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Business Law beyond Business

Shawn Bayern

Florida State University

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* Associate Dean for Academic Affairs and Larry & Joyce Beltz Professor, Florida State University College of Law. Thanks to Don Weidner for extraordinarily helpful comments and to Mel Eisenberg, Mark Gergen, Mark Seidenfeld, and Sam Wiseman for discussion. Thanks also to participants in workshops at Northwestern, Vanderbilt, and Florida State for valuable suggestions.

I. INTRODUCTION

The law of modern business entities is poorly understood from a comprehensive perspective.[1] This area of law has changed radically in the last several decades in ways that have gone largely unnoticed. The lack of attention is unfortunate because developments in the law of business-entity governance have radical implications for many other areas of law, far beyond what are normally conceived as business-law subjects.

Modern organizational statutes create something new to the legal system: a legal entity that is governed only or mainly by an operating agreement and that is capable of holding basic legal rights and forming fundamental legal relationships (like entering contracts or owning property). Effectively, the result is that "a contract" (or at least something closely akin to a contract) can act as a legal entity. This capability may sound mundane, but the flexibility of modern business entities enables them to provide immediate "workarounds" to many restrictions in other areas of the law, such as contract law, property law, and family law. Modern business entities are a hyper-flexible transactional tool that can lead their organizers to achieve goals that other areas of law have not contemplated, ranging from the capabilities of legal personhood for those who otherwise lack it (such as nonhuman computer systems and humans that the law deems incapable of contracting, such as children or those with mental illnesses) to circumvention of many of the traditional restrictions in property law.

One animating principle of business law over the last thirty years has been "freedom of contract"—so much so that it has become something of a slogan for LLCs among courts and commentators and has been enacted into the Delaware statutes.[2] On the surface, this principle seems narrow and relatively unremarkable: people forming a business ought to be able to structure the internal governance of the business in ways that suit their needs—at least, apart from increasingly exceptional mandatory rules, such as fiduciary duties that the parties cannot eliminate by private agreement.[3] So, for example, the organizers of a

1. Occasional statewide drafting committees, work at the Uniform Law Commission, and academic commentary address the "harmonization" of business-entity statutes, but perhaps surprisingly this effort has amounted mainly to harmonization either of individual focused legal rules across business-entity law (like aligning the default or mandatory fiduciary duties of business managers in various types of entities, as if all contexts demand the same default or mandatory fiduciary duties) or of largely technical matters (like conforming basic definitions in corporations statutes with those of partnership statutes). *See, e.g.*, UNIF. BUS. ORGS. CODE (UNIF. L. COMM'N 2011). *See generally* Thomas F. Blackwell, *The Revolution is Here: The Promise of a Unified Business Entity Code*, 24 J. CORP. L. 333 (1999) (discussing this harmonization).

2. DEL. CODE ANN. tit. 6, § 18-1101 (2016) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.").

3. For a summary of the issues that arise in the debate over focused mandatory rules concerning the fiduciary duties of business managers, see Sandra K. Miller, *Fiduciary Duties in the LLC: Mandatory Core Duties to Protect the Interests of Others Beyond the Contracting Parties*, 46 AM. BUS. L.J. 243 (2009). To be clear, I do

corporation might choose to eliminate the board of directors,[4] or general partners might decide to pre-commit to unusual restrictions on their own powers.[5]

Through most of the 1900s, the story of the development of business entities was simply one of flexibility in governance structure and was not itself radical. The radical implications arise not from the direct intent of business-organization statutes or in their ordinary use, but instead because those statutes[6] have made business entities more flexible than is conventionally understood. For example, the received conception of LLCs is that they function like some combination of partnerships and corporations except that parties can vary arrangements concerning control and economic benefit.[7] But whereas a classical corporation is a known type of entity in which a board of directors appoints agents who can make contracts on behalf of the entity, an LLC—and indeed a modern corporation and most other types of modern business organizations—is an entity in which an operating agreement alone can be set up to direct the entity, so that modern business-law statutes give legal agreements new fundamental legal capabilities. Empowered by statutes, a contract (or more generally a legal instrument) can effectively own property, cause lawsuits to be filed, serve as a legal agent, or enter another contract.[8] A modern business organization can

not oppose mandatory rules for business-entity governance.

4. *E.g.*, MODEL BUS. CORP. ACT § 7.32(a)(1) (1969) (AM. BAR ASS'N, amended 2016) ("An agreement among the shareholders of a corporation . . . is effective . . . even though it . . . eliminates the board of directors . . . ."). More particularly, instead of requiring (as classical corporate law did) that a shareholder's relationship with a company be quantified and largely exhausted by the number of shares owned (an owner of 20% of the common shares of a corporation had a simple right to 20% of the dividends and 20% of the assets left over when the corporation dissolved, and an owner of 40% of the shares owned twice as much as the owner of 20% of the shares), managers and investors have come to be free to create more flexible, more creative structures. *See id.* § 7.32(a)–(f) (listing capabilities of shareholder agreements). Similarly, instead of describing ownership fully by a simple, scalar number of shares, there can be multiple types of shares, each with slightly different risks, rewards, and degrees of organizational control; these different types of shares might appeal to different sorts of investors. *Id.* § 6.02 (permitting a corporation to "classify" shares with different rights).

5. UNIF. P'SHIP ACT § 105(a)(1) (1997) (UNIF. L. COMM'N, amended 2013) (providing that the "partnership agreement" governs "relations among the partners as partners and between the partners and the partnership"). More generally, capital investment in a partnership can be rewarded in ways that simple partnership interests can't fully capture, and creditors of a particular organization may insist on special restrictions on the business's operation that limit their risk. For example, in one of the most famous general-partnership cases, *Martin v. Peyton*, 158 N.E. 77 (N.Y. 1927), creditors of a general partnership had the contractual right to approve or deny new partnership business, along with many other rights touching on the internal governance of the entity. They were nonetheless held not to be partners. *Id.* at 80.

6. For most of this article, I focus on LLCs or refer to *modern legal organizations* more generally. But the LLC, though archetypical in its embrace of "freedom of contract," is not unique in this respect. For example, the modern limited liability partnership (LLP) works very similar to an LLC; it is best understood simply as a parallel type of legal organization with slightly different default rules. *See* UNIF. P'SHIP ACT §§ 1001–03 (1997) (UNIF. L. COMM'N, amended 2013) (laying out rules for a general-purpose limited liability partnership). Modern limited-partnership statutes may provide similar capabilities to LLCs, even if they have in mind a more specific default organizational structure than LLC statutes do. *See* UNIF. LTD. P'SHIP ACT § 110 (2001) (UNIF. L. COMM'N, amended 2013) (permitting the partnership agreement in a modern limited partnership or limited-liability limited partnership to vary the organizational structure considerably). For ease of exposition, and without loss of generality, my primary examples come from LLC statutes, which are as a general matter sufficiently flexible to allow LLCs to emulate all other modern business forms. *See infra* Section III.B.

7. *E.g.*, Susan Kalinka, *Assignment of an Interest in a Limited Liability Company and the Assignment of Income*, 64 U. CIN. L. REV. 443, 447 (1996) ("An LLC is an unincorporated business organization that has both corporate and partnership-like characteristics.").

8. Consequently, LLC law allows contracts to become "viral" in some sense, spreading themselves to new

be conceived as an agreement that can programmatically assume and apply these legal rights and powers. Moreover, because interests in modern organizations are deemed by statutes to be personal property, the statutes allow a layer of property interests to be inserted into transactions that otherwise could not benefit from property law. The result of all these capabilities is that the new organizational structures put significant pressure on other areas of law, potentially preempting many of the familiar restrictions of (for example) property law and the notion of legal personhood itself.

For example, as I have shown in prior work,[9] modern business entities are sufficiently flexible to give legal personhood, or a very close surrogate of it, to software and to many other systems that are not currently recognized as legal persons. (A legal entity can be controlled by a dog, so long as the operating agreement specifies conditions that the dog can trigger.) But this is just one example of the power of modern legal entities; this article explores others that have yet to be considered.

For example, modern business entities can cement the control of an individual or small group and can help to establish the sort of "dead-hand control" that property law attempts to limit. They may also raise problems for some leading conceptualizations of property law—for example, the *numerus clausus* principle popularized for use in the common law by Thomas Merrill and Henry Smith.[10]

This Article explores and largely defends new capabilities like these. Though flexible modern organizational entities are something new and not well known to the conventional legal system, they are not necessarily threats to be eliminated. Though "freedom of contract" has slipped in meaning from "freedom of internal organizational governance" to "freedom to create an entity that can develop legal relationships governed solely by contract" or even "freedom of an entity from ongoing governance by identified human beings," and though this may be a relatively large step, I am optimistic that the legal system can adapt appropriately, just as it has adapted to prior innovations in business law.[11] Indeed, this article's main prescriptive call is for explicit recognition of organizations' increased flexibility and simplification in other areas of law, rather than for a curtailment of business entities. For example, dead-hand control may be a problem, but it should be addressed in organizational statutes directly rather than through a series of overly complicated, incomplete, and formalistic doctrines in the law of property.

In short, this Article paints a picture of optimism and flexibility, even in the face of an unexpected tidal change in the structure and role of business organizations. This picture of optimism proceeds as follows. In Part II, I explain the basic changes from classical to modern organizational law, as demonstrated in corporations, partnerships of various types, and eventually LLCs. As suggested above, the shift is from a rigid governance structure involving appointed individuals to a flexible governance structure involving appointed individuals to an even more flexible structure that makes appointed individuals superfluous. The change is not just statutory; it is cultural and backed by judicial policies. For example, when this principle has been tested in common-law cases, the modern decisional tendency is to affirm the superfluity of identified human managers—or at least

contracts. *Cf. generally* Note, *On Enforcing Viral Terms*, 122 HARV. L. REV. 2184 (2009) (discussing individual "viral" terms in licenses and contracts).

9. For examples, see sources cited *infra* notes 59–60.

10. For a discussion of the *numerus clausus* principle, see *infra* note 106 and accompanying text.

11. *See infra* notes 162–163 and accompanying text.

to limit their power in favor of agreements.[12]

In Part III, I survey and analyze several specific implications of these changes as a matter of theory and practice. In particular, I consider areas of private law that modern business law effectively supplants or at least substantially complicates. This part of the Article introduces two loose categories of transactional techniques to demonstrate the capabilities of modern legal organizations—first, those that arise from the ability of an operating agreement to direct an entity without ongoing human oversight, and second, those that take advantage of business law's interaction with property law and its creation of property interests. Part III also discusses a variety of other novel applications of modern legal organizations that are hard to categorize.

Part IV attempts to draw general lessons from the analysis within Part III, and it highlights areas where further oversight and modifications to LLC statutes may be needed. The general conclusion of Part IV is that, though singular unifying normative principles are hard to come by, we would do well to recognize outright the abilities of modern business law, embrace them to some extent, and regulate them directly when appropriate rather than relying on a patchwork of outdated rules from property law, contract law, trust law, and so on. It also argues that all traditional forms of entity and trust are redundant when there exists a single, polymorphic form of entity (the LLC) that is capable of fulfilling all their functions.

If agreement is to become the foundational mechanism of business governance, however, more attention needs to be paid to such potential problems as the drift over time between an agreement and the circumstances that it governs—a problem suggested but never comprehensively addressed by more traditional corporate law.[13] Doctrines and techniques derived from the law's experience with organizational governance—such as a significant body of caselaw aimed at upholding the reasonable expectations of the parties within a closely held corporation—may be appealing and adaptive. Given business entities' ability to hide ownership, statutes and regulations outside the context of internal organizational governance may wish to track natural-person nominees of entities more directly in public records and reconsider their accountability under civil and criminal laws.[14] These problems are nontrivial, but they appear tractable; indeed, they are perhaps surprisingly small given the extent of the changes in organizational governance over the last half century.

In the end, conventional regulation can solve relatively conventional problems, whereas little needs to change in the law of organizational governance itself. In particular, nothing appears to be wrong with the Anglo-American notion that governance law should address governance problems and need not otherwise concern itself with extra-organizational regulation.

12. *E.g.*, VGS, Inc. v. Castiel, No. C.A. 17995, 2003 WL 723285, at *1 (Del. Ch. Feb. 28, 2003) (holding that the person who had the power to appoint an entity's "Board of Managers" retained power to control the entity even when the appointed Board of Managers attempted to overthrow them).

13. *See infra* Part IV.

14. Congress has very recently moved in this direction. *See* Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019).

II. An Introduction to Modern Legal Business Entities

A. A Brief History of Legal Organizations

In English law, legal organizations start out as simple creatures. The common-law world can trace its basic organizational structures to three separate developments—the rise of general partnerships through the common law of agency,[15] the invention of the trust,[16] and the introduction and increased flexibility of chartered corporations.[17] The further modern American landscape of organizational law builds on these structures and borrows some, such as the limited partnership (based specifically on the French *société en commandite simple*—"basic sponsorship company")[18] and the LLC (based more loosely, and more debatably, on the German GmbH, or *Gesellschaft mit beschränkter Haftung*—"company with limited liability"),[19] from civil-law systems.

