Daniel J.H. Greenwood FICTIONAL SHAREHOLDERS: FOR WHOM ARE CORPORATE MANAGERS TRUSTEES, REVISITED *
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It is a commonplace of American law that corporations are fictional. The U.S. Supreme Court said so, in the first important corporate law case to come before it, Bank of the United States v. Deveaux, and repeated it in the next, the famous contract case of Dartmouth College v. Woodward: The corporation is simply a convenient, though misleading, way to refer to its shareholders or members. Many modern theorists agree that the corporation is a metaphor, though they have different visions of what it "really" is.

But despite this ancient and sophisticated discourse regarding the corporation, the literature and cases have relatively little discussion of the shareholders. This omission is particularly glaring in light of the dominant paradigm of corporate law, which holds that the central task of corporate law is to lessen or eliminate the potential conflict between shareholders and corporate managers - the so-called problem of separation of ownership and control identified in Berle and Means' seminal work and put into its modern form by Jensen and Meckling.

Modern cases and theory, like the older ones, assume that shareholders, unlike corporations, are not problematic. Corporations may be legal fictions, mere metaphors for underlying - and quite different - realities. But shareholders, it is generally assumed, are not problematic at all. They are widows in Iowa, profit-maximizing investors or - more recently - institutional investors, and little further discussion is needed. After all, whatever else shareholders may or may not want, every shareholder wants to make a profit and that is all that is really important for the operation of corporate law and, indeed, the corporation itself.

Virtually all the major groups of corporate law scholars today agree on the centrality of the shareholder to corporate law; all but the communitarians agree that virtually the sole task of corporate law is to ensure that managers act as agents for the shareholder owners. This Article directly challenges the almost universally held assumption that shareholders, in the form understood by the law, are a group of human beings entitled to respect and consideration and having interests that exist independent of corporate law. I contend, rather, that corporate law theorists have missed the critical point that an agency (or trust) relationship has quite a different significance when the "principal" (or beneficiary) is a set of legally defined interests that are not under the control of any individual or group of individual human beings who could choose to redefine or act in opposition to those interests.

This Article, then, is an attempt at a careful look at the role of shareholders in corporate legal theory. Shareholders, I contend, are a legal fiction, and in many ways a far more problematic fiction than the corporation itself. Indeed, since corporate law and the market alike drive corporations to act in the interests of these fictional shareholders, the shareholder is the most important fiction of corporate law: The legally imputed characteristics of corporate shareholders are the power behind the throne of managerial autonomy, the driving force that determines the structure and functioning of our corporate system. For this reason, we need to examine the nature of our fictional shareholders more carefully: Both the successes and the failures of our system ultimately reflect the characteristics of the shareholder we have created.

Specifically, I contend that the fictional shareholder is fundamentally different from the human beings who ultimately stand behind the fiction. The law and the legally created structure of corporation and market filter out all the complexity of conflicted, committed, particularly situated, deeply embedded and multi-faceted human beings, leaving only simple, one-sided monomaniacs. Human beings have short lives, spent in particular places with particular relationships to other human beings; they constantly confront the problems of finitude and commitment. Shareholders, in contrast, are in significant senses immortal, uncommitted and universal: They are indifferent as to time and place, language and religion. They are indifferent between projects and personalities. They are understood to care deeply about one important and vital human aim - profit maximization - but not at all about numerous others. While the ultimate owners of the shares are specific, situated, conflicted and committed human beings, shareholders in most instances may be thought of more appropriately as a "large, fluid, changeable and changing market."

These differences between fictional shareholders and human beings can be grouped into two broad categories, each with a distinctive impact on the society and economy we use them to create. First, like classical utilitarians and the market itself, shareholders do not take the distinction between persons seriously. That is, in many important situations they are indifferent to distributional issues that are critical to ordinary human beings. Second, they are fundamentally inhuman because they have only one goal, profit maximization - and, thus, need not make the compromises among conflicting goals that are the essence of human politics and life.

