

Interview with David Ciepley

Government by Corporation: The Mythology of the Stockholder as the Owner

Uppsala, Sweden

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Part 1: The Corporation as a Governance Technology

In Motion Magazine: Why have you focused your research interests on the development of corporations?

David Ciepley: I was trained as a social theorist and then, noting there were no jobs in social theory, switched to political theory and immediately noticed that political theory is dominated by a dichotomy of the individual and the state -- usually, with the notion that the state is the only governing entity and

potentially coercive force over the individual. And, it was clear to me that there are all sorts of intermediary institutions that actually do the majority of the governing in our lives, and that the corporation was the most salient, most influential one.

So, I began my studies of the corporation and I think having a political theory background gave me a very different lens upon it than those who study it coming out of, for example, law or business. I immediately was discovering things that were not represented in the literature, and so I knew I had a field to develop – and, that led to my shift to studying corporations.

< The state, through the charter, is granting the board the right to control the property >

In Motion Magazine: If I may, for this first part of the interview, I'm going to go through the historical corporation development process you investigate. In the second part, I will ask some clarifying questions.

In 2017, you wrote and spoke of “the chartered corporation as a governance technology: colonial empire, constitutional state, and business firm.” This, it seems like, is a completely different way of looking at history and the development of society. Instead of looking at corporations as simply economic tools – that is, tools to make money -- you are presenting them as integral to a developing, multi-faceted governance paradigm. Could you talk about how you came to see things that way?

David Ciepley: Yes. In my early reading on the corporation, I came across a series of articles by Henry Hansmann and Reinier Kraakman making the case that you couldn't create a corporation simply through the laws of private property and contract, as available to natural persons. That you needed organizational law which separated the property and liability of corporations from all the natural persons involved.

But, nonetheless, they still referred to the stockholders as the owners of the corporation and its assets. And it was clear to me that if you follow their argument to its conclusion, it made no sense to speak of stockholders as owners. The legal entities were the owners. The stockholders just own a financial instrument, somewhat like a bond, with different kinds of rights.

And then I took the next step and realized that the usual way of thinking about how the board gets its authority is that it is delegated to them by the owners, the stockholders, as in a partnership or proprietorship. The partners or proprietors, they own the property, so they can exclude others from it or they can grant others the right to access it on condition of signing a labor contract which gives the employee the duty to obey, as long as the command is not obviously illegal, irrational, or unethical.

That's the usual way in which authority is derived in the world of business -- from ownership. But once you see that stockholders are not the owners, that the legal entity is the owner, then you have to ask: where does the board get its authority from? It can't be from the stockholders because in fact at no point in the history of a corporate firm do the stockholders have the right to control it. That authority is original to the board.

Then, I realized what was staring at me in the face for several years, was these charters that are explicitly saying that the state, through the charter, is granting the board the right to control the property, hire and fire personnel, and manage the firm. At that point, I realized that the business corporation is a way in which the state delegates authority to a board to then undertake activities that it approves of – of various kinds of businesses.

I realized that of course this is even more clear in non-profits, such as a university. I mean, who gives a university board of trustees its authority to run the university and control the property? There aren't even any stockholders to be confused about. It's clearly the charter coming from the state.

< The state extending its jurisdictional authority, its governing authority >

I realized that this is a general form for the state extending its jurisdictional authority, its governing authority, down to a lower layer of civil society and allowing private citizens to actually undertake some of the governing functions that the state would normally undertake – whether it's labor control, controlling assets, running an institution of learning -- that kind of thing.

And then, my final step was to realize that even something like the U.S. constitution really takes the form of a corporate charter where the people take the place of the king chartering a government to rule over the people as individuals. That's a longer story going into some of my later work.

I saw how England formed its early empire, instead of a state-led empire like Spain and Portugal, or even France, it chartered corporations in its first-generation empire. The East India Company into the Indies, the Massachusetts Bay Company in New England. It was using the corporation again as an indirect form of extending its authority.

That's the point I realized that this is really a much bigger story of really unpacking what is the fundamental mode of modern governance which has been obscured through mythologies of business corporations as just private associations of stockholders, universities like some kind of charitable trust. It turns out all of this was facilitated by the state as an indirect layer of governance.

< **Little republics** >

In Motion Magazine: In your 2019 paper about corporate fiduciaries, of who is beholding to who or what, you talk about how at the very beginning of the use of corporations there was a rivalry between the patriarchal metaphor of agrarian civilizations and the emerging Roman corporate metaphor. Can you talk about that?

