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

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INTRODUCTION

In 2005 decisions were handed down in two cases involving Railtrack, the group of companies set up to manage the infrastructure of the British railway system following privatization. The first case, decided in September, arose out of a rail crash at Hatfield five years earlier in which four people died and over 70 were injured. It saw Railtrack's successor company, Network Rail, fined £3.5 million for breaches of safety rules. 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' to be the failure of Railtrack and their maintenance contractor, Balfour Beatty Rail Maintenance Ltd (BBRM), 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 first been 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, a senior Railtrack manager admitted that there had been a 'terrible failure in the total management process'.[1] 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.[2]

The second case, *Weir & Others v Secretary of State for Transport & the Department of Transport*, was decided a month later. It too arose out of Hatfield, albeit indirectly, for the crash not only confirmed the safety and engineering problems arising out of 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

[1] *Train Derailment at Hatfield: Final Report by Independent Investigation Board*, 110
[2] http://www.telegraph.co.uk/news/uknews/1519644/Fined-13m-but-Hatfield-rail-firms-given-21m-costs.html

massive re-railing programme, much of it probably unnecessary. Over 1200 speed restrictions were imposed while checks were carried out and rails replaced. Huge sums were spent compensating the train-operating companies, and the company was plunged into the red, with debts of over £3 billion and rising. 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 and by June the railway commentator Christian Wolmar was predicting 'the end of the company as a viable independent entity'.[3] Restructuring the company 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 as although the market value of the company's shares had fallen to under £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. Byers opted for receivership and in October 2001 Railtrack plc was placed into administration and trading in its shares suspended.

At the time, the company had about 520 million shares, about 82% of which were held by institutions.[4] When Byers announced that there would be no compensation, two shareholder action groups were formed[5] and the institutional investors instructed Railtrack's directors to start proceedings against the government, warning that failure to pay compensation might put in jeopardy not only private funding for future rail projects but the public-private partnerships so dear to New Labour's heart. A deal was eventually struck for compensation of £2.62 per share, paid out in five instalments. One of the two shareholder groups, the Railtrack Action Group (RAG), accepted the offer, but the other, the Railtrack Private Shareholders Action Group (RPSAG), representing nearly 50,000 small shareholders, was not satisfied. Displaying great determination and persistence, RPSAG raised around £2.5 million to fund an action against the government, followed by a further £900k to cover possible adverse costs.[6] In December 2003 they issued a writ claiming that Byers had forced the company into administration to engineer a back-door re-nationalisation without proper compensation. He was guilty, they argued, of both misfeasance in public office with 'malice targeted at the shareholders of Railtrack Group' and a breach of Article 1 of the First Protocol to the European Convention on Human Rights. When the case was heard in 2005, the claim that there had been a *de facto* expropriation of their property was dropped during argument and the other claims decisively rejected by the judge. Agreeing with those who

[3] Christian Wolmar, 'The terminal failure of Railtrack', *Guardian* 7/6/01.
[4] The shareholders had shares in Railtrack Group plc, whose main operating subsidiary, Railtrack plc, was the company placed into administration.
[5] See Louise Butcher, 'Railways: Railtrack administration and the private shareholders, 2001-05', *HC Standard Note* SN/BT/1076, 10/8/2010, p7.
[6] See 'Railtrack Shareholders – What kept us going', *Private Investor*, Issue 109, Dec/Jan 2006, p 3-4

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, he did not have the intent necessary for misfeasance. RPSAG's human rights claim was rejected on the basis that the claimants could not be regarded as 'victims' under Article 34 of the Convention.

CORPORATE SCHIZOPHRENIA

The members of RPSAG were motivated by their belief that their property had been stolen. In newspapers, blogs and message boards, claims that the Government's behaviour amounted to an act of 'expropriation' or 'confiscation' were commonplace[7], as were accusations of 'theft'.[8] One newspaper wrote of the 'great Railtrack robbery'[9], another of shareholders 'whose property was expropriated overnight without compensation'.[10] In Parliament the government was accused of 'an act of confiscation without compensation'.[11] It is striking, however, that neither RPSAG nor their media supporters, 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, sometimes as the company's assets.[12] On still other occasions the 'stolen' property was identified as 'the company' itself. It was 'clear', asserted one member of RPSAG, 'that we the shareholders owned [Railtrack]'; another claimed that 'Railtrack Group owns Railtrack plc and we shareholders own both'[13]; yet another accused the Government of plotting to 'steal [the] company from its rightful owners'.[14] In similar vein, in one of its comment columns, the *Daily Telegraph* wrote of the 'expropriation of Railtrack's owners'.[15]

As many have pointed out, there is no legal basis for shareholder claims to 'ownership' of the corporate assets. In law, these are wholly owned by the company as a separate legal entity. Shareholders own shares, which are essentially rights to revenues.[16] The claim that shareholders

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

[8] 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.

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

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

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

[12] One message board contributor asked whether there was any 'justifiable reason for stealing the assets of a private sector company'; another accused the Government of 'grand theft'; they 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.

[13] 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.

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

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

[16] 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.

'own' the corporation itself is also legally unsustainable. When John Kay used A M Honoré's 'incidents of ownership' to assess the ownership claims of shareholders in public corporations, he concluded that only two of them were 'unequivocally satisfied' ('and these rather minor'), three 'partly met', and six 'not fulfilled at all'.[17] But these legal niceties eluded RPSAG and its supporters. They regularly conflated ownership of Railtrack's shares with ownership of 'the company' and/or its assets, and expressed anger at the modesty of the settlement and suspicion that a behind-the-scenes deal had been reached: surely, it was obvious that the company was worth more than £2.62 per share?[18]

They can't be entirely blamed for this. Even when it is recognised that the company, not its shareholders, owns the assets, it is regularly asserted that the shareholders 'own' the company instead. Indeed, this idea 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'.[19] The significance of this should not be underestimated, for legally unsustainable though it may be, it plays a key role in perpetuating the idea that shareholder primacy is a simple matter of property right. Thus when the law asserts that directors are legally bound to promote the 'interests' or 'success' of 'the company', this is interpreted to mean that they are legally bound promote the interests of the company's shareholders, its 'owners'. Company and shareholders are treated as more or less synonymous.[20]

However, if the Railtrack cases reveal the tendency in certain contexts to downplay separate corporate personality and identify companies with their shareholders, they also reveal the tendency in other contexts to take separate corporate personality very seriously and to regard them as 'completely separate'.[21] Thus it is striking that Railtrack's shareholders, who spent so much time, energy and money fighting for compensation from the government, showed little or no interest in, and certainly didn't mobilise themselves to address, the company's appalling safety

[17] John Kay, 'The Stakeholder Corporation', in Kelly, Kelly & Gamble, *Stakeholder Capitalism* (Palgrave Macmillan, 1997). Seealso Paddy Ireland, 'Company Law and the Myth of Shareholder Corporate Ownership', (1999), 62 *MLR*, 32.

[18] See http://boards.fool.co.uk/possible-amount-of-compensation-9347245.aspx?sort=whole. However, a former member of RAG 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.

