Олимпиада для студентов и выпускников – 2017 г.

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Профиль: «Корпоративный юрист» **КОД - 2100**

Время выполнения задания - 180 мин.

1. Прочитайте статью* и сделайте ее критический анализ. Напишите эссе на русском языке.

**Lynn Stout. Corporate entities: their ownership, control, and purpose. Oxford Handbook of Law and Economics. Forthcoming 2017.*

1. INTRODUCTION

Corporations are among the most powerful and economically important institutions in modern society. This chapter examines the nature and structure of corporate entities (a category that includes not only business corporations but also nonprofits and many limited liability companies [LLCs]). It discusses the basic characteristics of corporate entities; surveys different models or theories of the corporation; and explores the question of corporate purpose. The chapter pays special attention to how corporate law allocates economic and control rights to, and among, both the corporate entity itself and the natural persons involved with corporations, such as shareholders, directors, and executive officers.

1.1. THE CORPORATION VERSUS THE FIRM

As a preliminary matter, it is essential to note that while the words *corporation* and *firm* are often used interchangeably, they refer to very different things. The careless but unfortunately common habit of treating them as synonyms confuses and misleads (Robe 2011).

Firm is an economic concept that refers to the organization of economic activity involving more than one person, outside of formal markets. By contrast, *corporation* is a legal concept that carries important economic consequences. In particular, a corporation is a specific pattern of formal rights and responsibilities created by law and distributed between and among both human persons, and a legislatively-created, artificial legal person (the corporate entity).

It is possible to create a firm that is not a corporation. For example, a law firm or an accounting firm organized as a partnership is still (as the name implies) a firm in the economic sense. Similarly, a sole proprietor who hires employees has created a firm, but has not created a corporation.

In theory, it is equally possible to create a corporation that is not a firm. Modern corporate codes typically allow a single human person to create a corporate entity, contribute all of its capital, and then serve as that entity's sole shareholder, director, officer, and employee. Such a corporate entity is just that—a corporate entity—but it is not a firm.

The existence of a firm is neither necessary nor sufficient for a corporation to exist. A theory of the firm is not a theory of the corporation.

1.2. CORPORATIONS AND AGENCY COST ANALYSIS

Because the firm and the corporation are so frequently confused, economic analysis of corporations often focuses, almost exclusively, on the so-called agency cost problem (Ciepley 2013). However, agency costs are an issue whenever economic activity is organized in firms, not only (or always) in corporations. Agency costs also arise in partnerships and indeed in any project involving more than one person.

Because most corporate activity requires more than one person (even a corporation with a single shareholder is likely to borrow from creditors), agency costs are common in corporate entities (Rock 2013). However, corporate entities raise interesting economic issues beyond the conventional agency cost problem that has attracted so much attention.

Moreover, any discussion of agency costs in corporations must address the critical question of who (or what) is the principal and who is the agent. Many economic theorists and some legal scholars assert that shareholders are principals and directors are shareholder's agents in corporations (see, e.g. Jensen and Meckling 1976). However, this assumption is incorrect as a matter of law. Corporate law treats directors not as agents of shareholders but as fiduciaries who owe legal duties not only to shareholders, but also to the corporate entity itself (Blair and Stout 1999; Ciepley 2013). Although the trope that shareholders are principals and directors are agents is sometimes a useful simplification, especially in the rare case of a corporation with a single shareholder and no debt, it is more often seriously misleading (see Section 3.3, infra).

2. CHARACTERISTICS OF CORPORATE ENTITIES

Corporate entities are creatures of law, and they are associated with five important legal characteristics. These are legal personality (meaning the corporate entity can own assets and exercise rights in its own name); limited personal liability for shareholders and other natural persons who participate in the corporation; delegated and often professional management; transferable equity shares; and perpetual life (Clark 1986; Stout 2005; Schwartz 2012).

Only legal personality and delegated management are always found in the corporate form. A corporation without legal personality is an oxymoron, and as a legal entity, a corporation must delegate and rely on natural persons to make decisions and act in the entity's name. However, corporations can lack limited liability, professional management, transferable shares, or perpetual life. These latter four characteristics, nevertheless, are common in modern corporations, especially in public corporations.

2.1 LEGAL PERSONALITY (INCLUDING ENTITY SHIELDING AND ASSET LOCK–IN)

The most fundamental attribute of a corporate entity is legal personality. Legal personality allows corporate entities to hold property and enter transactions in their own names, including acquiring cash, land, equipment, and other property to be held in the corporation's name. Legal personality explains a number of otherwise-puzzling elements of corporate law: for example, the idea that directors can owe fiduciary duties of loyalty and care to an artificial person (Blair and Stout 1999). It also explains why jurisdictions tax the incomes of corporate entities, then also tax corporate distributions to shareholders (so-called double taxation) (Bank 2006).

Legal personality is economically important because it gives corporations "entity shielding" (Hansmann, Kraakman, and Squire 2006). This means that the creditors of a natural person involved in the corporation—e.g., a shareholder, director, or employee—cannot take corporate assets to satisfy the natural person's debt. A shareholder's creditors, for example, can enforce their claims against the shareholder's personal assets, including the shareholder's equity shares. But the shareholder's creditors cannot claim the corporation's assets. Similarly, a director's creditors can claim any fees that the corporation owes the director, but cannot claim corporate property.

