

# SOME REFLECTIONS ON THE CORPORATE THEORY—INCLUDING A JAPANESE PERSPECTIVE

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## I

MORE THAN forty years ago, Professor Machen attempted a comprehensive examination of the corporate theory in view of the complete obliviousness of American corporate theory scholars to the wealth of controversial learning enthusiastically accumulated by Continental jurists. Nevertheless, the conclusion he reached at that time, after a troublesome excursion, was in essence a reaffirmation of the orthodox American doctrine.<sup>1</sup> He said:<sup>2</sup>

A corporation, or indeed any group or succession of men—such as the Church, or any army, or a political party—is a real entity—something other than the mere sum of the members for the time being; but this entity is actually impersonal, and is regarded as a person only by way of metaphor or by a fiction of law.

In addition, he warned:<sup>3</sup>

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The author expresses his appreciation to Professors Myres McDougal, Francis Coker, Jr., Joseph Bishop, Jr., and Bayless Manning, of the Yale Law School, for their invaluable advice in the preparation of this article. He is also indebted to Mr. Bertram Schader and Mr. Arthur Shipe, former students in the Yale Law School, for their assistance.

<sup>1</sup> The orthodox American lawyer would be apt to say that a corporation is a fictitious, artificial person, composed of natural persons, created by the state, existing only in contemplation of law, insensible, soulless, immortal. Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 257 (1911). Chief Justice John Marshall spoke in a similar way, and at the same time decided that incorporation springs from a contract between the state and the incorporator, in the famous case of *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

<sup>2</sup> Machen, *supra* note 1, at 347.

<sup>3</sup> *Id.* at 365. Machen's viewpoint of the fictitious personality is as follows: "As a corporate entity is not a rational being, is not capable of understanding the law's commands, and has no will which can be affected by threats of legal punishment, it follows . . . that a corporation is not a real person, if the word 'person' be used in its ordinary sense." *Id.* at 265. So, "the corporate entity, or personifications which we

As scholars, or as students of the history of jurisprudence, we may pursue with interest the erudite and brilliant essays of French, German, and Italian jurists, but as practical lawyers we may and should disregard all that wealth of learning, contemplating it only as something to be avoided, and as teaching the dangerous character of the similar artificial statements which we find in our own law books. To understand and apply correctly the doctrine of corporate personality, no other guide is desirable than sturdy common sense.

He, therefore, avoided dispute with Professor Geldart, who advocated at that time the real personality theory,<sup>4</sup> because, in Machen's words, it signified "the outbreak in the common-law world of a metaphysical contest similar to that which has absorbed so much attention upon the Continent of Europe."<sup>5</sup>

After Machen, such brilliant scholars as Professors John Dewey and Bryant Smith penetrated critically into the crucial points of the corporate theory. But they did not assay any legal construction other than the traditional one. Rather, such a problem seemed to them to be a matter of no importance or interest.<sup>6</sup>

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call a corporation is regarded as having rights and liabilities for the sake of convenience; but it is men of flesh and blood . . . who must . . . enjoy the rights and bear the burdens attributed by the law to the corporate entity." *Id.* at 266. In this sense, his basic standpoint is implied to be nominalism-singularism in philosophical terms which do not admit the real existence of "conception" or "the universal" (realism or universalism).

<sup>4</sup>Geldart, *Legal Personality*, 27 L.Q. REV. 90 (1911). Geldart's objections to the fictitious theory are, of course, primarily founded on the social reality of the corporation and in details are directed to the fictitiousness of the conception of co-ownership of corporations by the stockholders while they have only a right to dividends without any power of use or disposal of corporate properties. *Id.* at 97. He also objects to the conception of contracts between society and its members, since contracts between individuals do not, as a rule, long outlive those who make them. *Id.* at 105. His basic motive seems to lie in the promotion of the liberty of trade unions as autonomous and real social units. Laski's pluralistic state theory is analogous, and will be referred to later in connection with the organic theory.

<sup>5</sup>Machen, *supra* note 1, at 365 n.29.

<sup>6</sup>Dewey attempts an historical analysis of corporate theories in *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926). According to Dewey, controversies over corporate theories are "primarily political and economic in nature, but there is not one of them which has not left its profound impress upon the law, including particularly the doctrines of the nature and seat of judicial personality. Discussions and concepts may have been in form intellectual, using the full arsenal of dialectical weapons; they have been in fact, where they have any importance, 'rationalizations' of the positions and claims of some party to a struggle. It is this fact which gives such extraordinary interest to the history of doctrines of judicial personality." *Id.* at 664-65.

Smith emphasizes the functional aspect of legal personality in *Legal Personality*, 37 YALE L.J. 283 (1928). He quotes Gray as saying, "Whether the corporation is a

It would be helpful in this connection further to examine the controversy between Professor Berle and the late Professor Dodd concerning "for whom are corporate managers trustees?"<sup>7</sup> There has been increasing recognition of corporations as social institutions or organisms, rather than mere aggregates of stockholders. Berle acknowledges this in his recently published book, *The Twentieth Century Capitalist Revolution*. But Berle was undoubtedly correct twenty-eight years ago when he expounded the thesis that<sup>8</sup>

all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.

Faced with the real situation of the 1930's, that while general shareholders were being transformed into mere investors not capable of participation in management, and management, as corporate administrators, was being granted virtually absolute power, emphasis on the trusteeship of directors was unavoidable. It may be said that corporation law had reached substantially the stage which equity had reached when it faced the situation of a trustee who had been granted apparently absolute powers in his deed of trust.<sup>9</sup> For the protection of general shareholders who became mere investors against self-seeking management, therefore, it was absolutely necessary to accent the position of shareholders as co-owners of the corporation.

But Dodd was equally correct when he said, in criticizing Berle's thesis, that corporations as legal entities are social units independent of the comprising shareholders. In other words, corporations are juristic

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fictitious entity, or whether it is a real entity, with no real will, or whether, according to Gierke's theory, it is a real entity with a real will, seems to be a matter of no practical importance or interest." *Id.* at 292-93 n.38. He is interested in the corporation as a functional aspect of an organized group on which legal rights and duties are predicated. *Id.* at 293. Whether a corporation or a partnership or other unincorporated association is to be treated as a legal person in any particular respect is improperly decided unless decided on its own merit. He seems especially to direct attention to the fact that courts, on the one hand, came to treat an unincorporated association or society as an entity and, on the other hand, to disregard the legal personality of the corporation when faced with abuse of the legal entity device. *Id.* at 299.

