The Separation of Ownership and Conscience

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Separation is at the heart of corporate law and practice. Corporations separate shareholders from their money by partitioning assets, dividing ownership from control, and filtering investment through institutional intermediaries. On the conventional view, these forms of corporate separation are ethically regrettable, because they undermine shareholders' motivation and capacity to take responsibility for how companies use their money. This Article challenges the conventional view and defends the claim that separating shareholders from their corporate investments promotes the value of pluralism in a diverse modern economy. It also makes the case that as new technological developments continue to erase the boundaries between social and economic spheres, corporate separation is now more important than ever.

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INTRODUCTION

Separation has long been a central concept in corporate law and practice. The separation of corporate assets from shareholder assets is said to be the "essential" feature of organizational law.[1] The separation of ownership and control revolutionized the way that modern firms do business.[2] And the recent rise of institutional intermediaries has even separated ordinary investors from their ownership of corporate shares.[3]

Conventional wisdom has tended to gravitate toward two distinct yet related propositions about the various ways in which shareholders are separated from their money. The first is that such separation is, on balance, economically beneficial.[4] But the second is that these economic benefits come packaged with significant ethical costs.[5] Critics of corporate separation argue that it insulates shareholders from the consequences of acts committed by the companies in which they invest. Separation, in their view, makes corporate harms seem distant—if they are even perceived at all. This sense of distance, in

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1. *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

2. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

3. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 865 (2013); *see also* Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 6 (2007) (discussing the "separation of ownership from ownership").

4. *See* FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 40–62 (1991) (discussing separation of corporate assets from shareholder assets); Hansmann & Kraakman, *supra* note 1, at 423–28 (same); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99 (1989) (discussing separation of ownership and control); Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. POL. ECON. 1155, 1155 (1985) (same); Harold Demsetz, *The Structure of Ownership and the Theory of the Firm*, 26 J.L. & ECON. 375, 375 (1983) (same); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301 (1983) (same); RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 197–217 (11th ed. 2014) (discussing the role of institutional investors in the capital markets); Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 20 (2019) (same); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 341 (2015) (same); Gilson & Gordon, *supra* note 3, at 865 (same); Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1827 (2011) (same).

5. *See, e.g.*, COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 1–45 (2018) [hereinafter MAYER, PROSPERITY]; SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 3–31 (2016); COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT 71–154 (2013) [hereinafter MAYER, FIRM COMMITMENT]; JOEL BAKAN, THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 28–59 (2004); LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 1–94 (2001); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 147–48 (2013); Kent Greenfield, *Corporate Ethics in a Devilish System*, 3 J. BUS. & TECH. L. 427, 430 (2008); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 798 (2005); Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1025 (1996); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1429 (1992).

turn, is said to dull shareholders' ethical sensibilities and make them unwilling to take—or incapable of taking—social responsibility.

This Article counters the conventional narrative by identifying the ethical benefits of corporate separation. More specifically, it argues that separating shareholders from their money facilitates social cooperation under conditions of pluralism. Just as citizens have grown more ideologically divided, so too have participants in modern corporations. To negotiate that fact of pluralism without succumbing to economic tribalism and balkanization, there must be ways of abstracting from deep disagreements about ultimate matters of what is good and valuable in life. Maximal ethical engagement in all of our social roles might be appealing in some small, homogeneous communities. But it is deeply unsuitable for a diverse modern economy.

After revealing corporate separation's ethical benefits, this Article responds to two kinds of objections. The first is that corporate separation leads to individual alienation.[6] The argument here is that distancing ourselves from our corporate investments fractures the sense of psychological integrity or authenticity needed to live a satisfying life. The second objection is that corporate separation undermines the social value of empathy.[7] On this view, adopting an instrumental or transactional attitude toward corporations undermines the emotional basis for ethics in business. Against these objections, this Article shows that corporate separation not only protects individual identity from the dangers of economic disruption, but also sets realistic ambitions for the scope and scale of our emotional commitments.

Having responded to objections, this Article turns to practical payoffs. It highlights burgeoning advancements in digital polling and blockchain technology—two developments that promise to facilitate shareholder connection to the companies in which they invest. Corporate reformers have thus far been optimistic about these developments. But this Article leverages insights from the ethical case for corporate separation to illustrate the real-world dangers of enhancing intimacy between shareholders and corporations.

Taken as a whole, this Article challenges the conventional view that corporate separation is ethically regrettable. Instead, it defends the claim that separating shareholders from their money protects healthy boundaries between the deepest aspects of identity and the modern corporations in which we invest. In doing so, it both enriches the normative case for separation in corporate law and practice, while also giving us reason to be cautious about emerging innovations that may put it in jeopardy.

Part I describes in detail the main ways in which shareholders are separated from the corporations in which they invest. Alongside these descriptions, it also articulates the common—and increasingly popular—claim that each form of corporate separation is ethically problematic. Countering this dominant narrative, Part II then defends corporate separation as a set of attractive strategies for achieving social cooperation under conditions

6. *See, e.g.*, MAYER, FIRM COMMITMENT, *supra* note 5, at 144; RAJENDRA S. SISODIA ET AL., FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE 125–42 (2007); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1871 (2017).

7. *See, e.g.*, MITCHELL, *supra* note 5, at 19–48; BAKAN, *supra* note 5, at 49–52.

of pluralism. In an era of severe ideological polarization, in which even the most basic questions divide diverse people, it argues that preserving such cooperative strategies is particularly urgent. Finally, Part III investigates new technologies that promise to bring shareholders and corporations closer together—sounding a note of caution for those inclined to celebrate their arrival.

I. SEPARATION AND ITS CRITICS

This Part provides a detailed description of three important ways in which corporate shareholders are separated from the companies in which they invest.[8] It begins with the separation of corporate assets from the personal finances of individual shareholders. It then discusses the separation of investor ownership and managerial control in modern corporations. And finally, it explores how the rise of institutional investors as a dominant force in the capital markets has separated ordinary individuals from direct corporate ownership.

Along with each description, this Part also sketches conventional wisdom regarding the ethical costs imposed by corporate separation. Most critics of modern corporations concede that the corporate structure carries economic benefits.[9] But these critics also maintain that the capacity for wealth creation comes with a significant downside; namely, the encouragement of unethical behavior.[10] In their view, the various separations that are

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8. Some of these separations are ingrained in corporate law, while others have arisen as a consequence of developments in corporate finance, especially those that concern the structure of modern capital markets.

9. *See, e.g.*, MAYER, PROSPERITY, *supra* note 5, at 1 ("The corporation is the creator of wealth, the source of employment, the deliverer of new technologies, the provider of our needs, the satisfier of our desires, and the means to our ends. It clothes, feeds, and houses us. It employs us and invests our savings. It is the source of economic prosperity and the growth of nations around the world."); MAYER, FIRM COMMITMENT, *supra* note 5, at 2 ("[T]he corporation has been able to undertake remarkable feats that have transformed our own lives . . . ."); *id.* at 24 ("[T]he corporation is delivering riches that were unimaginable years let alone decades ago."); *id.* at 67 (conceding that the corporation has "delivered extraordinary benefits in the form of products, services, technical advances, and prosperity to our lives, homes, and families"); BUELL, *supra* note 5, at 251 ("We created [corporations] as a vehicle for accomplishing things together that were harder to do alone or in small groups. We designed the corporation to encourage people to lend their financial and human capital to social and economic endeavors without having to fear ruin if a project goes bad. This was a brilliant innovation."); *see also* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 142 (2006) (acknowledging that corporations "have a comparative advantage in building wealth for all of its stakeholders"); Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 314 (2015) ("[C]orporate separateness has been one of the legal innovations most important to the development of national wealth."); MITCHELL, *supra* note 5, at 10 (describing the corporate form as "unarguably an efficient structure"); *id.* at 276 (conceding that corporations are "extremely efficient at allocating resources in ways that lead to the production of desirable goods and services"); *cf.* Ciepley, *supra* note 5, at 147 ("Corporate property . . . creates the conditions both for greater productivity and greater irresponsibility.").

10. *See, e.g.*, MAYER, PROSPERITY, *supra* note 5, at 34 ("That the different nature of the corporation is associated with social benefits and ills, and its changes over time with their emergence and eradication, suggests that it is to the corporation that we should turn for both the source of our prosperity and our impoverishment."); MAYER, FIRM COMMITMENT, *supra* note 5, at 23 ("The corporation has a darker side. At the same time as it is feeding, housing, educating, and transporting us, it is also exploiting, polluting, poisoning, and impoverishing

weaved into the fabric of modern corporate life insulate shareholders from the consequences of corporate activity and thereby undermine efforts to conduct business affairs in a responsible manner.[11]

A. Assets

1. Separating Assets

The first major way in which corporate shareholders are separated from their investments is through what is known as "asset partitioning."[12] Asset partitioning refers to the creation of a legally distinct pool of assets that the corporation itself owns. In creating this separate pool of firm assets, corporate law draws an important boundary between those assets and the personal finances of individual shareholders.[13]

a. *Affirmative Asset Partitioning*. More than two decades ago, prominent corporate law scholars began developing the idea of asset partitioning, setting a large part of the intellectual agenda in corporate law for years to follow.[14] Before its arrival on the scene, many in the legal academy viewed corporate law as an outgrowth of the law of contracts.[15]

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us."); MITCHELL, *supra* note 5, at 29 ("Why should corporations be particularly susceptible to the kind of behavior that most individuals—even if the thought crossed their minds—would reject as unethical to say the least? What is it about the way we structure the corporation and the nature and purpose we envision for it that gives the corporation a different moral construct, or at least makes a different moral outlook easier for them to adopt and easier for us to swallow?").

11. *See* Ciepley, *supra* note 5, at 147–48; Elhauge, *supra* note 5, at 798; *see also* Paddy Ireland, *Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility*, 34 CAMBRIDGE J. ECON. 837, 838 (2010) (arguing that separate corporate personality, limited liability, and the separation of ownership and control have "institutionalized irresponsibility"); Lawrence Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 521–22 (1995) (arguing that the rise of institutional investing diffuses responsibility).

12. *See* Hansmann & Kraakman, *supra* note 1.

13. *See id.* at 393–96. Following Hansmann and Kraakman, this section describes the "affirmative" and "defensive" components of asset partitioning. The efficiency properties of these two forms of asset partitioning often work together to promote value in business organizations. But the economic benefits provided by each form of asset partitioning are sufficiently distinct that they deserve their own treatment.

14. *See generally id.*; Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 877 (2000); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 392 (2003); *see also* George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102, 1104–07 (2004) (discussing asset partitioning concepts); Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515, 517–23 (2007) (same); Richard Squire, *The Case for Symmetry in Creditors' Rights*, 118 YALE L.J. 806, 808–09 (2009) (same); John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1240–44 (2014) (same); Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors' Selective Enforcement*, 124 YALE L.J. 2680, 2681–88 (2015) (same); John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2167–70 (2016) (same); Morgan Ricks, *Organizational Law as Commitment Device*, 70 VAND. L. REV. 1303, 1304–19 (2017) (same); Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247, 302 (2017) (same).

15. *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 4, at 1–39.

Following influential work in financial economics, most corporate law scholars saw the corporation as nothing more than a "nexus of contracts" and regarded corporate law as merely a convenient set of off-the-rack contractual default terms.[16] But the idea of asset partitioning challenged this dominant view, pointing out that the isolation of corporate assets from personal assets—or what might be called *the separation of owners and assets*—sounded more in property law than in contract.

Corporate law accomplished this separation of owners and assets through two distinct legal rules.[17] The first rule gives corporate creditors—that is, creditors of the business itself—a claim on corporate assets that is prior to the claims of any shareholder's personal creditors.[18] When shareholders invest in corporations, in other words, they alienate or "relinquish" their property interest in those investments in exchange for certain limited governance rights and claims on cash flow.[19] That relinquishment, in turn, allows the firm to use its own assets to bond contracts with business creditors.[20]

In addition to providing business creditors with prior claims, corporate law also protects firm assets from various threats of liquidation.[21] One aspect of this "liquidation protection" is that individual corporate shareholders may not unilaterally withdraw their financial stakes in the firm. Instead, to liquidate the corporation's assets, shareholders owning a majority of the company's stock would need to vote in favor of dissolving the firm, which is a much more complicated and cumbersome process.[22]

Although asset partitioning protects corporations from the threat of liquidation by individual shareholders, that is far from its most significant feature. A second—and more economically consequential—aspect of liquidation protection works to prevent shareholders' personal creditors from levying on the firm's assets to satisfy personal debts.[23] While it may be relatively simple for shareholders to enter into a binding agreement not to withdraw assets once they are committed to a firm, the same cannot be

16. *See id.* at 12; *see also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) (describing the firm as a "nexus for a set of contracting relationships among individuals").

17. *See* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 7 (2d ed. 2009); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1340 (2006).