Importantly, as a matter of classical common law, partnerships were not legal entities—they were descriptions of relationships among people and between people and property.[20] It was not until the 1900s that a partnership could act legally in its own name;[21] instead, a "partnership," much like a "friendship," was just the description of a relationship.[22] That is, a classical common-law partnership did not act for itself or enter contracts as a principal; individual partners, who were in private agreement, acted on behalf of each other, and a partnership was said to be the result. As a non-entity, the partnership could not sue or be sued except through clunky procedural techniques: all partners could sue or be joined as defendants, pursuing or defending an action in their own names.[23] Partnerships could not, originally, own property; partners simply held the property as fiduciaries for one another, though eventually the odd tenurial innovation of "tenancy in partnership" arose as an administrative simplification.[24]

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15. *See* CHRISTOPHER ANGLIM, JOINED IN COMMON ENTERPRISE: A BIBLIOGRAPHY ON THE ORIGINS OF EARLY ANGLO-AMERICAN PARTNERSHIP LAW 251–54 (2005) (describing this early development).

16. For background on the history of trusts, which are for the most part outside the scope of this Article except as an occasional analogy, see 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 1.1 (6th ed. 2019).

17. *See, e.g.*, John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 663–69 (1926).

18. Donald J. Weidner, *The Existence of State and Tax Partnerships: A Primer*, 11 FLA. ST. U. L. REV. 1, 47–49 (1983).

19. *See* Steven C. Bahls, *Application of Corporate Common Law Doctrines to Limited Liability Companies*, 55 MONT. L. REV. 43, 46–50 (1994) (tying the origins of LLCs to the GmbH); *but see* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 468 n.230 (1998) (referring to a "historiographic debate over the LLC's history; did the LLC evolve from the civil law *limitada* or GmbH").

20. *See* A. Ladru Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377, 377–79 (1963) (discussing the "common law aggregate doctrine").

21. *See id.* at 382–85 (documenting increased entity-like capabilities for general partnerships under the Uniform Partnership Act of 1914).

22. *Cf.* JAMES D. COX & MELVIN ARON EISENBERG, BUSINESS ORGANIZATIONS 99 (12th unabridged ed. 2019) (reporting that before the adoption of the Revised Uniform Partnership Act, which recognized partnerships as entities, "it was sometimes put . . . that a partnership was no more a legal entity than was a friendship").

23. *See* Jensen, *supra* note 20, at 382–85 (discussing civil-procedural mechanisms for suing partnerships).

24. *See* UNIF. P'SHIP ACT § 25(2) & cmt. (UNIF. L. COMM'N 1914) (discussing tenancy in partnership).

Though identifying various organizations (like towns or churches) as distinct legal entities has a long and complex history,[25] recognizable business corporations are relatively recent in the common-law world. Even as of the late 1600s, there were only a handful of individually chartered joint-stock companies.[26] Initially, corporations were chartered by individual legislative acts to accomplish legislatively identified purposes.[27] Eventually, policymakers appear to have become comfortable enough with the corporate form to let corporations do more than build a bridge or engage in specified shipping, and in the 1900s the general-purpose business corporation rose to dominance in the United States.[28]

As late as the mid-1900s, however, the internal structure of the corporation was still rigidly prescribed by statute. While business corporations could engage in "any lawful activity,"[29] and while the notion of acts *ultra vires* ("beyond the powers of") the corporation diminished and eventually disappeared,[30] a corporation remained a specific, known type of entity with a group of shareholders and a board of directors. The shareholders met at least annually under statute;[31] the board had a particularly envisioned structure, with a minimum of three members;[32] each group had particular powers derived from the statute;[33] and courts developed doctrines of fiduciary duties to prevent abuses. Anyone could look at a corporation and know how it was to be governed; the list of shareholders and identity and election dates of the current directors would almost entirely exhaust what there was to know about the legal governance structure of a corporation. Historically, attempts to depart from this structure were prohibited by the courts[34] although eventually structures like voting trusts, which allowed shareholders to reconfigure some of their rights among themselves, became permissible under particular conditions.[35]

In the second half of the 1900s, two apparently unrelated trends in partnership law

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25. Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 WM. & MARY L. REV. 447, 467 (2001); *see also* Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 107–08 (1888).

26. *See* Williston, *supra* note 25, at 109–10 (listing the East India Company, the Royal African Company, and the Hudson Bay Company as the only joint-stock companies in 1692).

27. *Id.* at 111–20.

28. The first general-purpose corporate statute in the United States—that is, the first state statute permitting private parties to organize corporations for general private purposes—appears to be Connecticut's in 1837. Delaware's general-purpose corporate statute did not appear until the late 1800s, but by 1900 nearly all states had adopted a similar statute. Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 258–65 (1976). It was not until the 1900s that the corporation, as a general-purpose private vehicle, became the dominant American business form. For more on the history of the American business corporation, see HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937 (1991) and Dewey, *supra* note 17.

29. *See* Michael A. Schaeftler, *Ultra Vires—Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81, 89, 89 n.33 (1983) (collecting period statutory sources).

30. *See generally id.* (describing the downfall of the *ultra vires* doctrine).

31. *See* MODEL BUS. CORP. ACT § 26 (AM. BAR ASS'N 1950).

32. *Id.* § 34.

33. *See id.* §§ 14–37.

34. *See* COX & EISENBERG, *supra* note 22, at 533 (describing early difficulties enforcing voting trusts and similar arrangements to depart from the classical corporate structure); *see, e.g.*, Warren v. Pim, 59 A. 773, 789 (N.J. 1904) ("Any arrangement that permanently separates the voting power from stock ownership nullifies, to the extent of the stock involved, the annual submission of the question of the management of the company to the stockholders.").

35. MODEL BUS. CORP. ACT § 32 (AM. BAR ASS'N 1950).

and corporate law ended up radically changing this state of affairs. First, partnerships increasingly became legal entities, empowered to act (that is, enter contracts or own property) in their own names.[36] Partnerships had always been relatively flexible in governance structure, but in the 1900s that flexibility began to characterize organizations that came to be treated as legal entities rather than only informal assemblies of people in business with each other.[37] In the early 1900s, entity status for partnerships was an academic idea that essentially failed to win the debate at the drafting of the Uniform Partnership Act of 1914;[38] the Revised Uniform Partnership Act of the 1990s reversed the position of its predecessor,[39] and by the early 2000s the majority of states recognized partnerships as legal entities.[40] Second, corporation statutes began to grant more organizational flexibility to corporations—increasing the possibilities for, initially, binding voting trusts and agreements among shareholders and culminating in possibilities for different classes of shares and novel organizational structures, such as corporations without a board of directors.[41] This trend reached its peak in the adoption (in 1977) and eventual widespread use (by the 1990s) of limited liability companies (LLCs).[42]

As a result, what was once thought of as a "deviant" structure of control for legal entities[43] is now essentially uncontroversial—blessed by LLC statutes as part of people's freedom to structure their own affairs.[44] The progression is from established forms of organizational governance (e.g., a board of directors elected by shareholders at annual meetings) to private agreement that directs the operation of legal entities.

To be clear, what I am describing is only a trend and only a spectrum. Throughout this Article I draw a distinction between classical and modern organizations—classical

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36. *See* Jensen, *supra* note 20, at 381–87 (discussing the rise of the "entity" view of partnerships).

37. *Id.*

38. *Id.*

39. *See* REVISED UNIF. P'SHIP ACT § 201(a) (1997) (UNIF. L. COMM'N, amended 2013) ("A partnership is an entity distinct from its partners.").

40. Today, the vast majority of states have adopted RUPA. *See Partnership Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=52456941-7883-47a5-91b6-d2f086d0bb44 [https://perma.cc/H96P-LBWJ].

41. As a leading treatise for business-law practitioners nicely puts it:

> Courts were once reluctant to validate these agreements precisely because they resulted in too great a deviance from the standard model of corporate governance. For example, shareholder agreements were struck down because they restricted the discretion of the board of directors or attempted to treat the corporation as a partnership. Increasingly, courts and legislatures are recognizing the necessity and legitimacy of shareholder agreements. Legislatures have enacted special provisions that permit closely held corporations to deviate from the corporate norm, and courts have shown less hostility toward shareholder agreements. In fact, these statutes essentially sanction the creation of "incorporated partnerships," allowing shareholders to take advantage of the internal flexibility of less formal associations while preserving the corporate benefits of continued existence, transferability of shares, and the ability to hold property and enter into contracts as a distinct legal entity.

ZOLMAN CAVITCH, 9 BUSINESS ORGANIZATIONS WITH TAX PLANNING § 114.01 (2019).

42. *See* Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 921–25 (2005) (describing this recent history).

43. *E.g.*, James S. Covington, Jr., *The Tennessee Corporation Act and Close Corporations for Profit*, 43 TENN. L. REV. 183, 192 (1976) ("[S]ome legislatures apparently feel that outsiders dealing with the corporation and nonowner employees should be given notice that the corporation is permitted to conduct and intends to conduct its management in a deviant manner.").

44. DEL. CODE ANN. tit. 6, § 18-1101 (2016).

organizations of particular known forms and modern organizations, exemplified by the LLC, of unlimited flexibility. But the classical organization never existed in their pure forms; corporations could always be varied in at least small ways by amending the corporation's charter, and innovations such as classified stock, staggered boards of directors, voting trusts, and shareholder agreements complicated the simplicity and predictability of the classical corporation considerably. Moreover, partnerships were always quite flexible. But for ease of exposition, it will be useful to contrast rigid organizational forms, which I call *classical organizations*, from flexible (or what I call *modern*) ones. The hyper-flexibility of the LLC is a modern innovation.

B. *The Information-Theoretic Content of Legal Organizations*

One way to understand the variety of, and change within, legal organizations is to analyze them from an informational perspective. As a matter of information theory, the clear trend of the 1900s and 2000s is toward the permissibility of informational complexity in the governance of legal organizations. In other words, the classical, paradigmatic forms of entity can all be described by relatively few bits of information, whereas modern legal organizations are of arbitrary and increasing complexity.

Complex legal rules defy reduction to simple information-theoretic propositions, but it is helpful to use a simple model to compare, roughly, the informational content of the governance structure of (1) the classical corporation, (2) the classical partnership, and (3) modern, more flexible entities. Informationally speaking, the classical corporation is the simplest of the commonly used legal organizations. The straightforward reason for this is that a shareholder's relationship, *qua* owner, to a corporation is characterized by a single scalar value: the classical corporation has a single class of shares, and an owner's relationship to the entity is fully described by the number of shares that the owner owns.[45] Of course, legal persons that are shareholders in a classical corporation can interact with such a corporation in more than one way; they might be a shareholder and an employee or

45. For ease of exposition in this informational discussion, the text refers to, and counts, scalar values or real numbers. Obviously, a single real number of infinite precision can accommodate an unlimited amount of information—that is more or less the definition of a real number. *See* L.D. Kudryavtsev, *Real Number*, ENCYCLOPEDIA OF MATHEMATICS, https://encyclopediaofmath.org/wiki/Real_number [https://perma.cc/LQ6P-HTB7] ("[A] real number is any infinite decimal expansion with a plus or a minus sign."). But envisioning numbers of infinite precision does not permit comparisons: everything can be expressed in a single real number, and thus everything appears to be equally complex. The simplest way forward is to recognize that in the real world, numbers of only limited precision are stored. For example, modern computers use the IEEE Standard for Floating-Point Arithmetic (IEEE 754) to store what are called "floating point" numbers. In practice, only a little precision in the fractional part of real numbers is necessary to reflect actual ownership in the vast majority of business entities. Reported cases show disputes over hundredths of a percentage of a company's equity stock—see, for example, Manitaras v. Beusman, 868 N.Y.S.2d 121, 122 (N.Y. App. Div. 2008) ("The plaintiff owns either 49.74% or 49.89% (the parties differ as to the precise figure) of the [LLC at issue in the case].")—but that is rare, and in any event, it would be an exceedingly rare case where parties disputed millionths or billionths of shares or percentage points in ownership of an entity.

Under the widely used IEEE 754 standard, a 16-bit binary number can store more than enough decimal places to represent commonly used numbers of shares or percentages of ownership in legal organizations. Accordingly, when I refer to a "number" in the text, a decently approximate guide would be to imagine 16 bits of storage on a concrete, real-world computer. Numbers conceived in this way can be easily compared: storing two numbers (of the same capacity for precision) takes up as twice as much space (i.e., 32 bits) as storing a single number (i.e., 16 bits).

a shareholder and a creditor, but it is only their relationship as owner—that is, their participation in internal governance—that matters if the goal is to analyze the structure of internal governance. Thus, a single scalar value (that is, a single real number) appears to exhaust nearly all of the relationship between an owner and the classical corporations that they partially own.

