

# **Our Corporate Civilization and its Neoliberal Crisis**

David Ciepley



The Occasional Papers of the School of Social Science are versions of talks given at the School's weekly Seminar. At these seminars, Members present work-in-progress and then take questions. There is often lively conversation and debate, some of which will be included with the papers. We have chosen papers we thought would be of interest to a broad audience. Our aim is to capture some part of the cross-disciplinary conversations that are the mark of the School's programs. While Members are drawn from specific disciplines of the social sciences—anthropology, economics, sociology and political science—as well as history, philosophy, literature and law, the School encourages new approaches that arise from exposure to different forms of interpretation. The papers in this series differ widely in their topics, methods, and disciplines. Yet they concur in a broadly humanistic attempt to understand how, and under what conditions, the concepts that order experience in different cultures and societies are produced, and how they change.

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## Our Corporate Civilization and its Neoliberal Crisis

In the wake of the recovery of Justinian's *Digest* and the Roman law of corporations in the eleventh century, Europe reorganized itself as a civilization of corporations—a dense web of monasteries, cathedral chapters, confraternities, universities, towns, and guilds that governed the associational life of an energized Europe. Ever since, the corporate form has been the West's distinctive mode of organizing and augmenting collective power, with profound and enduring consequences for the structure and trajectory of Europe, and, eventually, the world, not only by paving the way for the modern business corporation, but by giving a distinct form to other key European institutions, including the Catholic Church and the European state, which were for long themselves modeled as corporations.

The importance of this corporate history has been obscured in modern times by a liberal individualist self-description that one-sidedly attributes the West's distinct path to the “rise of individualism”—economic, political, legal, and religious. The story of individuation is not wrong. But first of all, much of it occurred *within* these corporate bodies. And second, it isn't the individuation, but organization, that generates capacity for action, or power. And when we consider leading markers of the rise of Europe—including the growth of towns, universities, religious orders, trading companies, and the European state—what we find is not individualism *per se*, but individuals organized in corporate and quasi-corporate forms.

Even more consequential than this misreading of our history, the individualist assumption in American liberalism is so strong that the corporation itself has come to be viewed through an individualist lens. The business corporation is, and always has been, brought into legal existence by state charter; yet it is now treated almost universally as a voluntary association created through private contract, and owned by its shareholders. This “privatization” exempts corporations from any duty or accountability to the public, or even publicity to the public, while earning them legal protections and rights of political participation that they ought not have. It licenses their free movement across national borders, launching a race to the bottom in all areas—corporate tax rates, regulation, worker rights, and wages. And it encourages vampire management—the sucking out, by executives and shareholders, of the corporation's collectively-generated wealth. In short, it turns the corporation into a constitutionally-protected inequality-generating machine.

Corporations predate liberalism. They cannot be understood through its categories; they cannot be contained by its institutions. The attempt to bridge this chasm between our individualist ideology and our corporate reality, by doubling-down on our individualist assumptions and treating corporations as private voluntary associations, is theoretically confused, economically damaging, and normatively deleterious. That, I suppose, is the major thesis of the book I am writing at IAS this year, parts of which I will be discussing today.

### The defining legal attributes of a corporation

Let's begin by defining our object. What is a corporation? It is a Roman invention, although the Romans only used it to a limited extent, and not for business purposes. The Latin word for corporation is *universitas*, literally, a "turning into one." You will recognize in this the root of the English word "university." In my idealistic youth, I imagined "universities" were so named because they aspired to universal knowledge. Now I know better. "University" just means "corporation," the *universitas scholarium*, the corporation of scholars, a collection of scholars "turned into one."

So here is a species of corporation that we all know well. Let's use it to understand the general type.

A corporation is not a natural kind, but a legal kind. So we should ask, what are its legal attributes?

Let's take the Institute as our *universitas scholarium* and ask, who owns this lectern? Is it the IAS faculty? Is it the donors? Is it the Board of Trustees? Can the Board sell the lectern and pocket the proceeds? No, the money goes to "The Institute," because the Institute owns it. And it is the Institute that pays our stipend. It is the Institute that sends us our bills and to whom we write our checks. And should we, heaven forbid, feel inclined to sue, it is not Didier, or Linda, or any other natural person who acts *on behalf* of the corporation that we sue. We can, and *only* can, sue the Institute, the corporation. So here we have one of the three defining legal attributes of a corporation:

(1) A corporation is a **contracting individual** (or "juridical person"), i.e., it owns property, makes contracts, and appears in court in its *own name*, with property and liabilities *wholly separate* from that of all natural persons. This is what is meant by "turning into one"—turning a collection into one legal individual.

So, you grasp this right away when we are talking about the university: the corporation owns the corporate assets. But as soon as I turn to the business corporation, confusion descends. And if I ask you, "who owns the lectern of a business corporation," I'm liable to get the answer, "the shareholders," because this is what you've always heard: "the shareholders own the corporation." We'll deal with that confusion in a minute.

What is the next defining legal attribute of a corporation? This is the piece that is forgotten today:

(2) A corporation has a **jurisdiction** within which it can establish and enforce rules beyond the law of the land, so long as these rules are not contrary, or "repugnant," to the law of the land.<sup>1</sup>

### Examples of corporate legislation

- Monasteries .....the rule of St. Benedict
- Incorporated towns ..... town ordinances
- Universities ..... university regulations

- Guilds ..... standards of workmanship
- Business corporations ..... by-laws and work rules

You will notice that these attributes are also the defining attributes of a European-style state:

### Legal Attributes of a State

- **Contracting individuality** (juridical personhood)
- **Jurisdiction**

Corporations are little governments...and sometimes not so little. Furthermore, they are a particular *kind* of government—a *state form* of government, which means, a government with juridical personhood, where the property is not owned by the ruler, or board, but by the legal entity. Rulership therefore becomes an office, with control rights but not ownership rights. (This, by the way, is what is *distinctive* about the European state form, which Weber’s definition of the state covers over. And this corporate aspect of the state is essential to the modern organization of states, as juridical persons.)

So we end up defining corporation and state in the same breath. This is not surprising if we look at their origins. As Justinian’s *Digest* explicitly notes, the corporation “is modeled on the state.”<sup>2</sup> The first corporation was the city of Rome (it had separate property and a jurisdiction). And the city of Rome was also the state (*civitas*). From the very beginning, corporation and state have been linked concepts and linked realities, and one cannot tell the history of the one without the other.