A second important economic consequence of legal personhood is that it allows some corporate entities—especially those controlled by an independent board of directors—to 'lock in' corporate assets. Assets are locked into the entity when natural persons involved with the entity, such as directors, shareholders, or employees, lack the power to extract those assets for themselves at will (Hansmann 1996; Blair 2003; Ciepley 2013). By reducing the risk of opportunistic or ill-timed demands for distributions, asset lock-in permits corporations to accumulate safely 'firm-specific' assets that would lose much of their value if they did not remain in the firm (Blair and Stout 1999; Blair 2003).

This allows corporate entities to pursue uncertain or long-term projects with less fear of disruption (Hansmann 1996; Stout 2014). It also encourages both equity investors and other corporate 'stakeholders' such as customers and employees to make their own beneficial firm-specific investments (Blair and Stout 1999).

To lock in their assets, many corporate entities rely on independent boards of directors (i.e. boards comprised in part or whole of individuals who are not also employees, major shareholders, or otherwise in a position to personally benefit from extracting corporate assets). (The fiduciary duty of loyalty bars directors from using their director positions to distribute corporate assets to themselves.) Asset lock in is possible in a board-controlled corporation because board governance separates "ownership and control" (Blair 1995). Corporate assets remain in the entity's name unless and until the board of directors decides to distribute those assets, for example by declaring a dividend, raising employees' salaries, or making charitable corporate contributions. As discussed further in part 3.5, infra, this "separation of ownership and control" raises some economic problems but can also contribute in important ways to corporate success.

Unlike entity shielding, which is inherent in the corporate form, asset lock in depends as a practical matter on the degree to which the corporation's board can resist the demands of natural persons who want the corporation to distribute its assets (e.g. shareholders seeking dividends, or executives or employees seeking larger salaries). Nonprofit corporations without shareholders typically have a high degree of lock in, especially when incumbent boards elect their own successors. In business corporations where shareholders have the nominal right to elect directors, asset lock in depends on share ownership patterns. Publicly traded corporations with disbursed shareholders who face obstacles to collective action usually have high degrees of lock in. In contrast, a corporation with a controlling shareholder who can easily remove and replace directors does not have much lock in, because the controlling shareholder can replace any director who refuses the shareholder's demands for distributions. In both nonprofit and for-profit corporations, asset lock in can be threatened when executives or other employees have the power to extract corporate assets in the form of excessive salaries and perquisites, or through theft or misappropriation.

2.2 LIMITED LIABILITY FOR NATURAL PERSONS

Legal personality allows corporate entities to enter contracts and commit torts in their own names. Only the corporation is legally responsible for, and only the corporation's assets may be used to satisfy liability arising from, these corporate contracts and torts. This phenomenon is often described as limited shareholder liability. However, other natural persons associated with corporations (e.g. directors and executives) also generally are not personally responsible for the corporation's acts. Thus, directors, executives, and creditors also have 'limited liability'.

In theory, limited liability for shareholders in particular is important to public corporations because it allows shareholders to invest without needing to too closely monitor managers' behaviour or the wealth of other shareholders (Manne 1967; Easterbrook and Fischel 1985). However, business history raises doubts about the importance of limited liability in explaining the rise of the public corporation, as many jurisdictions adopted limited liability relatively recently (Weinstein 2005). For example, Great Britain extended limited shareholder liability to companies with more than 25 members with the Limited Liability Act 1855, and California corporations did not enjoy limited shareholder liability until 1931 (Ibid.)

The practical importance of limited shareholder liability is especially questionable in the case of large, well-capitalized companies with assets more than sufficient to satisfy all likely corporate liabilities. This may be why the adoption of limited shareholder liability in California did not significantly affect the share prices of publicly traded California firms, implying that the market did not perceive limited liability legislation to be a significant event for these companies (Ibid.).

It should be noted that limited liability for natural persons associated with or acting on behalf of the corporate entity can be defeated in some circumstances. For example, in a corporation with a controlling shareholder, the doctrine of 'piercing the corporate veil' in some circumstances, allows creditors of the firm to access the controlling shareholder's personal assets. Similarly, corporate directors, executives, and employees may incur personal liability when they exercise their corporate powers in a negligent or criminal fashion.

2.3. DELEGATED AND PROFESSIONAL MANAGEMENT ('CENTRALIZED' MANAGEMENT)

Because corporate entities are not natural persons, they are incapable of making decisions or taking action except through natural persons. In this sense, delegated management—meaning management by natural persons, typically a board of directors—is intrinsic to the corporate form. Corporations can be distinguished in this regard from proprietorships, which can be run by their human proprietors, and partnerships, which can be run by their human partners. Corporations as artificial entities governed by human directors necessarily face agency problems that may not be present, or at least not present to as great a degree, in proprietorships and partnerships.

Moreover, corporate boards often further delegate the day-to-day operations of the company to teams of employees typically headed by a chief executive officer (CEO). This pattern of 'centralized' or professional management is common in corporations and certain 'management-managed' LLCs (Clark 1986; Stout 2005). However, professional management also can also be found in partnerships and proprietorships that hire executive managers.

Professional management has advantages, because it allows a firm to be operated by individuals who may have greater expertise, be able to make a larger time commitment, and have better access to information than the firm's owners or board of directors. However, the decision to hire professional management adds another layer of agency costs that must be incurred to run the firm, whether the firm is a proprietorship, partnership, or corporate entity.

2.4. TRANSFERABLE SHARES

Not all corporate entities issue equity shares. Nonprofits often lack shareholders, and nonstock business corporations exist. But most business corporations issue equity shares, and those shares are often ‘freely transferable’, meaning the shares and all their accompanying rights (e.g. to vote, receive dividends, and inspect documents) can be sold to third parties without restriction.

