

The History of Team Production Theory

*Ron Harris**

I. INTRODUCTION

In this short Essay, I consider the team production theory developed by Margaret Blair and Lynn Stout¹ from a historical perspective, in three senses. First, does the theory fit the historical use of the corporate form? Second, can it explain the development of corporation law doctrines? And third, can we place the development of the theory as such into the intellectual history of corporation theories at large? I will state my bottom line up front: while I find the team production theory insightful and useful for my historical research, for teaching corporation law, and for thinking about contemporary corporate problems, I am unable to position the theory in the three above-mentioned senses: the history of the corporation, the history of corporation law, and the history of the theory itself.

In this Essay, I first consider the changing function of the corporation. I argue that the corporate form has solved different problems in different periods and different contexts. I do not subscribe to the assertion that its main aim was or is to solve team production problems, but I do believe that in some cases this was its aim. I next discuss the history of legal doctrines and argue that the history of various corporate law doctrines does not support a coherent switch to doctrines that uphold the team production theory. At the time when some doctrines became more supportive of the theory, others undermined it. Third, and finally, I consider the intellectual history of cor-

* Ron Harris is Dean and Professor of Law and Legal History, School of Law, Tel Aviv University. I would like to thank the participants of the Berle VI Symposium at the Seattle University School of Law for their invaluable comments and suggestions, the organizer of the conference, Chuck O'Kelley, for putting together such an impressive group of scholars with different perspectives on the topic, and to Sapir Glassman and Oriya Peretz for their excellent research assistance.

1. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

poration theories. I argue that the theoretical discourse regarding the purpose of the corporation is not uniform. One cannot identify clear timing for the decline of other theories and for the rise of the team production theory. The team production theory and the agency theory coexist. As we shall see, they are designed to solve different problems, and, therefore, can coexist in different types of corporations.

II. THE CHANGING FUNCTION OF CORPORATIONS

Let us examine the problems encountered by entrepreneurs and investors in different historical periods and the solutions the corporation could offer to the various problems. In each of three historical periods, entrepreneurs and investors faced multiple, multi-dimensional organizational problems. The problems appeared in a different mixture in different business contexts. Organizational law in general, and the corporation in particular, served as the solution to more than one problem.

A. Business Organization in the Late Middle Ages

To understand the modern corporation, we must begin with the pre-corporation period. Two main organizational forms were used in late medieval Europe for organizing multilateral enterprises. One was the *compagnia* partnership² and the other was the *commenda* partnership.³ I hold that each was more efficient than the other in solving a different problem. The *commenda* was good for solving agency problems, while the *compagnia* was good for solving team production problems.

1. The *Compagnia* Partnership

The *compagnia* developed out of the family business.⁴ Once this was expanded to include more remote relatives as well as employees, the family firm arrangement was somewhat formalized and legalized.⁵ It was formalized as the forerunner of the general partnership.⁶

2. ROBERT S. LOPEZ & IRVING W. RAYMOND, *MEDIEVAL TRADE IN THE MEDITERRANEAN WORLD: ILLUSTRATIVE DOCUMENTS* 185–211 (2002).

3. See *id.* at 174–84; Ron Harris, *The Institutional Dynamics of Early Modern Eurasian Trade: The Corporation and the Commenda*, 71 J. ECON. BEHAV. & ORG. 606–22 (2009) [hereinafter Harris, *Corporation and the Commenda*]; RON HARRIS, *THE BIRTH OF THE CORPORATION: EAST AND WEST* (forthcoming).

4. LOPEZ & RAYMOND, *supra* note 2, at 185–86.

5. *Id.* at 185–211.

6. *Id.* at 186.

The term *compagnia* seems to come from the Latin “*cumpanis*”, meaning eating the same bread.⁷ This is indicative. The *compagnia* created strong social and economic ties among the partners.⁸ They were supposed to invest labor and to contribute their full time and efforts. In return, the *compagnia* provided for them and their families.⁹ Ties were strengthened by intermarriage. The *compagnia* was common in inland towns.¹⁰ It was used mainly for artisanal and manufacturing businesses. As I understand it, the bright-line rules that demanded exclusivity of the partners’ contribution to a single partnership, the physical proximity to enable fuller information, and the social ties to allow social sanctions, were all well geared to dealing with team production problems. That is, the organizational form of the *compagnia* was structured in a manner that mitigated shirking by partners. It could identify laziness—the preference for leisure over labor. It could punish this by deprivation of benefits and profits, and ultimately by ostracism.¹¹

2. The *Commenda* Partnership

The *commenda* developed from employment and sea loan contracts. It was the forerunner of the limited partnership. The basic *commenda* was a bilateral contract involving only two parties, a sedentary investing party and a traveling itinerant party. It was used in maritime trade. The *commenda* was an equity investment contract, specifying investments and payoffs. The investing party provided capital in the form of goods and cash used for the purchase of trade goods and for travel-related costs. The itinerant party typically did not invest capital. The traveling merchant controlled the pool of assets invested by the investor and travelled with it to faraway ports or markets.¹² The *commenda* was also a labor contract with the traveling party committing to invest labor, expertise, information, contacts, and bodily risk. The profits of the *commenda* were split between the two parties. In Italy, the investing party often received three-quarters of the net profits and the traveling party received one-quarter. The investor conveyed capital to a separate pool.¹³ In addition, the

7. *Id.* at 185.

8. *Id.* at 185–86.

9. *Id.* at 185–211.

10. *Id.* at 185–86.

11. This punishment is similar to that of the “mediating hierarchy” theory for dealing with this kind of problem. See Blair & Stout, *supra* note 1, at 271.

12. Harris, *Corporation and the Commenda*, *supra* note 3, at 609–11.

13. *Id.*; LOPEZ & RAYMOND, *supra* note 2, at 174–84.

commenda was also used in a multilateral version, typically when several investors invested in the same traveling party. But the fact that the *commenda* could be multilateral, and not only bilateral, does not refute its basic feature: having two classes of partners.¹⁴

The main problem that the *commenda* meant to mitigate was agency, not team production. The itinerant party was geographically separated from the investing party; the itinerant party did not work under direct instructions or supervision.¹⁵ Each partner was required to produce different output, either capital or labor. Their contributions took a different form, different timing, and were made in different locations. No team production had to be dealt with. Rather, the main problem stemmed from the fact that the investor could not fully anticipate *ex ante* the circumstances, opportunities, and risks. There was a major information asymmetry problem to be dealt with. Solutions included a clear mandate issued by the investor, a reporting obligation by the itinerant party, a fiduciary duty of the traveler to the investor, and an immunization of the investor from liability to the deeds of the traveler.¹⁶

Both the *compagnia* and the *commenda* were developed in response to the new needs stemming from the commercial revolution in the Italian towns of the late middle ages. In my view, they were forerunners of different versions of the partnership, the general and the limited. But the problems they were designed to mitigate were very different: team production for the *compagnia* and agency for the *commenda*. The ability to solve these different problems made them fit different types of business activities better: domestic manufacturing for the *compagnia* and overseas trade for the *commenda*.

