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# Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation

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*Although some excellent treatises, book chapters, and journal articles have been written about tax-exempt nonprofit entities, the body of scholarship relating to these entities is not nearly as healthy and robust as the scholarship relating to their for-profit companions. This is especially troubling considering that nonprofit entities help to improve our society in a myriad of different ways.*

*This Article seeks to fill a void in the existing scholarship by offering an essentialist theory for charitable tax-exempt nonprofit corporations that helps to explain the essence of these entities. Beyond the purely academic metaphysical inquiry into what a corporation is, understanding the essential nature of these corporations is important because it helps to determine how they should interact with society, what rights they should have, and how they should be governed by the law. This discussion is especially timely because the recent opinions by the Supreme Court of the United States in *Citizens United* and *Hobby Lobby* have reinvigorated the debate over the essence of the corporation.*

*This Article breaks new ground by offering a new essentialist theory of the corporation, which shall be termed “collaboration theory.” The decades of debate over the essence of for-profit corporations have coalesced into three prevailing theories of the corporation, i.e., the artificial entity theory, the real entity theory, and the aggregate theory.*

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*The problem is that none of these prevailing theories fully answers the question of what a corporation is.*

*Collaboration theory suggests that charitable tax-exempt nonprofit corporations are collaborations among the state governments, federal government, and individuals to promote the public good. Unlike the prevailing theories of the corporation, collaboration theory explains both how and why charitable tax-exempt nonprofit corporations exist, which provides a fuller and more robust understanding of these corporations. Collaboration theory advances the existing scholarship by finally offering an essentialist theory for nonprofit corporations, and it shows remarkable promise for understanding the essential nature of for-profit corporations as well.*

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## INTRODUCTION

Although some excellent treatises, articles, and book chapters have been written about tax-exempt nonprofit entities,<sup>1</sup> the amount of scholarship is remarkably small considering the massive amount of legal scholarship that is produced each year regarding for-profit businesses.<sup>2</sup> This oversight is especially troubling considering the important role that nonprofit tax-exempt entities play in the United States. As of 2012, approximately 1.44 million nonprofits were registered with the Internal Revenue Service (“IRS”).<sup>3</sup> In 2012, these entities accounted for an estimated \$887.3 billion of the economy in the United States, which comprised 5.4% of the country’s gross domestic product (“GDP”).<sup>4</sup> More importantly, because nonprofit status and tax-exempt status are tied to working for the public good, tax-exempt nonprofit entities uplift society in a myriad of ways.<sup>5</sup>

In regard to charitable tax-exempt nonprofit corporations, although the limited amount of scholarship focusing on tax-exempt nonprofit entities is troubling, it is somewhat understandable because these entities have not received the benefits of the revolution in corporate

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<sup>1</sup> See VICTOR FUTTER & LISA RUNQUIST, *NONPROFIT RESOURCES: A COMPANION TO NONPROFIT GOVERNANCE* 67-74 (2d ed. 2007) (providing a comprehensive, yet relatively short, list of legal scholarship discussing the governance of nonprofit business entities).

<sup>2</sup> See Robert B. Thompson, *Corporate Practice Commentator Annual Poll of Best Corporate & Securities Articles*, PROFESSORTHOMPSON.COM, <http://www.professorthompson.com/uploads/2/1/4/7/21478240/cplist2015finalnumbered.pdf> (last visited Mar. 13, 2016) (containing a substantial list of corporate law articles and essays from 2015).

<sup>3</sup> BRICE S. MCKEEVER & SARAH L. PETTJOHN, *THE NONPROFIT SECTOR IN BRIEF 2014: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING* 1 (Urban Inst. ed., 2014), available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413277-The-Nonprofit-Sector-in-Brief—.PDF> (providing statistics about the nonprofit sector from 2002 to 2012).

<sup>4</sup> *Id.*

<sup>5</sup> See MARILYN E. PHELAN & ROBERT J. DESIDERIO, *NONPROFIT ORGANIZATIONS LAW AND POLICY* 1 (3d ed. 2010) (discussing the “many and diverse purposes” that nonprofits serve in the United States); Evelyn A. Lewis, *Charitable Waste: Consideration of a “Waste Not, Want Not” Tax*, 30 VA. TAX REV. 39, 68-69 (2010) (“[T]he uniqueness and special missions of individual charities are truly to be celebrated and preserved from a societal perspective. . . . [N]onprofits foster the expression of diverse viewpoints, helping to create the vibrant political discourse necessary in a free society. Were it not for our charities, America would not be the democracy it is today.”); Kenya JH Smith, *Papa’s Brand New Bag: The Need for IRS Recognition of an Independent Nonprofit Limited Liability Company (NLLC)*, 98 MARQ. L. REV. 1695, 1696 (2015) (“Nonprofit organizations . . . are an important part of the economic, social, and civic fabric of American society, often serving the neediest in communities across the nation.”).

law scholarship that has occurred in the past few decades. Commentators have described corporate law scholarship during the 1960s and 1970s using terms such as “stagnant,”<sup>6</sup> “ossified,”<sup>7</sup> and “dead.”<sup>8</sup> In recent decades, however, a revival of corporate law scholarship and business law scholarship in general has occurred in large part as a result of the injection of economic theory into this field.<sup>9</sup> The marriage of economic theory and business law has been pervasive, and economics has come to transform and to dominate the field of business law generally.<sup>10</sup> This has produced some excellent scholarship, and it has greatly benefited the legal academy. But, because economists often ignore much of human behavior and view individuals as rational, self-interested profit-maximizers, one should not be surprised that those writing in business law have largely ignored nonprofit entities because the existence and the pervasiveness of such entities directly conflicts with many, not all, economists’ basic assumptions about how humans behave.<sup>11</sup>

To delve a bit deeper, in *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith, who is viewed by many as the father of modern economics, famously wrote: “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.”<sup>12</sup> In addition, he argued: “[E]very individual . . . neither intends to promote the public interest,

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<sup>6</sup> Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 343 (2005) (describing the state of corporate law scholarship during the 1960s).

<sup>7</sup> *Id.*

<sup>8</sup> See Bayless Manning, *The Shareholder’s Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962) (reporting that during the 1960s, “corporation law, as a field of intellectual effort, [was] dead in the United States”); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1073 (1994) (“American legal scholars from roughly 1930 to 1980 did little explicit theorizing about the nature of corporations. Apparently, the main reason was a widespread belief that such theorizing cannot, or should not, dictate particular legal rules.”).

<sup>9</sup> See Romano, *supra* note 6, at 359 (“In the 1980s, corporate law scholarship and practice were completely transformed in response to intellectual currents in finance and economics and new transactional developments, which called for comprehensive legal innovation.”).

<sup>10</sup> See *id.* at 342 (“The revolution in corporate law has been so thorough and profound that those working in the field today would have considerable difficulty recognizing what it was like twenty-five to thirty years ago.”).

<sup>11</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (8th ed. 2011) (asserting that the purpose of economics is “to explore the implications of assuming that man is a rational maximizer of his ends in life”).

<sup>12</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 14 (Edwin Cannan ed., The Modern Library 1937) (1776).

nor knows how much he is promoting it. . . . [A]nd he is . . . led by an invisible hand to promote an end which was no part of his intention.”<sup>13</sup> Through these statements and throughout *Wealth of Nations* generally, Smith suggests that individuals are self-interested and fixated on making a profit.<sup>14</sup> Smith’s worldview and the worldviews of the generations of economists that Smith inspired leaves little room for charitable behavior, and as a consequence, these economists have largely ignored charitable non-profit entities. As a result of the influence of the law and economics movement and its impact upon the legal academy, the need for legal scholars to write and law reviews to publish more nonprofit scholarship is undeniable.<sup>15</sup>

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<sup>13</sup> *Id.* at 423.

<sup>14</sup> *Id.*

<sup>15</sup> Other reasons for the lack of nonprofit scholarship also exist. First, with some notable exceptions, law schools do not tend hire individuals who have the interest and experience to write deeply about tax-exempt nonprofit entities because of the standard career path to the legal academy that usually entails college, law school, a clerkship, and a few years at a large law firm. See Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 *LEGAL WRITING*: J. *LEGAL WRITING* INST. 17, 32 (2008) (“[T]he traditional law professor career path is top student from top law school; federal appellate clerkship; ‘high-powered’ job such as a prestigious (albeit often lower level) federal government position or as an associate at a major corporate law firm.”). All of this leaves relatively little time for an individual entering the academy to gain practical experience with the legal issues surrounding tax-exempt nonprofit entities. Moreover, in recent years, a substantial push has occurred to hire those with advanced degrees in economics or at least individuals who have chosen to focus their scholarship on economics. See J.M. Balkin, *Interdisciplinarity as Colonization*, 53 *WASH. & LEE L. REV.* 949, 951 (1996) (“If you are going to be hired to teach certain subjects in many fancy [law] schools, and increasingly at many nonfancy schools, you have to do law and economics scholarship.”); Ben Depoorter & Jef Demot, *The Cross-Atlantic Law and Economics Divide: A Dissent*, 2011 *U. ILL. L. REV.* 1593, 1594-97 (“The presence of law and economics at law schools in the United States is evidenced by a host of factors, including the increase of hiring of economists, the amount of papers submitted to meetings of the American Association of Law and Economics, the rise of empirical legal studies, and the increase of new professors that work in the field of law and economics.”); Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 *ALA. L. REV.* 1555, 1568-69 (2008) (“[L]aw and economics has become a prominent and perhaps predominant part of the tool set of the majority of law professors in the United States, regardless of their field of professional specialization.”). Some academics have taken issue with the push to continue to hire scholars with non-legal graduate degrees to do interdisciplinary study within the legal academy. See Steve Bainbridge, *Comment to How Not to Win Friends and Influence People at a Law Professor Conference*, PROFESSORBAINBRIDGE.COM (June 19, 2014, 9:51 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2014/06/how-not-to-win-friends-and-influence-people-at-a-law-professor-conference.html#comments> (arguing that “[t]he shift towards ‘Law and [fill in the blank with a PhD field]’ has been a problem for a long time and a major factor in the separation of the legal academy from the profession and the bench”).

This Article seeks to fill a void in the existing scholarship by offering an essentialist theory for charitable tax-exempt nonprofit corporations that helps to explain the essence of these entities. Beyond the purely academic metaphysical inquiry into what a corporation is, understanding the essential nature of corporations is important because it helps to determine how they should interact with society, what rights they should have, and how they should be governed by the law.

The literature regarding essentialist theories of for-profit corporations is extensive and has coalesced around three primary theories of the corporation. First, the artificial entity theory, or concession theory as it is sometimes termed, suggests that corporations are nothing more than legal constructs that are given life by the state.<sup>16</sup> Under this theory, corporations are artificial beings that completely owe their existence to the government.<sup>17</sup> Second, the real entity theory, which is sometimes termed the natural entity theory, provides a competing view in which the corporation is a natural entity that exists independently from its individual members and the state.<sup>18</sup> Third, the aggregate theory, which is often termed the nexus of contracts theory, offers a final competing view that corporations are collections of individuals that are tied together by the intersection of various obligations.<sup>19</sup> Unlike the artificial entity theory and the real entity theory, the aggregate theory places the emphasis on the individuals composing the corporation, and under this theory, the

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However, this has done little to curb the influence of economics on academics writing about business law. As a result, nonprofit business entities tend to be ignored by these scholars with some notable exceptions. See BDG, Comment to *Chaffee on the “Collaboration Theory” of Charitable Organizations*, PRAWFSBLAWG, (Nov. 25, 2015, 9:56:37 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/11/chaffee-on-the-collaboration-theory-of-charitable-organizations.html> (reporting that some excellent literature exists regarding “why even rational self-maximizing entrepreneurs would form a non-profit”). Second, tax law and business law are both complicated and complex areas of the law that are difficult to master. Tax-exempt nonprofit entities straddle these two areas of law, and as a result, professors are often reluctant to take on such dense and intricate subject matter. Notably, tax professors are more willing to take on the tax issues associated with tax-exempt entities and charitable giving, but as a result, the scholarship discussing the governance of tax-exempt nonprofit entities is more sparse. See FUTTER & RUNQUIST, *supra* note 1, at 67-74 (providing a list of resources relating to the governance of nonprofit business entities).

<sup>16</sup> See *infra* Part II.A (providing a detailed discussion of the artificial entity theory).

<sup>17</sup> See *infra* Part II.A.

<sup>18</sup> See *infra* Part II.B (providing a detailed discussion of the real entity theory).

<sup>19</sup> See *infra* Part II.C (providing a detailed discussion of the aggregate theory).

corporation does not have an existence beyond the natural individuals that organize and operate it.<sup>20</sup>

Although each of these theories has considerable merit, each also has its drawbacks. Artificial entity theory underplays the roles of individuals in organizing corporations and provides that corporations exist by the will of the state alone. The real entity theory underplays the roles of both the state and individuals in giving life and existence to corporations. Finally, the aggregate theory celebrates the role of individuals in corporations, but it underplays the role of the state in giving them existence. This has led some commentators to embrace all three theories and to embrace the indeterminacy of the essence of corporations.<sup>21</sup> This view has substantial merit because it gives a fuller picture of the corporation, but it also fails to give a clear definition of the corporation.

This Article breaks fresh ground by offering a new essentialist theory of the corporation that explains the nature of charitable tax-exempt nonprofit corporations. Collaboration theory, as it will be termed, suggests that charitable tax-exempt corporations are collaborations between the federal government, state government, and individuals to promote the public good. This theory provides that as a result of collaboration, corporations take on qualities that are distinct from their individual parts in the sense that they are able to accomplish things that the federal government, state government, and individuals could not accomplish alone. However, this theory also explains why the federal government and state governments have the ability to circumscribe the actions of tax-exempt nonprofit entities. This theory is superior to the existing essentialist theories of for-profit corporations because it answers *why* corporations exist, rather than simply struggling with *how* they exist.

To be clear, this Article focuses on charitable nonprofit corporations that are exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code.<sup>22</sup> With that said, collaboration theory describes the essential nature of all nonprofit and for-profit corporations because it explains both how and why all of these entities exist. Because that broader discussion of collaboration theory would grossly exceed the length of a standard law review article, that discussion will be left for a later time.

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<sup>20</sup> See *infra* Part II.C.

<sup>21</sup> See *infra* Part II.D (discussing commentary suggesting that all three of the prevailing essentialist theories of the corporation have merit, and that as a result, scholars should embrace all of the theories and the indeterminacy of the corporation).

<sup>22</sup> 26 U.S.C. § 501(c)(3) (2012).

This Article advances existing scholarship in three main ways. First, this Article addresses the failure of legal scholars and law reviews to apply the prevailing essentialist theories of the corporation to charitable tax-exempt nonprofit corporations. In short, it fills a gaping hole in the existing scholarship. Second, this Article offers a new, cutting-edge theory of the corporation. Collaboration theory, as applied to charitable tax-exempt nonprofit corporations and other corporations generally, benefits from recent opinions from the Supreme Court of the United States, such as *Citizens United* and *Hobby Lobby*,<sup>23</sup> that have reinvigorated the debate about essentialist theories of the corporation and yielded a new wave of scholarship on the topic.<sup>24</sup> Third, this Article offers a discussion of the implications of collaboration theory for tax-exempt nonprofit corporations, including the ability of the government to circumscribe the behavior of such entities and to regulate their rights.

The remainder of this Article will be structured as follows. Part I will explore the history of tax-exempt nonprofit corporations,

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<sup>23</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>24</sup> See, e.g., Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999; Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785; Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015); Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and Citizens United*, 12 FLA. ST. U. BUS. REV. 1 (2013); Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1 (2012); Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731 (2013); Malcolm J. Harkins III, *The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201 (2014); Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879 (2012); Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47 (2015); Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 UC DAVIS BUS. L.J. 221 (2011); Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125 (2013); Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765 (2013); Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327 (2014) [hereinafter *Rehabilitating Concession Theory*]; Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831 (2013) [hereinafter *The Silent Role of Corporate Theory*]; Martin Petrin, *Reconceptualizing the Theory of the Firm — From Nature to Function*, 118 PENN. ST. L. REV. 1 (2013); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27 (2014); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 [hereinafter *Reconceiving Corporate Personhood*]; Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement To End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209 (2011).

including delving into the origins of nonprofit corporations, tax-exempt status, and charitable behavior. Part II will explore the prevailing essentialist theories of the corporation, i.e., artificial entity theory, real entity theory, and aggregate theory. Part III will explore the need, nature, and importance of collaboration theory, and Part IV will explore some of the concerns that may be raised about it, including whether collaboration theory is really different from the prevailing essentialist theories, how it can apply to controversial charitable tax-exempt nonprofit corporations, and whether it offers a viable essentialist theory for for-profit corporations. Finally, the Article ends with brief concluding remarks. The purpose of this Article will be to break fresh ground by exploring the application of existing essentialist theories of the corporation to charitable tax-exempt nonprofit corporations and by offering a new theory of the corporation that better explains the essential nature of these charitable tax-exempt nonprofit corporations.

### I. THE ORIGINS OF CHARITABLE TAX-EXEMPT NONPROFIT CORPORATIONS

As a result of economics being infused into and coming to dominate corporate law and corporate legal scholarship within the past few decades, many useful legal theories have been developed, and the corporate law field has advanced significantly.<sup>25</sup> This infusion of economic theory, however, has not been without its drawbacks and its critics. For example, in *In re Oracle Corp. Derivative Litigation*,<sup>26</sup> Chief Justice of the Delaware Supreme Court Leo E. Strine, Jr., who was a Vice Chancellor of the Delaware Court of Chancery at the time of the case, wrote:

Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement. *Homo sapiens* is not merely *homo economicus*. We may be thankful that an array of other motivations exist that influence human behavior; not all are any better than greed or avarice, think of envy, to name just one. But also think of motives like love, friendship, and collegiality, think of those

<sup>25</sup> See Romano, *supra* note 6, at 359 (reporting that “[i]n the 1980s, corporate law scholarship and practice were completely transformed in response to intellectual currents in finance and economics and new transactional developments”).

