

# **The Corporate Condition**

Thesis submitted for the degree of  
Doctor of Philosophy  
at the University of Leicester

by

Jeroen Veldman  
School of Management  
University of Leicester

November 2010



## **Abstract**

In this dissertation I aim to establish that the contemporary theory of incorporation rests on incoherent assumptions.

Using a historical approach, I distinguish three different historical discursive formations underlying the contemporary concept of incorporation. On the basis of a comparison of these three historical discursive formations I argue that the contemporary representation of incorporation is a result of the simultaneous use of these three formations, while the last discursive formation has become dominant.

This leads to a description of two problems of justification. The first problem is that in the contemporary theory of incorporation the three historical discursive formations, with their mutually exclusive assumptions, are all maintained in order to retain their practical effects. The second problem is that the assumptions underlying the third discursive formation are dominant, although this discursive formation employs a theory of representation that rejects the fundamental assumptions of the previous discursive formations. Together, these two problems lead to a contemporary theory of incorporation that relates to three historical discursive formations for their effects, but relates incoherently and inconsistently to the historical justifications for these effects.

I will argue that, as a result of this incoherence and inconsistency, the contemporary theory of incorporation introduces a singular reified representation, which leads to a reconceptualization of the basic concept of representation in the legal, economic, social and political systems of representations. Then, I will argue that this reconceptualization strongly favours incorporated reified singular legal representations over the legal, economic and political representation of natural persons. On this basis, I will conclude that the contemporary theory of incorporation leads to legal, economic, social and political theory that is based on fundamentally unequal types of representation with structural unequal attributions of agency, ownership and rights.

## **Acknowledgements**

This dissertation has seen the support of a large number of people. I would like to name some in particular.

I dedicate this dissertation to Elvira and Sophia. You made it all possible.

I want to thank my supervisors, Martin Parker and Ming Lim, for all their help and understanding while writing this dissertation. Special thanks to Martin Parker for his charm, his beauty and his intelligence, but most of all for being Jack Sparrow. Working with you has been a most wonderful gift.

Then, I would like to thank my examiners, Paddy Ireland and Steve Brown.

Friends and colleagues at the School of Management and in the Centre for Philosophy and Political Economy at the University of Leicester all contributed to this dissertation, most of all by providing a very special community of academics. In particular, I would like to thank Francois Bouchetoux, Armin Beverungen, Sverre Spoelstra, Campbell Jones, Ruud Kaulingfreks, George Kokkinidis, Christiana Tsaousi, Matt Allen, Steve Vallance, Simon Lilley and Stephen Dunne.

In addition, I would like to thank my colleagues at the Utrecht School of Governance at the University of Utrecht. In particular, I would like to thank Jeroen Vermeulen, Martijn Koster, Michel van Slobbe, Mick Matthys and Sebastiaan Steenman.

Finally, I would like to thank all my family and friends for their continuing support.

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## Introduction

“The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. (...) soon or late, it is ideas, not vested interests, which are dangerous for good or evil.” (Keynes 1936:383)

Incorporation is the most important type of modern business representation. This dissertation shows that incorporation is based on inconsistent and incoherent assumptions that lead to a particular way of understanding the representation and to the attribution of agency, ownership and amendment rights in particular ways to this representation.

The contemporary theory of incorporation produces a reified singular legal representation. This representation provides a core concept for economic organization. During the 20<sup>th</sup> century the number of corporations in the USA rose from 39 percent in 1949 to 70 percent in 2002, while the number of partnerships dropped from 61 percent in 1949 to 18 percent in 2002 (Guinnane *et al.* 2007:721). This importance of incorporation as a business representation reflects a worldwide trend. About half of the world’s trade takes place between multinational firms and their subsidiaries, receiving 25 percent of world GDP in 1983, 27.5 percent in 1999 (Kobrin in Chandler and Mazlish 2006:220). According to Chandler and Mazlish (2006) twenty-nine corporations figure in the list of the world’s largest economies (Goodwin in Chandler and Mazlish 2006:135), while they hold 90 percent of all

technology and product patents worldwide (Dine 2006:152).<sup>1</sup> It can then be argued that incorporation produces a business representation that dominates the current international business landscape and continues to become more important (Butler 1988).

In the light of this dominant position, it is interesting to note the persistence with which political, economic, legal and corporate governance scholars describe the contemporary theory of incorporation as incoherent, incomplete and unknown. Gamble *et al.* (2000) write: “In the last hundred years the company has become a central institution of the modern capitalist economy, rivalling the market in its importance, but it does not have a single, universal form. (...) There is indeed a great deal of specialist literature on the company, particularly in economics, law, and sociology, but much of this has stayed within quite tight discipline boundaries, and there has been relatively little work which seeks to link together the different insights of these literatures and attempts to understand the company in its full economic, legal and political context.”

Legal scholars arguably provide the theoretical basis for the contemporary understanding of incorporation. However, legal scholarship does not provide a consistent or coherent theory of incorporation either. As early as 1897, the leading American legal scholar Ernst Freund pointed out his concerns with incorporation:

“[...] our law has its accepted theory of corporate existence, while it can hardly be said to have such a theory with regard to the nature of contract, obligation, or incorporeal property.” (Freund 1897:5)

In 1994, the American legal scholar Laufer still writes:

“Liability rules for corporate actors in federal law are nearly a century old and remain in an elementary and unsatisfactory form. (...) the fiction of corporate

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<sup>1</sup> For more extensive lists of figures exemplifying the dominance of the corporate form see Bowman (1996:17, 288-289).

personhood, while received uncritically, exists with a very weak theoretical foundation.” (Laufer:649-650)

The ‘weak theoretical foundation’ of the theory of incorporation then remains a staple on the topic in legal scholarship (Freund 1897; Dewey 1926; Ireland 2003; Laufer 1994; Lederman 2000; Naffine 2003; Wells 2005).

In political science, Bowman (1996:1) writes: “Corporate power persists as one of the great enigmas of political science. A complex phenomenon possessing economic, legal, political, and social significance, corporate power does not lend itself to facile description or to conventional methods of political analysis. Nor are there convenient historical analogies that might offer guidance in disclosing the inner principles of this mysterious force.” As a result “(...) notwithstanding the growing number of studies on the corporation, the theoretical study of corporate power is still in its infancy” (Bowman 1996:27).

No wonder, then, that in the economic sciences Jensen and Meckling (1983:14) argue that “It is embarrassing to admit that, after several hundred years, social scientists have not yet developed a thorough understanding of the advantages and disadvantages of publicly held profit seeking corporations versus other forms of organizations such as cooperatives, non-profit corporations, universities, proprietorships, joint ventures and mutuals.”

The field of corporate governance follows this lack of clarity. Berle and Means produced a seminal book in 1932 that stated that incorporation created a division of ownership and control on the basis of pragmatic, rather than theoretical underpinnings. Bratton and McCahery, in 1999, still argue that comparative governance cannot provide a solid answer, but must provide a hybrid answer, based on multiple types of theory (Bratton and McCahery 1999:5).

On the basis of these statements it can be said that “There is perhaps nothing in U.S. society that is both more pervasive and yet less understood than the business corporation” (Schrader 1993:1). This lack of clarity regarding the core assumptions of the contemporary theory of incorporation contrasts starkly with its perceived

economic importance. This dissertation takes the contrast between the importance of incorporation and the lack of coherence of its theoretical understanding as its point of departure. It will establish that this lack of coherence is the result of the simultaneous acceptance of three historical discursive formations with mutually exclusive underlying assumptions and the dominance of the third historical discursive formation.

This dissertation, then, contributes to the existing body of knowledge on incorporation by identifying three historical discursive formations concerning incorporation, by comparing and contrasting these three historical discursive formations and by determining the effects of the presence of three historical discursive formations on the attribution of agency, ownership and amendment rights. Also, this dissertation contributes by describing the effects of the contemporary theory of incorporation on the representation of individuals and aggregations in the legal, economic, social and political systems of representation.

## **Chapter 1: The Corporate Condition**

The introduction showed that incorporation became ubiquitous in the 20<sup>th</sup> century and fulfilled an important role in legal, economic, political and corporate governance scholarship.

In section One, I will show how my research motivation follows from the inconclusiveness of the concept and its effects. I will show these effects with two examples. Section Two and Three will show how I focused my research and the particular choices I made. Section Four will describe the research questions, while section Five will describe the method used. This method delivers the background for the structure, provided in section Six.

### **1. Research Motivation**

Incorporation as a legal representation first caught my attention when I was watching the documentary ‘The Corporation’ (2005). In this documentary, Joel Bakan explores the corporation as a schizophrenic ‘corporate personality’. He portrays incorporation as creating a reified type of legal representation, which could be understood in many ways as a singular and even personified representation of the corporation itself.

The documentary and its portrayal of the corporation touched on many of the issues I had an interest in. The initial reason for my PhD was my interest in the phenomenology of Merleau-Ponty. Bakan’s documentary presented a singularized and personified legal representation with amendment protections with a kind of agency that was on a par with human beings. Given my interest in phenomenology, I started to ask where this personification comes from, how seriously it should be taken and to what extent these personifications functioned to attribute agency to an organization as a singular or even reified representation.

## ***1.1 Examples***

The special nature of the corporation is most easily shown by considering two recent examples in the form of legal cases against Union Carbide in Bhopal and against Royal Dutch Shell in Nigeria. I will explore these two examples in detail to show the issues that the contemporary concept of incorporation introduces. In the dissertation I will refer to these examples at various points.

### **1.1.1 Union Carbide**

On December 3, 1984, a plant owned by a local subsidiary of Union Carbide in India leaked gas into the surrounding shantytowns, killing thousands of people.

“Shortly after midnight, 27 tonnes of a gas 500 times more deadly than cyanide leaked from Union Carbide’s factory in Bhopal, India. There was no warning, none of the plant's safety systems were working. In the city people were sleeping. They woke in darkness to the sound of screams with the gases burning their eyes, noses and mouths. They began retching and coughing up froth streaked with blood. Whole neighbourhoods fled in panic, some were trampled, others convulsed and fell dead. People lost control of their bowels and bladders as they ran. Within hours thousands of dead bodies lay in the streets.”<sup>2</sup>

An estimated 20,000 people died as a result of their exposure<sup>3</sup>. Union Carbide was charged in 1992 for the accident (‘Union Carbide has committed the offence of culpable homicide’), but refused to submit to the courts of India. They argued that they did not carry responsibility for the operation of the plant since it was in fact under supervision of the Indian state (D’Silva 2006). If this argument was accepted, it would make claims for damages go through Indian courts, which would limit both liability and financial damages for Union Carbide (Jackson and Carter 2000).

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<sup>2</sup> <http://www.sofii.org/node/184>, accessed 3-10-2010

<sup>3</sup> <http://bhopal.org/index.php?id=22>, accessed 17-07-2010

In 2001, Dow Chemical acquired Union Carbide, turning Union Carbide into a 100% subsidiary. After this acquisition, Dow Chemical did not want to take responsibility for the disaster, nor the damage caused or the cleanup of the site. It claimed it was only a shareholder in Carbide, and therefore not responsible for any of its legal liabilities. When confronted by an inhabitant of Bhopal at a shareholder's meeting the CEO replied: "the only criminal charges that we are aware of is the one against the former CEO of Union Carbide, which [sic] has retired many many many years ago. So, we don't know of any other criminal charges."<sup>4</sup> Furthermore, Dow Chemical tried to deny the Indian courts jurisdiction. As a result of these legal moves, the victims not only had to sue for damages, but also had to sue the new owner to clean up the chemical toxins. The resulting lawsuit was protracted for more than twenty years. Establishing responsibility and the use of legal means to deny this responsibility played a large part in the length of the lawsuit. In the meantime, an estimated 120,000 people became ill because of the toxins still lying near the site of the disaster.<sup>5</sup>

What this example shows is that prosecution is thought to apply to the corporation as a singular reified representation. At the same time, the example shows that the representation can be addressed in multiple ways. The resulting protracted evasion of prosecution for an industrial disaster that left 20,000 dead in its wake raises a large number of questions about the legal status of Dow Chemical and Union Carbide as reified legal representations and the transfer of agency and liability from one legal agent 'acquiring' another. It also raises questions about the attribution of legal and economic agency to a representation and its presumed capacity to 'commit culpable homicide'. Furthermore, it raises questions about the jurisdiction of national courts when multinational corporations are concerned. Finally, it raises questions about the status under international law of holding companies, the status of subsidiaries in different jurisdictions and the attribution of agency to reified legal representations within such a holding structure.

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4 <http://www.bhopal.net/caseagainstdow.html>, accessed 17-07-2010

5 <http://bhopal.org/index.php?id=22>, accessed 17-07-2010

These claims and the numbers presented have been contested by a former Dow Chemical research scientist, Themosticles D'Silva. He claims these figures are exaggerated and "the full count of the dead and injured will never be known" (D'Silva 2006:169).

### 1.1.2 Royal Dutch Shell

The following example of *Oguru c.s. vs. Royal Dutch Shell* will show that the evasion of responsibility in the Bhopal case is not incidental to that single case. Rather, this evasion shows itself as germane to the theory that underlies the structure of multinational corporations.

In 2008, Royal Dutch Shell was held liable by Friends of the Earth Netherlands, its sister organisation in Nigeria and four Nigerian plaintiffs for massive damage that oil spills were causing to villages in the Niger Delta of Nigeria. This was a special case, as “(...) It would be the first time that Shell's liability in its home country for pollution overseas would be asserted in a Dutch court. (...)”<sup>6</sup> Friends of the Earth Netherlands argued that this step was necessary, since the accusers could not accuse Shell in Nigeria. In answer to the accusation by Friends of the Earth, Royal Dutch Shell (RDS) categorically denied all responsibility.

In answer<sup>7</sup> to the summons Royal Dutch Shell, with its headquarters in The Hague, Netherlands, states its reasons why it is not responsible for actions undertaken by SPDC (the Nigerian joint venture). It states the existence of multiple identities in a holding structure; it states the idea that Royal Dutch Shell is merely a holding company and therefore merely owns without direct involvement in operations; it states that Royal Dutch Shell is not a direct shareholder, but holds shares through subsidiaries in various jurisdictions; it states that only has a minority interest in SPDC (30 percent) and that in fact the Nigerian government has a majority interest and would therefore be responsible.

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<sup>6</sup> <http://www1.milieudedefensie.nl/english/press-releases/shell-faces-legal-action-in-the-netherlands-over-nigerian-pollution/view?searchterm=shell%20schaik> accessed 17-07-2010

<sup>7</sup> <http://www1.milieudedefensie.nl/english/publications/P090513%20CvA%20Shell%20Ouma%20ENGELS%20-incl.%20incid.%20concl.%20onbevoegdheid.pdf> accessed 17-07-2010

These answers deny a hierarchical or controlling relationship between the different entities in a holding structure; argue that Royal Dutch Shell should be seen as an entity in kind apart from Shell Nigeria; that intermediate companies in the holding structure in some way create more distance between the company holding the shares and the operations of the actual company working on the ground; that ownership through an intermediary would therefore be different from direct ownership; that the location of subsidiaries in various jurisdictions devolves the parent company from assuming legal responsibility as a parent company; that the fact that a company has subsidiaries in different jurisdictions puts it at a distance in legal terms from assuming legal responsibility and that a minority share interest implies a further distancing of responsibility. This motion by lawyers acting on behalf of Royal Dutch Shell shows in detail how the contemporary theory of incorporation is actively employed to argue in particular ways about the attribution of agency, ownership and rights in an international context and thus produces very particular legal and economic effects.

### **1.1.3 Personification**

Establishing the relations between these different types of legal representation becomes even more difficult when it is taken into account that these representations are effectively understood and addressed in multiple ways. The Union Carbide example already showed how ‘it’ operated as an American legal entity in Indian territory, retracted ‘its’ operations from India, how ‘it’ carried responsibility and how ‘it’ was accused of culpable homicide. These are examples of the singularization and personification of the legal representation. The summons against Royal Dutch Shell provides even stronger examples where the legal representation is not only reified in different ways (i.e. holding company, subsidiary and operator), but it is also referred to as a singular person. The summons states that “Shell Nigeria acted” and that “Royal Dutch Shell plc (...) refrained from seeing to it (...) whereas (...) it was capable and obliged to do so” and that in this sense Shell Nigeria and Shell plc are ‘defendants’, while Shell plc is considered as a “bearer of obligations” who “reacted” by “a refusal to accept liability” (Boehler *et al.* 2005:5). Outside its purely legal function, in the description of events “Shell Nigeria inspected the oil spill” and “Shell Nigeria did not bring materials along in order to stop the spill or limit the damage because of the spill, and left again” (Boehler *et al.* 2005:12). The language used here

quite literally depicts the legal representations of Royal Dutch Shell and Shell Nigeria as a personified singular representation. In this sense the representation is ‘obliged to see’, ‘able to inspect’, and it can ‘bring materials’ and ‘leave the scene’. This kind of anthropomorphical language posits the representation to a large extent as a personified reified singular representation, legally comparable to human beings: singular, with an ability to refuse or accept liability and able to bear obligations and with a type of agency that makes them comparable with the legal representation human beings. In both examples the representation is not depicted as a collection of singular individuals with their own agency, but as an anthropomorphical singular reified legal representation.

#### **1.1.4 Results of examples**

The Royal Dutch Shell and Bhopal examples both show that the theory behind incorporation creates multiple problems in terms of the attribution of agency, ownership and rights. In the Royal Dutch Shell example the appearance of multiple implicit types of representation, distributed through several types of jurisdiction produces opacity in the holding structure that is explicitly and actively employed to reject the attribution of responsibility and to reject direct legal relations between the parent and its subsidiary in international holding companies. This introduces questions about the status of ownership and control in terms of ‘owning’ subsidiaries and its relation to the attribution of agency, about the relative legal status of subsidiaries in different jurisdictions, about the conceptual differences between holding companies, subsidiaries and operating companies, about the relation between de facto control and financial ownership and about the attribution of responsibility on the basis of share ownership. The Bhopal and Royal Dutch Shell examples also both show how the legal understanding of incorporation provides a personification, singularization and reification of the representation that informs the legal as well as the economic attribution of agency, responsibility and liability (Wells 2005).

This reification<sup>8</sup> and personification of the legal representation created by the contemporary theory of incorporation apparently leads to the attribution of agency and rights to a reified legal representation, to the status of ‘owner’ over a subsidiary,

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<sup>8</sup> The turning of something abstract into a concrete thing or object.

to a contested transfer of agency when this reified representation is bought by a different company and to the possibility to accuse the company of culpable homicide. The examples both show that reification and personification thus allow for very particular ways of understanding the holding structure and international operations and thereby directly affect the exact ways in which ownership and agency can be attributed to the corporation and within a holding structure (Dine 2000).

## **2. What is incorporation?**

The examples clearly show how reification and personification is present and accepted in the legal and economic sphere. This reification drew my attention when I first encountered the concept of incorporation. I gathered that if the separate legal entity was reified, it would have to stand apart from its constituency. I also gathered that if it was attributable with agency and amendment rights as a reified representation, this separate and reified entity could not be relegated to the domain of ‘fiction’ that easily. Finally, it seemed to me that this reification and personification is rather alien to most theory in the social sciences, including organization theory. This led me to formulate a basic question: ‘What is incorporation?’

To answer this question I started reading contemporary texts from the field of Corporate Social Responsibility. Similar to Bakan's documentary, authors in this field mostly problematized the legal representation as a legal subject with human characteristics (Bakan 2005; Donaldson 1982; Goodpaster 1982; Moore 1962; Nader 1977; Stone 1991). However, trying to establish the ‘morality’ of the corporation or making comparisons between the corporation and other types of group representation (Bovens 1998; Dan-Cohen 1986; French 1984; Werhane 1985) seemed to focus more on establishing analogies and on attacking the corporation as ‘big business’, and less on an exploration of the concept of incorporation itself. This seemed to miss the important point that in legal theory, the reified legal representation was mostly presented not as a ‘personality’ but as a reified legal construct. I therefore decided to move away from this personification and its perceived effects and instead focus on the reification and singularization of the concept in contemporary legal scholarship. I then started to read legal texts that addressed the topic of incorporation and the

construction of a reified singular legal representation that is attributable with agency, ownership and amendment rights.

What I found was that the contemporary concept of representation in legal scholarship used quite a large set of mutually exclusive assumptions in order to arrive at the contemporary attribution of agency, ownership and amendment protections. These assumptions related to an attribution of agency to individuals within the aggregation (vicarious liability), to groups as the basis for the representation (corporate organs, aggregate knowledge) and even to the attribution of agency to the corporation as a reified 'entity' in itself (strict liability, corporate mens rea).

Moreover, the weak theoretical foundation underlying the concept of incorporation in contemporary legal scholarship was coupled to a general and explicit disinterest in the philosophical issues concerning incorporation. This disinterest led to a position in which the singular reified nature of the representation could be simply brushed away in dominant strands of legal and economic scholarship by relegating the representation produced by incorporation to the domain of a 'legal fiction'. Because I had dismissed the personification thesis earlier, I was now presented with a reified singular legal representation, which was attributable with ownership agency and amendment rights in practice and which exhibited clear effects in terms of the attribution of ownership, agency and rights, but which was in theory relegated to the status of a purely 'fictional' legal concept. The contemporary theory of incorporation then presented a multiplicity of theoretical frameworks as the result of a rather haphazard approach that seemed to be guided by legal pragmatism and economic convenience.

This weak theoretical justification for incorporation and its effects contrasted starkly with its conspicuous importance. As Butler stated, the corporation was "the greatest single discovery of modern times, (...) even steam and electricity would be reduced to comparative impotence without it" (Butler 1912 in Handlin and Handlin 1945). The conspicuous importance of incorporation as one of the most central concepts in legal, economic and organization scholarship in combination with the seeming absence of consistent theoretical underpinnings made me wonder whether some of underlying

historical or philosophical consistency could be found and if not, what the effects of this absence of consistency might be.

Next to these academic interests, it seemed to me that the absence of clear theory could have a number of practical effects. If personification was the tip of the iceberg, I was interested what sort of effects a factually reified representation would have for the constitution of legal and economic representations. As a factually reified representation with agency, incorporation produced a particular type of reified representation that would have to relate in some way to human beings and their representation in the legal and economic system of representations. Moreover, I wondered whether a theoretical equality of the representations of human beings and corporations in the legal and economic systems of representations could have a direct influence on their relative understanding in political, social, economic and legal systems of representation.

### ***2.1. Research Questions***

My initial research then identified a gap in the existing theory concerning incorporation. This gap provided the basis for my first research question:

*What is incorporation?*

This question was divided into two subquestions:

Given the theoretical inconsistency of the contemporary concept of incorporation, what historical discursive formations can be identified and how do they inform this theoretical inconsistency?

How does the contemporary idea of incorporation relate to these historical discursive formations?

This gap seemed to connect to practical results. This led me to formulate a second research question:

*What are the consequences of the contemporary theory of incorporation?*

This question led to one subquestion:

How does the existence of multiple historical discursive formations relate to the contemporary theory of incorporation in legal theory, the theory of corporate governance, and political theory?

### **3. Focus**

Given the weak theoretical foundation of the contemporary theory of incorporation, incorporation as a concept started to involve a wide field of research, combining legal scholarship (Freund 1897; Ireland 1999, 2003; Lederman 2000; Laufer 1994), economics (Schrader 1993), organization studies (Zey 1998) and political theory (Maitland 2003; Runciman 2005). Considering that the concept of incorporation as I came to understand it was an international legal, economic, social and political concept, which in its development spanned a long time period, the dissertation had to be constrained and guided by explicit choices.

These choices were made in the form of an approach that started from the perspective of organization studies, a rejection of fundamental differences in the contemporary concept of incorporation between major legal systems and a focus on the history of the concept.

#### ***3.1 Organization studies***

The first focus was provided by organization studies. Three areas of interest could be distinguished from this perspective.

The contemporary theory of (corporate) governance was a first point of departure because it relies to a large extent on the contemporary theory of incorporation. The attribution of agency, ownership and amendment rights to a 'legal fiction' in

combination with reification, singularization and personification arguably produces particular results for a theory of governance. Moreover, both public and economic types of representation would be affected by this type of theory.

Second, as a reified representation of an organization as an aggregation of individuals, the contemporary theory of incorporation presents a unique type of representation in the field of organization studies, because this concept seems to defy methodological individualism, which is generally used as a basis for research in the social sciences (Elster 2007).

Finally, the understanding of one particular type of representation as singular and reified and the attribution of agency, ownership and rights to this representation seems to offer a background to research the effects of particular kinds of group representations in legal, economic, social and political scholarship. This offers a way to compare the understanding of the representation of organizations across multiple systems of representation. Organization studies, then, provides a point of reference by which incorporation as a representation in its economic and legal, as well as its social and political aspects, can be gauged against other types of representation of organization.

For these three reasons, organization studies provides its own interest in establishing the consistency of the contemporary theory of incorporation and provides a specific vantage point to study the contemporary theory of incorporation and the way the assumptions behind the representation in different historical settings produces particular effects. Moreover, an 'outsider's view' from organization studies to the idea of representation allows me to connect the issues relating to incorporation and to point out where assumptions prevalent within and between legal and economic scholarship possibly could relate in inconsistent ways. The development of models underlying claims coming from the contemporary theory of incorporation and their relation to wider assumptions about legal and economic representation in organization studies then allows to gauge the consistency of the contemporary understanding of incorporation, to assess its impact on organization studies and other fields of scholarship and to assess its wider social and political consequences. The first choice

of this dissertation was, therefore, to approach incorporation from the perspective of organization studies, rather than the perspective of legal studies or economics.

### ***3.2 Legal differences***

A second focus was the understanding of the contemporary theory of incorporation as essentially similar between contemporary judicial systems. I acknowledge that different legal systems and historical developments do impose different constraints on the concept of incorporation. A rich scholarly field has developed around these differences, comparing the resultant governance systems and their relative effects (Guinnane *et al.* 2007; Gourevitch and Shinn 2005). However, during the research, I found two relevant arguments to argue that these differences are marginal compared to some underlying similarities.

First, my research found that the contemporary concept of incorporation has developed in a strikingly similar way all over the world in almost exactly the same time-frame (Bowman 1996; Guinnane *et al.* 2007). The contemporary concept of incorporation developed its characterizing features most decisively within a short historical timeframe in the Anglo-American common law context during the 19<sup>th</sup> century and spread from these origins through all other major legal systems. As Bowman (1996:291) argues: “the corporate reconstruction of the world political economy in the late twentieth century (...) appears to be modelled on the corporate transformation of North American society in the early-to-mid-twentieth century.” Although national and regional differences can be found in the precise understanding of incorporation, the major points by which incorporation diverges from other forms of business representation in legal systems worldwide then stayed the same in my analysis.

Second, as I make clear in chapters six and seven, the economic understanding of incorporation, its adoption of ‘markets for corporate control’ and shareholder primacy through a contractual model of the corporation have further spread a uniform understanding of incorporation over the world after the 1970s. These conceptual understandings of incorporation have made it almost impossible to conduct business on an international level without acknowledging and accepting the assumptions

behind the Anglo-American concept of incorporation (see also Guinnane *et al.* 2007:690).

For these two reasons I am confident to understand the contemporary concept of ‘incorporation’ as an internationally accepted concept relating to a specific form of incorporation that can be characterized as the modern western limited liability share corporation, emerging primarily from Anglo-American legal and economic origins in the 19<sup>th</sup> and 20<sup>th</sup> century.

### ***3.3 Historical approach***

A third focus of this dissertation is the presentation of issues within a framework that enables a general understanding of the contemporary theory of incorporation as a result of conflicting claims to historical positions, justifications and referents. These conflicting claims in turn informed the most important consequences and effects of these theories and their relative positions. I will describe this focus on conflicting historical claims and its consequences in more detail in the method.

## **4. Method**

As I described in the introduction, there is a wide recognition in the literature that incorporation rests on inconclusive theory. When I started the dissertation, I traced this inconclusiveness to two reasons. First, the models that I found in 20<sup>th</sup> century legal scholarship seemed to refer to different underlying legal and political justifications for the singularization and personification of the representation, relating both to a medieval conception and to a very particular conception developed during the 19<sup>th</sup> century. These notions seemed to introduce multiple as well as mutually exclusive assumptions about the justification for reification and personification.

Second, while the legal ideas mentioned above were all accepted and developed to a certain extent, only a limited number of these assumptions were consistently defended. The relevancy of reification was largely denied by a dominant strand of thinking in contemporary legal and governance scholarship. The basis for this denial was a very specific reading after the 1970s of the development of incorporation. It therefore seemed plausible that contemporary legal, economic and governance

scholarship had produced a number of inconclusive legal positions on the corporation in which singularization and reification exerted a strong influence on the theory of incorporation, but that it lacked a coherent basis to relate to this reification and singularization.

The contemporary theory of incorporation thus appeared as fragmented and inconclusive, but also as dominated by particular strands of thought. This necessitated a historical description that would allow for the understanding of the simultaneous use of multiple and mutually exclusive types of theory and for a comparison of their assumptions in a relative ordering.<sup>9</sup> Moreover, I needed to approach the formations themselves not as the outcome, nor as the sole producer of the concept of incorporation, since the concept ‘travelled’ through all the formations.

I therefore had to allow in my research for multiple historical ideas and justifications for incorporation as well as for the existence of more dominant and less dominant ideas and justifications underlying the contemporary theory of incorporation. I had to take into account that the contemporary theory of incorporation rested on a historical framework that negated the central assumptions of the previous formations and yet worked with the effects of those previous formations.

#### ***4.1 Archaeological method***

Such an approach was provided by Foucault’s ‘Archaeology of Knowledge’ (Foucault 1969, 2008). An archaeological approach allows for the understanding of more or less consistent historical ‘discursive formations’ that construct different material and theoretical backgrounds for a concept.

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<sup>9</sup> This means that, although this dissertation concerns itself with a theme that is in its contemporary form predominantly viewed as an economic type of representation, it is not an example of economic history. This dissertation does not provide statistical analyses, nor does it provide a detailed account of the effect of economic development in a wider societal context, issues which would concern contemporary economic historians most (Tosh 1996:96).

The archaeological method consists of five concrete tasks:

1. “To show how quite discursive elements may be formed on the basis of general rules (...); to show, between different formations, the *archaeological isomorphisms*.
2. To show to what extent these rules do or do not apply in the same way, are or are not linked in accordance with the same model in different types of discourse (...); to define the *archaeological model* of each formation.
3. To show how entirely different concepts (...) occupy a similar position in the ramification of their system of positivity (...) although their domain of application, their degree of formalization, and above all their historical genesis make them quite alien to one another.
4. To show, on the other hand, how a single notion (possibly designated by a single word) may cover two archaeologically distinct elements (...); to indicate the *archaeological shifts*.
5. Lastly, to show how, from one positivity to another, relations of subordination or complementarity may be established (...): to establish the *archaeological correlations*.”