B. Early Business Corporations

In sixteenth-century England, corporations of various sorts were widespread. For example, organized corporations included the King himself, cities and boroughs, guilds, universities and colleges, hospitals and other charitable institutions; bishops, deans, and chapters; and abbots, convents, and other ecclesiastical bodies. The business corporation, which emerged in England in the sixteenth century, was built on the old legal conception of the corporation that was first used in organizing churches, towns, universities, colleges, and

14. Harris, *Corporation and the Commenda*, *supra* note 3, at 609–11.

15. *Id.* at 609–10.

16. *Id.* at 609–11.

guilds.¹⁷ All these corporations, and others to a considerable degree, could be incorporated in the same pattern, enjoyed the same powers, capacities, and privileges, and were subject to the same remedies.

The early joint-stock business corporation was not distinguishable in its legal framework from any other corporation of that era.¹⁸ However, it combined the well-known legal conception of the corporation with the novel financial feature of joint stock. The joint-stock corporation, like the regulated corporation (a corporation modeled after the guild), and unlike other corporations, aimed at profit maximization. However, unlike the regulated corporation, the joint-stock corporation traded in only one account. That meant that members shared not only overheads, but also all the business activities of the corporation—all profits and losses. In this, the joint-stock corporation was somewhat similar to the general partnership. But while interests in the joint-stock corporation were relatively freely transferable, they were not in the partnership. In addition to the feature of transferability of interests, the joint-stock corporation, like other corporations but unlike partnerships, was also characterized by a separate legal personality that ensured longevity and a hierarchical organizational structure that enabled concentration of management in the hands of a governor and directors. Limitation of liability became an inherent feature of the joint-stock corporation only in the eighteenth century. Even without limited liability, the joint-stock corporation was fundamentally different from the partnership and substantially different in degree, if not in kind, from the regulated corporation. Did it intend to solve team production problems? The following examples will address this question.

1. The East India Company

The nature of the business of the East India Company (EIC)—long-distance trade—was similar to that of the typical *commenda*, and so was its main organizational challenge.¹⁹ In September 1599, a

17. RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844*, at 16–19 (2000) [hereinafter HARRIS, *INDUSTRIALIZING*].

18. See *id.* at 16–19, 32–33, 39–46. Business corporations were mentioned only briefly in the major eighteenth-century treatise on corporations: STEWART KYD, *A TREATISE ON THE LAW OF CORPORATIONS* (1794). They are also briefly noted in the chapter on corporations in 2 WILLIAM BLACKSTONE, *COMMENTARIES* *458–59, *462–64.

19. See Ron Harris, *Law, Finance and the First Corporations*, in *GLOBAL PERSPECTIVES ON THE RULE OF LAW* (James J. Heckman, Robert L. Nelson & Lee Cabatingan eds., 2009); Ron Harris, *The Formation of the East India Company as a Cooperation-Enhancing Institu-*

group of London merchants, dominated by members of the Levant Company, who felt it was crucial for them to enter the Cape Route trade with Asia in the face of Portuguese and Dutch competition, held a number of meetings that in retrospect turned out to be the founding meetings of the English East India Company.²⁰ The EIC was formed along two parallel tracks: one obtaining a Royal Charter that incorporated it as a corporate entity and permitted it to enter trade with new territories; and the other, raising equity capital for voyages to the East Indies from a large number of passive investors.²¹ By employing these parallel tracks, the promoters of the EIC coupled the familiar legal structure of the corporation with the less familiar element of joint stock.²²

The EIC was formally incorporated as “one body corporate and politick” on December 31, 1600.²³ It was initially formed as a trading company for a period of fifteen years.²⁴ In fact, it lasted for more than 250 years and became the territorial governor of India. The charter of incorporation defined the basic governance structure of the EIC. This included a Governor, a Deputy Governor, a Committee of 24—also called the “Court of Committees” (and after 1709, the “Court of Directors”)—and a General Court. The charter granted the EIC a trade monopoly.²⁵

The promoters of the EIC, and later its directors, were concerned with raising capital for a very costly and risky business enterprise. But asymmetric information created a major obstacle to cooperation. To entice outsiders, the insiders could not rely only on presenting the prospects of oceanic trade with Asia or promising a fair share of the profits. They had to credibly commit to provide information that would reduce the asymmetry. They had to provide tools for acting upon the information. An institutional innovation was required to enable this and to raise vast capital from outsiders. Pairing the financial tool of equity investment in joint stock with the legal concept of the corporation represented a major innovation. The EIC

tion (Dec. 2005) (unpublished manuscript) [hereinafter Harris, *Formation*], available at <http://ssrn.com/abstract=874406> or <http://dx.doi.org/10.2139/ssrn.874406>.

20. Harris, *Law, Finance and the First Corporations*, *supra* note 19, at 159–60.

21. Harris, *Formation*, *supra* note 19, at 23–24.

22. *Id.*

23. CHARTER GRANTED BY QUEEN ELIZABETH TO THE EAST INDIA COMPANY, 31 DECEMBER 1600 (1600), available at <http://www.sdstate.edu/projectsouthasia/loader.cfm?csModule=security/getfile&PageID=857407>.

24. *See id.*

25. *See id.*

was designed institutionally as it was—coupling a corporation with a per-voyage equity financial investment—to facilitate cooperation between insiders and outsiders. To attract external investors, and in an attempt to offset the lack of liquidity in the absence of an effective market for shares in 1600 England, the EIC offered them voice. Further, the EIC was designed in a manner that would allow its members an exit option despite the lack of a preexisting stock market.²⁶ Members of the EIC were given the option to invest, or not to invest, in any voyage after the first.²⁷ In this sense, the corporation was a club of potential, though not necessarily actual, investors.²⁸

The EIC was a solution to the agency problem. It allowed outside investors with inferior access to information to monitor the insiders. It allowed the insiders to credibly commit not to expropriate, lock in, or massively cheat the passive outside investors. The EIC dealt with a problem not altogether different from the one dealt with by the *commenda*. Team production was not a major issue early on. The early EIC did not have other major constituencies. Creditors were almost absent. Employees were weak. Asian constituencies were not taken into account. The Board of Directors did not have to function as a mediating hierarchy. The Board had to assure outside investors that the insiders would not defraud them and would not use their money for purposes not agreed upon. It had to mediate between principals and agents. The agents—the insiders—were the producing team; the outsiders—the passive shareholders back in England—had no skills, no information, and no physical proximity to the team's production.