<sup>26</sup> 824 A.2d 917 (Del. Ch. 2003).

among us who direct their behavior as best they can on a guiding creed or set of moral values.<sup>27</sup>

In short, economics often underplays or ignores a wide variety of human motivations.

Although traditional economic theory does offer insights regarding issues relating to charitable tax-exempt nonprofit corporations, traditional economic theory also suggests that these entities should not exist. If humans are just rational, self-interested profit-maximizers, this leaves little room for charitable behavior and little time for charitable associations. Historically, in the United States, however, individuals have formed associations for a wide range of reasons. When Alexis de Tocqueville visited the United States in 1831, he observed this phenomenon.<sup>28</sup> In his book *Democracy in America*, he wrote, "Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive."<sup>29</sup> He continued, "The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools."<sup>30</sup> De Tocqueville then contrasted the American experience with the European experience.<sup>31</sup> He observed, "Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association."<sup>32</sup> Based on the substantial number of nonprofit entities currently registered with the IRS, the phenomenon that de Tocqueville observed seems to have intensified since the time when he observed it in the 1830s.<sup>33</sup> Put simply, the will to associate in the United States is pervasive and emanates from a wider range of sources than traditional economics would suggest.

In the remainder of this Part, the origins of this will to associate and the government's subsidy of it will be explored in the context of

<sup>27</sup> *Id.* at 938.

<sup>28</sup> 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 106 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1951) (1840).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *supra* note 3 and accompanying text (reporting that as of 2012, 1.44 million nonprofits were registered with the IRS).

charitable tax-exempt nonprofit corporations. This exploration will be broken down into three constituent parts: 1) the origins of the nonprofit corporation, 2) the origins of tax-exempt status, and 3) the origins of charity. Obviously, an exploration of each of these parts is a worthy topic for a multiple volume treatise. For purposes of this Article, the discussion of these topics will be kept very brief with a focus on providing background for responding to the metaphysical question of what charitable tax-exempt nonprofit corporations are.

#### *A. The Origins of the Nonprofit Corporation*

Because corporations are currently viewed as primarily vehicles for making profit, one might believe that an exploration into the origins of nonprofit corporations needs to be bifurcated into a discussion of the origins of the corporate form and into a discussion of the origins of nonprofit status. In fact, nothing could be further from the truth considering that modern corporations evolved from earlier nonprofit organizations. All corporations find their roots in ancient Roman law in which the state recognized various organizations as having legal existence separate from the individuals who composed them.<sup>34</sup> The term “corporation” even derives from the Latin word “corpus,” which means “body of people,” although the organizations in ancient Rome were known by various names, including “corpus,” “collegium,” and “universitas.”<sup>35</sup> These entities were used for a wide range of nonprofit organizations, such as burial societies, political clubs, and religious societies.<sup>36</sup> These organizations also existed for a wide range of charitable purposes, including asylums, homes for the poor, homes for the aged, hospitals, and orphanages.<sup>37</sup> These entities were conceived of very broadly, and they included such entities as the Roman state and municipalities.<sup>38</sup>

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<sup>34</sup> NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, TAX EXEMPT ORGANIZATIONS: CASES AND MATERIALS 3 (2d ed. 2008) [hereinafter TAX EXEMPT ORGANIZATION CASES] (reporting that ancient Roman law included the idea of “organization[s] doing works and having rights, e.g., primarily the right to own its own property — that was different, legally, from the individual who composed or operated it”).

<sup>35</sup> HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 215 (1983) (discussing the origins of corporations under ancient Roman law).

<sup>36</sup> *Id.* at 216 (explaining that under Roman law “many private associations, including organizations for maintaining a religious cult, burial clubs, political clubs, and guilds of craftsmen or traders, were considered to be corporations”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 215.

Later, the Roman Catholic Church played a major role in the development of the modern corporation. During the thirteenth century, Sinibaldo Fieschi, who went on to become Pope Innocent IV, developed and used the term *persona ficta*, meaning a fictitious or legal person.<sup>39</sup> As a result of the adoption of this concept into Canon law, this legal system became the first to recognize the concept of fictitious legal personality for non-corporeal entities.<sup>40</sup>

Modern corporate law largely grew out of the law governing municipalities and religious institutions in Europe during the Middle Ages.<sup>41</sup> During this period, England began recognizing the creation of corporations for charitable purposes.<sup>42</sup> In England, only the Crown and later Parliament had the power to issue corporate charters.<sup>43</sup> The corporations during this period were not created for business or commerce.<sup>44</sup> Around this time, in regard to incorporated ecclesiastical, municipal and charitable entities, governments began to allow for perpetual existence, which is a feature that would ultimately become an aspect of modern corporations.<sup>45</sup>

During the sixteenth and seventeenth centuries, the Crown started chartering corporations to develop newly conquered lands.<sup>46</sup> The English government also chartered numerous corporations for overseas trading and created many joint stock companies.<sup>47</sup> The idea of common ownership by a group of passive investors originated from these joint stock entities.<sup>48</sup> These ideas were eventually brought to North America. During the colonial period prior to the Revolutionary War, corporations were created based upon the authority of the reigning monarch.<sup>49</sup>

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<sup>39</sup> Nicholas P. Cafardi, *The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis*, 29 SETON HALL LEGIS. J. 361, 362 (2005).

<sup>40</sup> *Id.* at 363.

<sup>41</sup> See Blair, *supra* note 24, at 789 (discussing the birth and evolution of the corporate form).

<sup>42</sup> See ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS ESSENTIAL TERMS AND CONCEPTS 186 (1996) (providing a brief history of corporations and corporate law).

<sup>43</sup> *Id.*

<sup>44</sup> See Blair, *supra* note 24, at 789 (examining the development of corporate law in England).

<sup>45</sup> See ALAN R. PALMITER, CORPORATIONS 7 (6th ed. 2009) (providing a historical overview of corporations).

<sup>46</sup> See HAMILTON, *supra* note 42, at 186.

<sup>47</sup> *Id.*

<sup>48</sup> PALMITER, *supra* note 45, at 7-8.

<sup>49</sup> See ROBERT W. HAMILTON & RICHARD D. FREER, THE LAW OF CORPORATIONS IN A

In the early days of the United States, the nexus between corporations and state law was even stronger than it is today. State governments created corporations through private bills that had to be passed in state legislatures and signed by state governors.<sup>50</sup> Legislatures had to pass additional acts if additional privileges were to be granted to a corporation, or if changes were to be made to a corporate charter.<sup>51</sup> Because of the relatively small number of corporations, often these entities had monopoly status.<sup>52</sup> Throughout this period, corporations were relatively uncommon, and the corporations that did exist often served relatively public functions, such as building and operating canals, bridges, and roads or operating banks or insurance companies.<sup>53</sup> In addition, state legislatures commonly granted corporate charters to noncommercial associations, such as charities, churches, and universities.<sup>54</sup>

During the late 1790s and early 1800s, modern corporations began to appear.<sup>55</sup> During this period, the concept of private property became more ingrained in the culture of the United States, and Americans embraced competition, markets, and industrialization.<sup>56</sup> As a result, state legislatures found themselves overwhelmed with requests for legislative grants of corporate status.<sup>57</sup> Various states began passing general incorporation statutes, including North Carolina in 1795, New York in 1811, and Connecticut in 1837.<sup>58</sup> Other states quickly followed suit, and these general incorporation statutes allowed a greater number of individuals access to the corporate form, rather than just the privileged few who previously had the ability to petition state legislators for corporate charters.<sup>59</sup> The

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NUTSHELL 41 (6th ed. 2011) (exploring the historical development of corporate law).

<sup>50</sup> JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 31 (2d ed. 2003) (discussing corporations during the early days of the United States of America).

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 32.

<sup>53</sup> *Id.*

<sup>54</sup> PALMITER, *supra* note 45, at 8.

<sup>55</sup> *See COX & HAZEN, supra* note 50, at 32.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 25 (3d ed. 1983) (examining the passage of the first general incorporation statutes in the United States).*

<sup>59</sup> *See ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 4 (3d ed. 2009) (providing historical background on the corporate form).*

modern corporation quickly came to dominate business in the United States.<sup>60</sup>

The creation of general incorporation statutes throughout the United States also gave birth to the first true nonprofit corporations. Prior to these general incorporation statutes, no real distinction existed between nonprofit, for profit, and governmental organizations because the existence of corporations prior to that were uniquely tailored by the state legislative acts that were passed individually to create them.<sup>61</sup> Many of the general statutes that were passed during the first half of the nineteenth century categorized corporations as either for-profit or nonprofit, and as a result, the modern nonprofit corporation came into being.<sup>62</sup>

Providing a robust definition of what constitutes a nonprofit corporation is difficult. Part of the problem is the vast array of organizations that compose the nonprofit sector.<sup>63</sup> In addition, nonprofit corporations are often called by different names in different states, e.g., nonstock corporations, not-for-profit corporations, public benefit organizations, and mutual benefit organizations.<sup>64</sup> Section 501(c)(3) of the Internal Revenue Code, which limits tax-exempt status to certain types of nonprofits, offers some insights into the nature of nonprofit corporations.<sup>65</sup> Section 501(c)(3) provides a basic definition of what a nonprofit is. It states that tax-exempt status under that section is available to corporations that “no part of the net earnings of which inures to the benefit of any private shareholder or individual.”<sup>66</sup> Notably, this definition does not require a charitable purpose, which means that charitable nonprofit corporations are a subset of nonprofit corporations generally.

Although section 501(c)(3) provides a useful place to start in understanding what constitutes a nonprofit corporation under the

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<sup>60</sup> See COX & HAZEN, *supra* note 50, at 33.

<sup>61</sup> See BETSY SCHMIDT, *NONPROFIT LAW: THE LIFE CYCLE OF A CHARITABLE ORGANIZATION* 14 (2011) (discussing the birth of nonprofit corporations in the United States).

<sup>62</sup> *Id.*

<sup>63</sup> See JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS* 2 (4th ed. 2010) (“The nonprofit form of organization extends well beyond . . . charitable, religious, and educational organizations. . . . Nonprofits include labor unions, fraternal lodges, social clubs, college fraternities, trade associations, and even professional sports leagues.”).

<sup>64</sup> See SCHMIDT, *supra* note 61, at 7 (discussing various other names for nonprofit corporations).

<sup>65</sup> 26 U.S.C. § 501(c)(3) (2012).

<sup>66</sup> *Id.*

laws of the United States, the definition needs to be more fully unpacked to truly understand these entities. In his seminal work, *The Role of Nonprofit Enterprise*, Professor Henry Hansmann offers the following useful analysis:

A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. By “net earnings” I mean here pure profits — that is, earnings in excess of the amount needed to pay for services rendered to the organization; in general, a nonprofit is free to pay reasonable compensation to any person for labor or capital that he provides, whether or not that person exercises some control over the organization. It should be noted that a nonprofit organization is not barred from earning a profit. Many nonprofits in fact consistently show an annual accounting surplus. It is only the distribution of the profits that is prohibited. Net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide.<sup>67</sup>

Put simply, although more robust definitions of nonprofit organizations are possible,<sup>68</sup> the restraint on distribution of income is the defining feature of these entities.

Notably, these nonprofit entities have only coalesced and existed as a distinct sector within roughly the past half a century.<sup>69</sup> Tax

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<sup>67</sup> Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (analyzing what defines a nonprofit organization).

<sup>68</sup> Peter Frumkin, for example, argues that “at least three features . . . connect these widely divergent entities: (1) they do not coerce participation; (2) they operate without distributing profits to stakeholders; and (3) they exist without simple and clear lines of ownership and accountability.” PETER FRUMKIN, ON BEING NONPROFIT: A CONCEPTUAL AND POLICY PRIMER 3 (2002). In addition, Lester M. Salamon and Helmut K. Anheier offer a more robust list of shared characteristics of nonprofits: “(a) formally constituted; (b) organizationally separate from government; (c) non-profit-seeking; (d) self-governing; and (e) voluntary to some significant degree.” LESTER M. SALAMON & HELMUT K. ANHEIER, THE EMERGING NONPROFIT SECTOR: AN OVERVIEW, at xvii-xviii (1996). But see Lloyd Hitoshi Mayer, *The “Independent” Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51, 55-56 (2012) (noting that “identifying a set of collective characteristics that distinguish . . . [the nonprofit] sector . . . has proven difficult”).

<sup>69</sup> See Peter Dobkin Hall, *Historical Perspectives on Nonprofit Organizations in the United States*, in THE JOSSEY-BASS HANDBOOK OF NONPROFIT LEADERSHIP AND MANAGEMENT 3, 3 (Robert D. Herman ed., 2d ed. 2004) (“[T]he concept of ‘nonprofit

exemptions, other government subsidies, and increased recognition by the public of the usefulness of nonprofit organizations has helped to fuel a substantial growth in the number of nonprofit organizations.<sup>70</sup> Within this sector, the nonprofit corporation is the preferred organizational structure.<sup>71</sup>

### B. The Origins of Tax-Exempt Status

Nonprofit organizations are creatures of state law.<sup>72</sup> However, nonprofit status does not guarantee exemption from taxation for an organization nor does nonprofit status guarantee the deductibility of contributions to that organization.<sup>73</sup> To qualify for tax-exempt status, the organization must meet the criteria established by the federal and state bodies with the power to tax that organization.<sup>74</sup> Tax-exempt status is a privilege and not a right. Because taxation is the default rule, tax-exempt status signals the government's willingness to subsidize the existence of a particular entity because exemption from

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organizations' as a unified and coherent 'sector' dates back only to the 1970s.”).

<sup>70</sup> See *id.* at 18 (“By 1940, there were only 12,500 charitable tax-exempt organizations registered by the IRS — along with 179,742 religious congregations (which did not have to apply for exemption) and 60,000 noncharitable nonprofits . . . . Today, there are more than 600,000 charitables, 400,000 religious congregations, and 600,000 noncharitables — a total of more than a million and a half nonprofits of various types.” (citation omitted)); SCHMIDT, *supra* note 61, at 15 (providing a chart summarizing the “remarkable growth of the [nonprofit] sector” between from 1995 through 2009).

<sup>71</sup> See FISHMAN & SCHWARZ, *supra* note 63, at 52 (reporting that the nonprofit corporation is the “predominant form of [tax] exempt organization in the United States”).

<sup>72</sup> Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 60 (2004) (“Nonprofit corporations or associations, like their for-profit counterparts, are creatures of state law.”); see James J. Fishman, *Stealth Preemption: The IRS’s Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545, 551-52 (2010) (“State nonprofit corporate codes govern the formation of nonprofit corporations and their dissolution, merger or consolidation; internal governance procedures; the election of and removal of directors, quorum and voting requirements; rules of procedure, the rights of members, matters of corporate finance, keeping and inspection of corporate records, and most important for our purposes, the obligations and restriction of directors and corporate boards.”).

<sup>73</sup> See PHELAN & DESIDERIO, *supra* note 5, at 221 (“Nonprofit organizations are not automatically exempt from federal income taxation.”).

<sup>74</sup> See *id.* (“With the exception of churches and certain other religious organizations . . . unless a nonprofit organization has received a determination letter or a Revenue Ruling informing it of its exempt status the organization is subject to tax liability.”).

taxation results in the governmental body with the power to tax receiving less revenue than it is potentially eligible to receive.<sup>75</sup> The state governments and the federal governments may establish different criteria as to what is necessary for tax-exempt status. Although distinct taxation issues exist on the state level,<sup>76</sup> this Article will concentrate on exemption of organizations from taxation at the federal level. A survey of exemption from taxation at the state level would grossly exceed the number of pages of a standard law review article, and it is unnecessary to prove that charitable tax-exempt nonprofit corporations are essentially a collaboration among the federal government, the state governments, and the public.

Federal tax-exempt status for charitable organizations finds its origins in the Wilson-Gorman Tariff Act of 1894.<sup>77</sup> This Act established a two percent tax on corporate income, but it expressly exempted "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary . . . associations . . ."<sup>78</sup> Prior to this Act, the federal government did not exempt charitable activity from taxation. Such an exemption was unnecessary because the federal government taxed commercial events, rather than income, which rarely involved charities.<sup>79</sup> In *Pollock v. Farmers' Loan & Trust Co.*,<sup>80</sup> the Supreme Court of the United States held that the income tax created by the Wilson-Gorman Tariff Act of 1894 was unconstitutional, and as a result, tax-exempt status for charitable organizations again became moot.<sup>81</sup> After the adoption of the Sixteenth Amendment on February 3, 1913, which rendered taxation of income

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<sup>75</sup> See *id.* at 2 ("Nonprofit organizations generally seek tax exempt status. In this context, nonprofit organizations are subsidized by the government."); Rebecca S. Rudnick, *State and Local Taxes on Nonprofit Organizations*, 22 CAP. U. L. REV. 321, 324 (1993) ("Congress has decided to subsidize nonprofit organizations by providing them with tax exemptions, thus encouraging certain desired behavior.").

<sup>76</sup> See generally Carroll H. Sierk, *State Tax Exemptions of Non-Profit Organizations*, 19 CLEV. ST. L. REV. 281 (1970) (discussing a variety of distinct tax issues that exist on the state level for nonprofit entities).

<sup>77</sup> Tariff Act of 1894, ch. 349, 28 Stat. 509.

<sup>78</sup> *Id.* at § 32.

<sup>79</sup> See CAFARDI & CHERRY, TAX EXEMPT ORGANIZATION CASES, *supra* note 34, at 18 (explaining the development of tax-exempt status under federal law).

<sup>80</sup> 158 U.S. 601 (1895).

