The Corporate Origins of Individual Rights

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Secure and enforced individual rights to person, property, and liberties available to all citizens – the rule of law – appear to be a necessary element of every economically and politically developed modern society. A feasible development policy therefore requires an understanding of how to implement a rule of law. How does it happen that a society manages to guarantee a range of individual rights for most, or all, of its population?

This essay works toward an answer by examining the way in which rights have evolved, particularly rights associated with organizations. Our main hypothesis is that the development of truly individual rights in modern societies has its roots in the development of particular kinds of organizational rights. Understanding how individual rights develop therefore requires an understanding of how the rights of organizations (and the individuals within them) develop.

Nested within the larger question are two more focused inquiries. We examine the complicated historical and theoretical process by which one type of organized groups within society – corporations – came to acquire legal standing equivalent to individual citizens – legal personality. Corporate personhood occupies a central place in American legal, business, and economic history and in the late 19th century in social science theories of the state and society, such as Gierke and Weber. Legal personhood turns out to be an anachronism, a word that means different things in different times and place. Corporations in the United States formally attained full "personhood" when the 14th amendment guaranteed all persons certain rights, and then the

Supreme Court quietly defined all corporations as persons.[1] We track different forms of corporations from Republican Rome up through modern America to explain the development of corporate personhood. Ultimately, corporate personhood exists when two or more individuals, possessing well defined rights and responsibilities under the law, have the right to form an organization that enjoys the same rights and responsibilities (more or less) as a corporation as the individuals do as individuals. Corporations of this type have existed for about a century.

Defining corporate personhood in terms of pre-existing individual rights under the law makes it appear that individual rights must precede organizational rights chronologically. This appearance is wrong. We argue that legal rights developed historically by recognizing the power and privileges of organizations. Individuals possessed rights only so far as they occupied specific places within recognized organizations. Kings, priests, dukes, mayors, and fathers possessed rights because they occupied legally defined places within organizations that were sanctioned, legitimatized, and supported by the larger society. In effect, rights and privileges attached to offices, not individuals.

The second specific question grapples with how the distinction between persons and offices evolved in the context of medieval canon and civil law. In the process of articulating organizational structures for the church and state after the 11th century investiture crisis, European societies began to develop formal legal systems capable of distinguishing between the person and the office. Working out a corporate structure for the Catholic Church involved little understood and unappreciated economic arrangements with regard to the alienation of property.

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[1]Hurst, *Legitimacy of the Business Corporation*,

This institutional arrangement then spread to the secular states. The new corporate form laid the groundwork for the modern nation state and the emergence of modern rule of law societies.

Roman law distinguished public law from private law. Public law concerned the operation of the Roman state and society, private law the well being of persons and actions that persons could take against and in relationship to one another.[2] The public/private law distinction still has meaning today and provides a critical element in the transformation of legal rights. As we show, throughout most of European history, the right to form an organization, specifically a corporation, was a matter of public law not private law. Individuals did not possess the private ability to form an organization with legal rights that paralleled their individual rights and that the state would recognize as a legal entity. An important part of the 19th century transformation of the corporate form was transferring the right to form organizations from the realm of public to private law. By 1900 in France, Britain, the Netherlands and the United States, individual citizens could form a new legal person, simply by their own actions as individuals. Remarkably, the governments in these societies recognized a wide range of such organizations.

At the same time that individuals attained the private law right to form organizations, it became possible to guarantee rights to individuals regardless of their office. Rule of law in the modern sense – fair, predictable, and unbiased enforcement of individual rights – emerged only after laws came to apply equally to everyone who is a citizen. But the origins of rule of law lay

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[2] *Justinian's Institutes*, 1.1.4. "There are two aspects of the subject: public and private. Public law is about the organization of the Roman state, while private law is about the well-being of individuals. Our business is private law." Birks and McCleod, *Justinian's Institutes*, p. 37.

in systems of law that recognize rights and privileges as deriving from an individual's place within a larger set of social institutions.

Rather than seeing this development of legal personhood for the corporation as the culmination of a historical process in which organizations acquire the rights of individuals, we see the development of legal personhood as the culmination of a process in which all organizations come to be treated equally before the law. Rather than a society filled with idiosyncratic organizations defined uniquely by their special privileges, society is now filled with transparently similar organizations whose rights at law are identical to those possessed by individuals. Groups and individuals obtaining just protection of their rights as individuals and organizations – that is, the rule of law – is the last step in a process of institutional change.

The two other papers on this panel offer complementary evidence in support of our argument. Lamoreaux and Bloch show that, in the development of American law, organizations rather than individuals framed the development of individual rights. Claire Priest shows how English property law, which had a strong individual orientation, was still constrained in the mid 18th century by the social organization of the family.

This paper proceeds as follows.

I. Organizations and Development

This paper is part of a larger project in social science theory and history that attempts to integrate an understanding of economic and political behavior. We lay out the outlines of our approach "A Conceptual Framework for Interpreting Recorded Human History" (available from

the authors upon request). Organizations, including the way in which organizations are supported by the larger society, are at the heart of our approach. In its briefest outline:

Most human societies regularly face the problem of violence. A natural way for societies to limit violence is to create economic privileges for specific powerful groups within society. Since these privileges are more valuable if there is peace than warfare, creation of the privilege (rents) creates incentives for powerful groups to not be violent. Similarly, because these privileges depend on the current coalition in power, individuals and groups possessing these privileges must support the coalition in power. This form of organization, therefore, provides the means for political and social order. The arrangement is never perfect, of course. We call this type of society a *natural state*. In more general terms it is a *limited access society*: a society where social order is maintained by limiting access to valuable economic, political, social, religious, and other functions.

Among the most valuable privileges that a state can give to a group is support for the group's organizational form. The extent to which groups of individuals can credibly commit to act as a group is severely limited by principal-agent problems and free rider problems, as Olson emphasized. If states act as third parties and enforce the agreements that groups make within and among themselves, those groups can coordinate much more complicated and productive activities. To protect the privileges of their ruling coalition, natural states have strong incentives to place strict limits on access to both organizations forms and third party enforcement of organizational agreements.

Modern politically and economically developed societies, in contrast, are characterized by competitive, *open access* polities and economies. These societies provide order through

competition. A necessary part of open entry competition is wide and open access to organizational forms whose internal and external relations the state will enforce. Moreover, modern open access states support a much wider set of organizational types than corporations. But corporations played a critical role in the thinking of western civilization, long before there were modern business corporations. Corporations, therefore, serve as a useful metric for tracing the evolution of open access to organizational forms in the European west. To that history we now turn.

II. Historical Background and Legal Concepts

Western law has two distinct origins. One strand of law goes back to Germanic kings in dark forests, handing down justice according to folk law and custom, evolving gradually as custom and circumstances change. The other strand of western law is Roman law, which reappears suddenly, formally, and prominently in the 11th and 12th century with the revival of Roman civil law. The history is unique enough to bear retelling, and it forms the starting point for our understanding of how individual rights and the rule of law came to dominate the developed western world. In this section and the next, we consider the second strand, while the following (fourth) section takes up the first strand.

The first written Roman Law was assembled by ten men, the Decemvirate, who were charged with writing down the laws that applied in the Roman Republic in 451 BCE. The result was the *Twelve Tables*, the first codification of Roman law.[3] The laws were modified by

[3]For the history see Livy, *History of Rome*, Book 3, chapters 32-54. For the text of the Twelve Tables see Scott, *The Civil Law*, 57-77.

legislation and experience and, after the fall of the Republic, by decrees and proclamations of the emperors. New collections of the law were made periodically. When the western Roman empire fell in the 5th century, the Germanic tribes recognized a "roman law" that applied to roman citizens living in their midst, but still applied the customary law to their own citizen/subjects. The brief reestablishment of the western empire under Justinian, coincided with a final collection of Roman civil law in the form of the Justinian Code. The *Institutes, Codex, Digest, and Novella* of the Justinian code were not systematic organization of laws like a modern legal code. They were, instead, a compilation of written legal decisions and authorities, prefaced by a short introduction to the structure of Roman Law (the *Institutes*). The complete collapse of the Western Empire after Justinian meant that Roman law in much of Europe was not the Justinian code, but the "vulgar" combination of Germanic and Roman law that had been around since the 5th century.

