THE CORPORATION AS IMPERFECT SOCIETY

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ABSTRACT

The way we think determines the way we will act. The way we conceive of a corporation will have profound implications for how judges, legislators, directors and employees will act with respect to a corporation. Current corporation theory is dominated by private law conceptions of the corporation. Such a conception places, in the realm of private ordering, not only corporate law, but corporate decision making. Yet, corporations, especially publicly traded ones, are public entities. Ontologically they are more similar to governments than private contractual relations. This Article argues that rather than contract or property law, public constitutional law is a more appropriate hermeneutic for understanding the corporation. Consequently the Article applies Aristotelian political philosophy to the corporate enterprise. The Article argues that the corporation is one of the many imperfect societies that form the perfect society of the nation. The implications of such understanding involve a recognition that the corporation must be governed consistently with the common good of the corporation but with due attention paid to the common good of the perfect society of which the corporation is a part.

The Article turns from theory to practice and briefly examines some of the main aspects of modern corporate law. The analysis reveals that the principles of Aristotelian political philosophy are evident in the results of corporate law decisions. This is not surprising since the corporate form developed in the shadow of such philosophy which formed the basis of Western political philosophy generally.

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### I. INTRODUCTION

If we judge it less cynically, the idea of corporate governance is at least useful in reminding us that companies are systems of government.

Debates about the role, composition and duties of the board of directors; about the role and rights of shareholders, either individually, in groups, or as a whole; and about the ways in
which directors and shareholders interact within a company, all raise some fundamental questions about the structures and processes of government within corporations.¹

Corporations are ubiquitous in modern society.² They pervade every aspect of our life, as well as our consumer, professional, and investment activity. People probably have more contact with corporations on a daily basis than any other institution, including government.³ From the South Sea Bubble to the Stock Market Crash of 1929 to Enron to General Motors and Countrywide Mortgage, corporate scandals and controversies invite fundamental questions about corporate law. This Article attempts to bring a fresh perspective to the question: "What is a corporation and how should the law treat it?" This Article articulates a corporate metaphysics rooted in political philosophy.

The dominant models of corporate law and philosophy are rooted in the realm of private law: particularly contract, agency, and property law. Corporations are viewed as a nexus of contracts or as vehicles for joint ownership of a pool of economic assets. Conceptualizing corporate law as an area of law facilitating private ordering has led to the entrenchment of the principle of shareholder wealth maximization. Corporations exist to maximize shareholder wealth. This conception affects the philosophy underpinning the system of corporate law. Although some commentators and policy makers have argued for some attention to the interests of other stakeholders or constituencies of a corporation, their arguments are still couched primarily within the hermeneutic of private law, albeit somewhat modified by their concern for particular groups or stakeholders. Placing corporate law within a political venue, however, allows corporate law to ask more fundamental questions such as: What is the purpose of a corporation within the larger society? How should its organization be structured? What claims should its authorities have over other members of the corporation? What are the roles and responsibilities of authority figures in a political community? As created, corporations are a legal entity "separate from the flesh-and-blood people who were its owners and managers."⁴ This leaves the

³Id. at 42 ("[C]orporate managers are entrusted with stewardship of enormous concentrations of wealth and power—in many instances both larger and more important in our daily lives than most governmental units").
⁴JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER
question of whether the corporation is "essentially a private association subject to the laws of the state but with no greater obligation than making money, or a public one which is supposed to act in the public interest?"

Based on Aristotelian political philosophy, this Article constructs a theory of corporations as political entities. In this light, corporate law is really a form of public law and not private ordering. Corporations are in the language of Aristotelian philosophy, imperfect communities which are one of several constituent parts of a perfect community, the civil polity. The end of corporations, production of certain economic goods, is an imperfect end. Corporations also lack internally all the means to achieve their end and are dependent on the rest of civil society to attain it. Several implications flow from this vision. Those who command authority within the corporate community have obligations to the larger perfect community as well as to all the members of the corporate community. The imperfect ends of corporations must be harmonized to the common good of the civil society. Those exercising political authority within the imperfect community have the obligation to exercise that authority for the common good of the corporation, not just the individual good of any one member, be they managers, directors, shareholders, creditors, suppliers, customers, or employees. This Article concludes by observing that, although this vision of the corporation differs from much of the commentary on corporate metaphysics, corporate law and many corporate practices are actually more consistent with this vision of the corporation as an imperfect society committed to the common good than the shareholder wealth maximization standard. The philosophy of corporate law should be realigned to take account of this reality.

Part II of this Article presents a critical summary of the dominant forms of corporate metaphysics rooted in concepts of private law. Part III presents a constitutional theory of the corporation. By examining the Aristotelian understanding of a political community and the differences between a perfect and an imperfect community this part argues that a corporation ought to be understood within the framework of political philosophy rather than private law. The analysis demonstrates that a corporation is a form of imperfect society. Part IV considers an implication of the corporation being considered a political community: the requirement of the common good that attaches to all authorities of a political community. From this concept of the common good the common purpose of a corporation is found in the satisfaction of customers of a corporation. Part V demonstrates that the vision of the corporation as an imperfect community

16 (2004).

committed to the common good is reflected in the reality of corporate law as it exists.

II. AN OVERVIEW OF CORPORATE METAPHYSICS

A. Corporate Law as Property Law

One conceptualization of the corporation that has pervaded the last century's discussion is rooted in property law. The corporation is the property of the shareholders; thus, corporate law is a form of private property law. Chancellor Allen summarizes this view: 

"[T]he corporation is seen as the private property of its stockholder-owners. The corporation's purpose is to advance the purposes of these owners (predominantly to increase their wealth), and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners."  

This view of the corporation as the private property of its shareholders may make sense for a company that is entirely—or at least a majority—financed by its shareholders. Yet, with large scale financing of public companies by debt, is it really accurate to think of these as entities owned by its shareholders? For public North American companies reporting balance sheet information for fiscal year 2008, the average ratio of total liabilities to stockholders' equity was 17.25. The median and mode for the same group of companies was 1.12 and 4.08, respectively. Even when only long-term debt is compared to shareholders' equity, the average, median, and mode were reduced to 16.05, 0.054, and 2.32, respectively. Thus, the capital invested in public companies does not come exclusively from shareholders and in many cases it comes many times over from debt investors. Can anyone say that company such as California Petroleum Transport Corporation, which had a debt to equity ratio of 68,039, is really owned by its shareholders? Taking a less extreme example, one of the companies in the mode with a ratio of 2.32, BWAY Holding Company,

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7This figure was derived from data made available by Compustat North America and is an average of 6900 companies for which both liabilities and shareholders' equity was reported and which had a positive ratio. The calculation excludes five companies whose ratio was zero (or virtually zero) and 667 companies with a negative ratio. There were 1662 companies for which either liabilities or shareholders' equity data was unavailable.

8Id.

9When calculating the ratio of long term debt to shareholders' equity there were 2,138 companies with a negative ratio and 478 with a ratio of zero (or virtually zero).

10CAL. PETROLEUM TRANSP. CORP., ANNUAL REPORT (Form 10-K) (March 19, 2010) (listing long term debt as $68,039 million and shareholders' equity as $1000).
had a shareholders' equity of $173.7 million and total long term debt of $402.4 million, while its total liabilities were $708.7 million.\textsuperscript{11} Can shareholders who have contributed less than half of the total capital of a business really be considered its owners? If all liabilities were considered capital, this figure would fall to less than a quarter of the total capital.

Beyond the financing of corporations, commentators have argued that in light of modern forms of stock ownership, "shareholders . . . do not resemble traditional owners" of property.\textsuperscript{12} With the advent of tiered ownership through nominees and multi-layered mutual funds, shareholders are often institutionally removed from the corporations that the property theorists purport to argue that they own.\textsuperscript{13} As much as two-thirds of equity securities are now owned through institutional, mediated structures.\textsuperscript{14} Even if ownership is direct, shareholders "own shares, not the corporation," and "lack most of the rights ordinarily associated with" ownership of property.\textsuperscript{15} At best, the property ownership model may only be a metaphor for the corporation/shareholder relationship, and a strained one at that.\textsuperscript{16}

Despite such pointed criticism, the model of a corporation as the property of shareholders has a long history. Adolf A. Berle and Gardiner C.