David Ciepley: The patriarchal agrarian model is very hierarchical. In a way, you can relate this to European feudalism where, under European feudalism, to use the Latin terms, *dominium*, ownership, and *imperium*, lordship, were fused. If you held the land, you also had the right to govern all those on the land. The serfs were tied to the land. And so, this is of course very hierarchical and in a sense all rule comes out of ownership. *Dominium*, the word for property, also comes from *dominus*, the master. So, this is a very hierarchical form of governance.

The Roman corporation, which the Europeans came into in the 11th century when they recovered Justinian's *Digest*, provided a very different model of governance. You could say it had some connections with vestigial Germanic conceptions of small consensual groups. This was where the real authority lay in the membership, in the members, and they each had one vote to elect a rector, or a curator, a kind of manager over their own activities. They are really little republics. Similar to republics where the citizens elect a government over themselves. That is also true of the Roman corporations.

And so, into the heart of these European kingships with their hierarchical structure, and the Catholic Church with its hierarchical structure, came this very republican form of organizing institutions -- the Roman corporation. And the law that they received from the Romans was quite sketchy, they had to flesh this out in various ways, but that Roman corporate concept did become the core of republican practices

and republican ideas in Europe. And by republican, here, I mean the notion of popularly accountable governments, whether we are talking about towns, where the citizens were the members, or universities where the faculty were members. At that time, the faculty elected the president, and that person was accountable to them.

In any case, you acquired this more democratic, republican representative form of government which eventually grew into the real model for our modern constitutional democracy.

< The Catholic Church and the monarchies >

In Motion Magazine: After the Roman corporations, the next stage in corporate development which you write about is in the context of church canon law, which then morphs into a dual corporate governance system where for several hundred years this governance technology was used by 1) organized religious hierarchies, and 2) civil governance by monarchies giving charters to guilds, townships, and universities. Can you talk about this?

David Ciepley: The church was the first major institution to latch onto this Roman law of the corporation because it was very useful in their struggle with the emperor. (This was) because the implication of declaring various church bodies to be corporations is that their membership should get to select the head, rather than the emperor selecting the head, or local lay notables selecting the heads -- say, the bishops -- which was the usual practice.

(So, in) the investiture conflict, a great conflict in the 11th century between Pope Gregory VII and the emperor (Henry IV) over who gets to select the pope, (who then) gets to select the archbishop, the

bishops, it was to the church's advantage to say, "These are corporate bodies, so there's a legal rule here. They should get to select their own leadership." That was the freedom of the church movement against control by the emperor and the secular authorities.

But, that said, the corporate form that they inherited from Rome was a little too democratic for the Catholic church, so they altered it. They have the local priests elect the bishop, just like the cardinal elects the pope, but those were elections for life. The heads were no longer accountable to the members. This is, call it, maybe, a hybrid model of republican and autocratic. Political theorists would say this is a form of mixed constitutionalism where both the head and the members share authority. This also, then, became a model for the way in which the emperor ruled in the empire because the emperor was elected by the electors.

It also became a model for the kingdoms. The king was not elected by the peers, nonetheless the rather robust legal model that was developed for the relations between bishop and priests in the cathedral chapter became a model for how the king would relate to the lords and parliament.

It has to be remembered that the king's clerks were typically also clerics who had practice as members of these church bodies and so if you would ask them, "What is the way to organize at a meeting?" well, they would, of course, immediately draw upon their experience and the rules from their own chapters. And that is the manner in which that kind of structure was passed from the church, particularly the bishopric, to the king.

There's a very famous analogy drawn throughout the Middle Ages between the bishops as the sacred princes of the church, and the kings as the secular princes. That was a natural analogy, therefore a lot of governance structure was traded between the two.

Part 2: The Business Corporation

< The business corporation emerged out of imperial competition >

In Motion Magazine: As that period fades, you then highlight the invention of the modern business corporation as a result of cross-learning between the Dutch East India Company (editor: officially the United East India Company) and the English East India Company. Could you please explain how that happened?

David Ciepley: This is a rather complicated process. I don't feel it's been done justice, previously. I'm hoping to do it justice in the forthcoming book.

So, the English East India Company was chartered in 1600. The Dutch East India Company, for short the VOC (Vereenigde Oostindische Compagnie), was chartered in 1602. They began as very different kinds of companies and the Dutch were the real innovators in terms of evolving towards something like an integrated modern business corporation.

