



Fall 9-1-2006

The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business

Ron Harris

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Business Organizations Law Commons](#), and the [Comparative and Foreign Law Commons](#)

Recommended Citation

Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 Wash. & Lee L. Rev. 1421 (2006).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol63/iss4/7>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business

Ron Harris*

Table of Contents

| | |
|--|------|
| I. Introduction | 1422 |
| II. Gierke's Peculiarly German Concerns..... | 1427 |
| III. Why German Theory? | 1431 |
| IV. What Was Imported from Germany?..... | 1435 |
| V. Political Theory | 1436 |
| A. Germany | 1436 |
| B. Britain..... | 1440 |
| C. The United States | 1443 |
| VI. Trade Unions | 1445 |
| A. Germany | 1445 |
| B. Britain..... | 1446 |
| C. The United States | 1450 |
| VII. City Governance..... | 1456 |
| A. The United States | 1456 |

* Professor of Law and Legal History, Tel Aviv University School of Law. L.L.B., B.A. (History), M.A. (History) Tel Aviv University; Ph.D. (History) Columbia University. I would like to thank Robert Adcock, Robert Kagan, Pnina Lahav, Naomi Lamoreaux, Gerald Leonard, David Lieberman, Jack Rakove, David Seipp, and participants in workshops and seminars at the University of Southern California, U.C. Berkeley and Boston University for comments and suggestions; the organizers of the conference: "Understanding Corporate Law Through History" David Millon and Lyman Johnson, the discussants of my paper Gregory Mark and Lawrence Mitchell and the other participants; and Ofira Alon, Nimrod Aviad, Roy Perleson, Tehila Sagi, and Nitzan Tevet for excellent research assistance.

| | |
|-----------------------------------|------|
| VIII. Business Organization | 1460 |
| A. Germany | 1460 |
| B. Britain | 1462 |
| C. The United States | 1466 |
| IX. Conclusion | 1474 |

I. Introduction

The debate on the nature of the legal personality of groups gathered momentum and focus in Germany after 1868, with the criticism mounted by Gierke on Savigny's theory of corporate personality and with the intensifying controversies over the drafting of the German Civil Code.¹ This discourse was well-rooted in German jurisprudential traditions, German historical narratives and the German political context.² Yet, somewhat unexpectedly, it was imported into the Anglo-American world in about 1900.³ The German-Gierkian real entity theory of the corporation journeyed through several contexts and discourses in Britain and the United States.⁴ It inspired numerous articles and books in English, French and German.⁵ Various scholars, counsel,

1. See Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 871 (1990) ("When Romanist individualism turned out to pervade the draft of the Civil Code, Gierke became one of its most ardent and influential critics."). Gierke believed that association was an expression of the collectivist character of German law, unlike the rampant individualism of Roman law. *Id.* "In the end, Gierke and his fellow Germanists prevented a purely Romanist codification and preserved the tradition of indigenous German law throughout the nineteenth century, and for the twentieth century." *Id.*

2. See *id.* at 858–74 (describing the historical and political background of the Romanist-Germanist interplay in legal scholarship by tracing the roles of Savigny's theories of the systematic and historical character of law).

3. See DAVID RUNCIMAN, *PLURALISM AND THE PERSONALITY OF THE STATE* 64 (1997) (describing the introduction of Gierke's ideas in England by an approving Frederic Maitland and the ensuing criticism by Ernst Barker); David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 THEORETICAL INQUIRIES IN LAW 541, 558–59 (2003) ("Just as Savigny and his German disciples had systematized Roman law . . . American and English scholars strove for a similar systematization of their own common law tradition."). See generally Joshua Getzler, *Law, History and the Social Sciences: Intellectual Traditions of Late Nineteenth- and Early Twentieth-Century Europe*, in 6 LAW AND HISTORY: CURRENT LEGAL ISSUES 215–63 (Andrew Lewis & Michael Lobban eds., 2004).

4. See, e.g., Mark H. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 583–85 (1989) (discussing how Gierke's critique of political individualism inspired legal progressives, and how the real entity theory was seen as a liberation from common law laissez-faire jurisprudence); *infra* note 6 and accompanying text (noting various contexts in which real entity theory was used in the United States and Britain).

5. See, e.g., RUNCIMAN, *supra* note 3, at 66, 175, 187 (discussing Gierke's influence on

politicians and judges used this and other corporate theories to advance different doctrinal and policy objectives.⁶ This was arguably the most intense legal discourse of the first quarter of the twentieth century. Around the mid-1920s it abruptly subsided, leaving only traces for historians to follow. Arthur Machen, writing in a sarcastic style in 1911, at the heat of the debate, captured the flavor of the discourse: The followers of real entity theory "strive 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."⁷

While all three venues of the discourse, Germany, Britain and the United States, have been thoroughly studied, the relationship among the three has been relatively neglected.⁸ I shall concentrate on this transnational aspect of the discourse. While every intellectual relationship is likely to be reciprocal, my interest is in the flows of influences from Germany to Britain and the United States. This was the main direction of the flow of ideas in this specific discourse because the discourse originated in Germany,⁹ which was at that time at the zenith of its legal-intellectual prestige. A study of the import of Anglo-American influences to Germany is beyond the scope of this project.

The discourse focused on three theories of corporate legal personality that were played against each other.¹⁰ The theories aimed to explain the rationale for the status of groups as entities bearing legal rights and duties. It was assumed that the nature of the rationale had bearing on the magnitude and range of these rights and duties. I will present them now in their developed archetypical form. In the next sections I will deal with their historical development and minute variations.

writers like Frederic Maitland, Ernest Barker, D.H. Cole and Harold Laski).

6. See Jonathan Chaplin, *Toward a Social Pluralist Theory of Institutional Rights*, 3 *AVE MARIA L. REV.* 147, 156 (2005) ("Gierke's depiction of the state as simply one among many associations in society was taken up enthusiastically by the English pluralists . . . to buttress their essentially constitutionalist argument against the doctrine of legally unlimited state sovereignty"); Rabban, *supra* note 3, at 560–61 (discussing the use of Savigny's ideas in the United States to oppose codification and to emphasize the role of the professional lawyer over the legislature in developing the law).

7. Arthur Machen, Jr., *Corporate Personality*, 24 *HARV. L. REV.* 253, 253 (1911).

8. France was another venue of this discourse. It is not dealt with in this Article which focuses on the transplantation to Anglo-American law. The transplants were mostly of German origin.

9. See Hager, *supra* note 4, at 580 ("Maitland's first English translation of Gierke, published in 1900 as *Political Theories of the Middle Age*, can be identified as the beginning of the Anglo-American controversy over paradigms of the corporation.").

10. See *id.* at 579 (distinguishing three broad camps of opinion about theories of corporate group nature: the fiction, the contractual-association, and the real entity paradigms).

The first theory to appear both in Germany and in the Anglo-American world was the state grant theory, also called the fictitious personality theory, the artificial personality theory, the concession theory or the hierarchical theory.¹¹ Grant theory viewed groups as gaining legal status by way of incorporation. Incorporation was a monopoly of the state. Only the state could incorporate groups and grant them legal personality. The state attached rights and duties to the legal personality at its discretion. The corporate personality was created by the state in the realm of public law.¹²

The second theory was the contract, aggregate, or partnership theory. Groups became legal entities by a voluntary and consensual undertaking of their members.¹³ This undertaking had constitutive status-creating consequences; namely, the birth of a new legal entity. This was a legal birth but one that took place in the realm of private, rather than public, law.¹⁴

The third theory, whose formation in Germany and import into Britain and the United States initiated the discourse, is the real entity theory, also called the natural entity theory.¹⁵ This theory holds that the real and social existence of a group makes it a legal person. The corporate entity is pre-legal or extra-legal. The law does not create it; it is bound to recognize and respect its real existence.¹⁶

What were the criteria for the validity or falsity of these theories? There was no consensus on this issue; often there was no articulated discussion. But the discourse suggests that verification moves included the following questions: Did the theory fit the historical formation of corporations? Did the theory

11. See Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1063–64 (1994) (discussing the three theories of the corporation in chronological order, beginning with the fiction theory).

12. See Hager, *supra* note 4, at 579–80 (“[C]orporate organizations owe their existence and their legitimacy to official grants of authority from the state which creates them.”).

13. See *id.* (describing the contract theory’s view that corporations were merely partnerships of individual members); Phillips, *supra* note 11, at 1065–67 (discussing implications of the aggregate theory’s view that the whole of the corporation is nothing more than the sum of its parts).

14. See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 202–03, 235 (1990) (suggesting that aggregate theorists have long posited that corporate law is private in nature).

15. See *id.* at 1068–69 (stating that British legal historian Frederic Maitland helped introduce Gierke’s writings on the real/natural entity theory of the corporation to Anglo-America).

16. See Phillips, *supra* note 11, at 1068–69 (arguing that because the individual shareholders are not responsible for the actions of the corporation, the corporation is an autonomous product of its organization and management and should be recognized as a real entity in its own right).

better fit the various attributes of corporations as we know them? Did it better fit doctrinal developments or legal reasoning by courts? The first two emphasized positive issues. The third had normative aspirations. The discourse often shifted among the three without full awareness.

Several factors make the discourse on corporate personality theories particularly interesting. First, it had a transnational dimension. It was rare for legal discourse in that era to have such a dimension. Second, it had intensity over a short and well-defined period of time. Third, this was not jurisprudential discourse. It was mid-level theory discourse. It did not deal with meta-questions such as what is law or what are its normative sources, or with specific doctrinal questions. Mid-level theory discourse with a transnational dimension was a rarity. Fourth, the discourse had a significant historical component. Theories were formed through historical narratives, were examined historically, and were used to form historical identity.¹⁷ Fifth, the discourse that began as academic touched upon practical issues: codification in Germany, and court decisions in the United States.¹⁸ Last, but very important for this Article, the discourse and its theories were transplanted in debates in various contexts.¹⁹

This Article follows the course of contextualization of the transplanted discourse. It first aims at clarifying the puzzle of the migration of the discourse. I will argue that the original German discourse was completely German in terms of its jurisprudential and political concerns, its underlying historical narrative, and the intentions of its promoter Otto Gierke. I will then discuss the reasons for its importation into the totally different British and American legal systems, identifying those elements of German discourse that were selected and transplanted and those that were not. I will also identify the contours and

17. See Joel Edan Friedlander, *Corporations and Kulturkampf: Time Culture as Illegal Fiction*, 31 CONN. L. REV. 31, 78 (1996) ("Gierke sought to ground his theory of corporations upon observable social processes and palpable psychological connections, but his studies were mostly historical."); Reimann, *supra* note 1, at 874–75 (explaining that, as there was no generally accepted standard definition of legal science, modern German legal historians and theorists characterized legal science by the various phases of nineteenth century jurisprudence instead of trying to isolate a single, uniform concept).

18. See Reuven Avi-Yonah, *The Cyclical Transformation of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 798 (2005) (discussing the U.S. courts choosing the real entity view over the aggregate view).

19. See Hager, *supra* note 4, at 626–67 (stating, for example, that fiction theory restricted the number of corporate franchises because it treated incorporation as a gift from the state, and Anglo-American law perfected the trust to avoid such inconveniences). Later, the real entity theory was used to suggest that minority shareholders of the corporation had the right to take legal recourse against an oppressive majority. *Id.* at 634; see also Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 640 (discussing the advancement of the idea of corporations as competing interests instead of artificial creations of a collective will during the New Deal era).

functions of the discourse in Britain and the United States in four contexts: political theory, trade unions, city governance, and business organization.

My focus is on the history of the discourse. I do not aspire at writing a history of the law of corporations or of the expansion of the corporate form. Such histories are only slightly related to the history of the intellectual discourse. They are influenced much more by interest group politics and economic developments. Such histories were written by several historians, and by me, elsewhere, and will be rewritten by others in the future. I follow here the course of expansion of the discourse and map its borders. Special emphasis is given to explaining the timing of its emergence in different venues, its transplantation into new contexts, its shifts from theory to doctrine, from academic to practical discourse, and from past narratives to present concerns. A central theme of this paper is that there was indeed an initial under-determinacy in each of the basic theories of personality, as John Dewey's critique argued,²⁰ one that sometimes enabled utilization of a single theory for conflicting purposes or of different theories for the same purpose. However, each personality theory could be used only in some venues, some periods and some contexts. Each became embedded in certain meanings when it functioned in concrete historical and spatial settings. Each lacked in the first place, or lost along the way, much of the manipulability that Dewey attributed to it.²¹

In the context of political theory, ideas that were used by Gierke to legitimize the existing state-based order of the Second Reich, in Britain, but not in the United States, were given a critical and communitarian twist. While in the context of trade unions the discourse was used in Germany to promote freedom of association, in Britain and the United States the discourse was applied in order to expose unions to tort liability in employers' suits. While in Germany and Britain the discourse had no bearing on local government, in the United States it was used to strengthen city self-government vis-à-vis the state and federal government. The application of the theory to big business, which was deemed irrelevant in Germany and Britain, became the focal point of

20. See Hager, *supra* note 4, at 637 ("Dewey . . . argued that no fixed set of political doctrines could . . . firmly be linked with any particular theory of corporate personality. Indeed, Dewey suggested that any given corporate personality theory could be manipulated with ease, yielding different, and even contradictory, political conclusions depending on how the manipulation is done.").

21. See Mayer, *supra* note 19, at 639–40 (suggesting that the Supreme Court's reliance on corporate theory to decide Bill of Rights cases counters Dewey's claims, demonstrating instead a perfect correlation between the invocation of the fiction theory and the denial of corporate rights).

American discourse.²² But there it served not only the interests of big business but also of other and often conflicting interests.

This project makes connections between three distinct bodies of literature that are usually not linked and that have served different groups of historians. The first body of literature deals with the history of nineteenth century German jurisprudence and the creation of the German Civil Code (the BGB or *Bürgerliche Gesetzbuch*).²³ The second deals with British political pluralism.²⁴ The third deals with American corporate theories and their application to business organizations.²⁵ These are complemented by other literature. Though this Article does not offer a comprehensive or authoritative contribution to any of these bodies of literature as such, it identifies new problems, asks new questions, makes new links and contrasts and, hopefully, provides new insights.

II. Gierke's Peculiarly German Concerns

Otto von Gierke did not initiate legal personality discourse nor did he invent real personality theory. He was born in a period of lively German discourse. As a law student in Berlin (1857–1860), his most influential teacher was Professor Georg Beseler.²⁶ Beseler was one of the leaders of the emerging

22. See, e.g., Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1872–75 (2003) (suggesting that the real/natural entity paradigms supported the rise of big businesses because they gave corporations protection under the Bill of Rights, and because they helped eliminate the class basis of corporations and society by endorsing a pluralist image of the state).

23. See generally MICHAEL JOHN, *POLITICS AND THE LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF CIVIL CODE* (A.J. Nicholls et al. eds., Clarendon Press 1989); Reimann, *supra* note 1; James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).

24. See generally ANTHONY BLACK, *GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT* 202–19 (1984); J.W. BURROW, *WHIGS AND LIBERALS, CONTINUITY AND CHANGE IN ENGLISH POLITICAL THOUGHT* 125–53 (1988); *THE PLURALIST THEORY OF THE STATE: SELECTED WRITINGS OF G.D.H. COLE, J.N. FIGGIS & H.J. LASKI* (Paul Q. Hirst ed., 1989) [hereinafter *PLURALIST THEORY*]; DAVID NICHOLLS, *THE PLURALIST STATE* (2d ed. 1994) [hereinafter *NICHOLLS, PLURALIST STATE*]; DAVID NICHOLLS, *THREE VARIETIES OF PLURALISM* (1974) [hereinafter *NICHOLLS, THREE VARIETIES OF PLURALISM*]; RUNCIMAN, *supra* note 3.

25. See generally Avi-Yonah, *supra* note 18; William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989); Hager, *supra* note 4; Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825 (1987); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); Millon, *supra* note 14; Tsuk, *supra* note 22.

26. See SOBEI MOGI, *OTTO VON GIERKE, HIS POLITICAL TEACHING AND JURISPRUDENCE* 13–22 (1932) (discussing how Beseler impacted Gierke as a scholar, professor, and historian).

