Vanderbilt Law Review

Volume 74 | Issue 6 Article 8

2021

The Personification of the Partnership

Harwell Wells

The Personification of the Partnership

Harwell Wells[*]

What does it mean to say a business association is a legal person? The question has shadowed the law of business organizations for at least two centuries. When we say a business is a legal person we may be claiming that the law distinguishes its assets, liabilities, and obligations from those of its owners; or that it has a "real will" and personality apart from its owners; or that it in some way can carry or assert rights generally ascribed to natural persons. This Article sheds new light on these old questions by looking at an oft-overlooked business form, the partnership, and at once-fierce debates over just what the partnership is. In the decades around the turn of the twentieth century scholars and practitioners hotly debated whether the partnership was an "aggregate" or "entity" and whether the law should treat it as a separate legal person, debates which culminated in the drafting of the Uniform Partnership Act (1914). Central to these disputes was a now-forgotten facet of legal personhood: the moral consequences of treating a business association as a distinct legal person.

* I. Herman Stern Professor of Law, Temple University Beasley School of Law. Thanks to Margaret Blair for inspiration and example over the years; to Brian Cheffins, Michael DiPietro, Ron Harris, Jonny Hardman, Christine Hurt, Elizabeth Pollman, David Chan Smith, Robert Thompson, John Turner, Andrew Verstein, and participants at the 23rd Annual Law & Business Conference at Vanderbilt University Law School and the Partnership Conference at the University of Edinburgh for helpful comments; to Charlie Perkins and Julie Randolph for seeking out difficult to find sources; to Temple University Beasley School of Law for research support; and to the archivists and organizations that worked to make obscure and outdated legal sources available online, thus rendering it possible to write this article in the year of COVID-19.

INTRODUCTION

> *In no department of the law has controversy been keener than between the advocates of the so-called "entity theory" of partnership and advocates of the so-called 'common law' theory.*
>
> —Sydney R. Wrightington[1]

What does it mean to say a business association is a legal person?[2] The question, phrased in different ways, has threaded through the law of business organizations for at least two centuries.[3] When we say a business association is a legal person we may simply be asserting that the law recognizes, for certain purposes, the entity as existing separate from its owners with the ability, for instance, to have property titled in its name, to enter into contracts, or to continue to exist when the natural persons who are its members change.[4] It may, however, entail grander assertions, as when in the late nineteenth century debate swirled over whether a corporation was a creation of the state, or had a "real will" and personality apart from its owners, or was instead no more than an aggregate of them.[5] In the United States, the debate has often been colored by the question of whether corporations, specifically business corporations, can claim some of the rights granted

1. SYDNEY R. WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND SIMILAR RELATIONS 144 n.1 (1916).

2. There is a vast literature on the topic. Good introductions focusing on corporate personhood include Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785 (2013); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); Paul B. Miller, *Corporate Personality, Purpose, and Liability*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 222 (Elizabeth Pollman & Robert Thompson eds., 2021); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201; ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (2013); Sergio Alberto Gramitti Ricci, *Archeology, Language, and Nature of Business Corporations*, 89 MISS. L.J. 43 (2019); and Susan Mary Watson, *The Corporate Legal Person*, 19 J. CORP. L. STUD. 137 (2019).

3. *See* Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 245 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

4. *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) ("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.").

5. *See, e.g.*, F.W. MAITLAND, STATE, TRUST AND CORPORATION 1, 2–3 (David Runciman & Magnus Ryan eds., 2003) (extracted from Maitland's Introduction to *Political Theories of the Middle Ages* by Otto von Gierke); VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE 1–2 (Bos., Little, Brown & Co. 1882) (discussing the history of corporate personification); *see also* Mark, *supra* note 2; Millon, *supra* note 2. I recognize that calling shareholders "owners" of a corporation can be disputed, but it is the best available shorthand for the relationship of shareholder and corporation. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 254–55 (1999) ("[T]he modern tendency to think of shareholders as corporate 'owners' and directors as their 'agents' glosses over several key legal doctrines . . . .").

to natural persons under the U.S. Constitution.[6] More recently, law and economics scholars have focused on legal personhood by examining whether and how the law separates out the assets and liabilities of a business from those of its owners, and the degree to which the assets of each are shielded from the others' creditors.[7]

This Article provides a new take on the debates over legal personhood, its meaning and consequences, by looking at an oft-overlooked business form, the partnership, and at once-fierce debates over whether the partnership should be viewed as a legal person separate from its partners. In the decades around the turn of the twentieth century, scholars and practitioners in the United States hotly debated whether the partnership was an "aggregate" or "entity"—whether it had any existence in the eyes of the law apart from the individual partners who comprised it. The common law had generally regarded the partnership as an aggregate, having no legal existence apart from its owners. In the late nineteenth century, however, reformers championed the entity view, which would treat the partnership as a separate legal person, in order to bring coherence to a sometime confusing area of the law and to bring the law into line with merchants' views of what a partnership was. These disputes culminated in the drafting of the Uniform Partnership Act (1914) ("UPA"), which after several twists and turns rejected the reformers' proposals and codified the view that the partnership was not a separate legal person.[8] Central to this result was a now-forgotten facet of the legal personhood

6. *See* Citizens United v. FEC, 588 U.S. 310, 364 (2010). On these debates, see, for example, Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015); MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 65–108 (1992); and ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

7. *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 387 (2003); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1356 (2006); REINER KRAAKMAN ET AL., ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 5–11 (3d ed. 2017).

8. UNIF. P'SHIP ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1914). The aggregate/entity divide still lives in partnership law. See, for example, REVISED UNIF. P'SHIP ACT § 307 & cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997) (amended 2013); and *infra* text accompanying notes 221–235. Earlier debates have, however, been largely forgotten, with a few exceptions. *See* 1 CHRISTINE HURT, D. GORDON SMITH, ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 1.03 (3d ed. Supp. 2021); Naomi R. Lamoreaux, *Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, AND CULTURE 29, 46–47 (Kenneth Lipartito & David B. Sicilia eds., 2004); LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 40–43 (2009); Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 401–04 (1989); Peter Winship, *Drafting Partnership Laws on the "Aggregate" or "Entity" Theory*, 68 SMU L. REV. 629, 631–37 (2015).

debates: the moral consequences that were believed to flow from treating a business association as a distinct legal person.

This Article is a contribution to legal history, business history, and contemporary debates over the nature of corporate personhood. While it sets the partnership debates in larger economic and intellectual context, it takes doctrine seriously, seeing the debates over which legal rules to adopt for partnerships as motivated less by external forces than by concern over the effects of internal, doctrinal innovations.[9] It ultimately aims both to recount a significant legal debate waged over a century ago and to highlight for contemporary debates an overlooked aspect of legal personhood.

It begins by sketching out the roots of Anglo-American partnership law and surveying that law's structure as it solidified in the nineteenth century. It then traces what became the defining issue of nineteenth-century American partnership law—whether the partnership was an "aggregate" or "entity"—from its origins in early nineteenth-century attempts to reform English partnership law through debates around the drafting of the UPA in the first decade of the twentieth century. Along the way the Article touches on the divide between partnership and corporation that is a basic feature of Anglo-American business law; how legal influences flowed back and forth across the Atlantic; recent theoretical writings on the business entities' essential features; our understandings of late nineteenth-century American legal thought and education; and the idea that some forms of business are more moral than others. It closes by showing how, even today, we have not quite resolved the aggregate/entity question.

I. THE PARTNERSHIP IN ENGLISH AND AMERICAN LAW

As a business form, the partnership, understood broadly as two or more persons associating together to conduct business, is very old. Its legal roots have been traced back at least to the societas of ancient Rome,[10] and business associations with many of the elements of modern partnerships can be found flourishing in parts of Europe during the

9. In this, the Article joins a few other recent works taking seriously the history of business law doctrine. *See, e.g.*, DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY DUTY 1–3 (2018) (providing a "pre-history of legal concepts and doctrinal structures"); Andrew S. Gold, *Internal and External Perspectives: On the New Private Law Methodology*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 3, 3–8 (Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020).

10. *See* Andreas Martin Fleckner, *Roman Business Associations*, *in* 1 ROMAN LAW AND ECONOMICS: INSTITUTIONS AND ORGANIZATIONS 233, 236–39 (Giuseppe Dari-Mattiacci & Dennis P. Kehoe eds., 2020) (discussing Roman business forms); Hansmann et al., *supra* note 7, at 1356–57 (discussing the "undeveloped status of the Roman partnership").

Middle Ages and the Renaissance.[11] In England, whose partnership law was eventually transplanted to the United States, one early authority found wide use of the partnership form during the reign of Elizabeth I,[12] and the first treatise on partnership law, organizing and presenting an apparently already well-established body of case law, appeared in the 1790s.[13]

Partnership law found its great expositors and standardizers in the nineteenth century. While a host of treatises and guides discussing partnership law appeared, three earned special prominence: Chancellor James Kent's *Commentaries on American Law* (1828),[14] Justice Joseph Story's *Law of Partnership* (1841),[15] and Lord Nathaniel Lindley's *Treatise on the Law of Partnership* (1860).[16] These works, regularly updated, became guides on both sides of the Atlantic, testifying to the degree to which England and the United States shared a common law of partnership. When dealing with partnership questions, for example, American courts frequently cited English cases, while Story's American treatise was influential in England.[17] As late as 1893 one American work treated a recent decision by the House of Lords as conclusive on the question of the definition of partnership.[18] These authorities also occasionally drew on sources outside the common law for guidance on partnership issues. When listing definitions of a partnership, for instance, Lindley quoted the Prussian Code, Pufendorf, and the

---

11. *See* Charles R. Hickson & John D. Turner, *Partnership*, *in* 2 HISTORY OF WORLD TRADE SINCE 1450, at 557 (John J. McCusker ed., 2006); RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844, at 19–21 (2000) (discussing the origins of partnerships); Yadira González de Lara, *Business Organization and Organizational Innovation in Late Medieval Italy*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 65 (Harwell Wells ed., 2018).

12. WILLIAM WATSON, A TREATISE ON THE LAW OF PARTNERSHIP, at x–xi (London, A. Strahan & W. Woodfall 1794).

13. *See id.* On English partnership law during this era, see ANDREAS TELEVANTOS, CAPITALISM BEFORE CORPORATIONS: THE MORALITY OF BUSINESS ASSOCIATONS AND THE ROOTS OF COMMERCIAL EQUITY AND LAW (2021).

14. 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1–43 (Claitor's 1985) (1828).

15. JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP (Bos., Charles C. Little & James Brown 1841).

16. 1 NATHANIEL LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP (London, William Maxwell 1860). For a general account of the role of the treatise in the nineteenth century, see A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 *passim* (1981).

17. For instance, discussing English law, Joshua Getzler and Mike Macnair write of "Joseph Story's seminal treatises." Joshua Getzler & Mike Macnair, *The Firm as an Entity Before the Companies Acts* 10–11 (Univ. of Oxford Fac. of L. Legal Stud. Rsch. Paper Series, Working Paper No. 47/2006, 2006) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=941231 [https://perma.cc/T9CC-7ZT6].

18. THEOPHILUS PARSONS & JOSEPH HENRY BEALE, JR., A TREATISE ON THE LAW OF PARTNERSHIP 41 (Bos., Little, Brown & Co., 4th ed. 1893) (discussing Cox v. Hickman (1860) 11 Eng. Rep. 431, 8 H.L.C. 268).

"civilian" authority Pothier,[19] while Story's treatise asserted that "the principles applicable to the Law of Partnership are stated with uncommon clearness and force in the leading title of the Institutes [ ] and those of the Digest and the code of Justinian."[20] Yet Anglo-American partnership law never reached total uniformity. In the United States partnership law could vary from one state to another and thus from English law as well.[21] Important cases shaping the law in one jurisdiction did not arise in others, and debates over the joint stock company, which involved partnership law, were immensely important in England but not in the United States.[22]

On the foundational question of partnership law, Kent, Story, and Lindley agreed: a partnership was by its nature an association of individuals, not a separate legal person.[23] As Lindley put it, "[t]he firm is not [recognized] by lawyers as in any way distinct from the members composing it."[24] To simplify a bit, this meant that when A and B joined together to operate a business as the partnership of A&B, the law saw A and B rather than a separate entity A&B. This distinguished the partnership from the corporation, which gained a separate legal existence following a grant from the state, as a consequence of which corporations could for instance hold property, enter into contracts, and sue and be sued in the corporate name.[25] In England, one authority explained that the difference between "joint stock companies or partnerships, and corporations . . . is, that in the first, the law looks to the individuals; while in the second, it sees only . . . the body corporate, and knows not the individuals."[26] In the United States, both Story and Kent depicted the partnership as essentially a contract between the partners, with additional special features deriving from agency and

19. 1 LINDLEY, *supra* note 16, at 7.