<sup>81</sup> *Id.* at 634 (holding the personal income tax created by the Wilson-Gorman Tariff Act of 1894 to be unconstitutional).

constitutional,<sup>82</sup> however, Congress reenacted tax-exempt status for certain nonprofit entities in the Revenue Act of 1913.<sup>83</sup>

During this period, Congress first allowed an income tax deduction for charitable donations. Although Congress rejected a proposed charitable deduction in 1913 when it established the federal income tax system,<sup>84</sup> it ultimately relented and enacted such a charitable deduction in the War Revenue Act of 1917.<sup>85</sup> Congress added this deduction to the federal tax system because of concerns that the higher taxes being levied at the time would cause a decline in charitable giving and philanthropy in general.<sup>86</sup> The Revenue Act of 1936 allowed corporations to begin to claim similar deductions.<sup>87</sup> Because taxation is the default rule and deductions are a matter of legislative grace,<sup>88</sup> the deductions for charitable giving are a de facto subsidy of the nonprofit sector,<sup>89</sup> and deductions for charitable giving have helped to fuel the rapid development and growth of the nonprofit sector during the second half of the twentieth century.<sup>90</sup>

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<sup>82</sup> U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

<sup>83</sup> Revenue Act of 1913, ch. 16, § II(G), 38 Stat. 114, 172.

<sup>84</sup> See FISHMAN & SCHWARZ, *supra* note 63, at 295 (discussing the addition of a deduction of charitable donations under federal tax law).

<sup>85</sup> War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330.

<sup>86</sup> See FISHMAN & SCHWARZ, *supra* note 63, at 295.

<sup>87</sup> Revenue Act of 1936, ch. 690, § 23(q), 49 Stat. 1648, 1661.

<sup>88</sup> See JAMES J. FREELAND, DANIEL J. LATHROPE, STEPHEN A. LIND & RICHARD B. STEPHENS, *FUNDAMENTALS OF FEDERAL INCOME TAXATION: CASES AND MATERIALS* 289 (17th ed. 2013) (“[D]eductions are spoken of as a matter of ‘legislative grace;’ and it is at least true that, as a taxpayer has no constitutional right to a deduction, a taxpayer must find a statutory provision that specifically allows the deduction claimed.”).

<sup>89</sup> *Id.* at 435 (“[A]n effect of the allowance of an income tax deduction is a federal subsidy.”).

<sup>90</sup> See Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 609 (2011) (reporting that the deductibility of charitable contributions “contribute[s] to the size and success of the charitable sector”); Eric M. Zolt, *Tax Deductions for Charitable Contributions: Domestic Activities, Foreign Activities, or None of the Above*, 63 HASTINGS L.J. 361, 364 (2012) (“Tax benefits, particularly the charitable tax deduction for individuals and corporations, play an important role in the success and viability of the nonprofit sector. No doubt, donors are more generous than they would be in a world without tax subsidies, perhaps even by an amount greater than the lost tax revenue.”); see generally Hall, *supra* note 69 (providing a historical overview of the development of the nonprofit sector including its rapid development during the second half of the twentieth century).

With that said, over the years, Congress has placed various additional requirements upon charitable nonprofit corporations to qualify for and maintain tax-exempt status.<sup>91</sup> For example, the Revenue Act of 1934 established limits for lobbying activities by charitable tax-exempt organizations;<sup>92</sup> the Revenue Act of 1943 added the requirement that charitable tax-exempt organizations file a Form 990;<sup>93</sup> and the Revenue Act of 1954 placed restrictions on political campaigning that can be undertaken by charitable nonprofit organizations.<sup>94</sup>

In regard to charitable tax-exempt nonprofit corporations, much of this regulation has coalesced into section 501 of the current version of the Internal Revenue Code.<sup>95</sup> Section 501(a) exempts the twenty-nine different categories of organization that are listed in section 501(c) from taxation.<sup>96</sup> Charitable organizations are primarily addressed in section 501(c)(3).<sup>97</sup> As a result, section 501(a) of the Internal Revenue Code provides that tax-exempt status shall apply to the following entities discussed in section 501(c)(3):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.<sup>98</sup>

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<sup>91</sup> Notably, this Article focuses on tax-exempt status for charitable corporations obtaining such status under § 501(c)(3) of the Internal Revenue Code.

<sup>92</sup> Revenue Act of 1934, ch. 277, § 23(o)(2), 48 Stat. 680, 690.

<sup>93</sup> Revenue Act of 1943, ch. 63, § 117, 58 Stat. 21, 37 (1944).

<sup>94</sup> Revenue Act of 1954, ch. 736, § 501(c)(3), 68A Stat. 3, 163.

<sup>95</sup> 26 U.S.C. § 501(c) (2012).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* § 501(c)(3).

<sup>98</sup> *Id.*

As is obvious from the text, section 501(c)(3) places substantial requirements upon entities seeking tax-exempt status, including that (1) the entity is organized for a charitable purpose; (2) the entity is operated for a charitable purpose; (3) the entity is a nonprofit because no part of the net earning can inure to the benefit of a private individual; (4) the entity must not engage in substantial lobbying activity; and (5) the entity must not engage in any political campaign.<sup>99</sup>

### C. The Origins of Charitable Behavior

Section 501(c)(3) defines the types of charitable nonprofit organization that qualify for tax-exempt status.<sup>100</sup> Understanding this subsection, the organizations afforded tax-exempt status under it, the case law associated with it, and the commentary offered regarding it goes a long way in understanding the essence of the charitable activity that is required for an entity to qualify as a charitable tax-exempt nonprofit corporation. Obviously, charity can and does exist beyond the boundaries of section 501(c)(3), and in fact, charity is so pervasive in the human experience that a dictionary definition is one of the more logical places to look in terms of defining it, and for purposes of this Article, charitable behavior will be defined as behavior that is “[g]enerous in giving financial or other aid to the needy.”<sup>101</sup>

The origins of charity are much more difficult to unravel because charity is deeply rooted in the human experience. For example, ancient Egyptians were buried with records of their “blessed givings” to the poor that were bestowed during the decedents’ lifetimes.<sup>102</sup> Most, if not all, of the world’s major religions endorse charitable behavior, including Buddhism, Christianity, Hinduism, Judaism, and Islam.<sup>103</sup> Charity and philanthropy are deeply ingrained within the American experience. The earliest records in existence are perhaps reports of the residents of the Bahama Islands who warmly greeted Christopher Columbus when he first arrived in North America.<sup>104</sup> In

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> WEBSTER’S II NEW COLLEGE DICTIONARY 188 (1995) (providing a definition of the term “charitable”).

<sup>102</sup> See Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America’s Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2440 (2005) (explaining “the concept of charity . . . existed long before the birth of Christ”).

<sup>103</sup> See SCHMIDT, *supra* note 61, at 12-13 (providing a brief historical overview on charitable behavior).

<sup>104</sup> ROBERT H. BREMNER, AMERICAN PHILANTHROPY 5 (2d ed. 1988) (“The earliest

addition, English colonists also carried their charitable traditions with them as they began to populate the land that was to become the United States.<sup>105</sup>

Whether charitable behavior originates from nature, nurture or some combination of the two is open to debate.<sup>106</sup> Regardless of the source, however, this behavior is pervasive in the United States. In 2013, for example, charitable giving from individuals, foundations and businesses was approximately \$335.17 billion.<sup>107</sup> During that year, 25.4% of all adults in the United States volunteered with a nonprofit organization.<sup>108</sup> This volunteering totaled approximately 8.1 billion hours and represented an estimated \$163 billion worth of work.<sup>109</sup> When this penchant for charitable behavior is coupled with the will to associate that de Tocqueville observed when he visited the United States,<sup>110</sup> the current vitality and growth of the nonprofit sector is not surprising.<sup>111</sup>

## II. THE PREVAILING ESSENTIALIST THEORIES OF THE CORPORATION

Understanding the component parts of a charitable tax-exempt nonprofit corporation, however, does not answer the metaphysical question of what a corporation is. The states in creating nonprofit entities,<sup>112</sup> the federal government in granting tax-exempt status,<sup>113</sup>

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American philanthropists, as far as European records go, were those gentle Indians of the Bahama Islands who greeted Columbus at his first landfall in the New World. . . . Columbus's report [stated] that they were 'ingenuous and free' with all that they had . . . and bestowed each gift 'with as much love as if their hearts went with it.'").

<sup>105</sup> See James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 621 (1985) ("An attitude favorable to philanthropy existed from the beginning of settlement in the new world. Colonists were accustomed to the traditional support and enforcement of charities in England.").

<sup>106</sup> See *supra* Part I.C (discussing the origins of charitable behavior).

<sup>107</sup> MCKEEVER & PETTIPOL, *supra* note 3, at 1 (providing facts and figures on charitable giving in the United States).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See *supra* notes 28–32 and accompanying text (discussing de Tocqueville's observations regarding the will to associate in the United States).

<sup>111</sup> See MCKEEVER & PETTIPOL, *supra* note 3, at 2 ("From 2002 to 2012, the number of nonprofit organizations registered with the IRS rose from 1.32 million to 1.44 million, an increase of 8.6 percent. These 1.44 million organizations contain a diverse range of nonprofits, including art, health, education, and advocacy nonprofits; labor unions; and business and professional associations.").

<sup>112</sup> See *supra* Part I.A (discussing the origin of the state governments' roles in the creation and regulation of nonprofit corporations).

and the public in engaging in charitable activity,<sup>114</sup> each have a role to play in the creation of charitable tax-exempt nonprofit corporations. In addition, the states, the federal government, and the public each have goals that are being pursued through these entities. Only by understanding the intersection of these roles and interests, however, does one begin to understand the essence of a charitable tax-exempt nonprofit corporation, and for that matter, corporations generally.<sup>115</sup>

In this Part, the prevailing essentialist theories of the corporation, i.e., the artificial entity theory, the real entity theory, and the aggregate theory, will be examined. Although each of these theories has considerable merit, each also fails to capture some of the essential attributes of a corporation. This has led some scholars to embrace all of them at the same time and embrace the indeterminacy of the corporation.<sup>116</sup> Although this is a tempting move, it still leaves unanswered the question of what a corporation is. The discussion in this Part of the prevailing essentialist theories will set the stage for answering that question in regard to charitable tax-exempt nonprofit corporations.

#### A. Artificial Entity Theory

The artificial entity theory, which is also commonly referred to as the concession theory,<sup>117</sup> represents the original conception of corporations in the United States.<sup>118</sup> Under this theory, the state is at

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<sup>113</sup> See *supra* Part I.B (discussing the origin of the federal government's role in granting and regulating tax-exempt status).

<sup>114</sup> See *supra* Part I.C (discussing the pervasiveness of charitable behavior in the human experience).

<sup>115</sup> See *infra* Part IV.C (suggesting that collaboration theory can and should be applied to for-profit corporations as well as charitable tax-exempt nonprofit corporations).

<sup>116</sup> See *infra* Part II.D (explaining that some scholars have embraced all of the prevailing essentialist theories of the corporation, i.e., the artificial entity theory, the real entity theory, and the aggregate theory, and as a result, they advocate for the indeterminacy of the corporation).

<sup>117</sup> See Phillips, *supra* note 8, at 1064 ("Although the concession and fiction theories of the corporation sometimes are treated separately, they fit together to form a coherent whole.").

<sup>118</sup> See Blair, *supra* note 24, at 799 ("The earliest scholarship and legal cases on the nature of corporations emphasized that corporations were created by acts of a sovereign which granted to a group of individuals the right to act together as a single person for purposes of holding property, entering into contracts, and suing and being sued in court."); Dibadj, *supra* note 24, at 735 ("The original theory of the corporation was the artificial entity theory . . . ."); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 184 (1985) ("The traditional

the center of the existence of the corporation because the corporation owes its existence to a concession by the state, i.e., a government grant of specific privileges.<sup>119</sup> The state grants this concession to achieve goals that it would otherwise be unable to achieve in the absence of granting the concession because of lack of time, money, or other resources.<sup>120</sup> Based upon this concession, an artificial entity is created and derives its existence exclusively from the state.<sup>121</sup> The state defines the rights of the corporation,<sup>122</sup> and the state has the power to place

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conception, derived from the ante-bellum grant theory, as well as older English corporation law, characterized the corporation as ‘an artificial entity created by positive law.’”).

<sup>119</sup> See Henry N. Butler & Larry E. Ribstein, *State Anti-Takeover Statutes and the Contract Clause*, 57 U. CIN. L. REV. 611, 618 (1988) (“The concession theory of the corporation views corporations as coming into existence only as a result of a special concession or grant made by the government.”); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1570 (“At its core, the artificial entity theory posits that the corporation is a creature of positive law that owes its existence to an act of the sovereign.”); Walter Werner, *Corporation Law in Search of Its Future*, 81 COLUM. L. REV. 1611, 1625 n.82 (1981) (“The concession theory holds that corporations exist by virtue of a grant from the sovereign.”).

<sup>120</sup> See Bradley T. Borden, *Residual-Risk Model for Classifying Business Arrangements*, 37 FLA. ST. U. L. REV. 245, 256 (2010) (“[T]he ‘grant’ or ‘concession’ theory of corporations . . . considered state law incorporation a grant or privilege for the pursuit of a public purpose.”); Padfield, *Rehabilitating Concession Theory*, *supra* note 24, at 332 (“[T]he concession theory of the corporation . . . views the corporation as a tremendous capital accumulation device that was only made possible by the state conveying certain privileges to incorporators for which they could not otherwise privately contract. The rationale for granting these privileges was that the state could thereby achieve goals that might otherwise fail for lack of funding.”); Eric Tucker, *Shareholder and Director Liability for Unpaid Workers’ Wages in Canada: From Condition of Granting Limited Liability to Exceptional Remedy*, 26 LAW & HIST. REV. 57, 87 (2008) (noting that under the artificial entity, the corporation is “created by the state to promote public policy objectives”).

<sup>121</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 72 (1992) (“Under the grant theory, the business corporation was regarded as an artificial being created by the state, with powers strictly limited by its charter of incorporation.”); Jeffrey N. Gordon, *Shareholder Initiative: A Social Choice and Game Theoretic Approach to Corporate Law*, 60 U. CIN. L. REV. 347, 349 n.7 (1991) (“The concession theory regards corporate existence and power as granted by the state, as opposed to the state’s mere recognition of a preexisting voluntary association.”); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence To Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPAC L. REV. 523, 535 (2010) (“The ‘grant’ or ‘concession’ theory asserted that the corporation was an ‘artificial entity’ that owed its existence to the state, with its powers limited by its charter of incorporation.”).

<sup>122</sup> See Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 737 (2011) (“[The] ‘artificial person’ or ‘concession’ theory rested on the view that a corporation effectively exists at the sufferance of the state and, therefore, is not

restrictions upon corporate activity and punish corporations that do not obey the state's mandates.<sup>123</sup>

This theory reached the height of its popularity during the colonial period and early days of the United States.<sup>124</sup> As previously discussed, corporations were individually chartered initially by the Crown and later by special legislative act of the state during this period.<sup>125</sup> As a result, the relationship between the corporation and the state was especially strong, and the corporation was uniquely crafted by the concession of the government contained within its corporate charter.<sup>126</sup> In addition, the Supreme Court of the United States

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entitled to any rights or protections not granted to it by statute."); J. Janewa OseiTutu, *Corporate "Human Rights" to Intellectual Property Protection?*, 55 SANTA CLARA L. REV. 1, 42 (2015) ("[T]he concession theory postulates that corporations are created by the state and have only the rights that are granted to them by the state."); *see also* André Douglas Pond Cummings, Steven A. Ramirez & Cheryl L. Wade, *Toward a Critical Corporate Law Pedagogy and Scholarship*, 92 WASH. U. L. REV. 397, 420 n.134 (2014) ("[T]he nature of the historic roots of the corporation was that the sovereign dispensed concessions to the corporation as its creator and that these could contravene constitutional rights.").

<sup>123</sup> See Iris H-Y Chiu, *Institutional Shareholders as Stewards: Toward a New Conception of Corporate Governance*, 6 BROOK. J. CORP. FIN. & COM. L. 387, 408 (2012) ("The concession theory posits that corporations are creatures of statute, and hence, there is not only a sense of public purpose in their existence, but that the state is also placed in an unquestioning position to impose regulation on corporations."); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 630 n.227 (1991) ("[T]he artificial entity theory . . . views the corporation as an artificial creation of the state subject to state-imposed limitations . . . ."); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 803 (1996) ("[The] 'concession theory' of corporate existence [means] that the government [retains] extensive power over the continued operation of the enterprise.").

<sup>124</sup> See Nicole Bremner Cásarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 NEB. L. REV. 689, 716 (1991) ("The artificial entity theory of the corporation . . . was the dominant American view of corporations in the eighteenth and early nineteenth centuries."); Colombo, *supra* note 24, at 15 ("[C]oncession theory' describes the original understanding of the corporation on American soil — an understanding that reigned supreme from colonial times through the middle of the nineteenth century."); Ho, *supra* note 24, at 892 ("The concession theory most accurately reflects the historical origins of the corporation and was the predominant view in the United States until the late nineteenth century.").

<sup>125</sup> See *supra* notes 46–54 and accompanying text (describing the origins of the corporate form).

<sup>126</sup> See Sarah C. Haan, *Federalizing the Foreign Corporate Form*, 85 ST. JOHN'S L. REV. 925, 943 n.62 (2011) ("The 'concession theory' originated during a time when corporate charters were special acts of legislation and characterizes the corporation as a privilege granted by the legislature to the shareholders.").

expressly adopted the artificial entity theory in *Trustees of Dartmouth College v. Woodward*.<sup>127</sup> Writing for the Court, Chief Justice John Marshall offered the following description of the essence of corporations:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand.<sup>128</sup>

Based on Chief Justice John Marshall's conception, the corporation exists and is defined solely by the grant of rights and privileges, i.e., the concession, of the state.

Although artificial entity theory still has its proponents, the popularity of this theory has waned.<sup>129</sup> With the rise of general incorporation statutes in the United States, special legislation is no longer required for the creation of corporations.<sup>130</sup> As a result, the role of states in creating and defining the existence of corporations is not as strong as it was in the days in which states tailored each entity individually and rendered bespoke corporations.

#### B. Real Entity Theory

The real entity theory, which is also commonly referred to as the natural entity theory, provides a second essentialist theory of the

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<sup>127</sup> 17 U.S. 518 (1819).

<sup>128</sup> *Id.* at 636.