18. Hansmann & Kraakman, *supra* note 1, at 394.

19. *See* Ricks, *supra* note 14, at 1306 ("[O]rganizational law provides a mechanism for business co-owners to *relinquish* their legally cognizable property interests in specific business assets."). Although Ricks presents his property-relinquishment theory as distinct from asset partitioning, he also sees the two ideas as "complementary." *Id.* at 1309.

20. Hansmann & Kraakman, *supra* note 1, at 392.

21. *Id.* at 394.

22. *See, e.g.*, DEL. CODE. ANN. tit. 8, § 275 (describing procedures for corporate dissolution); *see also* DOUGLAS K. MOLL & ROBERT A. RAGAZZO, CLOSELY HELD CORPORATIONS § 8.02[A], § 8–11 (2019) (noting that "[i]n most jurisdictions, a right to voluntarily dissolve a corporation is granted only to shareholders who own, individually or collectively, at least a majority of the outstanding voting stock of a corporation," and mentioning that "[e]ven then, voluntary dissolution often requires the agreement of the board of directors as well"); *id.* §§ 8–12 to –13 (describing problems associated with the ability of dissolution sales to generate a fair value for the business).

23. *See* KRAAKMAN ET AL., *supra* note 17, at 7.

said for protecting those assets from shareholders' personal creditors. Instead, corporate law allows shareholders to commit capital to the firm, which is then protected from "subdivision or seizure" in the case of personal bankruptcy.[24]

Finally, the law of asset partitioning protects corporate assets from liquidation by the heirs of current shareholders.[25] Without this form of liquidation protection, the death of individual shareholders would readily and predictably lead to efforts by heirs to squeeze cash out of corporate assets. Much like liquidation protection from shareholders' personal creditors, protection from the claims of shareholders' heirs "locks in" corporate investments beyond what could feasibly be achieved by ordinary contract law.[26]

Locking in capital, in turn, is critically important for protecting the firm. In the typical case, a firm is worth more as an ongoing business than it would be if all of its assets were liquidated. But this "going concern" value would be in danger if shareholders or their personal creditors had the power to suck money out of the firm at will. Such power would not only destroy firm value in instances where shareholders actually exercise liquidation authority, but also in cases where shareholders leverage the mere threat of liquidation to extract private benefits. By blocking this threat of liquidation, affirmative asset partitioning makes it much more difficult for investors or their creditors to engage in such value-destroying practices.[27]

b. *Defensive Asset Partitioning*. The previous section described the partition of firm assets from personal assets and the related rules of law that protect what is owned by the firm itself. But modern corporate law also includes a defensive form of asset partitioning, which protects the personal assets of shareholders from the claims of corporate creditors. Most commonly described in terms of shareholders' "limited liability," the defensive form of asset partitioning provides that business creditors (absent extreme circumstances) have no claim on the personal assets of shareholders.[28]

In contrast to its affirmative cousin, generations of scholars have exhaustively

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24. *See* Blair, *supra* note 14, at 424 ("Because of the special nature of the businesses that were granted corporate status, it was important that business property be held separately from the personal property of the individual business promoters, and that the business property be protected from subdivision or seizure.") (citing RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784–1855 (1982)); *see also id.* at 392 (arguing that the "commitment of capital by shareholders . . . helped protect the at-risk investments made by other corporate participants").

25. Blair, *supra* note 14, at 392; Ricks, *supra* note 14, at 1306.

26. *See* Blair, *supra* note 14, at 392.

27. *See* Hansmann & Kraakman, *supra* note 1, at 403; Hansmann, Kraakman & Squire, *supra* note 17, at 1348; *see also* Blair, *supra* note 14 (arguing that the ability to lock in capital in the corporate form contributed to the rise of the business corporation in the Nineteenth Century).

28. In their casebook on the law of business organization, Professors William T. Allen, Reinier Kraakman, and Vic Khanna point out that the term "limited liability" is "not quite accurate." WILLIAM T. ALLEN, REINIER KRAAKMAN & VIKRAMADITYA KHANNA, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 106 (6th ed. 2021). As they explain, "[N]either corporations nor shareholders have limited liability. Corporations have unlimited liability, and shareholders, by reason of their shareholder status alone, have no liability for the debts or obligations of the corporation." *Id.* Despite its infelicity, I follow Allen, Kraakman, and Khanna in using the term "limited liability" due to its common usage.

dissected the importance of limited liability.[29] On the leading account, limited liability reduces investor monitoring costs, facilitates diversification, harmonizes investor interests, and encourages creditor monitoring.[30] Indeed, many commentators have thought of limited liability as the *sine qua non* of corporate law.[31] That claim may be overstated,[32] but the story of separating shareholders from their investments would be incomplete without the defensive aspect of asset partitioning.

As an analytical matter, one could view limited shareholder liability as a conceptually neat corollary to the idea of separating owners and assets. While asset partitioning protects the firm's assets against the claims of shareholders' personal creditors, it also protects shareholders' assets against the claims of corporate creditors.[33] This relationship is not a necessary one. Indeed, there are numerous historical examples of corporate forms that provided affirmative asset partitioning without supplying limited investor liability.[34] Yet, in significant ways, these twin components of modern corporate law work together to put legal and economic distance between shareholders and the companies in which they invest.[35]

2. The Ethics of Separating Assets

Critics of corporate separation have long worried about the consequences of dividing personal assets from business property.[36] On this view, personal ownership of property serves as a sort of ethical ideal. Indeed, some have even claimed that such personal

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29. *See, e.g.*, STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS (2016); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262–63 (1967).

30. *See* Easterbrook & Fischel, *supra* note 29.

31. *See* Kevin F. Forbes, *Limited Liability and the Development of the Business Corporation*, 2 J.L. ECON. & ORG. 163, 163 (1986) (reporting the view that limited liability "is all but held to be the sine qua non of the corporate form").

32. *See* Hansmann & Kraakman, *supra* note 1, at 390 (stating that limited liability is "of distinctly secondary importance"); Mahoney, *supra* note 155. *But see* BAINBRIDGE & HENDERSON, *supra* note 29, at 13 (arguing that "the importance of limited liability to the development and success of the corporate form should not be minimized" and that "the dominance . . . achieved by the corporate form over the alternative business organization that until recently was its chief rival—the partnership—likely would not have happened but for limited liability").

33. In subsequent work, Professors Henry Hansmann, Reinier Kraakman, and Richard Squire refer to these features as "entity shielding" and "owner shielding," respectively. Hansmann, Kraakman & Squire, *supra* note 17, at 1351.

34. *See id.* at 1356–87. Indeed, the State of California did not grant corporate shareholders limited liability until 1931. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1924 (1991).

35. *See* KRAAKMAN ET AL., *supra* note 17, at 5 (explaining that the core features of corporate law "have strongly complementary qualities for many firms"); ALLEN, KRAAKMAN & KHANNA, *supra* note 28, at 94 (explaining that the corporate form's basic characteristics "interact to make the corporation an efficient legal form for enterprise organization").

36. *See, e.g.*, ADOLF A. BERLE, JR., POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY 59–76 (1959).

ownership forms the "moral basis for capitalism."[37] According to critics, however, corporate separation severs the connection between property and accountability, leading to insulation from the demands of ordinary ethics.[38]

The idea that asset separation causes ethical insulation draws on familiar aspects of human psychology. Separating corporate assets from personal assets is said to undermine our motivation to take responsibility for what our money does in the world.[39] When people are confronted with the direct consequences of their activities, they are thought to have the right incentives to take responsibility. But partitioning corporate assets is said to distort these incentives, leading both corporate shareholders and the managers who use their money to behave in unethical ways.[40]

Limited liability is often thought to pose an especially daunting ethical problem. Critics contend that it reduces shareholders' incentives to care about the consequences of actions taken by the corporations in which they invest.[41] Some critics have gone even further, arguing that evasion of individual responsibility is the whole point of the corporate form.[42] Rather than being an incidental side effect of incorporation, limited liability has been blamed for deliberately diminishing and dispersing responsibility, thereby creating a "responsibility deficit" that leads to unethical—and often illegal—behavior.[43]

Probing even deeper into shareholder psychology, some scholars have argued that limited liability undermines the emotional connections that support any kind of ethical behavior. On this account, most people tend to care less about things that are physically or relationally distant. That is, we tend to care less about things that happen far away from us than we do about things that happen in our backyards, and we tend to care less about what happens to strangers than we do about what happens to our relatives and close friends.[44] Limited liability, in turn, radically separates one's corporate investments and one's personal assets, and in so doing it dulls feelings of responsibility for the effects of corporate

37. *See*, *e.g.*, Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69, 77 (J. Roland Pennock & John W. Chipman eds., 1980).

38. *See* BERLE, *supra* note 36, at 59–64 (discussing effects of "the fission of property").

39. *See* Ciepley, *supra* note 5, at 147.

40. *See id.* at 148.

41. *See id.* ("Limited liability . . . generates incentives toward economic and legal irresponsibility."); Greenfield, *supra* note 5, at 430 ("Limited liability . . . is inconsistent with the ethical norm of taking responsibility for one's own actions since it shields people from liability that arises from their wrongful conduct.").

42. *See, e.g.*, BUELL, *supra* note 5, at 18 ("The history of the corporation in the United States reveals the essential mission of the modern firm: to reduce responsibility. That's not a byproduct or regrettable cost of organizing our economic lives around the corporation. It's the purpose of doing so."); *id.* at 20 ("The business firm was invented to reduce individual responsibility.").

43. *See id.* at 251 ("[T]he corporate age has left us with many problems. These include the problem of responsibility—of how to hold one another accountable for harms and wrongs—when they're committed within, and seriously enabled by, large nonhuman institutions that are designed to limit responsibility. The contemporary pattern of corporate crime prosecutions is evidence for the responsibility deficit, not its cure.").

44. *See* MITCHELL, *supra* note 5, at 38–48; Elhauge, *supra* note 5, at 798–801; *see also* DAVID HUME, A TREATISE OF HUMAN NATURE (1740); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759); PAUL BLOOM, AGAINST EMPATHY: THE CASE FOR RATIONAL COMPASSION 15–56 (2016).

activity.[45] Without these feelings, the claim goes, shareholders will be less inclined to care about how corporate behavior affects other people's lives.[46] Instead of fostering an ethical community governed by care and responsibility, limited liability is thought to lead to selfishness, instrumentalism, and—at the extreme—sociopathy.[47]

Indeed, on one prominent account, absence of emotional attachment is a central feature of the corporate form.[48] By erecting a legal structure that separates shareholders from the firms in which they invest, corporate law is said to encourage compartmentalization of personal ethics and the conduct of business.[49] In their personal lives, people are encouraged to care about the well-being of their neighbors and their communities. But critics contend that corporations separate us from these characteristically human feelings, inducing a sort of ethical indifference that approximates psychological illness.[50]

B. Control

1. Separating Control

The second major source of distance between shareholders and their corporate investments comes from the "separation of ownership and control." This phrase is most commonly associated with the work of Adolf Berle and Gardiner Means.[51] In 1932, Berle and Means published *The Modern Corporation and Private Property*, which quickly became a canonical text in the field. In fact, in 1933, *Time* magazine noted that it had already become the "economic Bible of the Roosevelt administration."[52]

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45. *See* MITCHELL, *supra* note 5, at 59 ("Limited liability means never having to say you're sorry—or at least feel the pain of sorrow."); *see also* Marina Welker & David Wood, *Shareholder Activism and Alienation*, 52 CURRENT ANTHROPOLOGY S57, S59 (2011) ("Shareholders' sense of responsibility for the actions of corporations they owned derived from their potential liability for corporate activities and debts.").

46. *See* MITCHELL, *supra* note 5, at 53–65; Gabaldon, *supra* note 5, at 1429 ("Limiting liability is about imposing risks that someone else must bear. Liability limitations artificially distance individuals from the real-life effects of the enterprise in which they invest, thus decreasing their acknowledged personal responsibility. Regardless of the legal effect of the policy, the fact that limited liability is enshrined in the law can inflict a separate harm by shaping values and social reality.").

47. *See* MITCHELL, *supra* note 5, at 60 ("Laws can't control [the corporation] from the outside because we've already created the corporation with a consciousness that will let it evade laws and legal detection . . . . Limited liability has cast the corporation in the image of the spoiled child."); *see also* BAKAN, *supra* note 5 (describing structural incentives that drive corporations to behave in antisocial ways); Greenwood, *supra* note 5, at 1025 ("The law and the legally created structure of corporation and market filter out all the complexity of conflicted, committed, particularly situated, deeply embedded and multi-faceted human beings, leaving only simple, one-sided monomaniacs.").

48. *See* BAKAN, *supra* note 5.

49. *See id.* at 55–58 (discussing reports of ethical compartmentalization in the corporation); *id.* at 56 (reporting accounts of how corporate culture "separate[s] us from who we are" and "fashion[s] a schizophrenia in many of us.").

50. *See id.* at 56–57 (describing a psychologist's assessment of corporate behavior as "psychopathic").