20. STORY, *supra* note 15, at vii.

21. For instance, English and U.S. law eventually diverged on whether a term partnership could be terminated at any time by a single partner. *See infra* note 66.

22. Because this article focuses on U.S. law, it sidesteps issues raised by joint-stock companies, which were not unknown in the United States but not at the center of controversy as they were in England. On U.S. joint-stock companies, see, for example, Blair & Pollman, *supra* note 3, at 258.

23. These authors, and later authorities quoted here, were careful to point out that the rule was different in two jurisdictions, Louisiana and Scotland, both of whose laws treated the partnership as a separate legal person.

24. 1 LINDLEY, *supra* note 16, at 164.

25. JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 22–23 (Bos., Hilliard, Gray, Little & Wilkins 1832).

26. Paddy Ireland, *Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality*, 17 J. LEGAL HIST. 41, 45 (1996) (quoting JOHN GEORGE, A VIEW OF THE EXISTING LAW AFFECTING UNINCORPORATED JOINT STOCK COMPANIES 29 (London, S. Sweet 1825)).

property law.[27] For Story, the partnership was a contract between two or more persons with "a communion of the profits thereof between them."[28] Each partner was agent for the other partners for purpose of their common business, rather than acting for the partnership as a separate entity, and the main difference between partnership and mere agency was that partners had "a community of interest" in the property and business.[29] Kent held much the same.[30] Neither saw the partnership as having a legal existence apart from its members—for instance, when discussing a corporation Kent spoke of it as "one moral person," but he eschewed such terms in discussing partnerships.[31]

The partnership's lack of separate legal existence had practical consequences. Unlike a corporation, for instance, a partnership could not hold property or contract in the firm name. Before a court of law, the litigants in a matter involving a partnership were the individual partners, not the partnership, so a suit by or against a partnership had to name every partner as plaintiff or defendant, a problem where partners were unknown or silent.[32] This also prevented a partner from suing his partnership over partnership affairs in courts of law, for in the eyes of the law the partner would be attempting the impossible task of suing himself, and for the same reason partnerships with a common member could not sue one another.[33] The reasoning here was that, if the claim was in contract, it would in effect assert that A contracted with A, and if in tort that A had harmed A, neither of which made sense.[34] The law's inflexibility in these matters explains why partnership law was largely shaped in the then-separate equity courts,

27. A formal contract was not, however, required, so long as the essence of the agreement between the parties was to share profit. *See* TELEVANTOS, *supra* note 13, at 17 ("If two people entered into a profit sharing agreement they would be partners, regardless of whether or not both partners had contributed capital to the firm [or] written articles of partnership were used.").

28. STORY, *supra* note 15, at 2.

29. *Id.* at 1.

30. 3 KENT, *supra* note 14, at 2.

31. 2 *id.* at 215.

32. JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP 366–70 (Bos., Charles C. Little & James Brown, 3d ed. 1850); 1 LINDLEY, *supra* note 16, at 167. Late in the nineteenth century, some states adopted statutes allowing lawsuits in the partnership's name. PARSONS & BEALE, *supra* note 18, at 333–34.

33. STORY, *supra* note 32, at 341–44. I deliberately use "him" to describe partners, as almost all were men in this era, though women partners were not unknown, which created interesting issues; for example, when a female partner wed, the common law held this dissolved the partnership because she lost her autonomous status, though the rule changed over the nineteenth century. THEOPHILUS PARSONS, A TREATISE ON THE LAW OF PARTNERSHIP 23–27 (Bos., Little, Brown & Co. 1867).

34. EDWARD H. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 297–99 (1929).

whose more flexible standards allowed partners to bring claims against one another.[35]

That said, there were elements of partnership law that were difficult to explain were the partnership really no more than a contract among partners. These gave the partnership a kind of flimsy legal substance apart from its partners, making its operations easier but also rendering partnership doctrine less coherent than might have been expected given the law's age and the partnership's ubiquity.[36] One was the so-called "jingle rule" of partnership bankruptcy.[37] Dating back to the seventeenth century,[38] the jingle rule applied in cases of insolvency and distinguished the assets of the partnership from those of the individual partners, giving the partnership's creditors a prior claim to the partnership's assets and an individual partner's creditor a prior claim to that partner's assets.[39] Only after the partnership's creditors were satisfied could remaining partnership assets be divided among individual partners' creditors, and vice versa.[40] (In terminology recently developed by Hansmann and Kraakman, the rule provided "weak entity shielding" for the partnership.[41])

Another area where the partnership appeared to have substance apart from individual partners was partnership property. A partnership's real or personal property was typically titled in the name of natural persons, usually the partners, as the partnership was not a legal person capable of holding property.[42] If a partnership's property were no more than property owned collectively by the partners, however, it would presumably be held in one of the long-established

35. STORY, *supra* note 32, at 344; PARSONS & BEALE, *supra* note 18, at 475 ("[T]he great majority of interesting questions concerning partnership fall within the jurisdiction of equity."). On the partnership in English law, see HARRIS, *supra* note 11, at 141–43; and TELEVANTOS, *supra* note 13, at 26–28.

36. Works making clear that the common law partnership had aspects that would lead the law occasionally to treat it as distinct from its partners include Getzler & Macnair, *supra* note 17, at 10; Hansmann et al., *supra* note 7, at 1379–83; and Morgan Ricks, *Organizational Law as Commitment Device*, 70 VAND. L. REV. 1303, 1327–42 (2017).

37. Getzler & Macnair, *supra* note 17, at 10–11; TELEVANTOS, *supra* note 13, at 145–69.

38. Getzler & Macnair, *supra* note 17, at 11–12 (citing Craven v. Knight (1682) 21 Eng. Rep. 664, 2 Ch. Rep. 226).

39. Richard Squire, *The Case for Symmetry in Creditors' Rights*, 118 YALE L.J. 806, 812 (2009) (summarizing the jingle rule). The classic statement of the rule was in *Ex parte* Cook, (1728) 24 Eng. Rep. 834, 2 Peere Williams 500, and was also cited in Getzler & Macnair, *supra* note 17, at 12. In the United States, the rule applied until it was rejected in the Bankrupcty Act of 1978 and afterwards in the Revised Uniform Partnership Act (1997). Squire, *supra*, at 845 n.100.

40. This sounds simple, but could become quite complex, particularly when there were successive partnerships operating a business. *See* TELEVANTOS, *supra* note 13, at 22–26, 149–69.

41. Hansmann et al., *supra* note 7, at 1381–82.

42. PARSONS & BEALE, *supra* note 18, at 351–54. Who held title to the property was not dispositive as to whether it was partnership property. *See id.*

forms of common ownership, either joint tenancy or tenancy in common. But were this so, a partner could transfer his direct interest in the partnership's property to a third party, therefore giving a partner's creditor direct access to partnership property, or, were it held in a joint tenancy, would leave a deceased partner's interest not with his heirs or devisees but with the surviving partners—none of which partners wanted.[43] So special rules developed for partnership property; Story and Kent both described partners as holding partnership property in joint tenancy, but joint tenancy without survivorship rights so long as the partnership lasted (a partner's heirs had some claim on the partnership, but not directly on the partnership property).[44] Thus, while it is correct to state that the partnership was not a legal person, stopping there would leave us with a mistaken impression of how partnership law functioned. Best to follow the advice of one legal historian and "enquire behind the label . . . in order to find out what it actually involves."[45]

II. ENTITY OR AGGREGATE? PARTNERSHIP LAW REFORM IN THE NINETEENTH CENTURY

For much of the nineteenth century, these lurking contradictions did not pose a problem for partnership law. This is not because the partnership was unimportant; quite the contrary. While use of the corporation expanded over the nineteenth century in both England and the United States, helped along by statutory reform,[46] partnerships remained dominant in many industries. In the United States, the partnership remained "the most common choice for small and medium-sized enterprises [ ] with multiple owners."[47] As late as

43. STORY, *supra* note 15, at 121–26.

44. *Id.*; 2 KENT, *supra* note 31, at 14–15.

45. Laura Macgregor, *Partnerships and Legal Personality: Cautionary Tales from Scotland*, 20 J. CORP. L. STUD. 237, 238 (2020).

46. In the United States, the number of corporations increased since early in the nineteenth century, even before general incorporation law made incorporation available without special legislative approval. *See* ROBERT WRIGHT, CORPORATION NATION 58–59 (2013) (finding over twenty-two thousand specially chartered corporations in antebellum America). In England, the passage of a series of reform acts, culminating in the Companies Act 1862, led to a rapid increase in incorporations. David Chan Smith, *The Mid-Victorian Reform of Britain's Company Laws and the Moral Economy of Fair Competition*, 17 ENTER. & SOC'Y 1, 2 & n.1 (2020) ("More than 5,000 companies registered as corporations in England during the decade following the watershed acts of 1855–1856 compared to 910 during the preceding period."); Michael Lobban, *Joint Stock Companies, in* 12 OXFORD HISTORY OF THE LAWS OF ENGLAND: 1820-1914 PRIVATE LAW 613, 625–31 (Cornish et al. eds., 2010) ("In 1865, 1063 companies were registered, while the years 1872–74 saw an average of 1014 companies founded annually.").

47. Howard Bodenhorn, *Partnership Fragility and Credit Costs* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16689, 2011). Even large industrial enterprises could be organized as

1900, the U.S. Census of Manufactures reported that a majority of "all manufacturing establishments owned by more than one person were partnerships."[48] In England, not until the end of the century did a "sizable proportion of sole traders, family businesses, and partnerships move into joint-stock incorporated form."[49]

Towards the end of the nineteenth century, however, English and American partnership law diverged, less in substance than in how lawyers viewed the law. As is well known, English corporate (company) law was a major topic for debate and reform from the 1820s to the 1860s, with significant reforms instituted in the series of statutes from the Joint Stock Companies Act of 1844 to the Companies Act 1862.[50] Reforms were also attempted in English partnership law from the 1830s to the 1850s, but most of these reform attempts sputtered out; it was the reform of joint-stock company law that in the end proved more consequential for partnerships, as laws transitioned joint stock companies away from their existence as an amalgam of partnership and trust law towards the modern company (corporate) form.[51] The companies acts did impact partnerships, beginning with the 1844 Act's requirement that all partnerships with more than twenty-five members register, effectively capping the size of partnerships, but the reform efforts left the common law of partnerships largely untouched.[52] When partnership law was given statutory form in the Partnership Act 1890, drafted by Sir Frederick Pollock, that act was not seen as radical but merely one of a series of acts codifying and standardizing the preexisting common law rather than altering it.[53]

---

partnerships. *See* Blair, *supra* note 7, at 452–53 (citing JOHN K. BROWN, THE BALDWIN LOCOMOTIVE WORKS, 1831-1915: A STUDY IN AMERICAN INDUSTRIAL PRACTICE (1995)).

48. Naomi Lamoreaux & Jean-Laurent Rosenthal, *Legal Regime and Contractual Flexibility: A Comparison of Business's Organizational Choices in France and the United States During the Era of Industrialization*, 7 AM. L. & ECON. REV. 28, 38 (2005).

49. Joshua Getzler, *Company Law: English Common Law*, *in* OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Stanley N. Katz ed., 2009).

50. The history is extensive. For a quick overview, see Lobban, *supra* note 46, at 625–31.

51. On attempts to reform partnership law during this period, and particularly to adopt the limited liability partnership, see Smith, *supra* note 46; and Lobban, *supra* note 46, at 614–19 (detailing turbulent nature of pre-1860 reform efforts).