The ancient Romans and medieval Europeans were quite happy to speak of what we would call states, as corporations. The empire was a corporation, the kingdom was a corporation, the republic was a corporation. But in the modern era, we distinguish states and corporations, because (and I would say, *only* because) the former are *sovereign*. So to be moderns we need to add one more defining legal feature of the corporation, that it is subordinate to the law of a sovereign or semi-sovereign:

### Defining Legal Attributes of a Corporation

- **Contracting individuality** (juridical personhood)
- **Jurisdiction**
- **Subordinate** to the law of a sovereign or semi-sovereign (Church or state)

This is why corporations cannot establish rules *repugnant* to the law of the land, but must abide by the law of the land.

So there you have it. A corporation is a government, “modeled on the state,” and the only thing that distinguishes it from a sovereign government is that it is legally subordinate to one.

Corporations can be endowed with many more legal attributes than these three: perpetual life, the right to issue shares, and so forth. But these are the three that are essential, in that without all three you do not have a corporation. You either have a state, or a partnership.

### Who Rules?

So if a corporation is a little government, the next question to ask is, who is the ruler? Who has the ultimate authority to make the rules within its jurisdiction? Here at the Institute, for example? The Board of Trustees.

Where does it get *its* authority. Who authorizes *it*? Do they get to do this because they own the place? No, the Board members don’t own anything here. It is *the state* that authorizes the Board. (Again, this is perfectly clear when we are talking about a non-profit corporation. But if I ask this about the board of a *business* corporation, confusion once again descends, and I will be told that the *shareholders* authorize the board. Again, we’ll get to that.)

So that you can see what this looks like in practice, I dug up the charter of the Institute. Here are some excerpts. I think you will especially enjoy the last line:

[Christening:] “The name by which the corporation is to be known in law is ‘INSTITUTE FOR ADVANCED STUDY—LOUIS BAMBERGER AND MRS. FELIX FULD FOUNDATION.’....”

[Creating and authorizing a (self-perpetuating) Board:] “The business of the corporation shall be conducted by Trustees, in number not less than twelve nor more than fifteen. The Trustees shall be members of the corporation and they shall be elected by the members....”

[Making the corporation a contracting individual, or “juridical person”...] “The purposes of the corporation shall include power to buy, sell, lease, and mortgage real and personal property....; to make contracts of all kinds;... [...with a jurisdiction and governing authority:] to make, amend, alter, and repeal by-laws not inconsistent with the laws of this State or of the United States; to make, amend, alter, and repeal rules and regulations for the government of the institute ... in respect to the appointment and duties of executive officers and members of the staff and faculty, and ... the admission ... and discipline of the students and workers....”

— IAS charter, May 20<sup>th</sup>, 1930

The image is perhaps amusing, of us being disciplined by a group of octogenarians. But the point is, unlike if this were a voluntary association, since it is a corporation, they would be backed up by the state. Because a corporation exercises state-authorized authority. So this is not simply a private entity. It is a hybrid.

This is why I call the corporation a “franchise government.” It is a little government. And it is a franchisee. It is privately organized, financed, and staffed, but the state creates it as a legal entity, prescribes its basic governance structure, and authorizes its management to control

the property and personnel. My point is, we need to see corporations as part of our overall governmental system, and a part that is itself authorized by the state, even if it is sometimes at odds with the state.

I am not being original in saying this. The term “franchise government” is mine, but it reflects what was the common understanding well into the nineteenth century. There are a variety of reasons why we’ve lost sight of the corporation’s debt to the state, but one is inherent to the corporate form itself, which is that incorporation involves a *most unusual way of delegating authority*. The most common manner of delegating authority is from a principal to an agent, such as from a boss to an employee. The agent has a fiduciary duty to advance the interests of the principal, and the principal has ultimate control and can order the agent to do the job one way or another way.

The state’s delegation of authority to a corporate board is very different. First, it does not delegate its authority to a specific person, or set of persons, but to an office, the office of Director. Second, the state does not serve as the principal. Rather, the state designates the *corporation* as the principal, and the board serves as *its* agent, with a fiduciary duty to *it*, and to its purpose, as declared in the charter. Third, the state does not tell the members of the board how to run things, but leaves it to their judgment. The state does not intervene unless the corporation departs from its authorized purpose or otherwise overleaps the bounds of its charter (and in that case, usually all that happens is that judges strike down those actions as *ultra vires*, or “beyond powers,” of the corporation.) In other words, although the corporation is *legally* dependent on the state, it is operationally *independent* of it. Because of this, it is easy to imagine that there is no role played by the state at all. Its role is the background one of constituting and legally sustaining it.

I dwell on this, because it helps us understand another phenomenon. There is a recurring dynamic in corporate history. The Church or state creates a raft of corporations that advance its purposes. But these corporations are themselves governments, they are operationally independent of their creator (which controls neither their personnel nor purse strings), and they can accumulate property indefinitely, so they become powerful and sometimes turn against their creator, and even capture it, impressing their own priorities and values upon it. This is why the Frankenstein monster image suggests itself so readily for corporations. I will return to this point at the end.

### **The corporation as model for the state**

What I am trying to do in this project, is to understand better the complicated relationship between state and corporation, so as to understand better how modern governance works, and to suggest reforms. So far, I’ve been discussing the debt of the corporation to the state. But now I want to turn this around and say something about the debt of the state to the corporation.

What I’ve just described, in terms of state capture, is the “push” factor in the influence of the corporation on the state. But there has also been, throughout corporate history, a “pull” factor.

