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Its Legal Structure and Economic Functions**

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October 2001

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**THE NATURE OF THE BUSINESS CORPORATION**  
**-- ITS LEGAL STRUCTURE AND ECONOMIC FUNCTIONS\***

by

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October 2001

**<Abstract>**

**There is a fundamental difference in legal structure between the classical firm and the business corporation. While the former consists of a single ownership relation between owners and assets, the latter consists of *two* overlapping ownership relations – one between shareholders and the corporation and the other between the corporation and corporate assets. The legal relation between shareholders and assets is indirect and only through the intermediary of the corporation that legally performs the dual role of a thing and a person. The main purpose of this paper is to show how such two-tier ownership structure of the business corporation has fundamental effects on the form of its organization, the ways and means of its governance, and the efficiency of its performances.**

**JEL Classification: D23, G30, K00, K22, L20**

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0. An Introduction: The Legal Structure of the Business Corporation.

Suppose you are an owner of a mom & pop grocery shop around the corner. Whenever you feel hungry, you can pick up an apple on the shelf and eat it right away. That apple is your property, and the only thing you have to worry about is the wrath of your spouse -- your co-owner. Suppose next you are a shareholder of a big supermarket chain. If you feel hungry, can you go into one of its stores and grab an apple from the shelf, claiming that that apple is your property? The answer is a "No." There is indeed a real possibility that you will be arrested as a thief. To be sure, if you are prudent enough to carry a share-certificate with you, the supermarket manager may let you off so as not to tarnish the public image of the chain as a shareholder-friendly corporation. But if you are known to be an activist shareholder fighting against the chain's inhuman treatment of animals in its slaughterhouse, the chance is high that you will be put into jail.

Why? It is because corporate shareholders are not the owners of corporate assets. Who is, then, the owner of the corporate assets? The answer is, of course, the corporation as a 'legal person.' The law treats a corporation as a subject of property right capable of owning real property, entering into contracts, and suing and being sued, all in its own name separate and distinct from its overlooking shareholders.<sup>1</sup> After all, the corporate assets are literally the corporation's assets. It is the corporation as a legal person that is the legal owner of the corporate assets. Then, what are the corporate shareholders? The answer is, of course, they are the owners of the corporation. Literally as well as legally, corporate shareholders are the holders of a corporate share -- of a bundle of the financial rights and participatory rights in the corporation that can be bought and sold freely as an object of property right. Indeed, to hold a corporate share is to own a fraction of the corporation as a thing, that is, as an asset separate and distinct from the underlying corporate assets. It is the corporation as a 'legal thing' that the corporate shareholders are the owners of.

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<sup>1</sup> For instance, sec. 3.02 of the American Bar Association's *Revised Model Business Corporation Act (RMBCA)* states that 'unless its articles of incorporation provide otherwise, every corporation ... has the same power as an individual to do things necessary or convenient to carry out its business and affairs, including without limitation power: (1) to sue and be sued, complain and defend in its corporate name;...(4) to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located; (5) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;....'

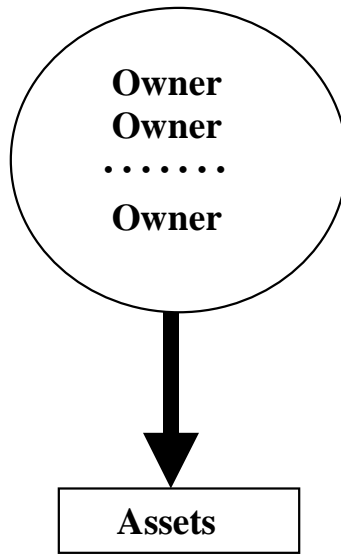


Fig. 1: Single Ownership Structure of a Classical Firm.

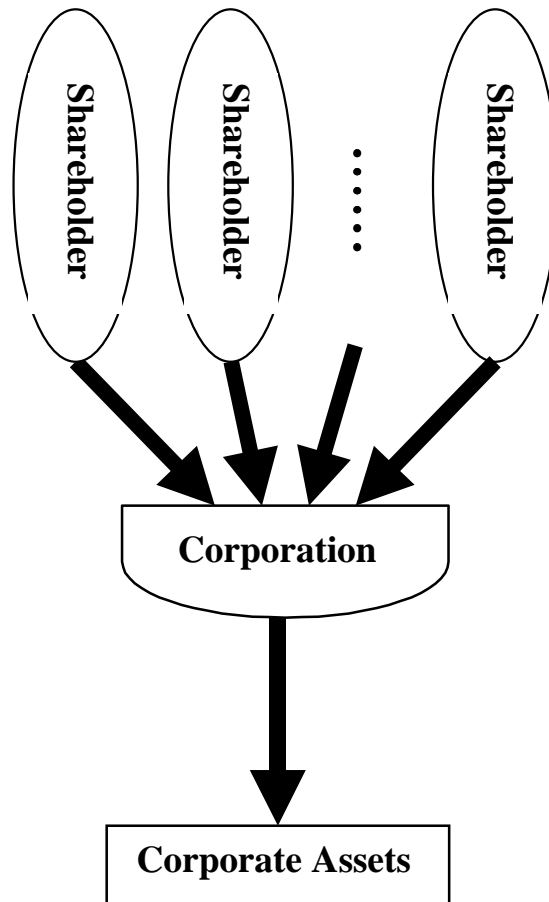


Fig. 2: Two-Tier Ownership Structure of a Business Corporation.

A classical firm like our small grocery shop has a very simple ownership structure. You and your spouse (your co-owner) jointly own apples and other grocery goods on the shelf. As is shown in Fig. 1, a classical firm consists of a single ownership relation between a group of owners (or an owner, in the case of a sole-proprietorship) and a collection of assets. In stark contrast, once a firm is incorporated and becomes a business corporation, its ownership structure undergoes a fundamental change. As is depicted in Fig.2, a business corporation like our supermarket chain now consists of not one but two ownership relations. The corporate shareholders own the corporation as a legal thing and the corporation as a legal person in turn owns corporate assets. You, as a shareholder, can have a legal relation with respect to apples and other assets of the supermarket chain only indirectly through the intermediary of the corporation both as a person and a thing.

There is thus a fundamental difference in legal structure between the firm that is incorporated and that is not. And yet, there is little trace among economists – and even among legal scholars – of taking heed to this difference in their analysis of business corporations. This is all the more surprising as there have been a tremendous upsurge of the interest in the so-called “corporate” governance in the last two decades.<sup>2</sup> In fact, most of the recent works on corporate governance do not even bother to make a distinction between classical firms and business corporations. They simply discuss the issues of governing an unincorporated firm and those of governing an incorporated firm as if they were one and the same. At best, these works regard the latter as mere extensions of the former with some complications arising from the dispersal of ownership among small shareholders with limited liability. To be sure, if the firm’s incorporation would not change any of its underlying economic activities, such a conceptual looseness would not cause any serious problem. The corporation is, however, not “just an empty legal shell.” Indeed, the main purpose of this paper is to show how the legal institution of corporation has fundamentally changed the organizational structure of the firm, the ways and means of its governance, and its overall efficiency.

The rest of the paper is organized as follows. Section 1 reviews the textbook account of the *raison d’être* of the corporation, and section 2 deduces the business corporation’s two-tier ownership structure we saw above from its basic characterization. For many centuries there has been a heated controversy between corporate nominalism and corporate realism on the ‘essence’ of the corporation. The former views a corporation as a mere contractual association of shareholders and the latter as a full-fledged organizational

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<sup>2</sup> See Schleifer and Vishny [1997], Zingales [1998], and Tirole [2001] for recent surveys on the theory of corporate governance.

entity. Sections 3 and 4 are an attempt to ‘end’ this controversy once and for all by demonstrating that the two-tier ownership structure of the corporation is capable of generating two seemingly contradictory corporate forms -- one approximating ‘corporate nominalism’ and the other ‘corporate realism.’ These two sections also show that the legal institution of corporation is able to support a wide variety of organizational structures, ranging from a closely-held private corporation with active shareholders to a large managerial corporation with passive shareholders, from a pyramidal system of vertically connected corporations to a horizontal network of mutually holding corporations. As section 5 suggests, what the paper establishes is a sort of the indeterminacy principle in law – that the corporate law is unable to determine the nature of the corporation even within its own system but merely provides each business enterprise with a legal menu of corporate forms. Section 6 introduces corporate managers, i. e. directors and officers, into our picture of the business corporation. Indeed, each corporation has a team of managers not by a contractual arrangement with shareholders but by the requirement of law. This implies that the legal status of corporate managers is not the agents of shareholders but the fiduciaries of the corporation and that the problems of governing business corporations cannot be reduced to the problems of controlling agency relations. Section 7 then maintains that every corporate governance system should have the managers’ fiduciary duties to the corporation at its core and that the rules stipulating these duties should be essentially mandatory. Section 8 turns to the characterization of business corporations as economic organizations. In organization theory there are two competing views of organizations – one as collectivities rationally constructed to attain exogenously given purposes and the other as collectivities autonomously striving to reproduce themselves as going-concerns. Not unexpectedly, our ‘nominalistic’/’realistic’ opposition of corporate forms corresponds more or less to these competing views of organizations. Furthermore, the paper relates the autonomous character of ‘realistic’ corporations to the accumulation of human assets that are specific to each organization, and argues that it is both rational and legitimate to suppose the ‘realistic’ corporation having a ‘purpose’ other than the maximization of shareholders’ returns. Section 9 then compares the economic efficiency of classical firms and ‘nominalistic’ corporations on the one hand and ‘realistic’ corporations on the other. It suggests that the separation of ownership and control that has been regarded as “the central weakness of the public corporation” in the traditional corporate governance literature may also contribute to its economic efficiency by mitigating the hold-up problems and encouraging managers and workers to create, maintain, and expand organization-specific human assets even if they have little or no ownership

stakes. Section 10 concludes the paper by discussing the future of the corporate system, albeit very briefly.

## 1. Persons, Things and Corporations

In the basic model of the market economy, expounded in any introductory textbook of economics, the relationship between persons and things is simple and clear. Persons are subjects of property right, and things are objects of property right. Persons own things, and things are owned by persons. There is an absolute divide between persons and things. If persons own persons, we are back to the slave economy of the ancient past. If things own persons, we are perhaps trapped in the world of a science-fiction.

Classical firms are founded on this simple relationship between persons and things. A group of persons (or a person in the case of a sole-proprietorship) invest their capital in assets in order to earn profits. The individual capitalists are the subjects of property right, whereas the assets, both tangible and intangible, are the objects of property right. They are directly opposed as persons and things. Indeed, such relationship was already depicted in Fig. 1 of Section 0.

In capitalistic society every business undertaking must enter into numerous contractual relations with outside parties such as employees, suppliers, customers, creditors, governments, and even tort plaintiffs in order to generate profits. In the case of a classical firm, every owner has an equal right and an equal duty to any contract it maintains, as is illustrated in Fig. 3. This means that whenever there is a departure of one of the co-owners, due to internal dispute or illness or death, or an admission of a new co-owner, due to lack of capital, each contract has to be rewritten or at least the signatures of the owners have to be updated. To rewrite a contract *ex post* involves various kinds of transaction costs. Of course, if owners are few and outside relations are limited and short-term, it may be possible to save these transaction costs by writing up detailed provisions for such contingencies in each contract *ex ante*. But, as the owners become numerous or outside relations become wide-spread and long-term, these transaction costs would soon become prohibitively large. The contracts would then become necessarily incomplete, and outside parties would be easily discouraged to enter into contractual relations with the classical firm.