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

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

[21] See Gower and Davies, *Principles of Modern Company Law* (9th ed., 2012), 35-38.

record. They simply didn't see this as *their* responsibility or concern.[22] They weren't alone. This view was shared by the media. Just as no-one attached any blame for the financial crash of 2007-08 on the shareholders of the financial institutions involved, or for Deepwater Horizon on the shareholders of BP, no one seems to have thought Railtrack's shareholders, as opposed to the company's senior managers and the company itself, in any way responsible for the company's dreadful safety record. In these contexts, companies and their shareholders are regarded and experienced as 'completely separate'. In *Weir* this found expression in counsel for RPSAG's argument that 'the "sins" of Railtrack, a separate entity, should not be visited on his clients'[23], and in Lindsay J's rejection RPSAG's claims: if there was any 'victim' for the purposes of Article 34 of the European Convention on Human Rights, Lindsay concluded, 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.[24]

The Railtrack cases thus throw into sharp relief the schizophrenic – in the sense of inconsistent and contradictory – nature of our perceptions of the relationship between public companies and their shareholders.[25] They show that for some purposes corporations are regarded as completely separate legal persons: not only were Railtrack's shareholders not held legally liable for the company's misdemeanours, nobody seems to have thought them in any way morally responsible for them either. They also show, however, that for other purposes the existence of corporations as separate legal persons is effectively ignored. Thus corporations are widely seen as 'owned' by their shareholders - a belief reflected in the claims of RPSAG and its supporters, in the principle of shareholder primacy, and in the tendency to treat the interests of company and shareholders as synonymous.[26] Indeed, the Railtrack cases not only illustrate the existence of corporate schizophrenia, they show why it is such a problem, for there clearly *was* a link between Railtrack's safety record and the legal and common sense identification of the company with its shareholders in some contexts (shareholder 'ownership' and primacy) and their 'complete separation' in others (no shareholder responsibility for corporate debts or malfeasance).

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[22] 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.

[23] 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.

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

[25] In this article the term 'corporation' is generally used, as it is in everyday usage, to refer to publicly quoted companies. The schizophrenia alluded to here is rather different from that alluded to by William Allen in his 'Our Schizophrenic Concept of the Business Corporation', 14 *Cardozo LR* (1992), 261.

[26] Under s 172 of the UK Companies Act 2006, for example, the 'success of the company' is explicitly identified with 'the benefit of the members as a whole'.

As Railtrack's chief executive, Gerald Corbett, candidly admitted after Ladbroke Grove, there was a 'tension between shareholder interests and public service obligations'.[27] 'The only way we can make profits', he explained, 'is by not doing the things we should do to make the railways better'. He might have added, 'and safer'.[28] In short, then, corporate schizophrenia is important both ideologically and in practice, normalising the irresponsibility which characterises our corporate system.

This article explores the origins of this schizophrenia - a schizophrenia which has been absorbed into everyday common sense, making it possible for shareholders to assert, in a manner which is generally seen as perfectly appropriate and legitimate, 'ownership' claims over corporations, while they simultaneously bear, in a manner 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 have 'developed organizations that are without principles'.[29] It argues that this schizophrenia is largely attributable to the way in which the legal form of the business corporation was constructed in the nineteenth century in response to the rise of the joint stock company (JSC) and pure *rentier* investment – and, in particular, to the transformation of the JSC share into a Janus-faced hybrid which allows shareholders to retain some of the key proprietary privileges of insiders (owners) while they simultaneously enjoy the responsibility- and liability-free privileges of outsiders (creditors).[30] It has not passed unnoticed that the resulting institutional structures are not only rather peculiar but tendentially dysfunctional. The twentieth century saw prolonged debates about the corporate legal form, with many arguing for a diminution of shareholder rights and a re-conceptualisation of the corporation as a social institution. This history and these debates, this article suggests, are worth revisiting, not only for highlighting the oddity of corporate rights structures and the consciousness that has come to accompany them, but for reminding us that the 'corporate revolution' and hybrid nature of shareholding could have taken us in very different directions – and, indeed, still could.

CORPORATIONS: LEGAL PERSONS AND OBJECTS OF PROPERTY

[27] 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).

[28] 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.

[29] Colin Mayer, *Firm Commitment* (OUP, 2013), 240.

[30] See Jongchul Kim, 'Identity and the Hybridity of Modern Finance', 38 *Cambridge Journal of Economics* (2014), 425. Shareholder rights are defined in part by statute and in part by the terms of the share issue and by the company's constitution. The Companies Acts have long provided comprehensive sets of default terms which have been widely followed. What I describe here is the common position of the corporate shareholder.

In 1923 the Harvard Law Professor, EH Warren, discussing asset ownership in early English JSCs, criticised 'English … legislators, pleaders and judges' for their poor 'corporation grammar'. When a JSC was *un*incorporated, he explained, there was 'no legal unit distinct from the associates' and the company's assets were therefore the 'joint-stock of th[ose] associates'. When a 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 judges and lawyers persistently identified corporations with their shareholders, referring to them as 'theys' and speaking of their assets 'as though they were the assets of the members and not of the corporation'. They didn't seem to appreciate that once incorporated, a JSC became an 'it', a property-owning legal entity quite separate from its shareholders. [31]

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. Affirmative asset partitioning meant that the property of firms, unincorporated as well as incorporated, was treated as a separate estate shielded to some extent from the creditors of the members of the firm as individuals.[32] This established even unincorporated 'firms' as entities separate from their members, though only in specific ways and to a limited extent. It did not result in anything resembling the modern conception of separate corporate 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 that had emerged by the time he wrote – one highlighted by Harold Laski when he noted the tendency to 'personalise' the corporation and treat it grammatically not only as an individual (an 'it') but as a 'real' entity with an independent existence of its own.[33] Warren's remarks also remind us 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 reified legal subject cleansed of shareholders – a 'disembodied entity'.[34] This underlay his emphasis on the fact that corporate assets are wholly owned by the corporate entity and 'not held by *it* with others'. As we have seen, however, this fully separate, property-owning corporate person is also now seen as a 'thing' which belongs to its shareholders. Corporations have thus come simultaneously to be conceptualised as (de-

[31] E H Warren, 'Safeguarding the creditors of corporations' 26 *Harvard Law Review* (1923) 509).
[32] See Henry Hansmann & Reinier Kraakman, 'The Essential Role of Organizational Law' (2000), 110 *Yale LJ* 387.
[33] Harold Laski, 'The Personality of Associations' (1916) 29 *Harvard Law Review*, 404-5. 'Personalise' was Laski's term.
[34] Gregory Mark, 'The Personification of the Business Corporation in American Law', 54 *University of Chicago Law Review* (1987), 1441 at 1445

personified) *legal persons* 'completely separate' from their shareholders and (reified) *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 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 it was confined to the English. As Merrick Dodd observed, early nineteenth century American judges also 'frequently refer[red] to corporations as "theys" rather than "its"'.[35] Naomi Lamoreaux confirms that during this period 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 'often referred to corporations in the same way'. Only in the mid-late nineteenth century and early-twentieth centuries did there emerge a de-personified conception of the corporate entity as a reified property-owning legal person, and only then did references to corporations 'with singular verbs and nouns' 'come to dominate and the plural constructions gradually disappear'. [36] Warren was a corporate 'essentialist' who believed that the creation of a legal person radically separate from its shareholders was inherent in the act of incorporation, but that this wasn't immediately recognised by the courts. He wasn't alone in suspecting 'early conceptual failure'.[37] In the UK, for example, LS Sealy has also argued that the introduction of general incorporation led to the substitution of a `metaphysical being' for a `collective organism', but that the `jurisprudential significance of this change [was] recognised' only `in due course'.[38] LCB Gower likewise claimed that it was 'not until *Salomon v Salomon & Co Ltd*' that the implications of corporate personality 'were fully grasped even by the courts' and the 'independent legal personality of the company' clearly established. Since then, he says, `the complete separation of the company and its members has never been doubted'.[39]

History suggests, however, that rather than lawyers struggling to grasp the 'true' unvarying meaning of incorporation, understandings of the legal nature of business corporations and their relationship to their shareholders *changed* over time. In the eighteenth and early nineteenth centuries, incorporating a JSC was *not* seen as bringing into existence a property-owning legal person 'completely separate' from its shareholders. On the contrary, while incorporation created

[35] E M Dodd, *American Business Corporations until 1860* (Harvard UP, 1954), 66.
[36] Naomi Lamoreaux, 'Partnerships, Corporations and the Limits on Contractual Freedom in US History', in Kenneth Lipartito & David B Sicilia, *Constructing Corporate America* (OUP, 2004) p 29 at 44-45.
[37] Robert Flannigan, 'Shareholder Fiduciary Accountability', [2014] *JBL*, 1 at 11.
[38] Sealy L.S. Sealy, *Cases and Materials in Company Law*, (Butterworths, 5th ed., 1992). Check.
[39] Gower, 4th ed., 1979, 97, 100.

a separate legal entity, 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...'[40] Similarly, the shareholders of both incorporated and unincorporated JSCs were regarded as the owners in equity of the assets.[41] This underlay the regular references to corporations as 'theys'. Things had changed by Warren's time.