A small amount of additional information is necessary, however, to exhaust fully the governance relationship between a classical corporation and its shareholders, and that is simply the list of the current composition of the corporation's board of directors. The internal governance of a classical corporation recognizes only two types of status: shareholder and director.[46] In the classical corporation, directors were all elected at once every year, so no further information about how long someone had been a director would have been necessary to characterize that person's role in internal governance.[47]

For each owner or operator of a corporation, a single numeric value (plus a single bit of information indicating director status) is sufficient to exhaust the owner or operator's governance relationship with a classical corporation specifically because the corporation adopts a singular view of shareholders: all shares confer an equal vote, an equal right to dividends, and an equal claim to the residual assets of the corporation. Indeed, until the early 1900s, the corporation's value was understood simply as the amount of capital that had been contributed, as recorded in the list of shareholders.[48]

Partnerships developed at common law could be governed by individual agreement, but the default, canonical general partnership embodied in the statutory defaults of the Uniform Partnership Act of 1914 and the Revised Uniform Partnership Act of the 1990s is moderately—but only moderately—more complex than a classical corporation. Several different variables are needed to express a partner's "share" of a partnership because the statutes disaggregated several dimensions of that ownership: partners were conceived as having a share of profits, a share of losses, and a capital account, and these might all vary from one another. For example, a labor partner might have a 50% share of profits, a 0% share of losses, and no capital contribution, whereas a capital partner might have a 50% share of profits, a 100% share of losses, and a capital account worth $100,000 that would take priority over claims by the labor partner on the partnership's assets at dissolution.[49] The partner's share of voting power may be independent of all these other figures.[50]

46. *E.g.*, MODEL BUS. CORP. ACT §§ 26, 33 (AM. BAR ASS'N 1950).

47. The classical corporate board used "straight" elections in which all directors were elected and re-elected at once, much like the United States House of Representatives. "Staggered" boards elect and re-elect only some directors each year, much like the United States Senate. *See* Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 895 n.20 (2002) ("Among the approximately 2500 companies in the Investor Responsibility Research Center (IRRC) database, the first staggered board appeared in the company now known as Equifax in 1920."). Staggered boards appear occasionally in cases from the mid-1900s but were not popular until the 1980s. *Id.* at 895.

48. *See generally* Herbert J. Hovenkamp, *Regulation and the Marginalist Revolution*, PENN L.: LEGAL SCHOLARSHIP REPOSITORY (May 29, 2018), https://scholarship.law.upenn.edu/faculty_scholarship/1984 [https://perma.cc/D78X-S58K].

49. *See* REVISED UNIF. P'SHIP ACT § 401(a) (1997) (UNIF. L. COMM'N, amended 2013) (establishing a capital-accounting mechanism in general partnerships); *Id.* § 401(b) (establishing defaults for partners' shares of profits and losses); *Id.* § 807 (establishing default procedures for residual claims to a general partnership upon dissolution).

50. *See id.* § 401(k) (establishing default procedures for voting on the "ordinary course of business of a partnership").

Several other numbers may be necessary to describe fully a partner's ownership of a general partnership because classical partnerships could be somewhat complex,[51] so the comparison to classical corporations admits of no great precision, but the point is that a partnership is at least roughly an order of magnitude more complex than a classical corporation in terms of the information required to characterize fully the relationship between owners and the business entity.

By contrast, a modern legal organization—for example, a general partnership that takes advantage of the Revised Uniform Partnership Act's (RUPA's) flexibility, or a modern general-purpose LLP or LLC—is infinitely complex. It is virtually impossible to characterize, for example, an LLC in the same manner as a prototypical corporation or simpler, classical partnership. Under most LLC statutes—including the Uniform Law Commission's Revised Uniform Limited Liability Company Act (RULLCA)—an LLC may be member-managed or manager-managed, which means it may, even as a matter of a statutory default framework, start out by resembling *either* a partnership (in which owners participate directly in management) or a corporation (in which owners participate only through their power to select or deselect managers).[52] Even given these statutory defaults, the entity can be structured however the parties see fit. RULLCA recognizes this flexibility in providing, for example, that members should not be deemed to be agents of an LLC merely by being members, noting in a comment that third parties have no idea about the internal-governance arrangements of an LLC because "variability of management structure is a key strength of the LLC as a form of business organization."[53]

It is worth at least an observation that this natural trend in organizational law toward complexity serves as a descriptive institutional counterexample to a growing notion in legal commentary that business parties demand informational simplicity because informational complexity is a transaction cost.[54]

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51. For example, separate rules could govern acts outside the "ordinary course of business of a partnership." *Id.*

52. REVISED UNIF. LTD. LIAB. CO. ACT § 407 (2006) (UNIF. L. COMM'N, amended 2013) (outlining different procedures for member-managed and manager-managed LLCs).

53. *Id.* at Prefatory Note.

54. *See, e.g.*, Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 971–72 (2004) (laying out an "information-cost theory" for understanding the law of nuisance); Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401 (2009) (using information costs to argue for standardization of forms of contracting).

C. Summary

The modern state of play in organizational law, then, is as follows: any legal person may create an organization, which will have independent status as a new legal entity.[55] The organization may have any lawful purpose, whether for-profit or not.[56] The organization's operating agreement may direct the structure and internal affairs of the organization.[57] The organization may last forever.[58] These basic characteristics, when combined in creative transactional ways, yield the novelty that the next Part of the Article describes.

III. THE CAPABILITIES OF MODERN LEGAL ORGANIZATIONS

This Article's main descriptive observation and main new theoretical insight is that the increased complexity and flexibility of modern legal organizations gives them new capabilities that are not widely understood. It is one thing to recognize that an LLC or other modern legal organization enables "freedom of contract" in organizational structure. But that notion plays out in ways that are unexpected and may seem radical, because flexibility of organizational structure coupled with legal personhood and the interposition of personal-property interests provide immense transactional generativity, permitting the organizers of business entities the latitude to circumvent apparent restrictions in other areas of law.

This Part describes several specific capabilities of modern legal organizations. In one sense, it acts as a sort of blueprint for transactional planners. It will, of course, also be necessary to understand these techniques in order to figure out how modern legal entities should be regulated, given their new capabilities.

This Part first considers the consequences of legal organization that can be controlled entirely, or almost entirely, by agreements—effectively, by contracts that have the incidents of legal personhood. It then surveys a variety of other capabilities that result mainly from the interaction between legal organizations and the property-law regime.

A. Legal Entities Controlled Only or Mainly by Agreement

Perhaps the most conceptually novel set of capabilities of modern legal organizations arises from the combination of (1) the notion of organization as "legal entity" with (2) the unlimited flexibility of an operating agreement. This combination gives agreements the power to take new legal actions in their own right—what I have called "a very close surrogate of legal personhood."[59]

1. Empowering Algorithms

In previous work, I have laid out a transactional technique through which software systems—indeed, any algorithm, however it is implemented—can achieve the practical

55. REVISED UNIF. LTD. LIAB. CO. ACT § 108(a)–(b) (2006) (UNIF. L. COMM'N, amended 2013).

56. *E.g.*, *id.* § 108(b) ("A limited liability company may have any lawful purpose, regardless of whether for profit.").

57. *E.g.*, *id.* § 105 ("Except as otherwise provided . . . the operating agreement governs . . . the activities and affairs of the company and the conduct of those activities.").

58. *E.g.*, *id.* § 108(c) ("A limited liability company has perpetual duration.").

59. Shawn Bayern, *Are Autonomous Entities Possible?*, 114 NW. U. L. REV. ONLINE 23, 24 (2019) [hereinafter Bayern, *Possible*].

capabilities, if not the formal incidents, of legal personality.[60] This section does not rehash that work or the reactions to it; it simply lays out the possibility as background, because understanding it will inform the novel techniques I present in the remainder of this Part.

The transactional technique that I have described to enable algorithmic personhood (or at least a very close substitute for it) depends on two basic propositions, neither of which is obvious but both of which follow from the statutory structure of modern business entities and background legal principles. The first proposition is that, because agreements and other legal instruments can condition obligations and other binding terms on external states of the world, agreements can "recognize" the verifiable state of algorithms.[61] As a mundane and familiar example of the use of contractual conditions, a contract to buy a house might condition the buyer's obligation to purchase the house on the buyer's satisfaction, in good faith, with an inspection.[62] More innovatively, the same sort of contract could condition the buyer's obligations on the verifiable output of an algorithm (such as, in a simple case, a software system designed to aggregate home-inspection data). I have described extensively in previous work how the use of contractual conditions can lead, for example, an LLC's operating agreement to permit an algorithm to make all internal decisions for an LLC.[63]

The second proposition is more controversial: it is that the LLC statutes permit LLCs to enter a persistent state in which the LLC has no members and is governed, as an internal matter, only by the operating agreement—not by a potential vote or participation of members as owners. Though this characterization of the LLC statutes is more controversial, I have demonstrated that it is a correct description of modern statutes in recent work.[64] Perhaps even more importantly, however, LLC acts permit LLC operating agreements to

60. *See generally id.* (defending the legal soundness of autonomous entities); Shawn Bayern, *Algorithm, Agreement, and Agency*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS 153 (Woodrow Barfield ed., 2020); Shawn Bayern, *Artificial Intelligence and Private Law*, *in* RESEARCH HANDBOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE 144 (Woodrow Barfield & Ugo Pagallo eds., 2018); Shawn Bayern, *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, 19 STAN. TECH. L. REV. 93 (2015); Shawn Bayern, *Of Bitcoins, Independently Wealthy Software, and the Zero-Member LLC*, 108 NW. U. L. REV. 1485 (2014).

61. I use the term *verifiable* in a manner consistent with its use in modern economic contract theory—that is, that the state be provable to a court. For a description and critique of this pillar of economic contract theory, see Hans Lind & Johan Nyström, *The Explanation of Incomplete Contracts in Mainstream Contract Theory: A Critique of the Distinction Between "Observable" and "Verifiable"*, 7 EVOLUTIONARY & INSTITUTIONAL ECON. REV. 279 (2011).

62. It is common for the express terms of contracts for the purchase and sale of real estate to condition the buyer's obligation to purchase the house on the buyer's simple satisfaction, without regard to its objective reasonableness or its motivation in good or bad faith, and for various reasons that is probably what most parties intend. But to avoid the force of largely unmotivated rules from consideration doctrine under classical contract law, courts often imply a requirement that the buyer's satisfaction not be unreasonably withheld so that the buyer's promise under the contract is not taken to be illusory. *See, e.g.*, Mattei v. Hopper, 330 P.2d 625, 627 (Cal. 1958) ("The standard of evaluating plaintiff's satisfaction—good faith—applies with equal vigor to this type of condition and prevents it from nullifying the consideration otherwise present in the promises exchanged.").

63. *See generally* Bayern, *Possible*, *supra* note 59 (describing the legal viability of LLCs without ongoing human internal governance). By referring to "internal decisions," I mean to exclude the sorts of oversight that courts may exercise over LLCs under most acts. For example, RULLCA provides several mechanisms for judicial or administrative dissolution of an LLC. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 701(4)–(5) (2006) (UNIF. L. COMM'N, amended 2013).

64. Bayern, *Possible*, *supra* note 59.

make themselves virtually impossible to amend, as a practical matter—by means of "veto gates" or similar barriers that frustrate attempts by any people who do remain members to alter the agreement—even if individual members remain in the organization.[65] Moreover, formal mechanisms can substitute for memberless LLCs—such as LLCs that own one another—if memberless LLCs are more difficult to set up than I have concluded they are.[66] The upshot is that, practically speaking, an LLC can be put into a state in which the exclusive source of its internal governance is the operating agreement, without any opportunity by "members" or "managers" to amend that agreement.

Consequently, an LLC may be set in motion that is controlled, as a matter of internal governance, solely by software, so long as the software is associated with verifiable states that can be established in court.

2. *Empowering Humans Who Face Legal Restrictions*

Nothing about the technique I have described in the previous section requires that the algorithm that controls an LLC be implemented in software; indeed, an operating agreement may recognize and give legal effect to *any* system with a verifiable state.[67] That system might be a human being who is incapable of entering legal contracts using conventional means, such as a child or someone for whom a legal guardian has been appointed. As a result, modern business entities provide novel transactional flexibility for individuals who face legal restrictions of various kinds.

Consider first people under legal disabilities. Considerable attention has recently focused on the wide gap between, on one hand, adults whom the law treats as fully responsible for their own legal affairs and, on the other, adults under guardianship who have no, or very limited, legal self-determination.[68] The need for guardianship arises in situations where it may be too dangerous to permit someone with diminished capacity, such as a person suffering from Alzheimer's disease or schizophrenia, to retain full legal autonomy; whatever money that person has is subject to being wasted or stolen. But

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65. The term "veto gate" is due originally to McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992). For more recent commentary, see generally William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756 (2015).

66. As a quick demonstration of my argument under the LLC statutes, RULLCA § 701(a)(3) provides that, by default, a memberless LLC will terminate in 90 days. REVISED UNIF. LTD. LIAB. CO. ACT § 701(a)(3) (2006) (UNIF. L. COMM'N, amended 2013). But the structure of RULLCA—and in the most recent edition of RULLCA, the explicit official comment to this section—make it clear that this provision is simply a default rule and can be superseded by the operating agreement. *Id.* § 701 cmt. I have, of course, laid out this argument in far more detail in the sources cited *supra* note 60.