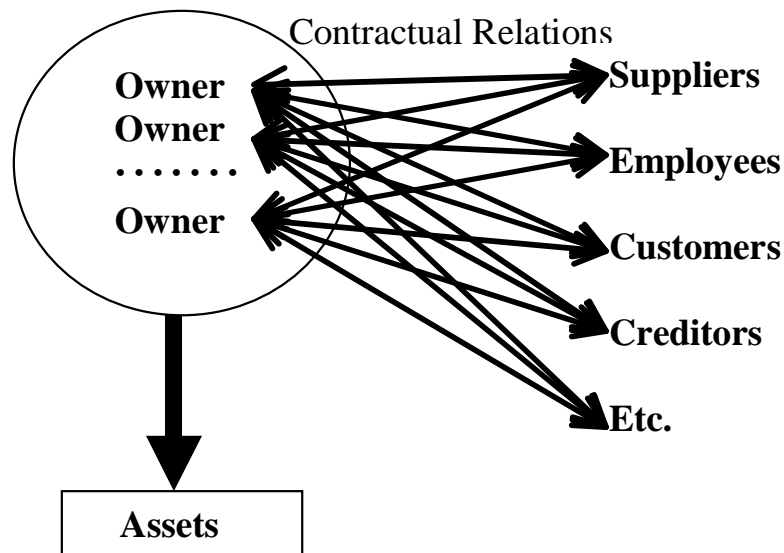


Fig. 3: Contractual Relations between a Classical Firm and Outside Parties.

The corporation is a legal solution to this problem. How can it solve this problem? Law endows a corporation with “the same power as an individual to do things necessary or convenient to carry its business and affairs.”<sup>3</sup> If a group of  $N$  investors set up a corporation and become its shareholders, it is like creating the  $N+1^{st}$  person who has the same legal capacity to own real assets as they themselves have. Outside parties are then able to form a contract with this  $N+1^{st}$  person, independently of its  $N$  shareholders, in exactly the same manner as they form a contract with the owner of a sole-proprietorship firm. As is illustrated in Fig. 4, the complex network of contractual relations is greatly simplified, leading to a large reduction of transaction costs for all participants.<sup>4</sup> This then shields the contracting outside parties from the vagaries of internal disputes, illness, death, or new entry of individual shareholders, thereby encouraging them to enter into long-term contractual relations with the firm.

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<sup>3</sup> See footnote 1 above.

<sup>4</sup> When there are  $N$  co-owners and  $M$  outsiders, the formation of a corporation reduces the number of necessary relations (contractual and other) from  $N \times M$  to  $N+M$ . If both  $N$  and  $M$  are large,  $N \times M - (N+M) = (N-1) \times (M-1) - 1$  can easily become a huge number.



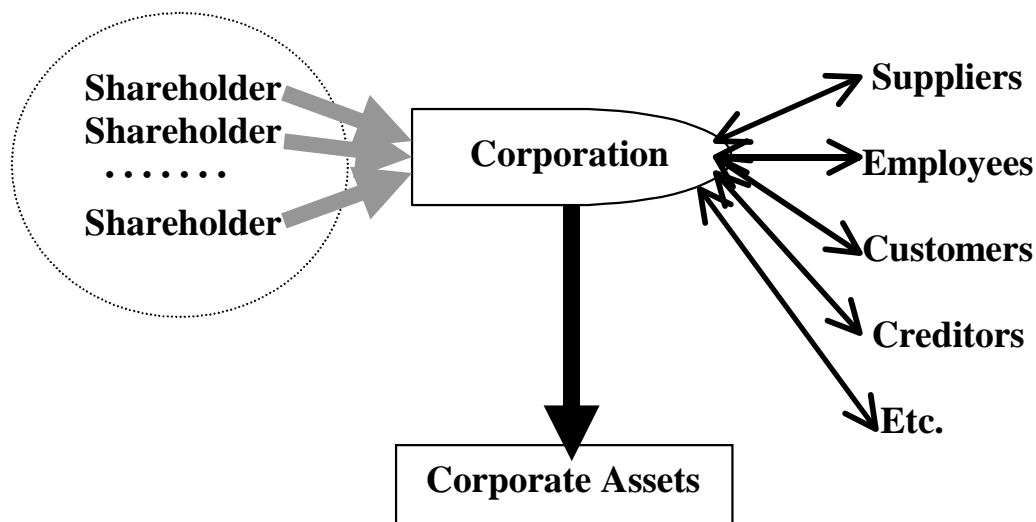


Fig. 4: Corporation as a Legal Device to Simplify Outside Relations.

I have dwelled upon a textbook account of the corporate *raison d'être* in order to bring home the central fact about the legal institution of corporation: the corporation cannot be reduced to a mere 'standard form contract' among its constituting shareholders. The corporation is presented here, not as a device to economize on the transaction costs of arranging internal organization among shareholders, but as a device to economize on the transaction costs of arranging external relationships the shareholders have to have with outside parties. As have been repeatedly pointed out by the advocates of the contractual theory of the firm, any innovation in the firm's organizational structure can in principle be arranged internally by a well-crafted contractual agreement among shareholders.<sup>5</sup> To do so may incur transaction costs, but those costs could easily be reduced by the extensive use of standard form contracts. In contrast, the corporation's legal capacity to coordinate the complex contractual relations between inside shareholders and outside parties is essentially a 'social' or 'inter-subjective' one. It cannot be asserted by the internal agreement among shareholders alone, no matter how skillfully they formulate the contract, unless it were acknowledged by employers, suppliers, customers, creditors, and other outsiders. A corporation is able to act as an independent holder of property rights capable of forming contractual relations with others, not because the inside shareholders will it to be so, but because, and in so far as, the outside parties recognize it to be so. Such social recognition is indispensable, and what the law does is to formalize and reinforce this social recognition in the form of legal personality.

<sup>5</sup> See, for instance, Easterbrook and Fischel [1991], p. 1445, and Posner [1992], pp. 392-393.

It should be noted that the corporation is described here not as a 'nexus of contracts'<sup>6</sup> but as a full-fledged subject of property rights. In order for a corporation to serve as one of the parties of a contractual relation, it has to be recognized by others as the holder of the ultimate rights over some real assets and as the bearer of the ultimate duties associated with their use, independently of its constituent members. A mere nexus of contracts can never enter into a contractual relationship even as a legal fiction, simply because it cannot locate the ultimate subject of rights and duties when an event not specified in contracts takes place.<sup>7</sup>

## 2. The Corporation as a Person/Thing Duality.

We have now seen that the legal institution of corporation has been introduced into the legal system as a non-contractual device that simplifies the external relations of a group of investors. But we all know that there is no 'free lunch' -- even in the province of law. What I would like to show now is that this simplifying device also has the effect of complicating the internal ownership structure of the business corporation.

For this purpose, the only thing we have to do is to go back to Fig. 3 of Section 1 and rotate the horizontal arrows (representing ownership relations) drawn from shareholders to the corporation clockwise around the latter until they all become vertical. Then, what we get is Fig. 2 of Section 0 that illustrates the two-tier ownership structure of the business corporation. The legal institution of corporation thus *doubles* the ownership relations within a firm -- shareholders own a share of the corporation as a tradable thing and the corporation as a legal person in turn owns corporate assets. In fact, in this two-tier ownership structure the corporation *per se* plays the *dual* role -- that of a 'person' and that of a 'thing'. It owns assets, and it is owned by shareholders. In other words, in regard to things, a corporation acts legally as a person, as a subject of property right; and in regard to persons, a corporation is acted on legally as a thing, as an object of property right. Of course, a corporation is neither a person nor a thing in reality. Legally, however, it is endowed with both personality and thingness.

For many centuries, philosophers, political scientists, sociologists, economists, and legal scholars have

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<sup>6</sup> Jensen and Meckling [1976], at 310-311.

<sup>7</sup> Grossman and Hart [1986] and Hart and Moore [1990], in their property rights theory of the firm, 'define' the ownership as the residual control rights over assets. If a contract is incomplete, it is the ownership that determines who has the right to decide the uses of assets in the event of contingencies not specified in the contract. I will come back to their theory in section 9.

debated heatedly as to what constitutes the 'essence' of the legal personality of the corporation. In this so-called 'corporate personality controversy,' one of the most celebrated controversies in legal theory and legal philosophy, two competing legal theories have emerged, each advancing a diametrically opposed view on the nature of the corporation. They are 'corporate nominalism' and 'corporate realism.'<sup>8</sup> The corporate nominalism asserts that the corporation is merely a contractual association of shareholders, whose legal personality is no more than an abbreviated way of writing their names together. In opposition, the corporate realism claims that the corporation is a full-fledged organizational entity whose legal personality is no more than an external expression of its real personality in the society. And both claim to have superseded the 'fiction theory,' the traditional doctrine since the medieval times, which maintained that the corporation is a separate and distinct social entity but its legal personality is a mere fiction created by the state.

The rivalry between corporate nominalism and corporate realism has continued up until now. The contractual theory of the firm, be it a transaction-cost economics version or an agency theory version, is a direct descendant of the corporate nominalism,<sup>9</sup> whereas the evolutionary theory of the firm or the knowledge-base view of the firm can be interpreted as a modern reincarnation of the corporate realism.<sup>10</sup> The former regards corporations as "simply legal fiction that serve as a nexus for a set of contracting relations among individuals,"<sup>11</sup> whereas the latter posits corporations as "organizations that know how to do things, ... while individual members come and go."<sup>12</sup> The corporate personality controversy is far from a relic of the past.

I believe, however, it is now possible to 'end' this age-old controversy once and for all. It is, however, not by declaring victory for one side or the other. It is rather by declaring victory for both. Indeed, I would like to suggest that it is the person/thing duality of corporation I have just elucidated that is responsible for the endless controversy on the nature of corporation up until now. If we only look at the first tier ownership relation in Fig. 2, the corporation appears merely as a thing owned and controlled by shareholders, and we draw near to the position of corporate nominalism. And, if we only look at the second tier ownership

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<sup>8</sup> There is a huge body of writings on this controversy. Some of the best-known works available in English are Savigny [1884], Maitland [1900], Machen [1911], Dewey [1926], Radin [1932], Hart [1954], Hessen, [1979], Dan-Cohen [1986], and Teubner [1988]. For a comprehensive review of various theories of corporate personality (before 1930), see Hallis [1930]. Iwai [1999] has given a more extensive discussion on this controversy.

<sup>9</sup> See, for instance, Coase [1937], Alchian and Demsetz [1972], Jensen and Meckling [1976], Easterbrook and Fischel [1991], and Williamson [1985].

<sup>10</sup> See, for instance, Penrose [1959], Nelson and Winter [1982], Teece [1982], Wernerfelt [1984], Pelikan [1989], and Chandler [1990].

<sup>11</sup> Jensen and Meckling [1976], p. 310.