Germanist branch of the historical school. He was the first to introduce the conception of the *genossenschaft* (for which I will use the English term, "fellowship"), in chapter six of his 1843 book, *Volkrecht und Juristrecht*.²⁷ But he did not fully develop this conception in his book or in his later writings and suggested it some twenty years later to his young disciple Gierke.²⁸ When Beseler was writing on fellowship in 1843, he did not do so in a vacuum. He was writing within the German discourse and in reaction to Friedrich Carl von Savigny, the most eminent of the founders of the German historical school.²⁹ Savigny represented the German jurists' reaction to natural law and the universalistic ideas of the French Revolution and the French-inspired codification threat posed by the Napoleonic conquest.³⁰ Beseler represented a reaction to the Roman law inclination, put forward by Savigny and the early historical school.³¹

Beseler influenced Gierke and sponsored him throughout his early academic career (in Berlin between 1865–1872), and eventually invited Gierke back to Berlin as his successor, (after he had held professorships in Breslau from 1872 to 1884 and Heidelberg 1884 to 1887) upon Beseler's retirement from his Chair in 1887.³² When Gierke offered his first contribution to legal personality scholarship in 1868, he did so as Beseler's student and Savigny's foe.³³ From Beseler's nascent conception of the fellowship, Gierke developed a theory of group legal personality.³⁴ This theory assailed Savigny's fictitious

27. *Id.* at 29.

28. *Id.*; see John Donald Lewis, *The Genossenschaft-Theory of Otto von Gierke: A Study in Political Thought*, in 25 UNIVERSITY OF WISCONSIN STUDIES IN THE SOCIAL SCIENCES AND HISTORY 18 (1935) (discussing Gierke's introduction to the concept of *genossenschaft*).

29. See Markus D. Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227, 250–51 (1995) (contrasting the treatment of Roman law in relation to German law by Savigny and Beseler).

30. See P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"*, 51 HASTINGS L.J. 479, 491–92 (2000) ("Savigny's historicism was intended to replace a universalistic theory of Natural law as a basis for a rational purposive discourse on the law [T]he cult of Roman law . . . had to supersede a universalistic rational conception of law.").

31. See Dubber, *supra* note 29, at 250 ("This attempt by Savigny to root Roman law and its jurists in the German Volk did not sit well with Germanists like Beseler who sought to eradicate centuries of Roman law influence and reestablish a 'truly' German law.").

32. See *supra* note 26 and accompanying text (providing information on Gierke and Beseler's relationship).

33. See Chaplin, *supra* note 6, at 147, 151–56 (stating that in developing his theory of group personality, Gierke sides with the Germanist wing against its Romanist rivals).

34. See Friedlander, *supra* note 17, at 79 ("In particular, Gierke found the historical antecedents of his theory [of corporations] in the ancient Germanic conception of the *Genossenschaft*, or fellowship.").

legal personality theory (grant theory in the terminology of this Article). For Savigny, corporations were unlike human beings. They had no souls, no states of minds, and no missions. Their legal personality was a mere legal fiction.³⁵ The state has a formal role in giving birth to fictitious legal personalities.³⁶ The legal personality and its attached attributes, such as the ability to own property, were granted to corporations by state and law. For Gierke, fellowships were at the core of German spirit and society. They had natural and organic attributes. They existed irrespective of the law.³⁷

With German scholars, Gierke debated issues that particularly concerned Germans along the developing Germanic-Romanist divide. The divide was initially jurisprudential and theoretical, but after the unification of Germany and the initiation of the codification project, the stakes in the debate became higher.³⁸ The Romanists, Savigny's disciples, wanted to base the code on the Justinian Code and earlier Roman law.³⁹ Gierke and the other Germanics wanted to base it on medieval Germanic law.⁴⁰ But the contention was not only about historical roots. Gierke and his followers argued, as we shall see in greater details below, that Roman law was universalistic and individualistic whereas Germanic law was communal and national.⁴¹ Gierke devoted much of

35. See Hager, *supra* note 4, at 579–80 (describing the fictional theory).

36. In his article, Hager explains that:

The fiction paradigm encompassed two related ideas. One was that corporate organizations owe their existence and their legitimacy to official grants of authority from the state which creates them. The second was that a corporation, though it exists as an entity separate from its individual participants, does so in a merely imaginary way, quite different from the way in which those real individuals exist.

Id.

37. See OTTO VON GIERKE, *COMMUNITY IN HISTORICAL PERSPECTIVE: A TRANSLATION OF SELECTIONS FROM DAS DEUTSCHE GENOSSENSCHAFTSRECHT* 7–8 (Antony Black ed., Mary Fischer trans., Cambridge Univ. Press 1990) (1868) [hereinafter GIERKE, *HISTORICAL PERSPECTIVE*] (discussing the fundamental attributes, importance, and implications of German fellowship law).

38. See JOHN, *supra* note 23, at 110–12 (outlining the social and political significance of basing the German Code on collective, and not individualistic, principles).

39. See Ernst Freund, *Historical Jurisprudence in Germany*, 5 *POL. SCI. Q.* 468, 473 (1890) ("The Roman law . . . had hardly advanced beyond the stage in which Justinian had left it.").

40. See Friedlander, *supra* note 17, at 78–80 (finding the historical antecedents of Gierke's theory in the ancient Germanic conception of fellowship, whose old world aspects are further discussed by Gierke's interpreters).

41. See JOHN, *supra* note 23, at 110 (discussing Gierke's criticism of the Civil Code for its Romanist character, its assumption that only autonomous individuals were involved, and for its failure to account for the associative nature of modern society).

his time to medieval German fellowships and their law. His past was Germanic. His concerns were contemporary German.⁴²

Others could possibly learn from him and from the German debate. But because they lacked the German spirit, they would not be able to fully appreciate and implement German ideas. "[T]he Germanic people have a gift other peoples lack, by means of which they have given the idea of freedom a special substance and the idea of unity a more secure foundation—they have the gift of forming fellowships."⁴³ "[T]hat strength which has characterised the Germanic people since the beginning of history and which always rose victorious above all the vicissitudes of fate—the creative power of association—lives on and is at work, more than in any other people, in the German people of today."⁴⁴ Roman-Latin Europe, as manifested in Romano-Canonical legal theory, "decomposed and radically transmuted the German notion of the autonomous life of communit[y] and fellowship[]."⁴⁵ This was Gierke's foe. The Anglo-American legal culture was not a threat but also not a source of inspiration. When needed, as, for example, when paying tribute to Maitland, or receiving an honorary doctorate from Harvard in 1909, Gierke was willing to recognize the common origins: "To the Teutonic states belong three great world powers: England, the United States, and the German Empire."⁴⁶ He also recognized some similarities:

[O]n both sides of the ocean people regard their constitution as the emanation of national spirit and the guaranty of national will. Germans and Americans attribute in a high degree the rapid growth of culture and material well-being . . . to the powerful unity, saved in America and, created in Germany, by blood and iron in a civil war, and typified in each case by a great man, your Lincoln and our Bismarck.⁴⁷

This common origin and similar experience could lead to friendship. But it could not lead to a reciprocal exchange of ideas. Anglo-American scholars

42. See *id.* at 115 ("Although [Gierke's] preference for German legal institutions developed out of his historical study of medieval German corporations . . . [h]is principal concern was with the solution of contemporary social problems, while his historical arguments were developed in order to support the cause of reform."). For example, Gierke's work linked the assertion of German legal traditions to contemporary social and political issues like landownership and agrarian law. *Id.* at 112–13.

43. GIERKE, HISTORICAL PERSPECTIVE, *supra* note 37, at 4.

44. *Id.* at 5.

45. OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 98 (Frederic W. Maitland trans., Thoemmes Press 1996) (1900).

46. Otto F. Gierke, *German Constitutional Law in Its Relation to the American Constitution*, 23 HARV. L. REV. 273, 275 (1910).

47. *Id.* at 290.

could not participate in meaningful and consequential discourse with Gierke and his colleagues. Gierke was not universalistic or cosmopolitan and did not wish to be a member of a Continental or a Teutonic, not to say a global, legal community. But he was also not a legal imperialist.

III. *Why German Theory?*

Why and how then was a patently German theory imported into Britain and the United States around the turn of the twentieth century? Many British and American legal scholars perceived German legal academia as the most advanced and sophisticated of the time.⁴⁸ They studied in Germany, read German scholars and followed German debates. In addition, whenever a German concept or theory was introduced either in Britain or in the United States, it was likely to make its way across the Atlantic, due to the close intellectual connections between British and American Academia.⁴⁹ But these were only facilitative factors. Not every German discourse was imported into the Anglo-American law. Not every discourse was as profoundly German as the legal personality discourse.

The standard narrative suggests that Frederic Maitland and Ernst Freund imported the corporate personality discourse by importing the real entity theory from Germany,⁵⁰ but that standard narrative does not expose the perplexity of this importation or its motivation. I would first like to establish the argument that it was Maitland, more than Freund or any other scholar, and possibly more

48. See generally M.H. HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* (1997); James E. Herget, *The Influence of German Thought on American Jurisprudence, 1880–1918*, in *RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820–1920* 203–28 (Mathias Reimann ed., 1993) [hereinafter *RECEPTION OF CONTINENTAL IDEAS*]; James Q. Whitman, *Early German Corporatism in America: Limits of the "Social" in the Land of Economics*, in *RECEPTION OF CONTINENTAL IDEAS* 229–52. For a later period, see James Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 *VA. L. REV.* 399 (1987).

49. See, e.g., RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY* 99–100, 108–09, 163 (1987) (referencing the Holmes-Pollock Letters, Holmes-Laski Letters and Maitland Letters).

50. See Nathan Oman, *Corporations and Autonomy Theories of Contracts: A Critique of the New Lex Mercatoria*, 83 *DENV. U. L. REV.* 101, 116–17 (2005) (describing Freund and Maitland as key proponents of real theory corporate jurisprudence in the nineteenth century); see also Mark, *supra* note 25, at 1465–66 ("Two works provided the foundation for the debates which would crowd the pages of legal publications in the ensuing years: Ernst Freund's 1897 *The Legal Nature of Corporations*, and Frederic Maitland's 1900 translation of Gierke's *Political Theories of the Middle Age*.").

than all other contemporary scholars together, who contributed to this theory being imported into Anglo-American discourse. He was not only first in standing and influence as the greatest legal historian of the era, but, contrary to common wisdom, he was also chronologically first, preceding Freund. Maitland's contribution did not begin with and was not limited to his famous translation of, and introduction to, parts of the third volume of Gierke's *Genossenschaftsrecht* in 1900. Gierke's influence was clearly manifested in the second edition of Pollock and Maitland, *The History of English Law Before the Time of Edward I*,⁵¹ published in 1898, a year after Freund's book. A section entitled "Fictitious Persons" in the first edition was now entitled "Corporations and Churches."⁵² In the first note to this section, Maitland acknowledged that this revision was made due to "a repeated perusal of Dr. Gierke's great book."⁵³ But a more careful reading of the first edition, published in 1895, reveals Gierke's less expressly admitted influence on that edition. The section "Fictitious Persons" contains numerous references to Gierke's *Genossenschaftsrecht* and an exposition of its basic themes and narratives.⁵⁴ Here Maitland already touched upon the real entity alternative to the grant-fictitious theory.⁵⁵ But we can go even further back in time, to a letter that Maitland sent to Pollock in 1890, to see that even then he was already embedded in Gierke's ideas.⁵⁶ He wrote: "[F]or six weeks past I have had 'Juristic Persons' on my mind, have been grubbing for the English evidence and rereading the Germans, in particular Gierke's great book (it is a splendid thing though G. is too metaphysical)."⁵⁷

It is clear by now that Maitland did more than translate Gierke's work from German into English. His own work interacted with Gierke's. Maitland's *Township and Borough*,⁵⁸ published in 1898, was part of the same project of

51. FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2d ed. 1968).

52. *Id.* at 486 n.1.

53. *Id.*

54. See FREDERIC POLLACK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 469-95* (1st ed. 1895) (providing early evidence of Maitland's incorporation of Gierke's ideas).

55. *Id.* at 471-73.

56. See Letter from Frederic Maitland to Frederick Pollock (Letter 87, Oct. 18, 1890), in *THE LETTERS OF FREDERIC WILLIAM MAITLAND* 86 (C.H.S. Fifoot ed., Harvard Univ. Press 1965) [hereinafter *LETTERS OF MAITLAND*] (suggesting that, even in 1890, Maitland had been familiar with Gierke's ideas for some time).

57. *Id.* In the following sentences he apologized for having to write long on this and other issues and for not being able to produce a brief history of English law. *Id.* He then obligingly granted Pollock the opportunity to end their partnership. *Id.*

58. FREDERICK W. MAITLAND, *TOWNSHIP AND BOROUGH* (1898).

importing and integrating Gierke's ideas. He even considered titling his Ford Lectures, the basis for the book, "English Boroughs and German Theories."⁵⁹ The inception of these lectures, like that of *History of English Law*, was in the early 1890s.⁶⁰

The famous 1900 introduction to Gierke made the German connection more explicit and visible, and is therefore often remembered as the time when it all began, but this was clearly not the case. I discuss the timing issue in some detail because clearly Gierke's ideas were not imported into the Anglo-American world as soon as they came off the press. Gierke entered the Anglo-American discourse some thirty years after the publication of the first volume of his book.⁶¹ The third volume was translated nineteen years after its publication.⁶² If the grant theory of the corporation was indeed in collapse since the introduction of general incorporation in Britain and the United States around the middle of the century, why did scholars wait? My claim is that corporate theory discourse erupted because of Maitland's—and to a lesser degree—Freund's import and transplantation of Gierke's ideas, and not the other way around. It was not the appearance of a new theory in Germany, nor its belated discovery by Maitland, nor the emergence of a new problem in the Anglo-American world that determined the timing of the importation or its successful fate. The major factors were Maitland's research agenda, determination and status.

During the five years after he translated parts of Gierke's book, Maitland wrote five more papers that employed real entity theory in a variety of ways.⁶³

59. C.H.S. FIFOOT, *FREDERIC WILLIAM MAITLAND: A LIFE* 148–50 (1971).

60. See *id.* (discussing Maitland's fascination with English history). In letters to Bigelow and Sidgwick dated 1891 and 1893, respectively, Maitland shared his conclusion that English towns were real legal entities before they were incorporated by Royal Charters. *LETTERS OF MAITLAND*, *supra* note 56, at 88, 106–10 (Letters 89 & 114).

61. See MOGI, *supra* note 26, at 15 (stating that *Das Deutsche Genossenschaftsrecht* was published in 1868).

62. See *id.* at 19 (stating that the third volume of *Das Deutsche Genossenschaftsrecht* was published in 1881 and was translated by Maitland in 1900).

63. See generally Frederic W. Maitland, *The Corporation Sole*, 16 L. Q. REV. 335 (1900), reprinted in 3 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 210–43 (H.A.L. Fisher ed., 1911) [hereinafter *THE COLLECTED PAPERS*]; Frederic W. Maitland, *The Crown as Corporation*, 17 L. Q. REV. 131 (1901), reprinted in *THE COLLECTED PAPERS* at 244–70; Frederic W. Maitland, *Moral Personality and Legal Personality*, Sidgwick Lecture delivered at Newnham College (1903), in *THE COLLECTED PAPERS* at 304–20; Frederic W. Maitland, *Trust and Corporation*, 32 *GRUNHÜT'S ZEITSCHRIFT FÜR DAS PRIVAT-OFFENTLICHE RECHT* (1904), reprinted in *THE COLLECTED PAPERS* at 321–404; Frederic W. Maitland, *The Unincorporate Body* (originally read to the Eranus Club), in *THE COLLECTED PAPERS* 271–84. The preceding lectures and articles were all published in English in 1911 shortly after Maitland's death as part of *THE COLLECTED PAPERS*. They were recently republished in *F. W. MAITLAND: STATE, TRUST*

By this time, real entity theory was already well-entrenched in the newly-created Anglo-American corporate theory discourse.