67. In now-classic work on the philosophy of mind, John Searle developed the notion that complex formal algorithms might be implemented directly by humans. John R. Searle, *Mind, Brains, and Programs*, 3 BEHAV. & BRAIN SCIS. 417 (1980). An organization's operating agreement can recognize even considerably less formal "algorithms," and of course nothing in the first place requires that the conditions refer to algorithms at all, rather than just the verifiable state of any system.

68. *See, e.g.*, Eliana J. Theodorou, Note, *Supported Decision-Making in the Lone-Star State*, 93 N.Y.U. L. REV. 973 (2018); Kristin Booth Glen, *Introducing a "New" Human Right: Learning from Others, Bringing Legal Capacity Home*, 49 COLUM. HUM. RTS. L. REV. 1 (2018); Leslie Salzman, *Using Domestic Law to Move Toward a Recognition of Universal Legal Capacity for Persons with Disabilities*, 39 CARDOZO L. REV. 521 (2017); Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111 (2013); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010).

researchers and advocates have identified several problems with removing legal capacity entirely from people, including feelings of helplessness and self-criticism[69] and potential abuse by untrustworthy legal guardians.[70]

There have been recent efforts to bridge this gap. The American Bar Association[71] and some states[72] have promoted models based on the notion of "supported decision making," a general term that includes many different, potentially rich and complex sorts of legal and social arrangements, ranging from the entirely informal to the adoption of sophisticated, durable power-of-attorney instruments.[73] The general notion common to all these techniques is to share decision-making powers between the disabled adult and one or more other supportive people, such as friends and family members. But because those who contract with disabled individuals may be concerned that their contracts will be unenforceable[74]—a concern that may of course be reflected, at least theoretically, in the costs and range of contracting options faced by the disabled individuals—there are downsides to models that leave legal powers in the hands of disabled individuals even if their decisions are socially or legally supported. That is, if an individual (or their future guardian) can challenge prior contracts based on the claim that the individual lacked capacity when the contract was made,[75] the individual may face higher costs, or certain large transactions may practically be unavailable to them—even if their decisions are informally or formally supported by others.

Modern legal organizations provide a new type of potential solution that has not been recognized. Attempts to share control that may be clumsy and unreliable in a durable power-of-attorney document become simpler and more powerful in the operating agreement of a legal organization. As an example, consider an affluent person suffering from mild cognitive impairment who recognizes the impairment, has recently made problematic but legally binding transactions that are small but of increasing concern to her and her family, and has assets worth \$3.2 million and a defined-benefit pension of \$120,000/year. Modern business entities, because of their flexibility, provide several novel options that may balance financial safety, agency costs, and the need for self-determination.

There are at least two different transactional possibilities. The simplest just entails the segregation of assets into a company whose operating agreement limits the formation of contracts and the disbursement of funds. For example, the person in my example above may recognize that she is no longer comfortable managing \$3.2 million outright and potentially risking its loss in a series of what she will later consider to be foolish transactions, but she is comfortable spending her annual pension and recognizes little long-term risk in doing so. She might, accordingly, transfer the \$3.2 million to an LLC in which

69. *See, e.g.*, B.J. Winick, *The Side-Effects of Incompetency Labeling and the Implications for Mental-Health Law*, 1 PSYCH. PUB. POL'Y & L. 6 (1995).

70. *See, e.g.*, Taylor Lemick, Note, *Society's Response to the "Invisible" Abuse of Elders: Understanding and Addressing the Financial Abuse of Society's Most Vulnerable Citizens*, 23 ELDER L.J. 151 (2015).

71. *See Guardianship and Supported Decision-Making*, AM. BAR. ASS'N (Jan. 28, 2021), https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/ [https://perma.cc/G5CG-5PY7].

72. *See* Theodorou, *supra* note 68 (analyzing statutory developments in Texas).

73. *See* Kohn et al., *supra* note 68, at 1121 ("There is no single model of supported decision-making.").

74. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 15 (AM. L. INST. 1981) (discussing the power to void contracts made by people suffering from mental illnesses).

75. *Id.*

she is a member and her children, or some other trustworthy agents, are managers. Of course, this arrangement is fairly conventional; it mirrors traditional trusts and family companies.[76]

A second technique, however, inverts this pattern. It is considerably more innovative and may be more appropriate for adults facing more serious disabilities. Under this second approach, the adult accepts legal guardianship and the loss of personal legal powers that comes with it, but only after having transferred assets to an LLC with an operating agreement that causes the LLC to act subject to conditions that will permit her to retain control over those assets. For example, assuming the same facts as above, the disabled adult may transfer her pension to the LLC and ensure that the LLC has an operating agreement that will cause the LLC to act on her wishes, whatever they may be. Just as an LLC might specify legal conditions based on a nonhuman system, nothing prevents it from operating based on conditions that involve a human being who lacks legal capacity. Accordingly, while the legal guardianship removes the disabled adult's power to act for herself, the LLC restores an ability for the adult to initiate legally binding actions as to the assets placed in the LLC. Those actions are formally on behalf of a distinct legal principal (the LLC), but functionally they serve the adult's interests. The adult cannot modify the operating agreement of the entity both because she is not a member and because the LLC agreement can prevent her from doing so.[77] The consequence is a business entity that exists durably[78] in an immutable state to achieve a particular purpose specified at the time of its creation.

Though it may seem dubious to permit a legal organization to act based on the wishes of someone facing a legal disability, the common law of agency provides specific support for the notion that disabled people may act for other legal persons (including a legal organization) because it recognizes that individuals who lack legal capacity may still have the power to be legal agents as long as they are appointed properly by principals. As the *Restatement (Third) of Agency* puts it, "Any person may ordinarily be empowered to act so as to affect the legal relations of another,"[79] and it observes in a comment that "It is not necessary for an agent, as to the action taken, to have capacity to hold legal rights or be subject to liabilities."[80] The *Restatement (Second) of Agency* was even more explicit as to the rights of disabled people:

> an infant . . . or a person otherwise so incompetent that he cannot bind himself by a contract can bind one who appoints him to make a contract for him. One whom a court has adjudged mentally incompetent but who retains volition, or one who has been deprived of civil rights, has power to affect the principal as fully as if he had complete capacity.[81]

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76. The typical "family limited partnership" or "family LLC" has a different purpose—often a directly inverted one, ensuring parents' control over assets they have transferred to children—but apart from taxation concerns, the legal structure is very similar. *See generally* Courtney Lieb, Comment, *The IRS Wages War on the Family Limited Partnership: How to Establish a Family Limited Partnership That Will Withstand Attack*, 71 UMKC L. REV. 887 (2003) (discussing family limited partnerships).

77. REVISED UNIF. LTD. LIAB. CO. ACT § 105 (2006) (UNIF. L. COMM'N, amended 2013).

78. *Id.* § 108(c) ("A limited liability company has perpetual duration.").

79. RESTATEMENT (THIRD) OF AGENCY § 3.05 (AM. L. INST. 2006).

80. *Id.* cmt. b.

81. RESTATEMENT (SECOND) OF AGENCY § 21 cmt. a (AM. L. INST. 1958).

Accordingly, my general argument about the ability of conditions in an operating agreement to recognize the state of physical systems may not even be necessary to restore limited powers to those under legal guardianship: they could simply be appointed as conventional agents of the legal organization.

Because a business entity can preserve the disabled individual's functional legal capacity as to the particular assets the entity controls, it provides a potentially limitless variety of intermediate options between full legal capacity and outright incapacity. This variety, in turn, makes it more likely that the disabled adult will seek help or defer partial decision-making powers to supportive family members or friends.

This technique may appear to work as a formalistic sleight of hand, enabling a result that contract law specifically opposes by permitting dangerous contracting by those who are severely disabled. But because an individual under guardianship can act only for a legal principal that has been established and funded, and because modern legal organizations provide what is conventionally understood as "limited liability,"[82] the risk is limited and is in theory exactly what the relevant parties desired. That is, the individual under guardianship has control only over limited assets that have been transferred to a distinct company. The possibility of this arrangement may make guardianship—that is, the removal of other legal rights—more satisfactory to a disabled individual.

The same technique, for the same reasons, could grant to children practical control over limited funds.[83] The potential reasons for doing this are as diverse as the circumstances of children and their parents. Maybe it is an educational lesson desired by a parent; maybe it accommodates the entrepreneurial potential of a particular 16-year-old; maybe it is a fair way to provide limited autonomy over funds already earned by a younger child (such as a child actor). Regardless, the availability of the technique for those who desire it seems to provide a limited, structured way to avoid standardized restrictions in contract law. In other words, while children cannot act fully as legal principals in their own right as a formal matter, organizational law permits them to achieve the functional capacities of private-law personhood.

Because this is our first detailed example of the use of business-entity statutes outside a business context, it is important to recognize that the capabilities of business entities to achieve these results has nothing to do with the intent of the business statutes; it was not envisioned by them, and nothing in the statutes directly suggests the use of (for example) an LLC as a mechanism to provide partial formal legal capacity for people who face partial functional disabilities. But the ability to use modern business entities in this way follows from the flexibility of the statutes. It would be exceedingly difficult to prevent; nothing requires, for example, that an LLC earn a profit or be constituted as a traditional business.[84]

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82. *E.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 304(a) (2006) (UNIF. L. COMM'N, amended 2013) ("A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company solely by reason of being or acting as a member or manager. This subsection applies regardless of the dissolution of the company.").

83. Children, of course, face similar legal restrictions under contract law to those faced by disabled adults. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. L. INST. 1981) ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.").

84. *See, e.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 108(b) (2006) (UNIF. L. COMM'N, amended 2013) ("A limited liability company may have any lawful purpose, regardless of whether for profit.").

The abilities to achieve novel transactional ends flow from the flexibility of business-entity structure under modern statutes, which permit a binding agreement that even a single member cannot change.

3. Generalized Commitment Without Third Parties

There is no ability under the conventional common law of contracts for individuals to make legally binding contracts with themselves.[85] There are many reasons to think that such an ability is desirable, however. Some of these reasons are grounded in human psychology. For example, some people may be motivated by formal or enforceable promises (compared to simple statements of present intent) and may use this motivation to help them achieve personal goals.[86] Some, however, may invoke familiar policies of contract law, such as wealth enhancement through commitment to third parties, but their situation lies outside the formal boundaries of conventional contract law. As one example, a business party may wish to make a general enforceable precontractual commitment in order to encourage future contracting, but without the existence of specific contracts it may find it difficult for those commitments to be binding. Or perhaps someone wants to make a guarantee to others but knows, and knows others know, that the guarantee will be very difficult to enforce legally because of the costs of enforcement: perhaps the harm to individual potential plaintiffs is very small, class-action liability is unlikely, or the damages that would be suffered by individual plaintiffs if the guarantee is broken are not legally cognizable.

To address this need, people may create binding promises with "themselves" simply by creating a separate legal organization and then contracting with that organization. The legal organization might have no members and no legal purpose apart from enforcing the obligation. For example, a business that wants to make a guarantee to potential consumers could create an independent organization whose sole purpose is to credibly police the business. Put that way, the technique may not even sound unconventional. For example, it would not be remarkable under a conventional understanding of organizational law for a food manufacturer to establish an independent nonprofit that credibly polices the manufacturer's use of "fair trade" ingredients.[87]

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85. *See* RESTATEMENT OF CONTRACTS § 15 cmt. a (AM. L. INST. 1932) (reporting that contracting with oneself is not possible); 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 27.04 (2015) ("[I]t is not possible for one to make a contract with oneself"); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 1–10, at 17 (3d ed. 1987) ("Every contract involves at least two contracting parties."); B. H. McPherson, *Self-Dealing Trustees*, *in* TRENDS IN CONTEMPORARY TRUST LAW 135, 136 (A.J. Oakley, ed., 1996) ("[A] person cannot make a contract with himself.").

86. For example, law professor Ian Ayres helped develop a company, stickK, that provides online tools to use "data-driven techniques" in the form of commitment mechanisms to "empower behavioral change." *Our Mission*, STICKK, https://www.stickk.com/aboutus [https://perma.cc/DZT7-57BH].

87. A considerably more innovative possibility involves contracting with purpose-built legal organizations in order to give legal effect to multiple personalities that a biological human being identifies with. Some people identify as more than one person without believing the plurality to be a disorder. *See, e.g.*, *Not Plural-Phobic: USPATH Psychiatrist Promotes Transition for Multiple Personalities*, 4THWAVENOW (Dec. 29, 2017), https://4thwavenow.com/2017/12/29/not-plural-phobic-uspath-psychiatrist-promotes-transition-for-multiple-personalities/ [https://perma.cc/QJ9Y-26JX]. In principle, people who so identify may give their various identities a close analogue of legal personhood by setting up different business entities for each of them, each subject to operating agreements that provide access to different assets and capabilities.

