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RESEARCH ARTICLE

The Anglo-American misconception of stockholders as ‘owners’ and ‘members’: its origins and consequences

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Abstract

That stockholders “own” the corporation and are its “members,” are assumptions deeply embedded in Anglo-American treatments of the business corporation. They are also principal supports of the policy of “shareholder primacy” and, in the United States, of the corporate claim to constitutional rights. This article critiques these assumptions, while also explaining why they took hold. Among several reasons for this, the primary explanation is to be found in the peculiar parentage of England’s first major business corporation, the English East India Company (EIC). The EIC did not begin its life as a true business corporation, but as a cross between a guild (a form of member corporation) and a joint stock company (a form of partnership). In the transition to a unified business corporation, its stockholders inherited the monikers of “member” and “owner” from their guild and partner forebears. This mis-description set the legal mold for all subsequent Anglo-American treatments of stockholders.

Keywords: Corporation; member corporation; property corporation; East India Company; stockholder; shareholder; shareholder primacy; corporate constitutional rights

1. Introduction

The corporation, viewed with fresh eyes

It may be a useful denaturalizing exercise to imagine the surprise of a traveler from a distant land, knowledgeable of business as practiced in village and bazaar, encountering for the first time the Anglo-American publicly traded business corporation. Amazement at the scale and scope of what such firms undertake must surely be the first reaction. But the amazement would not stop there.

Wondering who is in charge of such vast commercial empires, our traveler would discover, at the pinnacle of the firm, not an individual but a board, vested by law with complete control over the property and personnel of the firm, yet a board which, to our traveler’s amazement, generally meets but a few times a year, leaving it utterly incapable of actually managing the enterprise, or even providing much oversight.

Our traveler would no doubt also be amazed to learn that neither the members of this board, nor any of the subordinates they hire to manage the day-to-day affairs of the firm, bears any liability for the debts the business might accrue or for the (non-criminal) harms it might cause. Instead, our traveler is told, something called the “juridical person” of the corporation assumes liability for all debts, while the workers, managers, directors, and stockholders – those who actually exercise control, directly or indirectly – are exempted from this liability.

More amazed still would our traveler be to learn about the individuals who select the members of this board, the stockholders. Our traveler would note that these people are generally but rentiers, i.e. passive outside investors – persons with no experience working in the industry, who likely have never even set foot in one of the company’s facilities, may never have used one of its products, and indeed

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may be unaware even of what the company makes or does, attending only to their financial return from it. Furthermore, like the company's managers, they bear no liability for the debts the company might incur, the harms it might inflict, or, significantly, even for the crimes it might commit. Nor do they stay long – on average only four months (Stout, 2012: 45). Finally, most of these stockholders never make any direct contribution to the firm, financial or otherwise, because they purchase their "share" on the secondary market (the stock market), with not a penny going to the corporation. Nor do corporations, on balance, seem much to need these stockholders, as they have for years been buying back more stock than they have been issuing, gathering all the financing they need from earnings, loans, or the sale of bonds (Haldane, 2015: 12). In short, the stockholders are the most ill-informed, irresponsible, uncommitted, and unnecessary of all the parties involved with the firm. Yet they are the ones entitled to select the board's members, who (it is widely argued) are to cater to them alone – or rather, to their pecuniary interests alone[1] – over the well-being of workers, customers, the community, the environment, or even the long-term well-being of the company itself.

Our traveler might well think this a most unpromising arrangement for the governance of such sprawling organizations whose activities are so vital to the life of the society (as did Berle and Means even in 1932). He or she may well also notice the moral hazard that attends the focus on maximizing stockholder returns, given that stockholders reap most of the upside of extraordinary profits, but are not liable for and thus do not bear much of the cost of the firm's debts, harms, or crimes in the pursuit of these profits – especially as these latter may only be discovered well after the stockholder has profitably sold her shares (Ciepley, 2018). But if our traveler asks why these of all people are given such power and perquisites, the traveler will be told, first, that it is the most "efficient" way of running a corporation, and second, that there is little choice in the matter anyway, as these stockholders are the corporation's "owners" (or at least its "residual claimants," the fractional right of ownership that matters to the rentier), and furthermore, that the stockholders are the corporation's "members," with the normal right of members to select the organization's leadership as their representatives and servants.

The traveler may wonder at this appeal to "efficiency." Efficiency is only a meaningful concept if defined with respect to the production of some value out of a given set of inputs. Prioritizing stockholders, therefore, is only "efficient" if one presupposes what was being questioned – that the sole end of the corporation is to maximize their wealth – as if there were no alternative ends by which efficiency could be measured, such as efficiency in production (minimizing waste from a given set of inputs), or efficiency in gaining market share, or efficiency in generating wealth for workers, or satisfying consumers, or generating tax revenues for the public. Why one particular value is privileged as the maximand rather than some other, is a question to which "efficiency" cannot be an answer.

Construing efficiency as "profit maximization" does not commensurate these conflicting ends. In a sole proprietorship, maximizing profit means maximizing returns to the owner – which conflicts, for example, with the ends of consumers (low prices) and workers (high wages and benefits). In a corporation, it means maximizing returns to the corporate treasury. This too conflicts with the ends of consumers and workers. What is more, profits now need to be allocated – either kept with the firm for financial security or expansion, or distributed as consumer rebates, worker bonuses, or stockholder returns, for example. Profit maximization is meaningless as a criterion of profit allocation. Explicitly or implicitly, some other criterion must be used to justify privileging stockholders in this allocation – such as the notion that the stockholders are the corporation's members and owners.[2]

However, our traveler may wonder at this notion also. For example, stockholders seem very much to be "outsiders," not "insiders" (as we think of members being). And all of the rights over the firm's assets that we normally think of as bundled into the right of ownership – such as rights to exclude, use,

[1]On the contrast between the strictly pecuniary interests of stockholders and what they would actually like to see from their firms, see Stout (2012).

[2]It is sometimes also argued that control should lie with stockholders because they bear the most risk, their returns not being contractually protected, but coming entirely out of the residual (which they are thus incentivized to increase). But workers clearly bear more risk than the portfolio investor. Should the firm fail, the stockholder loses a small fraction of savings; the worker loses a livelihood.

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lend out, collateralize, sell, or profit from the use or sale of an asset – are held by the legal entity and exercised on its behalf by the board and its hirelings. The stockholders possess none of them, which makes them very odd "owners."

The stakes

The object of this paper is to vindicate our traveler's suspicions – stockholders are not the business corporation's "owners" and "members" as these terms are understood both today and historically, and we should stop considering them as such. This is not just a point of linguistic hygiene. There are practical stakes, and they are high.

First, as already suggested, these conceits are the principal ideological props of the doctrine of "shareholder primacy," the notion that the corporation should be run in their interest alone – because they "own" it (Friedman, 1970), and because it is a kind of private club of which they are the "members." Both of these suggest that the stockholders are the "principals" of the firm and management their "agent" – a view elaborated in the extremely influential work of Michael Jensen, whose orienting proposition is that "the relationship between the stockholders and manager of a corporation fit [*sic*] the definition of a pure agency relationship" (Jensen and Meckling, 1976: 309).

This wildly misrepresents the actual legal relationship between stockholders and management, as we will see. But while not the mandate of law, shareholder primacy is potent ideology, shaping managerial norms and corporate governance arrangements. In corporate America's "golden age" of the 1950s, 1960s, and 1970s, business leaders, including the Business Roundtable, subscribed to "stakeholder theory," which justified management balancing the interests of multiple constituencies – including stockholders, but also labor and the general public – in the postwar "mixed economy" (Jacobs, 2012). Shareholder primacy has overturned this, justifying instead the empowerment of stockholders in the boardroom (for example, through independent directors, proxy access, and the dismantling of takeover defenses) and the restructuring of CEO pay, now over 80% stock-based among Fortune 500 companies, to focus executives on stockholder interests above all else.

