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Corporate Schizophrenia: The Corporation as a Separate Legal *Person* and an *Object* of Property

Paddy Ireland, University of Bristol Law School

In the autumn of 2005 decisions were handed down in two cases involving Railtrack, the group of companies set up to own and manage the infrastructure of the British railway system following privatization.[1] The first case, decided on September 6th, arose out of a rail crash at Hatfield in October 2000 in which four people died and over 70 were injured. It saw Railtrack's successor company, Network Rail[2], convicted of breaches of safety rules and fined £3.5 million.[3] The official report into the accident had found the immediate cause to be the fragmentation of a rail due to multiple pre-existing fatigue cracks, but the 'underlying cause' was identified as the failure of Railtrack and their maintenance contractor, Balfour Beatty Rail Maintenance Ltd (BBRML), properly to inspect, maintain and, where necessary, replace damaged rails. These were not isolated oversights: the report documented a litany of management failures by both companies. Indeed, Hatfield was not the first accident to have exposed the safety shortcomings of Railtrack. In 1997 six people died and 150 were injured in a crash at Southall; and in 1999 thirty-one people died and 523 were injured in a crash at Ladbroke Grove. Both disasters were attributed to factors under the company's control: faulty equipment, poorly located signals, poor maintenance, inexperienced and inadequately trained drivers, the absence of safety-enhancing technologies and so on. It emerged that the cracks at Hatfield had been first spotted two years earlier but that neither Railtrack nor Balfour Beatty had addressed them. The rail eventually broke two weeks before it was scheduled to be replaced. Shortly after, one senior Railtrack manager wrote to the Managing Director of Balfour Beatty Rail Ltd, the parent company of BBRML, admitting that there had been a 'terrible failure in the total management process involving us and yourselves'.[4] Mackay J later described Balfour Beatty's failure to abide by safety rules as 'the worst example of sustained industrial negligence in a high-risk industry' he had ever seen.[5]

Judgment was handed down in the second case, *Weir & Others v Secretary of State for Transport & the Department of Transport*, a month later in October 2005. This case also arose out of Hatfield, albeit indirectly, for the crash not only confirmed the safety and engineering problems caused by privatisation, it exposed its financial flaws. After Hatfield, Railtrack, which had shed much of its engineering expertise and know-how in a string of post-privatization cost-cutting exercises, panicked and embarked on a massive re-railing programme, much of it probably unnecessary.[6] Over 1200 speed restrictions were imposed while checks were carried out and rails replaced, all but bringing the rail network to a standstill. Huge sums were spent re-railing and compensating the train-operating companies, and Railtrack started to

[1] The shareholders had shares in Railtrack Group plc, whose main operating subsidiary, Railtrack plc, was the company placed into administration.

[2] Railtrack was sold to the private sector in May 1996. By the time of the decisions, it had been replaced by the state-controlled, non-profit company, Network Rail, a company limited by guarantee and formed in 2002.

[3] None of the manslaughter and health and safety charges brought against employees of Railtrack and their maintenance contractor, Balfour Beatty, resulted in convictions. Balfour Beatty pleaded guilty to a health and safety charge and was fined £10 million, later reduced to £7.5 million for reasons of proportionality.

[4] Train Derailment at Hatfield: A Final Report by the Independent Investigation Board, 110

[5] http://www.telegraph.co.uk/news/uknews/1519644/Fined-13m-but-Hatfield-rail-firms-given-21m-costs.html

[6] Having lost much of its engineering knowledge and capacity on privatization, Railtrack simply didn't know how many genuine cases of gauge corner cracking there were.

haemorrhage money. With debts of over £3 billion and rising, the company was plunged into the red and the value of its shares, which had peaked in November 1998 at £17.68, plummeted. In May 2001, Railtrack Group announced its first post-tax loss; by early June 2001, when its shares stood at around £4.50, the railway commentator, Christian Wolmar predicted 'the end of the company as a viable independent entity'.[7] A report commissioned by the company laid out three options: restructuring, renationalisation and receivership. The company favoured the former, but it would have cost the government over £4 billion and the Minster concerned, Stephen Byers, decided against it. Straightforward re-nationalisation was also ruled out. Not only was it ideologically unpalatable to New Labour, it was also potentially very expensive: although the market value of the shares stood at only £3, under European rules shareholders would have been entitled to about £8 per share, the average price of the shares over the previous three years.[8] Byers opted for receivership and on October 7th 2001 Railtrack plc was placed into administration; trading in Railtrack Group plc's shares was suspended the following Monday.[9] At the time, the company had over 250,000 shareholders holding about 520 million shares, about 82% of which were held by institutions.[10] When Byers announced that there would be no compensation, two shareholder action groups were formed – the Railtrack Action Group and the Railtrack Private Shareholders Action Group (RPSAG). Together with the directors of Railtrack Group plc, they threatened litigation, demanding £3.60 per share – 'a fair value settlement'.[11] The Government resisted, but pressure was exerted, with the institutions warning that the failure to pay compensation might put in jeopardy not only private funding for future rail projects but the public-private partnerships so dear to the heart of New Labour, and a deal was struck for compensation of £2.50 per share. This eventually rose to a total £2.62, paid out in five instalments.[12] The larger of the two shareholder groups, the Railtrack Action Group, accepted the offer, but the RPSAG, representing nearly 50,000 shareholders, the great majority of whom had holdings of 800 shares or less, were outraged.

Displaying a determination and persistence which contrasted starkly with their apparent lack of interest in (let alone mobilisation around) the company's safety record, RPSAG raised around £2.5 million to fund an action against the government, followed later by a further £900k to cover possible adverse costs.[13] They issued a writ in December 2003 in the largest class action ever seen in British law. They claimed that Byers had forced the company into administration, engineering what amounted to a back-door re-nationalisation without proper compensation, and that he was guilty both of misfeasance in public office with 'malice targeted at the shareholders of Railtrack Group' and of a breach of Article 1 of the First Protocol to the European Convention on Human Rights. The case was heard in the summer of 2005, but was lost. The claim that there had been a *de facto* expropriation of their property was dropped during the course of argument and their other claims were decisively rejected by the judge. Agreeing with those who said that Railtrack was 'frankly, a complete mess' before being put into administration, Lindsay J held that although Byers had lied to the Transport Select Committee, the course of action he

[7] Christian Wolmar, 'The terminal failure of Railtrack', *Guardian* 7/6/01.

[8] The shareholders had shares in Railtrack Group plc, whose main operating subsidiary, Railtrack plc, was the company placed into administration. Just prior to suspension, the shares were trading at £2.80. The three year average price would have included the £17.68 high of 1998.

[9] They had closed at £2.80 per share the previous Friday, valuing the company at £1.46 billion.

[10] Compared with about 42% on May 1996 when the company was privatized.

[11] John Robinson, Railtrack Group chairman, quoted in Louise Butcher, 'Railways: Railtrack administration and the private shareholders, 2001-05', *HC Standard Note* SN/BT/1076, 10/8/2010, p7.

[12] The Government were particularly concerned about the reaction of the bondholders and large US institutions holding Railtrack shares. In their internal communications, they displayed some contempt for the small shareholders, who were variously described as 'grannies who might lose their blouses' and 'little old ladies': see Geoffrey Weir Second Witness Statement.

[13] See 'Railtrack Shareholders – What kept us going', *Private Investor*, Issue 109, Dec/Jan 2006, p 3-4

took was, in the circumstances, understandable and that he did not have the intent necessary for misfeasance. Lindsay also rejected the human rights claim on the basis that the claimants could not be regarded as 'victims' under Article 34 of the Convention.[14]

This article is concerned not so much with the decisions in the cases as with what the circumstances surrounding them reveal about the *legal* nature of the relationship between public corporations and their shareholders[15] and, more particularly, about *common sense* understandings of the nature of this relationship. The Railtrack cases, it argues, reveal these common sense understandings to be legally inaccurate and schizophrenic, in the sense of inconsistent and incompatible, but nevertheless to be important ideologically and in practice, playing a key role in legitimating shareholder primacy and in institutionalising the irresponsibility which characterises our corporate system. The cases show that for some purposes the existence of corporations as separate legal persons is taken very seriously indeed, both in law and common sense. Thus not only were Railtrack's shareholders not legally liable for the company's misdemeanours (or debts), they weren't considered morally responsible for them either: the company and its shareholders were regarded as 'completely separate'.[16] For other purposes, however, the existence of corporations as separate legal persons is effectively ignored. Thus Railtrack was widely seen as an object of property 'owned' by its shareholders, as a result of which it was regarded in certain crucial respects as more or less synonymous with them.

This article explores the nature and historical origins of this corporate schizophrenia - a schizophrenia which has been normalised and absorbed into everyday common sense and which makes it possible for shareholders to assert, in a manner which is generally seen as perfectly appropriate and legitimate, 'ownership' claims over corporations, while simultaneously bearing (and experiencing), in a manner which is thought equally appropriate and legitimate, no responsibility for the behaviour of those corporations. It explores, in other words, the historical processes whereby, as Colin Mayer puts it, we 'developed organizations that are without principles'.[17] It argues that this schizophrenia is largely attributable to the way in which the corporate legal form was constructed in the nineteenth century in response to the rise of the joint stock company (JSC) and transformation of the JSC shareholder into a pure *rentier* investor detached from the process of production. These developments saw the law regulating JSCs gradually modified to accommodate and protect these *rentier* shareholders, a process which saw them relieved of most of the rights and responsibilities traditionally associated with asset ownership and constituted as owners of intangible revenue rights. They retained, however, their rights of control. It did not pass unnoticed that the resulting institutional structures were not only rather peculiar but potentially dysfunctional. Indeed, the twentieth century saw fierce debates about the legal constitution of the corporation and the position and status of corporate shareholders within it. This article suggests that for those wishing better to understand some of the key institutional structures and property forms of contemporary finance capitalism, which seem to facilitate and encourage irresponsibility, this history and these debates are worth revisiting. They not only highlight the oddity of our institutional structures (and the consciousness that has come to accompany them) but remind us that the 'corporate revolution' could have taken us in very different directions – as, indeed, it still could. Thus some commentators saw it as a step on the path towards more socialised corporate governance, others as leading towards more

[14] Under Article 34 of the Convention

[15] In this article I generally use the term 'corporation', as in much everyday usage, to refer to publicly quoted companies. The everyday use of the term to describe large public but not small private companies, is itself revealing, for it implicitly recognises the separate existence of the former.

[16] The phrase is Gower's: see below.

[17] Colin Mayer, *Firm Commitment*, 240.

financialized governance. Historically, the article argues, both paths have been followed during different periods. The era of highly financialized governance we are now in, it is suggested, has amplified the negative consequences of our corporate schizophrenia, as the recent financial crisis has made only too clear.