<sup>129</sup> See Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 UC DAVIS L. REV. 407, 461 (2006) ("[T]he validity of the concession theory depends upon the existence of a concession. Where incorporation once was a special privilege, it is now a universal right. To many, the notion of a concession seems antiquated and inaccurate.").

<sup>130</sup> See *supra* notes 55–60 and accompanying text (describing the rise of general incorporation statutes in the United States).

corporation. Similar to the artificial entity theory, the real entity theory suggests that corporations exist separate and apart from their owners and managers as distinct entities.<sup>131</sup> Unlike the artificial entity theory, however, proponents of the real entity theory claim that corporations have existence beyond the artificial constructs created by the law and beyond the concession, i.e., the grant of powers, made by the state government.<sup>132</sup> As a result of this existence beyond the law, proponents of this theory have argued that corporations take on human qualities, which have led some to claim that corporations have various human rights.<sup>133</sup>

This theory emerged during the late nineteenth and early twentieth centuries.<sup>134</sup> As a result of state legislatures adopting general incorporation statutes and the ensuing rise of corporations in the United States, many theorists were no longer comfortable with the view that corporations are artificial entities that are heavily dependent upon the state.<sup>135</sup> Corporate legal theorists in the United States advancing the real entity theory built upon the work of European

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<sup>131</sup> See Phillips, *supra* note 8, at 1068 (“Real entity theories differ considerably, but they all distinguish themselves from the aggregate theory by maintaining that a corporation is a being with attributes not found among the humans who are its components. This corporate being, moreover, is a real thing.”).

<sup>132</sup> See Angelo Guisado, *When Harry Met Sallie Mae: Marriage, Corporate Personhood, and Hyperbole in an Evolving Landscape*, 49 U.S.F. L. REV. 123, 131 (2015) (“The real entity theory does not suggest that the corporation is a manufactured state construct, as the artificial entity theory does . . . .”); Nelson, *supra* note 119, at 1571 (“[Under the real entity theory], the corporation is neither an aggregated mass of shareholders nor an invention of the state. Instead, the corporation is a naturally occurring phenomenon that has an independent life and personality of its own.”); John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 818 (1989) (“Like the artificial entity theory, the natural entity theory insists on the separate existence of the corporation as an entity. But unlike the artificial entity theory, the natural entity theory holds that corporations have a natural existence outside of law.”).

<sup>133</sup> See Rubin, *supra* note 121, at 535-36 (“Pursuant to [the real entity] theory, the corporation took on more human qualities, which advocates would later use to take advantage of certain amendments in the Bill of Rights and the Fourteenth Amendment. Clearly, the debate can be characterized as the right of the state to regulate corporations versus the right of corporations to resist such regulation by invoking its ‘natural rights’ akin to human beings . . . .”).

<sup>134</sup> Dibadj, *supra* note 24, at 742 (“The natural entity theory emerged in the late nineteenth and early twentieth centuries.”).

<sup>135</sup> See Blair, *supra* note 24, at 805 (examining the development of the real entity theory, and reporting that as a result of industrialization in the United States during the nineteenth century, “it did . . . not seem particularly useful or plausible to think of corporations as creatures of the state — corporations had, it seemed, outgrown that view”).

theorists,<sup>136</sup> especially the work of German legal theorist Otto von Gierke.<sup>137</sup> During the late nineteenth century, Gierke theorized that when individuals unite and form associations, including corporations, that a real entity is created with a separate existence from the individuals who compose it.<sup>138</sup> Under Gierke's conception, groups have a "collective spirit" that gives them an identity separate and apart from their members.<sup>139</sup>

### C. Aggregate Theory

The aggregate theory, which is also commonly referred to as the nexus of contract theory, offers a third essentialist theory of the corporation. Unlike the artificial entity theory and the real entity theory, the aggregate theory focuses on the individuals composing the corporation, and under this conception of the corporation, the corporation does not exist beyond the natural individuals that organize and operate it.<sup>140</sup> In addition, the rights of the corporation are

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<sup>136</sup> See Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1465 (1987) ("The legal concern over the character of collectivities was by no means limited to the United States. Very sophisticated disputations, both theological and political, about the nature of associations had long been part of the intellectual discourse of continental Europe, and their resolution had shaped law there for the better part of six centuries.").

<sup>137</sup> See Joel Edan Friedlander, *Corporation and Kultkampf: Time Culture as Illegal Fiction*, 29 CONN. L. REV. 31, 40 (1996) (reporting that Otto von Gierke was "widely influential in American thinking about the modern corporation" during the late nineteenth century and early twentieth century).

<sup>138</sup> See OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 37 (Frederic William Maitland trans., 1900); see also Cásarez, *supra* note 124, at 719 ("Corporations, Gierke said, are not just artificial creations derived from law, but rather legitimate entities that exist regardless of and separate from the law's recognition. In other words, corporations are as 'real' and 'natural' as any person and exist independently of their shareholders and the state.").

<sup>139</sup> See Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101, 117 (2005) ("Corporations, [Gierke] argued, are the legal manifestation of communities possessed of a collective spirit.").

<sup>140</sup> See Thomas Lee Hazen, *The Corporate Persona, Contract (and Market) Failure, and Moral Values*, 69 N.C. L. REV. 273, 310 (1991) ("Another school of thought takes the position that the corporation (or any organization, for that matter) is merely an aggregate of its participants. Under such a view, the various individuals are their own moral agents and the corporation has no separate individual responsibility."); Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 931 (2011) ("Aggregation theory tries to reap all the benefits of the real entity theory without all of the metaphorical hocus-pocus. Corporations are not artificial; they are not real; they are a set of relationships with which government should not, or constitutionally must not, interfere."); Coates,

derivative of the rights of the individuals who compose it.<sup>141</sup> The aggregate theory has been refined into the nexus of contract theory.<sup>142</sup> Under this conception of the corporation, the corporation is defined by the contractual relationship that its promoters enter into with the state and the contractual relationships that exist within the corporation.<sup>143</sup> The corporation is a nexus of contracts among various entities, e.g., shareholders, managers, employees, creditors, customers, the state, and the public.<sup>144</sup>

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*supra* note 132, at 815 (“The aggregate theory starts with the proposition that corporations would not exist without individuals, and most importantly, individual shareholders. . . . [Proponents of this theory] reject the notion of the corporation as an entity in any way distinct from those individuals and relationships.”).

<sup>141</sup> See Brown, *supra* note 24, at 34 (“The aggregate theory granted no new rights to the corporation as its own entity, as the corporation was nothing more than an amalgam of the rights of individual shareholders and executives.”); Petrin, *supra* note 24, at 9-10 (“The ‘aggregate’ or ‘contractualist’ theory asserted that corporations and other legal entities constituted aggregations of natural persons whose relationships were structured by way of mutual agreements. As such, both a legal entity’s legal rights and duties were often seen, in an indirect or derivative manner, as simply those of its shareholders or other individuals that made up the entity.”); Coates, *supra* note 132, at 815 n.50 (“Under the aggregate theory, the extent to which a corporation may be said to have ‘rights,’ especially constitutional rights, corresponds to the rights of the individuals which make it up.”).

<sup>142</sup> See Avi-Yonah, *supra* note 24, at 1025 n.142 (“The point that the nexus of contracts theory is a reinvention of the aggregate view has been made repeatedly.”); Stefan J. Padfield, *The Dodd-Frank Corporation: More Than a Nexus-of-Contracts*, 114 W. VA. L. REV. 209, 215 (2011) [hereinafter *The Dodd-Frank Corporation*] (“The aggregate theory is generally understood to capture the nexus-of-contracts view . . . .”); Phillips, *supra* note 8, at 1064 (discussing the “aggregate theory’s reappearance in nexus-of-contracts clothing during the 1980s”).

<sup>143</sup> See Mark Anderson, *The Enigma of the Single Entity*, 16 U. PA. J. BUS. L. 497, 498 (2014) (“The nexus of contracts concept views the firm as a web of explicit and implicit contracts, which includes suppliers of capital, services, and goods together with the purchasers of output.”); Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 485 (2001) (“In brief, the nexus of contracts or contractarian model conceptualizes the firm not as an entity, but simply as a legal fiction representing the complex set of contractual relationships between many constituencies providing, or serving as, inputs for the corporation’s productive processes.”); Coates, *supra* note 132, at 815 (“Writers, using the aggregate theory, describe the corporation as a set of individuals and the relationships between those individuals. . . . The aggregate theory attempts to dissolve the corporate entity into its particularities — conjuring up an image of a ‘web’ or ‘nexus of contracts.’”).

<sup>144</sup> See Henry N. Butler, *Smith v. Van Gorkom, Jurisdictional Competition, and the Role of Random Mutations in the Evolution of Corporate Law*, 45 WASHBURN L.J. 267, 274 n.23 (2006) (“The contractual theory of the corporation views the corporation as a nexus of contracts among shareholders, managers, directors, creditors, and employees.”); Lily Kahng, *Resurrecting the General Utilities Doctrine*, 39 B.C. L. REV. 1087, 1097 n.37 (1998) (“The agency relationship between shareholders and

Although the aggregate theory did exist during the nineteenth century,<sup>145</sup> this theory was refined by economists during the 1930s because it permits sophisticated economic analyses of the corporation.<sup>146</sup> Ronald Coase is credited with reinvigorating interest in the aggregate theory through his 1937 article, *The Nature of the Firm*.<sup>147</sup> As a result of the revolution in corporate law scholarship that has occurred within the past few decades and as a result of the

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managers is . . . incorporated into the nexus-of-contracts theory of the firm, which views the corporation as a nexus of contracts among shareholders, managers, creditors, employees and others."); Phillips, *supra* note 8, at 1073 ("From [the nexus of contracts theory], it follows that various classes of people are parties to the contracts that form the corporation and therefore are participants in it. Some accounts emphasize such important corporate actors as shareholders and managers. Others identify employees and creditors, while still others add suppliers, bondholders, and customers.").

<sup>145</sup> See Colombo, *supra* note 24, at 13 (reporting that the aggregate theory "flourished fleetingly during the latter half of the nineteenth century"); Ripken, *supra* note 24, at 220 ("An alternative view of the corporate person arose during the last half of the nineteenth century. The aggregate theory emphasized that the corporation could not be formed without the action and agreement of human beings."); *see also* Coates, *supra* note 132, at 816 ("Though the aggregate theory can be found in American jurisprudence as early as 1809, the dominant belief of the early nineteenth century was the artificial entity theory.").

<sup>146</sup> See ROBERT W. HAMILTON & RICHARD A. BOOTH, BLACK LETTER OUTLINES: CORPORATIONS 330 (5th ed. 2006) ("Economists have developed a theory of corporateness[, i.e., the nexus of contract theory,] that permits analysis of the corporation as an economic phenomenon."); Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 UC DAVIS L. REV. 779, 789 (2002) ("Economists developed the 'nexus of contracts' model to analyze the 'firm.' In other words, economists attempted to explain the target firm in terms of the source nexus of contracts."); Padfield, *The Dodd-Frank Corporation*, *supra* note 142, at 236 (reporting that the "nexus-of-contracts theory has its roots in economics rather than law").

<sup>147</sup> R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); *see also* Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 9 (2002) [hereinafter *The Board of Directors*] ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory. This model's origins fairly can be traced to Nobel Prize laureate Ronald Coase's justly famous article, *The Nature of the Firm*."); Fred S. McChesney, *Economics, Law, and Science in the Corporate Field: A Critique of Eisenberg*, 89 COLUM. L. REV. 1530, 1534 n.13 (1989) ("Starting with the work of Coase, the contractarian approach has defined the corporate firm as a 'nexus of contracts' linking shareholders, managers, employees, creditors and others. That is, the essence of the firm is the private ordering represented by the web of contractual relationships freely entered into by the affected parties."); Charles R.T. O'Kelley, *Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 SEATTLE U. L. REV. 1247, 1247 (2012) ("Scholars routinely credit R. H. Coase and his first seminal work — *The Nature of the Firm* — as the progenitor of the nexus-of-contracts theory of the corporation.").

introduction and domination of economic theory in the field,<sup>148</sup> the aggregate theory has become the prevailing theory of the corporation today.<sup>149</sup>

#### D. The Indeterminacy of the Corporation

Each of the essentialist theories of the corporation discussed above has its virtues and its drawbacks. As a result, this has led some commentators to embrace the indeterminacy of the corporation, and to embrace all of the prevailing theories of the corporation at the same time. According to these scholars, one only obtains a complete view and full understanding of the corporation through such an inclusive approach.<sup>150</sup>

This inclusive view of the corporation finds its origins in the work of John Dewey. In 1926, Dewey published *The Historic Background of Corporate Legal Personality*.<sup>151</sup> In that work, he acknowledged, “The fact of the case is that there is no clear-cut line, logical or practical, through the different theories which have been advanced and which are still advanced in behalf of the ‘real’ personality of either ‘natural’ or associated persons.”<sup>152</sup> As a result, he concluded:

<sup>148</sup> See *supra* notes 6–10 and accompanying text (discussing the introduction and dominance of economics in business legal scholarship).

<sup>149</sup> See Bainbridge, *The Board of Directors*, *supra* note 147, at 9 (reporting that “modern law and economics scholars view the corporation not as an entity but as an aggregate of various inputs acting together to produce goods or services”); J. William Callison & Allan W. Vestal, *Contractarianism and Its Discontents: Reflections on Unincorporated Business Organization Law Reform*, 42 SUFFOLK U. L. REV. 493, 497 (2009) (“Throughout the 1980s and 1990s and into the new millennium, the ‘nexus of contracts’ conception has dominated the corporate law-and-economics academic literature, and because law-and-economics has developed a strong position in the United States academic hierarchy, ‘nexus of contracts’ theory has had a strong following in the corporate-law arena.”); Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 DEL. J. CORP. L. 895, 916 (1996) (“The nexus-of-contract theory ascended in hand with the Law and Economics movement . . . .”); Petrin, *supra* note 24, at 34 (“[T]he nexus of contracts theory . . . is now the dominant corporate law theory of the firm.”).

<sup>150</sup> See William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 464 (1989) (“Whatever the future interplay of theory and power, the concepts that make up theories of the firm — entity and aggregate, contract and concession, public and private, discrete and relational — will stay in internal opposition. This tendency toward contradiction should be accepted, not feared.”).

<sup>151</sup> John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

<sup>152</sup> *Id.* at 669.

As far as the historical survey implies a plea for anything, it is a plea for disengaging specific issues and disputes which arise from entanglement with *any* concept of personality which is other than a restatement that such and such rights and duties, benefits and burdens, accrue and are to be maintained and distributed in such and such ways, and in such and such situations.<sup>153</sup>

Put simply, Dewey argued for backing away from the essentialist theory debate by embracing the corporate form as a whole without seeking to find a single theory defining its essence.<sup>154</sup> Although the debate has continued, many scholars have embraced Dewey's work, and it did a great deal to quiet the essentialist theory debate for a large portion of the twentieth century.<sup>155</sup> With the injection of the economics into corporate law scholarship,<sup>156</sup> the debate was reawakened,<sup>157</sup> and the Supreme Court's recent opinions in *Citizen's United* and *Hobby Lobby* have reinvigorated the question of what defines the essence of a corporation.<sup>158</sup>

### III. COLLABORATION THEORY AND ITS IMPORT

All of the prevailing essentialist theories of the corporation have their virtues and their drawbacks. Each of the prevailing theories celebrates an aspect of the corporate form. The artificial entity theory celebrates the role of the government in the creation of the corporation;<sup>159</sup> the real entity theory celebrates the identity of corporation itself;<sup>160</sup> and the aggregate theory celebrates the role of

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<sup>153</sup> *Id.*

<sup>154</sup> *See id.*

<sup>155</sup> See Pollman, *Reconceiving Corporate Personhood*, *supra* note 24, at 1650 (“Many commentators view John Dewey’s 1926 Yale Law Journal article as having put an end to the corporate personhood debate.”).

<sup>156</sup> *See supra* notes 6–10 and accompanying text (examining the introduction of economics into corporate law scholarship).

<sup>157</sup> *See supra* notes 148–49 and accompanying text (suggesting that the emergence of the law and economics movement and influence in corporate law has driven an interest in aggregate theories of the corporation, especially the nexus of contracts theory, and as a result reinvigorated the debate over the essence of the corporate form).

<sup>158</sup> *See supra* note 24 and accompanying text (discussing the new wave of scholarship examining essentialist theories that has been touched off by the Supreme Court’s opinions in *Citizen’s United* and *Hobby Lobby*).

<sup>159</sup> *See supra* Part II.A (discussing the artificial entity theory of the corporation).

<sup>160</sup> *See supra* Part II.B (discussing the real entity theory of the corporation).

individuals in organizing and operating the corporation.<sup>161</sup> The problem is that none of these theories fully captures the essence of the corporation. This reality may give reason for embracing the indeterminacy of the corporation and embracing all of prevailing essentialist theories.<sup>162</sup> However, embracing the indeterminacy of the corporation is in fact embracing failure and accepting defeat in regard to understanding the essence of the corporate form. This Part advances a new essentialist theory of the corporation, collaboration theory, that is based upon perceiving charitable tax-exempt nonprofit corporations as collaborations among the state governments, federal government, and public. In this part, the need for, nature of, and importance of collaboration theory will be discussed.

#### A. The Need for Collaboration Theory

In 1873, an American poet and lawyer, John Godfrey Saxe, published *The Blind Men and the Elephant*.<sup>163</sup> The poem is a retelling of a parable that is common in India and is found in the Buddhist,<sup>164</sup> Hindu,<sup>165</sup> Jain,<sup>166</sup> and Sufi religious traditions on that subcontinent.<sup>167</sup> In the telling contained in the poem, six blind men are taken to interact with an elephant so that they can observe and understand the animal.<sup>168</sup> Each of the men experiences the elephant in a unique way, and each of the men comes to understand the essence of the animal very differently. The first man touches the elephant's side and declares the elephant to be like a wall; the second man touches the elephant's tusk and declares the elephant to be like a spear; the third man

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<sup>161</sup> See *supra* Part II.C (discussing the aggregate theory of the corporation).