52. *See* HARRIS, *supra* note 11, at 282–85 (discussing the Joint Stock Companies Act of 1844). Initially the law also required companies with limited liability to have at least twenty-five members, but that number was soon dropped to seven and, after the decision in *Salomon v. Salomon*, a company could effectively be incorporated with a single member. PAUL L. DAVIES & SARAH WORTHINGTON, GOWER & DAVIES PRINCIPLES OF MODERN COMPANY LAW 5 (9th ed. 2012) (citing Salomon v. Salomon & Co. Ltd. [1896] UKHL 1, [1897] AC 22). The cap on the number of partners has in recent years been lifted for many professional partnerships. *Id.*

53. Pollock was clear that the 1890 Act was meant to codify existing law, rather than alter it. FREDERICK POLLOCK, A DIGEST OF THE LAW OF PARTNERSHIP: INCORPORATING THE PARTNERSHIP ACT, 1890, at iv–ix (London, Stevens & Sons Ltd., 5th ed. 1890). The one notable change to common law in the 1890 Act was the adoption of the charging order as a remedy for a partner's creditor.

In the United States debates over partnership law took a different form. Reform was on the agenda, as the growth of a national market and the quest for uniformity between jurisdictions led to proposals to standardize a number of areas of law. Partnership law became a major area for contention beginning in the 1880s, as would-be reformers split into two camps based on their underlying notion of what a partnership was. Advocates of the "entity" view of the partnership (also called the "mercantile" view, purportedly held by businessmen) contended the law should treat the partnership as a separate legal person. Arrayed against them were advocates of the "aggregate" view (also called the "common law" view, allegedly held by lawyers), who defended the traditional view of the partnership as a mere association lacking legal substance. Each would eventually seek to have their view codified in the Uniform Partnership Act.

If we treat this as a mere question of intellectual genealogy, the origins of aggregate/entity debate in partnership law are easy to find. They can be traced back to the 1830s, when an English barrister and polymath, Isaac Cory, wrote an early work on accounting, *A Practical Treatise on Accounts*, where he argued that the lawyers' view of the partnership was completely at odds with the views of merchants and therefore wrong.[54] According to Cory, while the law viewed a partnership as effectively a way for separate individuals to hold property in common, as a "joint tenancy without benefit of survivorship . . . . The [m]ercantile notion of a partnership is simply, that it is a kind of CORPORATION," existing apart from its partners.[55] That is how, he pointed out, partnerships were treated by accountants, who kept separate entries for the partners and the partnership in their books. Cory died soon after publishing his work, but his argument was picked up by the midcentury Victorian barrister and reformer John Malcolm Ludlow.[56] Echoing Cory, Ludlow highlighted what he saw as the common law view's shortcomings. To the businessman, he wrote, the partnership appeared a separate entity "for whom the individual

See id. at 67–68. On codification during this period, see JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 233–34 (5th ed. 2019).

54. ISAAC PRESTON CORY, A PRACTICAL TREATISE ON ACCOUNTS 67–90 (London, William Pickering, 2d ed. 1839); *see also* M. C. Curthoys, *Isaac Preston Cory*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, https://www.oxforddnb.com (last updated Jan. 3, 2008) [https://perma.cc/Z64B-UXEQ] (also available in print).

55. CORY, *supra* note 54, at 71 (internal quotation marks omitted).

56. Ludlow wanted the limited partnership adopted, as he saw it as a business form offering investment opportunities to the middle class. Smith, *supra* note 46, at 15–20; *see also* Lobban, *supra* note 46, at 627 ("[W]anted limited liability to be available to all joint stock companies, and not merely ones with large capitals . . . ."); E.R. Norman & H. C. G. Matthew, *John Malcolm Forbes Ludlow*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY (Sept. 23, 2004), https://www.oxforddnb.com [https://perma.cc/LP95-HKX3] (also available in print).

partners are agents at once and sureties."[57] But the common law "could not recognise the personality of the firm. The only ideal persons it knows of are corporations. . . . [T]o admit that Jack and Tom, by clubbing together [ten pounds] each, can make an ideal person called a firm, was more than any Common Law imagination could reach."[58]

Absurdities followed. The common law described partnership property as a joint tenancy without survivorship rights, which Ludlow described as "about as rational an expression as a round square, or a dark light."[59] Some partnership rules only made sense if the partnership had an existence separate from the partners, such as the rule that allowed the partnership to be bound by bills endorsed by a single partner. "But when the law has thus recognised the firm for the purpose of fixing [this] liability, it suddenly shuts its eyes upon it for the purpose of enforcing it," requiring all partners be named in a suit to collect on such a bill.[60] Neither courts of law nor equity, he complained, would "notice, otherwise than by side-glances, the mercantile personality of the firm."[61] As Ludlow saw it this was a failure of the law, as "[t]he firm is a reality in all commercial transactions, whether the law acknowledge or ignore it."[62] Ludlow's views were extensively discussed in *Lindley on Partnership*, which was widely read on both sides of the Atlantic,[63] and Lindley was generally credited for popularizing the entity theory.[64]

Here we find the split between England and the United States. In England, the gap between the common law and mercantile views of the partnership was well recognized, but was just accepted as a fact about the law. Lindley, who eventually was a Law Lord as well as the leading authority on partnership law, simply stated in his treatise that the merchants' view was "not the legal notion of a firm."[65] When Sir Frederick Pollock, a student of Lindley's, drafted the Partnership Act 1890 he adopted the common law "aggregate" view with little analysis,

---

57. John Malcolm Ludlow, *On the Mercantile Notion of "the Firm," and Its Need for Legal Recognition*, *in* 2 PAPERS READ BEFORE THE JURIDICAL SOCIETY, 1858–1863, at 40, 41 (London, William Maxwell 1863).

58. *Id.* at 42.

59. *Id.* at 43.

60. *Id.* at 52.

61. *Id.* at 54.

62. *Id.* at 67.

63. 1 LINDLEY, *supra* note 16, at 163–75. Lindley's work was widely cited in the United States as well as in England, including in several U.S. Supreme Court decisions beginning with Ivinson v. Hutton, 98 U.S. 79, 80 (1878).

64. *See*, *e.g.*, Francis v. McNeil, 228 U.S. 695, 699 (1913) ("Since *Cory on Accounts* was made more famous by *Lindley on Partnership*, the notion that the firm is an entity distinct from its members had grown in popularity . . . .").

65. 1 LINDLEY, *supra* note 16, at 164.

the Act's first section defining a partnership as "the relation which subsists between persons carrying on a business in common with a view of profit."[66] Decades later Lindley would wish English law had taken more cognizance of the issue and adopted the entity approach, but after Cory and Ludlow no voices were raised in England calling for radical change.[67] This despite the fact that the English lawyers had a ready model for an alternative approach in Scottish law, which did treat the partnership as a separate legal entity.[68] We can only speculate as to why Cory's and Ludlow's calls for reform found no support in England. It may be that, unlike in the United States, by the late nineteenth century it was fairly easy for English businessmen dissatisfied with the partnership form to incorporate their businesses while retaining many desirable features of the partnership, so that no large constituency for reform of partnership law ever developed.[69]

In the United States, in contrast, demand for reform of partnership law, and for resolution of the aggregate/entity issue, grew toward the end of the nineteenth century. As mentioned, in good part this derived from a broader push for standardization of commercial law across the states. As the legal historian Lawrence Friedman explained it, during this period "[m]any legal scholars, and some business people, raised a cry for uniformity, or at least some form of harmonization. It seemed wrong, and inefficient, in a national market, to have fifty different forms of commercial law."[70] When the American Bar Association ("ABA") was founded in 1878, one reason given was the need to develop uniform state laws.[71]

---

66. Partnership Act 1890, 53 & 54 Vict. c. 39, § 1(1) (UK). The 1890 Act did retain the jingle rule, and in one break with the United States prevented partners from dissolving a partnership for a term. *See id.* § 32. Importantly, it also carved out an exception for Scottish law's different rule. *Id.* § 4(2).

67. 1 LINDLEY, *supra* note 16, at 4 (7th ed. 1905). Lindley identified that the "non-recognition of the firm was a defect in the law of partnership" and "regretted that the Partnership Act has not gone further than it has in the direction of assimilating the English law to the Scotch. Had it done so, the difficulties of suing and being sued, and of dealing with partners abroad, would have been greatly diminished." *Id.*

68. For more on the partnership in Scottish law, see Macgregor, *supra* note 45, at 247–55.

69. For instance, English company law during this period was sufficiently flexible that businessmen dissatisfied with what partnership law offered could fairly easily register their firms. *See* L. C. B. Gower, *Some Contrasts Between British and American Corporate Law*, 69 HARV. L. REV. 1369, 1371–72 (1956); Ron Harris & Naomi R. Lamoreaux, *Opening the Black Box of the Common Law Legal Regime*, 61 BUS. HIST. 1199, 1200 (2019) ("[T]he Companies Acts were laissez-faire in spirit, giving incorporators almost complete freedom to set up the governance structures of their businesses as they saw fit."); Ron Harris, *The Private Origins of the Private Company*, 33 OXFORD J. LEGAL STUD. 339, 352 (2013) (noting a "dramatic turn . . . in the use of the corporate form" by smaller companies during this period).

70. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 744 (4th ed. 2019).

71. *See* ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION (2013).

Partnership law was one area where American law was decidedly not uniform. Retrospective accounts of partnership law in the nineteenth century give it a consistency it did not always possess. While its broad outlines were the same from state to state, rules differed in many particulars. To give two examples concerning basic rules of partnership law, while the jingle rule of partnership insolvency was adopted in most states, a few rejected it,[72] and while many courts had voiced the familiar rule that a partnership for a term could always be dissolved by the act of a single partner, other state courts held a partner lacked that power.[73] Apart from jurisdictional variations, there were other areas where doctrinal inconsistency produced uncertainty in the law. There was, for instance, no universally accepted test for determining whether a partnership had been formed absent an explicit agreement between the partners.[74] Nor was it clear what justified the jingle rule's separation of partners' and partnership property if the partnership had no legal existence apart from the partners; nor were authorities settled on when property became partnership property and how to describe it (was partnership property a form of joint tenancy or tenancy in common, or something else entirely?).[75]

Reform of the law promised both to smooth out state variations—especially problematic for firms operating across state lines—and to resolve underlying confusions in the law. As the eventual drafter of the Uniform Partnership Act (1914) explained it, summing up why he thought a uniform statute necessary:

> There are two factors which have led to the desire for a Uniform Partnership Act; the lack of uniformity in the law of partnership in the several states, and its uncertainty in any given state. It is not difficult to demonstrate that uniformity among the several states in the law of partnership is desirable. The business conditions under which partnerships are conducted are similar throughout the United States. There is, therefore, no reason arising from diverse economic conditions in different states why the law of partnership should not be uniform. . . . But the principal reason why uniformity in the law of partnership is desirable, is that a considerable proportion of existing partnerships do business in more than one state. . . . An act in the business intended to have an effect on the business as a whole should have the same effect in all jurisdictions in which the business is carried on.[76]

---

72. PARSONS & BEALE, *supra* note 18, at 476–77.

73. *See* Benjamin F. Rex, *Power of Partners to Withdraw at Will from Partnerships Entered into for a Definite Period*, 32 AM. L. REG. 689, 692–96 (1884).

74. *See*, *e.g.*, George Wharton Pepper, *What Constitutes a Partnership?*, 46 AM. L. REG. 137, 137–39 (1898) (discussing varying viewpoints on the essential elements of a partnership).

75. *See*, *e.g.*, Francis M. Burdick, *Partnership Realty*, 9 COLUM. L. REV. 197, 202 (1909) (detailing the different views).

76. William Draper Lewis, *The Desirability of Expressing the Law of Partnership in Statutory Form*, 60 U. PA. L. REV. 93, 94–95 (1911).