<sup>7</sup> Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); BERLE, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 240-76 (1940); Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Berle, *For Whom Corporate Managers Are Trustees*, *id.* at 1365; BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* (1956).

<sup>8</sup> Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

<sup>9</sup> *Id.* at 1073.

persons, and as such, have duties to, as well as privileges from, society. Dodd was not utopian in believing that "public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function."<sup>10</sup>

The rationality of Dodd's belief is strongly evidenced by the fact that twenty-nine states have already passed statutes authorizing corporations to make contributions to philanthropy and education.<sup>11</sup> "Those [the directors] through whom it [the corporation] acts may therefore employ its funds in a manner appropriate to a person practising a profession and imbued with a sense of social responsibility without thereby being guilty of a breach of trust."<sup>12</sup> In other words, not only the protection of general shareholders as investors against self-seeking management, but also the relations or responsibilities of corporations as social-economic units to employees and consumers and ultimately to the community must be emphasized.

If this is so, then, sociologically at least, a corporation may be thought of as more than a mere fictitious person who is nothing but an aggregate of stockholders, with directors and officers chosen by them as their trustees or agents. Far from being "soulless," a corporation has a "collective soul," even though the soul be that of an automatic self-perpetuating oligarchy of directors. It was recently so described by Berle,<sup>13</sup> who, however, makes no reference to legal construction while drawing attention to the political and sociological significance of the recent corporation trend.

Such stable features of the corporate theory in the United States can be strikingly contrasted with the colorful, and at the same time specu-

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<sup>10</sup> Dodd, *supra* note 7, at 1148.

<sup>11</sup> BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 167 (1956).

<sup>12</sup> Dodd, *supra* note 7, at 1161.

<sup>13</sup> BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 183 (1956). We find the same idea in Kaysen, *The Social Significance of the Modern Corporation*, 47 *AM. ECON. REV.* 311 (1957). Kaysen especially seems to point out that the conception of business corporations as social institutions must be founded on the establishment of a management bureaucracy. Berle points out more clearly the significance of the proxy device, which is ordinarily in the possession of directors. He has said in his most recently published book, *ECONOMIC POWER AND THE FREE SOCIETY* 10 (1957), "The control system in today's corporations, when it does not lie solely in the directors as in the American Telephone and Telegraph Company, lies in a combination of the directors of a so-called control bloc (a misnomer, incidentally) plus the directors themselves. For practical purposes, therefore, the control or power element in most large corporations rests in its group of directors and it is autonomous—or autonomous if taken together with a control bloc."

lative, features in Japan. Since, as part of our historical destiny, we in Japan have had to transplant corporation law as one part of the unprecedented reception of Western law during the Meiji period,<sup>14</sup> and because of our inherent inclination toward theoretical speculation, we have been forced to struggle with all sorts of corporate theories. In fact, theories have always been somewhat ahead of social reality. Japan has been destined as a melting pot for all corporate theories as well as all European and American civilization.

This article primarily purports to portray the development of the corporate theory in Japan in its relation to its political and social structure. Considerable attention must first be given, however, to a critical survey of the development of Western corporate theory with reference to its political and social structure. Such a survey supplies indispensable criteria for evaluation of the development of the corporate theory in Japan.

## II

When we reflect on the history of the corporate or association theory, we find an alternation between an atomistic tendency and an organic tendency. Generally speaking, the former corresponds to the theory of the corporation as a fiction, and the latter to the theory of the corporation as a real person. The social contract theory leans toward the former.<sup>15</sup>

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<sup>14</sup> With regard to the inception of the Japanese corporation law and its recent revision after World War II, see Blakemore & Yazawa, *Japanese Commercial Code Revisions Concerning Corporations*, 2 AM. J. COMP. L. 12 (1953).

<sup>15</sup> In this connection, see GIERKE, JOHANNES ALTHUSIUS UND DIE ENTWICKLUNG DER NATURRECHTLICHEN STAATSTHEORIEN [JOHANNES ALTHUSIUS AND THE DEVELOPMENT OF NATURAL LAW THEORY OF THE STATE] (1880). (It is believed that an English translation of this book is now being undertaken by an American writer, Bernard Frey. This monograph is the backbone of Book IV of his *German Law of Associations*.) This book is a history of the social contract theory of the natural law under comprehensive implications—e.g., under (1) *Staatsvertrag* [social contract of state], (2) *Volkssouveränität* [sovereignty of people], (3) *das Representationsprinzip* [principle of representation], (4) *Federalismus* [federalism], and (5) *Rechtsstaat* [constitutional government]. According to Gierke, the social contract theory of modern times is divided into two tendencies—atomistic-centralistic and collectivistic-individualistic. The former grew in France, where centralization, only “powerful central government and free individuals,” was pushed to the forefront; the latter grew in Germany, where decentralization—that is, a pluralistic social structure which permits the autonomy of various subordinate bodies—was pushed to the forefront. *Id.* at 256-82. But Gierke rejected both as atomistic-mechanical and pursued his historic-organic theory as genuine theory. *Id.* at 317-20. In any case, his description of the history of the social contract theory of natural law is most excellent and unique. Incidentally, a recently-published book, GOUGH, *THE SOCIAL CONTRACT* (1957), presents a critical study of the development

"Unity" in "plurality" is sociologically common to associations of all kinds through each stage of history. In this sense, a corporation is an entity—not imaginary or fictitious, not artificial, but natural. Its existence is as real as that of an army or the Church.<sup>16</sup> But as far as the legal construction is concerned, each specific political and social-economic situation at one time pushes the "plurality" concept and at another time the "unity" concept to the fore. To state it fully, the choice between the atomistic-fictitious and the organic-real theories depends not so much upon one's philosophical preference for nominalism-singularism or realism-universalism, as upon the specific political, social, and economic situation.<sup>17</sup>

A single example may be selected:

The postulate of democracy or civil society in Western Europe<sup>18</sup> is that the state is under the co-ownership of sovereign citizens. In this connection, political theory, for which lawyers have provided most ideas, borrowed the concept of partnership rather than the apparently far more appropriate concept of incorporation. As Dr. Maitland noted, such an application of the concept of partnership, the application of primarily private law to the state, was the wisdom of political philosophers.<sup>19</sup> He then goes on to say,<sup>20</sup>

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of the social contract theory, and devotes much discussion to the American Constitution. For the most part, however, it relies upon Gierke's *Althusius*. The social contract theory is in itself, of course, not incompatible with the organic theory in terms of political science and sociology, as shown by the theory of Suarez. As time has gone by, however, the atomistic-individualistic tendency has been pushed to the forefront. Therefore, the atomistic-organic dichotomy used here would seem to be somewhat oversimplified and inaccurate.

