

ARTICLES

UNCONSCIOUS CLASSISM: ENTITY EQUALITY FOR SOLE PROPRIETORS

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“Our Constitution is color-blind, and neither knows
nor tolerates classes among citizens.”**

I. UNCONSCIOUS CLASSISM AND ELEVATING THE ENTITY RIGHTS OF SOLE PROPRIETORS

A. *Sole Proprietor’s View of the Firm*

Significant intellectual capital has rightfully been spent on big business issues.¹ Academic focus on big business issues, as evidenced

** *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (analyzing a black man’s constitutional right to equal accommodation on a public railroad). *See generally* CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987) (offering a comprehensive perspective on the legal and social context of *Plessy* and its outcome); LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* (1999) (providing a thorough study of Justice Harlan and his judicial views); David S. Bogen, *Why the Supreme Court Lied in Plessy*, 52 VILL. L. REV. 411 (2007) (criticizing the Court’s true motives in *Plessy*).

¹ *See, e.g.*, Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002) (discussing how executives influence their compensation by shaping their own pay arrangements); Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055 (2006) (discussing the role and liability of independent directors of public companies); Douglas M. Branson, *Enron—When All Systems Fail: Creative Destruction or Roadmap to Corporate Governance Reform?*, 48 VILL. L. REV. 989 (2003) (assessing the failed protections in corporate and securities law); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006) (exploring the nuances of controlling shareholder structures and the implications of such systems); Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006) (providing a nontraditional view of the shielding analysis, unveiling the roots of management and controlling-shareholder opportunistic behavior towards creditors and non-controlling, minority owners, or what the authors call “entity-shielding”); Jonathan R. Macey & Maureen O’Hara, *From Markets to Venues: Securities Regulation in an Evolving World*, 58 STAN. L. REV. 563 (2005) (analyzing the challenges

in business law casebooks, inadvertently ignores sole proprietorship law.² Sole proprietorship law is also curiously absent from legal re-statement and codification efforts,³ and from state statutory development, reflecting the fact that a sole proprietorship can be created without any formality.⁴ Despite their absence in many corners, sole proprietors and the legal complexities they face have recently gained

that securities regulation faces in international market development); Larry E. Ribstein, *International Implications of Sarbanes-Oxley: Raising the Rent on US Law*, 3 J. CORP. L. STUD. 299 (2003) (analyzing how Sarbanes-Oxley makes U.S. corporation law less appealing to multinational corporations); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005) (discussing the Sarbanes-Oxley model of corporate governance).

- 2 See, e.g., JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 1–29 (2d ed. 2003) (omitting references to sole proprietorships in discussion of forms of business associations); MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 1–2 (9th ed. 2005) (providing two pages on sole proprietorships); FRANKLIN A. GEVURTZ, CORPORATION LAW 2 (2000) (less than one page); WILLIAM A. GREGORY & THOMAS R. HURST, CASES AND MATERIALS ON CORPORATIONS 31–34 (2d ed. 2005) (four pages); WILLIAM A. GREGORY & THOMAS R. HURST, UNINCORPORATED BUSINESS ASSOCIATIONS INCLUDING AGENCY, PARTNERSHIP AND LIMITED LIABILITY COMPANIES: CASES AND MATERIALS 833–37 (3th ed. 2006) [hereinafter GREGORY & HURST, UNINCORPORATED BUSINESS ASSOCIATIONS] (five pages); ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW STUDENTS: ESSENTIAL CONCEPTS AND APPLICATIONS 250–52 (4th ed. 2006) (three pages); ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 8 (9th ed. 2005) (less than one page); CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 2, 14–15 (5th ed. 2006) (three pages); DANIEL Q. POSIN, CASES AND ANALYSES ON THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTITIES: A SOCRATIC APPROACH (2005) (no pages); STEPHEN B. PRESSER, AN INTRODUCTION TO THE LAW OF BUSINESS ORGANIZATIONS: CASES, NOTES AND QUESTIONS 68 (2005) (one page); ROBERT A. RAGAZZO & DOUGLAS K. MOLL, CLOSELY HELD BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS 2–3 (2006) (two pages); LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS 5–6, 60 (4th ed. 2003) (three pages); LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES 10, 524–25 (3d ed. 2004) (three pages); JOEL SELIGMAN, CORPORATIONS: CASES AND MATERIALS 1–2, 27–28 (1995) (four pages).
- 3 Restatements and Model Codes exist for all types of business entities except the sole proprietorship. See, e.g., UNIF. LTD. P’SHP ACT (2001) (outlining basic rules under model partnership laws); REVISED UNIF. P’SHP ACT (1997) (same); UNIF. P’SHP ACT (1914) (same); REVISED MODEL BUS. CORP. ACT (2007) (outlining model corporation laws).
- 4 A terms and connectors search for “sole proprietorship” in the State Statutes database (ST-ANN-ALL) on Westlaw shows that there is no state statute expressly enabling the creation of a sole proprietorship, although there are some statutory provisions relating to sole proprietorships. See also MELVIN ARON EISENBERG, AN INTRODUCTION TO AGENCY, PARTNERSHIPS, AND LLCs 1 (3d ed. 2000) (“A *sole proprietorship* is a business organization that is owned by a single individual, and is not cast in a special legal form of organization, such as a corporation, that can be utilized only by filing an organic document with the state pursuant to an authorizing statute.”); RIBSTEIN, *supra* note 2, at 525 (discussing possible reasons why there are no statutes covering sole proprietorships); cf. UNIF. LTD. P’SHP ACT (2001) (outlining formal rules for setting up a limited partnership).

the attention of some scholars.⁵ This Article is dedicated to exploring the law's treatment of the unincorporated sole proprietorship,⁶ especially as the alter ego of its owner,⁷ and to facilitating needed reform of this important business form.

Sole proprietorships are vital to both the U.S.⁸ and world⁹ economies and are the most prevalent of all business forms in the United States¹⁰—as such, they deserve serious scrutiny. Small business is big business; in 2004 alone, the IRS reported that all non-farm sole pro-

- 5 See, e.g., Mitchell F. Crusto, *Extending the Veil to Solo Entrepreneurs: A Limited Liability Sole Proprietorship Act (LLSP)*, 2001 COLUM. BUS. L. REV. 381 (proposing a model limited liability sole proprietorship act); Larry E. Ribstein, *The Loneliest Number: The Unincorporated Limited Liability Sole Proprietorship*, 1 J. ASSET PROTECTION 46 (May/June 1996) (challenging the denial of limited liability protection to sole proprietors). See generally ALFRED F. CONARD ET AL., AGENCY, ASSOCIATIONS, EMPLOYMENT AND PARTNERSHIPS: CASES, STATUTES AND ANALYSIS 4–5, 9–10, 17 (4th ed. 1987) (providing background information about sole proprietorships); ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS: ESSENTIAL TERMS AND CONCEPTS 29–49 (1996) (same); WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 5–50 (9th ed. 2004) (same).
- 6 See BLACK'S LAW DICTIONARY 1427 (8th ed. 2004) (defining a sole proprietorship as “[a] business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity”); see also HAMILTON, *supra* note 5, at 29–30 (stating that a sole proprietorship, also known as an “unincorporated proprietorship,” is the simplest form for operating a business); DAVID MELLINKOFF, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 606 (1992) (defining a sole proprietorship as “a business owned by an individual, as distinguished from ownership by a corporation, a partnership, or any form of group ownership”). “An entrepreneur is an owner of a business who is personally involved in its management and who shares in its profits or losses. Entrepreneurship combines both ownership and management.” HAMILTON, *supra* note 5, at 29–30 (emphasis omitted).
- 7 See *infra* Part II.A.
- 8 See *infra* Part II.D. See generally MANSEL G. BLACKFORD, A HISTORY OF SMALL BUSINESS IN AMERICA (2d ed. 2003) (exploring the long history of small businesses' contributions to the U.S. economy, including sole proprietorships).
- 9 See, e.g., Neil Gregory & Stoyan Tenev, *China's Home-Grown Entrepreneurs*, CHINA BUS. REV. 14 (Jan.-Feb. 2001), available at <http://www.chinabusinessreview.com/public/0101/gregory.html> (discussing the status of the sole proprietorship in China). In 1998, the domestic private sector of China, including sole proprietorships, made up about 27% of the nation's gross domestic product (“GDP”). *Id.*; see also NAT'L COMMERCIAL BANK, IPO BUSINESS AND OPPORTUNITIES IN SAUDI ARABIA 5 (2005), available at <http://www.alahli.com/personalbanking/er2005.asp> (discussing the potential of converting sole proprietorships in Saudi Arabia into joint stock companies to raise capital through initial public offerings). There are over 80,527 active sole proprietorships in Saudi Arabia. *Id.* at 6.
- 10 U.S. CENSUS BUREAU, 2008 STATISTICAL ABSTRACT, http://www.census.gov/compendia/statab/cats/business_enterprise/sole_proprietorships_partnerships_corporations.html (follow “Table 721” hyperlink) (reporting that in 2004, there were 20,591,000 non-farm proprietorship tax returns filed, compared to 2,547,000 partnership and 5,558,000 corporate filings). Indeed, the number of sole proprietorship filings was more than double the combined total of both corporate and partnership filings. See *id.*

prietorships in the United States accounted for \$1,140 billion in receipts and \$248 billion in net income.¹¹ The continued vitality of small businesses and their contributions to the economy have received national attention.¹²

When looking closer at these statistics, one discovers two universes of sole proprietors. One universe represents individuals already employed by other business entities, who operate sole proprietorships as an added source of income or as a hobby.¹³ The other universe represents sole proprietors who operate their businesses as the sole source of their income.¹⁴ Many of these businesses are often family-run and located in inner-city and rural communities.¹⁵ They operate their businesses as sole proprietorships despite the availability of legal business entities, such as the corporation and the limited liability company.¹⁶ As a result, sole proprietors fail to participate in what has

11 *Id.* Comparatively, the IRS reported that partnerships accounted for \$3,142 billion in receipts and \$385 billion in net income, while corporations accounted for \$21,717 billion in receipts and \$1,112 billion in net income. *Id.* *But see* SELIGMAN, *supra* note 2, at 2 (“At the same time the vast preponderance of business organizations—over 13.6 million sole proprietorships, over 1.6 million partnerships, and over 3.5 million corporations—are *not* on the Fortune 500 list.”).

12 *See* President George W. Bush, State of the Union Address (Feb. 2, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/02/20050202-11>. (“To make our economy stronger and more competitive, America must reward, not punish, the efforts and dreams of entrepreneurs. . . . [S]o we must free small businesses from needless regulation and protect honest job-creators from junk lawsuits.”); *see also* McRae C. Banks & Stephen Taylor, *Developing an Entrepreneur- and Small Business Owner-Defined Research Agenda*, 29 J. SMALL BUS. MGMT. 10 (1991) (summarizing a study on the “needs” and “problems” facing entrepreneurs); Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517 (1984) (focusing on tort reform as a means of supporting small business growth).

13 *See* U.S. CENSUS BUREAU, 2002 SURVEY OF BUSINESS OWNERS, <http://www.census.gov/csd/sbo/cbsummaryoffindings.htm> (“Forty-two percent of owner-operated firms with no paid employees and revenues of less than \$5,000 operated their business to supplement their income, compared to 7.0 percent of those with revenues of \$1,000,000 or more.”).

14 *See id.*

15 *See* U.S. CENSUS BUREAU, *supra* note 10; Deborah L. Murphy, *Understanding the Complexities of Private Family Firms: An Empirical Investigation*, 18 FAM. BUS. REV. 123, 124 (2005) (undertaking a study to “gain additional insight into the most important issues facing family firms”); Melissa Carey Shanker & Joseph H. Astrachan, *Myths and Realities: Family Businesses’ Contribution to the US Economy—A Framework for Assessing Family Business Statistics*, 9 FAM. BUS. REV. 107, 114–15 (1996) (assessing the contribution of family businesses in the United States to GDP and employment). While a study of sole proprietorship might also raise issues of spousal interests, particularly in community-property states, this area is beyond the scope of this Article.

16 *See infra* Part V; *see also* JOSEPH SHADE, BUSINESS ASSOCIATIONS IN A NUTSHELL 47 (2d ed. 2006) (noting that due to the preventive exposure that the sole proprietorship poses to its owners, “there are far more sole proprietorships than there should be” (emphasis omitted)).

been described as “[o]ne of the law’s most economically significant contributions to business life.”¹⁷ This is what is herein referred to as “legal entity status,” or the “creation of fictional but legally recognized entities or ‘persons’ that are treated as having some of the attributes of natural persons.”¹⁸ In addition, they are subject to unshielded business liabilities.¹⁹ This Article is not about liability shielding, although the creation of a sole proprietorship as a separate legal entity may result in some liability-shielding aspects. Rather, this Article focuses on the “mechanical efficiencies”²⁰ of entity status.

Why does the law treat unincorporated sole proprietors differently than all other business forms? Does sole proprietorship law disparately impact business owners who often reside at the bottom rung of the socioeconomic ladder? What does an analysis of the sole proprietorship unveil about the true meaning and rise of the firm? The answers to these questions are viewed from the lens of Critical Class Theory and what is referred to here as “unconscious classism.”

B. The Lens of Unconscious Classism and Critical Class Theory

Before outlining the direction of this Article, it is essential to present a perspective or lens through which sole proprietorship law will be viewed. Overt racism and sexism have received substantial attention from constitutional theorists, including the excellent work done under Critical Race Theory (“CRT”),²¹ Critical Feminist Theory

17 ROBERT CHARLES CLARK, CORPORATE LAW 15 (1986). See generally Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (discussing the development of the corporation as an autonomous legal entity in the American legal system).

18 CLARK, *supra* note 17, at 15.

19 See Crusto, *supra* note 5 (analyzing the issues relative to sole proprietors’ exposure to business liabilities and presenting a case for a limited liability sole proprietorship statute).

20 CLARK, *supra* note 17, at 19. See *infra* Part II.B.

21 See, e.g., CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (arguing that anti-racist scholars generally misunderstand the relationship between racial and other forms of oppression, and thus help perpetuate heterosexism); Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455 (2002) [hereinafter Hutchinson, *Progressive Race Blindness?*] (criticizing “progressive race blindness” theory for failing to embrace race as an important dimension of identity); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 330 (2006) (suggesting that CRT should more adequately account for issues of class); Bailey Figler, Note, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61

(“CFT”),²² and Critical Class Theory (“CCT”).²³ In addition to analyzing and remedying overt acts of inequity, constitutional rights theorists have come to recognize the need to expand constitutional rights theory beyond overt acts to redress unconscious and institutional forms of rights violations.²⁴ This Article seeks to contribute to Poverty or Critical Class Theory of constitutional rights by presenting, in part, a framework for analyzing social and economic discrepancies by focusing on the economic infrastructure, class divisions, and institutionalized inequities manifest within the United States.

CCT continues the work started by CRT and CFT, and in many ways is consistent with these theories. CRT calls for legal discourse

N.Y.U. ANN. SURV. AM. L. 723 (2006) (discussing the problem of unconscious racism in felon disenfranchisement).

- 22 See, e.g., Keith Aoki, *Does Nothing Ever Change; Is Everything New?: Comments on the “To Do Feminist Legal Theory” Symposium*, 9 CARDOZO WOMEN’S L.J. 415 (2003) (summarizing various works of CFT scholarship); Don S. Browning, *Linda McClain’s The Place of Families and Contemporary Family Law: A Critique from Critical Familism*, 56 EMORY L.J. 1383 (2007) (proposing a theory of “critical familism” to challenge trends in family law theory); Verna L. Williams, *Private Choices, Public Consequences: Public Education Reform and Feminist Legal Theory*, 12 WM. & MARY J. WOMEN & L. 563 (2006) (discussing public education from a CFT perspective).
- 23 See, e.g., EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005); MARTHA R. MAHONEY ET AL., *CASES AND MATERIALS ON SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW* (2003); Clark Freshman, *Foreword: Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship*, 55 STAN. L. REV. 2267 (2003) (suggesting an overlap between CRT and empirical studies of inequality); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005) (discussing discrimination in employment decisions); Kristin Brandser Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181 (2006) (arguing that feminist legal theory requires broader thinking about matters relating to women’s financial well-being); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996) (discussing disparate impact and class theory in the employment context); Rachel Bloomekatz, Comment, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963 (2007) (analyzing the statutory remedies available for U.S. workers to challenge employment discrimination in favor of immigrants).
- 24 See, e.g., Jacquelyn L. Bridgeman, *Seeing the Old Lady: A New Perspective on the Age Old Problems of Discrimination, Inequality, and Subordination*, 27 B.C. THIRD WORLD L.J. 263 (2007) (arguing that current laws only address blatant racism and should be further refined); Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (discussing the history of colorblindness in the context of anti-discrimination law); Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931 (2007) (arguing that federal courts treat federal affirmative action laws more leniently than they do state laws); cf. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (invalidating racial classifications in public school student assignment plans); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding a public law school’s use of race in admissions decisions to maintain a diverse student body).

intending to uphold the rights of those who are disadvantaged because of their race.²⁵ Similarly, CFT focuses on the social impact of gender discrimination.²⁶ However, these calls for legal discourse on race and gender equality have not reached their potential because the economic element of how or why there is racial and gender discrimination is often not addressed.²⁷ CCT hopes that by focusing on the economic aspect of discrimination, one might understand that various forms of discrimination are a by-product of class-based distinctions.²⁸ CCT assesses political and economic factors, in addition to social factors. One hopes that through the prism of CCT, various aspects of unconscious and/or institutionalized inequities will be redressed, as sometimes inequities result from the mentality of individuals and the socio-economic impact of their prejudices.²⁹ Through the bi-focal lens of “unconscious classism,” combining CCT with recent theories of unconscious adverse behavior, this Article analyzes sole proprietorship law as follows.