Freund's *The Legal Nature of Corporations* was published in 1897 by the University of Chicago Press.⁶⁴ It is often considered the book that imported Gierke's ideas into the United States,⁶⁵ as distinct from their import into Britain, of which Maitland was in charge.⁶⁶ Freund's book was based on a Columbia University dissertation completed a year earlier.⁶⁷ It so happened that Freund, a German Jew, was born in New York while his parents were visiting the city.⁶⁸ He spent his school years in Dresden and Frankfurt and went on to study Civil and Canon Law at the universities of Berlin and Heidelberg between 1881 and 1884.⁶⁹ In 1884, Freund moved to New York, making good his American citizenship.⁷⁰ He practiced law, and studied and taught part time at Columbia University.⁷¹ In 1894, he moved to the University of Chicago to join the faculty of political science, and in 1902 he joined the newly-created law school.⁷² Freund was in a unique position that enabled him to link American and German discourse. He utilized this position to introduce various German ideas and trends to American lawyers.⁷³ *The Legal Nature of Corporations* went one step further. The book was influenced by Gierke's book, as Freund acknowledges up-front in his Preface.⁷⁴ It introduced the

AND CORPORATION (David Runciman & Magnus Ryan eds., 2003).

64. ERNST FREUND, *THE LEGAL NATURE OF CORPORATIONS* (1897) [hereinafter FREUND, LEGAL NATURE].

65. See William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 743 n.32 (2001) ("In the United States, the theory's most prominent advocate was Ernst Freund.").

66. See RUNCIMAN, *supra* note 3, at 64 (noting England's introduction to Gierke's ideas by Maitland).

67. See OSCAR KRAINES, *THE WORLD AND IDEAS OF ERNST FREUND: THE SEARCH FOR GENERAL PRINCIPLES OF LEGISLATION AND ADMINISTRATIVE LAW* 168 (1974) (determining the LEGAL NATURE OF CORPORATIONS to be Freund's eighty-three page doctoral thesis at Columbia University).

68. See *id.* at 2 (providing biographical information).

69. *Id.*

70. *Id.*

71. *Id.*

72. KRAINES, *supra* note 67, at 2.

73. See generally Ernst Freund, *Historical Jurisprudence in Germany*, 5 POL. SCI. Q. 468 (1890); Ernst Freund, *The Proposed German Civil Code*, 24 AM. L. REV. 237-54 (1890); Ernst Freund, *The Study of Law in Germany*, 1 COUNSELLOR 131-35 (1892); Ernst Freund, *The New German Civil Code*, 13 HARV. L. REV. 627 (1900).

74. See FREUND, LEGAL NATURE, *supra* note 64, at 5-6 (noting that the history of the corporate idea in Continental Europe was most exhaustively treated by Gierke's *Deutsches Genossenschaftsrecht*). Gierke had already left Berlin long before Freund arrived, and he

American reader to Gierke's organic theory ("real theory" in the terms of this Article). It not only transmitted German ideas but also contextualized them among American theories and doctrines, examined them critically and adapted them to the American reality. However, Freund was a relatively marginal figure, practically a new immigrant, holding a position outside a law school and in a new university.⁷⁵ Furthermore, he soon lost interest in the field of corporate theory and turned his attention to administrative law, legislation and regulation.⁷⁶ When the author does not remain an active player in a discourse, the prospect of that author's texts being canonized is meager. Though Freund's book was familiar to contemporary scholars, and was cited by some of them, it is not too conjectural to say that Maitland's work was as influential in the United States as it was in Britain and more influential in the United States than Freund's book.

IV. What Was Imported from Germany?

Now that I have argued that the corporate personality discourse and particularly the real entity theory were not present or sought for in Anglo-American academia before its import from Germany and that I have identified the actual importation link, I would like to turn to my last question in this general section: What exactly was imported and transplanted? It is obvious that real entity theory, in its abstract form, was imported and transplanted. By "abstract form," I mean that it was transplanted without the full historical narration that legitimized it and without the direct policy conclusions that resulted from it in the German context. What was transplanted was also the clash between real entity theory and grant theory.⁷⁷ It was not only a single theory that was transplanted but also the notion of bipolar discourse. In the American case, this notion was extended to tri-polar discourse.⁷⁸ In the United

moved from Breslaw to Heidelberg in 1884. MOGI, *supra* note 26, at 18–20. Freund's last year in Heidelberg was also 1884. KRAINES, *supra* note 67, at 2. I found no evidence in the literature of any personal contact between the two, but it is likely that the origins of Freund's fascination with Gierke's ideas should be sought in that period.

75. See *supra* notes 71–72 and accompanying text (discussing Freund's teaching career).

76. See KRAINES, *supra* note 67, at 3–7 (providing a discussion of Freund's extensive work in legislation and administrative law).

77. See Hager, *supra* note 4, at 582 (discussing the excitement and debate Maitland's translation sparked among the legal intellectual community).

78. See *id.* at 579–82 (comparing the implications of using the fiction, contractual-association, or real entity theories to portray the political nature of business corporations).

States, a contractual theory emerged indigenously before the transplant.⁷⁹ The development of this theory, that did not gain hold in Germany or Britain, will be discussed later.⁸⁰ Since the early 1880s, contract theory had challenged the reigning grant theory. But, as I will show below, by the time real entity theory was imported into the United States, contract theory had already lost ground.⁸¹ The presence of a third theory gave the American discourse a unique structure and dynamic, different from German or British discourse. What was imported from Germany was a conflict between theories and, even more, the view that theories are something worth fighting for. In a deeper sense, what was transplanted was the idea that legal discourse can be conducted in mid-level theory without becoming too philosophical or redundant for the practical-minded lawyer. In other words, the close ties between theory and doctrine were also imported from Germany.

V. Political Theory

I will first discuss the transplantation of the discourse in the context of political theory. There are two reasons for beginning with political theory—it is the context closest to Gierke's initial and main interest, and it is the context that may be most revealing as to the ideological and political potential of the discourse. In Germany, personality discourse had its main manifestations in the fields of jurisprudence and political theory. In the United States, the discourse did not affect contemporary political theory in a meaningful way. In Britain it did, but in a different manner than in Germany. In this section I will examine the reasons for the peculiar contour of the dispersion of the personality debate into political theory.

A. Germany

Gierke was a historian but also a political theorist. He was interested in political theory more than in concrete legal doctrines.⁸² His jurisprudential

79. See *infra* note 256 and accompanying text (discussing the origins of the contract theory).

80. See *infra* notes 258–62 and accompanying text (explaining the development of this theory in the United States).

81. See *infra* notes 268–75 and accompanying text (noting that contract theory lost ground because it did not resolve all the problems of grant theory, support the idea of limited liability, or fit the corporate model of majority-based decisionmaking).

82. See Lewis, *supra* note 28, at 17–21 (explaining Gierke's task as a Germanist as

concerns were also secondary to his political theory agenda. The rise of the nation state carried with it the idea of omnipotent state sovereignty.⁸³ The advent of market capitalism made the atomistic individual a key player in the industrial era.⁸⁴ Liberal political theory connected the two. The ideas of the French Revolution could lead to a negative outcome, to hostility "to any organism which laid claim to its own existence between the omnipotent state and the liberated individual."⁸⁵ Early Gierke aimed to offer an alternative to absolute state sovereignty and to extreme atomistic individualism. Gierke criticized the view of the state-society compound as divided into two distinguishable spheres, sovereign and subjects, state and civic society. For him, the state was an organic entity. He objected to a state in which the head had absolute rule over the members or one in which citizens had absolute rights vis-à-vis the government. The rulers had duties in addition to privileges. The subjects had duties in addition to rights.⁸⁶ The state, even in its improved Gierkian version, should not be the only association around. Based on the German spirit, many other fellowships should be preserved and created in the space between the state and the individual.⁸⁷ "[The] state is not generically different from the lesser public-law associations contained within it—the communities and corporations."⁸⁸

Early Gierke saw danger not only in the liberal political ideas of the French revolution but also in material factors associated with the rise of industrial capitalism. "Under the pressure of unrestricted competition, the smaller and middle-sized economic concerns, unable to compete with the large concerns, are more and more disappearing . . . declin[ing] into wage labour."⁸⁹

finding truly German principles of law and insisting upon its recognition). For Gierke, historical research was the basis for his jurisprudence, as he believed that a common German law existed and that the principles of the Roman Code must gradually give way to resurrected German principles. *Id.* at 19–20.

83. *See id.* at 64–65 (distinguishing the state from other types of collective bodies because there is no controlling organization above it).

84. *See* GIERKE, HISTORICAL PERSPECTIVE, *supra* note 37, at 188–89 (discussing free fellowships for economic purposes from 1525 to the present and noting that the initial reliance on state direction and guardianship for fellowships of economic purposes gave way to a more independent free association by individuals).

85. *Id.* at 132.

86. *See id.* at 144–46 (arguing that the state must work with and respect the autonomy of the communities within, and must renounce its claim as the sole source of objective law).

87. *See id.* at 141 (distinguishing between the community personality in public law as a member of a higher organism—the state—and as a state citizen that bears his own public power).

88. *Id.* at 162.

89. GIERKE, HISTORICAL PERSPECTIVE, *supra* note 37, at 213.

"[T]he Gulf between owners and the unpropertied will expand until it is immense. If no other elements were to intervene, it would necessarily come to a point where the nation became divided into two opposing camps: the economic rulers and the economic ruled"⁹⁰ Capitalism, in a similar manner to liberalism, corrupted the state and polarized society. The next logical step in 1868 was to adopt Marx's prognosis about which he hints: "That would be the eve of the much- prophesied social revolution, the beginning of the end for the life of the . . . Volk."⁹¹ Here, the later Gierke begins to emerge:

The Roman tendency found its chief expression in the systems and experiments of the Communists and Socialists. Although their methods and aims diverged greatly, they all aimed to bring into play the highest universality Some aimed towards the despotism of equality—in comparison with which Asiatic despotism would be freedom itself. Others demanded proportional regulation, which would make the bureaucracy of the *Polizeistaat* look like a total absence of government.⁹²

After 1870, Gierke's theoretical position was transformed and his political views became clear and well-entrenched in the National-Conservative camp.⁹³ The unification and the Franco-Prussian war (in which he served as an active officer for the third time in less than a decade and received the Iron Cross)⁹⁴ overwhelmed Gierke. He began shifting, together with other members of the German branch of the historical school, towards a more conservative position, hostile to the economic liberalism of the Manchester School and of German liberals.⁹⁵ By the time the second volume of *Genossenschaftsrecht* was published in 1873 and the third in 1881, there was a marked shift in Gierke's political theory. It shifted from an emphasis on the smaller fellowships to an emphasis on the state as a fellowship, from construction of the whole from the

90. *Id.* at 214.

91. *Id.*

92. *Id.* at 215–16.

93. Black, the translator of sections of this volume, had good reasons for arguing so. *See id.* at xxi–xxv (discussing the evolution in Gierke's mind between the first volume of *Das Deutsche Genossenschaftsrecht* and his later writings). "[I]n his later writings, Gierke tacitly abandoned the more liberal—and pluralist-democratic—elements in his theory of fellowship From then on the supreme fellowship for Gierke was the German nation-state." *Id.* at xxi.

94. *See* MOGI, *supra* note 26, at 15–16 (describing Gierke's role in the wars of 1866 and 1870).

95. *See* JOHN, *supra* note 23, at 136–41 (emphasizing Gierke's insistence upon agrarian reform in the German Code, which he felt was dominated by the Manchester School's discrimination against the agrarian debtor in favor of the capitalist creditor).

bottom up to construction of the organic whole from the top down. Gierke maintained his support of Volkish law as opposed to Elitist law, not as a wheel of revolution or a radical reform, but rather as a means for blocking elitist liberal and universal reform. Politically, he backed the constitutional structure of the second Reich, legitimizing the dominant positions of Prussia, the Kaiser and Bismarck.

It was not only his personal war and unification experience, but also a fear of the rising tide of Socialism, Communism, Marxism and Revolution, that guided his later theory. This fear blended well into his old antagonism for Roman law, Latin culture, individualism, laissez-faire capitalism and universalism. He also deplored some of the core elements of the liberal ideas of his day associated with these. The preservation of the German Volk, based on Germanic spirits, became the paramount aim.⁹⁶ While for him, at first, the state was only one of many fellowships, it had special status in Gierke's later theory. It gained a privileged position as the most supreme and comprehensive association, not a despotic and authoritarian state controlled by foreign rulers and detached from the people, but a true and united German state.⁹⁷

Gierke's shift to theoretical etatism and political conservatism is evident in his positions on the codification debates that reached their climax after the publication of the first draft of the German Civil Code in 1888. As the leading speaker for the Germanist school in the debate, he vehemently criticized the draft code prepared by the Romanists as too universal, individualist, capitalist and in one word—liberal.⁹⁸ The proposed code could not be considered a great national achievement. It did not suit the *volkgeist* of the German people and did not emerge out of Germanic history.⁹⁹ In a way, he echoed Savigny's objection to codification in the 1810s.

More specifically, Gierke called for the inclusion in the code of a separate property regime for landed property to replace the harmonized regime (that ordered both movable and immovable property) advanced by the Romanists.¹⁰⁰

96. See GIERKE, HISTORICAL PERSPECTIVE, *supra* note 37, at 6 (stating that the main purpose of this work is to reassert the fellowship attribute of the German spirit, thereby demonstrating one of the most significant bases of the German state and legal system of German freedom and autonomy).

97. See Lewis, *supra* note 28, at 64–65 (explaining that the sovereign association should carry out the general will and, in some degree, enter every sphere of human social life).

98. See JOHN, *supra* note 23, at 109–15 (discussing Gierke's criticism of the Civil Code).

99. See *id.* at 109 (pointing out that Gierke desired a code largely free of Roman law elements even though German legal traditions had incorporated Romanist elements since the Middle Ages).

100. See *id.* at 111–12 (explaining that Gierke insisted that land and movable property be treated differently because of the German tradition of duties attached to landownership).

The idea was to block the commoditization of the Junkers' estates.¹⁰¹ The same idea led to his demand to include in the inheritance chapters of the code the principle of undivided succession of the homestead and of the entail for the aristocratic family estate.¹⁰² He also favored restrictions on the creation of land mortgages that were meant to protect owners from capitalist creditors.¹⁰³

The political parties that supported the BGB, even the National Liberals, were, to Gierke, not nationalistic enough. They reciprocated. Some leftist liberal contemporaries dismissed Gierke's positions during the battle over codification as "hopelessly nostalgic . . . with no bearing on modern needs . . . [and] constituted 'the translation of Neo-Gothic from architecture to politics.'"¹⁰⁴ Some historians went further and held him to be "the champion of the Germanist-Junker reactionary opposition to the Civil Code."¹⁰⁵

By the time Gierke's theory was transplanted to Anglo-American legal discourse in 1897–1900, Gierke himself was a more nationalist and conservative German than ever before and probably more conservative than any other prominent German jurist. How could his political theory, though written within heavily German discourse and intended for German consumption, be accessible—not to say appealing—to non-Germans? Could his political theory serve any of the contending emerging ideological-political movements of the late nineteenth and early twentieth centuries: liberals, communitarians, socialists, syndicalists or fascists? Were his specific political positions, which relied on this theory, relevant beyond Germany's agenda?

B. Britain

The most important point I wish to make about the transplant of the German political theory manifestation of the corporate personality discourse in Britain is that it imported only early and partial elements of Gierke's theory. The importers did not adopt Gierke's strong anti-socialism. They did not adopt his total disassociation with liberalism. They did not share his shift towards

101. See *id.* at 111 (noting Gierke's reputation as "the champion of the Germanist-Junker-reactionary opposition to the Civil Code").

102. See *id.* at 136 (explaining that as homesteads were archetypically German institutions, German law should prevail over Roman law in Germany).

103. See JOHN, *supra* note 23, at 137 (characterizing capitalism as Romanist and agrarianism as Germanist).

104. *Id.* at 109.

105. *Id.* at 111.

ascribing a privileged position to the state over other associations. They did not share his enthusiastic nationalism, be it German, Germanic or Teutonic.