Freely transferable equity shares are particularly associated with public corporations listed for trading on organized exchanges. Listing has important economic consequences for public corporations. Because the listed shares typically carry with them the right to elect directors, it becomes theoretically possible for an acquirer to purchase a majority or even all of the company’s shares, and so become a controlling shareholder. This shifts control of the corporate entity and its assets from a board, to the controlling shareholder.

The result has been described as a ‘market for corporate control’ (Manne 1965). A company with widely disbursed, passive shareholders, whose board enjoys a high degree of independence and insulation from shareholder pressures, can be transformed into a company whose board serves at the controlling shareholder’s pleasure. This limits the corporate entity’s ability to lock in its assets against shareholder demands (Blair 2003). It can also change the nature and magnitude of agency costs. The new controlling shareholder may be better (or worse) than the original board of directors at monitoring and constraining the agency costs associated with professional management (Manne 1965). Having a controlling shareholder may also introduce new agency problems if the controlling shareholder seeks to extract corporate assets at the expense of creditors, employees, or minority shareholders (Rock 2013).

2.5. PERPETUAL LIFE

Perhaps the most fascinating characteristic of the corporation is its potential to outlast its human incorporators. A corporation is ‘sempiternal’—once created, it can exist in perpetuity (Ciepley 2014). In contrast, a proprietorship or partnership ends when the proprietor or a partner exits the firm or dies. Business assets must be transferred to a new proprietorship or partnership for the business to continue (Stout 2014).

The possibility of perpetual life allows corporate entities to pursue projects over multiple human generations. For example, a corporate entity, the Veneranda Fabricca, has been building and maintaining the Cathedral of Milan for over 600 years (Ibid.). The Hudson’s Bay Company, which is still operating, was incorporated in 1670 (Schwartz 2012).

Not all corporations are so long-lived, of course. A corporate charter may provide that a corporation will exist only for a certain period. Moreover, corporate entities disappear because they are merged, dissolved, or become insolvent. Nevertheless, the possibility of perpetual life allows both nonprofit and business corporations to pursue long-term, open-ended projects of uncertain and possibly perpetual duration.

3. THEORIES OF THE CORPORATION

The literature offers several different theories or models of the corporation (Millon 1990; Allen 1992). These theories try to capture the pattern of legal rights, responsibilities, duties, and privileges typically found in corporations in a single readily understandable description. In other words, they attempt to summarize briefly the legal technology that is the corporate entity.

Given the complexity of corporations, it is not surprising that multiple models have been offered. The corporation has been described as, among other things: (1) an entity; (2) an aggregate of natural persons; (3) the property of its shareholders; (4) a nexus of contracts; (5) a collection of specific assets; and (6) a political system or 'franchise government'. Each of the models—perhaps they are better described as metaphors—offers some insight into the corporate form. However, all have limitations, and some have great potential to be misleading.

3.1. ENTITY THEORY

Perhaps the most solidly grounded theory of the corporation, at least from a legal perspective, holds that the corporation is an independent, artificially created entity. The entity theory of the corporation is captured in Chief Justice Marshall's famous description in the *Dartmouth College* case, *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), of the corporation as 'an artificial being, invisible [and] intangible' (636–37.) Justice Louis Brandeis expressed a similar view in 1933 in *Liggett vs. Lee*, when he described the corporation as a 'Frankenstein monster which States have created by their corporation laws', (288 U.S. 517 [1933]).

The entity theory of the corporation was widely embraced in the nineteenth century, and it is enjoying a resurgence today (see, e.g. Hayden and Bodie 2011 at 1127) ['[a] corporation is not a contract. It is a state-created entity']); (Biondi, Canziani, and Kirat 2007; Keay 2008). This may be because entity theory does an excellent job of explaining and predicting fundamental corporate characteristics, especially legal personality and perpetual life. If the corporation is an entity, it makes sense that corporations own assets in their own names, enter contracts and commit torts, and can sue and be sued. It makes sense that corporations are governed by boards of directors who owe fiduciary duties to the entity as well as shareholders. It makes sense to tax the entity's income. It makes sense that corporations can persist beyond the lifetimes of their human incorporators.

Entity theory is cognitively challenging, however, as it requires observers to ascribe significance to an institution that is not only artificial but also (as Chief Justice Marshall pointed out) invisible and intangible. Thus, some scholars have dismissed corporations as 'not real' (Easterbrook and Fischel 1985, 89). Nevertheless, just as gravity is real (if invisible) and political states are real (if intangible), corporations are real and have real effects (Stout 2012). Because the word *person* is normally used to describe human beings, it can also be difficult to think of corporate entities as 'legal persons'. However, in the case of corporations the word *person* is being used to describe not an organism, but rather an institution that, acting through its board of directors, can exercise many of the legal rights that natural persons enjoy, including the rights to own property and to enter contracts.

The most serious objection to entity theory may be normative rather than positive. This objection centers on the idea that, if we treat corporations as independent entities with rights, they may come to pose a threat to the welfare of human beings that created them (Millon 1990). (Hence, Brandeis's reference to Frankenstein's monster.) This normative concern does not detract from entity theory's strong positive value in realistically describing the nature of corporations and corporate behaviour.

3.2. AGGREGATE THEORY

Another theory of the corporation that crops up occasionally treats corporations as aggregations of natural persons. Thus, cases and commentators sometimes describe corporations as being 'composed' of human beings (Millon 1990, 214). The U.S. Supreme Court may have given a nod to aggregation theory in the *Hobby Lobby* case, *Burwell v. Hobby Lobby Stores Inc*., 134 S. Ct. 2751 (2014), when the majority held that, based on the religious beliefs of its current shareholders, a closely held corporation had freedom of religion rights, and further observed that 'a corporation is simply a form of organization used by human beings to achieve desired ends' (2768).