C. Overview of the Article

Through the lens of unconscious classism, this Article argues that sole proprietorship law should be reformed to recognize the sole proprietorship as a legal entity, separate from its owner, codifying its entity status in a Uniform Sole Proprietorship Act (“USPA”).³⁰ In promoting the legal entity nature of the sole proprietorship, this Article seeks to achieve what is hereinafter referred to as “entity equality,” placing sole proprietors on equal footing with owners of other

25 See, e.g., Hutchinson, *Progressive Race Blindness?*, *supra* note 21, at 1477 (noting that critical race theorists and critical legal scholars agree that rights are socially constructed).

26 See, e.g., Williams, *supra* note 22, at 569 (discussing the workings of inner city public schools and how educational reform policies appear to condemn poor parents, who are often single women).

27 See, e.g., Mutua, *supra* note 21, at 391 (discussing the interrelation between class and race in critical race theory).

28 *Id.* at 389.

29 See, e.g., Hart, *supra* note 23, at 744 (explaining that in some contexts, discrimination may be the result of individuals making subjective decisions).

30 There are, of course, other approaches to remedying the law’s unequal treatment of sole proprietors, such as amending the definition of a general partnership to include a one-person partnership, educating sole proprietors on the benefits of alternative legal forms including incorporation and the limited liability company, and/or automatically granting a sole proprietor partial entity status upon registering for a business license or a fictitious name. The statutory approach, following the example of the Uniform Partnership Act (“UPA”), would arguably result in the widest, most immediate means to redress the entity issue. The author thankfully acknowledges University of Miami Law Professor Caroline M. Bradley for raising the question of alternatives to statutory development.

business enterprises—partners, shareholders, and limited liability members.³¹

Some critics will see this as another unwanted development in the proliferation of legal entities,³² supporting the call for entity unification.³³ To the contrary, entity equality is consistent with the views of business law scholars who challenge the call for entity rationalization or simplification, arguing that form should follow function.³⁴ Most importantly, entity equality looks to “considerations of fairness, justice, or policy.”³⁵

Part I of this Article demonstrates the need to view the theory of the firm from the sole proprietorship perspective and to develop a critical class theory of constitutional law, as well as provides the thesis and an overview. Part II demonstrates that the law currently views the sole proprietorship solely as the alter ego of its owner (the “solitary alter ego” view), how the solitary alter ego view legally disadvantages sole proprietorships by treating them as individuals under common law principles, and why the solitary alter ego view is antiquated and ripe for reform. Part III analyzes the value of legal entity status, presents case law examples of the sophisticated nature of and probing issues surrounding modern sole proprietorship law, and proposes that the sole proprietorship should be treated as a legal entity for some purposes, as is the law for all other business forms.

Part IV argues that current constitutional law principles are inadequate to remedy unconscious and institutional classism against sole proprietors. Part V makes the public policy case for expanding

31 See *infra* Part II.B (discussing entity status of other legal enterprises). Also note that an alternative to granting entity status to the sole proprietorship is to strip entity status from the business enterprises that currently enjoy its benefits, including the corporation.

32 See generally Robert W. Hamilton, *Entity Proliferation*, 37 SUFFOLK U. L. REV. 859 (2004) (analyzing the pros and cons of the recent growth in the variety of business entities).

33 See, e.g., Harry J. Haynsworth, *The Unified Business Organizations Code: The Next Generation*, 29 DEL. J. CORP. L. 83, 90–109 (2004) (suggesting the creation of a unified business organizations code).

34 See, e.g., Richard A. Booth, *Form and Function in Business Organizations*, 58 BUS. L. 1433, 1443–48 (2003) (challenging the call for entity rationalization or simplification).

35 ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS IN A NUTSHELL* 50 (5th ed. 2000). In a critique of corporate law, Hamilton observes that:

The artificial entity theory has been criticized as being unrealistic and formalistic. . . . Professor Hohfeld summarized this view of the corporation in . . . *Hohfeld, Fundamental Legal Conceptions* 197 (1923).

Hohfeld’s analysis illustrates the fallacy of accepting uncritically the “artificial entity” theory. A corporation may be treated as an entity for many purposes but it need not be treated as an entity for all purposes. . . . For this reason, arguments grounded solely on the artificial entity theory and not supported by considerations of fairness, justice, or policy have sometimes not prevailed.

Id. at 48–50.

constitutional rights theory to redress the law's unequal treatment of sole proprietors. Part VI discusses the opposition to treating the sole proprietorship as a legal entity and shows why the opposition is wrong. Part VII concludes that the law should establish entity equality for sole proprietors by statutorily granting the sole proprietorship legal entity status for some purposes in addition to alter ego status for other purposes. Appendix A is a chart of the current entity features of a sole proprietorship compared to those proposed in this Article. Appendix B proposes the legal entity status features of a model sole proprietorship statute, the Uniform Sole Proprietorship Act ("USPA"), following the example of the National Conference of Commissioners on Uniform State Laws ("NCCUSL").³⁶ And Appendix C is a chart entitled "Distribution of Sole Proprietors and Their Gross Receipts by Size of Proprietorship, Tax Year 2003."

II. SOLE PROPRIETORSHIP LAW IS RIPE FOR REVIEW BECAUSE THE LAW AND THE SOLITARY ALTER EGO VIEW TREAT THE SOLE PROPRIETORSHIP AS INDISTINCT FROM ITS OWNER

This Part establishes that the law currently defines the sole proprietorship solely as the alter ego of its owner. It argues that this definition legally disadvantages sole proprietors compared to business owners who choose other business forms. It demonstrates that sole proprietorship law is currently seen as being indistinct from other common law principles. And it argues that the solitary alter ego view is antiquated and ripe for reform.

A. *The Solitary Alter Ego Theory of Sole Proprietorships*

Under the solitary ego view, a sole proprietorship has no separate identity from its owner.³⁷ A sole proprietor is solely entitled to all

³⁶ NCCUSL's treatment of the general partnership as a legal entity rather than as an aggregate of partners began in the Uniform Partnership Act ("UPA") (1914), and reached fruition in its independence of partners in the Revised Uniform Partnership Act ("RUPA") (1994). See HAMILTON, *supra* note 5, at 63 ("Much of the early case law adopted the aggregate theory, but almost all modern cases treat the partnership as a separate legal entity. UPA (1914) itself contains internal evidence that could be cited to support either theory, but section 201 of UPA (1994) squarely adopts the modern entity view by simply stating that 'a partnership is an entity' independent of its partners." (footnote omitted)).

³⁷ See HAMILTON, *supra* note 5, at 39 ("From a legal standpoint, . . . in a proprietorship there is no separation between personal and business affairs."); LARRY D. SODERQUIST ET AL., CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 39 (6th ed. 2005) ("[T]he legal identity of the sole proprietorship and its owner are one and the same . . ."); The Basics of Sole Proprietorships, <http://www.entrepreneur.com/>

profits from the business, subject to the rights of creditors,³⁸ while personally liable for all business debts and obligations,³⁹ including all contractual debts and all tort liabilities incurred by the sole proprietor, her employees, and other agents in the business's course.⁴⁰ The profits and losses of the business are reported on the personal income tax return of the owner, although a separate schedule must be used.⁴¹

Some courts have added to the solitary ego view in holding that any judgment rendered against a sole proprietorship, separate from its owner, is void.⁴² This non-entity view is further illustrated in rulings holding that the proper venue for actions brought against a sole proprietorship is the venue where the proprietor is domiciled.⁴³

B. *The Alter Ego View Legally Disadvantages Sole Proprietors*

The solitary alter ego view hampers the effectiveness of the sole proprietorship, making it a legally disadvantaged business form. There are “mechanical efficienc[ies]” in “[t]he function of attributing powers to a fictional legal person.”⁴⁴ Arguably, mechanical efficiencies result from two and, in some cases, thousands of partners or shareholders acting as a single legal entity or person.⁴⁵ One wonders whether the converse is also true—that mechanical efficiencies might also result from one person acting as two—which on the surface appears inefficient and contrary to logic.

startingabusiness/startupbasics/businessstructure/article77798.html (last visited Jan. 15, 2009) (presenting a simple description of sole proprietorships that assumes a solitary ego view).

38 1 STEVEN C. ALBERTY, *ADVISING SMALL BUSINESSES* § 3:2, at 2 (2005).

39 EISENBERG, *supra* note 2, at 1.

40 *See id.* at 2.

41 1 ALBERTY, *supra* note 38, § 4:2, at 1–2.

42 *See, e.g.*, *Patterson v. V & M Auto Body*, 589 N.E.2d 1306, 1309 (Ohio 1992) (voiding a judgment against an auto body shop because the complaint named a sole proprietorship—“a nonentity”—rather than its proprietor); *cf. United States v. Ball*, 163 U.S. 662, 671 (1896) (holding that a void judgment brought against a sole proprietorship does not violate its proprietor's double jeopardy rights).

43 *See, e.g.*, *Lee v. Xerox Corp.*, 387 S.E.2d 653, 653–54 (Ga. Ct. App. 1989) (holding venue improper in county where realty company was located because its proprietor resided in a different county); *Dowis v. Watson*, 289 S.E.2d 558, 559 (Ga. Ct. App. 1982) (“The county of residence of a sole proprietorship is the county of residence of its proprietor.”).

44 CLARK, *supra* note 17, at 19–20 (“Legal personality effects a clear saving of transaction costs, and the cumulative effect of these mundane savings is very great.”).

45 *See id.* (citing as an example “the ability of a corporation to own real estate in its own name”).

One way to view mechanical efficiency is not by consolidation of the number of actors but by the reduced cost of transactions. For example, it is likely that the solitary alter ego view restricts a sole proprietor's ability to obtain credit in the business's name. An illustration of the negative effect of this view is when a creditor who relies solely on a business's reported credit history successfully brings suit against the sole proprietor individually for an unpaid business obligation,⁴⁶ "[b]ecause a sole proprietorship has no legal identity apart from its owner."⁴⁷ Such an approach may limit a sole proprietor's ability to effectuate credit in both her personal name and in the business's name, reducing the amount of total credit available and eliminating the opportunity for the business to develop its own creditworthiness.

Another major advantage of legal entity status is "to minimize disruption and to preserve the going concern value of business ventures."⁴⁸ Another downside of the solitary alter ego view of sole proprietorships is that the death of the owner results in the complete dissolution of the business, disallowing a smooth continuation of the business.⁴⁹ "Insurance policies can protect a sole proprietor to some degree, but liabilities in excess of insurance proceeds may be satisfied from the sole proprietor's own assets."⁵⁰ Should a sole proprietor seek discharge from business obligations, the proprietor must declare personal bankruptcy.⁵¹ Alternatively, if the sole proprietor files a personal bankruptcy petition, her individual assets and liabilities and her business's assets and liabilities will be adversely affected.⁵²

Under the solitary alter ego view, if the sole proprietorship has been legally wronged, it is the proprietor and not the business who is the appropriate plaintiff; if the business does wrong, the proprietor and not the business is the proper defendant.⁵³ However,

46 HAMILTON, *supra* note 5, at 43.

47 *Credit Assocs. of Maui, Ltd. v. Carlbom*, 50 P.3d 431, 432, 435 (Haw. Ct. App. 2002) ("At common law, sole proprietorships are not 'legal entities.' Neither are partnerships. . . . Rather, sole proprietorships and partnerships are deemed to be merely the alter egos of the proprietor or the partners (as individuals).") (quoting *State v. ABC Towing*, 954 P.2d 575, 577-78 (Alaska Ct. App. 1998)).

48 CLARK, *supra* note 17, at 20.

49 See 1 ALBERTY, *supra* note 38, § 3:13 (discussing succession plans for sole proprietorships to avoid dissolution in the event of the proprietor's death); HARRY J. HAYNSWORTH, *SELECTING THE FORM OF A SMALL BUSINESS ENTITY* 3 (1985) ("Legally a sole proprietorship ceases to exist at the proprietor's death.").

50 9 MERTENS THE LAW OF FED INCOME TAX § 35A:05 (Supp. 2005).

51 HAMILTON, *supra* note 5, at 43.

52 *Id.*

53 *Id.* at 44-45.

“[p]rocedural statutes or rules of court may set forth the appropriate manner to name a [sole] proprietorship and its owner as a defendant.”⁵⁴ Accordingly, “in litigation involving a [sole] proprietorship it is customary in many jurisdictions to use the *dba* (doing business as) designation when bringing suit on a business obligation.”⁵⁵

In summary, under the solitary alter ego view of sole proprietorship, a sole proprietor is legally disadvantaged in that, without further action, she is unable to own property in her business’s name, obtain credit in her business’s name, sue or be sued in her business’s name, avoid personal liability for her business’s contract and tort liability, and segregate the business’s tax liability from her own personal tax liability.⁵⁶ Hence, the solitary alter ego view increases mechanical inefficiency, adds transaction costs, reduces savings, and maximizes disruption, thereby seriously restricting the ability of a sole proprietor to compete with an owner who is using other legal business forms.

C. *The Law Also Fails to Distinguish Sole Proprietorship Law from Other Common Law Principles*

Currently, sole proprietorship law is intertwined with agency law,⁵⁷ perhaps in recognition of the important role that agency law plays in the operation of sole proprietorships (although no more than in the operation of other types of business enterprises). “Under common law rules, a ‘sole proprietorship is created by the mutual assent of proprietor and agent,’ under which agency law imposes on the agent a fiduciary duty of loyalty with no corresponding duty on the proprietor.”⁵⁸ When receiving scholarly treatment, sole proprietorship law is usually relegated to an introduction to agency law, as if they are one and the same.⁵⁹

54 *Id.* at 45.

55 *Id.*

56 *See generally* RIEVA LESONSKY, *START YOUR OWN BUSINESS: THE ONLY START-UP BOOK YOU’LL EVER NEED* (2d ed. 2001); MICHAEL SPADACCINI, *ULTIMATE BOOK ON FORMING CORPORATIONS, LLC’S, SOLE PROPRIETORSHIPS, AND PARTNERSHIPS* (2004).

57 *See, e.g.*, EISENBERG, *supra* note 2, at 1 (discussing sole proprietorships under the rubric of agency law).

58 Crusto, *supra* note 5, at 395 (quoting Charles R. O’Kelley, Jr., *Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis*, 87 *NW. U. L. REV.* 216, 227 (1992)).

59 *See, e.g.*, RAGAZZO & MOLL, *supra* note 2, at 2 (stating that “[a]lthough agency law applies to all forms of business, it is frequently invoked when dealing with the most basic (and most common) form—the sole proprietorship”); RIBSTEIN, *supra* note 2, at 10 (“The relationships between the owner and the other inputs in a sole proprietorship are not covered in a separate business association statute . . . [T]he most important body of case law that applies to this type of firm [is] the common law of agency . . .”); SELIGMAN, *supra*

Sole proprietorship law is often seen as indistinguishable from and governed by common law default rules.⁶⁰ For example, sole proprietors are subject to general rules of tort liability.⁶¹ “Under the common law, a person has three sources of liability: direct, vicarious, and liability resulting from a sole proprietorship’s fiduciary duties.”⁶² Therefore, as long as the voluntary act has some causal link with the harm caused to the victim, the intent or negligence of the sole proprietor is irrelevant.⁶³

While common rules and principles of tort, contract, and agency law apply to all business entities, this does not negate the need to identify and codify unique rules and principles that govern and regulate sole proprietors.⁶⁴

D. The Current Views of a Sole Proprietorship Are Ripe for Reform

The law’s current views of the sole proprietorship are ripe for reform. As the most used and extremely valuable business form in the United States, often from the perspective of both the sole proprietor and the outside world, a sole proprietorship is treated as an entity separate and distinct from its owner. As a result, a sole proprietorship should be viewed as a legal entity for at least “titling” purposes, such as conveying business property in the business name, obtaining credit in the business name including establishing separate business creditor priorities from those of the sole proprietor’s individual creditors, issuing financial instruments on behalf of the business, suing and being sued for business matters in the business’s name, transferring ownership of the business in the business name, and permitting the business to continue beyond the death of the sole proprietor.

note 2, at 27 (“The source of the most significant legal principles for the sole proprietorship is the law of agency.”).

