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The Relevance of Corporate Theory to Corporate and Economic Development: Comment on *The Transplantation of the Legal Discourse on Corporate Personality Theories*

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The question posed by this conference is, what can history teach us about corporate law? The development of corporate law in the United States has been intensely practical, with courts and legislatures bowing to the changing needs of business in their regulation of corporate organization, management, and finance. As Professor Harris and others show us, positive and normative theories have appeared from time to time, typically, or so it would appear, in response to these changes.[1] This reactive nature of corporate law and theory departs from the tighter, traditional, continental interrelationships of theory and practice and undoubtedly reflects historical, social, environmental and psychological differences as much as anything else.

The differences are critically important to understanding the historical role of theory in corporate law and its impact on the present. I frankly admit that I find it difficult to approach Professor Harris's paper on its own terms for two different reasons. First, I approach the issue as a corporate scholar, not an intellectual historian, so I suppose my comments reflect the very pragmatic American approach to corporate law and theory in which I was raised and now work. Second, whatever troubles I might ordinarily encounter in evaluating theories about corporate law, Professor Harris's paper is not really about theory at all, nor, as he tells us, about corporate law, but instead it operates at an even higher level of abstraction as a theory about theory. The role of corporate theory in his paper is to serve as a case study for a broader story of the ways in

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1. *See* 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, 1424–25 (2006) (indicating normative qualities of a "real entity" theory).

which talk about corporate theories was conducted among Germans, Britons, and Americans over time and with effects across time. Professor Harris's central point appears to be that discourses, as well as theories, are historically constrained, and thus their doctrinal uses are also historically constrained.[2] The tale of the real entity theory and its ultimate grounding in American corporate law demonstrate that our understanding of the corporation is contextual.

It didn't take much to persuade me that our understanding of the corporation is contextual. My question about the paper is, what does the nature of discourse about corporate theory add to what seems to me to be a self-evident proposition? In keeping with the spirit of Professor Harris's thesis, I will develop this comment with keen sensitivity to context and will show and agree that context matters by telling a parallel story of the development of the American corporation. My comment places less emphasis on theory and more on the law, and it gives attention to economic developments as well.[3] What I am left with in the end is a nagging question as to why *theory* matters, let alone theorizing about theory, at least outside of the sacred precincts of academia. And I am left with this question precisely because I believe that theory played very little role in the truly important developments of American corporate law. Theory might have legitimated what had already happened, but that is not Harris's point. And so I begin my tale with, perhaps, an intellectual "barbaric yawp."[4]

Harris notes that the real personality theory was developed by Otto von Gierke more than three decades before it found its way into the American context.[5] Gierke didn't care about the relationship between stockholders and creditors, nor did he care about managers or markets.[6] He didn't care about solving practical business problems at all; rather he was "interested in the effects fellowships had on the ideas of the individual and on the spirit of the nation."[7] Thus, Harris asks, why was the theory so popular as applied to business corporations in the United States where "legal personality discourse entered the context of business organization more than any other American

2. *See generally id.*

3. LAWRENCE MITCHELL, SQUEEZING TRUTH FROM POWER: THE RISE OF AMERICAN CORPORATE CAPITALISM, 1888–1919 (working title, Berrett-Koehler Publishers, forthcoming 2007) (on file with the Washington & Lee Law Review) (all pagination refers to manuscript pages).

4. *See* WALT WHITMAN, LEAVES OF GRASS, "Song of Myself" 82 (The Heritage Press 1936) ("I sound my barbaric yawp over the roads of the world.").

5. *See* Harris, *supra* note 1, at 1427–29 (describing Gierke's theory as reaction to Savigny's ideas).

6. *See id.* at 1460–61 (summarizing characteristics of Gierke's theory).

7. *Id.* at 1461.

context?"[8] His answer appears to be that the theory permitted the corporation to enjoy a combination of constitutional rights and entity characteristics that would otherwise have been incompatible.[9] He states that personal constitutional rights, like those in the Fourth Amendment, could only be applied to the corporation if it were recognized as a "person."[10] He claims the same for corporate conveniences like limited liability and centralized managerial power that he says were incompatible with other corporate theories.[11] Yet Harris provides no evidence other than some inductive reasoning and a brief description of a Supreme Court case that appeared rather late in modern corporate development to support this apparent answer.[12] I conclude that he is undoubtedly correct about the greater ease with which the entity theory made certain constitutional rights applicable to corporations, but there is no evidence of any crying need for the theory, nor did it seem to have any discernible impact on corporate development.