The Dutch company really began as a deal between the Estates General, the sovereign legislature of this young Dutch republic, and these six, now called pre-companies, that were trading successfully and profitably to the Indies, but were competing with one another to do that. And the Estates General had the idea that, "Why don't we unify these six competing companies into one monopoly and assert our own governance over it, and then we can use it to attack Spanish and Portuguese interests in Asia in order to relieve pressure on the homeland?" because the Dutch had just recently broken off from the Spanish and there was fear of re-conquest.

So, that is what they did. But, initially, it wasn't really a unified business corporation because each of these six companies was now an independent chamber and the lead merchants were liable for outfitting their expeditions. But anyway, through a complicated process it became clear to the Dutch that it was more effective to have a more centralized governance and a more centralized structure for taking on debt. And, in particular, to relieve the various merchant heads from personal obligations for the debt so that the company could take on yet greater amounts of debt at a level necessary to build the kind of infrastructure they needed for trade in Asia, because the individual merchants were not willing to take on that much debt if they were personally liable for it.

At that point, it became a real corporation with its own separate juridical personhood, once the courts allowed the company to issue bonds in its own name, rather than with the merchants as co-signers.

In the meantime, the English formed what was really a guild, the individual members of which had the right to trade to the Indies. It wasn't a unified business corporation in 1600. No individual had the resources to make that kind of a trip to launch a successful expedition. So, the members of the guild sub-organized as joint-stock companies, which is just a form of glorified partnership, and ran these partnerships to Asia and dissolved them when the ships came back. And then they formed a new partnership and sent it out again. These remained very small operations, therefore, and they were no competition with this growing Dutch company whose assets were now locked-in permanently with profits used to expand it further and further.

And so, finally, the English, in 1657, decided to compete with the Dutch by copying the Dutch. It became one monopoly company. The merchants who had been inside-members became outside stockholders. The employees who had been apprentices became employers of the company. And so on. But, whereas the Dutch East India Company was governed by individuals selected by the Estates General, though they

usually delegated that authority to the *burgermeisters* (editor: similar to a mayor) of the Dutch cities, and so, therefore, were integrated into the Dutch structure of the Dutch republic, in the English East India Company, those former guild members were allowed to retain their voting rights as stockholders, and selected the management, and that became the Anglo-American model – the stockholder-dominated business corporation -- right there, at the outset.

So, that's the real story and just to be clear, it's not a story about trying to come up with an organizational form that was profitable in a free market. The Dutch had already done that with these private partnerships. The business corporation emerged out of imperial competition. How do you acquire land and trade routes on a monopoly basis in Asia against a violent competitor and against violent resistance by the natives? This wasn't your typical kind of free market story about more efficient use of limited resources. This was about achieving a scale to undertake an imperial operation. The corporate form allowed these companies to acquire that scale by having a legal entity, that never died, own the property and could therefore accumulate it across generations and build and build and build in a way that no private partnership could.

< Why Hayek, Friedman and others founded neoliberalism >

In Motion Magazine: After this development, corporations continued to change through the 18th, 19th, and 20th centuries but perhaps the next major shift in their technology comes after World War 2, as larger corporations become transnational and neoliberal corporations are created. You write about three phases in that development. The first two reflect economic theories by F.A. Hayek and then Milton Friedman. Could you talk a bit about what effect they had on corporations?

David Ciepley: In terms of the impact on the corporation, I'm not sure those first two iterations of neoliberalism -- that of Hayek and the founding generation of neoliberalism, or of Milton Friedman and

the second generation, although Friedman was there at the founding as well -- I'm not sure they had much impact upon the operation of the corporation. Their role, rather, was to revive on paper the shareholder-dominated model of the corporation because coming out of the Progressive era and out of the New Deal, there was a realization, a sense, that these corporations were so large, so influential, and the stockholders were so numerous and dispersed and had really given up any kind of effective control or responsibility for the corporation, you really had to think of these as institutions with a public coloring, a public caste to them. And, therefore, their responsibility was no longer just to the stockholders but was to stakeholders more broadly, and to the public.

That is the notion that was ascendant after World War 2. But, from the point of view of this emerging free market, neoliberal school of thought, this kind of approach to the corporation just invited state intervention into the world of business and they thought that was a stalking horse, or a Trojan horse, for state intervention in civil society, and then ultimately into totalitarian control of society. The real history of totalitarianism doesn't support that view of its origins, but that is what they sincerely believed. So, their role was to justify the continued dominance of the stockholder model.