<sup>162</sup> See *supra* Part II.D (discussing the reasons for embracing the indeterminacy of the corporation).

<sup>163</sup> John Godfrey Saxe, *The Blind Men and the Elephant*, in THE POEMS OF JOHN GODFREY SAXE 135, 135-36 (Boston, Houghton, Mifflin & Co., complete ed. 1873). Saxe is also known for the widely quoted maxim on law making: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." John Copeland Nagle, *Saxe's Aphorism*, 79 GEO. WASH. L. REV. 1505, 1506 (2011).

<sup>164</sup> See *Blind Men and Elephant*, in BUDDHIST PARABLES 75, 75-77 (Eugene Watson Burlingame trans., 1922) (containing a Buddhist retelling of the story).

<sup>165</sup> See DILIP KADODWALA, HINDUISM TEACHER'S RESOURCE BOOK 10-11 (2001) (containing a Hindu retelling of the story).

<sup>166</sup> See MARILYNN HUGHES, THE VOICE OF THE PROPHETS: WISDOM OF THE AGES, SIKHISM, JAINISM 591-92 (2005) (containing a Jain retelling of the story).

<sup>167</sup> See *The Blind Ones and the Matter of the Elephant*, in TALES OF THE DERVISHES: TEACHING-STORIES OF THE SUFI MASTERS OVER THE PAST THOUSAND YEARS 25, 25-26 (Idries Shah ed., 1967) (containing a Sufi retelling of the story).

<sup>168</sup> See Saxe, *supra* note 163, at 135-36.

touches the elephant's trunk and declares the elephant to be like a snake; the fourth man touches the elephant's knee and declares the elephant to be like a tree; the fifth man touches the elephant's ear and declares the elephant to be like a fan; and the sixth man touches the elephant's tail and declares the elephant to be like a rope.<sup>169</sup> Saxe closes his poem with the following stanza:

And so these men of Indostan  
Disputed loud and long,  
Each in his own opinion  
Exceeding stiff and strong,  
Though each was partly in the right,  
And all were in the wrong!<sup>170</sup>

The poem and the parables that it is based upon offer insight as to the need to take into account all available information about an item when trying to understand its essence.

In regard to essentialist theories of the corporation, each of the prevailing theories of the corporation offers substantial insight into the nature of the corporation. Although none of these theories should be characterized as "wrong," each of them fails to completely describe the essence of a corporation, especially a charitable tax-exempt nonprofit corporation. The artificial entity theory fails to take into account the role of individuals in creating and operating corporations and suggests that corporations exist by the will of the state alone.<sup>171</sup> The real entity underplays the role of the state and individuals in creating and operating the corporation by suggesting that corporations operate separate and apart from the state and individuals that create them.<sup>172</sup> Finally, the aggregate theory celebrates the role of individuals in creating and operating the corporation, but it fails to celebrate the role of the state in giving the corporation existence.<sup>173</sup> Each of these theories offers insight into the essence of the corporation, especially during the periods when each one was popularized.<sup>174</sup> However, they all fail to fully describe the corporation.

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<sup>169</sup> See *id.*

<sup>170</sup> *Id.* at 136.

<sup>171</sup> See *supra* Part II.A (discussing the artificial entity theory of the corporation).

<sup>172</sup> See *supra* Part II.B (discussing the real entity theory of the corporation).

<sup>173</sup> See *supra* Part II.C (discussing the aggregate theory of the corporation).

<sup>174</sup> See *supra* notes 124–26 and accompanying text (explaining that the artificial entity theory of the corporation reached the height of its popularity during the early days of the United States in which state governments passed special legislation to grant concessions to allow for the existence of corporations); *supra* notes 134–35 and

The descriptive failure of each of these theories creates an argument for the indeterminacy of the corporation, the path that was championed by John Dewey, which embraces all three of the prevailing theories of the corporation.<sup>175</sup> However, this solution is unsatisfying in two regards. First, it fails to give a definitive answer as to the true essence of a corporation because the prevailing theories contradict each other. For example, if one accepts the real entity theory and believes the corporation exists separate and apart from individuals who have organized it, the aggregate theory directly conflicts with this idea because that theory suggests that corporations are nothing more than the individuals that compose the corporation. Put simply, proponents of the indeterminacy of the corporation just give up trying to determine the essence of a corporation and are willing to accept ideas that are logically incoherent to avoid the tensions that the debate over the essence of corporations might create.

Second, even if one accepts and embraces all three prevailing essentialist theories of the corporation, these theories fail to fully answer the question of what the essence of a corporation is. At heart, the debate over the essence of corporations is a metaphysical inquiry into the question of what a corporation is. None of the prevailing essentialist theories fully answer this question, and even if these theories are cobbled together, they also fail to provide a satisfactory answer. To explain this point, an analogy will be helpful. Assume, for example, one wants to answer the metaphysical question of what is a bridge. Using similar reasoning as the prevailing essentialist theories of the corporation, one could provide three answers. First, one could claim that the bridge is an artificial structure created by state or other entities. This would basically be the artificial entity theory of bridges. Second, one could claim that the bridge simply exists, i.e., that the bridge is something separate and apart from the entities that created it. This would be the real entity theory of bridges. Third, one could claim that the bridge is the sum of its parts organized in a certain arrangement, and one could even do mathematical and economic

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accompanying text (explaining that the real entity theory of the corporation reached the height of its popularity during the late nineteenth and early twentieth centuries when the rise of general incorporation statutes across the United States allowed corporations greater separation from the state governments that provided for their incorporation); *supra* notes 148–49 and accompanying text (explaining that the aggregate theory of the corporation has reached the height of its popularity in the past few decades as a result of the corporation being reconceptualized as a result of the law and economics movement).

<sup>175</sup> See *supra* Part II.D (discussing that some individuals argue for embracing the indeterminacy the corporation).

analyses as to how these parts could be constructed and organized. This would be the aggregate theory of bridges. Each of these theories offers insights as to *how* bridges exist. The problem is that each of these theories fails to address *why* bridges exist. Even if one embraces the indeterminacy of bridges, the three essentialist theories of bridges never get beyond the question of *how* bridges exist. Without answering both *how* and *why* bridges exist, one cannot fully understand what bridges are, and the same is true for corporations.

One might claim that the question of *why* corporations exist is irrelevant to determining the essence of those entities, i.e., one could argue for an existentialist approach to determining the essence of corporations in which *how* corporations exist is placed above all else. René Descartes, for example, took such an approach to exploring the existence and the nature of human beings in his *Meditations on First Philosophy*.<sup>176</sup> In that work, Descartes explored his notion of “*cogito ergo sum*,” which can be translated, “I think therefore I am.”<sup>177</sup> He used this idea of *how* humans exist, as “thinking thing[s]” to understand the nature of being human and to validate human existence.<sup>178</sup> He ultimately employed this idea to validate the existence of material things and God.<sup>179</sup>

Such an existential approach, however, is not justified or appropriate in the case of corporations. First, such an approach does not get at the essence as to what a corporation is. An existential approach is appropriate in defining the essence of humans because thinking is one of their defining characteristics. As the bridge example offered above evidences, however, none of the prevailing theories of the corporation, which focus on *how* the corporation exists, fully entails the essence of a corporation. Descartes’ existential theory of human beings as “thinking thing[s]” gets at the essence of what humans are because they are defined by their ability to think.<sup>180</sup>

<sup>176</sup> RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY: WITH SELECTIONS FROM THE OBJECTIONS AND REPLIES* (John Cottingham ed. & trans., Cambridge Univ. Press, rev. ed. 1996) (1641) [hereinafter *MEDITATIONS*].

<sup>177</sup> Notably, Descartes did not expressly use the phrase “*cogito ergo sum*” in his *Meditations on First Philosophy*, although he thoroughly explored the concept underlying the phrase. See *id.* at 17. Descartes first used the phrase in his *Discourse on Method*. RENE DESCARTES, *DISCOURSE ON METHOD* 25 (Desmond M. Clarke, ed. & trans., Penguin Books 1999) (1637).

<sup>178</sup> See DESCARTES, *MEDITATIONS*, *supra* note 176, at 18 (“I am, then, in the strict sense only a thing that thinks; that is, I am a mind, or intelligence, or intellect, or reason . . . As I have just said — a thinking thing.”).

<sup>179</sup> See generally *id.*

<sup>180</sup> See *id.* at 18.

Second, existentialist theories are arguably appropriate in the context of human beings, while not being appropriate in the context of corporations, because society has an incomplete understanding of the origins of human beings. Descartes' existential musings are a necessary evil because humankind does not know why it exists. If one believes that human origins are solely the result of evolution, human beings occurred as a result of biological happenstance. If one believes that human origins are the result of intelligent design, knowing the reasoning of God for creating human beings is likely impossible. Put simply, the question of *why* humans exist is currently beyond human reach, which puts greater emphasis on the question of *how* humans exist. As this work evidences, however, the origins of corporations are recorded and can be fully traced.<sup>181</sup> As a result, in exploring the essence of corporations both *how* they exist and *why* they exist should be considered.

Put another way, a corporation is more similar to a bridge than a human being because, like a bridge, the reasons why corporations exist are fully understood. A bridge can be defined as “[a] structure spanning and providing passage over an obstacle . . .”<sup>182</sup> This definition provides an explanation of *how* a bridge exists, i.e., as a “structure,” and *why* a bridge exists, i.e., “providing passage over an obstacle.”<sup>183</sup> This definition is fuller and richer than if its author simply decided to just declare a bridge a “structure” and to leave it at that.<sup>184</sup> Similarly, a fuller essentialist theory of the corporation is needed that encompasses the question of *why* corporations exist. This work offers such a fuller theory of the corporation, and it applies that theory to charitable tax-exempt nonprofit corporations.

#### *B. The Nature of Collaboration Theory*

For purposes of this work, collaboration is defined as a common effort between or among multiple entities to accomplish a task or project. In regard to charitable tax-exempt nonprofit corporations, the term collaboration better describes these entities than any of the prevailing theories of the corporation. Charitable tax-exempt nonprofit corporations are common efforts among state governments,

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<sup>181</sup> See *supra* Part I (discussing the origins of charitable tax-exempt nonprofit corporations).

<sup>182</sup> WEBSTER's II NEW COLLEGE DICTIONARY, *supra* note 101, at 138 (providing a definition of the term “bridge”).

<sup>183</sup> *Id.*

<sup>184</sup> See *id.*

the federal government, and the public. In fact, these corporations would not exist in the absence of the efforts and the cooperation of these parties. State governments give life and define the contours of these corporations;<sup>185</sup> the federal government defines the requirements for and grants tax-exempt status;<sup>186</sup> and the public creates the demand for, organizes, and operates these entities.<sup>187</sup> In the absence of the efforts of the state governments, federal government, or the public, charitable tax-exempt nonprofit corporations as currently composed would cease to exist. The term collaboration also better describes the essence of charitable tax-exempt nonprofit corporations because the efforts of the state governments, federal government, and the public are focused on accomplishing a common task or project. Section 501(c)(3) of the Internal Revenue Code provides the relatively limited range of tasks and projects that these entities can be organized to achieve.<sup>188</sup> It provides that these entities can only be “[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals . . .”<sup>189</sup>

Collaboration theory is an improvement over the prevailing essentialist theories of the corporation because it describes *why* charitable tax-exempt nonprofit corporations exist in addition to *how* they exist. The artificial entity theory suggests that corporations exist solely based upon a concession by the state government;<sup>190</sup> the real entity theory suggests that corporations simply exist beyond the state governments and individuals that work to organize and operate them;<sup>191</sup> and the aggregate theory suggests that corporations exist simply as a collection of the parties organizing, operating, and interacting with the corporation and the contracts associated with those interactions.<sup>192</sup> For some of these theories, the purpose of these entities may be implicit. For example, one could argue that the artificial entity theory is founded upon the idea of the state advancing

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<sup>185</sup> See *supra* Part I.A (discussing the origins of nonprofit corporations).

<sup>186</sup> See *supra* Part I.B (discussing the origins of tax-exempt status).

<sup>187</sup> See *supra* Part I.C (discussing the origins of charitable behavior).

<sup>188</sup> 26 U.S.C. § 501(c)(3) (2012).

<sup>189</sup> *Id.*

<sup>190</sup> See *supra* Part II.A (describing the artificial entity theory of the corporation).

<sup>191</sup> See *supra* Part II.B (describing the real entity theory of the corporation).

<sup>192</sup> See *supra* Part II.C (describing the aggregate theory of the corporation).

certain goals through the state's concession of rights allowing for the formation of corporations.<sup>193</sup> In addition, for the proponent of law and economics championing the aggregate theory, the goal may be wealth maximization.<sup>194</sup> However, none of the prevailing theories explicitly answer the questions of why the parties organizing and operating corporations bind themselves together. Collaboration theory does because it makes explicit that the goal is to complete a common task or project.<sup>195</sup> Beyond that, collaboration theory is an improvement on embracing the indeterminacy of the corporation because it actually offers a coherent description of what the essence of a charitable tax-exempt nonprofit corporation is.<sup>196</sup>

### C. The Importance of Collaboration Theory

Although metaphysical debates over the essence of corporations may be an enjoyable way to pass the time, the issue that lingers is whether characterizing corporations as collaborations, rather than artificial entities, real entities, or aggregates of individuals, has any practical importance at all beyond the ivory towers of academia. In fact, collaboration theory helps to explain why the current law governing charitable tax-exempt nonprofit corporations gives these corporations separate entity status, why the state governments and federal government have the right to circumscribe the rights of these entities, and why the law currently governing these entities is permissible.

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<sup>193</sup> See *supra* notes 119–20 and accompanying text (explaining that under the artificial entity theory, the state grants a concession of rights to private individuals to pursue goals that the state would lack the time, money, and other resources to pursue).

<sup>194</sup> Many economists view humans as strictly rational, self-interested profit-maximizers. See *supra* notes 11–14 and accompanying text. Under this conception of human beings, corporations would have to be a vehicle for wealth maximization because human beings have no other goals.

<sup>195</sup> The application of collaboration theory in the for-profit context is complicated by the fact that the entities involved may have varied goals in being involved with the corporate entity. This issue will be discussed later in this work. See *infra* Part IV.C (discussing whether collaboration theory works in the context of for-profit corporations).

<sup>196</sup> See *supra* Part II.D and accompanying text (explaining that proponents of the indeterminacy theory of the corporation argue that there is no coherence among the prevailing essentialist theories of the corporation and simply embrace all of them). *But see infra* Part IV.A (arguing that collaboration theory offers a middle ground among all three of the prevailing essentialist theories of the corporation).

Charitable tax-exempt nonprofit corporations are afforded separate entity status beyond the state governments, the federal government, and the individuals who facilitate their existence and operation.<sup>197</sup> These corporations can enter into contracts, sue and be sued, and do a variety of other things that human beings can do.<sup>198</sup> The prevailing essentialist theories of the corporation do provide answers as to why this separate entity status exists. Proponents of the artificial entity often attribute this status to a concession by the state for purposes allowing the corporation to operate;<sup>199</sup> proponents of the real entity theory often attribute it to the emergent properties of a group of people banding together to form a corporation;<sup>200</sup> and proponents of the aggregate theory often attribute it to being a derivative quality of the entity status of the humans that organize and operate the corporation.<sup>201</sup> Collaboration theory, however, provides a deeper reason as to why this entity status exists. As the well-worn adage suggests, “two heads are better than one.” The idea is that when individuals collaborate, they are able to be more than any single individual could be alone.

Psychologists have validated this idea through various studies.<sup>202</sup> The existing research suggests that when collaboration occurs, groups are almost always able to achieve more than individuals are able to achieve by themselves.<sup>203</sup> Group members are able to build upon the talents, ideas, and resources of other group members to achieve more,<sup>204</sup> and collaborative production tends to be greater with more

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<sup>197</sup> See *supra* Part I (discussing the origins of the charitable tax-exempt nonprofit corporation and the role that state governments, the federal government, and individuals play in the organization, and the operation of these entities).

<sup>198</sup> See FISHMAN & SCHWARZ, *supra* note 63, at 52 (“The [nonprofit] corporation is an artificial entity that can sue and be sued, contract, and hold property in its own name.”); SCHMIDT, *supra* note 61, at 47 (explaining that nonprofit corporations “can sue and be sued, contract, and hold property”).

<sup>199</sup> See *supra* Part II.A (discussing the artificial entity theory of the corporation).

<sup>200</sup> See *supra* Part II.B (discussing the real entity theory of the corporation).

<sup>201</sup> See *supra* Part II.C (discussing the aggregate theory of the corporation).

<sup>202</sup> See R. Keith Sawyer, *The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law*, 86 NOTRE DAME L. REV. 2027, 2041 (2011) (providing summary of research suggesting “[t]eams generate better scientific research, and more important inventions, than solitary individuals”).

<sup>203</sup> See Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2014 (2011) (“Psychology studies find that the problem-solving capabilities of a group often exceed the problem-solving capabilities of an individual.”).

<sup>204</sup> See *id.* at 2000 (“[P]sychological research highlights the dynamic value of collaboration to creativity. Studies reveal that group collaboration can allow group

substantial results.<sup>205</sup> Because of a growing recognition of the importance of collaboration, collaborative behavior and organizational innovation has increased dramatically within the past few decades.<sup>206</sup>

Under collaboration theory, the reason why the corporation has separate entity status is because the collaboration amongst individuals and the government has created something beyond the constituent parts. This idea builds upon the work of German legal theorist Otto von Gierke who is credited with providing a foundation for the development of the real entity theory of the corporation in the United States.<sup>207</sup> As previously discussed, Gierke suggested that corporations have real entity status because they are the manifestation of the collective spirit of the individuals who compose them.<sup>208</sup> Collaboration theory goes beyond Gierke's work because it explains

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members to build on each others' ideas in ways that synergistically enhance individual and overall creativity.").