51. BERLE & MEANS, *supra* note 2.

52. *Transportation: Credit Manager*, TIME, Apr. 24, 1933, at 14; *see also* Herbert Hovenkamp, *The*

Although modern scholars dispute various aspects of Berle and Means' account, the separation of ownership and control remains a central feature of discourse about modern corporations.[53] Much of this work focuses on the costs and benefits of separating ownership from control and the conditions under which such separation will be efficient.[54] But before asking those questions, it is important to have a more precise description of exactly what is being separated.

On the traditional view, shareholders were thought to "own" the firms in which they invested.[55] The most intuitive example supporting this view would involve a company managed by a single shareholder. In such a company, that shareholder would have a right to the firm's residual cash flows and would also have authority to make all operating decisions. In other words, both ownership—that is, the right to residual cash flows—and control—that is, the power to make decisions for the firm—would be concentrated in one shareholder.

But in modern corporations, and particularly in public companies, residual claims on firms' cash flows no longer come packaged with significant decision-making authority.[56] To be sure, shareholders retain financial rights in the firm. But corporate control is vested in hierarchies of professional managers rather than in shareholders themselves.[57] That is, in modern public companies, there is a radical disconnect between the financial rights of "ownership" and managerial "control" over the use of corporate resources.

On Berle and Means' account, this radical disconnect was in large part the product of wide dispersion of corporate investments.[58] Rather than having a single shareholder (or even a small group of shareholders) in a company, the Berle–Means firm is instead

Classical Corporation in American Legal Thought, 76 GEO. L.J. 1593, 1685 (1988) (discussing the *Time* magazine statement quoted in the text).

53. *See, e.g.*, MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1996); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 82 (2001); Stephen G. Marks, *The Separation of Ownership and Control*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 692 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

54. The problem of "agency costs"—which typically refers to the misalignment of incentives between corporate investors and those who use their money—is often thought to be the "master problem" in corporate law. *See* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 929 (1984). Yet the conventional wisdom with regard to the separation of ownership and control is that its economic benefits outweigh its costs. The primary economic benefit of separating ownership and control is that it allows for a division of labor between investment and management of the firm. That is, the separation of ownership and control disaggregates the functions of residual risk bearing on the one hand, and firm decision-making on the other. Once these functions are disaggregated, different groups are then able to specialize in one or the other. Butler, *supra* note 4, at 107. This specialization of functions carries a variety of efficiency benefits, particularly in large and complex modern corporations. *See* Demsetz, *supra* note 4, at 386; Demsetz & Lehn, *supra* note 4, at 1158; Fama & Jensen, *supra* note 4, at 309.

55. For one widely discussed version of this view, see MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–34 (1962). *See also* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 17.

56. *See* Fama & Jensen, *supra* note 4, at 312–15.

57. *See* James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1587 (2013) (citing STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 5.3, at 195 (2002)).

58. *See generally* BERLE & MEANS, *supra* note 2.

characterized by a large group of equity investors, each of whom owns only a very small percentage of corporate shares.[59] As a consequence of this dispersion of share ownership, individual investors do not have adequate financial incentives to be active in matters of corporate governance. To take such an active role in the company would be costly, and any gains from corporate improvements would have to be shared with other investors.[60] Not surprisingly, on this model, incentives to free ride create massive collective action problems among corporate shareholders.[61]

These collective action problems, in turn, are magnified by the economic imperative to diversify one's investments. Modern portfolio theory teaches that maintaining a broad array of diversified investments maximizes risk-adjusted returns.[62] As a consequence, most public-company investors hold shares in many different firms in different sectors of the economy.[63] This diversification makes public company investors virtually neutral to firm-specific risk, further reducing their incentives to engage with the governance of any particular company. The result is "rational apathy" about the practices of particular firms and, therefore, collective powerlessness in those firms.[64]

This powerlessness is both recognized and solidified by corporate law.[65] Perhaps most importantly, corporate law reflects a profound commitment to centralized management under an elected board.[66] Section 141(a) of the Delaware General Corporation Law is illustrative of this commitment. It says, in relevant part, that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."[67] Many who teach and write in the area regard this as the single most important provision in all of corporate law.[68]

One might be inclined to challenge the idea that corporate ownership and control have

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59. *See id.*; *see also* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 11 (1991) (introducing the term "Berle-Means corporation"); Brian R. Cheffins, *The Rise and Fall (?) of the Berle-Means Corporation*, 42 SEATTLE U. L. REV. 445, 446 (2019) (crediting Professor Mark Roe with inventing the term "Berle-Means corporation").

60. *See* ALLEN, KRAAKMAN & KHANNA, *supra* note 28, at 190–92 (describing incentives for shareholders to be passive in widely held firms).

61. *See id.* (describing collective action problems in widely held firms).

62. *See* WILLIAM A. BIRDTHISTLE, EMPIRE OF THE FUND: THE WAY WE SAVE NOW 24 (2016); BREALEY ET AL., *supra* note 4, at 197–217; Gilson & Gordon, *supra* note 3, at 885–86; James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969, 2013 (2016).

63. *See generally* INV. CO. INST., 2022 INVESTMENT COMPANY FACT BOOK: A REVIEW OF TRENDS AND ACTIVITIES IN THE U.S. INVESTMENT COMPANY INDUSTRY (2022).

64. *See* ALLEN, KRAAKMAN & KHANNA, *supra* note 28, at 190 (discussing "rational apathy" among corporate shareholders); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1751 (2006) (same); Nelson, *supra* note 57, at 1587–89 (same).

65. *See* ALLEN, KRAAKMAN & KHANNA, *supra* note 28, at 111–13 (discussing centralized management in corporate law).

66. *Id.*; Bainbridge, *supra* note 64; Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2002).

67. DEL. CODE. ANN. tit. 8, § 141(a).

68. The Delaware Supreme Court appeared to take the same view in *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (noting that § 141(a) codifies "the fundamental principle . . . that the business and affairs of a Delaware Corporation are managed by or under its board of directors").

been entirely separated on the grounds that shareholders retain the right to vote in corporate elections.[69] On this view, shareholders may not be in charge of the corporation's day-to-day decisions, but they still retain significant "voice" through the shareholder franchise. Yet, as generations of corporate law scholars across the political and theoretical spectrum have demonstrated, corporate voting is rarely a source of significant shareholder power.[70] Some scholars contend that this disempowerment is regrettable,[71] while others applaud it.[72] But there is wide consensus on the idea that strong legal and economic forces—including pervasive collective action problems, plurality voting for directors, and management control of the corporate proxy machinery—converge to ensure that shareholder votes do not translate into "control" over the corporation.[73]

As a result of this disempowerment, shareholders are often left in a position where their only real means of influence is to "exit" corporate investments. To be sure, shareholders' ability to sell their shares in a liquid market translates into a substantial mechanism for disciplining corporate managers.[74] But even though the market for corporate control provides shareholders with some degree of power over the firms in which they invest, managers of public companies retain nearly total freedom to direct corporate resources as they see fit.

The separation of ownership and control, then, puts significant distance between shareholders' corporate investments and the decisions that are made with those investments. Not only are shareholders' assets legally separated from corporate assets, but shareholders' authority regarding the use of those corporate assets has been transferred to professional managers. Using other people's money, these managers enjoy significant discretionary power over corporate resources, and are insulated from direction or dictation by diversified, passive, and rationally apathetic investors.[75]

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69. *See* DEL. CODE. ANN. tit. 8, § 216(3) (stating that "[d]irectors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors").

70. *See, e.g.*, Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 679–94 (2007); Bainbridge, *supra* note 64, at 1748–50; Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 798 (2007); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 309–15 (1999).

71. *See, e.g.*, Bebchuk, *supra* note 70, at 679–82.

72. *See, e.g.*, Bainbridge, *supra* note 64, at 1748–50; Blair & Stout, *supra* note 70, at 310–15; Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 593–97 (2006).

73. *See* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 127, 138–39 (2009); James D. Nelson, *The Trouble with Corporate Conscience,* 71 VAND. L. REV. 1655, 1677–79 (2018). One recent development pushing in the opposite direction is the adoption of universal proxy rules for director elections. *See* 17 C.F.R. § 240.14a-19.

74. *See* Frank Easterbrook & Daniel Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1419 (1989); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

75. *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 104–06 (2004).

2. The Ethics of Separating Control

Critics claim that the separation of ownership and control has antisocial effects.[76] Before ownership and control separated, suppliers of corporate capital and managers of day-to-day business affairs were, generally speaking, the same people.[77] To be sure, the corporate assets that these people managed were legally distinct from their personal assets.[78] But in their roles as corporate officers and directors, entrepreneurs were intimately familiar with how their money was being used in the world. Even though they were managing corporate assets, they generally came face-to-face with the consequences of corporate action.[79]

But critics contend that the separation of ownership and control changed this state of affairs dramatically. Shareholders still provide capital to modern companies, but that capital is managed by other people—that is, by a professional class of corporate managers.[80] Those managers oversee the making of decisions that accrue to the financial benefit of investors.[81] But it is the managers—not the shareholders—who control how corporate resources are used.[82]

Managerial control, in the critics' view, means that managers encounter the consequences of corporate action while shareholders are spared the emotional toll of participating in the direction of the companies they fund.[83] In this way, the separation of

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76. *See* MAYER, PROSPERITY, *supra* note 5, at 16 ("[T]he steady erosion of ownership by founding families . . . left a vacuum in ownership that was filled by a process of 'financialization' prioritizing shareholder interests over everyone else's."); *see also* Welker & Wood, *supra* note 45, at S58 ("[T]he majority of shareholders today are . . . alienated from the firms they invest in."); Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 448 (1962) ("[P]urely passive property—that is, property divorced from any responsibilities of ownership, whose value grows or diminishes in the owner's hands without any relationship to his risk-taking, work, or effort—has outlived most of the economic justification that gave it birth.").

77. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 51–146 (1994) (discussing historical evidence regarding the separation of ownership and control in the United States); *see also* Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. LEGAL STUD. 459, 459 (2001) (comparing historical separation of ownership and control in the United States and the United Kingdom).

78. *See supra* Part I.A.1.a.; WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 470 (1765).

79. *See* MAYER, FIRM COMMITMENT, *supra* note 5, at 71–88 (describing the transition from family ownership to anonymous shareholding); Welker & Wood, *supra* note 45, at S58 ("In the early nineteenth century, American shareholders had a more powerful sense of agency over and responsibility for the corporations in which they invested."); *see also* Strine, *supra* note 6, at 1871 (discussing a time when "stockholders often had ties of loyalty to . . . communities" and "corporate managers tended to live in the community where the corporation was headquartered and be engaged in community affairs").

80. For well-known historical treatments of the "other people's money" problem, see LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT (1914), and ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

81. *See* Easterbrook & Fischel, *supra* note 74, at 1446 ("For most firms the expectation is that the residual riskbearers have contracted for a promise to maximize long-run profits of the firm . . . .").

82. *See* Mark Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 53 (1991).

83. *See* MAYER, FIRM COMMITMENT, *supra* note 5, at 86 ("[A]s share ownership has become ever more dispersed . . . owners have had progressively less responsibility for the corporations in which they invest."); *see*

ownership and control is thought to produce apathy among shareholders.[84] This apathy toward the conduct of corporate affairs then dulls the ethical instincts and impulses that would otherwise attend personal conduct of business.[85] And without the ethical confrontation that accompanies face-to-face interaction, shareholders are seen as incapable of developing serious relational connections that would spur responsible action in the business world.[86]

In the last chapter of their seminal volume, Berle and Means appeared to anticipate these concerns. They worried about the "depersonalization of ownership," and how it would erode the ethical character of corporate affairs.[87] Indeed, they warned of a future in which "the bulk of American Industry might soon be operated by trustees for the sole benefit of inactive and irresponsible security owners."[88] In the decades since Berle and Means' writing, critics of corporate separation have argued that their initial worries about separating ownership and control have only grown more pressing.

C. Ownership

1. Separating Ownership

The third main way in which corporate shareholders are separated from their money arises from a set of more recent developments in the capital markets. In Berle and Means' description, shared ownership had become widely dispersed, which had the consequence of turning over corporate power to hierarchies of professional managers. To use a spatial metaphor, the separation of residual financial claims from decision-making authority might be thought of as "vertical" separation.[89]

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also MAYER, PROSPERITY, *supra* note 5, at 36 ("It is this failure of governance with which all the ills of the corporation today are associated. Two hundred and fifty years after Adam Smith first identified the problem, we are still trying to grapple with it. The joint-stock corporation should not have existed, but not only have we allowed it to but we have encouraged it to become the most important institution in our lives, and we are paying the price for it.").

84. *See* ALLEN, KRAAKMAN & KHANNA, *supra* note 28, at 190 (discussing "rational apathy" among corporate shareholders); Bainbridge, *supra* note 64, at 1751 (same); Nelson, *supra* note 57, at 1587–89 (same).