\textsuperscript{11}BWAY, ANNUAL REPORT (Form 10-K) (December 11, 2009) (citing financial information for the fiscal year ending September 28, 2008).
\textsuperscript{14}The CONFERENCE BOARD, THE 2008 INSTITUTIONAL INVESTMENT REPORT 5, 20 (2008) (noting that institutional investor holdings grew from 6.1% of total equity markets in 1950 to 66.3% in 2006).
\textsuperscript{15}Greenwood, supra note 2, at 53.
\textsuperscript{16}Daniel J.H. Greenwood, Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited, 69 S. CAL. L. REV. 1021, 1029 (1996). A further discussion of the metaphor stated:

As powerful as the fiduciary and principal-agent metaphors have been, it is not hard to see that in many ways, they misrepresent the realities of the shareholder-management relationship. . . . One problem, long acknowledged in corporate law, is that ownership of a corporation is significantly different from the ownership of personal possessions. By and large, shareholders have no right to control the use of corporate assets. . . . This separation of ownership and control complicates the simple and morally compelling picture of owners exercising their will through agents whom they have expressly hired for that purpose and who correspondingly owe them duties of loyalty and service. In fact, in exchange for a good return on their investment, shareholders of public corporations have, by everyone's admission, already relinquished most of what we normally think of as the powers of ownership.

Means gave clear expression to the view of corporations as property of shareholders in their book *The Modern Corporation and Private Property*. As the title implies, corporations are seen as property and corporate law contains the rules affecting the management of that property. Daniel P. Sullivan and Donald E. Conlon observe:

Berle and Means . . . reconceived the norms of governance in terms of the principle that the corporation's property is the property of the shareholders and "it is unquestionably on their behalf that the directors are bound to act . . . Managerial powers are held in trust for stockholders as sole beneficiaries of the corporate enterprise."  

As this quotation indicates, the fact that the owner's property is managed by another implicates another form of private law in corporate law, the law of trusts and agency. Through much of the nineteenth century, corporate law—especially as it relates to corporate directors—was written in the language of private trust and agency law. Williston describes this original conceptualization in this way: "The old idea was rather that the corporation held all its property strictly as a trustee, and that the shareholders were, strictly speaking, *cestuis que trust*, being in equity co-owners of the corporate property."  

The employment of the language borrowed from trust

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17 Adolph A. Berle, Jr., & Gardiner C. Means, *The Modern Corporation and Private Property* (1932) (examining the implications of the separation of the ownership of this property from the control of the property); see also Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 Iowa L. Rev. 1, 3 (2002) (describing the defining characteristic of a corporation as the separation of ownership in the shareholders from control in the managers).


19 Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 Harv. L. Rev. 149, 149-50 (1888). Williston quotes from the case of Charitable Corp. v. Sutton, which speaks of the potential liability of directors (called committee-men) as a "breach of trust," and uses other language of trust and agency. *Id.* at 158 (quoting Lord Hardwicke in Charitable Corp. v. Sutton, 2 Atk. 400, 400 (1742)). Williston continues: "Committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or nonfeasance." *Id.* (quoting Lord Hardwicke in *Sutton*, 2 Atk. at 405); see also Koehler v. Black River Falls Iron Co., 67 U.S. 715, 721 (1862) ("The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation. . . ."); Hale v. Republican River Bridge Co., 8 Kan. 466, 472 (1871) ("Directors of a corporation, in reference to the corporate property, act in the relation of trustees. The stockholders are the *cestuis que trust*.")); Butts v. Wood, 37 N.Y. 317, 318 (1867)
and agency law produced the phrasing of conclusions about the duties of the directors sounding in trust language:

The directors are the trustees or managing partners, and the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy.20

By the end of the nineteenth century, commentators began to realize that corporate law was not really a species of trust law but only generally analogous to it.21 A case that exemplifies the lack of clarity regarding to whom directors owed duties is Stewart v. Harris.22 In their opinion, the Supreme Court of Kansas observed:

That they [the managers of a corporation] are trustees for the corporation and the corporate property all the authorities are agreed. It would be difficult to lay down a general rule comprehensive of the extent and all the instances in which their trusteeship exists as to the stockholders of the corporation.23

The adoption of the business judgment rule, which lies at the foundation of modern corporate law and directors' duties, marked a judicial rejection of the agency theory of corporate directors.24 The directors' powers and duties are not delegated from shareholders but by the applicable

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20 Koehler, 67 U.S. at 721 (1862) (citation omitted).
21 See, e.g., Seymour D. Thompson, Commentaries on the Law of Private Corporations § 1217, at 168 (2d ed. 1909) (discussing the "[r]elation of directors to individual stockholders" and how many cases affirm that directors do not stand in an actual fiduciary relation toward the individual shareholder). In an earlier work, this same commentator expressed the same sentiment as follows:

It is by no means a well-settled point what is the precise relation which directors sustain to the stockholders. They are undoubtedly said in many authorities to be trustees, but that as I apprehend is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another.

Seymour D. Thompson, The Liability of Directors and Other Officers and Agents of Corporations 236 (1880).
22 77 P. 277 (1904).
23 Id. at 279.
corporation law. The business and affairs of every corporation . . . shall be managed by or under . . . a board of directors[,] not by and under the direction of shareholders. If shareholders were principals delegating to director agents, they would have the right to call into question decisions of their agents in a way precluded by the business judgment rule.

Despite corporate law's recognition of an ambiguity as to whom a trust or agency duty is owed (the corporation or the shareholders) and ultimate rejection of the agency view of corporate management, throughout the twentieth century corporate theory still spoke of the shareholders as owners, and directors and managers as at least analogous to trustees. Directors and managers are viewed by this persistent theory as "mere stewards of the shareholders' interest." This philosophy is reflected most strongly in the shareholder wealth maximization conception of the corporation. The obligations of directors, whether rooted in property or trust law, center on making money for shareholders as ultimate owners. As Milton Friedman, champion of this conception of the corporation, stated, the responsibility of directors is to "conduct the business . . . to make as much money as possible while conforming to the basic rules of the society." Professor Joel Bakan cynically observes: "CEO's . . . have learned to repeat almost mindlessly', like a mantra, that 'corporations exist to maximize shareholder value'; they are trained to believe self interest is 'the first law of business.' Finally, Steven Bainbridge summarizes the causal connection between the property theory of the corporation and shareholder wealth maximization:

The corporation is a thing, so it can be owned. The shareholders own the corporation, so directors are merely stewards of their interests. Because no one can serve two

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25 Id. at 799-800; see also DEL. CODE ANN. tit. 8, §141 (a) (2006) ("[T]he powers and duties conferred or imposed upon the board of directors by this chapter . . . ") (emphasis added).
26 DEL. CODE ANN. tit. 8, §141 (a) (2006).
27 Bainbridge, supra note 17, at 6.
28 It is possible, however, to accept a property model of the corporation and argue that directors owe some obligations to constituencies other than shareholders. See Ronald J. Colombo, Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership, 34 J. CORP. L. 247, 249-50 (2008) (arguing that directors, although acting on behalf of shareholder owners, are bound by the same moral constraints in using property as the actual owners would be if it were owned directly).
30 Bakan, supra note 4, at 142 (quoting Robert Simons et al., Memo To: CEOs, FAST COMPANY, June 2002, at 117, 118).
masters at the same time, if shareholder and stakeholder interests conflict, directors cannot be loyal to both constituencies. The board of directors' role as stewards requires it to prefer the interests of its shareholder masters.31

Notwithstanding the conflict between agency theory and the business judgment rule, by the late twentieth century this idea of an explicit property right or trust duty gave way to some sort of a consensus that the managers of corporations have to manage the corporation in response to shareholder interest alone. As Henry Hansmann summarized it:

The principal elements of this emerging consensus are that ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; other corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance. . . . 32

The agency or trust view of the corporate directors still echoes throughout corporate theory, even if rejected by corporate law.