2. The Bank of England

England's Glorious Revolution of 1688 brought about political stability and commercial opportunities. But it also brought war with France and growing public expenses.²⁹ To bridge the gap between

26. Harris, *Formation*, *supra* note 19, at 31–33.

27. *Id.* at 23–27, 31–33.

28. The goods offered to club members—a share in the voyage's profit—was nonrivalrous because there was in fact no upper bound to investment in a voyage. When more capital was raised, more ships could be fitted or more goods (mainly silver) could be loaded on the ships.

29. See generally JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783* (1990); JOHN HAROLD CLAPHAM, *THE BANK OF ENGLAND: A HISTORY* (1944); P.G.M. DICKSON, *THE FINANCIAL REVOLUTION IN ENGLAND, A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688–1756* (1967); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989).

income taxation and wartime needs, the national debt was dramatically increased in what is known as the Financial Revolution.³⁰ There were calls for a national or public bank to encourage the propertied public to lend money to the state via an intermediary. The creditworthiness of the new Dutch King, William III, was so low in London that it was impossible for the government to borrow the £1,200,000 (at 8%) that it needed.³¹ To induce subscription to the loan, lenders were to be incorporated as the Governor and Company of the Bank of England (Bank), with long-term banking privileges including a corporate monopoly on the issue of notes.³² In return for government bonds, the lenders subscribed to the equity stock of the new Bank of England, which in turn lent the Government cash.³³

Although the new bank risked its entire capital by lending it to the government in return for a Royal Charter, the subscription proved popular. The £1.2 million was raised in twelve days, lent to the government, and half was used to rebuild the navy.³⁴ The Royal Charter was sealed on July 27, 1694, and the Bank began its role as the government's banker and debt manager, which it continues doing today.³⁵ The Bank's early years were dominated by the government's pressing demands for finance and the issue of new coinage. The Bank also embarked upon conventional banking business.³⁶ The Bank's notes became a widely accepted currency;³⁷ people seldom doubted that the "promise to pay"—which then referred to gold coin of the realm—would be honored. The Bank's connection with the government, the scale of its private banking business, and the position it held at the heart of the growing financial system of the City of London made the Bank a national treasure house and the leading commercial bank of the day.

The main role of the Governor and the Board was not in the realm of mitigating agency problems and it was not in the realm of team production mediation. It was mostly in the realm of asset partitioning.³⁸ It was to ensure that the pool of assets was sufficient for

30. See P.G.M. DICKSON, *supra* note 29, at 3–14.

31. *Id.*, at 39–75.

32. *Id.*; see also North & Weingast, *supra* note 29, at 820–21.

33. See P.G.M. DICKSON, *supra* note 29, at 39–75.

34. *Id.*; North & Weingast, *supra* note 29, at 821.

35. See P.G.M. DICKSON, *supra* note 29, at 46–57.

36. *Id.* at 39–75; North & Weingast, *supra* note 29, at 824–25.

37. North & Weingast, *supra* note 29, at 827–28.

38. Henry Hansmann, Reinier H. Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006).

servicing the debt. They were not involved in production, but rather in demarcation and separation. They had to make sure that loans to the Crown would be in appropriate terms so that insolvency would not occur and shareholders' investments would be protected.³⁹ Insurance companies that were formed during the eighteenth century had a similar function. These included the London Assurance and the Royal Exchange Assurance, which were marine insurance joint-stock companies formed in 1720.⁴⁰ Here again, the main role of the Board was monitoring pools of assets and demarcating the partitions between such pools. Syndicates such as the Lloyds for marine insurance—in Lloyds Coffee Shop around 1730—and unincorporated insurance companies, such as Phoenix and Equitable Life Insurance (1756) and Phoenix Fire Insurance Company (1781), were formed.⁴¹ These were not corporate entities; they did not have the privilege of limitation of liability, and they did not create a separate pool of assets from those of their investors.

3. Textile and Iron Firms

Textiles and iron were the leading sectors of the first Industrial Revolution. They began to revolutionize technologically in the 1760s and 1770s.⁴² New technologies in spinning and weaving, such as the spinning jenny, the spinning mule, the water frame, and eventually, the cotton mill, changed the cotton industry forever.⁴³ Similarly, the blast furnace, hot blast, and other improvements in machines and processes increased the productivity and quality of the iron industry.⁴⁴ The firms in these leading sectors grew in size from domestic cottage industries, to more capitalist putting-out systems, and even-

39. PHYLLIS DEANE, *THE INDUSTRIAL REVOLUTION IN ENGLAND, 1700–1914*, at 185 (1969).

40. See P.G.M. DICKSON, *supra* note 29, at 446–51.

41. HARRIS, *INDUSTRIALIZING*, *supra* note 17; BREWER, *supra* note 29, at 194.

42. See generally M. J. DAUNTON, *PROGRESS AND POVERTY: AN ECONOMIC AND SOCIAL HISTORY OF BRITAIN, 1700–1850* (1995); PAT HUDSON, *THE GENESIS OF INDUSTRIAL CAPITAL: A STUDY OF THE WEST RIDING WOOL AND TEXTILE INDUSTRY, C. 1750–1850* (1986); CHARLES K. HYDE, *TECHNOLOGICAL CHANGE AND THE BRITISH IRON INDUSTRY, 1700–1870* (1977); DAVID S. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* (1969); R.C. MICHIE, *THE LONDON AND NEW YORK STOCK EXCHANGES 1850–1914* (2012); JOEL MOKYR, *THE BRITISH INDUSTRIAL REVOLUTION: AN ECONOMIC PERSPECTIVE* (1999); JOEL MOKYR, *THE LEVER OF RICHES: TECHNOLOGICAL CREATIVITY AND ECONOMIC PROGRESS* (1990).

43. LANDES, *supra* note 42, at 42, 81–113; see HUDSON, *supra* note 42.

44. LANDES, *supra* note 42, at 81–113; HYDE, *supra* note 42.

tually to factories and town factories. These firms were team production firms, much like the Italian *compagnias* of earlier centuries. Their teams involved inventors, entrepreneurs, cotton and iron suppliers, credit providers, laborers, production floor managers, wholesalers and retailers, and supporting communities. Nevertheless, textiles and iron were organized throughout the Industrial Revolution—a full century—in the form of family firms and partnerships.⁴⁵ Team production problems in these leading and crucial sectors were addressed without resort to the corporation as a form of organization.