85. *See* MAYER, FIRM COMMITMENT, *supra* note 5, at 248 (arguing that the separation of ownership and control undermines ethics because it distances corporate action from the consciences of controlling shareholders); *see also* Earl W. Spurgin, *Do Shareholders Have Obligations to Stakeholders?*, 33 J. BUS. ETHICS 287, 295 (2001) (discussing possible efforts "to make shareholders aware of the[ir] impact on stakeholders in a way that effectively appeals to the compassion of shareholders"); ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 179 (1954) ("[W]e have not been accustomed to place over against each other, as necessarily interrelated facts, the pragmatic concept of the corporation and the philosophical concept of the desirable community.").

86. *See* MITCHELL, *supra* note 5, at 64; *see also* Greenwood, *supra* note 5, at 1025 ("Human beings have short lives, spent in particular places with particular relationships to other human beings; they constantly confront the problems of finitude and commitment. Shareholders, in contrast, are in significant senses immortal, uncommitted, and universal.").

87. BERLE & MEANS, *supra* note 2, at 352 (quoting WALTER RATHENAU, IN DAYS TO COME 121 (1921)).

88. *Id.* at 354.

89. Rodrigues, *supra* note 4, at 1827.

But over the last few decades, the rise of institutional investors has put significant "horizontal" distance between beneficial owners of corporate shares and the corporations in which they invest.[90] Instead of individuals investing directly in corporations, the vast majority of public equity now flows through institutional investors.[91] A host of different organizations—including mutual funds, pension funds, foundations, insurance companies, and bank trusts—serve as intermediaries between beneficial owners and the public companies in which their funds are invested.[92] The largest share of these funds, however, flows through institutions that manage broad investment portfolios, such as mutual funds and pension funds. Today, for example, mutual funds alone account for $27 trillion of assets under management.[93] On the whole, institutional investors control over two–thirds of public equity in the United States and around three-quarters of public equity held in the largest 1000 public companies.[94]

As a result of this horizontal separation—or what has been called "the separation of ownership from ownership"[95]—corporate law commentators have observed that there are now multiple layers of agency between individual investors and the public companies that use their money.[96] Indeed, two prominent scholars recently coined the term "agency capitalism" to describe this state of pervasive intermediation in modern capital markets.[97] This phrase is apt—our capital markets manifest not only the separation between shareholders and managers, but also between ordinary investors and the institutions in charge of managing their funds.

One key driver of this intermediation is the financial community's acceptance of modern portfolio theory. Today, the standard financial advice for those seeking to grow their wealth is that diversified portfolios, including investments in a broad array of firms

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90. *Id.* at 1829; Nelson, *supra* note 62, at 2010–13.

91. *See* Nelson, *supra* note 62, at 2010–13. For an early observation of this phenomenon by Berle himself, see Berle, *supra* note 76, at 437 ("Institutional holdings—by insurance companies, by pension trusts, in the unexplored aggregates of personal trusts accumulating in a few great banks, by mutual funds, and in foundation and charitable endowments—have thus far operated to separate the ultimate beneficial 'owners,' or at least beneficiaries, to astronomical distance from the industrial enterprises they (in theory) collectively 'own.'").

92. Rodrigues, *supra* note 4, at 1828–38; Nelson, *supra* note 62, at 2012; Gilson & Gordon, *supra* note 3, at 874–75.

93. INV. CO. INST., 2022 INVESTMENT COMPANY FACT BOOK: A REVIEW OF TRENDS AND ACTIVITIES IN THE U.S. INVESTMENT COMPANY INDUSTRY 45 (2022).

94. Marshall E. Blume & Donald B. Keim, *The Changing Nature of Institutional Stock Investing*, 7 CRITICAL FIN. REV. 1 (2017); Gilson & Gordon, *supra* note 3, at 874–75; MATTEO TONELLO & STEPHAN RABIMOV, THE 2010 INSTITUTIONAL INVESTMENT REPORT: TRENDS IN ASSET ALLOCATION AND PORTFOLIO COMPOSITION 22, THE CONFERENCE BOARD (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707512 [https://perma.cc/FJU3-5NM3]; *see also* Nelson, *supra* note 62, at 2011 (discussing these statistics).

95. Strine, *supra* note 3, at 6; *see also* Rodrigues, *supra* note 4, at 1828 (attributing this phrase to Leo Strine).

96. *See* Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 879 (2010); Gilson & Gordon, *supra* note 3, at 875–88.

97. Gilson & Gordon, *supra* note 3, at 865.

in different parts of the economy, maximize risk-adjusted returns.[98] Institutional investors—particularly mutual funds—offer low-cost access to these sorts of diversified investment vehicles.[99] In doing so, they pool together money from a large segment of the investing public, many of whom are seeking to fund their retirement or their children's education.[100]

Although these developments have made the arrangement of modern capital markets more complex, the consequences for ordinary investors are rather simple. Institutional investors—not individual shareholders—now control portfolio construction, maintenance, and the exercise of voting power appurtenant to corporate investments.[101] Through these vast complexes of funds, institutional investors add layers of relational distance between ordinary investors and the companies in which they invest.

2. The Ethics of Separating Ownership

Critics argue that the separation of ownership from ownership multiplies shareholder distance and thereby multiplies corporate irresponsibility.[102] The rise of institutional investors—particularly mutual funds—has provided ordinary investors with low-cost

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98. *See* BIRDTHISTLE, *supra* note 62, at 24; BREALEY ET AL., *supra* note 4, at 197–217; Gilson & Gordon, *supra* note 3, at 885–86.

99. If ordinary investors had to assemble their own diversified portfolios without the assistance of an institutional intermediary, they would quickly be priced out of the market. That is, the cost of assembling a diversified portfolio, company by company, would simply be more than ordinary investors could bear. *See* BIRDTHISTLE, *supra* note 62 at 24–25. Without access to easy diversification, one of two undesirable results would be likely. First, these investors might hold a smaller number of corporate investments, which would mean that their portfolios would be unbalanced and therefore riskier than they should be. Second, in the alternative, they might choose to avoid such risk entirely by purchasing Treasury bills (or perhaps stuffing their money under the mattress), which would lead to an enormous forfeiture of wealth. *See* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 341 (2015); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 838–44 (2012).

100. *See* Strine, *supra* note 3; BIRDTHISTLE, *supra* note 62, at 6.

101. *See* Fisch, *supra* note 96, at 880; BIRDTHISTLE, *supra* note 62, at 23 ("[I]nstitutions like mutual funds have come to dominate our stock markets."); *see also* Brief of Corporate Law Professors as Amici Curiae in Support of Respondents at 4–5, 38–39, Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 7068957 (discussing these trends in a Supreme Court amicus brief). Although BlackRock recently announced its intention to expand voting choice to individual investors, it states "until now, technological, operational and regulatory hurdles have, for the most part, allowed us to offer voting choice only to certain institutional investors like pension plans, endowments, and insurance companies." *See The Transformative Power of Choice in Proxy Voting*, BLACKROCK, https://www.blackrock.com/corporate/about-us/investment-stewardship/blackrock-voting-choice/proxy-voting-power-of-choice [https://perma.cc/8M7A-4JJC].

102. *See* MAYER, PROSPERITY, *supra* note 5, at 36 ("So from entities with persistent ownership beholden to their nation states, corporations have transitioned into organizations with investors with no commitment to any particular nation or generation other than the present. The result is that interests of the corporation have progressively diverged from those of the societies within which they operate."); *see also* Greenwood, *supra* note 5, at 1032 ("For the law and the market, the shareholders are simple, unidimensional, time-indifferent, fungible, uninterested and disinterested—uncommitted to any particular place, project or community."); Welker & Wood, *supra* note 45, at S59 ("The growth of indirect shareholding . . . is linked to a growing sense of alienation on the part of shareholders.").

access to diversified portfolios.[103] At the same time, though, widespread intermediation of modern capital markets has further attenuated the connection between these investors and the public companies they fund.[104] This lack of connection, according to one commentator, transforms the corporation into a "money monster."[105] Without connection to—and commitment from—its capital investors, the corporation is now thought to be structurally incapable of serving real human values.[106]

Indeed, some critics of corporate separation have argued that pervasive intermediation through diversified investment vehicles has made corporate irresponsibility worse than ever before.[107] On this view, longstanding features of the corporate form—such as limited liability and the separation of ownership and control—merely opened the door for corporate irresponsibility. The modern imperative to diversify one's investment portfolio, however, has done the real ethical damage by making shareholders insensitive to the risks posed by any particular firm.[108]

Even more fundamentally, critics of corporate separation claim that institutional intermediation in modern capital markets undermines the informational preconditions for ethical behavior. To begin with, investment through institutional intermediaries often means that investors know very little, if anything, about where their money is going or what it is doing.[109] In discussing this phenomenon, one scholar aptly characterized it as the "separation of ownership and awareness."[110] Such lack of shareholder awareness, in turn, would seem to increase relational distance exponentially. If investors do not even know what activities their money is funding, then they cannot feel personally implicated in the effects of those activities on other people.[111] And without that feeling of personal

103. *See* BIRDTHISTLE, *supra* note 62, at 24–28.

104. *See* MITCHELL, *supra* note 5, at 144–45 (arguing that modern portfolio theory produces shareholders who do not "feel any loyalty to or concern with the corporation at all"); *see also* Nelson, *supra* note 62, at 2010–16 (describing the attenuated connection between shareholders and public companies).

105. MAYER, PROSPERITY, *supra* note 5, at 229.

106. *See id.* at 45 ("The corporation today is inhumane. It is inhumane because we have taken humans and humanity out of it and replaced them with anonymous markets and shareholders over whom we have no control."); *see also* MAYER, FIRM COMMITMENT, *supra* note 5, at 25 (referring to corporations as "our Frankenstein").

107. *See, e.g.*, MAYER, FIRM COMMITMENT, *supra* note 5, at 87 ("[A]s we progressed further down the corporate evolutionary timeline, to dispersed ownership, the irresponsibility reappeared with a vengeance, and worse than before, because not only could those involved hide behind a veil of anonymity, but now they could enjoy the benefits of portfolio diversification.").

108. *See* BUELL, *supra* note 5, at 254 ("Limited liability, by design, tends to relax owners of the corporation about whether managers might be up to something disastrous. Not so much if an investor is one of a handful of owners and has staked her nest egg, or a lot of it, on the firm. The problem arises when the investor enjoys access to a deep, wide, and diverse market for investing in corporations—when she can choose among thousands of investments, while basic economics, in both theory and evidence, tells her that she must diversify her portfolio.").

109. *See* Herbert Hovenkamp, *Neoclassicism and the Separation of Ownership and Control*, 4 VA. L. & BUS. REV. 373, 400–02 (2009); *see also* Nelson, *supra* note 57, at 1590 ("[Investors] are often unaware of which particular companies compose their portfolios.").

110. Hovenkamp, *supra* note 109, at 400.

111. This informational insulation can be thought of as an extreme form of ethical insulation, shielding capital providers from even having to think about the uses to which their money is being put. *See generally* David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV.

implication, corporate action is said to naturally drift away from ethical standards.[112]

The flip side of this first informational deficit—that shareholders know very little about the firms in which they invest—is that society knows very little about shareholders themselves. Such shareholder anonymity, according to critics of corporate separation, should be very troubling. Without the ability to identify the real people who are investing their money in public companies, the worry is that society will not be able to mobilize the power of social judgment to influence their behavior. Sitting out of society's view, the thought goes, anonymous shareholders will invariably become selfish, opportunistic, and irresponsible.[113]

On one recent account, the best way to overcome such ethical erosion in corporations is to reconcentrate corporate ownership.[114] According to this view, it is the diversified, anonymous, and therefore socially uncommitted shareholders who are the problem with modern corporations. To avoid the harms that these uncommitted shareholders are causing, the recommendation is that we replace them—at least partially—with large investors who have enough skin in the game and reputation on the line to act responsibly. In doing so, the hope is that we can turn back the hands of time to when corporations, often run by founders or families, exercised ethical leadership.[115]

This solution, more broadly, seems to embrace a vision of the corporation as an ethical community rather than merely a vehicle for wealth creation.[116] The corporation, on this view, is a "conscious entity" that should allow us to "contribute to communal endeavor that otherwise lies dormant or unattainable within us."[117] This communitarian vision, moreover, resonates with other recent accounts that emphasize the value of "emotional loyalty" among investors.[118] These accounts hold that the dynamics of modern capital markets have pushed investors away from affective connection to the firms in which they

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2348 (1992) (arguing that participants in large-scale collective enterprises have a responsibility to overcome informational insulation); *see also* ERIC BEERBOHM, IN OUR NAME: THE ETHICS OF DEMOCRACY 142–65 (2012) (discussing the informational responsibilities of citizenship).