60 Crusto, *supra* note 5, at 390.

61 John H. Matheson, *Choice of Organizational Form for the Start-Up Business*, 1 MINN. J. BUS. L. & ENTREPRENEURSHIP 7, 8 (2002) (“The substantive law of . . . torts . . . govern[s] the sole proprietorship, including the personal liability of the owner for the obligations of the business.”).

62 Crusto, *supra* note 5, at 390.

63 *Id.*

64 *See* discussion *infra* Part III (making the case for a uniform sole proprietorship statute).

1. *The Sole Proprietorship Is the Most Used Type of Business Enterprise, Has Great Economic Significance, and Has Historical and International Significance*

Given that the sole proprietorship is the most prevalent business form in this country,⁶⁵ sole proprietorship law is worth reviewing for the sake of both sole proprietors and the attorneys who represent them.⁶⁶ As mentioned briefly in the Introduction, the sole proprietorship is the simplest form of business type, requiring merely conducting a business owned and often operated by one person.⁶⁷ A sole proprietorship can also result by operation of law from a defective solely-owned corporation, a defective solely-owned limited liability company, or a formerly-two-person-owned partnership where one partner disassociates (perhaps by death) and the surviving partner continues the business.⁶⁸

While sole proprietorship total revenue is dwarfed by that of corporations,⁶⁹ the sole proprietorship business form is used to operate large as well as small business enterprises.⁷⁰ They are greatly used in the service industry, with the largest numbers and producing the most significant net income and are also used in agriculture, forestry, and fishing, and in wholesale and retail trade.⁷¹ For these reasons, it is essential that sole proprietorship law be further explored.

65 See U.S. CENSUS BUREAU, *supra* note 10.

66 See generally 1 ALBERTY, *supra* note 38.

67 See *id.* § 3:2 (stating that all that is necessary to create a sole proprietorship is the sole proprietor's desire to enter into business); Nolo.com, Sole Proprietorship Basics, <http://www.nolo.com/article.cfm/objectID/3FD19141-DB91-4FCA-BDB93416A4D05479/111/182/147/ART> (last visited Jan. 15, 2009) (stating that the sole proprietorship is the simplest legal structure for those going into business on their own).

68 See HAMILTON, *supra* note 5, at 5 (noting that not all business forms result from conscious and rational selection by their owner and legal counsel, and that the law provides for default forms for business).

69 See HAMILTON, *supra* note 5, at 8 (stating that "the cumulative receipts of the ten largest corporations exceeded the gross receipts of the 15 million-odd proprietorships"); Biz Stats, Free Business Statistics and Financial Ratios Site Map, <http://www.bizstats.com/business.htm> (last visited Jan. 15, 2009) (showing that corporations account for a large percentage (85%) of total business revenues in the United States in 2003); U.S. CENSUS BUREAU, *supra* note 10 (showing that in 2004, there were over 1 million corporations with over \$1 million in business receipts compared to only 109,000 non-farm proprietorships with the same amount of business receipts).

70 See U.S. CENSUS BUREAU, *supra* note 10, at 485 ("A sole proprietorship is an unincorporated business owned by one person and may include large enterprises with many employees and hired managers and part-time operators.").

71 CONARD ET AL., *supra* note 5, at 9–10 (referencing 1980 figures from the *Statistical Abstract of the United States*, 1986).

2. "Sole Proprietorship" Is Often a Misnomer for a Larger Business Enterprise and Sometimes for a Large Enterprise

Perhaps the greatest reason for treating the sole proprietorship as a legal entity for some purposes is because it is a larger business enterprise than its name suggests. That is, when one takes an economic overview of the sole proprietorship, one uncovers that the sole proprietorship, while legally owned by one person, is often a family-run business,⁷² employing family members as functional, partial owners.⁷³ The sole proprietorship's use of family members is a profitable strategy and sometimes a questionable means of avoiding tax liability.⁷⁴ Consequently, "[t]he line between employees and owners (or potential owners) of a business is sometimes not clear cut."⁷⁵ From this brief discussion of the sometimes familial nature of the sole proprietorship, one can easily see that sole proprietorships are often more than mere alter egos of their apparent, named owners.

Whether or not it is a family-owned business, a sole proprietorship is sometimes a large economic enterprise involving many non-relatives.⁷⁶ A sole proprietor typically will not conduct the business by herself, but will engage various people such as salespersons, mechanics, and attorneys to act on her behalf and subject to her control.⁷⁷ In applying contract entity or agency analysis to the sole proprietorship,⁷⁸ one quickly discovers that the sole proprietorship represents a

72 See generally PAT B. ALCORN, *SUCCESS AND SURVIVAL IN THE FAMILY-OWNED BUSINESS* (1982) (discussing the influence and participation of families in small, privately owned businesses); Louis B. Barnes & Simon A. Hershon, *Transferring Power in the Family Business*, *HARVARD BUS. REV.*, July–Aug. 1976, at 105, 105–14 (describing the organization of family businesses and the challenges of transferring ownership from one generation to the next).

73 Bruce A. Kirchoff & Judith J. Kirchoff, *Family Contributions to Productivity and Profitability in Small Businesses*, 25 *J. SMALL BUS. MGMT.* 25, 26 (1987) (exploring "the effects of family involvement on productivity and profitability" on family businesses); see also Shanker & Astrachan, *supra* note 15, at 112–14 (discussing the role of family members in sole proprietorships).

74 See HAMILTON, *supra* note 5, at 36–37 (reporting that a 1992 study showed that hiring employees creates large tax obligations for employers).

75 *Id.* at 37.

76 KLEIN & COFFEE, *supra* note 5, at 5 (stating that a sole proprietorship "may be large and complex, involving many people other than the owner, and can plainly be an 'organization' in the nonlegal sense of the term").

77 EISENBERG, *supra* note 2, at 2 (explaining further that the law of agency facilitates the sole proprietor's bidding).

78 See generally WILLIAM T. ALLEN & REINIER KRAAKMAN, *COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION* 9–12 (2003) (comparing the transactional cost theory of the firm as a set of transactions of cost-reducing relationships to Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (citing OLIVER E. WILLIAMSON, *THE ECONOMIC*

nexus of economic and business interests. Through the use of outside agents via contracts, the sole proprietor often reduces internal operating overhead.⁷⁹ As such, the sole proprietorship may have some advantages over other types of business enterprise.⁸⁰

In summary, the sole proprietorship is the most-used business form in the United States, makes significant contributions to the economy, often involves family members, and sometimes is a large business that employs many non-relative agents. For these and other reasons, one can conclude that the law should consider a more sophisticated view of the sole proprietorship. From all of the above, it is posited that the sole proprietorship should be viewed as the alter ego of its owner for some purposes and as a legal entity for titling purposes.

III. THE SOLE PROPRIETORSHIP SHOULD BE VIEWED AS A LEGAL ENTITY FOR TITLING PURPOSES

Part III proposes that the sole proprietorship should be viewed as a legal entity for titling purposes and as an alter ego of its owner for other purposes. It analyzes the value of legal entity status, presents case law examples of the sophisticated nature of and probing issues surrounding modern sole proprietorship law, and suggests that entity equality requires that the sole proprietorship be treated as a legal entity for titling purposes comparable to all other business forms.

A. *Legal Entity Status Has Great Value to Business Associations*

Legal entity status, or entity status, is one of the most significant and most ignored features of business life.⁸¹ As previously mentioned, entity status is “the creation of fictional but legally recognized entities or ‘persons’ that are treated as having some of the attributes of natu-

INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985)); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (analyzing firm ownership structure through theories of agency, property rights, and finance).

⁷⁹ See Poznak Law Firm Ltd., *Doing Business as a Sole Proprietor*, <http://www.poznaklaw.com/articles/solep.htm> (last visited Jan. 15, 2009) (explaining how the operation of a business as a sole proprietorship can help the owner avoid double taxation of income).

⁸⁰ See DANIEL WM. FESSLER, *ALTERNATIVES TO INCORPORATION FOR PERSONS IN QUEST OF PROFIT: CASES AND MATERIALS ON PARTNERSHIPS, LIMITED PARTNERSHIPS, JOINT VENTURES AND RELATED AGENCY CONCEPTS* 4–6 (3d ed. 1991) (describing such advantages).

⁸¹ CLARK, *supra* note 17, at 15. See generally Mark, *supra* note 17 (discussing the development of the corporation as an autonomous legal entity in the American legal system).

ral persons.”⁸² An “unincorporated entity” is defined as “an organization or artificial legal person that either has a separate legal existence or has the power to acquire an estate in real property in its own name . . . includ[ing] a general partnership, limited liability company, limited partnership, business trust, joint stock association and incorporated nonprofit association.”⁸³

In order to appreciate the benefits that legal entity status would bring to the sole proprietorship, one need only look at the value of entity status to other business entities. For example, general partnerships have certain entity features: the power to sue or be sued in the partnership name, the right to hold and convey title to property in the partnership name, and the ability to provide for continuation of the partnership by contract even when the partnership technically dissolves because of a change in membership.⁸⁴

Entity status results from state statutory authority as represented in the following examples. First, under state incorporation statutes, a corporation as a separate legal entity has separate rights, powers, and liabilities separate from those who own or manage it. A corporate entity can own and hold title to property, and is liable for its debts. Additionally, the continued existence of a corporation is unaffected by changes in its shareholders and is liable for its debts.⁸⁵ Second, comparatively, although both the Uniform Partnership Act (“UPA”) and the Revised Uniform Partnership Act (“RUPA”) fail to expressly define the term “entity,” the UPA views a general partnership in part as a legal entity⁸⁶ while the RUPA does so in whole.⁸⁷ Third, under the Uniform Limited Liability Company Act, “[a] limited liability company is a legal entity distinct from its members.”⁸⁸ And fourth, under the Uniform Limited Partnership Act, a limited partnership is de-

82 CLARK, *supra* note 17, at 15.

83 MODEL BUS. CORP. ACT § 1.40(24A) (3d. ed. Supp. 2000).

84 RIBSTEIN & LETSOU, *supra* note 2, at 6–7. See generally Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 397–401 (1989) (discussing the legal-person conceptual approach and the functional approach to partnership relationships).

85 RIBSTEIN & LETSOU, *supra* note 2, at 7.

86 See UNIF. P'SHIP ACT (“UPA”) §§ 8(3), 9(1), 25, 40(h) (1914) (considering a partnership as a legal entity under these sections).

87 See REV. UNIF. P'SHIP ACT (“RUPA”) §§ 101(10), 201(a), 307(a) (1997). Section 201(a) states: “A partnership is an entity distinct from its partners.” In addition, under § 307(a), “[a] partnership may sue and be sued” in its own name. Furthermore, § 101(10) defines “person” as “an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.”

88 UNIF. LTD. LIAB. CO. ACT § 201 (1996).

defined as “an entity, having one or more general partners and one or more limited partners, which is formed under this [Act] by two or more persons”⁸⁹ Furthermore, as an entity, a limited partnership is distinct from its partners.⁹⁰

Legal entity status allows a business enterprise mechanical efficiencies to save money, operate more effectively, and arguably be more profitable. With needs similar to businesses organized under other legal forms, there is no good reason why sole proprietorships should be denied statutory benefits similar to those granted to other legal entities.

B. The Complexity of Modern Issues Facing the Sole Proprietorship Requires That It Be Granted Legal Entity Status in Some Circumstances

Compared to owners of other business forms, sole proprietors face the same business challenges, have unique legal issues, and require distinctive applications of common law rules. The following discussion shows that sole proprietorship law is distinct from general common law principles; and, as a result, sole proprietorship law requires statutory recognition.

1. The Sole Proprietorship Is a Distinct Body of Law, Raising Unique Legal Issues, Rules, and Principles

Like all business types, the sole proprietorship is subject to certain common law rules. And, like other business types, the sole proprietorship possesses distinctive legal issues, rules, and principles.⁹¹ Noting comparative differences with a general partnership, a limited partnership, and a corporation, a sole proprietorship has the following attractions and distractions:

⁸⁹ UNIF. LTD. P'SHIP ACT § 102(11) (2001) (brackets in original).

⁹⁰ *Id.* § 104(a).

⁹¹ See, e.g., CONARD ET AL., *supra* note 5, at 10 (noting that “[a]lthough proprietorships are the most numerous form of business organization, there is no distinctive body of law about them. One does not find any treatises or digest titles devoted to them. . . . But sole proprietors do have their problems, both as their duties and as to their rights”); FESSLER, *supra* note 80, at 4–6 (describing the many advantages of not incorporating); HAMILTON, *supra* note 5, at 29–41 (discussing essential terms and concepts of unincorporated businesses and closely held corporations); CHESTER A. ROHRlich, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES §§ 2.02, 2.04 (1989) (discussing the characteristics and advantages of individual proprietorship and limited partnerships); Crusto, *supra* note 5, at 387–89 (providing a list of twenty-eight unique characteristics of sole proprietorships); cf. RIBSTEIN, *supra* note 2, at 10 (explaining that the most important body of case law applying to sole proprietorships is the common law of agency).

- (1) No documentation or filing essential for existence;
- (2) No initial and annual franchise or license tax;
- (3) Owners are individually liable for business debts;
- (4) Judicial proceedings are in the name of the individual owner;
- (5) Transfer of ownership requires conveyancing formalities;
- (6) Ownership and authority are terminated by the death of the proprietor;
- (7) Distributed profits are taxed only as income of the members;
- (8) Enterprise profits are taxed as the income of members even though they are undistributed; and
- (9) Enterprise losses are offset against the members' individual taxable incomes.⁹²

Based on these features, compared to other business enterprises, one might conclude that the sole proprietorship is most similar to the general partnership, except that a general partnership is composed of two or more persons while a sole proprietorship is composed of only one person.⁹³ As noted above, as a general partnership is both a legal entity separate from its partner owner and a legal aggregate of partners, there is no reason why a sole proprietorship could not exist separately from the sole proprietor. Inquiring into the case law might provide some insight into the complex and distinctive nature of sole proprietorship law.

The following survey is a brief, non-exhaustive study of the case law concerning the sole proprietorship. The author believes that this survey is sufficient evidence that sole proprietorship law exists as a separate body of law, distinct from general common law principles and other business forms. While the majority of the following cases follow the solitary alter ego view of sole proprietorships, the courts often grapple with sole proprietorships as legal entities and the decisions illustrate the inequity of treating sole proprietors differently from owners of other business associations.

a. Sole Proprietorship as Alter Ego of the Sole Proprietor

A Texas case⁹⁴ illustrates that despite the truism that a sole proprietorship is the alter ego of the sole proprietor, courts sometimes grapple with the reality that a sole proprietorship is often operated as a separate business enterprise under an assumed name:

⁹² CONARD ET AL., *supra* note 5, at 4–5.

⁹³ *See id.*

⁹⁴ *Holberg & Co. v. Citizens Nat'l Assurance Co.*, 856 S.W.2d 515 (Tex. Ct. App. 1993).

[A] plaintiff brought suit against Holberg & Co., a [sole] proprietorship owned by Robert E. Holberg, naming as the defendant only the business in its assumed name. After obtaining a judgment for over \$90,000, the plaintiff moved to add Robert E. Holberg's name individually to the judgment. The trial court did so and Robert E. Holberg appealed on the ground there was no evidence indicating he was personally responsible for the debt. Not only did the appellate court affirm the trial court's action . . . , but it also sanctioned the defendant's attorney for filing a frivolous appeal taken "for delay and without sufficient cause."⁹⁵

According to the court, the "[c]ompany was, in law and in fact, one and the same as Holberg, because the sole proprietorship has a legal existence only in the identity of Holberg."⁹⁶

b. Constitutional Duty to Treat Sole Proprietors and Corporate Officers Equally

In assessing the application of § 17a(1)(e)⁹⁷ of the Bankruptcy Act to sole proprietors, the U.S. Supreme Court recognized the right of sole proprietors to equal treatment with corporate officers. In *United States v. Sotelo*, the Court held that the principal officer and majority shareholder of a corporation had to pay underpaid taxes after declaring bankruptcy in accordance with § 17a(1)(e).⁹⁸ The Court explained that the overall policy of the Bankruptcy Act of giving bankrupt corporations a "fresh start" does not override Congress's specific intent in § 17 a(1)(e) to make liability for unpaid taxes non-dischargeable, particularly because a contrary result "would have the effect of allowing a corporation and its officers to escape all liability for unpaid withholding taxes while leaving liable for such taxes after bankruptcy those individuals who do business in the sole proprietor-

⁹⁵ HAMILTON, *supra* note 5, at 41 (quoting and discussing *Holberg*, 856 S.W.2d at 515).