B. Corporate Law as Contract Law

As an alternative to property-based metaphysics, some scholars have offered a contractual explanation for corporations. This theory examines a corporation as a creature of contract, rather than property or agency law.33 Corporate law is seen as a subset of contract law; corporate governance and management, as creatures of real or purported contracts. The body of law identified as corporate law is merely a special set of contract terms applicable to this subset of contracts addressing corporate governance. It serves primarily as a set of gap filling terms that complete the purported

33See Bottomley, supra note 1, at 280 (discussing the concept of legal contractualism as it is understood in Australian corporate law scholarship).
contracts between shareholders and managers the way that the common law of contracts and the Uniform Commercial Code contain gap filling terms for other contracts.\textsuperscript{34}

This contract, like the fictional contract in social contractarian political philosophy, is only a metaphor or construct. The shareholders do not really enter into an actual contract. Their consent to the terms of the constitutional documents, prepared by the incorporators, is deemed to be given by their acquisition of shares.\textsuperscript{35} This process has none of the hallmarks of contract formation.\textsuperscript{36} There is no negotiation between directors and shareholders in public companies; nor is there execution by the shareholders of any written document. Further anomalies to typical contracts exist as well. For example, the contract can be changed without the consent of all contracting parties and issues of interpretation are not resolved by courts examining the intent of the parties.\textsuperscript{37} Contract law is generally "interventionist," with substantive law mediating the effects of bargained agreements.\textsuperscript{38} This stands


[C]orporate law is a set of terms available off-the-rack so that participants in corporate ventures can save the cost of contracting. . . . Corporate law—and in particular the fiduciary principle enforced by courts—fills the blanks and oversights with the terms that people would have bargained for had they anticipated the problems and been able to transact costlessly in advance. On this view corporate law supplements but never displaces actual bargains . . . .

\textit{Id.}

\textsuperscript{35}See Bottomley, \textit{supra} note 1, at 279-82 (noting the peculiarities of the corporate as compared to the classical contract in Australian corporate law).

\textsuperscript{36}Green, \textit{supra} note 16, at 1413-14. Green, citing John Boatright, goes on to note that:

The image of shareholders as owners-principals who enter into solemn agreements with either senior managers or directors breaks down further if we seek to identify any of the promises, covenants, or contracts, which this vision presumes. At what point do shareholders and managers ever freely enter into a relationship in which one party promises to perform specified services in return for payment or other consideration?

[T]he idea of a contract is most at home in situations in which two parties are able to negotiate a set of mutual obligations which governs specific interactions. In the case of shareholders and management, however, there is virtually no opportunity for the two parties to negotiate the terms of their relation.

\textit{Id.} (quoting John R. Boatright, \textit{The Shareholder-Management Relation and the Stakeholder Paradox} (paper presented at the Annual Meeting of the Society for Business Ethics, Atlanta, Ga., Aug. 6-7, 1993)).

\textsuperscript{37}See Bottomley, \textit{supra} note 1, at 281 (discussing this phenomena in the context of Australian law).

\textsuperscript{38}Greenwood, \textit{supra} note 2, at 51-52.
in contrast to corporate law, which "is not interventionist at all."39 Despite these anomalies, the contract theory persists.

Acceptance of a contractarian model brings with it several consequences. One is that corporate decision making is placed in the realm of economic decision making, which is rooted in the idea of negotiating for one's particular or individual economic best interest. Contract law is about economic negotiating and decision making. When a corporation is seen as a vehicle for contractual (economic) decisions, corporate decision makers are encouraged to make decisions in purely economic ways.40 A contractarian view of corporations also engenders skepticism about government interference with, or regulation of, corporate dealings and decision making. Contract law is considered a type of private law where governments should primarily enforce the private agreements of parties, subject to limited exceptions.41 Freedom of contract is an underlying principle of a contractual framework.42

Some scholars offer a more complicated understanding of corporate law as contract law.43 According to them, a corporation is more than a simple contract between shareholders and managers; it is a nexus of all sorts of contracts, both within the corporation as well as between the corporation and outside parties.44 Rather than a hierarchical relationship between shareholder/owners and manager/agents, the corporation is a "complex web

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39 Id. at 52.
40 CHANDRAN KUKATHAS & PHILIP PETTIT, RAWLS: A THEORY OF JUSTICE AND ITS CRITICS 32 (1990) ("The economic way is for each to calculate what best suits his own interests and then to try to get this . . . ").
41 See Bottomley, supra note 1, at 289.
42 Id.
44 See Bainbridge, supra note 17, at 5-6; see also Melvin A. Eisenberg, The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm, 24 J. CORP. L. 819, 825-27 (1999) (discussing the difficulties of viewing shareholders as owners of the corporation under the nexus-of-contracts conception). Professor Bainbridge notes that:

[A]ll [nexus of contract scholars] visualize the firm not as an entity but as an aggregate of various inputs acting together to produce goods or services. . . . In this model, the firm is a legal fiction representing a complex set of contractual relationships. In other words, the firm is not a thing, but rather a nexus or web of explicit and implicit contracts establishing rights and obligations among the various inputs making up the firm. Because shareholders are simply one of the inputs bound together by this web of voluntary agreements, ownership is not a meaningful concept under this model. Each input is owned by someone, but no one input owns the totality.

Bainbridge, supra note 31, at 1005-06 (footnotes omitted).
of explicit and implicit contracts. Proponents of the "nexus of contract" theory do not see the corporation as anything other than the sum of the individual market transactions among interested parties that are amalgamated in what we call a corporation.

Despite anchoring their conception of the corporation in contract law, as opposed to property and agency law, most nexus of contract adherents "continue to treat directors and officers as agents of the shareholders, with fiduciary obligations to maximize shareholder wealth." The wealth maximization obligation derives not from an agency or trust relationship, but merely because that is what the shareholders, implicitly or explicitly, contracted for when they purchased their investment. 

"[O]ne key term in the shareholders' contract with management [one of the many contracts in the nexus] is the open-ended injunction that management act 'in the best interests of the corporation and its shareholders.'

Like the property and agency metaphysical foundation, the contract theory of corporations presents several problems. First, it is, to at least some degree, a fiction. The hallmarks of a contractual relationship are not evident. Many of these contracts simply do not exist. Further, despite changing the basis of metaphysics, the ultimate conclusion is the same as the property/agency metaphysics: the purpose of corporations is to maximize profits for shareholders.

C. Stakeholder Model

Whether rooted in property or contractarian principles, the shareholder primacy conclusion is certainly the dominant conception of the corporation today. A rival theory has emerged questioning this conclusion in the form of the stakeholder model of the corporation. The stakeholder, or constituency model, of the corporation is difficult to describe precisely. A group of scholars can generally be discerned as sharing a common opinion that, to a varying degree, boards of directors ought to consider the interests

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45Bainbridge, supra note 17, at 6.
47See Bainbridge, supra note 17, at 6.
49Millon, supra note 46, at 3.
of identifiable groups of interested parties other than shareholders.\textsuperscript{51} Although such scholars may disagree about the extent and implementation of consideration of stakeholder concerns, starting with E. Merrick Dodd in the 1930s, the crux of the stakeholder model has been that managers of a corporate enterprise can "legitimately use corporate resources to address the interests of other constituents."\textsuperscript{52}

Yet this group has not presented a consistent justification for this position, nor a metaphysical answer to what aspect of the nature of the corporation requires, or at least suggests, this attention to non-shareholder concerns.\textsuperscript{53} Some stakeholder theorists argue from a nexus of contract theory of the corporation.\textsuperscript{54} They emphasize different aspects of implicit or explicit contracts to argue that the contractual make-up of the nexus of contracts requires managers to consider interests of various contracting parties, not exclusively those of shareholders.\textsuperscript{55}

Another strand of stakeholder theory relies not on the nexus of contract vision, but on the property notion of the corporation. Rather than seeing the corporation as the sole property of the shareholders, these scholars see the corporation as joint property, owned by a variety of constituencies whose ownership takes different forms.\textsuperscript{56} Shareholders, employees, and to

\textsuperscript{51}See, e.g., Colombo, supra note 28, at 257 ("[T]here is some consensus among stakeholder theorists with regard to what a board of directors ought to be doing with regard to nonshareholder stakeholders.").


\textsuperscript{53}See Colombo, supra note 28, at 256-57 ("The philosophical underpinnings of the stakeholder model of the corporation are difficult to summarize, as their articulation has varied from proponent to proponent. . . . [T]here is apparently little consensus on the nature of the corporation itself."); see also Milon, supra note 46, at 12-13 noting that:

The characterization issue is unimportant in so far as the objective is concerned. What unites these various communitarian approaches to the problem of non-shareholder vulnerability is the basic conviction that corporate law can do more than simply provide a framework within which the various participants in the corporate enterprise define their respective rights and duties through bargain.