<sup>12</sup> Winter [1988], p. 176.

relation in Fig. 2, the corporation appears fully as a person owning and managing corporate assets, and we draw near to the position of corporate realism. Of course, these observations alone cannot resolve the perennial opposition between nominalism and realism. The fact that the corporation can be owned by other persons makes it less than a person even legally, and the fact that the corporation can own other things makes it more than a thing even legally. The corporation still appears to fall short of being either a full person or a mere thing. However, in the following two sections I will endeavor to show that there are ways to eliminate either personality or thingness from the person-*cum*-thing corporation, thereby turning it into a mere 'thing' or a full 'person', respectively. The corporate personality controversy will then 'end' peacefully, because there will no longer be any contradiction to resolve between corporate nominalism and corporate realism.

#### 4. How to Make a 'Nominalistic' Corporation.

The way to eliminate the personality from a corporation is trivial: it is to have some tightly-knit group of individuals (or some individual) own more than fifty percent of its shares and become dominant shareholders. Those individuals command a majority block of votes in shareholders meetings and acquire an absolute control over the corporation. If they so wish, they can close off the corporation from the stock market. The corporation is now deprived of its subjectivity and turned into a mere object of property right. Legally speaking, the corporation is still the sole owner of the corporate assets, but in practice it is the dominant shareholders who can exercise the ultimate control over the corporate assets. As is illustrated in Fig. 5, such a closed corporation is reduced *de facto* to a single ownership relation between the dominant shareholders and the corporate assets. We are certainly in the world of corporate nominalism here.

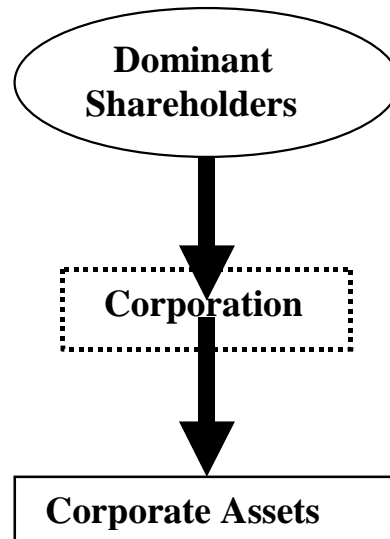


Fig. 5: A ‘Nominalistic’ Corporation.

In “Modern Corporation and Private Property” published in 1932 Adolphe Berle and Gardner Means reported that share ownership of public corporations in the United States was so dispersed among small and fragmented shareholders that by the end of 1920s about a half of the largest industrial corporations were effectively controlled by professional managers who had little or no ownership stakes in corporations. The dispersion of share ownership showed a steady increase since that time, and by the end of 1970s more than 80 percent of the 200 largest non-financial corporations in the United States were considered to be under management control.<sup>13</sup> Since the lifetime career of these professional managers hinges critically on the continued existence of business corporations as organizational entities, many viewed this as a triumph of corporate realism.

Such view was, however, challenged by the advocates of the ‘market for corporate control’ hypothesis.<sup>14</sup> They argued that threats of outside takeovers in the stock market are able to discipline managers who fail to promote the interests of shareholders and force the corporation to conform to the paradigm of corporate nominalism. In fact, as we will now see, the key to this hypothesis is the very two-tier ownership structure of the business corporation.

That any business corporation consists of two-tier ownership relations implies that it contains two kinds of ‘things’ — the corporate assets and the corporation itself. This fact immediately implies that there are also

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<sup>13</sup> Harman [1981].

<sup>14</sup> For the notion of the market for corporate control, see Manne [1965].

two kinds of values residing in a corporation. They are, respectively, the value of corporate assets and the value of the corporation as a thing. The former can be defined as the present discounted value of the future profit stream that would accrue from the most efficient use of these assets. This can also be called the 'fundamental' value of the corporation. The latter can be identified with the total share price of the corporation in the stock market. Can these two values be different from each other? The answer is a yes. The stock market is notoriously myopic, and its day-to-day valuation may fail to reflect the long-run profitability of the underlying corporate assets. More importantly, some managers are incompetent or opportunistic, and their management may fail to realize fully the fundamental value of the corporate assets.

Now the job of the so-called 'corporate raiders' is to buy corporations cheap and sell them dear. If there actually exists a corporation whose stock market value is substantially lower than the fundamental value of the underlying assets, a room is open for a team of corporate raiders to enter. As soon as such a firm is spotted, the raiders start negotiating a leveraged buyout (LBO) plan with their financiers. By an LBO I mean a form of financing which allows the corporate raiders to borrow the funds for acquiring a corporation by pledging the very assets of the target corporation as collateral. No sooner is the LBO plan approved than our corporate raiders begin a takeover bid (TOB), offering publicly to buy the shares of the target corporation at a price higher than the current market price. A TOB, especially a hostile one, seldom goes without challenges, and a bidding war is likely to break out soon. Let us, however, skip all the details of such bidding war and simply suppose that our team of corporate raiders has emerged as the ultimate winner.<sup>15</sup> They then gain an absolute control over the use of the corporate assets and are able to close off the corporation from the stock market. If they want quick money, they as the *de facto* owners sell off part or all of the corporate assets in second-hand asset markets. If they are patient, they replace the incumbent managers by new and better ones, and closely monitor their management. If the corporate restructuring goes well, the team of corporate raiders can enjoy the improved stream of profits in the long-run. And if the stock market eventually comes round to appreciate the fundamental value of the corporate assets, they can even make the corporation public again and resell all their shares at the improved price. In any case, it is the difference between the values of corporate assets and corporate shares, minus the price premium for TOB and the interest payment for LBO, that constitutes the profit from this TOB operation. It could be a huge prize if the raiders' original estimate of the 'fundamental' value of the corporate assets was not wide of the

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<sup>15</sup> We also ignore all the informational difficulties associated with TOB operation discussed by Grossman and Hart [1980].

mark. And the important thing to note is that this whole operation can be, if successful, self-financing. At least in theory, our team of corporate raiders did not have to prepare any of their own capital to carry it out.

We all know that money and hubris are what motivate corporate raiders. Whatever their subjective motives, their day-to-day business in effect consists of an attempt to realize the idea of corporate nominalism in this world. In fact, it is claimed that even if they are not daily raiding corporations, the mere perception that they may at any time enter the scene works as an effective threat to the incumbent managers, steering them away from management policies that may fail to realize the fundamental value of corporate assets. If this is indeed the case, the stock market is said to function efficiently as the ‘market for corporate control.’

Does this mean that by the mere existence of corporate raiders the corporate personality controversy has finally been settled in favor of corporate nominalism? The answer is, ‘No’. In the first place,, the incumbent managers of the targeted corporations have various measures to block takeover attempts under their arms. Examples are employee stock ownership plans (ESOP), super-majority amendments, fair price amendments, reductions in cumulative voting rights, greenmails, and poison pills.<sup>16</sup> Sometimes they even pressure central or local governments to pass legislations that protect the interests of the corporate constituencies other than shareholders. These anti-takeover measures are, however, no fool proof, and corporate raiders are undoubtedly devising new strategies daily to overcome these defense tactics. Yet, I will now demonstrate, there exists a legal mechanism that is able to eliminate the thingness almost completely from the person-*cum*-thing corporation.

#### 4. How to Make a 'Realistic' Corporation

We know that as a legal person a corporation can own things, and that as a legal thing a corporation can be owned by persons. This at once suggests us that a corporation as a person can in principle own another corporation as a thing. (Needless to say, anti-slavery law prohibits a real human being to own another real human being.) In fact, since the state of New Jersey in the United States legalized ‘holding corporation’ in 1889, business corporations all over the world have been buying and holding the shares of other corporations. As is shown in Fig. 6, a holding corporation is a business corporation that is created solely for the purpose of owning other corporations. It thus acts as a person in regard to these corporations it

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<sup>16</sup> For a useful discussion on various anti-takeover strategies, see Jarrell, Brickley and Netter [1988].

owns.

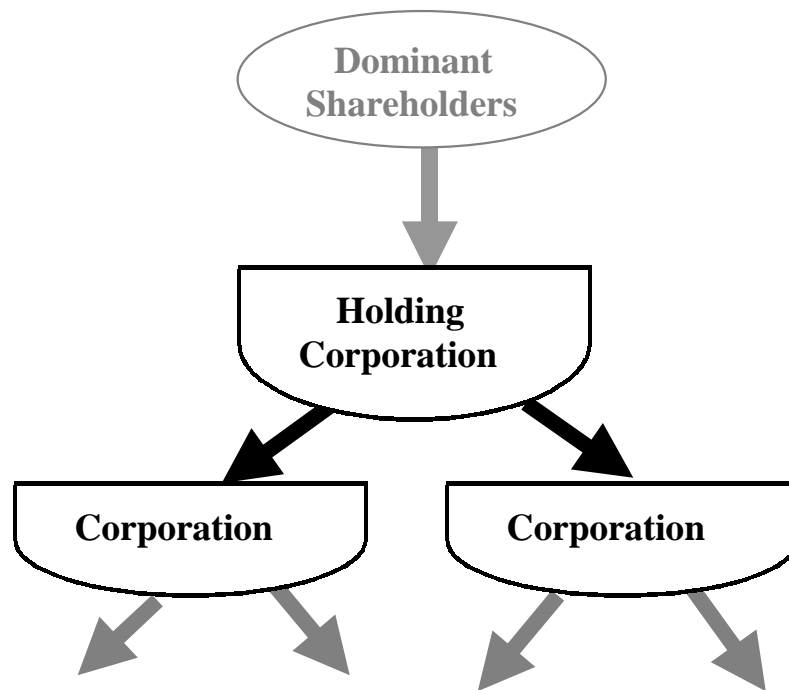


Fig. 6: A Holding Corporation and a Pyramidal System of Ownership and Control.

The legalization of holding corporation has opened a way to an important organizational innovation: the pyramidal system of corporate ownership and control. At the top is a group of natural persons who own a corporation as a thing. But, being also a legal person, that corporation can own another corporation as a thing, which again as a legal person can own another corporation as a thing, and so on. Such ownership hierarchy can extend *ad infinitum*. This is, however, not the whole picture. Because you do not have to own all the shares to control a public corporation. As long as minority shares are sufficiently diffused among passive investors, only a share slightly greater than 50% is sufficient for the control of the entire corporation. This implies that one unit of capital can in principle control almost two units of capital, if each half buys a bare majority of the shares of a corporation with a capital close to one unit. It then follows that, as more and more layers are added to the ownership hierarchy, capitalists at the top can multiply the controlling power of their capital by the order close to  $2^n$ , where  $n$  is the number of hierarchical layers beneath.<sup>17</sup> This was shown in Fig. 6. One can regard the pre-war Japanese Zaibatsu and present-day Italian

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<sup>17</sup> Moreover, if this hierarchical structure is combined with cross-shareholdings at each hierarchical layer, the capitalists at the top can further enhance the leverage of their own capital.



family empires and Korean chaebols as typical examples of this pyramidal system of corporate ownership and control.<sup>18</sup>

Nevertheless, a holding corporation still falls short of shedding its thingness entirely, because it has its own dominant shareholders watching over it. One can, however, go a step further at least in theory. A corporation as a person can own *r* as a thing. Indeed, nothing prevents us from imagining a corporation that becomes its own controlling shareholder by holding a majority block of its own shares under its own name, as is illustrated in Fig. 7. If this were indeed possible, that corporation would be free from any control by real human beings and become a self-determining subject. It would remove the thingness from itself and acquire a full personality at least in the province of law.