4. Railway Companies

The railway sector followed the path paved by the canal companies in the eighteenth century and, from its origins, was wholly based on the joint-stock form.⁴⁶ It made a slow start in the early 1820s with the world's first steam-powered public line, the Stockton & Darlington Railway.⁴⁷ But it really gathered momentum only after the completion of the thirty-mile long Liverpool and Manchester Railway in 1830.⁴⁸ New company formations peaked in two boom periods, one between 1834 and 1837—with the formation of 88 companies—and the other beginning in 1843 and culminating toward the end of the decade.⁴⁹ Altogether, 216 Railway Acts passed in Parliament between 1820 and 1844.⁵⁰ The total capital of railway companies traded in London was over £57 million in 1843.⁵¹ Between 1830 and 1850, some 6,000 miles of public railway were built in Britain, in what is known as the Railway Mania.⁵² By 1850, the annual number of passengers transported reached 68 million, and by 1870, it had reached

45. See generally P.L. COTTRELL, *INDUSTRIAL FINANCE, 1830–1914: THE FINANCE AND ORGANIZATION OF ENGLISH MANUFACTURING INDUSTRY* (1980); ROGER LLOYD-JONES & M.J. LEWIS, *MANCHESTER AND THE AGE OF THE FACTORY: THE BUSINESS STRUCTURE OF COTTONPOLIS IN THE INDUSTRIAL REVOLUTION* (1988).

46. See generally SEYMOUR A. BROADBRIDGE, *STUDIES IN RAILWAY EXPANSION AND THE CAPITAL MARKET IN ENGLAND: 1825–1873* (1970); T.R. GOURVISH, *RAILWAYS AND THE BRITISH ECONOMY: 1830–1914* (1980); M.C. REED, *INVESTMENT IN RAILWAYS IN BRITAIN: 1820–1844—A STUDY IN THE DEVELOPMENT OF THE CAPITAL MARKET* (1975).

47. REED, *supra* note 46, at 4–14.

48. *Id.*

49. HARRIS, *INDUSTRIALIZING*, *supra* note 17, at 220; REED, *supra* note 46, at 1–28.

50. HARRIS, *INDUSTRIALIZING*, *supra* note 17, at 221 (see the total in Table 8.3).

51. REED, *supra* note 46, at 46 tbl.8.

52. JACKSON J. SPIELVOGEL, *WESTERN CIVILIZATION, VOLUME II: SINCE 1500*, at 683–85 (7th ed. 2010). T. R. Gourvish, *Railways 1830–70: The Formative Years*, in *TRANSPORT IN VICTORIAN BRITAIN* 57, 57–58 (Michael J. Freeman & Derek H. Aldcroft eds., 1991).

322 million.⁵³ This was the fastest growth any economic sector had ever experienced.⁵⁴

From the start, the railway companies were very big. Network considerations led to a very rapid merger movement. The Liverpool & Manchester Railway opened to the public in 1830.⁵⁵ The Grand Junction Railway from Warrington to Birmingham was incorporated in 1833 and opened in 1837.⁵⁶ In 1845, it merged with the Liverpool & Manchester Railway. The line then merged with the London and Birmingham Railway (opened 1838) and the Birmingham and Manchester Railway to form the London and North Western Railway on 1846.⁵⁷ It grew on a colossal scale, never before seen, due to the rapid growth of the sector as a whole and the mergers of the railway companies. By the middle of the nineteenth century, it had capital in the millions of pounds, tens of thousands of shareholders, nearly a thousand miles of rails with dozens of stations, hundreds of locomotives, thousands of carriages, tens of thousands of employees, and millions of passengers.⁵⁸

Companies like the London and Northwestern Railway had many constituencies, including shareholders of ordinary and preferred shares, bondholders, adjacent landowners, passengers, freight customers, constructors, suppliers and service providers, executives, engineers, drivers, maintenance workers, salespersons, tort claimants, and many other types of employees, accountants, lawyers, and more.⁵⁹ According to Chandler, the large British and American railways were the first modern business enterprises.⁶⁰ The directors of these giant railway companies did not deal with bilateral agency problems or with the management of separate pools of assets. They primarily coordinated highly complex team production projects.

53. SUSIE L. STEINBACH, *UNDERSTANDING THE VICTORIANS: POLITICS, CULTURE AND SOCIETY IN NINETEENTH-CENTURY BRITAIN* 91 (2012).

54. GOURVISH, *supra* note 46, at 9–11.

55. REED, *supra* note 46, at 1–14.

56. *Id.*

57. Gourvish, *supra* note 52, at 57–58.

58. *Id.* at 99; BROADBRIDGE, *supra* note 46; MICHIE, *supra* note 42, at 3–27; *see also* E. VICTOR MORGAN & W. A. THOMAS, *THE STOCK EXCHANGE: ITS HISTORY AND FUNCTION* (1969); W. A. THOMAS, *THE PROVINCIAL STOCK EXCHANGES* (1973); Moshe Buchinsky & Ben Polak, *The Emergence of a National Capital Market in England, 1710–1880*, 53 J. ECON. HIST. 1 (1993).

59. R.W. KOSTAL, *LAW AND ENGLISH RAILWAY CAPITALISM 1825–1875* (1994).

60. ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 88 (1977). *See also* ALFRED D. CHANDLER, JR., *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* 1–3 (1990).

They could potentially mediate conflicting claims and interests within this diverse enterprise.

During the late nineteenth and the early twentieth century, several major legal systems divided the corporate form into two separate forms: public corporations and private companies. Though both forms share some common features, they also had distinctive features that made each of them more amenable to solving different problems. In Continental Europe, the legislatures created separate laws for private companies, which formed the two legal forms. Germany led the way in 1892 by introducing the GmbH.⁶¹ France, inspired by the annexation of Alsace-Lorraine (with GmbHs) in 1918, introduced the SARL in 1925.⁶² In Britain, the split was achieved within the same piece of legislation—the 1907 Companies Act.⁶³ After the 1862 Companies Act, private companies began to develop from below, by businesspersons and lawyers, using the contractual flexibility offered by the Act and its default Table A bylaws.⁶⁴ The courts first recognized the private company in the famous *Salomon v. Salomon* House of Lords decision in 1897.⁶⁵ Later, the Companies Acts of 1900 and 1907 formally recognized the status of private companies.⁶⁶ Generally speaking, private companies gained increased governance flexibility, lower public disclosure requirements, and less formal procedures

61. The GmbH was introduced as an alternative to the German public corporation (the AG) that had to meet lower minimum capitalization requirements and lower formalities. See Timothy W. Guinnane, *Using a New Legal Form: The GmbH from 1892 to World War I* (Yale Univ., Working Paper, 2010) [hereinafter Guinnane, *New Legal Form*] (permission to cite received from author).