B. "Propertization" in Business Entities as a Transactional Technique

Modern legal organizations allow "property" to be created at will in contexts where the treatment of an economically valuable potential right as legal property makes a formalistic difference. This capability provides clever transactional planners with a tool to avoid the empty formalistic force of outdated doctrines. This section considers several techniques that demonstrate this capability; the formalistic doctrines that are effectively overridden involve consideration doctrine in contract law (as applied to strike down otherwise unproblematic commercial transactions), requirements of a secured-transaction regime that collateral be "property," and several restrictions within property law itself. This section's techniques are not necessarily conceptually distinct from each other or from those of the prior section; they occasionally overlap with one another and with a business entity's ability to be controlled entirely by an operating agreement.

1. Avoiding Problems with Consideration Doctrine in Contract Law

The use of legal organizations permits parties to avoid the force of rules in contract law that distinguish donative promises from bargain promises. A background principle of contract law is that promises require consideration, and occasionally this doctrine is used to strike down modifications of contracts in which one party, under pressure, gives concessions to another party without getting anything in return. For example, in *Lingenfelder v. Wainwright Brewery Co.*,[88] an architect who had agreed to draw up plans for a brewery insisted on a higher payment than originally negotiated when he found out that the brewery would not, as he had hoped, award a contract for a "refrigerator plant" to a company with which he was affiliated. The architect had the power to extract this concession because of the "great haste" of the brewery owners to complete the brewery's construction.[89] The court struck down the brewery's promise to pay a 5% commission on the cost of the refrigerator because the brewery received no consideration for that new promise.

As background, consideration doctrine is probably a poor tool to address this sort of economic duress in the first place.[90] For example, had the architect in *Lingenfelder* simply demanded a present payment of money before continuing his work, rather than a promise for a future payment, consideration doctrine would not strike down the parties' new deal because the doctrine reaches only promissory obligations, not executed gifts.[91] But under property law, people can give gifts only of property they already own.[92] So it may be difficult for a party like the brewers in *Lingenfelder* to promise a 5% commission on the future cost of a refrigerator—or, say, a percentage of a revenue stream associated with the brewery's business, if that is what the architect had demanded—without making a promise that would, according to the court, require consideration.

But it would not be difficult to achieve these results by means of custom business

88. Lingenfelder v. Wainwright Brewery Co., 15 S.W. 844, 844 (Mo. 1891).

89. *Id.* at 847.

90. Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1035–36 (1998).

91. *See* Peter Benson, *The Idea of Consideration*, 61 U. TORONTO L.J. 241, 258 (2011) (discussing the tension between a set of legal rules that refuses to enforce promises to gift a gift but recognizes executed gifts).

92. RESTATEMENT (SECOND) OF PROPERTY § 32.2(1) cmt. a (AM. L. INST. 1990).

entities. The brewery could give the architect a membership interest in an LLC—which is personal property under typical LLC acts.[93] The LLC operating agreement, which could have been drafted before the architect had any formal involvement in the LLC and would not raise any problems associated with consideration under contract doctrine, could provide the terms under which members with particular interests would receive payments of money in the future. A gift of an interest in the LLC could then be executed by the owners of the brewery in favor of the architect. The architect winds up with what he wants, including the possibility of future streams of money—funds not presently owned by the brewery—without implicating consideration doctrine.

Indeed, such a simple arrangement probably doesn't require the flexibility of modern organizational law; a classical corporation would be sufficient for the parties in *Lingenfelder* to achieve a similar result. (For example, a 5% interest in a classical corporation could give the architect 5% of the profits associated with a business venture.) But modern legal organizations dramatically expand the capabilities of an executed gift of a present interest in a business. For example, it would be hard under classical corporate law to guarantee a shareholder a stream of a business's revenue, rather than profits, without making a donative promise and thus requiring consideration. (This is because shares in classical corporations entitle owners to shares of dividends and residual claims of the assets of a business, not to revenue.) And perhaps the owners of the brewery wouldn't want to give the architect voting power in their enterprise. Today, it would be unremarkable for an LLC operating agreement to restrict or enhance these attributes of the architect's "ownership" of the entity without implicating consideration doctrine.[94] And it would be unproblematic today to satisfy the architect if his demand were for control rather than for an economic interest.[95]

Modern legal organizations provide the same "solution" to people who attempt bribery of public officials rather than economic duress in the context of private contracts. For example, consideration doctrine has been used to strike down promises to pay public officers for doing their jobs.[96] As with cases of economic duress, consideration doctrine here cannot stop executed gifts of money or, in the modern world, interests in an LLC or other organization.

These results may appear problematic because they permit parties like the *Lingenfelder* architect to benefit even though his bargaining position results from economic duress. Modern contract law, however, is sufficiently flexible to strike down such contracts without using a brittle, formalistic doctrine of consideration.[97] To put it differently, the

93. *E.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 501 (2006) (UNIF. L. COMM'N, amended 2013) ("A transferable interest [in an LLC] is personal property."). "Transferable interest" in turn is defined in RULLCA § 102(24) to be "the right, as initially owned by a person in the person's capacity as a member, to receive distributions from a limited liability company, whether or not the person remains a member or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned." *Id.* § 102(24).

94. Indeed, RULLCA explicates this point even if it were not clear from the structure and timing of the adoption of LLC operating agreements alone. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 401(d) (2006) (UNIF. L. COMM'N, amended 2013) ("A person may become a member without . . . making or being obligated to make a contribution to the limited liability company.").

95. *Cf. id.* ("A person may become a member without . . . acquiring a transferable interest").

96. *See generally* Gray v. Martino, 103 A. 24 (N.J. 1918).

97. *Cf.* Eisenberg, *supra* note 90, at 1035–36; Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533 (N.Y. 1971) (striking down an executed transfer on grounds of economic duress).

expanding capabilities of modern legal organizations, and increasing recognition for them, merely puts appropriate pressure on contract law to avoid relying on the inapposite doctrine of consideration to prevent duress and bribery. Instead, duress and bribery should be prevented directly; the problem with payments based on those types of wrongdoing is not that they are gifts without consideration but that their enforcement is simply undesirable on moral and instrumental grounds. The problem is not with organizational law; that is, these cases do not provide a weighty reason to restrict the flexibility of LLC interests. Courts should, and can, simply rescind gifts of such interests, like gifts of anything else, when they are extracted wrongfully or in ways that violate public policy.

Importantly, nothing requires a business context for business entities to work in this way. That is, though my example involving the *Lingenfelder* case happens to involve business parties, the rule in contract law requiring consideration is general: it refuses to enforce promises without consideration, meaning that simple future gifts of property that a donor does not currently hold are unenforceable. For example, an uncle who owns a valuable car cannot donatively commit, by means of contract law alone, to permit his nephew to drive the car on weekends. (Such a promise would lack consideration and—without some other factor, like reliance[98]—be unenforceable.) But the uncle can create a business entity, transfer the car to that entity, gift a property interest in the entity to the nephew, and structure the entity's operating agreement so that the nephew has permission to drive the car on the weekends. The force of the consideration doctrine is thus circumvented by clever transactional use of modern entities.

2. *Interposing a Property Interest Where the Law Does Not Recognize One*

Principles for a Data Economy, a joint effort by the American Law Institute and the European Law Institute,[99] is a forthcoming academic and professional treatise designed to advise policymakers and commercial parties about transactions in data. For example, the principles that govern a transaction in data may raise different legal and practical questions than those that govern the sale of the hardware on which the data is stored. Data is valuable in its own right and is the subject of increasingly significant private contracts.

One innovation of the *Principles for a Data Economy* project is to address a novel commercial need to use the right to access or process data as security for a loan. For example, the main economic asset of a company may be its access to a valuable source of consumer data; the least costly way for the company to obtain financing might be to secure a loan with its access to such data. The familiar basis of a secured transaction is to secure it with legal property; for example, under Article 9 of the Uniform Commercial Code, collateral is defined as "*property* subject to a security interest."[100] So what is the business to do if its right to access, process, or control data is not formally a "property" right under local property law?

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98. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1981) (laying out the modern doctrine of promissory estoppel).

99. *See Principles for a Data Economy*, AM. L. INST., https://www.ali.org/projects/show/data-economy/ [https://perma.cc/8K8Z-4P8F]; *Principles for a Data Economy (with the ALI)*, EUR. L. INST., https://www.europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/data-economy/ [https://perma.cc/4XWW-8PNJ].

100. U.C.C. § 9-102(12) (AM. L. INST. & UNIF. L. COMM'N 2002) (emphasis added).

The current draft of the ALI/ELI *Principles* project has a nice solution to this problem: it encourages legal regimes governing secured transactions to permit security in economic assets associated with data rights without regard to whether those rights are "property" interests under local law. In other words, property doctrine is probably beside the economic point. But modern organizational law provides an alternative path without requiring any change in the law. If the secured-transaction regime formalistically requires "property," LLC law can create property that serves whatever role the regime requires.

For example, RULLCA defines an interest in an LLC as "personal property."[101] So to satisfy UCC's Article 9 or a similar secured-transactions regime that requires collateral to be property, a company with rights to valuable data might simply (1) create an LLC whose operating agreement specifies the relevant, economically valuable control over data; (2) cause the operating agreements to recognize various "transferable interests"[102] in the resulting legal entity; (3) pledge those interests as security for a loan. The formal problem raised by a formalistic secured-transaction regime is solved by formalistic smoke and mirrors.

This capability of LLCs seems to raise no problems at all, except perhaps for those who believe the formalism of property law creates a delicate balance in private law that should not be disturbed. It is hard to take that concern seriously as a functional matter, given what appears to be legitimate commercial needs for those with an economically valuable asset to secure financing.

101. REVISED UNIF. LTD. LIAB. CO. ACT § 501 (2006) (UNIF. L. COMM'N, amended 2013).

102. *Cf. id.* §§ 102(24), 501.

3. *Avoiding General Restrictions Within Property Law*

Property law seeks to impose various restrictions on the transfer of property. Among general lawyers, the best-known of these restrictions is probably the rule against perpetuities,[103] mainly because of that rule's notorious complexity.[104] Other restrictions include the law's prevention of unreasonable restraints on the alienation of property[105] and the inability to impose covenants that run with personal property.[106] Simple transactional techniques using modern legal organizations threaten to circumvent most or all of these restrictions.

i. The Rule Against Perpetuities

Consider first the rule against perpetuities. The traditional formulation of the rule is that, when evaluating a transferred interest of property, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[107] Under the classical rule, a purported transfer of a house to the owner's first grandchild to reach the age of thirty is invalid at the outset if the owner currently has no grandchildren, because the terms of the conveyance do not create a vested interest in the house within the rule's permissible period.

A homeowner desiring to make such a transfer on exactly those terms, however, could simply convey the house to an LLC and adopt, for the LLC, an operating agreement that (1) gives a license for the use of the house (rather than a present possessory interest in the house) to the owner's first grandchild to reach the age of thirty; (2) permits the LLC to sell the house on the condition (and only on the condition) that the owner's first grandchild to reach the age of thirty approves the transfer;[108] (3) and directs the proceeds of such a sale to that grandchild. Such a transaction probably does not create contingent interests in property subject to the rule against perpetuities; instead, it immediately creates a vested interest in the LLC, and the use of the property and conditions of its sale are then simply subject to the LLC's operating agreement.

I have claimed only that such a scheme "probably" succeeds in avoiding the rule

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103. The purposes of the rule against perpetuities have been debated, but the leading treatise classifies it as one of many possible restrains on the alienation of property. *See* 10 POWELL ON REAL PROPERTY § 72.01 (2020) ("In most American cases, this common-law rule had its chief importance as a social regulation of the creation of future interests, but the social policy embodied in the rule is, both historically and presently, broader than this. Parts of this basic policy have found independent development in the part of our law known as 'restraints on alienation.'").

104. *See, e.g.*, Lucas v. Hamm, 364 P.2d 685, 686 (Cal. 1961) (holding that the rule against perpetuities is so difficult to understand that failing to draft a will appropriately in view of the rule does not constitute legal malpractice).

105. *See* 10 POWELL *supra* note 103, § 77.02 (2021) ("Any provision that, without qualification, undertakes to deny to the conveyee of a legal estate in fee simple the power to alienate the acquired estate is invalid."); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 4.2 (AM. L. INST. 1987) (invalidating unreasonable restraints on alienation that purport to attach to gifts).

106. *See generally* Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2004) (surveying property restraints); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

107. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

108. See *supra* Section III.A for a discussion of the way that contractual conditions interact with the powers of an LLC's operating agreement.

against perpetuities. Because of the complexity of that rule, this conclusion is more debatable than the other capabilities of LLCs that I have discussed. For example, courts may strike down (or modify, under modern variants of the rule against perpetuities that permit modification)[109] an LLC operating agreement that appears to create equitable interests in property. The specific question, in the context of modern organizational law, is largely untested as a doctrinal matter,[110] but there are several reasons to think that transactions involving legal organizations can successfully circumvent the rule against perpetuities.