I don't think it was until the third iteration of neoliberalism, that we can get to, that then you can start seeing the reforms going on in the corporation that take it in the new direction.

< **Business corporations and Game Theory** >

In Motion Magazine: (And indeed) then comes the 3rd wave of neoliberalism, which we live with today, and which you say is based on Game Theory. Can you explain a little about what Game Theory is, and then how it's applied to corporate management and investment in corporations?

David Ciepley: The important premise of Game Theory for this corporate story is that within Game Theory the agents, the players of the game, are not just the old stick figure of *homo economicus*, the utility maximizer, but the even darker figure of *homo strategicus*, who is a figure who cannot even make promises or be trusted in any way because at every decision point they are to optimize their outcome and therefore would violate any kind of previous agreement they had made.

So, when Milton Friedman in the second wave of neoliberalism talked about corporations, he talked about, their job was to make money for the stockholders in a way that is consistent with the law and with reigning customs and norms in the land, which would presumably include promise-keeping, basic ethics, etc. Within Game Theory, those kinds of notions of promises and ethics, and what you call these various side constraints upon unconstrained self-interest maximization, go by the wayside. What is important about Game Theory is not the particular models of Prisoner's Dilemmas, that you might have heard of, but just this notion of the more deeply strategic, unbridled, self-interest pursuer.

And, how this enters into the corporate theory is that any corporation is going to have fiduciary duties at its heart. Even if you accept that stockholders are the owners, it's still the board, their representative, that runs the entity. And so, the board has a fiduciary duty to advance the interests of the stockholders. I should say that's not my model of the corporation. I think historically, corporations, even today, they have a purpose in their charter and the fiduciary duty of the board historically was to the corporation and its purpose, not to the stockholders. That was a subsidiary interest of theirs since the stockholders elected them, of course they had to pay attention to their interests. But the fiduciary duty was to the corporation and its purpose.

Even if you accept the stockholder theory, there's a fiduciary duty at the heart of every corporation. And, for the first two waves of neoliberal thought, that fiduciary duty was not challenged. But, in the third

wave, under the influence of this more radical conception of this self-interested actor, it was. And this comes in the form of a new principal-agent theory where the agent is assumed to be a completely unreliable agent who will only work in the interest of the principal if somehow coerced or bribed to do so. Translated, in the corporation, the stockholders were taken as the principal and management as the agent, and so the only way you could be sure that management would work in the interests of the stockholders was to coerce it or bribe it.

< The modern business practice of catering to short-term stockholders >

So, on the one hand, this led to strengthening the power of stockholders within the corporation by giving them a greater say over it: sometimes, efforts to give them a say over pay of the executives; to allow them easier access to the proxy, that is to more easily submit candidates of their own for potential election to the board rather than just accepting the board's nominees to the board.

On the one hand there is this effort to strengthen the power of the stockholders. But the really more influential movement was to change the way in which executives are compensated. Up until the 1970s, almost none of the pay of CEOs was in the form of stock or stock options. It would be primarily salary and then a bonus. But starting in the '70s, and really accelerating as this literature on agency theory is applied more thoroughly to the corporation, you see the growth of stock and stock options as part of the compensation package. Such that now in Fortune 500 firms it averages at over 80 percent of the pay of CEOs is in stock and stock options.

Of course, this is just a way to dramatically reorient the executives from other kinds of concerns like building the company for the long term towards the stockholder. Today's stockholder has become increasingly short term in his or her focus. In the 1950s, stock was held for an average of six years. Now

it's held for an average of four months. The stockholders aren't interested in your five-year plan, they are interested in your five-week plan.

As stockholders have been empowered, and as the fiduciary duties of the directors and executives have come to be seen as towards the stockholders, and then as executive pay is tilted towards stock and stock price, we have seen a remarkable reorientation of corporations towards the short term, towards existing stock price, toward paying out the vast majority of their profits in the form of dividends to stockholders and stock buy-backs. Just buying back their own stock, raising the stock price that way as just another way to get money to stockholders.

The whole point of the corporation, going back to that early history we talked about, is to lock in the capital for the long-term so you can build the company, build it over time. The very public justification for making accessible this form of business is now being undermined by the modern business practice of catering to short-term stockholders.

< The mythology of the English corporation >

In Motion Magazine: Why has there been this propagation of the idea of stockholder ownership of corporations?