Corporations and their shareholders: the 'ownership' myth

One of the main things that motivated the members of RPSAG was their belief that their property had been expropriated. In newspapers, blogs, and message boards claims that the Government's behaviour amounted to an act of 'expropriation' and 'confiscation' were commonplace[18], as were accusations of 'theft'.[19] One newspaper wrote of the 'great Railtrack robbery'[20], another of shareholders 'whose property was expropriated overnight without compensation'[21]; in Parliament the government was accused of 'an act of confiscation without compensation'.[22] It is striking, however, that neither the members of RPSAG nor their many supporters in the media, led by the *Daily Telegraph*, were entirely sure precisely what the nature of the 'expropriated' property was. Sometimes it was characterised as the company's shares, which, it was claimed, had been 'confiscated' for significantly less than their 'real' value. Sometimes, however, the shares were conflated with the assets of the company, which, it was argued, were worth even more.[23] On still other occasions the 'stolen' property was identified as 'the company' itself. 'It is clear', asserted one RPSAG member, 'that we the shareholders owned RTK [Railtrack]'; 'Railtrack Group owns Railtrack plc', asserted another, 'and we shareholders own both'.[24] Yet another accused the Government of plotting to 'steal [the] company from its rightful owners'.[25] In similar vein, in one of its comment columns, the *Daily Telegraph* wrote of the 'expropriation of Railtrack's owners'.[26]

As many have pointed out, there is no legal basis for shareholder claims to 'ownership' of the corporate assets. In law, these are owned by the company as a separate legal entity and shareholders have no direct proprietary interest in them; they own shares, bundles of intangible rights, most notably to dividends. It is true that shares give shareholders a residual claim on the liquidated assets of a company on insolvency, but very often there is little or nothing left after the company's debts and liabilities have been met. There is equally little legal basis for the claim that shareholders 'own' the corporation itself. When John Kay used A M Honoré's analysis of 'ownership' to assess the ownership claims of shareholders in public corporations, he concluded that only two of Honoré's 'tests of ownership' were 'unequivocally satisfied' ('and these rather minor'), three were 'partly met', and six 'not fulfilled at all'. The 'obvious conclusion', he wrote, was that 'no one owns or could own' these companies.[27] Others

[18] See, for example, *Financial Times*, 'The costly legacy of allowing Railtrack to fail', 13/7/05; Telegraph 1/12/01

[19] See *Daily Telegraph*, 10/10/01, quoting Crispin Odey, Head of Asset Management, a substantial shareholder in Railtrack. He likened it to the 'confiscation' of the property of white farmers in Zimbabwe.

[20] Telegraph, 'Even worse journeys', 1/12/01

[21] Alex Brummer, 'Backtrack Byers buys time', *Evening Standard* 26/03/02

[22] Christopher Chope, HC Deb 13/11/01 vol 374. The Conservative Transport Spokesperson, Alan Duncan, accused the Government of deliberately engineering an 'artifical insolvency' to enable renationalisation at no cost: HC Deb 24/10/05, cc30-31.

[23] One message board contributor asked whether there was any 'real justifiable reason for stealing the assets of a private sector company'; another argued that the Government were guilty of 'grand theft' and had 'stole[n] the assets of a Privately owned Company for no compensation': http://boards.fool.co.uk/possible-amount-of-compensation-9347245.aspx?sort=whole.

[24] http://boards.fool.co.uk/possible-amount-of-compensation-9347245.aspx?sort=whole. http://boards.fool.co.uk/railtrack-plc-v-railtrack-group-6956032.aspx?sort=whole.

[25] http://boards.fool.co.uk/i-am-a-little-slow-this-morning-the-telegraph-9348450.aspx

[26] Telegraph, 'The Bad Old Days', 15/1/2002.

[27] John Kay, 'The Stakeholder Corporation', in Kelly, Kelly & Gamble, *Stakeholder Capitalism* (1997)

deploying Honoré's work have reached a similar conclusion.[28] Indeed, the large institutional investors in Railtrack seem to have been only too aware of this. Realising that their property - shares in Railtrack - was virtually worthless once the Government withdrew financial support for the company, they applied considerable extra-legal pressure on the Government to squeeze out some measure of compensation. However, these legal realities eluded many RPSAG members and many in the media. They regularly conflated ownership of the shares with ownership of 'the company' and/or its assets. Hence their anger at the modesty of the settlement and suspicion that there must have been subterfuge of some kind: surely, it was obvious that the company and its assets were worth more than £2.50 per share?[29]

They can't be entirely blamed for failing to grasp these legal niceties. Even when it is recognised that in law the company, not its shareholders, owns the assets, it is regularly asserted that the shareholders 'own' the company instead. Indeed, the idea that shareholders 'own' companies has become part of our everyday, taken-for-granted 'common sense'. 'Back when I was a law student in the early 1980s', recounts Lynn Stout, 'my professors taught me that shareholders "own" corporations … [A]t the time … this made sense enough to me'.[30] The significance of this idea should not be underestimated, for although there is little or no legal basis for it[31], it plays a key role in perpetuating the idea that shareholder primacy is a simple matter of property right and that public corporations, as private enterprises, should be run in the interests of their shareholder-owners. Indeed, many – including many judges – seem to believe this is enshrined in law.[32] Thus when the law asserts that directors are legally bound to promote the 'interests' or 'success' of 'the company', this is usually interpreted to mean that they are legally bound promote the interests of shareholders.

If the Railtrack cases reveal the tendency in certain contexts to ignore separate corporate personality and to identify companies with their shareholders, however, they also reveal the tendency in other contexts to regard them as 'completely separate'. Thus, as far as I know, no-one suggested that Railtrack's shareholders, as opposed to the company's senior managers and the company itself, were to blame for Southall, Ladbroke Grove or Hatfield. Even more revealingly, perhaps, the resourcefulness shown by the Railtrack shareholders in pursuit of compensation was not matched by determination to tackle the company's appalling safety record. On the contrary, they showed little or no interest in this: they clearly didn't see it as *their* responsibility or concern.[33] Indeed, during the course of argument in *Weir*, Keith Rowley QC, counsel for RPSAG, went so far as to argue that 'the "sins" of Railtrack should not be visited on his clients'.[34] Clearly, for these purposes, the shareholders saw Railtrack, the company they believed they 'owned', as something quite separate from them. They weren't alone. Just as few blamed the financial crash of 2007-08 on the shareholders of the financial institutions involved, or Deepwater Horizon on the shareholders of BP, none of the commentators on Railtrack seemed to consider

[28] See Todd Sayre,

[29] See http://boards.fool.co.uk/possible-amount-of-compensation-9347245.aspx?sort=whole. However, a former member of the other shareholder action group explained that they accepted the £2.50 per share offer after 'independent professionals' confirmed that 'the whole company was not worth more than the nominal value of the ordinary shares' and 'top barristers' indicated their 'chances of success in court were minimal': http://boards.fool.co.uk/railtrack-action-group-8986529.aspx?sort=whole.

[30] Lynn Stout, *The Shareholder Value Myth* (Berrett-Koehler, San Francisco, 2012), v.

[31] See Paddy Ireland, 'Company Law and the Myth of Shareholder Corporate Ownership', (1999), 62 *MLR*, 32.

[32] See John Parkinson, *Corporate Power and Responsibility* (1993), 74-92.

[33] One RPSAG member wrote: 'And enough of the rants about safety – if BP can safely run a thermal hydrogen cracker 2 miles from the secondary school in Grangemouth, then Railtrack could most certainly run the railways': http://boards.fool.co.uk/i-think-its-more-appropriate-to-note-that-the-8173639.aspx.

[34] See Commons Standard Library Note, SN 01076, 'Railways: Railtrack administration and the private shareholders, 2001-2005' (10/8/10): http://www.parliament.uk/business/publications/research/briefing-papers/SN01076/railways-railtrack-administration-and-the-private-shareholders-20012005.

its shareholders as in any way responsible for the company's safety record. In these contexts, the doctrine of separate corporate personality reigned supreme, both in law and in everyday consciousness. Indeed, this was a factor in RPSAG's failed action, for Lindsay J concluded that if there was any 'victim' for the purposes of Article 34 of the European Convention on Human Rights, it was the parent company, not its shareholders. To have decided otherwise would have required the corporate veil to be lifted and that was justified only in exceptional circumstances not present in the case at hand.[35] Indeed, the Railtrack cases not only vividly illustrate the existence of corporate schizophrenia, they a show why it is such a problem, for there clearly *was* a link between the common sense identification of Railtrack with its shareholders in some contexts (directors are bound to pursue the interests of shareholder-owners) and 'complete separation' of them in others (shareholders carry no responsibility for the company's safety record). As Railtrack's chief executive, Gerald Corbett, candidly admitted after Ladbroke Grove, there was a 'tension between shareholder interests and public service obligations'. 'The only way we can make profits', he explained, 'is by not doing the things we should do to make the railways better'.[36]

The corporation: legal person and object of property

What, then, are the origins of this schizophrenia? How have we come to so identify companies so closely with their shareholders in some contexts, while simultaneously regarding them as 'completely separate' in others? In search of an answer, I'm going to begin not in 2005 but in 1923 and an article in which the Harvard Professor, Edward Warren, complained that 'English … legislators, pleaders and judges' had 'never been strong on corporation grammar'. The context was a discussion of asset ownership in early English joint stock companies (JSC). When a JSC was *un*incorporated, Warren argued, there was 'no legal unit distinct from the associates' and the company's assets were therefore the 'joint-stock of th[ose] associates'. When the company incorporated, however, the 'assets became the property of the corporation, and were not held by *it* with others'. Despite this, for Warren, obvious truth, in the early English cases the judges and lawyers persistently called a corporation 'they' and 'commonly spok[e]' of the assets of incorporated JSCs 'as though they were the assets of the members and not of the corporation'.[37] They did not seem to appreciate that once incorporated a JSC became an 'it', a property-owning legal entity quite separate from its shareholders. Instead they continued to identify the corporation with its shareholders.