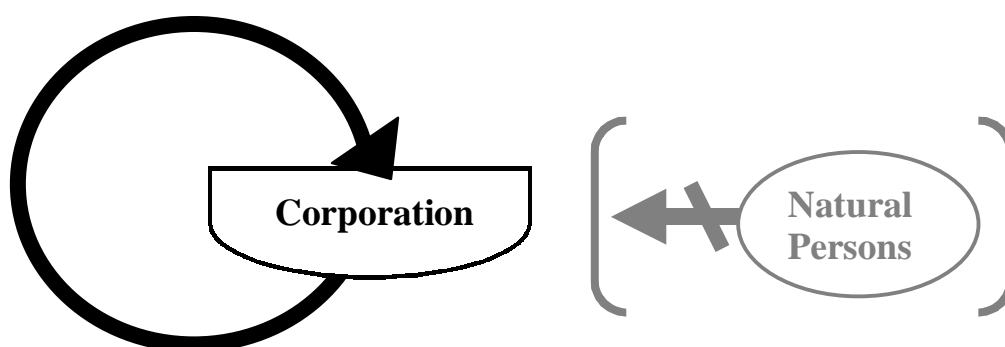


Fig. 7: A (Hypothetical) Self-Owning Corporation.

One might dismiss all this as idle speculation. Many countries prohibit a corporation from repurchasing its own outstanding shares.<sup>19</sup> And in other countries that allow share repurchases, the repurchased shares always lose their voting rights in shareholders meetings. (They are called ‘treasury stocks’ because they are kept in the corporate treasury’s safety box during shareholders meetings.) In the real economy, therefore, it appears impossible for the corporation to become its own owner.

There is, however, an important leeway to this. Imagine a situation where two corporations, A and B, hold a majority of each other's shares. As Fig. 8 shows, the corporation A as a person owns the corporation B as a thing, and the corporation B as a person in turn owns the corporation A as a thing. Even though each corporation does not own itself directly, it does indirectly through the intermediacy of the other corporation.

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<sup>18</sup> See Barca, Iwai, Pagano and Trento [1999] for extensive discussions on pre-war Japanese Zaibatsu and Italian family empires.

<sup>19</sup> German law and French law in principle prohibit the repurchase of the outstanding shares. Great Britain had made it illegal to acquire its own shares until 1980, but since then the repurchase was allowed under certain conditions. Japan also used to prohibit share buybacks, but the ban was partially lifted in 1995 and wholly removed in 2000.

Though in a much more attenuated manner than in the case of single self-ownership, we have here a pair of corporations owning themselves and becoming free from the control of any human beings.

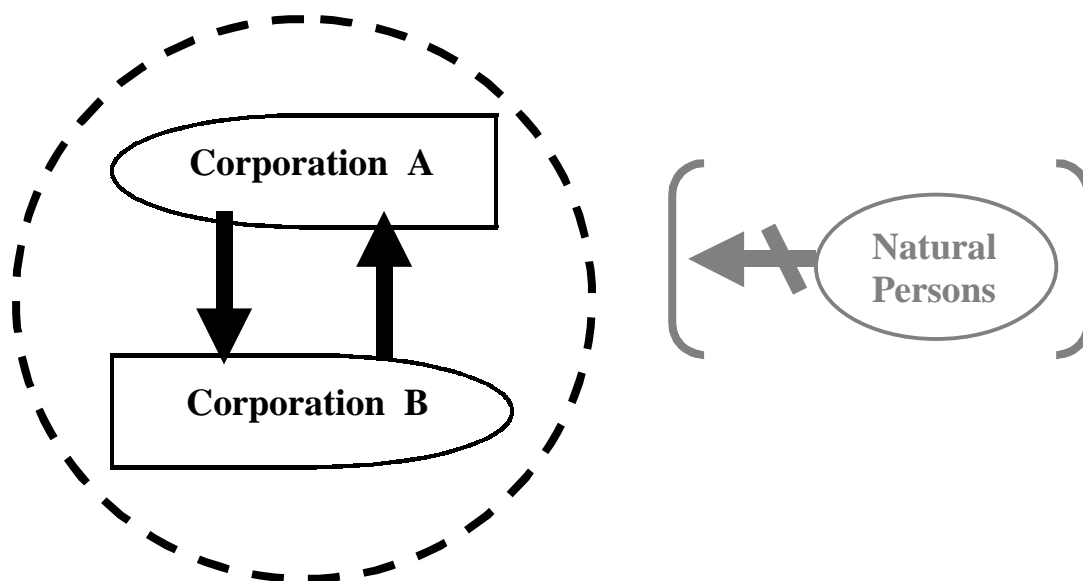


Fig. 8: Mutually Holding Corporations.

One might still object to the practical possibility of this leeway by pointing out that some countries impose legal limits on the extent of cross-shareholdings between corporations.<sup>20</sup> Equally important, many countries place ownership limits on the percentage of shares that banks and other financial institutions may own in an individual corporation. For instance, Japanese law forbids a bank from owning more than 5 percent of the shares of any domestic corporation.<sup>21</sup>

Yet, it is possible to circumvent even these limits. Suppose that twelve corporations get together and that each holds 5 percent of each of the other's shares. Then, simple arithmetic  $((12 - 1) \times 5\% = 55\% > 50\%)$  tells us that a majority block of each corporation's shares could be effectively sealed off from real human beings, without violating any of the above-mentioned legal restrictions on cross-shareholding. As is depicted in Fig. 9, these twelve corporations would indeed become their own owners at least as a group. It is therefore practically impossible to prevent corporations from becoming their own owners, if they so wish.

<sup>20</sup> In many countries including US, Great Britain, Germany, Sweden, Japan and France, a subsidiary is generally prohibited from holding the shares of its parent corporation.

<sup>21</sup> In the United States banks can own up to 5% of the voting stock of any non-banking corporation stocks only indirectly through bank holding companies.

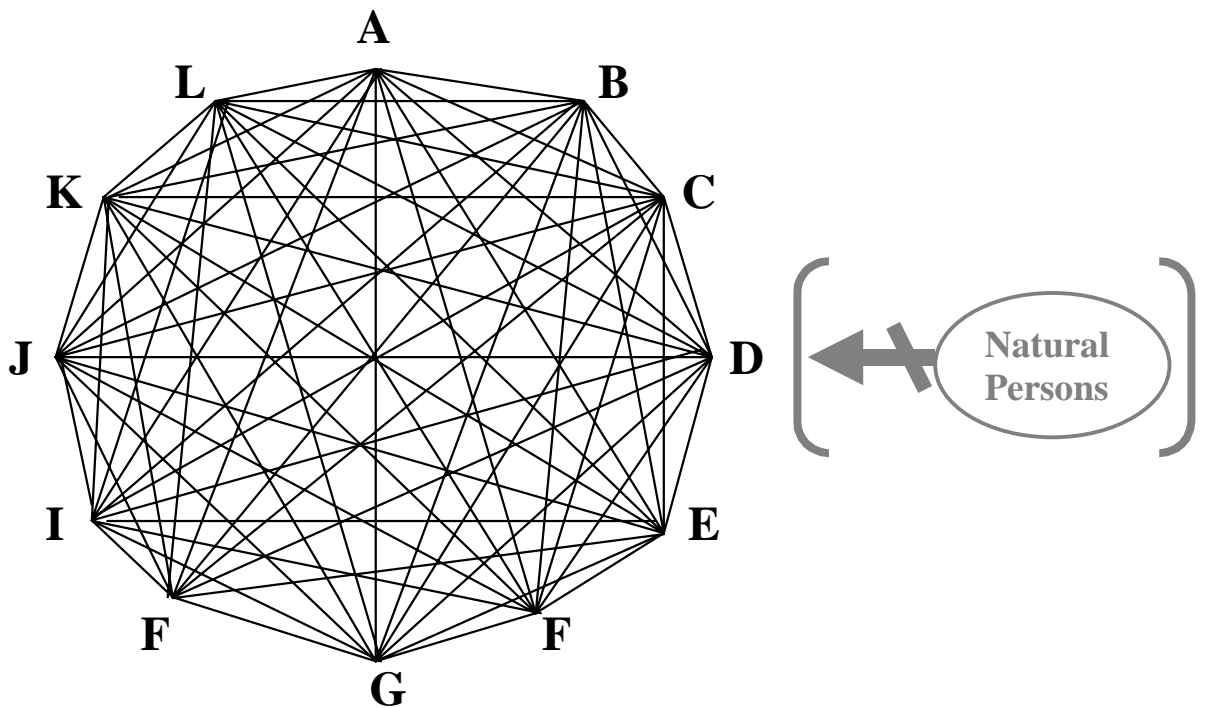


Fig. 9: Cross-Shareholdings Among 12 Corporations.

We have now reached the paradigm of corporate realism. What we have seen is that by extensive cross-shareholdings a group of corporations can get rid of their thingness and become an association of self-determining subjects, that is, full persons, in the system of law.

#### 5. The Indeterminacy Principle and a Variety of Capitalisms.

I have thus elucidated two legal mechanisms – one turning a person-*cum*-thing corporation into a mere thing, and the other turning a person-*cum*-thing corporation into a full person. Perhaps, the more important is the fact that its two-tier ownership structure enables the business corporations to have a wide variety of organizational forms, ranging from a closely-held private corporation fully controlled by a group of dominant shareholders to a Berle-Means type managerial corporations with dispersed shareholders, from a pyramidal system of vertically connected corporations to a horizontal network of mutually holding corporations. No doubt, other organizational forms are also possible for business corporations. In stark contrast, a classical firm can increase the number of co-owners, enlarge the size of its assets, and expand the extent of its contractual relations, but it can never be other than a single ownership relation.

What I have established is a sort of the indeterminacy principle in law, that law is incomplete and is

unable to determine the nature of the corporation even within its own system. Instead, the supposedly universal law of corporation has provided each business enterprise with a long 'menu' of corporate structures from which it can choose. That the law has really served as an effective 'menu' is evidenced by the well-known fact that even among advanced industrial societies the dominant organizational form of corporations varies widely from country to country – the United States and the United Kingdom with dispersed share ownership but active takeover activities, Italy and Korea with solid pyramidal structures of corporate groups, and Japan and Germany with extensive cross-shareholdings within corporate groups.<sup>22</sup>

#### 6. Corporate Managers as Fiduciaries of Corporation.

Our picture of the corporation could never be complete without having 'managers,' i.e., directors and officers, painted in it.<sup>23</sup> This is not a mere rhetorical statement, because a corporation without managers cannot be a corporation. The reason is straightforward. Even if the corporation has a full-fledged personality in the system of law, it is in reality a mere abstract entity incapable of performing any act except through the act of flesh and blood human beings. As a result, the corporate law imposes any corporation to have a board of directors as the ultimate holders of the powers to act in the name of the corporation.<sup>24</sup> And, the principle of division of labor generally dictates directors to delegate part of their powers to corporate officers for the actual management of corporate assets. Any act managers perform *qua* managers legally binds the corporation as the act of the corporation itself. This is once again an elementary fact in corporate law, but I have reiterated it so as to highlight a fundamental difference between managers in a classical firm and managers in a business corporation. The recent upsurge of the naïve form of corporate nominalism, under the new guise of the contractual theory of the firm, has blurred this difference completely and reduced the theory of 'corporate governance' to a mere application of the theory of agency. I argue now that this is a mistake.