(Foucault 2008:178-179)

With this method, the discursive formations themselves can first be compared with regard to their internal consistency and with regard to their relative consistency to one another. This allows a mapping of the elements of the contemporary theory of incorporation. Only when these modes are developed fully are they compared against each other and ordered hierarchically (Foucault 2008). Together, these steps deliver the necessary building blocks to produce a rather complete picture of the theoretical field underlying the contemporary theory of incorporation.

As a historical project, my archaeological approach thus takes on board an understanding of establishing historical facts that is best described as an attempt to determine “(...) the features of the discourse to which a particular text belongs, and its relation to other relevant discourses (...)” (Tosh 1996:88). It is then not the aim to provide a total or unifying concept of incorporation (Foucault 2006:407) but rather to provide a description of its fractured nature:

“The horizon of archaeology, therefore, is not *a science, a rationality, a mentality, a culture*; it is a tangle of interpositivities whose limits and points of intersection cannot be fixed in a single operation. Archaeology is a comparative analysis that is not intended to reduce the diversity of discourses, and to outline the unity that must totalize them, but is intended to divide up their diversity into different figures. Archaeological comparison does not have a unifying, but a diversifying effect.” (Foucault 2008:178, emphasis in original)

Through this approach historical texts are not straightforward, but become “(...) subject to divergent, even contradictory, readings” (Tosh 1996:90). The texts and the ‘discourses’ in which they find their justification and legitimation may be “(...) subject to contestation, adaptation and sometimes total rupture” (Tosh 1996:90). Understanding discourse and fragmentation in this way, the existence of multiple discursive formations in the archaeological approach makes it possible to understand the contemporary concept of incorporation as a fragmented and inconclusive concept, drawing on particular forms of historical understanding of this concept, which are based on different sets of basic assumptions. Moreover, this understanding of discourse and fragmentation means that the archaeological method leads to the understanding of a concept within, as well as between, different historical discursive formations.

This does not mean that power and ideology are necessarily the defining elements of the description of a discourse. As Purvis and Hunt make clear, ‘discourse’ is not the same as ‘ideology’. Whereas, ‘ideology’ reflects “(...) the attempt to understand how relations of domination or subordination are reproduced with only minimal resort to direct coercion” (Purvis and Hunt 1993:474) it is discourse that provides “(...) a term with which to grasp the way in which language and other forms of social semiotics not merely convey social experience, but play some major part in constituting social subjects (the subjectivities and their associated identities), their relations, and the field in which they exist” (Purvis and Hunt 1993:474). Discourse is, therefore, not the description of error, illusion or alienated consciousness, but rather the question after truth itself (Purvis and Hunt 1993:488). Although as a method it is aware of the normative underpinnings of any specific discursive formation, although it acknowledges the ideological effects of any specific discursive formation (Purvis and

Hunt 1993:496), and although there is a clear commitment to unravelling domination (Purvis and Hunt 1993:478), discourse is, therefore, neutral or sceptical and exhibits a “perennial hesitation” towards the direct connection of a description of a discursive formation to ‘ideology’ and notions such as interest (Purvis and Hunt 1993:476). This approach therefore treats language and text as having multiple layers of meaning and as fracturing into coexisting discourses, without immediately identifying these discourses as ideological. In this sense, the description of a discursive formation using the archaeological method is always ‘delaying the verdict’.

#### ***4.2 Two levels***

This means that the description of a concept has to take into account two levels for its description. On the first level, the archaeological method enables a description of internally more or less consistent formations (Purvis and Hunt 1993) through the description of concrete, limited and regional discursive practices (Purvis and Hunt 1993:490). On the second level, the discursive formations appear as a result of those practices and the justification for those practices.

Since the representation appears in between these two levels, the reading of the text determines and is determined by a field of discourse, while this field of discourse itself is produced by a particular historical demarcation of the discursive formation. Therefore, it cannot be claimed that the discursive formation ‘causes’ the concept to appear in one way or another. The choice for particular time-periods that provide consistent internal ‘discourses’ about incorporation and its effects are then a result of a description that emerges from a particular set of data as well as reflection of the choice of the researcher for the identification of a ‘discursive formation’ that combines multiple assumptions about the representation in a way that is as coherent as possible. This leads to multiple alternative understandings or discourses that tend to jostle for ascendancy (Tosh 1996:89). This approach is acceptable as a way of writing history, as long as the choices behind it are made explicit (Tosh 1996).

To develop the historical discursive formations I will treat texts as both the producer and the effect of the historical discursive formation, creating and reinforcing them as

well as expressing fundamental assumptions prevalent to such a historical discursive formation. This introduces two different reading strategies for this dissertation.

Relating to the first level, the ideas first and foremost have to be described within the more or less coherent context in which they developed. The description within the formations then remains quite literal and close to the assumptions prevalent within that historical context. On this level, the texts are approached ‘as is’, using them to extract their main assumptions and putting them into a historical framework that combines the positions that share largely similar basic assumptions. For this level, I relate mostly to the description of incorporation in legal and economic texts, initially in the 20<sup>th</sup> century, later also in earlier texts and court cases.

On the second level, the discursive formations allow for a comparison of the way in which incorporation appears as a concept between the formations in which it developed. Comparing the concept as it appears in different historical discursive formation, it appears in different ways that reflect the basic assumptions of those formations and show a difference in the understanding of basic underlying ideas. These differences in the basis of the concept can then be related to central ideas prevalent in that historical discursive formation. This level of analysis mostly involves secondary texts, relating incorporation to larger sets of assumptions in political, legal and economic thinking.

### ***4.3 Discursive formations***

I will start by identifying reification and singularization<sup>10</sup> as key problems in the contemporary concept of incorporation that relate to its historical emergence and dominance. By taking these two themes and grouping texts and cases in contemporary legal and governance discourse on incorporation around them, I will distinguish between three different types of understanding of the representation from the 13<sup>th</sup> century onward, with discursive shifts grouped around 1800 and around 1970.

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<sup>10</sup> I dismissed personification quite quickly as a rather strange aberration of singularization. I will explain this dismissal in more detail in Chapters Three, Four and Eight.

The first historical discursive formation then appears as a result of a general assumption in contemporary legal texts that the foundation of the reification and singularization of the legal representation can be found in its medieval history (Gierke 1968; Kantorowicz 1997; Maitland 2003).

The shift between the first and the second discursive formation lies at the end of the 18<sup>th</sup> century, when the discourse concerning political as well as business representation changed quite radically after the French and American Revolutions with the demise of the sovereign (Bowman 1996; Gierke 1968; Maitland 2003). The major political upheavals of this period led to an explicit shift in the assumptions about group representation (Gierke 1968; Maitland 2003; Runciman 2005). These assumptions will be related to a difference in assumptions about incorporation between Anglo-Saxon and continental European authors (Bowman 1996; Gierke 1968; Maitland 2003). I will describe this difference further at the start of chapter Two.

The third, post-1970s discursive formation is based on a striking change in treatment of the conceptualization of incorporation and the explicit acknowledgement of the advent of a very particular economic discourse into legal theory after the 1970's (Bratton 1989; Ireland 2009; Millon 1993).

The two shifts then produce three different types of thinking about the representation produced by incorporation expressing its justification primarily in political (1<sup>st</sup>), legal (2<sup>nd</sup>) and economic (3<sup>rd</sup>) terms. I argue that these terms introduce such fundamental differences concerning the understanding of the representation produced by incorporation, that they present distinguishable historical discursive formations.

To summarize, to study the logical consistency of the contemporary theory of incorporation, I structure this dissertation around the description of three particular historical modes of understanding incorporation. This historical approach asks for multiple levels of analysis. On the first level of analysis I construct historical models that describe the way in which the representation and its reification come about. On the second level of analysis I compare these historical models by themselves, and compare their positions on reification and representation. On the third level of

analysis I gauge the relative influence of these three positions for the contemporary theory of incorporation. This allows me assess the contemporary theory of incorporation in a way that takes into account the relative position of different types of understanding of reification and representation.

## **5. Structure of the dissertation**

Chapters Two, Three, Four and Five together form the first part of the dissertation, describing the three historical discursive formations underlying the contemporary concept of incorporation. This provides the answer to the first research question.

Chapter Two will give an overview of historical positions on incorporation before 1800, providing the first discursive formation. This discursive formation constructs the representation as a reified political representation, attached to an aggregation of individuals. In chapter Two I will develop how this understanding had particular consequences for the attachment of the representation, for the ownership over this representation and for the political and social aspects that inherently attach to the representation in this discursive formation.

Chapter Three will present a second discursive formation, developing between 1800 and 1970. This formation presents a shift in the nature of the representation from a political concession to an internal legal representation. These two concepts both introduce radically different assumptions about the nature of attachment of the representation, for the ownership over this representation and for the political and social aspects that inherently attach to the representation in this discursive formation. The two contradictory basic assumptions that underpin this *modern universitas* developing in the second discursive formation leads to two mutually exclusive concepts being used at one and the same time. As a result, the representation appears in a continuum of possible positions between these two mutually exclusive basic assumptions.

Chapter Four will further explore how the *modern universitas* developed into several different conceptions of legal representation in the second discursive formation. These conceptions will be described show five different models in which reification can be

understood. The chapter will show how the development of these legal models about representation in turn lead to different models of understanding corporate governance. This chapter, then, provides a clear description of the importance of legal understandings of incorporation; provides a description of their variability until the 1970s on the basis of the two previous discursive formations and provides a description of the effect of this variability for the development of a theory of governance.

Chapters Five, Six and Seven describe the dominance of the third discursive formation and the effects of this dominance in the contemporary theory of incorporation in the legal, economic and political system of representation. This delivers an answer to the second research question.

Chapter Five will continue with the last position presented in chapter Four, the aggregation of individuals' position. I will argue that the aggregation of individuals' position became dominant after the 1970s, providing a third discursive formation. The concept of representation central to the third discursive formation combines methodological individualism, taken from agency theory, with reification and the attribution singular agency, taken from the second discursive formation. This produces a very specific idea of a singular reified representation of organization which is, on the one hand, based on the aggregation of individuals position and, on the other hand, on reification and singularization. I will critically evaluate the theoretical consistency of this dominant concept and its effects for the understanding of representation in legal and economic scholarship.

Chapter Six will then compare the historical discursive formations by looking at the elements of those discursive formations that are being used in the contemporary theory of corporate governance and the way in which those elements relate hierarchically. I assess the influence of this third discursive formation and its operations on earlier discursive formations for a contemporary theory of corporate governance and its use of a particular idea of incorporation for the attribution of agency, ownership, and amendment attributions. The chapter will show that although the third discursive formation denies the assumptions underlying earlier historical discursive formations, it employs particular aspects of earlier discursive formations

and translates these into its own system of assumptions. On this basis, I will argue that the third discursive formation has become dominant and thereby strongly influences contemporary theories of corporate governance.

Chapter Seven will look at different models of the representation of association that have been developed in this thesis and compare them to the perspective that has become dominant during the third discursive formation. This chapter argues that the third discursive formation effects the exclusion of social and political agency from the representation. It compares the third discursive formation with the first formation developed in chapter two to see how the ideal-type assumptions in the third discursive formation equalize state institutions to the same position as commercial institutions. Finally, this chapter will evaluate how and in what capacity the contemporary theory of incorporation relates to the contemporary representation of sovereignty, states and state institutions in theories of (public) governance.

Chapter Eight will wrap up the previous chapters in order to crystallize the problem and answer the research questions. In this chapter I will argue that the contemporary theory of incorporation accepts an incoherent and inconsistent type of theory that has wide-ranging effects in the legal, governance and political spheres. Moreover, I will argue that the third discursive formation contradicts its stated roots in methodological individualism and therefore cannot be evaluated in a consistent way by the social sciences, including organization studies. Finally, I argue that the contemporary theory of incorporation and the emphasis on pragmatism protects vested interests. This provides conclusions and direction for further research.

## Chapter 2: Incorporation as a political representation

In chapter One the contemporary concept of incorporation was introduced as a very specific type of business representation: perpetual, for-profit, privately held, incorporated without a concession, with limited liability and with a capacity for distributing its ownership through shares. In this chapter, I will argue that this particular idea of incorporation and the ways in which it attributes special properties to this representation is a very recent construction that builds upon a long tradition of political and legal reasoning that provided the building blocks for this contemporary idea.

In section One, I will show the development of incorporation between the 13<sup>th</sup> and the end of the 18<sup>th</sup> century as a progression through ideas of political and legal representation. Section Two will provide a description of the *concessionized universitas*, while section Three will expand on this description by describing a general movement between the 13<sup>th</sup> and 18<sup>th</sup> century, which alienated sovereignty as a concept from the body of the king. In section Four I will argue that this alienation provided the background for the development of more juristic concepts of representation, like the corporation sole, in which the person as a referent and the increasingly reified representation vied for primacy. In Section Five I then briefly address the colonizing era, as this is generally seen as the most central period for the development of incorporation for economic representation. I will argue that the nature of incorporation in this era did not provide much change to the concept as it stood, since the reason for incorporation of the colonizing corporations was still the furthering of a public good. For this reason, the nature of incorporation did not fundamentally change before the advent of the 19<sup>th</sup> century. Finally, Section Six addresses the trust as an alternative English form to the concept of incorporation. I will describe some of the main aspects of the trust and the way in which it introduced an understanding of representation that would have major consequences for the understanding of incorporation, its representation, its ownership and its internal division in later discursive formations.

The history of incorporation until 1800 will thus produce a first discursive formation with regards to incorporation, which connects the history of incorporation directly to the history of sovereignty between the 13<sup>th</sup> century and the end of the 18<sup>th</sup> century. This discursive formation constructs the representation as a reified political representation, attached to an aggregation of individuals. This understanding has particular consequences for the attachment of the representation, for the ownership over this representation and for the political and social aspects that inherently attach to the representation in this discursive formation. As a whole, then, this chapter provides an overview of the first discursive formation.

## **1. Incorporation as a historical concept**

There is a large body of literature on the history of incorporation. Within this body of literature, various crosscuts are made. One marked difference can be discerned between scholars approaching the subject from a ‘European’ or from an ‘American’ perspective (Bowman 1996:36; Roy 1999). American scholars tend to assume a rather clear ascendancy of incorporation as a concept, created through American legal and economic developments, beginning with the founding of America. This has the effect that these scholars take as their starting point the situation found at that moment in time, i.e. a situation that starts with a legal landscape dominated by common law developed in Britain (Truitt 2006), a political landscape without a sovereign, a business landscape that recognizes joint-stock companies as the primary type of business representation (Horwitz 1985) and a historical landscape that understands incorporation as both a political and a legal instrument.

By contrast, scholars who look from a more ‘European’ perspective to the history of incorporation focus on a longer perspective, starting either with Roman (Duff 1971; Hallis 1978) or with medieval ideas about incorporation (Gierke 1968; Maitland 2003). Incorporation is sometimes traced to Roman origins<sup>11</sup> and is generally thought to have been around far before its use for business representation:

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<sup>11</sup> The idea of a legal representation for a group had already been conceived by the Romans. However, their idea of the legal *persona* created a far less tangible representation “(...) *persona* acquired the meaning of concrete individuality, a meaning which it did not have for the lawyer of Rome.” (Hallis1978: xx) Handlin argues that there is no direct link between Roman and modern business forms

“(…) [business corporations] are not a spontaneous product, but are rather the result of a gradual development of earlier institutions, running back farther than can be traced. (…) the law relating to them dates back farther than almost any other branch of the law (…)” (Williston 1888:113)

The oldest use of incorporation in Europe was for villages and towns (Savigny in Williston 1888:106) developing further into a representation of abbeys, universities, guilds and for colonial corporations (Gierke 1968; Williston 1888). This leads to the view that incorporation is reserved for public institutions and goals: “The general intent and end of all civil incorporations is for better government, either general or special” (Anonymous, “The Law of Corporations”, 1702, quoted in Williston 1888:110).

Since most legal scholars position the roots of incorporation in the 13<sup>th</sup> century concept of the *concessionized universitas* (Hallis 1978), I will start developing a first discursive formation on the basis of such a ‘European’ approach to incorporation. To this end I will explore some of the developments in the concept by looking at the history of incorporation and sovereignty between the 13<sup>th</sup> and 19<sup>th</sup> centuries. The first discursive formation then starts in a context in which incorporation is a political representation, created by a sovereign and in which the representation is a result of sovereign decisions.

## ***2. Concessionized universitas***

The *universitas* was derived from a *body corporate* or *caput*, which was introduced by Pope Innocent IV, who became pope in 1243. He devised the body corporate as a concession that granted public organizations a separate representation that would remain after its caretakers died to guarantee the perpetuity of their vital services. This allowed public institutions, like villages, towns, monasteries, abbeys, churches, hospitals, universities and orphanages (Gierke 1968, Williston 1888) to deal with issues of debt, possessions and financial obligations in a way that would make the

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(Handlin & Handlin 1945). The Roman concept is better compared with the emergent group entity concept that I will address in chapter 4. The concessionized *universitas* introduced by Pope Innocent IV will therefore be the starting point of this discussion.

execution of their task independent of their particular caretakers and would provide a means of transmitting traditions and wealth to future generations (Micklethwait & Wooldridge 2005:4-22).

### ***2.1 Political and economic threat***

Although convenient in terms of maintaining a public function or institution, the *concessionized universitas* also presented a double threat to the sovereign. The first threat was related to its economic position. The perpetuity of the *concessionized universitas* gave the representation the possibility to amass wealth and assets without reserve or time-limit. By not dying and never marrying, these ‘bodies corporate’ could circumvent feudal fees for inheritance and the costs for the renewal of commitments (Maitland 2003:53). The creation of a separate representation that would hold funds perpetually for a body corporate therefore worried the crown to no small end (Micklethwait & Wooldridge 2005:4). For this reason, the Statute of Mortmain of 1279 limited the amount of land that could be passed to corporate bodies in England (Micklethwait & Wooldridge 2005:23).

The second threat was that the *concessionized universitas* potentially created not only an executor of public functions, but also a public political body. It was therefore imperative that the sovereign could be sure that what was created between the State and the individual “has but a derivative and precarious existence” (Maitland 2003:66). This was achieved by tying the *universitas* to the *societas* and by keeping the concession a political grant.

### ***2.2 Societas***

The basic medieval form of understanding the representation of association in Europe was the *societas*: “an association of individuals each of whom conditions his actions to accord with the terms of a joint agreement” (Runciman 2005:13). The *societas* as an association in the form of contract avoided the question of identity in associations. Any form of common purpose was expressed in an explicit, bounded and legally valid contractual purpose between clearly defined parties. This form of representation was intensely individualistic and did not constitute anything like a representation of a group: “(...) there is no ‘jointness’ (Gesammthandschaft) in them” (Maitland in Gierke 1968:xxx). The assets were owned by its members and subject to the terms of

the contract that bound them. The issue of ownership, agency and in some cases liability would clearly reside with the individuals within that association (Scruton and Finnis 1989:242). Since the *societas* had no external representation to grant it perpetuity, the death or the will of a single member could dissolve the *societas*. In the end, the *societas* was nothing but the documents in which it was written (Runciman in Maitland 2003:xxiii). It was, then, essentially a contractual kind of association and appeared under the law of contract as a partnership.

The *universitas* was granted by a sovereign to the *societas*. By relating to the *societas* as a distinctly individualistic referent, the charter of the *concessionized universitas* would be delegated, not transferred, to the aggregate<sup>12</sup> group that was incorporated by the sovereign. The *concessionized universitas*<sup>13</sup> therefore did not create a direct representation of the aggregation as such. Therefore, the representation of those individuals would not provide a representation in itself even though the *universitas* provided “an association of individuals considered collectively to form a single entity itself capable of action” (Runciman 2005:14).

Since the *universitas* was no more than a political representation or concession, the *universitas* was in no sense a social representation. The group as a representation could then not be excommunicated, only the individuals within it (Coffee 1981; Dewey 1926:665). Therefore, only the individuals that made up the aggregation could be held responsible for the actions of the aggregation in the theological, the political as well as the legal sphere. This led to the Innocentian dictum ‘*Societas delinquere non potest*’ (The *societas* cannot commit a crime - JV) (Law Reform Commission (Ireland) 2005:103).

The *societas* and the *universitas* were therefore comparable forms of representation of association. Both were based upon an arrangement in which the group’s members

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<sup>12</sup> The terms ‘aggregation’, ‘aggregate group’ and ‘aggregation of individuals’ are used in this dissertation to denote a collection of singular individuals, without the direct attachment of a legal or political representation.

<sup>13</sup> The addition of *concessionized* serves to distinguish between a generalized use of the *universitas* in wider scholarship and the specifics of the medieval concept of the *universitas*, which is tied to an incorporator (either queen, king or sovereign) who grants a concession.

came before the group (Runciman 2005:37). The representation in itself then had no reified status in the theological, legal or political system of representation at the beginning of the first discursive formation. For these reasons, Pope Innocent IV never thought of the incorporated group as something apart from the individuals composing that group (Dewey 1926).

### ***2.3 Political concession***

The *concessionized universitas*, then, provided a perpetual representation of a public institution that adhered to the *societas* as a distinctly political concession, while the factual ‘ownership’ of the corporation remained with the sovereign.

Since the grant of a *concessionized universitas* was a mercy, bestowed by the crown and because it was held in anxious regard for its political and economic consequences, the use of incorporation was strictly limited to public institutions, while the reach of their activities was tied to closely described public goals: “The general intent and end of all civil incorporations is for better government, either general or special” (Anonymous, “The Law of Corporations”, 1702, quoted in Williston 1888:110). The concession further limited the corporation by the fact that it could only operate under the jurisdiction and under the political mandate of the sovereign for which it was incorporated.

The concession was never understood to grant lasting rights (Micklethwait & Wooldridge 2005:50) and charters were actively revoked if incorporated entities were deemed not to be acting under the conditions or towards the goals of their charter (Micklethwait & Wooldridge 2005:52). Until the middle of the 19<sup>th</sup> century this political prerogative remained very clear in Britain:

“The larger the corporation and the more consequential the effects of its activities, the more likely was the State to interfere in its business at one point or another. Incorporation itself was not considered a protectable property right. The State could, at will, withhold an incorporation franchise which, in many cases, was of limited duration.” (Harris in Nace 2003:102-103)

The granting of a charter under the *concessionized universitas* was, then, fully dependent on political will, did not provide a reified representation in the political sphere and restricted the corporation in time, place, public nature and operational scope.

### ***3. Concessionized universitas and sovereignty***

As argued above, most legal authors take the *concessionized universitas* as the root of thinking on modern incorporation. However, the modern version of incorporation differs in the use of a reified and sometimes personified legal entity, the separation of that entity from the constituent groups or individuals, the lack of a conditional political concession and the use of the concept for economic purposes. These changes are based on a long history of piecemeal changes to incorporation from the 13<sup>th</sup> century onwards. In turn, these piecemeal changes are based on piecemeal changes to the concept of sovereignty. Kantorowicz (1997) describes these changes as a ‘medieval political theology’ in which the actual, material body of the king (the body natural) is separated from the King as a concept (the body politic) through theological reasoning. This history directly relates to the concept of incorporation by the way it influences the granting and holding of the concession, the political position of the incorporator and the relative position of the constituent groups within the corporation. I will describe this historical shift in three episodes. The first episode represents the extension of the natural body of the king, the second represents the fusion of the natural body with those extensions and the third episode represents the extensions coming into their own to represent a separate Body for the King.

#### ***3.1 Extension of the body natural***

In the first period a split is made between the body natural and the body political of the king. In this period, the body natural is still primary. The expansion of the body natural is understood not in a metaphorical way, but as a quite literal expansion: “So that the Body natural, by this conjunction of the Body politic to it (which Body politic contains office, Government and Majesty royal) is magnified, and by the said Consolidation hath in it the Body politic” (Plowden 1816:213, in Kantorowicz 1997:9).

To solve the problem of which of these bodies, the body natural or the body politic, would hold the rights to a plot of land, judges in the Elizabethan age ruled that the King's body politic was an angelic body, as a likeness of the holy sprites and angels, immutable within time. This provides a “foothold on firm celestial ground” from which a form “mysticism” (Kantorowicz 1997:9) could emerge with regard to representation. The difference between the body natural and the body politic thus caused a conceptual split between these two bodies.

In this first period the body natural of the king is still superior to the body politic, but the body politic starts to acquire physiological attachments that make it “more ample and large” than the body natural alone (Kantorowicz 1997:9). In the body politic “there dwell (...) certain truly mysterious forces which reduce, or even remove the imperfections of the fragile human nature” (Kantorowicz 1997:9).

Maintaining the fusion of the body politic and the body natural was precarious, providing an uneasy balancing act between the body natural and its mystical qualities. Elizabethan jurists sometimes had to proceed with the caution and circumspection of theologians defining a dogma to remain consistent when one had to defend at once the perfect union of these Two Bodies as well as the very distinct capacities of each body alone (Kantorowicz 1997:12).

### ***3.2 Fusion and inversion***

The infusion of the body natural with mystical qualities soon became the hinge for a wider application of the body politic. Death was understood to kill the Body Natural, but not the Body Politic, so that the body of the king as King became immortal and would migrate without being touched by the death of the king. It was the Body politic that became the ‘eternal essence’ or ‘godhead’ of the monarch (Kantorowicz 1997:14). In this “physiological fiction” the king could never die, could never be under age and was not only exempted from doing wrong, but also from thinking wrong; he was invisible, had legal ubiquity and in general attained the state of a superhuman.

From here, it was a small step to the complete separation of the body natural and the body political. The body political, now with mystical overtones, stood apart from the physical body of the king. This made it possible to distinguish between the private person and the public person of the king. The public person of the king came to be seen as an expression of the metonymic corporeal state, and at the same time separated from the body of the state itself: the king became either head, soul or heart of the body itself (Maitland 2003:49). This split harboured the possibility that sovereignty itself could be completely separated from the body of the monarch. To stress the superiority of the body natural and to keep the mystical nature of the body politic firmly within reach of the king's body, the soul or will would have to be coupled to the king's body, rather than to his office.

At the same time, the church as an institution made a slow shift from the Church as *Corpus Christi* (the Church as an association of believers) to the *corpus mysticum* (the representation of the church as opposed to the real suffering body of Christ) (Kantorowicz 1997:195). Similar to the division that was effected by the separation of the King's Two Bodies, this theological shift effected a real separation between the body of the sacrament and the body of Christ of which he was the head (Gregory of Bergamo in Kantorowicz 1997:198). Both bodies, the aggregate as well as the reified version, were now united in the Sacrament (Kantorowicz 1997:198). It is this rich idea of the 'corpus mysticum' from the theological sphere that was used by jurists to connect sovereignty to the Body Politic. The expressions 'body politic' and 'mystical body' started to be used alternatively without great discrimination.

Through these developments, the emblems and depictions of the kings became more important than the actual body natural in processions (Kantorowicz 1997:74). By reapplying these developments to the king's body politic, which already betrayed so much resemblance to the 'holy sprites and angels', the body natural could now be left behind while its location and value as an idea was retained (Kantorowicz 1997:84). The understanding of the two natures in one person came to attach more to the representation of those natures than to the substantive body of the king. Having a dual status through his two bodies, one French bishop could observe strict celibacy as a bishop, while being dutifully married as a baron (Kantorowicz 1997:43). This reasoning prioritized the idea of the office rather than the natural body behind it: "the

pope is like Peter by his office ... he is not like Peter by his merits” (Kantorowicz 1997:58).

Through these moves, the representation drifted more towards a dual personality, in which the office, granted from above and invested with divine but time-limited Grace, rather than the person itself became constitutive of sacrality. The separation between the physical body and the office was completed by Aquinas, who connected the corpus mysticum as well as the corpus verum to the Eucharistic bread. The corpus verum became, through the sacrament, ever more mystical, whereas the corpus mysticum “came to be less and less mystical as time passed on, and came to mean simply the Church as a body politic or, by transference, any body politic of the secular world” (Kantorowicz 1997:206). This produced a corpus mysticum which was invested with so many practical meanings that it started to lose its sacredness. The mysterious materiality of the corpus mysticum had been abandoned, but the anthropomorphical and organological metaphors still served as the model for social and corporational functions: “it served with head and limbs, as the prototype of a supra-individual collective” (Kantorowicz 1997:201) The corpus mysticum of the king could thus be retained as a representation of the King, filled to the brim with anthropomorphical, organological and theological associations.

### ***3.3 Lady Iustitia takes over***

Through the distancing of sovereignty from the actual body of the king and the construction of a concept of sovereignty with combined legal and theological justifications, the king had become a ‘*deus in terris*’ (God on earth) (Kantorowicz 1997:92). This concept of sovereignty became almost impossible to disentangle from its political and theological associations. This increasingly decentred the physical body of the king. The physical *king* became less important than the *King* as a representation of sovereignty. Kingship had become the result of the separated sovereignty attached to the physical body of the king, rather than the other way around. This displacement meant that the king was now the animate king, the inanimate law and mediator all in one, although he had become so by different historical, theological and legal associations (Kantorowicz 1997:134). The ‘*deus in*

*terris*’ idea also meant that the abstract Virtues, Laws and Concepts were now located in the breast of the emperor.

The multiplicity of theoretical frameworks was acutely felt by legal scholars of the time. The idea of the dual personality of the king increasingly moved away from the body of the king and onto the office. The separate representation of sovereignty, together with the theological associations with the *corpus mysticum* as a representation of the body of Christ or the body of the Church had increasingly personified the separate representation, with the duality now resting in the office itself (Kantorowicz 1997:96). Through the *Corpus Christi* and the corporation of Christ, it could be changed into a “mystical *person*” as a juristic abstraction. The liturgical idiom of the mystical person was increasingly replaced by the juristic idiom of the fictitious person, “the *persona repraesentata* or *ficta*, which the jurists had introduced into legal thought and which will be found at the bottom of so much of the political theorizing during the later middle ages” (Kantorowicz 1997:202). As a result, the Prince became the living image of Justice, the personification of an Idea, which also was both divine and human, but represented a legal, rather than a theological supreme nature. Instead of having a heavenly super-body bestowed upon him by divine grace, the king could now be depicted as the exemplar of Justice: “(...) with Iustitia as the model deity and the Prince as both her incarnation and her Pontifex maximus” (Kantorowicz 1997:143). Lady Iustitia in her guise as Law and Reason now dictated the king, rather than the king being above the Law: “Not the Prince rules, but Justice rules through or in a Prince who is the instrument of Justice (...)” (Kantorowicz 1997:96). In this move, the religious overtones were kept intact, but replaced by Justice, the “goddess of the *religio iuris*” (Kantorowicz 1997:141), deified as a “Virtue in and of itself, a Universal or an Idea, a Goddess, perpetual and immortal with jurists as Her worshippers and priests and jurisprudence as the consecration” (Kantorowicz 1997:139-140).