Contrary to Warren's suggestion that in the absence of incorporation there could never be a 'legal unit distinct from the associates', business associations had long had a limited legal existence separate from that of their constituent members as a result of the process of affirmative asset partitioning whereby the property of firms, unincorporated as well as incorporated, came to be treated as a separate estate shielded to some degree from the creditors of the members of the firm as individuals.[38] Although this established even unincorporated 'firms' as separate entities from their members, it did so only in specific

[35] http://lexisweb.co.uk/cases/2004/june/weir-v-secretary-of-state-for-transport-and-another

[36] Interview on the Today programme, BBC Radio 4, 17/12/99, cited in Brendan Martin, 'The High Public price of Britain's private railway', *Public World*, November 2010. In similar vein, *National Commission on the BP Deepwater Horizon Oil Spill* concluded that the disaster was ultimately traceable to a string of decisions to ignore standard safety procedures in order to cut costs: see National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* (Jan 2011). Railtrack paid good dividends to shareholders, notwithstanding its appalling safety record: the total pay-out in 1999 was 26.3p. After Hatfield, pre-tax profits fell but the company nevertheless announced a 5% first half dividend rise. By this time, however, Railtrack's share price was falling: See 'Railtrack profits a scandal', BBC news 27/5/99; 'Railtrack raises dividend', *Guardian*, 14/11/00; 'Railtrack shares slump but dividend held: http://citywire.co.uk/money/railtrack-shares-slump-but-dividend-held/a223878.

[37] E H Warren, 'Safeguarding the creditors of corporations' 26 *Harvard Law Review* (1923) 509).

[38] See Henry Hansmann & Reinier Kraakman, 'The Essential Role of Organizational Law' (2000), 110 *Yale LJ* 387.

ways and to a limited extent: it did not result in anything resembling the modern conception of separate personality or prevent incorporated firms from being conceptualised as aggregates of individuals and referred to as 'theys'. Warren's comments reflected the much more radical conceptual separation of business corporations from their members that had emerged by the time he wrote – one noted a few years before by Harold Laski when he commented on the tendency to 'personalise' the corporation and to treat it not only grammatically as an individual (an 'it') but as a 'real' entity with an independent existence of its own.[39] Crucially, Warren's comments draw our attention to the fact that the modern conception of the corporation as a 'completely separate' legal person is actually premised on the corporation's *de-personification*, on a conception of it as a legal subject cleansed of shareholders. This conception of the corporation as a 'disembodied entity'[40] underlay Warren's emphasis on the fact that corporate assets are *wholly* owned by the corporate entity and are 'not held by *it* with others'. However, as we have seen, this fully separate corporate person has also come to be seen as a *res*, an object of property which is 'owned' by its shareholders. Today, then, we have arrived at the rather curious situation in which corporations are simultaneously conceptualised as de-personified legal *persons* 'completely separate' from their shareholders and as *objects* of property which are 'owned' by those shareholders.

From the personified to the de-personified corporate person

Edward Warren was right that eighteenth and early nineteenth century English lawyers and judges identified incorporated companies with their shareholders and referred to them as 'theys'. He was wrong, however, to attribute this to grammatical or conceptual error on their part, and wrong to assume that this problem was confined to the English. As Merrick Dodd observed, in the early nineteenth century American judges also 'frequently refer[red] to a corporation as "they" rather than it'.[41] Naomi Lamoreaux confirms this: 'During the early nineteenth century … [American] judges invariably referred to partnerships in ways that focused attention on the people who made them up rather than on the enterprises as entities ….[and] during this early period, judges often referred to corporations in the same way they did partnerships'. Only in the mid-late nineteenth century (in the UK) and late-nineteenth and early-twentieth centuries (in the US) did there emerge a de-personified conception of the corporate entity as a reified property-owning legal person - an 'it' 'completely separate' from its shareholders. As Lamoreaux says, references to corporations 'with singular verbs and nouns' 'came to dominate, and the plural constructions that typified the first half of the century gradually disappeared'. [42]

Warren was what we might call a corporate 'essentialist' who believed that the creation of an autonomous, property-owning legal person radically separate from its shareholders was inherent in the act of incorporation, but that this wasn't always recognised. Others have shared this 'essentialism'. In the UK, for example, LS Sealy similarly argued that the introduction of general incorporation led to the substitution of a `metaphysical being' for a `collective organism', but that only `*in due course*' was the `jurisprudential significance of this change … recognised'.[43] Likewise, LCB Gower: it was 'not until *Salomon v Salomon & Co Ltd* at the end of the nineteenth century' that the implications of corporate

[39] Harold Laski, 'The Personality of Associations' (1916) 29 *Harvard Law Review*, 404-5. 'Personalise' was Laski's term.

[40] Gregory Mark, 'The Personification of the Business Corporation in American Law', 54 *University of Chicago Law Review* (1987), 1441 at 1445

[41] E M Dodd, *American Business Corporations until 1860* (Harvard UP, 1954), 66.

[42] Naomi Lamoreaux, 'Partnerships, Corporations and the Limits on Contractual Freedom in US History: An Essay in Economics, Law, and Culture', in Kenneth Lipartito & David B Sicilia, *Constructing Corporate America* (Oxford UP, 2004) p 29 at 44-45.

[43] Sealy L.S. Sealy, *Cases and Materials in Company Law*, 5th ed., 1992,

personality 'were fully grasped even by the courts' and the 'independent legal personality of the company' clearly established, since which time `the complete separation of the company and its members has never been doubted'.[44]

History reveals, however, that rather than lawyers and judges struggling to grasp the 'true' meaning of incorporation, understandings of the nature of the corporate entity and its relationship to shareholders *changed* over time. In the eighteenth and for much of the nineteenth century, the incorporation of a JSC was *not* seen as bringing into existence a fully autonomous, property-owning legal person 'completely separate' from its shareholders. On the contrary, in both incorporated and unincorporated JSCs, shareholders were regarded as the owners in equity of the assets, and shares regarded as equitable interests in those assets.[45] Incorporation created a separate legal entity, but this entity was seen as the company's members merged into a single, legally distinct body. In the words of one contemporary writer, an incorporated company consisted of `several individuals, united in such a manner, that they and their successors constitute but one person in law, a person distinct from that of any of the members, though made up of them all...'[46] This underlay the regular references to corporations as 'theys'. This had changed by the time Warren wrote. What underlay the shift from a conception of the corporate entity as a *personified legal person* (a 'they') to a conception of the corporate entity as a *de-personified legal person* (an 'it')?

A clue is to be found in one of the differences between the US and the UK: what is called 'corporate law' in the US is called 'company law' in the UK. This difference is usually treated as purely terminological and of little consequence: the subject matters of company law and corporate law are basically the same. Broadly speaking, that is now true. But the historical origins of the difference are revealing. Both 'corporate law' and 'company law' were nineteenth century creations, the first books on which were published at around the same time: Joseph Angell and Samuel Ames' *The Law of Private Corporations Aggregate* appeared in 1832, Charles Wordsworth's *The Law Relating to Railway, Bank, Insurance, Mining and Other Joint Stock Companies* followed in 1836.[47] But they were rather different in orientation and approach. Like both corporate and company law texts today, Angell and Ames' treatise was organised around the corporate *legal* form, embracing all businesses with corporate status. Nowadays, of course, this means firms of all economic types, from large multinationals to medium-sized firms to small corner shops, all of which can (and do) become incorporated companies. In the eighteenth and for much of the nineteenth century, however, the term 'company' was an abridgement of 'joint stock company', and as the title of Wordsworth's book suggests, 'company law' (such as it was) was an abridgement of 'joint stock company law'. Crucially, JSCs were distinguished not by their *legal* status but by their *economic* nature: at this time, some JSCs were incorporated, but many were not. Organised around the JSC *economic* form rather than the corporate legal form, Wordsworth's book encompassed all JSCs, incorporated and *un*incorporated. This reminds us that 'company law' developed as a body of law designed for application to JSCs – as, in essence, did American 'corporate law'.[48]

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[44] Gower, 4th ed., 1979, 97, 100.
[45] See Ireland, 'Capitalism Without the Capitalist', (1996) 17 *JLH* 40.
[46] J.W. Smith, *A Compendium of Mercantile Law*, 3rd ed., 1843, 81.
[47] Joseph Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* (1st ed., 1832); Charles Wordsworth, *The Law Relating to Railway, Bank, Insurance Mining, and Other Joint Stock Companies* (1st ed., 1836; 2nd ed., 1837).
[48] The situation was more complicated in the US, where capital was less abundant and individual states more willing to grant corporate privileges to facilitate the formation of firms that would foster development. However, the close link between incorporation and JSCs remained: see Angell and Ames, 1st ed., 1832, v-vi.

The nature of the joint stock company

The distinguishing characteristics of JSCs were outlined by Adam Smith in *The Wealth of Nations* when he contrasted them with 'private copartneries'. At this time, JSCs were still relatively few in number and private partnerships (or 'copartneries') dominated productive activity.[49] Indeed, the principles of partnership had come to be regarded as 'natural' and just, and the law of partnership, embodying those principles, was becoming a settled body of law. The ideally typical private partnership was based around a small number of closely-related individuals who were active participants in the firm. In law, this was reflected in the principles of mutual agency (whereby partners could bind one another), joint asset ownership (whereby partners were the joint owners of the partnership property), and joint and several unlimited liability. For inactive 'investors' who opted to become partners rather than creditors in search of better returns than those available from government debt and usury-capped loans, the unlimited liability of the law of partnership posed a real threat. However, the prevailing view was that by ensuring that success was rewarded and failure penalised, unlimited liability not only accorded with the natural principles of justice and the laws of the market, but operated in the public interest by ensuring that firms were run productively and efficiently: the 'partnership system of commerce', it was argued, was the foundation of British economic success.[50]

By contrast, the ideally typical JSC was based around a capital fund and had many more members. Moreover, they tended to be inactive, their interest in the firm being largely, if not wholly, financial. The 'proprietors' of JSCs, Smith wrote, 'seldom pretend to understand anything of the business of the company; … and give themselves no trouble about it, but receive contentedly such half yearly dividend or yearly dividend as the directors think proper to make to them'.[51] JSCs were thus characterised by a separation of ownership and management, and by freely transferable shares. Indeed, it was the size, nature, and changing character of their memberships that made the possession by JSCs of corporate privileges highly desirable, if not indispensable. As this suggests, JSCs were vehicles not only for productive activity, but for *rentier* investment. In a JSC, Marx later wrote, 'the actually functioning capitalist' is transformed 'into a mere manager, [an] administrator of others people's capital' and the 'owner of capital [transformed] into a mere owner, a mere money capitalist'.[52] Or as *The Times* put it, the JSC was 'a system of dormant partners' in which 'the sole bond of connexion between the proprietors is money'.[53]

Smith believed that JSCs, composed of inactive *rentier* shareholders and run by directors who were managing 'other people's money', would inevitably be characterised by 'negligence and profusion'. They should, therefore, only be allowed and granted 'exemptions from the general law' (meaning unlimited liability) when certain conditions were met: where the capital required was beyond the capacity of a private partnership; where the risks were unusually great; where the operations of the business could be reduced to a routine; and where there was an identifiable public benefit.[54] These ideas about the legitimate scope of the JSC shaped state policy and public opinion well into the nineteenth century. As late as 1840, one finds a series of leading articles in *The Times* drawing on Smith to denigrate the JSC. Shareholders, they complained, wanted to 'enjoy the profits of trade consistently with the luxury of being

[49] The section on JSCs appeared in the 3rd edition, published in 1784, though the material probably existed in draft from as early as 1774: see John Rae, *Life of Adam Smith* (1965), 362.