\textsuperscript{54}See Bainbridge, supra note 31, at 1006-07 (describing an implicit contractual relationship between stakeholders and the corporation); see also Milon, supra note 46, at 16-19 (discussing the theory of "progressive contractarianism"); Lee A. Tavis, Modern Contract Theory and the Purpose of the Firm, in RETHINKING THE PURPOSE OF BUSINESS 216-18 (S.A. Cortright & Michael J. Naughton eds., 2002) (noting that the "contractual theory of the firm" provides the "basis of both the shareholder and stakeholder models").

\textsuperscript{55}See Lee A. Tavis, Modern Contract Theory and the Purpose of the Firm, in RETHINKING THE PURPOSE OF BUSINESS, supra note 54, at 218.

\textsuperscript{56}See Lynne L. Dallas, Working Toward a New Paradigm in PROGRESSIVE CORPORATE LAW 35, 37 (1995) (arguing that since "a number of different persons, beyond simply shareholders, have significant interests in the corporation's performance and governance," there exists a "need for
some extent the community, own inputs (capital, labor, resources) used by the corporation and thus their joint ownership of these inputs needs to be reflected in corporate decision making. Some stakeholder advocates look to an expanded fiduciary model of corporate constituency management. In this model, shareholders elect directors but the board would have duties to all stakeholders. This approach is reflected in some state statutes commonly known as "constituency statutes."^{58}

Some stakeholder theorists advocate a representative model where different groups of interested parties are entitled to representation within management or even on the company’s board. There are even some scholars who argue that corporate law rooted in the value of shareholder primacy actually benefits the other stakeholders or constituencies within a corporation. Thus, stakeholder theory is anything but a unified theory.

Aside from the fact that stakeholder theorists have not presented a consistent vision of the corporation that supports their practical proposals, it seems that they only reinterpreted the property and contract theories of a corporation. They see different implications from the vision of a corporation as private property or a bundle of contracts, but they accept either one of these metaphysical premises, which underlie the shareholder wealth maximization movement.

property rights of stakeholders (understood as more than shareholders) over corporate assets and their functioning must be addressed“); see also Jeff Gates, Reengineering Ownership for the Common Good, in RETHINKING THE PURPOSE OF BUSINESS 281 (S.A. Cortright & Michael J. Naughton eds., 2002) ("[A]s human capital becomes the most valued asset in a business organization, it makes no sense to limit ownership to those who provide financial capital.").


^{59} Allen, supra note 6, at 276. Chancellor Allen continues by noting that:

The statutes of Indiana, Pennsylvania, and Connecticut are particularly notable. The Indiana statute, as amended in 1989, and the Pennsylvania statute enacted in 1990, explicitly provide that directors are not required to give dominant or controlling effect to any particular constituency or interest. These statutes appear explicitly to decouple directors’ duties to the corporation from any distinctive duty to shareholders.

^{60} Hansmann & Kraakman, supra note 57, at 447-48; see also Kent Greenfield, Corporate Ethics in a Devilish System, 3 J. BUS. & TECH. L. 427, 434 (2008) (answering concerns about increasing stakeholder involvement in corporate governance).

^{61} Hansmann & Kraakman, supra note 57, at 442 (2001).

Of course, asserting the primacy of shareholder interests in corporate law does not imply that the interests of corporate stakeholders must or should go unprotected. It merely indicates that the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies—or at least all constituencies other than creditors—lie outside of corporate law.

^{62} Id.
III. CORPORATE CONSTITUTIONALISM—SEEING THE CORPORATION AS A POLITICAL COMMUNITY

Having noted that the existing corporation theories do not satisfactorily describe the nature of the corporation, this part proposes a different metaphysical vision of the corporation not rooted in private law. This part will argue that a corporation is a constituted political community and therefore corporate law is a form of constitutional or political law. This paradigm, although uncommon in the literature, is not novel. Daniel Greenwood has argued that corporations are "state-like," and resemble the government in many respects. Over ten years ago, Australian corporate scholar, Stephen Bottomley, advocated a theory of corporate constitutionalism. Certainly corporations, particularly large public corporations, "are prominent and powerful actors in our public life." Mark Roe has persuasively argued that the politics of a country and the forms of corporate law and governance are interrelated, with corporate law often playing a role in reaching political compromises. Bottomley argues, however, that beyond their role in the public life of nations, corporations are coherent systems "in which power and authority, rights and obligations, duties and expectations, benefits and disadvantages, are allocated and exercised . . . . Each company is a body politic, a governance system.

The foregoing issues and concerns are ones we generally associate with political decision making, not private contracting. The difference between a corporation and the state is that the state makes such decisions with respect to all citizens, but a corporation only makes decisions concerning its various constituent parts: investors, managers, employees, customers, and suppliers. Bottomley observes that such a political conception of a corporate entity is not new and has been held by thinkers as diverse as Thomas Hobbes, C. Wright Mills, and Adolph Berle. He notes:

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61 Greenwood, supra note 2, at 43-44, 54-55.
63 Bottomley, supra note 1, at 291.
64 See generally Mark J. Roe, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2003).
65 Bottomley, supra note 1, at 291.
66 See id.
For many years a variety of commentators, from a variety of perspectives, have made the same point. Maitland noted that the company and the state are two species within a single genus – that of more or less permanently organised groups of individual actors, group units to which we attribute actions, intentions, praise and blame. More recently, Unger has made the similar observation that modern society looks more like "a constellation of governments, rather than an association of individuals held together by a single government."\(^6\)

Although both Bottomley and Greenwood note the apparent similarities between a corporation and a state or other explicitly political body, neither of them rigorously and systematically present a vision of a political body. I believe that this lack of metaphysical analysis results from rooting their constitutionalism only in late eighteenth century liberal political theory or liberal democratic theory, such as those found in the writings of Thomas Hobbes, John Locke, Jeremy Bentham, James Madison, and John Stuart Mill.\(^6\)\(^7\) This Article approaches the hermeneutic of corporate constitutionalism from a different perspective which transcends the specifics of modern politic thought. It uses the principles of Aristotelian political philosophy to consider the nature of a corporation and the implications of this nature for corporate law.

A. Aristotelian Notions of Society—Perfect and Imperfect Communities

Aristotle defined a political community as a "human association . . . instituted for the sake of obtaining some good."\(^6\)\(^9\) Communities are different from "a mere multitude of men," in that a political community is "bound together by a particular agreement, looking toward a particular end, and existing under a particular head."\(^7\)\(^0\) Two elements from this definition emerge: (1) an agreed common end or purpose; and (2) an authority structure to make decisions relevant to attaining that end. Each of these will be considered in turn.

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\(^{67}\)Id. (internal citations omitted).
\(^{68}\)Bottomley, supra note 1, at 293 & n.75.
\(^{69}\)THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S POLITICS, bk. I. ch. 1. at 4 (Richard J. Regan trans., 2007) [hereinafter AQUINAS, ARISTOTLE'S POLITICS].
Political communities can be either perfect\(^1\) or imperfect.\(^2\) A perfect community possesses both the perfect or most complete end as well as the complete means of attaining such an end.\(^3\) In a word, the perfect community is completely self-sufficient.\(^4\) A community which aims at a complete good and thus incorporates the goods of all lesser communities is this perfect community.\(^5\) The nation\(^6\) is a perfect community because it pursues the ultimate end, human happiness, and is self-sufficient in the means to attain that end.\(^7\) The perfect community is comprised of a variety of different imperfect communities, such as families, households, villages, etc.\(^8\) Each of these associations share a common end, but each is only to some extent self-sufficient.\(^9\) The family's purpose is to provide the basic nourishments of life

\(^{71}\)In this Article, "perfect" is used in a precise sense to mean complete or fulfilled and not necessarily good or virtuous. See Władysław Tatarkiewicz, *Paradoxes of Perfection*, 1 DIALECTICS & HUMANISM 77, 78 (1980) (contrasting the Aristotelian notion of perfection as "complete," "finished," or "flawless" with a paradoxical view of perfection as "ceaseless improvement").

\(^{72}\)SUÁREZ, supra note 70, at 86.


\(^{74}\)SUÁREZ, supra note 70, at 86.