This is not the place to elaborate on the deleterious consequences. But in a world wherein the average length of stock ownership has, since the 1960s, dropped from six years to four months (Haldane, 2015: 12, 25; Stout, 2012: 45), focusing on stockholders' returns means focusing on *short-term* returns. And that means "disgorging" corporate revenue to stockholders, in the form of dividends and stock buy-backs (which elevate stock price), rather than using it, for example, for worker pay, worker training, research and development, plant modernization and expansion, or other reinvestments that provide long-term growth. Today, over 90% of the profits of Fortune 500 companies are expended on dividends and buy-backs rather than these more productive alternatives (Lazonick, 2014). The case is strong that our combined ills of stagnating productivity and skyrocketing inequality – the latter especially pronounced in the US (OECD data, 2016) – are significantly attributable to the ever-greater institutionalization since the 1980s of shareholder primacy (Ciepley, 2017).

Second, the notion that stockholders are the corporation's owners and members underpins the US Supreme Court's practice of extending constitutional rights to corporations, from the late 19th-century corporate tax cases (Justice Field arguing that "It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion," because "the property of a corporation is in fact the property of the corporators" (*San Mateo*, 1882[3])) to *Citizens United v. FEC* (Scalia arguing that "[t]he authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association – just as the spokesman of an unincorporated association speaks on behalf of its members"[4]). The underlying conceit is that the corporation is but an

[3]*County of San Mateo v. Southern Pacific Railroad Co.*, 13 F. 722, 747 (C.C.D. Cal. 1882).
[4]130 S. Ct. 876, 392 n7 (2010).

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association of member-owners and that therefore granting constitutional rights to corporations, such as speech and electioneering rights, is not *really* granting constitutional rights to corporations (i.e. to abstract right-bearing entities), but simply upholding the existing constitutional rights of its citizen members. The result is simultaneously to loosen the government's grip on the corporation, and tighten the corporation's grip on the government.

More broadly, these assumptions underwrite the notion that the corporation is wholly "private" – an aggregation of the stockholders' private property and a private club, formed without any special help of the public authority. This poses a significant obstacle to reform even when constitutional rights do not stand in the way. No rational person sitting down today to design a governance structure for the modern business corporation would propose the current Anglo-American system. In the eras when the Anglo-American model congealed – in 17th-century England and the early 19th-century US – capital was scarce; stockholders were generally knowledgeable about, and the large ones often ran, the business in which they invested; modern stock markets did not exist, meaning that investments were generally illiquid and long-term; and stockholder exemption from liability was the exception rather than the rule. In such a world, giving primacy to stockholders to attract their capital, talent, and commitment, made a good deal of sense. But in our world, none of these conditions obtains, and the stockholder's metamorphosis, from an informed, responsible, long-term investor to an uninformed, irresponsible, short-term stock speculator, has exposed the weakness of the Anglo-American corporate governance model. Indeed, under present-day conditions, the model undermines the very point of the corporate form, which is to facilitate long-term, large-scale undertakings of public utility, by locking in assets under the ownership of an undying legal entity, allowing them to be accumulated over time and dedicated to these undertakings (Ciepley, 2013a: 143–145; Stout, 2015). This can hardly be done when over 90% of profits are disgorged to the stockholders and the remaining investments are skewed toward that which provides quick payoffs. But viewing the corporation as "private" blinkers us from even considering public reform of corporate governance, and any proposal is liable to be met with the cry that it infringes on vested rights – the private rights of ownership and membership.

The thesis

The assumption that stockholders are the owners and members of the business corporation is deeply embedded in Anglo-American legal discourse, if not in current corporate law.[5] In fact, the assumption traces as far back as the English East India Company (EIC), England's first important stockholder-dominated limited liability business corporation. Given the assumption's long pedigree, historically minded critics of it have countered that, although describing stockholders as the corporation's "owners" and "members" made sense in the first centuries of the business corporation, 19th-century changes to the corporation's organization and market environment emptied the notions of meaning. This is the argument advanced, for example, in the excellent studies of Paddy Ireland (1996) and Margaret Blair and Elizabeth Pollman (2015: 1707–1710). The case they make that we would do best to drop reference to stockholders as owners and members is, I believe, compelling. But the line of argument they develop suggests that these notions belong on a spectrum, and some may yet argue that vestiges of earlier, clearer ownership and membership relations remain in today's publicly traded firms that are sufficient to justify continuing to speak of stockholders as owners and members.

I will argue a stronger thesis. From the very beginning, it has made no sense to speak of stockholders as the owners or members of the business corporation. I first establish this point with analytical arguments. I then bolster the point with historical arguments, showing why it is that we Anglo-Americans get this so wrong and have for so long.

[5]Delaware corporate law speaks of "stockholders" rather than "members." UK law, however, refers to "members." Neither is so bold as to say that stockholders "own" the assets of the corporation, and certainly do not treat them as if they did.

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2. The analytical case against stockholders as owners of the corporation

Who owns the assets of the corporation? The perennial Anglo-American answer is "the stockholders" (Berle and Means, 1932: 312; Friedman, 1970; Smith, 1976: II.233). This answer is not supportable, however, and is currently in rapid retreat among corporate law scholars (Stout, 2012). The main point of incorporation, after all, is to change the hands in which title to the firm's property (and responsibility for its contracts and debts) is placed, from the hands of natural persons to the "hands" of the legal entity that is the corporation in law. This question of who holds the legal right is no mere formality, but of first importance to the businessperson. Only a legal owner can be party to a commercial contract, and ownership allocates rights and liabilities that can be enforced in court, establishing certainties that the businessperson can incorporate into his or her planning.

In thinking about corporate ownership, it is helpful to distinguish between "the corporation" as an abstract legal entity, and "the corporate firm," which might be considered to include this entity, as well as the aggregation of property, contracts, and employees that the entity owns, bonds, and employs.[6] The business corporation (as an abstract legal entity) owns the assets of the business corporation (understood as an enterprise, or firm). That we use the same word for two distinct things – corporation (as owner) and corporation (as enterprise, or firm) – contributes to English-speakers' corporate confusions. But just as the proprietor owns the property and makes the contracts of a proprietor*ship*, and the partners own the property and make the contracts of the partner*ship*, so the corporation owns the property and makes the contracts of the corporate firm, or corporation*ship* (as we ought to call it for consistency). Put another way, the corporate firm is a special kind of sole proprietorship, with the corporate entity as the proprietor (and with the board acting as its legal agent).

One cannot save the notion of stockholder ownership by splitting the atom of property into a bundle of separable rights and claiming that there are rights among them held by the stockholders sufficient to justify their being considered owners. Stockholders hold none of them. Whether individually or jointly, stockholders cannot use the firm's assets, nor exclude others from them, lend them out, borrow them on, sell them, or claim the proceeds from their use or sale. This entire bundle of rights belongs to the corporate entity and is exercised by the board on its behalf. Even were there but one stockholder, and this stockholder elected herself to the board and appointed herself the CEO, we could not say she owned the firm's assets. If, at the end of a workday, she were to reach into the cash register and stuff the day's proceeds into her pocket, as a genuine proprietor may, she could go to jail. It is theft from the corporation. Only by having the corporation issue dividends to the stockholders (i.e. to herself) can she legally get the cash. Which is to say, there is a legal separation between the corporation's assets and her personal assets, and this is enforced even when "pro forma."