[50] See Ireland, 'Limited liability, shareholder rights and the problem of corporate irresponsibility', (2010) *Cambridge J of Economics*

[51] Smith , Campbell & Skinner vol 2, 741.

[52] Vol III, chap 27 436

[53] *Times* 9/11//40

[54] Smith.

sleeping partners', to 'share in the profits of trade without knowledge of trade, or any education in it; without abilities, without character, without any attention or exertion . . . '. The paper concluded that shareholding was 'a means or making money in idleness' and that JSCs were 'inconsistent with the solid and proper principles of trade' and 'contradict[ed] the proper principles of partnership'.[55] The persistence of such views meant that throughout this period corporate privileges were granted only sparingly, forcing many JSCs to operate as unincorporated concerns, hence the scope of Wordsworth's book.[56] It is nevertheless clear that from their inception JSCs were associated with, and linked to, corporate status and privileges, even if not all JSCs were able to secure them. When incorporation and limited liability were made freely available, the link became even stronger. Thereafter, not only were nearly all JSCs legally obliged to incorporate, for many years only JSCs did so. As a result, in the business context, the JSC and the corporate legal form became more or less co-extensive. It was only towards the end of the nineteenth century, with the rise of the so-called 'private' company, that the link was broken. Thereafter, 'company law' encompassed not only JSCs but all incorporated firms, irrespective of their economic natures.

The barriers to pure money capitalist shareholding

This history shows that the emergence of the modern doctrine of separate corporate personality and shift from a personified to a de-personified conception of the corporate entity occurred in the second half of the nineteenth century when company law and corporate law were closely associated with the JSC economic form and, indeed, being developed to accommodate it. Crucially, these conceptual changes also occurred during a period in which the nature of the JSC was itself undergoing significant change. It is these changes, which are as much economic as legal in nature, that we need to explore if we wish to understand the emergence of the de-personified conception of the corporate person.

In empirical reality, in the late eighteenth and early nineteenth centuries the line between the private partnership and the JSC was less clear than Smith's analysis suggested. During this period many firms with some of the features of Smith's JSC emerged: relatively large membership, a separation of ownership and management, relatively freely transferable shares, and so on. Some of these firms were incorporated, some not. But many of them were more in the nature of 'extended partnerships' than 'pure' JSCs.[57] Many of their shareholders had more than a purely financial interest in the firm and even if they aspired to be pure money capitalists they faced objective barriers. With both the number of companies and shares still relatively small, for example, there was no developed market for JSC securities. Restrictions on share transfers also remained common, in part because shares were only partly paid up and directors were therefore charged with vetting new members. In short, shares weren't the liquid assets they are today and there remained important senses in which shareholders were 'tied' to companies: they couldn't easily become pure money capitalists even if they wanted to. These material realities were reflected in the tendency, which continued well into the nineteenth century, to regard *all* JSCs (incorporated and unincorporated) as types of partnership. In the jargon of the day, they were 'public, rather than 'private', partnerships - quantitatively rather than qualitatively different. This notion found expression in the continuing depiction of shareholders as (dormant) 'partners'; in the continuing identification of all JSCs with their members; and in conceptualisation of them as aggregates of individuals ('theys'). It also found expression in the legal nature of shares: throughout the eighteenth and early

[55] 9 October 1840; 22 October 1840. There was, the paper added, 'only one more quality wanting to make the morsel wholesome as well as tempting' to the idle *rentier* - limited liability.

[56] See James Taylor, *Creating Capitalism*

[57] See Mark Freeman, Robin Pearson & James Taylor, *Shareholder Democracies* (2012).

nineteenth centuries, shares in both incorporated an unincorporated JSCs were treated as equitable interests in the assets of companies.[58]

The changing nature of the JSC and JSC shareholding

The second half of the century saw the emergence of much 'purer' JSCs and much 'purer' money capitalist shareholding. The changes were prompted by the rise of the railways. Railway companies needed to raise far more capital than previous JSCs and had to cast their investment nets far wider. The result was the emergence of companies populated by thousands (rather than tens or hundreds) of members, many of whose interest was purely financial. Crucially, the rapid growth in pure *rentier* investment generated the emergence for the first time of a developed market in JSC shares. Having previously been dominated by government securities, from the mid-1830s there was a substantial increase in share trading activity on the London Stock Exchange. By the mid-1840s, the Exchange's business had, in the words of one contemporary observer, been 'perfectly revolutionised'.[59] Formal share markets also began to emerge in the provinces and a national investment press began to develop. Shares were becoming increasingly liquid assets.[60]

The changing character of shareholding generated major changes to the law relating to JSCs, some of them legislative, some of them judicial. Their collective effect was to accommodate and protect the growing number of pure *rentier* investors, in which context it was not, perhaps, insignificant that more and more of the law-makers, legislative and judicial, were themselves becoming members of the *rentier* investor class. The legislative changes, and in particular the introduction of incorporation by registration and general limited liability, are well-known. However, a series of judicial changes were also made to the law of partnership as it was applied to JSCs. The 1840s, for example, saw the abandonment of the doctrine of mutual agency[61] and the development of a reformulated doctrine of ultra vires: both sought to protect shareholders by making *rentier* JSC investment more secure.[62] The shares of both incorporated and *un*incorporated JSCs were also reconceptualised in ways which reflected the changing nature of shareholding and which facilitated transferability, coming to be regarded not as interests in the assets of companies (and, therefore, potential interests in real estate) but as rights to profit – forms of intangible personal property.[63] Thereafter, as the shareholders of Railtrack discovered to their cost, there were two quite different pieces of property: the tangible assets owned by the company; and the shares owned by shareholders. With this, even *un*incorporated JSCs began to acquire (at least in this respect) a legal existence quite separate from that of their (share-owning) shareholders. All JSCs were gradually being constituted, in a much fuller sense than before, as separate, asset- and property-owning legal persons.[64] As George Dieser later wrote, 'where there is property, 'here is personality; where there is no property, there is no personality'.[65]

As part of these processes, JSC shareholders were themselves gradually re-conceptualised as (passive) 'investors' rather than (active) 'partners'; as finance-providing 'money capitalists' rather than

[58] See Paddy Ireland, Capitalism without the capitalist'.
[59] D M Evans, *The City, or The Physiology of London Business* (1945)
[60] See Ireland, Capitalism without the capitalist; Talbot on tendency of all capital to seek liquidity
[61] See *Burnes v. Pennell* (1849) 2 HLC 497.
[62] See *Colman v E Counties Railway* (1846)
[63] See Bligh v Brent (1836). Watson v Spratley.
[64] See David Gindis, 'Legal Personhood and the firm: avoiding anthropomorphism and equivocation'; Deakin.
[65] George F Deiser, 'The Juristic Person - I', 57 *University of Pennsylvania Law Review and American Law Register* (1908), 131 at 140.

asset-owning 'industrial capitalists'.[66] Although for many years policymakers continued to assume, or hope, that they would at least monitor managers, the law increasingly recognised that they were generally ignorant of business and stood outside the company and the process of production. This was reflected in the gradual transfer to directors of the rights traditionally associated with 'ownership'.[67] *The Times* picked up on this as early as 1840, remarking that companies had become 'means of making money' not only 'in idleness' but 'in compulsory idleness', for in 'public partnerships' of this sort, 'the proprietors are excluded from … control and all intimate knowledge is kept back from them', something they saw not as a risk but 'accepted as a privilege'.[68] By the closing decades of the century the law on JSCs had deviated so much from the principles of partnership that 'company law', previously regarded as a branch of the law of partnership, had come to be seen as an autonomous legal category in its own right.[69] In 1888 Nathaniel Lindley marked this by splitting his celebrated text on partnership into two separate books: one on the law of partnership, the other on company law.

Crucially, although JSC shareholders had given most of their ownership rights, they had acquired privilege of limited liability and retained their control rights. In this context, it is not insignificant that many of the mid-nineteenth century advocates of limited liability argued not for the introduction of general limited liability but for something resembling the French *société en commandite*, a limited partnership in which passive *rentier* (or `special') partners were given the privilege of limited liability, but active, managing (or `general') partners were not. In commendatory partnerships limited liability was given to money capitalist investors only on the condition that they remained passive and inactive; their rights and powers in the firm and ability to intervene in management were strictly limited. If they became more actively involved, they lost their privileged status as `special' partners and became 'general' partners subject to unlimited liability.[70] For the *rentier* investor in these firms, therefore, the price of limited liability was a loss of control rights. The belief was that the risk of irresponsible behaviour would be minimized by fixing those in control with unlimited liability and restricting the control rights of those with limited personal responsibility. It was, in other words, a legal form which decoupled limited liability from rights of control. By contrast, the newly emerging corporate legal form, which has since spread around the world[71], combined them.

The material underpinnings of the modern conceptions of the corporate person

As the nineteenth century progressed, then, JSC shareholders became ever more detached from the companies in which they held shares, conceptually, legally, and in economic reality. As this happened, the separate existence of 'the company' – its degree of separate legal personhood – grew. At the conceptual level, this was encapsulated in a subtle change in the wording of the Companies Acts. The Joint Stock Companies Act 1856 permitted seven or more persons to 'form *themselves*' into an incorporated company, clearly implying that the company was made *of* them; that the shareholders *were* the company. By contrast, the Companies Act 1862 permitted seven or more persons to 'form a company', implying that the company was an object external to them: a 'thing' made *by*, but not *of*, them. The reification of 'the company' was not finally concluded, however, until the final decades of the century and the rise of the fully paid up share.

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[66] See *Bligh v Brent*.
[67] See Freeman, Pearson, Taylor
[68] *Times* 9/10/1840
[69] See Ireland, 'Property and contract in contemporary corporate theory', 23 *Legal Studies* (2003), 453.
[70] Troubat 1853
[71] See Hansmann & Kraakman, 'The End of History for corporate law' (2000).