The consequences for corporate law are also twofold: First, in the eyes of the law and corporate management, shareholders are all the same. As a result, managers are given relatively clear direction without any need to pierce the cacophony of inconsistent demands from conflicted and conflicting individuals. Corporate management is therefore far easier than political management. This simplicity, however, is based on an illusion - the conflicts do not disappear merely because the law presumes that shareholders are above them.

Second, the actual owners of the shares are irrelevant to corporate law: Neither the interests nor the desires of the people behind the shares count. Because managers manage on behalf of a fictional principle rather than a human principal, corporations are a strange, driven kind of institution - neither managers nor anyone else has the ultimate authority to stop the institution from acting out its logic to the fullest.

This Article proceeds as follows. First, I explain what I mean by calling shareholders fictional and outline in more detail the basic characteristics of the legally determined fictional entity. Second, I illustrate some ways in which the fictional shareholder imposes its will on the corporation - here, I follow the current consensus that the conflict between managers and shareholders has been resolved in favor of shareholder control, but with a twist, since I view the corporations not as controlled by human owners but rather as run in the largely legally defined interests of fictional creations. Neither those legally defined interests nor their fictional holders can be mapped in any simple way onto an underlying group of human beings. Finally, I explore the consequences of having our largest institutions run in the interests of a legal fiction and offer some preliminary suggestions regarding areas in which an institution run in the interests of fictional shareholders will be similar to, or different from, one run by or in the interests of human beings.

Berle and Means' classical corporate theory and their leading contemporary critics agree that corporate law should strive to organize corporations so that managers act in the interests of shareholders. In the modern jargon, corporate law should seek to reduce the agency costs inherent in the separation of ownership and control. In contrast, this Article's analysis suggests that the agency metaphor is deeply misleading. Since shareholders are a legal fiction rather than living, breathing human beings in their full richness, they are not principals in any ordinary sense. The corporation, then, is not usefully understood as a more or less perfect agent acting more or less responsibly on behalf of its principal. Rather, corporate law creates a corporate entity that may behave distinctly differently from the ways in which any (or all) of the human participants would behave were they free from legal constraint.

For corporate theory, this shift in perspective is of enormous importance. If the corporation's shareholders cannot be identified with human citizens of the political community, then even the most sophisticated proof that the "genius" of American law forces corporations to act in shareholder interests cannot demonstrate that corporate actions reflect the will or interest of any citizen or group of citizens. Rather, the corporation becomes an independent actor in our polity and economy. Because the fictional shareholder is fundamentally different from any human being - even human beings who own shares - a corporation acting in shareholder interests will act quite differently from the way its supposed principals would have it act.

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The corporate system we have created generates a conflict that is not reducible to either of the classic conceptions: It is not a class conflict, as that term is understood in either the Marxist or sociological traditions, and it is not the agency conflict with which so much of corporate law is concerned. It is, instead, more closely related to the problem of government as understood by the classic liberal theorists: a human institution which may often and in predictable ways cease to serve the limited (if essential) purposes for which it was formed.

In short, we have created an institution for a specific purpose and put it on a sort of automatic pilot, so that it continues to pursue the preset goals whether or not they continue to be useful. Corporate law succeeds because it is single-minded, and fails because it lacks a principle of moderation or any significant countervailing power.

UNDERSTANDING SHAREHOLDERS: THE THEORY OF THE FICTIONAL SHAREHOLDER

Distinguishing People Who Own Shares From Shareholders

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Shareholders are a legal fiction in a very precise sense. The law demands that corporate directors and managers manage the corporation in the interests of the shareholders and the corporation. But by "shareholder interests" the law does not mean the interests - let alone the will - of the actual people who are the beneficial owners of the shares (or, in our increasingly institutional stock market, the people who are the ultimate beneficiaries of the legal entities that own the shares). The actual people are not consulted; they have only primitive, indirect and ineffective means of letting their perceived interests or actual will be known. No owner of shares ever negotiates a contract with or submits instructions to the directors or managers. Nor does the board act like a sort of Benthamite neutral observer examining the life situations of the actual people out there and determining that, whether they know it or not, their interests require some action or other.

