (1985).

246. 3 *Kent*, *supra* note 212, at 26–27 (explaining members of a private association can limit their liability through contract).

247. *Id.*

248. Thompson, *Business Trusts*, *supra* note 148, at 14–15; Warren, *supra* note 148, at 384 (claiming “people are very familiar these days with . . . and make no objection to” contractual waivers of creditors’ rights to recover against the personal assets of a trustee).

249. See, for example, the *Keystone Manufacturing Company Agreement* made in 1920. McCoy, *supra* note 148, at 193–99 (describing a clause in the Agreement waiving all liability of the trustees for management of the trust).

cases grew up around them. The courts concluded that a trustee could usually limit his personal liability by simply writing the words “as trustee, and not individually” next to his signature on a contract.<sup>250</sup> Additionally, by the early twentieth century in the United States, a trust instrument could categorically enable third parties to recover from the trust fund directly, rather than the trustee, making the trustee liable only if the trust fund was inadequate.<sup>251</sup>

These waivers of contractual liability worked quite well. This became clear in the early twentieth century after the collapse of a whole industry of companies known as “closed-end funds.” Closed-end funds were investment funds that bought stock in other companies and then issued stock of their own to investors who wanted to invest broadly.<sup>252</sup> Closed-end funds were a big business in the 1920s. During the great bull market of 1929, they issued nearly \$3 billion of securities and accounted for more than thirty percent of all new corporate issues in the United States.<sup>253</sup> Crucially, many—perhaps most—of these funds were organized as trusts. In the 1920s, the trust form was so prevalent among these funds that they became known in popular parlance as “investment trusts,” rather than “investment *funds*.”<sup>254</sup>

The closed-end fund industry collapsed in 1929 when the stock market crashed, and the collapse sent shards of debt flying in every direction. The capital structures of closed-end funds tended to include elaborately tiered layers of bonds in addition to equity,<sup>255</sup> and when the

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250. The classic case is *Shoe & Leather Nat'l Bank v. Dix*, 123 Mass. 148, 150 (1877); see also *Duvall v. Craig*, 15 U.S. 45, 56 (1817); *Rand v. Farquhar*, 115 N.E. 286, 288 (Mass. 1917); *Mitchell v. Whitlock*, 28 S.E. 292, 292–93 (N.C. 1897). The body of rules about what exactly was sufficient grew to be fairly detailed. See, e.g., *Dunn*, supra note 148, at 197; *Scott*, *Law of Trusts*, supra note 41, §§ 263, 263.2; *Sears*, supra note 148, §§ 33, 56, 75; *Warren*, supra note 148, at 860.

251. See *Scott*, *Law of Trusts*, supra note 41, § 265.4; *Sears*, supra note 148, §§ 53–54 (describing a series of cases wherein trust agreements made the trust, rather than trustees, directly liable). By the early twentieth century, this had become the default rule in Massachusetts and other important American jurisdictions. See *Frost v. Thompson*, 106 N.E. 1009, 1010 (Mass. 1914); *Wright v. Caney River Ry. Co.*, 66 S.E. 588, 590–91 (N.C. 1909); *Wells-Stone Mercantile Co. v. Grover*, 75 N.W. 911, 912 (N.D. 1898); *Dunn*, supra note 148, at 347; *Scott*, supra note 41, §§ 270–270.2; *Wrightington*, supra note 148, at 157–59.

252. *John Morley, Collective Branding and the Origins of Investment Management Regulation*, 6 *Va. L. & Bus. Rev.* 341, 348 (2012).

253. SEC, *Investment Trusts and Investment Companies*, H.R. Doc. No. 70, pt. 2, at 186 tbl.59, 190 tbl.60 (1939).

254. See, e.g., *Cravath*, supra note 145, at 14–15; *Walter N. Durst, Analysis and Handbook of Investment Trusts* 5–6 (1932); *Theodore J. Grayson, Investment Trusts, Their Origin, Development and Operation* 1 (1928); *1 C.P. Keane, Keane's Manual of Investment Trusts* 550, 552–53 (1928); *Williams*, supra note 145, at 1–2.

255. The SEC estimated that debt and preferred stock accounted for approximately fifty-six percent of the total assets of all leveraged closed-end funds in 1929. H.R. Doc. No. 70, pt. 2, at 140 tbl.33.

stock market crashed in October of 1929, most closed-end funds either dissolved or went bankrupt.<sup>256</sup>

Remarkably, however, there is no evidence that the shareholders of these funds ever became liable. Although the SEC spent years investigating the fund industry's collapse and compiled a four-volume report totaling thousands of pages to describe its findings,<sup>257</sup> the SEC never found any evidence of shareholder personal liability. The shareholders must have been protected either because the funds had centralized management structures that straightforwardly qualified them for limited liability under Massachusetts precedents or because the funds' debt contracts included waivers of shareholder liability. In either case, the closed-end funds proved that trust-based businesses with contractual debts could collapse on a massive scale and yet still leave their shareholders unscathed.

To be sure, a contractual waiver of shareholder liability had limits. Most importantly, it could not eliminate a shareholder's noncontractual liabilities for torts and taxes.<sup>258</sup> But this was not a serious problem prior to the early twentieth century. Tort liability was extremely rare prior to the mid-nineteenth century,<sup>259</sup> and the doctrines of tort law remained poorly developed up through at least the early twentieth century.<sup>260</sup> Tax liability was also relatively insignificant. Although the United Kingdom adopted a corporate income tax in 1803, its rates remained low for at least a century.<sup>261</sup> And the United States did not successfully tax corporate income until 1909—even then, the rates were very low by modern standards.<sup>262</sup>

Thus, by the 1920s, many practitioners were counseling their clients that although shareholders of a business trust might run a small risk of tort or governmental liability if they chose the trust form over the corporate form, these risks were small enough that they were worth

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256. Morley, *supra* note 252, at 353.

257. See H.R. Doc. No. 70, pt. 2.

258. See Warren, *supra* note 148, at 384 (explaining a trust could not eliminate liability for taxes or for claims under the Workmen's Compensation Act).

259. See Lawrence M. Friedman, *A History of American Law* 222–23, 350 (3d ed. 2005); John Fabian Witt, *The Accidental Republic* 4–6 (2004) (describing the development of tort law after the U.S. Civil War); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 *Ga. L. Rev.* 775, 777–86 (1982) (describing the moderate expansion of tort liability to employers in the mid- to late nineteenth century).