Most often, those pushing reform advocated for the entity approach, which would acknowledge the partnership as a legal person apart from its partners, giving it, for instance, title to partnership property and the ability to sue and be sued in its own name. It was the practical effects of legal personhood on partnership rules, not its theoretical implications, which most interested these reformers. Adopting legal personhood promised to bring coherence to the law. Concerning, for example, the challenge of distinguishing a partnership's obligations from the obligations of its individual partners, one widely cited article stated that

> [t]he moment the personality of the firm is recognized, all difficulty vanishes. An obligation of all the partners, in a matter not purporting to be firm business, is no more the obligation of the firm than an independent undertaking of all the stockholders in a corporation is the undertaking of the corporation.[77]

As to the confused status of partnership property, a comment in the *Harvard Law Review* claimed that once partnership law was "adapt[ed] . . . to the custom of merchants," clarity would appear.[78] "It will be held that the firm owns the capital and may be sued by any partner, while the death of a partner will not necessitate a dissolution[,]" it argued.[79] "The books will show whether property belongs to the firm, or is rented to it by a partner, and the firm creditors will have as large a share as a personal creditor of the assets of a partner."[80]

Before going further, we should acknowledge a strange fact about this brewing dispute: running alongside the debates over whether the partnership was an entity or aggregate was a similar debate over whether the corporation was an entity or aggregate (in turn only one episode in long-running debates over corporate personhood).[81] At the same time that some partnership experts were pushing for the law to define the partnership as an entity, many corporate lawyers were pushing for the law to treat the corporation as an aggregate, sometimes even comparing the corporation to a partnership.[82] (These corporation law scholars appear to have ignored the possibility the partnership was not an aggregate.) Surprisingly, there seems to have been little direct

77. William Hamilton Cowles, *The Firm as a Legal Person*, 57 CENT. L.J. 343, 351 (1903).

78. Recent Cases, *Partnership—Entity Theory*, 10 HARV. L. REV. 245, 250 (1896).

79. *Id.*

80. *Id.*

81. For surveys of these debates, see, for example, HOROWITZ, *supra* note 6, at 65–108; Mark, *supra* note 2, at 1455–78; Millon, *supra* note 2, at 205–20; and WINKLER, *supra* note 6, at 71–161.

82. *See*, *e.g.*, 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS, at iii (Bos., Little, Brown & Co. 2d ed. 1886) ("[A] corporation is really an association formed by the agreement of its shareholders, and [ ] the existence of a corporation as an entity . . . is a fiction . . . ."); *see also* Mark, *supra* note 2, at 1444–46.

connection between these debates.[83] The late nineteenth-century corporate debates were ways of addressing the very pressing, very public issue of how the new giant business corporations, especially railroads, were to be regulated. Traditionally, corporations were viewed as creations of the state, which made it easy to justify state regulation.[84] In the 1880s, however, other theories about the corporation appeared, including a theory that the corporation was in essence an aggregate, and should be treated chiefly as an association of the natural persons who were its shareholders.[85] Were this the case, so the argument went, corporate regulation would directly impinge on those individuals' contractual and property rights and thus should be subject to searching constitutional scrutiny.[86] To be sure, there were limits to the corporation-as-aggregate approach. Advocates of the aggregate theory of the corporation did not want the corporation treated as an aggregate in all respects; no one argued for ending limited liability, for example, or titling corporate property in the shareholders' names. The argument was deployed strategically, as a way to win corporations greater protections, and it is not unfair to summarize the arguments as "the corporation should be treated as an aggregate when regulated, but as a separate legal person for most other purposes." Nor was the aggregate theory the only one being put forward; still other scholars argued that the corporation was a "real entity," a creation not of the state but of its owners, albeit with an existence apart from them.[87]

The corporate and partnership debates over aggregate and entity thus turned on very different issues. The corporation debates were certainly about the corporation, but also about how corporations were to be regulated by the state and how their power would be tamed. The partnership debates focused on the partnership itself and what the internal rules governing partnerships should be. The debates also drew on different streams of legal thought. While the corporate debates had some roots in American traditions and borrowed the common law belief that the partnership was an aggregate, they also drew on scholarly and

83. Though both debates, it should be noted, occurred during a period when modernization seemed to have eroded the link between individuals and traditional communities, raising new questions about the status of individuals and groups. *See*, *e.g.*, Lamoreaux, *supra* note 8, at 43 (identifying in this period "an increased tendency to think about groups, regardless of size or function, as being more than the sum of their parts, as having identities, indeed personalities"); THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 15–45 (1982); CHRISTOPHER LASCH, THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS 139–43 (1991); ROBERT WIEBE, THE SEARCH FOR ORDER 44–75 (1967).

84. *See*, *e.g.*, HOROWITZ, *supra* note 6, at 65–107.

85. *See* Blair & Pollman, *supra* note 6, at 1887; Mark, *supra* note 2, at 1461–62.

86. *See* Blair & Pollman, *supra* note 6, at 1887–88.

87. Mark, *supra* note 2, at 1464–78.

philosophical disputes originating in Germany over the nature of collective bodies. As the legal historian Ron Harris has shown, those debates can be tracked by following German political theorist Otto von Gierke's "real entity" theory of the corporation from Germany, to the United Kingdom, to the United States.[88] When it arrived in the United States, the real entity theory became entangled in the domestic political disputes over government regulation. [89] The debate over the nature of the partnership had different roots. As shown above, it traced back to the Victorian legal reformers Cory and Ludlow and was transmitted to the United States via Lindley's *Treatise*, a work summarizing doctrinal law.[90] American partnership debates largely avoided the philosophical speculation that marked the corporate debates, and in them European theorists received barely a mention. Furthermore, the partnership disputants were firmly convinced that their dispute had practical consequences for the day-to-day operations of partnerships. As the great contracts scholar Samuel Williston saw it, there was "perhaps no considerable subject in the law in which a single fundamental but disputed principle makes so marked a difference in the conclusions reached, as is the case in the law of partnership."[91] Whichever approach was adopted promised to answer "[v]ery many of the troublesome questions involved in that branch of the law."[92]

That said, it is still striking how rarely advocates for the entity view of partnership mentioned the corporation. Fifty years earlier Cory had proclaimed that the mercantile (entity) view was that the partnership was simply "a kind of CORPORATION," but this claim disappeared in the American context.[93] Most likely it did so because the corporation was not very popular in turn-of-the-century America, and was the frequent target for withering attacks. If the entity theory meant that the partnership was merely a kind of corporation, that would be ready ammunition for its opponents. So we rarely hear advocates for the entity view mention the corporation, much less argue that the

88. *See* Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism to American Big Business*, 63 WASH. & LEE L. REV. 1421, 1424 (2006). It's possible of course that the influence of theory on practice was exaggerated; one acerbic contemporary claimed that the disputants over corporate personality strove "to exaggerate the importance of those questions, in order to pose as great reformers engaged in a gigantic task of emancipating the legal world from the thralldom of mediaeval superstition." *Id.* at 1423 (quoting Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 253 (1911)).

89. Harris, *supra* note 88, at 1466–74.

90. *See* 1 LINDLEY, *supra* note 16.

91. Samuel Williston, *The Uniform Partnership Act with Some Remarks on Other Uniform Commercial Laws*, 63 U. PA. L. REV. 196, 207 (1915).

92. *Id.*

93. CORY, *supra* note 54, at 71.

partnership was a kind of corporation—though as we shall see, opponents of the entity view eventually drew the connection and argued that the aggregate view was preferable in part because it would draw a sharp line between the partnership and the corporation.

In American law, the reformers' claim that a partnership should be viewed as an entity rather than an aggregate began to gain traction in the 1880s.[94] In 1881 a lecturer at the University of Pennsylvania could state that a partnership was simply "an aggregate of individuals[ ]—a collective name for individuals."[95] In 1888, a standard treatise, *Bates on Partnership*, repeated this, but here we find a change, for the work also stated that "[s]hould it be determined in the future that a partnership is an entity distinct from the persons composing it, my definition should not describe it as a relation but as a union or body."[96] By 1893 another major treatise, *Parsons on Partnership*, edited by Harvard Law School's Joseph H. Beale, embraced the new approach, announcing that "[p]artnership is a legal entity."[97] Beale justified this innovation by echoing Cory in pointing to accountants' practice of treating the partners and partnership separately when keeping partnership books, and by claiming that "[s]ince the law of partnership is founded upon the law merchant, that is, the custom of merchants, we should expect to find the mercantile conception of a partnership recognized by the law."[98] While acknowledging that in American law "the partnership has not been clearly recognized as an entity," he continued that "at law certain doctrines are held which can be consistently explained only by recognizing the firm as an entity."[99] Thus, there had developed "a strong disposition on the part of the courts to recognize the mercantile doctrine."[100] The mention of the law merchant is telling, for at the time many believed that English partnership law had its roots in this allegedly transnational body of medieval commercial law which had over time been incorporated into the common law.[101] Were that the case, then proponents of the entity

94. A few isolated cases from before 1880 referred to the partnership as a separate entity, but it seems to have entered the broader legal discourse only after this date. *See, e.g.*, Robertson v. Corsett, 39 Mich. 777, 784 (1878) ("The partnership for most legal purposes is a distinct entity.").

95. The Partnership During Its Continuance, or the Rights, Powers, and Liabilites of Partners (Lecture X, Nov. 14, 1881), *in* NOTES OF PROF. JAMES PARSONS' LECTURES ON PARTNERSHIPS, CORPORATIONS AND BAILMENT 36 (comp. by Frederick M. Leonard, 1882).

96. 1 CLEMENT BATES, THE LAW OF PARTNERSHIP 2 (Chi., T. H. Flood & Co. 1888).

97. PARSONS & BEALE, *supra* note 18, at 1.

98. *Id.* at 2.

99. *Id.* at 3.

100. *Id.* at 3.

101. Whether this is an accurate description of what occurred is disputed. *See* JOHN BAKER, *'Law Merchant' as a Source of English Law*, *in* 3 COLLECTED PAPERS ON ENGLISH LEGAL HISTORY 1263, 1274–82 (2013) ("It is a myth, therefore, to suppose that there was at some point in history

theory were just asking that partnership law be conformed to merchants' practices, as it had been before.

Those pushing the entity theory argued not only that courts should adopt the entity approach, but that courts had already begun to do so. Given that there were elements of partnership law that distinguished between the partnership and the partners, it was not difficult to find passages in older cases seeming to accept the entity theory. A New York case from 1832 was unearthed that asserted a partnership "constitutes but one person in law."[102] In 1870 the U.S. Supreme Court stated that "[t]he partnership is a distinct thing from the partners themselves,"[103] and a few state courts made similar statements over the next two decades.[104] One widely cited case was English. In *Pooley v Driver*, the respected judge Sir George Jessel wrote that partnership law only made sense from an entity standpoint. "You cannot grasp the notion of agency properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners . . . ."[105] More cases making similar assertions soon appeared, leading one author to identify an "unconscious instinct in [the] courts towards treating a firm as an entity."[106]

Reformers could also point to other legal developments supporting the entity approach, most significant the adoption of new rules for partnership bankruptcy. The Bankruptcy Act of 1898, the first national bankruptcy law in almost thirty years,[107] explicitly adopted the jingle rule distinguishing the partnership's assets from the partners',[108] and also included two other provisions taken to embrace the entity approach: it defined a partnership as a "person" under the Act,[109] and provided for the possibility that a partnership could be declared

---

a comprehensive body of mercantile law current throughout the world . . . waiting to be incorporated . . . ."); *see also* Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012).

102. Warner v. Griswold, 8 Wend. 665, 666 (N.Y. Sup. Ct. 1832) (allowing a law partnership to sue a former client in the name of only one partner). Many articles gathered these cases. *See, e.g.*, Note, *The Partnership as an Entity*, 15 IOWA L. REV. 186 (1930).

103. Forsyth v. Woods, 78 U.S. 484, 486 (1870) (dealing with priority of liens against partners and partnership).

104. *See, e.g.*, Campbell v. Farmers' & Merchs.' Bank, 68 N.W. 344, 346 (Neb. 1896) (noting, in the context of a transfer of assets between firms, that "[a] partnership is a distinct entity, having its own property, debts, and credits").

105. Pooley v. Driver [1876] 5 Ch D 458 at 471 (UK). This was, it appears, pure dicta.

106. 1 BATES, *supra* note 96, at 175–76.