Medieval history thus brought a shift from the king to the State and from theological to juristic reasoning, resulting in multiple identifications of constituent parts and an increased identification of office as the locus for the separate bundle of rights and duties. This provided the means for a variety of identifications of these constituent parts and for these parts to acquire a separate representation.

Although the king had become a '*deus in terris*' (God on earth) (Kantorowicz 1997:92) through these theological and legal associations the physical *king* became less important than the *King* as a representation of sovereignty. Although the king was still the fountain of Justice and Protection, his acts were no longer exercised by his own person, but by his Courts and his Ministers. Nor did they depend upon his pleasure. The declaration of the Lords and Commons in England of May 27, 1642 explicitly 'froze out' the body natural, while retaining the body politic: "Though the King in his own Person should forbid them (...) yet are they the King's judgments" (MacIlwain in Kantorowicz 1997:21). The king, who formerly held sovereignty in his body, had turned into a tool, a mere instrumental body of the state.

The separation of the representation and the referent led to a situation in which the physical king did not have possession over his sovereignty anymore. In 1649, this led to a charge of high treason by the *king* against the *King* (Kantorowicz 1997:39).

#### **4. Corporation Sole**

These theological and legal shifts in the understanding of representation led to a separation of the representation and the referent in political, theological and legal thinking. This led to new ideas of incorporation, in particular the corporation sole.

The corporation sole developed as a type of incorporation that adhered to a single person. The schism of churches in the first half of the sixteenth century (Runciman 2005:98) prompted a long legal battle in which four options were considered to establish where ownership should rest: in the church building, in the group of believers in a parish, in the person of the parson or in the office of the parson. In the end, it was the office of the parson that was deemed the most obvious choice (Runciman in Maitland 2003:xiv). Through this decision a new type of incorporation was developed, the corporation sole.

The corporation sole provided an idea of the 'office' that could be applied to parsons, bishops and deans, as well as a public function, dignity or office held by one man, like a Secretary of State or a Treasurer. As an office, the representation could also

comprise multiple persons (boards, state institutions) and could form institutions that became in turn understood as a metaphorical juridical ‘person’ (‘the most holy fisc’ – turning the Treasury into a reified representation). The corporation sole thus enabled the use of a reified legal representation for individuals, offices, objects and purposes as well as aggregations such as groups, offices, institutions and functions in the same capacity.

This multiplicity of referents proved extremely useful to deal with the increasing objectification of sovereignty through the separation of the two bodies. The corporation sole allowed a distinction between the sovereign representing a group (the commonwealth), an office that could be detached and transported to other dominions (the Crown), an office (the King) as well as a proper man or woman of flesh and blood (the king or queen).

The representation thus came to adhere to the singular person as it did to an aggregation of individuals before. The corporation sole came to represent the office as a ‘group of one’, in which the legal representation came to stand for both the natural person and the representation in the office, united in a third body, the corporation sole. This was a marked difference from the *concessionized universitas*, which had as its hallmark the inherent adherence to a *societas* as an aggregate group and the possibility of the members of that group to transact with the representation (Runciman in Maitland 2003:xv). These differences had two effects.

First, the corporation sole created a legal representation that started to relate on multiple levels. An abbot could be the recipient of two forms of incorporation, both in the form of the *concessionized universitas* for the abbey and in the form of the corporation sole for the abbot. The church could be a building owned by a parson, who had his office incorporated in a corporation sole, while he served the Church as an institution. This created possibilities to mix and match expressions of representation to develop various intermediate positions on ownership and sovereignty (Maitland 2003:18), making it unclear to which constituent part the representation adhered to.

Second, the corporation sole could not easily deal with the perpetuity granted by incorporation. In the case of the *concessionized universitas*, the representation continued to adhere to a group if one of the members died. However, the corporation sole adhered to a single person and could go into abeyance. The representation could thus become detached from its only member when the office was transferred or when the office holder died.

The lack of a direct referent, then, put the distinction between the office and the office holder to the test. Because of the problems with transferral and the use of multiple referents, singular as well as aggregated, the corporation sole increasingly came to adhere to the conceptual expression of the representation, i.e. the office, rather than to the person. This introduced a conceptual separation between the actual person and his office in which the office created the subject of the duty, rather than that subject instating the office: “It prejudices us in favour of the Fiction Theory. We suppose that we personify offices” (Maitland 2003:10).

This was problematic in the case of sovereignty. Sovereignty itself could hardly go into abeyance. This would mean a full separation of sovereignty as a concept, which could drive the final wedge between the physical person of the king and the office of the King. As Maitland argued: “Many things may be doubtful if we try to make two persons of one man, or to provide a person with two bodies” (Maitland 2003:36).

Only by focusing on the will of the sovereign, could the sovereign as a person not be taken out of the equation. A separation therefore had to be kept in place between that which was capable of will and that which was not (Gierke 1968:70). The office thereby became separable, while still retaining the connection to a specific person. The representation thereby became singularized, even though its referents could be the office itself, the natural person or different types of aggregations.

The subsequent confusion with regards to the representation and its referents prompted Kantorowicz to refer to the corporation sole as “That kind of man-made irreality – indeed, that strange construction of a human mind which finally becomes slave to its own fictions – we are normally more ready to find in the religious sphere than in the allegedly sober and realistic realms of law (...)” (Kantorowicz 1997:5).

Maitland dubbed the corporation sole “anomalous” (Runciman in Maitland 2003:xii) and marvelled at the “incompetence” (Maitland 2003:28) of the corporation sole in terms of rigorous legal thinking. According to him “(...) the ecclesiastical corporation sole is no ‘juristic person’; he or it is either natural man or juristic abortion” (Maitland 2003:30). Since it is unclear what object or form it has, he described the corporation sole as “a queer creature that is always turning out to be a mere mortal man just when we have need of an immortal person” (Maitland 2003:57).

However, because offices, institutions, colonies, the Treasurer of Public Charities, Secretary of State, Solicitor to the Treasury, The Board of Trade and the Board of Agriculture (Maitland 2003:47) had all been turned into a type of representation that was increasingly understood through the assumptions underlying the corporation sole, the conceptual difficulties with the corporation sole were offset with their role in maintaining an uneasy political and legal status quo.

## **5. Colonies and concessions**

This political and legal status quo led to further developments. Incorporation was extended to trading corporations for their public function in the project of colonization. Since incorporation also extended to colonial incorporation as a kind of municipal incorporation the trading companies increasingly came to fulfil a public role by acquiring, defending, administrating and policing these colonies.

Incorporation for the Dutch and British East India Companies was initially a result of their public nature, rather than their economic importance. Their task was the managing and ordering of overseas trade, which put them in the position of a guild. The guild system made use of a type of incorporation, which was meant to ensure quality control, standards, due regulation of domestic and foreign trade, education and generally the inclusion of particular trades in the wider good of the community (Williston 1888). The greatest advantage these guilds offered was the fact that within the domain of their trade, they had a derived form of sovereignty: “So far as that trade was concerned the right of government belonged to the guild.” (Williston 1888:108) Under Roman law, these corporations needed to be formed and dissolved by the sovereign. While they could incur obligations, they were dissolved by the will or by

the death of a single member (Williston 1888:111). This type of incorporation for the guilds was therefore not regarded as a convenient type of business organization, but rather as the provision of a public function.

This public function was what drove incorporation for the East India Companies as well. The Merchant Adventurers were guilds who started to pool resources and capital, building wharfs, convoys, and overseas embassies (Nace 2003:32). The commercial element of the trips provided a high risk, high-yield basis. A device was therefore needed to attract investors and protect them from the high risks that those long and dangerous voyages overseas brought and the risk that the company would go bankrupt (Micklethwait & Wooldridge 2005:26). Whereas most trips would be unsuccessful, the occasional success, be it through trade or through plunder, could make the investor a fortune. Given the steep risk-reward curve, these early ventures were much like “a venture capital fund that finances high-risk opportunities with potentially high returns” (Nace 2003:32). The early corporations as ‘bodies corporate’ were allowed to issue tradable shares with limited liability (Micklethwait & Wooldridge 2005:5). This provided a steady flow of capital opening the possibility to expand its operations into far more general ventures with a longer time horizon. The pooling of capital with limited liability thus allowed for multiple rolls of the dice.

The very first commercial venture to acquire incorporation was based in The Netherlands. In 1602, the Dutch VOC (Vereenigde Oostindische Compagnie) acquired a monopoly on trade to the Indies. Under the charter of this monopoly, all voyages were part of a 21-year venture with limited liability, which was typically the time needed to fund and operate a fleet for one round trip to the East. The charter would be valid for and terminated after each trip. This meant that costs and benefits were treated on a ‘project’ basis. This created a narrow basis for the scope of the ‘projects’ that the company could take on. Risks, costs and gains from these high-risk operations would be shared by the contributors. After the trip, the balance was made up and the surplus divided between the contributors (Bowman 1996). Although limited liability is often described as a hallmark of incorporation (Dine 2006) and it is clearly an important aspect of its contemporary attractiveness, limited liability itself was not a necessary or intrinsic aspect of incorporation at this time. It was a feature that existed in conjunction with incorporation, but not necessarily in connection to it.

Only in the late 19<sup>th</sup> century would limited liability become a generally accepted feature of incorporation (Handlin & Handlin 1945).

### ***5.1 Colonialism***

The scope of corporate charters was expanded and limited liability was granted to corporations through their involvement in the colonialism (Neocleous 2003; Truitt 2006:5). The colonization project brought massive costs and economic risks, which could not be covered by states alone. Involving the Companies in this project meant that the high costs that were involved with the founding, running and expansion of colonies would be privatized, while the high risks could be offset by economic and political support by the state. Increasingly, the Companies acquired and defended the colonies by military means and started to administer, police, adjudicate and levy taxes within them (Neocleous 2003). The Companies therefore acted as if they were holding a derived form of sovereignty (Micklethwait & Wooldridge 2005:60), extending their public charter not only to economic enterprise, but also to political involvement. The East India Company commanded an army of 250,000 men, twice the size of the British Army (Nace 2003:35). With the fortification of Bombay the East India Company “began to assume the military, administrative and fiscal character of a kind of state” (Maitland 2003:4). Only after 1784 did the government of British India come under the jurisdiction of a British government department (Maitland 2003:4). This provided the basis for wider collusion between companies and states (Neocleous 2003), turning the expansion and upkeep of colonies into a privatized enterprise (Micklethwait & Wooldridge 2005:26). The Virginia Company used its colonial workforce to gain a foothold in its new colonies, but also to keep rebellion in England in check by exporting its subversive elements to a place that was openly called a “prison without walls” (Nace 2003:43)

To reflect the importance of these public functions and to make sure that the Companies would continue to provide their vital services for the state charters were enlarged in scope and granted for longer periods of time (Williston 1888; Neocleous 2003). Granting an indefinite charter and limited liability therefore benefited the state by supporting the colonization project, the Companies by the grant of a perpetuity to an essentially economic enterprise and investors by the grant of a perpetuity. In many

cases, these interests would intermingle, as exemplified by the fact that a third of the English Parliament held stock in the East India Company and it netted ten percent of the government's revenues through taxes on its tea, while the King extracted periodic 'loans' from the company (Nace 2003:35).

Through this collusion between states and Companies (Parker 2009), the concept of incorporation could still be understood as a *concessionized universitas*, but shed the explicit notion that incorporation was not to be given to economic enterprises. However, charters were still considered a special prerogative and the grant of such charters was still very restricted (Bowman 1996:38).

## **6. Trust**

The history of the trust goes back as far as the 12<sup>th</sup> century (Maitland 2003:84). The trust developed as another English construction that dealt with the issue of ownership and in time with the legal representation of groups. The trust in time came to be conceived as a way to divide the handling and the ownership of assets between trustees and beneficiaries, in which the ownership would belong to neither. The trust thus imported the deed as the point of reification to which two constituent groups related. Trustees would have ownership in strict law, while ownership 'in equity' would lie with the beneficiaries. As a result, trustees would not be attributable with strict agency, but would only execute agency in their very specific capacity as 'trustees' for the beneficiaries: "Trustees do not have their actions ascribed to whatever it is they are to benefit (...); they merely act on the beneficiary's behalf (...)." (Runciman 2005:67) Since the constituency of the trust consists of two groups and its goals or charter did not directly relate back to a particular person or set of persons (Maitland 2003), the position of these groups is constructed in a direct relation to the representation itself. In other words, both 'ownership' and 'agency' within the trust became not the result of 'owning' that representation, but of a claim to a relative position with regards to the representation. The concept of 'ownership' related only to the trust as a representation in itself.

### ***6.1 An unincorporated representation***

The shift of ownership towards the trust itself meant that the trust provided “a legal existence for groups whose individual members remained completely unknown” (Runciman 2005:67). This was different from the partnership, where members were named. Moreover, the accepted charitable purpose of the trust made them acceptable to function as a crowbar for the law against perpetuities. (Maitland 2003). Although the trust itself was technically not incorporated, their charitable purpose led to a situation in which they were treated in practice as legal devices that could act with perpetuity.

The trust thus provided a way of legal recognition for group representation without naming its individual members and without making use of the *concessionized universitas*. As mentioned above, one of the perceived drawbacks of the *concessionized universitas* was that it came with a sovereign concession and therefore with political control. The trust pragmatically circumvented these perceived drawbacks of the *concessionized universitas* by creating legally recognized associated groups without actually incorporating them and thus provided a way to ensure enduring identity for an associated group of people without the burden of a concession: “(...) the device of building a wall of trustees enabled us [the British – JV] to construct bodies which were not technically corporations and which would yet be sufficiently protected from the assaults of individualistic theory” (Maitland 2003:70). This made the trust as a representation function as a carrier of enough juristic personality to be recognized in legal proceedings and not enough to be controlled directly in terms of goal or purpose by the state.

### ***6.2 An unincorporated reified representation***

The definition of the trust itself also quickly started to lose its sharp edges when the underlying distinction between ownership in strict law and ownership in equity became blurred (Maitland 2003). Particularly the idea of ‘beneficiary’ was changed. No longer was the beneficiary understood as one or more particular persons, but rather as a ‘goal’ or ‘purpose’, like the Protection of Rural England (Runciman 2005:67). Maitland expressed the importance of this shift: “That idea of the trust-fund which is dressed up (invested) now as land and now as current coin, now as shares

and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence.” (Maitland 2003: 56). This shift from discrete persons to a goal as the main referent of the trust meant a loss of distinction between two legal ways of understanding property, the *ius in personam* and the *ius in rem* (Maitland 2003:53).

This expanded the use of an enduring legal identity for all manner of people and things that did not exactly fit into the category of a *person* or a *thing* (Maitland 2003:55) and expanded the trust onto class after class of persons and things. This turned the trust into a convenient vehicle to form associations for the most wide-ranging purposes, without making distinctions regarding those purposes. (Runciman in Maitland 2003:xxii) The lack of capability to distinguish between referents meant that the trust became an ever more abstract notion of representation, ultimately leaving no way to distinguish between the Catholic Church and a football club (Maitland 2003).

### ***6.3 A contractual societas***

The trust pictured the legal representation as the expression of a contractual aggregation of individuals. Since the trust focused exclusively on the contractual relations between individuals, this individualistic nature of the trust was easily equated with the *societas* as a freely formed unincorporated body. The representation of association created by the trust was therefore contractual and individualistic, but was still treated as if it created a legal representation apart from the individual members. Interests and ownership were represented through a deed that related to constituent groups, rather than constituent individuals. The deed itself then constituted the representation, but also became a referent for the representation, as in the corporation sole. This meant that the trust could use the contractual *societas*, a dualistic division of two reified constituent groups and the reified legal representation itself as a referent.

As ‘the trust’ itself was not a *concessionized universitas* and the separation between ownership and agency left no clear group in the position of ‘control’, the wording of the trust deed became particularly important to ascertain that a particular stated goal

was served, rather than the pockets of the trustees. This emphasis on the exact wording of the forms and goals of the trust and its deed was fundamental for its peculiar contractual nature. In this way, the trust acquired a distinctly contractual and unincorporated nature as a representation of association, while it still provided an implicit legal reification of representation.

The trust thus combined a separate representation of the bundle of legal rights and duties, as had the corporation sole. Furthermore, the trust created a perpetual representation that was not created by the sovereign, but rather by the constituent members of the trust. Thereby, it could create a notion that this representation was the representation of the identity of the group in itself (Runciman in Maitland 2003:xix), while defending itself against individualist theory, but also against state control.

The trust then existed between the *concessionized universitas* and the *societas* as a pragmatic intermediate institution, taking from both while confessing to neither. This provided a way to keep the exact nature of the representation in the dark:

“The trust deed might be long; the lawyer’s bill might be longer; new trustees would be wanted from time to time; and now and again an awkward obstacle would require ingenious evasion; but the organized group could live and prosper, and be all the more autonomous because it fell under no solemn legal rubric.” (Maitland in Gierke 1968:xxxii)

The technically unincorporated body that was created in the trust was for lawyers not officially recognized as a juristic ‘person’ and even less as a concessionized corporation, although for all practical matters it functioned as such: “If Pope Innocent and Roman forces guard the front stairs, we shall walk up the back.” (Maitland in Gierke 1968: xxix) For these reasons, Maitland complained about the 1862 Act that “it left the crucial decisions in the wrong hands, relying on the individuals who made up a particular group to invent for it a corporate personality, rather than relying for such a personality on the group itself.” (Runciman 2005:237). According to him, the treatment of unincorporated groups in British law was “half-hearted” (Maitland in Gierke 1968:xxxii).

As a representation that could be used as a way of retaining and redistributing control over wealth in a perpetuity<sup>14</sup> without political control and with anonymity, “Trusteeship creates entities which nobody owns, and it protects them in a world in which dominion over such entities is often prized” (Runciman 2005:68). Maitland argued that the continued acceptance of this form was the result of its social importance. He argued that the trust existed “behind a wall that was erected in the interests of the richest and most powerful class of Englishmen: it is as safe as the duke and the Millionaire” (Maitland 2003:75). In this way, the trust “entered the service of a wealthy and powerful class” (Maitland 2003:96). An example of its perceived importance as a legal representation without political control can be found in the fact that the Inns of Court themselves were never incorporated, but, through the trust, could still wield “formidable power” (Maitland 2003:107). The trust, then, formed an important concept for the development of later conceptions of incorporation.

## 7. Conclusions

A voluminous body of literature in legal and economic theory habitually justifies its use of a reified representation in incorporation by referring to the 13<sup>th</sup> century *concessionized universitas*. This *concessionized universitas* was devised as a formal bestowal of a political concession on an aggregation of individuals. The grant, the holding and the continuation of the concession then designated a direct relationship to and constraint by the political will of the sovereign, who granted, held and withdrew the concession. Agency, ownership and rights could therefore not be attributed to the concession itself, or to the aggregation of individuals (Maitland 2003).

This chapter showed how during the first discursive formation the concept of incorporation slowly changed on the basis of piecemeal changes in the political, theological and legal reasoning on the representation of individuals and groups. This led to three basic changes in the concept of representation.

The first change was the separation of the representation and the referent. The creation of concepts like the corporation sole and the trust led to the estrangement of

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<sup>14</sup> It might be mentioned here that the trust in this way also served as an instrument for women’s financial liberation, by creating a possibility for women to inherit and acquire property through the trust fund (Maitland 2003:97).

the office and later the bundle of legal rights as a representation from the individual or a group of individuals as referents. At the end of the first discursive formation, the representation created by incorporation could follow the model provided by the *concessionized universitas*, the corporation sole or the trust, in which the representation related to respectively a political concession granted to a contractual association of individuals, a 'sole' individual and the deed or one of the two constituent groups that made up the trust. Therefore, at the end of the first discursive formation incorporation related to several referents and it was no longer the aggregation of individuals in the form of a *societas* that provided the necessary and only referent for incorporation.

The second change was the use of a singularized representation. The corporation sole initially used a singular person as its referent. The subsequent use of the representation for singular as well as aggregated referents led to a prioritization of the representation over the referent in order to retain the connection to the singular referent.

The third change was the reconceptualization of the representation as a legal, rather than a political representation. The history of sovereignty itself and its entanglement with the precise understanding of representation, the separation of the representation and its referent and finally the loss of the embodied sovereign as the granter and holder of a political concession together provided the basis that made it possible to change the representation from a distinctly political concept in the 13<sup>th</sup> century into a primarily legal concept at the start of the 19<sup>th</sup> century.

Together, these three changes substantially changed incorporation from the initial idea of the *concessionized universitas*. As shown in this chapter, these changes allowed for the development of multiple ideas of representation using a number of different types of referent. This led to the prioritization of the representation and made a shift possible from a political concession in the first discursive formation to a distinctly legal understanding of the representation in the second discursive formation.

*Schematic of first discursive formation*

Effects	Singular referent	Historical Discursive Formation and main developments	Aggregate referent	Effects
		<b>1st discursive formation</b> Representation of an aggregation created and held by the sovereign	societas (contractual aggregation of individuals)	public nature of operations perpetuity fears: reification of groups (political), unchecked amassing of wealth and lack of taxation (economic) strict restriction through terms of charter political control external creation and holding of concession external 'ownership'
corporation sole	person, parson, sovereign	<b>Increasing separation of representation and referent</b>	aggregation of individuals with concession dualist internal division	external 'bundle of rights and duties' trust (un-)incorporated
		<b>Corporations in colonization project</b>		limited liability

### Chapter 3: Developing the Modern Corporation

“The modern large corporation, hierarchical in structure and with billion-dollar assets and thousands of employees, bears little resemblance to its early-nineteenth-century predecessor.” (Bowman 1996:38)

Chapter One introduced particular problems with the contemporary concept of incorporation and the necessity for a historical approach to incorporation as a concept. In Chapter Two, I developed the first discursive formation based on the *concessionized universitas*. The chapter followed several piecemeal changes to this concept and ended with the notion that incorporation by the end of the 18<sup>th</sup> century had become a representation that was separable from its referent. This allowed for the use of a number of different types of referent and an idea of incorporation that shifted from a political concession to a legal representation.

This Chapter will further follow these developments by presenting a second discursive formation developed between 1800 and 1970. In this period an idea of incorporation developed, which I will term the *modern universitas*. This *modern universitas* distinguishes itself from the *concessionized universitas* of the first discursive formation in two ways. First, the *modern universitas* shifted the representation from a political concession to a reified legal representation. Second, the *modern universitas* hinged on the acceptance of a continuum between two mutually exclusive positions on representation. These two concepts both introduced radically different assumptions about the attachment of the representation, about the attribution of ownership of this representation and about the political and social aspects that attach to the representation.

I will develop this *modern universitas* in three sections, each focusing on different developments between 1800 and 1970.

In section One I will focus on the way incorporation functioned as a legal concept during the period between approximately 1800 and 1850. In this period the concept of incorporation became applicable specifically to business corporations (Ireland

2003:461). I will show that the concept during this period was still restricted in ways, reminiscent of the restrictions imposed on the *concessionized universitas*. I will also show how these restrictions became increasingly problematic within the legal and political framework after the Revolutions.

In section Two I will focus on the further development of the theory of incorporation between approximately 1850 and 1910, focusing on the USA and Britain. In this period, these two countries reinvented the concept through the introduction of the representation as a reified legal concept within a democratic political framework.

In section Three I will describe how the developments between 1850 and 1910 were based on two different conceptions of incorporation, the natural and the artificial entity theory. I will show how the acceptance of both positions was needed to retain the *modern universitas* and its specific effects.

## **1. 1800: incorporation as a political and economic threat**

In chapter Two I described how during the first discursive formation incorporation appeared as a political concession to ensure a continuous operation of public services. These public services gradually shifted into a grey domain of public-private collusion, with its culmination in the colonization era. In this era a model of incorporation developed that pictured the corporation as a semi-state enterprise with limited liability. The acceptance of incorporation for economic entities at the beginning of the 19<sup>th</sup> century was therefore primarily the result of their earlier collusion with colonization projects.

This use of incorporation for enterprises that colluded with the state on a large scale brought grave economic risks. The Mississippi Scheme and the South-Sea Bubble in the 18th century in which the French and the British State colluded with corporations politically and financially, eventually threatened those states and led to public outrage (Mackay 1995). This led to temporary bans on incorporation in the 17<sup>th</sup> and 18<sup>th</sup> centuries in Britain and France.

Another threat was seen in the potential for monopoly. Adam Smith (1998), writing in 1776, was explicitly opposed to incorporation, because he saw them as state-run

monopolies, rather than private enterprises. A joint-stock company to his mind could only serve very specific goals: “the only trades which it seems possible for a joint-stock company to carry on successfully without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called routine, or to such a uniformity of method as admits of little or no variation.” To be eligible for a concession, two conditions had to be met: “the undertaking is of greater and more general utility than the greater part of common trades; and, secondly, that it requires a greater capital than can easily be collected into a private copartnery” (Williston 1888:112). He held that incorporation provided a charter that was restricted to the development of public utilities such as mines, railways, turnpikes, roads, ferries and railroads that could not be executed by unincorporated companies.

### ***1.1 Incorporation and the Nation State***

One more reason to contest the idea of incorporation as a *concessionized universitas* from the end of the 18<sup>th</sup> century was the birth of the new constitutions on the European continent and in the USA. The power to incorporate throughout the whole medieval theological and political history adhered to a sovereign. The emergence of the nation state meant the waning of the idea that a single person could be the holder of sovereignty. As a result, the representation of groups could no longer be the result of a concession, granted and held by a single sovereign person. The direct connection between the political interests of sovereignty and the *universitas* concept therefore became problematic.

#### **1.1.1 The French Revolution**

The French Revolution in particular replaced the basic assumptions about the relation between sovereignty and association with a radical new idea. To have a ‘legal fiction’ with a life of its own would not be allowed, since this would “allow the group – guild, town, village, nation – to stand over against each and all of its members as a distinct person”. (Maitland 2003:64) Any idea of a representation of association in these new states was therefore tightly controlled and subject to the control of a state who would not accept the rise of institutions between itself and the citizens of which it was deemed to consist. The *concessionized universitas* was therefore all but outlawed: “at the beginning of this twentieth century it was still a misdemeanour to belong to an

unauthorized *association* having more than twenty members.” (Maitland 2003: 67, emphasis in original) I will explore this notion in more detail in Chapter Seven.

### **1.1.2 American Suspicion of Incorporation**

American history provides a similar account of distrust of corporate power directly after the Revolution (Bowman 1996:49). Although its founders could have acknowledged the existence of corporations and given them special status, corporations as such were never written into the constitution as separate entities (Nace 2003:21). They only conferred such a status on two other groups: the press and religious institutions. One reason for this choice was that the dominant form for a long term was the partnership or family ownership (Nace 2003:54). Another reason was that the corporate form was regarded with misgivings in early American history. The American constitution was drafted right after the great bubbles of the 18th century, in a time when incorporation was regarded with grave misgivings.

In addition, the Americans had first-hand experience of the role of the British East India Company. The East India Company had enjoyed a monopoly and immunity from competition as a direct result of a monopoly granted by the English state under English law (Bowman 1996:50). Through their status as a colony, the Americans were forced to accept second rate goods at high prices to keep prices in the mother country low. The Americans, also, did not enjoy the status of full British citizens (Smith 1998) and were not represented in Whitehall because of the type of intermediate position that the British East India Company initially played in the administration of the colonies. For these reasons, Nace classifies the Boston Tea Party as essentially an anti-corporate revolt (2003: 51) combining working class resentment against their treatment by corporations, with the merchant community resentment of America as a forced producer “of raw materials for British manufacturing and as captive markets for British goods” (Nace 2003: 52) and intellectual resentment against the monopolies and the usurpation through an elite residing in England. Nace notes: “(...) it was a highly pragmatic economic rebellion against an overbearing corporation, rather than a political rebellion against an oppressive government. Or, more accurately, it was a rebellion against a corporation and a government that were thoroughly intertwined” (Nace 2003: 54). The concept of incorporation was therefore

regarded with misgiving in America at the beginning of the 19th century for their earlier collusion with the state and for their possibility to provide monopolies. In 1787, after the Revolutionary War, the corporate form survived only as a former British institution, leaving no more than six business corporations in America, operating on a very limited scale (Nace 2003:59-60).

At the end of the 18<sup>th</sup> century incorporation for economic entities was therefore still viewed with suspicion. It was seen as a potential threat to national politics because of the size of these companies, the political influence they wielded as a result of collusion with the state and the potential for corruption. They were seen as an economic threat because of their potential for monopoly and the enormous impact the earlier scandals had had on national economies (Ferguson 2009).

It is, then, hardly surprising that there was no proper theory of incorporation at the beginning of the 19th century in American law: “(...) neither the colonies nor Britain had produced any quantity of law pertaining specifically to the business corporation that could serve as relevant precedent for the legal problems of corporate enterprise following the Revolution. (...) The American legal community had inherited from English law only a juristic concept of the corporation that applied more or less equally to all types of incorporated bodies. (...) English law therefore provided only a definition – the essential attributes of incorporation – from which the American law of business corporations would be constructed” (Bowman 1996:38-41).

## ***1.2 Artificial entity, political concession***

Even if incorporation was historically and politically suspect, it was never completely banned in the USA. The development and exploitation of utilities like canals, waterworks, laying of railways, and the establishment of gas lighting in the cities and the construction of the railroads meant that only joint ventures with limited liability could raise the kind of capital that was needed. Instead of abolishing it altogether, the concept was reformed. Corporations at the beginning of the 19<sup>th</sup> century were created in the USA to fulfil a very restricted public role under close political supervision. The corporate charter was seen as a special privilege, granted by the federal government, subject to strong regulation and control and restricting the corporation to execute very

particular public functions within a single state under a temporary monopoly. American states retained the power to incorporate out of fear that entrusting the central government with incorporation rights would give them the power to form another East India Company. The explicit idea was that this would emphasize restrictions and accountability measures and that state constitutions and statutes would reinforce the restrictive stance toward corporations (Nace 2003: 61). The corporation was therefore an artificial entity by virtue of its creation by the state (Dewey 1926) and by virtue of its restriction to a public function, with a charter stipulating very particular restrictions. Incorporation was still a special privilege, granted by a sovereign, subject to detailed terms, conditions and provisions in its charter (Bowman 1996:39,51). The companies incorporated in this way were therefore seen as public, rather than private companies at the start of the 19<sup>th</sup> century (Roy 1999).