Clues as to the sources of the shift from a conception of the corporation as a *personified legal person* (a 'they') to a reified conception of the corporation as a *de-personified legal person* (an 'it') are 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 now regarded as of little consequence as the subject matters of company law and corporate law are broadly the same. But the historical origins of the difference are revealing. Both 'corporate law' and 'company law' were nineteenth century constructs, the first books on which were published in the 1830s: Angell and Ames' *The Law of Private Corporations Aggregate* and Wordsworth's *The Law Relating to Railway, Bank, Insurance, Mining and Other Joint Stock Companies*.[42] But they were rather different in orientation and approach. Like 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 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 defined by reference not to their *legal* status but to their *economic* natures: at this time some JSCs were incorporated, but many were not. Organised around the JSC *economic* form, not the corporate legal form, Wordsworth's book encompassed all JSCs regardless of their legal status, reminding us that 'company law' emerged as a body of law designed for application to JSCs.[43]

The distinguishing characteristics of JSCs were outlined by Adam Smith in *Wealth of Nations* when he contrasted them with the 'private co-partneries' that dominated productive

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[40] J.W. Smith, *A Compendium of Mercantile Law*, (Maxwell, 3rd ed., 1843), 81.
[41] See Ireland, 'Capitalism without the capitalist', (1996) 17 *JLH* 40.
[42] Joseph Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* (Boston: Hilliard, Gray, Little & Watkins, 1st ed., 1832); Charles Wordsworth, *The Law Relating to Railway, Bank, Insurance Mining, and Other Joint Stock Companies* (Butterworth, 1st ed., 1836; 2nd ed., 1837).
[43] The same was essentially true of American 'corporate law', though capital shortages meant individual states were more willing to grant corporate privileges to facilitate the formation of firms that would foster development: see Angell and Ames, v-vi.

activity at this time.[44] 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 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 returns better than those available from government debt and usury-capped loans, unlimited liability was a problem. But the prevailing view was that by ensuring that partners were active and alert, and success rewarded and failure punished, unlimited liability accorded with the natural principles of justice and 'the market', and ensured that firms were run efficiently. The 'partnership system of commerce' was widely regarded as the foundation of British economic success.[45]

By contrast, the ideally-typical JSC was based around a capital fund, had many more members, most of whom were 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'.[46] As this suggests, JSCs were vehicles not only for productive activity, but for *rentier* investment. In a JSC 'the actually functioning capitalist' was 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'.[47] 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'.[48] The size, nature, and changing character of their memberships that made the possession by JSCs of corporate privileges highly desirable, but Smith argued that JSCs, composed of inactive *rentier* shareholders and run by directors managing 'other people's money', were inevitably characterised by 'negligence and profusion'. He therefore argued that they should be granted 'exemptions from the general law' (like limited liability) only in certain circumstances: 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.[49] These ideas about the legitimate scope of the JSC were highly influential and shaped state policy well into the nineteenth century. Thus as late as 1840 one finds a series of leading articles in *The*

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[44] Adam Smith, *Wealth of Nations* (1776, Liberty Fund 1982, ed by Campbell, Skinner & Todd), Volume II, 731-758. The section on JSCs appeared in the 3rd edition, published in 1784.
[45] See Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility', (2010) *Cambridge Journal of Economics*
[46] Smith, vol 2, 741.
[47] Karl Marx, *Capital Vol III* (Lawrence & Wishart, 1977), chap 27, 436
[48] *The Times,* 9/11/1840
[49] Smith, 757-58.

Times denigrating JSC shareholders as wanting to 'enjoy the profits of trade consistently with the luxury of being sleeping partners', to 'share in the profits of trade without knowledge of trade…, without abilities, without character, without any attention or exertion . . . '. JSCs were 'inconsistent with the solid and proper principles of trade' and 'contradict[ed the proper principles of partnership'; shareholding was 'a means or making money in idleness'.[50] The persistence of such views meant that throughout this period corporate privileges were granted only sparingly, forcing many JSCs to operate as unincorporated concerns.[51] 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, for henceforth nearly all JSCs were legally obliged to incorporate, as a result of which, 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 century and the rise of the private company that the link was broken and 'company law' came to encompass not only JSCs but all incorporated firms, irrespective of their economic natures.

THE CHANGING NATURE OF THE JSC AND JSC SHAREHOLDING

History shows that the shift from a personified to a de-personified conception of the corporate entity occurred in the second half of the nineteenth century when the law was being developed to accommodate the JSC. Moreover, it occurred when the nature of the JSC was itself undergoing significant change. It is to these changes, which were as much economic as legal in nature, that we need to turn if we wish to understand and the emergence of the modern doctrine of separate corporate personality.

In empirical reality, in the late eighteenth and early nineteenth centuries the line between the private partnership and the JSC was fuzzy. Many firms emerged with relatively large memberships, partially separated ownership and management, and transferable shares. Some of them were incorporated, others not. But many of these firms were more in the nature of 'extended partnerships' than 'pure' JSCs. Their shareholders often had more than a purely financial interest in the firm[52] and even if they aspired to be pure money capitalists, they were hampered by the legal constraints on share transfers[53] and absence of a developed share market. The result was that shares simply weren't the liquid assets they are today: shareholders couldn't become pure money capitalists even if they wished. These material realities were reflected in the

[50] 9 October 1840; 22 October 1840.
[51] See James Taylor, *Creating Capitalism*
[52] See Mark Freeman, Robin Pearson & James Taylor, *Shareholder Democracies* (2012).
[53] See *Duvergier v Fellowes* (1828), 5 Bing 267, per Best C J.

tendencies, which continued well into the nineteenth century, to regard *all* JSCs (incorporated and unincorporated) as types of partnership, to depict shareholders as 'partners', and to conceptualise JSCs as aggregates of individuals ('theys'). In the jargon of the day, they were 'public, rather than 'private', partnerships - quantitatively rather than qualitatively different. Equally importantly, throughout this period shares in both incorporated and unincorporated companies were regarded as equitable interests in the company's assets.

The second half of the century, however, saw the emergence of much 'purer' JSCs and much 'purer' money capitalist shareholding, a development driven by railway companies which needed to raise huge amounts of capital by contemporary standards. The result was the appearance of firms populated by thousands (rather than tens or hundreds) of members, most of whom were pure *rentier* investors, and the emergence for the first time of a developed share market. As shares became increasingly liquid assets[54], they were gradually endowed 'completely with the character of money capital'.[55] These changes prompted a series of changes to the law of partnership as it was applied to JSCs, the cumulative effect of which was to accommodate and offer protection to the growing number of pure *rentier* investors.[56] In Robert Flannigan's words, a 'sustained effort' was made 'to design ... arrangements that exposed passive investors to something less than the general liability of principals'.[57] 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 applied to JSCs: the partnership doctrine of mutual agency was abandoned[58], the doctrine of ultra vires was reformulated, and so on.[59] In this context it is not, perhaps, insignificant that more and more of the law-makers, legislative and judicial, were themselves becoming members of the shareholder class.