Rather, the law creates a simplified and fundamentally inaccurate image of a hypothetical shareholder and then requires that the interests of this nonexistent person be the focus of corporate efforts. It is the interests of a fictional person whose sole interest is the shares it owns that is the focus of legal and corporate efforts to promote "shareholder" interests - in effect, the shareholder is reduced to the shares.

I call this shareholder fictional because it is a coherent story, an essentially complete and unified being, lacking the complexity and contrasting commitments of real, human, people. When corporations are seen as owned by the fictional shareholder, the struggles of the corporate world seem to be a simple novel about a central character with one driving force, one story to tell and - although this has not often enough been remarked - one fatal flaw.

The fictional shareholder is also fictional because of a specific falsehood: the ideological belief that shareholders, as they are understood in the law and the marketplace, can be identified with specific individual human beings, and therefore, that defending shareholder rights is the same as defending human rights. * * * *

I do not mean to suggest that the shareholder is fictional in the sense of nonexistent. On the contrary, shareholders are legally created entities that exist in the strong sense that they determine much of our lives. * * * *

Nor do I mean to suggest that the motivations of fictional shareholders are entirely different from those of the underlying owners. After all, presumably most owners of shares would prefer that their shares be worth more rather than less, ceteris paribus. This Article is concerned with those instances where ceteris is not paribus. The problem is not that fictional shareholders always or even often make the wrong decision, but that they make no decision at all: The fiction of the one-sided shareholder hides the tradeoffs that must be made in life from the view of those who must make them.

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The Owners of the Shares

The facts about the ownership of publicly traded stock in the United States are fairly well known. About half the publicly held stock is held institutionally - principally by pension funds, insurance companies, mutual funds, bank trust funds and endowment funds. Most of this institutional ownership is, in turn, on behalf of identifiable individual human beings: the beneficiaries of pension funds, the policy holders of mutual insurance companies, the stockholders of mutual funds. Some of it is more difficult to see as held on behalf of specific people: Who is, for example, the ultimate beneficiary of Harvard University's endowment?

The indirect ownership of this institutionally owned stock is fairly broad. Virtually all American households own a car and carry automobile insurance. A large percentage of Americans own their own homes and carry homeowners insurance. Many Americans hold life insurance. Virtually all of these people - clearly the ones who hold their insurance through mutual companies, and arguably the rest as well - are indirect beneficiaries of insurance company stock holdings. In addition, a significant number of Americans have pension plans or 401(k) plans; all of the former and most of the latter group are also indirect holders of stocks. Finally, about twenty percent of American households hold stock mutual funds. Thus, it seems safe to assert that a significant proportion of Americans are indirect stockholders or closely related to such stockholders.

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Fictional Shareholders

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1. The Puzzle of the Uniform Shareholder

Here is the puzzle. If shares are held directly or indirectly by half the American population, and corporations act as agents of their shareholders, then we should expect two things: First, that corporate America would reflect the full diversity of human America, and second, that shareholder elections and other methods of determining what exactly it is that the shareholders are directing their agents to do would reflect in some fashion the wide range of human American politics.

We should see publicly held corporations that are as deeply dedicated to particular projects, or products, or places, or ideologies, or religions, or ways of working and lifestyles as many Americans are. We should see Berle and Means corporations that decide that profits are not the most important thing - just as many Americans put other values ahead of wealth maximization, some corporations should reduce their income in order to better serve needs of children, family, art, leisure time, status or religion. We should see Democratic corporations, Republican corporations, stamp collector corporations and the like.

We do not. Instead, public corporations have a rather narrow range of styles and interests. Few of them even claim to have Time Inc.'s dedication to a particular corporate culture, and even those that do seem able to throw it off - generally in the direction of corporate normality - as easily as IBM abandoned lifetime employment or the American Can Company abandoned the can business.

There are some importantly idiosyncratic corporations out there. But by and large the idiosyncratic ones are the ones that do not fit the Berle and Means model. Either they are privately held, and thus able to vary all the basic structures of corporate law, or they are dominated by founders who exploit the looseness of corporate law to treat a public company as if it were still private. We do not see public companies dropping their blandness to reflect the diversity of America.