This was reflected in the legal understanding of incorporation. The dominant aggregate or contractual view held that the corporation was a creature of free contract among individual shareholders, no different from a partnership. The joint stock company at the beginning of the 19<sup>th</sup> century was, then, not so much a completely different type of legal representation, but rather a special form of the partnership (Ireland 2003:458). In the USA, up through the 1880s there remained a strong tendency to analyze corporation law in line with partnership law. The rules governing internal governance were therefore taken from partnership law (Horwitz 1985:182). In this view, the charter was not the representation of the company itself, but rather a special concession, granted and held by public hands, rather than in the hands of those incorporated. As a result, the incorporated entity was seen as ‘artificial’, while the actual association was seen as an aggregation of individuals. Thomas Jefferson was very explicit about the fact that incorporation created entities, answering to the state: “The idea that institutions, established for the use of the nation, cannot be touched or modified [...] may perhaps be a salutary provision against the abuses of a monarch, but it is most absurd against the nation itself.” To make a corporate charter sacrosanct, said Jefferson, would amount to a belief that “the earth belongs to the dead, and not to the living” (Jefferson in Nace 2003:103). This closely resembles the results from the first discursive formation, as described in Chapter One.

The corporation was therefore comparable to a normal partnership, albeit with a charter that gave it special privileges for public purposes. In 1839, Chief Justice Taney still held that a corporation exists only in contemplation of the law as a mere artificial being, created by positive law: “Where that law ceases to operate, and is no longer obligatory, the corporation can have no existence” (*Bank of Augusta* at 578-88). If it were just a set of contracts, it would “make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation: and he might be sued for them in any state in which he might happen to be found.” (Horwitz 1985:184). As a result, incorporation at this point embraced the notion that risk and liability would largely remain with the individuals constituting the corporation. Combining this notion of the corporation as a public institution with the potential for monopoly Adam Smith (1998) argued that the monopoly furnished by the corporate charter had to be taken away once construction was finished and the undertaking was profitable. The American economic landscape and business law at the beginning of the 19<sup>th</sup> century therefore closely resembled the atomistic picture of the entrepreneurial economy of Adam Smith, based on a perspective that made human individuals and their economic agency central (Bratton 1989b:1483).

It was therefore until approximately the middle of the 19<sup>th</sup> century that a view remained dominant in the USA in which the corporation was a public institution, in which its charters were limited and in which the corporation consisted at the behest of its creator (Bowman 1996:42).

## **2. 1850-1910: Changing incorporation**

By 1910, the concept of incorporation had become very different from the concept used at the beginning of the 19<sup>th</sup> century. Incorporation had become a right that was easy to acquire without fear of revocation, allowing perpetuity for any economic activity. The aggregate or contractual model had been shed in favour of a model that reified the separate legal entity both as a holder of rights and as an agent, attributable with actions performed by the corporation. This entity could undertake activities over state, national and international borders in its own name. As a result, the state had completely lost power over the act of incorporation and over the entities it created.

These major shifts were the result of piecemeal changes to the concept of incorporation, involving the introduction of a distant kind of shareholding with majoritarianism, the use of general incorporation, the reinstatement of the *universitas*, the use of the holding company and the conception of the separate legal entity as a legal ‘person’ with separate agency. I will address these developments below.

## ***2.1 The rise of a different kind of shareholder***

In stockholding, the assumption at the beginning of the 19<sup>th</sup> century was that a genuine relationship between partners existed. Shareholders were generally involved in the management of the corporation and were able to exercise considerable strategic control. This conception was tied to the fact that corporations could call on shareholders to provide extra capital (Ireland 1999).

The conception of stockholding changed with the introduction of fully paid up shares. This meant that shareholders could no longer be held liable for an unpaid subscription price, i.e. that they couldn’t be obliged anymore to provide additional capital on the basis of owning a share. The individual shareholder now held a definite right, rather than a share that could receive further claims (Horwitz 1985). Because of the fully paid up share, large volumes of stock could be traded on the market. The rise of these stockmarkets further accommodated changes in the nature of shareholding. Stockholders were increasingly likely to be more interested in the direct monetary gains out of stock than in the direct involvement or running of the company (Ireland 1999). This conception worked the other way as well: directors were generally not very eager to have a large body of individual stockholders meddle in their strategic proceedings. The disinterested stockholder was thus beneficial to both parties in terms of daily management. The increasing numbers of stockholders also made it difficult to make decisions by voting on stocks and similarly made it difficult to prosecute companies by keeping individual stockholders responsible. If sued, all parties should be party to the suit, which meant that in principle all parties who held stock should be tracked down and should be present at the suit (Grantham and Ricket 1998:2-3). The increasing distance between shareholders and daily management made this practice both unpractical and made the attribution of liability to shareholders implausible.

The practical relation of shares to control and liability in the context of these new ideas about stocks and stockmarkets therefore led to a view that even the holding or selling of original stock did not lead to a formal relationship or liability anymore (Horwitz 1985:212-213). A reciprocal type of distancing took place in the direct claims that shareholders could make on corporate assets. In the 1837 UK case of *Blight v Brent* it was established that “shareholders had no direct interest in a legal sense or in terms of equity, in the property owned by the company.” This made a division between the share capital and the company’s assets possible. This turned shareholding into a detached and protected position. Rather than partners, involved in daily management, with a direct claim to assets and involvement in strategic decisions, shareholders were transformed ‘from active participant[s] to passive investor[s]’ (Ireland 1999:41-42), comparable to distant rentiers (Ireland 1999). The offset was that shareholders could only claim a right to dividend and a right to the value of the shares themselves (Ireland 1999:41).

## ***2.2 General incorporation***

The use of incorporation for private joint-stock companies in a public function gradually led to more indefinite charters, in terms of time span, purpose and risk-bearing profile. Between 1850 and 1870, charters for incorporation were increasingly denounced as the grant of a monopolistic charter to business associations, unjustly prioritizing corporations over partnerships and one man companies. The granting itself was seen as connected to political favouritism and corruption. Moreover, the practice of having one person who would be “(...) obliged to scrutinize, control and prescribe arrangements” was seen as ‘rigid’ (Berle and Means 2007:126). A movement ensued that sought to retain the prerogatives of incorporation, while making it available to everyone. These developments culminated in major changes to incorporation laws in the USA. The states increasingly repealed the rules that required businesses to incorporate only for clearly defined purposes, to exist only for limited durations, and to operate only in particular locations (Blair 1995:208).

The corporate form with limited liability became available in the USA in the middle of the 19<sup>th</sup> century, depending on the state (Guinnane *et al.* 2007). As a result “Incorporation eventually came to be regarded not as a special state-conferred

privilege but as a normal and regular mode of doing business” (Horwitz 1985:181). The British followed the same path. Incorporation became generally available in 1844, while incorporation with full limited liability became a possibility in 1855-56 (Guinnane *et al.* 2007).<sup>15</sup> The subsequent acceptance of the British Companies Act in 1862 made it as easy to form a corporation as to get married: the State became a passive registrar, making the corporate form accessible to “any seven persons associated for any lawful purpose” (Maitland in Gierke 1968:xxxviii). Charters were silently extended and not revoked anymore (Micklethwait & Wooldridge 2005:177). Germany followed in the 1860, while France followed suit in 1867 (Guinnane *et al.* 2007).

### **2.2.1 Expansion of activities**

These changes were partly a result of the fact that the theory of incorporation shifted from the artificial entity theory and its emphasis on a sovereign power that granted a concession to the natural entity theory, which looked at the “social reality of business and the creative energy of the individuals conducting it” (Bratton 1989b:1486). In this view, there was no room for political control over the charter of the corporation.

As a result, corporations could gradually expand their ‘agency’ to include more and more types of activity without acting outside their charters. This made the idea of *ultra vires*, central to the artificial entity conception, superfluous: “The courts are becoming more liberal, and many acts which fifty years ago would have been held to be *ultra vires* would now be held to be *intra vires*. The courts have gradually enlarged the *implied* powers of ordinary corporations until now such corporations may do almost anything that an individual may do, provided the stockholders and creditors do not object” (Cook 1894 in Horwitz 1985:187). Ultimately, the New Jersey incorporation law of 1889 made it possible “that a corporation could do virtually anything it wanted” (Horwitz 1985:187).

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<sup>15</sup> Limited liability is considered by many commentators to be a very important part of the contemporary concept of incorporation. As argued in Chapter One, I consider limited liability a complement to the concept of incorporation, an added property that has no real implications for the formal understanding of incorporation and which is therefore not a necessary aspect of any of the discursive formations (see also Ireland 2010:839). It will therefore not be discussed in detail.

The corporate charter thus changed from a tightly controlled political instrument, granting particular monopolies for public services for a limited amount of time into a right to incorporate for anyone and for any lawful purpose. In combination with its general availability this meant that not the public need, but economic interest started to dictate the necessity for incorporation (Bratton 1989b:1485). The development of incorporation for business purposes thus entered the corporate form as a new entity into the economy, where it started to out-compete the classic partnership form that had been the basis for the atomistic notions of Adam Smith about economies (Horwitz 1985).<sup>16</sup>

The use of general incorporation and its effects on corporate charters met with criticism and opposition during the 19<sup>th</sup> century. Incorporation was portrayed as opposite to the tenets of individual entrepreneurship, destroying individual businesses through the use of monopoly:

“We being journeymen at the Coach chaise and harness manufacturing business, do look forward with anticipation to a time when we shall be able to conduct the business upon our own responsibility and receive the profits of our labour, which we now relinquish to others, and we believe that incorporated bodies tend to crush all feable enterprise and compel us to worke out our dayes in the Service of others.” (Remonstrance of George W. Cushing & Others, 1838 in Nace 2003:64)

The general availability of incorporation was seen to lead to a relative decline in economic power held by individuals, a loss of control of workers and consumers relative to the atomistic economy, a dilution of moral and legal responsibility because of a concentration of ownership among groups and a tendency to decreasing efficiency, arising from a difference between incentives for individual entrepreneurs and group ownership (Bratton 1989b:1486).

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<sup>16</sup> I will address this topic more fully in Chapter Six.

### ***2.3 The holding company***

A radical change in the conception of incorporation was the invention of the holding company. Corporate charters at the beginning of the 19<sup>th</sup> century expressly prohibited ownership of stock in another company. For this reason Berle (1954:344) argues that “Multiplicity of artificial personalities within an enterprise unit would probably have been impossible under most early corporation laws.” In the 1880s Pennsylvania State legislature was persuaded to permit one corporation to hold stock in another. This move made it possible for corporations to incorporate another company in a different state, then sell its stock to the second company. This effectively circumvented the restrictions that the first state could impose on its operations and thereby effectively evaded control from both legislatures (Nace 2003:81). The holding company thereby created the possibility for one legal entity to own another legal entity, allowing corporations to form conglomerates, forming vertically integrated companies, controlling every aspect from production to distribution and retail (Nace 2003). By 1889, the holding device became available to all American corporations.

In order for the holding company to become fully functional, it was necessary that a majority of shareholders could decide to sell corporate assets, without individual shareholders being able to stop such a move. But the views taken from partnership law still took shareholder rights very seriously, holding that any fundamental corporate change had to be regarded as a breach of the individual shareholder’s contract and an unconsented “taking” of that shareholder’s property. Unanimous shareholder consent was necessary for corporate consolidations as well as to other “fundamental” corporate changes up until the 1880s (Horwitz 1985:200). The individual rights of shareholders, therefore, had to be eroded in order to shift ownership rights from individual shareholders to a majority of the shareholders. This erosion was effected between 1893 and 1902 through the use of the realist notion of a natural entity in corporate theory (Horwitz 1985). I will address this realist notion in more detail in Section 3.2.

### ***2.4 Reinventing incorporation***

Because shareholders were no longer seen as constituting the corporation as an aggregation of individuals, assets came to be owned by ‘the company’. This meant

that a legal space emerged between companies and shareholders (Ireland 1999:41). To accommodate for this space, it had to be filled by a concept that would be able to hold the right to the assets and ownership of the corporation in general. The development of the Companies Act between 1844 and 1862 shifted rights from shareholders towards ‘the company’. By 1856, the Companies Act permitted seven or more persons to form themselves into an incorporate company. By this time, ‘the company’ still referred to an aggregation of individuals as types of (‘public’) partnerships (Ireland 2010:846).

Following the 1862 UK Companies Act, people no longer ‘formed themselves’ into incorporated companies, they ‘formed’ incorporated companies, objects external to them, made *by* them but not *of* them (Ireland 2010:847; Neocleous 2003). The separate legal entity could therefore ‘hold’ ownership, effecting the separation of ownership and control (Berle and Means 2007). The growing separation between the company and its shareholders assumed a reified entity, holding the rights and duties of the corporation in its own name. The adoption of a reified separate legal entity that held the rights and duties of the corporation transformed the idea of the company from an association of individuals to a fully incorporated institution (Ireland 1999:42). This reification of the representation of the company was justified by referring to the historical use of the *concessionized universitas*. However, the kind of incorporation used in 1862 was very different from the concept conceived by Pope Innocent IV. Incorporation in 1862 was conceived in a context in which representation was the result of a legal recognition, rather than a political one. Furthermore, general incorporation allowed everyone to form a corporation for economic purposes, without the need for a limiting charter providing a public purpose. Finally, incorporation after 1862 did not provide an external political recognition to an aggregation of individuals or a *societas*, but provided a reified representation. This made incorporation amenable for purposes “for which one would hardly have thought of introducing it” (Savigny in Williston 1888:106).

Two cases were seminal to establish the separate legal entity as a reified legal representation in the second discursive formation: *Santa Clara* in the USA and *Salomon* in the UK.

### 2.4.1 Santa Clara

In the USA it was the 1886 *Santa Clara* case (*Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886)), which established the separate legal entity as a singular legal entity. *Santa Clara* used a recently passed law, which was meant to give civil rights to slaves. Since slaves, just like the separate legal entity, were formerly in need of representation by a legally recognized party as a *pupillus*<sup>17</sup>, the civil rights granted to slaves were interpreted also to be applicable to separate legal entities in their capacity as *pupillus*. In this sense, the separate legal entity was seen as a representation with similar capacities to other legal representations recognized by the 14<sup>th</sup> amendment. This position was increasingly understood as the creation of a separate legal ‘personality’, capable of receiving the same protections as other legal ‘personalities’ under the 14<sup>th</sup> amendment.

Although the *Santa Clara* case itself did not settle the case on personhood (Mayer 1989), the citizenship rights imparted to the legal entity under the *Santa Clara* decision allowed for an increasing number of Bill of Rights protections (Mayer 1989, Nace 2003, Williston 1888), turning it into a reified singular representation with its own rights and an attributed form of agency. Through the attribution of legal and economic agency and the attribution of amendment rights, concepts like ‘legal subject’, ‘legal persona’, ‘legal person’, ‘legal personality’, ‘legal entity’, ‘citizen’ and ‘subject’ became entangled with the idea of agency of a natural legal subject, making it possible to understand the legal representation as if it were a singular legal entity with capacities similar to those attributed to the legal representation accorded to human beings.<sup>18</sup>

### 2.4.2 Salomon

In Britain the *Salomon* case (*Salomon v Salomon & Co* [1897] AC 22) similarly established the idea of the corporate entity as a legal reified singular representation,

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<sup>17</sup> Literally: an infant. Used to denote a legal subject not capable of legally representing itself and therefore in need of legal representation by another (Horwitz 1985, Naffine 2003).

<sup>18</sup> At one point, corporations in the USA had more amendment rights than madmen, children, women and slaves (Naffine 2003)

separate from the individuals constituting it. The case revolved around Salomon, a leather merchant, who incorporated a company with 20,000 shares in the company and his wife, daughter and four sons each having one. The company folded and could not pay its debts. The question was, whether Salomon (who owned the majority of shares and acted in every way as a sole proprietor) could be made personally liable (Ireland 2010). The case established that the limited company of Mr. Salomon offered a fully separate legal identity to the company and that this produced a ‘corporate veil’ that offered legal protection (Micklethwait & Wooldridge 2005:58). The fact that Salomon had formally complied with the Act of Incorporation meant that the company was to be treated as a completely separate entity from Salomon, even though that incorporation adhered to a single natural person (Davies 2008:35).

The Salomon ruling by the House of Lords overturned two previous decisions in which it was ruled that the incorporation of Salomon as a separate entity from Mr. Salomon was either a fraud or an abuse of the privilege of incorporation because the shareholders were mere puppets. However, in the eyes of the Lords, judges were not to read matters into the law that they found ‘expedient’. The company was duly constituted in law, and therefore it constituted a corporation as de facto and de jure separate from the principal agent. The House of Lords noted:

“Either the limited company was a legal entity or it was not. If it were, the business belonged to it and not to Mr Salomon. If it was not, there was no person and no thing to be an agent [of] at all; and it is impossible to say at the same time that there is a company and there is not.” (*Salomon v Salomon & Co Ltd* [1897] AC 22)

The logic in this statement was that if there was to be something more than just a joint association of stockholders and the board, this must be a separate entity before the law, existing apart from the shareholders and the board. This created the separate legal entity as a representation with the capacity to own and represent a company. In this way, the separate legal entity was postulated *ex nihilo* as an unspecified reified singular representation.

The House then took a second step by stating:

“The company is at law a different person altogether from the [shareholders] ...; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands received the profits, the company is not in law the agent of the [shareholders] or trustee for them. Nor are the [shareholders], as members, liable in any shape or form, except to the extent and in the manner provided for by the Act.” (*Salomon v A Salomon & Co Ltd* [1897] AC 22)

This second step established the legal representation as not only singular and reified, but also as a ‘person’ in law, capable of holding ownership and attributable with legal or economic actions as a singular reified legal entity in itself. In addition, it separated the legal entity from the board and the shareholders so that the legal entity was not the agent or the trustee of the shareholders.

### ***2.5 Metaphysical midwifery***

The expression ‘either the limited company was a legal entity or it was not’ in the Salomon case performed an act of metaphysical midwifery. It postulated a reified singular representation in the shape of a separate legal entity out of nothing and fully separate from the persons incorporating with nothing to explain its nature or its position within the legal system of representations but the fact that it filled the legal space between the shareholders and the company in a very literal sense as an ‘artificial’ reified singular entity. This consolidated the theoretical split between the incorporators and the entity.

The ‘artificiality’ of the separate legal entity (Dewey 1926) thus came to relate to its existence as a singular reified legal construct, ‘separate’ from the aggregation of individuals, rather than relating to its concession or its political or public purpose. This reified separate legal entity established a totally new concept of incorporation based on three factors: reification, singularization and contractual agency.

As a *reified* representation of an aggregation this new understanding of incorporation transcended the traditional partnership view of corporations. It became a separate representation, which was in many respects fully independent of the persons constituting the corporation. By consequence, any valid legal or economic actions undertaken by the corporation were only attributable to the entity per se (Guinnane et al. 2007). Through this reification, the legal entity could therefore shield its incorporators from actions, undertaken on behalf of this entity. However, the legal understanding of this reification was not comparable to the reification of the concession in the *concessionized universitas*. Its reification was not the result of a fully external concession to the *concessionized universitas*, but of the creation of a reified legal representation by the incorporators themselves. The reified representation was therefore also no longer held and controlled by the sovereign, but by the incorporators themselves.

As a *singularized* representation, it held “powers and privileges (...) which individuals do not possess” (Jones in Horwitz 1985:205). The question therefore became how singular agency could be attributed to a legal representation that was not formally part of the legal system of representations in any of the newly founded democratic states (Bowman 1996; Mayer 1989). Given the strongly singular notions of legal subjecthood underlying the French and American constitutions after their revolutions, the legal representation of the corporation had to conform to these notions. The singularization of the representation therefore led to the understanding of the singular reified legal representation conforming to an individualistic legal system that understood the singularized representation as a singular legal ‘subject’, ‘entity’ or ‘person’. As a result, the word ‘person’ came to designate a corporation in the USA officially from 1886 (Bowman 1996:56). Bowman notes that

“This constitutes the most important development affecting the constitutional rights of the corporate entity – and hence the legal basis of the external dimension of corporate power – during the rise of the large corporation in the nineteenth century.” (Bowman 1996:57)

As a *singular reified* representation, this new representation held contractual agency: “From the English law of corporations, rooted in a medieval conception of the

corporate entity, developed the modern corporate individual, an entity capable of entering into contractual relations in a market economy” (Bowman 1996:52). The singular reified singular representation, therefore, introduced the question to what sort of referent its contractual agency could be attributed. Whereas the *concessionized universitas* attributed agency directly to the *societas*, the two steps from the *Salomon* decision together created a reified singular legal representation in the legal system of representations, but created this representation without a direct referent. As a result, the nature of the representation and the ways in which it was capable of acting and contracting could only be defined by relating to a reified singular legal representation that was completely internal to the legal system of representations.

### ***3. Modern universitas***

The expression ‘either the limited company was a legal entity or it was not’ in the *Salomon* case performed an act of metaphysical midwifery, postulating a reified singular representation in the shape of a separate legal entity out of nothing. *Santa Clara* as well as *Salomon*, then, employed the fundamental separation between the representation and the referent within the legal system that had become possible through the corporation sole to establish a reified singular representation within the legal system of representations. This representation presented an anomaly (Schrader 1993) in the wider social and political system of representations (Bowman 1996), because it did not refer to the natural person as its referent.

Although the separate legal entity was now an institutional fact, the question therefore remained how this representation could be interpreted, on whose behalf it acted and how exactly its agency should be interpreted. The change of incorporation from a political to a legal concept, the implicit moves away from partnership law and the reification and singularization of the representation led to two main competing theories attempting to understand this new idea of representation: the ‘natural’ entity theory and the ‘artificial’ entity theory (Mayer 1989:620).

#### ***3.1 Artificial entity***

The artificial entity theory referred to the corporation as an aggregation of individuals with an artificial entity added (Mayer 1989). This theory initially related to the

external representation as a political representation. This pictured “ownership” as the holding of a concession by a sovereign or state. In this sense, it related directly to the *concessionized universitas*.

However, as shown above, the concept of the representation shifted during the 19<sup>th</sup> century from the grant of a concession by a sovereign to the creation of a legal representation. Rather than a public concession, incorporation became a legal representation, relating to a bundle of rights and duties. During the first fifty years of the 19<sup>th</sup> century the separate legal entity was increasingly depicted not as a sovereign concession but rather as a state-granted monopoly (Roy 1999). Since the right to form associations freely was a democratic right, inherent to individuals: “Associations endowed with legal personality will no longer require a benevolent concession of the state in order to enjoy the rights essential to the fulfilment of their trusts (...)” (Hallis 1978:244). In this sense, the State itself increasingly appeared as a representation of sovereignty in an abstract bundle of legal rights and duties. As reified legal representations, the State and the artificial entity conception of the separate legal entity both referred to an aggregation of individuals. In this context, the servants of the State were not automatically superior to ordinary citizens. As such, it became unclear on what basis one business venture would be incorporated while another would not and why the state held a prerogative to the grant of that charter. As a result, incorporation became increasingly associated with graft and favouritism by civil servants.

These conceptual shifts led to a movement in the USA to make incorporation generally available, to widen the charters for corporation, to abandon the need for corporations to renew their charters and to abandon the possibility for the State to revoke them (Horwitz 1985). The reification of representation therefore increasingly came to refer to the representation created by incorporation as a voluntary legal representation, rather than a political representation. However, the proponents of a strict artificial entity theory mostly sought to remain close to classic economic notions, retaining the individualism underlying the artificial entity theory. They chose to retain the separate legal entity for economic reasons, but wanted to retain it in the form that was prevalent at the beginning of the 19<sup>th</sup> century, committing the representation to strict charters, limited economic functionality, and state regulation

(Bratton 1989b). The artificial entity theory thus argued for a representation that no longer referred to a charter or concession granted by an external party, but to a legal concession that could be freely obtained and that adhered to the underlying aggregation of individuals. Rather than the expression of a political or public purpose through a charter the resulting reified legal entity thus became a reified legal construct, outside the community of individuals making up the corporation as an aggregation.

### ***3.2 Natural entity***

The *natural entity* or *realist* theory saw the separate entity as an entity that existed in and for itself. The legal developments towards the end of the 19<sup>th</sup> century in the USA converged with two social movements that argued for a ‘realist’ or ‘progressive’ approach to the representation. This approach argued for the acceptance of a reified social representation of association:

“The attitude of those who attribute to the corporation, not a fictitious, but a true and real personality of its own, is quite different. (...) They insist that the association of many persons produces a volition of a higher order which governs the common right; that while this aggregate will manifest itself through individuals, yet these individuals are merely organs of the aggregate personality, inspired by its consciousness, its purpose, and its will.” (Freund 1897:37)

Reacting to a crisis of legitimacy of liberal individualism at the end of the 19<sup>th</sup> century, romantic conservatives and socialists attacked the ‘atomism’<sup>19</sup> of their days. The romantic conservatives pleaded for a society in which atomism would be replaced by a recognition of ‘organic’ group life (Horwitz 1985:221). In this view, the association as an emergent representation exhibited a social and moral force in itself: “Their fundamental right will be to alter the formulae of their associative life in order

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<sup>19</sup> “Atomism presupposes that reality is made up of individual discrete particles with identifiable properties and characteristics (...). Wholes are in principle reducible to ‘parts’ and are, in practice, aggregate outcomes of individual elements.” (Chia in Tsoukas and Knudsen 2003:115) Organizations as well as society are then the result of discrete, unique and independent individuals. There is no group personality as such (Hallis 1978:xxv)

to realize their purposes as re-defined by a maturer, more enlightened knowledge of their members” (Hallis 1978:244). The representation thus exerted a moral influence on the individuals it bound and related to the world around it as a reified moral representation in itself. The romantic conservative view was thus the expression of a desire for the moral betterment of society as a whole through a common purpose, expressed by and through the representation of association. To the romantic conservatives, a reified representation of association exemplified the moral influence the group could have on its constituent members. The reification of this social representation of the aggregation of individuals could subsequently be imbued with moral, social and political characteristics.

The other side fuelling this movement was a desire by mainly socialist political movements to transcend anti-collectivist categories of liberal social and legal thought (Horwitz 1985). The increasing reification of the representation of association for business purposes through the artificial entity theory offered the possibility to argue for a similar reified status for social and political representations, like collectives and labour unions. The separate legal entity then exemplified the possibility that this type of representation for associations could create a political recognition of the separateness of groups in society between individuals and the state.<sup>20</sup>

Both sides together provided arguments to argue that associations could be seen as representations of association, fully separate from the aggregation of individuals. Drawing on communitarian ideas, both approaches understood the separate legal entity as synonymous with an expression of group identity (Horwitz 1985). This gave rise to theories of corporate personality as the “most powerful and prominent example of the emergence of non-individualistic or, if you will, collectivist legal institutions” (Horwitz 1985:181).

The political and moral program behind this coalition colluded with pragmatic business interests. Understanding the separate legal entity as a natural entity meant that the agency and ownership formally came to lie in the hands of the separate legal entity itself as a “supra-individualistic entity” (Horwitz 1985:183). As explained

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<sup>20</sup> I will return to this topic in chapter 7.

above, this enabled a formal separation of ownership and control by delegating ownership to an intermediate entity (Berle and Means 2007). The separate legal entity thus functioned to make a distinction between the management and the shareholders, without putting either of them in a direct controlling position. Furthermore, the reified conception of the modern separate legal entity allowed it to become attributable with the singular agency necessary to contract, sue, hire, fire and pay taxes in its own name. The natural entity theory, therefore, allowed an understanding of the corporation in a way that reflected the increased distancing of shareholders, ensured the continued use of the perpetuity and limited liability and enabled the corporation to work with the same legal representation over state borders in a holding company. The natural entity theory thus allowed majoritarian shareholding and subsequently the holding company to be introduced by attributing rights and agency to the representation as a representation, apart from the shareholders and the board (Horwitz 1985; Nace 2003).

There was, then, a very real interest on the side of the ‘progressives’ to understand the separate legal entity as a natural entity, while at the same time keeping hold of it as a regular type of business representation (Horwitz 1985).

### **3.2.1 Practical value: The great merger movement**

The natural entity theory showed its value in practice through the introduction of a new act of incorporation in New Jersey: “(...) an incorporation act that completely eliminated restrictions on a variety of essential matters, including capitalization and assets, mergers and consolidations, the issuance of voting stock, the purposes of incorporation, and the duration and locale of business” (Bowman 1996:60). These changes also abolished the rule that one company could not own stock in another and loosened controls on mergers and acquisitions (Bakan 2005:14). These New Jersey laws transformed the American business landscape with a huge wave of mergers and acquisitions between 1898 and 1904 (Bowman 1996:60). The use of general incorporation and the holding company in New Jersey’s corporate statutes effected “the sudden exodus of hundreds upon hundreds of millions of dollars, controlled by corporate interests and financiers from New York into the State of New Jersey” (Bostwick in Horwitz 1985:195). 71 percent of all United States corporations with

assets of \$25 million or greater used New Jersey as their home base by 1901. According to Charles Bostwick, “[So] many Trusts and big corporations were paying tribute to the State of New Jersey that the authorities had become greatly perplexed as to what should be done with [its] surplus revenue...” (Nace 2003:83).

The fact that corporations created elsewhere could act in other jurisdictions meant that those states could be chosen for incorporation that offered the most possibilities and the least restraints (Roy 1999). When Woodrow Wilson tried to tighten legislature in New Jersey, Delaware followed New Jersey’s example in 1899 and became the next favourite state for incorporation and in time saw nine in ten of new corporations incorporated within its borders (Micklethwait & Wooldridge 2005:138). This created a ‘race to the bottom’ through the pressure on American states to adopt the same concept for the legal understanding of incorporation and the separate legal entity (Roy 1999). The *modern universitas* thus proved a successful concept, which created enormous pressure to adopt the same legal concept elsewhere. The pressures that allowed for the expansion of incorporation over state borders also took care of the expansion of the *modern universitas* internationally. As Guinnane et al. (2007) show, the same concept with the same underlying principles was accepted in most major economies of the 19<sup>th</sup> century in a relatively short amount of time. Using the same principle of the holding company in an international context, corporations could then threaten to move their headquarters to a different place if the rights most favourable to them were not granted in the jurisdiction where they operated (Micklethwait & Wooldridge 2005:57).

#### **4. Corporate Revolution**

So successful was the emergence of the holding company, that it saw a spectacular increase and prominence of the corporation, with three-quarters of the wealth of the US controlled by corporations in 1890 (Horwitz 1985:180). The merger movement of 1898-1904 further transformed the marketplace. It led to a concentration of economic power in corporations through consolidation and concentration (Bowman 1996:18, 61). Between 1898 and 1904, 1,800 corporations consolidated into 157 in the USA. By 1903 some 250 corporations had become dominant in the American economy (Bakan 2005; Nace 2003). Industries concentrated and controlled huge market shares,

with U.S. Steel controlling 62 percent of the steel market, International Harvester controlling 85 percent of the agricultural implement market, and the American Can Company controlling 90 percent of the can market (Nace 2003:84). From \$33 million aggregate amount of capital in publicly traded companies in 1890 it soared to \$7 billion in 1903 (Nace 2003).