This in turn shows that, contrary to the law-and-economics literature, stockholders are not the "residual claimants" of the firm, entitled to the profits after all the corporation's contractual obligations (to employees, suppliers, bondholders, etc.) have been met. This residual belongs to the legal entity, which the board may or may not distribute to stockholders at its discretion (Stout, 2012: 39–41). Stockholders have no legal right to it. Even in bankruptcy, when stockholders do, by law, come into what remains of the assets after all other liabilities have been discharged, they do so not as legal owners, but as heirs (Ciepley, 2013a: 146). Otherwise, it would be *their* responsibility to settle with all the firm's creditors, which they might do in an order of their own choosing, rather than the entity's responsibility, in a fixed order (Horwitz, 1992: 103, 291 n161).

No more coherent is it to say that, while the corporation owns the firm's assets, the corporation itself is owned by the stockholders (Iwai, 1999). The corporation is a legal entity, or legal "person," just as the reader and this writer are legal persons. Like us, it cannot be owned, but is an owner

[6]Unlike "corporation," "firm" is not a legally defined term. The definition above is meant to capture something like the layman's understanding, in which the "firm" refers to the productive enterprise as a whole. The distinction here drawn between corporation and firm is similar to that drawn by Robé, who, in an illuminating article, treats the corporation as the legal entity that owns and contracts, and the firm as an economic organization structured through the legal institutions of the corporation, contract, property, and fiduciary duty (Robé, 2011: 3–5, 7).

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(Robé, 2011: 3). If it *were* to be owned, like a slave, its legal personhood would be extinguished, like that of the slave's, and the purchaser would become the sole owner of the assets – the proprietor of a proprietorship, or the partners of a partnership. It is logically impossible to have a corporate firm in which the corporate entity is "owned." When the financial press speaks of a corporation being "purchased," what is really happening is that some legal person or persons (whether corporate or natural) is purchasing a controlling share of the stock of the corporation, which gives the purchaser functional control of the firm (by electing a compliant board). In corporate acquisitions, control is purchased, not the entity or its assets (although it is certainly possible for one corporation to sell its assets to another corporation – a different phenomenon, and not described as the purchase of a corporation). The assets of the "acquired" firm continue to be owned by its corporate entity, and that entity remains an unowned owner. This is, after all, precisely what makes possible, and advantages, the multinational corporate enterprise. The subsidiary retains its original (chartered) nationality, even when its stock is owned by a foreign stockholder, because its assets remain owned by its original corporate entity.

But what about the stockholder's electoral right? Owners have the right of control over their property (which is to say, the right to exclude other private parties from interfering, backed by the courts and police). Don't stockholders have ultimate control of the firm by virtue of electing its board? And doesn't this therefore identify them as the owners?

There are several problems with this inference. First, not only do elections not prove stockholder ownership; they prove the opposite. True owners, such as the partners of a general partnership, have a veto, not a vote. The vote is a charter right, not a property-derived right. In Anglo-American jurisdictions, the state gives the vote to the owners of common stock uniquely. But it could in principle be given to any others, as in Germany, where stockholders and workers each elect half of the corporation's supervisory board.

This points to a second problem. Although ownership entails control, control does not entail ownership – else the trustees of the university would be the owners of the university property, the US President would be the owner of the US military, and the Pope would be the owner of the Catholic Church. There are other mechanisms for acquiring control besides ownership, so an inquiry along these lines could not rest at the identification of control, but would have to go deeper.

Fortunately, however, we need not even come to this question because, strictly speaking, stockholders do not *have* control rights over the firm and its assets. Anglo-American corporate law allows the owners of common stock (although generally not the owners of preferred stock) to elect the members of the board. But this right of election does not include a right of the electors subsequently to control the firm, as principal to agent (any more than the electorate of a democracy has the subsequent right to control, say, the military). Stockholders cannot themselves hire and fire employees nor direct the use of corporate assets. This is the corollary of stockholders having no right to use the assets of the firm. The authority to control the personnel and property of the firm is original with the board, granted by the corporate charter or incorporation statute. There is no point in the life of a firm when stockholders may manage it directly.

Of course, there are circumstances in which the stockholders' right of election gives them enormous *influence* over the board, to the point where the board simply adopts the will of the dominant stockholder(s). We might call this "functional control," as distinct from legal control (the kind of control that generates an enforceable legal duty of obedience on the part of the agent or employee). Nonetheless, we should not confuse the influence that produces functional control with true ownership, which produces legal control. Otherwise, we will have to speak of "ownership" diffused among customers, workers, management consultants, and many others who, in addition to stockholders, influence the decisions of the board. And we would be left with no word to indicate who holds the legally enforceable rights of ownership. We'd simply have to invent a new word, and we'd be back at our starting point.

That stockholders lack legally enforceable control rights over the firm shows the fallacy of viewing the board's authority as delegated to it by the stockholders. *Nemo dat non habet* – no one can give what they do not have. Indeed, if the board held its authority on delegation from the stockholders,

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as agent to principal, it would be illegal for it to sub-delegate operational authority to a CEO and other officers of the firm, because legal agents may not sub-delegate. In other words, if the conventional view about stockholder ownership and board agency were correct, corporate capitalism would be impossible in its modern form. In reality, however, the board receives its authority from the state, *via* a charter, just as the board of the university or other non-profit does, and not from any set of natural persons. The corporation is a little government with authority delegated from the state – a "franchise government" (Ciepley, 2013a: 149–152).

We chronically overlook this state authorization because, after the appointment of the initial board, the stockholders elect their replacements, and we construe this as stockholder authorization of the board. But this is only selecting persons to enter into the powers of the office of director. Stockholders neither create the office nor endow it with its powers, nor can they alter its powers. The powers of the board are defined by the state's charter and statutes.[7] Indeed, the state creates the board, confirms its officers, and authorizes it to start running the firm before stock is even issued. The board creates the stockholders; the stockholders do not create the board.

From whichever angle one looks, the notion that stockholders own the corporation's assets cannot be maintained. So, what do stockholders own? They own stock – a financial instrument that corporations are privileged to sell to raise capital (Robé, 2011: 3). The money raised by a stock offering goes to the corporation and belongs to the corporation, just as if it sold any other good. The stock goes to the stockholder. Owning stock conveys a number of legal rights – to a proportionate share of dividends, if issued; to vote on board candidates; to launch a derivative suit or participate in a class action suit against directorial misconduct; to vote approval (or not) of the board's decision to terminate the corporation (through dissolution or merger); and so forth. But none of these imply ownership of firm assets.

The notion of stockholder ownership, as we will see, traces back to the peculiar way in which early modern Englishmen, following the practice of medieval Englishmen, conceptualized the corporate entity, or "legal person." It was a "body politic and corporate" (as opposed to a body natural) – a whole united out of many parts through political artifice. Just as St Paul figured the eternal Church as a mystical union of believers – the body of Christ, with Christ as its head and the believers as its "members" – so did Englishmen figure their bodies politic (Kantorowicz, 1957). The state figured as a mystically united body of subjects under the king as head (the frontispiece of Hobbes' *Leviathan*); the legal person of the guild figured as a mystical unity of members under the headship of the guild master; and the legal person of the business corporation figured as a mystical unity of stockholders under the headship of the governor and board.

I will be arguing that this final simile was a mistake. The business corporation was a fundamentally different kind of corporation than the medieval church, state, and guild. It was a property corporation (*universitas rerum*), not a member corporation (*universitas personarum*), and so should not have been conceptualized as a "body" of members, but as a more incorporeal kind of legal person.