⁹⁶ *Holberg*, 856 S.W.2d at 518; *accord* *Credit Assocs. of Maui, Ltd. v. Carlbom*, 50 P.3d 431, 435–36 (Haw. Ct. App. 2002) (holding that a sole proprietorship was essentially a trade name that its owner operated, and thus, the owner was personally liable for judgments against the trade name).

⁹⁷ Bankruptcy Act, Pub. L. No. 89-496, § 2, 80 Stat. 270 (1966) (repealed, but amending 11 U.S.C. 35 § 17(a)(1)(e)) (making nondischargeable in bankruptcy "any taxes . . . which the bankrupt has collected or withheld from others . . . , but has not paid over"). This provision has typically been applied in conjunction with § 6672 of the Internal Revenue Code, which provides that if "[a]ny person required to collect, truthfully account for, and pay over" federal taxes "willfully fails" to do so, that person shall be liable for a "penalty" equal to the amount of the taxes in question. I.R.C. § 6672 (2000).

⁹⁸ 436 U.S. 268 (1978).

ship or partnership, rather than the corporate, form.”⁹⁹ Thus, sole proprietors, like corporate officials, were liable for unpaid taxes under the Act.¹⁰⁰

While the *Sotelo* dissent opposed holding corporate officials liable under § 17a(1)(e),¹⁰¹ the majority believed that discharging corporate officials from liability but still holding sole proprietors liable would result in a tremendous injustice to the ordinary businessman.¹⁰² The majority noted that in passing § 17a (1) “Congress was expressly concerned about the fact that the operation of prior law was ‘unfairly discriminatory against . . . the unincorporated small businessman.’”¹⁰³ Indeed, “Congress recognized that a bankrupt corporation ‘dissolves and goes out of business,’ thereby avoiding IRS tax claims; it was thought inequitable that a sole proprietor or other individual would remain liable after bankruptcy for the same type of claims.”¹⁰⁴ According to the Court, “This inequity between a corporate officer and [a sole proprietor], both of whom have a similar liability to the Government, frequently would turn on nothing more than whether the individual was ‘sophisticated’ enough ‘to, in effect, incorporate himself.’”¹⁰⁵ Therefore, Congress’s concern about eliminating corporations’ unfair advantage over the sole proprietor played a huge part in the *Sotelo* majority’s holding.¹⁰⁶ *Sotelo* shows that the Court recognizes the need to evaluate equality issues when applying laws to different business types.

99 *Id.* at 279–81 (citation omitted). The Court also noted that the legislative history of § 17a(1) of the Bankruptcy Act “provides . . . support for the view that respondent’s liability should be held nondischargeable.” *Id.* at 275.

100 *Id.*

101 *Id.* at 291–92 (Rehnquist, J., dissenting).

102 *Id.* at 281.

103 *Id.* (quoting H.R. REP. NO. 88-372, at 2 (1965)).

104 *Id.* (quoting 112 CONG. REC. 13,817 (1966) (statement of Sen. Ervin), and citing 112 CONG. REC. 13,821 (letter to Senators from Sens. Ervin and Hruska); 112 CONG. REC. 13,822 (statement of Sen. Hruska); Letter from Edward Gudeman, Under Sec’y of Commerce, to Hon. James O. Eastland, Chairman, Committee on the Judiciary, *reprinted in* S. REP. NO. 89-114, at 12 (1965); Memorandum from W. Randolph Montgomery, Chairman of the Nat’l Bankruptcy Conference, to Senators, *reprinted in* S. REP. NO. 89-114, at 16 (1965); S. REP. NO. 88-1134, at 2 (1964); H.R. REP. NO. 86-735, at 2 (1959)).

105 *Sotelo*, 436 U.S. at 281 (quoting 112 CONG. REC. 13,817 (1966) (statement of Sen. Ervin)).

106 *See id.*

c. Exploring the Alter Ego Theory in the Criminal Law Context

The criminal law generally treats a sole proprietorship and its owner as one.¹⁰⁷ Yet there are exceptional instances where the criminal law has diverged from the solitary alter ego view and held a sole proprietor and his business to be separate entities. The following examples are instances wherein the robbery of a sole proprietor and his business were counted as two separate actions of robbery. In *McKinley v. State*,¹⁰⁸ the Indiana Supreme Court upheld a defendant's convictions for two counts of armed robbery. The defendant had taken money from a pharmacy's cash register and the wallet and wristwatch of its sole proprietor. The court concluded that these two takings did not fall within the "single larceny doctrine," and therefore separate convictions were proper.¹⁰⁹

Similarly, in *Pagan v. State*,¹¹⁰ the Indiana Court of Appeals found that a sole proprietor and his business were separate entities. The court considered a convicted defendant's claim that the State failed to prove robbery as alleged in the charging information. The defendant robbed a video rental store by threatening the proprietor with a knife until she gave him money from the cash register and a moneybag under the counter. The video store was operated as a sole proprietorship.¹¹¹ The defendant was charged with robbery with a deadly weapon, which requires proof that the defendant "took property from another person, or from the presence of another person, by using or threatening the use of force or by putting any person in fear, while armed with a deadly weapon."¹¹² The written charge was not phrased in terms of taking property "from the presence of another

¹⁰⁷ This concept has been universally recognized in numerous jurisdictions and applied in distinct criminal law cases. Several courts have held that the sole proprietorship does not qualify as an "organization" under criminal statutes and, thus, is not a separate legal entity that may be held liable. *See, e.g.,* *Masonoff v. State*, 546 So. 2d 72 (Fla. Dist. Ct. App. 1989) (holding that the existence of a separate address or telephone number for a sole proprietorship does not create an "organization" sufficiently separate from the proprietor for him to be held liable under the Racketeer Influenced and Corrupt Organizations Act ("RICO")); *State v. ABC Towing*, 954 P.2d 575 (Alaska Ct. App. 1998) (holding that a sole proprietorship is not an "organization" for purposes of an anti-pollution statute and thus cannot be held liable for the illegal discharge of pollutants by one of its employees); *State v. Worsencroft*, 653 N.E.2d 746 (Ohio Ct. App. 1995) (holding that a sole proprietorship is not an "organization" for purposes of a federal Medicaid statute and thus cannot be held criminally liable).

¹⁰⁸ 400 N.E.2d 1378 (Ind. 1980).

¹⁰⁹ *Id.* at 1379.

¹¹⁰ 809 N.E.2d 915 (Ind. Ct. App. 2004).

¹¹¹ *Id.* at 919.

¹¹² *Id.* at 918 (citing IND. CODE § 35-42-5-1 (West 2009)).

person, but from a person, namely Hardinsburg Video, owned by Judy McIntyre.”¹¹³ The defendant argued that the State failed to prove that Hardinsburg Video was a “person” that could be robbed because the Indiana Criminal Code did not expressly define “person” to include sole proprietorships.¹¹⁴ Relying on the *McKinley* decision and, in the alternative, the definition of a sole proprietorship, the court concluded that a sole proprietorship could qualify as a “person” under the statute and affirmed the conviction.¹¹⁵

Neither *McKinley* nor *Pagan* required the recognition of any separate legal status for a sole proprietorship. In *McKinley*, the court practically viewed the robbery incident as two separate episodes.¹¹⁶ It noted that, after the defendant first stole money from the cash register, his actions “took on a different character” when he ordered the store owner to turn over his wallet and wristwatch, and kicked him in the face.¹¹⁷ In upholding the two convictions, the court did not rely on any notion that two separate entities owned the stolen items.¹¹⁸ The court expressly noted that the rule it applied did not require “that the business entity be a separate ‘person’ as is a corporation or partnership.”¹¹⁹ Rather, the court merely concluded that the defendant’s actions had caused different types of injuries to a single individual.¹²⁰

The *Pagan* court cited *McKinley* for the proposition that a sole proprietorship could be a crime victim, separate and distinct from its owner.¹²¹ This limited distinction, however, stems from *McKinley*’s recognition that a single business owner may suffer from a robbery in two different capacities.¹²² The *Pagan* court provided an alternative

113 *Id.* at 918–19 (internal quotation marks omitted).

114 *Id.* at 919.

115 *Id.* (noting that the *McKinley* court “was not asked to consider whether a sole proprietorship fell under the legal definition of ‘person’ in the Criminal Code”).

116 400 N.E.2d at 1379.

117 *Id.*

118 *See id.*

119 *Id.*

120 *See id.* (explaining that the defendant “wronged an individual by robbing both that individual and that individual’s business”).

121 *Pagan v. State*, 809 N.E.2d 915, 919 (Ind. Ct. App. 2004) (“We are satisfied, though, that a sole proprietorship may qualify as a ‘person’ that can be the victim of a crime. Our supreme court clearly held that a sole proprietorship may be a crime victim, separate and distinct from the business owner, in *McKinley v. State* . . .”).

122 *See id.* (explaining that *McKinley* held that “two separate crimes were committed when the defendant robbed ‘both [an] individual and that individual’s business’” (quoting *McKinley*, 400 N.E.2d at 1379)).

rationale for its decision that relied on the universally recognized status of a sole proprietorship as legally indistinct from its owner.¹²³

d. Alter Ego Theory Applied in Standard “Non-Owned Auto Exception” in Business Liability Insurance Policies

The sole proprietorship and its proprietor are also considered one and indistinguishable in the context of insurance policies.¹²⁴ This concept is illustrated in numerous cases involving the standard “non-owned auto exception” in business liability insurance policies. In *Bledsoe v. State Farm Fire and Casualty Co.*,¹²⁵ an Indiana federal court opined as to whether the exception applied to a vehicle owned by the sole proprietor of an insured business. The issue was whether the sole proprietor’s business liability insurance policy provided insurance coverage for the unsatisfied portion of the judgment owed to the plaintiff by the proprietor himself.¹²⁶

In *Bledsoe*, a sole proprietor’s son caused a car accident that injured the plaintiff.¹²⁷ The sole proprietorship’s insurance policy generally excluded coverage for damages arising from the use of auto-

¹²³ The *Pagan* court stated:

We note in the alternative that the definition of “sole proprietorship” is “[a] business in which one person owns all the assets, owes all the liabilities, and operates in his or her own personal capacity.” Under this definition, it is clear that stealing property from a sole proprietorship business is tantamount to stealing from the individual owner of the business, who necessarily owns all of the business’ property. This is so even if, under *McKinley*, it is possible to be convicted of two separate counts of robbery if a defendant forcibly takes both clearly identifiable “business” property and “individual” property. Here, the only property Pagan took was clearly identifiable with the Hardinsburg Video business. As such, we conclude that although the State was only entitled to charge Pagan with one count of robbery, it could allege and prove the taking of property from the “person” of Hardinsburg Video, which property was also necessarily the property of [its proprietor], a human being.

Id. (alteration in original) (citation omitted) (quoting BLACK’S LAW DICTIONARY 1398 (7th ed. 1999)).

¹²⁴ This concept has been universally recognized in numerous jurisdictions and applied in distinct tort liability cases. *See, e.g.*, *Providence Washington Ins. Co. v. Valley Forge Ins. Co.*, 50 Cal. Rptr. 2d 192 (Cal. Ct. App. 1996) (concluding that a sole proprietorship had no existence apart from its proprietor, and thus business liability coverage excluded an automobile titled to the proprietor); *Allstate Ins. Co. v. Willison*, 885 P.2d 342 (Colo. Ct. App. 1994) (holding that a vehicle titled in a sole proprietorship’s name was owned by its proprietor, and thus did not fall within the non-owned auto exception of the proprietor’s insurance policy); *Samples v. Ga. Mut. Ins. Co.*, 138 S.E.2d. 463 (Ga. Ct. App. 1964) (holding that a vehicle purchased under the name of a sole proprietorship was also owned by the proprietor).

¹²⁵ No. 1:04 CV 1584 DFH-TAB, 2005 WL 2491577 (S.D. Ind. Oct. 7, 2005).

¹²⁶ *Id.* at *3.

¹²⁷ *Id.* at *2.

mobiles, including those owned by the insured, but it also contained a non-owned auto exception to that exclusion that referred to the named insured.¹²⁸ Thus, the sole proprietorship's non-owned auto exception provided coverage only for vehicles not owned by the named insured, the sole proprietorship.¹²⁹ The vehicle involved in the accident belonged to the proprietor individually.¹³⁰ As a sole proprietorship is often legally indistinguishable from its proprietor, the vehicle was considered as one owned by the named insured, the sole proprietorship.¹³¹ Consequently, the business liability exclusion applied to exclude coverage for the proprietor's claims.¹³² The court held that the insurance company owed no duty to defend or indemnify the sole proprietorship under the business liability policy.¹³³ In reaching this conclusion, the court relied on the widely recognized characteristics of the sole proprietorship and treated the insured sole proprietorship and its proprietor, the vehicle's owner, as legally the same person.¹³⁴

In *Trombley v. Allstate Insurance Co.*,¹³⁵ a proprietor argued that his sole proprietorship was a distinct legal entity from himself for purposes of a business coverage exception in his insurance policy.¹³⁶ The exception precluded any insurance coverage for damages arising out of the use of any vehicle owned by the insured while used for business purposes.¹³⁷ The court found that the proprietor was the same legal entity as his proprietorship.¹³⁸ Thus, the vehicle owned by the sole proprietorship, which was involved in a car wreck during business hours, was also owned by the proprietor himself.¹³⁹ The court reasoned

128 *Id.*

129 *Id.*

130 *Id.* at *1, *5 (suggesting that “[state] courts would not distinguish between the sole proprietorship and its owner, so that a vehicle owned by the business owner would be deemed owned by the insured business”); see also *CU Lloyd’s of Tex. v. Hatfield*, 126 S.W.3d 679 (Tex. Ct. App. 2004) (reaching the same conclusion based on similar facts).

131 *Bledsoe*, 2005 WL 2491577, at *5.

132 *Id.*

133 *Id.*

134 *Id.* Most courts addressing this issue in reported decisions under similar sets of facts have reached the same conclusion. See, e.g., *Providence Washington Ins. Co. v. Valley Forge Ins. Co.*, 50 Cal. Rptr. 2d 192 (Cal. Ct. App. 1996); *Allstate Ins. Co. v. Willison*, 885 P.2d 342 (Colo. Ct. App. 1994); *Hall v. Auto-Owners Ins. Co.*, 658 N.W.2d 711 (Neb. 2003); *Recalde v. ITT Hartford*, 492 S.E.2d 435 (Va. 1997).

135 640 So.2d 815 (La. Ct. App. 1994).

136 *Id.* at 817; see also *Carlson v. Doekson Gross, Inc.*, 372 N.W.2d 902 (N.D. 1985) (reversing trial court's holding that a proprietor was a separate entity from his businesses).

137 *Trombley*, 640 So.2d at 817.

138 *Id.*

139 *Id.*

that a proprietor who enters into a contract (i.e. an insurance policy) under a trade name has no separate legal existence from the sole proprietorship in whose name that contract is made.¹⁴⁰ In reaching its conclusion, the court relied on Louisiana Code of Civil Procedure Article 736, which provides: “A person who does business under a trade name is the proper defendant in an action to enforce an obligation created by or arising out of the doing of such business.”¹⁴¹

The *Trombley* court stated further that Louisiana courts have consistently held that a suit brought against the owner in the trade name used was sufficient to justify rendition of judgment against the owner.¹⁴² Therefore, the policy’s business coverage exception applied and precluded the proprietor from insurance coverage.¹⁴³

e. Dissenting Opinion Recognizes the Inequity of Exempting Sole Proprietors from Statutory Immunity for Negligent Supervision Liability Granted to Corporations and Partnerships

Some judges recognize the inequity of statutory provisions that benefit corporations and partnerships but provide the same benefits to sole proprietors. For example, in *Madden v. Aldrich*,¹⁴⁴ the Arkansas Supreme Court held that a sole proprietor was not entitled to statutory immunity, which extended to corporations and partnerships, from liability for negligent supervision of persons not in privity of contract with the plaintiffs, and therefore could be held liable for his employee’s misconduct. But a strong dissent recognized the anomaly of extending limited liability to firms but not to sole proprietors for acts of subordinates.¹⁴⁵ The dissent found that the disparate treat-

140 *Id.*; see also *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1387 (D. Neb. 1977) (observing that “[t]he individual who does business as a sole proprietor under one or several names remains one person, personally liable for all his obligations”); *Nat’l Sur. Co. v. Okla. Presbyterian Coll. for Girls*, 132 P. 652, 654 (Okla. 1913) (suggesting that doing business under another name does not create an entity distinct from the person operating that business); *Holberg & Co. v. Citizens Nat’l Assurance Co.*, 856 S.W.2d 515, 516–18 (Tex. Ct. App. 1993) (holding that a judgment rendered against a sole proprietorship is binding upon the proprietor contracting under the assumed name of the proprietorship).