The New Jersey version of corporate law thus “(...) ignited a revolution in corporate law that has yet to run its course” (Bowman 1996:60). It set a massive economic concentration in motion that allowed the corporation as a business form to sweep the economic world first in the USA (Horwitz 1985; Mayer 1989) and later on a global scale. Berle (1954) argued that this amounted to a capitalist revolution. It seems more than likely that this revolution was accomplished through the introduction of incorporation as a distinctly new form of business representation (Horwitz 1985; Ireland 2009:5). The *modern universitas* thus led to the “corporate reconstruction of American society (...)” (Bowman 1996:69).

With the real-life success of the *modern universitas* came the victory of the natural entity theory. The contractualists defending the artificial entity theory and its individualistic type of economy failed to account for the emergence of these new complex and capital-intensive corporate tendencies and the oligopolistic economy that came with them (Berle 1954). The conception that individuals contracted to form an association had been under pressure for a long time with the retreat of the active shareholder and the emergence of the fully paid up stock (Ireland 1999), but took a further blow with the success of the natural entity theory. The artificial entity theory was therefore only retained at the end of the 19<sup>th</sup> century in a strongly diluted form to oppose the restricting regulations regarding the use of the separate legal entity (Bratton 1989b:1489), to retain the idea of the corporation as an aggregation of individuals and to oppose the stronger claims by the realist movement for group representation<sup>21</sup>. Although progressives ridiculed discussions of corporate ‘will’ and ‘personality’ in the realist movement as a metaphysical inquiry derived from outmoded natural rights conceptions, they stood together with realist thinkers in their insistence that the recognition and protection of group interests was a “practical”

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<sup>21</sup> See also chapter 7

necessity of modern life. “The commercial world,” wrote Henderson, “whose habits of thought so largely influence the development of law, has come to regard the business unit as the typical juristic entity, rather than the human being .... New economic phenomena, railroads, industrial combinations, the emergence of hitherto disregarded social classes, determine its growth” (Horwitz 1985:222). The progressives therefore supported the realist claims to a natural entity theory in the light of their economic effect. As Cook wrote: “The laws of trade are stronger than the laws of men” (Cook 1891:226 in Horwitz 1985:196).

The acceptance of the natural entity theory was then a result of business interests, combined with political aspirations by two political groups. Together, they created a legal and political window of opportunity in the 1890s in which it was possible to change incorporation as a representation in a unique way, combining both the natural entity theory and the artificial entity theory into the *modern universitas*.

#### ***4.1 Social representation***

As Bowman (1996) makes clear, the *modern universitas* represents an aberration from early 19th century liberal economic and political thought. The extraordinary influence and control over institutions and processes of American politics of the new corporations as well as their reconstitution of the marketplace went against the grain of American liberal political thought. What Bowman terms the corporate reconstruction of American society was mainly accepted on the basis of the real-world success of the corporation in terms of its productive potential and the astounding technological advances that the corporation brought. The rise of the *modern universitas* and its acceptance in the second discursive formation was therefore the result of an uneasy balance.

Responding to the ‘anomalous’ nature of the corporation, Authors like Berle, Drucker and Galbraith (Bowman 1996:246) argued that the corporation should be understood primarily as a social institution, reflecting social needs as well as economic convenience. What they argued was that the size, economic power and influence on American politics (Bowman 1996) of the corporation were enough to argue that corporations were a special part of the social and political system.

These properties, in combination with their aberrant theoretical nature, became the main reasons why these authors argued that the corporation had become a ‘social institution’ (Ireland 2009:14). In their view, the legitimation of the corporate form was based on the inclusion of societal interests (Bowman 1996:250-251). Corporate managers therefore became ‘administrators of a community system’ which meant that the corporation should no longer be seen as a private ‘business device’ but rather as a ‘social institution’. It was this trope that led to the idea of the managerial corporation as a responsible and social institution: “By the 1950s and 60s non-sectional managerialist ideas had become commonplace, underpinning claims that corporations were becoming more ‘socially responsible’ and ‘soulful’” (Ireland 2009:15).

In this analysis, the corporation as a semi-public institution also presented a possibility to share ownership over these institutions by spreading ownership to the middle classes (Ireland 2009:28). A company with dispersed share ownership among all groups of society would represent the shared interests of all those individuals, both economically and in terms of the public good (Berle and Means 2007). It is in this sense that the managerial corporation represented a sensitive political trade-off that allowed the corporation to develop “(...) as a social and political force on a reconstructed economic foundation.” with an “(...) oligopolistic and monopolistic control of industry and finance by large corporations” (Bowman 1996:71). The acceptance of the *modern universitas* then revolved around the societal acceptance of the corporation. These ideas developed the large mid-20th century American corporation into a highly stable semi-public institution, reflecting a large number of goals (Bowman 1996).

This political trade-off formed the basis under what can be seen as a ‘stakeholder analysis’ (Ireland 2000:150–152). Dodd (1931) raised a famous question that in his time had a wide resonance: “for whom are corporate manager trustees?” This question about trusteeship related directly to the question behind the acceptance of incorporation as an exceptional type of representation that presented very large societal and economic effects on the basis of an oligopolistic reconstruction of the marketplace (Bowman 1996).

However, by moving away from the discussion about the corporation as an anomalous form of economic representation and examining the *modern universitas* as a natural part of economic and social life, these approaches also normalized the *modern universitas*. In this way, the corporate form became acceptable as a representation that functioned as a semi-public institution. This normalization meant that not the theory of incorporation but its effects came to be central. In this sense Berle and Means became the true godfathers of corporate governance by normalizing the concept of the *modern universitas* in the second discursive formation.

At the same time, the fact that this normalization was based on the acceptance of the corporation as a representation that inherently formed a part of the social and political system meant that the position taken by the initial authors on these effects was increasingly interpreted as a result of their philosophy or political views (Butler 1988:100), rather than as the acceptance of a deviant theoretical concept for particular social and political reasons.

#### ***4.2 Continuum between positions***

The *modern universitas* related both to the artificial entity theory and the natural entity theory. As explained above, both ideas were needed in some measure to retain the corporation as a *modern universitas*.

The development of the representation as a reified singular legal representation enabled the acceptance of majoritarian shareholding, and the holding company, while retaining the claims to perpetuity and limited liability. Moreover, this reification established a separation of ownership and control that allowed for the conceptual distancing of shareholders from daily management and established a ‘legal veil’ that distanced limited liability as a criminal, as well as a financial shield from liability for shareholders. The natural entity theory had to be retained to retain the effects of the reified singular legal representation.

At the same time, the artificial entity theory was needed to understand the corporation as fundamentally formed out of an aggregation of individuals. Through this understanding in conjunction with a disappearing formal incorporator, the corporation could be understood as a fundamentally private representation.

Although these positions imported mutually exclusive assumptions, the acceptance of both conceptions is necessary to retain the *modern universitas* and its effects. Therefore, the *modern universitas* produced a continuum between two extreme positions. This continuum underlying the second discursive formation means that every position developed on the basis of the *modern universitas* thus inherently accepts both the aggregation of individuals as well as the reified social representation to some degree. There is therefore no ‘natural evolution’ (Bowman 1996), let alone a definite solution to the political and social or the private ‘nature’ of the corporation. Both extremes are given with the production and acceptance of the continuum. The *modern universitas* thus leads to a situation in which a paradoxical relation to mutually exclusive types of theory is fundamental for its continued existence. The *modern universitas* is thus based on the acceptance of this paradox as well as the societal effects of this paradox.

The aberration that incorporation thereby presents in contemporary political, social, economic and legal thought was superficially revolved in the 1950s and 1960s by positioning the corporation as an inherently social and political, rather than a private institution. In this way, the *modern universitas* became normalized as a philosophically deviant, but practically necessary reified singular representation on the basis of its conformity to principles that were largely taken from the social aspects developed for the natural entity theory. The ‘social’ nature of the representation was, then, not just the result of the political ideas of Berle, Galbraith or Keynes but a direct result of a delicate political balance between different factors that legitimated the acceptance of this theory of incorporation in the second discursive formation.

## **5. Conclusions**

In this chapter, I have traced the development of the concept of incorporation through the 19<sup>th</sup> century to the 1970s. In this crucial period, the *modern universitas* appears as a concept of representation that combines two different and contradictory underlying positions on representation.

The artificial entity theory led to the use of general incorporation for business representation and the loss of *ultra vires*. By the beginning of the 20<sup>th</sup> century the perpetuity that came with incorporation had become a right that was easy to acquire for economic use without fear of revocation. The role of the state in incorporation was reduced to a technical requirement of filing the necessary papers (Bratton 1989:435). At the same time, majoritarian shareholding and the holding company hinged upon the acceptance of the natural entity theory. Through these developments, the incorporated entity could acquire other incorporated entities and undertake activities over state, national and international borders. Personification of the representation as a natural entity further led to the attribution of amendment rights to the separate legal entity in the USA. The resulting *modern universitas*, then, was the result of a continuum in which the conception of incorporation changed from the first discursive formation in terms of political and legal position, the attribution of ownership, agency, rights and in terms of its perceived governance structure.

The political nature of the representation in the first discursive formation changed to an explicitly legal nature in the second discursive formation. As shown in Chapter Two, the *concessionized universitas* attached formal ownership of the representation to the sovereign as a formal and external incorporator. Taking the sovereign or state out of the equation as the formal incorporator, therefore, also meant a shift in the formal attribution of ownership from the sovereign to the aggregation of individuals making up the corporation. The representation became increasingly seen as a separate reified legal representation, formed by and attached to the aggregation of individuals itself.

This also introduced a shift in the purpose of incorporation. Until the beginning of the 19<sup>th</sup> century the explicit purpose of incorporation was to ensure a politically controlled perpetuity to a public institution or project. If the representation adhered to an aggregation of individuals, but was no longer the result of a concession, the purpose shifted to provide an external representation that provided perpetuity and limited liability to every type of aggregation of individuals. The ‘artificiality’ of the representation thus changed from its initial political nature at the beginning of the 19<sup>th</sup> century to a distinctly legal reification at the end of that century.

The capacity to contract in its own name introduced the *modern universitas* as a new type of reified singular legal representation. Agency on the part of this reified representation related to three different referents: it could relate to itself; to its constituent groups; as well as to an aggregation of individuals. This new form of representation therefore provided multiple ways to address the representation, the underlying aggregation and their relation in the legal sphere.

The nature of the representation thus shifted during the 19<sup>th</sup> century from political to legal, the nature of ownership shifted from public to private and the main goal of incorporation shifted from public to commercial. Furthermore, a reified singular legal representation with the capacity to contract in its own name was introduced. These changes together produced the *modern universitas*, based on an implicit continuum between the natural entity and the aggregation of individuals' positions.

Chapter Four will take a closer look at the effects of the continuum underlying the *modern universitas* in 20<sup>th</sup> century legal scholarship.

## *Schematic of second discursive formation*

Effects	Singular referent	Historical Discursive Formation and main developments	Aggregate referent	Effects
		<b>2nd discursive formation</b>		
		Representation becomes legal, rather than political		
		General incorporation		creation and holding of concession shifts to aggregation of individuals
				concession shifts to position inside the aggregation of individuals
				concession 'owned' by the aggregation of individuals
				Concession becomes 'artificial entity'
legal reification of public concession	artificial entity with public nature	<b>Artificial legal entity</b>	artificial entity with private nature	legal reification of private representation of aggregation of individuals
reification of artificial legal entity		<b>Distancing of shareholders</b>		separation between shareholders and the company
				loss of residual control rights
public retaining limited liability, perpetuity	singular political and social representation of association	<b>Reified representation</b>	contractual aggregation of individuals	private
				reconstitution into 'property'
				attribution of agency, ownership and rights to an aggregation of equally constituted individuals
singularized majoritarian shareholding	natural entity			contractual nature of aggregating
				exclusion from criminal law as a purely economic representation
separation of ownership and control holding company			emergent representation of the aggregation of individuals	acceptance in legal, economic and political theory as a singular representation
personification anthropomorphical legal models attribution of agency to a singularized personified representation in criminal law	person			
amendment rights	citizen			
acceptance in legal, economic and political theory as a reified singular representation of a group social institution	natural entity	<b>Full separation of representation and referent Continuum</b>	legal fiction	acceptance in legal, economic and political theory as a singular legal representation
				denial of social and political aspects of reification and singularization
managerial corporation				
		<b>Multiple legal positions</b>		

## Chapter 4: Corporate Constructions

“Who’s the Shawnee Lan’ an’ Cattle Company?” “It ain’t nobody. It’s a company.” (Steinbeck 1976:44)

In Chapters Three and Four I showed how the understanding of incorporation came to be informed by two different discursive formations. The first discursive formation was developed in Chapter Two, starting with a reified political representation and ending with various legal conceptions of representation. The second discursive formation was developed in Chapter Three, spanning the period of the beginning of the 19<sup>th</sup> century to the 1970s. In this period the *modern universitas* developed as a continuum between two mutually exclusive underlying positions, the natural entity theory and the artificial entity theory. As a result of this continuum and the interests at stake in salvaging both underlying positions, all subsequent models of incorporation had to relate to both the natural entity theory and the aggregation of individuals’ theory. The *modern universitas* thus became a projection point in the 20<sup>th</sup> century for a large amount of theorizing about the representation and its referents.

In this chapter I will show how this projection point works in practice. The continuum led to a number of different legal positions on incorporation and the representation. Developing five different basic positions in detail, I will describe how these relate to the two basic positions on the continuum as well as to a particular use of referents. This will show the practical effects of the continuum in legal scholarship.

Moreover, since the legal understanding of incorporation arguably provides the foundation for its understanding in the academic fields of economics, corporate governance and organization studies, these five basic positions will also exemplify how the legal understanding of incorporation and provides different building blocks for the attribution of agency, ownership and amendment rights and informs different conceptions about corporate governance. Finally, this chapter will show how legal understanding until the 1970s related directly and necessarily to the natural entity position as the basis for the reification and singularization of the representation.

# 1. Constituting the corporation

The second discursive formation developed on the basis of two doctrinal theories.

The natural entity theory underlies conceptions that reify and singularize the representation. This makes the representation amenable to be attributed with agency, ownership and amendment protections. It also reconstitutes the representation as a reified representation in the system of law. In this position, its referent is necessarily singular. In 20<sup>th</sup> century legal theory this position has led to the understanding of the representation as a singular legal ‘subject’. In this chapter, I will show the sorts of metaphor and analogy that were applied to this singular legal subject.

The artificial entity theory stands at the other side of the spectrum. This position leads to theories that emphasize the existence of the corporation as an aggregation of individuals. The only possible referent then becomes the individual in an aggregation. In Chapter Three this was the ‘atomized’ view of aggregation that the natural entity theory opposed against. In Chapter Two, this position was described as the (contractual) *societas*. This position will be developed at the end of this chapter as the aggregation of individuals’ position.

Between the two extreme positions, a continuum can be distinguished in which five different contemporary positions on the nature of incorporation and the separate legal entity in the legal discourse about incorporation can be distinguished. These positions and the assumptions behind them will be developed here in order to enable a description of incorporation in the second discursive formation as the creation of a number of different competing types of representation. The existence of these competing types of representation in itself shows the continued acceptance and use of two mutually exclusive positions on incorporation in the contemporary legal discourse. Since this legal discourse is also constitutive of the understanding of incorporation in other disciplines establishing this fact is important in itself.

Second, by identifying these competing types of representation, I explore what effect a particular set of assumptions has in legal discourse on the understanding of the separate legal entity, and the possibilities to attribute agency, ownership and amendment rights in a theory of governance that takes particular assumptions as its point of departure. In Chapters Five, Six and Seven these assumptions will be further

developed as constitutive for a particular idea of legal representation, for a particular idea of a subject, for a particular idea of (corporate) governance and for a particular idea of the representation of association.

This chapter will therefore develop five main ideas of representation regarding incorporation in 20<sup>th</sup> century legal discourse. In Section 1.1 I will explore the representation as an active singular entity; in Section 1.2 I will look at the idea that the representation is an emergent representation of an aggregation of individuals; in Section 1.3 I will look at groups as representations of individuals with singular agency; in Section 1.4 I will look at the representation as a passive singular entity and in Section 1.5 I will examine the representation as a representation of a (contractual) aggregation of individuals.

### ***1.1 Active singular entity***

In the artificial entity theory the separate legal entity was not seen as a fully separate entity with agency for itself, but rather as an entity that expressed a very limited and well-defined type of agency, as described in its charter. The agency of the separate legal entity, therefore, had to remain *intra vires*, i.e. inside the bounds of its charter. Actions committed outside the bounds of the charter were considered *ultra vires* and thereby could be objected to by a court of law. In this position, the separate legal entity would have a limited kind of agency, restricted to the legal and economic sphere. This idea of agency was gradually expanded in the 19<sup>th</sup> century along two lines of thought.

First, as argued in Chapter 3, general incorporation changed the concept of incorporation in such a way, that more and more types of action became considered *intra vires*, leading to a position “that a corporation could do virtually anything it wanted” (Horwitz 1985:187). At the end of the 19<sup>th</sup> century, there was, therefore, no longer a functioning external restriction on the types of activities that the corporation could deploy.

Second, the acceptance of the natural entity position after the 1880s meant that the attribution of ‘agency’ to the separate legal entity itself was also expanded. Whereas,

the beginning of the 19<sup>th</sup> century still held to partnership law and attributed agency to the individuals within the corporate structure, the introduction of the *modern universitas* caused an increasing reification of the separate legal entity. As a result, the perception of corporations as collectives was increasingly replaced by the idea that the separate legal entity itself, as a representation of the corporation, had a singular acting capacity.

This attribution of agency to the separate legal entity does not automatically map back onto the agency of human individuals. It implies a possibility to attribute agency to the separate legal itself as a reified construct or to the separate legal entity as a representation of the aggregation of individuals, as exemplified in the example of the summons against Royal Dutch Shell in Chapter One. Therefore, new theory had to be developed to account for this attribution of agency to the *modern universitas*.

## ***1.2 Emergent social representation***

The main thrust of these new theories came from the emergent group entity model. This approach seeks to understand the separate legal entity as an emergent representation, springing forth from the aggregation but exhibiting an agency over and beyond that aggregation. It is an attempt to understand the separate legal entity in the same position as a passive, emergent representation of a common volition or group identity, which springs forth, but is distinct, from the underlying elements of the group as such (i.e. the individuals forming the group).

This was the model that was also most often used to support the natural entity debate. This approach is not the result of reification, but rather an attempt to position the separate legal entity directly as an emergent identity of the aggregation of individuals. In this position, the separate legal entity becomes the expression of the ‘common identity’ or the ‘common volition’ of this aggregation. The nature and behaviour of a representation springs forth from its constituent elements, but this nature and behaviour can attain a degree of coherence that does not necessarily map back on the separate elements that constituted it. There is something, which can be pointed towards as an emergent phenomenon, but this emergent entity cannot automatically be reified.

The most obvious problem with the emergent group entity approach is that it makes no distinction between the separate legal entity and an identity, which springs forth from the group. Particularly during the 20<sup>th</sup> century, the emergent group entity was increasingly associated in legal scholarship with the image of a common bond or common volition between aggregated individuals (Naffine 2003). This connects to the natural entity theory. However, although singular, in the case of the emergent entity it was not necessarily the legal reification that was seen as the carrier of agency. One represents the legal representation; the other represents an aggregation of individuals. For this reason, the emergent group entity cannot explain the singular legal entity or its agency, nor does it clarify by whom or what that agency is represented and with whom or what it resides. The emergent group entity therefore conflates the aggregation of individuals with the reified legal representation.

This conflation becomes problematic when agency and ownership are attributed. The aggregation of individuals as a referent attributes ownership and access to agency to the whole aggregation of individuals that constitute the corporation. An example is provided by the way in which Freund talks about the emergent entity theory and the attribution of ownership. Freund warns that the organic theory (i.e. the natural entity theory) is ‘illusory’. He warns that in most cases we would want to do without these “indemonstrable entities” because they are over-inclusive: the acts of a natural entity can be “imputed to the corporation for reasons of policy and convenience” (Freund 1897:39). On this basis, he argues against the ‘unity’ of the corporate entity. In a mathematical substitution of the problem of aggregation Freund (1897:62) states:

“Those who believe that all rights must be exercised like individual rights, regard it as anomalous that the rights of A B C D .... N P Q R should be exercised by acts in which P Q R refuse to join; but designate A .... R as X and it does not seem so strange that X should act independently of P Q R. The same is true as to relations between the association and one of its members (A to X instead of A to A .... R) and the identity in succession of changing members (X = X instead of A .... Q = B ... R). Born as these difficulties are of technical prejudices, and of the belief in the absolute value of abstract notions, they are easily overcome by the aid of technical expedients.”

Freund's eloquent dismissal of the natural entity theory thus leads him to identify the 'control' of the corporation in a very specific way. However, Freund's acceptance of the separate legal entity is based on an understanding that the corporation stands for the 'undivided control' that needs to be protected and the 'bond of association' that represents the 'association' of members. The idea of an emergent group entity, then, raises questions about the way in which the corporate entity is appropriated, represented and divided if the reified entity is taken out of the equation. The assumption behind his reasoning is that all parts in the equation remain stable and are of the same nature. Freund explicitly states that the aggregate is made out of 'similar component parts', which are individuals (Freund 1897:30-31). Moreover, his idea of an emergent group representation entity is based on an implicit assumption that these individuals equally contribute to and share in the constitution of a social bond and therefore have equal access to its ownership and agency.

Freund supposes this to be unproblematic in his representation theory, but let us say that A B and C represent the board, F G H the shareholders and Q E D the workers in the corporation. It now becomes rather less self-explanatory that A F Q can be represented in the same easy cut. In the same way the assembly of A ... Z is not necessarily comprised of similar parts when the attribution of agency, ownership or amendment rights are involved. The 'representation' principle therefore implicitly cuts in such a way that A B C and/or F G H are represented by their previous acceptance into a specific subdivision, but Q E D will have a hard time to find themselves back in X. Freund's 'bond of association', which is deemed to be 'representative' of the 'relative unity' of the corporation thus comes to stand for a 'unity of the few'. The unity of the corporation as an emergent representation then becomes a delegated unity.

These assumptions become even more problematic in legal theory, where the emergent social representation is susceptible to analogies from legal history, in particular to the trust. As shown in Chapters Two and Three, the trust creates an implicit, rather than an explicit version of incorporation for constituent groups (Maitland 2003). The trust therefore provides a representation which to a certain

extent is 'emergent'. However, this emergent position relates to a structural dualistic division of its constituency, rather than an underlying aggregation of individuals.

Using the trust as a valid legal model to understand the representation means that the representation links two structural constituent groups, the trustees and the beneficiaries, rather than to an equally constituted aggregation of individuals. This understanding of the corporation as a result of two constituencies leads from the beneficiaries and trustees of the trust to a translation into 'principals' and 'agents', or 'shareholders' and 'managers' in the case of the corporation. By looking for a common bond between aggregated individuals, the emergent entity theory therefore obscures rather than clarifies the singular reified representation and the attributions of agency, ownership and amendment rights.

### ***1.3 Conglomerate entity***

The conglomerate entity idea is a more radical variation of the emergent entity theory. In the conglomerate entity model, the emergent entity is not merely a representation of a passive identity of the aggregation of individuals: "corporations are not just organized crowds of people" (French in Laufer 1994:676). We can then state that the separate legal entity creates "a body, which *by no fiction of law, but by the very nature of things*, differs from the individuals of whom it is constituted" (Dicey 1894-1895 in Maitland 2003:63). In this version, the referent for the representation shifts from the aggregation of individuals to a reified representation that exhibits agency and intentionality as an entity in itself: "As legal subjects they are distinct and in kind different from the visible aggregate of their individual members. These individuals do not constitute the substance of that entity to which the law ascribes personality when it recognizes a corporation aggregate as a legal subject" (Hallis 1978:xliii). The incorporated entity then becomes a "real person with real will and life, but not a body of its own" and finds "'occult quality' in the person who has the status, distinguishable both from the rights and duties and from the facts engendering them" (Hart 1984:24-25). This type of thinking about representation lies behind the identification of a corporation like Union Carbide as an 'absconder', capable of committing 'homicide', as shown in Chapter One.

Turning the separate legal entity itself into a representation that expresses the agency of an individual introduces the question how this singular legal entity with its singular agency should be understood. Many scholars were led to explain the separate legal entity as an ontologically different type of subject, identifying the corporation as a moral (French 1984), metaphysical (Goodpaster 1982), spiritual, (Novak 1982) or psychopathic (Bakan 2005) entity, as well as producing analogies to a machine (Dan-Cohen 1986) or a moral structuring device (Fisse & Braithwaite 1993).

### **1.3.1 Identification and anthropomorphic approaches**

The search for an understanding of the legal representation of the corporation in terms of a singular ‘body’ with ‘agency’ that exhibited the ‘common volition’ of the aggregation of individuals justified an extensive search for an understanding of the corporation and its internal structure through anthropomorphical imagery. A relatively small group of individuals like a Board of Directors can be understood as the ‘alter ego’, ‘(directing) minds’ or ‘brain’ of the corporation, while other constituent groups then become the ‘hands’ and ‘body’ of the corporation (Laufer 2006, Lederman 2000, Leigh 1982). The use of these forms of identification has been well accepted (Wells 2005:144). This approach reflects Viscount Haldane’s ‘identification model’:

“My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation” (Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd [1914-15] All ER Rep 280, 283. in Leigh 1982:1514).

In this quote it becomes clear how the identification model attributes the position of shareholders, management, the board and workers through the specific uses of metaphor and analogy, favouring particular identifications of the corporation as divided into specific internal groups. Although the corporation as such is an ‘abstraction’, this abstraction can be replaced by another, namely the ‘very ego and centre of the personality of the corporation’, which can be seen to be ‘under the

direction' of one or more groups within the corporation. The corporation's agency and intent are therefore clearly within the hands of particular constituent groups. The 'fictional' and fully legal nature of the separate legal entity in legal scholarship therefore became accompanied by an almost full-blown anthropomorphic quality in legal practice (Naffine 2003:348).

The anthropomorphic approach thus allows for all sorts of analogies, dividing control and ownership within the corporation on the basis of implicit metaphors about the corporation as an organologic structure. Lord Denning expressed this idea most pointedly:

“A company may in many ways be likened to a human body. It has a brain and a nerve centre, which controls what it does. It also has hands, which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.” (*HL Bolton (Engineering) Co Ltd v TJ Graham & Co* ([1957] 1 QB 172 in Law Reform Commission (Ireland) 2002: 24)

According to Wells (2005) suspicion of these forms of identification is in order because they identify the corporation as a singular structure, hierarchically organized, centrally and top-down controlled and in the possession of a single controlling and intending person or group of persons. These identifications therefore use very particular assumptions about the locus and distribution of knowledge, implicit metaphorical models of hierarchy, control and decision-making and metaphorical ideas about focus and objectives (Morgan 1997; Lakoff and Johnson 1999). Similarly, the Irish Law Commission criticized the brain metaphor as reflecting a very centralized idea of control within a corporation: “The doctrine fails to reflect the reality that corporate decision-making can occur at many levels within a sophisticated organizational structure. In consequence, corporations will not be held criminally liable for the majority of their corporate acts, and some may even structure their

organizational system by devolving potentially criminal decisions to a lower level within the organization” (Law Reform Commission (Ireland) 2002:26).

Moreover, “the division of tasks into those for hands and brain has been used to justify the class structure, education inequalities, and the division of labour between manual and intellectual worker” (Wells 2005:154).

There is one more reason for suspicion of this model. The identification doctrine is necessary in the UK to prosecute a corporation for manslaughter. To convict a corporation for manslaughter, one needs to identify the persons “identified as the embodiment of the company itself”, understood as the “directing mind” of the corporation (Monks and Minow 2009:25). It is, then, not the employees or ‘the company’ that are used to attribute responsibility but rather a metaphor that establishes the corporation as a representation that is understood through anthropomorphical analogies. Wells (2005) notes that as the identification doctrine asks for guilt to be found with directors as ‘controlling minds’ and since few directors drive trains, steer lorries or sail ships, it seems unlikely that the identification of the agency of the corporate representation with the direction of that agency by directors will ever succeed. Monks and Minow (2009:25) reach a similar conclusion: “(...) in reality, successful prosecutions are all but impossible to achieve.”

### **1.3.2 Personification**

Although Viscount Haldane still stated that the corporation was an ‘abstraction’, the corporation was treated as a proper ‘person’ in legal debates in more ways than one. The idea of the corporation as a singular entity or a singular representation is mostly derived from the use of the ‘legal personality’ as a denominator of the separate legal entity, particularly after the 1886 *Santa Clara v. Southern Pacific Railroad* case in the USA and the 1897 *Salomon v. Salomon* case in England.

In these cases, the similarity between the singular nature of legal entities together with the idea that this singular legal entity has agency as a legal ‘personality’ produced the separate legal entity as a full legal actor with amendment rights and legal and economic agency in its own name. The 1889 Interpretation Act in the UK stated: “In this Act and in every Act passed after the commencement of this Act the expression

“person” shall, unless the contrary intention appears, include any body of persons corporate or unincorporated” (Interpretation Act, 1889, sec. 19 in Maitland 2003: 125). As shown in Chapter Three The *Santa Clara* case in the USA and the *Salomon* case in the UK specifically introduced the representation as a ‘person’. As a result of the *Santa Clara* case, Williston could write: “the fictitious person of the corporation shall have, in general, the capacity of acting as an actual person, so far as the nature of the case admits. (...) for the conception of a corporation as a legal person, a conception going back farther than can be definitely traced, involves necessarily the consequence that before the law the corporation shall be treated like any other person” (Williston 1888:117).

Initially, these terms were explicitly used with caution. Personification was seen as a convenient tool to deal with the singular agency, attributed to the separate legal entity. Freund as late as 1897 could still relate to the idea of a ‘corporate personality’ as a convenient shortcut, “(...) in most cases in which we speak of an act or an attribute as corporate, it is not corporate in the psychologically collective sense, but merely representative, and imputed to the corporation for reasons of policy and convenience” (Freund 1897: 39). It was a matter of common sense to him that the idea of ‘personification’ was a tool, not a concept to be taken seriously as a full personification of the legal fiction: “(...) it is also extremely convenient and helpful to operate with the notion of corporate personality, and there is no danger in this as long as we remember that the bond of association operates only upon and through individuals placed in a certain position. (...)” (Freund 1897:39, see also Horwitz 1985).

However, the identification of the legal entity as a singular legal ‘subject’ and the attribution of rights and agency increasingly led to a view that as a representation it deserved to be treated similarly to natural persons (Mayer 1989; Naffine 2003). The representation became increasingly personified. In *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 a case was made during World War I against Continental Tyre as a subsidiary to a German Company. All directors of the subsidiary were German and resident in Germany and all of its shares except one was held by German subjects in Germany. Daimler was concerned that making payments to Continental Tyre could be interpreted as making payments to the enemy.