112. Elhauge, *supra* note 5, at 798–801.

113. *See* MAYER, FIRM COMMITMENT, *supra* note 5, at 244 ("Why should I trust an organization that is owned and controlled by anonymous, opportunistic, self-interested wealth seekers? Without commitment, there is no reason why there should be any trust in the corporation, however much its fine promotional material suggests otherwise.").

114. *See* MAYER, PROSPERITY, *supra* note 5, at 85–106 (praising ownership by founders, families, and other large blockholders); MAYER, FIRM COMMITMENT, *supra* note 5, at 241–52 (same).

115. MAYER, FIRM COMMITMENT, *supra* note 5, at 246–47 ("The shareholding structure . . . of the moral corporation . . . allow[s] enhanced control to be conferred on shareholders who commit to invest in the corporation for a long period. Minimum periods for which shares can be held before they are sold allow voting control to be concentrated in long-term investors. Controlling shareholders commit to remain with the corporation for the long periods of time it takes for certain investments to come to fruition. In addition to being able to uphold the value of multiple stakeholders, shareholders are then also able to promote long-term investments in a way in which it is currently difficult for them to do because of the easy exit routes that stock markets provide them.").

116. MAYER, PROSPERITY, *supra* note 5, at 11–13 (arguing that "the purpose of life derives from community" and that the corporation is an organic group "with purposes and values that are distinct from both those who own and run it").

117. *Id.* at 57.

118. SISODIA ET AL., *supra* note 6, at 127.

invest. But if such trends toward rationally apathetic investment are to be reversed, it is said, we must accelerate our efforts to cultivate identification with and even "love" for corporations.[119] Only then can we overcome the pernicious effects of capitalistic "fundamentalism," which seeks to "hide . . . behind arguments that champion corporate insulation from social responsibilities."[120]

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This Part has described three principal forms of corporate separation and synthesized the main lines of ethical argument against them. Part II counters this conventional narrative by providing an account of corporate separation's ethical benefits. To date, these benefits have largely gone unnoticed in the literature. But taking them seriously should prompt normative reassessment of corporate separation.

II. DEFENDING CORPORATE SEPARATION

This Part highlights the ethical benefits of separating shareholders from the firms in which they invest. Its central claim is that corporate separation enables economic cooperation under conditions of pluralism. To be sure, the corporate form may be abused: shareholders can use it opportunistically to avoid taking responsibility for harms to which they are connected. But this Part contends that the ethical costs of corporate separation are often countered by the benefits of a healthy social, emotional, and civic life.

A. Pluralism

Among the most striking features of our current social condition is its diversity. We come from a variety of different racial, ethnic, cultural, and socioeconomic backgrounds.[121] At the same time, we also have deep and intractable differences when it comes to our views about what constitutes the good life.[122]

Such pluralism is not particularly new—it stretches back at least as far as the Reformation and ensuing disputes over religious toleration.[123] But as our laws and legal institutions have embraced greater degrees of political freedom, pluralism has become more pronounced. Indeed, our disagreements about deep questions of value have grown so

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119. *See id.* at 6 (defining "firms of endearment" as those that embrace "affection, love, joy, authenticity, empathy, compassion, [and] soulfulness").

120. *Id.* at 271.

121. *See* United States Census Bureau, *United States Census 2020: Diversity in the United States* (2020), https://www.census.gov/content/dam/Census/programssurveys/sis/resources/2020/sis_2020diversitymap_stateside_9-12.pdf [https://perma.cc/CU9Z-6B4Z] (demonstrating trends in diversity in the United States).

122. *See, e.g.*, PEW RSCH. CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE (2015), https://www.pewresearch.org/religion/2015/05/12/americas-changing-religious-landscape/ [https://perma.cc/FW8R-4EBT] (documenting the rise of religious diversity in the United States).

123. *See* 2 THE NEW CAMBRIDGE MODERN HISTORY: THE REFORMATION, 1520-1559 (G. R. Elton ed., 1990).

entrenched that many regard pluralism as a simple "fact" of modern life.[124]

Although pluralism has expanded over the years, it has not conquered all quarters of private life. In some social contexts—such as in families, churches, or voluntary associations—it remains possible to construct communities of homogeneous and like-minded people. In these communities, participants remain relatively free to police shared bonds of history, culture, and identity to ensure cohesion.[125]

Our modern economic order, however, does not permit such homogeneity in the corporate sector.[126] Millions of ordinary Americans, from all walks of life, now depend on public company investments to meet their future needs.[127] And when these investors put their money in the capital markets, they do not typically sort themselves according to a comprehensive theory of the good life.[128] Instead, the vast majority of investors are primarily, if not exclusively, interested in realizing durable financial returns. These investment patterns, in turn, ensure that public companies will be funded by capital investors who hold a wide variety of ethical views.

Recent studies of our capital markets provide further empirical support for these initial observations. According to the latest statistics, a majority of American households now invest their money in public companies, typically through diversified investment vehicles.[129] This wide dispersion of corporate investment has even led some commentators to argue that public equity markets have become broadly representative of society as a whole.[130] That claim appears to be overstated, as public company investments continue to skew toward the wealthy and away from racial minorities.[131] Yet the wide dispersion of

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124. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM xvii (1993) (discussing "the fact of reasonable pluralism").

125. *See* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 480–81 (2015) (discussing the "ties of solidarity and mutual identification that tend to form in voluntary associations, especially in groups like churches and other tight-knit communities").

126. For an account of pluralism and its implications for employment discrimination law, see James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595 (2019) (arguing that pluralism supports a disestablishment norm in the modern corporate workplace). For an account of how diverse customers suffer from moral impositions by businesses, see Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129 (2015). Although corporations can play a mediating role for employees and customers, this Article focuses on the implications of pluralism among corporate investors.

127. *See* Strine, *supra* note 3, at 4 (noting that most people invest in the capital markets for two reasons: "to send their children to college and to provide for themselves in retirement").

128. For a similar observation regarding political preferences, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 90 (2010) ("[S]hareholders generally do not sort themselves among companies according to political preferences . . . .").

129. *See Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 FED. RSRV. BULL. 5, 18 (Sept. 2020) (reporting most recent statistics showing that approximately 53 percent of American families hold stock in publicly traded companies either directly or indirectly).

130. *See, e.g.*, JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC 4 (2000); *see also* ROBERT A. G. MONKS & NELL MINOW, WATCHING THE WATCHERS: CORPORATE GOVERNANCE IN THE 21ST CENTURY 121 (1996) (arguing that the diversification of institutional investor holdings "endows them with a breadth of concern that naturally aligns with the public interest").

131. *See* William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L.

corporate investment does ensure that the pluralism of society as a whole will find its way into corporations through the capital markets.

Few would dispute the empirical reality of pluralism, either in political society or in the modern corporate world. But when it comes to identifying pluralism's root causes and to deciding how we should evaluate our current situation, we are likely to encounter more controversy. For example, some may see pluralism as a rather straightforward result of familial or cultural reproduction. On this view, people tend to adopt the political, social, and ethical beliefs of their parents or the local communities in which they were raised.[132] Others may reject such cultural determinism and instead argue that pluralism is a result of persistent epistemic mistakes committed by a wide swath of the population. On this view, pluralism is a sign of insufficient education or an inability to apply reliable methods of observation and inference to understand the world.[133]

On either of these accounts, pluralism would not command a great deal of praise or respect. If we have deep ethical disagreements merely because our parents had deep ethical disagreements, then pluralism may call for some weak form of toleration, but not much more.[134] Even worse, if pluralism is the product of widespread errors in perception and inference, then it would be a matter of serious regret, perhaps justifying an array of corrective measures.[135]

But rather than regretting the fact of pluralism, we have good reason to adopt an altogether different attitude. On one particularly influential account, pluralism cannot be chalked up to cultural inheritance or to logical mistakes. Instead, the diversity in our beliefs about the good life arises as a natural and expected result of freely using the capacity for ethical judgment and applying it to diverse life circumstances.[136] On this account, when people deliberate about deep ethical issues, they come up against various "burdens of judgment" that prevent them from converging on one single answer.[137] Human reasoning is highly complex, and it requires people to assess and weigh conflicting evidence.[138] It

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REV. 489, 524 (2013) (summarizing empirical findings that "the modal picture of the rich, old, white shareholder emerges intact.").

132. For one recent account of cultural influences on ethical disagreement, see JESSE PRINZ, THE EMOTIONAL CONSTRUCTION OF MORALS (2007).

133. On the psychological dynamics of such beliefs, see Geoffrey P. Goodwin & John M. Darley, *The Psychology of Meta-Ethics: Exploring Objectivism*, 106 COGNITION 1339 (2008), and Geoffrey P. Goodwin & John M. Darley, *The Perceived Objectivity of Ethical Beliefs: Psychological Findings and Implications for Public Policy*, 1 REV. PHIL. & PSYCH. 161 (2010).

134. For a discussion of Stephen Darwall's distinction between the minimal concept of "recognition respect" and the more positive concept of "appraisal respect," see BRIAN LEITER, WHY TOLERATE RELIGION 69–72 (2013).

135. For one recent call to arms, so to speak, see Sohrab Ahmari, *Against David French-ism*, FIRST THINGS (May 29, 2019), https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism [https://perma.cc/ZA9F-G7JX] (urging religious conservatives to "fight the culture war with the aim of defeating the enemy and enjoying the spoils in the form of a public square re-ordered to the common good and ultimately the Highest Good").

136. *See* RAWLS, *supra* note 124, at 54–66.

137. *See id.* at 56 (discussing "the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment").

138. *See id.* at 56–57.

requires them to apply vague or indeterminate concepts to messy real-life circumstances.[139] And it calls on them to select and prioritize a manageable set of core values from among a universe of potentially compelling considerations.[140] These burdens combine to ensure that, despite careful use of ethical reasoning, pluralism will persist among free and equal people.[141]

Although free ethical reasoning cannot produce widespread agreement on deep questions, that is not the source of its value. Instead, the search for answers to life's biggest questions should be regarded as valuable in itself. In searching for these answers, we engage in a constitutive process of identity formation—trying to answer questions about who we are and what we value is how we write the story of our own lives.[142] If people engage in this process conscientiously and under conditions of freedom, they should not be expected to write the exact same story. Indeed, they will likely write stories that are not only different, but fundamentally incompatible.[143] The process of crafting these narratives, however, is an indispensable exercise of individual autonomy.

If we recognize that the formation of ethical identity is intrinsically valuable, then we should not lament the fact of pluralism.[144] Instead, the proper attitude with regard to disagreement about deep commitments and projects is respect for people who use their human faculties to come to different conclusions.[145] To be sure, people who disagree about these questions need not subscribe to the results of other people's search for meaning.[146] But they should be able to appreciate the value in the search itself and recognize that deep pluralism of constitutive projects and commitments is the inevitable result of writing one's own life story.

B. Pluralism and Social Cooperation

Pluralism, however, creates a potentially serious problem for social cooperation. How is it that we are supposed to engage in collective projects when we are so deeply divided on the most important questions in life? And if the corporate form is supposed to enable large-scale economic cooperation, how will businesses negotiate the fact of basic disagreement among so many corporate participants?

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139. *See id.*

140. *See id.* at 57.

141. *See* RAWLS, *supra* note 124, at 58; *see also* THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 28–33 (1999) (discussing the implications of "bounded moral rationality" in the modern corporate world).

142. *See* Nelson, *supra* note 57, at 1577–78; Nelson, *supra* note 125, at 491–95; TIMOTHY MACKLEM, INDEPENDENCE OF MIND 68–118 (2006).

143. *See* RAWLS, *supra* note 124, at xvii, 36.

144. *See id.* at xxiv–xxv ("This pluralism is not seen as disaster but rather as the natural outcome of the activities of human reason under enduring free institutions. To see reasonable pluralism as a disaster is to see the exercise of reason under the conditions of freedom itself as a disaster.").

145. *See* Colin Bird, *Mutual Respect and Neutral Justification*, 107 ETHICS 62, 65 (1996); Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, 39 PHIL. & PUB. AFFS. 3, 17 (2011).

146. *See* JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 256–65 (2011).