Maitland, who was the first to import Gierke into Britain, was not a political theorist.¹⁰⁶ Unlike Gierke's, his history was not used instrumentally in the service of politics or theory. Genuine interest in history was his paramount motivation. Nevertheless he is considered the first English political pluralist.¹⁰⁷ Though he never meant it to be so, his work on the history of corporations was the trigger for the formation of one of the most dynamic and original schools of political thought in England of the first quarter of the twentieth century.¹⁰⁸ Various scholars have tried to portray his political positions and read political theories into his historical texts.¹⁰⁹ But the disagreements among them, the inability of any of them to construct his full-blown and coherent theory, and the absence of any political action by Maitland, all lead me to conclude that in the context of political theory we should focus our attention on Maitland's disciples and not on him.

The prominent figures among political pluralists were J.N. Figgis (1866–1919), Ernst Barker (1874–1960), Harold Laski (1893–1950) and G.D.H. Cole (1899–1959).¹¹⁰ Barker, like Maitland, also translated parts of

106. The best attempt at reading Maitland as a political theorist is David Runciman. *See RUNCIMAN, supra* note 3, at 64–123 (discussing environmental differences of Gierke's theories in Germany and in England and accounting for English political pluralism through three stages: the origins of pluralist thought in Maitland's work; the attempts of Figgis, Barker, Laski and Cole to build a distinct political theory based on the themes Maitland developed; and the decline of pluralism in England, culminating in Barker's criticism of Gierke's theories in 1933); F.W. MAITLAND: STATE, TRUST AND CORPORATION, *supra* note 63, at ix–xxix (discussing Maitland's task and goal in translating and understanding extracts of Gierke's work and its significance on English political theory).

107. *See RUNCIMAN, supra* note 3, at 64 (suggesting that Maitland's introduction of Gierke to England marks the beginning of English political pluralism).

108. *See NICHOLLS, PLURALIST STATE, supra* note 24, at 48–49 (suggesting a strong influence of Maitland on the work of Figgis); NICHOLLS, THREE VARIETIES OF PLURALISM, *supra* note 24, at 8–9 (discussing the reaction of English political theory to the idea of group personality put forth by Gierke and Maitland); PLURALIST THEORY, *supra* note 24, at 13–18 (suggesting Maitland's influence on Laski through the work of Figgis). *See generally* LEGAL PERSONALITY AND POLITICAL PLURALISM (Leicester C. Webb ed., 1958).

109. *See* J.W. Burrow, *The Village Community*, in HISTORICAL PERSPECTIVES: STUDIES IN ENGLISH THOUGHT AND SOCIETY IN HONOUR OF J.H. PLUMB 255, 275–84 (Neil McKendrick ed., 1974) (describing Maitland's political ideas); J.W. BURROW, A LIBERAL DESCENT: VICTORIAN HISTORIANS AND THE ENGLISH PAST 109–50 (1981) (discussing Maitland's influences and interactions with William Stubbs); BURROW, *supra* note 24, at 131–52 (analyzing Maitland's writings and political theories); STEFAN COLLINI ET AL., THAT NOBLE SCIENCE OF POLITICS: A STUDY IN NINETEENTH-CENTURY INTELLECTUAL HISTORY 300–59 (1983) (describing Maitland's interactions with political theorists).

110. *See generally* ERNST BARKER, POLITICAL THOUGHT IN ENGLAND (1915); G.D.H. COLE, GUILD SOCIALISM RE-STATED (1920); G.D.H. COLE, SELF GOVERNMENT IN INDUSTRY (5th ed.

Gierke's book into English.¹¹¹ The political pluralists, much like Gierke, were critical of economic-market individualism and liberal-political individualism. They were not as hostile as he was to Socialism and Marxism, but did mistrust state-centered socialism. Their aim was to create a space between the state and the individual. In this they shared early Gierke's conceptions, but not those of the transformed Gierke of their time. Their view of the association was much like Gierke's. An association of individuals has an existence that is distinct from that of its members. That fellowship-association has a life in itself. It has its own dynamics, motivations, aims, and group spirit. Groups are analogous to organisms. They have real existence. Their existence is pre-legal or beyond the law. The law is bound to recognize these associations and their inherent rights. Pluralist theory recognizes a large spectrum of associations. It views each of them as aiming at advancing, and the plurality as achieving, the common good.

But the British pluralists did not import Gierke's analysis of the state and sharply differed from his political attitude towards it. They adopted early Gierke's attack on the concept of sovereignty and further expanded it. Their primary concern was to check the growing power of the state. They concluded that the way to achieve this was by not allowing the state to intervene in the affairs of other associations. A view of associations as having real personality and as rights-possessing entities would advance this end. The state should be placed on an equal standing with other associations. The political pluralists' ideal society of the future was a web of voluntary associations. They rejected the liberal vision of a sovereign state and atomistic individuals. For the British pluralists, unlike for Gierke, the state was not the paramount association and the *volk* was not a meaningful entity. Despite their rejection of state-centered socialism and their dislike of Fabianism, most of the pluralists were, in many respects, on the left wing of the ideological map. They had affinity with trade unionism, guild socialism and even syndicalism. Two of their leading scholars, Cole and Laski, ended up among the principal intellectuals of the Labour Party.

1920); JOHN N. FIGGIS, CHURCHES AND THE MODERN STATE (1913); JOHN N. FIGGIS, THE DIVINE RIGHTS OF KINGS (2d ed. 1922); HAROLD LASKI, STUDIES IN THE PROBLEM OF SOVEREIGNTY (Howard Fertig, Inc. 1968) (1917); Harold Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916).

111. OTTO GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY (Ernst Barker trans., Univ. Press 1934).

C. *The United States*

Corporate personality theories did not feature high in the American political theory discourse of the time. Freund's book was used in the context of business organization but did not initiate political theory discourse. Harold Laski, a brilliant and controversial intellectual on the rise, could have served as an important connection between the British pluralists and American political theorists. He grew up in Manchester and was educated in Oxford, took up political science teaching positions in North America (McGill from 1914 to 1916 and Harvard from 1916 to 1920), and eventually returned to a position at the London School of Economics in 1920.¹¹² While at Harvard he was closely associated with such eminent jurists as Holmes and Brandeis and published pluralist articles in leading American law reviews such as *The Personality of Associations*.¹¹³ He was apparently the first scholar to offer a pluralist reading of the *Tenth Federalist Paper*.¹¹⁴ Yet, for reasons that I was only partially able to determine, his ideas were not integrated into American discourse. His attack, and that of other British pluralists, on the concept of state sovereignty possibly had less appeal in the American context of federalism, checks and balances and judicial review.¹¹⁵ His affinity with socialist and Fabian ideas and with European syndicalism raised suspicion of him in the United States.¹¹⁶ His return to London made his influence in North America short-lived.¹¹⁷ Insofar as spatial boundaries of discourse can be recognized, he should, in my opinion, be viewed as participating in the British discourse.

The American tradition of theories of interest groups had a different genealogy from the British tradition. The early twentieth century was a major juncture in this tradition, with the writings of Charles Beard, Mary Follett, Harold Laski and Arthur Bentley as key promoters of the importance of

112. See MICHAEL NEWMAN, *HAROLD LASKI: A POLITICAL BIOGRAPHY* 1–66 (1993) (providing biographical information).

113. See *id.* at 31–66 (discussing Laski's life in North America 1914–1920).

114. See Paul F. Bourk, *The Pluralist Reading of James Madison's Tenth Federalist*, in 9 *PERSPECTIVES IN AMERICAN HISTORY* 271, 273–74 (Donald Fleming & Bernard Bailyn eds., Charles Warren Center for Studies in American History 1975) ("The earliest expression of interest in The Federalist in the context of a modern pluralist argument appears to have occurred in the work of Harold Laski.").

115. See *id.* at 277 ("[M]ainstream political discourse seemed more preoccupied . . . with defining the proper role of a newly active national government in relation to capital, labor, and social welfare [than with] progressive political theory.").

116. See NEWMAN, *supra* note 112, at 56–64 (noting the treatment Laski endured during America's red scare and his subsequent departure from North America).

117. See *id.* at 56 (stating that "[b]y 1919 Laski had become an established theorist with a growing reputation" but left the United States in 1920).

studying interest group politics. In the 1950s, David B. Truman would establish the genealogy and develop interest group theory further.¹¹⁸ Once we put Laski aside as belonging to British discourse, we are left with scholars who did not present the basic tenets of corporate personality theory. They did not admire Gierke. They did not view corporate theories as a key to social and political problems. They did not find real entity theory particularly useful. Bentley and his contemporaries were not interested in the legal characteristics of the group. They did not view the group in terms of personality. A group was a gathering of individuals acting in order to advance common objectives.¹¹⁹ This gathering did not create a new entity.¹²⁰ The behavior of the group was more critical than its organizational form or legal status.¹²¹ The grouping often aimed solely at advancing some specific material interest of its individual members but did not involve or transform other aspects of their lives. The groups had no soul. The idea of a real group personality did not serve this view of the political system.

American group theorists of politics also did not share Gierke's and the British pluralists' view of the state. They were not particularly obsessed with the concept of state sovereignty and did not aim to undermine it.¹²² For the group theorists, the state was the arena of activity for groups.¹²³ It was not the omnipotent group that endangered the association, existence and autonomy of other groups. It was the outcome of the struggle between competing interest groups.

American political scientists did not share Gierke's anxiety about the rise of socialism or the British pluralists' concern with the rise of atomistic and individualistic liberalism. They reacted to American constitutional and federal traditions that were not shared by the Europeans. The metaphysical and historical characteristics of European real personality theory deterred them.

118. See DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 66–105 (9th ed. 1963) (discussing group origins and "the inevitable gravitation toward government").

119. See *id.* at 15–23 (describing the role of the individual within a group).

120. See *id.* at 22 (explaining that, rather than establishing a group personality, each individual retains his or her own identity).

121. See *id.* at 23 ("The justification for emphasizing groups as basic social units . . . is the uniformities of behavior produced through them.").

122. See *id.* at 507 (describing state and national parties as "poorly cohesive leagues of locally based organizations rather than unified and inclusive structures").

123. TRUMAN, *supra* note 118, at 507 (viewing each state constituency as "a channel of independent access to the larger party aggregation and to the formal government").

VI. Trade Unions

Corporate personality discourse was transplanted in the context of trade unions in all three venues. Yet it was used in Britain and the United States for totally different purposes than in Germany. As will be demonstrated in this section, in Germany it was used to promote the association of workers in trade unions, while in Britain and the United States it was used against trade unions.

A. Germany

The context of labor unions creates the sharpest contrast between Gierke's fellowship theory and his political positions. His insistence on the inclusion of the principle of freedom of association, and its extension even to labor unions, could not be explained as old conservative paternalism or as Bismarkian preemption of revolution. Bismarck and the old conservatives would never have suggested such a principle and would do all in their power to exclude it from the code. Even liberals objected to this principle. They were interested in the free incorporation of business enterprises. But this had already been achieved in most German states before the unification, long before the codification debate. The free incorporation of "ideal associations" (that is, non-business associations) was an idea that horrified conservatives and liberals alike.¹²⁴ It was to serve workers' unions and radical political parties. Not surprisingly, the only party that supported Gierke on this issue was the outcast Social Democratic Party (SPD).¹²⁵

Gierke was committed at the same time to his fellowship theory and to his national-conservative political sympathies and activities. This led to a tension that could not be reconciled. Many elements of his fellowship theory suited his politics well. Some elements of his politics did not have much to do with his fellowship theory. They arose out of his general jurisprudential conceptions or were developed outside the realm of theory. However, one basic element of his theory, the real and spontaneous creations of associations of all sorts, including labor unions, could not be reconciled with the views of other members of his political and juristic camp. In the context of labor unions, Gierke gave primacy to theory over politics. The expansion of the corporate personality discourse

124. See Alex Hall, *By Other Means: The Legal Struggle Against SPD in Wilhelmine Germany 1890-1900*, 17 *HIST. J.* 365, 365-86 (1974) (providing a sense of the legal campaign against socialist and labor politics during the discussions on the drafting of the BGB).

125. See JOHN, *supra* note 23, at 122-57 (discussing the campaign for legal reform through interest groups in Germany).

into the context of labor unions did not alter the actual legal regulation of labor unions. Gierke's theory lost. The BGB declared limited freedom of association that did not apply to labor unions.

B. Britain

By the closing decades of the nineteenth century, freedom of association was no longer an issue in Britain, as it had been earlier. The history of restrictions on labor associations, stretching from eighteenth century common law through the combination acts of 1799–1825, is well known.¹²⁶ After 1825, labor unions were gradually recognized in various statutes. The 1871 Trade Union Act declared and consolidated their legal status.¹²⁷ It accepted the principle of freedom of association of labor unions and regulated some aspects of their structure and function in a manner borrowed from the 1862 Companies Act.¹²⁸ Strikingly, the 1871 Act refrained from incorporating labor unions established according to it.¹²⁹ As legislative history makes clear, it was the unions and their supporters in Parliament that objected to the inclusion in the Act of a clause that would incorporate unions. They objected to full incorporation because they were concerned about the possibility that employers would sue unions for damages caused to them during periods of disputes and strikes. Indeed, when attempts were made to sue unions in later years, the courts dismissed the suits based on the fact that unions were not corporations and, lacking this form of organization, they were not entities that could sue and be sued in court.

In August 1900, at the height of the Boer War, the representative of the railway workers union in South Wales (ASRS) declared a strike on the Taff Vale Railway.¹³⁰ The three-week long strike ended in a settlement.¹³¹ But the General Manager of Taff Vale was determined to sue the union itself, rather

126. See JOHN V. ORTH, COMBINATION AND CONSPIRACY: A LEGAL HISTORY OF TRADE UNIONISM, 1721–1906, 43–67 (1991) (explaining how the combinations acts suppressed labor organizations).

127. Trade Union Act, 1871, 34 & 35 Vict., c. 31 (Eng.).

128. Companies Act, 1862, 25 & 26 Vict., c. 89 (Eng.). See Norman McCord, *Taff Vale Revisited*, 78 HISTORY 243, 247 (1993) ("The text of the 1871 Trade Union Act adopted the common practice of borrowing apparently analogous sections from previous legislation.").

129. See McCord, *supra* note 128, at 247 (stating that while portions of the 1862 Company Act were included, the "words which had conferred corporate status on companies were deliberately omitted").

130. See *id.* at 244–45 (recounting the events that led to the Taff Vale strike).

131. *Id.*

than suing the striking employees or their leaders personally, for damages.¹³² Based on the 1871 Act and on the court decisions that followed it, the suit seemed unlikely to succeed.

Attorneys for the union argued that: "The society, which is an association of many thousands of railway servants, cannot be sued unless it is incorporated, or the Legislature has said that it can be sued as if incorporated. Our law recognises nothing between an association of individuals and a corporation."¹³³ Such a statement is based on a grant theory view of the corporation. Only entities that were created by the state could have a legal personality and all its manifestations. Only they could be sued.

Attorneys for the railway corporation argued that:

The Act deals throughout with "a trade union," and in numerous provisions contemplates that the trade union is an entity with perpetual succession. By the Act of 1871 it is a registered body (s. 6), with power to purchase, mortgage, or sell land (s. 7), with property which is vested in trustees (s. 8); it may proceed by indictment or summary process (s. 12), is liable to penalties (s. 15 of the Act of 1876), and may in other respects act in its own name.¹³⁴

In other words, unions have sufficient corporate manifestations to be viewed as corporate entities for all purposes. The nature of the unions, and not a grant from the state as such, makes them corporate bodies. This is a clear adoption of real entity theory.

On appeal in the House of Lords, the railway company added:

A trade union, though not a corporation, is a legal entity, capable of suing and being sued in its own name. It is impossible to suppose that the Legislature, having given protection and powers to trade unions by the Acts of 1871 and 1876, did not intend to make them subject to correlative liabilities.¹³⁵

This is an attempt to combine grant theory, which had won favor in the lower instance when used by the union, with real entity theory. It was the state that

132. *Id.*; see VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* 199–202 (1993) (examining the history of "representative actions" before and after *Taff Vale*).

133. *Taff Vale Ry. Co. v. Amalgamated Soc'y of Ry. Servants*, [1901] 1 Q.B. 170, 171 (reporting the opinions from the trial, Judge Farwell serving as vacation judge, and the first appeal, Judge Smith, Master of the Rolls).

134. *Id.* at 172.