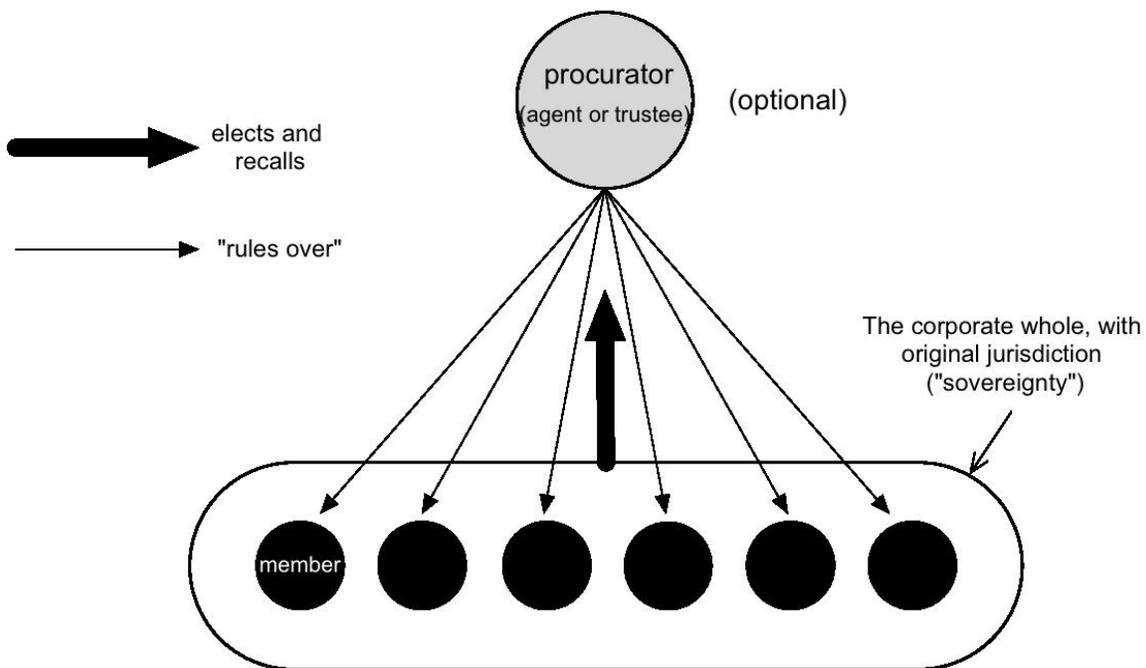
The *Digest* says the corporation “is modeled on the state.” But when Europeans first read this in the 11<sup>th</sup> century, they didn’t *have* states properly speaking. So they reverse engineered states for themselves, by modeling them on the corporation.

What kind of governmental model did the corporation provide? It turns out, it provided three *different* models, because there were three different kinds of corporation. I can only gesture at this here, but I do think it important to know that, historically, not all corporations have had the authoritarian structure of the Institute and of the modern business corporation.<sup>3</sup>

*Roman member corporation: a republic writ small*

The first kind of corporation is the Roman law corporation, a member corporation which Blackstone well-describes as a “republic writ small.” This was adopted by the early universities, towns, and merchant and crafts guilds. (In the early universities it was the faculty who were the members.) All authority lay with the members, although they could delegate this to an officeholder, such as a rector (or, in a town, a mayor), but this person remained accountable to the members. This kind of corporation became a model for *republican* government (Canning 1980).

## Roman Member Corporation

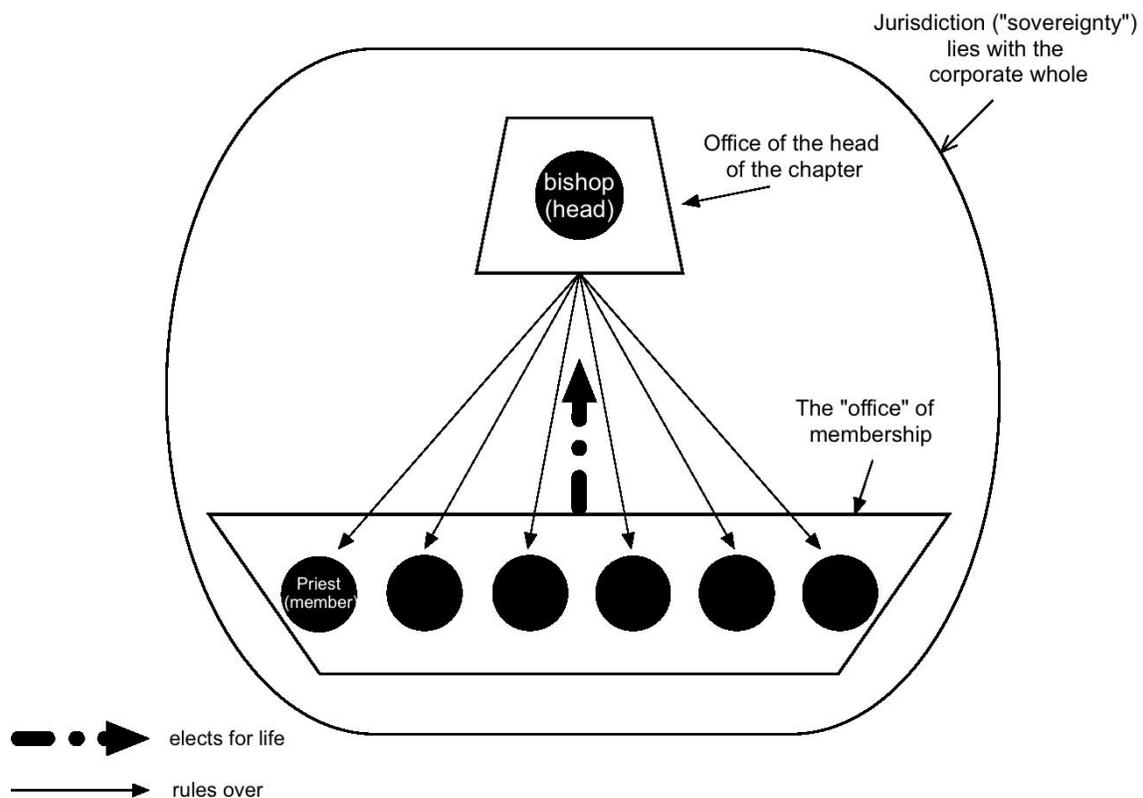


"The head is greater than any individual, but less than the corporate whole"

*The canon law member corporation: a mixed government*

The Roman form of corporation, however, was too democratic for the hierarchical Church to use, so canon lawyers adapted it, generating two new types. The canon law *member corporation* had what we would call a “mixed government.” Both the head and members were conceived as holding independent offices, authorized by the Church. The authority of the head did not come from the members, but was independent. On the most important matters, head and members had to concur.