Similarly, we do not see the hotly contested shareholder elections one might expect if corporations were reflecting a diverse shareholder body. * * * *

2. The Puzzle of the Missing Agency Rights

Another set of oddities seems to challenge the very notion of shareholders as principals of the corporation: Shareholders have few or none of the rights that agency law grants to principals. This is no secret; why, then, do courts and scholars continue to use the agency metaphor?

The Restatement states that an agency relationship is characterized by two special traits. The agent, who acts on behalf of the principal, is subject to the principal's control. And the principal has an unlimited right to terminate the agent at any time.

In sharp contrast, Delaware courts never tire of repeating that the board of a Delaware corporation has original, undelegated power to manage the corporation. The board may make virtually every decision on its own authority; only a few decisions must be ratified by the shareholders. Even in those relatively unusual circumstances where shareholder approval is required, shareholders generally have no right to initiate action. They can vote only at specified times for specified purposes; subject to a few exceptions, the board controls their agenda. Shareholders, to be sure, have the right to present proper proposals at the annual meeting. But state law generally bars most proposals ordering the directors to take particular actions: That would be a breach of the directors' fiduciary duty to act in the best interests of all shareholders. Federal law has been even more restrictive, denying even to purely advisory proposals access to the proxy machinery necessary to make proposals meaningful if, inter alia, the "proposal deals with a matter relating to the conduct of the ordinary business operations of the registrant"; this rule has been applied - though not consistently - to bar shareholders from expressing to management their opinions regarding employee health benefits, compensation policies, workplace management, racial discrimination, hiring and firing practices, labor relations, conditions of employment, EEO compliance, affirmative action, a company policy discriminating against homosexuals and so on.

Even the most important decision from a shareholder perspective - whether to sell the corporation as a whole - must be made in the first instance by the board. Merger agreements, sales of all assets, dissolution of the corporation and even amendments to its articles of incorporation must all be initiated and approved by the board prior to shareholder action. * * * *

3. A Different Kind of Principal

We have seen, then, that shareholders do not have the kinds of disputes one would expect if they were a diverse group of Americans engaged in a struggle to make corporations in their images, and that as a matter of law, shareholders, even taken as a collectivity, lack the control over directors that characterizes an ordinary agency relationship. The facts are no surprise: Every reader of the Wall Street Journal knows that corporate elections are generally won by margins not seen in democratic politics. * * * *

One might conclude from this that the agency metaphor is simply wrong; that in fact directors are not agents of the shareholders and the shareholders are not the principals, or owners, of the firm. Directors, after all, are explicitly authorized by statute in over half the states and by case law in Delaware to consider the interests of corporate participants other than the shareholders. Thus, the law of directors defies even the remaining aspect of agency law, that the agent acts on behalf of the principal. Taking these "constituency statutes" and the agency metaphor seriously, one might come to view the corporation as a coalition of bargaining groups with the shareholders as one among equals, or as a quasi-state that has (presumptively wrongfully) limited the franchise to but one subsection of the governed, or as a more amorphous kind of community.

The persistence of the notion that the directors are agents for shareholders, in the face of well-known facts and law to the contrary, however, suggests that the metaphor should not be dismissed so easily. The fictional shareholder solves the puzzle and rescues the agency metaphor from otherwise hopeless obscurity.

The key to the puzzle, in my view, is that in a sense directors often do view themselves as acting on behalf of shareholders, and the shareholders do control the corporation, despite the law and appearances to the contrary. But the shareholders on behalf of which the directors act and the shareholders that control the corporation are not the owners of the shares. Rather, they are a kind of personification of the shares themselves, almost imaginary creatures driven by only one goal: to maximize the value of their shares.

I claim, then, that the agency picture of the corporation is right in this sense: The people who make corporate decisions - directors and managers - do so and are required to view themselves as doing so in an agency role. Their job, as they see it, is to put aside their own interests and views and act on behalf of someone else's views and interests. In that strong sense, they are agents, regardless of whether the law gives that someone else the technical rights of a principal under agency law. But the someone whom the corporate agents represent, in whose behalf they must act, is not a full human being in all its complexity, much less a collection of half the citizens of the United States of America. Rather, it is the fictional simplification we call a shareholder.