141 *Trombley*, 640 So. 2d at 817 (citing LA. CODE CIV. P. art. 736).

142 *Id.*

143 *Id.* at 817–18.

144 58 S.W.3d 342 (Ark. 2001).

145 *Id.* at 360 (Imber, J., dissenting) (citing *Barclay v. First Paris Holding Co.*, 42 S.W.3d 496 (Ark. 2001)) (noting that a literal interpretation of the applicable statute, which denies negligent supervision liability to partnerships and corporations yet holds sole proprietorships liable for the same, leads to “absurd consequences” that are clearly contrary to legislative intent).

ment of sole proprietorships and corporations regarding negligent supervision liability was extremely inequitable.¹⁴⁶ Moreover, the dissent felt that the majority's holding would "open the floodgates to law suits against partners, members, and officers of legal business organizations by imposing liability on them for negligent or fraudulent actions taken by even the most junior attorney in the firm where the plaintiffs lack contractual privity with anyone in the firm."¹⁴⁷

* * *

This case and the others cited illustrate that sole proprietorship law is not merely the same as general common law principles and requires recognition as being distinct and unique. The case law also shows that the solitary alter ego view is not always the only view the law has of sole proprietorships: the law sometimes finds a sole proprietor as being separate from its business entity. The case law further shows that the U.S. Supreme Court and other courts recognize that the law sometimes treats sole proprietors inequitably compared to other business owners. Finally, the case law also shows that sole proprietors face sophisticated challenges that require attentive specialized legal considerations.

C. The Sole Proprietorship Deserves Entity Equality

As evidenced above, the alter ego theory of sole proprietorship law is currently ill-equipped to meet the complex challenges of effectively doing business in the modern world. If society seeks to support the growth and development of small businesses, it should support a broader view of sole proprietorships. This Article presents one approach to doing so, that is, by providing the sole proprietorship with legal entity status for titling purposes. To do so would achieve what is hereinafter referred to as "entity equality," placing sole proprietors on equal footing with the owners of other business enterprises, partners, shareholders, and limited liability members.¹⁴⁸ Hypothetically, an alternative means of achieving equity equality would be to strip legal entity status from other business enterprises that enjoy its benefits, including the corporation.

146 *Id.* at 359–60.

147 *Id.* at 361.

148 *See* discussion of other legal enterprises' entity status *infra* Part V.A.

Entity equality for sole proprietors would give them the benefits of business legal entity status, that is, the ability to own property in the business name, to sue and to be sued in the business name, to obtain credit, and perhaps to limit business liability to the business itself. While it is noted that a sole proprietor can currently achieve these desirable goals by incorporating, creating a limited liability company, or associating as a general partnership, these actions require additional expense that would not be necessary or appropriate if the following statutory changes were adopted. Appendix A is a chart of the current entity features of a sole proprietorship compared to those proposed in this Article. Appendix B to this Article is a proposed uniform sole proprietorship statute that codifies the legal entity features of a proposed revised sole proprietorship law.

IV. UNCONSCIOUS AND INSTITUTIONAL CLASSISM AND THE CASE FOR EXPANDING CONSTITUTIONAL RIGHTS THEORY TO TREAT SOLE PROPRIETORS FAIRLY

This Part argues that the present state of constitutional rights theory fails to redress the unconscious and institutional classism that sole proprietors face under the current state of the law and that constitutional rights theory needs expansion to find a constitutional basis for treating the sole proprietorship the same as other business forms, that is, as a legal entity for titling purposes.

A. *Current Constitutional Considerations Fail to Redress Entity Inequality*

A constitutional analysis of entity equality—the right of the sole proprietorship to be granted legal entity status—demonstrates that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution does not compel the states to grant entity status to the sole proprietorship. Arguing in favor of entity equality under current constitutional considerations would be a difficult task.

1. *Equal Protection Clause of the Fourteenth Amendment*

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁴⁹ The

¹⁴⁹ U.S. CONST. amend. XIV, § 1. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1989) (providing details on the rationale for and of the Fourteenth Amendment); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL

Equal Protection Clause can be seen as an attempt to secure the promise of the United States's professed commitment to the proposition that "all men are created equal" by empowering the judiciary to enforce that principle against the states.¹⁵⁰ In the wake of the Fourteenth Amendment, the states could not, among other things, deprive people of the equal protection of the laws.¹⁵¹ The Equal Protection Clause has been applied most significantly to protect the civil rights of African Americans.¹⁵²

In determining whether a law violates the Equal Protection Clause, the Supreme Court has applied three levels of scrutiny. Under strict scrutiny, a law is unconstitutional unless it is narrowly tailored to serve a compelling government interest. In addition, there cannot be a less restrictive alternative available to achieve that compelling interest.¹⁵³ Under intermediate scrutiny, a law is unconstitutional unless it is substantially related to an important government interest.¹⁵⁴ Finally, under rational basis, a law is constitutional so long as it is reasonably related to a legitimate government interest.¹⁵⁵

2. Equal Protection and Commercial Regulations

Arguments for entity equality must overcome the Supreme Court's deference to state regulation of economic concerns. Regarding economic concerns, the Court is very deferential to state authority:

DECISIONMAKING: CASES AND MATERIALS (4th ed. 2000) (discussing the Fourteenth Amendment in a historical context).

150 See generally PAUL BREST ET AL., *supra* note 149.

151 See *id.* (discussing the expanding application of the Fourteenth Amendment to protect civil rights through American history).

152 See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that the State's maintenance of segregated educational facilities denied African American children equal protection); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that Texas's state system of law schools, which educated blacks and whites at separate institutions, was unconstitutional); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that the Democratic primary in Texas, in which voting was restricted to whites alone, was unconstitutional on equal protection grounds); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that a state's offering of a legal education to whites but not to blacks violated the Equal Protection Clause); *Nixon v. Herndon*, 273 U.S. 536 (1927) (holding that the denial of the right to vote based on race was unconstitutional); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding that the exclusion of blacks from juries was a denial of equal protection to black defendants).

153 ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* § 9 (3d ed. 2006); see, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 319 U.S. 432 (1943).

154 CHEMERINSKY, *supra* note 153, § 9.

155 *Id.*

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.¹⁵⁶

As a result, the Court has applied rational basis review to economic issues. The Supreme Court has articulated the governing standard of review as follows:

[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.¹⁵⁷

3. *Equal Protection and the Sole Proprietorship*

Working against entity equality is the legal perception that there are inherent differences between a sole proprietorship and a corporation. The primary justification for treating the sole proprietorship as identical to its owner and not as a separate legal entity is that “[t]here are inherent differences between operating a business as a sole proprietorship” and operating a business as a separate legal entity like a corporation.¹⁵⁸ Where there are real differences between

156 *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (citation omitted) (upholding ordinance prohibiting certain businesses from operating in the city's French Quarter because it rationally furthered the city's purpose of supporting the customs and preserving the appearance of the area).

157 *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) (holding that classifications in laws restricting the sale of certain goods on Sunday did not result in a denial of equal protection).

158 *Cedar Valley FS, Inc. v. Iowa Dep't of Revenue & Fin.*, No. AA-1827, 1992 WL 510794, at *5 (D. Iowa Jan. 27, 1992) (holding that the decision not to exempt a corporate merger was not a violation of Cedar Valley's equal protection right because the denial of exemption did not constitute an arbitrary classification).

classifications, there is no violation of equal protection.¹⁵⁹ As the California Court of Appeals has stated:

[There is no] merit in the remaining contention that different statutory treatment of “sole proprietors or partners” on the one hand, and corporations and corporate officers on the other, is “class legislation” and a denial of “equal protection.” Treatment of corporations as a distinct class has received widespread constitutional sanction. . . . “The equality guaranteed by the equal protection clause is equality under the same conditions, and among persons similarly situated. The Legislature may make a reasonable classification of persons and businesses and other activities and pass special legislation applying to certain classes. The classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished.”¹⁶⁰

As of now, only heightened scrutiny would circumvent the Court’s deferential treatment of state economic regulatory concerns under rational basis review. To employ heightened scrutiny, the Court must find either that the sole proprietorship constitutes a suspect classification¹⁶¹ or that the differing treatment of the sole proprietorship infringes upon an owner’s fundamental rights.¹⁶²

4. *The Sole Proprietorship as a Suspect Classification*

On the surface, sole proprietors are not entitled to entity equality as a suspect class. Suspect classes typically have a “‘history of purposeful unequal treatment’ or [have] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their

159 *See, e.g.*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (noting that the Equal Protection Clause “does not demand that a statute necessarily apply equally to all persons or require things which are different in fact . . . to be treated in law as though they were the same” (omission in original) (internal quotation marks omitted) (citing *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966))); *see also* *Nguyen v. INS*, 533 U.S. 53, 63 (2001) (stating that a statutory scheme that imposed different requirements for a child’s citizenship depending upon whether the child’s citizen parent was his mother or father was “neither surprising nor troublesome from a constitutional perspective” because “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood”).

160 *Topps & Trowers v. Superior Court*, 31 Cal. App. 3d 102, 105 (Cal. Ct. App. 1973) (quoting 3 WITKIN, SUMMARY OF CALIFORNIA LAW, CONSTITUTIONAL LAW § 131, at 1934–36) (citing CAL. CONST. art. XII, §§ 1–24;) (finding no merit in the claim that different statutory treatment of sole proprietors or partners and corporations or corporate officers amounts to class legislation and a denial of equal protection).

161 *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (holding that mental retardation is not a suspect classification “calling for a more exacting standard of judicial review than is normally accorded economic and social legislation”).

162 *See, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that conditioning the right to vote on the payment of a tax violated the Equal Protection Clause).

abilities.”¹⁶³ An alleged disadvantaged class of individuals who choose to operate their businesses as sole proprietorships and not as single member corporations or limited liability companies is not obviously a “suspect” class.

But beneath the surface, sole proprietors are often composed of members of suspect classes, groups who have been historically discriminated against and have exhibited “obvious, immutable, or distinguishing characteristics that define them as a discrete group.”¹⁶⁴ Take, for example, the case of African American sole proprietors. As the Supreme Court considers “African Americans” to be a suspect class, if they were to sue the state alleging they were discriminated against because they are African Americans, then the class is obviously suspect. However, if instead they were to argue that state law discriminates against them purely because they are sole proprietors, then the class is obviously not suspect. An argument positing that the state discriminates against them because they are both African American and sole proprietors would trigger heightened scrutiny because they are African Americans.

In *City of Cleburne v. Cleburne Living Center*,¹⁶⁵ the Court established criteria for determining suspect classifications while grappling with the question of whether mental retardation should be a suspect class, after a group home for the mentally retarded was denied a special permit in Texas.¹⁶⁶ The Court considered four factors before concluding that the mentally retarded were not a suspect class: (1) whether there is a history of “continuing antipathy and prejudice” against the group; (2) whether the group is “politically powerless in the sense that they have no ability to attract the attention of lawmakers”; (3) whether the group is defined by an “immutable” characteristic; and (4) whether that characteristic is one that is generally irrelevant.¹⁶⁷

Despite a finding that mental retardation satisfied the first and third factors, the *Cleburne* Court denied suspect classification.¹⁶⁸ This

¹⁶³ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)) (holding that an age classification in a statute requiring police officers to retire at age fifty was rationally related to the state’s interest of ensuring its officers’ physical preparedness).

¹⁶⁴ *In re Watson*, 332 B.R. 740, 746 (Bankr. E.D. Va. 2005) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)) (noting that individuals who choose to operate their businesses as sole proprietorships have not been historically discriminated against).

¹⁶⁵ 473 U.S. 432.

¹⁶⁶ *See id.* at 442–46.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 446–47.

analysis suggests that each factor must be fulfilled to warrant heightened scrutiny, which is more probing than rational basis review.

Relative to business forms, the Supreme Court has held that corporations are persons within the meaning of the Equal Protection Clause.¹⁶⁹ States have promulgated laws that define the various aspects of corporations and that give corporations their distinct identity as a unique juridical entity. Accordingly, because the Equal Protection Clause provides that no state can deny any person within its jurisdiction equal protection of the laws, it follows that the sole proprietorship and/or the sole proprietor should also be afforded the same treatment, that is, equal protection. As a result, states should enact laws defining the various aspects of the sole proprietorship as a distinct, unique juridical entity.

5. Equal Protection Challenges to Facially Neutral State Statutes

If a suspect class of sole proprietors were to challenge the constitutionality of a state statute that discriminated between the sole proprietorship, the partnership, and the corporation, they would face additional challenges to trigger heightened scrutiny. Presumably, the state statute would be facially neutral, meaning the statutory language has no express mention of the suspect class. As such, to succeed, the claim should allege that the facially neutral law has a disparate impact among members of the suspect class and that discrimination against this class was the intent and purpose of the state act.¹⁷⁰

Not all regulations are equal. A legislature can present legitimate reasons for legislative acts that may disadvantage street vendors over store front merchants or for why the length of a cargo train should be less than twenty-four cars. But a legislature's arbitrary denial by default of entity status to sole proprietorships indiscriminate of industry can hardly be said to have a rational relationship to a legitimate state interest. In addition, another argument in favor of entity equality is that the legislative failure to grant the sole proprietorship entity status disadvantages small businesses, especially those composed of underserved, suspect class communities far more frequently, and may

¹⁶⁹ *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886) (declaring that there was no need to hear argument on whether the Equal Protection Clause protected corporations, because "[w]e are all of opinion that it does").

¹⁷⁰ *See Washington v. Davis*, 426 U.S. 229, 246 (1976) (upholding a police department's use of a written personnel test even though it had a disproportionate impact on black applicants because such impact alone could not infer a discriminatory intent on the part of the state).

rise to support an argument for disparate impact, although it may be difficult to prove discriminatory intent.

6. *Entity Status as a Fundamental Right*

Perhaps sole proprietors can successfully argue that entity status is a fundamental constitutional right as a denegation of the owner's right to the pursuit of happiness. A fundamental right, as defined by the U.S. Supreme Court, is "akin to free speech or marriage or to those other rights . . . that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated."¹⁷¹ While it is difficult to imagine how entity status might rise to a fundamental right, as the following analysis demonstrates, failing to provide the sole proprietorship entity status by default and under operation of the rules and principles of the common law is inherently unfair and discriminatory in comparison to the law's treatment of other one-person entities, namely, the one-person corporation and the one-person limited liability company. Granting the sole proprietorship entity status ensures equal treatment with the one-person corporation and the one-person limited liability company. This is because the threats to the sole proprietorship are virtually identical to those facing entity businesses like the corporation. Treating business types differently is inherently unfair, raising fundamental rights to the pursuit of happiness and equal protection issues.

An additional constitutionally-based argument in favor of granting the sole proprietorship entity status might be made under the Dormant Commerce Clause. If it could be established that the lack of "entity protection" for sole proprietors unduly burdens interstate commerce, then differing treatment of different types of businesses would be unconstitutional.

For the above reasons, an equal protection claim on behalf of sole proprietors would likely fail current judicial scrutiny.

7. *Final Word on Current Constitutional Considerations*

While courts are generally deferential to economic regulations under rational basis review, state laws motivated by irrational beliefs, antiquated values, or stereotypic notions of class attributes may still

171 United States v. Kras, 409 U.S. 434, 446 (1973), cited in *In re Watson*, 332 B.R. 740, 746 (Bankr. E.D. Va. 2005).

be suspect under rational basis review. The lynchpin of the argument favoring entity equality is that the current state of the law reflects antiquated notions of the sole proprietorship. Nowadays, the sole proprietorship and indeed all one-person businesses are more sophisticated than ever before. Evidence of this fact is the proliferation of one-person corporations and one-person limited liability companies, and the law's universal acceptance of their existence as legal entities.