260. See G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 *U. St. Thomas L.J.* 463, 483 (2014) (describing the “favorable environment for the filing of tort claims for personal injuries” that developed “in the latter decades of the nineteenth century and the first two decades of the twentieth”).

261. See Steven A. Bank, *Anglo-American Corporate Taxation* 24–26, 49–54 (2011) (describing the development of the United Kingdom's corporate tax and the subsequent rise of progressive taxation).

262. See *id.* at 70–71.

running. Edward Warren, a professor at Harvard Law School, wrote up a fictional dialogue between a lawyer and his entrepreneur clients to illustrate the advantages of the trust form.<sup>263</sup> The dialogue showed the lawyer counseling the clients that the risks of personal liability in the trust form were not meaningful.<sup>264</sup> In the dialogue, the lawyer says,

[T]he only possible risk would be with claims not based on contract, say, a claim against you under the Workmen's Compensation Act, or a claim for taxes. As to such claims, you would be entitled to use up the whole of the trust funds, if necessary, to protect yourselves. So the only risk is that there might be some such claim which was bigger than the trust fund. The risk seems a small one.<sup>265</sup>

The client replies, "It sounds almost too good to be true."<sup>266</sup>

Trustee liability was probably not a serious problem up through the early twentieth century for the same reasons that shareholder liability was not a serious problem. Contractual waivers were apparently effective enough that the risk of personal liability did not make it difficult to find trustees. In the eighteenth century, it was common for unincorporated companies to enlist local aristocrats and other men of high prestige to serve as trustees.<sup>267</sup> Later on, companies would draw their trustees from the ranks of company secretaries and other administrators who may have been judgment proof and whose sole job was to follow the instructions of a board of directors.<sup>268</sup> Personal liability for trustees was largely eliminated by statute in most American jurisdictions in the second half of the twentieth century.<sup>269</sup>

### C. *Legal Personhood in Litigation*

Of all the trust's purported weaknesses, the one that has loomed largest in the eyes of recent scholars is the trust's inability to achieve legal personhood in litigation.<sup>270</sup> Legal personhood in litigation was important

263. Warren, *supra* note 148, at 383–84.

264. *Id.*

265. *Id.* at 384.

266. *Id.*

267. See Freeman et al., *supra* note 24, at 41 (describing the popularity of the trust form as a result of business efforts to increase the likelihood of securing incorporation); Chantal Stebbings, *The Private Trustee in Victorian England*, at i (2002) (describing the popularity of the trust form as a result of efforts of the Victorian middle class to preserve wealth).

268. See *Blundell v. Winsor* (1837) 59 Eng. Rep. 238 (Ch) 238–39; 8 Sim. 601, 601–02 (describing a company that appointed its treasurer as trustee); *Harrison v. Heathorn* (1843) 134 Eng. Rep. 817 (CP) 822–23; 6 Man. & G. 81, 95 (same).

269. See Jones et al., *The Massachusetts Business Trust*, *supra* note 112, at 434–35 (describing trustee immunity from personal contract liability in Massachusetts).

270. See Harris, *Industrializing English Law*, *supra* note 16, at 153–54 (describing trustees' exposure to personal liability); Mahoney, *supra* note 23, at 887–88 (describing



because from early modern times, the rules of equity procedure technically required every person who was interested in a suit to be joined to the suit as a party.<sup>271</sup> That is, if a plaintiff sued a trust with many beneficiaries, each one of the beneficiaries would have to be named as a defendant and served with process.

If applied literally to an unincorporated joint-stock company, this rule made litigation impossible because it would have required personal service of process—a very difficult task in the days before email—on every one of the company's shareholders. If the shareholders numbered in the hundreds or thousands, as they often did, then serving each one of these shareholders with process was effectively impossible.<sup>272</sup> Recent historians thus have regarded the corporate form as a major innovation because the corporate form allowed a business to litigate in its own name.<sup>273</sup> In a suit involving a corporation, the interested party was the corporation, not the shareholders, and so the corporation could litigate without joining any of the shareholders.<sup>274</sup>

It turns out, however, that as a practical matter, the trust was almost as good as the corporation in this regard. From almost the moment the trust first appeared in joint-stock companies around the turn of the eighteenth century, the trust exploited a set of exceptions to the general rule of joinder. Although the rules of equity procedure technically required all of a joint-stock company's shareholders to be joined in most lawsuits involving the company, the courts of equity understood that this rule was impractical. The courts opened up gigantic exceptions that had the practical impact of waiving the joinder of a trust's shareholders in almost every instance in which joinder would have been impractical.

The exceptions to the general rule of joinder emerged in a variety of settings. One of the simplest was in cases in which the parties to a dispute were overseas. If the partners of a partnership or the beneficiaries of a trust were found to be in India or the Caribbean, for example, a court would not insist on joining them, so long as they were adequately represented by others.<sup>275</sup>

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Parliament's ban on legal personhood for unincorporated companies as an effort to eliminate them).

271. See Story, *Equity Pleadings*, *supra* note 199, §§ 72–76 (explaining equity requires that “all persons, whose interests are immediately connected” with a case and who are “affected by it, shall be provided for”).

272. See *Van Sandau v. Moore* (1826) 38 Eng. Rep. 171 (Ch) 173; 1 Russ. 441, 447 (denying relief to plaintiff who chose “to file a bill against between two and three hundred [d]efendants”).

273. See Harris, *Industrializing English Law*, *supra* note 16, at 159–66 (describing the comparative advantages of litigation involving unincorporated entities); Mahoney, *supra* note 23, at 877 (explaining how modern statutes enable the corporation to become “a legal person entitled to own assets and sue and be sued in its own name”).