According to Harris, the traditional grant theory—the idea that the corporation was a creature of the state with the characteristics the state bestowed upon it—was dying out after the Civil War. This was caused in part by the widespread enactment of general incorporation laws and in part by the fact that state corporations, principally railroads, engaged in business in states other than the ones in which they were incorporated.[13] Incorporation, he argues, became "a technical and trivial matter."[14]

While many have suggested it, the first cause appears implausible. General incorporation laws were simply an alternative method by which the states could create corporations.[15] Legislatures continued to engage in special chartering well into the 1870s,[16] and the concomitants of the grant theory, like the doctrine of *ultra vires*, persisted well into the twentieth century. While general incorporation laws made incorporation easier, they still imposed

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8. *Id.* at 1466.

9. *See id.* at 1473–74 (describing the historical development of the corporation as a "person").

10. *Id.* at 1474.

11. *See* Harris, *supra* note 1, at 1470 (declaring the incompatibility of limited liability with corporate theory).

12. *See id.* at 1473 (citing Hale v. Henkel, 201 U.S. 43, 75–76 (1906)).

13. *See id.* at 1466–67 (describing issues arising from interstate activities of large corporations).

14. *Id.* at 1466.

15. *See* MITCHELL, *supra* note 3, at ch. 2, 4–15 (discussing the history of general incorporation laws, and specifically, the role New Jersey played in that history).

16. *See id.* at ch. 2, 14 (noting how special chartering was outlawed in New Jersey in 1875, forcing states to adopt general corporation laws).

significant restrictions on corporate finance, governance, management, and behavior—restrictions that could be imposed and enforced by any sovereign. Besides, a significant vestige of grant theory was retained in the almost universal practice of including reserve clauses in state constitutions, corporations laws, and charters. This by itself would have weakened the grant theory which was, at least in practice, tied to a theory of vested corporate rights by permitting the sovereign to retain its plenary powers. Surely these factors raise significant questions as to the relationship between general incorporation laws and grant theory.[17]

The second reason that I find Professor Harris's paper difficult to approach is more complex. Harris correctly notes the increasing national business of many state corporations, arguing that this pushed "traditional doctrines with respect to the residency of corporations . . . to the limit."[18] But there is no natural relationship between grant theory and corporate residency requirements, nor would real entity theory necessarily solve the problem. Besides, corporate residency doctrines were only one aspect of grant theory, and not necessarily the most important one. Far more important, for example, was corporate purpose—as to which residency doctrines might or might not have made a difference—and certainly would not have made a difference in legislatively granted charters. Just as corporate residency mattered in the mid-nineteenth century, it continues to matter today. Remnants of this residency requirement continue to exist in, for example, the internal affairs doctrine, which demands that the law of the state of incorporation govern internal—that is, contractual—disputes, regardless of where the litigation takes place.[19] Thus, at least some aspects of grant theory remain alive and well.

The constitutionality of license requirements and the like, which Harris also cites as evidence for the weakening of grant theory,[20] had little to do with corporate theory and everything to do with the political issues surrounding the interpretation of the meaning of "interstate commerce," an issue that only

17. For excellent explanations of these issues in the context of an historical examination of corporate theory, see Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988); Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201 (2006). For a discussion of the limited way in which the advent of general corporation laws impacted the doctrine of *ultra vires*, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 77–78 (1992).

18. Harris, *supra* note 1, at 1467.

19. *See* MITCHELL, *supra* note 3, at ch. 6, 2 ("Internal corporate governance matters . . . traditionally were ruled by the states.").

20. *See* Harris, *supra* note 1, at 1467 (identifying requirements' constitutionality as an issue arising from interstate business practices).

worked itself out over the succeeding sixty years. While it may have been true that the business developments Harris observes loosened the ties of a corporation to its incorporating state, there is little evidence that state corporation law, and thus the predicate for grant theory, was weakened.

The contractual theory of Victor Morawetz, a theory that Harris claims served as an alternative to grant theory, was not really all that new.[21] All of the elements of the theory are contained in the law of partnership and in the very same *Dartmouth College* case that articulated the grant theory.[22] The virtue of Morawetz's theory might be the way it stressed the voluntary nature of the relationships among corporate participants. If so, its principal service was to open up the corporation to a market description. Although corporations would not be described as markets as a general matter until the rise of the law and economics movement of the 1960s, it nonetheless was practically manifest in the market for corporations themselves during the merger wave and the sometimes sudden, sometimes gradual, easing of state restrictions on organic corporate transactions that altered the relationships among shareholders.