107. On the adoption of the 1898 Act, see DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 23–47 (2001).

108. Bankruptcy Act of 1898, ch. 541, § 5, 30 Stat. 544.

109. *Id.* § 1(19), 30 Stat. at 544.

bankrupt even if some of its partners remained solvent.[110] Together these provisions were taken to be a "radical change in the theory of the nature of a partnership."[111] This produced a wave of federal court opinions which, after a little initial wavering, clearly adopted the entity theory—at least when interpreting federal bankruptcy law.[112]

Yet case law from the 1880s into the new century remained divided, and while the entity approach seemed to be gaining ground, defenders of the aggregate approach fought doggedly against it. One author, having quoted from numerous cases approving the entity theory of partnership, then confessed that

> it is quite as easy to make up from these jurisdictions just cited and from others equally weighty, a similar list of authorities to the effect that the property of a firm is the property of the partners, and the debts of a firm are the debts of the partners, and common law courts know nothing about any entity in a partnership other than the individuals who compose it.[113]

Some jurisdictions explicitly rejected the innovation, and not merely because of judicial conservatism. The entity approach, a few courts insisted, would disrupt something vital: the direct link between a partner and a creditor of the partnership.[114] In 1891 the Massachusetts Supreme Judicial Court allowed a bank to apply collateral provided by a partner to satisfy his partnership's debt, noting that, while "*Cory on Accounts* and *Lindley on Partnership* have made it popular to refer to a mercantile distinction between the firm and its members. . . . we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them."[115] Five years later in *Hughes v. Gross* then-Massachusetts Justice Oliver Wendell Holmes held that "the common law does not know the firm as an entity . . . [and a] contract with a firm is a contract with the members who compose it."[116] One article highlighted these and other Massachusetts cases which "scornfully repudiated, as an academic refinement, or as a logician's subtility, the idea of a partnership existing as a separate legal being, much in the same fashion as a corporation,

---

110. The situations would be rare, but this could occur where, for instance, one partner was a minor or insane and so could not be declared bankrupt. *See* William J. Shroder, *Distribution of Assets of Bankrupt Partnerships and Partners*, 18 HARV. L. REV. 495, 498 (1905).

111. *Id.* at 497.

112. *But see* Francis v. McNeal, 228 U.S. 695, 700–02 (1913) (holding that although bankruptcy law "recognize[s] the firm as an entity for certain purposes . . . the firm remains at common law a group of men").

113. Cowles, *supra* note 77, at 343. For other examples of cases on both sides of the question, see 1 SCOTT ROWLEY, THE MODERN LAW OF PARTNERSHIP 119–23 (1916).

114. *See, e.g.*, Hallowell v. Blackstone Nat'l Bank, 28 N.E. 281, 282 (Mass. 1891).

115. *Id.*

116. Hughes v. Gross, 43 N.E. 1031, 1032 (Mass. 1896) (citation omitted).

apart from the existence of the different copartners."[117] Decisions from other states were more nuanced, stating that a partnership was an entity for some purposes but not others, or cautioning that calling a partnership an entity did not make it so in the eyes of the law. In 1908 the Indiana Supreme Court explained that "[e]xpressions [that]" "a partnership is a legal entity. . . . are not infrequently found in the cases" but it warned that "in thus speaking the courts have referred to partnerships as legal entities merely as a term of accommodation . . . . Such statements cannot be accepted as affording a sufficient foundation for the view that a partnership is not composed of its individual members."[118]

The push and pull frustrated backers of the entity approach, who blamed the nation's jurisdictional fragmentation and the common law's inherent conservatism for the holdup in adopting what they believed the superior approach. "A legal system actually as adaptable as the common law claims to be," wrote one, "would not have required two hundred years to adjust itself to a view so advantageous practically, and so unexceptionable legally, no matter how novel."[119]

III. ENTITY AND AGGREGATE IN THE UNIFORM PARTNERSHIP ACT

Debates over the nature of the partnership came to a head when work began on the Uniform Partnership Act. Drafting of uniform acts had begun in the early 1890s under the aegis of the ABA, which led to the formation in 1892 of the Commission on Uniform State Laws (later the National Commission of Commissioners on Uniform State Laws, or "NCCUSL," and now the Uniform Law Commission, or "ULC").[120] It produced its first uniform act, the Uniform Negotiable Instruments Law, in 1896.[121] Partnership law was clearly on the agenda, and in 1903 Sir Frederick Pollock, drafter of the United Kingdom's Partnership Act 1890, spoke at the Commission's annual meeting and urged them to begin work on an American uniform law for partnership.[122] That year

117. Lee M. Friedman, *Some Recent Massachusetts Decisions in Partnership*, 32 AM. L. REV. 244, 244 (1898).

118. State v. Krasher, 83 N.E. 498, 500 (Ind. 1908).

119. Cowles, *supra* note 77, at 348. For more recent observations that the conservatism of the common law can hold back adoption of new business forms, see Timothy W. Guinnane, Ron Harris, Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Putting the Corporation in Its Place*, 8 ENTER. & SOC'Y 687, 718 (2007); Lamoreaux, *supra* note 8, at 31.

120. *See* STEIN, *supra* note 71, at 13–14.

121. *Id.* at 18. Not all proposed acts were drafted, and not all drafted were adopted by many states. *See* MORTON KELLER, REGULATING A NEW ECONOMY 1900-1933, at 95–97 (1990).

122. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTEENTH ANNUAL CONFERENCE MEETING 5, 8 (1903) [hereinafter 1903 NATIONAL CONFERENCE HANDBOOK].

the Commission proposed to begin work on a uniform partnership act without, it appears, any real dissent, though a few worried voices were raised; a comment in the *Harvard Law Review* from this period argued that "in its present state of flux it would be a great mistake to attempt to codify" partnership law, as this could interrupt the trend towards adoption of "the mercantile view of the nature of a partnership."[123] But such objections were ignored, and in 1903 the Commission decided to go ahead with a Uniform Partnership Act and asked the dean of the Harvard Law School, James Barr Ames, to draft it.[124]

Ames was to be a pivotal figure in the debates over the nature of the partnership. Today he is best remembered as an emanation of the Harvard Law School. He enrolled at the Law School in 1870, the year Christopher Columbus Langdell became dean and began teaching using the case method; joined the faculty upon graduation; succeeded Langdell as dean in 1895; and remained there until his death in 1910.[125] Ames was a legal historian, but also taught partnership law and may have authored the first casebook in the field (he is credited with naming the rule of insolvency priority the "jingle rule").[126] Most important for this Article, he was the leading American exponent of the entity theory, and his appointment seemed to foreshadow that view's triumph.[127]

How Ames came to champion the entity view calls for a quick detour into the history and myths of American legal education, for Ames's views appear to have come straight from his mentor Langdell. Today Langdell is remembered as a dry arch-formalist, devoted to distilling legal rules from appellate opinions alone.[128] Yet as the historian Bruce Kimball has recently discovered, when he first began teaching—with Ames as one of his first students—Langdell took a more empirical approach.[129] Among his subjects was partnership law, and

123. J. D. B., *The Partnership as a Legal Entity*, 17 HARV. L. REV. 207, 208 (1904).

124. 1903 NATIONAL CONFERENCE HANDBOOK, *supra* note 122, at 4.

125. *See* Joseph H. Beale, *James Barr Ames—His Life and Character*, 23 HARV. L. REV. 325, 325 (1910); DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 290–309 (2013).

126. Frank R. Kennedy, *A New Deal for Partnership Bankruptcy*, 60 COLUM. L. REV. 610, 630 n.86 (1960). *See generally* JAMES BARR AMES, A SELECTION OF CASES ON THE LAW OF PARTNERSHIP, 1881-1887 (Cambridge, Mass., Riverside Press 1893).

127. *See, e.g.*, PARSONS & BEALE, *supra* note 18, at 1–4.

128. *See, e.g.*, ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 52–53 (1983); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 4–6 (1997). This view has recently been challenged. *See* BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906 (2009).

129. *See* Bruce A. Kimball, "*Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870-1883*, 17 LAW & HIST. REV. 57, 60 (1999) (describing one student's opinion that Langdell was "more of a logician than a lawyer").

when trying to define partnership, Langdell insisted "that the legal doctrine of partnership must be inferred from 'careful observation' of extralegal factors, such as the practice of merchants."[130] At one point Langdell even told students that he was only "adopting and carrying out the theory developed by Mr. Cory in his treatise on accounts"—the entity theory of partnership.[131] What led Langdell to the entity view is not clear, but it may have been the fact that before Harvard he spent a dozen years in a commercial law practice in New York City, which exposed him to merchants' views of the partnership.[132] What is clear is that Ames inherited the entity view from Langdell and transmitted it to his own students; when Joseph Beale began teaching partnership law at Harvard he used Ames's notes, and recalled Ames concluding "in case after case that the decision is absolutely inconsistent with any other theory than that of entity."[133] Decades later Judge Learned Hand, a member of Harvard Law's class of 1896, recalled learning from Ames "how inadequate was the common law of partnership before the advent of *Cory on Accounts*."[134]

In 1905, two years after being named drafter of the UPA, Ames returned to the NCCUSL and explained more fully why he proposed to draft the Act on the entity theory.[135] Echoing other advocates of the entity approach, he argued that only a statute founded on that theory could bring coherence to the law. Partnership law, he warned the Commission, posed a particular challenge for a drafter, for while other commercial laws might differ from state to state there "the distinctions are not fundamental."[136] That was not the case with partnership law, whose basic rules varied between the states, which he attributed to the unresolved theories of the partnership. "[A]lmost from the beginning of the development of the law of partnership," Ames announced, "there has been a contest going on between the lawyers and the merchants."[137] "The merchants have looked upon a partnership as a distinct personality; . . . they look upon it as owning property and as contracting. The lawyers, on the other hand, have steadily insisted that a

130. *Id.* at 69.

131. *Id.* at 68 (internal quotation marks omitted).

132. *Id.* at 65.

133. WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 208 n.113 (1994) (internal quotation marks omitted).

134. LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958, at 77 (1958) (reminiscing about his time at Harvard).

135. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTEENTH ANNUAL CONFERENCE MEETING 23, 24 (1905).

136. *Id.* at 24.

137. *Id.* at 25.

partnership is simply a group of co-owners, co-obligors and co-obligees."[138]

Many of the tangles he found in partnership law he blamed on unthinking adherence to the aggregate approach, which clashed with commercial realities. In no state, for example, could a firm hold real property in its own name—a consequence of the aggregate approach.[139] What then should the rule be when such property was inadvertently conveyed to a partnership in the firm's name? "Where is the title to go? Not having the mercantile principle to go upon, the courts have gone apart in different jurisdictions."[140] In eight states title was vested in the named partners, in three it stayed with the grantor, while in seven title vested in all the partners named and unnamed. "[A]ll those difficulties will disappear at once if the mercantile conception is adopted."[141] Or what should occur when a partner's creditor attempted to levy on the partnership's property? Due to the aggregate theory the property was not titled in the firm's name but that of the partners. If the partners held the property as cotenants, then in seventeen states the creditor could take "the legal title of the partner . . . upon execution or attachment."[142] In ten other states, however, the law held that a partner's creditor had no direct claim on partnership property, and "the sheriff is a trespasser if he touches the firm's property."[143] "That illustration brings out what we see continually in the law of partnership, the courts professing to look upon the partnership from the common law point of view and abandoning the principle in concrete cases."[144] Ames piled up example after example of how rules differed from state to state, ranging from a partner's power to demand partition of firm real estate, to whether a partner's widow has a dower right in partnership real estate, to the rights of a firm's creditors against the estate of a deceased partner.[145]

So great were the differences between states' rules, he concluded, that a uniform act would have to "sacrifice[ ] the law of almost all of the states in many particulars," and it was not "worth while [sic] to attempt to draft a partnership act except upon some sound fundamental principle," which for him was "the mercantile conception

138. *Id.*
139. *Id.* Ames did note that Louisiana took the entity approach.
140. *Id.*
141. *Id.* at 26.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 26–28.

of a partnership."[146] It's important to observe that for Ames the term used mattered less than that the partnership would be given separate legal existence and would serve as a locus for the firm's legal relationships:

> I do not mean by that to say that it is necessary to state . . . that a partnership is a person. That is a mere matter of detail. But what I should deem of fundamental importance would be substantially this: That the partnership as such should be made the owner of the firm's property; the title at law should vest in the partnership as such; the partnership as such should be treated as the obligor, and also as the obligee on firm contracts, and that actions by or against the partners should be brought in the firm name.[147]

He concluded by refusing to take any other approach. "[I]f the Conference thinks my plan undesirable, I should much prefer to have someone else draw the act . . . ."[148] The Commission unanimously authorized Ames to draft the act on the entity theory.[149]

In 1906 Ames produced a first draft of the Uniform Partnership Act.[150] While borrowing heavily from the Partnership Act 1890, it broke with the English approach by squarely adopting the entity theory, defining the partnership as a "legal person" and adopting rules giving the partnership separate legal existence.[151] Partnership property was now to be titled in the name of the partnership.[152] A partnership for a term or specific undertaking could not be dissolved by an individual partner in violation of the partnership agreement,[153] and even the common law rule that a partner's death or bankruptcy would dissolve the partnership was "[s]ubject to any agreement between the partners."[154] Partners would no longer be directly liable for partnership debts; now partnership assets would have to be exhausted before a separate proceeding could be brought against a partner (this did not shield partners from liability, but added procedural hurdles for a partnership creditor).[155] Two innovations not related to the entity approach were also notable. Ames's 1906 draft would have required all

146. *Id.* at 28.