62. See Timothy Guinnane et al., *Putting the Corporation in its Place*, 3 ENTER. & SOC'Y 687, 690 (2007) [hereinafter Guinnane et al., *Putting*]; see also Timothy W. Guinnane et al., *Droit et capital à l'épreuve de l'histoire: l'essor des sociétés à responsabilité limitée*, ("Law and Capital Face the Test of History: The Development of the Limited Liability Company"), 63 ANNALES H.S.C. 73 (2008); Timothy Guinnane et al., *Ownership and Control in the Entrepreneurial Firm: An International History of Private Limited Companies* (Yale Univ. Econ. Growth Ctr., Discussion Paper No. 959, 2007) [hereinafter Guinnane et al., *Ownership and Control*], available at http://www.econ.yale.edu/growth_pdf/cdp959.pdf or <http://ssrn.com/abstract=1071007>; Timothy W. Guinnane & Jean-Laurent Rosenthal, *Making Do with Imperfect Law: Small Firms in France and Germany, 1890–1935*, 57 ENTREPRISES ET HISTOIRE, no. 4, 2009, at 79 [hereinafter Guinnane & Rosenthal, *Making Do with Imperfect Law*].

63. Companies Act, 1907, 7 Edw.7, c. 50 (Eng.).

64. Guinnane et al., *Ownership and Control*, *supra* note 62, at 13–14. See also Companies Act, 1862, 25 & 26 Vict., c. 89 (Eng.).

65. See *Salomon v. A. Salomon*, [1897] A.C. 22 (H.L.) (appeal taken from Eng.).

66. Guinnane et al., *Putting*, *supra* note 62, at 704–08.

in return for giving up the access to stock markets and to external equity.⁶⁷

Thus, the organizational menu in Germany, Britain, and France expanded to include at least two options. Different firms seeking to solve different problems selected either the private or the public corporation form, or remained sole proprietorships or partnerships. The GmbH, Private Company, SARL, and LLC options were often incorporated for asset partitioning purposes or in order to solve intergenerational issues or control problems between shareholders.⁶⁸ They do not seem to fit the team production theory and, at least in some of their manifestations, they fit agency theory.

The above examples demonstrate that the joint-stock business corporation could be used to deal with three different problems: agency in the case of the East India Company, asset partitioning in the case of the Bank of England, and team production in the case of the giant railway companies. Furthermore, two different organizational forms could deal with team production: family firms in the case of textile and iron factories, and business corporations in the case of railways. But the fact that the team production problem was relevant for some corporations in the second half of the nineteenth century does not mean that corporate boards were mediating it. The existence of a problem was a necessary, but not a sufficient condition. Boards needed the status, legal powers, and motivation to mediate.

67. The United States was the outlier. After a failed attempt at introducing private company-like Partnership Associations in 1870s Pennsylvania, it did not follow suit with the other jurisdictions and did not introduce a split between public and private corporation law until the second half of the twentieth century. The S Corporation was formed in 1950 with mostly tax-related effects. Close Corporations chapters and supplements were included in the general corporation laws from 1969 with Delaware as the first state to do so. A real distinction, based on a separate law, appeared for the first time only in 1977, when Wyoming enacted the first Limited Liability Companies Act. In the following decades, practically all U.S. states enacted LLC laws. See, Timothy W. Guinnane, Ron Harris & Naomi R. Lamoreaux, *Contractual Freedom and the Evolution of Corporate Governance in Britain, 1862 to 1929* (Nat'l Bureau of Econ. Research, Working Paper No. 20481, 2014) available at [http://blog.lib.umn.edu/amstdy/main/GHL,%20Contractual%20Freedom%20\(18%20Sept%202013\).pdf](http://blog.lib.umn.edu/amstdy/main/GHL,%20Contractual%20Freedom%20(18%20Sept%202013).pdf) (forthcoming at the NBER Summer Institute meetings of the Development of the American Economy program).

68. Guinnane, *New Legal Form*, *supra* note 61; Guinnane et al., *Ownership and Control*, *supra* note 62; Guinnane & Rosenthal, *Making Do with Imperfect Law*, *supra* note 62; Guinnane et al., *Putting*, *supra* note 62.

III. DOCTRINAL HISTORY

Let us move from the history of the corporate form in solving organizational problems to the legal history of specific corporate structures and doctrines. For the team production theory to validly explain the functioning of corporate boards as mediating hierarchies, we must establish a few supporting doctrines. Doctrinal developments could lead to a theoretical shift. Conversely, a paradigm shift from one theory, say agency, to another, say team production, could enhance doctrinal change. Each can nourish the other simultaneously. Did specific doctrines that support the team production develop before, in tandem, or after the formulation of the theory? To help answer this question, I will examine the doctrinal examples of separate legal personality, the trust doctrine, and the business judgment rule, which Blair and Stout offered in their seminal 1999 article.⁶⁹

A. Separate Legal Personality

First, separate legal personality emerged.⁷⁰ For directors not to hold their full alliance to members, they needed another anchor—the corporate entity. This separate legal personality developed as a key characteristic of the corporation as early as the Middle Ages. New College, mentioned in the Stout article, and the East India Company are examples of the early corporations with a distinct legal personality. The corporation's separate legal personality received its starkest modern form in *Salomon v. Salomon* in 1897.⁷¹ This case recognized in England the separation between a sole shareholder, who was also a creditor, and the company in which he held shares.⁷² The case was decided in the context of all private companies and at a time when boards were considered to represent shareholders.⁷³ Historically, legal personality was in place long before the team production theory became viable.

Corporations in the second half of the nineteenth century were not structured in a way that allowed the board of directors to serve as mediators between stakeholders. This was primarily because board members were expected to be major shareholders and not independ-

69. Blair & Stout, *supra* note 1.

70. Blair & Stout, *supra* note 1, at 292–97.

71. *Salomon v. A. Salomon*, [1897] A.C. 22 (H.L.) (appeal taken from Eng.).