David Ciepley: If you look back at the origins of the business corporation, the Dutch were never under the illusion that the stockholders were either members or owners of the business corporation. One thing we didn't touch on is that in the initial letters patent that the Dutch company received -- it wasn't technically a corporate charter because it wasn't at that point a real corporation, it was just a legalized cartel -- but in the letters patent, the sovereign letters enabling this new company to operate with these

new rules, the original merchant investors were locked in for a period of ten years. And then, all of the assets were supposed to be liquidated. Any increase in the value of the property was to go back to these investors.

But the Estates General (the parliament of the Dutch republic) realized that if they liquidated these assets it would undermine their position in Asia, which had been won through very bloody warfare. So, they just reneged on that dissolution period and locked in the capital on a permanent basis. And this was simply an expropriation of the property of the merchants that had been in a partnership. They all expected their money back. They were mollified by a 162.5 percent dividend. Now, why that number? That happens to be the principal plus ten years' worth of the growing rate of interest in Amsterdam of 6.25 percent. They got the standard return of investment in the Dutch republic of that time. That kind of quieted them down, but they were under no illusions that they remained the owners of this property. They had just been expropriated. Now, they just owned a financial instrument, their stock certificate.

But the English, in contrast, they never underwent that object lesson of an expropriation. In 1657, when the East India Company was re-chartered, the capital was locked in but there was a *proviso* that after five years, and every few years after that, there would be an audit and accounting of the assets of the corporation and as an alternative to selling their stock they could ask for a return to them of their *pro rata* share of their investment. That looks a lot like they are owning part of the company, even though now this was only a charter-granted right and only this occasional period in which they could do that.

Well, at the first five-year period, the company was doing quite well, was quite profitable, the shares were trading at par value, at full value, so there was no real reason to take the plan B exit – almost no one did. And then those provisions in the charter went away upon re-chartering of the company in later years, but

the stockholders maintained this sense that they nonetheless owned a portion of the company, even though in any literal sense now it was the legal entity of the corporation that owned the property.

And so that became the mythology of the English corporation, and following them the American corporation, and the Canadian corporation, and the Australian corporation. All of the commonwealth companies have lived under that notion that the stockholders are the owners, even though no court would literally enforce that. That would undermine the whole legal form. The title is definitely held by the legal entity. And even though it is not a legal fact, the ideology has been very strong, and it has underpinned the assumption that we have to give electoral rights, control rights, to the stockholders as owners, and that they are the sole beneficiaries as owners.

< The race to the bottom >

In Motion Magazine: What has been the effect of Game Theory on corporations on the societies that they are within?

David Ciepley: When you prioritize stockholders, both in terms of power and benefits, and these stockholders are very short-term holders of stock, then, instead of holding on to your revenues and reinvesting it so that a stockholder will five years from now have a higher return, you need to give all of that revenue out as soon as possible to keep them happy.

This forces you down a different economic strategy, in terms of being a successful company. You can think of there being two main strategies for business success. One would be a high-quality strategy, let's call it the German path, of retaining a lot of your earnings, investing them in research and development,

investing them in worker training, investing them in plant expansion, and in this way competing on grounds of high quality.

The alternative model is low cost. High quality can charge a higher price, that's how you get your profit margin. The alternative is a low-cost model. Well, if you are already committed to sending out the vast majority of your revenues to stockholders, you can't apply it to research and development, or worker training, or whatnot. The high-quality path is closed to you. So, instead you adopt the low quality, low-cost path, and if you do that then obviously your next step is to start moving your manufacturing to low-cost, low-wage jurisdictions. So, this is accelerating, then, the move overseas to Mexico, to China, and now elsewhere of American manufacture, American capital, of American jobs. That is one consequence.

And then, as these companies become internationalized, and they have a branch in China for manufacturing. But I shouldn't say branch. They have a subsidiary, another corporation, so they own a controlling portion of the stock of that subsidiary, so they get to nominate the board, elect the board. They control it but legally they are separate. Their liabilities are separate, and the formal control is separate. And then, maybe, they set up another subsidiary in Ireland, which is a very low tax jurisdiction in Europe.

This is the creation of the multinational enterprise, which I argue has been encouraged by this neoliberal model of corporation. And so now, you might want to sell an item which is manufactured in China to France. China may not be the best example, but let's just pretend that China is a high-tax jurisdiction. I'm not sure what level of taxation it has. But you want the profits to be taken in a low-tax jurisdiction. So, first you have your subsidiary in China sell it to your subsidiary in Ireland at a price that is almost at cost so that almost no profits are taken in China. Then, the Irish subsidiary sells it on to France at the very high market price, so all the profits are taken in Ireland and then you have a very low tax on your revenues.