“Agency” is, according to its leading definition, “a fiduciary relation which results from the manifestation of consent by one person [the principal] to another [the agent] that the other shall act on his

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<sup>22</sup> See Prowse [1994] for a very informative survey of corporate structures among large firms in the U.S., U.K., Japan and Germany.

<sup>23</sup> I use the term 'managers' to designate both directors and officers in the case of incorporated business firms. I therefore ignore in this paper the problems pertaining to the often difficult relationship between directors and officers.

<sup>24</sup> Sec. 8.01 (6) of *RMBCA* (1984), for instance, states: “All corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation shall be managed, under the direction of its board of directors ....”

[or her] behalf and subject to his [or her] control, and consent by the other so to act.”<sup>25</sup> The control need not be total and continuous, but there must be some sense that the principal is “in charge.”<sup>26</sup> Needless to say, the relation between owners and managers in a classical firm is a paradigmatic agency relation, with the owners being the principals and the managers their agents, as is illustrated in Fig. 10. It is the owners who unilaterally define the objective of the relationship and maintain the power to control and direct the managers who have consented to act solely on their behalf. In fact, it is important to note that the owners need not hire any managers at all. The owners can at any time terminate the agency relation and manage their own assets by themselves. If there are any problems pertaining to the governance of a classical firm, they all arise from asymmetric information between owners and managers in the form of adverse selection and moral hazard. The owners may try to discipline the managers by monitoring their activities more diligently. The managers may try to guarantee their trustworthiness by setting up a bond that the owners could forfeit upon their sub-standard performance. But either attempt requires efforts and expenses, and the task of the owners of a classical firm is to find an optimal balance between the monitoring and bonding costs on the one hand and the residual managerial slack too costly to eliminate on the other so as to minimize their total sum (agency cost). Of course, this is all in the realm of contractual law, and little room is left for mandatory legal rules or other forms of legal intervention.<sup>27</sup>

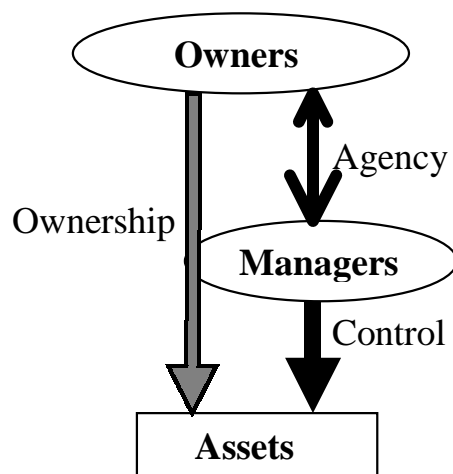


Fig. 10: Managers as Agents in a Classical Firm

<sup>25</sup> The American Law Institute’s *Restatement [Second] of Agency* (1958), sec. 1 [1].

<sup>26</sup> “The agency cannot exist unless the ‘acting for’ party (the agent) consents to the will of the ‘acted for’ party (the principal). The control need not be total or continuous and need not extend to the way the agent physically performs, but there must be some sense that the principal is ‘in charge.’ At minimum, the principal must have the right to control the goal of the relationship.” Kleinberger [1995], p. 8.

<sup>27</sup> The classic paper on agency approach to ‘corporate’ governance is Jensen and Meckling [1976].

Once, however, we turn to the problem of ‘corporate’ governance, or of governing the ‘corporate’ form of business firm with its characteristic two-tier ownership structure, we find ourselves on a totally different plane. The relation between shareholders and managers (i.e., directors and officers) can no longer be identified with an agency relation. To be sure, shareholders can fire individual directors or even replace the entire team of incumbent directors at shareholder meetings. But, they cannot dismiss the very legal institution of the board of directors, as long as a corporation remains a corporation. To be sure, shareholders can approve or veto major policy decisions of directors at shareholders meetings. But they cannot deny the very legal power of the directors to act in the name of corporation, as long as a corporation remains a corporation.<sup>28</sup> Shareholders are in no sense “in charge” of the managers of their corporation.

Corporate managers are not the agents of the shareholders. If so, what are they? What are the legal status of the corporate managers? The answer is: they are the ‘fiduciaries’ of the corporation. (See Fig. 11 as an attempt to illustrate this relationship.) The fiduciary is a person who is entrusted to act as a substitute for another person for the sole purpose of serving that person.<sup>29</sup> Examples include guardian, conservator, trustee, administrator, attorney, physician, psychiatrist, fund manager, etc. A fiduciary is called an agent if he is bound by a contract (often implicit) with the beneficiary and is subject to her control. But the agent is merely a special type of fiduciary, and many of the fiduciary relations are by their very nature non-contractual. As a matter of fact, in the case of corporate directors it is the corporate law, not any contract with shareholders, that endows them with the fiduciary power to act in the name of the corporation.

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<sup>28</sup> “Stockholders cannot withdraw the authority they delegated to the board of directors, because they never delegated any authority to the directors.” Clark [1985], p. 57.

<sup>29</sup> According to Tamar Frankel [1983], the defining characteristics of fiduciary relations are: (a) that “the fiduciary serves as a substitute for the entrustor” and (b) that “the fiduciary obtains powers from the entrustor or from a third party for the sole purpose of enabling the fiduciary to act effectively.” (pp. 808-9). See also Frankel [1995] and DeMott [1991].

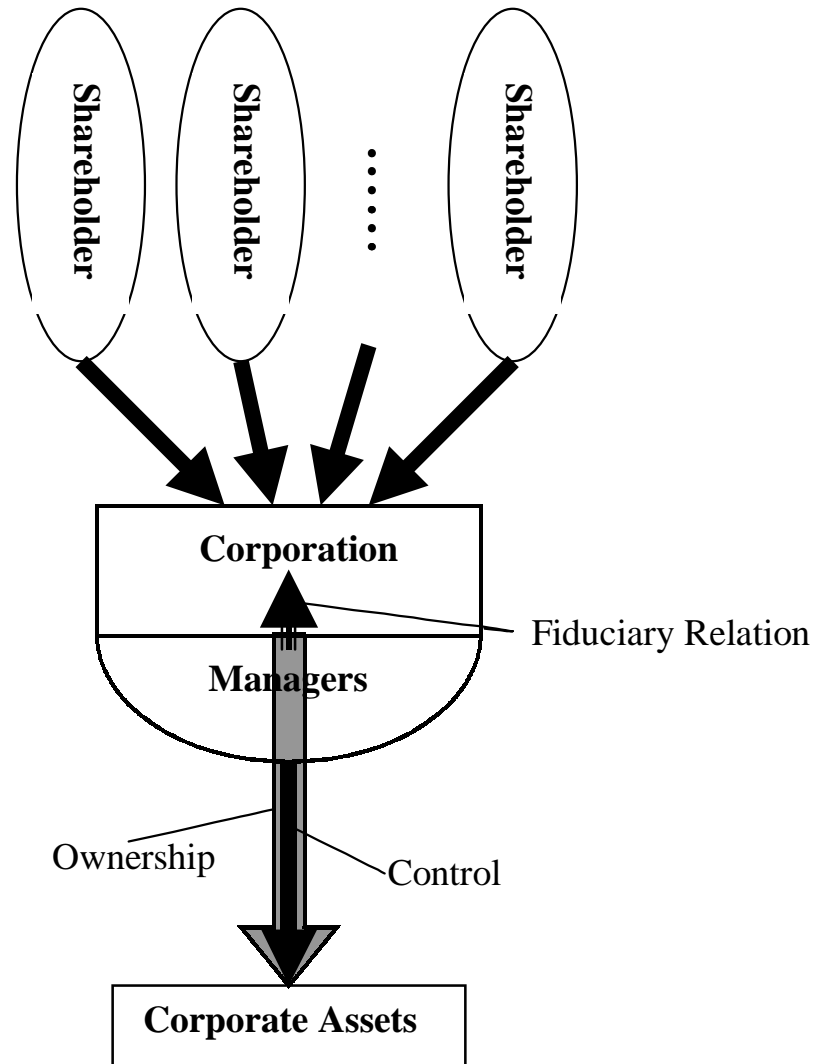


Fig. 11: Corporate Managers as Fiduciaries of the Corporation.

This at once leads us to the central problem of corporate governance: the managers' abuse of fiduciary power. The risk that corporate managers may not use their fiduciary power in the best interest of the corporation stems, not from the opportunism or incompetence of managers, but from the very nature of the corporation as a legal person.<sup>30</sup> Since the corporation is a mere legal construct, its managers are the ones who actually decide whether to buy or sell, lend or mortgage, use or maintain the corporate assets, all in the name of the corporation. Then, there inevitably emerges the danger of *quid pro quo*: the danger that the

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<sup>30</sup> "It is important to emphasize that the entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary. .... Rather, the entrustor's vulnerability stems from the structure and nature of the fiduciary relation. The delegated power that enables the fiduciary to benefit the entrustor also enables him to injure the entrustor, because the purpose for which the fiduciary is allowed to use his delegated power is narrower than the purposes for which he is capable of using that power." Frankel [1983], p. 810.

managers unconsciously mistake their fiduciary power for their own powers which can be employed at their own discretion. They may not exercise these powers with enough care and prudence that the best interest of the corporation would demand. Worse, they may consciously appropriate these powers for the purposes of conferring a benefit on themselves, or even of injuring a particular party.

## 7. Fiduciary Principles in Corporate Governance

How can we prevent corporate managers from abusing their fiduciary powers? The answer to this question is by no means simple. But, I would maintain that at the foundation of any corporate governance system should lie the corporate managers' 'fiduciary duties' to the corporation, and that the fiduciary rules regulating these duties should be essentially mandatory.

Indeed, it is impossible to control the behavior of corporate managers by contractual arrangements alone. Because any act performed by the corporation is in reality the act performed by its managers. Hence, the corporation is unable to arrange a monitoring mechanism or a bonding scheme with the managers, except through the very managers it is supposed to discipline. The corporation is unable to work out an incentive system (such as performance dependent bonuses and stock options) with the managers, except through the very managers it is supposed to give an incentive. Any attempt to control corporate managers by means of contractual arrangements, whether explicit or implicit, would necessarily degenerate into self-dealing by managers, and create the very problem it is attempting to solve. One may appeal to the morality of corporate managers to behave themselves, but we all know that moral sentiments are the scarcest resources in this universe. The only way to protect the interests of the corporation from managerial self-dealing is to have fiduciary rules regulate directly the behavior of managers.