First, though the rule against perpetuities has been applied to some contracts—that is, while a transfer in a contract does not, as a formal matter, put a conveyance beyond the scope of the rule against perpetuities—ordinarily only contracts that create an equitable interest in property are subject to the rule.[111] In some jurisdictions, only contracts that can be specifically enforced have been held to trigger the rule against perpetuities,[112] and the LLC agreement can easily be written not to confer such a right. In my example above, in addition to ruling out specific performance explicitly, arbitrary complexity can be added to the LLC operating agreement so that the grandchild's interest does not resemble a property interest; perhaps an independent board must review the grandchild's application before a license to use the real property on any particular occasion is granted, or perhaps the proceeds from the sale must stay in the LLC, with the grandchild then admitted as a member of the business organization. In other words, given the sheer potential informational complexity of LLCs, it seems unlikely that courts could stymie a sufficient sophisticated transactional planner who uses the full set of tools that modern organizational law provides.[113] Nothing in concept differentiates an organizational scheme like the one I have described from an LLC that functions as a public charity[114] or as a private noncharitable organization with claims to public-oriented goals.[115] For example, each may

109. *See, e.g.*, T. K. Carroll, *Future Interests—Rule against Perpetuities—Cy Pres Applied to Modify an Interest Violating the Rule*, 61 MICH. L. REV. 609 (1963).

110. For an early suggestion that courts may be motivated to implement the policies of the rule against perpetuities to strike down novel forms that achieve ends that are prohibited under that rule, see *Eastman Marble Co. v. Vermont. Marble Co.*, 128 N.E. 177, 183 (Mass. 1920) ("Any other conclusion would afford simple and direct means, at least for corporations which ordinarily have unlimited existence, through the form of options to buy covering long periods and binding heirs and assigns, to circumvent the rule against perpetuities and restraints upon alienation.").

111. *See, e.g.*, Ryland Grp., Inc. v. Wills, 331 S.E.2d 399, 402 (Va. 1985) ("The rule against perpetuities is applicable to option contracts . . . . An option contract creates no present vested interest; instead, the holder of an option has an executory interest by virtue of the possibility that he may obtain a future right to purchase certain property."); 10 POWELL, *supra* note 103, § 72.11 ("Rule Against Perpetuities Applies to Options to Purchase").

112. *See, e.g.*, Comstock v. Smith, 501 S.W.2d 617, 618 (Ark. 1973) ("While the rule [against perpetuities] does not apply to executory contracts not affecting an interest in property, it does apply to a contract which creates a property right that can be enforced by specific performance.").

113. *See also* 10 POWELL, *supra* note 103, § 72.07 ("[T]ransactions purely contractual do not involve future interests in specific property; hence there can be no problem at all of remote vesting.").

114. LLCs need not be for-profit. *E.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 108(b) (2006) (UNIF. L. COMM'N, amended 2013) ("A limited liability company may have any lawful purpose, regardless of whether for profit.").

115. *Cf.* Dana Brakman Reiser, *Disruptive Philanthropy: Zuckerberg, the Limited Liability Company, and the Millionaire Next Door* (Brooklyn L. Sch. Legal Stud., Rsch. Paper No. 536, 2017), https://ssrn.com/abstract=3049021 [https://perma.cc/9LFN-6Q8L] (describing the Chan-Zuckerberg Initiative, an LLC funded with billions of dollars said to be committed to philanthropic endeavors).

eventually come to transact with, or provide donative benefits to, parties who do not exist at the time the organization is founded (or within the rule against perpetuities' permissible period).

Second, many specific organizational arrangements have long been held under U.S. law to be exempt from the rule against perpetuities. Some state-court decisions suggest business organizations and business trusts are exempt entirely from the rule.[116] Many charitable organizations similarly appear to be exempt, though the matter is not settled.[117] As new organizations have developed, the rule often has not been applied to them; for example, it is commonplace for a right of first refusal held by the homeowners association of a condominium to be exempt from the rule.[118] Certainly, in the general case, a legal organization with a perpetual existence can unproblematically own and dispose of property.

Third, because of the informational complexity and potential privacy of an LLC's operating agreement, it is unclear who would challenge the arrangement. In the case of a conventional deed, the owner of a reversionary interest in the property might be in a position to challenge a grant, or perhaps the hopeful contingent owner would seek to accelerate ownership by voiding conditions under a modern *cy pres* statute. But in my example above, there is no reversionary interest: the LLC owns the land outright, and it is uncontroversial that legal organizations can own and use land. And the future grandchild is not a member of the LLC from the outset and has no standing to sue, for example, for the dissolution of the entity.

ii. Restraints on Alienation

Consider the following illustration from the *Restatement (Second) of Property*:

> O, owning Blackacre in fee simple absolute, makes an otherwise effective transfer thereof "to D (O's daughter) and her heirs, but if Blackacre is ever transferred to any coal company, O or his successors in interest shall have a right to reenter and terminate the estate." Blackacre is suitable only for coal mining purposes. D later transfers Blackacre to the X Coal Company. A finding that the restraint is unreasonable is justified. Coal companies which are excluded as transferees constitute the probable transferees of such land. The X Coal Company has an estate in fee simple absolute in Blackacre.[119]

Instead of transferring the property to *D*, however, *O* may simply transfer the property to an LLC governed by an agreement that is hard to amend and that prevents the LLC from conveying the property to a coal company. *O* may then transfer his or her interest in the LLC to *D*. If *D* becomes a member of the LLC, the terms of the LLC operating agreement

116. *E.g.*, *In re* Great N. Iron Ore Props., 263 N.W.2d 610, 619 n.15 (Minn. 1978) ("Common-law or Massachusetts trusts are treated specially in some respects because of their similarity to the corporate form of business. For example, they may be exempted from the common-law rule against perpetuities . . . .")

117. *See* 10 POWELL, *supra* note 103, § 72.10 (discussing charitable exemptions from the rule and some open legal questions concerning them).

118. 10 POWELL, *supra* note 103, § 72.11[4] ("Options and similar rights associated with commercial or residential leases are generally viewed as outside the purview of the rule against perpetuities. . . . As a policy matter, the option to repurchase phrased in terms of the life of the condominium regime should be upheld.").

119. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 4.2 (1987).

will bind *D*.[120] Formalistically, no property interest subject to a restraint on alienation is transferred. It may seem appealing to say that courts should not recognize the form of the transfer and instead hold, substantively, that property with an unreasonable restriction on alienation has been transferred. But again, because of the arbitrary amounts of complexity that may be inserted into the operating agreements of modern legal organizations, it would be difficult to know, practically, what is substantively occurring beneath any formal veneer. The Restatement's example is perhaps unrealistic because it is unclear what gift *O* is intending to give. If *O*'s goal is that *O*'s daughter (or her successors) should receive the proceeds of any future valuable sale of the property to anyone other than a coal company, even though no such valuable sale is envisioned, the operating agreement could simply say that: the business is to own and use the property and does not have the power to sell the property until the right conditions emerge. If *O* is afraid that courts may give *D* too many rights over an entity in which she is the only member, *O* may add other members for the sole purpose of restricting *D*'s voting (but not economic) rights. Apart from remedies within organizational law that would terminate an organization because of deadlock,[121] which are granted extremely rarely under modern law,[122] it is hard to see how or why courts would strike down a sufficiently detailed organization that *O* had set up. That said, the rules about deadlock should not be ignored, as they provide a potentially more adaptive framework for regulating businesses than specific rules about restraints on alienation; I discuss this possibility in Part IV.

iii. Covenants that Run with Personal Property

In their influential article in favor of a principle of *numerus clausus* in property law—that is, the notion that there should be a "closed number" of legally recognized forms of property ownership—Tom Merrill and Henry Smith laid out an argument that attempts to explain why property law does not recognize such things as covenants on personal property.[123] The essence of their argument, which is instrumental and rests on transaction costs, is that if an owner of (say) a consumer item like a wristwatch creates a new form of ownership in which that wristwatch can be held, the costs of evaluating that new form of ownership are an externality for all other people who own wristwatches. One owner of a wristwatch might enter into a contract permitting a counterparty to use that watch on Mondays, but as Merrill and Smith conceive it, that is just a contractual right between the two parties; it is not a property interest, such as a covenant on property, that encumbers anyone who later purchases the wristwatch. If it were, Merrill and Smith argue that anyone

120. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 106(b) (2006) (UNIF. L. COMM'N, amended 2013) ("A person that becomes a member is deemed to assent to the operating agreement."). The LLC remains bound regardless. *See id.* § 106(a) ("A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement.").

121. *E.g.*, *id.* § 701(a)(4)(B) (granting judges the authority to dissolve an LLC when "it is not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement").

122. *See, e.g.*, *In re* 1545 Ocean Ave., LLC, 72 A.D.3d 121, 131 (N.Y. App. Div. 2010) ("[d]issolution is a drastic remedy"); *In re* Arrow Inv. Advisors, LLC, C.A. No. 4091-VCS, 2009 LEXIS 66, at *8 (Del. Ch. Apr. 23, 2009) ("Given its extreme nature, judicial dissolution is a limited remedy that this court grants sparingly.").

123. Merrill & Smith, *supra* note 106.

buying a wristwatch would need to evaluate the wristwatch for potential encumbrances.[124]

Merrill and Smith recognized in their original article that the use of modern legal organizations poses an apparent challenge to their argument. As they put the objection to their argument, "most resources today are controlled by legal entities organized around a nexus of contracts, such as trusts, partnerships, and corporations. Using contracts, contract assignments, and these organizational forms, individuals can hold resources in any form they wish, rendering the traditional boxes of property a quaint anachronism."[125]

I believe they were correct, however, not to consider the ownership of property by legal organizations to be a significant threat to their argument. If the watch owner in Merrill and Smith's example wants to convey a right that "runs with" a particular wristwatch (as a covenant on real property "runs with" the land),[126] the owner could (1) transfer the watch to an LLC whose operating agreement specifies different sorts of membership (or non-membership) interests that give a license to use the watch on particular days and then (2) simply sell these interests to those who want them.[127] But as Merrill and Smith understood, transferring ownership of a wristwatch to a legal organization does not create the negative externality that they are concerned with: it does not require all owners of wristwatches to determine what rights encumber their ownership of wristwatches. Of course, people who transfer interests in the watch owner's LLC will face that informational obligation, but that is not an externality on watch owners; its cost, instead, can be evaluated by buyers of interests in the LLC from the outset.[128]

Therefore, I do not consider the capability of modern legal organizations to parcel out wristwatch use on particular days to be a direct challenge to Merrill and Smith's argument. Nonetheless, this capability is important for two reasons. First, though it has been recognized for a long time, unlike most of the other transactional techniques I have described, it still demonstrates one of the capabilities of modern legal organizations. Second, though ownership of wristwatches by a modern legal organization does not itself externalize informational costs to owners of all wristwatches, the capabilities of such organizations permit, in ways that would be cumbersome for a trust or a traditional corporation, the owner of an *entire class of watches* to opt out, for that entire class of property, of the purportedly limited property system that Merrill and Smith describe. For example, the seller of a new type of product may refuse to sell any instances of that product outright to the world, instead selling only membership interests in a legal organization whose operating agreement details the permissible uses of the product.[129] Granted, people

124. I critique Merrill & Smith's general economic argument more fully in SHAWN BAYERN, THE ANALYTICAL FAILURES OF LAW AND ECONOMICS (forthcoming), mainly on the grounds that the additional costs of evaluating title for encumbrances for people who have to evaluate title in the first place are negligible or nonexistent. In other words, buyers already face a risk that sellers do not own the property they are purporting to sell; evaluating the extra risk that the title is defective in some more minor way does not add significant costs for real-world buyers.

125. Merrill & Smith, *supra* note 106, at 54.

126. *See* 9 POWELL ON REAL PROPERTY § 60.04 (2019) (discussing covenants in general).

127. Christopher Bradley outlines in detail a creative transactional technique along these lines, using modern business entities to emulate a covenant that runs with personal property. Christopher G. Bradley, *Artworks as Business Entities: Sculpting Property Rights by Private Agreement*, 94 TUL. L. REV. 247 (2020).

128. *Cf.* Merrill & Smith, *supra* note 106, at 29–31 (evaluating carefully the particular externality with which they are concerned).

129. Software licenses have been used to achieve similar types of control that would have been hard to

buying LLC interests to gain access to this new product would know that they were doing so, and it does not raise the particular externality that concerns Merrill and Smith. But when an entire type of property is owned by organizations and no buyer has any choice to opt out of that system, it becomes hard to say that the property system enforces any particular level of standardization.[130]

Of course, this sort of arrangement already exists in narrower contexts by means of more traditional legal organizations. For example, there is no way to buy an apartment in many buildings in New York without buying what amounts to a specific share of a "cooperative" organization that effectively owns and operates the building under its own charter and bylaws.[131] The story here, as elsewhere, is of increasing generalization and flexibility for private parties. If a state's cooperative laws don't suit a particular real-estate developer's needs, a flexible LLC could substitute (subject, of course, to the state's housing laws). The pattern can be extended to forms beyond buildings, such as moveable property, intangible property, and so on.