4. Hypothetical Politics of Imagined Monads: Hobbes Meets the Fictional Shareholder

The fictional principal solves many of the puzzles of the agency metaphor. First, it explains the startling absence of intra-shareholder conflict and actual agency rules in corporate law noted in the prior two sections. Second, it justifies an extraordinary level of deference to the professional managers of the corporation.

Fictional shareholders, unlike real ones, do not have strong conflicts in their attachments or ideologies. They are not Democrats and Republicans, religious and atheist, committed to New York or Iowa, tied to a job or a family or encumbered by the life stages of a real human being. They do not have a multiplicity of plans for a too-short life: They have one, to maximize the value of their shares. As a result, they are all the same (or almost all the same, as we shall see in a moment).

Now, timeless, ageless, familyless, unencumbered imaginary people with unified goals getting together and deciding what to do are a familiar image to students of Western political philosophy. That is a crude, one-sentence description of persons in the state of nature of the liberal political theory tradition of John Locke and Thomas Hobbes.

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Consent, especially consent under fair conditions, is notoriously difficult to obtain. Those who premise justice on obtaining actual agreement tend to conclude that all existing societies are unjust and the possibility of creating a future just society is slim indeed, as do Robert P. Wolff, Robert Nozick and John Jacques Rousseau. Furthermore, their work can easily become a justification for creating agreements by force - by killing or expelling those who disagree, as in the nationalist and revolutionary reinterpretations of Rousseau.

In contrast, if we could imagine an agreement that all rational people would agree to under fair conditions, some philosophers have argued that there would then be no need to reach an actual agreement. Real people might well refuse to agree - but their refusal may be disregarded, since it must (by hypothesis) stem either from irrationality or from an unfair bargaining situation.

Hobbes thus argued that all people, whatever else they want and whatever their goals in life, wish to stay alive; accordingly, under fair bargaining conditions they would all agree to create a government that will keep them alive. From this foundation, he constructed the Leviathan - a massive defense of a rather unfree politics based on a hypothetical unanimous agreement. The power of his argument is that if we were persuaded that all rational people would, after reflection, agree to the society he describes, then such a political arrangement would be legitimate regardless of its history or origin: No investigation of real history, no questioning of real people, no actual debates or politics in this world are necessary to show the legitimacy or illegitimacy of the existing government. Hypothetical politics replaces the real form.

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The exciting thing is that once the philosopher has identified a common goal - life, or maximization of primary goods, or whatever - the philosopher can then derive the agreement that such individuals would reach if they were in a fair starting point. No actual discussions with actual people are necessary: We can figure out what they would want by applied logic.

* * * * In our corporate law, this liberal model of a hypothetical politics is taken to its fullest, Hobbesian, extreme. Fictional shareholders all want to maximize the value of their shares. They exist without context or history. Since the value of their shares is nothing more than the discounted value of the future income stream represented by the dividends, they are time indifferent. Since dividend streams are fully fungible, they are as uncommitted as persons in the state of nature. Since fictional shareholders function in a free market, they are individualist and self-interested. And like the persons in the state of

nature or behind the veil of ignorance, they are fully equal and able to enter into a fair bargain.

Fictional shareholders, then, meet all the requirements of hypothetical politics. Here, as in the Hobbesian model, something very exciting happens: Once we agree that all the shareholders share this common goal, actual politics becomes an unnecessary distraction. We can calculate what rational and equal shareholders want by mere reason. Discussion is unnecessary; expertise can replace persuasion and voting.

* * * * [F]ictional shareholders, whatever else the people behind them may want, all want to maximize the value of their shares. And as follows from the basic teachings of Adam Smith regarding the division of labor, rational share-value-maximizers would agree to delegate management of the company to professionals. Maximizing the value of the shares is a job for technical experts; there is no reason to think that the average (or indeed any) shareholder is particularly good at it.

It follows, then, that the separation of ownership and control is not a vaguely illegitimate deprivation of the rightful prerogatives of ownership, but rather a supremely sensible application of the division of labor. Companies need professional managers; the shareholding system allows competent managers to be chosen without regard for whether they also have the wealth to be shareholders.