Harris follows Morton Horwitz's argument that contract theory did not suit the corporation's majority-based decisionmaking processes and that it did not fit with a theoretical understanding of limited liability.[23] But partnerships could contract for majority decisionmaking and be no less contractual for it. Limited liability was bestowed upon corporations increasingly for practical and regulatory competitive reasons. Moreover, limited liability is hardly necessarily inconsistent with contractual entities, as the limited partnership device demonstrates.

None of Harris's explanations for the adoption of real entity theory makes sense, and none explains why real entity theory was embraced in the United States.[24] There is no particular conflict between the kinds of privileges

21. *See id.* at 1468 (describing the theories of Morawetz).

22. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (1 Wheat.) 518, 636 (1819) (describing a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law .... It possesses only those properties which the charter of its creation confers upon it, either expressly, or an incidental to its very existence").

23. *See* Harris, *supra* note 1, at 1469 (describing Horwitz's applications of contract theory).

24. Harris also refers to "real entity theory" as "natural entity theory." *Id.* at 1424. Dalia Tsuk distinguishes the two theories, arguing that "natural entity theory" was an attempt to apply the concept of the natural rights of persons to the corporation as just another person, while in contrast the "real entity theory" was a political concept that acknowledged the priority of groups and their rights to state recognition of those groups. Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1870 (2003). In the same article, Tsuk argues that the real entity theory was adopted for the political purpose of protecting collective property rights. *See id.* at 1872 ("[T]he success of the natural entity theory of the

corporate participants could enjoy under grant theory and under contract theory. The power of directors, *ultra vires* doctrine, liberalization of corporate purpose, and new forms of organic transaction could easily have been varied by positive law under any of the different theories. Default contract rules could have been legislatively provided, as could mandatory contractual terms. Corporate personality theory might well have made the corporation as a collective entity more intellectually coherent, but the practical differences continue to escape me. The only place where Harris demonstrates that the introduction of real entity theory could make a practical difference is in the grant of constitutional rights to the corporation. As Harris acknowledges, however, Horwitz's interpretation of the *Santa Clara*[25] case showed that even constitutional rights could be bestowed upon a corporation under contract theory.[26]

It is not only contract theory but all corporate theory that is politically indeterminate. What mattered was the practicalities. The reason that Harris cannot give a strong explanation for the adoption of entity theory in the business world of the United States is that it simply did not matter. Perhaps it mattered for tax purposes, and perhaps for constitutional purposes, but theory had little impact on corporate law.

In 1888, New Jersey adopted the first modern holding company act, ultimately codified as Section 55 of the New Jersey corporate law revisions of 1896.[27] This law is commonly, but, in my view, mistakenly, seen as New Jersey's most important contribution to the growth of the giant corporation. Prior to 1889, the general rule in the United States was that it was *ultra vires* for a corporation to buy stock in another corporation. Contravening American common law, the holding company act granted New Jersey corporations the power to buy and hold stock in other corporations if otherwise permitted by law. Although it isn't entirely clear from his paper, Harris appears to see the traditional *ultra vires* rule as a concomitant of grant theory, a limitation on the purposes for which the state created the corporation. In truth, the rationales were mixed. One rationale was that the shareholders of a corporation invested their money in the business and officers of that specific corporation. To permit corporations to buy stock in another corporation would change the nature of the

corporation was due to the inability of the contractual paradigm to accommodate the dramatic changes in business structure at the turn of the twentieth century.").

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

26. *See* Harris, *supra* note 1, at 1469 (summarizing Horwitz's application of contract theory to *Santa Clara*).

27. N.J. LAWS c. 185, § 55 (1896); *see also* MITCHELL, *supra* note 3, at ch. 2, 24–32 (discussing the decision to pass the holding company act, and the effects that act had on New Jersey law).

investment. According to Harris, the death of the doctrine of *ultra vires* was possible only after a real entity theory was adopted.[28] Of course, Professor Harris tells us that the real entity theory was not available during the earlier period,[29] nor for that matter was the contract theory exposited by Morawetz.[30] But even if *ultra vires* was consistent with the grant theory of the corporation as it was set out in *Dartmouth College*,[31] the state cases showed no particular theoretical approach in adjudicating *ultra vires* cases. They simply looked to the powers expressed and implied in the charter. They interpreted a contract.