147. *Id.*

148. *Id.* at 29.

149. *Id.* at 30.

150. This draft is appended to *Proceedings*, *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE SIXTEENTH ANNUAL CONFERENCE MEETING 237 (1906) [hereinafter 1906 DRAFT].

151. *Id.* at 239 (Sections 1 and 5).

152. *Id.* (Section 5(2)).

153. *Id.* at 247 (Section 32). A partner had the power to petition a court for dissolution in other circumstances, such as when another partner "wilfuly [sic] and or persistently commits a breach of the partnership agreement," or when circumstances have arisen which "in the opinion of the Court render it just and equitable that the partnership be dissolved." *Id.* at 248 (Section 35).

154. *Id.* at 248 (Section 33).

155. *Id.* at 241 (Section 12).

partnerships to publicly register by filing a certificate in the county clerk's office "stating the firm name of the partnership, the general nature of its business, and the full name and residence of each member of the partnership."[156] It also adopted the English innovation that limited an individual partner's creditors to securing a "charging order" against partnership property, replacing the confusing morass of older rules that, in a few states, had allowed a partner's creditors directly to attach partnership property.[157] Ames's draft did not abandon the common law partnership wholesale, but neither did it just codify preexisting rules.

The first response was largely positive; even partnership law specialists who eventually turned against the entity theory initially favored it,[158] and Ames continued the slow work of drafting for the next few years. There were, to be sure, stumbling blocks; in 1908 he reported that several state constitutions defined "corporation" in a way that might sweep up a partnership defined as a separate legal person, giving the partnership limited liability, "which, of course, is quite at war with the whole conception of partnership."[159] (The drafters never contemplated a general partnership with limited liability.[160]) The Commission however urged Ames to continue drafting upon the mercantile theory.[161]

Broader trends in American jurisprudence lent weight to Ames's preference for the "mercantile" view, specifically the protorealist "sociological jurisprudence" then being championed by Roscoe Pound (himself a future dean of the Harvard Law School).[162] In several articles published during this time Pound argued for rejecting formalist approaches to the law, and called instead for "the adjustment of [legal]

156. *Id.* at 239 (Section 6)

157. *Id.* at 244 (Section 23). On the different rules states followed before the UPA was adopted, see FRANCIS BURDICK, THE LAW OF PARTNERSHIP, INCLUDING LIMITED PARTNERSHIPS 259–60 (Bos., Little, Brown & Co. 1899).

158. *See, e.g.*, COMM. ON COM. L., REPRINT OF DISCUSSIONS BEFORE THE COMMITTEE ON COMMERCIAL LAW OF THE CONFERENCE ON UNIFORM STATE LAWS *IN RE* THE THEORY ON WHICH AN ACT TO MAKE UNIFORM THE LAW OF PARTNERSHIP SHOULD BE DRAWN 18–19 (1910) [hereinafter 1910 PAMPHLET] (comment of Francis Burdick).

159. Charles Thaddeus Terry, *Proceedings*, 31 ANN. REP. A.B.A. 964, 984 (1908) (proceedings of the 18th Annual Conference of the Commissioners on Uniform State Laws).

160. The drafts of the UPA did include provisions for the limited partnership, which was, however, a different legal entity than the general partnership. *See* 1906 DRAFT, *supra* note 150, at 252–55 (Sections 45–55). On the limited partnership's career in the United States, see generally Amalia Kessler, *Limited Liability in Context: Lessons from the French Origins of the American Limited Partnership*, 32 J. LEGAL STUD. 511 (2003); and WARREN, *supra* note 34, at 302–26.

161. *See, e.g.*, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE EIGHTEENTH ANNUAL CONFERENCE MEETING 22, 51, 102 (1908) (report on drafting the UPA by Ames).

162. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 54–66 (1997).

principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place."[163] Indeed, Pound pointed to Ames's work on the Uniform Partnership Act as a prime example of this new approach in his classic 1911 article "The Scope and Purpose of Sociological Jurisprudence." There he praised the "attempt to put the law of partnership upon a better basis through the proposed partnership act and to bring it into accord with the uniform understanding of business men," and criticized the resistance to the new approach from "teachers of law, who insist that the traditional course of judicial opposition to the mercantile view shall be perpetuated in the code."[164]

Then Ames died. At the end of 1909 he developed what may have been early onset Alzheimer's disease and died a few months later, leaving the UPA unfinished.[165] The NCCUSL named William Draper Lewis, dean of the University of Pennsylvania School of Law, to succeed Ames as drafter. While it is not possible to tell what occurred behind the scenes, evidence suggests that the Committee began to have second thoughts about the entity approach. Lewis reported that, when he was named as drafter, "individual members of the Committee" asked him to prepare two potential drafts, one taking the entity approach, one the aggregate.[166] The debate was reopened.

To settle the aggregate/entity question the Committee on Commercial Laws held a summit in Philadelphia in February 1911 to discuss "the nature of the partnership" and the approach that should be adopted when drafting the Act, inviting "a large number of judges, law teachers, practicing members of the Bar, and representatives of commercial bodies."[167] After two days' debate, the Committee swung decisively behind the aggregate approach. A record of the meeting was printed and circulated, allowing us to reconstruct why the Committee abandoned Ames's work, and the entity approach, in favor of the aggregate approach.

These records also allow us to address a question that has probably occurred to the reader by now: Why did the parties care so fervently about the aggregate/entity distinction? Apart from tidying up

163. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609–10 (1908).

164. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 601–02 (1911).

165. Winship, *supra* note 8, at 633.

166. Lewis, *supra* note 76, at 93. Lewis was aided by his former student James Lichtenberger. *Id.* In 1910 the Committee published a pamphlet with three different drafts: Ames's last draft, entity and aggregate drafts produced by Lewis and Lichtenberger, and the Partnership Act of 1890. JAMES B. LICHTENBERGER & WILLIAM DRAPER LEWIS, TENTATIVE DRAFTS OF AN ACT TO MAKE UNIFORM THE LAW OF PARTNERSHIP (1910).

167. 1910 PAMPHLET, *supra* note 158, at 2.

certain corners of partnership law, what difference did legal personhood really make? As should be clear, while the common law did not treat the partnership as a separate legal person, aspects of partnership law had long distinguished between partnership and partners,[168] and outside of legal disputes it was common to speak of the partnership instead of the partners.[169] Even the initial "aggregate" draft that Lewis produced in 1911 recognized "the business carried on by the partners as an entity," the chief legal point being that the "business [was] being carried on by the partners in their separate legal capacities, not as directors or agents for a *separate legal entity*."[170] Furthermore, Lewis acknowledged that "in the majority of the provisions, many of which deal with subjects of the greatest consequence, it is entirely immaterial whether the Act is drawn on the aggregate or on the entity theory of partnership."[171] Why, then, was so much ink spilled, and why after initial acceptance was the entity approach rejected?

Some at the Philadelphia meeting did identify practical problems with adopting the entity approach. Were the partnership primarily liable for firm debts, and partners only secondarily liable, as would be the case under an entity approach, several commentors feared that a partnership creditor might have to file two suits to have a debt repaid, one against the partnership and then, when that judgment went unsatisfied, another against the partners.[172] The registration requirement was another sticking point. Lewis feared that, if adopted, this would create a new kind of business form, making the UPA "an Act relative to registered partnerships and [that] would necessitate another statute to deal with those which were unregistered."[173] Several commentors were unsure where the partnership's legal domicile would be under the entity theory.[174] Still other objections were products of the common lawyer's aversion to change. The University of Chicago's Floyd Mechem was blunt: "I do not like to see the common law changed. . . . I do not like to see people start in to tinker with it."[175]

A more fundamental objection to the entity approach was repeatedly voiced, however, one that illustrates an aspect of legal personhood not well appreciated today. When touching on issues of

168. *See supra* text accompanying notes 32–36.

169. This point dates back to CORY, *supra* note 54, at 71.

170. 1910 PAMPHLET, *supra* note 158, at 1–2 (emphasis added).

171. *Id.* at 5.

172. *Id.* at 12–13.

173. *Id.* at 10.

174. *Id.* at 26.

175. *Id.* at 17; *see also* Williston, *supra* note 91, at 209 ("Lawyers are distrustful and, as they believe, rightfully distrustful of attempts to change the law root and branch.").

legal personhood and the divide between a business entity and its owners, present-day commentators most often emphasize the economic or managerial consequences that flow from legal acknowledgement of the separate entity, whether that be shielding for entity assets,[176] limited liability for owners,[177] or surrender of control of firm assets to managers.[178] (In the United States, extensive discussions also occurred over whether the corporate legal person can assert constitutional rights.[179]) In all these accounts, the partnership typically appears as imperfect, an organizational form lacking something owners should want.[180] As one recent observer puts it, "modern commentators have by and large . . . seen partnership law simply as a step towards later law's proper and inevitable recognition of the superior form of trading."[181] At the 1911 meeting, however, defenders of the partnership-as-aggregate had a very different take. They rejected any approach that would treat the partnership as an entity because they believed the traditional partnership was a *superior* form of business, one that encouraged a higher level of commercial morality than did the corporation.

Some nineteenth-century commentators had favored the partnership because it lacked limited liability, a feature that would not only make more assets available to creditors but would also encourage partners to more carefully oversee their firms and fellow partners.[182] As the legal historian Michael Lobban puts it, the partnership was seen as the "most moral form of business, [because] . . . all partners would be

176. *See, e.g.*, Hansmann et al., *supra* note 7, at 1337–38.

177. *See, e.g.*, Hansmann & Kraakman, *supra* note 7, at 423–25.

178. *See, e.g.*, Blair, *supra* note 7, at 433–37 (corporate law achieving both capital lock-in and centralizing control of assets); Ricks, *supra* note 36, at 1306 (relinquishment of control of assets).

179. *See* Citizens United v. FEC, 588 U.S. 310 (2010); Blair & Pollman, *supra* note 6 (analyzing the Supreme Court's treatment of corporations and constitutional rights); WINKLER, *supra* note 6, at 324–95 (discussing *Citzens United*).

180. Thus the partnership provides only weak entity shielding, or lacks limited liability. For exceptions to this negative view, see Lamoreaux, *supra* note 8, at 49–50 (noting partnership's structural flexibility as an advantage); and Ryan Bubb, *Choosing the Partnership: English Business Organizational Law During the Industrial Revolution*, 38 SEATTLE U. L. REV. 337, 339 (2015) (explaining why English entrepreneurs chose the partnership form).

181. TELEVANTOS, *supra* note 13, at 28.

182. This view of the positive effects of unlimited liability survives today. *See, e.g.*, Claire Hill & Richard Painter, *Berle's Vision Beyond Shareholder Interest: Why Investment Bankers Should Have (Some) Personal Liability*, 33 SEATTLE U. L. REV. 1173 *passim* (2010) (arguing for imposing personal liability on investment bankers as a way to deter financial risk-taking); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 175 (2002) ("The spread of limited liability partnerships accentuates the willingness of partners to ignore the risks that other partners are taking."); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1880 (1991) (arguing for a general regime of unlimited shareholder liability in tort). In this vein, Erik Gerding has pointed to recent scholarship arguing that encouraging financial institutions to use less-utilized business forms, including the partnership, may tame risky behavior. Erik Gerding, *Remutualization*, 105 CORNELL L. REV. 797, 801 (2020).

active in the business and would share liability."[183] In England, "[t]he impersonality of the joint-stock company, operating on the basis of limited liability, was contrasted with the partnership, where the crucial relationship was one of unreserved trust, grounded in mutual personal knowledge."[184] But the disciplining effect of unlimited liability was not why the experts at the Philadelphia meeting opposed the entity theory, for the entity theory, at least as embodied in Ames's drafts, would not have limited partners' liability. While it made it more difficult to reach a partner's assets, partners would still have ultimately been answerable for the partnership's unpaid debts.