274. See Mahoney, *supra* note 23, at 877.

275. See *Good v. Blewitt* (1807) 33 Eng. Rep. 343 (Ch) 345; 13 Ves. Jr. 397, 401 (seamen); *AG v. Baliol Coll.* (1744) 88 Eng. Rep. 538 (Ch) 539; 9 Mod. 407, 409 (out-of-

Another exception arose in trusts for the benefit of creditors.<sup>276</sup> As observed above,<sup>277</sup> from at least early modern times, borrowers commonly conveyed assets to trustees for the benefit of creditors in order to secure loans, manage bankruptcies, or render land reachable by creditors at death. In many of these trusts, the creditors who were named as beneficiaries were so numerous and so spread out that joining them all in disputes with outsiders or with the trustee or other creditors became impossible. Hence, by the late 1600s, the Chancery was routinely waiving joinder of the creditors in these trusts.<sup>278</sup> Similar waivers would later be used to massive effect when American railroads began using the trust to issue corporate bonds to thousands of creditors in the mid-nineteenth century.<sup>279</sup>

Thus, by at least the early eighteenth century, the Chancery had developed a vast set of exceptions to the joinder rule that allowed parties in interest to be waived wherever the parties were too numerous to be joined. This became very important for the trust-based joint-stock companies that emerged around this time. Justice Story, the great nineteenth-century treatise writer and Justice of the American Supreme Court, summarized the doctrine for joint-stock company shareholders in 1840: It was a rule “of Courts of Equity, that where the parties are so numerous, as to render it inconvenient or impracticable, that they should be parties to the record; *if they all have one common interest, a few may sue on behalf of themselves and all the other members of the company.*”<sup>280</sup>

This doctrine appeared at the very birth of trust-based joint-stock companies in the early 1700s. In the water supply company case from 1701, *City of London*, the city filed its complaint against the company’s trustees and a handful of stockholders, rather than against all of its

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kingdom university); *Quintine v. Yard* (1702) 21 Eng. Rep. 886 (Ch) 886; 1 Eq. Ab. 74, 74 (beneficiaries in Barbados); *Cowslad v. Cely* (1698) 24 Eng. Rep. 40 (Ch) 40; Fin. Pr. 83, 83 (co-executor in foreign country); *Walley v. Walley* (1687) 23 Eng. Rep. 609 (Ch) 610; 1 Vern. 484, 487 (executor in Indies).

276. See *Cockburn v. Thompson* (1809) 33 Eng. Rep. 1005 (Ch) 1008; 16 Ves. Jr. 321, 328 (permitting a residuary beneficiary of a trust to file suit on behalf of all residuary beneficiaries); Story, *Equity Pleadings*, supra note 199, § 76(b) (“[T]rustees for the payment of debts and legacies may sustain a suit, either as plaintiffs or as defendants, touching the trust estate, without bringing the creditors or legatees before the Court as parties.”).

277. See supra notes 175–179 and accompanying text (discussing “composition” arrangements).

278. See *Barker v. Wyld* (1682) 23 Eng. Rep. 373 (Ch) 373; 1 Vern. 140, 140; see also *Cockburn*, 33 Eng. Rep. at 1007; 16 Ves. Jr. at 327 (waiving the joinder of shareholders in a joint-stock company and referring to “the familiar case of creditors” as precedent).

279. See *Shaw v. Norfolk R.R.*, 71 Mass. (5 Gray) 162, 170 (1855) (waiving joinder of all of the bondholders in litigation over a bond default); *Bd. of Supervisors v. Mineral Point R.R.*, 24 Wis. 93, 132 (1869) (same).

280. Story, *Equity Pleadings*, supra note 199, § 115 (emphasis added) (discussing *Small v. Attwood* (1838) 7 Eng. Rep. 684 (Ch); 6 Cl. & F. 232).

stockholders.<sup>281</sup> The trustees then defended by saying that all of the company's stockholders had to be joined before the suit could proceed.<sup>282</sup> Because there were 900 shares outstanding, the trustees knew that requiring the plaintiff to join all of the shareholders would make the suit impossible.

The Lord Keeper in Chancery understood the effect of requiring joinder, however, and he thus refused to apply the general rule of joinder. The trustees, the Lord Keeper observed, "by dividing of [the lease] into so many shares, had made it impracticable to have them all before the court."<sup>283</sup> The Lord Keeper thus simply waived the joinder requirement and let the suit proceed against the trustees alone.<sup>284</sup> The House of Lords later upheld the Lord Keeper's decision, saying that to bring all the shareholders to a hearing "could not be done, and would render it impossible for the respondents ever to recover."<sup>285</sup> Twenty years later in 1722, the Chancellor reached a similar result for a joint-stock company and its shareholders in the case of *Chancey v. May*.<sup>286</sup> The courts had thus said that whenever joinder was impractical because the stockholders were too numerous, it would not be required. This ripped open a huge hole that left the general rule of joinder in tatters.

The rule was reaffirmed again at the beginning of the nineteenth century<sup>287</sup> in a series of Chancery opinions that were well known to commentators at the time but that have received almost no attention from recent historians. The first of these opinions appeared in 1805 and was written by Lord Chancellor Eldon in the case of *Adair v. New River Co.*<sup>288</sup> In that case, Lord Eldon waived the joinder of a group of stockholders in an unincorporated company, reasoning that the shareholders were too numerous to be joined and that "where it is impracticable," the rule requiring joinder "shall not be pressed."<sup>289</sup> It was enough, Lord Eldon said, for a plaintiff to "bring[] all whom he can bring" of the stockholders.<sup>290</sup> Lord Eldon reached the same result again

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281. See *City of London I* (1701) 23 Eng. Rep. 870 (Ch) 870; 2 Vern. 421, 422.

282. *Id.* at 870; 2 Vern. at 421, 422.

283. *Id.* at 871; 2 Vern. at 422.

284. *Id.* at 871; 2 Vern. at 423.

285. *City of London II* (1702) 1 Eng. Rep. 727 (HL) 728; 1 Bro. Parl. Cas. 516, 518.

286. (1722) 24 Eng. Rep. 265 (Ch) 265; Fin. Pr. 592, 592.

287. It is difficult to say what happened to the numerosity exception between *Chancey v. May* in 1722 and the end of the eighteenth century because, as noted above, *supra* note 181, very few trusts appeared in the reports of chancery proceedings between 1722 and the early nineteenth century.

288. (1805) 32 Eng. Rep. 1153 (Ch); 11 Ves. Jr. 429. The New River Company had been incorporated by royal charter pursuant to a scheme in which the Crown would receive a share in the company equal to one half of its annual profits. *Id.* at 1153; 11 Ves. Jr. at 429. Subsequently, the profits interest was divided up into shares distributed to "100 [persons] or a much greater number." *Id.* at 1153; 11 Ves. Jr. at 429.

289. *Id.* at 1159; 11 Ves. Jr. at 444.