This situation changed in the 11th and 12th centuries. After the fall of the empire, the church formed a reservoir of literacy and administrative competency in societies characterized by widespread violence and illiteracy. Church and state were intimately connected. We don't have to go as far as Figgis's dramatic characterization of church and state in his history of medieval political theory: that the church in medieval Europe was really the state and the various armed political units merely the church/state's police force.[4] Local political leaders used their

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[4]Figgis, *Political Thought,* p. 4: "In the Middle Ages the Church was not a State, it was the State; the State or rather the civil authority (for a separate society was not recognised) was merely the police department of the Church. The latter took over from the Roman Empire its theory of the absolute and universal jurisdiction of the supreme authority, and developed it into the doctrine of the *plenitudo potestatis* of the Pope, who was the supreme dispenser of law, the fountain of honour, including regal honour, and the sole legitimate earthly source of power, the legal if not the actual founder of religious orders, university degrees, the supreme "judge and

patronage and protection of the church to harness clerical talents to the service of the state. Under the proprietary church system, a land owner had the right to erect a church on his land which remained his property and the clerics appointed to these churches came under the jurisdiction of the lay lord.[5]

The growth of papal independence and aspirations in the 11th century challenged the secular influence and use of the church. Under Pope Gregory VII, in 1075 the papacy asserted its claims to select bishops and archbishops throughout western Christendom, attempting to wrest control of ecclesiastic appointments and ecclesiastic patronage from secular princes. The "investiture crisis" that followed generated conflict between the church and the states, and conflict within the church itself. The conflict among the Pope, the Holy Roman Emperor, and the Kings is easy to understand. The Pope claimed as his right a privilege that secular political leaders had exercised in western Europe for centuries. But the conflict within the church was equally profound. By claiming supremacy over all of the church, the Popes assertion of new rights made the Bishop of Rome much more than the first among equals. This claim did not sit well with the archbishops and bishops, the princes of the church who were like as not to be secular princes as well.

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divider" among nations, the guardian of international right, the avenger of Christian blood. All these functions have passed elsewhere, and the theory of omnipotence, which the Popes held on the plea that any action might come under their cognizance so far as it concerned morality, has now been assumed by the State on the analogous theory that any action, religious or otherwise, so far as it becomes a matter of money, or contract, must be matter for the courts." The church did claim universal sovereignty, in a series of papal bulls culminating in *Unum sanctam* by Boniface VIII in 1302. For a discussion see Gierke *Political Theories*, pp. 9-21 and Ullman, *Short History*, p. 275.

[5]See Ullman, *Short History of the Papacy*, pp. 99, 116, and for the Gregorian reforms aimed at the proprietary system, p. 145.

The significance of the investiture crisis lay not in the Pope's quest for military and diplomatic power, but in Gregory's decision to support his claims to primacy through the law. Gregory argued that his policies were legal, and he drew on the Code of Justinian and the accumulated documents issued by Popes and Church Councils to justify his actions. The investiture crisis stimulated the development of legal science and education, as legal scholars pored over the classic texts and church documents to bolster the Pope or in the capitals and ecclesiastic cities of Europe to bolster the Kings and bishops. The Justinian code did not directly help in the Pope's contest with the Emperor and the kings; Justinian after all was a emperor who ruled over, not under, popes. But the structure of public and private law gave the Pope and his lawyers an organizational structure within which claims of papal supremacy could be justified. From the 12th century on, the development of civil law and canon law paralleled each other. The civil law was Roman law and the canon law was a combination of Roman law and the "decretals" issued by church authorities (so canon lawyers were also called decretists).[6]

The investiture crisis and the legal developments that followed produced a more sophisticated and articulated organizational structure for both the church and secular governments. The debate within the church involved complicated issues of theology and

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[6]The term "civil law" is another anachronism. The entirety of Roman law was the civil law. The modern distinction of civil and criminal law is a later development. The written sources of Roman law were not readily and transparently applicable to the 11th century. The Justinian code was a compilation of Roman laws and decisions, much of it inconsistent with itself and corrupted by the multiple copying and interpolations of a millenia of history. In the 12th century, the monk Gratian published *Concordia Discordatium Canonum* or *The Harmony of Discordant Canons*. Gratian and the legal scholars that followed, laid out and then perfected a dialetical method for resolving inconsistencies within the historical sources. It would lead to the development of a legal science and the establishment of legal faculty at Universities throughout Europe, notably Bologna, Paris, and Oxford.

politics, and a host of questions had to be answered (and fought over): The church on earth was literally supposed to be the body of Christ. Who was the head? How was the head related to the body? Was the Pope above or part of the church? If the Pope was the head, what happened if the head lost its marbles? What happened if a Pope erred? What group within the corporate body of the church was responsible for making such decisions? How could such a body be summoned? In the history of the church there had been a series of Councils, e.g. the Council of Nicea, that had decided church policy. Was such a council the ultimate authority within the church? The theory supporting the Council's ultimate authority became known as "conciliar" theory and the theory's proponents as counciliarists.[7]

These issues came to a dramatic head in 1378 when the college of Cardinals selected a Pope, Clement VII and then a few weeks later reversed their decision and selected another Pope, Urban IX. For the next forty years, the schism within the church meant that there would be at least two Popes (and at some points three), before the Council of Constance crafted a resolution to the schism in 1414. Although the counciliarists carried the day at Constance, by the end of the 15th century papal supremacy had reasserted itself.

The legal debates within the church had immediate application within the secular states. Was the King above or below the law? Was the King the head of state, and if so, how did he (or she) relate to the body politic? What happened if the King erred or became incompetent? What body within the body politic was responsible for making such decisions?

Today, of course, we recognize these questions as fundamental to the constitutional organization of society. The genius of medieval Europe began to puzzle out answers after the

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[7]Tierney, *Counciliar Theory*.

11th century. Before we can get to those developments, however, we have to go back to the Roman law and consider the Roman concept of legal personality.

III. Legal Personality

The Justinian *Institutes* divided Roman law into three parts: persons, things, and actions. Persons were divided first into the classes of free and slave, and then into further a division of independent and dependent persons. Independent persons were citizens and heads of households. "... in reality a person in early Rome was more likely to be considered as a member of a group. The unit which early Roman law was concerned was the family. The law did not deal with what went on within the family. So far as those outside the family were concerned, the family was represented by its head, the paterfamilias, and all the family property was concentrated in him."[8] Or as Law of the Twelve Tables put it: "A father shall have the right of life and death over his son born in lawful marriage, and shall also have the power to render him independent, after he has been sold three times."[9]

For clarity, we distinguish between individual human beings, who we call individuals or people, and the legal entities that possessed rights and standing before the law, which we call persons.[10] An individual was not necessarily a person within the Roman legal system. Private

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[8]Stein, *Roman Law and European History*, p. 5.

[9]Law I of Table IV, Scott, *Civil Law*, p. 64. Scott comments "This privilege, the *patria potestas*, enjoyed by Roman fathers, was a relic of patriarchal authority... from ancient custom, it continued to exist for centuries after Rome had attained an exalted rank in the scale of civilization, and other practices of barbarous origin and primitive character had long been abandoned."

[10] Section 1 of Amendment 14 defined "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

law applied to persons, not individuals, and private law actions were legal relationships among persons. A son under his father's guardianship was not a person. If the son damaged another person, that person had recourse through the law to the father, the legal person.