A less sophisticated reason, more consistent with the grant theory, was a simple declaration that the act was *ultra vires* because the power to buy stock in other corporations was not expressly provided in a corporation's charter. Again, while theoretically consistent with the grant theory, simple positive law based on an entrenched American suspicion of corporations going back to British monopoly grants and manifested in *Gibbons v. Ogden*[32] provides all the explanation necessary for limiting corporate conduct.[33] Again Harris claims that the real entity theory made a difference, arguing that "it could serve as a basis for abolishing the *ultra vires* doctrine" and noting that its "abolishment was a prerequisite to the advance of the merger movement."[34] As I noted earlier, a doctrine like *ultra vires* could fit comfortably with grant theory and contract theory but could also fit with real entity theory because no entity is capable of possessing unlimited purposes. Other problems with Harris's assertions are both that New Jersey demonstrated that *ultra vires* could be abolished statutorily without any reliance on theory, and that real entity theory was completely irrelevant to the merger movement which was over two years before Harris claims that the theory was available in the United States.

A third, entirely practical, reason for the common law rule, which began to appear in the 1880s as monopoly became an issue and the Standard Oil Trust

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28. *See* Harris, *supra* note 1, at 1474 ("[Real entity theory] could serve as a basis for abolishing the *ultra vires* doctrine.").

29. *See id.* ("Real entity theory became available only after 1900.").

30. Professor Harris treats Morawetz as a theorist, and indeed he wrote the first widely-circulated American treatise on corporate law. But Morawetz was hardly disinterested in articulating a theory that served to protect business and property. He had been a partner in what was to become the Cravath firm, served as Chairman of the Atchison, Topeka, and Santa Fe Railroad, and worked closely with J.P. Morgan and his lawyer, Francis Lynde Stetson.

31. Trustees of Dartmouth College v. Woodward, 17 U.S. (1 Wheat.) 518 (1819). *See supra* notes 21–22 and accompanying text (discussing the *Dartmouth* case and its relationship to grant theory).

32. Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1 (1824).

33. *See generally id.* (deciding issues of interstate corporate treatment).

34. Harris, *supra* note 1, at 1474.

formed in 1882, was that corporations were prohibited from buying stock in other corporations because the likely purpose underlying the purchase was monopoly.[35] Although the cases do not distinguish much between vertical and horizontal integration, the general rule applied because of the broad public concern that was developing over the trust issue.

Theory might help to explain the development of the New Jersey statute. It took the legislature a few tries to get it right. The 1888 holding company act allowed corporations "of this state, or any other state, doing business in this state *and authorized by law to own and hold shares of stock and bonds of corporations of other states*" to do so, and to do so "with all the rights, powers and privileges of individual owners of shares."[36] The statute served its purpose as an opening salvo, but it wasn't enough. It appears that there was confusion over the meaning of corporations owning stock with rights of individuals.

On March 14, 1893, the law was improved in a way that would induce promoters to incorporate in New Jersey. It now provided that "any corporation" created under the New Jersey corporation act could own stock in corporations of New Jersey or any other state and specifically provided that the rights of individual owners included *"the right to vote thereon, which natural persons, being the owners of such stock, might, could, or would exercise."*[37] This was intended to make it clear that corporations could vote shares they owned and control corporations in the way we now understand corporations to control their subsidiaries.

There was more still. Evidently the meaning of the rights of "natural persons" exercising rights they "might, could, or would" exercise remained unclear.[38] In 1896, the statute was amended to eliminate the phrase "natural persons" and "might, could, and would."[39] It simply allowed a corporation, "while owner of such stock," to "exercise all the rights, powers, and privileges of ownership, including the right to vote thereon."[40] In 1899, the law was perfected, and a holding company was allowed to exist as a finance company

35. *See* MITCHELL, *supra* note 3, at ch. 2, 23 ("A final reason [for limiting corporate activities] that started to appear frequently in the early 1880s as the antitrust debate heated up, was that corporations buying the stock of other corporations, especially in the same business, was the mark of monopoly.").

36. Act of Apr. 4, 1888, ch. 269, § 1, 1888 N.J. Laws 385, 385–86 (quoted in Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C. L. REV. 687, 750 n.187 (1998) (emphasis added)).