### Canon Law Member Corporation

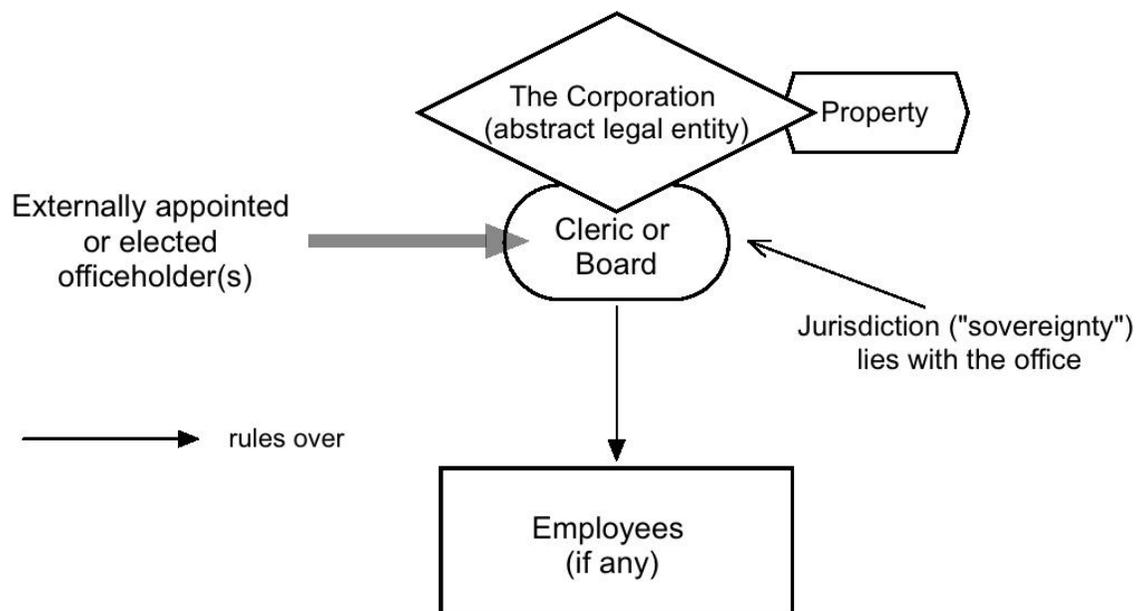


The most important example of this corporation was the cathedral chapter, a corporation of bishop and cathedral priests. And it became an important model for mixed constitutionalism in the kingdoms of Europe. Throughout the Middle Ages, a strong analogy was drawn between the kings and the bishops, the temporal and spiritual princes of Christendom. On the strength of this analogy, the constitutional rules for relations between bishop and cathedral priests became a powerful influence on the development of constitutional rules for the relations between king and parliament (Tierney, 1982).

*The canon law property corporation: authoritarian government*

The other canonist innovation—and it is a major one—is what I call the property corporation, the *universitas bonorum*, or *rerum*. Almost all modern corporations are of this type. Early examples are the bishoprics, the Holy See, and various kinds of prebends. Today it includes non-profits such as the Institute, and the business corporation. A property corporation owns property, it has an office or offices, and it has procedures for selecting the office-holder or holders (who have a fiduciary duty to the authorized purpose of the corporation). But it has no members, properly speaking. It is a wholly abstract legal entity. Since it has no members, it is of course autocratic in structure, with all authority in the office-holder. So, to the extent that the *property* corporation becomes a model for the state, it will have *authoritarian* implications.

## Canon Law Property Corporation



Now, I've just said the Institute is a property corporation, without members; but you've read the charter, which says that its officers, the *trustees*, are the members. This is a confusion unique to common law countries. It is ultimately the same confusion that has been leading our Supreme Court to grant constitutional rights to corporations. Here I just flag the issue, but I'd be happy to talk about it later. On the Continent, there is no confusion on this point. In France, the Institute would be a *fondacion*; in Germany, it would be a *Stiftung*; in current canon law, it would be a *universitas rerum*. Each of these is recognized as a property corporation—an incorporation of property under the government of a cleric or

board with a fiduciary duty to use the property for advancement of the corporation's declared purpose. They do not misconstrue the office-holders as the corporation's "members."

### American Constitutionalism as Corporate Constitutionalism

I've uncovered one example of a state modeling itself on the corporation that might be of especial interest to many of you, so I thought I would say a few more words about it. I am talking about the United States.

On the received view, American constitutionalism is an outgrowth of social contract theory, and the constitution is a kind of social contract. In actual fact, it doesn't follow social contract theory at all. I can say more about that, but I'm more interested in explaining what it is an outgrowth of.

The first thing to note is that the earliest American colonies were literal corporations of the Crown. The Massachusetts Bay Colony was the Massachusetts Bay Company. The Virginia Colony was the Virginia Company. We should not be misled by the word "company" into thinking that these were modern business corporations—that is, authoritarian property corporations. They were settlement corporations that in organization were more akin to the early modern guilds and towns, which is to say, they were a form of *member* corporation, a hybrid between the Roman and canon law type of member corporation. (I am not about to argue that the U.S. Constitutional system has its roots in the business corporation, however fitting that might seem today. Rather, its roots are in the chartered guild and town.) Their offices were authorized by the Crown, but their office-holders were elected by the membership (which in Massachusetts comprised all male heads of household who were Church members in good standing). Like all corporations, they had a jurisdiction—in this case, territorial—and their government was authorized by, and limited by, a corporate charter.

It was from this experience that Americans got their understanding of what a constitution is: a written document—a charter—that authorizes and limits a government. That is *not* the British understanding of a political constitution, then or now. It comes from living under a corporate government.

What is more, they *liked* their governments limited by charter. They associated it with liberty, freedom from arbitrary rule. Life under a *sovereign* government, such as the British Parliament, they associated with despotism, even political slavery. They didn't *want* their governments to be sovereign.

But the break with Britain left the Americans with a problem. Their existing chartered governments had all been chartered by the *Crown* whose authority they had just thrown off. This left their chartered governments groundless ... unauthorized ... unlimited ... and there was no other sovereign to turn to for reissue. Or was there?

This was the great Federalist innovation: to wed corporate practice to popular sovereignty. Just as a sovereign king could issue a corporate charter that founds a corporate government with a legally limited jurisdiction, so could a sovereign people. And it meant that the Americans retained a corporate form of government.

Setting aside the ins and outs of how the Federalists orchestrated this, let's turn straight to the structural homology. Here are the traits of a corporation's government:

### Traits of 18<sup>th</sup> Century Corporate Government

- Authorized and limited by a charter issued by the **king**
- Owns property and makes contracts in its own name (is a juridical person)
- Authority resides in the office, not in specific persons
- Its officers are *not* legal agents of the **king**. They are dual fiduciaries—to the members and to the purposes established in the charter
- The **king** does not directly participate in the government, but...
- The government may not act outside the bounds of the **king's** charter
- Its statutes may not be repugnant to the **king's** law
- These restrictions are enforced by the **king's** courts rather than by the **king** directly, but...
- The **king** reserves the right to amend the charter if unhappy with the way things are going

Now let us substitute “people” for “king”:

### Traits of Modern Constitutional Government

- Authorized and limited by a charter issued by the **people**
- Owns property and makes contracts in its own name (is a juridical person)
- Authority resides in the office, not in specific persons
- Its officers are *not* legal agents of the **people**. They are dual fiduciaries—to the members (the populace) and to the purposes established in the charter
- The **people** does not directly participate in the government, but...
- The government may not act outside the bounds of the **people's** charter
- Its statutes may not be repugnant to the **people's** law<sup>4</sup>
- These restrictions are enforced by the **people's** courts rather than by the **people** directly, but...
- The **people** reserves the right to amend the charter if unhappy with the way things are going

This is, of course, a description of modern constitutionalism.