The question was whether the separate legal entity, existing independent of its members, could be classified as ‘English’ or not (Hallis 1978:xlvi). The verdict ruled that Continental Tyre and Rubber Co., Ltd. was “a living thing with a separate existence”, “an English company with a personality at law distinct from the personalities of its members and could therefore sue in the English courts as a British subject” (Hallis 1978:lix). In his dissenting opinion Lord Buckley further stated that the artificial personality was ‘swayed by the enemy’: “He is German in fact although British in form.” Corporations were thus portrayed as male natural persons, who as national subjects could sue in the courts and who, as singular legal subjects, were in the possession of a ‘character’ that could be ‘swayed’.

This personification of the representation as a singular legal subject with separate agency led to the attribution of agency and amendment rights to the representation as a singularized legal representation in and for itself. These effects of personification were retained after the rejection of the natural entity position in the 1920s. The British and American courts continued to expand gradually on the idea that the separate legal entity could be constructed as a singular legal ‘personality’. This endowed the incorporated entity with Bill of Rights protections in the USA under the First, Fourth, Fifth and Seventh Amendment, giving the right against double jeopardy (Fong Foo, 1962), the right to jury trial in a civil case (Ross v. Bernhard, 1970), the right of “commercial free speech” (Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 1976, and Central Hudson Gas, 1980), the right against unwarranted regulatory searches (Marshall v. Barlow, 1978) and the right to spend money to influence a state referendum (Bellotti, 1978)<sup>22</sup>. These rights make it impossible to prohibit corporate political activity and allow corporations to turn inspectors away by claiming their search and seizure protection as ‘citizens’ protected by the Fourth Amendment.

It is this personification of the representation that enables scholars like Monks and Minow (2009:14) to state that “Indeed, corporations have a life, and even citizenship, of their own, with attendant rights and powers. Corporations are “persons” within the meaning of the United States Federal Constitution and Bill of Rights.” The same

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<sup>22</sup> Examples provided in Mayer (1990:582).

personification can also be found in the summons against Royal Dutch Shell, as noted in Chapter One. I will further discuss the personification approach in Chapter Five.

#### ***1.4 Passive singular entity***

John C. Coffee Jr. (1981) states that the understanding of the corporation as a ‘person’ is nothing more than an “anthropomorphic fallacy”. He quotes Pope Innocent IV: “In the thirteenth century Pope Innocent IV forbade the practice of excommunicating corporations on the unassailable logic that, since the corporation had no soul, it could not lose one” (Coffee 1981:386). Apart from lacking a soul, they also overtly lacked physical bodies. This was pointedly expressed by Sir Edward Coke (1552-1634): “they cannot commit treason, nor be outlawed or excommunicated, for they have no souls” and by Edward Thurlow (1731-1806): ‘Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like.’<sup>23</sup>

The lack of a corporate body and soul meant that the separate legal entity could not be understood as a ‘person’. Legal scholars therefore posited that the separate legal entity was no more than a ‘legal fiction’. In this conception, the representation itself produces a presence before the law, a pure legal agent of which the definition is completely internal to legal reasoning. The legal ‘person’ becomes a legal abstraction, a formal handle for the legal rights and duties conferred upon a purely fictional legal agent, with no more substantive nature than the law accords it: “We are, (...) tricked by a grammar of subject and predicates into thinking that the legal person is something other than a pure abstraction of law” (Naffine 2003:353). The separate legal entity is seen as a purely passive holder of rights and duties, reserving agency strictly for the human individuals within the corporation and relegating the idea of the separate legal entity as a ‘persona’ or ‘personality’ to the domain of metaphor, a shortcut to understanding the representation of the corporation.

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<sup>23</sup> This famous quote turns up in quite a number of different ways. Bovens describes the quote as such: “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?” Thurlow, Lord Chancellor of England, according to this quote added in a whisper: “and by God, it ought to have both” (Coffee 1981:386 in Bovens 1998:66).

In theory, this version of the representation cannot represent itself, nor can it exhibit agency on behalf of the corporation as an aggregation of individuals, as this would remove it from the passive position of the holder of the separate rights and duties and move the attribution of agency to an active legal entity. Coke introduced this position lucidly: “the corporate person is something apart from the members of the corporate body, since it is a fiction while they are realities” (Coke in Hallis 1978:xlii-xliii). What underlies the representation created by incorporation therefore splits into an aggregated type of association *plus* a reified singular representation. The legal representation must be seen as N+1 persons, in which the 1 is the reified singular representation functioning only within the domain of the law. This position therefore attributes agency only to human individuals acting within the corporation, while continuing to acknowledge the reified singular representation within a very particular domain.

This position is problematic, because the representation as a *modern universitas* is dependent on the dismissal of the artificial entity approach, the dismissal of *ultra vires*, and the attribution with a singular type of agency. Using a passive singular entity approach together with the *modern universitas*, then, means that a representation is created that has the capacity for ownership, as well as the agency to contract, sue, incur debt, and for being attributable for general corporate legal and economic agency as a singular entity. Since this is hardly a fully passive representation, the question then remains how and in what capacity the legal fiction as a merely passive legal device to hold and represent the bundle of rights and duties can own and act as a reified entity. The agency attributed to the reified singular representation as a contracting and owning entity makes it a singular entity with a specific type of attributed agency. It also remains to be explained in what exact capacity the separate legal entity exists next to the aggregation of individuals, how its attributed agency relates to the individuals within the corporation and how the reified singular representation can contract with the individuals within that corporation in its own name. It also still has to be specified who exactly, and in what capacity, holds control over the passive reified singular representation and its agency (Berle 1931; Berle and Means 2007). The passive entity approach therefore returns the representation to a position that it held before the beginning of the 19<sup>th</sup> century and gives no explanations for the specifics of the *modern universitas*.

### ***1.5 Aggregation of individuals***

This passive approach has been taken further by the aggregation of individuals' position in legal scholarship, also known as the law and economics approach. This position argues that there is no such thing as a reified legal representation. Rather, a company is made out of individual agents: "Courts have long recognized that, despite its long history of entity, a corporation is at bottom but an association of individuals united for a common purpose and permitted by law to use a common name" (Berle 1954:352). As Wells (2005:147) states: "Corporations, whatever they are, are not individuals and do not act as unitary individuals."

For these reasons, the aggregation of individuals' position holds that there are no reasons to assume that companies or corporations are persons or even unitary entities in any legal, moral or organizational sense. Dispelling the company or the corporate entity means that we can only look at the constituent elements, the members of the corporation as the proper seat to identify the seat of agency. Any imputation of consciousness (Lederman in Fisse and Braithwaite 1988: 488), intent (Cressey in Fisse and Braithwaite 1988:490) but also of agency in general (Fisse and Braithwaite 1988:475) are fallacious: "Intentions gleaned from policies, practices, and the achievement of consensus among board members or principals, for example, are all traceable to individual intentions held by individual members of the corporation. This logic avoids the paradox of a corporate will that is both independent of, and yet wholly circumscribed by, employee intentions. Both state and federal law subscribe to this position without exception" (Laufer 1994:676). Since corporations cannot act in the real world, they cannot commit crimes (Fisse and Braithwaite 1988:473). Any imputation of agency or liability towards 'the corporation' should therefore be rejected and redirected towards individual members of the corporation. And therefore attribution of liability can only be directed at human, moral agents (Wells 2005; Clarkson 1996).

This approach takes methodological individualism as its basic philosophy, positing that it is a logical fallacy to assume anything to exist beyond the individual human person with intentionality and agency (Elster 2007; Hayek 1996; Popper 2004). In methodological individualism: "human beings are the basic unit of social reality and

social explanation” (Philips in Wells 2005:147). The aggregation of individuals’ position thus applies methodological individualism to the corporation to replace the reification of the representation and the attribution of agency to that representation with a corporation that consists of an aggregation of individuals and agency that remains with those individuals. Using methodological individualism, not only the personification of the representation is denied, but the existence of any type of supra-individual representation is rejected. On the basis of this view, Lord Hoffman stated in *Meridian* that there is no such thing about a company “of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as a company as such” (*Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507).

Like the passive singular entity position, the aggregation of individuals’ position returns the conception of incorporation to a theory of the *societas* or contractual partnership. I will argue in Chapters Five and Seven that in this sense this approach seems consistent with methodological individualism. However, by accepting the representation as singular and reified and by accepting the attribution of agency, ownership and rights to this reified singular representation, this position has no answer for the later effects of the acceptance of the natural entity position and the resulting reification of the representation. This approach, therefore, puts us back to the artificial entity position before the beginning of the 19<sup>th</sup> century. What is left is a reified singular representation that functions as no more than a theoretical legal construct. I will discuss these notions further in Chapter Five.

## **2. Five contemporary positions**

In this chapter, five different models were identified, describing different ideas about representation, based on alternative readings of the contemporary continuum between the natural and artificial entity positions.

The active singular entity position stated that the representation changed at the end of the 19<sup>th</sup> century. General incorporation expanded its possibilities for deploying activities until no restrictions were left. The representation, at the same time, became increasingly reified and singularized through the natural entity position. An increasing

attribution of agency to this reified singular representation and an expansion of the possibilities to use that agency meant that ways had to be found to explain this attribution.

The emergent entity position attempted to understand this reified singular representation as an emergent representation of an aggregation of individuals. The representation then emerged through various projections, like a ‘common volition’, the more anthropomorphical imagery of a ‘corporate body’ and led to a search for similarities between corporation and human beings as singular legal entities with agency.

The emergent entity position, the conglomerate entity position and personification all conflate the separate legal entity with a different kind of representation, returning the conception of the separate legal entity to the 19<sup>th</sup> century debates around the ‘natural entity’. Its projected nature is then no longer that of a singular *legal* entity, but a projection of a *social* representation based on the idea that the aggregation of individual creates an emergent entity. The conflation of these positions in the context of the reified legal entity with singular agency leads to governance attributions, based on analogy and metaphor.

The passive singular entity position, by contrast, understood the singular reified representation as a fully passive entity. Although this would be in line with the artificial entity position, it also suffered from its defects, because this position could not explain any of the later developments around incorporation that followed from the natural entity position.

The aggregation of individuals’ position turned out to be even less compatible with the historical antecedents of incorporation. Where the legal entity evolved as a reified entity through the natural entity theory, the ‘aggregation of individuals’ position urged a return to a representation without reification, turning the representation into a mere ‘convenient fiction’ on the basis that the corporation consists only as a collection of contracting individual agents with individual interests. The reified singular representation then appeared as merely a convenient technical legal device: “Thus, the “corporate device” was “not an expression of any philosophic quality in

the group of any group will or group organism. It is no more than a convenient technical device (...) to achieve the practical results desired, of unity to action, continuity of policy [and] limited liability (...)" (Horwitz 1985:221-222). The aggregation of individuals' position therefore denied the historical differences between incorporation, the *societas* and the partnership.

As shown above, every these idea about the representation invokes and protects very particular images of division. I will return to these outcomes in show Chapters Five and Six to show how these images relate to the access within the corporate structure to corporate hierarchy, agency, ownership and control.

### **3. Conclusions**

I have shown in this chapter how the second discursive formation produced a multiplicity of ideas concerning representation leading to five distinct versions of representation in contemporary legal theory.

On the basis of these five ideas concerning representation, three main conclusions can be drawn.

The first conclusion is that any position in the second discursive formation will relate to the continuum between the natural entity theory and the aggregation of individuals' theory if it seeks to retain the theoretical coherence as well as the practical results of the second discursive formation. Even though the aggregation of individuals' position theoretically opposes the use of reified representations and the attribution of agency to anything but human individuals, it has to accept and justify the type of singularization and reification that underlies the second discursive formation and the natural entity position on which it is based.<sup>24</sup> The effects of this implicit acceptance will be further discussed in Chapters Five, Six and Seven.

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<sup>24</sup> In Chapter Seven I will argue that for this reason the acceptance of this continuum was a result of the acceptance of a reified singular representation with social and political aspects (Bowman 1996; Drucker 2006). The acceptance of the continuum was, then, not the outcome of an inherent tension between opposing doctrinal positions (Millon 1993), but rather a political choice to justify an inherently anomalous concept.

The second conclusion is that the representation developed in the second discursive formation, described in Chapter Three and in this chapter is clearly distinguishable from the representation developed from the beginning of the 19<sup>th</sup> century from the representation that was used in the first discursive formation. The *concessionized universitas* provided a distinctly political concession, whereas the *modern universitas* provides a distinctly legal representation. This has direct effects for the attachment of ‘ownership’. The first discursive formation provided an external political charter to a *societas*. Ownership and agency can, then, not be attributed to the aggregation of individuals or to the concession itself because the concession stands fully apart from the aggregation of individuals as a grant from outside. The grant and formal ownership over the representation is, therefore, fundamentally separated from the aggregation of individuals in the first discursive formation. By contrast, in the second discursive formation there is no external authority to which the formation of the representation can be attributed. The representation therefore relies on the aggregation of individuals for its production as well as for the attribution of the way it is ‘held’ or ‘owned’. The concession or grant then changes to a legal representation of that aggregation of individuals and thus shifts from a position external to the aggregation of individuals to a position within the aggregation of individuals. The second discursive formation, therefore, does not allow for a fundamental split between the aggregation and its representation. Since the *modern universitas* as a reified and singular legal representation is, therefore, fundamentally different from the *concessionized universitas* in the first discursive formation, the type of reification produced in the *modern universitas* cannot be justified on the basis of the reification produced in the *concessionized universitas* in the first discursive formation.

The third conclusion is that the use of a continuum between two mutually exclusive starting positions in the second discursive formation creates an inherently inconclusive basis for incorporation and the ideas of representation based on this concept of incorporation. Mayer (1989) argues that the mutually exclusive nature of the concepts underlying the theory of incorporation has created a practical impossibility to formulate a coherent and explicit theory of incorporation. Any ruling leaning more toward an artificial entity conception would potentially take away amendment rights from the reified singular representation and make it more amenable

to government intervention, while any ruling leaning more towards the natural entity conception would increase the room for the attribution of agency to the representation itself, making it vulnerable to lawsuits targeting the reified representation. Any ruling on the nature of the representation is therefore a de facto economic ruling: “The more overt the Court is about imposing its economic view of what is a corporation, the more the Court engages in reading its own substantive content into the Bill of Rights (...)” (Mayer 1989: 649). The interests involved, therefore, prohibit the formulation of a consistent type of theory based on either the natural entity position or the artificial entity position: “For the Court to appear to be imposing its view of the corporation - and therefore shaping a state and imposing an economic view - creates problems of legitimacy [...]” (Mayer 1989:646).

This chapter showed that the contemporary theory of incorporation is based on two mutually exclusive sets of theory producing a theory. Both theory and practice, therefore, necessarily work with paradoxical, incoherent and inconclusive types of representation. Moreover, theory and practice actively rely on the indeterminacy between these underlying positions and the paradoxical nature of the representation to retain practical results. The contemporary understanding of the reified singular representation is, then, not only the result of an indeterminacy regarding the natural entity theory and the artificial entity theory positions (Horwitz 1985) but also on an unwillingness to cut the Gordian knot resulting from the combination of inconsistent theory and practical interests.

In Chapter Five, I will argue that this fundamentally contradictory type of theory challenged the doctrinal use of methodological individualism from agency theory after the 1970s, leading to the development of a third and last discursive formation. The three discursive formations, together, will be used in Chapter Six, where I will argue that contemporary legal scholarship produces an inherently ambiguous and paradoxical concept of representation. Chapter Six will also show how these theories are based on a hierarchical ordering of these three discursive formations. In Chapter Seven, I will return to the roots of the representation in the first discursive formation and explore how these contradictory modes of representation relate to the representation of association.

## Chapter 5: Agency theory and singular representation

In Chapters Two and Three I developed two distinctive discursive formations underlying the contemporary concept of incorporation. In Chapter Four I gave an overview of the positions that developed on incorporation in 20<sup>th</sup> century legal debate as a result of the acceptance of the mutually exclusive doctrinal positions put forward in Chapter Three. I also showed that one position, the aggregation of individuals differed from the other positions by its rejection of the reified legal representation. This chapter will argue that this last position provides the building blocks for a concept of incorporation that forms a third and final discursive formation informing the contemporary theory of incorporation.

In Section One I will argue that the version of incorporation that became dominant after the 1970s originated in the economic domain (Butler 1988:99) and that assumptions taken from the economic domain led to a rejection of the *modern universitas* and the doctrinal position provided by the natural entity theory through a particular use of methodological individualism.

In Section Two I will evaluate the theoretical consistency of this new understanding of incorporation in relation to the understanding of representation in legal scholarship. I will argue that economic and legal assumptions about the representation in the third discursive formation differ in terms of their referent.

In Section Three I will describe how the third discursive formation combined methodological individualism, taken from agency theory, with an implicit acceptance of the reification and the attribution of singular agency, taken from the second discursive formation. This produces a very specific idea of a singular reified representation without a definite, external referent. The singular reified representation thereby becomes an ideal-type<sup>25</sup> agent. This ideal-type agent is based on an explicit

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<sup>25</sup> ‘Ideal-type’ both as a noun and as an adjective, in this dissertation denotes a representation that is separated from a definite referent, leading to a theoretical superposition that cannot relate back logically to one particular referent. The use of ‘ideal-type’ in this dissertation, therefore, is not meant as the provision of a heuristic device for sociological research (Weber 2005) and does not refer to ‘ideal’ as normatively positive.

denial of reification, while the consequences of this reification are retained. This shows an implicit acceptance of the reification and singularization of the representation. I will return to the relation between the third discursive formation and its relation to the doctrinal assumptions underlying methodological individualism to argue that methodological individualism relates to natural persons as a fixed referent, while the third discursive formation relates to ideal-type singular reified constructs as its referent. I will argue that the implicitly reified ideal-type agent posited in the third discursive formation strongly informs the theoretical relation between natural persons and the reified singular representation in the legal and economic domain.

Section Four will conclude the chapter. I will argue that the results from Section Three lead to the projection of ideal-type assumptions of agents and agency onto an ideal-type representation, which leads not only to the loss of a definite referent, but also to an impossibility to reconnect to one definite referent. I will argue that this position on incorporation functions as a third discursive formation and that the assumptions behind this third discursive formation became dominant after the 1970s and thereby largely shape the contemporary concept of incorporation.

## **1. Agency theory and incorporation**

“‘We’re sorry. It’s not us. It’s the monster. The bank isn’t like a man.’

‘Yes, but the bank is only made of men.’

‘No, you’re wrong there – quite wrong there. The bank is something else than man. It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you. It’s the monster. Men made it, but they can’t control it.’” (Steinbeck 1976:35)

The most prominent contemporary idea about the representation created by incorporation is presented by agency theory (Ripken 2009) also termed the new economic or contractualist theory (Bratton 1989), nexus-of-contracts theory (Ireland 1999), organizational economics theory (Zey 1998) or the marginalist economic view (Schrader 1993). This theory is interesting in the context of incorporation, because it provides assumptions from the field of economics that have been imported from the 1970s onwards as a basis to understanding incorporation in the legal sphere in the

aggregation of individuals' position. The most important assumption is that the referent of the representation necessarily relates to the natural person. This assumption, in turn, is derived from the emphasis that agency theory places on methodological individualism.

### ***1.1 Methodological individualism***

Agency theory refers to methodological individualism as an ontological starting point (Schrader 1993:159). Methodological individualism is generally used for the explanation of agency in social representations (Elster 2007:36) for three reasons. The first reason is that, although we can talk of collectives like states and corporations as if they were individual persons with properties like will, intent or volition, these properties can only be recognized through the projection of ideas that pertain to the researcher, rather than to the object of research, if they are projected onto representations that do not conform to a human measure of will, intent and volition (Elster 2007). A sociological description, therefore, has to rest only on the description of the acts of individual persons (Weber 2005). This posits methodological individualism essentially as a methodological approach (Elster 2007).

Methodological individualism is also employed as a methodological corollary to political individualism and liberalism (Bowman 1996). Retaining the human individual as the ultimate measure for agency retains the idea that any collective is ultimately formed out of, and explainable by, the agency and will of individual human beings. This keeps the idea of supra-individual agency and representations in the political and social sphere at bay, since any representation is, in itself, only the expression of the agency, will and volition of human individuals (Elster 2007; Popper 2004).

Methodological individualism in general thus presents a view in which the human individual and its agency (Horwitz 1985:181) are the only appropriate unit of analysis for the social sciences (Zey 1998:90). This idea of methodological individualism has become deeply rooted in the social and political sciences as a methodological and philosophical point of departure for the understanding and constitution of modern politics, law, economics and the constitution of the social sphere (Elster 2007). As

argued in Chapter Two, Three and Four, its assumptions have become central to criminal individualism (Wells 2005), economic atomism (MacKenzie *et al.* 2007) and political liberalism (Bowman 1996).

### ***1.2 Methodological individualism and the reification of representation***

In agency theory, methodological individualism is used as a starting point to argue against the existence of agency over and above the level of the individual human being (Schrader 1993:80). The reduction of the collective into an aggregation of contractual individuals is a theoretical starting point that delivers the best predictive possibilities in economics (Schrader 1993:71). This leads to the use of behavioural models to understand the individual as a unit that explains or predicts the behaviour of a wider system (MacKenzie *et al.* 2007; Zey 1998). Based on these assumptions, methodological individualism provides a methodological background for rational choice theory to argue that models can only be based on the agency of individual units within a system. This leads to a reduction of the basic actor (Schrader 1993:72) and social phenomena (Schrader 1993:78) to a level of analysis that takes into account the individual level, rather than the collective. This means that the individual is antecedent to and independent of the group (Zey 1998: 90), while agency at an organizational level is invalidated.

From this model it follows that voluntary arrangements between human individuals are the foundation upon which all social order rests (Ripken 2009:194). Returning to the historical models, the *societas* then remains as the only possible mode of representation of association. The individual members of the firm are therefore the primary element for theory about the organization: “It finds the firm's separate characteristics to be insignificant and attaches determinant significance to the relationship's aggregate parts” (Bratton 1989:423). These notions are extended into the domain of organizations more generally: “The convention of viewing the organization as a bounded body is simply reification, a cognitive error to be overcome” (Davis *et al.* 1994:565). Any organization, then, is composed of individual members who form the organization as a whole solely through their (contractual) relations with one another (Bratton 1989:423). This view is specifically extended to corporations in agency theory. Jensen and Meckling assert that:

“Stripped to its essentials, the corporation is simply a legal fiction which serves as a nexus of contracts. Individuals and organizations— employees, investors, suppliers, customers, etc.—contract with each other in the name of a fictional entity—the corporation. (...) The corporation did not draw its first breath of life from either a minister of state or civil servant. More importantly, the corporation requires for its existence only freedom of contract.” (Jensen and Meckling 1983b:7)

In this example, the primacy of the attribution of agency to human individuals in a generalized organizational setting is applied to corporations. Like organizations in general, only the (contractual) arrangements of individuals form the corporation: “Individuals are ontologically prior to corporations, which, as fictions, have significance only because of the freely contracted arrangements of their human constituents” (Scruton and Finnis 1989:254). In this sense, corporations are nothing but ensembles of individuals: “Corporations have no reality over and above their constituents, because they are created by and function only because of them” (Werhane 1985:51). Apart from natural persons corporations would never exist and corporate actions would never occur (Ripken 2009:161).

Starting from this perspective, agency theory emphatically denies the reified singular legal representation as a “mere legal fiction” (Ripken 2009:158) arguing that “(...) no independent, real corporate entity exists” (Ripken 2009:159). The representation of the corporation is “(...) merely a fiction that serves as a nexus of contracts among the firm’s various individual participants” (Ripken 2009:104). It is argued that the term “contractual theory” would be preferable to “nexus of contracts”, because the ‘nexus’ potentially refers to a reified concept, existing as an entity apart from contractual relations (Ripken 2009:159). The corporation thus “springs up as a spontaneous productive order” (Bratton 1989:451). Corporations and their representations do not appear as actors but merely as “dense patches in networks of relations among economic free agents” (Zukin and DiMaggio in Davis et al. 1994:565).

### *1.3 Pragmatic acceptance*

However, the emphatic denial of the reification of the representation does not lead to a full rejection of the singular reified representation or a reduction of the ‘firm’ to the agency of individuals. The reification of the representation is acknowledged in three ways in agency theory.

First, the representation continues to be recognized as singular as well as reified from the perspective of an outside marketplace (Bratton 1989:429), doing things that neither markets nor individuals can do. Rational economic actors ‘fuse’ and ‘coalesce’ into firms and emerge altered through the process. Furthermore, they “determine output and price levels in response to changes in data” and they “determine the quality of products before turning them over to the market for evaluation” (Bratton 1989:429). They can also be found in the language of agency theory, where they are “a means to the end of team production centred on management” and serve as repositories for productive knowledge (Bratton 1989:429). Similarly, when Alchian and Demsetz talk about their joint team production model of the firm, the idea of a “combined owner and residual claimant” possessing numerous powers looks very much like a reified entity: “it observes the input behaviour of team members, determines the terms of firm participation contracts, and terminates firm membership.” (Bratton 1989:454-455) There is therefore a pragmatic recognition of the corporation as a singular economic representation that represents collective economic agency. As Bratton argues:

“The corporate entity (...) retains a cognizable social reality even as it returns to the diminished status of a reification. The firm, like other institutions, retains a meaningful existence as a separate entity because it carries on while individuals, with their narrower interests and whims, come and go. This reified entity receives separate substantive content from the “common purpose” of its participants. (...) It provides a means to the end of production, setting the common goals of the participants apart from those of the rest of the world. It also facilitates decision making and conflict resolution within the group and external action in the name of the group.” (Bratton 1989:425-426)

In terms of the models presented in the previous chapter, the collective economic agency that is acknowledged here resembles the emergent group representation position.

Second, agency theory advocates pragmatism with regard to the singular reified legal representation, arguing that the problems with its reification are negligible in the light of the concept's 'convenience' (Bratton 1989). At one point, Jensen and Meckling argue that

“Viewing the firm as the nexus of a set of contracting relationships among individuals also serves to make it clear that the personalization of the firm implied by asking questions such as “what should be the objective function of the firm”, or “does the firm have a social responsibility” is seriously misleading. *The firm is not an individual*. It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals (some of whom may “represent” other organizations) are brought into equilibrium within a framework of contractual relations. In this sense the “behaviour” of the firm is like the behaviour of a market; i.e., the outcome of a complex equilibrium process. We seldom fall into the trap of characterizing the wheat or stock market as an individual, but we often make this error by thinking about organizations as if they were persons with motivations and intentions.” (Jensen and Meckling 1976:310-11, emphasis in original)

However, at another point Jensen and Meckling (1983b:8) argue:

“Economists have found it convenient to treat the corporation as if it were a (wealth) maximizing individual in explaining how market systems function. For many purposes, assuming that corporations choose and maximize like an individual simplifies our analysis without seriously impairing the usefulness of the theory. More generally, of course, ascribing human characteristics to the corporation is often a useful linguistic expedient.”

Apparently, even if the separate legal entity is reconceptualized as a 'nexus', it still functions in particular ways in the third discursive formation: “Nexuses, like

punctuation marks and other formal devices, bear on substance” (Bratton 1989:429). Through pragmatism, the ‘nexus’ can still contract for itself, remains attributable with legal agency, ownership and amendment rights and implicitly represents the aggregation of individuals as a reified singular representation in the legal as well as the economic domain. It is, therefore, the personification of the representation that is emphatically denied, while the singularization and reification of the representation are treated with pragmatism for reasons of convenience.

The third acknowledgement of the reified singular representation is therefore present in the advocacy of pragmatism with regards to the legal singular reified representation, arguing that the problems with its reification are negligible in the light of the concept’s ‘convenience’ (Bratton 1989). The singular reified representation is indeed convenient, because it provides perpetuity, limited liability, agency, ownership and amendment rights, as well as the ground for the holding company and the possibility for a separation of ownership and control.

Agency theory, therefore, emphatically denies the personification of the representation, while the singularization and reification of the representation are retained. In this way, the singular reified representation continues to provide all of its ‘convenient’ functions, while at the same time the denial of personification sheds the possibility for the attribution of agency, ownership and rights to a definite referent. For this reason Bratton argues that “(...) for contractualists the reality of the ‘personhood’ of the corporation, or lack of it, is indeed a matter of convenience” (Bratton 1989:475).

This move into pragmatism is particularly interesting in the light of its reliance on methodological individualism, because the denial of reification in agency theory through the invocation of methodological individualism invokes a specific idea about representation that is incompatible with the way legal scholarship understands its construction of representations.

## **2. Two agents**

Agency theory employs methodological individualism to reduce supra-individual representations into individual agents with individual agency. As argued above, the only referent for these individual agents in methodological individualism are human individuals. The pragmatic acceptance of a factually reified and singularized representation from legal theory thereby introduces a conundrum in agency theory.

One way to understand this conundrum is by taking a closer look at the assumptions underlying constructions of the ‘subject’ in legal theory and how these assumptions differ from the assumptions in methodological individualism and in agency theory.

### ***2.1 Legal constructs***

“(…) juristic concepts are ideal expressions of social facts, and (…) their ideality is possible only by means of the abstraction which the jurist deliberately makes in his account of society.” (Hallis 1978:163)

Nature does not create the law or the form of legal presentation: “The key to the nature of this legal subject will therefore lie in the implications of the law which has created it, not in the character of the association as a living fact” (Hallis 1978:9). Rather, the jurists themselves “produce legal realities – that is, realities from the legal point of view” (Hallis 1978:41). As a result, Scruton and Finnis can state that “(…) ‘personality’, like ‘trust’, is a mere creature of the law which discerns it, and not something that exists ‘in itself’” (Scruton and Finnis 1989:246). In this sense, all legal representations, including the category of the person, become constructs, formed through theory: “put roughly, “person” signifies what law makes it signify” (Dewey 1926:655). Legal scholarship, then, does not work with human beings or the social representation of association as referents, but only with the nature of their representation in the system of law: “It is only through its jurists object that the juristic person has any existence as a person” (Savigny in Hallis 1978). The representation, then, relates not to a definite referent but to the role the representation has within the larger system of law: “The person is not a relation but a being, a living reality. It is a social reality so organized as to conform to the requirements of juridical order” (Saleilles in Hallis 1978:238).

Since the theoretical construct defines what a legal subject is, the representation of the legal 'subject' does not necessarily need the human being as its referent. The 'legal subject' appears as no more than a formal legal representation that in principle can refer to any type of referent. The legal representation, then, is primary to its referent in legal scholarship. In this sense, any type of legal construct is formally possible as long as legal scholars would conceive of the legal construct operating in that position and would be willing to expand the legal system to include such a concept.