Roman public law recognized many types of organizations, ranging from the state itself, but also a wide variety of religious organizations, towns, gilds, and fraternal organizations. Duff provides a useful working definition of a legal person: "By a Legal Person we mean any entity which, reasonably or unreasonably, is deemed capable of legal rights and duties; and whether any particular entity is a Legal Person or not is a pure question of law."[11] This definition is cut and dried: legal persons are who or whatever the law admits as bearing rights and duties. Duff readily shows that many organizations, towns (*municipia*), various religious, military, and fraternal groups (*collegia*),[12] and more generic groups of individuals (*universitas*)[13] could bear

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wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The 14th Amendment explicitly defined all individual (citizens) as legal persons. The courts implicitly accepted that there were other types of legal persons and 1886 and 1888 "the Supreme Court quietly accepted the proposition that a corporation was a 'person' within these guarantees." Hurst, *Business Corporation*, p. 65.

[11]Duff, *Personality in Roman Private Law*, p. 2.

[12]"The normal college of the Republic and the early Empire was a body of men, sometimes neighbors, often workers in the same trade, who associated themselves voluntarily, always under the protection and for the worship of some god or gods, and usually either for purposes connected to their trade, or to secure well-furnished and well-attended funerals, or both. These bodies are usually called *collegia*, often *corpora*, and sometimes *sodalicia* (not *sodalitaties*), without any apparent distinction of meaning." Duff, *Personality*, p. 102.

[13]"*Universitas* originally meant a whole as contrasted with its parts, or, which is the same thing, a group as contrasted with its members;... A *universitas*, then, is a group of people, with more or less emphasis on the fact that they are a group, and not so many separate individuals." Duff, *Personality*, pp. 36-37.

rights and duties and therefore were legal persons. Duff's primary interest is in the constitution of *personality* in Roman law and whether the Roman's had a well defined theoretical understanding of corporate personality corresponding to early 20th century categories. He concludes that the Romans did not.

Duff reports that organizations in Rome acquired legal personhood only by explicit permission of the state: "All personality at Rome was created, and created by the state, except that of *civis Romanus ingenuus* [a free-born Roman citizen], but no one could deny that a freedman was a real person. This seems to be the only positive lesson we can learn from the Roman law of Personality."[14] The critical part of Duff's conclusion for our inquiry is that the creation of legal personhood in a corporate body, no matter how constituted, was a matter of public law, not of private law. Neither individuals nor legal persons were at liberty to create new legal entities at will. Only the state could create a corporate legal person.

Cities "were the most important unit in the history of Roman corporations... It was for them that the ideas of corporate ownership and corporate action were first evolved; and they were the model on which all the Juristic Persons known to later law were framed and fashioned."[15] It is clear that towns possessed the ability to act as legal persons; to buy, sell, and own property in the form of land, slaves, and other assets. But equally clear, the margins of legal personhood were not clearly defined in private law: were towns liable for damages, how were towns able to enter into contracts, and who represented towns in legal dealings? These were all questions that merged into public law. So while we may think of Rome as possessing

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[14]Duff, *Personality*, p. 236.

[15]Duff,*Personality*, p. 62.

corporations who were legal persons, we should be wary of ascribing the same well defined personhood as modern corporations. Certainly no Roman corporate entities possessed the same legal status as the legal personhood of an individual citizen.

The Roman civil law did provide a clear indication of how organizations could be sanctioned and supported through public law. It also provided a clear private law framework for family, marriage, inheritance, and property.

To summarize: Legal personhood was a creation of the state, and while citizens were automatically persons, individuals were not automatically citizens. Various types of organizations qualified as legal persons in the sense that the organization could bear rights and duties. Organizations could not be created under private law, however, and the relationships between organizations and individuals remained very much a matter for the public law.

IV. Western Folk Law

The last element we need in place is the folk law of western Europe that combined customary law and the early roman law. This is sometimes called Roman vulgar law to distinguish it from the more sophisticated Roman civil law. Western folk law continued to exercise a strong influence on European law even after the reception of Roman civil law in the 11th and 12th centuries. Several features of folk law are important for our history.

First, like Roman law, the basic legal units were families and tribes, not individuals.[16] Second, the primary elements of the law were detailed schedules of the penalties to be paid for causing injury or death of various types and to various individuals. The schedules highlight the third important aspect of the folk law: it was based on a recognition of status within the larger community. Murdering a king merited a larger penalty than murdering a freeman, which merited a larger penalty than murdering a household servant or a slave. Schedules were laid out in detail for specific body parts and injuries. By specifying the penalties, the law played a role in preventing crimes and violence. But the logic of the system lay less in prevention than in unifying the household and the political structure into a set of relationships that would minimize retribution for injury and death.

The blood feud provided individuals and families a limited measure of personal security. The threat of retribution by families and households for injuries to one of their members simultaneously prevented violence *ex ante*, but *ex post* was a source of instability and disorder. By specifying a tariff for compensating damages, the folk law enabled the substitution of a monetary payment for physical retribution. At the same time it saved the face and honor of the family of the damaged party.[17]

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[16]"On the one hand, the basic unit within the tribe was the household, a community of comradeship and trust based partly on kinship and partly on oaths of mutual protection and service... On the other hand, there were territorial legal units consisting typically of households grouped into villages, villages grouped often in larger units often called hundreds and counties, and hundreds and counties grouped in very loosely organized duchies or kingdoms." Berman, *Law and Revolution*, p. 52.

[17]See Berman, *Law and Revolution*, pp. 49-61, for a discussion of folk law.

The status structure of the folk law, explicitly recognized in the tariffs for injuries, also affirmed a hierarchical structure of justice. The folk law clearly laid out who judged whom. In these societies, the operative element of kingship and leadership was not sovereign command over men and resources, it was the right and obligation to judge.

The main point for our purposes is that the folk law produced a structure in which an individual's place within the organization of the state, as reflected in the many interlinked households of the community and in the social hierarchy, determined his or her legal rights and obligations.

V. Canonists, Councialiarists, and Church Corporations

At its most visible level, the investiture crisis centered on patronage: would the Pope or the secular lords appoint bishops, archbishops, and other members of the ecclesiastic hierarchy? The patronage struggle was over who would place individuals in positions of power and influence within the existing structure of church and secular organizations. A parallel constitutional crisis developed at a deeper level in the church. What was the relationship between the Pope and the local church? Was the Pope the head of the Body of Christ on Earth? Was the Pope above the law? These constitutional issues all touched on the corporate organization of the church as a living entity.[18]

Gregory VII based the expansion of papal authority within the church on canon law. In doing so, he laid the foundation for a lasting organizational structure within the church and

[18]The issues also mirrored in an similar set of constitutional problems facing secular states.

through the church to the larger society. The structure was not without contradictions. The Justinian code claimed that "what pleases the prince has the force of law (*quod principi placuit vigorem legis habet*)" and "the prince is not bound by the law (*princeps legibus solutus est*)".[19] One possible constitutional structure was an absolute sovereign authority lodged in the person of the Pope. The idea that the ruler was above the law conveyed the idea in spatial terms . But Rome's attempt to centralize power required the cooperation of bishops outside of Rome. Powerful and historically independent bishops would not readily concede absolute sovereignty to Rome.

To solve this problem, the church constructed two interdependent constitutional structures. The first was a constitutional structure for ecclesiastical dioceses and other corporate entities of the church (abbeys, monasteries, universities, and orders for example). A bishop was the head of a cathedral college, made up of church officials. The constitutional relationship between a bishop and his college affected the internal workings of the cathedral and see (in general when and to what extent the bishop had to seek the consul or explicit consent of the cathedral chapter to make specific decisions); the external relations between the diocese and the external world (the freedom and responsibilities which the bishop exercised as a representative of the diocese with respect to law suits, contracts, and property relations); and the process of selecting bishops when a vacancy occurred (both the exercise of a bishops functions while the office lay vacant, and the selection of a replacement).[20] We will not discuss these points in detail, except to note that all were discussed at great length with great learning and that despite

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[19]The first quote is from the *Digest* (1.4.1) and the second from the *Digest* (1.3.31).