Crucially, JSC shares were also reconceptualised to reflect the increasingly *rentier* nature of shareholding, coming to be seen as intangible personal property in the form of rights to profit.[60] This was a very significant shift. As we have seen, shares in all JSCs, incorporated and unincorporated, were originally seen as equitable interests in the company's assets.[61] Like

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[54] See Paddy Ireland, Capitalism without the capitalist', 17 *Journal of Legal History* (1996) 40.
[55] Rudolf Hilferding, *Finance Capital* (1910, Routledge ed., 2007), 109. On the tendency of capital to seek liquidity, see Lorraine Talbot, 'Why Shareholders Shouldn't Vote', 76 *Modern Law Review* (2013), 791.
[56] See Paddy Ireland, 'Property and contract in contemporary corporate theory', 23 *Legal Studies* (2003), 453.
[57] Robert Flannigan, 'The Political Imposture of Passive Capital', (2009) 9 *Journal of Corporate Law Studies*, 139 at 146-47.
[58] *Burnes v. Pennell* (1849) 2 HLC 497.
[59] *Colman v E Counties Railway* (1846), 10 Beav 1.
[60] *Bligh v Brent* (1837) 2 Y&C 268.
[61] Shares are, of course, still referred to as 'equity'.

partners, therefore, shareholders were seen as having a direct proprietary interest in the firm's assets, including any land it happened to own. The decision in *Bligh v Brent* in 1837, however, marked the beginning of a new approach. In *Bligh*, the property of the shareholders was conceptualised as money, and the shareholders portrayed, like creditors and unlike partners, as *transferring* ownership of this money to the corporation to invest in whatever assets it thought fit. These assets were conceptualised as being wholly owned, legally and equitably, by the corporation as a separate entity. The shares were mere rights to 'surplus profit' and, as such, personal property, irrespective of the nature of the assets held by the corporation.[62] The same reasoning was soon applied to the shares of *un*incorporated JSCs.[63] The effects were paradoxical. On the one hand, shares, disconnected from assets, began to look less like the rights *in rem* of partners – 'insiders' who retain ownership of a firm's assets and continue to carry the responsibilities and liabilities that go with this - and more like the rights *in personam* of creditors - 'outsiders' who transfer ownership of their assets and cede responsibility and liability in return for regular money payments and a bundle of contractual rights.[64] On the other hand, the disconnection of shares from the company's assets (including any real estate owned by the company), together with the development of the market for shares and the provisions of the 1844 Act[65] enhanced their transferability. The result was that that although they were now intangible and more contractual in nature, they were also more exchangeable and, as such, more thing- and property-like. As the shareholders of Railtrack discovered to their cost, there were now two quite different pieces of property with often very different values: the assets owned by the company and the shares owned by the shareholders.[66] JSCs, incorporated and unincorporated, were acquiring, in a much fuller sense than before, an existence as asset-owning legal persons quite separate from that of their share-owning shareholders.

As part of these processes, JSC shareholders were re-conceptualised as (passive) 'investors' rather than (active) 'partners', as finance-providing 'money capitalists' rather than asset-owning 'industrial capitalists'.[67] For many years policymakers nevertheless continued to assume (or hope) that they would act like owners rather than creditors and, as a minimum, monitor

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[62] See Baron Alderson's analysis in *Bligh v Brent* (1837)
[63] *Watson v Spratley* (1854) 10 Ex. 222.
[64] The rights relate mainly to dividends, winding up and voting, and are determined, like contractual rights, primarily by the terms of the share issue and by the company's constitution, though some are conferred by statute: See Sarah Worthington, 'Shares and Shareholders: Property, Power and Entitlements: Part 1', 22 *Company Lawyer* (2001), 258.
[65] The Act decalred the shares of registered companies to be personal property and transferable as such. However, the liabilities of former shareholders did not terminate on transfer, continuing in certain circumstances for a further three years: see s66.
[66] See *Short Bros v Treasury Commissioners* [1948] 1 KB 116.
[67] This is very apparent in Alderson's judgement in *Bligh v Brent*.

managers – a hope which persists to this day. But gradually the rights and powers traditionally associated with 'ownership' were delegated to directors in recognition of the fact that shareholders were generally not only passive but ignorant of business.[68] Indeed, *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'; in these 'public partnerships' 'the proprietors are excluded from … control and all intimate knowledge is kept back from them'.[69]

Although JSC shareholders gradually relinquished most of the rights traditionally associated with ownership, however, they had acquired the privilege of limited liability and retained their residual control rights: even if they couldn't direct directors they could still dismiss them.[70] Significantly, this ran counter to what many of the advocates of limited liability had sought. They argued not for the introduction of general limited liability but for something resembling the French *société en commandite,* a type of limited partnership. In *sociétés en commandite*, investors ('special partners') acquired and retained limited liability only if 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 and became 'general' (or 'managing') partners subject to unlimited liability.[71] For *rentier* investors in these firms, therefore, the price of limited liability was a loss of control rights and relegation to the status of something closer to creditor than owner. By fixing those in control with unlimited liability and restricting the control rights of those with limited personal responsibility, it was hoped, the risk of irresponsible behaviour would be reduced. In the commendatory partnership limited liability and control rights were decoupled; in the newly emerging corporate legal form they were combined.[72]

PROPERTY OR CONTRACT? THE JANUS-FACED NATURE OF MODERN SHAREHOLDING

As the nineteenth century progressed, shareholders gradually became ever more detached from companies, conceptually, legally and economically. 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. By contrast, the Companies Act 1862 permitted seven or more persons to 'form a company', implying that the company was an

[68] See Freeman et al, especially chaps 4 & 5.
[69] *Times* 9/10/1840
[70] The shareholders' right to elect directors was explicit in the 1844 Act: 7 & 8 Vict, c 110, s26. The Act, however, placed management firmly in the hands of company directors.
[71] See Francis Troubat, *The Law of Commandatary and Limited Partnership*s (Philadaelphia, Kay, 1853).
[72] See Hansmann & Kraakman, 'The End of History for Corporate Law' (2000).

object external to them, a 'thing' made *by*, but not *of*, them. It was not, however, until the final decades of the century and the rise of the fully paid-up share that the de-personification and reification of 'the company' was concluded. Hitherto shares had been high in denomination and only partly paid-up. Although the resulting uncalled capital provided companies with a ready source of additional finance and acted as a comfort to creditors, it also meant that links remained between shareholders and companies, and, indirectly, between shareholders and the company's creditors. By the close of the century, however, these links had but all been severed as denominations fell and residual liabilities were eliminated, a process once again facilitated by the courts and legislature.[73] By 1885 only about 32% of companies outside the banking, insurance and finance sectors had shares that weren't fully paid-up; by 1913 this had fallen to just 5.4%, more or less completing the process of defensive asset partitioning. The disappearance of residual shareholder liabilities was attributable 'mainly … to demand-side pressures from investors', the growing and increasingly prosperous middle classes demanding 'safe equity' and a 'diversified portfolio of readily marketable stocks'.[74] The result was that a *de jure* regime of limited liability became a *de facto* regime of no-liability. 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.[75] Indeed, by the 1870s wealthier shareholders were beginning to delegate not only management of companies but management of their money, diversifying their holdings and spreading their risks.[76] Incremental changes had seen corporate shareholding come to comprise ownership of an unencumbered, free-standing right to revenue, entailing no responsibilities or liabilities, contractual or otherwise, to the company or third parties. This paved the way for the emergence of the modern doctrine of separate corporate personality with its 'complete separation' of companies and shareholders.