Based on the reasoning that not the external referent but legal scholarship itself states the nature of the representation, it makes sense that legal scholars plead to retain the separate legal entity as a reified singular construct. Changing the singularization and reification of the representation produced by incorporation would entail the construction of a completely new system of representations. Because the legal construct relies on the imposition of a theoretical nature to a singular representation that does not present a direct relation to the natural person, this means that the development of a new system of representations is not necessary as long as these representations can relate in more or less consistent ways within the existing structure of law. Legal scholarship, then, continues to use a reified singular legal representation for reasons of internal theoretical consistency, even though it could potentially move beyond this position.

In this reasoning, both individual human beings and corporations appear first and foremost as conceptual reified singular representations, fully internal to a system of legal representations. The reification and singularization of the legal representations then precedes its connection to a particular referent, such as a natural person or a natural aggregation of individuals. It therefore applies reification and singularization to an internal legal construct that does not have the natural person as a necessary referent. This type of scholarship, then, does not posit that its agents are necessarily individual human beings, or that the referent for the 'legal subject' construct is necessarily a human being, quite the opposite. They, therefore, do not apply methodological individualism and do not work with individual human beings as a necessary referent for representation and agency.

Given the continuum and its necessary adherence to singular as well as aggregate referents developed in Chapters Three and Four it is only through the nominal equality of its representations that legal theory can continue to refer to different types of ‘legal subjects’ in equal fashion and thereby retain the current system of representations. Because the consistency of the current system of representations relies on the reification and singularization of the representation created by incorporation, singularization and reification of the reification remain acceptable and even necessary.

This means that *exactly because* in legal scholarship the representation and its singular agency are *not* based on a commitment to methodological individualism and the natural person that the current system of representations can continue to exist. In this light, the attribution of singular agency, ownership and rights are also not necessary, but merely convenient modes of attribution to understand the reified singular legal construct as a representation that fits the rest of the legal system and sustains its ontological assumptions. Neither methodological individualism nor the natural person as a referent can therefore function as a basis in legal scholarship to create, understand and justify the reified singularized representation created by incorporation.

## ***2.2 Different fictions***

Following this logic of the legal construct, it does not matter whether the representation is theoretical or not. Because legal scholars themselves constitute and maintain the reification and singularization of the representation, it can constitute a reified and singularized point of ascription that exists solely within the legal system of representations. Within this system of representations, the reified singular legal representation, for all intents and purposes, then constitutes a reified, singular representation, attributable with agency, ownership and amendment rights, which is as reified and as singularized as other representations within the legal system of representations. The ‘legal fiction’ in legal scholarship, then, needs to be understood as an ‘artificial’ rather than a ‘mythical’ representation within the legal system of representations: “If a corporation is ‘created’ it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination” (Dewey

1926:655).

Even in the aggregation of individuals' position, which comes closest to agency theory, the 'legal fiction' is predicated on the idea that the representation can be attributed with agency and ownership apart from the aggregation of individuals. In this sense, every legal position that uses this artificial representation, either directly or through the factual attribution of perpetuity, limited liability, agency, ownership and amendment rights, or the use of the holding company, implicitly applies a theory that rests on singularization and reification. As argued in the previous chapters, the historical basis for the understanding and justification of this artificial singular reified legal construct lies in the *concessionized universitas* and the natural entity conception from the first and second discursive formations. Any legal theory that concerns itself with the contemporary theory of incorporation, therefore, has to take into account the factual reification and singularization of the representation and the history that justified its becoming and acceptance. The 'legal fiction' therefore functions as an 'artificial', rather than a 'mythical' reified and singular representation, even within the legal position that comes closest to agency theory.

Therefore, when agency theory invokes methodological individualism, which uses only the natural person as its referent, this introduces a very different understanding of the attribution of representation and agency to the internally constructed legal representation. The 'legal fiction' in agency theory is therefore intrinsically different from the 'legal fiction' in legal theory, even in the aggregation of individuals' position.

### **3. Ideal-type legal and economic representations**

This situation is further complicated, because agency theory does not consistently use the natural person as a referent either. As Bratton argues: "For the economist, any particular transaction will be a theoretical construct, devised outside history through the manipulation of hypothetical economic actors" (Bratton 1989:446). As an economic theory, agency theory then uses its own reduction of the singular agent, based on rational choice theory. Rational choice theory explains all agency through the same conceptual lens (Zey 1998), that of the individual contracting agent,

behaving according to microeconomic assumptions. This representation of the singular agent and its agency is distinctly theoretical, based on very particular behavioural assumptions. Agency is then not attributed to human individuals, as the insistence on methodological individualism would have it. As Schrader argues: “Surely at one level those claims are about individuals. But the individuals they are about are not natural individuals, but rather analytical individuals, rational economic persons and heuristic firms (...)” (Schrader 1993:114). Agency is then attributed to theoretical ideal-type agents (Zey 1998) that answer to ideal-type behavioural assumptions of microeconomic theory (Bratton 1989, 1989b). These behavioural assumptions include that the individual is a rational, greedy and self-interested, perfectly informed, maximizing, inherently opportunistic, instrumental, economically motivated, utility-maximizing contractual agent in the possession of a fixed hierarchy of preferences (Zey 1998).

This has very particular consequences for the constitution of the legal representation, because in order to reconstitute all reified singular legal representation through the lens of methodological individualism, the aggregation of individuals’ position in legal scholarship has to borrow assumptions about the reduction of collectives, agency and representation from agency theory (Bratton 1989, 1989b). Only after these ideas become accepted in legal theory is it possible to derive the ideas for representation and agency for reified singular representations from the same source, making behavioural assumptions about agency and the contractual construction of supra-individual representation applicable to singular reified legal and economic representations in the same capacity. The singular legal representation is then reconstituted to take in the assumptions presented by the ideal-type economic actor. The reified singular legal representation that underlies the aggregation of individuals thus becomes nominally the same agent that is produced in agency theory. Agency theory and legal theory thus meet where the reconstitution of the singular reified representation as a singular agent with contractual agency creates ideal-type singular reified constructs interacting as similar entities in the same legal and economic space (Bratton 1989; Macey 1991; MacKenzie *et al.* 2007:4).

Since agency theory assumes that it produces its representations through methodological individualism, the agent that comes to constitute the basic agent in the aggregation of individuals' position then acquires the natural person as a *necessary* referent. The lack of a concrete referent in legal scholarship in conjunction with the acceptance of the reified singular legal representation, reconstituted through the assumptions of agency theory then turns the legal idea of a 'subject' around. The reified singular legal representation as a singular reified representation with the natural person as an implicit referent comes to relate to the corporation and the human individual in equal fashion as a singular 'legal subject'. This constitutes the representation as a reified singular contracting agent in the same capacity for corporations and for individual human beings. They interact as nominally equal and similarly constituted ideal-type singular reified representation with contractual agency in the economic domain with other singular reified legal representations, including human beings. This places the ideal-type representation of corporations and human beings on the same level in the legal (Mayer 1989:650-651) as well as the economic system of representations (Bratton 1989:448-449).

The ideal-type singular reified legal and economic representation thus becomes the primary and inevitable shared mode through which the representation is constructed. It is then no longer necessary to relate to a direct referent for the attribution of agency. Instead, a natural person becomes the implied referent, but only appears as an ideal-type singular reified representation, applicable to natural persons and corporations in equal fashion. Both the legal system of representations (Mayer 1989:650-651) and the economic system of representations (Bratton 1989; Schrader 1998; Zey 1998) then assume a social and political (Bowman 1996) environment as well as a legal system and a market in which these representations interact as nominally equal singular reified representations.

### ***3.1 Ideal-type agents***

All legal and economic representations denoted as 'persons', 'actors', 'agents', 'entities', 'corporations' and even 'citizens' can then be reconstituted as ideal-type singular legal and economic contractual legal subjects (Naffine 2003) that answer to

the narrow set of behavioural and political constraints (Bratton 1989) that reflect the implied ideal-type characteristics of a singular reified representation (Zey 1998).

As a result, the representation of the ‘individual’ or ‘person’ and its agency in legal and economic scholarship shifts towards that of a paradigmatic legal and economic contractual subject (Naffine 2003) and natural persons turn into “(...) rational economic actors denuded of significant human characteristics” (Bratton 1989:462). Human beings, then, become “(...) not flesh-and-blood people, but the utility-maximizing rational actors of economic theory” (Phillips 1992:439 in Ripken 2009:159). The natural person is thus increasingly displaced as a referent in favour of the ideal-type legal and economic representation. Shedding the natural person as a direct referent means that the ideal-type singular reified legal representation comes to represent human beings and the separate legal entity alike as a reified singular representation. Similarly, the aggregation of individuals cannot act as a direct referent because agency theory employs methodological individualism. In methodological individualism individuals are not ‘ontologically prior to corporations’ but the *only* type of subject that agency can be attached to. Agency is therefore not attributable to an emergent representation of association or another more reified representation of groups but only directly to individual natural persons. Both the aggregation of individuals and the natural person are therefore displaced by the ideal-type reified singular representation with contractual agency that reflects the ideal-type assumptions about agency taken from agency theory.

The use of two underlying referents is therefore solved through relegating the position of both the natural person and the aggregation of individuals as the referent and the prioritization of the ideal-type singular referent. The reified singular representation with contractual agency then turns out to be a conflation of three referents: the natural person, the aggregation of individuals as well as the singular reified ideal-type representation. In this construction, the ideal-type singular reified representation has become dominant. This creates a very potent hybrid picture of persons, legal subjects, aggregations and reified singular representations as ideal-type and equal contractual agents within a very one-sidedly defined economic-legal system (Ireland 2003).

#### 4. Third discursive formation

The previous sections showed that the way agency theory deals with the reified legal representation contradicts legal theory as well as methodological individualism. In legal theory, the reified singular representation for all intents and purposes functions as a reified entity with definite attributions of singular (contractual) agency, ownership and amendment protections. Agency theory accepts this representation from legal theory, but denies its inherently reified nature. What is meant by the ‘legal fiction’ of agency theory is then a ‘mythical’ rather than an ‘artificial’ (Dewey 1926) representation.

Agency theory employs methodological individualism to argue that this mythical legal fiction does not produce a reified representation in the economic sphere. The ‘legal fiction’ in agency theory thus becomes a singular *legal* entity with reified properties, necessary to retain the attribution of agency, ownership and amendment protections but not a reified entity that is a concrete singular reified *economic* representation. Agency theory thus accepts the reified singular legal representation not as an intrinsic element of the construction of the corporation but rather as a legal construct and therefore external to economic scholarship. The representation then appears as a ‘convenient’ legal representation that is only relevant to economic theory for its effects. This reduces the separate legal entity to a negligible *economic* fiction, but pragmatism and convenience are invoked to justify its continued use as a reified singular *legal* representation. The subsequent pragmatic acceptance of the singular reified representation in legal scholarship then effects a de facto singularized and reified legal entity that acquires singular agency by reference to the natural person in the economic sphere. Agency theory thereby retains the effects of reification and singularization for their convenience, but rejects the theory as well as the consequences of reification and singularization.

This reified singular legal representation imports a singular reified representation into economic theory under the header of ‘pragmatism’ that can be attributed with singular contractual agency in the legal and economic domain without a definite referent. This constructs an economic version of the representation in a position that cannot be related to any known type of entity in economic theory and leaves the position of the

representation as a reified economic entity in limbo, both in terms of the reason for its existence and in terms of the exact functions it performs. As Williamson and Winter (1991:199) note: “Ironically, economists have either downplayed or rejected outright the role of the law in defining the firm, divorcing the economic concept from the “legal fiction””.

Agency theory also uses the natural person as its only referent, but simultaneously rejects the personalization of the representation. Both the natural person and the aggregation of individuals’ positions are thereby retained, but under the header of an ideal-type referent that relates only indirectly to both the natural person and the aggregation of individuals. The use of methodological individualism in agency theory in conjunction with the reified singular representation in legal scholarship thus imports a reified singular legal representation that establishes within the legal and within the economic system of representations a theoretical equalization of the corporation and the natural person. This reconstitutes both the corporation and the natural person into nominally equal ideal-type singular reified representations with contractual agency and behavioural assumptions taken from agency theory.

These assumptions diverge strongly from the previous two historical discursive formations. Methodological individualism introduces the natural person as the direct referent, although neither the first nor the second discursive formation referred to the natural person. Moreover, the dominance of the ideal-type conceptions about the representation relegates both the natural entity conception and the aggregation of individuals’ position on which the second discursive formation developed.

I therefore argue that the version of incorporation that developed after the 1970s constitutes a third historical discursive formation. Moreover, since the contemporary theory of incorporation has come to be understood mostly through assumptions taken from agency theory in contemporary legal, economic and governance theories (Bratton 1989, 1989b; Ireland 2009) I argue that the third discursive formation has become dominant in the contemporary theory of incorporation.

## 5. Conclusions

In this chapter, I described a third discursive formation underlying the contemporary theory of incorporation. Taking assumptions from agency theory inconsistent with the legal history of incorporation, the third discursive formation establishes that the reified nature of the legal representation can be completely disregarded, but clings to the reified representation with singular agency for its ‘convenience’. This pragmatic exception produces an implicit reification of the separate legal entity against a theoretical and normative background that explicitly prohibits the acceptance of such reifications.

I showed how the conjunction of legal and economic scholarship on the reified singular representation depends on four moves.

The first move is the implicit acceptance of the natural entity position with its singularization and reification of the legal representation. This is accomplished by diminishing the importance of reification through the idea of the ‘legal fiction’ while retaining its contractual agency. The reified singular legal representation then appears as an ideal-type reified singular agent with contractual agency. In this way, assumptions about the ideal-type contractual agent from agency theory can be imported into legal scholarship as a singular *contractual* agent in the *legal* system.

The second move is a reduction of the general reification of the representation to the natural person. This move is accomplished by the invocation of methodological individualism.

The third move is the conjunction of ideal-type assumptions about agency between economic and legal scholarship. This move is accomplished through the acceptance of behavioural assumptions about ideal-type economic agents taken from agency theory and applying them to the reconstituted ideal-type representation that, after the first two moves, occupies the slot of the reified singular legal ‘subject’. The reified singular legal representation then comes to occupy the slot of a singular legal and economic ‘subject’, along with the behavioural assumptions that come with the ideal-type singular reified representation.

The fourth and last move is the prioritization of the ideal-type singular reified representation over the natural person. This is accomplished through the continued use of singular as well as aggregate referents and the need to combine both through the use of ideal-type assumptions about agency that reflect the agency of both types of referent. Ignoring the underlying referents and prioritizing the ideal-type singular reified representation thus adapts the category of the legal 'subject' to the ideal-type economic subject. The prioritization of the ideal-type referent then produces a very powerful idea concerning natural persons and corporations as equal types of representation with equal types of agency.

I then argued that prioritizing the ideal-type singular reified representation over the natural person means that the third discursive formation employs methodological individualism in a way that defies the principles of methodological individualism and its use in social science (Elster 2007). The third discursive formation leaves both the representation and its agency as fully inexplicable reified singular quantities in the legal and the economic framework. It is this idea of representation that has become the core of theorizing on the reified singular representation in economic and legal scholarship since the 1980s (Bratton 1989). Finally, I have argued that this particular form of representation creates a dominant third discursive formation.

In Chapter Six I will argue that the dominance of the ideal-type singular reified representation has direct consequences for theories of corporate governance. Governance theories based on these findings define the agency and interrelations of natural persons and reified legal representations as essentially equal. This leads to a negation of power differences, posits all types of relations as contractual and posits assumptions about very narrowly economically motivated agents geared towards short-term economic compensation as equally applicable to both incorporated and natural representations.

## *Schematic of third discursive formation*

Effects	Singular referent	Historical Discursive Formation and main developments	Aggregate referent	Effects
		<b>3rd discursive formation</b>		
denial of singularization and personification		<b>denial of reification</b>		denial of social and political aspects of aggregation
	<b>implicit ideal-type representation of individual</b>	<b>Implicit reified representation</b>	<b>implicit ideal-type representation of aggregation</b>	
retaining of limited liability, perpetuity			legal fiction	private
majoritarian shareholding				reconstitution into 'property'
separation of ownership and control				attribution of agency, ownership and rights to an aggregation of equally constituted individuals
holding company				contractual nature of aggregating
retaining of amendment rights				exclusion from criminal law as a purely economic representation
attribution of agency to a singularized personified representation in criminal law				acceptance in legal, economic and political theory as a reified legal representation
acceptance in legal, economic and political theory as a reified singular representation of a group				denial of social and political aspects of representation
				Corporation appears constituted as a partnership
ownership held by implicit ideal-type representation	implicit natural entity	<b>Ownership between natural entity and aggregation of individuals</b>	singular reified representation presented as 'property'	ownership over 'property' attributed to shareholders
				shareholder primacy
				reappropriating residual control and ownership rights
		<b>Combination of singular and aggregate referents</b>		
Nominal equality of corporations and natural persons as singular reified representations	ideal-type referent	<b>Methodological individualism refers to singular, aggregate and ideal-type referents</b>	ideal-type referent	Nominal equality of corporations and natural persons as singular reified representations
Behavioral assumptions from agency theory apply to individuals and corporations as singular reified representations				Behavioral assumptions from agency theory apply to individuals and corporations as singular reified representations
				Natural persons, foundations, trusts, associations, state institutions, partnerships and corporations appear nominally equal
Inversion of ultra vires: not a de facto check on charter, but nature of representation determines the extent to which agency can be applied	ideal-type referent	<b>Inversion of the representation and the referent</b>	ideal-type referent	
ideal-type referent becomes basis for methodological individualism, economic atomism, political liberalism and criminal individualism	ideal-type referent	<b>Reconstitution of the referent</b>	ideal-type referent	ideal-type referent becomes basis for methodological individualism, economic atomism, political liberalism and criminal individualism
Corporation appears as an ideal-type singular reified representation in the legal system of representations	ideal-type referent	<b>Reconstitution of the legal subject</b>	ideal-type referent	Corporation appears as an ideal-type singular reified representation in the legal system of representations
singular ideal-type representation	ideal-type referent	<b>Reconstitution of the market</b>	ideal-type referent	denial of aggregation
Nominal equality to natural person as contracting agent				Nominal equality to all other singular reified representations with contractual agency
equalization of singular reified representation to singular profit maximizer	ideal-type referent	<b>Reconstitution of the firm</b>	ideal-type referent	No boundaries: mass of contracts extends inside and outside
				Denial of hierarchy
				Use of complete contracts
Natural person appears as ideal-type reified singular representation with ideal-type contractual agency in the legal, economic, social and political systems of representation	ideal-type referent	<b>Reconstitution of the natural person</b>	ideal-type referent	Aggregation of individuals appears as an aggregation of ideal-type singular reified representations in the legal, economic, social and political systems of representation

## Chapter 6: Corporate governance

“‘You’re not killing the right guy.’

‘That’s so,’ the tenant said. ‘Who gave your orders? I’ll go after him. He’s the one to kill.’

‘You’re wrong. He got his orders from the bank. The bank told him: “Clear those people out for it’s your job.”’

‘Well, there’s a president of the bank. There’s a board of directors. I’ll fill up the magazine of the rifle and go into the bank.’

The driver said: ‘Fellow was telling me the bank gets orders from the east.’

(...)

‘But where does it stop? Who can we shoot? I don’t aim to starve to death before I kill a man that’s starving me.’

‘I don’t know. Maybe there’s nobody to shoot. Maybe the thing isn’t men at all. Maybe, like you said, the property’s doing it’” (Steinbeck 1976:38).

Chapters Two to Five developed three different historical discursive formations in detail. I have shown that these three formations were built on different assumptions regarding their legal or political nature, regarding reification and regarding the type of referent. Within those chapters, I have laid out the main differences and argued the general inconsistency of the assumptions underlying those positions and the inconsistency of the simultaneous use of those formations. In this chapter, I will establish the simultaneous use of multiple historical formations in the contemporary theory of corporate governance<sup>26</sup> and show the relative importance of these three discursive formations. Then, I will show the effects of the multiplicity of discursive formations underlying the contemporary theory of incorporation on the contemporary

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<sup>26</sup> “Corporate governance – the authority structure of the firm - lies at the heart of the most important issues of society. That authority structure decides who has claim to the cash flow of the firm, who has a say in its strategy and its allocation of resources. As such, corporate governance affects the creation of wealth and its distribution into different pockets. It shapes the efficiency of firms, the stability of employment, the fortunes of suppliers and distributors, the endowments of orphanages and hospitals, the claims of the rich and the poor. (...) it structures pension systems, social security, and retirement plans.” (Gourevitch 2005:3)

theory of governance<sup>27</sup>, as well as the effects of the implicit hierarchy of these formations.

In Section One, I will show that the second discursive formation still underlies discussions concerning the international nature of incorporation. I will point out the specific problems with the continued acceptance of the natural entity theory in an international context.

In Section Two, I will argue that the third discursive formation has become the dominant position in the contemporary theory of incorporation and in debates on corporate governance. I will then argue that the use of three different notions of representation leads to a multiplicity of theories in corporate governance to attribute ownership, agency and rights to corporations and that this leads to an inconsistent and incoherent basis for the contemporary theory of corporate governance. I will relate the three discursive formations back to the previous chapters to argue that the precise theory of incorporation produces a representation that is constitutive for the way in which the representation relates to individuals and groups in legal and economic settings and to the attachment of ownership, the attribution of agency and the attribution of amendment protections.

Finally, given that corporate governance determines the relative distribution of corporate wealth and power, I will argue that the paradox underlying the contemporary theory of incorporation needs to be addressed as a theoretical, as well as a normative issue. This normativity lies in the fact that the dominance of the third discursive formation establishes a particular theory of corporate governance, with shareholder primacy as its basis (Ireland 2009:1).

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<sup>27</sup> “Governance systems, broadly defined, set the ground rules that determine who has what control rights under what circumstances, who receives what share of the wealth created, and who bears what associated risks. Governance systems thus help determine how priorities are set, how decisions are made about spending resources on building organizational capabilities, and how management and employees are evaluated and compensated.” (Blair 1995:273)

## **1. International governance**

One explicitly problematic aspect of incorporation is its transnational nature and its reliance on the natural entity theory. The example of Friends of the Earth Netherlands vs. Royal Dutch Shell in Chapter one showed how the natural entity theory introduces a number of problematic assumptions into theories of corporate governance concerning transnational corporations. The example showed a general difficulty in establishing the relation between the parent and its subsidiary in international holding companies, its presence and operations in multiple jurisdictions, the nature of ownership and the attribution of agency and responsibility (Dine 2000).

### ***1.1 Doctrinal assumptions underlying the natural entity theory***

The natural entity theory fulfils a number of roles in transnational corporations. First, its basic role is the facilitation of the holding company. As shown in Chapter Two, transnational operations were made possible through the fact that firms and operations in different states and countries could be brought together under a single holding company.

Second, the natural entity theory is necessary to retain the use of subsidiaries in a position in which the holding company ‘owns’ and the subsidiary is ‘being owned’ as a reified singular legal representation in itself. This leads to the attribution of limited liability to subsidiaries within the holding structure. The doctrinal similarity between closely held and public corporations (Berle and Means 2007) is based on the natural entity theory. Only on the basis of the natural entity theory can subsidiaries exist as ‘empty shells’. It is on the basis of holding structures with empty shells that transnational corporations “have developed legal structures for transnational corporate capital which take advantage of the ambiguities, disjunctures and loopholes in the international tax system” (Piccioto in Dine 2000:65). The acceptance of these empty shells is therefore vital to the continued functioning of most international holding structures (Dine 2000).

Third, as exemplified in the Shell example in Chapter One, distinctions are made in

legal practice between different kinds of representation within the holding structure. Intermediate subsidiaries are separated from both holding companies and subsidiaries that perform operations. The multinational corporation, therefore, has a continuing dependence on the natural entity theory for its practical functioning.

## ***1.2 Relative rights***

The first question that can be asked relates to the relative status of holding companies and subsidiaries. The holding structure treats the parent company as a full natural entity with all rights, but also implicitly gives these rights to the subsidiaries. Therefore, the natural entity theory facilitates the use of limited liability within the structure for parent companies with regard to their subsidiaries (Dine 2000:38). Not only the parent company but its subsidiaries also are, therefore, seen as ‘natural’ entities with regard to the use of limited liability. This understanding implicitly multiplies the attribution of rights with the number of subsidiaries between the parent and the operating company<sup>28</sup>. At the same time, the natural entity theory posits the parent company as an ‘owner’, while a subsidiary in the same natural entity position can be seen as ‘property’. As ‘property’, these subsidiaries are in an ‘owned’ and therefore ‘controlled’ position. As Dine argues, a reified representation held as ‘property’ by a parent company gives unprecedented control to those in control of the parent: “(...) by permitting the control and rule over subsidiaries to be vested in those managing the parent, the law sanctioned an unprecedented aggregation of power in a central body” (Dine 2000:39).

Berle (1954:350) showed what the acceptance of such an idea means:

“In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it. The court thus has constructed for purposes of imposing liability an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of both, and charged it with the liabilities of one or

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<sup>28</sup> See also the example of Royal Dutch Shell in chapter 1

both. The facts which induce courts to do this are precisely the facts which most persuasively demonstrate that, though nominally there were supposed to be two or more enterprises, in fact, there was but one. The economic fact pushes through the paper differentiations embodied in the corporate certificates; and liabilities are dealt with in accord with the business, instead of the legal fact of corporate entity.”

There is, the, a difference between kinds of representations. This difference can be related to the formal position in the holding structure (i.e. owner or owned, holding company or subsidiary) as well as to pragmatic distinctions (i.e. financial holding company, empty shell, intermediate subsidiary or subsidiary with operations). Yet, all these reified singular representations derive their formal representation and the agency, ownership and rights attached to that formal representation from the same natural entity theory.

### ***1.3 National incorporation and Multinational Corporations***

A question that follows from the relative status of holding companies, subsidiaries and operating companies and the way they relate to the natural entity theory is the relative legal status of these individually reified representations in an international legal setting. There are two ways to understand the laws by which the corporation is governed in an international context (Dine 2000).

One understanding is provided by the place of incorporation theory. In this theory, corporations have to abide by the rules of the place where they are incorporated (Dine 2000:67). However, if the state of incorporation is taken as the main point of departure, what we end up with is the type of logic displayed in the Shell example in Chapter One: the mother company then absolves responsibility by portraying the mother company as in kind different (holding company), separated by international intermediaries (invoking different jurisdictions and differences in applicability of law) and not necessarily invoked as an ‘operator’ in a joint venture in which it has a minority interest.

The other understanding is provided by the real seat theory. In this theory, the corporation is recognized only if it has a real connection with the legal system in which it operates (Dine 2000:67). However, if the location of operation is held as constitutive, the whole chain works the other way around. How can a reified entity, created by and in a particular jurisdiction be held answerable as such in a different jurisdiction or even in a different legal system? In the example given in Chapter One, how can RDS be held accountable for operations of a subsidiary if that subsidiary answers for itself as a natural entity under national laws?

As shown above, the natural entity theory is constitutive for the contemporary understanding of holding companies, subsidiaries and operating companies.

As representations formed through the natural entity theory, these representations are necessarily the result of national law. The natural entity conception is then used to determine the applicability of national laws, national taxation regimes, to determine responsibility and liability for actions on the part of holding companies and subsidiaries in an international context and to determine the attribution of ownership agency and amendment protection between these representations. However, under the real seat theory, these representations are exempt from national legal strictures because ownership and rights to the subsidiary and the operating company, constituted as 'owned property', lie elsewhere. Under the place of incorporation theory, it is equally improbable to apply national legislation to reified singular legal representations that 'own' representations acting in or through other jurisdictions.

Since it is unclear whether incorporation itself is the result of the laws of the country of incorporation or to the laws of the country of operation, this introduces the question of which legislation is the 'leading' one in international holding companies for what type of representation. The attribution of rights and ownership to the representation as a natural entity provides arguments for the state of incorporation theory, while the attribution of agency in theory provides arguments for the real seat theory. In this way, the representation provides a paradoxical rationale for the attribution of ownership, rights and agency. The multinational corporation is therefore no longer the result of one definite legislature. Although corporations, as natural entities, are always formed under national law, the corporation, whether as a parent or as a subsidiary in

the capacity of a natural entity, is no longer the result of a definite legal context in the international sphere: “Multinational corporations (...) are in a sense composed of separate enterprises, or juridical persons, under different domestic jurisdictions in different states. No single law creates the MNC [multinational corporation] and no single law determines the limits of its proper activity (...)” (Van den Heuvel 2009:50, explanation inserted) For this reason Dine (2000:68) argues that “It seems, then, that different rules apply for jurisdiction, for determination of the *situs* of property and for tax and other issues including security for costs” (Dine 2000:98).

### ***1.4 International incorporation and Multinational Corporations***

Corporations are not just elusive legal representations on the national level. As reified legal representations operating in the international sphere, without a proper legal basis for their operations in a definite state, they become hard to distinguish from the representation that states assume in the international sphere. As a reified representation that relates to an aggregation of individuals as a referent, and which functions as a singular representation in an international context, incorporation then produces a reified representation that in many ways resembles a state before international law (Van den Heuvel 2009). This is exemplified by the fact that corporations can bring claims before international judicial organs and against states and by the fact that the 1949 United Nations Report Advisory Opinion speaks of the corporation as an ‘international personality’ (Van den Heuvel 2009:50). This turns the reified singular legal representation that flows from the contemporary theory of incorporation into the first singular reified representation that answers to international law alone. In this respect, multinational corporations become subject to international law: “They operate on the international plane where, for States, international law is the natural object of regulation” (Van den Heuvel 2009:50).

This position implies the existence of a cohesive body of international law that has the ability to create and regulate international bodies of law as natural entities, while no such body exists (Van den Heuvel 2009). Furthermore, it implies a clear demarcation of such an international body of law with national bodies of law with regard to the treatment of incorporation. Considering the lack of clarity on the legal status of corporation on the national level and considering the lack of cohesion around the

treatment of corporations under the main seat or the seat of operations principle, no such demarcation exists either.

The two understandings of the multinational corporation thus open a conceptual space for an evasion of national legislatures. The representation as a natural entity in the international sphere is not traceable to a particular legislature and comes to exist between national regulations, rather than within them. In an international setting the singular reified representation as a natural entity attains a type of reification and agency that reflects its development in national legal regimes, but with an absent international regulatory framework.

This produces a singular reified legal representation in the international sphere for which the establishment of responsibility needs to address assumptions about relations between singular natural entity representations in international holding structures, including empty shells and ideas of ‘control’ and ‘operatorship’ running through different types of different jurisdictions and legal systems and with legal representations that differ in status from ‘legal agents’ on the ground, to ‘property’ in subsidiaries to ‘purely financial constructions’ in the holding. As the Royal Dutch Shell example showed, this puts any person or community seeking to prosecute an international holding company at an enormous disadvantage.