Be this as it may, in this figuration lies the source of the stockholder ownership concept. To say that the corporation, as a legal entity, is a mystical unity of stockholders, and then to observe that this corporation owns the assets of the corporate firm, is to say, in effect, that the stockholders own the corporation (meaning, the assets of the corporate firm or, more loosely, the corporate firm itself). But here is the catch. Even if one thinks of the legal corporation as a Leviathan-like unity of stockholders, it remains an abstract legal entity "entirely distinct" (as the law puts it) from the natural persons that animate it. It is an artificial being, "invisible, intangible, existing only in contemplation of the law," living forever through "perpetual succession," and it is this abstraction that owns the assets of the firm (*Dartmouth College v Woodward* (1918)). The assets are not owned by the stockholders as natural persons, like the partners of a partnership.

[7]*Bank of the United States v. Dandridge*, 25 US (12 Wheat.) 64 (1827), at 113: "The stockholders impart no authority to [the members of the board] except by electing them as directors … [T]he authority is given in the charter."

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The real trouble only starts when the Pauline and medieval notion of a "mystical unity" loses its purchase under the nominalism of the modern age. Then is this metaphysical being, the imagined perpetual body politic, decomposed into material parts – the individual stockholders of the moment, with their current demands.

The idea that currently existing stockholders each "own" a "part" of the corporate firm thus derives from two confusions. First was the mischaracterization of the business corporation as a body politic – a member corporation with the stockholders as its members. The stockholders could then be said to "own" the corporation, although only in their metaphysical, corporate capacity. Second, the solvents of nominalism and materialism dissolved this metaphysical body politic into a collection of natural persons, now said to "own" the firm as concrete individuals, like the partners of a partnership.

We have just been through an analytical argument opposing this second confusion. Shareholders are not the owners of the corporation. Now I develop an analytical argument against the first confusion. Stockholders are not "members" of the business corporation. The business corporation has no members at all, properly speaking.

3. The analytical case against stockholders as members of the corporation

Making this case involves invoking two distinctions already touched on – the distinction between member corporations and property corporations, and the distinction between the corporation (the legal entity) and the firm. I will argue that, properly understood, the business corporation is and always has been a property corporation, without members. As a subsidiary point, I will argue that, while the *firm* might be said to have members – for example, its employees – the corporate entity, which owns the firm's assets and contracts with its employees, does not.

Member corporations and property corporations

The paradigmatic corporation of the Roman law books was the *universitas personarum* – what I am calling the "member corporation." This was the form generally utilized in medieval Europe for civil corporations (towns and guilds) and eleemosynary corporations (universities and charitable societies). It was an incorporation of both people and property, but with an emphasis on the people – the members and their member privileges (Tierney, 1982: 26).

In its classic form, as presented in the Roman law books, it operated, in Blackstone"s apt phrase, as a "little republic" (Blackstone, 1893: 293). The members made decisions by majority vote, on the principle of one-member-one-vote. They controlled who became a member, by vote. And they set rules, or by-laws, for themselves (and for any others who fell within their jurisdiction), by vote. They might also elect a head, or a head council, generally on an annual basis, to manage the property and quotidian affairs of the corporation, to enforce its rules, and often to serve as a court for adjudicating disputes among the members. But the authority of the head was entirely derivative of the members, who held original jurisdiction, and the head remained accountable to these members.[8]

In addition to the *universitas personarum*, there was another corporate form mentioned by the Roman law books – the *universitas rerum*, an incorporation of things, or property, without members (Buckland, 1925: 172–173), which I am calling the "property corporation." Used by the Romans to describe the estate of a decedent, it was given a much wider application by the Church, which used it to characterize important bodies of property such as the bishopric. Today, canon law divides the world of juridical persons between these two types, member corporations and property corporations: "Juridical persons in the Church are either aggregates of persons (*universitates personarum*) or

[8]Although not germane to the present article, it should be noted that the Church developed a variant of the member corporation, in which the head was elected for life and thus not subsequently accountable to the members. This was the form of member corporation used by cathedral chapters, and it became a model for relations between the pope and cardinals and even between king and members of parliament (Tierney, 1982).

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aggregates of things (*universitates rerum*)."[9] Prior statements of canon law used as an equivalent expression for the latter, "persona moralis non collegialis," which makes even more explicit that this is a legal form without members ("non collegialis").[10]

Lacking members, control of the property corporation is necessarily lodged in a "head" alone – an officeholder or officeholders (such as the bishop) with unilateral control over the property and over any personnel hired to manage it consistent with the corporation's authorized purpose. It is an "autocratic" form of government. Also, its lack of members makes clear that the authority of the office comes from above – from a superior member of the church hierarchy, or perhaps from the general "constitution of the Church," understood as being from God (Tierney, 1982: 41).

The concept of a *universitas rerum* was taken up by the civil law of continental Europe. For example, the canon law distinction between the *universitas personarum* and the *universitas rerum* is nicely reproduced in French corporate law as a distinction between the *société de personnes* and the *société de capitaux*. Analogously, in Germany, an 1842 legal handbook on incorporated joint stock companies explained that "in an association of capitalists, in which the personages [of the stockholders] necessarily lie outside [the organization], the total capital specified in the charter (the total of the shares) is actually more the *socius* than the proprietor of the share." This was echoed in textbooks for generations, with a 1904 text speaking of "The nature of the joint stock corporation as a distinctive association of property, in which the person of the shareholder takes second place to the share" (quotations in Dunlavy, 1998: 23, 33).

Although the distinction between incorporations of people and of property undermined the notion that stockholders are "members," it did not preclude the view that stockholders "own" the property of the property corporation. Indeed, this idea became widespread on the Continent with the refounding of corporate law in the 19th century. But the *universitas rerum* also deposited on the Continent its purer identity as an incorporation of property *without* human owners, as in the German *Stiftung* and the French *fondation*, that "personify" a body of property. This created the conceptual space for construing the business corporation, too, as an institution rather than an association of stockholder-owners. In 1977, a year after the German Bundestag instituted co-determination for German corporations, a group of firms and employer associations challenged the law in the German constitutional court on the grounds that "labor's co-determination in the conduct of company affairs posed a threat to the full sovereignty of owners over their private property" (Markovits, 2016: 140). They lost.

However, in a fact of great significance for the English understanding of corporations, the concept of the *universitas rerum* was either never taken up in England, or it was lost early.[11] In consequence, English common lawyers developed no concept of a *société de capitaux* or of a *Stiftung*, but were instead all but bound to describe property corporations, as developed on the Continent, as some variety of member corporation.

In the case of non-profits, this was generally done by construing the corporation's officeholders as the "members" of the corporation. If the non-profit had a board – such as a charitable foundation or university – the board members were identified as the "members" of the corporation. In the case of non-profits with a single officeholder, such as the bishopric, its head – the bishop – was construed as a member. And thus originated that English curiosity, the "corporation sole," a one-member corporation, which, like the property corporation, served to dedicate property to a purpose across generations by blocking the claims of the incumbent's heirs.[12]

[9]Canon 115.1, available at www.vatican.va/archive/ENG1104/_PD.HTM (accessed February 24, 2019).

[10]CIC, c. 99 (1917), citing as examples "ut ecclesiae, Seminaria, beneficia," etc.

[11]Bracton (1210–1268), who was both cleric and jurist, appears to have had the concept of a property corporation without members (for evidence, Kantorowicz, 1957: 186), but this either didn't make its way into English law, or it was lost. I have so far been unable to solve the mystery of the disappearing *universitas rerum* in England, despite consultations with leading historians of the canon law, including Brian Tierney, Richard Helmholz, Charles Donahue, and Kenneth Pennington.