Participants at the Philadelphia meeting—the giants of partnership law in their day—rejected the entity approach because it threatened to sever the direct, unmediated link between partners and those who did business with the partnership by inserting a new party, the legal person of the partnership, between the two. Dean Lewis was clear on this, stating that

> [t]he serious objection [to the entity approach] . . . is deeper. When third persons deal with a partnership they deal with the individual partners just as personally and directly as they deal with the sole owner of a business. To make the liability of the partner a secondary or contributory liability is refusing to recognize the real relation between the partners and those who do business with the firm.[185]

George Wharton Pepper, a professor at the University of Pennsylvania and leader of the Philadelphia bar, echoed this conclusion:

> A fundamental objection to the entity theory is that it leaves the partner no status but that of . . . the agent of "the firm." But in point of fact he acts for himself and not merely for others. He is a principal. He has the responsibility of a principal, morally, economically, and legally. It is perverse and unintelligent to force him into a category which takes no account of this fact.[186]

In this the partnership compared favorably to the corporation, and here we see the defense of the traditional view of the partnership joined to criticism of the corporation. Participants at the partnership summit made clear their wish to keep the partnership as unlike the corporation as possible. (The sharp divide they drew between the two may help explain American law's historic hostility to business forms that sat midway between corporation and partnership.[187]) While some corporate theorists of this era argued that the corporation was much

183. Lobban, *supra* note 46, at 614.

184. G. R. SEARLE, MORALITY AND THE MARKET IN VICTORIAN BRITAIN 87 (1998).

185. 1910 PAMPHLET, *supra* note 158, at 13.

186. *Id.* at 33.

187. *See* Guinnane et al., *supra* note 119, at 714–23; Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 268, 276–91 (2008) (describing how legal norms posed a problem for closed corporations).

like the partnership, these experts in partnership law were having none of it.[188] The partnership was for them the antithesis of the corporation; as the University of Chicago's Floyd Mechem put it, "a corporation is a legal person made up of the association of a number of individuals. A partnership is just exactly not that."[189] The last thing the participants wanted was a partnership that resembled a corporation. Burton Mansfield, a respected practitioner who represented the Chamber of Commerce at the meeting, made this clear when he spoke of "too great a tendency toward joint stock corporations, from the point of view of allowing individuals to escape financial responsibility. I do not like that phase of it. I think it would be very much better if partnership were encouraged."[190] Ames's innovations were also opposed because there had been earlier attempts to create a business form midway between the corporation and partnership, and they were generally perceived as unwieldy failures. As Mechem explained, "I am opposed to more corporations. We have had in Michigan," he explained,

> much trouble as to the nature of the informal corporate association that you have in Massachusetts. In Pennsylvania we had an association that gave us a great deal of trouble. . . . [If] we declare that the partnership is a legal person, we are going to have just that question in many States.[191]

Lewis summed up his and the Committee's view when he concluded that the then-existing partnership encouraged moral behavior in a way that a partnership with a separate legal personality would not:

> [S]o far as business men now separate their own personality from the personality of the firm . . . they tend to do acts as a firm which lower the moral standards of the community. I think we see that in corporations, and it seems to me that one of the chief issues that is before you today is whether you want to give formal statutory sanction to a separation of personality between the firm and the individual which will, in my opinion, and I think in the opinion of others of much more experience than myself, be a direct blow to the commercial morality of this country.[192]

This view was widely shared. Looking back two decades later, after the adoption of the UPA on the aggregate theory, Harvard Law School professor Edward Warren identified as

---

188. Advocates of the "aggregate" view of the corporation. *See* Mark, *supra* note 2, at 1478–87 (discussing the "astonishingly rapid erosion" of the partnership analogy).

189. 1910 PAMPHLET, *supra* note 158, at 15.

190. *Id.* at 22–23.

191. *Id.* at 18. For an account of one such business form, Pennsylvania's Partnership Association, and its lack of success, see Naomi Lamoreaux, *Revisiting American Exceptionalism: Democracy and the Regulation of Corporate Governance, in* ENTERPRISING AMERICA: BUSINESSES, BANKS, AND CREDIT MARKETS IN HISTORICAL PERSPECTIVE 25, 48–59 (William Collins & Robert Margo eds., 2015).

192. 1910 PAMPHLET, *supra* note 158, at 24–25.

> the most important matter in all partnership law . . . that the law should make partners feel that partnership liabilities are *their* liabilities, to be met promptly by them out of *all* their assets, joint or separate. The law should give the partners no excuse for feeling that separate assets should not be touched until it has been demonstrated that joint assets are insufficient.[193]

The entity approach, which made partners mere guarantors for the partnership with no direct tie to partnership creditors, would mean those debts were "not buttressed by the same moral responsibility that [they] be promptly met as is a primary liability."[194]

What emerged from the Philadelphia conclave was a consensus in favor of the aggregate approach. At the NCCUSL meeting later that year Lewis presented his draft, which he described as a "positive negation of the proposition that you can regard a partnership as a separate legal person."[195] The Act he proposed was not without innovations; as Lewis acknowledged, states' partnership laws were so divergent that any Uniform Act would unavoidably change some of them. The Act also cleared up areas of confusion by adopting an entirely new kind of common ownership, the "tenancy in partnership," for partnership property[196] and by borrowing the "charging order" remedy from the Partnership Act 1890.[197] There was little dispute over these changes, though, and no serious defense made of the entity approach during the rest of the drafting process. After several more revisions Lewis's work was promulgated as the Uniform Partnership Act in 1914, which defined a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[198]

The fights were not quite done. In 1915 there was one more exchange over the new Act, showing scholars still wrestling with the entity concept. An article attacking the new UPA appeared in the *Harvard Law Review*, arguing that whatever its drafters claimed, the Act in fact treated the partnership as an entity. Written by Judson Crane, later dean at the University of Pittsburgh, the article cited Gierke and other "real entity" theorists—perhaps the only time legal philosophy really appeared in the partnership debates—to argue that "modern jurists are coming to accept the view that any group of human beings united for a common purpose forms a real or natural entity

193. WARREN, *supra* note 34, at 38.

194. *Id.* at 39.

195. *Proceedings*, 34 ANN. REP. A.B.A. 798, 825 (1911) (proceedings of the 21st Annual Conference of Commissioners on Uniform State Laws).

196. *See* Joseph H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for a Definition*, 15 MICH. L. REV. 609, 611 (1917).

197. UNIF. P'SHIP ACT § 28 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1914).

198. *Id.* § 6(1).

distinct from its members."[199] The Act, Crane claimed, in fact treated the partnership as a "legal person . . . an entity having legal capacity for rights and obligations."[200] He cited specific sections for support. Under the UPA, for instance, a partnership could take title to property "in the partnership name," which "would seem to make the partnership as such the subject of rights, and thus a legal person."[201] Other provisions made "every partner the agent of the partnership, not of the partners," and required "the partnership, not the co-partners, to indemnify the partner in respect of certain payments."[202] And while the new tenancy in partnership vested partnership property in the partners, the tenure was so hemmed about that a partner's right over the property was "no more than nominal, and it does not materially impair the ownership of partnership property by the partnership entity."[203] Given all this, Crane concluded, "it ought to be very difficult for an open-minded court . . . to hold that a partnership is not vested with rights and obligations, and therefore a person before the law."[204]

Lewis fired back with a response that showed how he viewed the aggregate/entity distinction. Relying less on jurisprudence than what appears to be homegrown metaphysics, he conceded that of course any set of activities, such as those involved in conducting a business, could be grouped together and "by the very fact [they] are grouped become[ ] an entity."[205] But this mental shortcut wasn't the issue in partnership law. For Lewis the issue was "whether the group of activities carried on by the partners should be regarded as being carried on by them—which is the actual fact—or as being carried on *by a legal personality distinct from the legal personalities of the partners*."[206] Because the Act never ascribed the partnership's acts to a separate legal person, Lewis believed it did not adopt the entity theory. As Edward Warren later explained it, for Lewis, "the definition of a partnership as a 'legal person' seems to have been equivalent to a statement that a partnership has a personality, just as a human being has a personality."[207]

After this, the debate dwindled. In partnership as in corporate law, over the next few decades rigid adherence to one or another theory

199. Judson A. Crane, *The Uniform Partnership Act: A Criticism*, 28 HARV. L. REV. 762, 763 (1915).

200. *Id.*

201. *Id.* at 770.

202. *Id.* at 770–71.

203. *Id.* at 773.

204. *Id.* at 773–74.

205. William Draper Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticisms*, 29 HARV. L. REV. 158, 160–61 (1915).

206. *Id.* at 162 (emphasis added).

207. WARREN, *supra* note 34, at 299.

of personhood came to seem less important as the malleable nature of the concepts used, and the indeterminate results that could be derived from them, became apparent and more accepted in the legal academy.[208] The UPA was slowly adopted,[209] and as the fights over its adoption retreated, commentators were willing to admit that, while drafted on the aggregate theory, it retained traces of the entity approach as well, and that perhaps the practical consequence of the different approaches was not as great as had once been assumed. At the end of the 1920s Harvard's corporation law specialist Merrick Dodd concluded that while the Act "purports to adopt the aggregate concept," its rules produced "many of the results to which the entity theory would lead."[210] One understands the waspish comment of an early observer who asked, "If the act had emanated from a legislative committee should we suspect that the radicals had, in the language of the day, 'put one over on' the conservatives?"[211]

Over the rest of the century scholars occasionally returned to the question of whether the UPA embodied the aggregate view, or mixed aggregate and entity, but without the passion or urgency that gripped lawyers when the Act was drafted.[212] Most partnership cases simply did not turn on whether the partnership was defined as aggregate or entity.[213] In 1985 an unusual case appeared where the question did matter. In *Fairways Development Co. v. Title Insurance Co. of Minnesota*, a court held that a title insurance policy sold to a partnership lapsed when two partners left, as their departure dissolved the partnership, even though the underlying business continued—a

208. This of course reflects the triumph of legal realism. In corporation theory the debate over the nature of the corporate personality was deflated after publication of John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926). *See also* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1650–51.

209. By 1920 it had been adopted in thirteen states. H.S. Richards, *Uniform Partnership Act*, 1 WIS. L. REV. 5, 7 (1920).

210. E. Merrick Dodd, *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 1011 (1929) (reversing order of quoted passages). Dodd's article was criticizing one author who still cared deeply about the divide, Edward Warren, whose *Corporate Advantages Without Incorporation* spent its first hundred pages trying to bury the entity theory. *See* WARREN, *supra* note 34, at 17–141.

211. WRIGHTINGTON, *supra* note 1, at 144–45.

212. *See, e.g.*, A. Ladru Jensen, *Is the Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377 (1962); Rosin, *supra* note 8, 422–36; RIBSTEIN, *supra* note 8; Winship, *supra* note 8. The articles addressing the issue appear to be almost completely tax articles. *But see* Rosin, *supra* note 8, at 422–36.

213. *See, e.g.*, Donald J. Weidner, *A Perspective to Reconsider Partnership Law*, 16 FLA. ST. U. L. REV. 1, 8 (1988) ("Most cases can, of course, be decided without resort to the general theory of the partnership as an entity versus an aggregate.").

result dictated by the aggregate view of partnership.[214] The case attracted extensive scholarly commentary, and when in the early 1990s the UPA was redrafted, its successor, the Revised Uniform Partnership Act ("RUPA"),[215] explicitly adopted the entity approach, largely in response to *Fairways* and fears that the aggregate approach dictated that every time a partner left a firm the partnership dissolved.[216] RUPA produced a good deal of scholarly commentary, but none of the fireworks that accompanied the drafting of UPA. The entity status of the partnership appeared settled.