290. *Id.* at 1159; 11 Ves. Jr. at 444.

four years later in two more cases, *Pearce v. Piper* and *Cockburn v. Thompson*.<sup>291</sup> In *Cockburn*, a mutual annuity company broke down into litigation between its promoters and some of the mutual shareholders. The promoters retreated to the familiar procedural argument, claiming that the suit could not proceed unless all of the mutual shareholders were joined by name.<sup>292</sup> Lord Eldon refused to go along, however. He took note of the explosive growth of trust-based companies in early-nineteenth-century London and said that if what the defendants argued were true and people who sued these companies had to join all of their shareholders, then “with regard to all those Institutions [i.e., trust-based joint-stock companies], known to subsist in this great metropolis in the nature of partnership[,] . . . if they have not a corporate character, no law can be administered in any Court of Justice among the members of such Societies.”<sup>293</sup> The companies, in other words, would become lawless, and the Chancellor refused to let that happen. In addition to this practical argument, Lord Eldon also made a doctrinal argument. Referring to “the familiar case of creditors,” Lord Eldon reminded the litigants that the trust had long been used to structure credit relationships and that the joinder of the creditors in these relationships had long been waived if the creditors were numerous.<sup>294</sup>

The rule in *Cockburn* soon caught on. The most influential development came in 1818, when the Master of the Rolls decided *Meux v. Malby*, a case involving a dock company organized as a trust.<sup>295</sup> Citing *Cockburn* and several other cases taken from the trust’s long history in credit relationships, the court held that in each of these various cases, practical considerations had long ago permitted waiving the joinder of trust beneficiaries.<sup>296</sup> The Master also cited the two unincorporated joint-stock company cases from the early 1700s, including the water supply case, to hold that waiver was long-established doctrine.<sup>297</sup>

The doctrine waiving joinder of shareholders soon crossed the Atlantic. In the 1816 case of *Van Vechten v. Terry*, New York Chancellor

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291. *Cockburn v. Thompson* (1809) 33 Eng. Rep. 1005 (Ch); 16 Ves. Jr. 321; *Pearce v. Piper* (1809) 34 Eng. Rep. 1 (Ch); 17 Ves. Jr. 1.

292. *Cockburn* 33 Eng. Rep. at 1006; 16 Ves. Jr. at 322–23.

293. *Id.* at 1006; 16 Ves. Jr. at 324.

294. *Id.* at 1007; 16 Ves. Jr. at 327. Contemporary treatises likewise acknowledged that creditors could sue on behalf of a large group of creditors without joining other creditors. See, e.g., Denis George Lubé, *An Analysis of the Principles of Equity Pleading* 188–89 (London, S. Sweet 1823); John Whitworth, *Equity Precedents* 288, 309, 316 (Phila., T. & J.W. Johnson 1848).

295. (1818) 36 Eng. Rep. 621 (Ch); 2 Swanst. 277.

296. *Id.* at 623–25; 2 Swanst. at 282–87.

297. *Id.* at 623–25; 2 Swanst. at 282–87. (citing *Adair v. New River Co.* (1805) 32 Eng. Rep. 1153 (Ch); 11 Ves. Jr. 429; *City of London I* (1701) 23 Eng. Rep. 870 (Ch); 2 Vern. 421).

James Kent, the leading figure in contemporary American law,<sup>298</sup> waived the joinder of 250 shareholders in an unincorporated joint-stock banking company.<sup>299</sup> Like Lord Eldon, Kent explained his reasoning in practical terms:

The trustees are sufficient for the purpose of this bill . . . [I]t would be intolerably oppressive and burdensome, to compel the plaintiffs to bring in all the *cestui que trusts* [i.e., the shareholders]. The delay, and the expense incident to such a proceeding, would be a reflection on the justice of the Court. This is one of those cases in which the general rule cannot, and need not be enforced; for the trustees sufficiently represent all the interests concerned; they were selected by the association for that purpose, and we need not look beyond them.<sup>300</sup>

By the 1830s, the numerosity exception had completely swallowed the general rule of joinder. Although it is possible to find cases that came out differently,<sup>301</sup> most courts were routinely waiving joinder of joint-stock company shareholders.<sup>302</sup> Crucially, the courts waived joinder in cases involving every possible combination of plaintiffs and defendants, including cases in which the company was litigating with outsiders and cases in which the company's shareholders were in litigation with each other or with the trustees.<sup>303</sup>

The vast scope of the numerosity exception became clear in 1840, when Justice Story published his landmark treatise on equity pleading in English and American law.<sup>304</sup> Justice Story devoted just four pages to articulating the general rule of joinder and 127 pages to enumerating its

298. See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *Colum. L. Rev.* 547, 548 (1993).

299. 2 *Johns. Ch.* 197, 197–98 (N.Y. Ch. 1816).

300. *Id.*

301. See, e.g., *Deeks v. Stanhope* (1844) 60 *Eng. Rep.* 278 (Ch) 282–85; 14 *Sim.* 57, 66–75; *Leigh v. Thomas* (1751) 28 *Eng. Rep.* 201 (Ch) 201–02; 2 *Ves. Sen.* 312, 313.

302. See, e.g., *Walker v. Miller & Co.*, 11 *Ala.* 1067, 1085–87 (1847); *Willis v. Henderson*, 5 *Ill.* (4 *Scam.*) 13, 20 (1842); *Willink v. Morris Canal & Banking Co.*, 4 *N.J. Eq.* 377, 398 (Ch. 1843); *Cross v. Jackson*, 5 *Hill* 478, 480 (N.Y. 1843); *Townsend v. Goewey*, 19 *Wend.* 424, 430 (N.Y. 1838); *Stimson v. Lewis*, 36 *Vt.* 91, 91 (1863); *Richardson v. Hastings* (1844) 49 *Eng. Rep.* 1089 (Ch) 1091–92; 7 *Beav.* 323, 327–31; *Benson v. Hadfield* (1842) 49 *Eng. Rep.* 690 (Ch) 693; 5 *Beav.* 546, 554; *Taylor v. Salmon* (1838) 41 *Eng. Rep.* 53 (Ch) 53; 4 *My. & Cr.* 134, 134; *Fenn v. Craig* (1838) 160 *Eng. Rep.* 680 (Ex Ct) 680; 3 *Y. & C. Ex.* 216, 216; *Gillett v. Abbott* (1838) 112 *Eng. Rep.* 665 (KB) 665; 7 *A. & E.* 783, 783; *Mare v. Malachy* (1836) 40 *Eng. Rep.* 490 (Ch) 498; 1 *My. & Cr.* 559, 579; *Walburn v. Ingilby* (1833) 47 *Eng. Rep.* 96 (Ch) 96; *Coop. temp. Brough.* 270, 270; *Small v. Attwood* (1832) 159 *Eng. Rep.* 1051 (Ex Ct) 1072; 1 *You.* 407, 457–59; *Hitchens v. Congreve* (1828) 38 *Eng. Rep.* 917 (Ch) 922; 4 *Russ.* 562, 576; *Baldwin v. Lawrence* (1824) 57 *Eng. Rep.* 251 (Ch) 254–55; 2 *Sim. & St.* 18, 27; *Jones v. Garcia del Rio* (1823) 37 *Eng. Rep.* 1113 (Ch) 1113; *Turn. & R.* 297, 297.