[12]For discussion of the king as corporation sole, see Maitland, 2003 and Kantorowicz, 1957, although neither recognized these as English workarounds for canon law concepts.

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In the case of for-profits, it was not the officeholders that the English cast as the "members" of the corporation, but the stockholders, with the stockholders analogized to the members of a merchant guild. I relate the story below. But how apt was this? Is the business corporation a proper member corporation?

Classifying the business corporation

Although the word "member" can have a broad range of significations, to be the member of a member corporation was something quite specific, with legally defined rights. I see the members of a (civil) member corporation as possessing three key attributes, which together give the member corporation its republican form: the members operate on the principle of one-member-one-vote (usually with majority rule); they collectively control the membership; and the government they elect is a government over themselves. This understanding of a "member" is also consonant with how we think of "members" managing their affairs in informal, unincorporated member associations, such as a bridge club. If affiliates of a civil corporation don't possess *any* of these three attributes, I believe we can conclude that we are not looking at a member corporation and that its affiliates are not the members of a member corporation.

The early modern "regulated company" – a merchant guild specializing in overseas trade, such as the Levant Company, out of which the English EIC emerged (Brenner, 1993: 19–22) – was a classic member corporation of the civil type. Unlike a business corporation, a regulated company was not a unified business enterprise. Each member traded with his own capital, using an apprentice or former apprentice (often his son) as his overseas agent (Wood, 1964: 211–215). But the members were united by the charter as "one bodye corporate and pollitique" for the purpose of governing the trade (Levant Company Charter: 160–161). The members typically enjoyed an exclusive privilege (a monopoly) of trading in a specific range of goods or a specific region, which they enforced with the backing of the government (Levant Company Charter: 196, 207). But more, they also governed their own individual conduct as traders. Acting in their corporate capacity (i.e. sitting in general assembly and operating by majority vote), they passed "statutes lawes orders constitucions and ordinances" regulating their conduct as individual traders and made collective decisions regarding their individual use of the corporate property – for example, the ships and warehouses that they used in common (Levant Company Charter: 186; Wood, 1964: 209). They also elected a governor and assistants annually to enforce their statutes and to adjudicate disputes among themselves in their trading activities (Levant Company Charter: 182–183). And they voted on the admission of new members.[13] It could well be described as a little commercial republic, with all the key features of a member corporation.

This cannot be said of the modern business corporation. The annual stockholders' meeting is indeed the direct descendant of the member assembly of the regulated company (although the latter met much more frequently (Wood, 1964: 209)). But its principles of operation have been completely altered. A stockholder assembly is, within the limits of charter and statute, typically allowed to make and amend by-laws governing the procedures of shareholder meetings and board meetings. However, it does not operate on the principle of one-member-one-vote, but on the principle, utterly alien to member corporations, of one-share-one-vote. The stockholders do not collectively control who becomes a stockholder, as shares are freely tradable. And most importantly, they do not elect a government over themselves as individuals, but a government over the employees of the firm, from whom value is extracted. This is no republic. For one group to appoint a government over another group is an imperial relationship. A business corporation is, technically speaking, a (charter- and statute-limited) representative imperial oligarchy (or oligarchic empire). Furthermore, as we have seen, the authority of its board does not derive from the stockholders, but from the state. So we have a governance structure in which a set of offices (the board) is created by a higher authority and granted autocratic authority over the corporation's property and employees – just like a bishopric. In other words, it has the structure of a property corporation. It is not any kind of member corporation.

[13]For these operational details, Wood, 1964: 205–228, especially 209.

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This is confirmed by the breakdown of the "body politic" metaphor that had always been central to English treatments of the corporation. The member corporation, whether civil or church, was, if you will, a centipede with equal members that elevated a head and then operated under its government, which was supposed to act for the good of those governed, so long as this was consistent with pursuit of its authorized purpose. The stockholders of a business corporation, in contrast, are of vastly different size, some weighing in with one share, some with millions. They elevate a head; but they take no direction from it. Instead, the head governs an unconnected group, and not for that group's own good but, at least on many present-day interpretations, for the pecuniary benefit of the first group. This is a shambolic, autocratic, extractive monster never dreamt up in the bestiary of member corporations, and hardly qualifies as a coherent "body."

Of course, one can find many charters especially of early business corporations that speak of the stockholders incorporated into one body politic. I will shortly explain why this happened. My present point is, if one thinks through the metaphor, it clearly doesn't work and indeed has fallen into desuetude, which attests to the business corporation being something very different from the member corporation.

Nor do the technicalities of corporate creation continue to support the metaphor. The "body politic" of a civil member corporation, such as a merchant guild, was regarded as being composed of its "incorporators" and their successors, usually listed at the beginning of the charter. Originally, subscribers to a joint stock company during its pre-chartered organizational phase might become the formal incorporators of the business corporation, and this was conducive to thinking of them as the "members" of a "body politic," on analogy with the merchant guild. But this is no longer the practice. The incorporators of a modern business corporation are often just a few lawyers hired to handle the paperwork, who then disappear from the scene. Regardless, the bulk of the stockholders of today's publicly traded firm – even those who purchase at the initial public offering – cannot be among the incorporators, and thus cannot be the members of the putative "body politic," because they don't exist at the time of incorporation and their future identities are unknown. The only intuitive way to conceptualize the legal entity that owns the property is as an abstract legal posit without members – the legal entity of a property corporation – and not as a group of stockholder-members mystically united into a metaphysical being.

In a different vein, Mansell and Sison (2019, this volume) argue that corporations *do* have members – namely, those who participate in the common good of the firm, that is, who contribute to its joint production. This may include the stockholders, as its financiers, but also its workers, and possibly even its suppliers and customers.

It is at this point that I would draw attention again to the crucial distinction between the legal corporation that owns the firm's assets, and the corporation understood as the firm itself (which encompasses the legal corporation, the property that this legal entity owns, the employees it hires, the contracts it makes, and so forth). The arguments the authors make about membership in "the corporation" are really about membership in the firm (and indeed apply to *any* kind of firm, corporate or non-corporate). They are not arguments about the corporation that *owns* the assets of the firm. That is, they are not arguing that stockholders, workers, and the rest, are all mystically united as the members of a body politic that owns and governs the firm's property. That is classically how one would make the case for corporate membership. The authors are talking about something else – membership in a firm that engages in joint production.

The purpose of the member corporation was not joint production. It was joint governance – joint governance of individual activity and joint governance of corporate property facilitating individual activity. Membership in a member corporation, such as a guild, did not make one a "member" in any of the enterprises that it regulated. Those were separately organized, on different principles, with different "members," or participants.

I will not weigh in on the question of who are the "members" of various kinds of firms, including corporately owned firms. Cooperatives aside, I have some doubts that firms are well characterized as member associations, although they may certainly have "members" in one of the many other senses of

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the word, including the authors' meaning that "members" are those who contribute to a joint enterprise. My point is, such discussions are orthogonal to the question of whether the legal corporation has members – or put another way, whether it is a "body politic."[14] I do not think so; and certainly the stockholders are not its "members," but simply purchasers of a financial instrument with limited rights.

4. From member corporation to property corporation: rise of the business corporation

This leaves us with the question of how the English could have come to mis-describe the corporation's stockholders as "owners" and "members," and to have done so from the very beginning. The argument that stockholders are not owners and members is strengthened if it can be explained how reasonable people might have gotten this wrong.