Treating corporations as aggregations of natural persons seems, however, to raise more questions than offer answers. For example, which human beings are being aggregated? Only shareholders (some of whom may themselves be trusts or corporations)? Or should we also aggregate the interest of customers, executives, and rank-and-file employees, and possibly the community? Perpetual corporate life also poses a serious challenge to aggregation theory. Whether we view corporations as aggregations of shareholders or other humans, as well, the pool of humans involved may be constantly shifting, especially in large public corporations, where both employees and shareholders come and go quickly. Is the corporation an aggregation of those who originally founded it or an aggregation those who are involved with it at present? Also, aggregation theory glosses over the difficult reality that natural persons who supposedly 'compose' the corporate entity often have very different interests and different ideas about what the corporation ought to do.

Finally, the aggregate approach fails to distinguish corporate entities from other legal forms such as partnerships or membership associations, and it fails to explain the fundamental characteristics of legal personality and perpetual life. As a result, the aggregation model of the corporation can be criticized as offering relatively little insight into the nature of corporate entities.

3.3. PROPERTY ('PRINCIPAL/AGENT') THEORY

An influential model of the corporation often associated with economic analysis, which is somewhat related to aggregate theory, is property theory. Property theory treats corporations not as aggregations of natural persons but as aggregations of shareholders' property (Allen 1992). According to this view, corporations 'belong' to their shareholders (see, e.g. Friedman 1970). Managers, including directors, are agents whom the shareholder-owners hire to manage their property, much as a landowner might hire a property manager.

Property theory carries important governance implications. One is that corporations ought to be run in shareholders' interests, typically interpreted as shareholders' financial interests (Hansmann and Kraakman 2000). A second implication is that directors ought to do shareholders' bidding when asked (Hansmann and Kraakman 2000; Bebchuk 2007; but see Bainbridge 2003, adopting property theory but disagreeing with this implication).

While many laypersons believe shareholders own corporations, this statement is incorrect as a matter of law. As legal persons, corporations (like natural persons) either own themselves or have no owners (Blair 1995; Robe 2011; Stout 2012). Shareholders do not own corporations, they own shares of stock, a kind of contract between the shareholder and the corporate entity that gives the shareholder limited rights (e.g. to receive any dividends the directors declare, to vote on certain corporate matters, and to inspect certain records). Thus, shareholders are on equal legal footing with bondholders and employees who, like shareholders, also have contracts with the corporate entity that give them limited distribution rights and in some cases, limited voting and inspection rights.

Property theory accordingly seems to disregard the formal legal relationship between shareholders and corporations. This seems a serious flaw in property theory, as property rights are defined by law. Thus, property theory can be criticized as offering an erroneous description of the legal technology that is the corporation (Stout 2012).

However, the property model may be a reasonable metaphor in cases where a shareholder enjoys such a high degree of control over the board and corporate policy that the shareholder becomes the functional equivalent of a sole proprietor. Thus, property theory may be useful for analyzing corporations with no debt and a single shareholder who controls the board of directors.

However, in the typical modern public corporations with disbursed shareholders, collective action problems make it extremely difficult for shareholders to influence incumbent boards of directors. Thus, as Adolf Berle and Gardiner Means described nearly a century ago (Berle and Means 1932), shareownership in a public corporation does not as a practical matter typically translate to shareholder control over the corporate entity. Accordingly, the property theory provides a very poor model for describing the typical public corporation.

Property theorists often concede that public corporations are characterized by the separation between shareholder ‘ownership’ and actual control of corporate assets that Berle and Means described (Blair 1995). However, they typically view this as a flaw not of property theory, but of public corporations. Thus, property theorists often argue that corporate law and practice should be ‘reformed’ to give disbursed public company shareholders greater influence over boards or to encourage more hostile takeovers in which public companies acquire controlling shareholders (Manne 1965; Bebchuk 2007). In other words, they argue that corporations should be changed to fit the model, rather than changing the model to fit real corporations.

This approach disregards and puts at risk the economic benefits generated by asset lock in and board-controlled corporations (Blair 2003; Stout 2013).

3.4. NEXUS OF CONTRACTS THEORY

Another theory of the corporation frequently associated with law and economics is the nexus of contracts theory (Easterbrook and Fischel 1985). This theory views the corporation as a web or ‘nexus’ of explicit and implicit contractual agreements between and among various parties associated with the firm, including shareholders, directors, officers, employees, and creditors (Eisenberg 1999; Hayden and Bodie 2011).

The nexus of contracts approach has many strengths. First, it embraces the intricacy of corporate entities, which can rival nation-states in size, scope, and complexity. It thus avoids the unrealistic reductionism of the property or aggregation theories. Second, nexus theory emphasizes the voluntary nature of most corporate relationships. Third, it highlights corporate diversity and the reality that those who create and participate in corporations can draft customized charters, bylaws, and contracts that depart from the standard 'default' rules. For example, while most corporate codes provide that each share of common equity has one vote ('one share, one vote'), they also permit corporations to issue classes of shares with different voting rights.