In sum, corporate government and modern constitutional government employ *the same institutional technology*, which the latter borrowed from the former. They are both “franchise governments.” Only the identity of the chartering sovereign has changed.

Of course, if national and state constitutions are popularly issued corporate charters, then this makes the American governments literal corporations. They have juridical personhood,

they have a jurisdiction, and they are subordinate to the law of a sovereign. This is an implication that many founders recognized. Here are some excerpts from the Constitutional convention:

“The States, at present [under the Articles of Confederation], are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation.”

~ James Madison, Yates transcript<sup>5</sup>

“The states are now subordinate corporations or societies and not sovereigns.”

~ Rufus King, King transcript<sup>6</sup>

And here is one from the ratification debate:

“[T]he term corporation ... is generally applied to petty associations for the ease and conveniency of a few individuals; but in its enlarged sense, it will comprehend the government of Pennsylvania, the existing union of the states, and even this projected system is nothing more than a formal act of incorporation.”

~ James Wilson, State House Yard Speech (1787).<sup>7</sup>

This was also the reigning understanding on the Supreme Court after ratification:

“[N]ot only each State singly, but even the United States, may without impropriety be termed ‘corporations.’”

~ Justice James Iredell, *Chisholm v. Georgia* (1793)

“‘The United States of America’ is the true name of that grand corporation which the American people have formed, and the charter will, I trust, long remain in full force and vigour.”

~ Chief Justice John Marshall, *Dixon et al. v United States*, (1811)

And it continued to be understood well into the nineteenth century, as shown in this popular encyclopedia:

“[A] corporation is a political or civil institution, comprehending one or more persons, by whom it is conducted according to the laws of its constitution.... All the American governments are corporations created by charters, viz. their constitutions.” Indeed, “[t]he whole political system is made up of a concatenation of various corporations, political, civil, religious, social and economical,” with the “nation itself ... the great corporation, comprehending all others.”

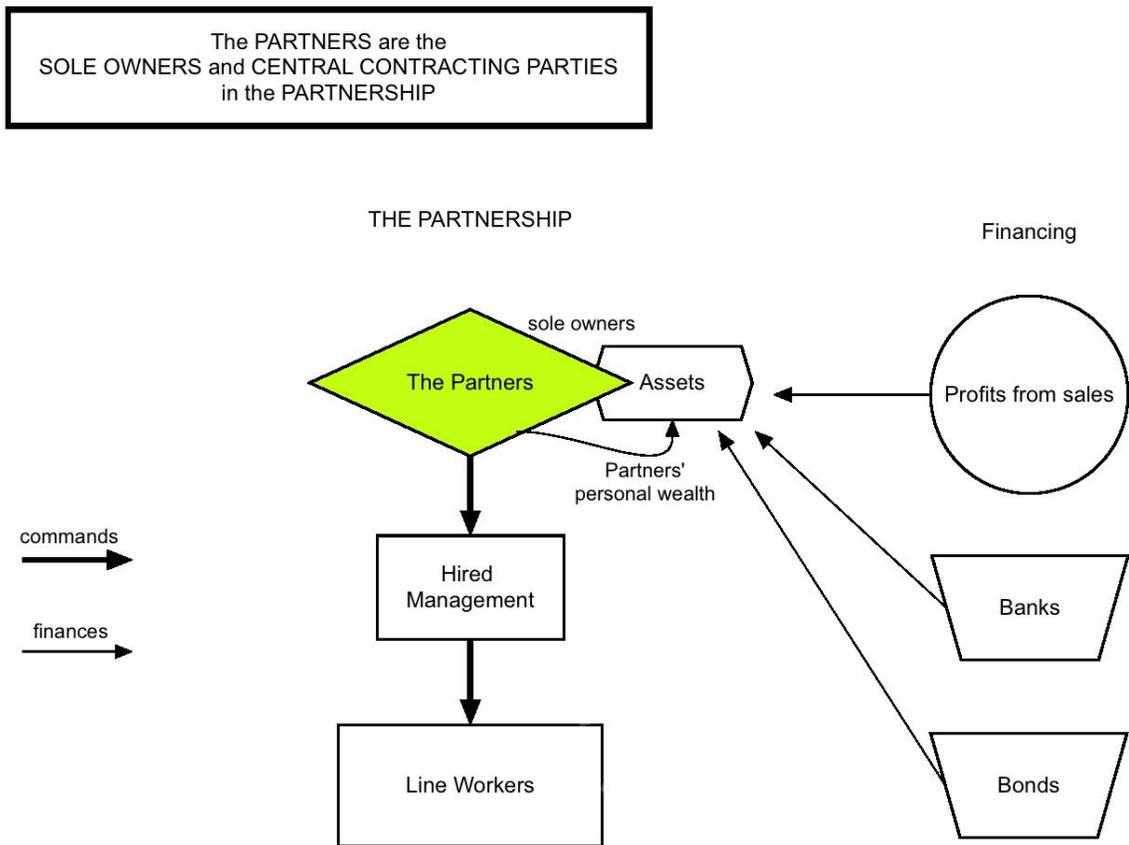
~ Francis Lieber, *Encyclopedia Americana* (1830)

Why has everyone missed this, that American constitutionalism is a corporate transposition? These are not obscure people I am citing. This idea has been hidden in plain sight. The explanation, I think, is that for the last 150 years we've been thinking of corporations as private, voluntary associations, and if you do *that*, then you'll read these passages as invoking only a feeble metaphor. Only if you see that a corporation is a delegated government can you see that these are meant as *literal* descriptions.