[20]These three issues are considered in Tierney, *Conciliar Theory*, pp. 106-131.

an accretion of canon law on the subject, the actual administration of church corporations continued to exhibit considerable variety.

The second major issue was the constitutional structure of the whole church: the relationships among the Pope, the church in Rome (including the College of Cardinals), and the arch-bishops and bishops of the universal church. The same problems faced the larger church. How were the parts of the church to interact? How much independent authority did the center have? Was ultimate authority in the church to be vested in the pope or a general council? These questions were not answered definitively in the middle ages. There were proponents of several positions, and they debated intensely.

Two general principles, however, emerged from the debates and generated significant benefits for the church as an organization. First, the principle of perpetuity was strengthened. The church acquired a more articulated governance structure that persisted beyond the life of individual leaders. The corporate identity of the diocese was strengthened, although it was never completely detached from the identity of its bishop.

Second, firm agreement was reached about the ownership and alienation of church property. Ownership of church property did not reside with the individual person of the bishop:

> The inevitable starting point for such inquiries was the accepted fact that, when a prelate appeared in a court of law on behalf of his church, it was not his own possessions that he defended; he did not possess legal *dominium* over the ecclesiastical property entrusted to his protection; his status, therefore, had to be defined as that of one who represents the interests of another party. The canonists often discussed the question where actual *dominium* did reside and usually agreed that, while God himself was the ultimate owner of all the goods of the Church, *dominium* over them in an earthly sense belonged to the ecclesiastical community. Hugguccio attributed it to the *congregatio fidelium*.[21]

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[21]Tierney, *Counciliar Theory*, p. 118. The *congregatio fidelium* was the whole body of the faithful.

Economic historians should have more than a passing interest in this ecclesiastical corporation. Control over property was exercised collectively through the corporation, the *universitas*, the whole as contrasted with its parts. Presaging the modern debate about ownership, control, and fiduciary responsibility, the canon law most firmly identifies the interests of the corporation in terms of real property. The bishop is not at liberty to alienate the property of his see without the active consent of the cathedral canons. By privileging the corporate interest in property, the body of the church (as represented by the cathedral canons) has leverage with the bishop as leader and a control over the bishop as the representative of the corporation in the wider world, in the bishop as *procurator* of the corporation. Formalization of the process of consent and consultation between the bishop and the cathedral chapter, or between the pope and a church council, creates an organizational structure that gives life to the corporate body. At the same time, it creates political structures within the church. By lodging rights in the officer as a representative of the larger organization, and subjecting the officer to a collegial control system, this legal structure helped the church align the interests of individual church officials with those of the wider church.

In a similar manner, relations between the wider church and the Pope had to be structured. Again there were issue about internal relationships within the church; representation of church interests within the larger society; and questions about the operation of the church should a vacancy occur (and related questions about creating and filling vacancies).[22] It will not serve us well here to go into details. But as with the theory of the ecclesiastical corporation, the corporate theory of the whole church generated benefitted by strengthening the perpetual form of

[22]See Tierney, *Counciliar Theory*, pp. 132-153.

the church organization and by explicitly delineating the property relationships inherent in the papal responsibility to act as the head of a corporate body. The popes began making a promise in their coronation vows not to alienate the property of the church. In this, the popes found themselves in the same position as the bishops[23]; that is, as officials with rights and duties, acting as church officials rather than as individuals.

Before moving to the state, however, we must acknowledge what happened in the investiture crisis and its aftermath, and to what extent changes in the canon law modified the Roman civil law with respect to corporations and organizations. The bid for papal supremacy challenged the internal structure of the church and external relationships between the church and lay lords. The two challenges were connected, as the investiture of bishops by lay lords intermediated the relationship between bishops and the pope. The attempt to establish a direct relationship between the Holy See and the selection and investment of bishops was fought in terms of real politics and increasingly in the law courts. Looking back, it is hard to see how the papacy could have extended its control over local bishops without a closely argued and cogent appeal to legitimacy. On the other hand, there is no reason, *ex ante* or *ex post* that the pope's legitimacy needed to be based in the Justinian Code.

The framework of Roman law adopted by the church had an important long-term effect: it created space for several types of organizations that possessed legal personhood: the ability to bear rights and duties at law. The creation of these organizations was entirely a matter of public law, however, and nothing in the new canon law did anything to change that. The counciliar reforms did bring a measure of uniformity to the highly idiosyncratic corporate structure of

[23]And as we will see in the next section, with several secular kings as well.

church entities, but it was only a matter of degree. Individual corporations remained creatures of public law. While the canon lawyers thought more deeply about corporate structure, they did not develop a theory of corporate personality or anything approaching a coherent approach to corporations as general entities.[24]

The counciliarists did make a fundamental contribution to the structure of corporations, however. They deliberately created a locus of property relations between the nominal head of the corporate body, the *procurator*, and the formal structure of the corporate body. The creation of an economic nexus within the corporate structure must have dramatically restructured the relationships between the heads and their organizations. But, as far as we can tell, the existing literature is completely oblivious to economic side of these organizational forms.

These outcomes were a mixture of intention and chance. The Gregorian reforms were intended to reform the church and that, intentionally, required more papal authority. The threat of expanded papal authority produced a reaction in the form of conciliar theory and a formalization of the corporate structure of the church that was unintended.

VI. The King's Two Bodies

It is now time to explicitly consider the corporate structure of the medieval state. In *The King's Two Bodies*, Ernst Kantorowicz lays out the intellectual history of how the new corporate

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[24]Tierney, *Counciliar Theory*, discusses the difficulties inherent in modern studies of medieval (or Roman for that matter) corporations. The questions modern scholars want to ask about corporate structure and theories simply weren't of concern to the canon lawyers. As a result, modern studies of medieval corporations are often biased by modern desires to find answers to modern questions about social organizations that medieval people were not even aware of. For a similar set of conclusions about the Roman experience see the concluding chapter to Duff, *Personality in Roman Law.*

concepts in the church simultaneously developed in secular states. Kantorowicz starts with Maitland's observations about the problematic nature of the English "corporation sole:" a corporation with only one member. Maitland begins with Edmund Plowden's 16th century *Reports* in which it is clear that the English legal system had already developed a well articulated theory of the "king's two bodies."[25] Maitland quotes Plowden:

> So that he [the king] has a body natural adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person and make one body and not divers, that is, the body corporate in the body natural *et e contra* the body natural in the body corporate. So that the body natural by the conjunction of the body politic to it (which body politic contains the office, government and majesty royal) is magnified and by the said consolidation hath in it the body politic.[26]

One of the king's two bodies is a physical, corporeal body that dies: the king as an individual. The other of the king's two bodies is a corporate and immortal body politic: the king as king, the legal person. Maitland traced the problem of the king's two bodies to the paradoxical and absurd existence in English law of a corporation sole. Paradoxical, because since Roman times a corporation always referred to an aggregate of individuals. Absurd, because a central purpose of the corporate form was to confer upon the corporation a perpetual life that extended beyond the life of its individual members, but the corporation sole had only one member.

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[25]Near the end of life, Maitland wrote a series of essays on the state and the concept of corporations. He also translated a portion of Otto von Gierke's massive *Das deutsche Genossenschaftsrecht* into English, Gierke *Political Theories*, and wrote an introductory essay in which he addressed the problem of situating European corporate concepts into English history. Part of the introduction to Gierke and all of Maitland's papers on corporations and the state have been conveniently reprinted in Maitland, *State, Trust, and Corporation*, with an illuminating editorial introduction by Runicman and Ryan.

[26]Maitland, *State, Trust, and Corporation*, p. 35-36, emphasis in original.

Maitland found only two cases of the corporation sole in English law: for parish priests and for the king.