At the same time, the nexus of contracts approach has weaknesses. Many nexus theorists dismiss the corporate entity as irrelevant or even nonexistent. As two pioneers of nexus theory have put it, 'the corporation is not real. It is no more than a name for a complex set of contracts among managers, workers, and contributors of capital. It has no existence independent of these relations' (Easterbrook and Fischel 1989, 89; see also Jensen and Meckling 1976 at 310–11, describing the corporation as a "legal fiction"). This not only is inconsistent with the corporation's legal status, it also makes it difficult to determine the corporation's boundaries. For example, when General Motors sells a car to a dealer, is the sales contract part of the corporation? What if the dealer subsequently sells the car to a retail customer, who then buys car accessories from a department store? Are these purchase contracts also part of the corporation?

The question of corporate boundaries under nexus theory can be answered by combining nexus theory with the entity theory, and treating the corporate entity itself as the contracting party at the center of the web of implicit and explicit contracts that makes up a corporation. The corporation can then be defined as including only contracts to which the corporate entity is a party (e.g. the charter and bylaws, as well as contracts, employment agreements, and debt instruments and equity shares issued in the name of the corporation).

However, nexus theory has a second limitation in that it glosses over the critical role played by the state in permitting incorporation and limiting how corporations may be organized. Although corporate law allows for a high degree of customization (most corporate law rules are a default rules), there are some corporate law rules that are mandatory. For example, the director's fiduciary duty of loyalty is mandatory and cannot be contracted around.

3.5. TEAM PRODUCTION THEORY

The team production theory of the corporation focuses on the role corporate entities play in fostering team production, meaning production that requires contributions from more than one party (Blair and Stout 1999). Team production projects pose a difficult contracting problem when team members' contributions are project-specific (they have limited value outside the project) and nonseparable (all contributions are essential to the project's success, making it impossible to assign any particular portion of the benefits generated by the project to any particular contribution). In such cases ex ante sharing rules invite shirking, while ex post negotiations over the division of rewards encourage opportunistic rent-seeking.

Corporate projects often involve team production, requiring project-specific contributions from investors, employees, and others and others (Blair and Stout 1999). The team production approach to corporate law posits that the unique corporate characteristic of governance by a board of directors whose members cannot distribute corporate assets to themselves (what Henry Hansmann [1996] has called a 'distribution constraint') can be understood as a second-best contracting solution to the team production problem. Essential corporate team members (shareholders, employees, and others who make company-specific investments) give up property rights over the team's joint output to the corporate entity, which 'owns' any surplus generated by team production. The corporate entity in turn is governed by a board of directors whose members cannot keep the surplus for themselves but must choose between keeping the surplus in the entity's name or distributing all or part of it to various corporate team members (e.g. paying dividends to shareholders or larger salaries to employees). If the board's members want to keep the corporate entity viable, which is a prerequisite to their keeping their board positions, they have incentive to use corporate surplus to reward various team members as necessary to keep those members inside the corporate team.

The team production model accordingly views corporate directors not as agents of shareholders, but as a governance mechanism designed to encourage and protect specific investment in corporate team production. This approach explains a number of aspects of corporate law, including the rules of fiduciary duty, shareholders' limited voting rights, and derivative suit procedure (Blair and Stout 1999).

The team production theory of the corporation can be critiqued as applying more clearly to public corporations with disbursed and relatively powerless shareholders than to closely held firms or firms with a single shareholder. This is because directors in companies with a controlling shareholder may find it difficult to act as independent 'mediating hierarchs' who control and distribute the corporate surplus (Coates 1999). The property model may be a better model for describing such controlled firms.

3.6. POLITICAL THEORIES (CORPORATIONS AS 'FRANCHISE GOVERNMENTS')

Another way to model the corporate entity is to view it as an extension or 'franchise' of the political state (Ciepley 2013). This theory recognizes that corporations closely resemble governments in their internal governing authority over their constituents, especially shareholders and employees. Moreover, this internal governing authority exists because it has been expressly granted by state action; it is state law that gives corporate entities legal personhood. Thus, corporations should be viewed not only as aggregations of private contracts or private property but also as quasi-public institutions.

The political theory of the corporation finds support from the fact that many early corporations (e.g. the British East India Company) were chartered by governments for expressly public purposes, not merely for private profit. It also recognizes that corporate entities and political entities have many common characteristics, including the use of voting rules to select representatives and the creation of lines of authority within the entity. Finally, it recognizes that political action is essential for corporate entities to exist, as private contract alone cannot create legal persons with entity shielding (Hansmann, Kraakman, and Squire 2006; Ciepley 2013).

But while the political theory of the corporation offers many insights, it does not provide much guidance on what corporate governance structures are most desirable for corporations. To some extent, it also begs the question of why states allow incorporation; that is, the normative question of corporate purpose. To this question we now turn.

4. THEORIES OF CORPORATE PURPOSE

A corporate entity must rely on natural persons, especially its board of directors, to make decisions and to take action in the entity's name. This inevitably raises the question of what goals the natural persons tasked with serving the corporation's interests should pursue.

To qualify for favorable tax treatment, nonprofit corporations must describe their goals and purposes in their charters. In contrast, corporate codes generally allow other corporations (often called 'for-profit' corporations, to highlight their tax status) to be formed 'for any lawful purpose'. Moreover, the vast majority of for-profit corporate entities describe their purpose in their charters by using some variation of the phrase 'any lawful purpose' (Stout 2012). It is, therefore, not surprising that, just as different models of the corporate entity have been offered, different theories of corporate purpose have predominated at different times and in different places.

4.1. STATE INTERESTS

As a historical matter, most early business corporations were chartered by political states to accomplish specific purposes relating to the state's interests. For example, the Hudson's Bay Company was chartered by the English crown for the specific purpose of exploring and developing colonial lands in North America; the Dutch East Indies Company was chartered by the Dutch legislature to do the same in Asia. Each company enjoyed a state-granted monopoly over trading in its area. These early corporations were clear examples of 'franchise corporations', whose principal purpose was to serve the interests of the chartering government (Ciepley 2013).