In other words, I am arguing that corporate governance is the basic form of Western governance, from top to bottom. I would add one more thing. Constitutional states and corporations not only utilize the same governance form, but have the same authorizing sovereign, with only this difference: the constitutional state is authorized by the people directly, the corporation indirectly, by the people's authorized governments. Any sharp distinction between constitutional state and corporation, as public and private, is untenable.<sup>8</sup>

**Business corporation as property corporation**

But, you may ask: is the business corporation an exception to my claim that corporations are franchise governments? I say, no. The corporate form was *designed* for governing—towns,

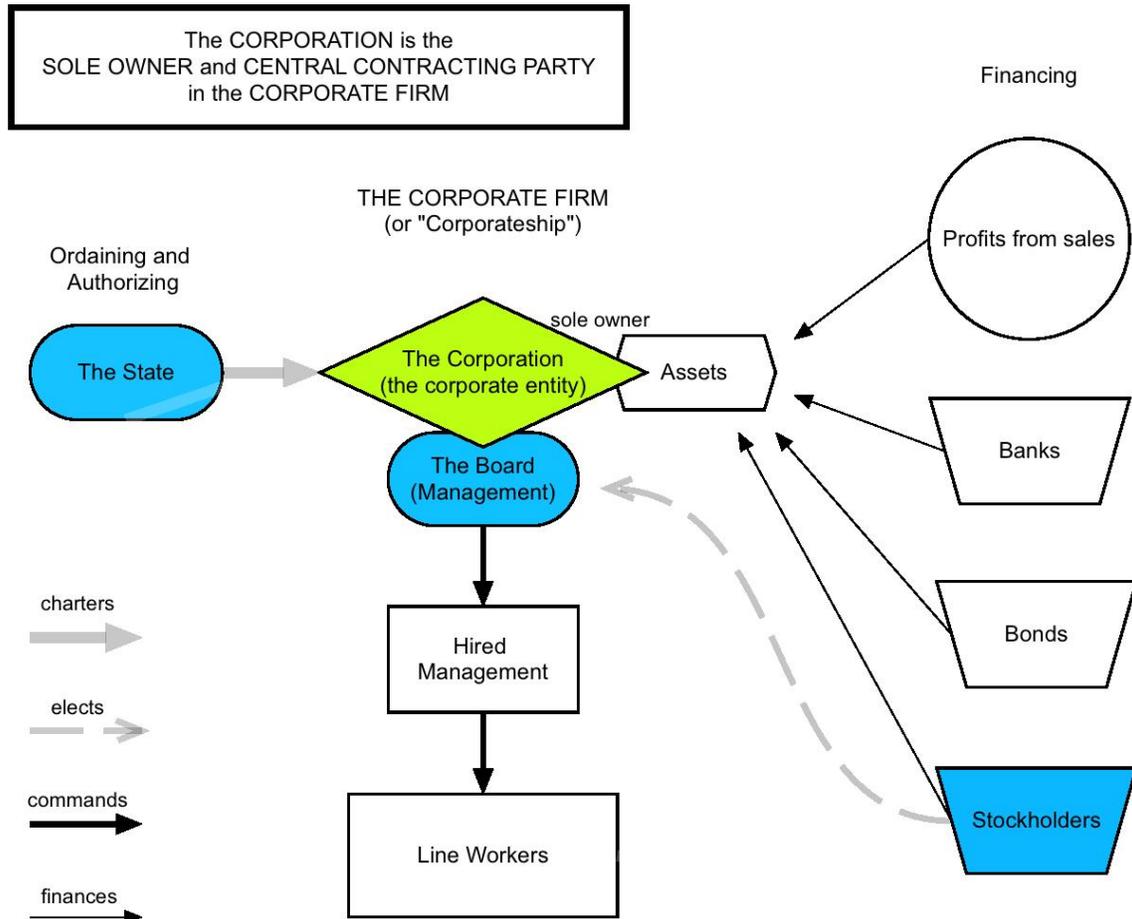


universities, monasteries, etc. Business was the *last* major activity for which it was granted. This turned the corporation into a *for-profit* government, in which individuals were allowed to invest. But it still had to receive its contracting individuality and its jurisdiction from the state.

To get a better grip on this, let's first look at a general partnership. (You can substitute "sole proprietor" for "partners," and have a sole proprietorship. It's the same set-up.)

This business form is pretty straightforward. The partners are the sole owners; and they are contracting individuals, the central contracting parties. All firm contracts are with them, and they are jointly and severally liable. They also rule over the employees. What is the legal basis of this? It is based on their ownership of the assets. Because they are the owners, they can exclude others. If others want to make use of the assets, they have to sign a labor contract. And labor contracts include a non-negotiable duty to obey.

Here is a schematic representation of a business corporation:



In this there has been a simple but ingenious substitution, of an abstract legal entity (the corporation proper) for the partners, as the sole owner and central contracting party. All contracts are with it, and it bears all liabilities.

It is significant that there is no way, through private contract, to create the corporate entity (the diamond in the diagram). It comes from the state.<sup>9</sup> When I say the state creates the corporation, I mean this, the legal corporation that owns and contracts. The corporate “firm” is co-created—the state provides the corporate entity, mandates the basic governance structure, and authorizes the board, while private parties staff and finance it. It is a hybrid.

But aren’t the shareholders the owners of the assets? No. Neither individually, nor collectively, do they have a right to use the assets, exclude others from them, lend them out, borrow on them, or sell them. Nor do they have a legal claim to the residual profits from use or sale.<sup>10</sup> The legal entity owns the assets and is the residual claimant. Corporate assets are a form of socialized property, not owned by natural persons. Marx was thus correct, that bourgeois property would become a fetter on capital, to be burst asunder and replaced by socialized property. His mistake was to see this socialization occurring at the level of the state. It has occurred at the level of the corporation. As for the shareholders, what they own are “shares,” which is a separate kind of property, a financial instrument that the corporation is authorized to sell to them.

So how does the board get its authority over the property? It can’t come from the shareholders, because they don’t own the property. The answer, again, is that the state’s charter grants it.

And where does the board get its authority to rule over the *employees*? It can’t come from their ownership, or the shareholder’s ownership, because neither of them own. The state’s charter delegates it.<sup>11</sup> Once again, here is the set-up—incorporators organize, the state creates and authorizes, and the board directs, on authority of the state.

### **Exemption from liability**

There is one other point that needs to be emphasized, with respect to liability. History shows us a widespread, almost universal rule, for the liability of group members. Not only is the individual held liable for his actions, but all the members of his family, and perhaps also his working associates, are held liable. This is collective responsibility, the logic of the great blood feuds, of the Capulets and Montagues, the Hatfields and McCoys, the Crips and Bloods. It is also the logic of the English general partnership, with joint and several liability.