37. Act of Mar. 14, 1893, ch. 171, § 1, 1893 N.J. Laws 301, 301.

38. *Id.*

39. Act of Apr. 21, 1896, ch. 185, § 51, 1896 N.J. Laws 277, 294–95.

40. *Id.*

alone, to exist solely for the purpose of owning another corporation's stock, without having to conduct any other sort of business.[41]

The progression of voting from owner to natural person to "rights, powers, and privileges of ownership, including the right to vote," might suggest some legal difficulty in conceptualizing the corporation as a real entity.[42] I have not found any cases or legislative record that explain these changes. Perhaps theory might. Perhaps had the real entity theory been available there would have been less trouble with the phrase "natural person" as applied to corporations. But since I have found no evidence of the nature of the problem that caused the statutory changes, it is hard to tell.

The most important of New Jersey's contributions, perfected in 1893, was Section 51. This law permitted corporations to issue stock as consideration for the purchase of property, with the value of the property to be entirely in the discretion of the board of directors in the absence of fraud.[43] Corporations had long been permitted, as a matter of common law and eventually statute, to purchase property in exchange for stock. New Jersey's addition was the idea that directors' valuations were to be conclusive. Prior to New Jersey's statute, courts adopted a variety of rules on valuation, ranging from, at first, a "good faith" rule in directors' valuations[44] to a relatively short-lived "true value" rule, which imposed strict liability on directors if the assets purchased were in fact less than the value of the stock issued.[45] In each case, the valuation was typically performed by the court. The New Jersey legislature took the courts out of it and tried to vest sole power in the board of directors.[46] There was no

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41. *See* Act of Mar. 24, 1899, ch. 150, § 1, 1899 N.J. Laws 334, 334 (explaining the rights granted to corporations as stockholders). The Act stated:

> Any corporation of [New Jersey], except railroad and canal corporations, may hereafter, with the assent of two-thirds in interest of its stockholders, . . . lease its property and franchises to any corporation, and every corporation of [New Jersey] is hereby authorized to take the lease or any assignment thereof, for such terms and upon such conditions as may be agreed upon, and . . . any such lease assignments . . . heretofore made, are hereby validated.

Id.

42. *See supra* notes 37–40 and accompanying text (discussing the progression of voting powers in New Jersey law).

43. *See* MITCHELL, *supra* note 3, at ch. 2, 29–32 (describing the advent and impact of the 1896 statutory revisions).

44. *See id.* at ch. 2, 35 ("If 'the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint.'" (quoting Coit v. N.C. Gold Amalgamating Co., 119 U.S. 343, 345 (1886))).

45. *See id.* at ch. 2, 34 ("Value had to be a 'fair bona fide valuation' in 'what may fairly be considered as money's worth.'" (quoting Wetherbee v. Baker, 35 N.J. Eq. 501 (1882))).

46. *See id.* at ch. 2, 29–30 (describing the 1896 statute's changes to the valuation system).

theoretical reason for this. The practical reason lay in the fact that promoters of corporate combinations facilitated by the holding company act found it cheaper to buy corporate assets with stock rather than cash. Just a few years later, those same promoters would use this statutory permission to overcapitalize giant corporations for the purpose of acquiring and dumping large amounts of stock on the market to enrich themselves.[47] Again, there is no evidence in the historical record that any corporate theory drove the statute. The only theoretical issue lay in the financial area of corporate valuation.

The New Jersey courts tried to gut the statute by developing interpretations that attempted to restore the courts' role in valuation.[48] Their goal was not theoretical but to protect the creditors and shareholders who relied upon the corporation's stated capital as an important factor in making their investment decisions. Even so, litigation was rare, and the courts' rulings in cases like *Donald v. American Smelting & Refining*[49] and *See v. Heppenheimer*[50] were completely ignored by the corporate and business world.[51]

Why were the courts ignored? Because the New Jersey legislature had great timing. In 1897, after the national depression that followed the Panic of 1893, as national capital surpluses began to grow to record levels, the great merger wave began.[52] During the seven years of the merger wave, according to John Moody—whose numbers largely have been treated by historians and almost all contemporaneous economists as authoritative—318 industrial trusts, which consolidated 4,933 plants, were formed with an aggregate capitalization of over $7 billion.[53] Railroad, street railway, and utility company consolidations added another 127 combinations, which consolidated 3,712 different operators for a total capitalization of over $20 billion created in a six year period.[54] According to the financial thinking of the time, about two-thirds of this capitalization was water, and the water's creation was allowed by statutes like New Jersey's—which permitted the exchange of property for

47. *See id.* at ch. 2, 31–32 (describing the practical impact of the 1896 revisions).