Today, most states permit 'free incorporation', allowing anyone to create a corporation for any lawful purpose. However, the franchise theory of corporate purpose persists in the form of scholarly arguments that, because state action is required for corporations to exist, corporations should be run in a fashion that contributes broadly to public welfare, not only to generate private profits (see, e.g. Ciepley 2013).

4.2. CUSTOMER WELFARE

In the eighteenth and early nineteenth century, many business corporations were created not to serve their investors, but to serve the consumers who relied on the goods and services produced by the corporations (Hansmann and Pargendler 2014). This is most directly evidenced by the voting structures of these corporations, which typically were local monopolies created to provide needed infrastructure (roads and canals) and financial services (banking and insurance). The merchants, farmers, and landowners who patronized these businesses were also their principal shareholders, and voting rights were allocated in a fashion that favored small shareholders over larger ones (Ibid.).

The customer welfare theory of corporate purpose finds its modern expression in prominent management scholars who argue that corporations ought to serve 'customer capitalism' (Martin 2010). For example, management guru Peter Drucker famously believed that 'the purpose of business is to create and keep a customer' (Stern 2011).

4.3. MANAGERIALISM

During most of the twentieth century, the dominant theory of corporate purpose was managerial capitalism or managerialism (Davis 2009, 63). This business philosophy viewed professional managers of public corporations (i.e. directors and executive employees) as stewards or trustees of important economic institutions that ought to be operated to benefit a wide range of constituents, including not only shareholders also customers, employees, suppliers, the local community, and the nation.

Managerialism fell into disfavor at the close of the twentieth century owing to the increasingly widely-held belief, perhaps related to the decline of the heavily unionized American auto and steel industries, that it promoted self-serving managerial behavior and inefficient 'empire building'. It is questionable whether the evidence supports the view that managerialism proved uncompetitive (Rock 2013; Stout 2013). Nevertheless, many experts today view managerialism as discredited. However, considerable support remains for stakeholder theory, see Section 4.5, which shares many elements of managerialism.

4.4 SHAREHOLDER VALUE AND SHAREHOLDER PRIMACY

Perhaps the dominant theory of corporate purpose today, especially among nonexperts in the United States and United Kingdom, might be called shareholder value theory or shareholder primacy. This theory holds that the sole purpose of business corporations is to maximize shareholder wealth or 'shareholder value' (Hansmann and Kraakman 2000; see, e.g. Bainbridge 2003). Shareholder value theory is associated with the notion that the corporation is the property of its shareholders, see Section 3.4. Like the property model, it implies that corporations exist to serve only shareholders and that directors ought to do shareholders' collective bidding. Shareholder value theory is also associated with the 'fundamental value' version of the efficient capital markets hypothesis, which holds that the price of the company's shares always reflects the best possible estimate of the company's fundamental economic value (Hansmann and Kraakman 2000; see, generally, Gilson and Kraakman 1984; Stout 2003).

Despite its popularity, the idea that corporations exist to maximize shareholder value rests on questionable intellectual foundations. As a positive matter, it conflicts with modern corporate codes and charters, which typically permit corporations to pursue any lawful objective. The business judgment rule similarly gives boards of directors wide latitude to pursue noneconomic objectives and to serve nonshareholder interests. (Blair and Stout 1999; Stout 2012). The result, as the U.S. Supreme Court recently stated in the *Hobby Lobby* case, is that "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so," *Hobby Lobby* case, *Burwell*, 134 S. Ct. at 2771.

Many proponents of shareholder value thinking concede its positive limitations. They argue instead that, even if corporate law does not require boards to maximize shareholder value, as a normative matter that is what boards ought to do, because shareholders own corporations and are the corporate entity's residual claimants (Hansmann and Kraakman 2000; see, e.g. Bainbridge 2003). These last two statements are factually incorrect, however. As discussed in Sections 2.1 and 3.3, corporations as legal persons either own themselves or are incapable of being owned by anyone. Similarly, the corporate entity holds legal title to all corporate profits and is its own residual claimant; the board of directors, and not the shareholders, has the legal authority to decide what to do with the entity's residual (Stout 2012).

A second intellectual flaw in the normative case for a shareholder value theory of corporate purpose is that it implicitly presumes that a single 'shareholder value' exists. In other words, it assumes shareholders are homogeneous. It thus glosses over the reality that shareholders frequently have different and conflicting interests (Greenwood 1996). For example, the pursuit of 'shareholder value' in the form of a higher share price today may benefit short-term shareholders while harming longer-term shareholders by eroding the company's long-run profitability (Stout 2012; Aspen Institute 2014).

Finally, the shareholder value theory of the corporation can be critiqued on the grounds that it produces socially inefficient results because it discourages team production, see Section 4.6, and encourages corporations to be managed in a fashion that ignores external costs and benefits, see Section 4.5.

4.5. STAKEHOLDER WELFARE

Another theory of corporate purpose that enjoys substantial support among contemporary corporate experts, especially outside the United States, is stakeholder welfare theory (Freeman 1984; Freeman, Harrison, Wicks, Parmar, and de Colle 2010). Stakeholder theory, like franchise theory, holds that states permit incorporation so that companies may generate social benefits. Stakeholder theory further argues that, in calculating social benefits from corporate activity, there is no reason to focus only on benefits to equity investors. The welfare of other parties involved with or affected by corporate behaviour (e.g. employees, customers, suppliers, and the community) should also be considered.