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Finally, the fictional shareholder model explains the strikingly primitive understanding of agency problems in the corporate law agency cost literature. Corporate law agency theory concerns itself almost exclusively with corruption costs - the problem of agents who deliberately refuse to do the job they are hired to do, or who ignore their duties, intentionally putting their own interests ahead of their principals'.

Compare this thin view of the difficulties of the role of the professional agent to, for example, the elaborate discussions of how best to represent another that arise entirely within good faith models of professionalism in other fields: lawyers and doctors struggling to understand how to pursue their clients' interests and goals in a world where those interests and goals may be nonexistent, underdeveloped or incoherent. These issues drop out of corporate law because the fictional shareholder - unlike the human clients of doctors and other professionals - is seen as having only a single, consistent and clear goal.

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THE CONFLICT BETWEEN THE FICTIONAL SHAREHOLDER AND LIVING HUMANS

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The Parable of the Agent With No Principal (Principles)

Imagine a company operating lunch counters in the South in 1963 - a publicly traded version of Hooper's Lunch Counter as described in Bell v. Maryland. In my variant on Bell, the company's shares are mostly held by defined benefit pension funds (anachronistically subject to ERISA) and mutual funds. As it happens, by a strange fluke of fate, the beneficiaries of those pension funds and the shareholders of those mutual funds do not reflect the national division on the future of apartheid in 1963; rather, all the beneficiaries and mutual fund shareholders already believe - as virtually every American will profess to believe a few years later - that apartheid is immoral and should be illegal. I choose mutual funds and defined benefit funds intentionally: Both have easily identifiable human beings who are the ultimate beneficial owners of the shares the institution holds, and neither, in the usual manner of organizations, has any way for those people to indicate their views on segregation or similar matters.

The CEO of the lunch counter firm (call him Mr. Popper), who built the company before taking it public, is also a bit ahead of his time. Like Mr. Hooper in the real case, Mr. Popper is proud of his African-American employees (he calls them "Negroes") and of the jobs he provides for them. He agrees with Mr. Hooper: "I've nothing against these people [the lunch counter demonstrators of the civil rights movement] .... Talk to my boys - they're all with me." Indeed, he goes beyond the reported facts - he is prepared to state (if it is not quoted in the local media) that he would support a civil rights act himself.

The company's lunch counters have always been segregated - it was the custom when Mr. Popper began the business and he never thought much about it after that. In 1963 demonstrators have begun to challenge the segregation policy, sometimes going so far as actually to have black students sit down at white-only counters and demand to be served. However, I shall assume, at least in the towns where this company operates, the white population (which includes virtually all of the population affluent enough to patronize the lunch counters) is still committed to segregation.

Mr. Popper, like Mr. Hooper, is no hero. But he thinks of himself as a decent human being who does his duty and what is right. He recognizes that segregation is wrong, but he also believes that if he integrates, he will be out of business, with attendant consequences for his wife and five children and his 500 employees, half of whom are "Negroes" and all of whom have others dependent on them.

What will Mr. Popper do? When I ask my Business Organizations students to put themselves in his place (generally without specifying any particular shareholders), the class often breaks down into two large groups. One group refuses to accept the facts as given: They counsel Mr. Popper to believe in the good fairy, or the invisible hand, and to decide that integration is good business despite the statement in the facts to the contrary. Pressed to accept the facts as given, they often conclude Mr. Popper should resign, notwithstanding the impact on his family and other dependents.

The second group bites the bullet: They counsel Mr. Popper to set aside his political convictions and to do his duty - that is, to manage the company in the interests of its fictional shareholders. In short, they conclude that Mr. Popper should take an action they believe is wrong, and that they believe Mr. Popper believes is wrong, in order to promote the interests of third parties - who, as it happens, also believe the action is wrong.

This, I believe, is the scandal of the fictional shareholder writ in black letter - the fictional shareholder allows people to take actions they know are wrong while believing they are doing the right thing. Simultaneously, it strongly hinders attempts to take actions that may be not only right, but in the best interest of all the real people concerned: Even most of the students who do not take refuge in the role morality of serving the fictional shareholder are unable to articulate a principled basis for ignoring it. Some of them, to be sure, imagine themselves as heroes - but even then, the most they can do in good conscience is to resign, leaving the administration of the firm to those who have less problem following the institutional norms. While the hero who resigns and his family pay a price for his clean conscience, they have little effect on the course of the institution; with the corporation guided by a more complacent leader, the fictional shareholder's vision will prevail anyway.