For much of the nineteenth century, shares carried high denominations and were only partly paid up. Although the uncalled capital provided companies with a ready source of additional finance and acted as a comfort to creditors, the residual liabilities attached to shares also meant that links remained between shareholders and companies and, indirectly, between shareholders and the company's creditors. In the closing decades of the century, however, these links were all but severed as denominations fell and the residual liabilities on shares were eliminated, a process was which was once again facilitated by the courts and legislature. The period between 1867 and 1885 was a 'watershed in the demise of the prevalence of uncalled capital'. By 1885 only about 32% of companies outside the banking, insurance and finance sectors had shares which weren't fully paid up; by 1913 this had fallen to just 5.4%. The disappearance of residual shareholder liabilities was attributable 'mainly … to demand-side pressures from investors' and to the growing and increasingly prosperous middle classes demanding 'safe equity' and a 'diversified portfolio of readily marketable stocks'.[72] By the close of the century, the *de jure* regime of limited liability had become a *de facto* regime of no-liability. Existing shares were no longer sources of new capital; corporate creditors could look only to the assets of companies in settlement; and there was no longer any need for directors to check the financial wherewithal of new shareholders. Shareholders really did now benefit from Smith's 'total exemption from trouble and from risk': all they stood to lose was the money spent on their shares.[73] Corporate shareholding had come to take its modern form, comprising ownership of an unencumbered, free-standing right to revenue, external to the process of production and entailing no liabilities or obligations, contractual or otherwise, to the company or to outsiders. JSC shareholders had become fully fledged money capitalists, able (if they wished) to completely detach themselves from the companies in which they held shares, and to do so with minimal risk. Indeed, by the 1870s, the wealthier among them were already diversifying their holdings in investment trusts, spreading the remaining risk across a portfolio of investments.[74] They had delegated not only management of the company, but management of their money. The stage was now set both for the emergence of the doctrine of separate corporate personality in its modern form, with its reified, de-personified, conception of the company, and for the conceptualisation of the company as a *res*, as an object of property 'owned' by its control-rights-possessing shareholders. Corporations thus came to be seen both as de-personified legal *persons* 'completely separate' from their shareholders and as *objects* of property 'owned' by those shareholders. The result is that today shareholders and their institutional representatives are able to enjoy revenue rights without actually doing anything, and able to insist (as 'owners') on the maximisation of those revenues without having to worry about where they come from, all safe in the knowledge that they are not legally responsible for corporate misbehaviour and that only their initial investments are at risk in the event of failure. As Harry Glasbeek says, corporate shareholders 'have little financial incentive to ensure that the managers involved behave legally, ethically, or decently . . . [because] in law, [they] are personally untouchable. . .' [75] This was, of course, only too evident in the Railtrack cases and, more recently, in the financial crisis.

The rise to dominance of the corporate legal form

The significance of these developments grew in the late nineteenth and early twentieth centuries with the rapid growth in the number of both joint-stock and incorporated limited liability companies. The increase

[72] See Acheson, Turner & Ye, 'The character and denomination of shares in the Victorian equity market', *Economic History Review*, 65, 3 (2012) pp 862- 886.
[73] See Ireland, 'Limited liability, shareholder rights and the problem of corporate irresponsibility'
[74] See Arthur Scratchley (1875)
[75] Glasbeek, *Wealth by stealth* (2002), 129.

in the number of JSCs was driven partly by advancing technology and rising capital needs, but primarily by the desire of businessmen to eliminate competition. The 'Great Depression' of 1873–96 saw firms respond to chronic overproduction, severe price cutting and falling profits by trying to fix output and prices. They did this initially through Trade Associations, trusts, cartels and other similar devices, but when these failed (as they almost invariably did) they resorted to mergers in which large numbers of unincorporated, unlimited liability firms amalgamated to form large incorporated, limited liability, JSCs able to influence, if not control, markets. These processes, associated with the 'rise of the corporate economy'[76], continued between the wars and underlay the rapid growth in the number of corporate shares. The rise to dominance of the de-personified JSC was thus part and parcel of important changes in the nature of capitalist social property relations – changes in which ownership of intangible financial property forms (fictitious capital) became ever more central and important.

At the same time, the corporate legal form was increasingly adopted by business firms of all economic types. The Companies Acts 1844–62 were clearly intended to be used only by JSCs, and for many years, as intended, this was the case.[77] However, the 'Great Depression' saw more and more sole traders and small partnerships incorporate under the Acts using 'dummy' shareholders. Some doubted the legitimacy and legality of this practice but in the celebrated case of *Salomon v. Salomon & Co Ltd* the House of Lords, overturning the decision of the Court of Appeal, held that Salomon's one-man company was a 'completely separate' entity.[78] The radical separation of companies and shareholders, developed in the specific context of JSCs populated by large numbers of passive, detached *rentier* shareholders, was thus extended to 'private' companies that, in reality, were often nothing more than incorporated individual proprietorships and partnerships. It was not long before most significant business enterprises were becoming incorporated companies, whatever their economic natures.

Equally importantly, when at the same time corporate groups began to emerge for the first time, often as part of continuing attempts to suppress competition, the *Salomon* principle was formalistically extended to them. Parent companies thus came to be regarded as completely separate entities from the subsidiaries they controlled, making possible and, indeed, encouraging the construction of complex groups in which each company is a separate legal person benefitting from limited liability. Rigid adherence to *Salomon*, coupled with *de facto* no-liability shareholding, has thus greatly extended the scope for opportunistic behaviour and provided an institutional foundation for systematic irresponsibility. Today, the economically most powerful firms are multinational enterprises made up of groups of companies. In law, the existence of these enterprises is barely recognised: the companies in the group are regarded for most legal purposes as separate entities. In principle, therefore, those dealing with one company have no rights against the other group members, even though the organisation as a whole is usually co-ordinated by a single management team. The structures which have resulted are complex, involving subsidiaries, cross-holdings, joint-ventures and the like, though it is usually the same mechanism that is at work: direct or indirect control through shareholding. Crucially, these enterprises can choose where to locate different parts of their activities, introducing competition among states for the creation of favourable legal and regulatory environments. This competition reaches its apotheosis with tax laws, as enterprises locate their profits in low-tax jurisdictions and states trade their sovereignty in the legal marketplace.[79]

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[76] See Leslie Hannah, *Rise of the Corporate Economy*
[77] See 'The rise of the limited liability company' (1984)
[78] *Salomon v Salomon & Co Ltd* [1897] AC 22; see also Ireland (1984)
[79] See Jean-Phillipe Robe, 'Enterprises and the constitutionalization of the world power system' (2011)

Crucially, the rise of private and subsidiary companies has fuelled the myth of shareholder corporate 'ownership'. In large public companies populated by detached *rentiers*, there is little or no *legal* basis for the idea that they are 'owned' by their shareholders, and little or no *de facto* basis for it either, notwithstanding shareholder retention of control rights. In the case of private companies and subsidiaries, however, the 'ownership' claim usually has much more *de facto* substance, for although the 'complete separation' of company and shareholders is legally very real for liability purposes, it is often entirely fictional in empirical reality so far as control of corporate assets is concerned. This has contributed to the entrenchment of the idea of shareholder corporate 'ownership' in everyday common sense, even in situations where it lacks *de facto*, as well as legal, substance.

The 'corporate revolution': towards socialisation or financialization?

The peculiarities of the institutional forms that emerged from all this did not pass unnoticed by late nineteenth and early twentieth century observers. Nor did the changes they wrought in the social relations and dynamics of capitalism. However, they sparked rather different reactions and visions of the future: some saw them leading towards more socialised corporate governance, others towards more financialized governance. History confirms that things could have gone either way and that at different times they did. Contrary to the claims of contemporary advocates of 'evolution to efficiency'[80], the directions taken were as much the product of political struggles as of economic (or technological) imperatives: it was by no means inevitable that we would end up where we are today. The twentieth century saw lively debates about corporate rights-obligation structures and many challenges to the prevailing arrangements. The peculiar nature of the share as property and the odd status and position of the *rentier* shareholder lay at their heart, as did the latter's dubious claims to corporate 'ownership'.

Some saw the rise of the JSC as a potentially progressive development, a step on the road to the socialisation of production. Echoing Smith, for example, Marx observed that in JSCs 'the owner of capital' was transformed into 'a mere money capitalist' who received dividends in the form of interest - as 'mere compensation for owning capital' that was 'entirely divorced from function in the actual process of production'. The rise of these JSCs, he suggested, presaged the emergence of more socialised productive forms: they represented 'private production without the control of private property' and 'the abolition of capital as private property within the framework of capitalist production itself'. JSCs were 'social undertakings as distinct from private undertakings' and marked a 'mere phase of transition to a new form of production' in which capital would be 'reconverted' into 'the property of producers', 'outright social property'. Marx observed, however, that with the development of the credit system, money capital was also assuming an increasingly 'social character', becoming concentrated in and loaned out by banks rather than its 'direct proprietors'. Focusing in particular on the highly concentrated ownership of public debt, he noted that these banks represented 'all lenders of money' and acted as 'the general managers of money capital'. This was generating the rise of 'a new financial aristocracy' and new 'variet[ies] of parasites'.[81]

If Marx saw the rise of the joint stock corporation as potentially progressive, however, the American economist and sociologist Thorstein Veblen, writing a few decades later, was less sure. By this time large swathes of American and German industry had come to be dominated by banks and financiers, Marx's 'new financial aristocracy'. In Germany banks led the way, as Rudolf Hilferding recounted in

[80] See Mark Roe, 'Chaos and evolution in law and economics' (1996) 109 *Harvard LR*, 601; see also Hansmann & Kraakman (2001), 'The End of History for Corporate Law' (2001) 89 *Georgetown LJ*, 439–68

[81] Capital, vol III chaps 23, 25, 27.

Finance Capital[82]; in the US financiers like J P Morgan were dominant. This was the period of what Dumenil and Levy have called 'the first financial hegemony'.[83] Taking advantage of the increasingly desperate attempts of firms to suppress competition, these financiers arranged merger after merger, reaping massive 'promoter's profits' and using a mixture of voting trusts, debt and interlocking directorates to exercise *de facto* control over corporations with minority shareholdings. Some, like John Moody, founder of the bond-rating agency, celebrated this development[84], but many were highly critical. Indeed, it was the increasingly direct domination of American industry by a plutocratic financial and industrial elite (the so-called 'money trust') that underlay the Pujo Committee investigations of 1912-13 and Louis Brandeis' fierce attack on the American 'financial oligarchy'.[85] 'Toward the close of the [nineteenth] century', Veblen wrote, 'the financial community … found themselves in a position to take over and control the usufruct of the country's industrial system by taking over the ownership of [its] strategically dominant members'.[86] Veblen argued that with the rise of the joint stock corporation, '*industry'*, the technical processes concerned with the efficient production of useful goods, had fallen under the control of '*business'* – what we would now call 'finance'. 'Business' was more concerned with making money than things, and managed industrial processes not primarily to enhance productive efficiency and maximise output, but to secure pecuniary gains for the owners of financial property.[87] Indeed, Veblen argued, financial domination often led to the 'conscientious sabotage' of industry, for, larger profits were often to be had from obstructing production than from facilitating and maximising it[88], hence his claim that business had become a parasitic growth on industry and the investment bankers and corporate financiers had become as restrictive of further economic development as the old landed elite.[89] With the 'corporate revolution', therefore, the problems associated with the JSC identified by Smith had been generalised.