The problem for a parish priest stemmed from the ownership of property. When a priest was put into a parish, he typically enjoyed a flow of income from the real property of the parish and, in a very real sense, owned the property. But the property was not his to dispose of, he could not unilaterally alienate church property. Moreover, on the priests death, retirement, or transfer, where would the property lodge? The fiction of the corporate sole created a legal identity in which the rights and duties of the parish were vested. The individual priest possessed rights to the property only by virtue of his office. This meant that the successor to an individual priest would enter into the possession of the corporate property upon his investment as the parish priest.

In this distinction, we can clearly see that the investiture crisis involved more than the patronage benefits attendant on the appoint of a bishop. It also involved the corporate ownership and rights to income from the church property during any vacancy of the office. In Britain, the king enjoyed the use of the property during a vacancy.

We return to Maitland's speculations on the corporation sole in England in the next section. Kantorowicz starts with Maitland's question about Plowden and goes well beyond Maitland's understanding.[27] Kantorowicz documents the development in 12th century of the secular corporate concepts we identified in the counciliar thought of church in the previous section. The secular prince swore an oath not to alienate the common property that he held in a kind of fiduciary trust for the good of all. The body of property owned by the church came to

[27]The opening chapter of the *King's Two Bodies* is "The Problem: Plowden's Reports."

known as the *christus* and the parallel body of property owned by the state came to be known as the *fiscus.*[28] The property in the *christus* or *fiscus* was *res nullius*: things that belonged to no one.

Two critical elements changed the nature of the state and of the nature of corporate entities: inalienability and perpetual life. Lawyers and policymakers engaged in innumerable debates about the nature of the corporate structure governing the property of the state/church and the leaders, but "Unanimity there was in one respect: that fiscal property was normally inalienable and that the fisc was perpetual or immortal."[29] Proscriptions about inalienability were not absolute. Property could be alienated by the bishop or prince, pope or king, but only within the context of the corporate structure and consent or consultation required. Perpetual life created a common interest in a body of real property and assets which would serve as tangible resources over which kings, popes, bishops, princes, and lesser magnates and officials would bargain and negotiate.[30]

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[28]In particular see *The King's Two Bodies*, pp. 164-192. Note that the use of *fiscus* in the middle ages has a different meaning from the use of the term *fiscus* in Roman law, where it meant the private purse of the emperor, see Duff, *Personality*, pp. 51-61.

[29]*The King's Two Bodies*, p. 180.

[30]The process of separating the property of the king as king from the property of the king as an individual began in the 12th century. Kantorowicz, *The King's Two Bodies*, p. 343 describes incidents in 1155 and 1176 during the reign of Henry II in England: "To be sure, to Henry II himself it may have made little, if any, practical difference whether things belonged to him by right of the king or by right of the Crown. Sometimes the first, sometimes the latter may have been more advantageous to him. However, by building up a royal demesne as an administrative entity which was set apart from lands falling in with the feudal dependencies, Henry II certainly laid the foundation to the fiscus which, clearly by the thirteenth century, 'has been separated, as something for the common utility, from the person of the king.' Moreover, by categorizing the royal demesne as an entity pertaining to the Crown, Henry II, no matter whether intentionally or not, prompted the officials to distinguish on their part more carefully than before between rights of the Crown and rights of the king."

Perpetual life imposed stringent demands on the legal personality of the actors. The idea in Roman law that an organization could outlive its members had to be greatly strengthened. A specific body of property had to be identified with a specific ecclesiastic or secular office. At the same time, the life of the specific office had become perpetual in order to secure the continuing relationships among the property, the individual officer, and the corporate group. Thus, officeholders came to have two bodies. The corporate, personal, and immortal body signified the office or the "dignity" of the corporate legal person; the other corporeal and mortal body signified the individual who temporarily occupied the office. The overlapping identity of the corporate office and the individual human being could create a corporation "sole": a perpetually lived organization with specific right- and duty-bearing features that, nonetheless, was held by an individual. Of course, the organizational structure in which the corporation sole was located extended far beyond a single office. It was, indeed, a mistake to identify a king or pope as a corporation sole without reference to the larger ecclesiastic and secular institutions in which the corporate powers of the individual were lodged.

Kantorowicz's book is both brilliant and difficult. As an intellectual historian, he traces the implication of the king's two bodies in literature (Shakespeare and Dante), art, funerary practice, and coronation oaths among many sources. Perhaps the most striking physical example of the king's two bodies is the practice, once glass was perfected, of burying notables in crypts that symbolized the two bodies: The notable's official body was immortally preserved in stone or metal on the top of the crypt; below and inside the glass walls the corruptible natural body, the skin and bones of a mortal sinner, were on prominent display.[31] The incorruptible corporate

[31]For a picture see the tomb of Archbishop Henry Chicheley (1424) in Bertelli, *The King's Body*. Bertilli cites Kantorowicz on the possibility that this type of burial practice has a

body atop the corruptible natural body. The corporation sole captures the sense in which the king never dies: "THE KING IS DEAD! LONG LIVE THE KING!"

Although Kantorowicz discusses much more than we can explore here, his central point for us is the creation of a corporate entity in which the property relations of ownership and control between the head of an organization and its parts are specified (however, imperfectly) and linked together through concepts of inalienability and perpetual life. The construction of the legal concepts grew directly out of the conflicts within the church over claims of papal supremacy and was replicated in the secular organization of the state. By the 15th century, France, England, and the Roman Catholic Church had developed corporate structures of governance with well defined concepts of corporate ownership. The concepts were not always clear in practice, in large part because the corporate relationship specified how the use and alienation of property was to be subject to consultation and consent. Consultation and consent were often hard to define and always subject to the forces of real politics. At numerous place Kantorowicz shows how the idea of the "Crown" as separate from the "king" provided an institutional mechanism for political conflict and compromise within a perpetually lived organization.[32]

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political significance, then concludes that "But it is difficult to find a political message here, or a distinction between the dignitas and the person in whom the dignity was invested ("Tenens dignitatem est corruptibilis, Dignitas tam en semper est, non moritur" [He who has dignity is corruptible, but dignity itself always exists; it does not die])." Bertelli's opinion notwithstanding, it is the notion that "the dignity does not die" that provides the perpetual life of the corporate entity at the center of the organizational innovation of the middle ages.

[32]"Clearly and authoritatively, it has been stated here by Edward I that the Crown was not the king – or, at least, not the king alone. It was something that touched all and, therefore, was "public," and no less public than waters, highways, or the *fiscus*.It served the common utility and thus was superior to both the king and the lords spiritual and secular including – a little later – the commons as well." *The King's Two Bodies*, p. 362. Kantorowicz also draws examples from

The medieval corporate revolution was a thorough going reorganization and reconceptualization of the state, both ecclesiastic and secular. The role of kings and popes in this revolutionary development in institutional structures must not be under-emphasized, but we should also not overlook the fact that the principles of corporate structure also applied to popes and kings also applied to bishops and lesser princes. This institutional change applied to the entire structure of the state and church, not just to their highest levels. Ultimately it applied to parish priest and village constables.

The identification of specific individuals who possessed specific rights and duties because of their position within the organizational structure of the church or state underlies our notion that historically the origin of rights has been organizational rather than individual. That is, rights adhere to offices and authorities within the organizations specified by public law; and officeholders exercise them by virtue of holding the office, not as individuals. The clear distinction between the king's two bodies, between the identity of the office and the corruptible and mortal identity of the individual, reflects the distinction between rights that adhere to organizations and rights that adhere to individuals.

VII. English Individualism and Exceptionalism

Conceptually, we may seem to be a long way from the 14th Amendment to the American Constitution in 1868, but we are actually coming quite close. To close the gap we must consider the development of "individualism" in English law, as described most vividly in Alan Macfarlane's *The Origins of English Individualism,* but equally important in the private law of

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France.

individual action in lands and trusts described by F.W. Maitland in many places.[33] Before engaging English history, however, we review our ideas about corporate personality and about the distinction between public and private law.