To manage such pluralism, there must be ways of abstracting from our deep disagreements.[147] If all of our social and economic activities were to engage our comprehensive commitments and projects, then we would constantly encounter roadblocks to working together.[148] The more our deep yet conflicting commitments are brought to the surface, that is, the more they will collide with one another.[149]

The key to avoiding these constant collisions is, in turn, to try and find common ground for cooperation that does not call for comprehensive ethical agreement. One strategy for locating such common ground is for individuals to adopt a practice of differentiating their various social roles. Some of our roles—for example, the ones we play in romantic or familial contexts—need not abstract from deep ethical identity to be successful. Indeed, such abstraction may very well undermine the distinctive goods associated with those relationships.[150] But there are other social roles that call for more instrumental or transactional forms of interaction. In these roles, where bonds of identification or affection are typically absent, full ethical authenticity may stand in the way of achieving our common objectives. Putting some distance between our deepest sense of self and these roles, in turn, will help to "keep us out of each other's faces."[151]

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147. *See* Jules Coleman, *Competition and Cooperation*, 98 ETHICS 76, 88 (1987) (discussing the view that "the market is compatible with widely disparate conceptions of the good, and, more so than other institutions, it does not require that we come to any agreement on values in order to relate fruitfully with one another"). For a critical view of abstracting from deep disagreement in the corporate world, *see* Greenwood, *supra* note 5, at 1045 ("Fictional shareholders . . . are not Democrats and Republicans, religious and atheist, committed to New York or Iowa, tied to a job or a family or encumbered by the life stages of a real human being. They do not have a multiplicity of plans for a too-short life: They have one, to maximize the value of their shares."). This view substantially—and explicitly—parallels the communitarian critique of liberalism. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (criticizing liberalism for its supposed dependence on "unencumbered" selves with no constitutive communal attachments). For a persuasive defense of liberalism from communitarian critiques, see Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFFS. 308 (1985).

148. *See* CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 91–130 (1987); MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD 3 (1994); *see also* Charles Larmore, Book Review, 81 J. PHIL. 336, 336 (1984) (reviewing MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE) (defending liberal principles as a "*modus vivendi* among persons having constitutive views of the good life which are shared with some but differ from those of many others"); Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 PHIL. & PUB. AFFS. 134, 148 (1984) ("[W]ithout some degree of inauthenticity, it is doubtful whether civil relations among people could long be maintained.").

149. *See* LARMORE, *supra* note 148, at 91–130; *see also* Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 319 (1984) ("The art of separation is not an illusory or fantastic enterprise; it is a morally and politically necessary adaptation to the complexities of modern life."). For a criticism of Walzer's approach, see RICHARD BELLAMY, TOWARDS A POLITICS OF COMPROMISE 67–89 (1999).

150. *See* CHARLES FRIED, AN ANATOMY OF VALUES (1970); James Rachels, *Why Privacy Is Important*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 290 (Ferdinand David Schoeman ed., 1984); Saba Bazargan-Forward, *The Identity-Enactment Account of Associative Duties*, 175 PHIL. STUD. 1 (2018); *see also* Loren Lomasky, *Classical Liberalism and Civil Society*, *in* ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY (Simone Chambers & Will Kymlicka eds., 2002) (defending the idea that practical reason requires "partiality on the part of the agent toward those projects which she has made her own").

151. Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFFS. 3, 4 (1998).

Investments in modern public companies would seem to call for just this sort of role distancing.[152] Pooling capital together in public companies does not require us to form deep "bonds" with our fellow investors. Instead, it calls on us to form the kinds of shallow, superficial connections that can "bridge" the large gaps that divide diverse people.[153] Without these kinds of superficial connections, many of the value-creating arrangements that characterize the modern business world would not be practical or feasible.[154]

Consider the same point from a different angle. Rather than taking the modern corporate world as it currently stands, one could imagine a world in which our investments required us to fully engage each other's ethical personalities. Indeed, this sort of full engagement has attracted considerable attention in recent years, especially among those who promote a sort of corporate "integralism."[155] The prospect of such integralism raises the question, what would it be like if we were to carry our "full selves" into the corporate world, being maximally transparent and authentic with respect to our deepest commitments?

The answer should trouble those hoping for widespread economic cooperation through the corporate form.[156] When people have an array of diverse life projects, bringing the entirety of those commitments into any social engagement will maximize the sites of irresolvable conflict.[157] And without a clear path to cooperation across these forms of difference, people will naturally seek to build insular communities united in shared identification with particular conceptions of the good life. The result of this social process, then, will be an economy composed of many different tribes, maximally committed to

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152. On the importance of maintaining role distance in some social relationships, see Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1238 (1994); *see also infra* Part II.C.

153. *See* Nelson, *supra* note 125, at 480–81; *see also* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22 (2000) (explaining the distinction between "bonding" and "bridging" social capital); ROSS GITTELL & AVIS VIDAL, COMMUNITY ORGANIZING: BUILDING SOCIAL CAPITAL AS A DEVELOPMENT STRATEGY 15 (1998) (same).

154. *See* Nelson, *supra* note 125, at 481.

155. For recent work on integralism in the corporate world, see Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 180 (2014) ("To a growing and increasingly visible extent, a range of faiths and sects take an 'integralist' view that sees 'religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual's life.'") (quoting Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL'Y J. 471, 474 (2009)); Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 18 (2013) (discussing corporate integralism); LAKE LAMBERT III, SPIRITUALITY INC.: RELIGION IN THE AMERICAN WORKPLACE (2009) (same); DAVID W. MILLER, GOD AT WORK: THE HISTORY AND PROMISE OF THE FAITH AT WORK MOVEMENT (2007) (same); HELEN J. ALFORD & MICHAEL J. NAUGHTON, MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION (2001) (same). For criticism of integralism in the modern corporate workplace, see Nelson, *supra* note 125.

156. *See* CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 168 (2000) ("So it is desirable that agents who offer goods and services on the marketplace not police each other's motives too scrupulously.").

157. *See* MACKLEM, *supra* note 142, at 52 ("[S]uccessful engagement with a given value depends on its isolation from all those values with which its pursuit is incompatible."); LARMORE, *supra* note 148, at 129 ("From what is of the greatest importance in one domain of social life, we must learn to abstract in another.").

fellow members, but minimally engaged with those on the outside.[158] This sort of balkanization, in turn, threatens to undermine the considerable value of widespread economic cooperation through the corporate form.[159]

If modern companies are to avoid these cooperative breakdowns, they will need to resist the growing calls for corporate integralism.[160] As things stand today, the corporate form helps limit the zones in which we invest our full ethical personalities. Various forms of corporate separation establish boundaries that enable instrumentally cooperative relations with a vast array of people with whom we likely disagree on fundamental ethical questions.[161] These boundaries, in turn, protect investors from the strains of ethical conflict and imposition, while at the same time preserving pathways for large-scale economic cooperation. An integralist approach to the corporation, by contrast, would erase these boundaries and their associated ethical benefits.

The romantic view of a fully integrated person maximally engaging other fully integrated people may sound appealing at first. After all, the idea that "good fences make good neighbors" has a troubling normative valence.[162] But while the promise of greater community with our fellows may seem attractive, such community can easily devolve into social division.[163] When people are divided in their worldviews, that is, full ethical engagement with each other will produce competing camps of comprehensive doctrines.[164] In the modern corporate world, then, perhaps the good fences we have do make us better neighbors.[165] These fences are necessary to mediate the fact of pluralism and to get along

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158. *See* Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339, 347–52 (1990); *cf.* Aaron K. Chatterji & Michael W. Toffel, *The Power of CEO Activism*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/2016/04/03/opinion/sunday/the-power-of-ceo-activism.html [https://perma.cc/T3CG-TSGM] (suggesting that "in an era of political polarization, in which we are increasingly cloistered in neighborhoods, social networks and workplaces that serve as echo chambers for our ideological beliefs, corporate neutrality may be outdated.").

159. On the value of cooperation without ties of identity, see ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS 69–93 (1977); PUTNAM, *supra* note 153, at 22–24; Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 47–50 (2000). On the threat of economic balkanization posed by corporate social activism, see Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1582 (2018) ("The rise of contemporary corporate social activism could further politicize the marketplace and polarize an already balkanized society.").

160. *See* sources cited *supra* note 155; *see also supra* Part I (discussing themes in contemporary criticism of corporate separation).

161. On the value of boundaries in pluralistic societies, see Walzer, *supra* note 149, at 315 ("Liberalism is a world of walls, and each one creates a new liberty.").

162. *See* Robert Frost, *Mending Wall*, *in* ROBERT FROST, NORTH OF BOSTON (1915); *see also* ONORA O'NEILL, JUSTICE ACROSS BOUNDARIES: WHOSE OBLIGATIONS? 1–3 (2016) (discussing Frost's famous quotation).

163. For an extended discussion of this dynamic in political society, see LARMORE, *supra* note 148, at 91–130.

164. For discussion of "comprehensive doctrines," see RAWLS, *supra* note 124, at xv–xxi.

165. *See* Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 667–68 (2016) ("[T]he unfettered personalization of transactions will balkanize markets, splintering each market into smaller markets of the like-minded.").

with others despite our messy personal differences and disagreements.[166]

C. Protecting Identity?

One kind of objection to my argument is that corporate separation harms individual identity. On this view, compartmentalizing our full ethical personalities and confining them to non-commercial spheres is isolating or alienating.[167] By distancing ourselves from corporations, it is said, we do violence to our organic wholeness, condemning ourselves to live "divided li[ves]."[168] To protect our identities from such harms, in turn, critics of corporate separation have recommended various efforts to induce attachments and loyalties to the companies in which we invest.[169]

Instead of protecting individual identity, however, cultivating deep attachments and loyalties to modern corporations will only make investors more vulnerable. To begin with, emotional commitments to particular companies are destined to be strained by broader economic forces. The business world has long been a site of rapid—and often sudden—change.[170] In the last few decades, however, the pace of business change has accelerated,[171] as a combination of globalization, technological advances, and strategic innovation have disrupted many aspects of the modern economy.[172] No amount of

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166. *See* Paul du Gay, *Making Up Managers: Bureaucracy, Enterprise and the Liberal Art of Separation*, 45 BRIT. J. SOCIO. 655, 669 (1994) (arguing that separation is necessary to mediate pluralism); Ferdinand D. Schoeman, *Privacy and Intimate Information*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 408 (Ferdinand D. Schoeman ed., 1984) (arguing that our ability to get along with others depends on abstracting away from deep disagreements); Lomasky, *supra* note 150, at 63 (arguing that "depersonalization is a good thing" in part because it helps us to "abstract away from the personal goo").

167. *See* MAYER, FIRM COMMITMENT, *supra* note 5, at 144 ("Economics does not recognize the fundamental role of commitment in all aspects of our commercial as well as social lives and the way in which institutions contribute to the creation and preservation of commitment.").

168. ALFORD & NAUGHTON, *supra* note 155, at 7.

169. *See* MAYER, FIRM COMMITMENT, *supra* note 5; SISODIA ET AL., *supra* note 6.

170. *See generally* PETER DRUCKER, MANAGING IN A TIME OF GREAT CHANGE (1995); PETER DRUCKER, MANAGING IN TURBULENT TIMES (1980). Indeed, on one influential account, such change is not merely a byproduct of particular industrial developments, but instead it is a central feature of capitalism itself. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 82 (1943) ("Capitalism . . . is by nature a form or method of economic change and not only never is but never can be stationary."). For Schumpeter, "creative destruction"—a process that "incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one"—is the "essential fact about capitalism." *Id.* at 83.

171. *See* Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71, 74 (2018) (reporting that "by important measures trading increased in recent decades"); *id.* at 114 (discussing "rapid trading accelerat[ion]"); John Armour et al., *Putting Technology to Good Use for Society: The Role of Corporate, Competition and Tax Law*, 6 J. BRIT. ACAD. 1, 2 (2018) ("Society's primary challenge today is to cope with the effects of accelerated innovation and the disruptive technologies it generates.").

172. *See* Jonathan Macey, *Their Bark Is Bigger Than Their Bite: An Essay on Who Bleeds When the Wolves Bite*, 126 YALE L.J. F. 526, 529–34 (2017); *see also* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 450–51 (2001) (discussing global competition in the capital markets); Armour et al., *supra* note 171, at 18 ("Technological change is behind all past waves of globalization."). In particular, recent developments in the capital markets have undermined the stability of shareholders' relationships with the companies in which they invest. *See* K. J. Martijn Cremers & Simone Sepe, *The Shareholder Value of*

emotional commitment from investors will be sufficient to stem the tide of fundamental economic adjustments.