V. PUBLIC POLICY ARGUMENTS FOR ENTITY EQUALITY

Although the Fourteenth Amendment's Equal Protection Clause does not compel the states to grant entity status to sole proprietorships for titling purposes, public policy provides convincing arguments why the states should choose to do so. One argument is that the law has provided many public policy reasons for treating other business enterprises as a legal entity and that many of these apply to the sole proprietorship. For example, and by way of comparison, § 4 of the Uniform Unincorporated Nonprofit Association Act gives an unincorporated nonprofit association the power to acquire an estate in real property, and thus an unincorporated or nonprofit association organized in a state that has adopted that act will be an unincorporated "legal entity."¹⁷² The following argues on behalf of states' adoption of the entity theory of sole proprietorship for titling purposes.

A. *All Other Business Enterprises Are Granted Legal Entity Status for Titling Purposes*

1. *The Corporation as a Legal Entity*

Early in the development of corporate law, a corporation was considered an artificial person or legal entity.¹⁷³ "[A] corporation may also be viewed as a fund of property, a band of investors, a crew of workers, or merely as an entry in official records."¹⁷⁴ This relatively

172 UNIF. NONPROFIT UNINCORPORATED ASSOC. ACT § 4 (1996).

173 HAMILTON, *supra* note 5, at 186–87. By 1765, it was understood that a corporation has the power to "sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may." *Id.* at 186 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *475). To be sure, "Chief Justice Marshall, paraphrased Blackstone in a famous comment in *Dartmouth College v. Woodward*, [17 U.S. (4 Wheat.) 250, 304 (1819)], when he defined a corporation as an 'artificial being, invisible, intangible, and existing only in contemplation of law.'" *Id.* at 187 (footnote omitted).

174 HAMILTON, *supra* note 5, at 192 (citing A. CONARD, CORPORATIONS IN PERSPECTIVE 416 (1976)).

mundane legal characteristic, the doctrinal fiction of an artificial entity, is extraordinarily important in many ways.¹⁷⁵

A reflection on the implications of corporation law suggests that entity status provides a benefit to businesses and their owners.¹⁷⁶ In fact, entity status provides many benefits to a corporation, its officers, and its owners. For example, entity status allows a corporation to “vastly reduce[] the costs of contracting for credit.”¹⁷⁷ A corporation can use its separate assets “to enter into contracts, such as bank loans.”¹⁷⁸ Entity status also allows a corporation to have an indefinite “life,” and supports tradable shares, centralized management, and limited liability.¹⁷⁹

2. *The General Partnership as a Legal Entity*

Similar to the corporation, the general partnership enjoys the benefits of entity status. The general partnership has been treated as a legal entity for many purposes, but it was not always thought to be so.¹⁸⁰ The historical development of the general partnership from a legal aggregate to a legal entity is instructive relative to the developmental needs of the sole proprietorship.

Historically, the common law treated general partnerships as an aggregation of individuals.¹⁸¹ In drafting the UPA in 1914, the NCCUSL did not totally reject the common law view of partnerships, often treating them as legal entities separate from their owners for most purposes and as legal aggregates of their owners for other purposes.¹⁸² Yet, the UPA adopted the view that a general partnership should be legally recognized as a legal entity in several circumstances.

175 See ALLEN & KRAAKMAN, *supra* note 78, at 83–84.

176 See *id.* at 83 (providing some of the practical advantages of a corporation’s entity status). See generally CLARK, *supra* note 17, at 17–19 (describing the entity status of a corporation); HAMILTON, *supra* note 5, at 62–63 (same).

177 ALLEN & KRAAKMAN, *supra* note 78, at 83 (citing Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000)).

178 *Id.*; see also Hansmann & Kraakman, *supra* note 177, at 401–02 n.22 (discussing the cost-effective strategy of participating by subincorporation).

179 ALLEN & KRAAKMAN, *supra* note 78, at 83–84.

180 See CLARK, *supra* note 17, at 15–16 n.39 (discussing partnership treatment prior to 1907); HAMILTON, *supra* note 5, at 62–63 (discussing early case law on partnerships).

181 See CLARK, *supra* note 17, at 15–16 n.39.

182 *Id.*; see, e.g., UNIF. P’SHIP ACT § 15 (1914) (stating that partners are jointly and severally liable for the debts of a partnership); *Id.* § 29 (stating that a partnership lacks continuity of existence); cf. I.R.C. § 701 (2000) (stating that individual partners are liable for the income tax of a partnership “in their separate or individual capacities”).

Today, there are many circumstances under which a general partnership is clearly a legal entity. For example, a partnership may acquire title to real estate in the partnership name which, if so acquired, can be conveyed only in the partnership name.¹⁸³ In addition, each partner is an agent of the partnership.¹⁸⁴ Any partner may also convey title to real property that is in the partnership name, but the partnership may not recover such property unless the partner binds the partnership.¹⁸⁵ Additionally, a partnership's assets, liabilities, and business transactions are treated as those of the business unit and are considered distinct from the partners' individual assets, liabilities, and non-partnership business transactions.¹⁸⁶ In marshaling assets, the partnership's assets and liabilities are considered separate and distinct from those of the respective individual partners, and partnership creditors have a prior right to partnership assets, while individual partners' creditors have a prior right, respectively, to the separate assets of their individual debtors.¹⁸⁷ And there are other provisions in the UPA that recognize the existence of a partnership as a separate legal entity.¹⁸⁸

183 UNIF. P'SHIP ACT § 8(3) (1914) ("Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.").

184 *Id.* § 9(1) ("Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.").

185 *Id.* § 10(1) ("Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.").

186 *See id.* § 25(1) ("A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership."); *id.* § 25(2)(b) ("A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property."); *id.* § 25(2)(c) ("A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representative of a deceased partner, cannot claim any right under the homestead or exemption laws.").

187 REV. UNIF. P'SHIP ACT § 40(h) ("When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.").

188 *See, e.g., id.* § 11 (stating that a partnership is bound by an admission or representation made by a partner); *id.* § 12 (stating that a partnership is charged with knowledge of or

In 1994, the NCCUSL cemented the general partnership's entity status in RUPA, which states that a partnership is "an entity distinct from its partners."¹⁸⁹ In addition to RUPA, other statutes treat a general partnership as a legal entity, separate and distinct from its individual owners. For example, in certain state and federal courts, a partnership may sue and be sued in the partnership's name.¹⁹⁰ In addition, the Uniform Commercial Code¹⁹¹ and the Bankruptcy Reform Act¹⁹² both define a partnership as a person. The State of Louisiana, following its civil law tradition, regards a partnership as a full legal entity.¹⁹³ Therefore, a general partnership is sometimes a legal entity and sometimes a legal aggregate.¹⁹⁴ By comparison to a general partnership, although quite different in many ways, a limited partnership is similarly a legal entity.¹⁹⁵

3. *The Limited Liability Company as Legal Entity*

Another business form, the limited liability company ("LLC"), is by statutory definition a legal entity.¹⁹⁶ Like a corporation and a partnership, an LLC is a legal entity, separate from its owners or members.¹⁹⁷ Despite getting off to a slow start, in 1996, as a result of the Internal Revenue Service ("IRS") issuing final regulations simplifying

notice to a partner of any matter concerning the partnership); *id.* § 13 (stating that a partnership is bound by any wrongful act or omission of a partner); *id.* § 14 (stating that a partnership is bound to make good the loss on account of a breach of partnership trust by a partner); *id.* § 19 (stating that partners must have access to partnership books, which are required to be kept at the partnership's principal place of business); *id.* § 26 (stating that a partner's interest in a partnership is his share of the partnership's profits).

189 REV. UNIF. P'SHIP ACT § 201(a) (1994) (amended 1997).

190 *See, e.g.*, Connecticut Licensing Info Center, Glossary of Business Structures, http://www.ct-clc.com/Content/Glossary_of_Business_Terms.asp (last visited Jan. 15, 2009) (indicating that Connecticut is an example of a state that permits such action).

191 U.C.C. § 1-201(27) (2005).

192 11 U.S.C. § 101(41) (2000).

193 *See* LA. CIV. CODE ANN. arts. 2806-43 (2005) (enumerating provisions that govern general partnerships in the state).

194 *See supra* notes 182-93 and accompanying text.

195 *See* UNIF. LTD. P'SHIP ACT § 104 (2001) ("A limited partnership is a legal entity distinct from its partners.").

196 UNIF. LTD. LIAB. CO. ACT § 201 (1996) ("A limited liability company is a legal entity distinct from its members."); DEL. CODE ANN. tit. 6, § 18-201(b) (2005) ("A limited liability company formed under this chapter shall be a separate legal entity . . ."). *See generally* 2 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 19:8 (Supp. 2008) (discussing circumstances where a single-member LLC has an impact).

197 *See* HAMILTON, *supra* note 5, at 126 (comparing LLCs to corporations and general partnerships).

tax laws, allowing taxpayers to treat unincorporated business organizations on an elective “check the box” basis, LLCs achieved their greatest popularity.¹⁹⁸ In addition to providing flexible tax treatment, LLC law was revolutionary as it was the first to grant an unincorporated entity statutory limited liability.

As seen with corporations, partnerships, and LLCs, entity status has its advantages. Clearly, sole proprietorship law begs for greater development and modernization along the lines of other business forms.

B. Entity Equality Demands That the Sole Proprietorship Be Granted Entity Status

In addition to fair treatment as a legal entity, sole proprietorship law’s proposed entity status would reflect its functional separateness from its owner, financially, psychologically, and sociologically.¹⁹⁹ For example, sole proprietorships often adopt a fictitious business name, must comply with general business and licensing requirements, and often establish a separate tax identification number. A review of these aspects of the sole proprietorship shows its separation from its owner.

1. Operating Under an Assumed Name

One example of how the sole proprietorship functions separately from its owner is the adoption of a trade, assumed, or fictitious name.²⁰⁰ So that the public is not deceived, state laws require that an assumed or fictitious name be filed in the appropriate public record; some prescribe criminal penalties for using an unregistered fictitious name.²⁰¹ There are few legal restrictions on the use of specific words

198 See Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,585 (Dec. 18, 1996) (to be codified at 26 C.F.R. pts. 1, 301, 602).

199 EISENBERG, *supra* note 2, at 1.

200 See HAMILTON, *supra* note 5, at 41 (discussing examples of the use of assumed names by proprietorships); Gordon E. McClintock, *Fictitious Business Name Legislation—Modernizing California’s Pioneer Statute*, 19 HASTINGS L.J. 1349, 1349 (1968) (noting that “[t]he common law permitted a sole proprietor or partnership to adopt and use an assumed business or trade name in transacting business”); *cf.* Cal. Law Revision Comm’n, *Recommendation and Study Relating to Fictitious Business Names*, 9 REPS., RECOMMENDATIONS, & STUDS. 601, 608 (1969) (concluding that while California should keep its fictitious name statute, many revisions are recommended).

201 See CONSTANCE E. BAGLEY & CRAIG E. DAUCHY, *THE ENTREPRENEUR’S GUIDE TO BUSINESS LAW 50* (2d ed. 2003) (noting that sole proprietorships require “no government filing except a fictitious-business-name statement, which discloses the name under which the

in trade names; in most states, for example, terms such as “corporation,” “incorporated,” or “Inc.” may not be used because they falsely imply that the business is incorporated.²⁰²

2. *The Sole Proprietorship Must Comply with Business Permitting, Licensing, and Operating Requirements*

The second area of analysis regarding how the sole proprietorship functions in conjunction with its owner is its compliance with business permitting, licensing, and operating requirements.²⁰³ Since the sole proprietorship is essentially a private business enterprise, it is required to obtain a business license and to collect sales taxes where appropriate.²⁰⁴ Like every other business type, the sole proprietorship must comply with all general licensing and operating statutes. For example, “[a] proprietorship that conducts a pharmacy or a gun shop must comply with the various legal requirements applicable to such businesses.”²⁰⁵ “If the proprietorship is engaged in a professional practice such as law, medicine, dentistry, or accounting, both the proprietor and each person having responsibility for providing professional services must be licensed.”²⁰⁶ Unlike a corporation, a “[sole] proprietorship may open a new office or facility in another state, without obtaining permission or qualifying to transact business . . . [but a] corporation . . . may be required to obtain permission to transact business in the second state.”²⁰⁷ Opening an office in another state may subject the proprietor to suits in that state, may require the proprietor to file an assumed name certificate in the new state, and may hold the proprietor liable for state income taxes in the

business will be conducted and the owner’s name and address”); CONARD ET AL., *supra* note 5, at 17.

202 See CONARD ET AL., *supra* note 5, at 17. See generally Checklist: Starting a Sole Proprietorship, <http://smallbusiness.findlaw.com/business-structures/sole-proprietorship/sole-proprietorship-checklist.html> (last visited Jan. 15, 2009) (demonstrating how unrestrictive the name-choosing process is in general).

203 See generally AM. BAR ASSOC., FAMILY LEGAL GUIDE ch. 12 (3d ed. 2004), available at http://www.abanet.org/publiced/practical/books/family_legal_guide/chapter_12.pdf (discussing various issues related to small businesses using a user-friendly question-and-answer format); STATE OF IND., BUSINESS OWNER’S GUIDE TO STATE GOVERNMENT (2008), available at http://www.in.gov/core/files/Business_Owners_Guide608.pdf (providing an overview under Indiana law).

204 See BUSINESS OWNER’S GUIDE, *supra* note 203, at 3, 5, 7.

205 HAMILTON, *supra* note 5, at 45.

206 *Id.*

207 *Id.*; see also Sole Proprietor Magazine, What is Sole Proprietorship?, http://www.solepriortormagazine.com/index.php?option=com_content&task=view&id=231 (noting that “[y]our sole proprietorship exists as soon as you start doing business”).

new state.²⁰⁸ In these ways, the sole proprietorship faces the same or similar licensing issues as do other business types.

3. *Taxation of the Sole Proprietorship: Individual or Business?*

The third instance of how the sole proprietorship functions separate from its owner is its use of a separate tax identification number, as well as business tax strategies not available to individual tax filers. The sole proprietorship, not unlike other types of businesses, is permitted to apply for and receive a tax identification number different from that of its owner's social security number, such as a separate tax or employee identification number ("TIN" or "EIN").²⁰⁹

The manner of reporting the income and expenses of a proprietorship is interesting because it reflects a pragmatic compromise between the legal view that a proprietorship is not a separate entity from its owner and the economic view that the proprietorship's financial affairs should not be intermixed with the proprietor's personal affairs.²¹⁰

In addition to often using a separate tax identification number, the sole proprietorship often uses business tax strategies. While the sole proprietorship is not a separate taxable entity²¹¹ and is required to file the long-form 1040, personal tax return,²¹² the Internal Revenue Code also requires a separate tax form, Schedule C, to be prepared to record the gain or loss from each business owned by the taxpayer.²¹³ The business income or loss is reported on the proprietor's personal income tax return, the form 1040, while a considerably simpler form, the Schedule C-EZ is available for the very smallest business that has no employees and less than \$25,000 in gross receipts.²¹⁴ "[T]he Internal Revenue Code requires the entrepreneur to file quarterly declarations of estimated tax, and to make the payment of estimated tax each quarter reflected on that declaration."²¹⁵

208 HAMILTON, *supra* note 5, at 45.

209 *Id.* at 48; *see also* I.R.S. Form SS-4, Application for Employer Identification Number (OMB No. 1545-0003) (2007). *See generally* I.R.S., TAX GUIDE FOR SMALL BUSINESS, PUBLICATION 334 (2007), available at www.irs.gov/pub/irs-pdf/p334.pdf (last visited Sep. 4, 2006) (providing general information about federal tax laws applicable to small business owners).

210 HAMILTON, *supra* note 5, at 47.

211 *See* Sole Proprietorship Magazine, *supra* note 207.

212 HAMILTON, *supra* note 5, at 47.

213 *See* BAGLEY & DAUCHY, *supra* note 201, at 50.

214 *See* HENRY B.R. BEALE, U.S. SMALL BUS. ADMIN., HOME-BASED BUSINESS AND GOVERNMENT REGULATION (2004), available at <http://www.sba.gov/advo/research/rs235tot.pdf>.

215 HAMILTON, *supra* note 5, at 47. *See generally* Commissioner v. Acker, 361 U.S. 87 (1959) (assessing additional tax for the failure to file a declaration of estimated income tax without reasonable cause).

Therefore, for the various ways in which a sole proprietor operates her business separate from her personal life, fundamental and distributive justice as well as socioeconomic theory demand that the parameters of constitutional theory be expanded to remedy the law's failure to treat the sole proprietorship as a legal entity for titling purposes.