\(^{75}\)AQUINAS, ALEXANDER POLITICS, supra note 69, bk. I, ch. I, at 4 ("And the association that is supreme and includes all other associations is the absolutely supreme good.").

\(^{76}\)The name of this perfect community varies from age to age and author to author. Aristotle referred to the *polis* or "city-state." Aroney, supra note 73, at 170. Aquinas varyingly refers to the perfect community as the *civitas* (city), *regnum* (kingdom), and *provincia* (province). *Id.* at n.34. Suárez uses the term *civitas* when referring to Aristotle's perfect community. See SUÁREZ, supra note 70, at 37. The translators use the word "state" for *civitas* in this passage. *Id.* at 86. In the modern context, I have chosen the word "nation" as most approximating the concept of the *polis* in Aristotle's time because it lacks the negative modern connotations of the word state.

\(^{77}\)AQUINAS, ALEXANDER POLITICS, supra note 69, bk. I., ch. 1, at 5 ("And the perfect association... is the political community, now complete, having a self-sufficient end... Therefore, the political community was instituted for the sake of protecting life and exists to promote the good life."); "[Aristotle] shows that the good to which the political community is directed is the supreme human good." *Id.* at 7. "[I]t follows that a communal society is the more perfect to the extent that it is sufficient in providing for life's necessities." AQUINAS, POLITICAL WRITINGS, supra note 73, pt. I, bk. I, ch.1, at 9.

\(^{78}\)See AQUINAS, ALEXANDER POLITICS, supra note 69, bk. I, ch. I, at 5 (showing how the union of men and women combine to form households, and households combine to form villages, and villages unite to form the political community); see also *id.* at 2 (stating that "since there are indeed different grades and orders of these associations, the ultimate association is the political community directed to the things self-sufficient for human life"). Aristotle continues by proposing "the true relation of other associations to the political community[...]. First, he explains the association of one person to another. Second, he explains the association of the household, which includes different associations of persons. Third, he explains the association of the village, which includes many households." *Id.* bk. I, ch. 1, at 9; AQUINAS, POLITICAL WRITINGS, supra note 73, bk. I, ch.1, at 9 (containing the same list of family, household, and city).

\(^{79}\)See AQUINAS, POLITICAL WRITINGS, supra note 73, bk. I, ch. 1, at 9.
for one household and the begetting of children. The village aims at the necessities for a particular trade or profession. The perfect community, city, or province has the aim of achieving all the necessities of human life and defense against external danger. Each imperfect community aims to an aspect of the complete good but does not encompass all of that complete good, the good life, or human happiness; they are parts of a whole.

Despite being perfect and embodying the supreme good, the perfect community—or nation—is not supreme in the sense of overriding or preempting the ends of the imperfect communities. According to Aristotle, the nation "pursues a goal that encompasses the lesser and narrower goals of those subordinate human communities of which it is composed." Although the nation comprises the supreme good, the imperfect communities are not obliterated within the whole. The relationship between the perfect community and the various constituent parts is subtle. The parts are composed into the whole since it is more complete and perfect, yet the smaller communities retain an aspect of independent operation. The difference between the smaller communities and the nation—the perfect community—is one of degree. The linchpin reconciling this unity of the whole but the independence of the parts is the concept of the common good discussed in the next section.

The second hallmark of a community, as opposed to an amalgamation of persons, is a sovereign, someone who can direct the community to its end. The nature of the authority figure in an imperfect community differs

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80 Id.
81Id. The term vicus translated "village" has an economic overtone more than the modern word neighborhood or village, as can be seen when Aquinas says that a village is self-sufficient with respect to "a particular trade or calling." Id. Elsewhere, Aquinas refers to the fact that in many Medieval towns, streets or sections of a town were divided on the basis of occupation, as evidenced when he says "in one [vicus] smiths practice their craft, in another of which weavers practice theirs." AQUINAS, ARISTOTLE'S POLITICS, supra note 69, bk. I, ch.1, at 15.
82 AQUINAS, POLITICAL WRITINGS, supra note 73, bk. I, ch. 1, at 9.
83AQUINAS, ARISTOTLE'S POLITICS, supra note 69, bk. I, ch.1, cmt.2, at 7 (stating that "an association is a whole, and wholes are ordered so that one that includes another is superior. . . . And the association that includes other associations is likewise superior. But the political community clearly includes all other associations, since households and villages are included in the political community"); see also supra note 79 and accompanying text.
84 Aroney, supra note 73, at 173.
85 See ST. THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS bk. I, Lecture 1, cmt. 5, (C.I. Litzinger, trans., Henry Regnery Co. 1964) [hereinafter AQUINAS, NICOMACHEAN]; see also Aroney, supra note 73, at 176-77.
86 See Aroney, supra note 73, at 182-83 (noting that for Aquinas, the difference between lower and higher orders is that the higher are "more universal" and "more perfect").
87 See AQUINAS, POLITICAL WRITINGS, supra note 73, bk. I, ch.1, at 3-5.
[W]henver a certain end has been decided upon . . . some one must provide
from that of a perfect community, although it is analogous. The leaders who take care of their imperfect communities make decisions—alogous to making laws—for their own community. Although the smaller communities are to a degree autonomous and self-governing, as a part, it must be harmonized with the whole, the authority exercised over an imperfect community must be harmonized with the government of the perfect community of which it is a part.

Having summarized the nature, operation, and relationship of perfect and imperfect communities the next section will argue that the corporation is an imperfect community. It will argue that the corporate form is, and throughout its history has been understood to be, an imperfect community.

B. The Corporation as an Imperfect Community

This section will proceed to demonstrate that the corporate form meets the criteria of an imperfect community. First, throughout its history a corporation has been identified as a community and not a mere transient partnership of individuals. It is organized for the attainment of an end or good. Finally, a corporation has the hallmark of authority.

direction if that end is to be expeditiously attained. . . . For if a great number of people were to live, each intent only upon his own interests, such a community would surely disintegrate unless there were one of its number to have a care for the common good.

Id.

88 See id. at 9 ("The head of a household . . . is not called king but father. Even so there is a certain similarity about the two[.]"); see also AQUINAS, ARISTOTLE'S POLITICS, supra note 69, bk. I, ch. 1, at 5 (comparing and demonstrating the connections between the rule of a father over a family, a senior clansman over a neighborhood, and a king over a city and quoting Homer: "[e]ach man lays down laws for his wife and children," just as kings lay down laws in political communities).

89 See AQUINAS, ARISTOTLE'S POLITICS, supra note 69, bk. I, ch. 1, at 5-6.

90 See Aroney, supra note 73, at 184-85 (discussing the Guild as an example).

91 See AQUINAS, NICOMACHEAN, supra note 85, bk. I, Lecture I, cmt. 5.

92 I ST. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I-II, Q. 90, Reply Obj. 3.

As one man is a part of the household, so a household is a part of the state: and the state is a perfect community, according to Polit. i. 1. And therefore, as the good of one man is not the last end, but is ordained to the common good; so too the good of one household is ordained to the good of a single state, which is a perfect community. Consequently he that governs a family, can indeed make certain commands or ordinances, but not such as to have properly the force of law.

Id.
1. The Corporation Has Been Understood as a Community Oriented to an End

In ancient Rome, in addition to the Republic or the Empire, there were different types of human association on a smaller scale. The universitas\textsuperscript{93} and the societas were groups of people gathered together for a purpose.\textsuperscript{94} But the nature of the relationship formed differed between the two. Universitas is defined as "[a] number of persons associated into one body, a society, company, community, guild, corporation, etc."\textsuperscript{95} As the definition implies, this legal form included a sense of something coming into existence, a community, beyond the partnership of individuals. The term universitas and corpus (body) are used interchangeably to refer to a collective body other than an explicitly political community, such as a city.\textsuperscript{96} A wide variety of associations took on the form of a universitas in Roman times: religious organizations, burial clubs, political clubs, guilds of craftsmen or traders, orphanages, and asylums.\textsuperscript{97} What these groups share is a common purpose and a sense of an organizational unit greater than a partnership of particular individuals.