<sup>16</sup> Machen, *supra* note 1, at 262.

<sup>17</sup> "[N]one of these conceptions is absolutely true or false per se; none of them can convince the others of its own adequacy and of the inadequacy of the opponent. But each of them may rise in the period of the domination of its respective type of culture and decline when the uncongenial type of culture rises. Each of them has a 'popularity' and is believed to be true and 'scientific' in the period of domination of its congenial type of culture mentality and becomes 'false' when this culture mentality declines." 2 SOROKIN, *SOCIAL AND CULTURAL DYNAMICS* 312 (1937).

<sup>18</sup> Though the ambiguity of "Western Europe" must be admitted, see Troeltsch, a German philosopher who spoke of "the contrast between German thought and the thought of Western Europe." Troeltsch, *The Ideals of Natural Law and Humanity in World Politics*, in BARKER, *NATURAL LAW AND THE THEORY OF SOCIETY* app. 1 (1950).

<sup>19</sup> GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* xxiii (Maitland transl. 1951) [hereinafter cited as Maitland]. According to Maitland, the current doctrine of corporations, the classical and Innocentia Doctrine, stood beneath the level of philosophic thought. A merely fictitious personality created by the state and shut up within the

philosophy reacted upon legal theory. When the State itself had become a merely collective unit—a sum of presently existing individuals bound together by the operation of their own wills—it was not likely that any other group would seem capable of withstanding similar analysis.

Therefore, all kinds of associations were necessarily thought of as partnerships of composing members. Business corporations are partnerships of stockholders, and stockholders are co-owners of such corporations.<sup>21</sup>

The Roman lawyers' traditional distinction between *universitas* (corporation) and *societas* (partnership) was removed:<sup>22</sup>

The *universitas* was lowered to the rank of *societas*, or the *societas* was raised to the rank of the *universitas*. Both alike exhibited a certain unity in plurality; but in the one case as in the other, this personality was to be thought of as a mere labor-saving device, like stenography, or the mathematician's symbols. What we may call the Bracket Theory or Expansible Symbol Theory of the Corporation really stands in sharp contrast with the Fiction

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limit of private law was not what the philosopher wanted when he went about to constitute the state itself. Incidentally, Innocent IV, who became Pope in 1243, was one of the top-ranking scholars of Roman canon law and an exponent of the revival of the fictitious personality of the corporation. 3 GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT [GERMAN LAW OF ASSOCIATIONS] 279, 363 (1881). His theory contributed to centralization in terms of church policy, thus depriving the local churches of their autonomy. Cf. Maitland xix. In this connection, it must be noted that "the fiction theory is ultimately a philosophical theory that the corporate body is but a name, a thing of intellect; the concession theory may be indifferent as to the question of the reality of a corporate body; what it must insist upon is that legal power is derived [from the state]."<sup>20</sup> Dewey, *supra* note 6, at 667. But both tend ultimately in the same direction. The Innocentia Doctrine was primarily stated as the reason why an ecclesiastic *collegium* and *universitas* or *capitulum* could not be excommunicated or be guilty of a delict, because they have neither a body nor a will. A chapter was but a name and an incorporated res. 3 GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT [GERMAN LAW OF ASSOCIATIONS] 299-85 (1881); Dewey, *supra* note 6, at 665.

<sup>20</sup> Maitland xxiv.

<sup>21</sup> One of the reasons why corporations were easily constructed as partnerships was that in England, France, and other West European countries where modernization and industrialization grew gradually and naturally, dominant business units grew step by step from single firms to partnerships, and from partnerships with limited liabilities to corporations.

<sup>22</sup> Maitland xxiv. The same explanation can be found in BARKER, *op. cit. supra* note 18, at xvi. *Universitas* is a corporation by Roman definition and was interpreted, especially by Innocent IV, as a fictitious personality. As such, it was conveyed to modern times and was thought of as the original type of corporation by Savigny and his scholars. *Societas* is a partnership in Roman law and shows strong inclination to individualism. It is more easily dissolved than the partnership (*Gemeinschaft zur gesammten Hand*) of Anglo-Germanic law, which shows "unity" in "plurality," like other associations. MECHEM, ELEMENTS OF PARTNERSHIP xxii-xxiii (1920).

Theory as Savigny conceived it,<sup>23</sup> though sometimes English writers seem to be speaking of the one and thinking of the other. The existing corporators, who in the scheme are mere guardians for something that the State has instituted, become in the other scheme the real "subjects" of those rights and duties that are ascribed to the corporation, though legal art usually keeps these "subjects" enclosed within a bracket.

The organic theory may be a historical heritage of German law, as emphasized by Dr. Gierke.<sup>24</sup> Nevertheless, the theory was a response to the specific situation of nineteenth century German modernization. Prussian constitutional monarchy was a compromise between the monarch and the people. It was thus necessary to leave in some doubt on which side sovereignty resided.<sup>25</sup> The answer was that sovereignty

<sup>23</sup> "The Savignian corporation is no 'subject' for liberties and franchises or right of self-government. Really and 'publicistically' it can hardly be other than a wheel in the State's machinery, though for the purpose of Property Law a personification of this wheel is found to be convenient. Lastly, some popular thoughts about 'body' and 'member' must needs go overboard. The guardian is no 'member' of his ward, and how, even by way of fiction, could a figment be composed of real men? We had better leave body and members to the vulgar." Maitland xxi. The fatal weakness of this theory is that a corporation is thought of as something like a minor who stands under the guardianship of directors and stockholders, ultimately of the state, and, therefore, is exempted from tort liability. Faced with the situation that in proportion to the growth of railroads, cases of tort liability of railway corporations increased, this theory showed its incapacity, *cf.* Maitland xxxix, and was gradually replaced by the organic theory of corporation. According to the latter theory, all powers and all liabilities can be attributed to the corporation, through acts of its organs or agents, as a living organism like a natural person, except in the field of family law. In Anglo-American law, however, where the principle of liability of principal (through the theory of agency) was established, we need not worry about the liability of legal persons. In any event, the Savignian theory is a typical model of the fusion of the fictitious theory and the concession theory.