Stakeholder theory is sometimes criticized as failing to explain why shareholders typically elect directors. However, as a matter of logic, the observation that shareholders have voting rights that other stakeholders do not have is not enough to demonstrate that only shareholder welfare should count in setting corporate policy. There may be other reasons for limiting voting rights (Blair and Stout 1999). For example, minors and noncitizen residents cannot vote in U.S. political elections, but this does not mean U.S. policymakers should ignore their interests. Similarly, case law sometimes seems to give shareholders special treatment by describing directors' fiduciary duties as being owed to 'the corporation and its shareholders'. This critique has led some stakeholder theorists to propose the creation of explicit fiduciary duties to stakeholders (see, e.g. Freeman 1984). However, it can be argued that the existence of fiduciary duties to the corporate entity demonstrates both that shareholder welfare is not the only corporate goal that matters, and that they can operate to protect stakeholder interests (Blair and Stout 1999).

A second common objection to the idea of maximizing stakeholder welfare as a corporate objective is the claim that, as a practical matter, it is difficult to balance the interests of different constituencies against each other, and inviting corporate managers to do so simply gives them discretion to impose more agency costs. While this objection has some merit, it is subject to the qualification that managerial discretion still might be a 'second best' solution if maximizing shareholder wealth is itself an inefficient objective (e.g. because it discourages team production or because it generates excessive external costs).

4.6. TEAM PRODUCTION THEORY

A third contemporary theory of corporate purpose that shares some common elements with stakeholder theory is team production theory (Blair and Stout 1999). Team production theory holds that the purpose of the corporation is to generate economic surplus by protecting the company-specific investments of various corporate 'team members', such as the equity investors who contribute financial capital used to make specific investments in research or infrastructure, employees who invest in firm-specific human capital or customers who rely and become dependent upon on the firm's products. As described in Section 3.5, team production theory views the corporate goal as maximizing the surplus generated by the team. Accomplishing this goal requires ensuring that each essential team member receives a large enough share of the benefits from corporate production that the member wants to continue with the team.

Team production theory resembles stakeholder theory in supporting the idea that corporations should be run to benefit not only shareholders but also employees, customers, suppliers, and other groups whose specific investments contribute to corporate success. Like stakeholder welfare theory, it recommends that managers seek to balance the interests of several constituencies, and so it is subject to similar criticisms (balancing interests is difficult, can increase agency costs, and so forth). Unlike stakeholder theory, however, team production theory does not address the problem of external corporate costs and benefits to groups that do not participate in corporate production.

4.7 LONG-TERM PRODUCTION THEORY

A theory of corporate purpose that has recently emerged from several sources might be called long-term production theory (Schwartz 2012; Stout 2014; Keay 2008). This approach to understanding corporate purpose focuses on what may be the most interesting and unique feature of corporate entities: the possibility of perpetual existence and ‘immortal investing’ (Schwartz 2012).

Unlike partnerships and proprietorships, corporations, in theory, can exist in perpetuity. This unique corporate characteristic suggests that an important and perhaps primary economic purpose of at least some corporations is to pursue economically beneficial projects likely to succeed only over very long or uncertain periods of time (Schwartz 2012; Stout 2014). For example, many of the earliest nonprofit corporations were universities, municipalities, and religious organizations pursuing projects over timeframes measured in several human generations (e.g. building and maintaining a cathedral or university) (Stout 2014). Similarly, some contemporary business corporations have been operating for centuries (Schwartz 2012).

Among modern business corporations, the public company comes closest to fitting the notion that the primary purpose of corporate entities is to pursue long-term projects. This is because public corporations whose shares are traded in an even somewhat efficient stock market (i.e. a market where prices roughly capture future value) provide incentives for the present generation of investors to pursue projects that may not generate profits for decades—as long as those future profits can be captured in today’s share price. Public corporations thus help overcome the limits to altruism that might otherwise lead the present generation to underinvest in projects that benefit future generations (Stout 2014).

It should be noted that when stock markets are somewhat inefficient, public corporations are more likely to be able to pursue long-term investments if they are board governed, and so able to keep their corporate assets locked in. This suggests that under conditions of limited market efficiency, ‘shareholder democracy’ of the sort often favored by proponents of the property model and shareholder value theory (see Sections 3.3 and 4.4) may harm the public corporation’s ability to pursue beneficial long-term projects (Stout 2014).

The idea that pursuing very long-term projects is an important economic function of the corporate form raises interesting questions about the best way to measure corporate performance. If the future is foreseeable and the stock market is perfectly efficient, today’s share price may be a reliable measure of the value of the corporation’s future returns to shareholders. But if (as seems far more likely) the future is uncertain or the market is imperfectly efficient, stock price can be unreliable. Indeed, to the extent the future is uncertain, long-term ‘shareholder value’ becomes fundamentally unobservable. An unobservable variable is useless as a performance metric. In such a case, it might be better to gauge long-term corporate performance by focusing on whether the corporation is likely to survive into the long term. In other words, entity sustainability may be a better metric of corporate performance, and a more useful goal, than maximizing today’s profits or share (Keay 2008; Belinfanti and Stout 2016).

5. CONCLUSION

As a positive matter, there is widespread agreement about the basic legal characteristics of corporate entities: legal personhood, limited liability, delegated management, transferable shares (for stock corporations), and perpetual existence. However, when it comes to models of the corporate entity and to the normative question of proper corporate purpose, we see great diversity and a fair degree of disagreement (Allen 1992; Aspen Institute 2014).