72. Ron Harris, *The Private Origins of the Private Company: Britain 1862–1907*, 33 OXFORD J. LEGAL STUD. 339, 339–78 (2013).

73. MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 98–100 (1992).

ent directors. Most public companies had relatively high qualification requirements for directors in terms of minimum holdings of shares. Directors were viewed as representing the shareholders and, as such, were expected to be shareholders themselves.⁷⁴ Late nineteenth century directors were considered to be agents of corporate shareholders.⁷⁵ As representatives and agents of the shareholders, directors could not serve as honest brokers. The dominant corporate personality theory of the time, the contractual or aggregate theory, put the ultimate controlling power of the corporation in the hands of the shareholders and equated the corporation with its shareholders.⁷⁶ But this too did not make the board the pivotal organ of the corporation. Boards of directors did not attain this status until the merger movement at the turn of the twentieth century weakened the stance of shareholders in their corporations and empowered directors. However, this process was lengthy and gradual, and it may have resulted, in part, from the managers' desire to escape from the control of shareholders.

B. The Trust Doctrine

According to the trust doctrine, the legal relationship between directors and shareholders is similar to the legal relationship between trustees and beneficiaries.⁷⁷ The trust doctrine was first applied to officers of unincorporated companies in the late eighteenth century because they used the trust as a basic device for holding property on behalf of their shareholders. The trust doctrine migrated to the corporate context and was applied to directors and officers in the middle of the nineteenth century.⁷⁸ Thus, from an early stage, directors were committed to serving the interests of shareholders, like trustees to beneficiaries. As long as this was the state of doctrine, directors could not serve as mediators, even when they were not required to own shares for board qualification.

74. This rationale goes back to the very first business corporations, such as the East India Company and its contemporaries.

75. HORWITZ, *supra* note 73.

76. Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1462–78 (2006).

77. Blair & Stout, *supra* note 1, at 290–92.

78. HARRIS, *INDUSTRIALIZING*, *supra* note 17, at 137–67.

C. The Business Judgment Rule

The business judgment rule developed gradually.⁷⁹ The shielding of managerial decisions from judicial review during the lifetime of the enterprise first developed in Britain in the equitable context of partnerships, and made its way into the corporate context as early as 1843 in *Foss v. Harbottle*.⁸⁰ This was an important first step in allowing directors a level of independence from shareholders.

The business judgment rule is an essential doctrine in the United States that can detach directors from shareholders. It gives directors immunity from shareholder intervention in decisions that favor other constituencies. The history of the business judgment rule in the United States still awaits a complete study of its origins. Yet we can point to some significant cases. For example, the business judgment rule was quite clearly stated as early as 1919 in *Dodge v. Ford*.⁸¹ In the *Unocal* case of 1985, the court held that a board of directors may only try to prevent a takeover where it can be shown that there was a threat to corporate policy.⁸² In other words, the court was willing to review the decision of a board in these circumstances, despite the general applicability of the business judgment rule.⁸³ In *Van Gorkom*, also decided in 1985, the court found that the directors were grossly negligent because they hastily approved a merger without substantial inquiry or any expert advice.⁸⁴ Though a well-developed business judgment rule is a precondition for the application of the mediating hierarchies theory, as Blair and Stout suggest, the timing of its development is not clear.⁸⁵

As can be seen, different doctrines developed in different times. Therefore, the doctrinal history does not define any specific period when all the doctrinal pieces necessary to team production theory matured. Let us move from the history of the doctrine to the history of the theory itself.

79. Blair & Stout, *supra* note 1, at 299–305.

80. *Foss v. Harbottle*, (1843) 2 Hare 461 (Eng.).

81. See generally *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). Yet in the end, the court intervened in Henry Ford's business judgment with respect to investment, pricing, and employment policy. *Id.*

82. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954–55 (Del. 1985).

83. *Id.*

84. *Smith v. Van Gorkom*, 488 A.2d 858, 881 (Del. 1985).

85. Blair & Stout, *supra* note 2, at 299–305.

IV. DYNAMICS OF CORPORATION THEORIES

Three preconditions are needed for the theory of team production to develop. First, corporations had to encounter team production problems. Second, legal doctrine had to support the theory, for example, by positioning boards in a legal position in which they could serve as mediators. Third, the previously dominant theory of the corporation, agency theory, had to be sufficiently undermined. In this Part, we will follow the history of the team production theory of the corporation and the theories that competed with it, primarily agency theory. Let us begin in the early twentieth century, because before that time the other preconditions were not met.

The canonic 1919 *Dodge v. Ford* case does not fit a mediating board conception of the corporation.⁸⁶ The issue was whether Henry Ford and the board he controlled could promote a business strategy that benefited consumers of Model T automobiles (by lowering its price) and employees of the Ford Motor Company (by paying premium wages) at the expense of shareholders (the plaintiffs were large shareholders).⁸⁷ The Michigan Supreme Court stated in a very famous quote:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.⁸⁸

This judgment upheld a shareholder value conception of the company and undermined a conception that took into account the interests of various other stakeholders.⁸⁹

In the early 1930s, the Berle–Dodd debate about shareholder versus stakeholder views of the firm raged, mostly in the pages of the *Harvard Law Review*.⁹⁰ The parties to the debate were two of the

86. See *Dodge v. Ford*, 170 N.W. 668.

87. *Id.*

88. *Id.* at 684.

89. Some scholars interpreted the case as a business judgment rule case. Some believed that Ford in fact intended to promote shareholders' value in the longer term. For historical discussions of the case see, for example, M. Todd Henderson, *Everything Old Is New Again: Lessons from Dodge v. Ford Motor Company*, in *CORPORATE LAW STORIES* (J. Mark Ramseyer ed., 2009).

90. See, e.g., A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV.

corporate law luminaries of the time: Adolf Berle, at the time professor at Columbia Law School, and Merrick Dodd, then a Harvard Law School professor.⁹¹ The Berle–Dodd controversy concerned the primary purpose of the publicly owned corporation.

Berle’s position was, in a nutshell, “that all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, *are necessarily and at all times exercisable only for the ratable benefit of all shareholders . . .*”⁹² Dodd, on the other hand, argued that since the corporation was viewed as a separate legal entity, the directors were fiduciaries of the corporation and not of the shareholders, and as such, had to take into account other constituencies and stakeholders and the society at large.⁹³

We do not have to delve deeper into the arguments in the debate. It is sufficient for our purposes to establish that in the early 1930s there was a harsh debate between two paradigms and not dominance of a single paradigm. The first paradigm was the agency paradigm, according to which the main role of corporation law is to mitigate agency problems between shareholders and directors. The second is our very own team production paradigm. Not only did one of the two paradigms—the shareholder primacy paradigm—not support a team production theory of the corporation, but it also promoted its competitor.