<sup>24</sup> GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* [GERMAN LAW OF ASSOCIATIONS] (1868, 1873, 1881, 1913). There is inadequate space to enter into the details of Gierke's theory, which is a comprehensive historical analysis covering all human groups, including states, at each historical stage. Such an attempt may be a German mode of systematization. But its success seems to have been founded upon the modernization of the German society, with its tendency toward homogeneity. Gierke's association theory is thought of as a basic principle of the democratization of a specific German type. Therefore, the criticism of him by West European natural law theorists should be noted. MAITLAND, *POLITICAL THEORY OF MIDDLE AGE* (rev. ed. 1951), which is a translation of III GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* [GERMAN LAW OF ASSOCIATIONS] ch. 11 (1881), especially the translator's introduction; BARKER, *op. cit. supra* note 18, app. 2, which is a translation of Gierke's conception of Law. Much of the writer's criticism of Gierke and his understanding of the theoretical relationship between the social contract theory of natural law and the historic-organic theory which is developed in this article is owed to these two English writers.

<sup>25</sup> "For him [Gierke] Sovereignty is an attribute, not of some part of the State, but of the *Gesamtperson*, the whole organized community, . . ." Maitland xiii.



resided in the state itself as the real person which is the organism. The "unity" theory was, thus, pushed to the fore. And this theory of the state must be carried through in the case of associations of all other kinds. The owner of the business corporation is rather the corporation itself, as the real person which is the organism, rather than the mere aggregate of stockholders. In fact, such a construction appears to be more adequate to business corporations, where the fictitiousness of the co-ownership by shareholders comes easily to mind.

The development of an organic theory of the corporation may also be considered a response to the organic theory of the state. Characteristically, an absolutist state is conceived of as an entity unto itself, separate from and above its subjects. Historically, the subjects of such states can better preserve their interests if they group themselves (or are already grouped) into associations—whether modern corporations or medieval communes—which are themselves regarded as organic entities of the same species as the state itself<sup>26</sup>—or, as Hobbes put it, "lesser commonwealths in the bowels of a greater, like worms in the entrails of a natural man."<sup>27</sup> In any event, neither the state nor the corporation has any room to admit the concept of contract, even that of social contract. In other words, the distinction between *Korperschaft* (corporation) and *Gesellschaft* (partnership) is strictly maintained.

The above description, for the convenience of comparison, shows only the typical pattern. It is no wonder, therefore, that not a few German scholars, such as Dr. Jhering,<sup>28</sup> followed the natural jurisprudence, paralleling the so-called bracket theory or expansible symbolic theory of the corporation, and calling the development "the new fictitious theory" (*Neuere Fiktionstheorie*). Meanwhile, Harold Laski adopted the real personality theory as the foundation of his pluralistic

<sup>26</sup> In any event, in countries where modernization or industrialization was delayed in starting and afterwards rapidly caught up with the level of the forerunners, on the one hand, big financial industrial corporations grew within a short time; on the other hand, feudalistic remnants remained in the political and social fields. Either the organic theory or ultimately romanticism most adequately matches such a reality. Such was the situation in Japan.

<sup>27</sup> HOBBS, *LEVIATHAN* ch. 11 (1651).

<sup>28</sup> Jhering teaches that the legal personality is not the creature of the state, but an abbreviated way of writing the names of the several composing members, especially for the convenience of action or claim against the outer world. So, the true subjects of rights are composing natural persons, and not the legal entity. III JHERING, *GEIST DES ROMISCHEN RECHT* 356 (1877). See Machen, *supra* note 1, at 257; I WOLFF, *ORGANISATION UND JURISTISCHE PERSON* 37 (1933). Such a tendency gradually achieved importance even in German jurisprudence, especially in the field of private law. I WOLFF, *op. cit. supra*, at 63.

state theory,<sup>20</sup> and Dr. Michoud's theory,<sup>30</sup> according to which the substratum of a corporation is not organism, but organization, is a French variety of the organic theory, which has exerted considerable influence upon the French corporation theory.

The problem, however, concerns the differences in practical consequences of the atomistic theory and the organic theory. The following are a few examples which come to mind:

1. Under the German law, which has been more or less influenced by the organic theory, corporations are generally thought to have general powers<sup>31</sup> like natural persons, except those which relate to physiological aspects, those of family law, and other statutory limitations. The purposes of business corporations which are listed in the articles of incorporation, therefore, must have been thought of not as the scope or limitations of corporate capacities or powers, but rather as authority of limitations imposed by articles upon directors as corporate "organs." Moreover, the doctrine of constructive notice of the articles of incorporation was not required to develop. There has also been no objection to its having discretionary power of philanthropic donation, because the donation of a part of profit for such purposes has been thought to infringe no dividend right of stockholders.<sup>32</sup>

By way of contrast, under Anglo-American law, the so-called ultra vires theory has, in the past at least, had considerable importance. Such a conclusion has not necessarily been drawn from the atomistic-partnership theory of corporations, however, but rather has owed its origin to

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<sup>20</sup> Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916) (this article is a backbone of his FOUNDATION OF SOVEREIGNTY (1921)). According to Laski, if the personality of associations is real and not conferred by the state, "we then give to this latter group no peculiar merit. We repose it the title of creator of all else. We make it justify itself by its consequences. We stimulate its activities by making it compete with the work of other groups co-extensive with or complementary to itself." *Id.* at 426.

<sup>30</sup> MICHOD, LA NOTION DE LA PERSONALITÉ MORAL, REVUE DE DROIT PUBLIC ET DE LA SCIENCE POLITIQUE (1899). This theory found many followers in Japan, but it seems little more than tautology. On the other hand, Gierke's organic theory does not confuse a sociological organism with a biological organism. This is clear even from the terminology of association law. Human groups or associations are in their very nature nothing but legal organizations. Without organization norm, there are no human groups.

<sup>31</sup> As far as German classical literature is concerned, mention will be made only of GIERKE, GENOSSENSCHAFTS-THEORIE UND DIE DEUTSCHE RECHTSSPRECHUNG 141, 603; 1 LEHMANN, DAS RECHT DER AKTIENGESELLSCHAFTEN 19 (1898). Cf. 1 MICHOD, LE THEORIE DE LA PERSONALITÉ MORAL ch. 7 (1906).