As to models, it seems reasonable to suggest that most have insights to offer. Recall the parable of the four blind men and the elephant: the blind man who grasped the trunk compared the elephant to a snake; the man who grasped the leg likened it to a tree; the man who touched the side thought it resembled a wall; and the man who grabbed the tail thought it was like a rope. Just as each of the four blind men had different but useful insights into the nature of the elephant, different models of the corporation may each have some value. However, some models are more useful than others in particular circumstances. For example, the property model is best applied to firms with a single shareholder, whereas the team production model is typically most applicable to public firms with disbursed shareholders.

Regarding theories of proper corporate purpose, commentators sometimes argue that we need a single corporate objective because otherwise, the directors and executive employees who manage corporations will enjoy too much discretion and generate excessive agency costs. As economist Michael Jensen has put it, 'any organization must have a single-valued objective as a precursor to purposeful or rational behavior . . . [i]t is logically impossible to maximize in more than one dimension in the same time' (2002).

This perspective overlooks the possibility that it is often rational not to seek to maximize a single objective, but instead to 'satisfice' several important constraining objectives (as Nobel prize-winning economist Herbert A. Simon has put it [1978]). Biological organisms and mechanical systems, for example, typically satisfice multiple objectives (e.g. ensuring a minimum required level of energy inputs, maintaining temperatures within an acceptable range, avoiding dangerously stressful forces, and so forth). There seems no reason to assume that organizations like corporations cannot similarly follow Simon's satisficing principle. Although a goal of satisficing several objectives may leave more room for agency costs than mindlessly pursuing a single objective, satisficing multiple objectives may be preferable if it produces a more successful, resilient, and sustainable organism, mechanism, or organization.

Moreover, it may be desirable to permit different corporate entities to pursue different purposes. This is clearly the case for nonprofits; different nonprofits typically described different purposes in their charters. There seems no reason to assume business corporations cannot also be used for diverse purposes. After all, the typical corporate code and the typical corporate charter simply provide the business must be 'lawful'. While a certain amount of profitability is necessary to ensure survival, outside that constraint business corporations can pursue a number of objectives, including producing innovative products, providing secure and high-paying employment opportunities, generating returns for equity and debt investors, and promoting economic growth and stability. Like the Swiss army knife, the corporate entity is an organizational tool that can be put to many uses.

References

Allen, William T. 1992. "Our Schizophrenic Conception of the Business Corporation." *Cardozo Law Review*, 14(2), pp. 261–281.

2. Решите задачу. Оцените (строго по пунктам) все доводы Ответчика (Заказчика) (1.1, 1.2, 2.1) и Истца (Поставщика) (1.1, 1.2, 2.1, 2.2). Сделайте общий вывод о возможности удовлетворения предъявленного Истцом (Поставщиком) иска и в каком объеме.

Заказчик - юридическое лицо по договору поставки оплатил поставленное ему Поставщиком оборудование через шесть месяцев с даты поставки (дата поставки – 30.09.2013, оплата – 31.03.2014). Однако согласно договору он должен был произвести оплату не позднее двух месяцев с даты поставки (т. е. не позднее 30.11.2013).

В договоре поставки за данное нарушение была установлена неустойка в размере 0,5 процента от несвоевременно уплаченной суммы за каждый день просрочки, но не более 10

процентов от общей стоимости оборудования. Других условий по поводу ответственности Заказчика в договоре поставки не было.
В связи с данным нарушением Поставщик предъявил в арбитражный суд иск к Заказчику о взыскании:

1) неустойки в размере 10 процентов от стоимости оборудования, поскольку неустойка, рассчитанная за период просрочки оплаты, превысила установленный договором максимальный размер неустойки;

2) процентов за пользование чужими денежными средствами на основании ст. 395 Гражданского кодекса РФ за период просрочки оплаты.

Позиция Ответчика (Заказчика).

1. Ответчик (Заказчик) иск не признал по следующим основаниям:

1.1) для взыскания неустойки и процентов за пользование чужими денежными средствами истек срок исковой давности, поскольку дата поставки – 30.09.2013, а иск заявлен 05.10.2016, т. е. по истечении трехгодичного срока исковой давности;

1.2) он не должен нести в данном случае ответственность за просрочку оплаты, поскольку она была обусловлена не зависящими от него обстоятельствами, а именно неисполнением обязательств перед ним его контрагентами, что вызвало у него недостаток денежных средств.

2. Ответчик(Заказчик) заявил ходатайство о снижении размера неустойки и процентов за пользование чужими денежными средствами, поскольку:

2.1) он находится в тяжелом финансовом положении и взыскание этих сумм приведет к его фактическому банкротству.

Позиция Истца (Поставщика).

1. Истец (Поставщик) с доводами Ответчика (Заказчика) не согласился по следующим основаниям:

1.1) поскольку Ответчик (Заказчик) 31.03.2014 оплатил поставленное оборудование, то он фактически признал свой долг. В этом случае течение срока исковой давности прерывается и начинает течь заново;

1.2) в предпринимательских отношениях ответственность наступает вне зависимости от вины.

2. Ходатайство Ответчика (Заказчика) о снижении размера ответственности Истец (Поставщик) просил арбитражный суд отклонить:

2.1) им заявлено требование о взыскании неустойки не в полном размере, так как он ограничен договором. Поскольку размер неустойки ограничен соглашением сторон, арбитражный суд ее снижать не должен;

2.2) проценты за пользование чужими денежными средствами не подлежат снижению, поскольку это не неустойка, а самостоятельный вид гражданско-правовой ответственности.