(And), the other consequence of this out-sourcing is corporations take advantage of this ability of shifting capital around to circumvent the taxing authorities of their home jurisdictions, to circumvent environmental standards, to circumvent the labor standards. And as these jurisdictions compete with one another, they lower their own standards to try to attract the capital and the jobs that these corporations can create.

This is what they call the race to the bottom. This whole dynamic began in the U.S. in the 19th century with states competing for corporate capital. It still occurs to this day. But then, finally, you had a federal tax which somewhat mitigated at least the tax avoidance. But now this is occurring at the international level. And there is no equivalent to the national government, an international government, to impose common standards on this. So, you have a race to the bottom with no real bottom in sight.

Part 3: The Governance of Collective Power

< The state learning from the corporation >

In Motion Magazine: If you cut the corporations off from the state, the way they are structured, the hierarchy, the very-centralized hierarchy, is still there. And a lot of the organizations that have formed – for example, political parties – they are structured in exactly the same way, as corporations. In fact, political parties usually want to be the state. Well, they all do, that’s their very function. And in a place like China, where they have actually merged the two, the party is the state. They are the same people. Is that an ongoing development of the concept of a corporation?

David Ciepley: We didn't really discuss the transformation of this kind of republican corporation in medieval and early modern Europe into this kind of autocratic hierarchical structure of the business corporation. So, just briefly a word on that.

It was simply a function of the former members of the guild who elected a government over themselves becoming outsiders and now electing a government over the employees. The board of the business corporation does not govern the stockholders, it governs the employees. The employees have no say in the selection of those who rule them. That is not a republic, that is an imperial relationship, really. One group elects a government over another group. In this case, an imperial oligarchy, since it's by one share one vote, not one member one vote.

So, as we have already touched on, there's a lot of back and forth, mutual modeling, between the corporation and the state. And I would say it's usually the state learning from the corporation. This is true with the American constitutional state, which is patterned after the early modern republican member corporation. And my fear is that with the ascendance of this autocratic business corporation, that also becomes the model for the constitutional democracies that are chartering them. There's this kind of historical irony that these monarchical kingdoms of Europe primarily chartered republican corporations, while these constitutional republics of the modern age primarily charter autocratic business corporations.

The way in which this could happen is the same way I talked about with the bishopric becoming the model for the relationship between the king and the members of parliament, where the king's own staff came out of the world of corporations, of these canon law corporations of the church, and impressed that model on the kingdom. Well now, in the U.S. government especially, but in some other countries as well, but I think the problem is most acute here, the staffing of our executive branch is often of corporate CEOs, who have a particular model of governance in mind when they come in.

It's interesting to compare, to see how this plays out in practice. It's interesting to compare the Clinton, the Bush, and the Trump administrations. Clinton had many academics and it was often said that Washington, especially in the first years, it seemed like a series of seminars that were being run. Various meetings were being held, workshops, trying to develop governance ideas. When George W. Bush came in, he had at that time an unprecedented number of CEOs in his administration, and you had a very corporate structure to the White House, to the way of running the government. Trump is really not a creature of the corporations. He is a sole proprietor. He is a real estate company owner and manager. He doesn't answer to the board, or anyone. And that again really shows in his governance style. Just wanting to be the boss. He can't brook anyone checking him.

I think people enter into government with their particular patterns of how organizations should operate. The dominant mode here, though, is not the Trumpian mode -- let us hope that is an exception -- but is the more corporate mode, characteristic of the Bush administration. I think those kinds of corporate habits, which are not ones of consultation, which are not ones of more broad participation, but of more top-down structure, though still a sense of accountability that they have, accountability to the board members -- they have some sense of accountability to the public -- but after they have that moment of accountability, the public should be quiet and let the pros do their job.

So, I do fear that given the historical tendency of states to follow the pattern of the dominant corporations that that will be the continued pressure, especially in the U.S., of having a more corporate, hierarchical, unresponsive conception of government among those who occupy its offices.

< The legal empowerment of corporations over time >

In Motion Magazine: What has been the role of the U.S. Supreme Court in the development of corporations – in particular, the significance of the *Citizens United* decision?