However, shareholders had retained their residual control rights over this now de-personified legal entity, and this gave rise to the idea that the company was an object of property that they 'owned'. They had acquired a 'novel status'[77] in which they were simultaneously 'insiders' with residual proprietary rights able to elect and dismiss directors and thus insist that the company be run in their interests, and 'outsiders' who, like creditors (and unlike partners), had transferred ownership of their property to this separate legal entity and become responsibility- and liability-

[73] See Seymour Thompson, *Treatise on the Liability of Stockholders in Corporations* (Thomas & Co., 1879).
[74] See Acheson, Turner & Ye, 'The character and denomination of shares in the Victorian equity market', *Economic History Review*, 65, 3 (2012) pp 862- 886.
[75] See Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility', (2010) 34 *Cambridge Journal of Economics,* 837.
[76] See Arthur Scratchley, *On Average Investment Trusts* (London, Shaw and Sons,1875).
[77] Robert Flannigan, 'Shareholder Fiduciary Accountability' [2014] JBL, 1 at 6.

free. The Janus-faced nature of shareholding is vividly reflected in the difficulties company lawyers have trying to describe the legal nature of the share. One of the most oft-cited definitions, that provided by Farwell J in *Borland's Trustee v Steel Bros & Co Ltd,* seeks to encompass both the proprietary and contractual dimensions of the share. According to Farwell, the share is 'the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* … [It] is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount'.[78] Others have followed Farwell in foregrounding the contractual dimensions of shares while noting their proprietary dimension. Thus, for Robert Pennington shares `are simply bundles of contractual and statutory rights which the shareholder has against the company'. Pennington is aware that this seems to suggest that the relationship between shareholders and companies 'is that of creditor and debtor', but assures us that this is `quite wrong'. Being transferable, he says, the contractual rights which make up the share are of `a peculiar nature', and this has led to them being called property. Slightly discomforted by this, but not wanting to dismiss it out of hand, Pennington says this view is `innocuous enough, provided that it is remembered that they do not comprise any proprietary interest in the company's assets'. Pennington concludes that shares are 'a species of intangible movable property which comprise a collection of rights and obligations relating to an interest in a company of an economic and proprietary character, but not constituting a debt'. This covers all the bases but is about as clear as mud.[79]

Others, struggling with the same problem, have placed much greater emphasis on the proprietary qualities of shares. Gower, for example, thought Farwell's definition laid 'disproportionate stress on the contractual nature of the shareholder's rights' and sought instead to highlight Farwell's claim that the shareholder has an 'interest *in* the company', arguing that this underlined the 'insider' status of shareholders by constituting them 'members of the company'. Gower recognised that it was 'tempting to equate shares with rights under a contract', but insisted that they were 'something far more than mere contractual right[s] *in personam*'. It might not be possible to classify 'the rights which a share confers on its holder … as "proprietary" in the usual sense', but it was clear that `the share itself is an object of *dominion*, i.e. of rights *in rem* and not so to regard it would be barren and academic in the extreme'. For all practical purposes shares are recognised in law, as well as in fact, `as objects of property which are bought, sold, mortgaged and

[78] [1901] 1 Ch 279 at 288.
[79] Robert Pennington, *Company Law* (London, Butterworths, 7th ed., 1995), 56-57, 135-36; Robert Pennington, `Can Shares in Companies be Defined?' (1989) 10 *Company Lawyer* 144.

bequeathed.' Gower knew, however, that this mixing of rights *in rem* with rights *in personam* didn't make it easy to specify the precise nature and basis of this proprietary interest: 'The theory', Gower argued, '*seems to be* that the contract constituted by the articles of association defines the nature of the rights, which, however, are not purely personal rights but instead confer *some sort of* proprietary interest in the company though not in its property'.[80] Lord Miller recently endorsed this view in *HM Commissioners of Inland Revenue v Laird Group plc*. 'It is customary', he argued, 'to describe [a share] as "bundle of rights and liabilities" and this is probably the *nearest one can get to* its character, provided that it is appreciated that it is more than a bundle of contractual rights .. These rights … are not purely personal rights. They confer proprietary rights in the company though not in its property'.[81]

Gower was nevertheless well aware that it isn't easy to distinguish shareholders from debenture holders.[82] He conceded that the rigid *theoretical* separation between shareholders (with rights in the company as well as against it) and debenture-holders (with rights against the company but never in the company itself) collapsed in contemporary `economic reality'.[83] Sealy agrees, arguing that the 'theoretical differences between being a creditor of the company and being a member are considerable from a legal point of view, but (at least in the case of a solvent and prosperous company) the practical consequences for investors, apart sometimes from tax considerations, are very similar .... an investment in debentures or debenture stock is very similar to an investment in shares: both are securities in the corporate sector of the economy offering different kinds of risk and different kinds of return'.[84]

The share's mixing of insider and outsider rights, of ownership rights with creditors privileges, lies at the heart of contemporary corporate irresponsibility, for it gives shareholders residual control rights which enable them to ensure that companies are run to maximise their financial returns, at the same time as it offers them exemption from liability and responsibility. They are able to enjoy revenue rights without actually doing anything and able to insist (as 'owners') on the maximisation of their dividends without having to worry about how they are generated, safe in the knowledge that, like creditors, they aren't legally responsible for corporate misbehaviour and only their initial investments are at risk. As Harry Glasbeek says, corporate shareholders 'have little financial incentive to ensure that the managers involved behave legally,

[80] Gower (4th ed 1979), 299-301, 400.
[81] UKHL 54 at para 35
[82] Legally, Robert Flannigan suggests, the debt-equity distinction is rooted in liability questions: 'The Debt-Equity Distinction' (2011) 26 *BFLR*, 451 at 454; 'Shareholder Fiduciary Accountability' [2014] *JBL*, 1 at 10.
[83] Gower, 299-301, 321.
[84] L.S. Sealy, *Cases and Materials in Company Law* (London: Butterworths, 6th ed 1996), 420-421.

ethically, or decently . . . [because] in law, [they] are personally untouchable. . .' [85] This was, of course, only too evident in the Railtrack cases and, more recently, in the financial crisis.

FUELLING THE OWNERSHIP MYTH

Fuelled partly by advancing technology and rising capital needs but mainly by mergers, the late nineteenth and early twentieth century saw a rapid growth in the number of JSCs. The 'Great Depression' of 1873-96 brought chronic overproduction, severe price cutting and falling profits and saw more and more firms amalgamate in an attempt to eliminate competition and fix output and prices. The 'rise of the corporate economy' saw major changes in the nature of capitalist social property relations in which ownership of intangible financial property became ever more central and important.[86] It also saw more and more small firms not organised on a joint-stock basis adopt the corporate legal form to try to get limited liability. Many doubted the legitimacy and legality of this practice – the Companies Acts 1844–62 were clearly not intended to be used in this way – but it was validated by the House of Lords in *Salomon v. Salomon & Co Ltd*..[87] The radical legal separation of companies and shareholders, developed in the specific context of JSCs populated by large numbers of passive *rentier* shareholders, was thus extended to 'private companies' that were, in reality, often nothing more than incorporated individual proprietorships and partnerships. It was not long before most significant business enterprises were incorporating, whatever their economic natures.[88]

Equally importantly, when corporate groups began to emerge for the first time, the *Salomon* principle was formalistically extended to them. Coupled with *de facto* no-liability shareholding, this has 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 connected companies which are regarded for most legal purposes as separate entities - even if, as is usually the case, the organisation as a whole is co-ordinated by a single management team. The resulting structures are complex, involving subsidiaries, cross-holdings, joint-ventures and the like, but it is usually the same mechanism that is at work: direct or indirect control through shareholding. Moreover, because these enterprises can choose where to locate different parts of their activities, states compete to create favourable

[85] Glasbeek, *Wealth by Stealth* (Toronto, Between the Lines, 2002), 129.
[86] See Leslie Hannah, *Rise of the Corporate Economy*
[87] *Salomon v Salomon & Co Ltd* [1897] AC 22.
[88] See Paddy Ireland 'The rise of the limited liability company' (1984) 12 *International Journal of the Sociology of Law* 239.

legal and regulatory environments to attract investment, trading their sovereignty in the legal marketplace. This reaches its apotheosis with tax laws.

The rise of these private and subsidiary companies fuelled the myth of shareholder corporate 'ownership'. In large public companies populated by detached *rentiers* there is little or no legal or *de facto* basis for the idea that they are 'owned' by their shareholders, notwithstanding shareholder retention of residual control rights. With private companies and subsidiaries, however, the 'ownership' claim often 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 in everyday common sense of the idea that shareholders 'own' corporations.