The critique of the *rentier*

By the 1920s, however, investment was spreading among the American middle class and share ownership becoming more widespread and dispersed. At the same time, the direct personal control exercised by financiers like Morgan was gradually being replaced by the more impersonal, bureaucratic routines of investment banks. With this, the focus of Veblen's assault on the financial control of corporations shifted somewhat. He still railed against the consequences of financial domination. 'Business enterprise' and 'particularly American business enterprise', he argued, 'habitually looks to the short run', sacrificing long-term productive gains in favour of 'an enhanced rate of earnings for the time being'.[90] This operated against the best interests of the community which lay 'in the efficient management of . . . concern[s] as . . . industrial enterprise[s]' and was 'best served by an unhampered working out of the industrial system at its full capacity without interruption or dislocation'.[91] But by this time Veblen's attack on finance was turning into a thoroughgoing attack on the legal position of shareholders: the financial interests of these 'absentee owners' was obstructing productive activity and conspiring against the full use of the 'industrial

[82] *Finance Capital* (1909)
[83] Gerard Dumenil & Dominique Levy, *The crisis of neoliberalism* (2011)
[84] John Moody, *The Truth about the Trusts* (1904), discussed in Becht & de Long, 613.
[85] Louis Brandeis, *Other People's Money* (1912)
[86] *Absentee Ownership*, 231-2.
[87] *Theory of Business Enterprise*, pp. 77–8, 80.
[88] See *Absentee Ownership*; Joseph Dorfman, *Thorstein Veblen and his America* (1934) 227-8.
[89] Veblen, *Vested Interests*, 97–8, 105
[90] Veblen, *Absentee Ownership*, 214.
[91] Veblen, *Business Enterprise*, 78; Veblen, *The Vested Interests and the Common Man* (1919), 93.

arts'.[92] It was in this context that Veblen began to question shareholder rights and privileges, arguing that the classic liberal justifications for absolute property rights simply did not apply to passive, financial property. The new absentee owners of industry had delegated most of the traditional powers of ownership to managers, retaining only certain 'rights and immunities'. 'Ownership' in the new corporate order had been 'depersonalised' and 'no longer carrie[d] its earlier duties and responsibilities'. Indeed, corporate shareholders now resembled bondholders rather than 'real' owners. They were 'anonymous pensioners', whose personal identities were irrelevant 'even to the concern itself' and whose 'sole effective relation to the enterprise [was] that of a fixed overhead charge on its operations'. They were the owners of rights to receive a 'free income' drawn from 'the . . . product of the underlying community'.[93]

Commentators in the UK began to echo these views. Although British industry had never fallen under financial control in the same way as American and German industry, there emerged a very similar and equally radical critique of the *rentier* and financialized industrial governance. The Labour Party intellectuals, R H Tawney and Harold Laski, led the assault. In his influential 1921 book, *The Acquisitive Society*, Tawney castigated the inherently pernicious and parasitic nature of intangible financial property forms like the corporate share.[94] Like Veblen, he argued that the traditional justifications for private property rights were inapplicable to property forms of this sort which divorced gain from service, and reward from work. Unlike rights to tangible personal possessions, which could be defended as 'indispensable to a life of decency and comfort' and as encouraging industry and individual initiative, these new intangible, passive property forms were 'functionless'. Indeed, in directing productive activity towards 'acquisition' rather than 'service to society', they were positively *dys*functional, dissipating creative energy, 'corrupting the principle of industry' and distorting productive activity. To redirect industry along more productively rational and socially beneficial paths, Tawney proposed that shareholders be re-classified as creditors and their rights attenuated. Wresting control from them, he suggested, would enable industry to be released from financial domination and to be (re)organised in productively more functional ways; it would also allow management to be turned into a 'profession' akin to medicine and law.[95] A few years later, Harold Laski echoed these sentiments in *Grammar of Politics*.[96] The rise of the JSC had seen a massive growth in 'functionless property' and the emergence of an 'investing class' 'freed from the legal obligation to labour', and 'maintained in parasitic idleness'.[97] This class had come to 'dominate [society's] institutions', and its functionless property had become 'the controlling factor in industrial production'. As a result, the 'notion of function' had all but disappeared, as had the 'ideal of service'. Like Tawney, Laski recommended an 'alteration of the character of the owner of wealth into a person to whom a fixed dividend is paid' to enable production to be socialised and 'infused … with the sense of responsibility it now lacks'.[98] Socialisation, he argued, could be accomplished in many different ways, from outright nationalisation to public regulation; what was needed was experimentation. Like both Marx and Veblen, then, Tawney and Laski recognised the ways in which the rise of the JSC and financial property forms like the JSC share had blurred the lines between debt and property, and between credit and capital. On this basis they challenged the idea that shareholders 'owned' corporations, explicitly likening them to creditors who are 'owed' but do not 'own'. To see shareholders

[92] Veblen, *Vested Interests*, 97–8, 105.
[93] Veblen
[94] R H Tawney, *The Acquisitive Society* (1921).
[95] For an earlier expression of this idea, see Louis Brandeis, *Business – A profession, system* (October 1912).
[96] H Laski, *A Grammar of Politics* (1925).
[97] Laski, *Grammar*, 175, 185–6.
[98] Laski, *Grammar*, pp. 201–9.

as ‘owners’ of the corporation, they suggested, was not only legally and morally unjustifiable, it almost inevitably led to socially undesirable, financialized forms of management and governance - not just because of the productively inefficient outcomes they were likely to generate, but because of the injustices and social attitudes and values they were likely to propagate.

Similar ideas surfaced in the US in the 1930s, by which time capitalism had been plunged into a depression which was widely blamed on finance. They figured prominently in the debates between Adolf Berle and Merrick Dodd, and in the closing chapters of Berle and Means’ *The Modern Corporation and Private Property*.[99]. In his debate with Berle, Dodd argued that the great majority of the shareholders in large joint stock corporations were *rentiers* with little resemblance to traditional owners, and that these corporations increasingly had the character of s*ocial* or *public* institutions rather than of private enterprises. On this basis, he suggested, it was clearly arguable that directors should be required to take account of the interests of employees, consumers, creditors and society as a whole, as well as of shareholders. This view, Dodd argued, was perfectly defensible if you took seriously the existence of the corporation as a separate legal person[100], an idea which, as Berle and Means later noted, had already found expression in Germany in the notion of the ‘enterprise as such’.[101] Despite his differences with Dodd, which were as much pragmatic as principled, Berle also recognised that the character of both the shareholder and the corporation had radically changed. In the final section of *The Modern Corporation* Berle and Means drew on the radical critiques of Veblen, Tawney and Laski to question the applicability of the ‘traditional logic’ of profit and property in the modern corporate era.[102] The modern corporation had ‘dissolved the [private] property atom’ in which possession and control were united, and now involved two forms of property: one *active*, the tangible assets owned by the corporation and controlled by the managers; the other *passive*, the intangible revenue rights, ‘liquid, impersonal, and involving no responsibility’, owned by the shareholders. Reduced to a ‘mere recipient of the wages of capital’, they argued, the modern corporate shareholder was now ‘not dissimilar in kind from the bondholder or lender of money’. The modern corporation was qualitatively different from the traditional, small, ‘private’ enterprise. It had a ‘quasi-public’ character, from which it followed that it might no longer be appropriate to view shareholders as ‘owners’ (other than of shares) or to view corporations as objects of property. The ‘corporate revolution’, they concluded, had raised ‘legal, economic and social questions’ of considerable importance, the ‘greatest’ of which was ‘in whose interests should the great quasi-public corporations …be operated?’[103]

In the final chapter of the book they outlined some possible answers. The first entailed sticking with the traditional logic of property and insisting that corporations be run in the exclusive interest of their shareholders ‘despite the fact that [they] ha[d] ceased to have power over or accept responsibility for the active property’. The second entailed giving the controlling managers ‘free rein’ to use their powers as they wished, though this was thought likely to encourage the emergence of a plundering ‘corporate oligarchy’. The third involved abandoning the ideas of shareholders as ‘owners’ and corporations as private property, and developing a ‘new concept of the corporation’ as a social institution. In becoming functionless *rentiers* shareholders had ‘surrendered the right that the corporation should be operated in their sole interest’ and ‘released the community from the obligation to protect them to the full extent implied in the doctrine of strict

[99] A Berle and G Means, *The Modern Corporation and Private Property* (1932).
[100] See E Merrick Dodd, “For whom are corporate managers trustees?” (1932) 45 *Harvard Law Review* 1147.
[101] This idea originated with Franz Klein and was popularised by Walther Rathenau: *Vom Aktienwesen, eine geschaftliche Betrachtung* (1918).
[102] Berle and Means’ work is permeated by ‘Veblenite echoes’: see D.M.Wright, ‘The Modern Corporation – Twenty Years After’ (1951-52) 19 *University of Chicago Law Review* 662.
[103] B & M, Book IV.

property rights'. The community was now entitled 'to demand that the modern corporation serve ... all society' and that various groups be 'assign[ed] ... a portion of the income stream on the basis of public policy rather than private cupidity'; shareholders should get only 'a fair return' on their capital.[104] Berle clearly sympathised with this conception but hesitated to advocate it because we didn't yet have the institutional know-how to impose a broader 'scheme of responsibilities' on managers, hence his disagreements with Dodd.[105]

Managerialism and the taming of finance

Commentators continued to voice ideas of this sort well into the 1960s. In the US they appeared in the work of J K Galbraith and in the later work of Berle himself; in the UK they appeared in the work of people such as George Goyder and Bill Wedderburn, both of whom argued that shareholders should be re-conceptualised as creditors.[106] They also found indirect expression in the many proposals for worker participation and industrial democracy. They did not, however, result in significant changes to corporate rights-obligations structures, in part because many on the left did not think there was any need to press for such changes. By this time, with Bretton Woods in place, finance seemed to have been tamed, and corporate shareholders seemed to have been disempowered by dispersal. The managers were now in charge and subject to social controls and influences. The 'managerial revolution', the argument ran, had ushered in a new form of 'managerial capitalism' and rendered radical, politically contentious changes to corporate rights structures unnecessary.