Duff claims that legal personality is a instrumental concept in Roman law rather than a theoretical one: a legal person is whatever duty- and right-bearing entity that the courts recognize.[34] Duff's eminently empirical definition works well, and it is clear that corporate bodies, however constituted, existed as legal persons throughout European history from the Roman times to the present. Roman corporations and all European corporations that followed – whether they were individual parishes, dioceses, the Catholic Church, the Church of England, or national, provincial, and local governments – were all creatures of public law. They were all created by explicit public acts, often times (but not always) under written charters, civil law, or canon law, whose internal structure and whose relationships within the corporation and between the corporation and the wider world was idiosyncratically specific to each corporation.

The intense debate among scholars at the end of the 19th and beginning of the 20th century to categorize corporations into pure types was inevitably bound to come to no firm conclusions.[35] The structure of corporations in the Roman and medieval worlds was inherently idiosyncratic; general rules did not apply. In terms of 19th century American law, all corporations were special, none were general. The debate was spurred in part by the ideas in Gierke's *Das deutsche*

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[33]In particular, *The Constitutional History of England* and "Trust and Corporation" in *State, Trust and Corporation.*

[34]Duff, *Personality in Roman Law*, p. 2.

[35]The most prominent in this literature were Gierke, *Political Theories*, and Weber, *Theory of Social and Economic Organization.*

*Genossenschaftsrecht (*Maitland's translated title is *Political Theories of the Middle Age),* but also by the dramatic increase in the number, size, and importance of corporations in 19th century Europe. Arguments about whether the corporation was a fictional person or a real person could not be resolved by empirical investigation: the range and types of corporations found in the historical record was far to varied.[36]

Because all corporations were creations of public law, there was no reason to develop a workable definition of the legal personality of a corporation created by private action. No occasion arose to develop a generic or general concept of the corporation that could be called upon by individuals acting outside of the public orbit, because there was no legal support for any such action on the part of private individuals. All this implied the absence of a private law of corporations. As in Roman law, corporations figured in private law because the were right- and duty-bearing legal units that could own property, inflict and suffer damages, and enter into contracts. But corporations were not yet the creation of private law and therefore not governed by private law. The internal structure and operation of corporations was governed by public

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[36]This reflects a difference between Maitland and the English school of law, which begins with the observation of what works in practice and then attempts to understand why it works, from Gierke and German school of law that attempts to reason out a logical theoretical system of law and then apply those principles to what we observe. Runciman and Magnus, *State, Trust and Corporation* put it this way in their introduction to Maitland's essays, when they describe Maitland's tasks as Gierke's translator, pp. xii-xiii: " Thus Maitland's first, and perhaps most difficult task, as he saw it, was simply to translate for an English audience words, concepts and arguments for which there was no English equivalent. But in trying to make clear for his readers how things stood in Germany he also saw the value of helping them to understand how things looked in England from a German perspective. 'We Englishmen', who, as he puts it elsewhere, 'never clean our slates', were rarely afforded the vantage point from which to judge whether the law by which they lived made sense as a set of ideas, not least because they were too busily and successfully living by it. But a German, who believed that it was not possible to live by law unless it cohered intellectually, could not fail to be both puzzled and intrigued by some of the governing concepts of English law, particularly those that related to the life of groups, up to and including the continuous life of that group we call the state."

law, including dispute resolution within the corporation and, very often, between the corporation other legal persons.[37]

The unique development of English property law eventually produced a movement towards private corporation law, expressed in the law of trusts. The English law of real property begins a new chapter, with the rise of papal supremacy that result in the Gregorian reforms in 1075. William the Conquer came to England in 1066 under the pope's banner.[38] The pope legitimized the Norman Conquest, even though the existing English were certainly Christians. This did not mean that the Norman conquerors replaced English law with Norman law. When it came to land, Maitland argues that "the Norman landowners were conceived as stepping into the exact place of the English owners whose forfeited lands had come into their hands; the Norman represents an English antecessor whose rights have fallen upon him"[39] William's successful insistence that "every man, no matter of whom he holds his land, is the king's man and owes allegiance to the king,"[40] combined with the large number of small landholdings among William's military supporters, to produce a land law in which tenure was alienable under certain general conditions. The statute of *Quia Emptores* in 1290 forbade further subinfeudation and made the conditions under which land could be alienated very clear. *Quia Emptores* solidified

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[37]As a result, it was tricky for a private person to contract with a corporation, since the rules that governed the behavior of the corporation at law were not necessarily the general rules that governed all private persons. On occasion, the public law constitution of a corporation gave it special privileges or exemptions not possessed by persons under the private law.

[38]The pope was Alexander II, Gregory VII's predecessor and a active promoter of papal power. See Ullman *Short History*, p. 142.

[39]Maitland, *Constitutional History*, p. 8.

[40]Maitland, *Constitutional History*, p. 9.

the position of individual ownership of property in British law and, as a direct result, meant that in disputes over property, the landowner had legal personhood as an individual.[41]

Even under Roman law, land law had been private law, a stipulation of the rules under which individuals could contract and interact that defined the default rules for resolving disputes. Macfarlane's ingenious analysis of the origins of English individualism is based, in large part, on the importance of markets in alienable land.[42] In much of English law, as in most of all European law, legal persons were not individuals, but families or representatives of other types of organizations. Alienability of land, particularly the performance by the tenant of specific obligations to the lord, enabled individuals to own land in free and common socage, and required the law to recognize individuals as owners.

As Macfarlane shows, vesting some property rights in land in individuals rather than in organizations, such as the family, had important implications for the structure of English society. Maitland emphasizes this theme in his analysis of the English law of trusts. Although an English landowner could alienate his land held in free and common socage in the 15th century, he was still constrained in his ability to devise land by will; and inherited land was still subject to many fees and incidents upon the tenant's death (and here I am not clear whether Maitland is talking

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[41]See Jonathan Hughes, *Social Control*, for an extended discussion of how *Quia Emptores* and the alienability of land under free and common socage, the only form of land tenure allowed in Virginia under the terms of the Virginia Company charter, influenced the economic development of the United States.

[42]This is not the place to get into the details of Macfarlane's rich argument. His fundamental strategy however, is to define peasant societies by the relationship of individuals and families to land tenure, occupation, and ownership and then show that the English had moved past anything that could be called a peasant society sometime in the 14th century. This over simplifies Marfarlane's argument, but it conveys the essence relevant for our argument.

about all land or land that was not held in socage. I hope Claire can help with this point).[43] In his own words:

> And now we come to the origin of the Trust. The Englishman cannot leave his land by will. In the case of land every germ of testamentary power has been ruthlessly stamped out in the twelfth century. But the Englishman would like to leave his land by will. He would like to provide for the weal of his sinful soul, and he would like to provide for his daughters and younger sons. That is the root of the matter. But further, it is to be observed that the law is hard upon him at the hour of death, more especially if he is one of the great. If he leaves an heir of full age, there is a *relevium* [relief] to be paid to the lord. If he leaves an heir under age, the lord may take the profits of the land, perhaps for twenty years, and may sell the marriage of the heir. And then if there is no heir, the land falls back ('escheats') to the lord for good and all.
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> Once more recourse is had to the Treuhander. The landowner conveys his land to some friends. They are to hold it 'to his use (*a son oes*)'. They will let him enjoy it while he lives, and he can tell them what they are to do with it after his death.
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> I say that he conveys his land, not to a friend, but to some friends. This is a point of some importance. If there were a single owner, a single *feoffatus*, he might die, and then the lord would claim the ordinary rights of a lord; *relevium, custodia haeredis* [wardship of the heir], *maritagium haeredis* [the sale of the heir in marriage], *escaeta* [escheats], all would follow as a matter of course. But here the Germanic Gesamthandschaft [joint ownership] comes to our help. Enfeoff five or perhaps ten friends *zu gesamter Hand* ('as joint tenants'). When one of them dies there is no inheritance; there is merely accrescence. The lord can claim nothing. If the number of the feoffees is running low, then indeed it will be prudent to introduce some new ones, and this can be done by some transferring and retransferring. But, if a little care be taken about this matter, the lord's chance of getting anything is very small.[44]

Maitland describes the Trust as a private law transaction, in which an artificial entity – the trust – is created to relieve the landowner of paying dues and fees to his land lord. The Trust is an unincorporated body. It has a single purpose, but more than one member. The legal form of the Trust found great support in the Court of Chancery, which was empowered to hear claims

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[43]As the paper Claire Priest is giving at our session makes clear, the development of truly individual rights in land did not extinguish the rights and claims of family and heirs to land. The British explicitly reordered the rights of creditors to land held in estates in the colonies in 1732 in the "Act for more easy recovery of debts in America," securing the creditors against family claims.