135. *Taff Vale Ry. Co. v. Amalgamated Soc'y of Ry. Servants*, [1901] 1 A.C. 426, 434 (reporting the opinion from the second appeal, Judge Farwell now delivering judgment for the Lords).

granted them some attributes of entity. They are not merely a spontaneously-created social phenomenon with legal entity manifestations.

Judge Farwell in the first instance said:

Although a corporation and an individual or individuals may be the only entities known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals, which is neither a corporation nor a partnership nor an individual, a capacity for owning property and acting by agents; and such capacity, in the absence of express enactment to the contrary, involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents.¹³⁶

Though this may look like grant theory-based reasoning, it is in fact real entity theory-based argumentation. Once an entity, such as a trade union, has some corporate manifestations, it is viewed as a legal entity for all purposes and can be sued. It can be sued not because the state determined that it can be sued but rather because of its corporate manifestations.

In the Court of Appeal, Judge Smith reversed the decision and disallowed the suit against the union. He said:

When once one gets an entity not known to the law, and therefore incapable of being sued, in our judgment, to enable such an entity to be sued, an enactment must be found either express or implied enabling this to be done, and it is incorrect to say that such an entity can be sued unless there be found an express enactment to the contrary. Where in the Trade Union Acts is to be found any enactment, express or implied, that a trade union is to be sued in its registered name? Express there is none, and it is clear that a trade union is not made a corporation, as the Acts above referred to show is constantly the case with other societies. That the Legislature has omitted to enact this in the Trade Union Acts of 1871 and 1876 is clear; and in our judgment this has not been omitted by error.¹³⁷

This is grant theory reasoning. Only express attributes granted by the state apply to entities. The union entity was not granted the attribute of being sued as an entity. The reasoning of Judge Smith can also be viewed as based merely on statutory interpretation.

The House of Lords in appeal restored the decision of the first instance. Judge Farwell, who had served in first instance as vacation judge, now delivered the leading judgment for the Lords. Lord Chancellor Halsbury and Lords Macnaghten, Shand, Brampton, and Lindley concurred in quite similar language. Farwell repeated his former assertion adding:

136. *Taff Vale Ry. Co.*, 1 Q.B. at 175.

137. *Id.*

If the contention of the defendant society were well founded, the Legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents.¹³⁸

He goes even further towards real entity theory by saying that:

[T]he proper rule of construction of statutes such as these is that [in] the absence of express contrary intention the Legislature intends that the creature of the statute shall have the same duties, and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing.¹³⁹

Equation of associations with individual human beings is one of the most profound expressions for the approval of the real entity theory.

But again Farwell shifts from entity theory to a statutory interpretation. He states his interpretive presumption that "[i]t would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalised the existence of such irresponsible bodies with such wide capacity for evil."¹⁴⁰ Union leaders and politicians used this sentence as evidence for Farwell's anti-unionist and pro-capital tilt.¹⁴¹ This aspect of the case is not in the center of my work. But what is important for me is the fact that he switched back and forth between reliance on corporate theory and on conventional statutory interpretation.

The House of Lords reversed both the Court of Appeal's decision and the common wisdom. The union was obliged to pay high damages, other unions were alarmed, and a political crisis ensued.¹⁴² After five years of debate in Parliament, the Trade Disputes Act passed in 1906. The awkwardly drafted Act reversed *Taff Vale* and limited the possibility of suing trade unions in tort.¹⁴³

138. *Taff Vale Ry. Co.*, 1 A.C. at 430.

139. *Id.* at 430–31.

140. *Id.* at 431.

141. See McCord, *supra* note 128, at 254 ("[U]nions were carrying on a spirited campaign against the Taff Vale verdict and . . . [a]ccusations of judicial anti-union bias were frequently made . . .").

142. See *id.* ("[I]t is well known that the Taff Vale case and other related legal judgments inspired the trade unions to political intervention to secure a statutory reversal of these setbacks . . .").

143. See *id.* ("A key section which conferred a broad immunity from civil suits on trade unions was section 4 This crucial section was badly drafted . . .").

Taff Vale is an interesting case because corporate theories were relevant. Real entity theory served the railway company. Grant theory served the union. The parties used entity theory vocabulary without mentioning it by name.

What is the relevancy of the *Taff Vale* decision to our concerns? It is a case in which the nature of the legal personality of trade unions was placed on the table. The legal controversy in Britain is on a different front than that in Germany during the period. It is not the freedom of association but rather the burdens and liabilities that are associated with association. A discussion on the theory of legal personality level can be highly relevant for tackling the legal controversy. Resorting to grant theory would probably lead to the conclusion that because the state, in the Trade Union Act, did not positively and expressly confer incorporation on unions, unions are not corporations and thus can not be sued as such. Resorting to real entity theory, on the other hand, would lead to the opposite conclusion, that because unions behave as associations, they are indeed associations for all purposes, and can be sued. Real entity theory could have served the Lords' needs well.

By 1901 real entity theory had been imported by Maitland and was well known in England. But the Lords did not resort to theory. As in *Salomon v. Salomon*, decided four years earlier,¹⁴⁴ the House of Lords did not use real entity theory to decide fundamental corporate law issues that could be resolved based on available legal theory.¹⁴⁵ Unlike in Germany, real entity theory could be applied in England in order to advance the political aims of conservatives or liberals, rather than socialists.

C. The United States

In the United States, the legal setting of corporate personality discourse in the context of trade unions was different from its setting in Germany and England. Like in England and unlike in Germany, association of workers was not in itself illegal. But while in England the formation of unions was allowed and regulated by the Trade Unions Acts of 1871 and 1876, this was not the case in the United States. Union struggles in America were first met by the resort of employers to common law conspiracy and then by the use of the more expedient Chancery injunctions.¹⁴⁶ The Sherman Antitrust Act of 1890

144. *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.).

145. See *infra* notes 223–39 (discussing the *Salomon* case and the opinions of the Lords).

146. See WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 37–58 (1991) (providing the history of American labor law with special reference to the legal status of unions and of their activities); Herbert Hovenkamp, *Labor Conspiracies in American*

prohibited and criminalized "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."¹⁴⁷ The famous *In re Debs* case of 1895 in fact approved the use of injunctions against union leaders on the federal level.¹⁴⁸ The combination of the two allowed the imprisonment of union leaders and their ranks.¹⁴⁹ But there was still a controversy over the question of whether injunctions could be issued only against named members of a union or if they could be directed at all members of the union and in fact against the union as a whole, or at least its membership as a whole. Some state supreme courts disallowed the decreeing of injunction to union members who were not parties to the legal proceeding.¹⁵⁰ The ability to imprison labor leaders made civil remedies against unions as entities and against their funds somewhat less essential in the United States than in Britain. But, on the other hand, there was a legal basis in the United States for civil claims that could be directed at the unions themselves.

The famous debate between Louis Brandeis and Samuel Gompers over the corporate status of trade unions took place in the Economic Club of Boston in 1902,¹⁵¹ a year after the *Taff Vale* decision. Brandeis was then still a Boston attorney involved in progressive public interest litigation. Gompers was President of the American Federation of Labor. The conflict was over the question of whether unions should be organized as corporations. Unlike the *Taff Vale* case, and the future *Coronado* case, here Brandeis, who supported incorporation, did not do so in the service of industry and capital. He believed that the unions themselves would benefit from it.¹⁵² Thus the debate may provide a glimpse into the nature of unions not dominated by political interests.

Law, 1880-1930, 66 TEX. L. REV. 919, 962-64 (1988) (same).

147. Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (2004)).

148. See *In re Debs*, 158 U.S. 564, 593 (1895) (stating the court has injunctive power when there are "interferences, actual or threatened, with property or rights of a pecuniary nature").

149. See FORBATH, *supra* note 146, at 95-96 (describing the state of the American labor movement at the turn of the century).

150. See *Pickett v. Walsh*, 78 N.E. 753, 759-60 (1906) (holding the union could not be enjoined because the strikers were acting as individuals, not on behalf of the union); *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131*, 75 N.E. 877, 880 (1905) (holding the union was "not amenable to injunction" because the strikers were acting lawfully).

151. See Louis D. Brandeis & Samuel Gompers, *The Incorporation of Trade Unions*, 1 GREEN BAG 2d 306 (1998) (transcribing and commenting on the debate).

152. See *id.* at 308 (stating that the "growth and success of labor unions . . . would be much advanced" if they incorporated).

According to Brandeis:

The rules of law established by the courts of this country afford, it is true, no justification for this opinion. A union, although a voluntary unincorporated association, is legally responsible for its acts in much the same way that an individual, a partnership, or a corporation is responsible. . . . The Taff Vale Railway case, decided last year in England, in which it was held that the Amalgamated Society of Railway Servants could, as a union, be enjoined and be made liable in damages for wrongs perpetrated in the course of a strike, created consternation among labor unions there, but it laid down no principle of law new to this country.¹⁵³

Brandeis was probably wrong with respect to the state of law in the United States. But he was fully aware of *Taff Vale*, indicating the close ties of corporate personality discourse in the Britain and the United States. The interesting point for us is the fact that his reasoning was based, insofar as one can read it, on real entity theory. He equates voluntary associations such as unions with individuals and corporations. A grant by the state does not make them sueable—their mere existence has this legal consequence.

Gompers was quick to reply:

I made a note while our friend was speaking, and he partially answered himself, but for fear that it may escape the attention of any of us, I want to repeat it. He said that the union was liable under the law now, and I made the note, "Then why demand the incorporation of trade unions?" And he answered that under the law at present the trades unions can be attacked, but that it is difficult of application, and it is because it is difficult to get at the funds of the trade unions that the proposition is made to incorporate them. (Laughter).¹⁵⁴

Though he did not use theoretical rhetoric, Gompers pointed to the contradiction in Brandeis's argument; namely, that if one holds to real entity theory, one should not recommend incorporation based on state law. The union can, anyway, be sued and enjoys other corporate attributes. But he himself, as he held to grant theory, did not think that unions could be sued as long as they were not incorporated. For this reason he was against incorporation. He did not see any of the advantages that Brandeis found in the corporate status. The threat of suits by employers would not make unions more responsible but rather would lessen their ability to bargain and strike.

The case of *United Mine Workers of America v. Coronado Coal Company*¹⁵⁵ placed the character of the legal personality of labor unions on the

153. *Id.*

154. *Id.* at 312.

155. *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344 (1922).

U.S. Supreme Court's log two decades after *Taff Vale* was put in the hands of the Lords and after the Brandeis-Gompers debate initiated the corporate entity debate in the United States. The *Coronado* case serves my purpose of mapping the discourse because, in the case, the option of treating the question of civil liability of labor unions as a question of legal personality and of personality theory was forwarded by the litigating parties.¹⁵⁶ By the time the file reached the Supreme Court, the dispute was eight years old and had been adjudicated throughout the court system.¹⁵⁷ The employers in several mining companies (the plaintiffs in the court below and now defendants in error) sought treble damages resulting from a strike that took place in 1914, amounting to \$2,220,000 from sixty-five individual workers and union leaders, a few local mining unions and the national miners' union.¹⁵⁸ It was clear that only the large national union had deep enough pockets and the mining companies aimed at getting to its funds.¹⁵⁹

The unions' counsels argued that the union was not a corporation: "The very essence of the action of the State in creating a corporation is that it brings into being a legal entity which can be treated as such, in suing and being sued."¹⁶⁰ The counsel worked within personality discourse, favoring grant theory. The union was not created by the state and thus it is an unincorporated association. "A group of individuals is not liable to be sued in tort unless it constitutes a person in law."¹⁶¹ The union was not created by the state, thus it is not a legal person and cannot be sued. The counsel drew a distinction between the *Taff Vale* decision and the legal status of unions in the United States. In England, unions received their legal status from parliamentary legislation and that same parliament annulled the decision five years after it had been decided. In the United States, unions were not formed by such a law. The question was whether the Sherman Act, a uniquely American law, changed the status of preexisting unions making them into legal "persons." In sections seven and eight of that Act, "Congress did not attempt to give labor unions a status which they did not have before."¹⁶²

156. See *id.* at 383–93 (discussing whether a labor union as a distinct body may be sued); see also STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 226–28 (1987) (analyzing *Coronado* in the context of group litigation).

157. See *Coronado Coal Co.*, 259 U.S. at 346–50 (describing the background of the case).

158. *Id.*

159. See HATTAM, *supra* note 132, at 131–34 (noting the unions' earlier switch from the claim that they should be allowed to obtain full incorporation to the claim that they are merely unincorporated entities that cannot be sued as associations).

160. *Coronado Coal Co.*, 259 U.S. at 351.

161. *Id.* at 350.

162. *Id.* at 353.

The employers' counsel claimed the unions had liability within corporate personality discourse, holding them to be real entities and as such, subject to suits in tort. The employers' counsel stated:

Although the union has a membership of upwards of 400,000 men, bound together by a constitution to carry out its objects, which objects constitute the sole business and livelihood of its members; . . . although it has vast associate funds delegated to its officers to be used in carrying on its business, and which, as in the present case, may be employed solely by unlawful means and with an unlawful purpose to crush those who stand in its way; nevertheless, it is claimed, these same vast funds cannot be made to pay for the damage which they have caused, solely because the union has not chosen to incorporate.¹⁶³

Then came a statement that makes the most explicit real entity theory claim: "In case of an association of this type, what the parties have actually done and what powers they have actually assumed and exercised in the management of the organization are even more important than what their constitution says."¹⁶⁴

An amicus curiae brief for the mining companies asserted: "[The union] is clearly an entity apart from its members. Common sense declares this; economic facts declare it; the law should declare it."¹⁶⁵ To be on the safe side, it explained the sources of misunderstanding by reviewing the historical narrative of corporate personality theories, relying on Pollock and Maitland and on some American authors.¹⁶⁶ The amicus added: "It seems historically that the State began by refusing to recognize associations, and when this did not stop their growth, looked to their regulation and supervision by giving them juristic personality."¹⁶⁷ Both grant theory and real entity theory lead to the same conclusion. Either the state through the Sherman Act had already taken control of the union, empowering employers to sue it as a person, or its actual characteristics make it a sueable legal entity.

Chief Justice Taft for the court accepted this line of reasoning. After surveying the scale and scope of activities of the national union, he concluded: "[I]n every way the union acts as a business entity. . . . No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies."¹⁶⁸ He went on to recount the familiar narrative of the growing legal recognition of such associations. Despite the fact

163. *Id.* at 364.

164. *Id.* at 364–65.

165. *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 377 (1922).

166. *Id.* at 377–78.

167. *Id.* at 378.

168. *Id.* at 385.

that unincorporated associations were viewed in common law as partnerships and not as corporations, "the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness."¹⁶⁹ Taft then detailed the various manifestations of this recognition, including a long appendix that lists legislative recognition of unions.¹⁷⁰ All this rhetoric is well within personality discourse.

After establishing theoretical grounds for viewing unions as legal entities for all purposes, based on real entity theory, he moved on to more conservative ground. His formal anchoring was eventually the Sherman Antitrust Act.¹⁷¹ Sections 7 and 8 of the Act enable the suing of "corporations and associations existing under or authorized by the laws of either the United States, or the laws of any of the Territories, the laws of any State, or the laws of any foreign country."¹⁷² "This language [says Chief Justice Taft] is very broad, and the words given their natural signification certainly include labor unions like these."¹⁷³ This was also the original meaning of the drafters of the Act: "Their thought was especially directed against business associations and combinations that were unincorporated to do things forbidden by the act . . ."¹⁷⁴ Finally, he said, there is a long tradition of applying the Sherman Act to associations of various sorts.¹⁷⁵ The application of the Sherman Act to unions can scarcely be viewed as relying on grant theory. It does not rely on formation of unions by the state through the Act. It relies on a meaning of the term "person" that equates associations with persons. The bottom line of the case is that the union as such can be made a party to a tort suit and is exposed to liability.¹⁷⁶

The long tradition of antitrust discourse with respect to unions, originating with the Sherman Antitrust Act of 1890 and the *In re Debs* case of 1895, gave a peculiar twist to the contextualization of personality discourse with respect to the status of labor unions in the United States. The fact that antitrust legislation

169. *Id.* at 385–86.

170. *Coronado Coal Co.*, 259 U.S. at 386 n.1.