The law governing fiduciary rules imposes on the fiduciaries the 'duties' to perform once they have consented to act as fiduciaries. The law lists many such duties, but the most fundamental ones are 'the duty of loyalty' and 'the duty of care'.<sup>31</sup> The duty of loyalty obliges corporate managers to control the assets of the corporation in the best interest of the corporation and not in conflict of interest. It forbids them to self-deal with corporate assets, to trade corporate opportunity, and to trade on inside information; it imposes strict rules on the disclosure of information; it restrains managers from taking 'excessive' compensations. The duty of care then demands corporate managers to manage corporate assets with reasonable skill and

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<sup>31</sup> The American Law Institute's *Restatement (Second) of Trusts* [1959], for instance, lists 17 (!) such duties in §§169 - 185.



care.

It is the essence of the fiduciary law that it imposes these duties, not as a mere rhetorical device, but as the real content of the law.<sup>32</sup> The advocates of the contractual theory of the firm, however, identify the fiduciary rules with “a standard-form penalty clause in every agency contract” and characterize them as the rules which “approximate the bargain that investors and agents would strike if they were able to dicker at no cost.”<sup>33</sup> They thus argue that the fiduciary duties specified in corporate law are essentially ‘enabling’ and can be and must be waived if the participants of what they call ‘the corporate contract’ believe they can strike a better bargain among themselves. This is totally untenable. Fiduciary rules can never be a substitute for the private order. They are placed and ought to be placed at the foundation of the corporate governance system for no other reason than that any attempt to control corporate managers by means of contract or other forms of voluntary agreement would necessarily involve an element of managerial self-dealing. To make corporate law enabling and permit its fiduciary rules to be bargained around by insiders would be the surest way to destroy the corporate governance system.

It is fortunate that the entire tradition of fiduciary law (at least in Anglo-American legal system) has so far resisted to viewing the fiduciary rules as implicit contracts.<sup>34</sup> The courts hold corporate managers liable for a breach of the fiduciary duties, even if some of these duties are expressly removed by corporate statutes, charter and bylaws, or by terms in contracts. They also refuse to delve into the subjective intentions of managers. Once corporate managers choose to become corporate managers, they owe the fiduciary duties to the corporation and cannot waive the courts’ supervision at will.

I should, however, hasten to add that implementation of fiduciary rules requires a well-organized legal system in general and active courts in particular. But not every country has a well-organized legal system, let alone active courts. And even if the courts were active, the full implementation of fiduciary rules would demand a large amount of human and non-human resources. All the more so since the so-called ‘business judgment rule’ very often works as a barrier to their applications unless courts are presented very strong cases. It is neither wise nor practical to rely exclusively on the fiduciary law for the governance of business

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<sup>32</sup> See Frankel [1983], pp. 829-832; and Clark [1985], pp. 75-79.

<sup>33</sup> Easterbrook and Fischel [1982], p. 737.

<sup>34</sup> Clark [1989] is a very insightful exposition of the orthodox principles before the appearance of the contractual theory of the firm; see also Clark [1986] pp. 114 -189 and Eisenberg [1989]. Recently, Margaret Blair has made a vigorous effort to revive these old orthodox principles. (Blair [1995] and Blair and Stout [1999].) I share most of her critical concerns but dissent from her claim that the faults of the post-contractual theory orthodoxy arise from their view of shareholders as the owners of the corporation. The whole point of this paper is that shareholders *are* the owners of the corporation itself but *not* the owners of corporate assets.

corporations.

For the efficient as well as effective governance of business corporations, it is therefore of vital importance to supplement the fiduciary law with other governance mechanisms. And it is as the agents of these supplementary mechanisms that various stakeholders, such as banks, employees, suppliers, customers, and among others shareholders, find their roles to play in the system of corporate governance. Indeed, there is a wide variation in costs and benefits of these supplementary mechanisms across countries, depending more or less on whether their dominant corporate form is 'realistic' or 'nominalistic.' It is this variation that, I believe, should constitute the starting point of the comprehensive theory of comparative corporate governance. I, however, leave the details of such theory to other papers.<sup>35</sup>

## 8. The Business Corporation as an Economic Organization

What is the 'purpose' of the business corporation? In the case of the 'nominalistic' corporation, the answer is straightforward. It is, as in the textbook model of the firm, to maximize the returns to its shareholders. Nonetheless, the logic behind this answer is not as straightforward as it is in the textbook model of the firm, because the legal owner of corporate assets is not the shareholders but the corporation itself as a legal person. The corporate profit is literally the profit of the corporation, and the legal claimant to the profits from corporate assets is the corporation itself, not the shareholders. Of course, this is only half of the story, because the corporation is also a thing owned by shareholders. Indeed, it is as the owners of the corporation as a thing that the shareholders lay legal claim to the corporate profit. And if a corporation is turned purely 'nominalistic' by the actual control of dominant shareholders or by the potential takeover threats in the stock market, it becomes perfectly legitimate to assume, as the traditional theory has been assuming, that the sole purpose of the business corporation is to maximize the returns to its shareholders.

But, as we have already seen, the 'nominalistic' corporation constitutes but one end of the long legal menu of possible corporate structures. In fact, if a corporation becomes purely 'realistic' through extensive cross-shareholdings with others, it can lay total claim to the corporate profit. What, then, is the purpose of this 'realistic' corporation? We of course cannot attribute this purpose to anything like the 'will' of the corporation itself, for its legal personality is a mere construct within the system of law. Nor can we attribute

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<sup>35</sup> For some useful accounts of comparative corporate governance, see Mayer (1988), Aoki (1988, 2000), Franks and Mayer (1990), Coffee (1991), Baums (1992), Aoki and Dore (1992), Prowse (1994). See section 9 of Iwai [1999] for an attempt to develop a unified theory of comparative corporate governance.

this purpose to the personal objectives of corporate managers, for the managers are mere fiduciaries of the corporation whose task is to exercise their fiduciary powers solely for the purpose of their corporation. (That corporate managers are prone to abuse their fiduciary powers is a different matter – a matter already dealt with in the previous two sections on corporate governance.) If there is such a thing as a ‘purpose’ to this ‘realistic’ corporation, it should refer to the purpose of some social entity that lies beneath the legal personality of corporation. But what is this social entity? In order to answer this question, we now have to look at the business corporation as an organization of real individuals who participate either directly or indirectly in production and distribution of goods and services in the society.

“An organization,” according to Max Weber, is “a system of continuous purposive activity of a specified kind.”<sup>36</sup> The classical conception of organization is that of an instrument. It is for the explicit purpose of attaining a specified goal that the activities of individuals participating in an organization are coordinated centrally and structured formally.<sup>37</sup> An organization is said to “come into existence when explicit procedures are established to coordinate the activities of a group in the interest of achieving specified objectives.”<sup>38</sup>

This instrumental conception of organizations is broadly consistent with the nominalistic view of the corporation. True to that view, a purely ‘nominalistic’ corporation is a mere means for its dominant shareholders. In fact, a business corporation typically begins its life as purely ‘nominalistic’. It is founded by a group of entrepreneurs who invest their money and manage the enterprise for the sole purpose of maximizing their returns. Nevertheless, it is a commonplace in the history of social institutions that a means to an end becomes an end itself.<sup>39</sup>

The best account of such process is still found in the famous study by Robert Michels, a contemporary of Max Weber, on the transformation of the Social Democratic Party in pre-World War I Germany. The party is originally created as a means to implement radical causes for workers. In the process of political struggle and economic bargaining, power is gradually consolidated in the hands of full-time officers who

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<sup>36</sup> Max Weber [1947].

<sup>37</sup> “Formal organization is that kind of coöperation among men that is conscious, deliberate, purposeful,” Barnard [1938]; “Organizations are social units (or human groupings) deliberately constructed and reconstructed to seek specific goals,” Etzioni [1964]; “Organizations are collectivities orientated to the pursuit of relatively specific goals and exhibiting relatively highly formalized social structures,” Scott [1998]. What I have called the ‘classical conception of organizations’ above corresponds to what Richard Scott [1998] have called ‘a rational system definition of organizations.’ My account of the theory of organizations owes much to Scott's textbook.

<sup>38</sup> Blau [1968].

<sup>39</sup> Such process is called ‘goal displacement’ in organization theory. See, for instance, Merton [1957] and Etzioni [1964].

become indispensable for carrying out complex administrative tasks for the party. As the organization expands in size and scope, these officers become increasingly concerned with protecting the organization against attacks from outside forces and increasingly preoccupied with fortifying its formal structure for the sake of its own survival and growth. From this observation, Michels drew a conclusion that it is “a universally applicable law” that “every organ of the collectivity, brought into existence through the need for the division of labor, creates for itself, as soon as it becomes consolidated, interests peculiar to itself.”<sup>40</sup> This at once leads us to a second conception of organizations, according to which “organizations are collectivities whose participants share a common interest in the survival of the system and who engage in collective activities...to secure this end.”<sup>41</sup>

Before us are two different conceptions of organizations, one emphasizing their instrumental nature and the other their autonomous nature. I believe that these two opposing conceptions of organizations are not mutually incompatible characterizations of their ideal-type but equally valid representations of their two polar empirical types. There are organizations that are merely instrumental and there are organizations that are fully autonomous, though most organizations we observe in actual society occupy positions more or less in-between.

What do we find when we lift the legal veil of a business corporation? I have already suggested that the type of organization that is consistent with the ‘nominalistic’ corporation is an instrumental one. What we find as its social substratum is a group of shareholders who control its managers for the sole purpose of maximizing their own returns. I now suggest, not unexpectedly, that the type of organization that is associated with the ‘realistic’ corporation is an autonomous one. What we find as its social substratum is, this time, a corporate organization whose members share a common interest in the survival and growth of the organization itself. And it is this organizational self-reproduction and self-expansion that should constitute the ‘purpose,’ or at least one of the main purposes, of the ‘realistic’ corporation. In contradistinction to the instrumental type of organization which has no purpose of its own but the one imposed from outside, the autonomous type of organization has every claim to be taken as a social entity in its own right.

Having said that, however, I have to make sure that I have no intention to conjure up the specter of that

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<sup>40</sup> Michels [1959].

<sup>41</sup> Scott [1998]. This is what Scott called a ‘natural system definition of organizations.’ I omit his reference to the informality of the structure, because I believe that self-perpetuating organizations are not necessarily informal.

notorious ‘physico-spiritual unity’ of ‘real corporate personality’ à la Otto Gierke.<sup>42</sup> A corporate organization is never a superhuman being or metaphysical organism, mysteriously endowed with a will of its own. If it has any autonomy, that is an autonomy which emerges as an effect of social actions of -- or rather, social interactions among -- individual human beings both inside and outside the corporate organization. Directors, top officers, middle managers, regular workers, and other ‘insiders’ all identify themselves as members of the corporate organization and attribute their actions *qua* members to those of the corporation. More importantly, creditors, suppliers, customers, temporary workers, and other ‘outsiders’ in turn recognize these individuals as members of the corporate organization and acknowledge their actions *qua* members as those of the corporation itself. It is true that a corporate personality is a mere legal artifact. But it can serve as a sort of catalyst for the social construction of reality. To the extent that internal actions of organizational members and external recognition by contracting partners become routinely oriented around the corporate personality (instead of shareholders), the corporate organization maintains its autonomy and takes on social reality.<sup>43</sup>

It should be noted that the autonomous character of corporate organization is tied closely to the existence of human assets that are specific to each organization. Various authors have variously called these ‘organization-specific human assets’ as “managerial resources,” “organizational capabilities,” “organizational routines,” “core competences” “firm-specific human capital,” “good-will of a going concern,” “corporate cultures,” etc.<sup>44</sup> In spite of a wide variation of labels, they all refer to “the collective learning in the organization,”<sup>45</sup> especially how to coordinate diverse production skills, integrate multiple streams of technology, maintain a reliable network of suppliers, and cultivate the goodwill of customers.