When faced with new economic realities, moreover, emotionally committed shareholders would likely find it difficult to adapt the deep structure of their identities to avoid psychological dislocation. Constructing one's identity involves making durable commitments to a certain set of social projects and relationships.[173] These durable commitments, in turn, form the core of our social selves and anchor our ongoing interactions with the rest of the social world.[174] If the anchors of identity are deep and stable, then one's social character is likely to be deep and stable as well. But if the projects and relationships to which we commit are unstable, then we will be vulnerable to serious and serial identity disruption.[175]

Asking shareholders to identify with the companies in which they invest, in turn, invites them to construct their identities around something that is not likely to be very durable. This risk is particularly acute in light of the well-documented tendency of businesses to drift from initial principles when facing competitive commercial pressures.[176] Amidst powerful forces of economic change, investors concerned about the stability of their own identities may wish to resist the call for more emotional commitment to the firms in which they invest.[177]

To avoid the identity disruptions that come with deep corporate commitments, shareholders may instead seek to cultivate a more flexible or versatile attitude toward their

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Empowered Boards, 68 STAN. L. REV. 67, 112–17 (2016) (discussing factors that undermine shareholder commitment to firms). In recent years, we have also seen major advances in computerized data processing, which have allowed investors instantly to digest and compare firms' financial information. *See* Macey, *supra*, at 530. These technological advances, in turn, have improved the depth of capital markets and bolstered the liquidity of corporate investments. *See id.* at 530–31; *see also* Hansmann & Kraakman, *supra*, at 451 (discussing the effect of technological change on international equity markets). With improved depth and liquidity, the relative cost of shareholder exit has dropped, making long-term shareholder engagement less attractive. *See* Macey, *supra*, at 531. Technology has also expanded the geography of corporate investment. *See* Roe, *supra* note 171, at 108; Macey, *supra*, at 533. Remote physical location is no longer a significant impediment to investing in American public companies, which now routinely seek infusions of capital from around the world. *See* Maurice Obstfeld & Alan M. Taylor, *Globalization and Capital Markets*, *in* GLOBALIZATION IN HISTORICAL PERSPECTIVE 121 (Michael D. Bordo, Alan M. Taylor & Jeffrey G. Williamson eds., 2003). This globalization, in turn, has driven up the competitiveness of capital markets. *See* Greg Bell & Abdul A. Rasheed, *Seeking Capital Abroad: Motivations, Process, and Suggestions for Success*, 28 J. APP. CORP. FIN. 104 (2016). And as global competition in the capital markets has increased, so too has the "hyper-competitiveness" of modern public corporations. *See* Macey, *supra*, at 527–28 (discussing the "hyper-competitiveness that characterizes the corporate world").

173. *See* MACKLEM, *supra* note 142, at 68–118 (2006).

174. *See* Dan-Cohen, *supra* note 152, at 1220–25 (discussing construction of the self through identification with certain social roles).

175. For extended accounts of the dynamics of identity formation, see Nelson, *supra* note 57, Nelson, *supra* note 62, and Nelson, *supra* note 125.

176. *See* Sarah Dadush, *Regulating Social Finance: Can Social Stock Exchanges Meet the Challenge*, 37 U. PA. J. INT'L L. 139, 178–83 (2015) (discussing "mission drift" among social enterprises that face pressure to make a profit).

177. *See* Nelson, *supra* note 57, at 1615 ("In situations that lack long-term stability, like the modern corporate marketplace, concern for the psychological welfare of individual members might provide an additional reason not to encourage identification with business firms.").

investments. To participate in modern capital markets, that is, investors need to remain "nimble." They need to be prepared for constant economic change and steeled against the vicissitudes of the capital markets.[178] Such versatility would avoid deep psychological investments in perpetually unstable economic relationships and thereby minimize the threat of harm to oneself. Perhaps in a different time, we might celebrate the model of a shareholder who is "bound to the community of the corporation."[179] But this appeal to the connections and attachments of the corporate community now appears to be profoundly anachronistic.[180]

To be sure, our deepest personal attachments carry enormous value. They help to order our priorities and to give attention to the people and projects that we care about and that provide meaning in our lives.[181] But as these attachments proliferate, they multiply the possible sites of damage to identity. And if we were to cultivate a sense of affective commitment to the expansive and disparate affairs of the corporations in which we invest, then we would become more vulnerable to the instability of business affairs over which we have little control.[182]

Corporate separation, in turn, provides a shield against the identity harms that might come from insecure connections to modern businesses. It makes us more adaptable in the face of inevitable change, protecting the core of our identities against constant fracture. On the surface, this "cold and impersonal" view of corporate affiliation may appear to undermine our sense of personal integrity and wholeness.[183] But a cold and impersonal attitude is precisely what makes shareholders resilient in uncertain times.[184]

D. Extending Empathy?

A second objection to my account is that it might provide an excuse for people not to become more generous and inclusive in their social connections. On this view, corporate separation magnifies a regrettable feature of human psychology, namely, our natural tendency to focus a disproportionate amount of energy on those close to us.[185] Rather than

178. *See* Roe, *supra* note 171, at 108–09 ("Accelerating change, technological and otherwise, probably makes it *more* efficient than ever for investments and decisions to be short-term, nimble, adaptable, and not set in concrete.").

179. *See* Strine, *supra* note 6, at 1932; Macey, *supra* note 172, at 528 (citing Strine); *see also* Welker & Wood, *supra* note 45, at S60 (arguing that shareholders should consider their corporate investments an "extension of self into the world").

180. *See* Macey, *supra* note 172, at 527 (describing Leo Strine's view of the public corporation as "nostalgic" in light of globalization and technological change).

181. *See* Benjamin Bagley, *Loving Someone in Particular*, 125 ETHICS 477, 501–02 (2015).

182. *See* Dan-Cohen, *supra* note 152, at 1238; *see also* Roe, *supra* note 171, at 76 ("More people feel more vulnerable. Sharper technological shifts and enhanced global competition are the cause; stock markets are the messenger.").

183. *See* Macey, *supra* note 172, at 532 (acknowledging that the dynamics in today's capital markets "may seem cold and impersonal").

184. *See* Dan-Cohen, *supra* note 152, at 1234 (arguing that distant social roles are "sources of versatility and resilience").

185. For recent work on this psychological phenomenon, see PAUL BLOOM, AGAINST EMPATHY: THE CASE

being complacent about this state of affairs, it might be said, we should instead cultivate emotional connections that transcend their current, parochial focus.[186]

At first glance, the idea of universalizing our emotional commitments seems attractive. From an ethical point of view, it appears difficult to defend giving preferences to relatives, intimates, and close associates.[187] Even if such preferences were thought to be "natural" in some sense, the hope is that an appropriate education can overcome these prejudices in favor of the near and dear.[188]

But upon closer inspection, this line of argument fails to grapple with the psychological limits of emotional commitment. On the inclusive view, emotions can be thought of like muscles—the more we use them, the stronger they become.[189] But this view stands starkly at odds with leading research in social psychology, which shows that emotions—including empathy—are a limited resource.[190] That is, when we form deep emotional connections with others, we allocate a portion of our emotional capital to them, leaving us with fewer affective resources to expend on other relationships.[191]

FOR RATIONAL COMPASSION 15–56 (2016). For philosophical work anticipating recent social science literature on the topic, see DAVID HUME, A TREATISE OF HUMAN NATURE (1740); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759).

186. *See* SISODIA ET AL., *supra* note 6; *see also* PAUL R. EHRLICH & ROBERT E. ORNSTEIN, HUMANITY ON A TIGHTROPE: THOUGHTS ON EMPATHY, FAMILY, AND BIG CHANGES FOR A VIABLE FUTURE 8 (2010) ("With the conscious understanding that humanity is and must be one single family, people could begin to deal with many of our predicaments, avoid our big family being dysfunctional, and perhaps even extend our full empathy and membership in our family to future generations.").

187. For a defense of "moderate impartiality," see Susan Wolf, *Morality and Partiality*, 6 PHIL. PERSPS. 243 (1992).

188. *See* THOMAS NAGEL, EQUALITY AND PARTIALITY 7 (1991) ("[W]e shouldn't be too tied down by limits derived from the baseness of actual motives or by excessive pessimism about the possibility of human improvement."); Railton, *supra* note 148, at 146 ("[E]ven when love or concern is strong, it is often desirable that people achieve some distance from their sentiments or one another.").

189. *See* Wolf, *supra* note 187, at 248 ("Sympathy for a friend teaches and encourages one to have sympathy also for a stranger. Thinking about the feelings and interests of a loved one helps develop the habit of thinking about others more generally.").

190. *See, e.g.*, Jean Decety & Jason M. Cowell, *The Complex Relation Between Morality and Empathy*, 18 TRENDS COG. SCI. 337, 337–38 (2014); Paul Bloom, *Empathy and Its Discontents*, 21 TRENDS COG. SCI. 24 (2016). For a contrary view, see Daryl Cameron, Michael Inzlicht & William A. Cunningham, *Empathy Is Actually a Choice*, N.Y. TIMES (July 12, 2015), https://www.nytimes.com/2015/07/12/opinion/sunday/empathy-is-actually-a-choice.html [https://perma.cc/9TTK-BSDU] (disputing results of studies suggesting that "empathy is a limited resource, like a fossil fuel, which we cannot extend indefinitely or to everyone").

191. *See* Paul Bloom, *The Baby in the Well: The Case Against Empathy*, NEW YORKER (May 13, 2013), https://www.newyorker.com/magazine/2013/05/20/the-baby-in-the-well [https://perma.cc/8PQW-FEZQ] ("It is impossible to empathize with seven billion strangers, or to feel toward someone you've never met the degree of concern you feel for a child, a friend or a lover."). The key mechanism underlying this limited-resource account appears to depend on the dynamics of cognitive effort. To begin with, empathizing with other people requires mental exertion—that is, it imposes significant cognitive costs. *See* C. Daryl Cameron et al., *Empathy is Hard Work: People Choose to Avoid Empathy Because of Its Cognitive Costs*, 148 J. EXPERIMENTAL PSYCH. 962, 962–63 (2019); Wouter Kool & Joseph T. McGuire, *Decision Making and the Avoidance of Cognitive Demand*, 139 J. EXPERIMENTAL PSYCH. 665, 666 (2010). These cognitive costs include the aversive or unpleasant feelings associated with empathy, Cameron et al., *supra*, at 3, difficulties in managing an increasing "cognitive load," *see*

With this picture of our limited psychological resources in focus, we can see more clearly the downsides of attempting to expand the scope and scale of our emotional commitments. One particularly acute worry, which has strong empirical support from research on the helping professions, is that efforts to universalize our emotions will lead to exhaustion or burnout.[192] If empathy is a limited psychological resource, then attempts to extend it into previously impersonal domains will deplete that resource.[193] Such depletion may not only leave us unable to respond to distant others as we might like, but it will also drain the raw emotional material necessary to attend to our closer, more intimate relationships.[194]

Faced with a limited supply of emotional energy, people may wish to devise a set of "regulatory strategies" to manage their own emotional reactions and entanglements.[195] For example, they can identify a set of close associates to whom they owe special care and attention and then deliberately expose themselves to emotional appeals from those close associates.[196] At the same time, though, they might use a variety of distancing techniques to keep those same emotions out of relationships that they wish to keep more impersonal or transactional.[197] The upshot of this regulatory strategy is that people would be able to conserve their emotional energy and expend it taking special care of those close to them.[198]

Corporate separation, in turn, should be regarded as one component of a general strategy for managing emotional commitments. The various ways of separating our financial investments from our full ethical personalities facilitate the joint efforts of withholding emotional investment from dispersed and distant relationships, on the one hand, and selectively inviting emotionally consuming relationships, on the other. Such selective emotional investment may disappoint those who hope to harness human empathy

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C. Daryl Cameron & B. Keith Payne, *Escaping Affect: How Motivated Emotion Regulation Creates Insensitivity to Mass Suffering*, 100 J. PERSONALITY & SOCIO. PSYCH. 1, 12 (2011), and the opportunity costs of spending cognitive effort in one place where it could have been spent somewhere else. *See* Cameron et al., *supra*, at 18. In short, humans have a limited supply of mental energy, and any decision to spend emotional capital in one place means that there will be less of it to go around for others. *See* Kool & McGuire, *supra*, at 678.

192. *See* Bloom, *supra* note 191, at 25; Decety & Cowell, *supra* note 190, at 337; Charles R. Figley, *Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview*, *in* COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED 11–12 (1995); Charles R. Figley, *Psychotherapists' Chronic Lack of Self-Care*, 58 J. CLINICAL PSYCH. 1433 (2002); Richard E. Adams, Joseph A. Boscarino & Charles R. Figley, *Compassion Fatigue and Psychological Distress Among Social Workers: A Validation Study*, 76 AM. J. ORTHOPSYCHIATRY 103 (2006); Elizabeth A. Yoder, *Compassion Fatigue in Nurses*, 23 APPLIED NURSING RSCH. 191 (2010). Peter Railton's description of "Juan" seems to anticipate the results of this research. *See* Railton, *supra* note 148, at 150 ("[P]eople get burned out, or lose touch, if they try to save the world by themselves. The ones who can stick with it and do a good job of making things better are usually the ones who can make that fit into a life that does not make them miserable.").

193. *See* Cameron et al., *supra* note 191, at 2.

194. *Cf.* Hanyi Xu, Laurent Begue & Brad J. Bushman, *Too Fatigued to Care: Ego Depletion, Guilt, and Prosocial Behavior*, 48 J. EXPERIMENTAL SOCIO. PSYCH. 1183, 1183 (2012) (arguing that the emotion of guilt is a limited resource that is subject to depletion).

195. Jamil Zaki, *Empathy: A Motivated Account*, 140 PSYCH. BULL. 1608, 1608 (2014).

196. *See id.* at 1628–31 (discussing factors that lead people to "approach" empathic relationships).

197. *See id.* at 1614–28 (discussing factors that lead people to "avoid" empathy).