303. See *Carlisle v. Se. Ry. Co.* (1850) 41 *Eng. Rep.* 1432 (Ch) 1436; 1 *Mac. & G.* 689, 698; *Richardson v. Larpent* (1843) 63 *Eng. Rep.* 227 (Ch) 230; 2 *Y. & C. Ch. Cas.* 507, 513; *Preston v. Grand Collier Dock Co.* (1840) 59 *Eng. Rep.* 900 (Ch) 906; 11 *Sim.* 327, 344.

304. See *Story, Equity Pleadings*, *supra* note 199.

various exceptions.<sup>305</sup> And Justice Story was not alone. By the second quarter of the nineteenth century, all of the leading English and American treatises on equity procedure, including those by George Cooper, Basil Montagu, and Lord Redesdale, described the joinder rule's exceptions in a huge variety of contexts, ranging from insolvency to unincorporated joint-stock companies.<sup>306</sup> Charles Wordsworth's treatise on the *Law of Joint Stock Companies* described the exception in similarly broad terms.<sup>307</sup>

By the 1830s, the only setting in which the joinder requirement remained serious was in petitions for dissolution.<sup>308</sup> Several treatises on equity pleading identified petitions for dissolution as a kind of exception to the exception: Although a trust-based company did not usually have to join its stockholders if the stockholders were too numerous, it nevertheless did have to join them in petitions for dissolution.<sup>309</sup> This was what motivated Lord Eldon's opinion in *Van Sandau v. Moore*, in which one shareholder sought to dissolve the company and the court required joinder of the rest.<sup>310</sup> As we have already seen, this exception to the exception was not an instance of doctrinal breakdown or judicial dysfunction—it was a rule with a great deal of practical sense.<sup>311</sup> The rule in *Van Sandau* made sense because it helped to lock in capital.

Another area of controversy involved suits in which shareholders of a trust-based joint-stock company sued each other, rather than suing or being sued by third-party outsiders. When trusts reappeared in the equity courts in the early nineteenth century, some rulings suggested that a company organized in trust had to be dissolved before the shareholders could sue each other.<sup>312</sup> This rule soon disappeared, however. Lord Langdale, the Master of the Rolls, would make this clear in the case of *Richardson v. Hastings* in 1844.<sup>313</sup> After observing that some courts had required a company to be dissolved before the shareholders could sue

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305. See *id.* §§ 74–204 (discussing joint-stock companies in sections 107–119).

306. See George Cooper, *A Treatise of Pleading on the Equity Side of the High Court of Chancery* 185–87 (N.Y.C., I. Riley 1813); John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery* 164–81 (London, George Jeremy ed., J. & W.T. Clarke 4th ed. 1827) (1782); 1 Basil Montagu, *A Digest of Pleading in Equity* 58–60 (London, J. & W.T. Clarke 1824).

307. See Wordsworth, *supra* note 212, at 226–32.

308. See *Evans v. Stokes* (1836) 48 Eng. Rep. 215 (Ch) 218; 1 Keen 24, 32–33; *Long v. Yonge* (1830) 57 Eng. Rep. 827 (Ch) 833–34; 2 Sim. 369, 385–87.

309. See Mitford, *supra* note 306, at 163–65 (noting that “all persons materially interested in the subject ought generally to be parties to the suit . . . however numerous they may be”); Story, *Equity Pleadings*, *supra* note 199, §§ 130–133.

310. *Van Sandau v. Moore* (1826) 38 Eng. Rep. 171 (Ch) 180; 1 Russ. 441, 465–66.

311. See *supra* text accompanying notes 198–199 (discussing the rule in *Van Sandau*).

312. See *Report on the Bd. of Trade*, *supra* note 198, at 3.

313. (1844) 49 Eng. Rep. 1089 (Ch); 7 Beav. 323.

each other, Lord Langdale said, "it now appears very clear that there is no such rule."<sup>314</sup> He went on,

It has been decided, that in a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, and claim for themselves the benefit of that interest, a bill may be filed against those few, by one or more partners on behalf of themselves and all the rest.<sup>315</sup>

Remarkably, none of these developments that permitted trust-based companies to litigate has made it into recent historiography. The reason, perhaps, is the outside prominence in modern scholarship of an 1837 document called the *Report on the Law of Partnership*.<sup>316</sup> Commissioned by the Board of Trade, an institution that Parliament briefly empowered to charter corporations in the 1830s,<sup>317</sup> the report's principal argument was that the law of partnership required reform or replacement by incorporation because unincorporated joint-stock companies could not sue or be sued in their own names or the names of the trustees.<sup>318</sup> The report was influential in the mid-1800s and has loomed even larger in the work of modern historians.<sup>319</sup>

In reality, however, the report was simply wrong, or at least profoundly incomplete. Amazingly, at a time when practitioner treatises were treating the waiver of shareholder joinder as settled doctrine, the report failed to cite any of the cases discussed above. The report based its claims about the difficulty of litigation by joint-stock companies mainly on second-hand anecdotes from lawyers that the author of the report had interviewed and on an overly strong generalization of the result in *Van Sandau*, the dissolution case.<sup>320</sup> Though the report did cite a few cases that required companies to dissolve before shareholders could sue each other,<sup>321</sup> it did not cite the cases that held the opposite, and it did not foresee Lord Langdale's declaration as Master of the Rolls just a few years later that dissolution in intershareholder lawsuits was no longer required.<sup>322</sup>

If any doubt remained about whether unincorporated joint-stock companies could sue without joining their shareholders in litigation, Parliament would remove this doubt in 1852 by passing a statute that confirmed the right of trustees to litigate in their own names without

314. *Id.* at 1091; 7 *Beav.* at 328.