David Ciepley: If we look at the legal empowerment of corporations over time, what we see is that it is not democratic legislatures that are doing this. Overwhelmingly, democratic legislatures are trying to restrain, keep within narrower bounds, the corporations that they create. But the federal courts, especially after the Civil War, have a liberal conception of the U.S., more than a democratic conception. By liberal I mean that sense of individual rights. And they apply those to corporations. *Citizens United* is just at the end of a long series of these developments.

Let me mention a couple that probably aren't so well known, nonetheless very important. In the U.S. almost all corporations are chartered by the individual states. These days most of them in Delaware because it has the most lenient requirements. Originally chartered by the states, and so the corporations only had the right to operate within that jurisdiction. If a corporation in Connecticut wants to operate in Georgia, it was considered, in the first half of the 19th century, a foreign corporation and could only operate there on permission from the state of Georgia and its legislature. Otherwise, it did not exist as a corporation. It only existed as a corporation in its little original jurisdictional world. But it was the federal courts and then the U.S. Supreme Court that slowly granted corporations the right to operate across state lines and states couldn't say "no" and treat them as foreign corporations, and exclude them or subject them to more stringent rules than their own domestic corporations.

So, the first thing that the Supreme Court did of immense importance was to create a national corporate market. Before it had been a national market for natural persons. States couldn't set up tariffs if you wanted to transport goods from one to another. But corporations were not covered by that constitutional right in the commerce clause. But the courts applied it to them. So, they created a corporate market and

corporations now operated across state lines and of course they had the capacity to become large and they became national players in the economy.

But then what you are pointing to is the advent of various other kinds of constitutional rights – protection of their property, due process protections, and ultimately free speech, freedom against search and seizure. These rights that were the preserve of individuals, initially, in every case all of those articles in the Bill of Rights and the 14th Amendment were just to be applied to natural persons.

But the court has construed corporations, not as individual citizens or individual persons—which is the reigning mythology of what they have done. What they say is a corporation is just an association of citizens, an association of persons, and it is the rights of those associating individuals that we are protecting.

So, in the case of *Citizens United*, it says, “Well, these are just associations of stockholders. Stockholders are overwhelmingly citizens. Citizens have the right to give money or spend money for a candidate or against a candidate.” The problem, of course, is that corporations aren’t simply associations of stockholders. Corporations are legal entities with their own treasury. The stockholders already have their own individual bank accounts and they can spend money out of their accounts for or against candidates to the last penny. And, if they want to sell some of their stock to put even more cash into their bank accounts, they can do that. Their constitutional rights are already fully protected. If you accept money as speech – they are fully protected.

What *Citizens United* does is allow management to use the corporate treasury, which is not stockholder money but is the money of the corporate entity, and use that in elections for and against a candidate. So, it really is representation of these state-created entities, which are neither citizens nor natural persons in our

electoral system. Again, against the will of the legislature which was trying to constrain the influence of corporations upon our elections.

It has been this persistent work on the part of the federal courts to, first, reduce the corporation in theory to just an association of citizens, and then to give citizen's rights to corporations.

In Motion Magazine: What does that mean for society?

David Ciepley: Well, it means the citizen's grip upon the corporation loosens because they cannot pass laws in areas of speech, transparency, the search and seizure protection they have, to try to constrain these corporations. It loosens the public's grip upon the corporation while it strengthens the corporation's grip upon the government, the people's representatives, because the corporations are then free to spend money in campaigns and therefore curry favor with the candidates and expect to be and generally are rewarded afterwards. That is a main mechanism of strengthening the hold of corporations upon our government.

< Democracy is under threat from two sides >

In Motion Magazine: Now that many larger corporations are global, with operations and access to resources in multiple countries, as well as taxation deals with multiple governments, has there been a fundamental shift in the relationship between business corporations and the various corporation-modelled countries in this post-World War 2 era?

To explain that a little further, one of the points you make is that the U.S. is a corporation, modelled on a corporation concept and most countries in the world, with the passing of monarchies, are pretty much adopting the same idea that we need a constitution, we need three branches. Many countries have been

modeling themselves on the United States, even places like China or the Soviet Union when it was the Soviet Union. But the basic point that you've been making all along is that these corporations get their power from the state. They get a charter. This is what you can do. These are the rules governing you. But now that corporations are no longer restricted to just one country, one state, in fact many times have more wealth than countries, is there now, and this has all really happened since World War 2, is there now a fundamental shift in the power relations? Are the corporations now more powerful than the countries?