48. *See id.* at ch. 2, 35–41 (describing the background and impact of *Donald v. Am. Smelting & Refining*, 48 A. 771 (N.J. 1901)).

49. Donald v. Am. Smelting & Refining, 48 A. 771 (N.J. 1901).

50. See v. Heppenheimer, 61 A. 843 (N.J. 1905).

51. *See supra* note 47 and accompanying text (discussing how entrepreneurs used the New Jersey laws to their own advantage).

52. *See* MITCHELL, *supra* note 3, at ch. 3, 103 (describing the intersection of overcapitalization and the merger wave).

53. *Id.* at ch. 1, 8 (citing JOHN MOODY, THE TRUTH ABOUT TRUSTS 112 (1904)).

54. *Id.*

stock—and thus allowed directors to decide the value.[55] Of course the courts were ignored. Corporate promoters, investment banks, and businessmen were growing rich from selling water in the form of common stock.

The merger wave was over before real entity theory came to the United States. The legal battles that ensued were over monopolies, railroad regulation, stock speculation and, eventually, investor protection. They were the practical issues of a brand new economic order born full blown in the space of a few short years. They were the issues of a society frantically trying to conform itself to new realities and to mold new realities to old values. There was not any time for theory.

Why did New Jersey law change in a manner that facilitated the merger wave? For theoretical reasons? Not at all. For much of the nineteenth century, from 1832 to the early 1870s, New Jersey was held hostage to its own creation, the Delaware and Raritan Canal and Camden & Amboy Railroad Companies.[56] The Amboy, the first railroad monopoly in America, not only was New Jersey's most powerful corporation but also was tax exempt, except for modest transit taxes out of which the company repeatedly cheated the state.[57] By the 1840s it controlled almost all transportation between New York and Philadelphia and was selecting the state's legislators.[58] Although economist Henry C. Carey, writing as "A Citizen of Burlington," published several letters exposing the Amboy's frauds,[59] the Amboy was whitewashed, and even praised, in two official investigations of its conduct in the late 1840s.[60] In the early 1870s, the Amboy leased its track to the Pennsylvania Railroad on the terms on which it had been chartered, leaving control of Jersey in the Pennsy's hands.[61] The upshot was that New Jersey, for all these years, had been starved for tax revenues, and even after it attempted to tax the Amboy in the early 1870s, it was again cheated out of its money.[62]

Superimpose on this story crushing Civil War debt owed by New Jersey, and you have a state in deep financial trouble. In 1888, Governor Leon Abbett

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55. *See id.* at ch. 3, 19–20 (discussing historical perceptions of overcapitalization and watering stock).

56. *See id.* at ch. 2, 10 (detailing the advent of Delaware and Raritan Canal and Camden & Amboy Railroad Companies).

57. *See id.* (describing the railroad's tax exempt status).

58. *See* Mitchell, *supra* note 3, at ch. 2, 14 ("The Amboy more or less picked New Jersey's legislators and its governor.").

59. *See id.* (describing the impact of Carey's reports).

60. *See id.* (discussing the investigations and their results).

61. *See id.* (describing the lease of track to the Pennsylvania Railroad).

62. *See id.* (detailing results of Pennsylvania Railroad lease).

was approached by James B. Dill, a young New York lawyer who lived in New Jersey, with a plan to raise revenue.[63] Dill, whom Lincoln Steffens described as "a masterpiece,"[64] was to become one of the wealthiest and the most famous trust lawyers of the next decades, and in helping New Jersey, he helped himself.[65] While Dill had been rebuffed by New York, Governor Abbett was highly receptive.[66] The plan was to create the most liberal corporations law in the country, a law that could help resolve the legal problems of consolidation and management that the trusts were encountering with more restrictive state law. New Jersey was not the first to have this idea. West Virginia, Maine, and Delaware had already loosened their laws.[67] But Dill's brilliance was in creating a corporation, The Corporation Trust Company, to advertise New Jersey's law throughout the country and to perform all of the tasks necessary to set up New Jersey corporations on behalf of paying clients. The company published widely distributed brochures, which described the step-by-step creation of New Jersey corporations and the advantages of New Jersey law.[68] The enterprise succeeded wildly when the merger wave began, and the Corporation Trust Company's shareholders—including Governor Abbett, Secretary of State Henry Kelsey, clerk of the Chancery Court, Allan L. McDermott, United States District Attorney Henry S. White, and Mr. Dill himself, among others—collected profits.[69] New Jersey's Civil War debt was erased within a decade and the state coffers flowed with treasure.[70] It was simple economic desperation created by its own poor judgment that led New Jersey to change its laws. I suppose we could say that grant theory was at play, but it seems to me that this is nothing more than saying that positive law was at play. Theory did not seem to matter.