<sup>205</sup> See Michael I. Meyerson, *Law School Culture and the Lost Art of Collaboration: Why Don't Law Professors Play Well with Others?*, 93 NEB. L. REV. 547, 589 (2015) ("When properly understood, collaboration is not the opposite of individualism, but a vital part of the process whereby an individual can achieve more of his or her unique potential."). See generally MORTEN T. HANSEN, *COLLABORATION: HOW LEADERS AVOID THE TRAPS, CREATE UNITY, AND REAP BIG RESULTS* (2009) (discussing the importance of collaboration within organizations to achieve better results); EVAN ROSEN, *THE CULTURE OF COLLABORATION: MAXIMIZING TIME, TALENT AND TOOLS TO CREATE VALUE IN THE GLOBAL ECONOMY* (2009) (examining the growing importance of collaboration in value creation within the modern world); KEITH SAWYER, *GROUP GENIUS: THE CREATIVE POWER OF COLLABORATION* (2007); LEIGH THOMPSON, *CREATIVE CONSPIRACY: THE NEW RULES OF BREAKTHROUGH COLLABORATION* (2013) (analyzing the role of collaboration in innovation and meeting challenges).

<sup>206</sup> See Sawyer, *supra* note 202, at 2041 ("The historical data show that collaboration is becoming more widespread. In addition, research shows that this increased collaboration has also increased creativity."); Brenda M. Simon, *The Implications of Technological Advancement for Obviousness*, 19 MICH. TELECOMM. & TECH. L. REV. 331, 351-52 (2013) ("In many fields, the inventor is no longer an individual, but instead a 'research entity.' As evidence of the trend toward collaboration, the average number of inventors listed in patent filings from the 1970s through the 2000s has increased by fifty percent."); Stefan Wuchty, Benjamin F. Jones & Brian Uzzi, *The Increasing Dominance of Teams in Production of Knowledge*, 316 SCIENCEEXPRESS 1036, 1036 (2007) ("Research is increasingly done in teams across virtually all fields. Teams typically produce more highly cited research than individuals do, and this advantage is increasing over time. Teams now also produce the exceptionally high impact research, even where that distinction was once the domain of solo authors.").

<sup>207</sup> See *supra* notes 136-39 and accompanying text (explaining the influence of Gierke's work in the development of the real entity theory in the United States).

<sup>208</sup> See *supra* notes 138-39 (explaining Gierke's theory that when individuals associate, a real entity is created that has an existence separate and apart from the individuals who compose it).

why corporations are something separate and apart from the state governments, the federal government, and individuals who facilitate their existence.<sup>209</sup>

Collaboration theory explains why corporations have separate entity status, and unlike the other prevailing theories, it does a better job of explaining why the state governments and the federal governments have the ability to circumscribe the rights of those entities. Once the separate entity status of a corporation is recognized, the issue then becomes what sort of rights that entity has. In fact, the wave of scholarship that has occurred in the wake of the Supreme Court of the United States's opinions in *Citizens United* and *Hobby Lobby* has largely been a debate of what sorts of rights should be attributed to corporations and what sorts of powers should the federal and state governments have to circumscribe those rights.<sup>210</sup>

Under the prevailing theories of the corporation, the rights that are attributed to corporations and the power of the government to circumscribe those rights remain murky. If one accepts the artificial entity theory, then the rights attributed to the corporation and the power of the state to circumscribe those rights is defined by the concession that the state makes in allowing the organization and operation of the corporation.<sup>211</sup> Under this theory, the corporation

<sup>209</sup> Notably, a similar debate exists in regard to the status of general partnerships in which legal scholars have disputed whether they should be perceived as aggregates of individuals or entities separate from those who compose them. See RICHARD D. FREER & DOUGLAS K. MOLL, PRINCIPLES OF BUSINESS ORGANIZATIONS 72-74 (2013) (examining the debate as to whether a partnership should be considered an aggregate of individuals or a separate entity from those who compose it); Bradley T. Borden, *Aggregate-Plus Theory of Partnership Taxation*, 43 GA. L. REV. 717, 719 (2009) ("A predominant legal question over the last century has been whether partnerships are entities separate from their members or merely an aggregate of their members."); Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 396 (1989) ("The central problem of partnership law has been the development of a framework for determining the substantive rights and obligations arising out of the partnership relationship. Historically, this problem has been addressed on a conceptual basis, determined by whether a partnership is viewed as an 'entity,' a legal person separate from its partners, or an 'aggregate,' a relationship among the partners."). For sake of logical consistency, adopters and proponents of collaboration theory would likely have to adopt the view that partnerships are entities that exist separate and apart from the individuals who compose them. However, a thorough exploration of this topic is beyond the scope of this work.

<sup>210</sup> See *supra* note 24 (providing citations to various articles exploring what sorts of rights should be afforded to corporations in the wake of the Supreme Court's opinions in *Citizens United* and *Hobby Lobby*).

<sup>211</sup> See *supra* note 122 and accompanying text (reporting that under the artificial entity theory the rights of the corporation are defined by the concession made by the

exists based upon the will of the state, and as a result, the state should have the power to define and circumscribe the corporation's rights.<sup>212</sup> The problem is that most scholars no longer accept this theory of the corporation because the formation of corporations has changed dramatically since this theory was initially formulated.<sup>213</sup>

The real entity theory does not provide a clear answer as to what rights a corporation has and what powers the state has to circumscribe those rights.<sup>214</sup> If one accepts that groups possess a collective spirit that creates an entity separate and apart from their members, understanding what rights these entities have and the ability of the government to circumscribe those rights is a difficult task.<sup>215</sup> The real entity theory emerged during the late nineteenth and early twentieth centuries.<sup>216</sup> This means that the framers of the Constitution and Bill of Rights could not have had this conception of the corporation in mind when they drafted those documents. One might claim that these rights are somehow inalienable and natural to the real entity, but that seems odd and tortured, especially because of the relatively recent addition of the real entity theory to the prevailing theories of the corporation.<sup>217</sup> The rights of a corporation would then come to be defined by the state constitutions in which a corporation was organized and/or operates. Some of these constitutions would have been adopted before the creation of the real entity theory, and some of these constitutions would have been adopted after the formulation of the real entity theory. This would create a bizarre patchwork of corporate rights that does not seem correct or workable.

Finally, if one accepts the aggregate theory, the rights of corporation become easier to define and understand because they are derivative of

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state to allow for the corporation's existence).

<sup>212</sup> See *supra* notes 121–22 and accompanying text (explaining that under the artificial entity theory state governments have the right to define and circumscribe the rights of corporations because the existence of the corporation is dependent upon the state).

<sup>213</sup> See *supra* notes 129–30 and accompanying text (reporting that the popularity of the artificial entity theory has waned as a result of the transition from the chartering of corporations by the Crown and specific legislative acts to organization under general incorporation statutes).

<sup>214</sup> See *supra* Part II.B (explaining the real entity theory of the corporation).

<sup>215</sup> See *supra* Part II.B.

<sup>216</sup> See *supra* notes 134–35 and accompanying text (discussing the emergence of the real entity theory of the corporation in the United States).

<sup>217</sup> See *supra* note 134 and accompanying text (explaining that the real entity theory of the corporation emerged in the United States during the late nineteenth and early twentieth centuries).

the rights of the individuals that compose the corporation.<sup>218</sup> However, proponents of the aggregate theory have difficulty explaining the ability of the government to circumscribe those rights. This very issue fueled the Supreme Court of the United States's holding in *Citizens United* and *Hobby Lobby*, and it fueled the fervor that resulted over those opinions.<sup>219</sup> One response is to argue that the government simply does not and should not have the ability to circumscribe the rights of the corporation because they have rights that are derivative of the individuals that compose them. The problem is that people in the United States have widely accepted that the government has the ability to define and circumscribe the rights of corporations.<sup>220</sup>

Collaboration theory explains why the government has the right to circumscribe the rights of corporations. Because a collaboration is an effort between or among multiple entities to accomplish a task or project,<sup>221</sup> the entities involved should have the ability to determine the direction and scope of that collaboration. In regard to charitable nonprofit tax-exempt corporations, this explains why state governments and the federal government have the ability to define the rights of these entities and why these rights are not coexistent with real people. Under this conception of the corporation, individuals retain their rights to fully and freely associate, but the state and federal governments retain the ability to determine with whom they want to collaborate. Although this might sound restrictive because it will limit some individuals' ability to associate using the corporate form, this is actually how the world currently works. State governments currently determine when individuals are able to promote the formation of a corporation because each state's general incorporation statute contains guidelines for when incorporation is permissible.<sup>222</sup>

<sup>218</sup> See *supra* note 141 and accompanying text (reporting that under the aggregate theory the rights of the corporation are derivative of the individuals composing it).

<sup>219</sup> See *supra* note 24 (providing citations from the wave of scholarship touched off by the Supreme Court's opinions in *Citizens United* and *Hobby Lobby*).

<sup>220</sup> See *supra* Part I.A (providing a historical perspective on the government's role in creating and defining the rights of corporations).

<sup>221</sup> See *supra* Part III.B (defining a "collaboration" and discussing the nature of collaboration theory).

<sup>222</sup> See FRANKLIN A. GEVURTZ, *CORPORATION LAW* 34 (2d ed. 2010) ("[C]orporations exist by virtue of state statutes. These general incorporation laws both enable persons to form a corporation and provide rules concerning the entity."); HAMILTON & FREER, *supra* note 49, at 5 ("[C]orporation[s] can only be formed by satisfying the requirements set forth by state statutes."); ARTHUR R. PINTO & DOUGLAS M. BRANSON, *UNDERSTANDING CORPORATE LAW* 3 (3d ed. 2009) ("Every state has a corporate law

Collaboration theory also validates the currently existing law governing charitable tax-exempt nonprofit corporations. Notably, section 501(c)(3) of the Internal Revenue Code contains express prohibitions on the political activities of charitable tax-exempt nonprofit corporations.<sup>223</sup> Tax-exempt status pursuant to section 501(c)(3) can only be obtained by nonprofit corporations that “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>224</sup> The prohibition against lobbying by charitable nonprofit tax-exempt corporations has been in place since the Revenue Act of 1934,<sup>225</sup> and the prohibition against campaigning by charitable nonprofit tax-exempt corporations has been in place since the Revenue Act of 1954.<sup>226</sup> Prior to the Supreme Court’s opinion in *Citizens United*,<sup>227</sup> these prohibitions were well entrenched and their validity seemed beyond peradventure.<sup>228</sup> After *Citizens United*,<sup>229</sup> however, the validity of these prohibitions seems less certain because they interfere with the exercise of free speech, and as a result, they raise constitutional concerns.<sup>230</sup>

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statute that provides the rules for corporations incorporated in that state . . . . The statutes indicate how to incorporate, deal with financing and legal capital rules, establish the basic structure of the board of directors, deal with shareholder power and rights, and disposes of a variety of other issues.”).

<sup>223</sup> 26 U.S.C. § 501(c)(3) (2012).

<sup>224</sup> *Id.*

<sup>225</sup> Revenue Act of 1934, ch. 277, § 23, 48 Stat. 680, 690.

<sup>226</sup> Revenue Act of 1954, ch. 736, § 501(c)(3), 68A Stat. 3, 163.

<sup>227</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>228</sup> See NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, UNDERSTANDING NONPROFIT AND TAX-EXEMPT ORGANIZATIONS 89 (2d ed. 2012) (reporting in 2012 that although § 501(c)(3) had been challenged in a variety of instances on First Amendment grounds, “[n]one of these challenges have had much success in the courts . . . .”); Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 869 (1993) (“Various taxpayers who were denied section 501(c)(3) status because of excessive lobbying have asserted that the limits on lobbying violate their right to free speech. Courts have had no difficulty holding that the government can refuse to grant section 501(c)(3) status to organizations engaging in substantial lobbying.”); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 48 (2003) (reporting in a 2003 article that “[f]rom a free speech standpoint, the 501(c)(3) prohibitions are constitutional”).

<sup>229</sup> See *Citizens United*, 558 U.S. 310.

<sup>230</sup> See *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321,

Collaboration theory validates the ability of the federal government to limit the availability of tax-exempt status to charitable nonprofit corporations engaging in political activities that otherwise might be protected by the First Amendment. Because a collaboration is an effort between or among multiple entities to accomplish a task or project,<sup>231</sup> the entities involved should have the ability to define the contours of that collaboration.

The idea of allowing the federal government to define First Amendment rights based upon the notion that charitable nonprofit corporations are collaborations is controversial. If it applies, the government speech doctrine that has developed in Supreme Court jurisprudence may dovetail nicely with collaboration theory and allow the government to define First Amendment rights in the context of the tax-exempt status of charitable nonprofit corporations. The government speech doctrine provides that although the Free Speech Clause of the First Amendment limits the government's ability to restrict speech of private individuals and other entities,<sup>232</sup> the

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2332 (2013) (holding that a that a law requiring that organizations have an express policy opposing prostitution in order to receive government funding violated those organizations' First Amendment rights); Brandon S. Boulter, Note, *Expensive Speech: Citizens United v. FEC and the Free Speech Rights of Tax-Exempt Religious Organizations*, 2010 BYU L. REV. 2243, 2244-45 ("With a new emphasis on First Amendment political speech rights under the Citizens United decision, it is likely that any challenge to the § 501(c)(3) restrictions would be based on the doctrine of unconstitutional conditions, which limits the types of conditions government can place on the benefits it provides. Although this doctrine has been used to make similar arguments in the past, the new First Amendment paradigm established by the Citizens United holding has changed the legal landscape on this issue."); Seth Korman, Note, *Citizens United and the Press: Two Distinct Implications*, 37 RUTGERS L. REC. 1, 7 (2010) ("Citizens United, in granting corporations additional free-speech rights, may have provided significant ammunition to push back on 501(c)(3) restrictions against political advocacy."); Hannah Lepow, Note, *Speaking Up: The Challenges to Section 501(c)(3)'s Political Activities Prohibition in a Post-Citizens United World*, 2014 COLUM. BUS. L. REV. 817, 819-20 ("[T]he Supreme Court has issued strong First Amendment protections in recent cases involving corporate political activity and the government's ability to condition speech on the receipt of a benefit. In the wake of these decisions, the political activities prohibition might soon face a First Amendment challenge."); Jennifer Rigterink, Comment, *I'll Believe It When I "C" It: Rethinking § 501(c)(3)'s Prohibition on Politicking*, 86 TUL. L. REV. 493, 496 (2011) ("The new First Amendment paradigm established in *Citizens United v. FEC* has significantly altered the legal landscape of political speech restrictions and created a slight gap in the United States Supreme Court's jurisprudence that could breathe new life into challenging the politicking ban on § 501(c)(3) organizations.").

<sup>231</sup> See *supra* Part III.B (defining a "collaboration" and explaining the nature of collaboration theory).

<sup>232</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment

government does have the ability to restrict speech when it is speaking on behalf of itself.<sup>233</sup> In *Rust v. Sullivan*,<sup>234</sup> for example, the Supreme Court of the United States held that regulations of the United States Department of Health and Human Services prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in counseling, referral, and distribution of information regarding abortion did not constitute a violation of the First Amendment.<sup>235</sup> Writing for the Court, Chief Justice Rehnquist stated, “To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.”<sup>236</sup> As a result, the Court held that the restrictions on speech within the collaboration between the private parties and the government did not violate the First Amendment. The Court ultimately held, “[T]he general rule that the Government may choose not to subsidize speech applies with full force.”<sup>237</sup> A similar sort of analysis could be applied in the context of charitable tax-exempt nonprofit corporations if collaboration is applied. Because corporations are collaborations with the government, the argument would be that the government is fully entitled to restrict the speech of those entities because that speech within the context of the collaboration is in fact government speech.

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of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>233</sup> See Blake R. Bertagna, *The Government’s Ten Commandments: Pleasant Grove City v. Summum and the Government Speech Doctrine*, 58 DRAKE L. REV. 1, 10 (2009) (“When the government is the speaker — whether through its own employees or private parties — it is able to regulate its own speech free of the traditional First Amendment forum-analysis constraints. The government has a bundle of duties that it must fulfill at many different levels to successfully govern, all of which require the government to speak in some form.”); Barry P. McDonald, *The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a “Jurisprudence of Labels.”* 2010 BYU L. REV. 2071, 2071 (“In its current incarnation, [the government speech] doctrine holds that whenever it can be said that the government is engaging in speech, then it is not subject to First Amendment limitations with respect to the impact its actions or message may have on private speakers associated with that speech.”).

<sup>234</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>235</sup> *Id.* at 192-200.

<sup>236</sup> *Id.* at 194.

<sup>237</sup> *Id.* at 200.

The limits of the government speech doctrine remain murky, however, because the Supreme Court's case law applying the doctrine is limited,<sup>238</sup> and the Supreme Court has never articulated a clear standard for when the doctrine applies.<sup>239</sup> The interaction between the government speech doctrine and the doctrine of unconstitutional conditions also remains unclear. The doctrine of unconstitutional conditions provides that the government cannot condition a person's or an entity's receipt of a governmental benefit on the relinquishment of a constitutionally protected right.<sup>240</sup> The Supreme Court has applied this doctrine in the context of First Amendment rights and charitable organizations. In *Agency for International Development v. Alliance for Open Society International, Inc.*,<sup>241</sup> the Supreme Court held that the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act") violated the First Amendment by mandating that organizations receiving certain federal funding adopt policies explicitly opposing prostitution and sex trafficking.<sup>242</sup> Writing for the majority, Chief Justice John Roberts stated, "The Policy

<sup>238</sup> See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that statements of public employees made pursuant to their official duties is government speech that is not subject to First Amendment protection because of the government speech doctrine); *Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. 550 (2005) (holding that generic beef advertising by the Beef Board Operating Committee was effectively controlled by the federal government and thus was not subject to First Amendment protection because of the government speech doctrine); *Rust*, 500 U.S. 173 (holding that regulations of the United States Department of Health and Human Services prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in counseling, referral, and distribution of information regarding abortion did not constitute a violation of the First Amendment because of the government speech doctrine).