315. *Id.* at 1091; 7 *Beav.* at 328.

316. *Bd. of Trustees*, *supra* note 198.

317. See 6 *Geo.* 4 c. 91 (1825). Parliament authorized the Board of Trade to grant charters of incorporation in the same statute that repealed the Bubble Act. *Id.*

318. See *Bd. of Trade*, *supra* note 198, at 6–8.

319. See, e.g., Mahoney, *supra* note 23, at 889–90.

320. See *Bd. of Trade*, *supra* note 198, at 6–8.

321. See *id.* at 3 n.\*.

322. See *supra* notes 313–315 and accompanying text (discussing Lord Langdale's opinion in *Richardson v. Hastings* (1844) 49 *Eng. Rep.* 1089 (Ch); 7 *Beav.* 323).

joining stockholders.<sup>323</sup> Many American state legislatures soon followed with similar statutes in the second half of the nineteenth century.<sup>324</sup>

With that said, the rights of a trust-based company in litigation were not quite as strong as those of a corporation. Unlike a corporation, a trust had no direct right to bring a suit in its own name. Instead, a trust had to rely on a judge to apply an exception to a general rule. But by at least the 1830s, the exception had essentially become the rule.

#### D. *Tradable Shares*

The trust form also allowed tradable shares. The ability to buy and sell shares is useful to investors because it allows investors to convert their holdings into cash even as a company continues to own and employ the underlying capital. If, for example, the entrepreneur who founded the water supply company from the 1702 Chancery case wanted to retire, he might wish to turn his twenty-six percent equity interest in the business into cash to fund his retirement. If he could not sell his shares, his only option would be to ask the business to buy him out. This action, in turn, might destroy the business, since the only way the business could raise the cash might be to sell off the water pipes and other assets that allowed the business to operate. If the entrepreneur could sell his shares, however, then someone else could buy the shares from him and the company could continue to own its equipment and operate as before. Scholars have long viewed the capacity to trade shares as a key innovation of the corporate form, because traditional partnership law created a set of problems that made it difficult for partners to trade their shares.<sup>325</sup> It turns out, however, that the trust solved these problems just as well as the corporation, and the trust is still used in businesses with tradable shares today.<sup>326</sup>

1. *Charitable Enterprise.* — The innovations that enabled tradable shares in the business trust actually first appeared in charitable trusts. From the late Middle Ages to at least the mid-nineteenth century, the vast bulk of England's charitable assets belonged to trusts, rather than to

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323. Chancery Procedure Act 1852, 15 & 16 Vict. c. 86.

324. The first statute to do this was New York's famous Field Code, which was the first statutory system of procedural rules—outside of Louisiana—in either England or the United States. Robert G. Bone, *Mapping the Boundaries of the Dispute*, 89 Colum. L. Rev. 1, 9–10 (1989); see N.Y. Code of Civ. Proc. § 599 (1850) (“An executor or administrator, a trustee of an express trust, or a person expressly authorised by statute, may sue without joining with him the persons for whose benefit the action is prosecuted.”). Other states soon adopted codes of procedure with similar provisions. See, e.g., Cal. Civ. Proc. Code § 378 (1872); Mo. Rev. Stat. art. 2, § 2 (1855); N.C. Code of Civ. Proc. § 57 (1868).

325. See Harris, *Industrializing English Law*, *supra* note 16, at 142.

326. For example, the Mesabi Trust, a New York Stock Exchange-listed trust, was set up to receive royalties from a mining operating in Minnesota. See *Mesabi Tr.*, Annual Report of the Trustees of Mesabi Trust (Form 10-K) exh. 13, at 15 (Apr. 15, 2015).



corporations.<sup>327</sup> Trustees in England held the property of monastic orders,<sup>328</sup> protestant churches,<sup>329</sup> fraternal organizations,<sup>330</sup> guilds,<sup>331</sup> and societies for the benefit of the poor.<sup>332</sup> Trustees even held the property of the Catholic Church in England after the reformation deprived the Church of its incorporated legal status.<sup>333</sup>

The trust's most basic function in these enterprises was to consolidate title in the names of the trustees. In Anglo-American law, property is owned by a specific legal person. It must be conveyed or titled in somebody's name. This created a problem in charities because it was often unclear just whose name this should be. If a charity had multiple beneficiaries, should each beneficiary be named on the deed? Under the rules of joint tenancy, a conveyance had to include the name of every single joint tenant.<sup>334</sup> But naming every beneficiary as a joint tenant was impossible because the beneficiaries often changed over time, as in guilds and monasteries, or were simply impossible to identify in advance, as in programs for the relief of the poor.

Charities dealt with this problem by titling their property in the names of trustees, who could then convey title later on in their own names.<sup>335</sup> This was crucial because it eliminated the need for beneficiaries to sign conveyances. A charitable trust did not have to bother trying to track down each of the beneficiaries when it wanted to sell a piece of property because the title legally belonged only to the trustees.

2. *Commercial Enterprise.* — When the trust made its leap from charity to commerce at the end of the seventeenth century, one of its main contributions was to solve a similar problem in identifying numerous beneficiaries—though in the case of businesses, the beneficiaries were known as shareholders or partners. Like the law of joint tenancy, the common law of partnership required each of the

327. Gareth Jones, *History of the Law of Charity: 1532–1827*, at 6 (1969) (stating that the bulk of charitable endowment was sheltered through the “use” or “trust”).

328. See, e.g., *Prioress of Thetford v. Wychyngham* (1426) 10 *Selden Society* 119 (1896); Maitland, *supra* note 22, at 338–39.

329. See, e.g., *AG v. Floyer* (1716) 23 *Eng. Rep.* 1090 (Ch) 1090; 2 *Vern.* 748, 748; *AG v. Gouge*, *YB* 8 *Car.* 1, fol. 116, *Hil.*, pl. 172 (1633) (*Ex Ct*) (*Eng.*), reprinted in 118 *Selden Society* 643, 643 (2001).

330. See, e.g., *R v. Cain* (1841) 169 *Eng. Rep.* 81 (Ch) 81; 2 *Mod.* 204, 205; *Todd v. Emly* (1841) 151 *Eng. Rep.* 832 (*Ex Ct*) 834; 7 *M. & W.* 425, 427.