A team production model of the firm may have appeared with “managerialism,” a concept that emerged in the 1930s and experienced a heyday in the 1950s and 1960s.⁹⁴ At the core of managerialism was the belief that large corporations were not only rapidly growing to become, or already were, dominant economic and

L. REV. 1145 (1932) [hereinafter Dodd, *For Whom*]; A. A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1935); ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). But for a different interpretation of the debate in its historical context, see William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 102 (2008).

91. See generally ‘Adolf Augustus Berle, Jr.’, Gale Encyclopedia of Biography in Context, Gale Document Number: GALE|BT2310017845; Edwin Merrick Dodd, WASHINGTON & LEE UNIV. SCH. OF L., <http://law.wlu.edu/faculty/profiledetail.asp?id=368> (last visited Nov. 24, 2014).

92. Berle, *Corporate Powers as Powers in Trust*, *supra* note 90, at 1050 (emphasis added).

93. Dodd, *For Whom*, *supra* note 90, at 1154.

94. See CHANDLER, *THE VISIBLE HAND*, *supra* note 60.

social institutions, but also that they were being run by a new kind of controller.⁹⁵ Both optimistic and pessimistic views of managerialism pointed to corporate managers as a central element in the new system.⁹⁶ In the immediate postwar period, Peter Drucker wrote about the internal life of corporate management and the need for a business corporation to have “management whose responsibility is to the enterprise rather than to any one group: owners, workers, or consumers.”⁹⁷ James Burnham’s work, *The Managerial Revolution*, sought to express the movement of all functional power into the hands of managers rather than politicians or businessmen.⁹⁸ He viewed corporate managers as a new class in society, supplanting the capitalists of a previous era.⁹⁹

The evidence suggests that, at least in their public pronouncements, corporate leaders voiced managerial views. Clearly, many business leaders accepted some or all of the economic underpinnings of managerialism. The idea became widespread in the postwar era, as corporate leaders were increasingly depicted as balancing the demands of various corporate constituencies, including employees, communities, consumers, and society in general.¹⁰⁰ This was the first time a fertile breeding ground for developing a team production theory of the corporation was in place. But in his famous 1970 *New York Times* essay, *The Social Responsibility of Business is to Increase Its Profits*, Milton Friedman stated in the most direct and powerful way that:

In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible¹⁰¹

95. See Harwell Wells, “Corporation Law is Dead”: Heroic Managerialism, the Cold War, and the Puzzle of Corporation Law at the Height of the American Century, 15 U. PA. J. BUS. L. 306, 326 (2013).

96. *Id.*

97. Peter F. Drucker, *Structure of the Enterprise: Economic, Governmental, Social*, 44 ILL. L. REV. 769, 770 (1950).

98. See JAMES BURNHAM, *THE MANAGERIAL REVOLUTION* (1960).

99. *Id.* at 96–112.

100. See Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247 (2010); Wells, *supra* note 95, at 321.

101. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32–33.

Friedman was, at the time, one of the most influential economists globally, a leader of the Chicago School of Economics, a prominent public figure and columnist, and soon to become a Nobel laureate.¹⁰² Considering Friedman's strong criticism, clearly the team production theory was still not the dominant theory of the 1970s. Or alternatively, it was already past its heyday.

Jensen and Meckling's 1976 article on agency cost theory was another challenge.¹⁰³ The theory placed the agency relationship between shareholders and managers, in the center of the analysis of the corporation.¹⁰⁴ It analyzed monitoring costs, bonding costs, and residual loss.¹⁰⁵ What is important for our context is the reception the article received, not its details. The article became one of the most cited articles in the field of economics.¹⁰⁶ In the following four decades, it became one of the most canonic and influential articles in the field of theory of the firm.

So far we have examined a few anecdotes along the twentieth century, in which we encountered the persistence of agency theory and its resistance to alternative theories. Let us use another method—a more continuous one—for looking at the rise and decline of major twentieth century paradigms of firm and corporate theory. The method is citation counting. In this case, it is based on Google Books.¹⁰⁷

102. See generally LANNY EBENSTEIN, MILTON FRIEDMAN: A BIOGRAPHY (2007).

103. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

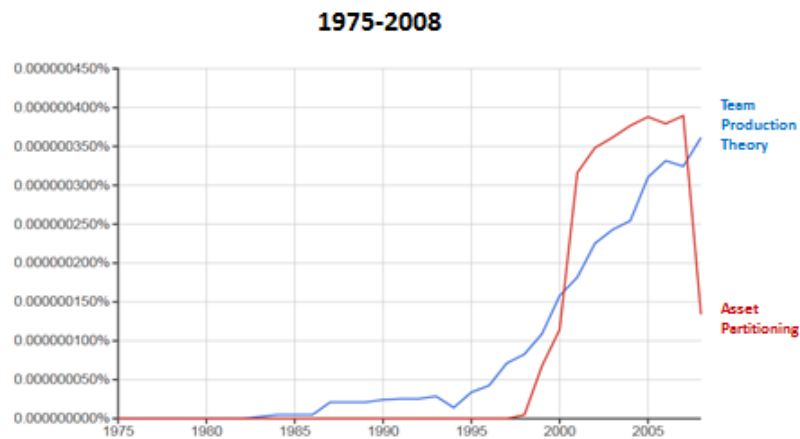
104. See *id.*

105. *Id.* at 308.

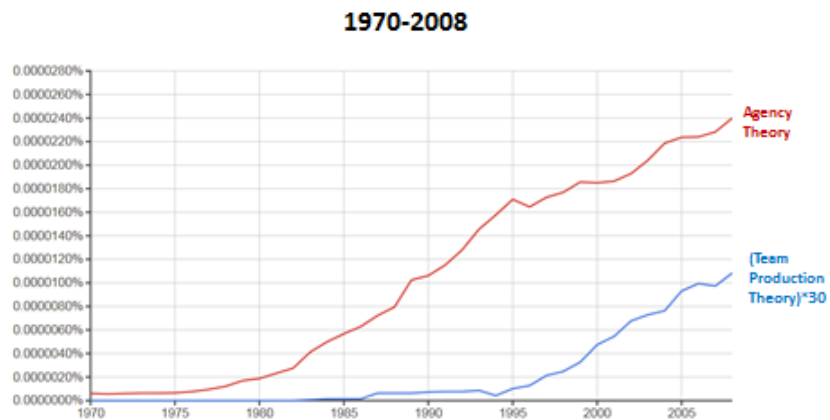
106. As of August 21, 2014, it had 44,422 citations in Google Scholar: http://scholar.google.com/citations?view_op=view_citation&hl=en&user=44R7TLwAAAAJ&citation_for_view=44R7TLwAAAAJ:5qfkUJPXOUwC.