<sup>239</sup> See Lilia Lim, Comment, *Four-Factor Disaster: Courts Should Abandon the Circuit Test for Distinguishing Government Speech from Private Speech*, 83 WASH. L. REV. 569, 570 (2008) ("While the Supreme Court has explained some of the things government can do when it is speaking, it has not clearly explained how to tell whether government is speaking in the first place."); Jennifer Thacker, Comment, *Enough Smoke and Mirrors! — Why the Graphic-Warning Mandate Under the Family Smoking Prevention and Tobacco Control Act Is Speech Consumers Don't Want To Hear*, 44 U. TOL. L. REV. 659, 701 (2013) ("Because the government-speech doctrine is still relatively young, the standard for determining whether speech should be attributed to the government or to a private party is often unclear.").

<sup>240</sup> See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.").

<sup>241</sup> 133 S. Ct. 2321 (2013).

<sup>242</sup> See *id.* at 2331-32.

Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained.”<sup>243</sup> Although collaboration theory when coupled with the government speech doctrine and other similar doctrines may help to explain why the government could be allowed to restrict corporate speech and limit other corporate constitutional rights, the unconstitutional conditions doctrine makes the results, if this matter reaches the Supreme Court, hard to predict.

In general, the exact course that the Supreme Court will take regarding the rights of corporations is unclear, and it is currently being aggressively debated.<sup>244</sup> A lot of this confusion emanates from the Court’s failure to adopt a single essentialist theory of the corporation.<sup>245</sup> This is understandable because all of the prevailing essentialist theories of the corporation have their virtues and drawbacks. This has led the Court intentionally or unintentionally to embrace the indeterminacy of the corporation in a manner to that suggested by John Dewey.<sup>246</sup> Although this approach is seductive as a theory and has merit in many contexts, embracing the indeterminacy of the corporation, or at least failing to adopt a single essentialist theory of the corporation has led to bedlam in Supreme Court jurisprudence.<sup>247</sup>

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<sup>243</sup> *Id.* at 2332.

<sup>244</sup> See *supra* note 24 (providing citations to various recent articles exploring the rights of corporations under the United States Constitution).

<sup>245</sup> See Harkins, *supra* note 24, at 203 (reporting that “the Supreme Court has never decided: on what basis, if any, is a corporation a ‘person’ entitled to assert the constitutional and statutory rights of natural persons?”); Iuliano, *supra* note 24, at 98 (“The Supreme Court has grappled with the issue of corporate personhood for more than two hundred years. Despite addressing the topic in dozens of cases, the Court has never adopted a coherent, consistent account of corporate personhood.”); Padfield, *The Silent Role of Corporate Theory*, *supra* note 24, at 864 (discussing the Supreme Court’s “avoidance and denial of the role of corporate theory in cases involving the rights and responsibilities of corporations under the Constitution”).

<sup>246</sup> See *supra* notes 151–55 and accompanying text (discussing John Dewey’s argument for embracing the indeterminacy of the corporation).

<sup>247</sup> See Dibadj, *supra* note 24, at 734 (“[A]s Supreme Court precedent [regarding the corporation] evolved, it became sadly muddled and . . . today the Court has essentially given up on theorizing the corporation.”); Harkins, *supra* note 24, at 307 (arguing that “*Hobby Lobby* well-illustrate[s] the confusion and inconsistency caused by the Supreme Court’s failure to define when and why a corporation may, and may not, claim the rights of a ‘person’”); Pollman, *Reconceiving Corporate Personhood*, *supra* note 24, at 1647 (“Despite robust debate of corporate personality from the turn of the century to the 1930s, as well as dissenting calls for reexamination of the doctrine, the Court has not grounded the expansions of corporate rights in a coherent concept of

The importance of collaboration theory is that, if adopted, it helps to explain how and why corporations exist,<sup>248</sup> and in addition, collaboration theory helps to explain why the government has the power to regulate corporations. If collaboration theory is adopted, the ability of the federal government to limit political activities may be justified by existing Supreme Court doctrines, e.g., the government speech doctrine, but adoption of a coherent essentialist theory of the corporation should also signal an opportunity for the Court to revisit its case law in the area and render it coherent. Although much of the existing case law will likely be validated, some of it will likely need to be reimagined. The point, however, is that collaboration offers a superior theory of the corporation because it explains *how* and *why* charitable tax-exempt nonprofits exist, and should therefore be adopted.

#### IV. POTENTIAL CONCERNS ABOUT COLLABORATION THEORY

This Article breaks new ground by offering an innovative essentialist theory of the corporation that explains both *how* and *why* the charitable tax-exempt nonprofit corporation exists.<sup>249</sup> Because the metaphysical debate over the essence of the corporate form has raged for centuries, answering all of the potential questions and concerns about collaboration theory in a single article or even a series of articles would be impossible, especially considering that the nature of the corporation interfaces with numerous other complex areas of the law.<sup>250</sup> In this Part, a few of the more substantial potential concerns about collaboration theory will be addressed, including whether it is truly different than the prevailing essentialist theories of the corporation, whether it is a viable theory considering that charitable tax-exempt nonprofit corporations sometimes engage in controversial and antisocial behavior, and whether it can and should be viewed as a coherent essentialist theory for for-profit corporations.

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corporate personhood nor used a consistent approach in determining the scope of corporate rights. . . . Mapping the panoply of corporate rights and the rationale for them has become increasingly complex, and what the doctrine of corporate personhood stands for has become obscured.”).

<sup>248</sup> See *supra* Part III.A (explaining the need for collaboration theory).

<sup>249</sup> See *supra* Part III.B (explaining the nature of collaboration theory).

<sup>250</sup> See *supra* notes 231–43 and accompanying text (examining how collaboration theory might interface with the complex case law and legal doctrines surrounding the First Amendment).

A. *Is Collaboration Theory Different than the Prevailing Essentialist Theories of the Corporation?*

One of the obvious complaints about the discussion in this Article of the prevailing essentialist theories of the corporation is that it only provides caricatures of these theories.<sup>251</sup> Although this work offers a solid introduction to these theories, it offers very little analysis of the nuanced approaches to thinking about these theories that have developed over the centuries during which the essence of the corporation has been debated.<sup>252</sup> In addition, many of these nuanced approaches offer more reasonable essentialist theories of the corporation. Some of these more nuanced approaches even look similar to collaboration theory. All of the prevailing essentialist theories can be tweaked in ways that make them look similar to collaboration theory. Artificial entity theory, for example, places the state at the center of the conception of the corporation because the corporation owes its existence to a concession by the state.<sup>253</sup> To make artificial entity theory look like collaboration theory, all one has to do is acknowledge the role of individuals in organizing and operating the corporation. In regard to real entity theory, proponents of this theory argue that corporations exist separate and apart from their owners and managers as distinct entities.<sup>254</sup> Collaboration theory makes a similar claim about corporations because collaborations create something that is greater than any of the collaborators could create alone.<sup>255</sup> To make real entity theory look like collaboration theory, one has only to argue that real entity status results from the collaboration of the entities who facilitate the organization and operation of the corporation. In regard to aggregate theory, this theory focuses on the entities composing the corporation and the relationships among them.<sup>256</sup> To make this theory, especially the nexus of contracts variety of it, look like collaboration

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<sup>251</sup> See *supra* Part II (providing an overview of the prevailing essentialist theories of the corporation).

<sup>252</sup> See *supra* Part II.

<sup>253</sup> See *supra* Part II.A (providing an overview of the artificial entity theory of the corporation).

<sup>254</sup> See *supra* Part II.B (providing an overview of the real entity theory of the corporation).

<sup>255</sup> See *supra* notes 197–209 and accompanying text (explaining that under collaboration theory, corporations have separate existence from the entities organizing and operating them because collaboration allows for the creation of results that exceed the results that individuals could achieve working alone).

<sup>256</sup> See *supra* Part II.C (providing an overview of the aggregate theory of the corporation).

theory, all one has to do is count the state governments' and federal government's involvement with corporations among the aggregate of entities working together to organize and operate the corporation. Finally, in regard to the indeterminacy theory, this theory argues for embracing all of the prevailing essentialist theories of the corporation at the same time.<sup>257</sup> Notably, collaboration theory seems to embrace aspects of all of the prevailing theories of the corporation. All of this creates the question of whether collaboration theory is actually different from the prevailing essentialist theories of the corporation.

Collaboration theory does vary from the existing prevailing essentialist theories in a variety of substantial ways. First, collaboration theory finds a discernible middle ground among all of the prevailing theories of the corporation. Similar to the blind men in the parable memorialized in *The Blind Men and The Elephant*, proponents of the artificial entity, real entity, and aggregate theories of the corporation have all captured some aspect of the object that they seek to describe, i.e., the corporate form, without describing the whole entity.<sup>258</sup> The reason that the prevailing theories of the corporation are the prevailing theories is because an element of truth exists about each of them. One option is to accept that each theory alone does not fully explain the essence of the corporation and to embrace the indeterminacy of the corporation.<sup>259</sup> This is exactly what John Dewey suggested in 1926 when he published *The Historic Background of Corporate Legal Personality*, which stated Dewey's argument so compellingly that it silenced the debate over the essence of the corporation for decades afterward.<sup>260</sup> The problem is that this approach still leaves the true nature of corporations uncertain, which creates issues regarding how these entities should interact with the law. *Citizens United* and *Hobby Lobby* offer convincing examples of why embracing the indeterminacy of corporations is not optimal.

Collaboration theory finds a discernible middle ground among the prevailing theories of the corporation, rather than leaving courts, practitioners, and commentators in the middle of a Bermuda Triangle

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<sup>257</sup> See *supra* Part II.D (providing an overview of the indeterminacy theory of the corporation).

<sup>258</sup> See *supra* notes 163–70 and accompanying text (discussing the parable memorialized in the poem, *The Blind Men and the Elephant*, by John Godfrey Saxe).

<sup>259</sup> See *supra* Part II.D (explaining that some individuals advocate for embracing all of the prevailing essentialist theories and embracing the indeterminacy of the corporation).

<sup>260</sup> See *supra* notes 151–55 and accompanying text (discussing John Dewey's work arguing for embracing the indeterminacy of the corporate form).

created by the three prevailing theories of the corporation.<sup>261</sup> It embraces aspects of each of the prevailing theories of the corporation. For example, similar to artificial entity theory, collaboration theory embraces the importance of the concession made by the state in the creation of the corporation, and it recognizes that corporations would not exist in the absence of the state.<sup>262</sup> Similar to artificial entity theory and real entity theory, collaboration theory provides that the corporation is a separate entity, although it does not take a stance on whether it is an artificial or real entity.<sup>263</sup> Finally, similar to aggregate theory, collaboration theory celebrates that the corporation is an aggregate of entities collaborating together, which arguably can be viewed as a nexus of contracts.<sup>264</sup> Collaboration theory also rejects pieces of the prevailing essentialist theories of the corporation to provide a coherent theory of the corporation. It rejects just considering the corporation an artificial entity because such an approach ignores the role of the individuals organizing and operating the corporation.<sup>265</sup> Collaboration theory also rejects just considering the corporation a real entity without deeper exploration because such explanation of the corporation as a collaboration is needed to fully understand the corporation.<sup>266</sup> Finally, collaboration theory rejects the notion of the corporation as just being an aggregate of entities because it fails to explain the separate entity status that exists for corporations in the United States.<sup>267</sup>

Second, in addition to finding a discernible middle ground among the prevailing essentialist theories of the corporation, collaboration theory also builds upon the foundations of those theories. Collaboration theory explains both *how* and *why* corporations exist, which does more to answer the metaphysical inquiry of what the essence of the corporate form is.<sup>268</sup> As explained above, a collaboration is a common effort between or among multiple entities to accomplish a task or project.<sup>269</sup> When one uses this definition as a basis for an essentialist theory of the corporation, it provides a fuller and deeper

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<sup>261</sup> See *supra* Part III.B (describing the nature of collaboration theory).

<sup>262</sup> See *supra* Part II.A (discussing the artificial entity theory of the corporation).

<sup>263</sup> See *supra* Parts II.A–B (discussing the artificial entity theory and the real entity theory).

<sup>264</sup> See *supra* Part II.C (discussing the aggregate theory of the corporation).

<sup>265</sup> See *supra* Part II.A (discussing the artificial entity theory of the corporation).

<sup>266</sup> See *supra* Part II.B (discussing the real entity theory of the corporation).

<sup>267</sup> See *supra* Part II.C (discussing the aggregate theory of the corporation).

<sup>268</sup> See *supra* Part III.B (describing the nature of collaboration theory).

<sup>269</sup> See *supra* Part III.B.

understanding of the corporation than any of the prevailing theories. The prevailing theories of the corporation provide explanations of *how* corporations exists, i.e., as artificial entities, real entities, or aggregates, but they fail to explain *why* they exist. For some economists, they may find it acceptable that the answer to the question of why corporations exist is implicit by claiming that it is obviously wealth maximization.<sup>270</sup> However, that explanation does not work well for charitable tax-exempt nonprofit corporations because of the nature of those firms,<sup>271</sup> and it fails to take into account the wide range of motivations that cause individuals to associate in the United States.<sup>272</sup>

Third, even if artificial entity theory, real entity theory, and aggregate theory can be described in ways that might seem similar to collaboration theory, employing the term “collaboration theory” rebrands the prevailing theories of the corporation in a more accurate and more compelling way. As explained above, collaboration theory is different than the prevailing theories of the corporation. It incorporates some aspects of all of these theories; it rejects other aspects; and it adds additional insights into the essence of the corporate form.<sup>273</sup> As a result, this new theory deserves to have a new name, i.e., collaboration theory. Even if one believes that collaboration theory is somehow the same as one or more of the existing theories of the corporation, which it is not, using the term “collaboration theory” better describes the essence of the corporation because the term alludes to *how* and *why* corporations exist. The names of the prevailing essentialist theories of the corporation only allude to *how* corporations exist, but they fail to offer any insight as to *why* they exist.

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<sup>270</sup> See *supra* notes 11–14 and accompanying text (explaining that many economists ignore much of human behavior and view individuals as rational, self-interested profit-maximizers).

<sup>271</sup> See *supra* notes 11–14 and accompanying text (reporting that many economists and proponents of the law and economics movement have ignored charitable tax-exempt nonprofit corporations because the behavior of the individuals organizing and operating those entities contradicts how many economists assume people behave).

<sup>272</sup> See *supra* notes 28–32 and accompanying text (explaining that historically individuals in the United States have chosen to associate for a wide range of reasons).

<sup>273</sup> See *supra* Part III (discussing the need, nature, and importance of collaboration theory).

*B. Is Collaboration Theory Viable Considering that Charitable Tax-Exempt Nonprofit Corporations Sometimes Engage in Controversial and Antisocial Behavior?*

Even if collaboration theory differs from the existing essentialist theories of the corporation, that does not mean that it is a viable theory of the corporation. This work has made a lot of the fact that collaboration theory offers an explanation of *how* and *why* charitable tax-exempt nonprofit corporations exist, while the prevailing essentialists theories offer an explanation only of *how* corporations exist.<sup>274</sup> Because of the current popularity of the aggregate theory,<sup>275</sup> which has been refined by economists,<sup>276</sup> the answer as to *why* corporations exist may implicitly be wealth maximization.<sup>277</sup> However, that answer does not fully explain the reasons why people associate,<sup>278</sup> and it also suggests that charitable tax-exempt nonprofit corporations should not exist because these entities do not focus on profit-making and wealth maximization.<sup>279</sup> Collaboration theory offers a fuller and thicker essentialist theory of the corporation because it explains *why* charitable nonprofit tax-exempt nonprofit corporations exist, i.e., they are a common effort among the federal government, state government, and private individuals to accomplish a task or project.<sup>280</sup> At first blush, this idea likely seems very appealing because in the abstract it sounds very socially uplifting, and these collaborations seem like very positive things.<sup>281</sup> In practice, however, charitable tax-exempt nonprofit corporations often engage in controversial behavior with

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<sup>274</sup> See *supra* Part III.A (discussing the need for a theory of the corporation that explains how and why corporations exist).

<sup>275</sup> See *supra* note 149 and accompanying text (explaining that the aggregate theory is currently the leading essentialist theory of the corporation).

<sup>276</sup> See *supra* notes 145–46 and accompanying text (explaining that the aggregate theory has been developed and refined by economists because it allows for sophisticated economic analysis of corporations).

<sup>277</sup> See *supra* notes 11–14 and accompanying text (discussing many economists' unflinching belief that humans should be viewed as rational, self-interested profit-maximizers).

<sup>278</sup> See *supra* notes 28–33 and accompanying text (explaining that individuals in the United States associate for a wide variety of reasons that extend beyond merely making a profit).

<sup>279</sup> See *supra* Part I (exploring the origins of charitable tax-exempt nonprofit corporations, which extend far beyond wealth maximization).

<sup>280</sup> See *supra* Part III.B (describing the nature of collaboration theory).

<sup>281</sup> See *supra* Part III (examining the need, nature, and importance of the collaboration theory of the corporation).

which the government may not wish to be associated,<sup>282</sup> and at times, the missions of these corporations can contradict one another.<sup>283</sup> Part of the reason that the prevailing essentialist theories do not provide thicker explanations as to *why* corporations exist is that these entities exist for a myriad of different reasons, and because answering the question of *why* they exist makes it extraordinarily hard to create a coherent essentialist theory of the corporation.

A variety of responses exist to the concerns over the presence of controversial charitable tax-exempt nonprofit corporations and the existence of such corporations with contradictory missions. In regard to controversial charitable tax-exempt nonprofit corporations, one simple answer is that some nonprofits act in ways that substantially deviate from the purposes for which they were created. These corporations are subject to the *ultra vires* doctrine, which renders unlawful acts that lie beyond the authority of the corporation, in the same way that for-profit corporations are.<sup>284</sup> As a result, some

<sup>282</sup> See *Developments in the Law — Nonprofit Corporations*, 105 HARV. L. REV. 1581, 1581 (1992) (“The nonprofit sector includes not only organizations commanding wide public support, but also a number of controversial organizations and special interest groups such as the Ku Klux Klan, People for Ethical Treatment of Animals (PETA), the Federalist Society, and the Star Trek Fan Club.”); Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1048 (2014) (“Nonprofits both tend to seek government benefits and desire to speak freely about controversial issues, as illustrated by a series of disputes that have reached the Supreme Court.”); Eric R. Swibel, Comment, *Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation*, 57 EMORY L.J. 1605, 1606 (2008) (“Section 501(c)(3) organizations may speak freely on matters of public concern, including controversial and timely political issues.”).