When a business corporation suddenly goes bankrupt, its unfortunate creditors can still get hold of a variety of tangible and intangible assets, such as land and buildings, plant and equipment, materials and inventories, cash and bank accounts, stocks and bonds of other corporations. They can also seize computer software, technology licenses, patent rights, copyrights, trademarks, and even brand names. Note that all of

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<sup>42</sup> See Maitland [1900].

<sup>43</sup> See Teubner [1988] for an illuminating discussion on the ‘social reality’ of corporation. “The corporate actor is ‘fictional’ because it is not identical with the real organization but only with the semantics of its self-description. It is ‘real’ because this fiction takes on structural effect and orients social actions by binding them collectively.” (p. 57.)

<sup>44</sup> Let me cite a few examples: ‘working rules’ – Commons [1924]; ‘managerial resources’ -- Penrose[1959]; ‘resources’ --Wernerfelt [1984]; ‘organizational capabilities’ -- Chandler [1990]; ‘organizational routines’ -- Nelson and Winter [1982]; ‘economic competence’ – Pelikan [1989]; ‘core competences’ -- Prahalad and Hamel [1990]; ‘firm-specific assets’ --Williamson [1985]; ‘firm-specific human assets’ -- Klein, Crawford, and Alchian [1978]; etc. etc.

<sup>45</sup> Prahalad and Hamel [1990].

the assets I have just listed are things that were bought or leased from the market, or produced or in the process of being produced for the market. More importantly, they can be detached from the organization and sold or leased to the market, individually or in parcels or as a whole unit.

In contrast to these more or less familiar assets, the organization-specific human assets can neither be bought nor leased from the market; nor can they be sold or leased to the market; because they consist of skills and know-how that are highly specialized to each organization. Such skills and know-how have to be developed and accumulated by organizational members themselves through repeated practices within an organization or repeated transactions with outside parties, because they are not available ready-made in the market. And such skills and know-how are not readily available in the market, because they were developed and accumulated within a very specific organizational context and are difficult to transfer to other organizations.

Hence, the peculiarity of organization-specific human assets. They can function as assets only within the organization they have been specialized to. They cease to be productive, as soon as the bankruptcy or hostile takeover dissolves the corporate organization containing them. Moreover, they belong to no one but the corporation! No one outside of the corporate organization, and by this I include not only creditors but also shareholders, can own them as their own property, because they are embodied in the organizational members in the form of skills and know-how. No one inside of the corporate organization, and by this I mean managers and regular workers, can own them as their own property either, because these skills and know-how become useless once they leave the organization.

Here emerges a rationale for regarding the organizational self-reproduction and self-expansion as the 'purpose' of the 'realistic' corporation. Since the profits accruing from organization-specific human assets are contingent upon the continuation of the corporate organization, and since no individual human beings, whether inside or outside of the corporate organization, can get hold of these human assets as their property, it is both rational and legitimate for the corporation to retain at least part of its profits and use them for the maintenance and enlargement of its own organization. In other words, the corporation as a legal person may assume the role of a *de facto* owner of the human assets that are specific to its organization.

## 9. Costs and Benefits of the Separation of Ownership and Control.

Since the work of Berle and Means, the traditional literature on corporate governance (based mostly on

the perspective of the agency theory of the firm) has deemed ‘the separation of ownership and control’ as “the central weakness of the public corporation.”<sup>46</sup> Its main concern is on managers’ autonomous pursuit of goals that fail to conform to the interests of shareholders.<sup>47</sup> Corporate managers may over-invest on growth opportunities in order to enhance their own compensations, social prominence and political power all of which are correlated with firm size; they may retain excess cash balances in order to increase their autonomy against capital markets; they may forgo profitable projects in order to stay in the lines of business operations they have been familiar with; they may encourage corporate organization to multiply its hierarchical layers in order to generate new positions for middle managers who are motivated more by internal promotions than by performance bonuses; they may hesitate to fire unproductive workers in order to maintain their standing as conscientious managers; etc. And it is these ‘managerial discretions’ that are said to cause large inefficiencies in the public corporations in advanced capitalistic societies.

From such perspective, the ‘realistic’ corporation with autonomous organization is nothing but a formula for disaster. As has already been seen, in the case of a purely ‘realistic’ corporation its managers have no human shareholders to serve the interests of. Even in its less pure form, managers of a ‘realistic’ corporation may still pursue, together with other members of the corporate organization, a ‘purpose’ that does not conform to the interests of its human shareholders. If the central weakness of the public corporation were the separation of ownership and control, the ‘realistic’ corporation would be the weakest of all corporations.

Yet, ‘realistic’ corporations are not a mere academic curiosity. Not only have they survived the competition with classical firms and ‘nominalistic’ corporations, both of which are managed or controlled by owners; they even dominated the industrial sectors of the advanced capitalist economies at least during the good part of the 20<sup>th</sup> century. One of their variants – Berle-Means type managerial corporations – played the central role in creating the industrial capitalism of the U. S. and some of the European countries since the last quarter of the 19<sup>th</sup> century (at least until very recently), and another variant – corporate groups (Keiretsu) with extensive cross-shareholdings – formed the core of the Japanese-style corporate system since the end of the WWII (at least until very recently). Why?

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<sup>46</sup> Jensen [1989], p. 61.

<sup>47</sup> Shleifer and Vishny wrote in their survey on corporate governance [1997]: “Corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting return on their investment. How do suppliers of finance get managers to return some of the profits to them? How do they make sure that managers do not steal the capital they supply or invest it in bad projects? How do suppliers of finance control managers?”

The first explanation would be the financial advantage of the ‘realistic’ corporation. The public corporation is often regarded as “a method of solving problems encountered in raising substantial amounts of capital.”<sup>48</sup> In contrast to classical firms and ‘nominalistic’ corporations, both of which had to rely upon a closed circle of people for the source of capital, the ‘realistic’ corporations did invariably take the form of public corporations and were able to raise large sums of capital from thousands of small investors through stock markets or from tens of thousands of small savers through financial intermediaries. Capital thus amassed from the public then allowed the ‘realistic’ corporations to invest in production facilities and distribution networks large enough to exploit the potential economies of scale and scope modern industrial technologies made possible.

However, as have been repeatedly emphasized by Alfred Chandler and other business historians, “the potential economies of scale and scope, as measured by capital invested, are characteristics of a technology,” whereas “the actual economies of scale or of scope, as measured by throughput, are organizational.”<sup>49</sup> The huge cost advantages of industrial technologies could be fully realized unless continuing flows of inputs and outputs, or what Chandler have called throughputs, were maintained to assure effective utilization of invested capital. Such continuing throughputs could not be consistently maintained unless procedures to operate production facilities and distribution networks were effectively routinized, and unless production and distribution among different operating units and between current and future operations were carefully coordinated. Of course, such routinization and coordination could not come about automatically; they demanded constant participations of a large corps of regular workers and a large team of professional managers who were equipped with skills and know-how specialized to these tasks. And such skills and know-how were, as Chandler points out, “developed by learning through trial and error, feedback and evaluation; thus, the skills [and know-how] of individuals depended on the organizational setting in which they were developed and used.”<sup>50</sup> In other words, it is the existence of organization-specific human assets that played the critical role in realizing the potential scale-and-scope economies of highly capital-intensive technologies of industrial capitalism. I now maintain that the primary advantage of the ‘realistic’ corporation over the classical firm and ‘nominalistic’ corporation lies in its capacity to create, maintain, and expand these human assets that are unique to its organization.

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<sup>48</sup> Posner [1992], p.428.

<sup>49</sup> Chandler [1990], p. 24. See also Chandler [1977]. For the role of professional managers in Japanese corporations, see Morikawa [1992].

<sup>50</sup> Chandler [1990], p. xx.



Indeed, the ‘property rights theory of the firm’ recently developed by Grossman, Hart and Moore has (inadvertently) revealed the fundamental limitation of the classical firm and ‘nominalistic’ corporation as economic organization.<sup>51</sup> It defines a firm as a collection of physical assets under joint ownership and investigates the factors that determine the boundary of a firm. Ownership matters because it confers the owners “residual control rights” – “the rights to decide all usages of assets in any way not inconsistent with a prior contract, custom, or law.”<sup>52</sup> In particular, the owners can deny their partners in relational contracts a further access to their assets when events not specified in the original contracts occur. “In a world of transactions costs and incomplete contract,” Hart notes, “*ex post* residual rights of control will be important because, through their influence on asset usage, they will affect *ex post* bargaining power and the division of *ex post* surplus in a relationship. This division in turn will affect the incentives of actors to invest in that relationship.”<sup>53</sup> Where the firm draws its boundary against markets thus has a direct bearing on its efficiency.

Unlike the contractual theory of the firm, the property rights theory has the merit of distinguishing a firm from a mere contractual relationship. Nevertheless, it applies only to the classical firm and, even if it is extended to the corporation, it applies at most to the ‘nominalistic’ corporation, because what it calls a firm is still a single ownership relation between owners and assets.<sup>54</sup> Furthermore, its very logic points to the intrinsic difficulty of the classical firm and ‘nominalistic’ corporation in inducing investments in organization-specific human assets.

To see this, consider a contractual relation between employers and employees in a classical firm. (Almost the same argument applies to a relationship between dominant shareholders and corporate employees in a ‘nominalistic’ corporation.) Employers are by definition the owners of the physical assets in the firm, whereas by employees I include both managers and workers who have no ownership stakes in the firm. If the employees invest in human assets that are specialized to the physical assets of the firm, the value of the firm will be much enhanced. But human assets are neither visible nor tangible. It is in general very difficult to measure their marginal contributions to the firm and almost impossible to verify their values in

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<sup>51</sup> Grossman and Hart [1986] and Hart and Moore [1990]. Hart [1989, 1995] and Moore [1992] provide the more accessible expositions.

<sup>52</sup> Hart [1995], p.30.

<sup>53</sup> Hart [1989], p. 1767.