IV. A TWENTY-FIRST CENTURY CODA

Today one might think the issue is settled. RUPA defines the partnership as an entity, and metaphysical discussions are long gone from the law of business associations.[217] Corporate personhood has become again an issue in corporation law, but the conversation occurs in the language of law and economics or constitutional law and rarely reaches partnerships.[218] With the spread of the limited liability company ("LLC"),[219] partnerships have become less common, and partnership law now seems important chiefly for limited partnerships ("LPs") and limited liability partnerships ("LLPs"), entities concentrated in a few fields.[220] But the aggregate/entity issue in partnership law has not completely disappeared. Surprisingly, it was a

---

214. 621 F. Supp. 120, 122 (N.D. Ohio 1985). While this case followed blackletter partnership law, it appears that in many states courts had turned a blind eye to this rule, which is one of the reasons the case drew such attention. *See* Donald J. Weidner, *Three Policy Decisions Animate Revision of the Uniform Partnership Act*, 46 BUS. LAW. 427, 435–38 (1991).

215. Adopted in several guises between 1993 and 1997.

216. REVISED UNIF. P'SHIP ACT § 2 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997) (amended 2013). Though, even here, the entity approach had its limits; a partnership still had to have two or more partners, for instance. *See also* Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 3–5, 4 n.15 (1993). It should also be noted that a few states retain the UPA and its aggregate approach; New York, for instance, still follows the UPA and thus states in its statute that the partnership is an aggregate. *See* N.Y. P'SHIP LAW § 10 (Consol. 2021) ("A partnership is an association of two or more persons to carry on as co-owners a business for profit.").

217. Intriguingly, debates over the entity status of some businesses live on in underexplored areas of the law. Reciprocal exchanges in insurance, for instance, are sizeable enterprises that lack entity status but seem to operate well. *See* Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247, 249–50 (2017).

218. *See supra* text accompanying notes 179–180. *But see* Hansmann et. al, *supra* note 7, at 1337 (discussing weak entity shielding in partnerships).

219. *See* LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 1.2 (2020).

220. *See* Christine Hurt, *Extra Large Partnerships* (BYU L., Rsch. Paper No. 20-10, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523375# [https://perma.cc/NMH3-34YV]. *But see* Christine Hurt, *Startup Partnerships*, 61 B.C. L. REV. 2487, 2499 (2020) (discussing ongoing issues raised by accidental partnerships).

central issue in a case decided in 2020, one that shows us how much the discourse over the partnership has changed in the last century.

United States v. Sanofi-Aventis, a case recently decided by the Delaware Supreme Court, began in 2011 when three would-be whistleblowers filed a qui tam claim under the False Claims Act ("FCA") against Sanofi-Aventis and other pharmaceutical firms in federal court in New Jersey.[221] Three former employees of Sanofi-Aventis alleged that the corporation had violated the FCA when marketing Plavix, a drug used to prevent heart attacks and strokes.[222] Rather than pursue their claims individually, they decided to join together in a business entity to do so, perhaps to maintain anonymity temporarily.[223] But the FCA posed a problem, for it requires that in certain situations a private plaintiff be "an 'original source' with direct knowledge of the fraud."[224] If the lawsuit against Sanofi was maintained by an entity separate from its owners, that entity might not qualify as an original source. So the three whistleblowers formed a Delaware limited liability partnership to conduct the litigation, "JKJ Partnership 2011 LLP" ("JKJ"), and stated in the partnership agreement that the partnership "shall not be a separate legal entity distinct from its Partners."[225] In other words, they elected to be treated as an aggregate. At the same time, in what would later become a point of contention, the agreement also provided that "withdrawal of a Partner shall not cause dissolution of the Partnership," a provision which seemingly contradicted the decision to be treated as an aggregate.[226]

In 2016, several years after JKJ filed its initial complaint against Sanofi, one of the partners left and was replaced by another whistleblower also claiming direct knowledge of the fraud.[227] When this chain of events was brought to the district court's attention in 2017, it faced issues rarely raised anymore: Was JKJ an aggregate or entity? And, if it was an aggregate, had it dissolved when one of its original partners left? The answers mattered because, if JKJ dissolved in 2016 and was replaced by a new partnership, the new partnership might be ineligible to pursue the litigation, due to a different provision of the FCA

221. 226 A.3d 1117 (Del. 2020). My thanks to Michael DiPietro, who brought this case to my attention.

222. These facts and conclusions are drawn from *In re* Plavix Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II), 315 F. Supp. 3d 817 (D.N.J. 2018), *vacated*, 974 F.3d 228 (3d Cir. 2020).

223. *In re Plavix*, 315 F. Supp. 3d at 820. The original complaint listed them as "Partner A," "Partner B," and "Partner C."

224. *Id.* at 824.

225. *Id.* at 830.

226. *Id.*

227. *Id.* at 821.

that bars private parties from "intervening" in ongoing cases.[228] In 2018, the federal district court ruled that JKJ was an aggregate, as stated in its partnership agreement, and under rules governing aggregate partnerships had dissolved when a partner left in 2016.[229] A different holding, the court stated, would lead to the "absurd result that JKJ would be permitted to proceed as a relator because it is legally indistinguishable from . . . its members, but would also be permitted to change its membership without becoming a different legal entity because it is legally independent and distinguishable from its present membership."[230] The court then dismissed the case.[231]

Plaintiffs appealed this decision to the U.S. Court of Appeals for the Third Circuit, which concluded the case raised novel questions of Delaware partnership law and certified several questions to the Delaware Supreme Court, the most important being:

> A limited liability partnership is formed to file and prosecute a specific lawsuit. Its formational documents say both that the partnership is not "a separate legal entity distinct from its Partners" . . . and that the "withdrawal of a Partner shall not cause a dissolution of the Partnership." If one of the partners leaves the partnership and a new partner joins, does it stay the same partnership? Or is it a new partnership?[232]

In answering these queries, the Delaware Supreme Court first had to determine whether a partnership could choose to be treated as an aggregate instead of an entity at all. The court held that it could.[233] It pointed to the state's partnership statute ("DRUPA"), which specifically provided that "[a] partnership is a separate legal entity which is an entity distinct from its partners *unless otherwise provided in a statement of partnership existence or a statement of qualification and in a partnership agreement*."[234] While Delaware placed this provision squarely in its statute, the same idea, it turns out, lurked in the Revised Uniform Partnership Act, whose official comments state that a "partnership agreement may govern the relations among partners and between the partnership and the partners according to the aggregate model."[235] (*Sanofi-Aventis* appears to be the first case

228. *See id.* at 829–32.

229. *See id.*

230. *Id.* at 831.

231. *Id.*

232. United States v. Sanofi-Aventis U.S. LLC, No. 18-2472, 2019 WL 10271190, at *1 (3d Cir. June 12, 2019).

233. United States v. Sanofi-Aventis U.S. LLC, 226 A.3d 1117, 1128 (Del. 2019).

234. DEL. CODE ANN. tit. 6, § 15-201(a) (2020) (emphasis added). The Delaware Supreme Court opinion also cited provisions of the act giving "maximum effect to the princip[les] of freedom of contract." *Sanofi-Aventis*, 226 A.3d at 1127.

235. REVISED UNIF. P'SHIP ACT § 201 cmt. 3 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997) (amended 2013).

involving these provisions.[236]) Because it elected to be treated as an aggregate in its partnership agreement, and because the clause doing so stated it would trump any other clause in the agreement to the contrary, the court concluded that JKJ had dissolved in 2016 when a partner left. "JKJ was not distinct from partners A, B, and C," the court stated. "The withdrawal of B and the substitution of G changed the composition from A, B, and C to A, C, and G. JKJ cannot be indistinct from A, B, and C and remain the same entity with a new cast of partners."[237]

Sanofi-Aventis is not yet done—the Third Circuit recently remanded it to the district court, because of the possibility that the new partnership's entry into the litigation was not an "intervention" under the FCA. Yet the Third Circuit opinion and remand pointed to one more twist dictated by the aggregate theory.[238] As it pointed out, a "key feature of aggregate partnerships is that they cannot sue or be sued in their own names."[239] Because of that, Judge Bibas reasoned, "one could question whether either partnership was ever a proper relator."[240] Resolving that question was left to the district court. In the meantime, Delaware has moved to change its law and avoid a repeat of the situation in *Sanofi-Aventis*. In an amendment to DRUPA which took effect in August 2021, Delaware's law now provides that a partnership that elects in its partnership agreement to be an aggregate will not dissolve merely because a partner leaves or joins.[241]

A century on we find the issue of aggregate and entity still lurking in partnership law, but utterly transformed. At the turn of the twentieth century the question of whether the partnership was an

236. *See id.* nn.71–72 (citing DEL. CODE ANN. tit. 6, § 15-201(a) and *Sanofi-Aventis*, 226 A.3d at 1117, respectively).

237. *Sanofi-Aventis*, 226 A.3d at 1132.

238. *In re* Plavix Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II), 974 F.3d 228, 236 (3d Cir. 2020).

239. *Id.* at 236.

240. *Id.* The Third Circuit asked the district court on remand to decide "whether that is true and, if so, whether to allow amendment so that the partners can name themselves as the real relators in interest." *Id.* This could be an issue for plaintiffs in *Sanofi-Aventis*, but not necessarily; while under the aggregate approach all partners had to be individually named when the partnership was a plaintiff, before RUPA was adopted many states passed "common name statutes" allowing the partnership to be named as plaintiff, WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 338 (3d ed. 2001), and Delaware has such a common name statute. Sillman v. DuPont, 302 A.2d 327, 331 (Del. Super. Ct. 1972) (citing DEL. CODE ANN. tit. 10, § 3904).

241. *See* DEL. CODE ANN. tit. 6, § 15-103(c) (2021) ("Unless otherwise provided in a partnership agreement, the provisions of this chapter apply to a partnership that has a statement of partnership existence or a statement of qualification and a partnership agreement that has modified §§ 15-201(a), 15-203 and 15-501 of this title."). While the language is not straightforward, its effect is that a partnership electing to be an aggregate will still be governed by the dissolution provisions of DRUPA, which do not mandate dissolution on every change in the membership of the partnership. *See* DEL. CODE ANN. tit. 6, § 15-201(a) (2021).

aggregate or entity was fundamental, a basic choice to be made by lawmakers which would dictate how all of partnership law would then be framed. The answer had economic and moral consequences, shaping both specific rules adopted and partners' larger understandings of the demands and obligations placed on them. This is no longer so. Now, in a move that would surely have baffled those who clashed over the UPA, a partnership is an entity, unless it's an aggregate, or unless the parties have mixed and matched elements of both approaches, as they did in the JKJ partnership agreement. No longer a fundamental determination set by the law, entity and aggregate are choices to be made by the partners themselves, items selected off a statutory menu. The great partnership debates are over.

CONCLUSION

Legal scholars have long debated what it means for a business entity to be a legal person. Today those debates focus on the corporation, and are usually conducted either in the language of law and economics, asking how the law locks in a business's assets or partitions them among the business and its owners, or in the vernacular of constitutional law, arguing over whether and how a corporation can assert constitutional rights. This Article contributes to present-day debates over legal personhood by looking back over a hundred years to debates over a different business form, the partnership. In the decades around the turn of the twentieth century, legal scholars wrestled with the legal personhood of the partnership by asking whether the law should view it as an entity or an aggregate. Reformers pushing the "entity" view argued that partnership law should be rewritten to treat a partnership as an entity, a separate legal person. This, they believed, would both bring coherence to partnership law's sometimes discordant rules and bring the law into line with businessmen's views of the partnership. At the turn of the twentieth century, they came close to writing the entity view into the new Uniform Partnership Act. These reformers eventually lost, however, to advocates of the "aggregate" view, who defended the traditional, common law belief that a partnership was simply an association of its partners with no legal existence apart from them. Debates over this seemingly abstract topic were often impassioned because they raised basic questions of whether the law should follow business practices and how businessmen should perceive their responsibilities. Ultimately, the aggregate view prevailed because drafters of the Uniform Act were concerned about an issue absent from present-day debates: the moral consequences of legal personhood.