<sup>32</sup> E.g., 2 LEHMANN, *op. cit. supra* note 31, at 421.

the remnants of the Savignian fiction theory or the concession theory, according to which the powers of corporations were given by the act of incorporation itself.<sup>33</sup> It is no wonder, therefore, that today in the United States, the words "authority or limitations imposed by the articles on those who act for the corporation" are replacing the traditional phrase, "corporate powers or capacities." The tendency of the statutory revision may be said to be in the direction of the abolition of the doctrine of constructive notice of the articles of incorporation and the substitution of the doctrine of general capacity for the doctrine of limited capacity.<sup>34</sup> Such a substitution obliterates all difficulty about the donation of a part of profit to philanthropic and other social welfare purposes, so long as this may be argued to benefit the corporation by promoting patronage or improving employee relations.<sup>35</sup>

2. According to most German scholars, who have been more or less under the influence of the organic theory, there exist two kinds of rights of shareholders against corporations. The first kind are rights which must be exercised jointly with other shareholders for the common purposes of the corporation and which, therefore, are subject to the common interests of the corporation. Such rights cannot be waived, but on the other hand, they are subject to the restriction by corporate power—*i.e.*, by charter or by corporate action. This is why such rights are called rights of common interest in the corporation (*e.g.*, voting rights). The second kind are rights which serve the individual interest of a particular shareholder and which, therefore, cannot be taken away or restricted without the explicit consent of the shareholders concerned. These are called rights of individual interest in the corporation (*e.g.*, dividend rights, liquidation rights).<sup>36</sup>

<sup>33</sup> BALLANTINE, *CORPORATIONS* 221 *et. seq.* (1946).

<sup>34</sup> *Id.* at 228 *et seq.* See, *e.g.*, MODEL BUSINESS CORPORATION ACT ¶ 1011 (1928). In Great Britain, notwithstanding the recommendation of the Cohen Report, the abolition of the ultra vires doctrine has not been achieved. But the fact that the Companies Act of 1948, 11 & 12 Geo. 6, c. 38, § 5(1), provides that the objects contained in the memorandum may be amended without the consent of the court must be noted, as must the view according to which this doctrine has been virtually abolished in Great Britain. Holt, *Alteration of a Company's Objects and the Ultra Vires Doctrine*, 66 L.Q. REV. 493 (1950).

<sup>35</sup> BALLANTINE, *op. cit. supra* note 33, at 264 *et seq.*

<sup>36</sup> 1 REGELSBERGER, PANDEKTEN 332 *et. seq.* (1893). The first kind was *Gemeinnützige Recht*, the second, *Selbstnützige Recht*. But the first was called *Nichtvermögensrecht* or *Verwaltungsrecht* or *Herrschaftsrecht* or *Mitverwaltungsrecht*, and the second was called *Vermögensrecht* among other scholars. See, *e.g.*, 1 BONDI, *DIE RECHT DER AKTIONARE* 47 (1930).

Such a categorical distinction, however, seems to be of quite minor significance. Even though the voting right must be exercised for the common interest of the corporation, it does not necessarily mean that such a right can be taken away in the name of the corporation by majority decision. On the other hand, even though the dividend right serves the individual interest of each shareholder, its exercise is conditioned upon the decision through corporation machinery, and it, therefore, cannot absolutely be secured like creditors' rights.

According to the atomistic partnership theory, all rights and duties of the shareholders flow from a common source of equity. There is no categorical distinction between shareholders' rights.<sup>37</sup> All rights ultimately serve the individual interest of each shareholder. The corporation is nothing but the instrumentality for this purpose. But so long as each shareholder remains as a member of the corporation, his individual interest shall be achieved within this framework—that is, in harmony with co-shareholders. This is especially exemplified by the fact that controlling shareholders may have fiduciary duty both to the corporation and to the co-shareholders. Thus, in the same way as in the case of the organic theory, a relative distinction seems to exist between the field of common interest and that of the freedom of each shareholder. The distinction, in more realistic terms, seems to be drawn in a negative way between rights the exercise of which is likely to affect the common interest of the corporation which, therefore, is threatened by its abuse, and those whose exercise creates no such fear.

3. Minority stockholders' rights, such as rights of derivative suits, inspection of corporate documents, and various injunctions of illegal corporate acts, make up a conflicting area between the common interest of the corporation and the individual interest of each shareholder. Such rights are primarily invoked to protect minorities, but at the same time, there is a possibility of intervening in a going concern. Therefore, these rights must reasonably be restricted from the point of view of the common interest of the corporation. The existence of such rights makes insignificant the categorical distinction between rights of common interest and rights of individual interest.

German corporation law seems to have had a tradition of disliking such rights and of primarily emphasizing the stockholders' meeting as the official corporate mechanism. Or, at least a certain amount of stock-

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<sup>37</sup> Under Anglo-American law, the definition of the share has not been seriously discussed. Generally speaking, it is nothing but the description of the functioning status of the share. BALLANTINE, *op. cit. supra* note 33, at 465 *et seq.*

holding was required for the purpose of intervening in corporate affairs.<sup>38</sup> Such a status may be due to the influence of the organic theory, according to which "unity" must be pushed to the fore.

By way of contrast, under the partnership theory, it is likely to be admitted that even the owner of a single share can take such an action for the defense of his interest against the abuse of administration. It goes without saying that courts and legislatures in the United States have been making maximum efforts to prevent the so-called strike suit. There is inadequate space to enter into details of this matter. Reference, however, may be made to the California legislation which imposes a duty upon the court in connection with a defendant's motion to require a plaintiff-stockholder to post security for litigation expenses and to make a preliminary inquiry into the motives and good faith of shareholder-plaintiff.<sup>39</sup>

The German Corporation Law of 1937 (*Aktiengesetz*) also grants certain rights to the owner of a single share as a counter-balance to the shift of authority from the stockholders' meeting to the administration. But it must be noted that the shareholders' right to ask explanations from the administration is exercisable only at a stockholders' meeting and in connection with an agenda prepared by management. However, if the management does not respond to a request by a minority holding not less than one-twentieth of the outstanding stock to convene a stockholders' meeting, the court authorizes this minority in its application to convene a meeting and prescribe the agenda.

The individual shareholder has no remedy like the derivative suit. Whether a suit should be brought or not is decided either by the stockholders' meeting or by the request of a minority holding not less than one-tenth of the outstanding stock (although in case the matters concerned have already been mentioned in the report of a special auditor, one-twentieth is enough). In the first case, the suit is brought by a person appointed by the stockholders' meeting; while in the second case, the court appoints as a representative the person who was recommended by this minority.

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<sup>38</sup> *E.g.*, according to § 116 of the German Commercial Code, which is a former corporation law as far as the German corporation law is concerned, a minority holding not less than one-tenth of the outstanding capital can require the adjournment of a stockholders' meetings or appointment of a special inspector by the court for the purpose of thorough investigation of balance sheets and other accounting documents.

<sup>39</sup> CAL. CORP. CODE § 384 (1949). See also, BALLANTINE, LATTIN & JENNINGS, CASES ON CORPORATIONS 563 (2d ed. 1953).