If the power of the fictional shareholder is enough to force one to segregate - almost as unquestionably a wrong action as one can imagine in an American law school in the 1990s - how much stronger it must be in hotly contested issues of today.

The Mr. Poppers of corporate America surely will often act much as my students did: They will set aside their political beliefs when they can. When they cannot, they will distort the facts (or, in an option I didn't allow my students, adapt their political beliefs to fit the ones they feel compelled to advocate). But they will not ask the people behind the fictional shareholders what they really think. And they will not act against the interests of the fictional shareholders even when those interests conflict with the desires or interests of the people behind them. Or, if they do, they will shortly be cashiered, if not by their superiors, then by the arbitragers and the portfolios, leaving the job to be done by those who will follow the fictional shareholder's direction.

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Why Should We Care?

We have seen that the shareholder of corporate law is a fictional stripped-down being interested in only one thing. Corporations acting in good faith consider only the needs and interests of the stripped-down fiction, not the desires or wishes of the underlying complex humans. At the same time, institutional investors seeking to advance the interests of their own fictional shareholders push the corporations whose shares they own to act in ways they deem beneficial to their portfolio (and therefore to their fictional shareholders).

Many of the difficult issues in modern corporate law can be understood in terms of the conflict between these two visions of the shareholder. Unlike the corporate law shareholder, the portfolio shareholder does not take seriously the distinction among companies: The institutional integrity of a particular corporation is of no interest to it. For the portfolio shareholder, dismantling a company is of no special significance; all that matters is the total value of the portfolio and the particular security's contribution to that value. Similarly, prevailing against a publicly traded competitor may not even seem a desirable goal to the portfolio shareholder.

Some rational portfolio shareholders, then, should oppose a series of investment and competitive decisions - including all those aimed at shifting wealth from one set of securitized interests to another - that less diversified fictional investors would support. Because of their different perspective, portfolio investors drive companies to take actions that are likely to seem inappropriate to managers deeply invested (literally and figuratively) in the particular institution.

These conflicts between the portfolio shareholder view and managerial perspectives may drive managers to seek to free themselves from shareholder control - through poison pills, anti-takeover laws and other takeover defenses that effectively reduce the portfolio shareholder's ability to use the right to sell the company to force it to adopt portfolio perspectives, or through constituency statutes that essentially remove any threat of judicial enforcement of a fiduciary duty that might remain even after the business judgment rule. Alternatively, the conflict between portfolio and corporate law shareholder perspectives may create a space in which corporate leaders may feel conflicting duties without a clear guide explaining which to follow (or may be able to appeal to conflicting norms to justify actions adopted for other reasons).

At least equally important as the ongoing conflict of the fictions, however, is a set of conflicts largely ignored by modern corporate law and the associated scholarship. Both the diversified and the undiversified fictional shareholder agree on far more than they disagree. If only the portfolio investor fails to take the distinction among companies seriously, both fail to take the distinctions within companies seriously. That is, fictional shareholders of all varieties are supremely inhuman in their indifference to particularity within the corporation.

The fictional shareholder takes the position that a dollar is a dollar. It does not matter if it is earned in the company's traditional field of business or a new acquisition (unless, of course, experience allows the company to be more profitable). It does not matter if it is earned in the Rust Belt or the Sun Belt or the Third World. So long as the dollar results are the same, it does not matter if it is earned with highly paid, highly motivated labor or with low-paid child labor abroad. It does not matter if it is earned in a high-risk operation with a high potential for putting many people out of work or a more stable operation. All that matters is the risk-adjusted present discounted value of the future income flows.

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The fictional shareholder focuses our corporate managers' minds admirably. But sometimes we need a little less focus and a little more breadth. The old task of corporate law has been to tie the managers to the shareholders; the new task must be to align the fictional shareholder more closely with us.