THE `CORPORATE REVOLUTION': TOWARDS SOCIALIZATION OR FINANCIALIZATION?

The peculiarities of these emerging institutional forms did not pass unnoticed. They sparked rather different visions of the future, however, with some seeing the corporate revolution as foreshadowing the 'socialisation' of production and others its 'financialization'. Things could have gone either direction and at different times did. Historically, the trajectory of corporate governance has tended to turn on the ability of *rentier* shareholders to utilise their residual proprietary rights to shape the behaviour of corporate executives. Broadly speaking, when they are able to assert themselves over executives, governance tends to be 'financialized; when they aren't able to do so, 'socialisation' become possible. Contrary to the claims of contemporary advocates of 'evolution to efficiency'[89], the directions taken have been as much the product of institutional changes and political struggles as of economic or technological imperatives. Indeed, the twentieth century saw frequent challenges to the prevailing arrangements, with the peculiar status of the *rentier* shareholder and their dubious claims to corporate 'ownership' at their heart.

Some saw the rise of the JSC as an essentially progressive development, a step on the road to the socialisation of production. Echoing Smith, for example, Marx noted that JSC shareholders had been transformed into 'mere money capitalists', receiving dividends in the form of interest as 'mere compensation for owning capital'. Sensing the increasingly creditor-like nature of shareholders – he analysed the JSC amidst a discussion of the development of the credit system - Marx argued that the JSC represented 'the abolition of capital as private property within the framework of capitalist production itself' and 'private production without the control of private

[89] 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

property'. JSCs were 'social undertakings as distinct from private undertakings' and presaged the emergence of more socialised organisational forms in which capital would be 'reconverted' into 'outright social property', 'the property of producers'. Marx also observed, however, that with the development of the credit system, money capital was itself assuming an increasingly 'social character' as it became concentrated in (and loaned out by) powerful banks representing 'all lenders of money' and acting as 'the general managers of money capital'. As a result, 'a new financial aristocracy' was emerging, as were new 'variet[ies] of parasites'.[90] By the early twentieth century, by which time large swathes of American and German industry had come to be dominated by banks and financiers - with banks leading the way in Germany[91] and financiers like J P Morgan leading the way in the US - more and more commentators were echoing this. Financial domination, argued Thorstein Veblen, had seen '*industry'*, the technical processes concerned with the efficient production of useful goods, fall under the control of '*business'*[92] which was more concerned with making money than things, managing industrial processes primarily to secure pecuniary gains for the owners of financial property rather than to increase productive efficiency and output.[93] Indeed, according to Veblen the financialization of corporate governance often led to the 'conscientious sabotage' of industry, for larger profits were often to be had from obstructing production than from enhancing it.[94] 'Business' had become a parasitic growth on industry, with investment bankers and corporate financiers inhibiting economic development.[95]

THE CRITIQUE OF THE RENTIER: SHAREHOLDERS AS CREDITORS

By the 1920s, however, share ownership in places such as the US was spreading and becoming increasingly dispersed. At the same time within investment banks the direct personal control exercised by financiers like Morgan was being replaced by more impersonal, bureaucratic routines. With this, the focus of Veblen's assault shifted. He continued to rail against 'financialization' - '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'[96] - but he now also highlighted the resemblance of shareholders to creditors and questioned their residual proprietary rights. The new 'absentee owners' of industry, he argued, had delegated most of the traditional powers of ownership to managers, retaining only certain 'rights and immunities'.

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[90] Karl Marx, *Capital, Vol III* (Lawrence & Wishart, 1973), chaps 23, 25, 27.
[91] Rudolf Hilferding, *Finance Capital* (1909, Routledge ed., 2007).
[92] (what we would now call 'finance')
[93] Thorstein Veblen, *Theory of Business Enterprise* (Scribner, 1904), 77–8, 80.
[94] See Joseph Dorfman, *Thorstein Veblen and his America* (New York, Viking, 1934) 227-8.
[95] Thorsten Veblen, *The Vested Interests and the Common Man* (New York: Huebsch, 1919), 97–8, 105
[96] Veblen, *Absentee Ownership*, 214.

‘Ownership’ in the new corporate order had been ‘depersonalised’ and ‘no longer carrie[d] its earlier duties and responsibilities’. Corporate shareholders 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’. Moreover, the financial interests of these parasitic owners of rights to receive a ‘free income’ drawn from ‘the… product of the underlying community’ was obstructing productive activity and conspiring against the full use of the ‘industrial arts’.[97]

Others echoed these sentiments. In Britain the assault on the *rentier* and financialized governance was led by the Labour Party intellectuals, R H Tawney and Harold Laski. In *The Acquisitive Society* Tawney castigated the pernicious nature of intangible financial property forms like the share which divorced gain from service, and reward from work.[98] Unlike rights to tangible personal possessions which were ‘indispensable to a life of decency and comfort’ and encouraged 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 officially re-classified as creditors and their control rights withdrawn, and that management be turned into a ‘profession’ akin to medicine and law.[99] Harold Laski reiterated these sentiments in *Grammar of Politics,* recommending an ‘alteration of the character of the owner of wealth into a person to whom a fixed dividend is paid’. This would enable production to be ‘infused … with the sense of responsibility it now lacks’.[100] Like Marx and Veblen, Tawney and Laski implicitly recognised the ways in which the rise of the JSC share had blurred the lines between debt and property, between credit and capital, and between rights *in rem* and rights *in personam*. To continue to see shareholders as ‘owners’, they suggested, was not only legally and morally unjustifiable but likely to lead to productively and socially undesirable, financialized forms of management. They recommended re-constituting shareholders as ‘outsiders’ who were ‘owed’ but did not ‘own’.

Similar ideas figured in the celebrated Berle-Dodd debate and in the closing chapters of Berle and Means’ *The Modern Corporation and Private Property*.[101] In his debate with Berle, Dodd argued that the great majority of shareholders were *rentiers* with little resemblance to traditional

[97] Veblen, *Vested Interests*, 163-4, 97–8, 105.
[98] R H Tawney,*The Acquisitive Society* (1920)
[99] For an earlier expression of this idea, see Louis Brandeis, ‘Business – A profession’ *System* (October 1912).
[100] H Laski, *A Grammar of Politics* (Allen & Unwin, 1925) pp. 201–9.
[101] A Berle and G Means, *The Modern Corporation and Private Property* (New York, Macmillan, 1932).

owners and that corporations increasingly resembled *social* institutions.[102] On this basis, he suggested, directors should be required to take account of the interests not only of shareholders but of employees, consumers, creditors and society as a whole - a radical but perfectly defensible view if you took seriously the existence of the corporation as a separate legal person. Despite his differences with Dodd, which were as much pragmatic as principled, Berle also recognised that the character of the shareholder and the corporation had radically changed. The final section of *The Modern Corporation* drew on Veblen and others to argue that the rise of the modern corporation had 'dissolved the [private] property atom' in which possession and control were united.[103] There were now 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. As 'mere recipients of the wages of capital', modern corporate shareholders were now 'not dissimilar in kind from bondholders or lenders of money'. It was no longer appropriate to view them as 'owners' of the corporation. The 'corporate revolution' had, therefore, raised crucial 'legal, economic and social questions', the 'greatest' of which was 'in whose interests should the great quasi-public corporations …be operated?'[104]

Berle and Means offered three possible answers. The first entailed sticking with the traditional logic of property and insisting that corporations be run in the shareholder interest 'despite the fact that [they] ha[d] ceased to have power over or accept responsibility for the active property'. The second entailed giving managers 'free rein' to use their powers, though this was thought likely to encourage the emergence of a plundering 'corporate oligarchy'. The third involved replacing the idea of the corporation as a private enterprise and object of property with a 'new concept of the corporation' as a *social* institution. Berle and Means clearly sympathised with this conception, arguing that 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 property rights'. The community was 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.[105] However, we didn't yet have the institutional know-how to impose this broader 'scheme of responsibilities' on managers, rendering shareholder primacy, at least temporarily, the only available way of making them accountable.[106]

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[102] See E Merrick Dodd, "For whom are corporate managers trustees?" (1932) 45 *Harvard Law Review* 1147.
[103] See D.M.Wright, 'The Modern Corporation – Twenty Years After' (1951-52) 19 *University of Chicago Law Review* 662.
[104] Berle & Means, Book IV.
[105] Berle and Means, Book IV, chapter IV.
[106] Berle, 'For Whom Corporate Managers are Trustees'(1932), 45 *Harvard Law Review*,1365.