VI. ARGUMENTS AGAINST THE ENTITY STATUS PROVISIONS OF THE USPA

Part VI presents the opposition to treating the sole proprietorship as a legal entity. What follows is a discussion of three arguments against the entity status provisions of the Uniform Sole Proprietorship Act ("USPA") and a response to each. While the first one directly challenges entity status for the sole proprietorship, the other two challenge corollary features that may follow entity status, specifically, limited liability and perpetual existence. In the end, none of these arguments outweighs the benefits of entity equality for sole proprietors.

A. *The USPA Is Flawed Because One Person Cannot Legally Clone Herself into Another Legal Entity*

One argument against the USPA is that it contradicts a common viewpoint that the sole proprietorship automatically fails to qualify as a separate entity because it is owned by one person.²¹⁶ This solitary alter ego view of the sole proprietorship is discussed earlier in this Article.²¹⁷ On the surface, it seems logical that the law should not allow a person to legally clone herself into another, separate legal entity. But, in point of fact, the law currently allows legal cloning through the use of other legal business entities, other than the sole proprietorship. That is, one person can legally create and own a one-person corporation; and, in many if not all jurisdictions, a one-person limited liability company or several such one-person entities.

216 See GREGORY & HURST, UNINCORPORATED BUSINESS ASSOCIATIONS, *supra* note 2, at 833 ("Strictly speaking, the sole proprietorship is not a business organization since, by definition, it has only one owner and indeed the owner and the business entity are one and the same."); HAMILTON & BOOTH, *supra* note 2, at 251 ("For legal purposes, a proprietorship is not a separate entity."); Credit Assocs. of Maui, Ltd. v. Carlbon, 50 P.3d 431, 432 (Haw. Ct. App. 2002) (holding a sole proprietor personally liable for the debts of his proprietorship because "a sole proprietorship has no legal identity apart from its owner").

217 See *supra* Part II.A.

The laws of the one-person corporation and of the one-person limited liability company refute the argument that the sole proprietorship cannot be an entity because it is owned by one person. But from a current constitutional perspective, as the sole proprietorship is distinctly different from the corporation and the LLC, it is not entitled to equal protection treatment, as was fully explored earlier in this Article.²¹⁸

The following discussion of the sole proprietorship assumes that it must be owned by one individual, living person. There is no statutory test or legal requirement that a sole proprietorship must be owned by a living person. As a result, as a corporation has been deemed to be a legal person, it is legally possible for a corporation to own a sole proprietorship. Also, as the UPA considers a partnership a legal entity for several purposes, it would appear that a general partnership could own a sole proprietorship. And, arguably, there could be a one-person limited liability partnership.²¹⁹ This discussion of the varying potential owners of a sole proprietorship shows that legal analysis of sole proprietorship law is never as simple as it first appears.

1. *The One-Person Corporation or an Incorporated Proprietorship*

Historically, the corporation was not designed as an alternative to the sole proprietorship.²²⁰ But over the years, state statutes have provided for and courts have sanctioned corporations owned by a single shareholder, the “incorporated proprietorship” or “one-person corporation.”²²¹ Today, all states allow for the creation of an incorpo-

218 See *supra* Part IV.

219 See HAMILTON, *supra* note 5, at 176.

220 See generally WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1 (2005) (discussing the development and history of the corporation).

221 COX & HAZEN, *supra* note 2, at 24 (citing *Leventhal v. Atl. Fin. Corp.*, 55 N.E.2d 20 (Mass. 1944); *Elenkrieg v. Siebrecht*, 144 N.E. 519 (N.Y. 1924)); see, e.g., *Factors & Traders' Ins. Co. v. New Harbor Prot. Co.*, 37 La. Ann. 233 (1885) (holding that a corporation was not a “person” within the Louisiana statute authorizing the formation of a corporation by any number of “persons” not less than six); *Keller v. Haas*, 12 So.2d 238 (La. 1943) (holding that an individual shareholder could not use a corporation to shield himself from personal liability); *L.L. Ridgeway Co. v. Marks*, 146 So.2d 61, 63 (La. Ct. App. 1962) (holding that even if the shares of a corporation pass into the hands of one person, the theory of the corporate entity and limited liability is preserved); *Lindstrom v. Sauer*, 166 So. 636, 638 (La. Ct. App. 1936) (holding also that a shareholder cannot use a corporation as a shield against personal liability). For general discussions of the one-person corporation, see ROBERT A. ESPERTI & RENNO L. PETERSON, *INCORPORATING YOUR TALENTS: A GUIDE TO THE ONE-PERSON CORPORATION OR HOW TO LEAD A SHELTERED LIFE* 5–6 (1984); HAMILTON, *supra* note 5, at 213–18; Bernard F. Cataldo, *Limited Liability with One-Man*

rated proprietorship wherein one person owns all the shares of the corporation and operates the business with total autonomy.²²² The incorporated proprietorship's assets are legally owned by the corporation; the shares have value only to the extent the corporation's business and assets have value; shares are not the same as the corporate assets.²²³ But a sole entrepreneur may be best advised to incorporate her enterprise and elect "S-corporation" tax treatment to avoid potentially costly reclassification as a corporation and double taxation.²²⁴

2. *The One-Person Limited Liability Company ("LLC")*

Similar to the one-person corporation, in virtually every state today, one person may form a limited liability company.²²⁵ Generally, LLCs have seven chief legal characteristics.²²⁶ A one-person LLC may be member-managed or manager-managed.²²⁷ In a member-managed LLC, each member has the right to participate in management decision-making and to sign contracts on behalf of the LLC, whereas in a

Companies and Subsidiary Corporations, 18 LAW & CONTEMP. PROBS. 473 (1953); Warner Fuller, *The Incorporated Individual: A Study of the One-Man Company*, 51 HARV. L. REV. 1373 (1938); R. Barry McComic, *Theory of the Corporate Entity and the One-Man Corporation in Louisiana*, 38 TUL. L. REV. 738 (1964); Mario Rotondi, *Limited Liability of the Individual Trader: One-Man Company or Commercial Foundation?*, 48 TUL. L. REV. 989 (1974).

²²² HAMILTON, *supra* note 5, at 214 & n.62 (noting that some states require that there be more than one director and more than one officer); *id.* at 252 (describing some of the modifications of the standard corporate form for closely held corporations, such as a reducing the size of the board of directors and allowing one person to perform all corporate functions). *See generally* Eisenberg, *supra* note 2, at 336–39 (describing various statutory strategies to address the unique problems of closely held corporations).

²²³ *See* HAMILTON, *supra* note 5, at 214–15.

²²⁴ *See id.* at 143.

²²⁵ *See* Findlaw, *Limited Liability Company FAQ—Small Business*, <http://smallbusiness.findlaw.com/business-structures/llc/llc-faq.html> ("You can form an LLC in any state with just one owner."); *see, e.g.*, LA. REV. STAT. ANN. § 12:1301(A)(10) (2005) (defining the limited liability company as "an entity that is an unincorporated association having one or more members that is organized and existing under this Chapter"). *See generally* HAMILTON, *supra* note 5, at 143 (noting that several states specifically authorize the creation of a one-person LLC).

²²⁶ John M. Cunningham, *What Are the Main Legal Characteristics of LLCs? How Do the Characteristics of LLCs Compare with Those of Non-LLC Entities?* (2005), <http://www.llcformations.com/3.1%20LLC%20legal%20characteristics%20-%204-14-04.htm>. These characteristics include: (1) entity status; (2) a one-member minimum; (3) contractual freedom and enforceability; (4) statutory informality; (5) statutory liability shielding; (6) statutory asset protection; and (7) two alternate management structures—member-management or manager-management. *Id.*

²²⁷ *Id.*

manager-managed LLC a select group manages the business.²²⁸ The LLC is an alternative for the sole proprietor seeking to shield her personal assets from her business liabilities without the legal complexity of operating as a corporation.

* * *

Overall, critics of the entity status provisions of the USPA fail to account for the fact that the law currently allows one-owner entities to clone themselves as legal entities under both corporation law and limited liability company law. Clearly, there are benefits to granting the sole proprietorship entity status, as reflected by benefits and efficiencies that one-person corporations and one-person limited liability companies enjoy. The entity status benefits of the USPA include the ability to take title to property, to establish credit, to enter into leases, and to open bank accounts, all in the name of the business entity.

B. The USPA Impliedly Grants Sole Proprietorships Limited Liability Along with Entity Status

A second argument against the USPA is that it impliedly grants limited liability to the sole proprietorship, contrary to recent arguments favoring the complete abolition of total limited liability.²²⁹ As the sole proprietor owns all the property used by the business, she is and should be personally responsible for all of the business's debts.²³⁰ The author believes that the sole proprietorship should be granted limited liability, in addition to titling benefits, to achieve full equality with other business types. The codification of sole proprietorship

²²⁸ See generally James R. Walker, *Limited Liability Companies: Structuring Members' Economic Rights*, 34 COLO. LAW. 73 (2005) (discussing structuring an LLC in order to maximize the economic rights of its members).

²²⁹ See ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 37-41 (1999) (citing as an example, Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991) (promoting pro-rated shares of corporate tort liabilities)); Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387 (1992) (arguing that procedural obstacles will make it unlikely that changes in state law will affect a corporation's excess tort liability); Joseph A. Grundfest, *The Limited Future of Unlimited Liability: A Capital Markets Perspective*, 102 YALE L.J. 387 (1992) (arguing that efforts to regulate through market manipulation will generally fail to meet desired objectives); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991) (promoting an aggregate approach to piercing the corporate veil).

²³⁰ HAMILTON, *supra* note 5, at 39; see also BAGLEY & DAUCHY, *supra* note 201, at 50 (explaining that the sole proprietorship is often considered a poor business choice because the owner has unlimited liability, which puts all her personal assets at risk).

law, such as the USPA, is an essential first step toward a limited liability sole proprietorship statute (“LLSP”).²³¹ But granting the sole proprietorship entity status for titling purposes alone does not imply or require granting it limited liability.

Limited liability and entity status are not joined at the hip like Siamese twins. Entity status and limited liability are not one and the same. A business enterprise might have legal entity status separate from its owners, while the owners continue to have personal liability for the business’s liabilities.²³² In addition, the law fails to provide the owners of limited liability entities an absolute shield against business liabilities.²³³ For example, courts have developed “piercing the corporate veil” law to impose personal liability on shareholders for business liabilities,²³⁴ with most piercing cases involving three or fewer shareholders.²³⁵ On the other hand, sole proprietors, like the owners of other business forms, are responsible for their agents’ actions under the principles of agency law.²³⁶

Sole proprietors may achieve some limited liability protections without statutory entity status. For example, they can avoid personal exposure for business liabilities, such as a loan from a creditor, if the lender agrees to a “nonrecourse” loan.²³⁷ In addition, they may be entitled to some statutory protections including homestead, anti-seizure, and prohibition against garnishment for wages.²³⁸ As previously discussed, *infra* Part III.B.1.e, under recent case law, a sole proprietor was not entitled to statutory immunity for negligent supervision liability extended to corporations, partnerships, and persons not

231 See Crusto, *supra* note 5, at 397–417 (providing provisions of a proposed Model LLSP Act).

232 See REV. UNIF. P’SHIP ACT §§ 103–105 (1997) (describing the nature of liability for a partner and a partnership in relation to a partner’s wrongful act).

233 See Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 7 (1997) (suggesting that the liability protection afforded to LLCs “will not be markedly different than the protection provided by the corporate form”).

234 O’KELLEY & THOMPSON, *supra* note 2, at 541–44 (“The separateness of the corporate entity is normally to be respected. However, a corporation’s veil will be pierced whenever corporate form is employed to evade an existing obligation, circumvent a statute, perpetuate fraud, commit a crime, or work an injustice.”).

235 Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991) (analyzing an empirical study of reported appellate piercing cases).

236 See generally RESTATEMENT (SECOND) OF AGENCY (1958).

237 See RIBSTEIN & LETSOU, *supra* note 2, at 60 (noting that “[c]ourts have generally enforced the liability limiting provisions of nonrecourse contracts, at least where the party alleged to be bound knew of the limitations and consented to them”).

238 See HAMILTON, *supra* note 5, at 42–43 & n.9 (stating that if a proprietor files for bankruptcy, individual and business assets and liabilities are covered).

in privity of contract with the plaintiff, and therefore could be held liable for the employee's misconduct.²³⁹ A strong dissent recognized the anomaly of extending limited liability to firms for the acts of subordinates but not to the sole proprietorship.²⁴⁰

To refute the limited liability critique of the USPA, one needs only to analyze RUPA's treatment of general partnerships.²⁴¹ There the law grants a general partnership entity status while expressly maintaining personal joint and several liabilities to its partners.²⁴² Therefore, it is possible to follow the statutory lead of RUPA by providing the sole proprietorship entity status for titling purposes while maintaining personal, flow-through exposure for business liability. By doing so, the USPA would avoid creating a whole new universe of veil-piercing problems, but this is beyond the purview of this Article.²⁴³

C. *The USPA Wrongly Creates Perpetual Life for Sole Proprietorships*

A third argument against the USPA is that the USPA contradicts the practical reality that when the sole proprietor dies (or disassociates through retirement, sale, or gift) her business often ends as well. This critique has some practical merit, but this is an advantage of the USPA, not a defect. Promoting longevity and flexibility of transfer in ownership would likely be beneficial to the sole proprietor and would be consistent with entity equality. The continuation of the business under different ownership would be very desirable in the case of a family-operated business or where employees may want to buy out the owner, such as under a profit-sharing plan.²⁴⁴ Therefore, in order to refute this argument against the USPA, one need only look to con-

239 *Madden v. Aldrich*, 58 S.W.3d 342 (Ark. 2001).

240 *Id.* at 360 (Imber, J., dissenting).

241 *See* REV. UNIF. P'SHIP ACT §§ 103–105 (1997).

242 *Id.*

243 *See* PINTO & BRANSON, *supra* note 229, at 41–68 (describing procedures and contexts for piercing the corporate veil); John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners' Limited-Liability Protection*, 75 WASH. L. REV. 147, 177 (2000) (noting that “[d]epriving small business owners of their limited-liability protection because of their indebtedness runs counter to the purpose” of the statute); Stephen B. Presser, *The Bogalusa Explosion, “Single Business Enterprise,” “Alter Ego,” and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary “Abuse” Theory of Piercing the Corporate Veil*, 100 NW. U. L. REV. 405, 420–27 (2006) (analyzing whether the use of “single business enterprise” is suitable in determining liability); Eric Fox, Note, *Piercing the Veil of Limited Liability Companies*, 62 GEO. WASH. L. REV. 1143, 1155 (1994) (listing criteria courts use to justify piercing the corporate veil).

244 *See* HAMILTON, *supra* note 5, at 45–46 (stating that structuring ownership to give employees ownership opportunities creates incentives to make a business more successful).

tinuation features of all other business enterprises, including the corporation, the general partnership, and the limited liability company. Allowing the sole proprietor's business to continue after her death might lead to creative ways to address the estate tax problem that many small business owners and their families face,²⁴⁵ but an in depth analysis of this issue is beyond the scope of this Article.

As with other business types, particularly the general partnership, the death of the owner should not automatically result in the termination of the business as well. Consider RUPA's approach to the issue of "dissociation," allowing the business the option to continue uninterrupted following the death of a partner.²⁴⁶ The general partnership faces a unique dissociation problem with the death of one partner of a two-person partnership: the general partnership would devolve into a sole proprietorship by default, because by definition a partnership must be owned by two or more persons. While the issue of dissociation has recently been evaluated in LLC statutes,²⁴⁷ it is an interesting issue, the deeper analysis of which is beyond the scope of this Article.

Analyzing the continuation issue of the sole proprietorship, an assessment of corporation law might also add some valuable insights. Clearly, when it comes to a one-person corporation, the law has no problem with perpetual existence.²⁴⁸ If the law does not prohibit such perpetual existence for an incorporated proprietorship, there is no reason why the law should disallow it for the sole proprietorship.

²⁴⁵ See John L. Ward, *Growing the Family Business: Special Challenges and Best Practices*, 10 FAM. BUS. REV. 323, 330–34 (1997) (proposing practices to promote performance in light of specific challenges to the sole proprietorship). See generally Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310 (2005) (taking a critical look at creditors' rights relative to small business bankruptcies).

²⁴⁶ See REV. UNIF. P'SHIP ACT §§ 601–705 (1997) (describing the processes of dissociation and continuation, noting "a partner is dissociated from a partnership upon the occurrence of certain events. . . . (7) in the case of a partner who is an individual: (i) the partner's death" (§ 601) and that dissociation does not mean the automatic dissolution and liquidation of the partnership, it may continue to operate pursuant to Article 7).