The explanation, I believe, is found in the early history of the Dutch and English East India companies. The key is to recognize that, although conventionally and rightly identified as the first fully fledged business corporations of note, neither began as one. The Dutch East India Company (VOC) innovated its way there first, over a two-decade period. The English EIC, meanwhile, went down a different path of innovation. But its fusion of the merchant guild with the joint stock company proved an organizational dead end. Consistently outcompeted, the EIC finally copied the VOC model (although with one important change), in a process that began with a new charter in 1657. Yet the English persisted in describing this new type of corporation in the legal vocabulary proper to the merchant guild and joint stock company. This introduced basic confusions into the English language discussion of business corporations, including the proclivity to speak of the stockholders as the members and owners of the corporation. In this place, I can only telegraph the organizational innovations and legal mischaracterizations involved.

The Dutch East India Company

The VOC, as founded in 1602 through "letters patent" (*octrooi*), was not any kind of corporation, but a kind of legalized cartel among six so-called "pre-companies" – that is, the six merchant partnerships that had begun successfully trading to the Indies at the close of the 16th century. These were "united" at the instigation of the Dutch States-General, so as to create a coordinated force that, in addition to pursuing profit, could attack Spanish and Portuguese interests in Asia, relieving Spanish and Portuguese pressure on the Dutch homeland. A central board – the Heren XVII – was instituted to set general policy for, and assign destinations to, the six merchant groups (now denominated "chambers" of the company) and to set policy on the pricing of the returned goods (Gaastra, 2007: 19–20). But the VOC lacked separate "juridical personhood." Its letters patent did not constitute it a "body corporate," grant it ownership rights, or grant it a seal.[15] All operating funds were provided by the individual chambers,[16] the leading merchants of which remained personally responsible for equipping their chamber's fleet and, crucially, fully liable for all debts contracted (with the exception only of the sailors' wages, which were to come out of profits or not at all) (Gelderblom *et al.*, 2013: 1069).

Outside investors could put money into one or another of these individual chambers, on terms that involved two innovations. First, their investment would be locked into the chamber for a period of ten years (rather than only until the return of the fleet), to be returned to them only upon the company's

[14]The authors also question whether equal voting power is a relevant desideratum of membership in a civil member corporation. But their historical counterexamples are not compelling. Their first comes from the world of church corporations, not civil corporations, and furthermore, it is not a true counterexample. The head of a church corporation had, on certain issues, a vote equal to that of all members. But the members had an equal vote. Their second counterexample comes from medieval towns, which, the authors argue, had "passive" non-voting "members," such as women and children. Be this as it may, the voting members had equal votes, unlike stockholders.

[15]See VOC Letters Patent at https://www.vocsite.nl/geschiedenis/octrooi.html (accessed 10 September 2019).

[16]Ibid.

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first scheduled liquidation in 1612 (Steensgaard 1982, 246–247). Second, as compensation for this long lock-up period, investors were allowed to sell their shares to any willing buyer, returning liquidity to them. This created the first corporate stock market (Steensgaard, 1975: 128). However, no stockholder ever believed himself a "member" of the VOC. They were denominated "participanten," not "ledden" (Dutch for "members"). The VOC was organized without their initiative or involvement (they were mere outsiders allowed to "participate," not the incorporated members of a body politic); they had no control over who else participated; and they didn't get a vote on anything, let alone an equal vote – not on membership, not on legislation, and not on the board's composition. Board members were selected by the Dutch States-General (or by the burgomeisters of the Dutch cities, on permission of the States-General) from among candidates nominated by the individual chambers (Gaastra, 2007: 16, 18).

Over the first two decades of the VOC's operation, a number of changes occurred that had the effect of transforming the VOC into a fully-fledged business corporation. Here I mention only the two most important.

First, the board, with the support of the Dutch States-General, reneged on the planned 1612 liquidation out of fears (surely accurate) that liquidating would deprive the company of its hard won (indeed, violently won) positions and fortifications in Asia (Gelderblom *et al.*, 2013: 1060–1061). The investors' money was locked in indefinitely, creating "permanent capital" for the company. Understandably, the investors threw a fit, as there was no hiding that this was a total expropriation. They were under no illusion thereafter that they "owned" anything of the VOC. But they were pacified with a massive 162.5% dividend (Steensgaard, 1982: 246, 248).

Second, in 1623, the Dutch court allowed the VOC to be transformed into a separate property-owning and contracting entity – a juridical "person" – by accepting the validity of bonds issued by the VOC bookkeepers, without any merchant cosigners (Gelderblom *et al.*, 2013: 1069–1071). Company funds guaranteed the bonds, not the merchants. Without this, the merchants, being liable for all debts, had been unwilling to take on the debt levels needed to reach a profitable scale in bellicose trade. With it, the VOC, through significantly heightened borrowing and locking in of accumulated capital, reached a scale that not only made it profitable but made it the dominant player in the spice trade until its dissolution in 1800. But more, it also now had all the attributes that modern scholars associate with the business corporation: a permanent capital, legal personhood, centralized management, limited liability for shareholders and directors,[17] and tradable shares (Kraakman *et al.*, 2004: 5–12).

One thing that did not change was the position of the stockholders as outsiders. They were not a group of individuals "incorporated into one body politic," who then elected a government over themselves on the principle of one-member-one-vote. Instead, there was a government-appointed board, a body of assets, employees (the merchants and sailors and staff), and themselves, the holders of stock certificates, standing outside the firm and receiving dividends at the discretion of the board. It was not an incorporation of persons (*universitas personarum*), or what I call a "member corporation," but an incorporation of things (*universitas rerum*), what I call a "property corporation."

The English East India Company

The EIC traveled down a very different path, until it abandoned that path and copied the Dutch. Unlike the VOC, the EIC *did* begin as a corporation, but not as a unified business corporation. Like the Levant Company out of which it emerged, it was chartered as a regulated company. The charter granted the members a trade monopoly, and the members collectively set the rules for its use, for the most part through a board they elected, with one-member-one-vote (*Charter*, 1887 [1600]). But in principle, each merchant traded on his own capital. In this, it was a typical member corporation, with the members establishing a government over themselves as individuals.

[17]For a compelling argument that "limited liability" was not yet a consciously formulated legal attribute of the corporation but, in this case, a de facto consequence of separate corporate personhood, see Harris (2019, this volume).

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However, the costs involved in trade to the Indies were so great that, from the very first, members of the guild (not all of them, and not always the same ones) organized a succession of joint stock companies – a form of partnership – to undertake trading expeditions, each company selling all its assets with the return of its ships and dividing the proceeds, as was customary with merchant partnerships (Chaudhuri, 1965: 25–27). Naturally, the participants in the early EIC saw themselves as members, and twice over. They were the members of the regulated company – a proper member corporation. And they were, more loosely, the "members," or partners, in individual joint stock expeditions.

The results of this arrangement, however, were not happy, with the separate joint stock enterprises undercutting one another in Asia, and with merchants quarreling over the pre-sale valuations and fair divisions of the return goods (Scott, 1910: 109–110). The superiority of the revamped VOC was not hard to see, with its accumulating permanent capital, permanent bases, and seemingly permanent dominance over the diminutive English joint stocks.