Such qualifications may be remnants of the organic theory. This is, however, probably not so. Moreover, such qualifications may be rather reasonable technical methods of preventing the strike suit. After all, as described above, the practical consequences tend in a similar direction with only slight technical differences, whether by the organic theory or by the atomistic-partnership theory, whether by German law or by Anglo-American law. The only slight advantage of the atomistic-partnership theory seems to lie in the fact that all corporate legal relations can be explained more simply and plainly. In any event, even though they are different in philosophical terms as well as in political, social, and economic implications, they keep in view the same autonomous social reality—*i.e.*, “unity” in “plurality.”

Besides these two patterns, some mention must be made of a class of theories which regards an aggregate of properties designed to specific purposes (*Zweckvermögen*) as substratum of the corporation. A well-known exponent of such a way of thinking was Doctor Brinz.<sup>40</sup> This idea is thought of, on the one hand, as a substitute for the Savignian fiction theory, and on the other hand, as a generalization of charitable foundation. Even though Brinz himself did not get substantial support during his time, there is no doubt that such a way of thinking made a very important contribution to the discovery of the functional aspect of the corporate device as a method of insulating separate properties dedicated to the corporate purpose from claims of the creditors of individual owners (*Sondervermögen*).

Incidentally, such a conception as that of a “corporation having no membership as its substratum” is not limited to the field of the private law. According to Dr. Gierke, such a conception originated in the canon law and was gradually developed into the institution (*Anstalt*) theory, especially with reference to absolutistic bureaucratic monarchies (*e.g.*, *deutsche Territorialstaaten*), where governmental mechanisms developed in such a way that they must necessarily have been conceived of as legal personalities distinguished from the personal status of kings or lords.<sup>41</sup> It is by the same reasoning that the English monarch, as the crown (distinguished from his or her personal status), has been conceived of as a corporation sole.<sup>42</sup> It might not be wrong to postulate two opposing conceptual categories of corporations: those having as their substratum

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<sup>40</sup> BRINZ, *LEHRBUCH DES PANDEKTEN* 979 (1857).

<sup>41</sup> 2 GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* 958 *et seq.* (1873); 2 GIERKE, *GENOSSENSCHAFTSTHEORIE* (1887).

<sup>42</sup> MAITLAND, *SELECTED ESSAYS* 73 *et seq.*, 104 *et seq.* (1936).

members and the members' general assembly—the latter being the supreme and autonomous decision-maker of the corporation (*Körperschaft*); and corporations having no such members and no such general assembly (*Anstalt* or *Stiftung*). Along the continuum between these two conceptualistic extremes exist innumerable mixtures and variations of the two concepts.<sup>43</sup> In any event, even as a contemporary problem, due consideration must be given to the second category, with regard to the increasing importance of the government-owned corporate instrumentalities existing in economies that have, to a greater or lesser degree, undergone the process of nationalization.

### III

Now, let us look at the development of the Japanese corporate theory with reference to its state theory since the modernization instituted by the Meiji regime (1868). By reason of its unique historical development, the modernization of Japan was powerfully pursued by the central government, which was a constitutional monarchy in a broader sense, but virtually an absolute hierarchical bureaucracy with the Emperor as its head. Its constitution took the Prussian constitutional monarchy as its model, but was of a more absolute nature. All powers, legislative, administrative, military, and judicial, centered on the Emperor. And, therefore, as far as the political and social structures were concerned, there remained medieval and feudalistic remnants—or, rather, these were preserved. On the other hand, under the world situation at that time, and especially because of the military expansion policy, the industrialization was forcibly pushed by the government's aid. So, instead of a natural process of capital accumulation—that is, from single firm to partnership and then to corporation—the corporation was, from the very beginning, the dominant form of enterprise, and a few family holding companies reigned over the whole economic field. Thus, the political power of the *Zaibatsu* was as great as their economic power. Such a political-economic-social condition determined, more or less, the development of the state and corporate theory in Japan.

As far as the political or state theory was concerned, the Hegelian theory of the state was dominant. Thus, the Emperor was thought of

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<sup>43</sup> According to Gierke there were not a few cases wherein *körperschaft* and *anstalt* elements co-existed and clear-cut demarcation could be drawn only with great difficulty. Universities were regarded by some states as *körperschaft* and by others as *anstalt*. 1 GIERKE, DEUTSCHES PRIVATRECHT 474. He designated besides *körperschaft* and *anstalt*, a third category, *staat*, because of its unique qualification of sovereignty. *Id.* at 475. Its necessity is doubtful, however.

as an incarnation of an "absolute spirit" (*Absolut Geist*). The Hegelian theory was merged with Shintoism, the Japanese state religion, or Emperor worship.<sup>44</sup> Against this, the organic theory of the state, according to which the Emperor is an organ of the sovereign state, was the maximum extent of the liberalism under the circumstances of that time.<sup>45</sup> And even this theory was suppressed by the ultranational or totalitarian pressure during the dark age preceding World War II and continuing until the end of that war. Most of the liberal constitutional lawyers were Kelsenists in a broader sense, who shut out political points of view from the field of jurisprudence. As far as the public law was concerned, therefore, the state theory was not fully developed as one species of the association theory, because basic rights of citizens against the state were not fully established.

With regard to corporation law, the Japanese Commercial Code, one part of which relates to corporation law, was first drafted by Dr. Herrman Rossler, a German legal advisor to the Department of Justice in 1844, and finally took definite shape in 1899. Its form and substance closely resembled the (then) draft German Commercial Code, which took effect at the beginning of the twentieth century. Subsequent amendments to the Commercial Code in 1911, 1913, and 1938 in the field of corporation law tended to reflect German development.<sup>46</sup> Therefore, as far as the corporation theory was concerned, the organic theory in a broader sense became dominant at an early stage.<sup>47</sup> In any event, there was no room for the social contract or partnership theory either in the corporate field or in the state field. The Savignian fiction theory was likewise not supported.

From the beginning, the main dispute was concerned with the kind of right the share is—that is, with the definition of the share. According to the dominant theory, there are two kinds of shareholders' rights, as in the case of the German corporation theory—the first of which is conferred on shareholders on behalf of the corporation itself, called rights of common interest; and the second of which is conferred on behalf of the shareholders themselves, and therefore, called rights of individual interest. These two kinds of rights are derived from a com-

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<sup>44</sup> Dr. Kakei, a professor emeritus at the University of Tokyo, was an exponent of such a standpoint.

<sup>45</sup> The late Dr. Minobe, a professor emeritus at the University of Tokyo, cannot be overlooked. His organic state theory marked one epoch in the development of the constitutional theory in Japan.

<sup>46</sup> Blakemore & Yazawa, *supra* note 14.