David Ciepley: I think popular government, democracy, is under threat from two sides. In countries where the rule of law is not respected, in more authoritarian countries, like China, like Orbán's Hungary, Erdoğan's Turkey, what you see is authoritarian leaders subordinating corporations to their party or to their personal control. In countries where the rule of law is largely upheld, you have corporations able to flourish under the rule of law and capture the democratic government. And so, the threat is not the real disappearance of democracy, but its hollowing out as you get a kind of fusion of corporations and political power where the corporations help support a particular class of politician, and the politicians through their legislation help support the dominance of those corporations. A kind of fusion of power in the interest of dominating the broader public.

So, I think that that is the threat, this dual threat from both sides that popular government faces today and that the advent of the modern multinational within that rule of law portion of the world has exacerbated and accelerated as these corporations are able to elude the control of their elected governments and then more easily capture them as well.

< The corporate form separates ownership and governance >

In Motion Magazine: Besides corporations, there are other available governance technologies. For example, there is the Indigenous self-governance model which has endured for 10,000 years. And other modes of self-governance may be in the process of creation. Why do you think the corporate technology has become so omnipresent over the centuries? And what can we learn from studying that history?

David Ciepley: In a sociological point of view, you could say, what the corporate form does is vastly augment collective power. I mean the power of groups of humans to get certain things done. And it does this in two main ways.

One is by dedicating property in perpetuity to a particular activity by having that property owned by an undying legal entity. A former colleague of mine, Lynn Stout, liked to use the example of the cathedral of Milan which has been built over thirty generations because the assets are locked into a corporate entity so humans can work on this from century to century to century. Rather than it dissolving at the death of the original projectors. So, you have a vast increase over time and also in scale. Something like Exxon Mobil is unimaginable from just some individual partners getting together and having those kinds of assets.

The other thing, though, about a corporation is: how is it governed? What is its governance like? Here again the advent of the corporation can augment the collective power by improving the nature of its governance. In the feudal world we talked about, ownership gave governance but if the king had an incompetent heir then governance would be a mess and the kingdom would cease to flourish and might even be conquered by others, etcetera. Because ownership passes rule down from owner to owner and not all owners are effective at governing.

The corporate form separates ownership and governance. The owner is now the legal entity, and this allows you to recruit the leadership of the institution from outside the propertied classes and get a more

professional kind of government. The church discovered this very early on, the advantages of that. The church could recruit from the commoners to have members and train them, and have bishops, and so forth.

And also, it allows you to have a more constitutional form of government. You could have government by board, for example. You could have a government by dual board. You could have a government by three branches of government, with one branch divided into two, further divided into a federal system – I'm of course describing the United States government where all federal property is held by a legal entity, "the state," and then a separate charter establishes the government structure.

< Our imaginations are blocked >

So, these are the two advantages of the corporate form augmenting collective power of scale, duration, and at least the potential for more effective governance.

But what we've inherited with the business corporation is an assumption that the stockholders are the owners and should therefore have the control and benefit. It is not at all clear, in fact I would say it is quite the opposite of clear, that that is the most effective form of government for a corporation. If you just look at those countries that have adapted most successfully to the winds of globalization, it is not the Anglo-American countries with the stockholder-dominated corporation. It is in fact the Germanic and Nordic countries that have a greater proportion of worker participation. In all those countries workers get to elect a certain percentage of the board members. That's more like a mixed constitutional method which we talked about – with different groups sharing governance power. It turns out that can be more effective than the kind of autocratic stockholder corporation.

I think that the corporation creates the potential for more inclusive forms of government of the business than the world of just sole proprietorships and partnerships. There's actually more potential there for a more participatory, one can even say more democratic, at least more republican form of firm within this. But, at least in the Anglo-American countries, like the United States, our imaginations are blocked from even thinking about this because of that very strong mythology that the stockholders are the owners. And if you tried to institute something like German co-determination with half the board members elected by the workers and half by the stockholders, probably existing stockholders would sue that this is a violation of their property rights. And, given the current opinions of our Supreme Court, they might well win.

So, a pre-condition, I think, for claiming, at least experimenting with, some of these alternative forms of governance that are more democratic that would distribute their benefits more widely, that would be less domineering over their workers, that might create less negative externalities for the neighborhoods where the workers live – the precondition for that is overcoming the mythology of the stockholder as the owner. And that is very much what I'm putting front and center in my theoretical work on the corporation.

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