<sup>54</sup> For instance, Hart [1989] identifies a firm with “all the nonhuman assets that belong to it (i.e., that the firm’s owners possess by virtue of being the owners of the firm),” and Moore [1992] with “a collection of assets over which certain agents have property rights.”

courts. In such situation, do the employees have incentives to invest in firm-specific human assets? The property rights approach tells us otherwise. The employees have every reason to worry about being “held up” by the employers, that is, being threatened to deny the access to the physical assets of the firm after their firm-specific investments are sunk and then forced to accept a smaller division of surplus than was initially agreed. Anticipating this, they are likely to refrain from specializing their human assets to the firm at the time of the contract. Inefficiency thus ensues.<sup>55</sup>

Of course, the above hold-up problem could be solved if the firm’s physical assets and the firm-specific human assets were merged under common ownership. Since human assets are inalienable from the persons embodying them and cannot be owned by others, the only possible solution is to have the employees (managers and workers) own the physical assets and become the owners of the firm.<sup>56</sup> But this is precisely what most employees cannot do or will not do.<sup>57</sup> Employees are employees primarily because they are poor – they simply do not have enough wealth to own a firm. Can’t they finance necessary funds from banks or some other investors? Inalienability of human assets again plays a crucial role here. The time of debt-prisons is long past, and human assets cannot be used as collaterals for the debt. If borrowers default, the most banks can seize is the alienable physical assets they own. Knowing this, borrowers with little or no physical assets have a strong temptation to invest borrowed funds on excessively risky projects or even to secretly divert borrowed funds to their pockets and simply declare default. Knowing this, banks find little reason to lend them substantial sums of money. Furthermore, even if employees have large enough wealth of their own or can borrow large enough funds from banks, they may still choose not to become owners of the firm. As long as they are risk-averse, employees may prefer to diversify their portfolios, rather than to devote a heavy share of their assets to the firm they participate in.<sup>58</sup>

A classical firm is an ownership relation between a group of persons and a set of assets. True that “ownership is a source of power.”<sup>59</sup> It gives the owners not only a power to hire employees (and not the other way around) but also a power to hold up the hired employees. But this power is double-edged. In a

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<sup>55</sup> In the traditional corporate governance literature, this is known as “the costs of large investors.” See section V of Schleifer and Vishny [1997] for its concise summary.

<sup>56</sup> As is pointed out by Milgrom and Roberts’ textbook [1992], “human capital is not easily tradable, and if the residual returns on that capital belong to the humans embodying them, then the usual arguments about ownership rights suggest that the residual control should be assigned to them too,” (p. 523). Indeed, most of the literature on the property rights theory simply equates owners and managers.

<sup>57</sup> The following discussion is very much related to the general question of why capital usually hires labor and not vice versa. See Hansman [1996] and Dow and Putterman [1999] for informative surveys on this issue.

<sup>58</sup> Fama and Jensen [1983].

<sup>59</sup> Hart [1995], p. 29.

world of incomplete contracts the owners cannot commit themselves *not* to hold up their employees, and the mere possibility that the owners may exercise that power in the future will discourage employees from committing themselves to those human assets that have little value outside the firm. The resulting employment relationship tends to be at arm's length, and anything worthy of the name of "organization" is hard to develop around a classical firm.<sup>60</sup> And, the same can be said about a 'nominalistic' corporation, which is in practice a single ownership relationship between a group of dominant shareholders and a set of corporate assets.

It should be evident by now that the advantage of the 'realistic' corporation over the classical firm and 'nominalistic' corporation lies in its very separation of ownership and control. The corporation as a *de facto* owner of organization-specific human assets can serve as an effective shield to inside employees against possible hold-up by outside shareholders. It thus encourages managers and workers to create, maintain and expand human assets that are critical for the corporation to realize the potential scale-and-scope economies of modern industrial technologies, even if they have little or no equities.

I, however, have no intention to insist that the separation of ownership and control is totally costless. On the contrary, the autonomy of managers and worker it fosters may cause a substantial loss in efficiency. My intention is merely to call attention to the fact that the same autonomy may also come with a substantial gain in efficiency.<sup>61</sup> There is a real trade-off, and the choice of the firm's legal form -- whether it should be incorporated or not, and, once incorporated, whether it should remain 'nominalistic' or become 'realistic' -- depends very much on these costs and benefits of the separation of ownership and control. The corporation is a legal shell but by no means an empty one.

## 10. A Conclusion: The Future of the Corporate System.

The eclipse of Berle-Means type managerial corporations has been reported in the United States and the

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<sup>60</sup> This is, of course, a little overstatement. Classical firms may be able to build up organizations if their owners have established a good reputation as committed employers. As Kreps [1990] has shown in his model of 'corporate culture,' a good reputation can even be carried over from one generation of owners to another generation. Nevertheless, the reputation is a fragile commodity, and the intrinsic uncertainty of human lives would make such a generational transaction very difficult to repeat many times, unless it is aided by the legal institution of corporation.

<sup>61</sup> Aghion and Tirole [1997] have developed a model of incomplete contracts that distinguishes real authority from formal authority, and Burkart, Gromb and Panunzi [1997] have applied this model to the problems of corporate governance. Our comparison between 'nominalistic' and 'realistic' corporations is analogous to their comparison between corporations with large shareholders and corporations with dispersed shareholders. The main point of this paper is, however, that shareholders, especially those of 'realistic' corporations, do not even have a formal authority in corporations because of the very legal structure of the corporation.

United Kingdom.<sup>62</sup> A massive wave of hostile corporate takeovers in the 1980s has brought significant changes in the ways corporations are financed and controlled in these economies. A paradigmatic example is a firm that has gone through a leveraged buyout (LBO).<sup>63</sup> Such firm is still corporate in form but is closed off to the stock markets. Its sole shareholders are LBO partners comprised by professional raiders that have executed the LBO and institutional investors that have financed the LBO. They monitor the performance of managers closely. They give managers a substantial equity stake in order to align the interests of managers with those of shareholders. They keep the firm highly leveraged in order to leave the managers little cash flow to divert to their empire building. They sell off many of the former businesses and spin off some of the former divisions in order to force the managers to concentrate on a well-defined range of businesses. Indeed, it is the same idea that lies behind many of the recent changes in Anglo-American corporate system – to improve the firm’s performance by tightening the shareholders’ control over managers.

Across the Pacific Ocean, a growing number of journalists, business leaders, public officials, and academics have been claiming that the Japanese-style corporate system is in eclipse. The ‘origin’ of the Japanese-style corporate system has been traced by various authorities to various historical sources, such as the heritage of traditional merchant houses during the Tokugawa period, the late-development effect before the WWII, the legacy of control economy during the WWII, the one-shot effect of the break-up of Zaibatsu after the WWII, the bureaucratic guidance during the high-speed growth era, and so on. But there is at least one consensus -- Japan was able to develop a highly idiosyncratic corporate system chiefly because its relatively large domestic market was effectively shielded from the outside world during much of the postwar period. In this era of ever-intensive global competition, such condition is quickly disappearing. In addition to this, the bursting of the stock market and property market bubbles in the late 1980s and the belated but rapid liberalization of financial markets in the 1990s have weakened the traditional ties between major banks and industrial corporations and begun to loosen the tight networks of corporate cross-shareholdings that have allowed corporate managers and core workers to pursue policies congenial to the autonomy of the corporate organization.

There thus appears to be no doubt that the long-run tide of the corporate system in advanced capitalist economies is from the ‘realistic’ to the ‘nominalistic’ direction.

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<sup>62</sup> According to Michael Jensen [1988] what is in decline is not merely the Berle-Means type managerial corporation but the entire institution of the public corporation.

<sup>63</sup> See Jensen [1988].

And yet, I am also discerning another tide that moves in the opposite direction. It is a tide brought about by the forces of ‘post-industrial’ capitalism. There is now a strong shift in the capitalistic system from physical assets to organization-specific human assets as the major source of profits. What is critical to the long-run competitiveness of business corporations is no longer the scale-and-scope economies of production facilities and distributional networks, but is more and more ideas, know-how, coordinating skills, forecasting capabilities, strategic prowess, strong leadership, etc. of managers, researchers, engineers, and other knowledge-oriented employees working inside of their organizations.<sup>64</sup> There is indeed a growing body of literature that suggests that the capital values of human assets and other ‘intangibles’ have shown a phenomenal rise in recent years.<sup>65</sup>

The single most important characteristic of human assets is its inalienability. Money can buy factories, machines, offices, land, and other physical assets. Money can even buy software, licenses, patents, copyrights, trademarks, brand names, and other non-physical but non-human assets. Money, however, cannot directly buy ideas, know-how, skills, capabilities, prowess, leadership, and other human assets, because they are all some forms of knowledge stored inside of human brains. As long as there is free will in humans, it is impossible to dictate from outside how such knowledge should be employed and accumulated in their brains. The only thing money can do is to provide a variety of incentive schemes that would encourage the employees to utilize the existing knowledge effectively and develop the new knowledge willingly within the organization. Examples of such schemes are performance bonuses, promotion systems, stock options, pension plans, flexible working conditions, intellectual autonomy, etc.

In the era of modern industrial capitalism, the shareholders were able to hold an upper-hand in the balance of power within a business corporation, because a large sum of money was required to construct and

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<sup>64</sup> It is the exhaustion of the ‘industrial reserve army’ -- the surplus population deposited in rural areas and supported by communal networks -- that is the ultimate cause of this massive phase-transition of capitalistic system from ‘industrial’ to ‘post-industrial.’ The consequent rise in real wages has reduced the profit margins of the existing production facilities and distribution networks so that capitalist enterprises are able to reap profits only by undertaking what Schumpeter [1950] called “innovations.” By innovations Schumpeter designated a broad range of events which includes “the introduction of new commodities..., the technological change in the production of commodities already in use, the opening-up of new markets or of new sources of supply, Taylorization of work, improved handling of material, the setting-up of new business organizations ... -- in short, any ‘doing things differently’ in the realm of economic life.” Obviously, in order to do things differently, capitalist enterprises need ideas, know-how, coordinating skills, forecasting capabilities, strategic prowess, strong leadership, etc. of real human beings. (See Iwai [2001a] for an attempt to formulate Schumpeterian or post-industrial way of generating profits.) In an interesting recent paper Rajan and Zingales [2001] have claimed that the financial revolution that has made finance (money) cheap is the major cause for the rise of the importance of specialized human assets. But the financial revolution is merely a result of the more fundamental structural changes undergoing in capitalism.

<sup>65</sup> See, for instance, Hall [1999]. Blair and Wallman [2001] provides a useful summary of the recent trend.

maintain production facilities and distribution networks that were critical to the firm's competitive advantage. Now, in this new era of post-industrial capitalism, the physical assets have surrendered its central position to the knowledge-based human assets that money can no longer buy and control. The balance of power within a business corporation is clearly tilting away from suppliers of money towards suppliers of knowledge-based human assets, that is, from shareholders to knowledge-orientated employees. The recent tide of the corporate system in the 'nominalistic' direction certainly runs counter to this new development. Indeed, the tighter shareholders' control will breed the worries of hold-ups on the part of employees and impede their efforts to invest in organization-specific human assets the business corporation badly needs for its survival and growth.

I am not advocating the return to the ancient regime of the Berle-Means type managerial corporations or the Japanese-style corporate groups. The future of the corporate system will be, in all likelihood, not theirs. But it will not belong to 'nominalistic' corporations either. The necessity of encouraging the knowledge-orientated employees to invest in the human assets unique to each organization will locate it more on the 'realistic' side than on the 'nominalistic' side of the long menu of possible corporate structures. The only certainty is, however, that no single organizational form is likely to dominate the future of the corporate system. The legal institution of corporation has shown a surprising versatility in the past. Its two-tier ownership structure will surely be able to engender a wide variety of business organizations even in this new era of post-industrial capitalism.

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