331. Shaw Livermore, *Early American Land Companies: Their Influence on Corporate Development* 17 (1939).

332. See, e.g., *Love v. Eade* (1676) 23 *Eng. Rep.* 147 (Ch) 147; *Fin.* 269, 269 (alleging a breach of trust in a trust for the benefit of the poor of a parish).

333. Maitland, *supra* note 22, at 358, 364.

334. See DuBois, *supra* note 23, at 217–19 (describing the difficulties of conveying property without use of a trust).

335. Cf. *id.* at 217 (explaining that the trustee device was used to overcome difficulties involved in managing organizations).

owners' names to appear on a deed or conveyance.<sup>336</sup> A partnership, in other words, had to own property not in its own name but in the common names of all of the various partners.<sup>337</sup> The rules of property law thus required that whenever a partnership bought or sold property, each partner had to put his signature or seal on the deed. Buying and selling property in a large partnership thus posed the same conceptual problem as buying and selling property in a charity: A partnership had to track down each one of its partners personally in order to convey or receive title.<sup>338</sup> As the number of stockholders in unincorporated businesses spiraled upward around the turn of the eighteenth century—recall that the water supply company of 1702 potentially had as many as 900 shareholders<sup>339</sup>—getting each partner to sign every conveyance became impossible. Share tradability supercharged this problem. In an unincorporated joint-stock company with tradable shares, the partners were not just numerous but highly transitory as well: New partners constantly came in and old ones constantly left as shares were bought and sold. In theory, under the default rules of property law, a partnership with tradable shares might have had to update its titles and deeds to reflect the changes in the partnership every day.<sup>340</sup>

Businesses learned to solve this problem, however, the same way that charities did—by titling their property in the names of trustees. When a business gave its property to a trustee, the business no longer needed the signatures of its partners on deeds and conveyances because the signatures of the trustees were enough.<sup>341</sup> A business could have 900 shareholders—but only a handful of trustees. The trust was especially useful for businesses with tradable shares because a trust instrument could easily accommodate constant shifts in the partnership. Trust law had always permitted unknown and contingent beneficiaries.<sup>342</sup> And so just as a grandfather could create a trust for his unborn future grandchildren, so too could an entrepreneur create a trust for unidentified future shareholders.<sup>343</sup> And if, by chance, a single partner took conveyance of property that should have been shared with the full

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336. *Id.* at 217–19.

337. See Bisset, *supra* note 192, at 47; Joseph Dixon, *A Treatise on the Law of Partnership* 48–52 (London, Butterworths 1866) (describing the rights of partners in relation to property); Story, *Commentaries on the Law of Partnership*, *supra* note 192, § 92.

338. DuBois, *supra* note 23, at 217–19.

339. *City of London I* (1701) 23 Eng. Rep. 870 (Ch) 870; 2 Vern. 421, 422.

340. *Id.* at 870; 2 Vern. 421, 422.

341. See DuBois, *supra* note 23, at 217–19 (describing how the trust made it easier to develop larger partnerships).

342. See, e.g., Lloyd Bonfield, *Marriage Settlements: 1601–1740*, at 1–2 (2008) (describing the use of the trust in marriage settlements in the late Middle Ages to create beneficial interests in a settlor's unborn grandchildren).

343. *City of London I*, 23 Eng. Rep. at 870; 2 Vern. at 422; McCoy, *supra* note 148, at 193–95.

partnership, the law would treat that partner as though he were in fact a trustee for the partnership.<sup>344</sup>

The trust thus became the standard way of consolidating title, and contemporary observers understood its importance.<sup>345</sup> In an 1816 opinion in the New York Court of Chancery, Chancellor Kent explained why a trust-based joint-stock company had placed its property in the names of trustees: "The trustees were selected in this case to hold and represent the property, for the sake of convenience, and because the subscribers were too numerous to hold and manage the property as a copartnership."<sup>346</sup>

In addition to eliminating the need to rearrange title to a business's property, the trust also eliminated the need to reorganize the business. Under the default rules of eighteenth- and nineteenth-century partnership law, a partnership automatically dissolved any time a partner sold his shares or otherwise withdrew, for death or any other reason.<sup>347</sup> Hence, if one partner sold his shares and the partnership was to continue operating, the default rules of partnership law would have required the business to dissolve and reorganize again with the purchaser admitted as a new partner.<sup>348</sup> This problem was very easily solved, however. Trust law had always allowed a trust to persist after the death, disappearance, or change of a beneficiary, and a trust instrument did not even need to expressly declare its persistence after a transfer of the shares to continue existing.<sup>349</sup> Partnership law was similarly flexible to the extent that it applied. The rules of partnership law preventing transfer were mere

344. E.g., Collyer, *supra* note 188, at 101 ("If a partner takes a lease of lands in his own name for the purposes of the partnership, he will be considered in equity as trustee."); Gow, *supra* note 191, at 47–48 (noting that courts of equity considered there to be "a tenancy in common between partners of real property, and . . . the person in whom the legal estate vests to be a trustee for those beneficially interested"); 1 Nathaniel Lindley, *A Treatise on the Law of Partnership* 323–24 (Bos., Charles H. Edson & Co. 5th ed. 1888) (1860).

345. Bisset, *supra* note 192, at 47–48 (citing *Morris v. Barrett* (1829) 148 Eng. Rep. 1228 (Ex); 3 Y. & J. 384, for the proposition that "[t]he usual course in conveying real estate purchased by a partnership is to vest it in a trustee").

346. *Van Vechten v. Terry*, 2 Johns. Ch. 197, 197 (N.Y. Ch. 1816). Chancellor Kent reached a similar result on similar grounds a year earlier in a case in which a guardian was sued for breach of trust. *Wiser v. Blachly*, 1 Johns. Ch. 437, 437 (N.Y. Ch. 1815).

347. See Dixon, *supra* note 337, at 167–68 ("Where the partnership is for a term of years [a right to transfer shares] is of course substantial and valuable; for the continuing partner cannot dissolve the partnership . . ."); 1 Lindley, *supra* note 344, at 194–95 (implying that a partnership can exist for a term); Story, *Commentaries on the Law of Partnership*, *supra* note 192, § 275 ("Whenever a stipulation is positively made, that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner, at his mere pleasure, to violate his engagement . . .").

348. Harris, *Industrializing English Law*, *supra* note 16, at 141–43 (describing the need for partnerships to reorganize as partners withdrew).