MANAGERIALISM: TOWARDS SOCIALIZATION?

In the US, Berle and commentators like JK Galbraith continued to voice ideas of this sort well into the 1960s. In the UK similar ideas animated the work of people such as George Goyder and Bill Wedderburn, both of whom argued that shareholders should be formally re-conceptualised as creditors.[107] They also found indirect expression in 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 them. By this time, with shareholders dispersed and Bretton Woods in place, finance seemed to have been tamed and shareholders disempowered. Managers not only seemed to be in charge but to be subject to the countervailing forces of the labour movement and 'public opinion'. The 'managerial revolution' had, many believed, ushered in a new era of 'managerial capitalism', rendering radical, politically contentious changes to corporate rights structures unnecessary.

In the UK, where JSC shareholding first became widely dispersed[108], the idea that the 'socialisation' of corporations could be achieved without formally diminishing shareholder rights can be traced back at least to the mid-1920s and Keynes' claim 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 suggested, 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 and shareholders have to satisfy themselves with 'conventionally adequate dividends'. It was on this basis that 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'. In his view, 'the battle… against unlimited private profit [was] being won in detail hour by hour' from within these large enterprises.[109] Ten years later, in *The General Theory*, having observed that interest rewarded 'no genuine sacrifice' and predicted 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, warning that investors (and especially 'professional

[107] George Goyder, *The Responsible Company* (Basil Blackwell, 1961). K W Wedderburn, *Company Law Reform* (Fabian Society, 1965)

[108] See Leslie Hannah, 'The Divorce of Ownership from Control from 1900 onwards: Recalibrating Imagined Global Trends' 49 *Business History* (2007), 404. .

[109] JM Keynes, *The End of Laissez-Faire* (Hogarth Press, 1926)).

investors') tended to seek short-term gain by outguessing the market. Their growing power was causing 'speculation' to dominate 'enterprise', damaging productive investment and acting as a source of economic instability. He concluded that because there was 'no clear evidence from experience that the investment policy which is socially advantageous coincides with that which is most profitable'. The state, which was better placed to take a longer view and take account of the general social interest, should therefore 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.[110]

The idea that the corporation was being socialised without changes to corporate rights structures gathered strength after the Second World War. The leading Labour Party intellectual Anthony Crosland, for example, insisted that passive and dispersed shareholders were acting more like creditors than owners and had neither the desire nor the ability to exercise their control rights. This, together with the rise of monopolies and oligopolies which had diminished product market competition, had enabled professional managers to create more socialised corporations and a more socialised 'managerialist capitalism'.[111] There was no need for outright nationalisation or for radical legal reform. Even proposals for industrial democracy and worker representation on the boards of large corporations were received half-heartedly by the labour movement. Co-determination, the leading labour lawyer Otto Kahn-Freund argued, was 'alien to the TU movement' and a denial of the fundamental conflict of interest between capital and labour.[112] Disagreeing, others continued to press not only for industrial democracy but for the formal relegation of shareholders to the status of creditors. Indeed, this suggestion was not confined to the left: a number of mainstream commentators also argued for alterations to corporate rights structures along these lines 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 believed that socialisation did not require the diminution of shareholder rights might be right. A mixture of financial repression, shareholder dispersal, countervailing trade union power, public opinion, and the rise of oligopolistic markets seemed to have relaxed the shareholder and market pressures confronting managers. It is important not to exaggerate this, but equally important not to ignore or understate it. The claim that we were entering an era of more 'socially responsible corporations', with manager-

[110] JM Keynes, *The General Theory of Employment, Interest and Money* (Macmillan, 1936), chs 12 and 24.
[111] CAR Crosland, *The Future of Socialism* (London: Jonathan Cape 1956); and *The Conservative Enemy* (London: Cape, 1962).
[112] O Kahn-Freund, 'Industrial democracy' (1977) 6 *Industrial Law Journal* 65.

technocrats at their heart, which became commonplace in the 1950s and 60s, was not without substance.[113] Corporations were increasingly treated as though they really were separate from their shareholders – and not just for liability purposes. Nor is it insignificant that the 'managerialist' era overlapped the fifty or so year period identified by Thomas Piketty as one in which wealth inequalities in advanced capitalist countries narrowed.

THE NEOLIBERAL REVOLUTION: FINANCIAL POWER AND THE RETURN OF THE SHAREHOLDER-OWNER

But it didn't last. Beginning in the 1970s, the landscape began to change once more. Firstly, although the legal rights-obligations structures of corporations and the key characteristics of the corporate legal form changed relatively little, the bundle of rights possessed by shareholders was enhanced by such things as the relaxation of the rules regulating the free movement of capital (the demise of Bretton Woods), by alterations to the rules on take-overs, and by the rise of the 'New Constitutionalism' and other mechanisms of investor protection. Secondly, share ownership was transformed by the re-concentration of financial property ownership in institutions and the development within those institutions of competition between portfolio managers subject to regular market-based performance evaluation. The result is that today shareholders, acting through their institutional representatives, are much better placed to exercise (or to threaten to exercise) their residual proprietary rights and to re-assert their power in and over corporations. This has propelled us back towards the kind of finance-capital-dominated world described by Veblen a century ago, although shareholder power is now generally exercised not *directly* in individual companies (although this kind of activism has increased) but *indirectly* on the corporate sector as a whole through financial markets. This has rendered it ubiquitous. Permanently under threat, managers have been pressed into trying to 'maximise shareholder value'. 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'. The changes in managerial behaviour have not, of course, only been a matter of externally imposed imperatives. Modern forms of executive remuneration, designed to align the interests of managers and shareholders, have made the ruthless pursuit of 'shareholder value' very lucrative. Commonly mistaken as evidence of shareholder 'ownership', this growth in shareholder power has underlain the emergence of corporate schizophrenia on an unprecedented scale.

[113] See J K Galbraith, *The New Industrial State* (Hamish Hamilton, 1967).

These developments have, of course, radically altered the balance of power between capital and labour, and generated markedly less socialised corporations, contributing to the increases in wealth inequality documented by Piketty and others. It is striking, however, that those defending the pursuit of 'shareholder value' now tend to rely less on assertions of shareholder corporate 'ownership', although as the Railtrack cases demonstrate their common sense appeal remains strong, and more on efficiency-based, consequentialist claims. Shareholder primacy, it is argued, benefits society as a whole by ensuring that corporations operate efficiently and maximise aggregate social wealth. This is particularly evident in the nexus-of-contracts theories of the corporation which rose to prominence in the 1970s and 80s. Despite their recognition that shareholders don't own corporations, nexus-of-contracts theories in many ways represent the academic apotheosis of corporate schizophrenia, for in some contexts they are dependent on the reality of the separate corporate person, while in other contexts they conceptualise the corporation out of existence. Thus Easterbrook and Fischel begin their well-known exposition of contractual theory by curtly dismissing the existence of the corporation as a mere 'legal fiction', a matter of 'convenience rather than reality'. This enables them to reconnect shareholders not only to the corporate assets, but to the directors, who thereby become agents not of the (non-existent) corporation but of the shareholders. This reduces corporate governance to a simple 'agency problem': how do you get agent-directors to act in the interests of their shareholder-principals? However, when defending limited liability - which they describe as 'perhaps *the* distinguishing feature of corporate law'- Easterbrook and Fischel have hastily to resurrect the corporate entity. 'Corporations', they tell us, 'do not have limited liability; they must pay all of their debts, just as anyone else must'.[114] The reality of the corporation's separate personhood is emphasized in one context, but dismissed in another.