171. *Id.* at 391.

172. 15 U.S.C. § 7 (2004); *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 392 (1922).

173. *Coronado Coal Co.*, 259 U.S. at 392.

174. *Id.*

175. *See id.* (citing cases in which the Sherman Act had been applied to unincorporated associations of various sorts).

176. Later court decisions on the federal and state level limited the effect of the *Coronado* decision. *See id.* at 310 (stating that not all interference with interstate commerce will be a "direct violation of the Anti-Trust Act"); T. Richard Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 *YALE L.J.* 40, 42 (1941) (finding that "the *Coronado* case has not won favor with the state courts").

was introduced before corporate personality discourse created this distinct American twist to the legal discourse on the status of unions.

VII. City Governance

In this context, corporate personality discourse played a contemporary role only in the United States. In Britain the history of towns and boroughs was deemed, at least by Maitland, to be relevant to the history of corporate theories but not to any contemporary policy controversy about city governance.

A. The United States

John Dillon, the author of the first American municipal law treatise,¹⁷⁷ advanced the well-established view, well-supported by court decisions, that cities were subject to state control.¹⁷⁸ The role of the judiciary, according to this view, was to supervise cities, making sure that they did not infringe on this control. The state and the judiciary were the check on municipal abuse. Dillon, writing in 1872 before the appearance of corporate personality discourse, did not formulate his argument in terms of corporate theory. His view was in line with the grant theory that still dominated the law of corporations.

Amasa Eaton, writing in 1900, when the discourse was on the rise, used historical reasoning quite similar to Maitland.¹⁷⁹ In order to establish the right to self-government of American cities of his time, he examined the history of New England towns focusing on Rhode Island. Each of the first three Rhode Island towns, Providence, Portsmouth and Newport "had its own agreement or agreements of association, voluntarily entered into by its own settlers, without

177. See generally JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872).

178. See, e.g., *Hunter v. Pittsburgh*, 207 U.S. 161, 179 (1907) (adopting Dillon's emphasis on state power over property held by municipalities in their governmental capacity and by this also stressing the centrality of the distinction between public and private property).

179. See Amasa M. Eaton, *The Right to Local Self-Government*, pt. 1, 13 HARV. L. REV. 441, 441-42 (1899-1900) (discussing whether "towns and cities in the United States are completely under the control of the legislature" by "considering the fundamental principles on both sides"). For an excellent discussion of this literature, see generally HENDRICK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 1730-1870 (1983) (examining the early history of the American city); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (same).

authority or sanction of any kind from crown or parliament."¹⁸⁰ The chronology presented here is telling:

It is evident that the original towns or colonies of Rhode Island possessed governmental powers of their own before there was any united colony; that they formed the colony, subsequently the state, and gave up some of their powers to it; . . . that little by little the power of the colony, afterwards the state, has increased and that of the towns has diminished; that this has been done with their consent; but among the rights still reserved to the towns . . . are the right of existence and the right to manage their own local affairs, free from the interference or control of the general government.¹⁸¹

Cities were chartered by the state only at a later phase. State restrictions on cities arrived even later and as such are not legitimate. Though not saying so expressly, Eaton combines contract theory of the corporation with real entity theory of the corporation. The origin is contractual; the later development created real entities. Though he does not reject grant theory with respect to other types of corporations or other regions, his historical findings reject this theory's applicability to many of the towns he studied.

Eugene McQuillin first published *A Treatise on the Law of Municipal Corporations*, a huge six-volume set, in 1911.¹⁸² The first volume follows Eaton's historical reasoning, expanding the scope of the narrative.¹⁸³ He begins with ancient city states and moves on to the independent medieval towns of Italy, the Netherlands and Northern Germany.¹⁸⁴ He then makes the case for the Anglo-Saxon origins of English boroughs.¹⁸⁵ "The present English local government is a development of the fundamental principles early established (Anglo-Saxon institutions) . . . the local authorities, therefore, are not to be viewed as mere organs or instruments of the national government as they are in the countries of Continental Europe."¹⁸⁶ The later incorporation of municipalities by the central government was one of the means for gaining control over them and legitimizing that control.

180. Eaton, *supra* note 179, at 448.

181. Amasa M. Eaton, *The Right of Local Self-Government*, pt. II, 13 HARV. L. REV. 570, 588 (1899–1900). Parts III through V of Eaton's article may be found at: 13 HARV. L. REV. 638 (1899–1900), 14 HARV. L. REV. 20 (1900–1901), and 14 HARV. L. REV. 116 (1900–1901), respectively.

182. See 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* ix–xi (2d ed. 1940) (providing publication history of treatise).

183. See *id.* at 4–355 (providing a historical account of the rise and progression of municipal institutions throughout the world).

184. See *id.* at 19–111 (describing the ancient cities and the cities of the Middle Ages).

185. See *id.* at 125–223 (discussing the municipal government in England).

186. *Id.* at 225.

McQuillin emphasized the English and Germanic origins of the New England towns. He narrated a history of local government whose main junctures were Aryan settlements, Teutonic forms of government, the Germanic mark, the farmer commonwealth of the Angles and Saxons, the English parish, and finally the New England town.¹⁸⁷ McQuillin explained:

Township or town government among the colonies, which subsequently became the original New England states, was similar in organization and administration to the Farmer Commonwealths planted in early England by the Saxons. Like the Teutonic mark it brought the government close to the people. It found its most perfect development in early New England. It has been aptly said that it was "a case of revival of organs and functions on recurrence of the primitive environment."¹⁸⁸

When he writes that Teutonic-Germanic "communities and assemblies developed a free and independent spirit in the individual, inculcated the benefit of association and co-operation, and taught the inhabitants to work together for the common welfare,"¹⁸⁹ he sounds much like Gierke on the Germanic inclination to form fellowships. While McQuillin did not refer to Gierke, his sections on the Germanic origins of New England towns refer to Herbert Baxter Adams's *Germanic Origins of New England Towns*.¹⁹⁰ In the chapters on England, the author frequently referred to Maitland, particularly to his *Township and Borough*,¹⁹¹ and to Stubbs's *Constitutional History of England*.¹⁹² In the sections on village communities, many references were made to Sir Henry Maine.¹⁹³ Even if McQuillin did not himself import elements from German corporate theory discourse into the United States, he did rely heavily on secondhand German ideas. Eaton,

187. See *supra* note 182, at 244 (tracing the history of the "primary assembly" from the Aryans to the New England town).

188. *Id.* at 245-46.

189. *Id.* at 244.

190. *Id.* at 246 n.16.

191. *Id.* at 150 n.24, 151 n.26, 152 nn.35-37 & 42, 153 n.44, 172 n.24.

192. McQUILLIN, *supra* note 182, at 130 n.37, 139 n.17, 151 n.33, 152 nn.39 & 43, 166 n.99, 167 n.2, 172 n.22, 213 n.5.

193. See *id.* at 15-18 (discussing Maine's studies on the village community). Two distinguishable though connected strands must have influenced McQuillin: that of corporate theory that is the focus of the present article; and that of historico-politics, which gave birth to political science. For more on the second strand, see generally DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991); Robert Adcock, *The Emergence of Political Science as a Discipline: History and the Study of Politics in America, 1875-1910*, 24 *HIST. OF POL. THOUGHT* 481 (2003).

who wrote about a decade earlier, when Freund and Maitland were importing Gierke's ideas into the English speaking world, did not make similar Germanic connections.

The endeavor by Eaton and McQuillin (and earlier by Michigan Supreme Court Justice Thomas Cooley) to establish the right of self-government based on historical legitimization was not particularly successful. The distinction between private and public corporations, pronounced as early as 1819 in *Trustees of Dartmouth College v. Woodward*,¹⁹⁴ was well entrenched in American discourse on municipalities. Public corporations, performing public functions, were seen as branches of the state.¹⁹⁵ The state could revoke or alter their charters. Private corporations were viewed as private property.¹⁹⁶ Their charters were protected by the Contract Clause of the Constitution¹⁹⁷ and their property by the due process clause of the Fifth Amendment.¹⁹⁸ The attempt to strengthen cities through corporate theory discourse, by showing that the basis for their legal entity is either real or contractual but does not rest on a grant from above by the state did not convince contemporary courts. An attempt was made to distinguish between the private and public functions of cities, asserting that the former were ancient and as such should be protected from state control. The state could exercise control over city's public functions—those that were granted to it by the state, but not over its private functions—its pre-state functions that were based on reality or on a social contract. But even this line of reasoning that respected the centrality of the public-private distinction did not become popular. It contradicted the idea that the sovereignty of the people lies in the state and federal government and that there was no sphere for intermediate political associations. It contradicted the assertion that municipal corporations were public corporations.

194. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

195. *See id.* at 671 ("When the corporation is said at bar to be public . . . that the whole community may be the proper objects of the bounty, but that the government have the sole right . . . to regulate, control, and direct the corporation, and its funds and its franchises, at its own good will and pleasure.").

196. *See id.* at 675 (stating that when a private corporation is created it is subject to "no other control on the part of the crown").

197. *See id.* at 682 (determining that "the grant of a state is a contract within the clause of the constitution").

198. *See id.* at 689 (declaring that a charter's corporate franchises should not be taken away except by due process of law).

VIII. Business Organization

A. Germany

If not in political theory, could Gierke offer his Anglo-American devotees interesting insights with respect to business organizations? Gierke did not devote much attention to joint-stock business corporations. He dealt with them, quite briefly, in the first volume of *Genossenschaftsrecht*,¹⁹⁹ published in 1868, and they practically vanished in later volumes. The joint-stock corporation did not fit his conception of the fellowship.²⁰⁰ A meaningful fellowship was a fellowship in which the personal aspect of the membership was dominant. Though it was not essential for each person to belong exclusively to only one fellowship, this was desirable. A fellow was expected to have a personal and emotional affinity with the fellowship. The fellowship was expected to have an effect on the consciousness and spirit of its members. Joint-stock corporations were not well suited to this mission. The problem was not only that many investors tended to spread their risks by purchasing shares in several corporations, but also that their involvement in these corporations was often limited to transacting in shares and drawing dividends.²⁰¹ In Gierke's classification, joint-stock corporations were economic fellowships based on property, as distinct from economic fellowships based on personality and from non-economic fellowships.²⁰² While they were considered fellowships, they were not the kind of fellowships that Gierke yearned for. "[I]f [the joint-stock company] alone ruled it would lead to despotism of capital."²⁰³ He viewed it as a blessing that the role of this type of fellowship in economic life was checked by activities conducted in other forms of organization: the individual institutions controlled by the state in sectors such as banking, railways, insurance and welfare (which were of particular importance in German industrialization), and fellowships based on personality.²⁰⁴ The latter, in the

199. See GIERKE, HISTORICAL PERSPECTIVE, *supra* note 37, at 196–204 (discussing the joint-stock corporation in only two chapters of Gierke's original, which included over seventy chapters).

200. See *supra* notes 37, 40–42 and accompanying text (describing in greater detail Gierke's notion of the fellowship).

201. See GIERKE, HISTORICAL PERSPECTIVE, *supra* note 37, at 203–04 (lamenting the joint-stock company's use as "a capitalist trading company" that overcomes the otherwise "noble concept of association").

202. See *id.* at 198–204 (discussing the nature of the joint-stock company).

203. *Id.* at 203–04.

204. See *id.* at 204 (describing the circumstances that counteract the joint-stock company's selfishness).

form of guilds, were of significant importance in the Middle Ages and reemerged in the nineteenth century in the form of insurance associations, mutual banks, savings and loan fellowships, housing associations, distribution co-operatives and labor co-operatives. The joint stock company was not in the mainstream of the history of German fellowships. Economic fellowships based on personality were. They were also the big promise for a better future.²⁰⁵

Though real corporate personality theory was imported into the United States in the late 1890s, a decade during which big business and the corporate economy were the issues of the day, and was applied primarily in this context, it was not born in the era or the context of big business. Real corporate personality theory received its initial impetus from Beseler's work in the early 1840s and by the mid-1860s was shaped by Gierke.²⁰⁶ At that time, about three decades before its import into the United States, joint-stock companies were already in existence in Germany but were not at the center of economic growth. Gierke's reaction to their existence was one of bypassing rather than direct confrontation. He did not study the relationship between equity holders and creditors, between controlling shareholders and minority shareholders or between shareholders and managers. He did not develop his real personality theory in order to solve the difficulties created within these basic relationships. His theory did not suit the unique characteristics of the joint-stock corporation. He was not interested in the functioning of the market, the modes of production, and the accumulation of capital, as Marx was.²⁰⁷ He was, rather, interested in the effects fellowships had on the ideas of the individual and on the spirit of the nation. His views in 1868 had a romantic and backward-looking element; they were not shaped by a reaction to the rise of the big business corporate economy.²⁰⁸ His interest in personality theory did not emerge out of an interest in joint-stock corporations or any of the new types of associations, trade unions and capitalist producer organizations, which emerged in the closing decades of the nineteenth century.

Insofar as modern business corporations were, by 1868, visible in England, the first industrial nation, or in the United States, the home of the huge transcontinental railways, this was not relevant to Gierke's Germanic

205. See *id.* (stating that the personal fellowship for economic purposes had proven helpful in the recent past and can "promise much for the future").

206. See GIERKE, *supra* note 37, at 196 (declaring that Beseler founded the theory of fellowship and expressly recognized the joint-stock company as a corporation).

207. See *supra* notes 91-105 and accompanying text (discussing Gierke's response to Marxism).

208. See *supra* notes 34, 40, 42 and accompanying text (referencing Gierke's historical, romantic views).

historical and philosophical project. Why then was Gierke's real personality theory so popular in the context of business corporations when he himself bypassed this context?

B. Britain

Corporate personality discourse did not play a major role in Britain in the context of business organization.²⁰⁹ This was in sharp contrast to the role it played in the United States, as discussed in the next section.²¹⁰ But interestingly, its minor role in Britain resulted from different reasons than those that applied in Germany. I will consider four developments that could have challenged the prevailing grant theory and generated the demand for a new corporate theory: First, the appearance of unincorporated business enterprises; second, the growth of large publicly held corporations; third, the introduction of general and free incorporation; and fourth, the introduction of general limited liability.

The unincorporated business company could have potentially challenged grant theory because it was a form of organization created from below, by its members, using contract and trust tools, and not from above, by the state, using the public law tools of Royal charters and Parliamentary acts. However, the unincorporated company was not a late nineteenth century creature. This form of organization existed throughout the eighteenth and early nineteenth centuries. Its rise at that time did not put in question the dominant grant theory and did not cause English lawyers to consider an alternative, real personality, theory. By the second half of the nineteenth century, unincorporated business companies were in decline. The law enabled them to convert easily into corporations. On the other hand, for the first time it expressly prohibited the formation of large (unincorporated) partnerships.²¹¹ Through these two steps the law collapsed the previously created distinction between the business corporation and the unincorporated company. It is perplexing that legal personality discourse erupted in England just when the major challenge to grant theory in the real world of business—the existence of unincorporated companies—disappeared.

209. See RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844*, 112 (2000) (noting that "the eighteenth-century English corporate personality was not a part of contemporary English discourse").

210. See *infra* Part VIII.C (describing the prominence of corporate personality theories in American business organizations).

211. See HARRIS, *supra* note 209, at 284 (discussing the effects of the Companies Act of 1844).

The large publicly held corporation, with widely dispersed transferable shares and a degree of separation between ownership and control, is considered an important trigger for the discourse on corporate personality in the United States. However, in Britain this was not a new or challenging late nineteenth century phenomenon. The large public corporation appeared in England as early as the seventeenth century with the establishment of the East India Company, the Bank of England and the like, and in the eighteenth century, when insurance and canal companies adopted this form of organization.²¹² In it, the separation of control from ownership, the locus of governance in the hands of a few directors, professional management, and the agency problems that would show up in post-Civil War America, were already apparent.²¹³ The rise of the large railway companies in the nineteenth century was not thought to pose a new threat to the prevailing corporate theory.²¹⁴

The introduction of general and free incorporation of business enterprises in England in 1844 could have led to the downfall of the dominant, and only, theory of the day: grant theory. The Companies Act of 1844²¹⁵ deprived the state of its discretion with respect to the formation of new business corporations.²¹⁶ A petition for a charter or a specific act of incorporation was no longer required. All that was needed, according to the Act, was formal and simple registration with a Companies Registrar.²¹⁷ However, grant theory did survive the reform. It survived the reform because corporations were still formed by the state; if not by specific act or charter, then by the legal constitutive action of registration.²¹⁸ It survived general incorporation because there was no competing theory around that could claim a better fit with reality.²¹⁹ And finally, it survived because most English lawyers did not care

212. *See id.* at 118–27 (describing the first large public corporations to be traded on the British Stock Exchange).