It did not matter much at the federal level, either, although the congressional debate over the 1894 corporate income tax did involve the question of whether the corporation was an entity (although not the real entity of which Professor Harris writes).[71] Federal concern was antitrust, which

63. *See id.* at ch. 2, 16–18 (describing the background and character of James B. Dill).

64. Mitchell, *supra* note 3, at ch. 2, 16–18.

65. *See id.* (detailing Dill's successful career, and how he achieved this success).

66. *See id.* (describing the response of governmental officials to Dill's plan).

67. *See id.* at ch. 2, 15–16 (describing legislative solutions of West Virginia, Maine, and Delaware).

68. *See id.* at ch. 2, 20 (describing the purpose of the Corporation Trust Company).

69. *See id.* at ch. 2, 19 (cataloging the founding stockholders of the Corporation Trust Company).

70. Mitchell, *supra* note 3, at ch. 2, 21.

71. *See* Harris, *supra* note 1, at 1424 (describing tenets of real entity theory).

absorbed almost all of Congress' business energy in the 1890s, and entity theory had nothing much to do with that debate.[72] At that point, around 1900, the debate shifted for over a decade to federal incorporation, of which antitrust was a large component, and reigning in New Jersey and its sister states who had gone into the incorporation business was a significant goal.[73] Reading the congressional debates, you will not find any discussion of entity theory at all (or for that matter any other corporate theory) even though real entity theory was then available. You will find arguments over states' rights, executive powers, capitalization and financial concerns, the appropriate way to restrain monopolies, and even some movement for securities regulation. But the debate was driven by policy and economics, not corporate theory.

So, finally, this brings me to my question: What does the history of the development and transplantation of theoretical corporate discourse tell us about corporate law? What does the theory tell us about ourselves? It is possible that real entity theory had an effect on the development of corporate law, but how? Even in the era of grant theory, directors were considered to have non-delegable power to run the corporation, regardless of shareholder desires, as long as they were in office. Could real entity theory have affected this doctrine? Did it? Perhaps real entity theory could tell us something about shareholder power. The 1890s saw a change in merger law from required unanimous shareholder consent to a two-thirds vote. Perhaps entity theory had an effect on these developments, but I suspect that the economic imperatives I have described were more significant. Even if it did, can it explain how these merger laws, including New Jersey's, only permitted mergers between corporations of the same state well into the second decade of the twentieth century? What can it tell us about the changes in corporate finance law that brought about the merger wave and thus the giant modern corporation?

So there is my barbaric yawp. Theory didn't make a difference. If theory didn't make a difference, it is hard to see how conversations about theory made a difference. Professor Harris, in response, I suppose, to my comments at the conference insists he is not interested in corporate law. But how could he not be? Unless he explains to us why conversations about corporate theory have something to teach us about the world past or the one in which we live, there seems to be little point in the exercise.

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72. *See* MITCHELL, *supra* note 3, at ch. 2, 23 (describing the advent of the antitrust debate in the early 1880s).

73. *See id.* at ch. 4, 1–69 (detailing the federal incorporation debate and its intersection with contemporaneous developments in antitrust theory).

I'm not really as philistine as I sound. I accept that theory can be vitally important, even, as Professor Harris notes, "worth fighting for,"[74] and thus the history of theory can tell us much about our present world. I have even written a little theory myself. Perhaps Professor Harris's theory talk is important in terms of legitimating corporate behavior following the merger wave. If so, he does not show it. So, I remain unsure of the relevance of the history of corporate theory to the development of modern American corporate law. I leave it as my open question to Professor Harris.

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74. Harris, *supra* note 1, at 1436.