C. *Other Alternatives to Familiar Transactional Paths*

Occasionally there is a simple mismatch between a legal rule outside organizational law and the same version of the rule within organizational law. For example, a state's Statute of Frauds may require evidence of a writing for a contract but specifically avoid that requirement in its LLC statute.[132] These mismatches often tend to extend the power of

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implement by individual one-on-one contracts. *See, e.g.*, Kenneth J. Rodriguez, *Closing the Door on Open Source: Can the General Public License Save Linux and Other Open Source Software?*, 5 J. HIGH TECH. L. 403, 403 (2005) (describing one such licensing arrangement).

130. To be clear, Merrill and Smith do not argue for any particular level of standardization. As I observe in BAYERN, *supra* note 124, in a more general context, another limitation of Merrill and Smith's argument is that it does not provide tools to determine whether any particular level of standardization for a property regime is optimal over competing candidates. In other words, their analysis can explain any proposed property system and therefore has difficulty making specific legal recommendations. *See generally id.*

131. *See* N.Y. COOP. CORP. LAW §§ 1–13 (explaining the process and necessity of purchasing an apartment by also purchasing a specific share of a cooperative organization that owns the building).

132. For example, compare FLA. STAT. § 605.0106(6) (2020) ("Except as provided in s. 605.0403(1) [a provision requiring that promises to contribute to an LLC must be in writing], an operating agreement is not subject to a statute of frauds.") with *id.* § 725.01 (laying out a typical modern statute of frauds under which several categories of promises, including "any agreement that is not to be performed within the space of 1 year," to be "in writing and signed by the party to be charged therewith").

It may be worth adding that the Statute of Frauds is a troubled area of law anyway and that courts are already used to seeing it in tatters. As Lon Fuller and Mel Eisenberg have put it:

> The best general guide to the judicial interpretation of the Statute of Frauds is to remember this simple truth: The courts have not favored the Statute of Frauds. Generally—although certainly not invariably—whenever the words of the Statute leave any leeway (and often when they do not), the courts have restricted its meaning and found ways of making an oral agreement enforceable.

LON FULLER, MELVIN ARON EISENBERG, & MARK GERGEN, BASIC CONTRACT LAW 1097 (10th ed. 2018).

It may also be worth adding that, from a transactional-planning perspective, it is trivially easy to work around the Statute of Frauds; it is simply a trap for the unwary. (Parties that want to avoid the Statute of Frauds can create a writing, or in many contexts simply admit the existence of the contract, at any time. Importantly, under most incarnations of the Statute of Frauds, it is not even the original contract that must be in writing; any signed writing evidencing the deal will do.) *See id.* at 1095–1102.

It is also worth adding that not all LLC statutes eliminate the Statute of Frauds. *See, e.g.*, REVISED UNIF.

legal organizations to achieve parties' objectives even if other areas of law disfavor those objectives. At the very least, organizational statutes give legal actors an option, and they can decide whether to use an organizational statute (and, if so, which one to use).[133]

Consider, for instance, a policy by some courts to disfavor contracts that are "perpetual." Several state courts have explicitly stated this policy as a matter of contract law,[134] but those same states have statutes that clearly permit some organizations to last forever.[135] As with the Statute of Frauds, an interpretive policy disfavoring perpetual contracts is probably not difficult for most parties to work around; ordinarily they can do so simply by making the contract's intended perpetual nature explicit.[136] But at a minimum, for actors who cannot precisely predict (for example) whether a court would hold that a record they intend to make would count as a writing for the purposes of the Statute of Frauds or who are not sure whether they can express their intent clearly enough that their contractual arrangement is intended to be perpetual, the use of legal organizations increases the actors' certainty that the same substantive legal transaction that they intend can be accomplished in a legally binding manner just because they have invoked organizational statutes.

Less mundanely, legal entrepreneurs have suggested the use of LLCs to substitute for marriage.[137] The notion perhaps won't even seem surprising given the rest of this Article's discussion: LLCs can collect any variety of rights and obligations that legal actors desire, so they may be more attractive to those in nontraditional relationships than the state's off-the-shelf rules governing marriage. As one proponent put it several years ago:

> It is our position that limited liability companies . . . may prove to be the new marriage model. Marriage is presently available only to one man and one woman. LLCs are available to everyone, couples (of any sexual mix) who wish to pursue life together, a single parent family and groups of friends. Marriage is based on family law, limited liability companies are based on partnership law and the legal arrangement its "members" agree to.[138]

P'SHIP ACT § 102 cmt. (1997) (UNIF. L. COMM'N, amended 2013) ("This act states no rule as to whether the statute of frauds applies to partnership agreements. Case law suggests that the answer is yes . . . .").

133. In recent work, Christopher Bradley has identified other examples of this phenomenon, such as homestead exemptions for real property that can be avoided—for the purpose of using the property to secure a loan—by putting title to the property in the name of an LLC. Bradley, *supra* note 127.

134. *E.g.*, MS Real Est. Holdings, LLC v. Donald P. Fox Fam. Tr., 864 N.W.2d 83, 93 (Wis. 2015) (referring to "Wisconsin's policy disfavoring perpetual contracts"); Wyeth Pharms., Inc. v. Borough of W. Chester, 126 A.3d 1055, 1064 (Pa. Commw. Ct. 2015) ("Pennsylvania law disfavors perpetual contracts and, thus, requires a perpetual term to be expressed unequivocally."); *see also* 17A AM. JUR. 2D *Contracts* § 457 (2020) (collecting sources on this topic).

135. *E.g.*, WIS. STAT. § 180.0302 (2020) ("Unless its articles of incorporation provide otherwise, a corporation has perpetual duration . . . ."); 15 PA. CONS. STAT § 8818(c) (2016) ("A limited liability company has perpetual duration.").

136. *E.g.*, *Wyeth Pharms.*, 126 A.3d at 1064 ("In general, a contract for an indefinite period will be construed to be for a 'reasonable time or terminable at will *unless the intention of the parties can be ascertained*.'") (internal quotations and citations omitted and emphasis added).

137. *E.g.*, *Marriage Perfected*, RELATIONSHIP LLC, http://www.relationshipllc.com/ [https://perma.cc/9PU8-JS62].

138. *Id.*

IV. GOVERNING MODERN ORGANIZATIONS

This Part considers the law's response to novel capabilities of legal organizations. Section A introduces various statutory and doctrinal principles that emerged in the 1900s as solutions to problems of organizational governance, primarily in the context of closely held corporations, and suggests that these principles may be appealing, adaptive ways to regulate even modern legal organizations. Section B suggests that it is probably better to tolerate than to stymie the capabilities of modern organizations and proposes a general framework under which regulation would address targeted harms rather than broad organizational capabilities.

A. "Internal" Limitations on Transactional Flexibility: The Law of Closely Held Organizations

Several structural rules in the law of organizations have the capability to restrain or at least shape legal organizations even when those organizations are used to circumvent restrictions in other areas of law. In other words, despite the breadth of potentially novel transactional capabilities that modern organizations provide, internal principles of organizational governance may dampen the power of legal entities to achieve the arbitrary ends of transactional planners. The statutes and common law governing legal organizations have developed several potentially appealing, adaptive rules that solve several problems that legal organizations raise and that suggest useful paths for making sure that these organizations act consistently with public policy. This section describes several of those rules.

1. Interpretation

Surprisingly to some lawyers, but less often to businesspeople, the law of business organizations often pays close attention to the individualized circumstances of the parties. It is probably no accident that Delaware, the state whose courts handle the most significant corporate litigation, is one of the few states that has preserved a separate system of equitable courts to address the need to respond flexibly to the varied circumstances of business parties.[139]

One significant difference between the law of legal organizations and at least many states' contract law is that organizational statutes pay much more attention to oral and implicit agreements. Based on questionable factual premises (for example, that contracting parties read contracts or that excluding evidence of oral agreements will make it easier for parties to know their legal obligations) the contract law of many states has adopted strong versions of the parol-evidence and plain-meaning rules.[140] These rules can be complex, as can the distinction between them, but at bottom they emphasize the text of the parties' record of their agreement over all information outside that text, including trade usages,

139. *See* Gregory Day, *Revisiting the North Carolina Business Court After Twenty Years*, 37 CAMPBELL L. REV. 277, 285 n.24 (2015) ("The only states that currently employ equitable courts are Delaware, Mississippi, and Tennessee.").

140. *E.g.*, Steuart v. McChesney, 444 A.2d 659 (Pa. 1982) (interpreting a confusing contractual provision in a bizarre way that the parties almost certainly did not intend because of the state's plain-meaning rule).

prior dealings, oral agreements, and implied agreements.[141] Even under modern contract law, which is less formalistic than the conceptual artifice created by Langdell and Williston in the late 1800s and early 1900s,[142] states can occasionally act with surprising formalism to enforce a deal that parties almost certainly did not make.

The statutes that govern modern legal organizations tend to oppose this sort of textualism by specifically recognizing nontextual sources of agreement. The statutes express this recognition in two ways. First, as mentioned earlier, they may, but do not always, remove a formal barrier to the enforcement of oral agreements by eliminating the Statute of Frauds. Second and more importantly, they tend fairly consistently to define the operating agreement for an organization to include, explicitly, oral and implied components of the parties' actual agreement. Thus, for example, RULLCA defines an operating agreement as "the agreement, whether or not referred to as an operating agreement and whether oral, implied, in a record, or in any combination thereof,"[143] and most states adopt a similarly broad view of the agreement (with New York as a typical textualist outlier).[144]

In other words, the statutory state of play seems to be as follows: transactional planners may use LLCs very flexibly to solve the problems they face in novel and creative ways, but they must do so with regard to the actual agreements between the parties to their transactions. The interpretive law that governs LLCs is a contextualist one.[145]

2. *Reasonable Expectations and Changing Circumstances*

Consistent with modern statutes' explicit recognition of oral and implied agreements, the law of closely held organizations in the 1900s developed a sensitive set of techniques to respond to the reasonable expectations of business parties, even when those expectations changed over time. Professor Hodge O'Neal, perhaps the leading expert in the 1900s on closely held corporations, identified an increasing "reliance by the courts on the shareholders' reasonable expectations as a guide for the settlement of shareholders' disputes . . . coupled with a growing judicial resourcefulness in developing effective remedies to assure the gratification of those expectations."[146] Ultimately, Professor O'Neal concluded:

> The reasonable expectations of the shareholders, as they exist at the inception of the enterprise, and as they develop thereafter through a course of dealing

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141. *See id.* at 662.

142. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (AM. L. INST. 1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.").

143. REVISED UNIF. LTD. LIAB. CO. ACT § 102(13) (2006) (UNIF. L. COMM'N, amended 2013).

144. *E.g.*, FLA. STAT. ANN. § 605.0102(45) (West 2020); DEL. CODE ANN. tit. 6, § 18-101(9) (2020); CAL. CORP. CODE § 17701.02(s) (Deering 2020); 805 ILL. COMP. STAT. § 180/1-5 (2020) ("operating agreement"); TEX. BUS. ORGS. CODE ANN. § 101.001(1) (West 2019); *but see* N.Y. LTD. LIAB. CO. LAW. § 102(u) (McKinney 2020) (requiring operating agreements to be written).

145. For more on the debate between textualists and contextualists in modern contract law, see Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. DAVIS L. REV. 1097 (2016) (arguing that parties should be able to choose interpretive rules but that contextualist interpretation should apply to such choices). *See generally* Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010) (arguing for textualism).

146. F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 142 (1987); *see also generally* F. HODGE O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE (3d ed. 1988).

> concurred in by all of the shareholders, is perhaps the most reliable guide to a just solution of a dispute among shareholders in the typical close corporation.[147]

This doctrine, paying attention to reasonable expectations of owners of an organization even as they change over time, may provide the most significant limit on the ability of those engaged in a transaction to achieve their long-term ends by means of a legal organization. Of course, to the extent that the organization has no identifiable owners over time, this doctrine may not apply directly. Even there, however, this principle may inspire productive judicial adaptation. Importantly, the doctrine of reasonable expectations in closely held organizations is concerned with changing expectations over time, not just with expectations at the time of an organization's formation. It would therefore seem not to be a large step for judges to oversee the drift between an original operating agreement and present circumstances.

For example, consider the case of an LLC set up to encapsulate autonomous software. Suppose that software is hacked so that it is producing results far from what anyone could reasonably have intended when the LLC was set up. Perhaps the LLC's operating agreement refers to hacking and ways to detect it; perhaps it does not. A judge determining whether an action of the autonomous algorithm should bind the entity could well use the doctrine of reasonable expectations that developed in the law of closely held corporations to hold that the operating agreement was not understood to give legal effect to the consequences of illegal hacking.