²⁴⁷ See, e.g., UNIF. LTD. LIAB. CO. ACT §§ 601–704 (1996) (describing rights and the process of dissociation).

²⁴⁸ See Carlos L. Israels, *The Sacred Cow of Corporate Existence Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778, 778 (1952) (stating that "under most statutes corporate existence is permitted to be perpetual"); Lawrence A. Schei, Comment, *Corporations: Statutory Revival of Corporate Existence*, 28 CAL. L. REV. 195, 195–202 (1940) (discussing California statutes allowing corporations to extend terms of existence by altering the articles of incorporation).

VII. ENTITY EQUALITY TO REMEDY UNCONSCIOUS CLASSISM AGAINST SOLE PROPRIETORS

The solitary alter ego view of the sole proprietorship handicaps sole proprietors and unconsciously relegates them to a legally disadvantaged status compared to their business association counterparts. A modern, remedial approach would recognize that a sole proprietor faces the same legal issues as owners of entity-granting business forms, especially when it comes to titling matters. Therefore, appropriate legal reform would statutorily grant the sole proprietorship legal entity status for titling purposes. As constitutional law principles have not yet been applied to redress this form of unconscious classism, constitutional theory should be expanded to support entity equality between sole proprietors and other business owners. To do so would promote principles of inherent fairness and would ensure the continued growth of and financial contributions made by small businesses, leading to the development of new applications of common law contract and tort law principles to sole proprietorship law. In summary, entity equality for the sole proprietor ensures the same mechanical efficiency that statutory authority currently provides other business owners, placing sole proprietors on a level playing field with partners, shareholders, and members.

APPENDIX A: ENTITY FEATURES OF A SOLE PROPRIETORSHIP,
CURRENTLY COMPARED TO PROPOSED CHANGES

FEATURES	CURRENTLY	PROPOSED CHANGES
Agency	The sole proprietor is the sole agent of the business.	The sole proprietor may assign authority to others to act as the sole proprietor's agent for the business.
Creation	No statutory authority.	No statutory compliance needed; statutory authority to define new normative features.
Credit Reporting	Sole proprietor's credit is directly affected by the business credit.	Credit issued solely in the name of the business does not appear on the credit report of the sole proprietor.
Criminal Law	Criminal actions on behalf of the business are imputed to the sole proprietor.	Criminal actions on the business's behalf may be imputed to the business and not to its owner in some cases.
Duration	Dissolved at death, bankruptcy, or termination.	May be perpetual; transferable to surviving spouse (marital ex-emption from estate tax); may be put in trust.
Entity	Solitary alter ego, same as owner; treat business as identical to the sole proprietor.	Legal entity for some purposes but not for all purposes, making it subject to benefits reserved to businesses, such as business rates for rental cars, insurance, credit cards, and airlines.
Goodwill	Sole proprietor does not likely benefit from business goodwill.	As a separate entity with its own separate client base and accounting, business is more likely to establish goodwill.
Liability	Sole proprietor is directly subject to unlimited liability for the contracts, debts, and torts of the business.	Sole proprietor still subject to unlimited liability for the contracts, debts, and torts of the business, but only after exhausting the business assets.
Licensing Segregation	Sole proprietor's personal licensing and business licensing may not be separated.	The sole proprietor's personal licensing status, such as practicing law, may be separate from the business's activities, such as public adjusting.
Management	The sole proprietor has complete management authority and control.	The sole proprietor may appoint management authority to another person, subject to final authority and control exercised by the sole proprietor.

FEATURES	CURRENTLY	PROPOSED CHANGES
Name	Sole proprietor may adopt a fictitious or assumed name, subject to registration requirements.	A sole proprietor may adopt a separate business fictitious or assumed name, which may be registered and may include the term "sole proprietorship" or "s.p." designation.
Privacy	Sole proprietor's business activities are of record and go to the personal reputation of the sole proprietor.	Sole proprietor's business activities may not be reflected in the personal name of the sole proprietor. Separate entity may protect sole proprietor from identity fraud.
Suits	In an action brought by or against the sole proprietorship, the sole proprietor is the sole and necessary party.	The sole proprietorship may sue or be sued in its own name.
Taxation	Sole proprietor may obtain separate TIN/EIN and may offset business expenses beyond itemized deductions.	Sole proprietor should obtain separate TIN/EIN and should file Schedule C to offset business expenses.
Title of Property	All business property must be titled in the name of the sole proprietor.	All business property must be titled under business name, promoting ease of transferability.
Transferability	Interest of the sole proprietor may not be assigned.	Interest of the sole proprietor may be assigned; but the assignee does not become the sole proprietor.
Trust Treatment/ Estate Planning	Sole proprietorship cannot be the subject of a trust.	Sole proprietorship can be placed into a trust, providing potential creditor protection, estate planning benefits.

APPENDIX B: UNIFORM SOLE PROPRIETORSHIP ACT ("USPA")

The following proposes the legal entity status features of a model sole proprietorship statute, the Uniform Sole Proprietorship Act ("USPA"). It follows the example of the National Conference of Commissioners on Uniform State Laws' ("NCCUSL") treatment of the general partnership as a legal entity, rather than as an aggregate of partners. The USPA is based, in part on the Uniform Partnership Act (1914)²⁴⁹ and the Revised Uniform Partnership Act (1994).²⁵⁰

²⁴⁹ UNIF. P'SHIP ACT (1914).

²⁵⁰ UNIF. P'SHIP ACT (1997).

§ 1. Sole Proprietorship Defined

(1) A sole proprietorship is an unincorporated or non-LLC business entity owned by one person, the sole proprietor or owner, for the purpose of making a profit.

(2) A sole proprietorship is distinguished from other one-person legal entities, including a one-owner corporation or a one-owner limited liability company.

§ 2. Rules for Determining the Existence of a Sole Proprietorship

In determining whether a sole proprietorship exists, these rules shall apply:

(1) A person solely operating a business for profit may be legally found to be a sole proprietorship, pursuant to the terms of this statute.

(2) A person solely owning a business for profit, in association with family members may still be found to be a sole proprietorship.

(3) Owning property in another legal entity such as an LLC does not in itself negate the existence of a sole proprietorship.

§ 3. Creation of a Sole Proprietorship

(1) A sole proprietorship results from the operation of an unincorporated or non-LLC business for profit that is owned by one person, whether or not the operator intends to create a sole proprietorship. Its existence does not require compliance with an enabling statute. Its operation should also comply with other statutes such as licensing, permits, safety, taxation, and zoning, but its existence as a sole proprietorship does not require such compliance.

(2) By operation of law, a failed attempt either to create a one-person limited liability company or to create a one-person corporation results in the creation of a sole proprietorship.

(3) By operation of law, the sole surviving partner of a duly created partnership who rightfully or wrongfully continues the business of the former partnership operates the business as a sole proprietor, unless a new partnership is formed through the election of an additional partner(s).

§ 4. Sole Proprietorship Property

(1) Sole proprietorship property shall include but not be limited to all property originally brought into the sole proprietorship, stock,

or property subsequently acquired by purchase or otherwise, on account of the sole proprietorship.

(2) Unless the contrary intention is manifested at the time of acquisition, property acquired with sole proprietorship funds is sole proprietorship property.

(3) Any estate in real property may be acquired in the sole proprietorship name or in an assumed or fictitious name. Title so acquired can be conveyed only in the sole proprietorship name.

(4) A conveyance to a sole proprietorship in the sole proprietorship name, though without words of inheritance, passes the entire sole proprietorship interest of the grantor unless a contrary intent appears.

§ 5. The Sole Proprietor is an Agent of the Sole Proprietorship as to the Sole Proprietorship Business

(1) The sole proprietor is an agent of the sole proprietorship for the purposes of its business, and the act of the sole proprietor, including the execution in the sole proprietorship name of any instrument, for apparently carrying on in the usual way the business of the sole proprietorship binds the sole proprietorship, unless the sole proprietor so acting has in fact no authority to act for the sole proprietorship in the particular matter, and the person with whom she is dealing has knowledge of the fact that she has no such authority. When executing a contract on behalf of the sole proprietorship, a sole proprietor identifies when she is acting in representative capacity by using the designation "owner" or "proprietor" following her signature. Failure to do so results in direct personal liability.

(2) An act of the sole proprietor which is not apparently for the carrying on of the business of the sole proprietorship in the usual way does not bind the sole proprietorship.

(3) Unless clearly contrary to the terms of the sole proprietorship, the sole proprietor shall have the authority to:

(a) Assign the sole proprietorship property in trust for creditors or on the assignee's promise to pay the debts of the sole proprietorship,

(b) Dispose of the good-will of the business,

(c) Do any other act which would make it possible to carry on the ordinary business of the sole proprietorship,

(d) Confess a judgment, or

(e) Submit a sole proprietorship claim or liability to arbitration or reference.

(4) No act of a sole proprietor in contravention of a restriction on authority shall bind the sole proprietorship to persons having knowledge of the restriction.

§ 6. Conveyance of Real Property of the Sole Proprietorship

(1) Where title to real property is in the sole proprietorship name, the sole proprietor may convey title to such property by a conveyance executed in the sole proprietorship name and shall pass both the legal interest of the sole proprietorship and the equitable interest of the sole proprietor.

(2) Where title to sole proprietorship real property is in the name of the sole proprietor, and the record does not disclose the right of the sole proprietorship, the sole proprietor may convey title to such property.

(3) These provisions are not intended to change any existing operation of state or federal law relative to rule of property law, spousal rights, or marital interests.

§ 7. Sole Proprietorship Bound by Sole Proprietor's Wrongful Acts

Where, by any wrongful act or omission of the sole proprietor acting in the ordinary course of the business of the sole proprietorship, loss or injury is caused to any person, or any penalty is incurred, the sole proprietorship is liable therefore to the same extent as the sole proprietor so acting or omitting to act.

§ 8. Sole Proprietorship Bound by Sole Proprietor's Breach of Trust

The sole proprietorship is bound to make good the loss:

(a) Where the sole proprietor acting within the scope of her actual or apparent authority receives money or property of a third person and misapplies it; and

(b) Where the sole proprietorship in the course of its business receives money or property of a third person and the money or property so received is misapplied by the sole proprietor or any agent of the sole proprietor while it is in the custody of the sole proprietorship.

§ 9. Nature of Sole Proprietor's Liability

The sole proprietor is liable:

(a) Personally for everything chargeable to the sole proprietorship under sections 13 and 14.

(b) Personally for all other debts and obligations of the sole proprietorship.

§ 10. Rules Determining the Rights and Duties Between the Sole Proprietor and the Sole Proprietorship

The duties and rights of the sole proprietor in relation to the sole proprietorship shall be determined, subject to any agreement between them, by the following rules:

(a) The sole proprietor shall be repaid her contributions, whether by way of capital or advances to the sole proprietorship property, and share totally in the profits and surplus remaining after all liabilities, including those to creditors, are satisfied; and must contribute totally towards the losses, whether of capital or otherwise, sustained by the sole proprietorship.

(b) The sole proprietorship must indemnify the sole proprietor in respect of payments made and personal liabilities reasonably incurred by her in the ordinary and property conduct of its business, or for the preservation of its business or property.

§ 11. Sole Proprietorship Books.

The sole proprietorship books shall be kept, subject to any agreement between the sole proprietor and the sole proprietorship, at the principal place of business of the sole proprietorship, and the sole proprietor shall at all times have access to and may inspect and copy them.

§ 12. Sole Proprietor as a Fiduciary

The sole proprietor must account to the sole proprietorship for any benefit, and hold as trustee for it any profits derived by her from any transaction connected with the formation, conduct, or liquidation of the sole proprietorship or from any use by her of its property.

§ 13. Right to an Account

A sole proprietor shall have the right to a formal account as to sole proprietorship affairs.

§ 14. Continuation of Sole Proprietorship Beyond Fixed Term

(1) When a sole proprietorship for a fixed term or particular undertaking is continued after the termination of such term or particu-

lar undertaking without any express agreement, the rights and duties of the sole proprietor remains the same as they were at such termination, so far as is consistent with a sole proprietorship at will.

(2) A continuation of the business by the sole proprietor as habitually acted therein during the term, without any settlement or liquidation of the sole proprietorship's affairs, is prima facie evidence of a continuation of the sole proprietorship.

§ 15. Extent of Property Rights of a Sole Proprietor

The property rights of sole proprietor are (1) her rights in specific sole proprietorship property, (2) her interest in the sole proprietorship, and (3) her right to total control in the management of the sole proprietorship, subject to creditors' rights.

§ 16. Nature of a Sole Proprietor's Right in Specific Sole Proprietorship Property

(a) A sole proprietor is the sole owner of specific sole proprietorship property holding as an "owner in sole proprietorship."

(b) A sole proprietor's right to specific sole proprietorship property is assignable.

(c) A sole proprietor interest in specific sole proprietorship property is not subject to attachment or execution, except on a claim against the sole proprietorship.

(d) When sole proprietorship property is attached for a sole proprietorship debt, the sole proprietor cannot claim any right under the homestead or exemption laws.

(e) On the death of the sole proprietor, her right in specific sole proprietorship property vests in her legal representative.

§ 17. Nature of a Partner's Interest in the Sole Proprietorship

A sole proprietor's interest in the sole proprietorship is her total share of the profits and surplus, and the same is personal property.

§ 18. Assignment of a Sole Proprietor's Interest; Conveyance of the Business

(1) A conveyance by a sole proprietor of her interest in the sole proprietorship does not of itself dissolve the sole proprietorship, nor, entitle the assignee, during the continuation of the sole proprietorship, to interfere in the management or administration of the sole proprietorship business or affairs, or require any information or account of sole proprietorship transactions, or to inspect the sole pro-

prietorship books; but it merely entitles the assignee to receive in accordance with her contract the profits to which the sole proprietor would otherwise be entitled.

(2) In order for a sole proprietor to sell or convey the sole proprietorship, the sole proprietor must sell or convey the entire sole proprietorship including its assets (property), interests, and all rights thereto.

§ 19. Sole Proprietor's Interest Subject to a Charging Order

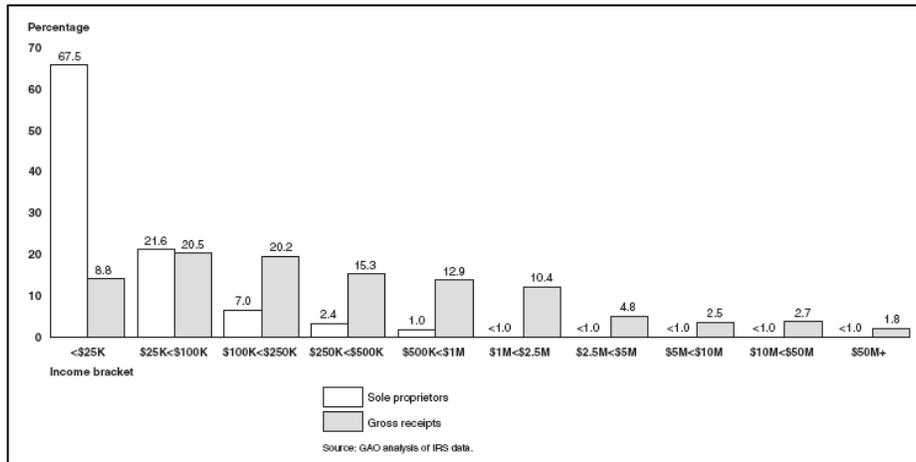
On due application to a competent court by any judgment creditor of the sole proprietor, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor sole proprietor with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of her share of the profits, and or any other money due or to fall due to her in respect of the sole proprietorship, and make all other orders, directions, accounts, and inquiries which the debtor sole proprietor might have made, or which the circumstances of the case may require.

§ 20. Dissolution Following the Death of the Sole Proprietor

(1) Upon the death of the sole proprietor, the sole proprietorship shall terminate. The property of the sole proprietorship shall automatically become the property of the sole proprietor's estate, subject to creditors' rights.

(2) If the sole proprietorship is created for a purpose, or term, the death of the sole proprietor will not terminate the sole proprietorship so long as the continuation of the sole proprietorship has been anticipated and agreed to by the sole proprietor. The sole proprietor may make provisions for the management of the sole proprietorship upon her death.

APPENDIX C: DISTRIBUTION OF SOLE PROPRIETORS AND THEIR GROSS RECEIPTS BY SIZE OF PROPRIETORSHIP, TAX YEAR 2003²⁵¹



251 Chart from U.S. GOV'T ACCOUNTABILITY OFFICE, TAX GAP: A STRATEGY FOR REDUCING THE GAP SHOULD INCLUDE OPTIONS FOR ADDRESSING SOLE PROPRIETOR NONCOMPLIANCE 5 (2007).