213. *See id.* at 168–98 (surveying various industries and the organization and structure of companies within those industries).

214. *See id.* at 218–20, 228–29 (noting the ease with which railroads entered the existing corporate frameworks).

215. Joint Stock Companies Act, 1844, 7 & 8 Vict., c. 110 (Eng.).

216. *See HARRIS, supra* note 209, at 282–85 (discussing the changes brought about by the Companies Act of 1844, particularly the extent to which it removed the power of incorporation from the hands of the sovereign).

217. *See id.* at 282–83 (explaining the provisions of the 1844 Act).

218. *See id.* at 112–14, 284 (discussing the entrenchment of grant theory in England and the fact corporations still relied on state statutes for their formation and were subject to state regulation).

219. *See id.* at 110–14 (conveying the intellectual atmosphere and the difficulties of establishing a comprehensive legal theory).

much about legal theories and believed that whatever new problems arose in the world of free incorporation could be dealt with successfully using conventional doctrinal legal tools.²²⁰

Making limited liability readily available to all corporations by the limited liability companies acts of 1855–1856 did not shake grant theory either. Limitation of liability was not a new privilege. It was quite common in eighteenth century incorporation acts and almost standard in early nineteenth century acts.²²¹ Thus the timing of the change cannot explain the escalation of the discourse in the late nineteenth century, and not before. The passage of the limited liability acts only made this privilege more widespread and readily available.²²² In any case, this did not shake grant theory, which could easily justify the general limitation of liability.

*Salomon v. Salomon*²²³ is one of the most famous and frequently-cited cases in the history of English company law.²²⁴ It was decided in 1897 when Maitland was in the midst of the project of importing real personality theory from Germany. It is an excellent example of the irrelevancy of Maitland's endeavors to the context of England's turn-of-the-century business company law. It shows that in that period England was preoccupied with the status of small, single owner companies, known by then as "private companies," for which real entity theory, or any corporate personality theory, could not be of any relevance.²²⁵ For three decades, Aron Salomon was a prosperous leather merchant and boot manufacturer.²²⁶ At some point he transferred his solvent business into a private joint-stock company, A. Salomon & Co. Ltd.²²⁷ In return, he was issued all the shares in the company (nominal shares were held

220. See *id.* (noting that discussions of corporate personality did not appear in English literature until late in the nineteenth century, in part because of England's common law, adversarial court system, as opposed to the European-Continental model).

221. See HARRIS, *supra* note 209, at 127–32 (describing the origins and rise of limited liability in the context of Britain's harsh debtor and bankruptcy laws).

222. See *id.* (noting that some scholars even argue these acts created the link between limited liability and incorporation).

223. *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.).

224. See, e.g., PAUL DAVIES, INTRODUCTION TO COMPANY LAW 28, 37 (2002) (discussing the importance of *Salomon*); LAURENCE GOWER & PAUL DAVIES, PRINCIPLES OF MODERN COMPANY LAW 27–29 (7th ed. 2003) (same); ROBERT R. PENNINGTON, COMPANY LAW 39–42 (7th ed. 1995) (same).

225. See Timothy Guinnane, Ron Harris, Naomi Lamoreaux & Jean-Laurent Rosenthal, *Putting the Corporation in Its Place*, 8 ENTERPRISE & SOC'Y (forthcoming 2007) (discussing the centrality of private companies and the marginality of public companies in Britain in this period).

226. *Salomon*, A.C. at 47.

227. *Id.*

by six of his family members to meet the statutory minimum seven-member requirement), and took debentures.²²⁸ Shortly afterwards, the company failed because of external factors.²²⁹ Its creditors sued Salomon personally for the company's unpaid debts.²³⁰ He claimed to be protected by the limitation of his liability as shareholder.²³¹ The trial court and the Court of Appeal held Salomon to be personally liable, on the grounds that the formation of the company was a fraudulent scheme, and that, in fact, the company was merely Salomon's agent or trustee.²³² The House of Lords reversed the decision and recognized the existence of a separate corporate personality, distinct from that of its sole effective proprietor.²³³ It honored the limitation of the liability of that shareholder. It did so based on the Companies Act of 1862.²³⁴ The Act is referred to throughout the opinions of the Lords.²³⁵ It is considered the absolute normative source for creating business companies and their separate legal personality.²³⁶ The only relevant question, according to the Lords, is whether the company was registered properly and whether it provided the registrar with the required information.²³⁷ The discussion is highly positive and somewhat formalist. Parliament is supreme and the Court's role is to apply its acts, not to question its wisdom.²³⁸ The use of common sense and policy considerations by the Court of Appeal is deplored. The state, by way of legislation, has the power to create any legal personality it wishes, and by implication, also to deprive of personality any association it does not wish to incorporate. As late as 1897, grant theory seemed to be intact. The House of Lords did not sense that it had to tackle or question the theoretical foundation of the legal personality of

228 *Id.* at 23–24.

229. *Id.* at 25.

230. *Id.* at 26.

231. *Salomon*, A.C. at 26–27.

232. *See id.* at 23–29 (outlining the procedural and factual history of the case).

233. *Id.* at 23.

234. *Id.* at 22–23.

235. *See id.* at 31, 34, 42, 48, 56 (mentioning the Act in the opinions of Lords Halsbury, Watson, Herschell, Macnaghten and Davey).

236. *See Salomon*, A.C. at 27 (discussing rhetorically the extent to which incorporating a business is a regular occurrence, and that the register would not have had any grounds to refuse to register Salomon's company).

237. *Id.* at 29 (Halsbury, L., concurring).

238. *See, e.g., id.* (Halsbury, L., concurring) ("I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.").

business corporations. None of the five opinion-writing Lords entered into theoretical discourse of any sort.²³⁹

In England, insofar as business organization was concerned, the grant theory of the corporation remained stable and secure during the half century after the introduction of free incorporation. Nothing in the real world of businessmen or judges forced a paradigmatic revolution or the invention of a new corporate theory. Maitland did not turn to Gierke in order to find a solution for business-related legal puzzles.

C. *The United States*

In the United States, things were quite different. Legal personality discourse entered the context of business organization more than any other American context. Grant theory dominated the mid-nineteenth century American scene at least as much as it dominated the British scene. Its clearest and often reiterated expression was Chief Justice Marshall's statement in 1819 in *Dartmouth College*: "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."²⁴⁰

The grant theory paradigm eroded in the third quarter of the nineteenth century.²⁴¹ It is often argued that the passage of general incorporation acts in all states and constitutional amendments prohibiting the grant of specific incorporation charters in many states between 1840 and 1870 was the major cause of this erosion.²⁴² Now incorporators could simply contract for the formation of a new corporation, and just as simply register it. The grant of incorporation and its attached privileges by the state became a technical and trivial matter.

This not uniquely American development was coupled with the question of the status of foreign corporations; that is, corporations from other states, a uniquely American issue that resulted from the U.S. federal political structure.²⁴³ This issue was highly relevant with the rise of interstate

239. See *id.* at 22–58 (relying on statutory interpretation and deference to the legislature rather than corporate personality theory).

240. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

241. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 72 (1992).

242. *Id.* at 73.

243. See *id.* at 79 (discussing legal principles holding that a corporation cannot have an existence outside the jurisdiction because it is an artificial being only existing in law, and that

commerce, of a national share market and of corporations acting throughout the union with shareholders residing in many states. The traditional doctrines with respect to the residency of corporations were pushed to the limit with the appearance of competition among states over incorporation. In 1889, New Jersey was the first to move by offering an attractive corporation law to corporate decision makers.²⁴⁴ This led to a wave of migration of large corporations to that state.²⁴⁵ The business activities of large corporations were now totally detached from their state of chartering.

These developments gave rise to a whole set of issues.²⁴⁶ One issue was the selection of a forum for litigation and the applicability of diversity jurisdiction.²⁴⁷ Another was the constitutionality of license requirements, regulation and other limitations that could be viewed as discrimination against foreign corporations.²⁴⁸ Yet another was the law to apply to corporations that were chartered in more than one state.²⁴⁹ The more loosely a business corporation was connected to the state of its chartering, the more difficult it became to justify a solution to all these legal problems based on the grant theory of corporation.²⁵⁰ Corporations were present in states that did not create them and did not grant them any privileges.²⁵¹ They were expected to be recognized as corporations by these states.²⁵² Their state of incorporation was a foreign forum for most of their shareholders, directors and officers.²⁵³

The Constitution and the Bill of Rights protect the various rights of "persons" and "citizens." A question arose as to the application of these rights

one state is not constitutionally obligated to allow a "foreign" corporation to do business within its borders).

244. *Id.* at 83.

245. *Id.* at 84.

246. See generally Joseph H. Beale, Jr., *Corporations of Two States*, 4 COLUM. L. REV. 391 (1904); Edward Quinton Keasbey, *Jurisdiction over Foreign Corporations*, 12 HARV. L. REV. 1 (1898); Thomas Thacher, *Corporations at Home and Abroad*, 2 COLUM. L. REV. 351 (1902); Thomas Thacher, *Incorporation in One State for Business to be Done in Another*, 1 YALE L.J. 52 (1891); E. Hilton Young, *The Nationality of a Juristic Person*, 22 HARV. L. REV. 1 (1908).

247. See Keasbey, *supra* note 246, at 1–23 (discussing issues of forum and jurisdiction).

248. See Thacher, *Corporations at Home and Abroad*, *supra* note 246, at 359 (describing problems of equal protection for corporations operating in states other than their home state).

249. See Beale, *supra* note 246, at 391–408 (explaining various ways to apply the law when a corporation is chartered by two states).

250. See Young, *supra* note 246, at 17–18 (discussing the problems inherent in having a corporation's domicile determined "once and for all by its constitutive documents").

251. See Thacher, *Incorporation in One State*, *supra* note 246, at 52 (noting that "[i]t is no new thing to form a corporation in one State to do business in another").

252. *Id.*

253. *Id.*

to corporate entities. The ratification of the Fourteenth Amendment made their application to corporations a new issue. The presence of corporations in foreign states and the argued incorporation of the Bill of Rights by the Fourteenth Amendment made judicial review of state legislation applying to corporations yet another crucial issue. Grant theory could not justify the wholesale application of rights reserved for "persons" to corporations.

By the early 1880s, criticism of the reigning paradigm reached new levels. Some of the critics worked only on the doctrinal level. Others settled for criticizing grant theory on the theoretical level but without offering an alternative theory. Only a few scholars offered a fully blown alternative theory.

The first to offer an alternative theory was Victor Morawetz. In 1882 he wrote:

It is evident, however, that a corporation is not in reality a person or a thing distinct from the corporators who compose it. The word "corporation" is a collective name for the corporators or members who compose an incorporated association [T]he rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.²⁵⁴

He added:

A private corporation is an association formed by the mutual agreement of the individuals composing it. It is therefore impossible, in the nature of things, that a private corporation be formed by law without the action of the corporators; for the legislature has not the power to create the mutual consent, which is essential to every contractual relation.²⁵⁵

This was a direct criticism of grant theory and the offer of a new alternative—the contract theory of corporate personality. It was an indigenous American theory.²⁵⁶ Yet it was not totally original as it relied on the common view of the partnership as an aggregate of its individual partners.

The validity of contractual theory was based on the introduction of general incorporation. It was argued that in fact corporations were no longer formed by the state by way of charters of franchise. The charters that formed corporations under the new regime of general incorporation were in fact contracts between

254. VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 1–2 (1882).

255. *Id.* at 11.

256. A few Continental scholars have argued that a corporation is no more than the aggregation of its members. They did not view the corporation as a legal entity distinct from its members. They did not think of corporations in the context of business and were not inspired by the introduction of free and general incorporation. Thus, the fully-developed contract theory was peculiarly American. See HORWITZ, *supra* note 241, at 65–107 (discussing the development of corporate theory in the United States and contrasting it with European theories).

the various members and not between the group of members and the state. They were only registered ex-post by state registrars. Contractual theory was a powerful theory, it was argued, because it was much better than grant theory for explaining the corporate personality in an era of general incorporation.

Morton Horwitz convincingly contended that *Santa Clara v. Southern Pacific Railroad Co.*²⁵⁷ was a grand application of contract theory, just four years after the publication of Morawetz's book.²⁵⁸ He put to rest the conventional wisdom that the case was decided on the basis of real entity theory.²⁵⁹ That theory was not yet available in the United States in 1886. It was imported to the Anglo-American world by Maitland and Freund only a decade later.²⁶⁰ Chief Justice Waite ruled in *Santa Clara* that:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.²⁶¹

The operative outcome of this holding was that property of corporations could not be taxed on a higher level than the property of individuals. This application of constitutional protection to corporations did not stem from the fact that they were real "persons" as was mistakenly believed. Horwitz demonstrated that the Supreme Court's decision was based on contract theory²⁶² by relying on the arguments of John Pomeroy, counsel for the railway companies in *Santa Clara*,²⁶³ and of Judge Field in a companion circuit court case.²⁶⁴ Pomeroy's argument was that "*for the purpose of protecting rights, the property of all business and trading corporations IS the property of the individual corporators.*"²⁶⁵ Field's holding was based on a view that "the courts will always look beyond the name of the artificial being to the individuals whom it represents."²⁶⁶

257. *Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

258. See HORWITZ, *supra* note 241, at 65–78 (discussing *Santa Clara* and its effects).

259. *Id.*

260. See *id.* at 70–72 (highlighting the importance of Maitland and Freund in introducing real entity theory to English and American thinkers).

261. *Santa Clara*, 118 U.S. at 396.

262. HORWITZ, *supra* note 241, at 66–72.

263. See *id.* at 69–70 (quoting and summarizing the arguments of defense counsel).

264. See *id.* (citing the reasoning of Judge Field in *San Mateo v. S. Pac. R.R. Co.*, 13 F. 722, 743–44 (C.C.D. Cal. 1882)).

265. *Id.* at 70 (emphasis in original).

266. *Id.* (quoting *San Mateo*, 13 F. at 743–44).

Pro-business jurists preferred contract theory because it advanced the application of constitutional rights to corporations via their shareholders. It delegitimized state and federal regulation of business corporations as such regulation would violate the emerging principle of freedom of contract. In the mid-1880s, contract theory was seen as the new trump card of rising big businesses.²⁶⁷

It did not take long for scholars and big business to realize that contract theory did not solve all of their problems and could have adverse consequences. Some of the problems that eroded grant theory were not better addressed by contract theory. The issues of jurisdiction and litigation in corporate affairs were only further complicated by the move from the corporation to individual shareholders who were now spread throughout the country.²⁶⁸

Contract theory could not be squared with the limited liability attribute of business corporations.²⁶⁹ When corporations are equated with their shareholders, there is no justification for limiting the access of creditors to the private property of these shareholders.²⁷⁰ There is no justification for allowing shareholders a privilege that is not allowed to individuals. There is some inconsistency between the promotion of contractual freedom within corporations based on contract theory and intervention in the freedom of contract between corporations and their creditors by imposing limitation of liability.²⁷¹

Contract theory did not fit corporations' majority-based decisionmaking procedures well. Contractual conceptions better fit a model based on the unanimous consent of all parties to any change in original arrangements, embodied in the charter or elsewhere. Minority shareholders could rely on

267. See HORWITZ, *supra* note 241, at 75 (stating that during the 1880s legal writers began conceptualizing the corporation as a creature of free contract among individual shareholders similar to a partnership).

268. See Young, *supra* note 246, at 2-3 (reasoning that the changing body of a juristic person results in complete uncertainty as to its residency at any given time).