In the UK, the idea that the 'socialisation' of corporations could be achieved without radical changes to corporate rights structures can be traced back at least to the mid-1920s. In Britain, industry had never been dominated by high finance in the same way as in Germany and America, JSC shareholding was more widely spread and dispersed, and the separation of ownership and control more advanced than elsewhere.[107] The resulting weakening of shareholder control led Keynes to argue that there was an inevitable tendency for 'joint stock institutions, when they [had] reached a certain age and size, to approximate to the status of public corporations rather than that of individualistic private enterprise'. The 'tendency of big enterprise to socialise itself', he argued, was manifested when 'the owners of the capital, i.e. its shareholders, are almost entirely disassociated from the management', at which point managers become more concerned about the stability and reputation of the institution than with profit maximisation, and shareholders have to satisfy themselves with 'conventionally adequate dividends'. On this basis, Keynes dismissed the need for overt socialisation. There was 'no so-called important political question so really unimportant, so irrelevant to the reorganisation of the economic life of Great Britain as the nationalisation of the railways'. 'The battle of socialism against unlimited private profit [was] being won in detail hour by hour' from within these large enterprises.[108] Ten years later, in *The General Theory*, after observing that interest rewarded 'no genuine sacrifice' and anticipating an end to the scarcity of capital, he famously foresaw the gradual 'euthanasia of the *rentier'*. By this time he was clearly concerned about the pernicious effects of finance. Echoing Veblen, he warned that investors, and especially 'professional investors', tended to seek short-term gain by outguessing the market rather than long-term gain. The growing power of these professional investors in financial markets was causing 'speculation' to dominate 'enterprise', especially in the US, not only damaging productive investment but acting as a source of

[104] Berle and Means, Book IV, chapter IV. See Levy, Volume I, 177.
[105] Berle, 'For Whom Corporate Managers are Trustees'(1932), 45 *Harvard Law Review*,1365.
[106] George Goyder, *The Responsible Company* (1961). K W Wedderburn, *Company Law Reform* (1965)
[107] See Hannah.
[108] J M Keynes, *The End of Laissez-Faire* (1926)).

economic instability. Because there was 'no clear evidence from experience that the investment policy which is socially advantageous coincides with that which is most profitable', Keynes concluded that the state, which was better placed to take a longer view and to take account of the general social interest, should take greater responsibility for 'directly organising investment'. To secure 'an approximation to full employment' and to channel resources away from speculation to production, a 'somewhat comprehensive socialisation of investment' was required.[109]

The idea that changes to corporate rights structures were not needed to 'socialise' the corporation gathered strength after the Second World War. In the 1950s, for example, the leading Labour Party intellectual, Anthony Crosland, insisted that socialist goals could be realised within the existing structures because passive and dispersed shareholders had neither the desire nor the ability to exercise their control rights; neither outright nationalisation nor radical legal reforms were necessary. For him, as for many others, the rise of professional managers and of monopolies and oligopolies which diminished product market competition were positive developments which were leading to more 'socialised' corporations and a more socialised 'managerialist capitalism'.[110] Even when proposals were made for industrial democracy and worker representation on the boards of large corporations – proposals which would have attenuated shareholder control rights – the response from the labour movement was less than wholehearted. Co-determination, the leading labour lawyer, Otto Kahn-Freund argued, could be achieved either 'in the land of collective bargaining on the pluralistic pattern' or 'in the land of company law on the unitary pattern'. He rejected the latter as 'alien to the TU movement' and a denial of the fundamental conflict of interest between capital and labour.[111] Others thought otherwise, however, and continued to press not only for industrial democracy but for the relegation of shareholders to the status of creditors. Indeed, this suggestion was not confined to the left: some argued for alterations to corporate rights structures simply to make them better reflect the 'real' nature of the corporate shareholder as an inactive *rentier*.

For a while, it looked as though those who denied that 'socialisation' required radical changes to corporate rights structures might be right. A mixture of financial repression, shareholder dispersal, countervailing trade union power, and the rise of oligopolistic markets seemed to have partially liberated managers from shareholder and market imperatives, and made it possible for them to balance the interests of different 'stakeholder' groups and to operate in a more socially responsible manner. It is important not to exaggerate these changes, but equally important not to ignore or understate them either. The claim that we were entering an era of more 'socially responsible corporations', with manager-technocrats at its heart, which became commonplace in the 1950s and 60s, was not without substance.[112] Nor is it insignificant that the 'managerialist' era overlapped the fifty or so year period after World War One recently identified by Thomas Piketty as one in which wealth inequalities in advanced capitalist countries narrowed. *Les trentes glorieuses* really did see the power of the *rentier* class and finance reduced and the emergence of more socialised corporations. Indeed, corporations were increasingly treated as though they really were separate from their shareholders – and not just for liability purposes. With this, of course, corporate schizophrenia began to wane.

Institutional change and the reassertion financial power

[109] J M Keynes, *The General Theory of Employment, Interest and Money* (1936), chs 12 and 24.
[110] C A R Crosland, *The Future of Socialism* (London: Jonathan Cape 1956); and *The Conservative Enemy* (1962).
[111] O Kahn-Freund, 'Industrial democracy' (1977) 6 *Industrial Law Journal* 65.
[112] See J K Galbraith, *The New Industrial State*

In recent decades, however, the landscape has changed dramatically. Many things have contributed to this, but changes to the legal rights-obligations structures of corporations have not been prominent amongst them: the key characteristics and features of corporate legal form have changed relatively little. This is not to say that the bundle of rights possessed by shareholders has not been enhanced: it has. But many of the enhancements have occurred not in company law but in the rules regulating international capital flows, take-overs, and securities markets: the demise of Bretton Woods and removal of controls over the free movement of capital; the rise of the 'New Constitutionalism' and new mechanisms of investor protection so on. In the UK, for example, the development of the City Code on Takeovers and Mergers, especially general principle 7 and rule 21 on non-frustration, has strengthened the position of target-company shareholders by placing decisions on the fate of takeover bids in their hands, reducing management to providing information and persuasion.[113] As Paul Davies has pointed out, financial institutions find it much easier to influence changes to the rules regulating securities markets, which are generally devolved to regulators who are close to the market participants, than to influence changes to rules of company law, which are subject to the normal legislative process where financial institutions are 'only one among a number of powerful influences'.[114] It is not insignificant that general principle 7 has been adopted in many jurisdictions around the world and is a central plank of the EU Directive on Takeovers[115], nor that many in Europe saw the Directive as an attack not only on their less financialized and shareholder-oriented modes of corporate governance but on their social democratic, social market versions of capitalism.[116]

The other main source of the changed direction of corporate governance has been the transformation of the institutions of share ownership: the re-concentration of financial property ownership in institutions and the development within those institutions of management systems using portfolio managers who are subject to regular market-based performance evaluation. The result is that shareholders as a class are now much better placed to *exercise* (or threaten to exercise) their residual rights and the power they confer. Re-concentration has enabled finance - money capital, acting through its institutional representatives - to re-assert its power in and over corporations, and indeed over the state[117], propelling us back towards the kind of manipulative, finance-dominated world described by Veblen a century ago. Notwithstanding increased activism, shareholder power is generally exercised not directly in individual companies as it was in Veblen's time, but indirectly on the corporate sector as a whole through financial markets. Permanently under threat, managers have been pressured and lured into trying to 'maximise shareholder value'. The rise of the market for corporate control has been central here. As Grahame Thompson says, 'even the largest global firms can be stalked by activist investors – hunted by private equity or sovereign wealth funds seeking added shareholder value extraction … Few companies – however large or internationalised – are immune from the threat of takeover'. So far as corporate executives are concerned, of course, it isn't just a matter of externally imposed imperatives: modern forms of executive remuneration, designed to realign the interests of managers and shareholders, have made the ruthless pursuit of 'shareholder value' very attractive to the executive class. With increased shareholder power and activism commonly mistaken as evidence of shareholder 'ownership', these

[113] The Code was developed by the City Panel on Takeovers and Mergers and is now in its 8th edition (2006).
[114] P Davies, "Shareholder value, company law, and securities markets".
[115] See A Dignam, "The globalisation of general principle 7: transforming the market for corporate control in Australia and Europe"(2008) 28 *Legal Studies* 96.
[116] See A Nilsen, *The EU Takeover Directive and the Competitiveness*
[117] See Wolfgang Streeck's idea of the debt state: *Buying Time* (2014).

developments have underlain the emergence of corporate schizophrenia on a grand and unprecedented scale.

The gradual reassertion by finance of its power over corporations using the residual control rights of shareholders has, of course, been controversial, generating not only the emergence of markedly less 'socialised' corporations, but altering the balance of power between capital and labour and contributing to the increases in wealth inequality documented by Piketty. It is striking, however, that in the defences forwarded by academic commentators for the restoration of unambiguous shareholder primacy, reassertions of shareholder corporate 'ownership' do not figure prominently, although as the Railtrack case demonstrates their common sense appeal remains strong. Aware, perhaps, like the lawyers representing Railtrack's institutional shareholders, that the claim that the shareholders 'own' corporations is legally unsustainable, in recent decades academic supporters of shareholder primacy have tended to marginalise claims about shareholder corporate 'ownership'. Thus in the nexus-of-contracts theories of the corporation which emerged in the 1970s and 80s, traditional rights-based, 'ownership' defences of shareholder primacy were replaced by efficiency-based, consequentialist defences. Shareholder primacy, it was argued, benefits society as a whole by ensuring that corporations operate efficiently and that aggregate social wealth is maximised.

Although they recognise that the shareholders are not the 'owners' of the firm, nexus-of-contracts theories in many ways represent the academic embodiment of corporate schizophrenia, for in some contexts they confirm, and indeed rely on, the existence and reality of the separate corporate person, while in others they conceptualise the corporation out of existence, dismissing it as a mere 'legal fiction'. Frank Easterbrook and Daniel Fischel, for example, begin their well-known exposition of the contractual theory by curtly dismissing the separate existence of the corporation as a matter of 'convenience rather than reality'. With no corporate entity standing in the way, it becomes possible to reconnect shareholders to the corporate capital and assets, and also to the directors, who are depicted not as agents of the (non-existent) company but of the shareholders. Corporate governance accordingly becomes a simple 'agency problem'. However, when defending limited liability ('perhaps *the* distinguishing feature of corporate law', according to Easterbrook and Fischel) and the *de facto* non-liability of shareholders for corporate debts, the corporate entity has to be hastily resurrected. 'C*orporations*', they tell us, 'do not have limited liability; they must pay all of their debts, just as anyone else must' (their emphasis).[118] It is difficult to find a more egregious example of 'the corporation' appearing and disappearing as and when required. Clearly, for these writers the ideological attractions of nexus-of-contracts theory outweigh its theoretical and empirical implausibility: in its convoluted and round-about way, it has the desired effect of restoring the corporation's capital/ assets – if not the (non-existent) corporation itself - to the status of objects of private property owned by the shareholders and managed by their agents, the directors.