198. *See id.* at 1608 (discussing approach and avoidance as "regulatory strategies" for managing emotions).

in service of corporate ethics. But a dose of psychological realism helps reveal the perils of such a strategy.

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The conventional story about corporate separation needs to be revised. Separating shareholders from their corporate investments is not some "pact with the Devil" to get the economic benefits of a modern economy.[199] To be sure, corporate separation can be used opportunistically by shareholders to slough off their responsibilities. But it also empowers shareholders to regulate the boundary between their comprehensive ethical personalities and the corporations in which they invest. Doing so facilitates widespread economic cooperation among those who do not share deep attachments, while at the same time protecting individual identity and setting realistic expectations for our emotional commitments.

III. THE FUTURE OF CORPORATE SEPARATION

The previous Parts have demonstrated that modern corporations allow shareholders to distance themselves from the ultimate uses to which their money is put. On the conventional view, this distancing leads shareholders to become ethically insulated from the effects of their investments and therefore promotes corporate irresponsibility. But Part II of this Article countered that conventional wisdom by illustrating the ways in which corporate separation enables social cooperation under conditions of pluralism.[200]

In the last few years, however, several prominent law and economics scholars have suggested that emerging technologies may soon dramatically reduce the relational distance between shareholders and the corporations in which they invest.[201] One aspect of this claim is that such technologies—including new means of digital polling—will make it easier for shareholders to communicate their detailed preferences to firms and to asset managers.[202] At the same time, these technologies might also reduce the cost of using the corporate proxy machinery to communicate ethical positions to firm management.[203] In this new wired world, shareholders will be able to engage with more firms and make their voices heard on a variety of issues, including their social and ethical preferences.[204]

As these technologies continue to develop and an increasing number of corporations come to adopt them, the idea is that shareholders may form stronger ethical commitments

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199. *See* BAKAN, *supra* note 5, at 52 (reporting and discussing the comments of Anita Roddick, founder of The Body Shop).

200. *See supra* Part II.

201. *See, e.g.*, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 258–61 (2017); George Geis, *Traceable Shares and Corporate Law*, 113 NW. U. L. REV. 227, 267–73 (2018).

202. *See* Hart & Zingales, *supra* note 201, at 263 ("Directors can poll their members on some fundamental choices and then decide accordingly.").

203. *See id.* at 271 ("[I]n a wired world we regard the bureaucratic cost of administering proxy votes as trivial.").

204. *Id.* at 263.

to the companies in which they invest. On this view, technology has the power to cut through the multiple layers of corporate agency that dilute shareholder power and dull shareholder responsibility.[205]

Corporate law, on this view, can facilitate heightened shareholder responsibility. One suggestion is to change corporate proxy rules to make it easier for shareholders to vote on ethical issues.[206] In doing so, corporate law would not only remove barriers to shareholders' ethical engagement, but would also lead those shareholders to feel closer to—and thus more responsible for—the activities of the companies in which they invest.[207] In short, if technology can lower the cost of shareholder ethical engagement, then corporate law can act to encourage such engagement by clearing the obstacles that stand between shareholders and corporate management.[208]

Another way in which technological advancements may undermine the existing state of corporate separation is through the introduction of blockchain technology.[209] In recent years, scholars have explored whether blockchain might provide a way to overcome various informational deficits related to corporate shareholding.[210] More specifically, one scholar has suggested that blockchain may make it possible to identify previously anonymous shareholders and specify the precise pattern and timing of individual shareholding.[211]

If this technology were to be widely adopted, it has been suggested, we may need to rethink some of our most basic assumptions about the distribution of responsibility within corporations.[212] For decades now, there has been an insurmountable informational barrier to pinning the results of corporate action on particular shareholders. And so, when blame and consequences need to be doled out, they tend to fall on the corporation itself, with the perverse result that some shareholders will benefit from corporate wrongdoing, while other innocent shareholders will be forced to bear the financial burdens.[213] But blockchain

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205. *Id.* at 263, 271.

206. *See* Hart & Zingales, *supra* note 201, at 264 ("[E]xisting proxy access rules . . . make it difficult for moral issues to be put up for a shareholders' vote"); *see also id.* at 271 ("[T]he issues that we think should be put to a vote—such as the decision to sell high-capacity magazines in Walmart stores—are a matter of individual preference, not of managerial expertise.").

207. *See id.* at 264.

208. *See id.* at 258 ("Overall, it is fair to say that law and regulation have not helped to prevent [] amoral drift.").

209. For a helpful overview of blockchain technology, see Morgan E. Peck, *Blockchains: How They Work and Why They'll Change the World*, IEEE SPECTRUM (Sept. 28, 2017), https://spectrum.ieee.org/computing/networks/blockchains-how-they-work-and-why-theyll-change-the-world [https://perma.cc/G5M6-YPKA]. For an accessible visual guide, see Maryanne Murray, *Blockchain Explained*, REUTERS (June 15, 2018), https://graphics.reuters.com/TECHNOLOGY-BLOCKCHAIN/010070P11GN/index.html [https://perma.cc/A8DW-VF6E].

210. Geis, *supra* note 201; Christopher Van der Elst & Anne Lafarre, *Blockchain and Smart Contracting for the Shareholder Community*, 20 EUR. BUS. ORG. L. REV. 111, 126–31 (2019).

211. *See* Geis, *supra* note 201, at 267–73.

212. *See id.* at 231 ("In light of the information that traceable shares could offer, we may even need to reexamine fundamental principles of shareholder responsibility for corporate misdeeds.").

213. *See id.* at 228–29 (arguing that corporate liability is "not entirely satisfactory because money is simply

technology, on this account, promises a new way to overcome these informational hurdles and individually identify particular shareholders, thereby making them available for personal attributions of responsibility.[214]

Considered in tandem, these new technological developments are likely to elevate the salience of the normative arguments advanced in this Article. On the one hand, many proponents of corporate law reform have longed for tools and strategies to encourage corporate responsibility.[215] And to the degree that the conventional wisdom is correct—that the corporate form has permitted shareholders to insulate themselves from the ethical implications of their investments—perhaps we should welcome new technology that promises to dismantle corporate separation.[216]

On the other hand, the arguments in the previous Part offer reasons to be skeptical of efforts to close the gap between shareholders and the companies in which they invest. To begin with, if technology facilitates unlimited transparency between shareholders and corporations, we may come to know far more about our fellow investors than we should want. As things stand now, investors from diverse backgrounds, with diverse cultural, political, and religious beliefs, can all invest in the same set of public companies without worrying too much about the deep identities and commitments of their fellow investors.[217] Under current conditions, shareholders do not need to ask themselves whether their fellow investors are Christians, Kantians, Southerners, or even Yankees fans. They do not have to smooth out matters that divide people in other social arenas and preclude them from close association with one another. Instead, they can invest in a broad array of companies in the hopes of growing their wealth—wealth that they can then use however they see fit.[218]

But if new technological developments bring us into constant contact with information about the deep ethical commitments of fellow investors, it may become more difficult to abstract away from our differences. To be sure, as we discover new aspects of other

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shifted from one pocket (that of all current shareholders) to another (that of wronged shareholders)") (citing John C. Coffee, Jr., *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse Broudo*, 60 BUS. LAW. 533, 541 (2005), and Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 441–42 (2008)).

214. *See* Geis, *supra* note 201, at 276 (arguing that blockchain technology "may even prompt lawmakers to reconsider fundamental notions of corporate liability and shareholder responsibility").

215. *See supra* Part I.

216. *See id.*; *see also* Mark Fenwick & Erik P.M. Vermeulen, *Technology and Corporate Governance: Blockchain, Crypto, and Artificial Intelligence* 1, 19 (Euro. Corp. Governance, Working Paper No. 424, 2018) ("Of particular interest is how digital technologies might facilitate an emphasis on the 'human' aspects of corporate governance. That is to say, technologies are well-placed to facilitate more 'inclusive' and 'communal' models of organization that empower more stakeholders.").

217. *See* Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1022 (2011) ("[D]ispersed, passive, and anonymous shareholders . . . are unlikely to have much expressive interest at stake in corporate activities"); *see also* Greenwood, *supra* note 5, at 1066 (observing that institutional investors do not offer "any mechanism by which their own investors could indicate any contrary interests or desires").

218. *See* Friedman, *supra* note 55, at 17 (arguing that individual shareholders are free to use their own funds on charitable causes); *see also* Greenwood, *supra* note 5, at 1077 (observing that portfolio investing "suppresses many of the difficult political and economic decisions that affect the real people behind them").

shareholders' personalities, we may forge stronger bonds with some of them.[219] As we do so, we may even come to form a sense of community among like-minded investors—a sense of community that would not have been possible without lifting the veil of shareholder anonymity.[220]

The flip side of this new sense of community, however, will be disaffection for those who are different. The more we come to know about these individuals, the harder we may find it to participate alongside them in cooperative economic endeavors. In many economic contexts, we can be confident that more information will lead to more efficient outcomes.[221] But not all information is created equal, and the conditions of modern business should give us pause before we embrace a fully informed corporate community.[222]

If new technology encourages investors to jettison their apathy and adopt an emotionally engaged and ethically active stance, then we may also have reason to worry that economic disruptions will spill over into the domain of identity. When investors are rationally apathetic about the companies in which they invest, it is relatively easy for them to adapt to changing economic circumstances by adjusting their investment strategy.[223] But if the companies that make up investors' portfolios are the objects of deep emotional attachments, it will be psychologically costly to react to changed circumstances. Shallow, superficial relationships with these companies breed flexibility and resilience, while thick communal attachments make investors vulnerable to harms of self.[224]

Finally, new technology that brings shareholders closer to the companies in which they invest threatens the values of anonymity and privacy in our economic relationships. If firms begin to adopt technology that makes public company management a matter of channeling shareholders' ethical attachments, then it will be harder to confine those deep aspects of personality to oneself and one's close associates. Instead of sharing these aspects of self with a chosen few, that is, we will need to share them with far-flung members of the corporate and investment communities. In our new digital age, perhaps these worries about overexposure may seem outdated.[225] But to the degree that participation in modern corporations and capital markets still remains anonymous, technological developments that promise to identify shareholders and their activities more precisely may remove any lingering benefits of that anonymity.[226]

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219. For exploration of relational bonds in family businesses, see CRAIG E. ARONOFF & JOHN L. WARD, FAMILY BUSINESS VALUES: HOW TO ASSURE A LEGACY OF CONTINUITY AND SUCCESS 57–71 (2011) and Benjamin Means, *Non-Market Values in Family Businesses*, 54 WM. & MARY L. REV. 1185 (2013).

220. On the economic value of shareholder anonymity, see J. Gregory Sidak & Susan E. Woodward, *Corporate Takeovers, The Commerce Clause, and the Efficient Anonymity of Shareholders*, 84 NW. U. L. REV. 1092 (1990).

221. *See* George A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488 (1970).

222. *See supra* Part II.B.

223. *See* Nelson, *supra* note 57, at 1587–89.

224. *See supra* Part II.C.

225. *See* Martin Enserink & Gilbert Chin, *Introduction to Special Issue: The End of Privacy*, 347 SCI. 490, 491 (2015) ("Privacy as we have known it is ending, and we're only beginning to fathom the consequences.").

226. *See supra* Part II.D.

The techniques of corporate separation, in sum, help people to manage various challenges of a globalized commercial world. These techniques enable shareholders to construct distant relationships with the corporations in which they invest and to maintain separation between deep identity and corporate investment. But it seems we are increasingly faced with the prospect of modern technology making it harder to preserve the walls we need to keep corporations at a distance. And if we think that these various corporate walls have value, then we may wish to reconsider our celebration of technology that is tearing them down.

CONCLUSION

We have come to think of separating shareholders and corporations as something of a necessary evil. Around the globe, corporations are routinely praised for their unparalleled ability to produce economic wealth. At the same time, though, corporations are often pilloried for their irresponsibility.

Corporate separation is typically seen as a regrettable feature of modernity. Corporations are thought to be indispensable to modern life, but they have made us selfish, greedy, and asocial. Given their great economic power, it may be unrealistic to imagine a world without their influence. And yet many have become nostalgic for an earlier time when norms of communal attachment provided common ground for connections with our neighbors.

The value of close association cannot be gainsaid. Indeed, bonds of intimacy and solidarity remain crucial for constructing a durable identity in modern life. But not every social connection can be—or should be—at the center of defining our deepest projects and commitments. Indeed, if every social connection had to be so engrossing, it would not be possible to operate in a complex and diverse modern economy.

Corporate separation, then, should not be regarded as a necessary evil. The ethics of separation are more complicated than that. Social and relational distance between shareholders and the companies in which they invest may undermine emotional attachments underlying the strongest bonds of affection and care. But those same bonds cannot be replicated in every relationship without sacrificing other important social values. The pluralism of our modern economy poses a serious challenge for social cooperation. By empowering investors to construct boundaries between their deepest sense of self and the array of relationships they need to maintain with companies, corporate separation helps meet that ethical challenge.