349. This was apparently implicit in the *Keystone Manufacturing Company*, for example. See, e.g., *McCoy*, *supra* note 148, at 193–99.

defaults, not mandates, and they could easily be changed by agreement among the partners.

We know the trust was effective at enabling tradable shares because the evidence of share trading is written into the Bubble Act. Recall that the Bubble Act was passed in 1720 to regulate business trusts.<sup>350</sup> The center of the Bubble Act was a provision prohibiting a trust from “pretending to raise transferrable Stock or Stocks.”<sup>351</sup> The presence of this language indicates that the trust had, in fact, been effective at allowing “transferrable Stock or Stocks” in unincorporated companies. And to be clear, the Bubble Act did not meaningfully change this. As noted above,<sup>352</sup> the Bubble Act was rarely enforced, and shares in unincorporated joint-stock companies continued to trade, especially after the turn of the nineteenth century.<sup>353</sup>

#### E. *Fiduciary Powers*

Business trusts also developed a sensible scheme of fiduciary powers. The issue arises because, as Professor John Langbein explains, before the twentieth century, trust law disabled trustees from exercising many powers.<sup>354</sup> By default, trustees had almost no powers unless a settlor expressly granted them.<sup>355</sup> Trust law also imposed by default a set of heavy restrictions on investment and property ownership.<sup>356</sup> One such restriction was that trustees could invest only in land and government securities; investments in new commercial enterprises were prohibited.<sup>357</sup> Another was that trustees could not buy and sell trust property without specific authorization.<sup>358</sup> Trust law grew into this mold because it was consistent with what donative trustees—as distinct from business trustees—had traditionally done. From late medieval times to the early twentieth century, a donative trustee’s main job was simply to hold a family estate and pass it to the next generation, and the disabling framework of fiduciary powers prevented a trustee from disobeying a

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350. See *supra* text accompanying notes 77–80 (discussing the origins of the Bubble Act of 1720).

351. 6 Geo. 1 c. 18, § 18 (1720) (Eng.).

352. *Supra* notes 81–89 and accompanying text (discussing the Bubble Act’s ineffectiveness in slowing or stopping the creation of trusts and unincorporated companies).

353. DuBois, *supra* note 23; Freeman et al., *supra* note 24.

354. Langbein, *Contractarian Basis*, *supra* note 200, at 640–42.

355. Michael R. Chesterman, *Family Settlements on Trust: Landowners and the Rising Bourgeoisie*, in *Law, Economy and Society, 1750–1914: Essays in the History of English Law* 124, 159–60 (G.R. Rubin & David Sugarman eds., 1984).

356. *Id.*

357. *Id.*

358. *Id.*

family's wishes by doing anything more.<sup>359</sup> Modern historians have argued, though, that this disabling fiduciary framework was inappropriate to businesses because it must have hobbled any trustee who tried to carry out the complicated activities required to operate a business.<sup>360</sup>

As a practical matter, however, these rules had almost no impact on nineteenth-century business companies because the rules were defaults, not mandates. A company could easily change a rule by drafting its deed of settlement accordingly. This was true for donative trusts, whose drafters widely opted out of the default restrictions in the nineteenth century.<sup>361</sup> And it was also true for business trusts, which often opted out of the restrictions on investing, for example, by simply endowing their trustees with nonstandard forms of property, such as machines and private-company securities. Businesses also opted out of the default rules about discretionary decisionmaking by instructing their trustees to follow the directions of boards of directors.<sup>362</sup> In any case, there is very little evidence that trustee-powers law meaningfully restricted the activities of unincorporated joint-stock company trustees. Furthermore, the popularity of the trust in business companies provides circumstantial evidence that the problem simply could not have been insurmountable. Given that the trust was enormously widespread in the organization of businesses up through the early twentieth century, it is simply not plausible to think that trustees were incapable of operating a business.

#### CONCLUSION

Throughout modern history, the common law trust offered English and American businesses a remarkably powerful—and remarkably modern—form of legal organization. The trust offered almost all of the same doctrinal features as contemporaneous versions of the corporate form, and it did so in a package that was freely available to every English subject and American citizen. The most fragile doctrinal feature of the

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359. Langbein, *Contractarian Basis*, supra note 200, at 640–64; see also John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 *Yale L.J.* 929, 947 (2005); John H. Langbein, *The Rise of the Management Trust*, 143 *Tr. & Est.* 52, 53 (2004).

360. Harris, *Industrializing English Law*, supra note 16, at 147–59.

361. Chesterman, supra note 355, at 162–63. Contemporary treatises also made it clear that fiduciary duties about some types of investments could easily be waived. The Sanders treatise, for example, said in 1824 that “[a] trustee cannot . . . alter the nature of the trust property”—unless, of course, the trustee had received “an express power for that purpose.” 1 Sanders, supra note 149, at 364–65. The first edition of Thomas Lewin’s treatise took a similar view. Thomas Lewin, *A Practical Treatise on the Law of Trusts and Trustees* 311 (London, A. Maxwell 1837) (“In the absence, then, of any express power, the only unobjectionable investment is in one of the Government or Bank Annuities.”).

362. For examples of companies that did this, see *Vigers v. Pike* (1842) 8 Eng. Rep. 220 (HL) 220; 8 Cl. & F. 562; *Lund v. Blanshard* (1844) 67 Eng. Rep. 540 (Ch) 541–44; 4 Hare 9; *R v. Cain* (1841) 169 Eng. Rep. 81 (Ch) 81; 2 Mod. 204.

trust was limited liability. But even limited liability was almost as strong in the trust as in contemporaneous versions of the corporate form. Thus, although the trust was never a completely perfect substitute for the corporate form, the trust frequently came close enough to be a serious competitor of the corporate form from early modern times until nearly a hundred years after the corporate form became widely available.

This thesis is important because it calls into question the central narrative of business law history. For decades, legal scholars have devoted themselves to understanding precisely when the corporate form appeared and exactly who had access to it. The need for such an understanding has been driven by the sense that there was something deeply special about the corporate form—that the corporate form was the only form of organization that could offer the legal technologies that made modern business possible. The rise of the corporate form has almost been equated with the rise of big business itself.

The trust thus invites us to reappraise the corporate form and its historical functions. If the corporate form did not offer a unique set of doctrinal features, then what exactly did it do? Why did businesses want incorporation, and why did the government try to limit their access to it? These are deep questions with far-reaching implications. And the history of the trust suggests that we need a new set of answers.