Members of a universitas did not have direct ownership interests in the assets of the universitas since assets were owned by the corporate body for use in its stated field of action, and not the members.\textsuperscript{98} For example, the Digest contains this passage:

Things in civitates such as theaters and stadiums and such like, and anything else which belongs communally to the civitates

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\textsuperscript{93}In addition to universitas, the corporation was also referred to by the words, corpus (body) and collegium (college). See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 215 (1983).


\textsuperscript{95}CHARLTON T. LEWIS & CHARLES SHORT, A LATIN DICTIONARY 1933 (1975).

\textsuperscript{96}See, e.g., 2 THE DIGEST OF JUSTINIAN, bk. 2.4, no. 10.4 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 1985) [hereinafter DIGEST OF JUSTINIAN] stating:

One who is manumitted by some guild [corporis] or corporation [collegio] or city [civitate], may summon the members as individuals; for he is not their freedman. But he ought to consider the honor of the municipality, and, if he wishes to bring an action against a municipality [rem publicam] or a corporation [universitatem], he ought to seek permission under the edict although he intends to summon a person who has been appointed their agent.

\textsuperscript{97}BERMAN, supra note 93, at 215-16.

\textsuperscript{98}The later Medieval canonists claimed that the property of a universitas was owned by nobody and the managers acted as mere guardians of this property. See Scruton & Finnis, supra note 94, at 242.
are property of the community [universitatis] corporately not of separate individuals [singlorum]. Thus, even the communal slave of the civitas is considered to belong not to the individuals in undivided shares but to the community [universitatis] corporately.99

Observe the connection between universitas (the body corporate) and civitas (the political community of the city). The term describes the nature of a political community, a people taken as a whole. The Roman jurist Ulpian also makes the connection between a communal body and universitas when he says:

If members of a municipality [municipes], or any corporate body [universitas] appoint an attorney for legal business, it should not be said that he is in the position of a man appointed by several people; for he comes in on behalf of a public [republica] authority or corporate body [universitas], not on behalf of individuals. 100

The words "municipality" and "corporation" are used in parallel, identifying similar types of groups. Yet, ownership by a universitas is distinguished in Roman legal thinking from ownership by the whole political community, even if the two are of a similar nature. Justinian's Institutes distinguishes between public ownership (by all citizens) and ownership by a universitas. To Justinian, some things are by natural law common to all persons (omnium), some are public (publica), some belong to a corporate body (universitatis), some to no one, with the greater part being the property of individuals.101 Although not an exhaustive study of the uses of the word, it is interesting to note that it is in all these instances, universitas denotes a community which comprises some sort of body or identity which is equated or analogous to a political community, a city, or municipality.

The universitas was not limited to the lives or agreement of a particular set of individuals. Its identity and ability to sue and be sued remained despite changes in, or even a complete turnover of, its original

99Digest of Justinian, supra note 96, bk. 1.8, no. 6.
100Digest of Justinian, supra note 96, bk. 3.4, no 2. ("Si municipes uel aliqua universitas ad agendum det actorem, non erit dicendum quasi a pluribus datum sic haberi: hic enim pro re publica uel universitate interuenit, non pro singulis.").
101See, e.g., J. Inst. 2.1 (Peter Birks & Grant McLeod, ed. & trans., 1987) ("Things can be: everybody's by the law of nature; the state's; a corporation's; or nobody's. But most things belong to individuals, who acquire them in a variety of ways . . . ").
membership. Again this quality is similar to a civitas. A new city is not formed as citizens are born and die. The same city or corporate body continues. The similarity between the larger political community and a corporation as well as their difference was established by the time of Justinian. The Roman Empire was itself considered to be a corporation having attributes similar to the smaller corporate bodies yet it was still referred to as the People of Rome (populous Romanus) signaling it was greater than any individual universitas.

In contrast to a universitas, there were other associations with less permanence. A societas is defined as a "copartnership, association for trading purposes." In Roman law, the societas was a "pooling of resources (money, property, expertise or labor, or a combination of them) for a common purpose." Roman law recognized various forms of partnership, ranging from a pooling of all assets to the pooling of specific assets for a single transaction. The emphasis is not on a body of people coming together but a pooling of assets. Significantly, the partnership provided virtually no asset shielding as each partner was liable pro rata for the liabilities of the partnership, and the law made no distinction between the obligations and assets of the partnership and that of the partners. Unlike ownership of the universitas, the partners were also seen as having a form of direct ownership of the assets of the societas. Although the nature of the partners' ownership of contributed assets changed (the two partners became joint owners of the money contractually agreeing to limit the use of their joint property in accordance with their specific common purpose), they still retained an ownership interest directly in the joint assets.

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102 See, e.g., DIGEST OF JUSTINIAN, supra note 96, bk. 3.4, no. 7 ("As regards decurions or other corporate bodies [universitas], it does not matter whether all the members remain the same or only some or whether all have changed.").
103 Berman, supra note 93, at 215.
104 Lewis & Short, supra note 95, at 1715.
106 See Zimmermann, supra note 105, at 452-54; see also DIGEST OF JUSTINIAN, supra note 96, bk. 17.2, no. 5 ("Partnerships are formed in all goods, or in some business, or for the collection of a tax, or even one thing.").
107 See Zimmermann, supra note 105, at 454-56.
108 See id. at 465-66 ("[E]ach of them having 'totius corporis pro indiviso pro parte dominium' [. . . .]; see also DIGEST OF JUSTINIAN, supra note 96, bk. 17.2, no. 1 (describing all of the assets of the partnership being held in common).
Finally, a *societas* was limited in duration to, at most, the lives of the partners.\textsuperscript{109} Unlike a corporate body, events affecting members of a *societas*—such as death, bankruptcy, and loss of freedom—dissolved the partnership.\textsuperscript{110}

Although for-profit business was conducted in the period following antiquity through contractual arrangements,\textsuperscript{111} the jurists of the Middle Ages discerned another form of association, in addition to the contractual forms of business arrangements.\textsuperscript{112} The jurists discussed this form of association as if it had its own legal identity, independent of the identities of the members, its own corporate personality.\textsuperscript{113} A corporation (coming from the Latin "corpus, corporis" meaning a body) survived the life of its members.\textsuperscript{114} The jurists were drawing on the Roman law discussion of a *universitas*, which term was appropriated to describe the new centers of learning emerging in the twelfth century. Bartolus of Sassoferatto describes a university in a way that recognizes that something exists beyond the particular members and scholars of the university at a particular place and time. He says:

A corporate body [*universitas*] is a legal name, and it does not have a soul or an intellect. Therefore it cannot commit crimes. . . . Others say, that corporate bodies [*universitas*] can commit crimes. . . . We must consider first, whether a corporate body [*universitas*] differs from its members [*homineness universitatis*]?\textsuperscript{115} Some say no, like the philosophers and canonists, who hold that the whole does not really differ from its parts. The truth is, that if we speak about reality proper, those say the truth. For a university of scholars [*universitas scholars*] is nothing other than the scholars. But according to legal fiction they err. For a university [*universitas*] represents a person, which is different than the scholars, or its members [*hominibus universitatis*] . . . . Thus, if some scholars leave and others return, nevertheless the

\textsuperscript{109}Digest of Justinian, supra note 96, bk. 17.2, no. 1 ("A partnership [*societas*] can be formed either for all time, that is, as long as the contracting partners live or for a limited period of time or from a particular moment in time or under a condition.") (emphasis added).

\textsuperscript{110}Id. bk. 17.2., no. 4.

\textsuperscript{111}Particularly the *societas*; however, other contractual forms such as the *census* and the commenda were used. See Brian M. McCall, It's Just Secured Credit! The Natural Law Case in Defense of Some Forms of Secured Credit, 43 IND. L. REV. 7, 22-23 (2009).

\textsuperscript{112}See Micklethwait & Wooldridge, supra note 5, at 12.

\textsuperscript{113}Id.

\textsuperscript{114}Id. at 12-13.