In a corporate firm, in sharp contrast, no member of the firm—director, manager, employee, or shareholder—bears liability for the actions of any other member. The corporation does. *It* pays. Nor do any of these bear any liability even for their *own* actions. The corporation does. In other words, no natural person bears *any* liability—the artificial person of the corporation bears it all.<sup>12</sup> We have moved from a world of groups wherein everyone is personally liable for the actions of each, to one wherein no one is personally liable for the actions of any one, including their own actions.

This is a stunning reversal in the character of group life. And this is another way to appreciate the dependence of the corporation on the state. Human cultural diversity has never produced a society where it is okay, as a general principle, for individuals or groups to harm other members of the society and dodge all responsibility. This only happens when these individuals or groups command overwhelming force and cannot be challenged. The humans in corporate firms are such groups. Their exemption flies in the face of human morality. The corporate form that exempts them is only possible because it is backed by the overwhelming force of the state.

### **Three corporate ages, and the dynamics of European history**

It is useful now to give an overview of the history of the corporation. European civilization has passed through three great corporate ages, each dominated by a different type of corporation. The first age was the age of the church corporation—the heyday of the canon law member corporation, the model for mixed government. The first corporations in Europe were the monasteries. In the second half of the first millennium, popes chartered rafts of them, in part to channel popular movements for a purer Christian life, but in part to undermine the power of the bishops (Davis 1905, 57). The bishops at this time were not selected by the pope, but usually by lay election or royal appointment, and thus functioned as independent powers within the Church. The monasteries sapped the financial resources of the bishops and deprived them of their popular followings.

But like all corporations, the monasteries were operationally independent of their chartering sovereign, and they accumulated property through the generations. We forget just how massive were the landholdings of the monasteries, and how great their wealth as recipients of bequests and centers of economic activity. And they were organized. They were organized internally as a disciplined corps; and, beginning with Cluny in 910, were organized externally as great congregations of sister monasteries. And they captured the church that had chartered them. From the seventh through the ninth centuries, the church was “monasticized” in its organization and values (Davis 1905, 56). And after a century of degeneracy, it was captured by the monasteries again, as symbolized by the Gregorian Reform. Pope Gregory VII, significantly inspired by the great monastery at Cluny, impressed the monastic values of celibacy, discipline, and hierarchy upon the Church as a whole.<sup>15</sup> Soon the entire Church was reorganized as a loose hierarchy of canon law corporations (with “mixed governments” that allowed for member participation and consent, this being more suitable to associations of priests and laity than the more authoritarian structure of the monasteries).

The second corporate age was the age of the guilds and towns. Chartered by the king to check the power of the lords, they too were operationally independent, accumulated indefinitely, and were organized. And they too captured the sovereign that chartered them. First the guilds captured the towns and impressed their priorities and values upon them. And then the towns captured the state and did the same. That town self-assertion was the origin of the Dutch Republic, needs no argument. As for England, we remember the Puritans as the foot soldiers of

the English Civil War, but forget that the Corporation of London bankrolled it. This was Marx's "*bürgerliche revolution*," or "bourgeois revolution," which could as well be translated "townsman revolution." And as discussed above, the American constitutional revolution represents, we might say, the nationalization of the chartered republicanism of the guild and town. It was the last act of the second corporate age, that the civic values of republicanism, rule of law, and commercial spirit were impressed upon the state; henceforth the state was to serve civil society, rather than civil society serve the king and state.

These same republican revolutions of Europe and America that culminated the second corporate age, simultaneously inaugurated the third corporate age, which is our own age, the age of the property corporation. Constitutional democracies have protected property, including corporate property, more faithfully than all predecessors. Only once the grasping of kings had been checked, and their recurrent expropriations of the accumulated funds of the corporations ended, would merchants dare to build the permanently accumulating capital funds of the modern business corporation. After the founding of the republic, the Dutch East India Company could be formed, beginning with a 10-year capital in 1602 and adopting a permanent capital in 1612. The English East India Company, though founded in 1600, dared not recharter with a permanent capital until Parliament was ascendant, which it finally ventured in 1657. The U.S. Constitution provided unprecedented protection for property, and proved highly favorable to corporate rights. It oversaw an unprecedented explosion of incorporations in the new republic. In other words, the constitutional republic, which was developed out of the republican member corporation as a bulwark *against* arbitrary government, facilitated the proliferation of the modern business corporation, an authoritarian property corporation and *redoubt* of arbitrary government.

This third corporate age has itself generated three distinct corporate waves, each of which has threatened to overwhelm the republican state that launched them. The age began with the launching of the great trading companies—the first corporate wave. The English (EIC) and Dutch (VOC) East India Companies were the pace-setters. Their chartering was to advance the purposes of the state, weakening Spain and Portugal by sapping their Asian trade. The board of the Dutch VOC was under the control of the Dutch political oligarchy, so it did not have the operational independence of the typical corporation and was seldom at odds with the Dutch state, but almost a department of it. The English EIC, in contrast, was under the control of its shareholders. It was operationally independent, and could accumulate property indefinitely. And it was organized. By the end of the eighteenth century, it had a quarter million man army and revenues greater than the Crown.<sup>14</sup> It repeatedly worked at cross-purposes to the British state, and nearly subverted it. When it couldn't corrupt Parliament, it corrupted the Crown. When it couldn't corrupt the Crown, it corrupted Parliament. But after its own failures in India, it was finally pushed back and, in the nineteenth century, dissolved.

The second corporate wave was that of the great industrial combinations. The American states initially chartered corporations to advance their purposes, using them to build the nation's infrastructure at a time when the states themselves lacked both the necessary organizational capacity and tax base. But they were operationally independent and could accumulate capital

indefinitely. By the 1880s, the Pennsylvania Railroad employed more people, and collected more revenue, than the Federal government. Many more behemoths would be formed by the close of the century. The U.S. Senate came to be known as the millionaire's club. But the populist movement, and then the progressive movement, pushed back, and with the New Deal, a kind of containment was established.

Finally there is our own time. We are swept up in the wave of the neoliberal corporation. It is the corporation theorized as a private association, with constitutional rights of political participation that enhance its ability to capture the state. It is the corporation re-orientated to short-term stock price, dropping its erstwhile public benefit of generating long-term economic growth, in favor of immediate value extraction for those who control it. It is the corporation that has engineered a new global economic regime and that, in the form of the multinational, uses the international state system to its advantage, leveraging the mobility of capital and the mobility of legal personhood, against the immobility of land, labor, and the natural world, to degrade these latter while evading the state's regulatory and tax regimes. It leaves the constitutional republic unable to fulfill its founding purpose, of advancing the welfare of its citizenry, and twists it to advance its own purposes. We face a classic example of a new form of government—the constitutional republic—unleashing at its birth a new social force, the modern business corporation, that ultimately works to undermines it.