<sup>47</sup> 1 MATSUMOTO, HITO HOJIN MONO (1910).



mon source of membership or membership right (*Mitgliedschaftrecht*). This membership right is neither a right in rem nor a creditor's right, but *sui generis*, and in the case of business corporations, is a kind of property right, because it has a capital value. The transfer of the share means the transfer of the membership right.

Incidentally, the Supreme Court of Japan held at first that the share is a creditor's right against the corporation, although the court did not clearly show its reasoning.<sup>48</sup> Nearly twenty years later, the Court adopted the membership-right theory.<sup>49</sup> In any event, by this conclusion, the recognition of the corporation or association law as against the individual law was established.

With regard to corporate powers from the earlier time, not only acts which are reasonably related to purposes, but also grants or donations for charitable purposes have been thought of as being *intra vires* under the Germanic influence.<sup>50</sup> In the case of nonprofit corporations, however, the scope of corporate power has been strictly construed, since the Civil Code has been thought to adopt the strict *ultra vires* doctrine,<sup>51</sup> while the Commercial Code does not have any specific provision that is likely to lead to such a conclusion.

It must be noted that the change of economic structure, especially after World War I, resulted in a general tendency throughout the world to differentiate between controlling groups of shareholders and scattered minority shareholders, and to lower the latter to something like low-grade debenture-holders. The above-mentioned revisions of the Japanese corporation law were along this line and were intended to

<sup>48</sup> "The sale of a share is the sale of the shareholder's right like a creditor's assignment of his claim, and is not a sale of a mere certificate." 7.5 Minroku (Civil Section) 111 (1901). "A shareholder's right is not a mere creditor's right. But it is something like a creditor's right in which dividend right and litigation right are included." 13 Minroku (Civil Section) 807 (1905).

<sup>49</sup> "A share means the membership right of a shareholder as against a corporation, and this right exists before the issuance of a certificate." 25 Minroku (Civil Section) 1088 (1919). "The right of a corporation to require payment from shareholders after call is originated from its right to require contribution from a shareholder. This right is a component of the membership relationship between shareholder and corporation." 4 Minshu 277 (1925).

<sup>50</sup> MATSUMOTO, *EIRIGGISHA NO JIZENJIGYO NI TAISURU KIFU* [PHILANTHROPY OF THE BUSINESS CORPORATION] 135 *et seq.* (1915).

<sup>51</sup> The Japanese Civil Code § 343, which was enacted in 1896 and took as its model the first project of the German Civil Code, provides as follows: "A juristic person has rights and duties, subject to the provisions of laws and ordinances and within the scope of its objects as determined by the articles of incorporation or by the act of endowment."

increase the flexibility of corporate financing. At the same time, they facilitated the disclosure of and the court's intervention in corporate affairs, and the assessment of penalties designed to protect general shareholders against arbitrary actions of the management.

Against this background about thirty years ago, Dr. Tanaka,<sup>52</sup> presently the Chief Justice of the Supreme Court of Japan, presented a theory that was primarily founded on the organic theory, but that was deeply influenced by the then-current German theory (*Unternehmen an sich*). According to this latter formulation, business corporations are no longer under the co-ownership of shareholders, but rather their maintenance and prosperity is the common concern of employees, customers, and so on. Therefore, shareholders cannot arbitrarily dissolve corporations or make other dispositions of their assets.<sup>53</sup> Dr. Tanaka construed the above-mentioned first kind of shareholders' rights (*e.g.*, the voting right) as not rights against corporations, but as powers that should be exercised solely on behalf of corporations. Thus, he reasoned that shareholders should be regarded as an organ of the corporation in much the same way as are its directors. His ultimate conclusion was that the terminology of membership right, which is the common source of rights of shareholders against corporations, must be rejected.

This rationale was followed with little change by Dr. Matsuda<sup>54</sup> according to whose theory such rights are not property rights, but personal rights that cannot be disposed of by the shareholder. They are, therefore, exercisable only by the shareholder himself at a stockholders' meeting, since they are conferred solely for the benefit of the corporation. This is the reason why the nonvoting shares stand side by side with the voting shares. Dr. Matsuda then concluded that the essence of the share is the above-mentioned second kind of right of shareholders (*e.g.*, the dividend right and liquidation right) and the transfer of shares means only the transfer of this right. Therefore, shareholders must be thought of as (internal) creditors. It goes without saying, however,

<sup>52</sup> 2 TANAKA, SHOHO-KENKYU [STUDIES ON THE COMMERCIAL LAW] 200 *et seq.*, 265 *et seq.* (1935); KAISER-KAISHAHO-GAIKON [ON THE CORPORATION LAW] 112 *et seq.* (rev. ed. 1939). Dr. Tanaka, a Professor Emeritus at the University of Tokyo, is one of the most brilliant scholars of Japanese jurisprudence and an exponent of the Catholic natural law theory. It must not be overlooked that his great work *Theory of World Law*, about thirty years ago, had labeled private international law, or conflict of laws, as virtually international law, not as a part of domestic law.

<sup>53</sup> See RATHENAU, VON AKTIENWESEN (1918).

<sup>54</sup> MATSUDA, KABUSHIKIGAISHA NO KISO-RIRON [THE BASIC THEORY OF THE CORPORATION] (1942).

that their dividend right is not absolutely secured and their liquidation right is deferred to creditors.

All in all, the main consequences of this theory are to make the voting trust illegal and to admit the voting proxy as an exception that is explicitly permitted by the corporation law. In any event, such a construction is consistent with the fact that in modern corporate practice, the line between creditors and stockholders tends to blur (*e.g.*, the holder of a subordinated income debenture is not very different from a holder of nonvoting preferred stock).

But this approach could not completely dominate the field of the corporate theory in Japan, and, in fact, serious criticism was raised against such extreme conceptualism.<sup>55</sup> It was pointed out that even the first kind of rights, such as the voting right, is a kind of property right that can be derived from co-ownership of or equity in the corporation by shareholders. These rights can be exercised with individual motives, therefore, as long as this does not impinge upon the common interest of the corporation. The illegality of the voting trust and the strict regulation concerning the proxy device are not drawn from the nature of the voting right, but rather are imposed by statute as a matter of public policy. Indeed, under certain circumstances, such devices may be of benefit to the corporation. The existence of nonvoting shares, too, can be justified upon the institutional presumption that such shareholders implicitly waived the voting right. This way of thinking was deeply influenced by Dr. Karl Wieland of Switzerland, who consequently pursued the atomistic-partnership theory, especially in the field of private law.<sup>56</sup> In support of the atomistic-partnership theory it should be noted that according to the Japanese Commercial Code, a business partnership can become a corporation by registration in com-

<sup>55</sup> *E.g.*, *Susuki, Kyoeki-ken no Honshitsu* [On the True Nature of the Public Rights in the Corporation] HOGAKU-KYOKAI-ZASHI [62 J. JURISPRUDENCE ASS'N] 300 *et seq.* (1944).