\textsuperscript{115}Literally, "the men of the corporate body."
university [\textit{universitas}] stays the same. Similarly if all members of a people [\textit{omnibus de populo}] die and others take their place, the people [\textit{populus}] is the same . . . and thus a corporate body [\textit{universitas}] is different from its members [\textit{persone}], by legal fiction, because it is a represented person.\textsuperscript{116}

Bartolus is clearly commenting on the Roman law concept of the \textit{universitas}, which still had a broader meaning than an institution of learning. When speaking about a university, in the modern sense, he needs to qualify it as a \textit{universitas scholares}. Putting aside the debate about the development of the particular conception of the nature of the legal fiction of the corporate form,\textsuperscript{117} it is clear that the \textit{universitas} differs from a mere partnership of members (\textit{societas}) as it survives the complete replacement of all members. The parallel to a political community is present. The \textit{universitas} is related to its particular members ("[f]or a university of scholars [\textit{universitas scholares}] is nothing other than the scholars") but it transcends those particular members.\textsuperscript{118} Likewise, a city cannot exist without particular citizens but its survival transcends any particular person. The comparison to a political community can be seen in his comparison of the changeover in the members of a university to that of a people (\textit{populus}). The American people are a political community, which is dependent upon particular members at the present time, but also transcends them. The person (\textit{persona}) that the legal fiction makes out of a \textit{universitas}, but not a \textit{societas}, is a type of transcendent political community.

The Medieval jurists made a significant contribution to the Roman concept of a corporation; they added the concept of jurisdiction.\textsuperscript{119} The canonists recognized a quasi-political nature of a corporation in that it had the ability to make law for its members.\textsuperscript{120} The corporate authorities possessed a form of jurisdiction over the members of the corporate community, albeit a limited jurisdiction.\textsuperscript{121} This recognition of a form of jurisdiction places a corporation as a form of imperfect political community within the broader perfect political community.

\textsuperscript{116}Avi-Yonah, \textit{supra} note 24, at 781 (quoting BARTOLUS OF SASSOFE RATO, \textit{Commentary on Dig. 3.4.1.1} (1653)) (alteration to original).
\textsuperscript{117}See id. at 776-77 (tracing the development of the history of three views of the corporate form: (1) the real entity view; (2) the artificial entity view; and (3) the aggregate view).
\textsuperscript{118}See supra note 116 and accompanying text.
\textsuperscript{119}BERMAN, \textit{supra} note 93, at 219.
\textsuperscript{120}Id. at 218-219.
\textsuperscript{121}Id. at 219.
In the period of the Medieval jurists (as in Roman times), the types of human association recognized as a corporate body (universitas) were generally of a non-profit nature: towns, universities, religious communities, and guilds. These bodies were not formed for profit making activities and no distributions of income could be made to the members (although salaries could be paid to employees). Since the law did not preclude the use of the corporate form to undertake for-profit business, eventually profit making businesses began adopting this form, with the first arguably being the Aberdeen Harbour Board in 1136. By the eighteenth century, some for-profit commercial corporations were established. The guild represents a good example of the combined public/private nature of these early corporate entities. Although guilds had focused on trade and business, their interests and activities surpassed mere commercial activity. By the early modern period, in the age of mercantilism, corporations possessed an admixture of characteristics of a private business association and a public institution, possessing elements of government: standing armies and democratic elections. Employees of the great mercantile corporations in England and Germany referred to themselves as "civil servants."

From the time of the Middle Ages, governments were skeptical of use of these perpetual entities for profit making activities since they could be used to evade regulation and taxation by their perpetuity. In the eighteenth century, corporations were subject to inspection by a committee of visitors, "which represented the interests of the founder and of the wider community." This skepticism, combined with a financial collapse, led to restriction of the corporate form (universitas) in business. After the passage of the Bubble Act in England, business companies, in an effort to escape the restrictions it imposed, had to be formed as creatures of contract

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122 MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 12; see also Reuven S. Avi-Yonah, supra note 24, at 783.
124 MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 12-13.
125 Avi-Yonah, supra note 24, at 783.
126 See MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 13; see also EAMON DUFFY, THE STRIPPING OF THE ALTARS 141-54 (1992) (discussing guild involvement in the parish).
127 MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 21, 33-36.
128 Id. at 35, 95.
129 Id. at 13.
130 Avi-Yonah, supra note 24, at 783.
131 MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 28-32 (describing the financial bubbles of the Mississippi Company and the South Sea Company).
through a deed of settlement signed by all shareholders. Corporate law in this phase had to rely on contract (particularly partnership contracts) and trust law. With the advent of the English Companies Act of 1844, and later the English Joint Stock Companies Act of 1856, registration—rather than contractual execution—became the method for forming companies. The law of the corporate form (universitas) rather than mere contract (societas) became accessible again by business ventures. A positive act of the government was necessary to create a corporate body; in England this was an Act of Parliament, and in the United States, of state legislatures. These bodies also had to be constrained to exist for a limited stated public purpose (i.e. fulfilling some aspect of the common good such as exploration of new lands, building of railroads, etc.). The public aspect of corporate law began to break down by the mid-nineteenth century. In the 1830s, Massachusetts and Connecticut removed the requirement that a corporation be engaged in some form of public work to obtain limited liability. The modern corporation is thus a political creation of governments fused out of the Roman concept of the universitas married to the profit-making purpose of the societas.

Throughout this varied history, we see that the universitas, or body corporate, has been seen as a community directed to a particular end or purpose. Clearly, the corporate body has been discussed as a community and even one analogous to the wider, perfect, political community. It was larger than the mere contractual association of transient partners. It was smaller than, and thus subject to, the jurisdiction of the larger political community.

2. Corporations Possess the Attribute of Authority

As the texts of the Roman jurists discussed above note, a corporate body cannot act for itself. It must act through an agent or person managing its affairs. A partnership acts by consensus of its private members, a

132 Bottomley, supra note 1, at 282.
133 Id.
134 See MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 40-44.
135 Id.; see also Avi-Yonah, supra note 24, at 784 (noting that "only corporations that were clearly vested with a public purpose and benefited the public fisc, like the East India and Hudson Bay Companies, received royal approval").
136 MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 46. By the end of the nineteenth century, regulation of corporate bodies changed to do away with specially defined purposes and gave way to broader, more general purposes. See Bakan, supra note 4, at 13-14; see also MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 45-46.
137 See MICKLETHWAIT & WOOLDRIDGE, supra note 5, at 53-54.
138 See Michael P. Dooley, Two Models of Corporate Governance, 47 BUS. LAW. 461, 466-
community acts through identified decision makers. This attribute, a defined hierarchy of decision making, is a defining attribute of a corporation.\textsuperscript{139} Steven Bainbridge persuasively argues that this fiat governing authority is centered in the board of directors,\textsuperscript{140} by or under whom, in the words of Delaware's corporation law, "[t]he business and affairs of every corporation . . . shall be managed."\textsuperscript{141}

The Model Business Corporation Act's language more clearly identifies the authoritative power of a corporate board of directors: "All corporate powers shall be exercised by or under the authority of the board of directors . . . and the business and affairs of the corporation shall be managed by or under the direction . . . of its board of directors."\textsuperscript{142} Certainly the board does not have to make all the decisions personally, it can exercise its authority through a hierarchy of delegation.\textsuperscript{143} In the words of the Model Business Corporation Act, the authority is to be exercised by or under the board of directors. That authority, even if exercised by others, traces its legitimacy back to the board. Unlike contractual decision making characterized by negotiation and bargaining, corporate decision making is authoritarian.

IV. THE NATURE OF THE COMMON GOOD OF THE CORPORATION

The previous part established that a corporation is an imperfect community distinct from, but analogous to, the perfect community of the nation. This section will consider the implications of the concept of the common good for an imperfect community like a corporation. The common good serves two primary purposes within an imperfect community. First, the common good is the principle which harmonizes the autonomy of the imperfect community with the unity of the end of the perfect community of which it is a part. Second, the common good has implications for the way the imperfect community governs itself within its sphere of autonomy from the perfect community.

\textsuperscript{67} (1992) (describing partnership decision making as generally dominated by consensus rather than fiat).

\textsuperscript{139} Bainbridge, supra note 17, at 17 ("[T]he defining characteristic of a firm is the existence of a central decision maker vested with the power of fiat.").

\textsuperscript{140} See id. at 25-29. Although Bainbridge sees the political "sovereignty" of the board of directors, he does not see this sovereignty governing an entity, a community, but a mere amalgamation of contracts, a \textit{societas of societates}. See id. at 8. This Article argues that boards have real sovereignty over a community not the mere private amalgamation of contracts.


\textsuperscript{142} Model Bus. Corp. Act § 8.01(b) (2008).