Corporate schizophrenia and the 'new financial aristocracy'

The defenders of shareholder primacy are aware, however, that, no matter how theoretically sophisticated, consequentialist defences of shareholder rights do not have quite the same persuasive power as defences based on notions of ownership and property right. As a result, assertions of (or assumptions about) shareholder corporate 'ownership' persist not only in everyday consciousness, as the Railtrack case shows, but in the academic literature. Indeed, ownership claims form an important part of the defences of shareholder primacy in other ways too. The privatization of previously state-owned industries and spread of private pensions have seen ownership of financial property spread: shareholding is no longer the

[118] Easterbrook & Fischel, *The Structure of Corporate Law* (1991)

preserve of the very wealthy but has trickled down to ordinary people. On this basis it is often argued that shareholding has been 'democratised'; that 'we are all (more or less) shareholders now'. The implication is that shareholder primacy not only *in*directly benefits us all by ensuring productive efficiency and the maximisation of aggregate social wealth, but directly benefits a growing number of us in our capacity as share-owners.

This is misleading. Although the (direct and indirect) ownership of shares and other forms of financial property has indeed spread, in recent decades it has also become increasingly concentrated amongst the very wealthy.[119] Piketty shows, for example, that since 1970 in the US the proportion of 'wealth' or 'capital' owned by the top 10% has risen from just over 60% to over 70%, and the proportion owned by the top 1% has risen from under 30% to over 35%. The levels of concentration are not quite as high in Europe but the pattern is similar.[120] Indeed, if anything, Piketty may have *understated* the levels of wealth and financial property concentration in the US.[121] Recent research by Sandy Hager on the ownership of US public debt, for example, shows how over the last three decades 'widely owned pension funds have seen their share of the public debt fall drastically, while mutual funds, which are heavily concentrated in the hands of the top one percent of US households, have seen their share of public debt increase'.[122] Piketty also traces the dramatic increase in income inequality, driven mainly by the growth in 'supersalaries', the enormously high incomes going to corporate executives and the 'supermanagers' of 'other people's money'.[123] This elite managerial class has been co-opted by the upper fractions of the capitalist class. The result is a politically powerful alliance between the very wealthy, the managers of their money, the executive managerial class, and what Jeffrey Winters has called the 'agents of wealth defence' - the army of skilled professionals (lawyers, accountants and the like) employed by the wealthy to protect their incomes.[124] Indeed, Olivier Weinstein notes the detachment not only of shareholders but of the 'new type of CEO' from corporations. The latter 'no longer identif[ies] with his company', he argues, but 'much more with the class to which he belongs and for which financial results are the "normal" preoccupation'.[125] The identity of the 'financial aristocracy' has, then, changed since Marx's time. It is not the small shareholders of the RPSAG but the elite owners of financial property and new elite class of executives and money managers who have been the real beneficiaries of the vigorous reassertion of shareholder primacy and restoration and intensification of corporate schizophrenia. At no time was this clearer than during the financial crisis, when, after years of reaping plentiful financial benefits, the shareholders of the financial institutions concerned, like the shareholders of Railtrack, were seen as bearing no responsibility for the disasters wrought by the corporations they claimed to 'own'.

Rethinking Corporate Rights-Obligation Structures

The financialization of the corporate sphere has, then, created problems not only of distributional justice but of economic and social dynamics: our current institutional arrangements have generated a logic of

[119] 'Shareholder primacy and the distribution of wealth' (2005) 68 *MLR* 49.
[120] Thomas Piketty, *Capital in the twenty first century* (2014), 346-350
[121] See, for example, Emmanuel Saez & Gabriel Zucman, *The Distribution of US Wealth, Capital Income and Returns since 1913* (March, 2013): http://gabriel-zucman.eu/files/SaezZucman2014Slides.pdf;
[122] Sandy Brian Hager, 'Public Debt as Corporate Power: Mapping the New Aristocracy of Finance', Jan 2015 http://www.capitalaspower.com/?p=1587.
[123] Piketty, 315-335
[124] See, for example, Winters 'Wealth Defence Industry' (2011) http://www.alternet.org/story/154930/wealth_defense_industry%3A_the_real_reason_america's_oligarchs_can_squeeze_the_rest_of_us.
[125] Olivier Weinstein, 'The shareholder value corporation: Between mythology and reality', 3 *Accounting, Economic and Law* (2013) 43 at 57

process that not only prevents the most productive use of Veblen's 'industrial arts' but encourages financial manipulation and excessive risk-taking. Since the financial crash of 2007-08, more and more commentators have recognised this, agreeing that the (short-term) financial focus on 'shareholder value' and emphasis on performance-related pay linked to share prices contributed to the meltdown. As a result, debates not only about corporate governance but about the nature and purpose of the corporation and the constitution of corporate rights-obligations structures have begun to re-emerge.

These debates still lack the radical edge of those of the 1920s and 30s, but there is no doubt that some of the neoliberal corporate governance orthodoxies of the 1990s are being questioned, particularly the idea that managers should trying to maximise shareholder value. The attack on shareholder value, encapsulated academically by Lynn Stout's *Myth of Shareholder Value*[126], extends to the business world, exemplified by Jack Welch's assertion that it was 'the dumbest idea in the world'.[127] Even the *Financial Times* has joined in. The 'mess' we have made of corporate governance, the FT's Martin Wolf suggests, 'has a name: it is shareholder value maximisation'.[128] These critiques do not, however, generally rest on a rejection of shareholder primacy. On the contrary, their goal is generally to get managers to pursue shareholder value in a more 'enlightened' manner and to focus on long- rather than short-term financial returns: to act less like industrial capitalists and more like money capitalists. The reform proposals that have emerged thus seek to 'empower' shareholders and to get them to act more like 'proper', active, committed 'owners' and to engineer a change of attitude in managers in which they adopt the role of 'stewards'. Thus Colin Mayer, implicitly recognising the problem of corporate schizophrenia, seeks to supplement the traditional emphasis on 'incentives, ownership and control' with an emphasis on 'obligations, responsibilities and commitment', proposing *inter alia* that voting rights be withheld from shareholders until they have shown their 'ownership' credentials and held their shares for a specified number of years.[129]

What is missing from many of these critiques is recognition that the great majority of corporate shareholding is inherently passive, detached, financial and parasitical in nature; and that the increasing mediation of share ownership by institutions acting as the 'general managers' of 'all lenders of money' has intensified its financial focus. Trying to get money capitalist *rentier* shareholders and their representatives to act more like proper, industrial capitalist 'owners' is rather like trying to get cats to bark. Indeed, as Lorraine Talbot has pointed out, reforms aimed at trying to make these *rentier* shareholders more active, whether in financial markets or in the corporations themselves, may exacerbate the problem not solve it.[130] Although proposals such as Mayer's for time-dependent voting rights are, then, steps in the right direction in highlighting the need to make changes to corporate rights-obligation structures, they don't go far enough. They don't address the underlying problem: shareholder primacy and our continuing treatment of *rentier* corporate shareholders as 'owners'. Our schizophrenic treatment of the corporation as 'completely separate' from its shareholders for some (liability) purposes but as an object of property 'owned' by them for others is a toxic mix, especially in an institutional context in which money capital, increasingly concentrated in the hands of a small elite, is managed by powerful financial institutions. By combining no-liability *rentier* shareholding with control rights, our rights-obligations structures are a recipe not only for short-termist financialized governance, but for managerial

[126] Stout
[127] Welch is the former CEO of GE and was previously seen as one of shareholder value's leading proponents,
[128] Financial Times, 20/8/14
[129] Colin Mayer, *Firm Commitment* (2013), 6, 246-8. This underpins his proposed solution: 'trust companies'. Mayer still characterises shareholders as 'owners'.
[130] Talbot

excess, corporate rapacity and irresponsibility, the increasing exploitation of labour by capital, and growing inequality. The problem is not merely one of 'commitment': the members of RPSAG were long-term, committed shareholders, but they lacked any sense of responsibility for Railtrack's behaviour.

We need, then, to look hard at the legal organisational forms available to business and to embrace experimentation and diversity. In the specific context of the large, *rentier*-dominated, public corporations that dominate so many areas of productive activity, there is an urgent need to take the separate personhood of the corporation seriously and to abandon shareholder primacy. This might enable us to tap the 'yet unrealized potential of the corporation'.[131] This will entail radical reform of corporate rights-obligations structures, a pre-requisite of which will be dispelling the myth of shareholder ownership. The intellectual and ideological barriers are considerable. When Lynn Stout discussed her book on New York City Radio recently, 'the interviewer simply couldn't get his mind around [her] claim that shareholders aren't really "owners"'.[132] And Mayer, while keen to emphasise that companies are entities with a separate legal existence of their own, still refers to corporate shareholders as 'owners'.[133] The political obstacles are even greater. The enormous power and influence of the new financial oligarchy means that reform (even of the Mayer type) is going to be vigorously opposed and resisted, as are the shifts in understandings and consciousness that are needed. But there are some promising signs: the characterisation and treatment of shareholders as 'owners' is once again actively and widely being questioned[134], and the issue of worker participation is beginning to re-emerge as a live issue.[135] In this more open intellectual context, the historical development of the corporate legal form and the old debates surrounding corporate shareholding are worth revisiting, for they not only force us to question the status of corporate shareholders – 'owed' or 'owning'?[136] – but remind us just how contingent, complex and malleable are the institutions of property and ownership. The rights in the property bundle can be allocated and arranged in many different ways. Not everything has to be 'owned' in the full liberal sense; nor is it always better if they are. As Mayer says, 'there is no natural order ... we can create concepts and institutions to assist rather than subjugate us'.[137] The range of institutional possibility is much wider than often realised: the choice is not simply between private property and collective property, or markets and government.[138] It is time we began to experiment with different rights-obligations structures and what Berle called new 'schemes of responsibility', and to address the problem of institutional know-how he identified all those years ago.

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[131] Mayer 241
[132] http://www.thedeal.com/thedealeconomy/lynn-stouts-the-shareholder-value-myth.php
[133] 22, 242.
[134] EU
[135] http://www.centreforum.org/index.php/mainpublications/292-employee-empowerment; http://policy.greenparty.org.uk/wr.html
[136] https://themoderncorporation.wordpress.com/company-law-memo/
https://themoderncorporation.wordpress.com/economics-and-msv/
[137] 255
[138] See Roberto Unger, *The Left Alternative*