<sup>56</sup> WIELAND, HANDELSRECHT [COMMERCIAL LAW] (1921, 1931). According to Wieland, partnership (*offene Handelsgesellschaft*), partnership with limited liability (*Kommanditgesellschaft*), and corporations (*Aktiengesellschaft, Gesellschaft mit beschränkter Haftung*) all are, in fundamental structure, partnerships (*Gesellschaftsvertrag*), and the distinction exists only between the individualistic partnership (*individualistische Gesellschaft*) and the collectivistic partnership (*kollektivistische Gesellschaft*). His way of thinking is quite the same as the bracket theory or expansible symbol theory or the new fictitious theory of corporation. He is much influenced by Maitland. The present author's work, *Shadan-hojinsei no Saikento* [On the Corporate Personality], HOGAKU-KYOKAI-ZASHI [70 J. JURISPRUDENCE ASS'N] 248 (1953); 71 *id.* at 47 (1954) (in Japanese) was much influenced by Professor Wieland.

pliance with required qualifications; in other words, there exists no bar between partnerships and corporations.

Now, what is the situation after the end of World War II?<sup>57</sup> Following the fragmentation of the *Zaibatsu* and the incidence of heavy capital levies in 1947 that forced the sales of shares, the corporate ownership became more broadly based. While this dispersal did not occur by a gradual evolutionary process as in the United States, the resulting situation was comparable. It is no wonder, then, that the great reform of Japanese corporation law, under the guidance of the MacArthur regime, centered on the shift of power from the stockholders' meeting to the board of directors and on the strengthening of the rights of shareholders. Shareholders tended to lose direct contact with the business, and this was regarded as essential for the attainment of corporate democracy.

In this connection, the holder of even a single share became entitled to sue for injunction against illegality, fraud, or unfairness on the part of the management and to institute a derivative suit. In both cases, however, the shareholder is required to have been such for at least six months; and in the case of a derivative suit, thirty days must have expired without any action by the corporation after the shareholder's demand in writing, except in the case of emergency. Formerly, only shareholders owning not less than one-tenth of the outstanding shares, after unsuccessfully demanding a shareholders' meeting for the purpose of removing directors, might sue to enjoin all such acts by directors. And instead of a derivative suit, an auditor could bring an action upon the demand of shareholders owning not less than one-tenth of the outstanding shares whose request had been refused at a shareholders' meeting.

The newly-established right to examine the corporate books of account and records and make extracts therefrom is exercisable only by shareholders owning not less than one-tenth of the outstanding shares and meeting certain other requirements. This one-tenth requirement was inserted by the Legislative Council, a draft-reviewing body whose members were nominated by the Office of the Attorney General from among scholars, businessmen, lawyers, and officials. This body refused to accept the original draft giving such right, without limitation to each individual shareholder. In any event, the recognition of the rights of

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<sup>57</sup> With regard to the status of the corporate structure after World War II and the reform of the corporation law under the guidance of the MacArthur regime, see Blake-more & Yazawa, *supra* note 14, at 19 *et seq.*

a single shareholder has made a channel through which the atomistic-partnership theory can easily penetrate Japanese corporate theory. In fact, as already mentioned, these rights make insignificant the categorical distinction between the rights of common interest and the rights of individuals.

The atomistic-partnership theory appears recently to have gained dominance, owing probably to the reorganization of the government structure. The establishment of the sovereignty of the people has worked in favor of the social contract theory, and this tendency has automatically reacted upon the corporate theory. Thus, the recognition of the membership or equity as the common source of all rights and duties of the shareholders is more plainly established than it was under the organic theory. Incidentally, with regard to corporate powers, purposes of corporations are no longer thought of in the traditional term of "power," but in the more realistic term of "authority" or limitations imposed upon the directors. And the general tendency is to move further toward the abolition of constructive notice of the articles of incorporation.<sup>58</sup>

At last, there must be noted a most recent theory according to which business corporations must simply be regarded as business foundations, and shareholders as contributors and at the same time beneficiaries. Shareholders' meetings are committees of this foundation.<sup>59</sup> Such a theory is thought of, on the one hand, as a return to Brinz's foundation theory, and, on the other, as being founded upon the already-mentioned tendency of general shareholders to become closer and closer to low-grade debenture or bond holders. Therefore, this theory accords with the above-mentioned view of shareholders as internal creditors against corporations. It may not be appropriate, however, to deny the status of shareholders as members of the corporate body. Such a construction quite ignores the fact that even though, or rather because, general shareholders of the mid-twentieth-century big corporations are only nominal owners, having only "rights without possession,"<sup>60</sup> control of the corporation is impossible without the proxy device, a trust, or waiver of voting power of scattered general shareholders.

In conclusion, the development of corporate theories in Japan always centers on the question of "What is the substance of the share?"

<sup>58</sup> UYANAGI, KAISHA NO NORIYU [ON THE CAPACITY OF THE CORPORATION] 85 *et seq.* (1955).

<sup>59</sup> 3 YAGI, KABUSHIKIGAISHA NO ZAIDANTEKI KOSER [ON THE CORPORATION AS BUSINESS FOUNDATION] 3 *et seq.* (1953).

<sup>60</sup> BERLE, ECONOMIC POWER AND THE FREE SOCIETY 8 (1957).

And every time practical consequences need to be drawn or a change in the social economic tendency is felt, basic legal constructions are attempted. More importantly, the Japanese corporate theory has been developed without the interaction of the state theory, because the state theory has not been fully developed as a species of association law.

#### IV

The principal aim of this article has been to demonstrate that the development of corporate theories was basically directed by that of state theories, whether or not each corporate theory was pursued in consciousness of its corresponding state theory. And each state theory is nothing but the reflection of its corresponding state or government structure.

In Western Europe, the earlier establishment of peoples sovereignty and democracy produced a simple and plain formula of the partnership or social-contract theory in the field of corporate theory as well as in that of state theory. On the other hand, the German Modernization—*i.e.*, the constitutional monarchies of the Prussian style—produced a variety of both state and corporate theories. Japan had to follow this path. The present tendency in Japan toward the partnership doctrine in corporate theory seems to be based not so much upon scholasticism as upon the actual political and social environment—*i.e.*, the establishment of the new constitution and democratic government after World War II.