The rechartering of the EIC in 1657 began the process whereby the EIC was enabled to compete with the VOC by adopting its form. From the very start, the EIC had juridical personhood, although only as a regulated company, or guild. In 1657, its juridical personhood was attached to a single and permanent "joint stock," making it a unified business corporation. Capital that previously had been temporarily invested in individual joint stock ventures was now locked in the company permanently, owned by the corporate entity. Those who had participated in the individual joint stock enterprises previously as co-owners became outside investors who owned shares of stock alone – a financial instrument, not a claim on assets. Directors were exempted from liability for company debts, as were stockholders.[18] And shares were made freely tradable (Gelderblom *et al.*, 2013: 1051). What had been a regulated company with members was thus transformed into a property corporation with external stockholders. Just like the VOC. Or almost so. The erstwhile members of the guild, who had elected the board, continued to elect the new board in their role as stockholders. This made the EIC a stockholder-dominated enterprise, unlike the VOC. But this didn't preserve it as a member corporation. The board governed the employees, not themselves; elections moved stepwise to the investor principle of one-share-one-vote rather than the member principle of one-member-one-vote; and the stockholders had no control over who else became a stockholder.

5. The English mis-description of the business corporation

Despite this dramatic transformation, it is of great import that the English did not change their legal terminology to reflect the change in corporate form, but continued to speak of the stockholders as the "members" and "owners" of the corporation, however inapt. Why?

For one thing, as already noted, English law had either lost its grip on, or had never received, the canon law concept of the property corporation (*universitas rerum*), which was received into the legal systems of continental Europe. Therefore, English commentators were bound to try to squeeze this new kind of corporation into the mold of the member corporation, the only type of corporation they knew, even if this was conceptually confused.

One shoehorn for this was that, unlike the *participanten* of the VOC, the stockholders of the EIC were conceptualized by its 1657 charter as the incorporators, united by the charter into one body politic and corporate. As already argued, this was a monstrous form of body at best. But the preservation of the body politic metaphor – it being the only conceptualization the English had at hand – would have reinforced the notion that the stockholders remained the corporation's "members." Also relevant is that they continued to elect the board, as they had as guild members. No longer was it a government over themselves, and the voting rule would eventually change to the non-member principle of one-share-one-vote. But this did not occur right away, and the present continuity suggested that nothing fundamental had changed.

[18]The archaic concept that stockholders have "limited liability" is a misnomer once shares of stock are fully paid up at the time of purchase. They have no liability (Ireland, 1996: 48–49).

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The notion of stockholder "ownership" was also facilitated by the gradualism in the transition between forms. The stockholders of the EIC never experienced an overnight expropriation as did the *participanten* of the VOC. The year 1657 is conventionally cited as the birthyear of the EIC remodeled with a permanent joint stock. Yet it was not until September 1661 that the board, in declaring the first dividend, announced the policy that dividends would come only out of profits earned and not in the form of "divisions" of the value of both assets and profits, as had been the practice of terminable joint stock companies (Scott, 1910: 131–132). Only such a change in policy could make the company a permanent joint stock in practice, and its belated announcement shows that the change in mentality from the old to the new form of the company was coming only gradually.

Why didn't the EIC stockholders react to this announcement with cries that it was an expropriation? Perhaps because the charter of 1657 mandated a valuation of the company after seven years, and every three years thereafter, at which time any stockholder could demand the ratable value of his or her portion of the stock subscription, provided that a replacement stockholder could be found (Scott, 1910: II.129). In other words, stockholders were entitled to receive, as an alternative to the going market price for their stock (or in the absence of a ready market in the stock), a price based on the book valuation of all assets minus liabilities. This would have helped carry forward the notion that the stockholders were the owners of a portion of the company's assets, even if their claim on these assets no longer derived from legal title, but was episodic and conditional, resting on a charter provision.

When the first valuation came, in 1664, few exercised their right to exit. Annual dividends of 20% were being distributed, a ready market for EIC stock appears to have been on foot, and the stock was trading at or near par value (Scott, 1910: 132). Under these conditions, there was little reason to avail oneself of the charter provision, and it disappeared from subsequent charters. But the notion of stockholders as the "owners" remained. In the conceptualization that became dominant by the 18th century, legal title to the company's property was vested in the corporation (still understood as a body politic composed of the stockholders), which held it in trust for the individual stockholders, or "members," who held an "equitable interest" in the property. In the language of the English and also the early American courts, "the corporation was the trustee, the shareholders the *cestuis que trust*," or beneficiaries.[19] In the vernacular of English trusts, this made the corporation the legal owner, but the stockholders, as natural persons, could be considered the "beneficial owners" or "equitable owners."

6. The member corporation decomposed

In principle, the consequences of England's atavistic notion that the stockholders were the members of a member corporation – and that they, as a metaphysical incorporated body, "owned" the assets of the firm – should have been limited. No less than a property corporation, a member corporation holds property distinct from the property of all natural persons, including the persons who, metaphysically speaking, comprise it. It is *not* a general partnership, the rights, duties, and property of which trace back to the partners. However, as the medieval notion of a "mystical unity" lost its intuitive sense to the modern nominalist mind, it became all too tempting to decompose the incorporated body into its component parts.

One result was a reconfiguration of the trust analogy, with the directors taking the place of the corporation as the trustees for the stockholders. In the US, this did not begin before the 1830s (Smith, 1998: 307 n145), but was certainly present by mid-century. "The relation between directors of a corporation, and its stockholders, is that of trustee and *cestuis que trust*" (*Butts v. Wood*).[20]

The other possibility brought on by the weakening of corporate metaphysics was analysis of the business corporation as a form of *partnership*, with the board as the agent of the stockholders, the presumed "owners" of the firm. This was commonplace in England from the very beginning, given

[19]Ireland, 1996: 49–50. See also examples in Smith, 1998: 301–304.

[20]38 Barb. 181, 189 (NY App. Div. 1862).

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the emergence of the business corporation from the terminal joint stock company. The law of business corporations was for long typically treated as a subspecies of partnership law in textbooks on partnerships (Ireland, 1996: 45).

English usage naturally echoed in the United States. But it was really after the American Civil War that the partnership conceit had its first American heyday (Horwitz, 1992: 90–93). Increasing numbers of jurists derided the "metaphysics," "fiction," and "unnecessary mystification" of attributing to the corporation an existence distinct from natural persons (Horwitz, 1992: 90–91). The partnership conception was a "realistic" alternative with the added merit of squaring the corporation with the classical-economic ideal of an economy based on (individually owned) private property and contract. Corporations, wrote the prominent corporate lawyer Victor Morawetz, in his popular corporate law treatise,

> are formed by the voluntary association of their members … Although a corporation is frequently spoken of as a person or unit … the existence of a corporation as an entity, independently of its members, is a fiction; … the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being. (Morawetz, 1882: 2)

In sum, the state-created corporate entity was beginning to fade – in textbooks and in the dicta that judges used to conceptualize the corporation in their legal reasoning – to be replaced by accounts of corporations as (increasingly literal) partnerships and trusts. This unsettled inherited understandings of corporate rights. The partnership conception in particular pushed some commentators to challenge the notion that stockholders have limited liability. If they were but partners, they should have the full liability of partners (Horwitz, 1992: 76, 91). But in another direction, legal counsel for corporations began to argue that corporate property, being the property of the stockholders, deserved the protections that the US Constitution affords to personal property under the Fourteenth Amendment. The argument won over the Supreme Court in the 1880s (ibid.: 69–70), and thus began the process of extending constitutional rights to corporations in the name of their supposed owner-members (Ciepley, 2013b).

7. The separate entity emerges

There is an underlying reason that these conceits were able to grab hold and, for long, hold on. Until there were liquid stock markets – and not just for the shares of a few massive monopolies, but for a broad spectrum of firms – the ownership of shares tended to be long-term and stable. Furthermore, the day-to-day price of these shares was not so clear. Under these conditions, it was possible to imagine that the physical assets of a corporation were tied to specific, identifiable stockholders, and that stock prices reflected the valuation of the firm's assets (Ireland, 1996: 67). To own a share still felt like owning a piece of the company. This made it possible to maintain the partnership and trust conceits.