\textsuperscript{143} See Bainbridge, supra note 17, at 27.
A. The Concept of the Common Good

A consequence of seeing a corporation as a type of political community is that corporate decision making is seen in a different light. The nature of personal economic decision making differs from political decision making by an authority for a community. In making a political decision, the authorities are meant to put aside purely private interests and to make decisions that support the common good of the political community. The political process is characterized by a process where parties "are blocked, if only by the sanction of social disapproval, from arguing by reference to special as distinct from common concerns." The concept, which embodies the nature of political decision making, is the common good.

The definition of the common good is a vast subject. For purposes of this Article, I will note that it involves the relationship of two concepts. Something which is a common good must be both a good and common, as opposed to private. What is the definition of "good" in this context?

The "good" is none other than the end or purpose of something. In the Aristotelian tradition, "end" and "good" refer to that toward which something aims, its purpose: "every agent acts for an end under the aspect of good." Good and end are also related to a third concept, being. The end of something is the correspondence of that thing to what it is designed to be. Aquinas explains: "the good or evil of an action, as of other things, depends on its fulness of being or its lack of that fulness." To make the logic explicit, the end of something is defined as the "good" of that thing, and something is judged as good to the extent it achieves the fullness of its own being. Hence, by substitution, the end of something is to achieve the fullness of what it is, which is "good."

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144 See Bottomley, supra note 1, at 288 (quoting KUKATHAS & PETTIT, supra note 40, at 32-33) ("The political way [of decision making] is for the parties to put aside their own particular interests and to debate about the arrangement that best answers to such considerations – usually considerations in some sense to do with the common good – as all can equally countenance as relevant.").

145 See KUKATHAS & PETTIT, supra note 40, at 32-33.


147 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, Q. 94, art. 2., at 1009 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) [hereinafter AQUINAS, SUMMA THEOLOGICA].

148 Id. Q. 18, art. 2, at 664.

149 See JOHN RZIHA, PERFECTING HUMAN ACTIONS: ST. THOMAS AQUINAS ON HUMAN PARTICIPATION IN ETERNAL LAW 36 (2009) ("Thomas argues that although humans make a distinction between goodness and being in their knowledge, they are the same in reality.").
But how is this end (this fullness of being, the good) known? Aquinas says: "Consequently the first principle in the practical reason is one founded on the notion of good, viz., that good is that which all things seek after." All things seek after their natural type, exemplar, or idea. The definition of the nature of something contains the definition of that thing's end or good. As Professor Maria T. Carl states:

St. Thomas holds that good and being are really the same, although they differ in their concept or notion [secundum rationem] or in thought in that they are not predicated of a thing in the same way. Being signifies that something is, either absolutely [per se] as a substance is, or relatively [per alium] as an accident is. Goodness expresses actuality and perfection, and ultimate goodness expresses the complete actuality of a being.

Goodness is the perfection (fullness) of something's very existence. The common good of a community is thus that common end, which is the purpose of the community itself.

Since a community is formed by a commitment to a common purpose, something that is for the common good of a community is established for the common advantage of all in the community. Decisions made for a political community, or laws, "should be framed, not for any private benefit, but for the common good of all the citizens."

The ends would be inverted if those in charge of a community pursue the private good of individuals in contravention of the common good. Tyranny occurs when a ruler pursues

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150 Aquinas, Summa Theologica, supra note 147, pt. I-II, Q. 94, art. 2., at 1009 (emphasis omitted).
153 See Suárez, supra note 70, at 90, 92; see also supra Part III.A (explaining the definition of community).
154 Aquinas, Summa Theologica, supra note 147, pt. I-II, Q. 96, art. 1, at 1017; see also Suárez, supra note 70, at 90 (stating that "it is inherent in the nature and essence of law, that it shall be enacted for the sake of the common good"); Aquinas, Summa Theologica, supra note 147, pt. I-II, Q. 90, art. 2, at 994 (explaining that every law is ordained for the public good).
155 See Suárez, supra note 70, at 92; see also Aquinas, Summa Theologica, supra note 147, pt I-II, q. 96, art. 1 ("Whatever is for an end should be proportionate to that end. Now the end of law is the common good . . . .").
private advantage in lieu of the common good. The common good does not exclude the good of individual members of the community. Individual good is compatible with the common good, however, only when it is not inconsistent with the common good. Suárez explains:

[T]he good of private individuals . . . forms a part of the common good, when the former is not of a nature to exclude the latter good; being rather such that it is a necessary requisite in individuals . . . in order that the common good may result from this good enjoyed by private persons.

Thus, pursuing the common good does not exclude pursuing something which is advantageous to an individual member as long as the contemplated action benefits the common good as well as the private good of that individual. As Mary M. Keys explains:

But to be fully just, these ordinances [which advantage a particular person or group] must be made with a view to the overarching welfare of the entire political community and reflect a reasonably equitable allocation of benefits and burdens. Likewise, any exception made to the law must conduce in some respect to the public welfare, lest it constitute an act of arbitrary privileging of one part of civil society over another.

The good of individuals and the community at large need not be considered in opposition to one another. The good of the individual is related to and a part of the good of the whole community. As Aquinas says:

He that seeks the good of the many, seeks in consequence his own good, for two reasons. First, because the individual good is impossible without the common good of the family, state, or kingdom. Hence Valerius Maximus says of the ancient Romans that 'they would rather be poor in a rich empire than rich in a poor empire.' Secondly, because, since man is a part

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154 See SUÁREZ, supra note 70, at 93; see also AQUINAS, POLITICAL WRITINGS, supra note 73, bk. 1, ch. 3, at 15 (describing a tyrant as one who "substitutes his private interest for the common welfare of the citizens").
157 SUÁREZ, supra note 70, at 91.
158 KEYS, supra note 146, at 213 (internal citations omitted).
of the home and state, he must need[] to consider what is
good for him by being prudent about the good of the many.
For the good disposition of parts depends on their relation to
the whole . . . . 159

Since man is a social and political animal, 160 it is not in his nature to
pursue his individual good separately from the good of the communities of
which he is a part. Note, the individual good is not subordinated to the good
of the many, as in a form of utilitarianism. The common good should not be
advanced by unduly harming an individual. As a Roman law maxim states:
"[b]y the law of nature it is fair that no one become richer by the loss and
injury of another."161 Aquinas restated this principle, stating: "[n]ow
whatever is established for the common advantage, should not be more of a
burden to one party than to another."162 The good of the individual is not a
mere means to an end to be sacrificed to the common good. The individual
good is still an end, even if it is to be coordinated with the common good.
Pursuing the common good may mean that the ultimate individual good is
not maximized, but the individual good cannot be sacrificed for the sake of
the common good.

Both the individual and common good are ends to be pursued in
tandem. As the twelfth century philosopher John of Salisbury stated: "The
public welfare is therefore that which fosters a secure life both universally
and in each particular person."163 Even the individual good is not attainable
in a community not pursuing that individual good along with the common
good of the community. A task of the ruler of a community is to work to
harmonize the individual and common good. Even the individual good is
not attainable in a community that is not pursuing that individual good along
with the common good of the community.164 A task of the ruler of a
community is to work to harmonize the individual and the common good.165

159 AQUINAS, SUMMA THEOLOGICA, supra note 147, pt. II-II, Q. 47, art. 10, at 1395 see also
id. pt. II-II, Q. 50, art. 1-4, at 1406-09 (explaining that through political prudence an individual
directs himself in relation to the common good).
160 AQUINAS, ARISTOTLE'S POLITICS, supra note 69, at 6-7.
161 DIGEST OF JUSTINIAN, supra note 96, bk. 50, ch. 17, no. 206 ("lure naturae aequum est
neminem cum alterius detrimento et iniuria fiyi locupletiorem").
162 AQUINAS, SUMMA THEOLOGICA, supra note 147, pt. II-II, Q. 77 art. 1, at 1513.
163 JOHN OF SALISBURY, POLICRATICUS bk. III, ch.1, at 14 (Cary J. Nederman ed. & trans.,
Cambridge Univ. Press 1990) (1159).
164 SUÁREZ, supra note 70, at 95 (stating that the subject matter of laws may deal directly
with the common good or the individual good, "but the reason why law deals with either kind of
subject-matter is the common good, which therefore should always be the primary aim of law").
165 Id. at 94 (stating that "a law which is useful to one kingdom often is harmful to