269. See Mary Stokes, *Company Law and Legal Theory*, in LEGAL THEORY AND THE COMMON LAW 155, 164 (William Twining ed., 1986) (stating that if the company was "viewed as no more than a contractual association between the members much like a partnership, it was difficult to explain why each shareholder should not be liable for the full extent of any debts, as was the case in a partnership").

270. See *id.* (finding that when a corporation is treated as a sum of contracts between shareholders, the contractual relationship is the same as between partners in a partnership, and a partnership does not grant limited liability to its partners).

271. See *id.* ("[T]he legal doctrine had drawn upon conflicting conceptions of the company to legitimate limited liability and to endorse the power conferred upon directors to manage the company.").

contract theory in objecting to majority-based decisionmaking and charter amendments.²⁷²

The politics of contract theory turned out to be indeterminate. The theory could legitimize varying attitudes, policies and doctrines. It could serve competing interests: Those of small corporate shareholders and those of corporate directors and managers; those of supporters of big business and those who wanted to return to the good old days of family firms and small partnerships; those who objected to state intervention and those who supported it. It belonged more to the world of yesterday, when business was mainly conducted by partnerships, than to that of its time, when business was conducted increasingly by large publicly held joint-stock corporations.

The criticism of contract theory mounted before the import of real entity theory. In 1885 a note in the *American Law Review* suggested such:

A corporation, in most of its relations, acts as a unit, and it is, for the most part, convenient to view it as a unit, and to regard it as a person in law; but in many relations, the proper idea of a corporation is not that of a person, but that of an aggregation of persons, or a kind of limited partnership. The efforts of practical jurisprudence should be to regard it as a unit, or as a collection of persons according to the relation in which it acts in a given instance.²⁷³

The author of the note admits that in many respects the aggregate-contract theory does not fit the reality of corporations. The call is to pragmatically combine the grant and contract theories.

By 1892, the attack on contract theory, and its apostles Morawetz and Taylor, was harsh:

The main value of a corporate charter arises from the fact that powers and privileges are thereby acquired which individuals do not possess. It is this that makes the difference between a business corporation and a partnership. . . . [A corporation] should rather hold to its independence and insist upon the fact of its existence as a distinct entity under any and all circumstances. Any mingling of corporate existence with the existence of the shareholders will weaken corporate rights.²⁷⁴

The call here is no longer for a combination of the two theories: It is for full rejection of contract theory and a return to grant theory. Grant theory better protects corporations and, presumably, their shareholders. Contract theory did

272. See JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 569 (11th ed. 1882) (stating that stockholders who do not assent to charter alterations are absolved from liability on their subscriptions to capital stock).

273. Note, *The Legal Idea of a Corporation*, 19 AM. L. REV. 114, 116 (1885).

274. Dwight A. Jones, *A Corporation as 'A Distinct Entity'*, 2 COUNSELLOR 78, 81 (1892).

not hold after the initial enthusiasm of the 1880s. By the time real entity theory was imported from Britain and Germany, it primarily encountered the revived grant theory, not the newer and short-lived contract theory.²⁷⁵ The chronology suggested here, which is somewhat different from Horwitz's, demonstrates that corporate personality discourse went through a stage of reshaping first by domestic dynamics, and only at a second, unrelated stage, by infusion from the outside.

As Horwitz convincingly clarified, real entity theory was not part of American discourse until Freund imported it from Germany.²⁷⁶ Freund's *The Legal Nature of Corporations*²⁷⁷ not only transmitted German ideas but also contextualized them among American theories and doctrines, examined them critically, and adapted them to the American reality.²⁷⁸ Freund's book was full of interesting insights—a book ahead of its time. However, Freund, like Gierke, and for the same reasons, was not particularly interested in the association of capital in the form of business corporations, as distinct from the association of persons. He was a political scientist and later an administrative law scholar, not a corporate law scholar. At about the same time, Gierke's ideas were also being imported into the United States via England and Maitland.²⁷⁹ But Maitland was not particularly interested in business corporations either. By 1901, the ends were tied together for the first time in the United States by Pepper's *Brief Introduction to the Study of the Law of Associations*,²⁸⁰ which presented Maitland's latest work, Freund's book, and Gierke's influence on both.²⁸¹

Hale v. Henkel,²⁸² decided in 1906, is considered the first U.S. Supreme Court case to apply real entity theory.²⁸³ In that case, the Court refused to apply

275. See HORWITZ, *supra* note 241, at 74 (stating that the entity theory of the corporation was formulated at the end of the nineteenth century after the collapse of the grant theory).

276. See *id.* at 71 (noting that German-trained University of Chicago Professor Ernst Freund first noticed Gierke's work).

277. See *supra* notes 64–67 and accompanying text (discussing Freund's 1897 book and corresponding doctoral thesis written a year earlier at Columbia University).

278. See HORWITZ, *supra* note 241, at 101 (explaining that Freund sought to translate Gierke's Hegelian analysis for a practical-minded and anti-metaphysical bar).

279. See RUNCIMAN, *supra* note 3, at 64 (describing the introduction of Gierke's work).

280. George W. Pepper, *Brief Introduction to the Study of the Law of Associations*, 40 AM. L. REGISTER (NEW SERIES) 255 (1901).

281. See HORWITZ, *supra* note 241, at 98 (finding that Pepper introduced Maitland's work on Gierke to an American audience in 1901).

282. *Hale v. Henkel*, 201 U.S. 43 (1906).

283. See HORWITZ, *supra* note 241, at 73 ("[T]he first Supreme Court natural entity opinion was the 1906 decision in *Hale v. Henkel*, extending Fourth Amendment protections to a corporation."); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of*

the Fifth Amendment to the self-incrimination of a corporation.²⁸⁴ However, on its own initiative, it applied Fourth Amendment protection against unreasonable searches and seizures.²⁸⁵ The decision was novel in that the Court protected corporations under the Bill of Rights, rather than the Fourteenth Amendment; that it did so on its own initiative; and that the meaning of the decision was to protect big business from regulation, namely the Sherman Act, the proclaimed purpose of which was to check further growth of big business. This was the first application of constitutional protection to corporations after real entity theory was imported into the United States. Though the opinions did not include any express reference to corporate theory or to the scholars who advocated it, one can find traces of the theory in the texts. Justice Brown, when refusing to apply the Fifth Amendment, first makes a remark in line with grant theory: "[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law."²⁸⁶ Then, when deciding to apply the Fourth Amendment, he states:

A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected under the Fourteenth Amendment, against unlawful discrimination Corporations are a necessary feature of modern business activities, and their aggregated capital has become the source of nearly all great enterprises.²⁸⁷

This is the closest hint at real entity theory. The corporation is protected not as a byproduct of the protection of its members, as contract theory would hold, but rather because "such body"—a corporation—is the bearer of rights and protections. The corporation is a social and economic phenomenon, not merely the creation of state and law. The fact that it is a real entity justifies a wide set of constitutional protections, based on the Bill of Rights and the Fourteenth Amendment.²⁸⁸

Rights, 41 HASTINGS L.J. 577, 592 (1990) (stating that the Court applied the Bill of Rights protection to the corporation, which was traditionally used to protect persons, not corporations).

284. See *Hale*, 201 U.S. at 75 (finding a corporation is subject to the laws of the state that granted their charter; hence, the state has the right to inquire into the abuse of such privileges).

285. See *id.* at 76 (applying a test of reasonableness to determine that the order for the production of books and papers constituted an unreasonable search and seizure, while holding that the defendant, "be he individual or corporation, is entitled to protection").

286. *Id.* at 74.

287. *Id.* at 76.

288. See *id.* ("In organizing itself as a collective body it waives no constitutional

Until the transplantation of real entity theory, one had to choose between the privilege of limited liability, the majority decisionmaking rule and other state-conferred privileges that came with grant theory on one hand, and the various constitutional rights that were reserved only to natural "persons" and "citizens" that could be applied to corporations only through contract theory, on the other. The import of real entity theory into the United States and into the business organization context enabled enterprises to hold for both rights and privileges.²⁸⁹ The introduction of real entity theory opened up new venues for applying theory to doctrine. The theory could be used to legitimize the strengthening of directors at the expense of shareholders. Contract theory viewed directors as agents of the shareholders, and as such, limited in various respects. Real entity theory could view directors as organs and as a manifestation of the corporation, holding all its powers. It could serve as a basis for abolishing the *ultra vires* doctrine. This doctrine hindered the entrance of business corporations into new fields of activity when opportunity arose. Its abolishment was a prerequisite to the advance of the merger movement. Real entity theory could release corporations, their majority shareholders and their directors from old shackles, but it did not postulate or determine a change. In fact, real entity theory did little to define the internal relationships within a corporation; it was an underdetermined theory in this respect. But its indeterminacy was historically constructed. The contract and grant theories were not underdetermined in the same manner. Real entity theory became available only after 1900,²⁹⁰ and it had a legitimizing effect only as long as the discourse in which it was utilized was alive and reputable. It was underdetermined only in the United States and only with respect to a corporation's internal affairs.

IX. Conclusion

In 1926, John Dewey was the first to demonstrate the manipulability and indeterminacy of the three corporate personality theories.²⁹¹ "Each theory has

immunities appropriate to such body.").

289. See Hagar, *supra* note 4, at 581 (finding that the real entity theory offers the best explanation of the notion that corporations possess natural rights and the trend toward redistributing corporate power in favor of directorial and managerial elites as opposed to shareholders).

290. See HORWITZ, *supra* note 241, at 73 (explaining that the Supreme Court first used the real entity theory in 1906).

291. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669 (1926) ("The fact of the case is that there is no clear cut line, logical or practical, through the different theories that have been advanced and which are still advanced in behalf of

been used to serve the same ends, and each has been used to serve opposing ends."²⁹² When Horwitz historicized the theories over sixty years later, he agreed that they could be used in the abstract to advance a wide variety of conflicting political ends. But he also asserted that, in a given historical context, not all theories could be used to advance any particular political end: "They carried with them considerable legal and intellectual baggage that did not permit random deployment or infinite manipulability."²⁹³ For example, Horwitz demonstrated that in the United States at the turn of the twentieth century, real entity theory could serve the needs of directors and controlling shareholders of big business, while contract theory could not.²⁹⁴

In writing this Article, I aimed to go beyond the historicizing of the theories and to historicize the discourse itself. Not only was the utilization of each of the three corporate theories historically constrained, but so was the utilization of the corporate theories discourse. In this Article, I was interested in such questions as: Why was there a debate over corporate theories in one geographical site but not in another? In one period but not in another? Which theories were played against each other in each site and time? For which spheres of activity and which types of associations was the discourse considered to be relevant in each site and time? I hopefully demonstrated that the importation of the discourse depended on unique intellectual junctures and personal contingencies. The extent to which the discourse was transplanted was not merely the result of manipulability of the three corporate theories. State structures, political concerns, legal frameworks, and historical dynamics also constrained the drifting of the discourse. Consequently, I reject Dewey's interpretation of the nature of the discourse as ahistorical and add a dimension to Horwitz's account by taking the discourse, rather than the theory, as the unit of analysis.

In the context of political theory, real entity theory served different ideological camps and fought different nemeses in Germany and the Anglo-American world, taking almost no hold in the United States. In the context of trade unions, real entity theory was transplanted into the United States and Britain, not only to serve completely opposite classes than those in Germany, but also with respect to issues that would have been irrelevant in Germany. Timing, which Dewey ignored, is also an issue relevant to real entity theory.

the 'real' personality of either 'natural' or associated persons.").

292. *Id.*

293. HORWITZ, *supra* note 241, at 106.

294. *See id.* at 68 (stating that the rise of real entity theory was a major factor in legitimating big business and none of the other theories could have provided as much sustenance to a newly organized enterprise).

The circumstances that allowed the U.S. Supreme Court to apply the theory arose more than a decade after it was applied in the House of Lords. In the context of city governance, no political group in Germany or Britain found it useful to transplant the discourse on real entity theory. In the United States, however, real entity theory, but not the others, was found to advance the ends of city self-government.

In the context of business organization, as Horwitz convincingly demonstrated, each theory became available in a different period. Even if real entity theory could have been useful for big business throughout the last quarter of the nineteenth century, it was unavailable in the United States at that time. Because real entity theory had been available in Germany since 1868, the intellectual junctures and personal contingencies for its transplantation into the United States existed. But its availability did not lead to its utilization there. The business organization context was not a concern for Gierke, who did not yet perceive the consequences of industrialization and the rise of big business and thus did not see any reason to use the real entity theory in this context. Because British disputes involved private companies, particularly single person companies, real entity theory was practically irrelevant to any of the camps in resolving this dispute. Thus, even in the context of business organization, which scholars viewed as the context in which the potential for manipulability and indeterminacy was the highest, manipulation did not have an effect in Germany or Britain. Opportunities for theoretical manipulation are available only when problems arise in specific historical periods, venues, and contexts.

Why did the corporate personality discourse die out? In Germany, the main reason was the approval of the German Civil Code in 1896 and its enforcement beginning January 1, 1900. The Code also signaled the end of the vehement debate between the Romanists and the Germanists; hence the historical school exhausted its purpose and new jurisprudential concerns and schools emerged. The famed Gierke had lost considerable influence. The last volume of Gierke's *Genossenschaftsrecht* was published twenty-two years after the third volume and thirty-five years after the first volume, which had the greatest impact in Britain. By 1913, Gierke was no longer the intellectual forerunner and his ideas may have been considered eccentric.

In a way, the discourse in Britain and the United States only began when the discourse in Germany neared its end. In Britain, the growing contradictions in political pluralist writings and the growing cleavages among them are considered the main causes for its demise. World War I led to disengagement with German jurists and to general anti-German sentiments. After the war, British syndicalism died out. Italian fascists and other European conservatives

appropriated some corporatist and syndicalistic ideas making them less attractive to British liberals.

In the United States, corporate personality discourse died out later, around the middle of the 1920s. Most of the reasons for its demise were domestic and unrelated to causes elsewhere. At this time, John Dewey criticized its manipulability.²⁹⁵ Realists, such as Felix Cohen and Max Radin, criticized abstract theories as useless for deciding concrete cases.²⁹⁶ Thurman Arnold argued that the personification discourse affected cultural conceptions of the corporation in an irreversible manner.²⁹⁷ For Arnold, the discourse was not nonsense; it had simply run its full course.²⁹⁸ Adolf Berle and Gardiner Means shifted the emphasis from the nature of corporate personality to a focus on the rise of a new type of property: They examined corporations as performing state-like functions.²⁹⁹ The different timing and causes of the wane of corporate personality discourse in the three venues further supports my claim that the discourse, its manipulability and its effects can only be understood historically.

I believe that observing the different patterns of expansion of corporate personality discourse in different venues, periods, institutional settings and contexts can provide valuable insights. The intellectual history of the transnational dimensions and multifaceted contexts of this discourse provides insight into the journeys of legal discourses, their transplantation, the formation of legal-historical narratives and the interplay between theory, doctrine and policy. Several transnational legal discourses are ongoing today relating to the purpose of the corporation and the most efficient structure of corporate governance. The American shareholder-oriented model of the corporation and the widely dispersed American model of the public corporation are traveling around the globe. Foreign corporations are struggling with the shareholder-

295. See Dewey, *supra* note 291, at 669 ("Each theory has been used to serve the same ends, and each has been used to serve opposing ends.").

296. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 813–14 (1935) (finding that the actions of the court regarding corporate liability are not justifiable and that the question of justifiability must be answered in non-legal terms); Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643, 667 (1932) (stating that an entity "consists of nothing more than a name by which a complex can be dealt with in discourse").

297. See THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 185 (1937) (explaining that the personification of great industrial enterprises has caused men to equate restraints upon industry to restraints on their own personal freedom, similar to man's relationship with ecclesiastical organizations in the Middle Ages).

298. See *id.* at 203–05 (explaining the purpose of personification during times of great economic depression).

299. See generally ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

oriented and the controlling-shareholder models.³⁰⁰ Despite the significant differences between the early twentieth century discourse and the early twenty-first century discourse, a transnational study of the latter, along the lines suggested in this Article, may prove insightful.

300. See generally Mary O'Sullivan, *The Innovative Enterprise and Corporate Governance*, 24 CAMBRIDGE J. ECON. 393 (2000) (critiquing the shareholders-as-owners model).