<sup>283</sup> See Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571, 591 (2010) (“Nonprofits can and do form on all sides of a contentious issue . . .”); Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. RICH. L. REV. 1057, 1111 (2008) (“The vast charitable sector is quite diverse. It serves society not by means of uniformity, but with a variety of visions and methods. One charity seeks to lessen teen pregnancy through abstinence education, whereas another does so by providing free birth control. One charity strives to treat brain cancer patients with chemotherapy, whereas another does so with alternative, experimental drugs shunned by the majority of oncologists.”).

<sup>284</sup> See Thomas Lee Hazen & Lisa Love Hazen, *Duties of Nonprofit Corporate Directors—Emphasizing Oversight Responsibilities*, 90 N.C. L. REV. 1845, 1864 (2012) (“[M]any nonprofit organizations have limited missions, and this breathes more vitality into the *ultra vires* doctrine, which is designed to curtail corporations from acting beyond the scope of their purpose.”); Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation’s Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 699 (2005) (“In the

controversial charitable tax-exempt nonprofit corporations are operating beyond the scope of the collaboration that created them. This explanation, however, fails to explain the organization of all controversial charitable tax-exempt nonprofit corporations, and it also fails to explain the fact that charitable tax-exempt nonprofit corporations exist that have contradictory missions.

A second reason why controversial charitable tax-exempt nonprofit corporations exist is that society is multifaceted, and as a result, controversial nonprofit corporations are allowed to exist to represent this pluralism. Democracy allows for and celebrates the existence of controversial and contradictory views. One can argue that the state governments and the federal government have enabled the existence of controversial charitable tax-exempt nonprofit corporations as a consequence of this pluralism.<sup>285</sup> Such entities encourage pluralism in the United States and help to support the democracy in America.<sup>286</sup>

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nonprofit context, ultra vires prohibits a charitable corporation from advancing charitable purposes other than those set forth in its articles of incorporation."); Christopher Lacovara, Note, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 845 n.128 ("The ultra vires doctrine, which has languished in its application to business corporations, retains some vitality as a check on the ability of nonprofit directors to divert resources from the purposes for which they were intended.").

<sup>285</sup> See Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity Under Federal Income Tax Law, Theory and Policy*, 70 FORDHAM L. REV. 1243, 1314 (2002) ("The argument that the nonprofit sector promotes pluralism is in many respects just a non-technical way of saying that nonprofits are likely to provide goods and services that would not be provided by government or for-profit firms (or in a manner that such entities would not provide."); John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 692 (2001) ("[N]onprofits promote pluralism in society by providing an outlet for individual initiatives and experiments that would not otherwise be undertaken by government or the for-profit sector."); Donald L. Sharpe, *Unfair Business Competition and the Tax on Income Destined for Charity: Forty-Six Years Later*, 3 FLA. TAX. REV. 367, 371 (1996) ("The tax exemption afforded to the charitable activities of nonprofit organizations is justified as a means of subsidizing and encouraging an institutional system that has historically fostered pluralism, diversity, and democratic decentralization in American society.").

<sup>286</sup> See Miranda Perry Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 184 (2008) (reporting that "scholars highlight the role that nonprofits play in countering governmental power and enhancing pluralism"); Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1097 (2001) ("By encouraging individual initiatives for the public good, nonprofits promote the values of pluralism, freedom, and social integration."); David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 558-59 (2006) ("Nonprofits, and the deductions that support them, correct for government failure by facilitating the closer

These entities help to fill gaps and provide services that state governments and the federal government cannot or will not provide.<sup>287</sup>

A third reason that the state governments and the federal government might choose to collaborate with individuals organizing and operating nonprofits with controversial and sometimes contradictory missions is that it facilitates experimentation that is beneficial to society. Because charitable tax-exempt nonprofit corporations support pluralism, the nonprofit sector as a whole engages in more experimentation, which can help societal advancement.<sup>288</sup> This experimentation coupled with competition for donor support creates a marketplace for ideas in which socially beneficial ideas tend to rise to the top.<sup>289</sup> The state governments and

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matching of voter preferences. The more heterogeneous the community, the more value nonprofits will add.”).

<sup>287</sup> See Nicole S. Dandridge, *Choking Out Local Community Service Organizations: Rising Federal Tax Regulation and Its Impact on Small Nonprofit Entities*, 99 KY. L.J. 695, 700 (2011) (“Nonprofit organizations fill the gaps when for-profit firms and government entities fail to meet the particular demands of certain, mostly underserved, populations.”); Jenkins, *supra* note 286, at 1101 (“[N]onprofit organizations lend support to controversial issues, such as AIDS research and birth control education, in order to complement or fill gaps in governmental efforts in the public health domain.”); Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 889 (2003) (“[W]hile one of the societal benefits of the nonprofit sector is its contribution to creating civil society, nonprofits serve many other laudable goals. The nonprofit sector fills various gaps left in society by the operation of the market and the government.”).

<sup>288</sup> See David A. Brennen, *A Diversity Theory of Charitable Tax Exemption — Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITTS. TAX REV. 1, 24 (2006) (“[T]he charitable tax exemption allows for diversity and experimentation that often lead to production of undiscovered values.”); Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 51 (2003) (“Nonprofits are often more likely than government or for-profit organizations to support reform and experimentation. Nonprofits are more flexible because they have a broader range of goals than profit.”); Justice D. Warren, Note, *My Way and/or the Highway: Exploring the “Adequacy” of the Alternative Channels Test in Conditional Speech Cases*, 11 FIRST AMEND. L. REV. 636, 643 (2013) (“While Congress, as an elected body, is accountable to, and representative of, the majority, nonprofits are not bound by the same restraints, and can exercise more innovation and experimentation to produce secondary benefits falling outside the scope of those demanded by the majority.”).

<sup>289</sup> See Pozen, *supra* note 286, at 560 (“[T]he nonprofit activity facilitated by the deduction contributes to the increase of social welfare both by fulfilling the demand schedules of a greater number of individuals (a pluralism of ends) and by generating innovation and experimentation in the delivery of goods and services, thereby spurring the marketplace to higher-quality modes of production (a pluralism of means.”); David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 244 (2009)

the federal government embrace and tolerate collaborating with individuals organizing and operating nonprofits with controversial and sometimes contradictory missions because it facilitates this marketplace of ideas and the ideas and positive social benefits that emerge from it.

A fourth reason that the state governments and the federal government might choose to collaborate with individuals organizing and operating nonprofits with controversial and sometimes contradictory missions is that it is a necessary evil to achieve the social benefits that the nonprofit sector creates. As previously discussed, corporations in the United States were initially the product of special legislation from state legislatures that debated whether each corporation was beneficial and then individually crafted the rights and inner workings of those corporations.<sup>290</sup> Although this bespoke approach to incorporation has its virtues, state governments ultimately realized that it was impractical and inefficient, and states transitioned to general incorporation statutes because societal goals could better be achieved without micromanaging the incorporation process.<sup>291</sup> In the realm of charitable tax-exempt nonprofit corporations, state governments and the federal government can and should be viewed as using a similar approach. After setting general parameters in the form of state nonprofit incorporation statutes and the federal internal revenue code for when they will collaborate with individuals, the state governments and federal government have chosen not to micromanage the incorporation process even if it leads to some controversial nonprofits and nonprofits with contradictory missions. This reality may lead to some uncomfortable and nonproductive collaborations, but not every collaboration is comfortable or productive. The state

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(“[N]onprofits are freer to engage in experimentation, and to compete with each other. Even if there is a conventional wisdom about how to pursue a public goal, it is relatively straightforward for dissenters to form a new organization with a novel approach. . . . Not surprisingly, then, a number of important social movements — from civil rights and women’s rights to environmentalism — were pursued first through nonprofits (for example, the NAACP, the ACLU Women’s Rights Project, the NRDC) before they ultimately became the subject of government action.”); Katie Stewart, Note, *Property Tax Exemptions for Nonprofit Hospitals: The Implications of Provena Covenant Medical Center v. Department of Revenue*, 62 TAX LAW. 1157, 1179 (2009) (“[N]onprofits both bring new voices, which might not otherwise be heard, to the marketplace of ideas and help to address market failures, particularly in the health care context.”).

<sup>290</sup> See *supra* notes 50–54 and accompanying text (describing the formation of corporations in the early years of the United States).

<sup>291</sup> See *supra* notes 55–60 and accompanying text (discussing the transition to general incorporation statutes in the United States).

governments and the federal government have chosen to take this generalized approach because as a whole the nonprofit sector does a lot to promote the public good,<sup>292</sup> and such an approach offers the most efficient method for achieving this good.<sup>293</sup>

### C. Does Collaboration Theory Work for For-Profit Entities?

One of the virtues of the prevailing essentialist theories of the corporation is that they likely offer viable theories of the corporation for both for-profit and nonprofit entities. Although they do not offer a comprehensive explanation of both *how* and *why* corporations exist,<sup>294</sup> and although they do not offer a comprehensive explanation of the corporation,<sup>295</sup> which has led some to embrace the indeterminacy of the corporation, the prevailing essentialist theories at least work equally as well, or equally as poorly, regardless of whether one is focusing on for-profit or nonprofit entities. Because this work has focused on providing a viable essentialist theory for charitable nonprofit tax-exempt corporations, this raises the question of whether collaboration theory provides a viable theory for for-profit entities as well. This is especially true based upon the definition of a collaboration offered in this paper, i.e., a common effort between or among multiple entities to accomplish a task or project. This definition suggests that the entities involved in a collaboration may need to have a common goal in mind to truly be engaged in a collaboration. A complete exploration of the application of

<sup>292</sup> See *supra* notes 1–5 and accompanying text (discussing the size of the nonprofit sector and the many ways it improves society).

<sup>293</sup> See David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 652 (2011) (reporting that the adoption of “general incorporation laws that made it easier for Americans to form corporations”); Nuno Garoupa & Andrew P. Morris, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1468 (“Statutes could also be efficiency enhancing by reducing transaction costs, as general incorporation statutes were in the United States.”); Donald Kehl, *The Origin and Early Development of American Dividend Law*, 53 HARV. L. REV. 36, 55 (1939) (“The legislative burden in considering large numbers of special charters led inevitably to the passage of general incorporation acts similar to the form now in use, eliminating the necessity for any specific approval by the legislature.”).

<sup>294</sup> See *supra* Part II.A–C (providing an overview of the prevailing essentialist theories of the corporation, including the artificial entity theory, the real entity theory, and the aggregate theory).

<sup>295</sup> See *supra* Part III.A (explaining the need for collaboration theory because the prevailing essentialist theories of the corporation fail to capture the complete essence of the corporation).

collaboration theory to for-profit entities is beyond the scope of this work and will be saved for a later day. But a few thoughts on the application of collaboration theory to for-profit entities will be provided, including that collaboration theory can coherently be applied to for-profit entities.

The simplest and easiest solution to the issue of whether collaboration theory provides a coherent and viable essentialist theory for for-profit corporations is to argue that collaboration theory applies only to charitable tax-exempt nonprofit corporations. This solution is unappealing for a variety of reasons. First, all corporations evolved from similar origins.<sup>296</sup> As a result, any theory of the corporation should provide insight into the essence of all types of corporations. Second, although nonprofit corporations and for-profit corporations do vary significantly, they also have many commonalities, which suggests that any viable theory of the corporation should have something to say about the essence of both entities. Third, collaboration theory does actually offer a coherent explanation of the essence of for-profit corporations, and as a result, no need exists to limit collaboration theory only to charitable tax-exempt nonprofit corporations.

The question which remains then is how collaboration theory applies in the context of for-profit corporations. For purposes of this work and for purposes of understanding collaboration theory, collaboration has been defined as a common effort between or among multiple entities to accomplish a task or project. In terms of charitable tax-exempt nonprofit corporations, the collaboration is a common effort between the state government, the federal government, and private individuals to improve society as a whole. Although this idea properly embodies how collaboration theory relates to charitable nonprofit tax-exempt corporations, it still does not expressly identify what the collaboration is. One answer is that the common effort to accomplish a task or project is the effort to improve society as a whole. Another answer, and the better answer, is that the collaboration is the corporation itself.

Attempting to apply collaboration theory to a for-profit entity is helpful because it helps to clarify that the collaboration to accomplish a task or project in regard to the corporation is the business entity itself. For charitable nonprofit tax-exempt corporations, the interests are aligned for all parties in the sense that all parties are debatably

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<sup>296</sup> See *supra* Part I.A (exploring the common origins of nonprofit and for profit corporations).

attempting to achieve the common goal of improving society as a whole. This point is highly debatable because selfish reasons may also exist for forming a nonprofit, such as seeking to be employed by it. With for-profit entities, this interest divergence becomes even more apparent. The state governments almost invariably will be seeking economic growth and innovation while the individuals organizing the corporation will very often be seeking to make a profit. As a result, the collaboration, i.e., the common effort to accomplish a task or project, has to be the corporation itself because if it was the actual goals the entities composing the collaboration were trying to achieve, in many instances you would have corporations without collaboration, which seems counterintuitive and incorrect.

Logically, conceiving of the collaboration as the corporation makes sense because many collaborations involve individuals with conflicting goals, which are collaborations nonetheless. For example, the recording industry commonly involves collaborative recordings.<sup>297</sup> The primary musicians may want to advance their own artistic vision; the supporting musicians may be seeking money to develop their own separate artistic projects; and the record company may be seeking merely to make a profit. This does not make this any less of a collaboration. The similar is true for nonprofit and for-profit corporations. With charitable tax-exempt nonprofit corporations, the case for collaboration theory is the strongest because the common goals tend to be strongest because of the emphasis on improving society. However, even if the common goals may lessen with for-profit corporations, the fact that they are collaborations does not lessen.

Throughout this work, collaboration theory has been celebrated as a theory that explains *how* and *why* corporations exist. Admitting that mixed motives do exist does weaken the explanation of *why* corporations exist, but it does reflect the realities of human existence.

<sup>297</sup> See Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1254 (2015) (“Popular songs today are akin to Lego block or Tinker Toy assemblages in which the constituent components may contain greater inventiveness than their combination.”); Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 880 (2011) (“[P]erformance-arts like music have traditionally utilized collaboration (with and without attribution) and borrowing (with and without permission) in the creative process.”); Gabriel Jacob Fleet, Note, *What’s in a Song? Copyright’s Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1252 (2008) (“[O]ver time [the] conventional vision of the composer has become more a theoretical notion than a practical reality, at least for popular music. The use of a written musical score largely has been replaced by a collaborative authorship process, which often occurs in the recording studio.”).

Charitable tax-exempt nonprofit corporations exist based generally upon promoting the public good, and for-profit corporations exist based generally upon conducting business. The fact that mixed motives may exist among the entities participating is significant, but it does not imperil the validity of collaboration theory. Mixed motives are simply a reality in any collaboration, and that does not prevent a collaboration from occurring. Mixed motives also does not mean that common efforts are not being used for purposes of attempting to satiate those mixed motives. In short, collaboration theory provides a viable and unified theory for all corporations regardless of whether a profit motive exists.

#### CONCLUSION

This Article advances a new essentialist theory of the corporation. Collaboration theory, as it has been termed, suggests that charitable tax-exempt corporations are collaborations between the federal government, state government, and individuals to promote the public good, i.e., a common effort between or among multiple entities to accomplish a task or project.<sup>298</sup> This essentialist theory of the corporation is superior to other essentialist theories of the corporation because it explains both *how* and *why* charitable tax-exempt nonprofit corporations exist.<sup>299</sup> It also explains why these corporations have separate entity status, why the state governments and federal government have the right to circumscribe the rights of these entities, and why the law currently governing these entities is permissible.<sup>300</sup> Collaboration theory finds a middle ground among the prevailing essentialist theories of the corporation in a way that embracing the indeterminacy of the corporation does not.<sup>301</sup> Collaboration theory also shows promise as a united theory of the corporation as well, i.e., it explains the essence of both for-profit and nonprofits corporations.

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<sup>298</sup> See *supra* Part III.B (explaining the nature of the collaboration theory of the corporation).

<sup>299</sup> See *supra* Parts III.A–B (explaining the need for and the nature of the collaboration theory of the corporation).

<sup>300</sup> See *supra* Part III.C (explaining the importance of the collaboration theory of the corporation).

<sup>301</sup> See *supra* Parts II.A–C (examining the prevailing essentialist theories of the corporation, including the artificial entity theory, the real entity theory, and the aggregate theory); *supra* Part II.D (examining the argument for embracing the indeterminacy of the corporation); *supra* Part IV.A (discussing the reasons why the collaboration theory of the corporation is different than the other prevailing theories of the corporation).

Based on length restrictions, it would be impossible to answer all of the questions that collaboration theory may raise. At minimum, however, the discussion of collaboration theory helps to better understand the elephant that is the corporate form.<sup>302</sup>

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<sup>302</sup> See *supra* notes 163–70 (discussing the parable embodied in John Godfrey Saxe's poem, *The Blind Men and the Elephant*). Notably, a well-worn riddle begins with the following question: "How do you eat an elephant?" The answer is "One bite at a time." A similar sort of approach will be needed in the development of collaboration theory. Because likely thousands of gallons of ink, if not more, have been spilled discussing the prevailing essentialist theories of the corporation, readers are likely to have many questions about the theory, even after reading this Article. The existence of these questions does not prevent collaboration theory from being a viable essentialist theory of the corporation. It simply means that more ink can and should be spilled in regard to the coherence of collaboration theory with the realities of the corporate form, i.e., a "one bite at a time" approach.