[44]Maitland, "Trust and Corporation" in *State, Trust and Corporation*, pp. 84-85.

in equity. The Court would, under the persuasion of the appropriate legal argument, support Trusts.[45] The Court survived on legal fees, the Trusts survived with the support of the Court.

Many scholars claim that the development of the corporation in Britain was slowed by the Bubble Act and by the readily available legal form of the Trust.[46] But the use of the Trust in England (and then in Britain) should not overshadow the extensive use made of the explicit corporate form. The first business corporation in Europe is usually taken to be the Russia Company, chartered by England in 1553. Britain colonized the world with corporations, including the famously American corporations we know today as the states of Virginia and Massachusetts.[47] In comparison with Western Europe, Britain did not lag in the use of the corporate form of enterprise in the 17th and 18th century. Only in comparison with the explosion of corporations in the 19th century United States can Britain be called a laggard.

To summarize, Britain established two forms of creating legal organizations. One worked through the public law of corporations. Under this law corporations were legal persons, but could be created only by an explicit act of the sovereign power. Many of these corporations served an explicitly public purpose, and many of them had close connections with the public

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[45]"I think it might be said that if the Court of Chancery saved the Trust, the Trust saved the Court of Chancery." Maitland, "Trust and Corporation" in *State, Trust and Corporation*, pp. 84.

[46]Maitland provides this explanation in his introduction to Gierke's *Political Theories of the Middle Age*, as well as in his essay on "Trust and Corporation" in *State, Trust and Corporation*, pp. 75-76. Hurst also makes the same point in the introduction to *The Legitimacy of the Business Corporation*, pp. 2-7.

[47]For the Russia Company specifically, see Scott, *Constitution and Finance*, pp.17-38. Scott provides a detailed history of British corporations in general as well.

fisc, such as the Bank of England.[48] The other type of organization worked through the equity law of the Trust. Under this law a legal organization could be created through the private law. Both forms of organization possessed legal personhood in Duff's straightforward meaning: the ability to bear duties and rights. Only in the United States of the early 19th century combined the two British forms.

VIII. American Corporate Law

> "Despite the rhetoric of the American Revolution, during the early-nineteenth-century U.S. rights devolved as a matter of practice on collectivities (families, corporations, towns, churches, voluntary associations) rather than on individuals. As collectivities assumed new quasi-governmental functions in the half century following the Revolution, they carved out spheres of autonomy within which the state was reluctant to intervene." Lamoreaux and Bloch.

This quote is taken from the abstract to Naomi Lamoreaux and Ruth Bloch's paper on our session. Despite the rhetoric of individual rights, legal rights were located in organizations recognized by society. Individuals possessed rights associated with their place in the organizational structure of society: heads of households, heads of states, heads of congregations. The personality of the organization was not an issue. Most organizations existed as creations of public law.

The expansion of individually defined rights grew out of land law and expanded exponentially in the American colonies. The charter of the Virginia Company limited land tenure in the colony to free and common socage. Although subinfeudation of land would be

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[48]The close connection of corporations and public finances in the United States is considered in Wallis, Sylla, and Legler "The Interaction of Taxation and Regulation," Wallis "Market Augmenting Government" and Wallis, "Constitutions, Corporations, and Corruption."

allowed in the proprietary colonies, most land in the colonies would be held in alienable free and common socage.[49] Of course, English common law was American common law until 1776, so the same forces making for recognition of individual rights was working in the American colonies as in Britain. Importantly, this meant that the same historical forces leading the British to utilize the trust were at work in America.

It was by no means inevitable, therefore, that the United States would choose to support organizations primarily through formal public recognition of corporations rather than through private law recognition of trusts. Once independent, however, Americans set off on a different path than Britain, one that was both more corporate and more private.

The American states started life as chartered corporations. As Nichols (1963) emphasized, their constitutional history grew out of written documents. Immediately upon deciding for independence in the spring of 1776, the states began writing constitutions. Within a few years of independence, states began chartering corporations in unprecedented number and in original forms.

To understand why Americans pursued a new corporation policy, we need go no further than the policy of corporation and trust in Britain and the now classic understanding of Whig political thought underlying the revolution.[50] The British developed two corporate forms for business: the private law trust and the public law corporation. Public law corporations were

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[49]The most visible and celebrated exception is the tenure's established in New York after the Dutch were displaced by the British. These "feudal" tenures would become the subject of a political movement in New York in the 1830s, as described in McCurdy *The Anti-Rent Era.*

[50]See Bailyn *Ideological Origins* and Wood, *Creation of the American Republic* for a review of Whig ideas and their importance leading up to the revolution and in the constitutoin making that followed.

widely seen as grants of special privilege to elite economic groups. Often the grant of privilege was to induce the group to provide a valuable public good or service, but the mechanism of creating special corporations was potentially subject to abuse and corruption. Whig political theorists laid a large share of the blame for the for the corruption of the British constitution at the feet of the corporations and stock-jobbers.[51] Adam Smith in the *Wealth of Nations* famously argued against corporations as creations of privilege.

So Americans were quite familiar with corporations, understood their power as a way of organizing private interests for the public purposes; but they also feared corporations as grants of special privilege that could be abused. New York, for example, provides an example of the use of special grants for the state to discriminate in favor of some and against others. In the colonial period:

> Churches of the established faith [Church of England] were freely chartered by the royal governors of New York, apparently finding no difficulty in securing corporate privileges there. By the end of the colonial period probably all, or nearly all, of this faith were incorporated. A few of the Dutch Reformed denomination were also chartered, perhaps out of respect to a clause in the treaty of 1664 by which New Netherlands had been surrendered to the English. Other sects, on the other hand, – notably the Presbyterians, the French Protestants, and the Lutherans, – sought frequently but in vain for like advantages. (Davis, (1917), p. 77)

Although colonial New York allowed religious freedom for Protestant Christians, the state would not extend the benefits of the corporate form to non-Anglican congregations. These benefits were of substantial advantages to a church, since recognition as a corporation allowed the church to hold real property and receive bequests and legacies.

At the state legislature's first peace time session, held in New York City in 1784, the legislature passed a general incorporation statute for churches:

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[51]See Wallis, "Systematic Corruption."

> The statute provided an equal opportunity for all religious denominations to secure the legal advantages of corporate ownership of their real property. It is noteworthy that the first enactment of a general incorporation law in New York made these advantages equally available by excluding partisan politics form the incorporation procedure. ...
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> The great value of incorporation was that the trustees of a congregation could receive bequests and legacies, and the lands and buildings and other property owned by the congregation was(were??) secured by a corporate title that could be defended at law in the name of the congregation. Under common law, an unincorporated company could not legally possess property in its own name; its property had to be held in trust; and it could not defend its property at law in its collective capacity. (Seavoy, 1982, pp. 9-10).