### **Against neoliberalism**

Once we understand the business corporation, I believe we are in possession of a sharp critique of the neoliberal view of the world.

1. Neoliberalism idealizes an individualistic, private property economy. But the economy it actually promotes is a socialized, corporate property economy, where property is controlled by, but not owned by, natural persons, with all the problems of moral hazard that this raises.

2. Neoliberalism idealizes a free market economy, with minimal state intervention, beyond protecting property and contract. Yet the economy it promotes is dominated by state-created legal entities. State intervention makes the corporation.

3. Neoliberalism (especially in its more libertarian flavor) argues that the state is a sphere of coercion, while the market is a sphere of freedom. But in most contexts, the state only makes general laws that must be followed as one pursues ones *own* ends. In contrast, the corporation, for which most people must now work, issues direct commands, to *its* ends. A market overgrown with corporation is not a sphere of freedom.

4. Neoliberalism advocates an ethic of individual responsibility. If you fail in the market, you should accept the consequences, and not expect the wealth generated by others to be redistributed to you. Yet the corporate form exempts those who control the corporation from the legal or direct economic consequences of their actions. The corporation is institutionalized irresponsibility. In the neoliberal economy, individual responsibility is imposed on the weak (with a downsized social safety net, tightened personal bankruptcy laws, etc.); *exemption* from responsibility is enjoyed by the strong—those who invest, and those who control.

It is hard fully to appreciate how far neoliberal ideology departs from our economic reality.

### **What I don't have time or space to discuss here**

There is a long history I would need to invoke to address some of the issues that might be posed, among them:

- How the American constitutional system gave unprecedented protection to corporations, and propelled their reinterpretation as private.
- How the Progressives attempted to “re-publicize” the corporation.
- How the postwar Chicago neo-liberals such as Milton Friedman and Aaron Director, as their *very first* intellectual endeavor, challenged this, arguing that corporations were not a problem, and were fully private, a kind of glorified partnership or “nexus of private contracts.”
- That this re-privatization of the corporation was the *precondition* for the rise of neoliberalism, because one couldn't put across free market principles if it were conceded that one's central market actors are state creations.
- That the neoliberal re-theorization of the corporation has contributed to its “financialization.” Neoliberalism treats shareholders as the corporation's owners and principals, ties management to their interests by compensating management in stock and stock options, and thereby reorients management from long-term growth to short-term share price.
- That this short-term focus has led to sharp reductions in reinvestment for expansion, in research and development, and in worker training, so that free cash flow can be disgorged to the shareholders, which includes the executives themselves. (We might think of this as a vampire management gaining control of the Frankenstein monster.)
- That stock compensation also encourages management to engage in greater risk-taking and law breaking, because it bears the upside but not the downside risk.
- And that this re-theorization has led the Court to issue new constitutional rights to corporations.

Alas, this is a lot to skip. And this list does not even include the consequences of neoliberal success in institutionalizing a globalized corporate economy, in which mobile corporations play one country off against another, launching races to the bottom in business regulation, worker protection, wages, and corporate income tax rates, while multinationals shift accounting profits among subsidiaries to slash their sales taxes as well. It is this pairing of exorbitant executive compensation with declining real wage payments and contributions to the public fund, that makes the neoliberal corporation an inequality-generating machine.

### **Conclusion**

Our history has too long focused on the rise of the individual. This storyline is not exactly false, but arguably it is best subsumed within the history of the corporation. The corporate capture of the state has not always been bad; it depends on the nature of the corporation doing the

capturing. The great question we face today, is whether, forced to operate across a fragmented international landscape, the forces of democracy have the wherewithal to push back the property corporation once again, before it fully captures the state and impresses upon it its authoritarianism, its heedless wealth extraction, and its generation of inequality.

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## ENDNOTES

1. Already from the Middle Ages, both civil and canon lawyers noted jurisdictional power as distinguishing corporations from other groups of individuals (Tierney 1982, 36). See also Blackstone, *Commentaries*, I.18.
2. “*ad exemplum rei publicae*” (*Digest*, III.4.1).
3. This is the mistake that, for example, Michael Oakeshott makes when he correctly notes the use of the corporation as a model for the state in the early modern period but supposes that it was an authoritarian model and blames it for the rise of statism and absolutism (*On Human Conduct*). In fact, absolutism was modeled on the patriarchal family and divine right (the target of the first book of Locke’s *Two Treatises*). In this period the influence of the corporate model (which pervades the *second* book of the *Two Treatises*) was towards either mixed constitutionalism or republicanism. See below.
4. The Constitution functions both as the people’s charter and as the people’s general law, which is a natural conflation, since at this time, charters were issued as ordinary pieces of legislation.
5. [http://avalon.law.yale.edu/18th\\_century/yates.asp](http://avalon.law.yale.edu/18th_century/yates.asp).
6. [http://avalon.law.yale.edu/18th\\_century/king.asp](http://avalon.law.yale.edu/18th_century/king.asp).
7. *Collected Works of James Wilson*, Vol. 1. Liberty Fund (2007), 174.
8. For more details on the debt of American constitutionalism to the corporation, see Ciepley, “Is the U.S. Government a Corporation? The Corporate Genesis of Modern Constitutionalism” (under resubmission for publication).
9. This point is argued in Ciepley 2013.
10. Some of the profits customarily go to dividends, but these are issued at the discretion of the board. Shareholders cannot sue a board for issuing a smaller dividend than they want. Perhaps they can replace it, but they cannot sue it. They have no *legal* claim to the residual.
11. Indeed, there *are* no shareholders when the board is created and begins to govern. The charter authorizes the board to issue shares, and the sale of these shares creates the shareholders. So the board creates the shareholders, not the other way around. Therefore, the shareholders couldn’t possibly be the ones to authorize the board.
12. I am speaking of liability for ordinary debts and for torts—two matters of immense importance to the operation of a business corporation. But individuals associated with the corporation are liable for any *crimes* they commit. The corporation is authorized only for legal activities. Therefore, if an employee commits a crime, she cannot plead that she was acting in the name of the corporation. She was acting outside of what was authorized and thus bears the consequences herself.
13. There was, however, this tension between the ideals of Cluny and Gregory VII: the former sought to reform the individual soul within the confines of the monastery, while

the latter sought to reform the external, secular world as a whole. See H.E.J. Cowdrey, *The Cluniacs and the Gregorian Reform*, Oxford University Press (1970).

14. The Dutch VOC was even larger.