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, as the Railtrack cases show, in common sense, but in the academic literature. Indeed, ownership claims loom large in 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

[114] Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard UP, 1991)

spread: shareholding is no longer the preserve of the very wealthy but has trickled down to ordinary people. On this basis it is often argued that shareholding has been 'democratised'. The implication is that shareholder primacy not only *in*directly benefits us all by ensuring productive efficiency 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.[115] Piketty shows, for example, that in the US since 1970 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.[116] Piketty also traces the dramatic increase in income inequality, observing that it has been driven in part by the growth of the 'supersalaries' going to corporate executives and the 'supermanagers' of 'other people's money'.[117] This has resulted in the emergence of 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.[118] Indeed, Olivier Weinstein has noted the detachment from corporations not only of shareholders but of the 'new type of CEO', who 'no longer identif[ies] with his company' but 'much more with the class to which he belongs and for which financial results are the "normal" preoccupation'.[119] The identity of the 'new aristocracy of finance' has, then, changed since Marx's time. It is composed not of the small shareholders of the RPSAG but the elite owners of financial property and the new class of executives and money managers. These have been the real beneficiaries of the vigorous reassertion of shareholder primacy and intensification of corporate schizophrenia. At no time was this more evident 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'.

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[115] Paddy Ireland, 'Shareholder primacy and the distribution of wealth' (2005) 68 *MLR* 49.

[116] Thomas Piketty, *Capital in the twenty first century* (Belknapp, Harvard UP, 2014), 346-350. If anything, he may have *understated* the levels of wealth and financial property concentration in the US: See Emmanuel Saez & Gabriel Zucman, *The Distribution of US Wealth, Capital Income and Returns since 1913* (March, 2013): http://gabriel-zucman.eu/files/SaezZucman2014Slides.pdf.

[117] Piketty, 315-335

[118] 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.

[119] Olivier Weinstein, 'The shareholder value corporation: Between mythology and reality', 3 *Accounting, Economic and Law* (2013) 43 at 57

CONCLUSION: RETHINKING CORPORATE RIGHTS-OBLIGATIONS STRUCTURES

Historically, when *rentier* shareholders have been able to use their residual ownership rights to shape executive behaviour, corporate governance has tended to be 'financialized'. When they have been unable to do so (and have been reduced to the *de facto* status of creditors) governance has tended to be less shareholder-oriented and more sensitive to the interests of other stakeholders. We should not be surprised, therefore, that the recent reassertion by *rentiers* (through their institutional representatives) of their residual proprietary rights has underpinned a re-financialization of corporate governance, which has not only created problems of distributional justice but encouraged financial manipulation and risk-taking, and impeded productive activity. Since the 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 price contributed to the meltdown. As a result, debates about corporate governance, the nature and purpose of the corporation, and the constitution of corporate rights-obligations structures have begun to re-surface.

These debates still lack the radical edge of those of the 1920s and 30s, but a number of neoliberal corporate governance orthodoxies are now being questioned. Attacks on the idea of shareholder value, for example, encapsulated academically by Lynn Stout's *The Shareholder Value Myth*[120], extend to the business world, exemplified by Jack Welch's assertion that it was 'the dumbest idea in the world'.[121] The 'mess' we have made of corporate governance, the *Financial Times*' Martin Wolf argues, 'has a name: it is shareholder value maximisation'.[122] These critiques do not, however, generally entail a rejection of shareholder primacy. On the contrary, their goal is usually to get managers to pursue shareholder value in a more 'enlightened' manner and to focus on long- rather than short-term financial returns. Many of 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 persuade managers to 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 demonstrated their 'ownership' credentials by holding their shares for a minimum period.[123]

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[120] Stout, *Shareholder Value Myth*
[121] Welch is the former CEO of GE and was previously seen as one of shareholder value's leading proponents.
[122] *Financial Times*, 20/8/14
[123] Colin Mayer, *Firm Commitment* (OUP, 2013), 6, 246-8. This underpins his proposed solution: 'trust companies'.

What is missing from many of these critiques is recognition that the great majority of corporate shareholding is inherently passive, 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 industrial capitalist 'owners' is rather like trying to get cats to bark. Indeed, as Lorraine Talbot has pointed out, reforms aimed at trying to empower *rentier* shareholders and make them more active, whether in financial markets or in the corporations themselves, are more likely to exacerbate the problem than to solve it.[124] Although proposals such as Mayer's for time-dependent voting rights are, then, steps in the right direction and highlight the need to make changes to corporate rights-obligation structures, they don't address the underlying problem: the Janus-faced, hybrid nature of corporate shareholding and the schizophrenic treatment of the corporation as 'completely separate' from its shareholders for some purposes and as an object of property 'owned' by them for others. In an institutional context in which money capital is increasingly concentrated in the hands of a small elite and managed by powerful financial institutions, this is a toxic mix. By combining no-liability *rentier* shareholding with control rights, by mixing 'insider' with 'outsider' rights, our corporate rights-obligations structures have become a recipe not only for short-termist financialized governance, but for managerial 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 critically re-examine the corporate legal form. The Railtrack cases confirm that the 'contractual right [of shareholders] to receive profit on a residual basis … along with rights to elect and remove directors ... suggest[s] to some that shareholders remain the "real owners" of the business and ought therefore to enjoy that status *whenever it suits their purposes'*. They also confirm that this involves 'a direct rejection of the entity status of the corporation' upon which shareholders rely in other (liability) contexts.[125] This underlines the urgent need to reconsider the Janus-faced, hybrid nature of corporate shareholding and, in particular, the coupling of control rights with *de facto* no-liability. Radical reform of corporate rights-obligations structures will, of course, require us to dispel the myth of shareholder ownership and the ideological and intellectual barriers to this are considerable. Thus although Mayer emphasises that companies are entities with a separate legal existence of their own, he still refers to corporate

[124] Lorraine Talbot, 'Why Shareholders Shouldn't Vote, 76 *MLR* (2013), 791.
[125] Flannigan, *JBL*, 10 (emphasis added).

shareholders as 'owners'.[126] And when Lynn Stout discussed her book on the radio, she reports that the interviewer 'simply couldn't get his mind around [her] claim that shareholders aren't really "owners"'.[127]

The political obstacles to reform are, of course, even greater. The enormous power and influence of the new financial oligarchy means that even modest reforms will fiercely resisted. But there are some promising signs: the characterisation and treatment of shareholders as 'owners' is once again actively being questioned, and worker participation is beginning to re-emerge as a live issue.[128] In this more open intellectual environment, the historical development of the corporate legal form and some of the old debates are worth revisiting, for they not only force us to question the hybrid status of corporate shareholders – 'owed' or 'owning'?[129] – 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'.[130] The choice is not simply between private property and collective property.[131] 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. We might then tap the 'yet unrealized potential of the corporation'.[132]

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[126] Mayer, 22, 242.
[127] http://www.thedeal.com/thedealeconomy/lynn-stouts-the-shareholder-value-myth.php
[128] http://www.centreforum.org/index.php/mainpublications/292-employee-empowerment; http://policy.greenparty.org.uk/wr.html
[129] https://themoderncorporation.wordpress.com/company-law-memo/
https://themoderncorporation.wordpress.com/economics-and-msv/
[130] 255
[131] See Roberto Unger, *The Left Alternative* (Verso, 2009).
[132] Mayer, 241