The New York statute did two very important things for churches as organizations. First, it created open access to the privileges of the corporate form by granting every congregation that met the (minimal) requirements of the statute. Second, it did not require congregations to acquire the approval of the state legislature to create a corporation. By creating an administrative process to approve applications for corporate status, New York took politics, special privilege, and discrimination out of the chartering of congregations. New Jersey passed a general incorporation statute for religious organizations in 1786 (Cadman, p. 5-6) and Pennsylvania in 1791. Between 1784 and 1830, New York passed twenty general regulatory statutes and general incorporations acts governing the establishment of churches, colleges and academies, municipal corporations, libraries, medical societies, turnpikes, manufacturing corporations, bible societies, agricultural societies, charitable societies, limited partnerships, and obituary societies (Seavoy, pp. 283-5).

Under a general incorporation act, any group meeting minimum requirements can secure a corporate charter through an administrative procedure. Although the state still formally granted the charter, the transformation of the charter creation from legislative act to administrative procedure effectively created a private law mechanism for corporate chartering.

For the first time, in all of the history we have surveyed, a formal legal corporation could be created by the acts of private individuals without the express approval of the state.[52] Americans consciously decided to open access to corporate forms of organization, and in so doing, to privatize corporation law, all in order to eliminate the political manipulation of economic and political privileges that had been part of the public law creation of corporations throughout western history.

Jacksonian Democrats railed against the evils of corporations. But Jacksonians did not press for the elimination of corporations, they pressed for free and open entry into the corporate organizational form. In the 1840's, states began making it mandatory for state legislatures to create general incorporation procedures for all types of corporations.[53]

In 1839, the Supreme Court (*Bank of Augusta v. Earle)* ruled that while corporations enjoyed protection under the law, corporations were not citizens.[54] By 1886 and 1888, the American legal and constitutional landscape had changed in many respects. In those years, the Court ruled that corporations were "persons" under the protection of the 14th amendment (*Santa Clara County v. Southern Pacific Railroad* and *Minneapolis and St. Louis Railroad v. Beckwith).* Hurst summarizes this era as follows: "In the 1890's the Court firmly established the principle that corporations might seek protection of 'liberty' – freedom to transact business – and of

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[52]See Wallis "Public Promotion."

[53]Wallis "Constitutions, Corporations, and Corruption."

[54]Because corporations were not citizens, they did not enjoy equal protection under the privilege and immunities clause. States could, and did, discriminate against corporations chartered in other states.

'property' – assets – against unreasonable or discriminatory state laws."[55] The general incorporation acts of the early 19th century gave way to liberal general incorporation acts in the 1880s, beginning with New Jersey. Whereas the old general incorporation acts had not allowed corporations much latitude in their choice of internal structure, the new laws effectively allowed corporations to design their own internal rules for operation. By 1900, corporations truly were the equal of individual citizens at law and, critically important, could be created by groups of individuals without needing to seek the permission of the state. Corporations were finally the creature of private law.

We should not overstress the American case. By the mid-19th century the French and British were also moving to general incorporation. In the French case, general incorporation laws included a much richer set of alternatives from the very beginning.[56] Nor should we overemphasize British exceptionalism. Western Europe in general was primed to move to more open access incorporation for business and other types of corporations.

Finally, it is important in our story not to unduly privilege business corporations. As noted, New York created the first general incorporation act for churches, not businesses. By the end of the 19th century American states in the the "home rule" movement began overhauling the way that county and municipal governments were created and chartered. Home rule was a kind of private/public law, allowing individual communities some say in the structure of their local governments.

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[55]Hurst, *Business Corporation,* p. 65.

[56]See Lamoreaux and Rosenthal, "Legal Regime."

IX. Conclusions

The rule of law based on individual rights and universal citizenship is one of western civilization's contributions to both freedom and economic development. Yet the basis for the rule of law is history is relatively new. Despite the American Revolutionary era's rhetorical emphasis on individual rights, law in the early United States was still associated rights with an individual's place held within the social organization rather than as citizens (see, e.g., Lamoreaux and Ruth 2006).

From as far back as Roman times and continuing through medieval Europe, rights and duties were held by legal persons and not all individuals were legal persons. Moreover, legal personhood included many corporate bodies created by public acts and public law. Corporate groups could exercise private law functions – holding property, owning slaves, incurring damages – but the formation of corporate groups was not a matter of private law. The most important corporate groups made up the church and state.

The rise of claims to papal supremacy, embodied in the 11th century Gregorian reforms and the cause of the investiture crisis, led to a fundamental change in the way corporate structures were defined in the public law. Papal aspirations made it imperative to articulate more clearly the relationship between the head and the body of a corporate entity. Much like modern concerns over ownership and control within business corporations, the central dilemma for the counciliarists was balancing the interests of the organization and the interests of the individual members. The church created a formally defined body of property – the *christus* -- owned in principle by the *congregation fidelium* (the body of the faithful), allowing the head control over the allocation and use of the property, but vesting the right to alienate property in a process of

consultation and consent with representatives of the corporate body. The fusing of economic assets and a political process for deciding managing those assets was a revolutionary change in the structure of human organizations.

The new corporate entity defined rights to use, derive income from, and decide about alienation of corporate assets. The corporate structure spread the decisions and rights across individuals throughout the organization. Moreover, the organization was not defined in terms of the individuals who made up the organization, but in terms of the offices that possessed rights within the organization. The corporation gained a much firmer and more distinct notion of perpetual life. Perpetual life required a diminution of individual claims to corporate assets. The result was the doctrine of two bodies. In one body, the bishop (pope, king, duke, or officer) exercised wide control over corporate assets within broad limits. Those limits were enforced by the consent and consultation portion of the corporate structure, aligning the interests of the leaders and the members of the group. The bishop's other corporeal body, however, was mortal and not privileged to access the common property.

This new corporate structure underlay the growing sophistication of public law organizations in both the church and the state. The structure was scalable: it could apply to popes, bishops, and parish priests or kings, dukes, and sheriffs. The medium of the civil law enured that organizational changes occurred simultaneously in church and state. The new corporate organizations fit quite easily into a legal framework in which rights were exercised by organizations, indeed the new structures were an outgrowth and expression of the underlying principle.

We look back on the debate in secular organizations about the relationship between the head and body as the beginnings of sovereignty and nation states. The vitality of the secular corporations showed in the articulation and consolidation of larger political units. The advantages of the new corporate form as an adjunct of secular power led to the creation of more and more varied publicly chartered privately owned corporations. These new corporations were often directly or indirectly tied to the public fisc, for example the Bank of England, the Dutch and British East Indies company, and famously the South Sea Company.

The proliferation of publicly created private corporations raised political alarms throughout liberal Europe, where public manipulation of private economic interests was regarded as primary source of corruption. In the United States, the possibility of creating a dominant political faction through the granting of economic privilege threatened the democratic experiment in strengthening individual rights. Governments could not plausibly support a wide range of individual rights if the government itself fell under the control of an economic faction (ala Federalist #10). The resulting of fears that private corporations created under public law would corrupt democratic government led the Americans do adopt free entry into the corporate form. Essentially they completed the movement corporate law from public law to private law. The dramatic expansion of support for private organizations released an enormous amount of private economic energy.

The English-British-American path was only one possible way. France and Netherlands moved simultaneously along parallel paths toward more open public support for private organizations, Germany and Switzerland soon followed. This was a European innovation with its roots in a shared history.

The Americans articulated a clear rational for privatizing access to the corporate form: the support of individual rights. Jacksonian Democrats made a strong case that a democratically elected government would only provide strong protection for individual rights if the government served the interest of everyone, not just powerful and well organized interests. The Democrat's solution, supported by their political opponents, the Whigs, was to allow everyone to form a corporation who wanted to. Let anyone who wanted to organize to produce widgets or to lobby the government. If such privileges were open to everyone, they would cease to be privileges. And corporate charters ceased to be privileges, the creation of charters could not be used to bind together political coalitions. Open entry directly enhanced economic and political competition simultaneously. The equivalence of corporate and individual rights that soon followed may not have been inevitable, but the privatization of the corporate form enabled the legal system to define and defend individual rights that had previously been organizational rights. This truly was the corporate origins of individual rights.

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