But once liquid stock markets developed – in England, in the mid-19th century; in the US, at the century's end – the conceits began to collapse. As Paddy Ireland argues, the fluctuations in stock price were proof that the value of a share was not tied to the value of some underlying set of assets, but was a form of property distinct therefrom, with a price perhaps related to the present value of the company as a "going concern," but in any case not a price representing a "piece" of the firm's assets (ibid.: 68–69). The share came to be recognized as a form of property in its own right – a negotiable asset so liquid that it was almost like money – separate from the industrial property of the firm, now recognized as belonging to the corporation itself, not the stockholders.

The sea change began with the case of *Bligh v. Brent* (1837). At issue was whether the deceased, who by reigning English law could not pass land to his wife, could pass to her the stock of a company, the property of which was largely land. Previous cases had held this illegal (unless perhaps the stock

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had been expressly declared by Parliament's act of incorporation to be treated as personalty rather than realty, which, in this instance, it had not been). Counsel for the plaintiff, who wanted the stock for himself, argued the received view that a corporation's property is vested in the "shareholders as a corporation, in trust for themselves individually, according to their respective interests." To come into the shares was in effect to come into the land; therefore, the wife could not inherit. But the Court was no longer having it and sided with the defense: "The individual members of a corporation" are "quite as distinct from the metaphysical body called the corporation, as any others of His Majesty's subjects are" (quoted in ibid.: 52). Therefore, to be a stockholder was not to be a landowner. The view that the corporation and the corporation's property is wholly separate from the stockholders and their property (including their shares) gradually gained ground, and by the 1880s was well institutionalized in the law (ibid.: 53–62).

What is more, this was accompanied by an ejection of the stockholders from the corporate body politic, and indeed, the collapse of the body politic metaphor itself, which had been the source of the "membership" notion. Well into the 19th century, the British image of corporations, including even business corporations, as a collection of individuals united into one body, gave rise to a commonplace practice of referring to corporations in the plural, as a "they" (Ireland, 1996: 46). But as the actual logic underlying *Bligh v. Brent* took hold in the next decades, corporate grammar switched to the modern practice of referring to the corporation strictly as an "it."

> Section three of the 1856 Joint Stock Companies Act permitted seven or more persons to "*form themselves* into an incorporated company," clearly implying that they *were* the company, that it was made of them. In contrast, the corresponding provision of the 1862 Companies Act, section 6, permitted seven people "to form" an incorporated company, an object apparently external to them. Companies, the act implied, were no made not *of* people but *by* them … (Ireland, 1996: 47)

Yet for all this, the British never discontinued speaking of stockholders as the company's "members," even while now emphasizing, in language that impugns the coherence of this continued usage, "the complete separation of the company and its members" (Gower, 1979: 100). In contrast, true member corporations were described as legally "distinct" from their members, although composed of them (Ireland, 1996: 67).

An analogous development occurred in the US, although later. Prior to the final decade of the 19th century, the nascent corporate economy of the US was, outside of the railroad sector, dominated by small, closely held firms whose stockholders were often also founders, board members, and managers – active participants in the enterprise. This was the backdrop for inroads of the partnership analogy, which, as noted, helped square the corporation with the individualist and free market assumptions of classical political economy that, in modified form, became ascendant in the US in the three decades after the American Civil War (Cohen, 2002). It was therefore only at the close of the 19th century, as the "great merger movement" concentrated the American industrial landscape into continent-straddling industrial behemoths with publicly traded stock, passive stockholders, and strongly centralized management (Lamoreaux, 1988), that Americans traveled roughly the same path as the British out of the partnership analogy.

As in Britain, the rise of a broad and liquid national stock market broke the presumed tie between individual stockholders and corporate assets that had supported the ownership conceit (for details, Horwitz, 1992: 93–98). This was largely accomplished by the time of the First World War. "It cannot be too strongly emphasized," wrote one textbook writer in 1919, "that stockholders today are primarily investors and not proprietors" (quoted in ibid.: 93).

As for the membership conceit, it was, in the US case, pressured more by the centralization of management. The imperative of centralized control for assembling and managing these industrial behemoths led courts and state legislatures to clarify that all authority to manage the corporate firm was original with the board. The board did not act as an agent of the stockholders, and it was free to delegate operational authority and legal agency to hired executives. As noted by perceptive

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turn-of-the-century legal commentators, the conceit that stockholders comprise the corporation, as the "members" of a proprietary body politic, "is of no value under modern conditions. The modern stockholder is a negligible factor in the management of a corporation" (quoted in Horwitz, 1992: 105). "[W]here the whole sum of corporate powers is vested by law directly in a board of directors … such an organization … allows us to see in a large railroad, banking or insurance corporation rather an aggregation of capital than an association of persons" (quoted in Horwitz,1992: 100). In other words, it discloses itself as a property corporation rather than a member corporation.

Conclusion

By the end of the 19th century, developments in the corporate economy in both the UK and the US had, in the eyes of the legal cognoscenti, finally rendered untenable the longstanding conceit that stockholders are the owners and members of the business corporation. The 20th century should have witnessed the elaboration of a more abstract conception of the corporation, as an "incorporation of property," or pure legal posit, without owners or members.

But the identification of the stockholders as the corporation's owners and members would not go away, so deeply embedded is it in English language legal discourse. Despite its continued inconsistency with the modern corporate economy, Chicago School economists, equally desirous as their 19th-century laissez-faire forebears to assimilate the corporation to the categories of the free market, revived analysis of the corporation in partnership terms and formulated the modern doctrine of shareholder primacy, the primacy of the rentier (Friedman, 1970). At the same time, the US Supreme Court, in the wake of its dramatic post-WWII expansion of civil rights and civil liberties for natural persons, began extending many of these rights to corporations as well, on similar partnership reasoning. Looking straight through the legal entity that is the holder of corporate property and corporate rights, the Court only sees an "association of citizens," and specifically an association of stockholders – the "members" who, it assumes, constitute it and own its assets (*Citizens United v. FEC* (2010): 108, 392 n7; Ciepley, 2013b).

The fallacies behind these developments should now be clear. Should corporations be extended constitutional rights? The corporation proper is a separate legal entity created by legal fiat of the public authority. It is not reducible to its stockholders or to any other set of natural persons (as "members" or associates), and has completely separate property and rights. Such an entity, created by legislative authority for the benefit of the public, with the legislature normally reserving the right to dissolve it, does not have the standing of a citizen or natural person under the Constitution. For the Court nonetheless to give these entities constitutional rights is giving them rights against efforts by their creators to keep them from undermining the public good they were meant to serve. For example, for the Court to give corporations the right to spend unlimited sums in elections is not protecting the rights of citizen-stockholders to spend their personal funds in elections. This they may already do, by using cash on hand, or by selling stock or other assets to generate yet more cash. Rather, it allows corporate management to spend the *corporation*'s funds, without limit, to influence what is supposed to be the *popular* election of those who might regulate it.

Nor is there reason to give stockholders "primacy" in the control of, or returns from, corporate enterprise. They are not the "owners" and "members," but one among many contributors to the success of the firm (including the public itself, which contributes the legal entity and endows the board with its authority). Given what has become of the Anglo-American stockholder – typically the least informed, least liable, least committed, and least contributing participant in the firm – it is high time for reform of the Anglo-American system of corporate governance, free of the straightjacket of stockholder ownership and membership claims, so as to render the Anglo-American corporation more productive, equitable, and responsible.

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