3. *Judicial and Administrative Oversight*

General partnerships have always, at least by default, made it relatively easy for a partner to cause a partnership to dissolve, wind up, and terminate.[148] Public entities make it easy for owners to leave the organization by selling their shares.[149] In closely held organizations other than general partnerships, however, owners are potentially stuck: they cannot exert control over an entity and cannot cause it to dissolve, wind up, or terminate. Because of the possibility that an organization's controllers can exploit other owners' lack of ability to exert control or to depart from the organization, the corporations statutes have long given shareholders the right, in limited circumstances, to sue for judicially ordered dissolution of the organization.[150] Corporate statutes ordinarily made dissolution available in two broad cases: (1) a deadlock in control or a similar inability for the corporation to function, and (2) abuse of power by fiduciaries, often described as "fraud, illegality or

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147. O'Neal, *supra* note 146, at 142; *accord* A.W. Chesterton Co. v. Chesterton, 128 F.3d 1, 7 (1st Cir. 1997) (holding that even an unenforceable agreement made 100 years after the corporation's charter was written "sheds light on the Company's and other shareholders' expectations"); Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) (holding that a closely held corporation is to be governed by "reasonable organizations" that "are to be ascertained by examining the entire history of the participants' relationship" and that may be "altered over time").

148. Under RUPA, the default statutory framework gives each partner the power to cause the entity to dissolve, wind up, and terminate. *See* REVISED UNIF. P'SHIP ACT § 801(1) (1997) (UNIF. L. COMM'N, amended 2013) (giving this power to partners in at-will partnerships); *Id.* § 101 cmt. ("Presumptively, every partnership is an at-will partnership.").

149. *Cf. generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (describing three main sources of rights and powers of members of organizations—leaving, voting, and fiduciary duties).

150. *E.g.*, MODEL BUS. CORP. ACT § 14.30 (AM. BAR ASS'N 2016) (providing for judicial dissolution).

oppression."[151] These statutory provisions have carried over into modern LLC statutes.[152]

The potential for judicial oversight is likely to become more significant as LLCs are used in more creative ways. For example, dissolution for deadlock may be one solution to problems of dead-hand control created by the creation of long-term LLCs to manage property. It may similarly be an adaptive technique to address a situation in which an algorithm or a disabled adult controls an entity but sharply changed circumstances make it unproductive or even meaningless for the algorithm or disabled adult to continue to control the entity. Perhaps it may also serve as a direct response to the problem of hacking described in the previous section.

LLC statutes also provide for administrative dissolution—that is, dissolution in a proceeding brought by the state, usually because the LLC has failed to meet certain formal requirements, like paying state fees or registering an agent for service of legal process.[153] These statutory provisions are not widely used, but they at least suggest another path for oversight of LLCs that are violating public policy.

4. Summary

The picture of modern legal organizations, then, is one of almost unlimited "external" flexibility—that is, the flexibility to adapt to ends that have nothing to do with organizational governance—but with several coherent and functional principles, or at least suggestions of principles, "internal" to corporate governance. This descriptive picture demonstrates one path forward in understanding how organizations should interact with other areas of law. The next section will consider that sort of interaction more explicitly.

B. Assessing the New Landscape

1. Unifying Organizational Law

Attention to the capability of modern legal organizations suggests that the landscape of legal entities is simply too complicated. It is not a direct response to the broad capabilities of modern business entities to suggest unifying business organizational law—that is, my analysis in Part III of this article doesn't necessitate it—but the current multiplicity of entities is perhaps something of a distraction to sensible understanding and regulation of legal organizations. In addition to the general partnership and the LLC, most states have statutes that enable limited partnerships (LPs),[154] limited liability partnerships (LLPs),[155] limited-liability limited partnerships (LLLPs),[156] several forms for professional

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151. *Id.* at xxvi (describing these as "[t]he traditional grounds for involuntary dissolution").

152. *E.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 701(a)(4)(B) (2006) (UNIF. L. COMM'N, amended 2013) (providing for dissolution for deadlock, or more specifically for cases where "it is not reasonably practicable to carry on the company's activities and affairs in conformity with the certificate of organization and the operating agreement"); *e.g.*, *id.* § 701(a)(4)(C) (allowing dissolution for fraud, illegality, or oppression).

153. *E.g.*, *id.* § 708.

154. *E.g.*, UNIF. LTD. P'SHIP ACT (2001) (UNIF. L. COMM'N, amended 2013) (laying out rules for the organization of limited partnerships).

155. *E.g.*, REVISED UNIF. P'SHIP ACT § 901 (1997) (UNIF. L. COMM'N, amended 2013) (enabling limited-liability partnerships as a subspecies of general partnerships).

156. *E.g.*, UNIF. LTD. P'SHIP ACT § 201(a)(4) (2001) (UNIF. L. COMM'N, amended 2013) (enabling limited-liability limited partnerships as a subspecies of limited partnerships).

organizations,[157] charitable forms,[158] and, increasingly, specialized corporations that serve as hybrids between charities and business organizations.[159] These all exist alongside various forms that have their origin in the common-law trust.

Regulating these entities should probably start with a recognition that the capabilities and extreme flexibility of the LLC makes all the other business forms redundant. LLCs, which may be for profit, not for profit, or anything in between—the typical statute simply doesn't care[160]—are flexible enough to adopt the default frameworks of all the other statutes. For example, an LLC's operating agreement could simply say "This LLC is to be governed by the organizational rules of the Revised Uniform Partnership Act" or ". . . the Model Business Corporation Act," and such a declaration would be effective as to all or nearly all the provisions in those other acts.

Others have argued before that business-entity law should be simplified; for example, as early as 1997, commentators suggested unifying the law of small business entities.[161] Today, it should be clear that not only could the law of small business entities be simplified but that such reform needn't be limited either to small organizations or to business organizations. Instead, a single unified organizational form with extreme flexibility (and optional statutory default paths, like the typical LLC statute's choice between member-managed and manager-managed LLCs)[162] would be sufficient.

If there were a unified organizational form—called perhaps a Registered Company or, more generally, a Registered Organization—the single enabling statute and its procedures could focus regulators' attention on potential harms and abuses common to all modern legal organizations. For example, to the extent that registering organizations enables assets or wrongdoing to be hidden, legal organizations could be required, at the time of registration, to nominate responsible individuals, much as they are required through a series of patchwork statutes to nominate registered agents for service of civil process.[163] Similarly, to the extent a business's substantive activities and limited-liability shield raise concerns for a state's public policy, registration would be a convenient point to require insurance.

If nothing else, a state's set of organizational statutes is probably misleading to the public if it fails to suggest the extreme flexibility of LLCs or suggests that other organizational forms are still needed.

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157. *E.g.*, FLA. STAT. § 621.01 *et seq.*

158. *E.g.*, CAL. CORP. CODE § 5000–10841 (laying out rules for the organization of nonprofit corporations).

159. *E.g.*, FLA. STAT. §§ 607.501 *et seq.* (recognizing "social purpose corporations); *see also id.* §§ 607.601 *et seq.* (recognizing "benefit corporations").

160. REVISED UNIF. LTD. LIAB. CO. ACT § 108(b) (2006) (UNIF. L. COMM'N, amended 2013) ("A limited liability company may have any lawful purpose, regardless of whether for profit.").

161. *E.g.*, Dale A. Oesterle & Wayne M. Gazur, *What's in a Name?: An Argument for a Small Business "Limited Liability Entity" Statute (with Three Subsets of Default Rules)*, 32 WAKE FOREST L. REV. 101 (1997).

162. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 407 (2006) (UNIF. L. COMM'N, amended 2013) (providing a switching mechanism between these two statutory default options).

163. *Compare* REVISED UNIF. LTD. LIAB. CO. ACT § 115 (2006) (UNIF. L. COMM'N, amended 2013) (requiring a registered agent in LLCs), *with* MODEL BUS. CORP. ACT §§ 5.01–5.04 (AM. BAR ASS'N 2016) (requiring a registered agent for corporations). In addition, note the absence of such explicit general requirements for all entities governed by RUPA or RULPA. RUPA does require a registered agent for LLPs without in-state headquarters. REVISED UNIF. P'SHIP ACT § 1001(c)(3) (1997) (UNIF. L. COMM'N, amended 2013). The difference among these entities as to whether a registered agent for service of process is required is largely historical and seems unmotivated in view of modern policies.

2. *Addressing Harms Adaptively*

One possible response to the novel capabilities of modern legal organizations is an instinct to restrict them—that is, to roll back the developments of the last half century so that every organization is of a known form, fixed in advance, with particular legal persons playing particular roles like "shareholder," "partner," or "director." This response is understandable, particularly because it may seem as if the capabilities I have outlined[164] result largely from the use of forms. In other words, it may seem as if a set of restrictions in another area of law—say, contract law's rules about the incapacity of those under legal guardianship, or property law's rule against perpetuities—should not be superseded by formal techniques that simply rearrange legal interests on paper.

On a closer look, however, I believe that such an instinct suffers from the sort of casual formalism or essentialism that it purports to reject. There is little reason to think that rules of a particular conventional legal "topic" (like the law of property or the law of contracts) need to be dominant in regulating the matters within that topic's scope. Just because something appears to be "property" does not mean that classical property law should govern it; an avoidance of a restriction by means of clever transactional techniques may in fact suggest the brittleness of an outdated rule.

The problem with flexible organizations is not, in the general case, that they provide capabilities to transactional planners; the problem lies in the harms associated with particular capabilities, and those harms should be addressed directly and specifically. The challenge then is to identify those harms. As this article surveyed several novel capabilities of legal organizations, it pointed out various benefits and various potential abuses. Rather than seeing new capabilities in legal organizations as a threat to an existing legal order, it is probably a more functional approach to target abuses directly.

Many of the transactional techniques presented in Part III have little or no downsides. For example, it is not a threat to the policies of contract law that children or disabled adults may be authorized to act for an LLC or that an LLC's operating agreement may take note, by means of contractual conditions, of their expressed wishes or actions. The restrictions on the legal abilities of children and disabled adults are meant to protect them, but if others are willing to give them control over assets, the need for protection is very different, if it still exists at all. Because the ability to work around contract law's legal-capacity rules is only as powerful, economically, as those who fund or otherwise enable an LLC, the technique, and its potential harms, are self-limiting. Put loosely, the techniques of Section III.A, which rest on new powers for operating agreements of modern organizations, can be seen to address limitations in prior law rather than upsetting any sort of policy-based balance.

The techniques in Section III.B, by means of which transactional planners may use organizational law to overcome outright limitations imposed by other areas of law, is perhaps of more concern. Even here, however, most of the techniques seem to pose little practical threat to the legal system. In particular, the capacity to invent property interests to satisfy, for example, a need for such interest by Article 9 of the Uniform Commercial Code seems only productive and appears to undermine no stated or implicit policy either of organizational law or of Article 9. Of most concern is the dead-hand control enabled by

164. *See supra* Part III.

techniques that would avoid the common law rule against perpetuities, but many states have sharply restricted that rule anyway,[165] and courts have long disfavored it.[166]

More importantly, however, there is little reason in the modern world that concerns about dead-hand control should be funneled through an ancient English rule that focuses on future interests in identifiable property. Instead of an inconsistently applied, hard-to-understand rule, the doctrines that have arisen to give courts oversight of organizational governance, as described in Section IV.A, are potentially far more adaptive. They are framed in terms of modern concepts, such as "deadlock," whether it is "reasonably practicable to carry on" activities, fraud, oppression, and illegality.[167] These same doctrines, as well, present promising ways to respond to future organizations controlled increasingly by software.

In any event, it seems unnecessarily cautious to respond to increasing flexibility in organizational law by seeking to stifle that flexibility regardless of its results. Governance problems can be addressed as governance problems, and otherwise organizations can be regulated outside the law of governance.

V. CONCLUSION

A quiet revolution has taken place in organizational law, with flexible agreement substituting for predeveloped organizational forms. This Article has described several novel capabilities of modern business entities, from autonomous entities controlled by legally disabled people (who can't make contracts on their own but can make contracts on behalf of "businesses") to transactional approaches to avoid restrictions in other areas of law. Though these new and largely unrecognized transactional techniques may seem threatening, they are just part of the evolution of organizational law. Organizational law has evolved before; it was not too long ago, for example, that a single-member corporation or a corporation without a board of directors was seen as bizarre or even deviant,[168] and my prior work on zero-member LLCs has led to similar reactions.[169] But when the techniques described in this Article are evaluated individually in functional terms for their distinct harms and benefits, the picture that emerges is not one of danger but simply of expanded possibility and the typical need for focused regulation to prevent particular abuses.

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165. *See* 10 POWELL, *supra* note 103, § 75A.01.

166. *See id.* § 72.17 (entitled "In Rule Against Perpetuities Cases There Is Strong Constructional Preference for Validity").

167. *E.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 701(4) (2006) (UNIF. L. COMM'N, amended 2013); *see supra* Section IV.A.

168. *See supra* note 45 and accompanying text.

169. *See generally* Lynn M. LoPucki, *Algorithmic Entities*, 95 WASH. U. L. REV. 887 (2018) (arguing that "algorithmic entities . . . greatly exacerbate the threat of artificial intelligence"); Matthew U. Scherer, *Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems*, 19 NEV. L.J. 259 (2019) (arguing that courts would reject one of my transactional techniques on the grounds that it violates public policy).