107. The graphs were produced using the Google Books Ngram Viewer. The Google Books Ngram Viewer displays a graph showing how often the search phrases have occurred in the period defined for search in the comprehensive corpus of books included in Google Books. I compared the relevant terms and narrowed the results to the relevant time frame. Finally, when necessary, I multiplied the graphs of the terms that were less common, so that we can see their shape even when compared to terms that occurred more frequently.

Team Production Theory, Asset Partitioning



(Team Production Theory)*30, Agency Theory



Source: Google Books Ngram

Let us understand the graphs. The first graph compares occurrence of team production theory and asset partitioning. We can see that until the 2000s, the team production theory occurred more frequently. At the beginning of the 2000s, although the occurrence of the team production theory kept rising steadily, asset partitioning held prominence. At the end of the decade, the occurrence of asset partitioning dropped dramatically.

The second graph compares occurrence of team production theory and agency theory. It is clear that throughout the time period, agency theory appears much more frequently than team production theory.

I am not sure how Blair and Stout would view the intellectual history of thinking about team production theory. Did the theory enjoy a golden age between the 1930s and 1970s, during the heyday of managerialism, and decline thereafter? Did the agency paradigm rise to dominance for the first time after the seminal 1976 Jensen and Meckling article to replace the seasoned team production theory? Or did agency theory dominate throughout the twentieth century, with team production theory of the corporation emerging for the first time only very late in the century, in the 1990s, as Blair and Stout suggest in their seminal article?¹⁰⁸ As Blair and Stout note, several indications support their view.¹⁰⁹ But there is also evidence of a different trend. For example, Bebchuk's Shareholder Rights Project at Harvard and other shareholder democracy movements suggest the persistence or reemergence of shareholder primacy and the agency-focused theory of the corporation.¹¹⁰ Or have agency theory and mediating hierarchies theory competed with each other throughout the century, with some ups and downs?

V. CONCLUSION

The team production theory surely could not develop, even initially, before actual corporations dealt with team production problems. Theorizing problems such as this was not likely to occur before the occurrence of the problem itself. As we saw in the first section, the first complex multistakeholder corporations—the first corporations to encounter team production problems on a large scale—were

108. Blair & Stout, *supra* note 1.

109. *Id.* at 276–79, 289 n.90, 325, 328.

110. See, e.g., SHAREHOLDER RIGHTS PROJECT, THE SHAREHOLDER RIGHTS PROJECT REPORT FOR THE 2012 AND 2013 PROXY SEASONS (2013), available at <http://srp.law.harvard.edu/releases/2012-13-Annual-Report.pdf>.

the railway companies. The next wave emerged from the Second Industrial Revolution, which gave rise to the steel, chemical, and automobile industries. These were the first large public industrial corporations. Before that period, most industrial firms that encountered team production problems were not incorporated, as we saw in the survey of the textile and iron industries, and dealt with the team production problem through other organizational means. Textile and iron corporations involved in team production actually developed after the middle of the nineteenth century, giant railway companies in the third quarter of that century, and large industrial companies in the fourth. But even then, not all public corporations experienced team production problems as existential issues. Some, like the *commenda* and the East India Company in their times, viewed agency problems as their main concern. Many twentieth-century banking, financial, and insurance companies, like the Bank of England, and the London Assurance earlier, viewed asset partitioning and the management of pools of assets and liabilities as their main tasks. We have also seen that the various types of private companies that developed since the late nineteenth century as an organizational form—distinct from the public corporation—did not primarily aim to solve team production problems.

Doctrinal and structural histories do not point to any well-defined period as the one when all the doctrinal pieces necessary to team production theory matured. Some of the doctrines, notably separate legal personality, were in place by the late middle ages but nevertheless did not give rise to the team production theory. Some, like the structural independence of the board, developed only in the first half of the twentieth century. Yet others, such as the business judgment rule, experienced ups and downs until the 1980s and beyond. Does one expect doctrine to change first from below, followed intuitively by, for instance, Delaware judges, and only then to be followed by the development of an organizing theory by academics such as Blair and Stout? Or do we expect theory to change first and then the courts to settle disputes and develop the common law based on the theory as an organizing rationale?

The intellectual history of the two competing theories, agency and team production, over the twentieth century is quite complex. What I did in this Essay was offer only a very narrow narrative based on a few familiar manifestations, not a thick intellectual history based on thorough research. Based on this sketch, it seems as though, rather than witnessing a single, one-directional paradigm shift from team production to agency, or vice versa, we are in fact witnessing

an ongoing competition between two theories, two paradigms. The Great Depression led to a major debate as to the social and economic role of the business corporation. The heyday of managerialism in the postwar period could have given rise to team production theory, but it did not. The growing criticism of executives and of the actual achievements of agency theory in the 1990s and 2000s did give rise to team production theory, but did not lead to the demise of agency theory.

To conclude, I would like to put forward three arguments. I would like to urge Blair and Stout and other scholars examining this issue to provide a more precise historical narrative of the timing and causes of the development of the mediating hierarchies theory and its supporting doctrines. For now, and based on my preliminary historical study, I would like to put forward the hypothesis that agency theory and team production theory have existed in parallel for much of the past century.

I would like to suggest that business organizations are highly heterogeneous and the problems addressed by their entrepreneurs and investors change over time and among sectors and contexts. The public corporation is an institution that can and does solve more than one problem. Team production, agency, and asset partitioning problems can all be mitigated by differently functioning and differently structured corporations. Consequently, it appears that the team production model is very insightful for understanding what is going on in some corporations, but not in others.

The normative question of whether it is efficient and desirable from a social engineering perspective to use the same organizational form—the business corporation—to solve different problems, namely agency, team production, and asset partitioning, is still very much open in my judgment. On one hand, because the corporation is used more often and it is deployed to solve several problems, many players invest in the development of the business corporation. Network externalities are being created. On the other hand, one size does not fit all. There are rigidities. There are advantages to having a menu of options, different platforms for private and public corporations, for shareholder-controlled and for director-mediated corporations. Maybe different organizational forms could be designed to better solve different organizational problems. A systematic normative analysis will have to await another opportunity.