The result is that the singular reified representation corporation becomes a representation that evades national legislation by taking rights as natural entity on the national level, while operating as a multiplicity of entities without allegiances or liability to national legislation on the international level. The natural entity theory in the international sphere, therefore, multiplies positions to attribute ownership, agency and amendment protections and becomes able to avoid national legislation by using multiple types of theory. As a result, multinational corporations have attained a complex and elusive character, making them difficult to regulate and to prosecute<sup>29</sup>

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<sup>29</sup> This is complicated further by the interests involved: “(...) some States of MNCs are often unable or unwilling to take on violations of such corporations when it concerns fundamental international rights of individuals infringed in other countries (...) host states are often ever more so unable or unwilling to prosecute MNCs or their local branches or sub-contractors, fearing loss of foreign investment, or lacking the

(Van den Heuvel 2009; Wells 2005). Dine argues that “It seems unlikely that a coherent system of private international law will be adopted, either within the EU or beyond unless the issue of conflicting philosophies is properly addressed” (Dine 2000:105).

The practical problems with the establishment of a clear theory for multinational corporations in national and international legal settings means that, in practice, these representations become increasingly seen like states. Van den Heuvel argues that this is not a desirable point of departure to create a consistent theory of international governance: “Treaties are made by States, and international obligations and duties can rest on, or be violated by them only. Apart from few international organizations, which are also made up of States, no other entity is, and neither should they be, the bearer of rights and duties under international law according to them” (Van den Heuvel 2009:3). The background and consequences of these ideas will be further developed in Chapter Seven.

### ***1.5 Multinational incorporation and the second discursive formation***

The first section established that the acceptance of the second discursive formation and the natural entity theory is necessary for the creation of a singular reified representation on the international level. This section also showed that the continuum underlying this formation and its inherent reliance on the natural entity position provides a paradoxical basis for the development of a theory of corporate governance, particularly in an international context.

The next section will complicate matters further. The introduction of the third discursive formation moved away from the second discursive formation in theory, but retained its doctrinal assumptions and effects. I will explore the results of these assumptions for the theory of corporate governance.

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financial and legal resources for successful prosecutions (...)” (Van den Heuvel 2009:48).

## **2. Third discursive formation: equal representation**

As argued in Chapter Five, the third discursive position took its assumptions about the constitution of the ‘firm’ from agency theory. I argued how these assumptions differed from legal theory. In this chapter, I will show how the contemporary dominance of the third discursive formation has specific consequences for a theory of corporate governance. I will argue that the idea of the firm as an aggregation of individuals has become the central position not only in economic theory (Schrader 1993:156), but also in the contemporary theory of (corporate) governance.

Agency theory assumes that the corporation is formed as the result of a free choice by contracting individuals (Ireland 1999:481). This reconstitutes the corporation from a public institution into a fully private institution (Ireland 1999:481), a flat firm formed out of voluntary contractual relations. It is then a mass of contracts, rather than individuals, relations or a reified representation that constitutes the corporation: “the corporation tends to disappear, transformed from a substantial institution into just a relatively stable corner of the market in which autonomous property owners freely contract” (Bratton 1989:420). As a result, the reification fulfils no definite role anymore: “(...) the corporation itself is stripped of substance and more or less conceptualised out of existence, reduced to a mere cipher through which the owners of different factors of production are brought contractually together” (Bratton 1989:474).

Agency theory thus presents the corporation as a generic representation of business association (Bratton 1989: 454): “According to Alchian and Demsetz, for example, the firm is merely ‘a highly specialized surrogate market’ with ‘no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting’” (Bratton 1989:476-477). Because it makes little sense to categorize transactions as ‘inside’ or ‘outside’ a firm, if that firm itself is little more than a nexus of contracts (Bratton 1989:476, Jensen and Meckling 1976:310-11), the organization loses a defining boundary to the outside world. Jensen and Meckling exemplify this position:

“(…) most organizations are simply legal fictions which *serve as a nexus for a set of contracting relationships between individuals* (…). Viewed in this way, it makes little or no sense to try to distinguish those things which are ‘inside’ the firm (or any other organization) from those that are ‘out-side’ of it. There is in a very real sense only a multitude of complex relationships (i.e., contracts) between the legal fiction (the firm) and the owners of labour, material and capital inputs and the consumers of output (…).” (Jensen and Meckling 1976:310-11, emphasis in original).

This turns the corporation into a ‘corporation without boundaries’ (Hirschhorn and Gilmore 1992:104 in Davis *et al.*1994). Contracting within the corporation is, then, no longer fundamentally different from contracting without. The inside of the corporation becomes an extension of the larger market. It then becomes logical to think that the same market tests can be applied to contractual relations inside and outside the corporation. As Ireland (1999) argues, this puts the corporation, which had become a managerial construct before the 1970s, ‘back under the market’: “The idea of the properly functioning market for corporate control has become ‘the fundamental concept of agency theory’ precisely because, theoretically at least, it placed the managerially controlled company ‘back under the market’” (Ireland 2003:482). This has effects on strategic decision making, since the market then also becomes the judge on the necessity and relevance of activities employed within the corporation (Davis *et al.*1994:554). This constituted an “institutional shift” from the corporate model that existed before. The firm-as-portfolio model, based on the M-form was deinstitutionalized. This “vastly restructured” the field of the largest corporation in a relatively brief period (Davis *et al.*1994:564).

## ***2.1 Public versus private corporations***

The theoretical equality of legal representations is repeated between small, private or closely held corporations and ‘open’, ‘dispersed shareholdership’, ‘socialized’ or ‘(quasi-)public’ corporations. For Berle and Means, closely held corporations represented “business as carried on by individuals adopting for that purpose certain legal clothing” (Berle and Means 2007:5). In this category ownership and control is more or less directly attributable through a limited number of stable shareholders. As

Ireland argues “(...) shareholding in these [smaller] companies is commonly ‘personality-rich’. Or, to put it slightly different, unlike corporate shares, shares in smaller, closely held companies have the character of contractual rights and ‘significantly involve personality, such as people, their actions, and their ongoing, dynamic relations with other people’” (Ireland 1999:479).

By contrast, shareholding in public corporations is distributed (Berle and Means 2007:8) or ‘socialized’ (Roy 1999). The shares then become “freely transferable ‘things’ with a propertied character and an independent market value of their own” (Ireland 1999:479). The large corporation is then ‘personality-poor’ (Ireland 1999:479) because “a large measure of separation of ownership and control has taken place through the multiplication of owners” (Berle and Means 2007:8). It is only this category that Berle and Means consider to be ‘real’ corporations. This distinction is echoed widely in the literature on incorporation and corporate governance (Dine 2000). The two types of corporations therefore have essentially different economics (Berle and Means 2007:6-7) and in practice a different legal status (Dine 2000).

However, contemporary incorporation to a large degree hinges on a doctrinal use of incorporation. The Salomon verdict overturned two earlier decisions in lower courts, which made exactly such pragmatic distinctions. In the verdict, it was argued that incorporation created a technical device, a legal reified construct and as such applied to small as well as large corporations. A small business like Salomon’s was seen as technically incorporated and therefore in the possession of a reified separate legal entity, with all the advantages that brings. The metaphysical midwifery in Salomon thus produced a doctrinal understanding that led to a reified singular representation that fundamentally severed the link between individual ownership, individual agency and individual responsibility. This was a momentous decision, because it established the doctrinal understanding of the reification of the representation, which in turn allowed for the particular advantages that the *modern universitas* brings.

Turning away from the doctrinal decision reached by Salomon threatens the advantages produced by the natural entity theory. Moreover, it threatens to reintroduce the direct connection between ownership and individual agency. This would not simply reintroduce an unincorporated status for small associations; it would

mean the necessity for a clear guideline how and in what measure agency can be connected to individuals behind the ‘veil’ that the separate legal entity created. Recreating this link would eliminate the distinction between the corporation and the partnership. The whole issue of reification, the resulting separation of ownership and control and the attribution of ownership, agency and amendment rights therefore hinges on this doctrinal understanding of incorporation and its reification. The contemporary theory of incorporation therefore relies on the lack of distinction between the public and the private corporation and the resultant doctrinal use of the reified legal entity, regardless of the size of the corporation or the way in which the shares are held (Ireland 1999).

As shown in Chapter Five, the continued implicit acceptance of the reification in the third discursive formation therefore diverges in a fundamental way from the tenets of methodological individualism, while the explicit rejection of the reification means that this discursive formation diverges in a very basic way from a basic tenet of modern incorporation. I will show below what effects this divergence has in the sphere of governance by looking at the attribution of agency, the use of complete contracts, the effects on corporate hierarchy, the construction of the representation as an implicit singular profit maximizer and the macro-economic effects of this position.

## ***2.2 Attribution of agency***

The acceptance of the reified legal entity in almost all legal positions and its denial in the third discursive formation position produces a conflicting background for the attribution of agency within the corporation. As shown in Chapter Three, the acceptance of this doctrinal understanding of incorporation severs the link between ownership, individual agency and individual responsibility. The attribution of agency in modern incorporation can then relate to different types of referents simultaneously. These referents include the natural person, the ideal-type singular representation, and the aggregation of individuals. These issues provide the background for a ‘veil’, produced by the representation, in legal reasoning (Dine 2000). In order to attribute agency, this ‘veil’ has to be ‘pierced’. ‘Piercing the veil’ is then an attempt to find ways to attribute legal agency between different types of referents.

This leads to a reduction as well as a doubling of the capacity to attribute agency. The capacity for the attribution of agency is doubled, because the representation is able to contract in its own name as a singular contracting partner. This means that agency for the reified representation is attributable both to the aggregation of individuals and to the reified representation in itself. However, although the reified singular representation contracts for itself and in its own name, the aggregation of individuals' position states that factual agency can only be attributed to the aggregation of individuals. This effects a displacement of agency in which the reified singular legal representation in whose name the contracting is done becomes attributable with ideal-type agency only, while factual agency is attributed to natural persons that do not contract.

Since the contractual agency of the reified singular legal representation is best accessible by those individual(s) within the corporation who are in a position of 'control' (Berle and Means 2007) these individuals can then contract in the capacity of the 'control' behind the reified singular representation, while attributing the agency of that act to the reified legal construct. Since the factual capacity to access agency is limited to the 'control', this doctrinal position then means that agency is theoretically attributed to the aggregation individuals as a whole, while in practice it remains with the control: "Since no cognizable corporate collectivity appears amidst the nexus of contracts, no tension arises between collective and individual interests." (Bratton 1989b:1499) This doubles the capacity for contractual agency by putting the control in a position where contracting can be done through a reified representation in the name of an aggregation of individuals. Using the reified legal construct and the aggregation of individuals simultaneously as a referent thus presents an opportunity for the doubling of agency. This doubling of contractual agency is then a doubling on the part of a very small part of the corporate constituency.

The fact that individuals *within* the corporation can contract with the reified singular representation further reifies the representation by making it distinguishable from the natural persons that theoretically constitute the aggregation of individuals in the third discursive formation.

At the same time, the capacity to attribute factual contractual agency is reduced. The reified singular representation contracts as a singular contractual agent against other actors. In this position, the reified singular representation is introduced through the back door as a reified singular legal agent with ideal-type agency, but with a reduced type of agency.

The singular reified legal representation reduces the agency of an organization to the agency of a singular entity, rather than an aggregation of individuals: “The marginalist theory’s alternative is to take the firm, itself, as a basic individual agent. As a result the theory can take no account of the collective character of the firm, which is absolutely essential to understanding its practice” Schrader (1993:119). In addition: “(...) when organizational economic theorists do consider the organization as a whole, they conceive of it as an individual. To do this, much of the natural complexity of large organizations is ignored” (Zey 1998:85).

The singular representation is portrayed with the characteristics of an individual human entrepreneur (Schrader 1993:125): “(...) the firm is deemed to behave as an entity in rational patterns no different from those of human actors” (Bratton 1989:416). As argued in chapter five, this ‘singular entrepreneur’ is reconstituted along the rational patterns of an ideal-type economic agent. The reified singular representation then appears as an ideal-type contracting actor that is restrained to models of rationality that mirrors the microeconomic rationality and behavioural constraints of agency theory. The attribution of contractual agency then only applies to a singularized reified ideal-type legal representation, not to a natural person or to an aggregation of individuals.

Not only does this remove the natural entity and the aggregation of individuals as referents for the attribution of agency, it also reconstitutes the nature of the agency that can be attributed. The ideal-type singular reified representation is only attributable with theoretical ideal-type agency and therefore always acts within the bounds of micro-economic theory. This rejects all agency that does not comply with the behavioural constraints set for an ideal-type actor by agency theory and instils a regulatory regime that accepts notions of ‘expected’ or ‘normal’ behaviour based on ideal-type theoretical assumptions. The agency of the reified legal and economic

entity is therefore only acknowledged in so far as it complies with the ideal-type assumptions about agency. The reified singular representation can therefore contract, sue, hire and fire as a regular singular legal representation but it cannot be found guilty of malfeasance, tort, criminal neglect, perjury or murder. Similarly, it can contract as a singular reified legal representation, but cannot be found responsible as such for the effects of that contract.

Using methodological individualism to posit the human individual as the referent for the attribution of agency thus multiplies the capacity for the attribution of agency to the corporation, produces a singular reified legal representation that draws in ideal-type assumptions about its contracting agency but cannot be held responsible for that agency in itself, implicitly doubles the access to contractual agency for the ‘control’ and constrains the theoretical attribution of agency to either of the referents underlying the corporation. The contemporary theory of incorporation thus results in ample opportunities to attribute agency strategically when ‘the veil’ needs to be ‘pierced’.

### ***2.3 (In)complete contracts***

A central aspect of the reduction of the corporation into a flat firm is the emphasis on the complete contract. This reduction is based on the idea that any contract is a complete contract in which all claims and rights are explicitly laid out: “(...) contractualists are very anxious to establish that the rights of ‘any employee or investor other than the residual claimant’ (in other words, everyone but the shareholders) are all to be found in ‘explicit negotiated contracts’.” (Ireland 1999: 478) These corporate contracts are “(...) famously empty at their cores omitting important future variables due to the difficulty or impossibility of *ex ante* description or *ex post* observation and verification” (Bratton and McCahery 1999:5).

The idea of complete contracts is distinctly economic: “The lawyer understands contract as a business or commercial exchange (...) The economist thinks more broadly in terms of voluntary exchanges and other relations among free agents.” (Bratton 1989:446). The contractual relation itself is then “consonant with human freedom” (Bratton 1989: 457) and the corporation becomes a private entity for the

benefit of private parties (Ripken 2009:105). This is the basis for the argument that contractual parties benefit from a legal setting in which they are free to set terms of interaction terms that “the parties, as rational, informed actors, would have bargained for hypothetically if they could have done so in a costless setting” (Ripken 2009:162-163). The body of corporate law then provides “(...) simply ‘a set of [contractual] terms available off-the-rack’ which enables ‘participants in corporate ventures’ to save on the costs of contracting, reducing transaction costs by emulating those provisions that the parties would have contracted themselves” (Ireland 1999:484). In this view, laws should enable, rather than restrict, and parties should be free to change the rules of the agreement if they so desire (Ripken 2009:162) or to contract around them (Ripken 2009:163) As a result, the state should yield to freedom of contract principles. Government is therefore kept out of corporate operations (Bratton 1989b:1515) in terms of the way in which contractual relations are effected (Bratton 1989:457-458). The acceptance of this form of contract in itself represents a major divergence from the earlier legal idea of contract (Bratton 1989). Moreover, the explicit rejection of the role of the state presented a divergence of the tacit understanding that had developed in the second discursive formation of the corporation as a semi-public institution (Bowman 1996).

Three other problems can be pointed out with this complete contracts approach.

First, contracting often works imperfectly, because not all contingencies can be contacted for (Bratton 1989:459). Since contracts are necessarily incomplete, the assumption that all parties to the contract are fully informed to all terms of the contract becomes spurious: “Ex post contract construction on a “would have agreed to” basis cannot permit a strictly rational basis. The endless quantity of contingent considerations bearing on corporate contracting precludes it” (Bratton 1989:459).

Williamson & Winter note that contracts between employees and employers therefore tend to put special obligations on the employee. Laws regarding employer-employee relationship include a wide set of broader obligations like the disclosure of information and working in the direct interest of the employer. Contracts between a worker and an employer therefore implicitly assume loyalty, respect and faithfulness; decency and propriety of deportment and require the employee to maintain friendly relations with the employer (Williamson and Winter 1991:200). Furthermore, the employee can be held to act in his employer's interest and he may be held liable for

damages if he refrains from doing so (Williamson and Winter 1991:202). Failure to follow these obligations could constitute a breach of contract and are subject to formal legal sanctions that are only available to the employers (Williamson and Winter 1991:205). Williamson and Winter conclude that “(...) the distinctions and responsibilities uncovered seem to have the intent of making the employee, to as great an extent as possible, an extension of his employer” (Williamson and Winter 1991:208) and that: “(...) the law does in fact recognize substantial differences in the obligation, sanctions and procedures governing the two types of exchange, and that these distinctions are likely to alter the incentives of actors across institutional modes in a meaningful way” (Williamson and Winter 1991:208). Therefore, as Ireland argues “(...) it is not possible to write in advance complete contracts which protect the interests of employees and other corporate participants (...)” (Ireland 1999:478).

Second, it can be argued that the corporation still knows hierarchical aspects and therefore has distinct boundaries. As an organization it stands apart from the market as an entity, buys and sells on the market as a unit and “internally, the firm resembles a little government” (Bratton 1989:452). The corporation is therefore a reifiable organization, not an organization that “mixes freely with markets” (Bratton 1989:452). As a result management wields power “(...) in several arenas: It directs the activities of subordinates; it determines the existence and course of corporate business operations; it determines the markets the corporation supplies; it initiates technical developments; it directs the direction and extent of capital expansion; and, within limits, it participates in the formulation of public opinion” (Berle in Bratton 1989:453). This means that managerial power within the corporation is not relegated to contractual relations only, but functions through direct hierarchical power as well. The relegation of the corporation to a mass of contracts therefore misses out on important aspects of corporate practice.

Third, as Dewey argues, the reified representation is an artificial, not a mythical representation. When the reified singular legal representation contracts in and for itself, it arguably contracts from a different position than as a natural person. In the ideal-type contractual notion, equal types of representation bargain in a costless setting on a voluntary basis (Bratton 1989b:1480), have the same access to resources, both internally and externally (i.e. time and legal and economic resources), generally

have a similar bargaining position in terms of power, and therefore benefit in equal measure from a liberal regulatory framework that gives them the possibility to contract around existing legal rules and set the terms of their interactions.

Contracting from a theoretically equal position excludes the differences between this reified representation and the human being, like the limitation of time horizons, incomplete information, faulty knowledge and limited capacity for understanding complexities on the part of individual human actors (Dine 2000:112), while it practically expands the possibilities for the reified singular representation to act in all capacities in which it exceeds the human being, like its access to limited liability, perpetuity, information and organizational resources (Dine 2000:155).

There is, then, no such thing as a complete contract or a complete contractual relation in the corporate setting. Also, there are no such things as completely rational and fully informed contracting actors. Finally, there is no class of singular ideal-type agents that comprises the representation of corporations in the same way as human individuals. Negating the reification of representation and constituting both types of representation as theoretically equal contracting entities thus leads to a theoretical defence of equal interactions between practically very unequal entities:

“[...] the new economic theory's picture of liberal-utilitarian concord holds validity only in theory, and even the theoretical construct depends on rational economic actors denuded of significant human characteristics. As a result, its hypothetical bargaining inadequately captures the social reality real people face.” (Bratton 1989:462)

Removing restrictions on the interaction between unequal representations then produces a distinctly advantaged position for the corporation as a legal and economic representation.

Both the nature of contracts and the nature of the parties contracting are therefore primarily theoretical. This provides the background for the reconstitution of the corporate landscape constructing the firm as an “individualistic, transient, network-like, with production accomplished by shifting sets of individuals tied through impermanent contracts” (Davis *et al.* 1994:567). Viewing the firm as a flat network of

contracts allows to see the firm as a financial tinker toy, an organization that can be rearranged at a whim (Davis *et al.* 1994). This allowed for “(...) extreme specialization and contracting for any aspects of production outside of the firm’s “core competence”” (Davis *et al.* 1994:563). As a result, the logic of the corporation as a business form has gone from “exceptionally broad (the conglomerate) to strikingly narrow” (Davis *et al.* 1994:563). As Davis *et al.* argue: “By subcontracting virtually all functions that did not add sufficient value, an increased use of temporary contracts and a network model that rejected vertical integration the corporation became a ‘hollow corporation’” (Davis *et al.* 1994:565). The new notions of contract thus introduce a very explicit shift from group conceptions to individualist assumptions in legal theory.

## ***2.4 Corporate hierarchy***

By denying the reified legal entity, the reified representation also disappears as a constitutive factor in the corporate hierarchical structure. By entering into contract, actors perform a “manifestation of assent”, binding the actor to a voluntary contractual arrangement (Bratton 1989:457). This voluntary arrangement assumes a particular kind of relation between agents in the corporation, recasting all internal relations within the corporation as voluntary and contractual relations (Bratton 1989:455). As a result, “The hierarchical structure exists, but on a foundation of perfect consent of participants without human weaknesses” (Bratton 1989:455). In this sense the corporation “dissolves into disaggregated but interrelated transactions among the participating human actors” (Bratton 1989:420).

Constituting the corporation out of homogenous individuals (Schrader 1993:69) then denies the reified representation (Bratton 1989:440) and turns the corporation into a flat firm without hierarchy. Since all types of firms become the result of contracting between autonomous individuals and these contracts are bilateral, “management power and corporate hierarchy, as previously conceived, disappear” (Bratton 1989b: 1480). Rather than hierarchy pre-imposed by the structure of the organization “Hierarchical power springs from and coexists with the participant's choice” (Bratton 1989:454). This creates a factual position of delegated authority without representation, while theoretically it purports to be an aggregation of individuals with

equal attributions of agency to all constituent individuals. The third discursive formation thus produces a hierarchical institution that delegates authority through implicit divisions and implicitly reified representations:

“Though the neoclassicists nominally made these moves for the purpose of explanation, their operative assumptions gave the theory a normative aspect. Treating hierarchy as if it does not exist offers wonderful support to those at the top of the hierarchy, so long as the treatment implies no concomitant reordering of the status quo.” (Bratton 1988:1499)

I will address this outcome further in Chapter Seven.

## ***2.5 Singular profit maximizer and the reconstitution of the market***

As shown above, the third discursive formation position produces a denied reified singular agent with contracting agency in the legal and economic landscape. As shown in chapter 5 and above, the third discursive formation implicitly accepts the representation as a reified legal agent with singular agency. This means that the idea that singular ‘fictional’ entities act on their own accord is also implicitly accepted in economic scholarship: “(...) the dubious assumption is made that organizations can be treated as a single person or as entrepreneurs. The organization operates as a single person who gathers information and resources, produces goods and services, and makes decisions about what will maximize utility (profits)” (Zey 1998:81). As an artificial “person”, its behaviour in the market is deemed to follow ideal-type assumptions about agency and therefore to be substantially the same as that of other (natural) persons (Schrader 1993:92). The corporate ‘person’ or ‘individual’ then appears as “just a bigger and more powerful individual agent in the market” (Schrader 1993:3). However, as a contracting ‘person’, it is obviously limited to its ideal-type referent. Rather than just another individual, the corporation then appears as the paradigmatic entrepreneur, an individualist capitalist profit maximizer (Bowman 1996:232-233)<sup>30</sup>. The corporation then behaves as “(...) an individual acting in the

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<sup>30</sup> Bowman argues that this identification of the corporation as an ‘individual’ with the paradigmatic entrepreneur was the legitimation for the reconstruction of liberal tenets to introduce ‘corporate individualism’ and the acceptance of the granting of amendment rights to these corporate individuals: “(...) the identification of the

marketplace to maximize its own utility” (Schrader 1993:2). As an economic representation that answers to ideal-type assumptions about its singular agency, the reified representation thus becomes a classic singular profit maximizer in collective form (Bratton 1989b:1490).

Reduced to its ideal-type referent, the reified singular representation then performs an implicit function in the economic sphere by centralizing contracting agency, income streams, ownership attributions, agency and rights as a singular representation, but does not create a recognizable representation to which both agency and wealth accumulation can be traced:

“Even if the observer concludes that only the reified firm entity exists, questions about the source and character of the ideas constituting the reification still arise. One question concerns personification of the firm - the appropriateness of modelling the reified entity as an economic and social actor with the behaviour patterns of an individual.” (Bratton 1989:423)

These fictional entities then come to function as bigger-than-life singular ideal-type legal and economic agents in a market consisting of equal singular agents with ideal-type economic and legal agency. As Henry C. Adams argued in 1894: “[T]hese corporations assert for themselves most of the rights conferred on individuals by the law of private property, and apply to themselves a social philosophy true only of a society composed of individuals who are industrial competitors” (Adams 1894 in Horwitz 1985:205).

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corporation with the enterprising individual, the corporate personification of the American entrepreneur, would constitute the very basis of the ideology of a rising corporate bourgeoisie” (1996:45-46). This corporate individualism was necessary, in turn, to protect ‘corporate autonomy’: “Thus, while profits were no longer associated with personal greed, the capitalist imperative of profit-making had become identical with the objective needs of the corporation and the economic interests of society. Because it was essential to the successful functioning of the enterprise and therefore to society as a whole, profitability, like corporate decision-making, must be protected by the doctrine of corporate autonomy. In this fashion, the individualist creed of liberal individuals was revised to accommodate the requirements of corporate power in “industrial society.” (Bowman 1996:232-233)

This has obvious effects in the constitution of the marketplace, where these singular reified representations with ideal-type agency contract with natural persons.

## ***2.6 Concentration and monopoly***

“Every age is befooled by the notions which are in fashion in it. Our age is befooled by “democracy”; we hear arguments about the industrial organization which are deductions from democratic dogmas or which appeal to prejudice by using analogies drawn from democracy to affect sentiment about industrial relations. (...) In our time joint-stock companies, which are in form republican, are drifting over into oligarchies or monarchies because one or a few get greater efficiency of control and greater vigor of administration.” (Sumner 1902 in Bowman 1996:76)

The second discursive formation introduced the singular reified representation into the economic sphere as a new phenomenon in the economic world (Schrader 1993:160). Incorporation produced a representation that invoked coordination and concentration, rather than a decentralized market mechanism:

“the central fact about the modern business corporation that makes it an anomaly for traditional economic theory is that the corporation is a genuine collective entity that features a very conscious “visible hand” type of coordination of economic activity. Such an entity must invariably prove anomalous to an economic theory committed to a reductive individualistic mode of analysis and to the ideal of unconscious invisible hand coordination of economic activity.” (Schrader 1993:7)

The idea of what economic activity is was changed by incorporation in the second discursive formation. Production was no longer the result of blind forces:

“Coordination of economic activity (...) becomes, within the firm, the labour union, and various other social collectives, very conscious, guided by the very visible hand of the manager or bureaucrat. The social world in which the

manager reigns is quite significantly different from the world in which the classical entrepreneur reigned.” (Schrader 1993:161)

Economic power relations in this system shifted towards hierarchical corporate structures and the exercise of economic dominance of singular representations entities over the individuals that acted as their investors, suppliers and consumers. Coordination and control shifted from an unplanned economic system, in which individuals contracting in the marketplace under bilateral power relation of production and consumption to a system in which group representations became constitutive for production and distribution. Rather than the classical notion of the individual entrepreneur, emphasis therefore shifted to the producing group and its legitimation (Bratton 1989b:1491). The acceptance of incorporation thus led to centralization and monopolization, rather than individual responsibility and entrepreneurship.

Berle and Means (2007) stated that these changes led to a corporate revolution that was probably the most important revolution in the last century. Companies came in huge units rather than in a multitude of small competing firms, initiating a change in the character of competition from an individualistic model to a competition between a small number of large firms. This led to an “(...) increasing concentration of both economic and political power” (Schrader 1993:124). According to Bratton, the success of the management corporation amounted to “the management corporation’s displacement of the market-controlled economy” (Bratton 1989b:1488). The result was a shift from market competition and property law, legitimizing power in individual hands, to an emphasis on management performance, legitimating power in corporate organizations (Bratton 1989b:1491). This not only changed the nature of individual businesses, but also the nature of the whole economy: “When combined in a few hundred large corporations, these powers fundamentally altered the nature of the capitalist economy” (Bowman 1996:208).

These changes arguably led the change of the economic landscape from a landscape of mostly small, privately owned enterprises into a small number of overpowering institutions and thereby to a destruction of competition (Horwitz 1985:205). This amounted to a “substantial relocation and reformulation of economic power.

Corporate control of production partially displaced market control, causing power to flow from individuals to groups” (Bratton 1989b:1488).

Berle and Means suggested that the unit of analysis for the economist was then no longer the small-time entrepreneur envisioned by Adam Smith: “It is worth suggesting that the apparent complexity may arise in part from the effort to analyze the process in terms of concepts which no longer apply” (Berle and Means 2007:308). Rather, the unit of analysis had become oligopolies of big corporations in the hands of a small number of individuals:

“The recognition that industry has come to be dominated by these economic autocrats must bring with it a realization of the hollowness of the familiar statement that economic enterprise in America is a matter of individual initiative. To the dozen or so men in control, there is room for such initiative. For the tens and even hundreds of thousands of owners in a single enterprise, individual initiative no longer exists. Their activity is group activity on a scale so large that the individual, except he be in a position of control, has dropped into relative insignificance.” (Berle and Means 2007:116)

This led, in their view, to a society in which individuals were organized first and foremost through organizations. In this sense, their individual liberty as citizens was curbed by their participation in institutions that organized as social institutions beneath the state (Berle and Means 2007:307).

In Horwitz’s view, the moves away from the emphasis on individual entrepreneurship and the granting of rights and agency to supra-individual representations constitutes a ‘stunning reversal in American economic thought’ (Horwitz 1985:190). Schrader similarly argues that these moves “(...) constituted a major, perhaps revolutionary, modification in the development of traditional economic theory” (Schrader 1993:173). He argues these ideas go directly against the idea of an economic landscape of individuals: “There was very clearly in the minds of Smith, Mill, Marshall, and Clark a significant tension between the laws of classical economic theory and the existence of the large managerial corporation” (Schrader 1993:125). As Schrader argues: “(...) a fairly radical revision of economic theory is required to be

able to give a satisfactory and comprehensive explanation of economic phenomena in a world in which corporations are among the chief economic agents” (Schrader 1993:7).

The third discursive formation in theory returns to a liberal view of a market, reconstituting into a flat contractual aggregation of individuals. In practice, it retains all the advantages produced by the second discursive formation through the ‘pragmatic’ acceptance of the ‘convenient’ reified legal representation. Based on the discussion above it can be argued that this position implicitly justifies concentration and monopoly by positing corporations in the same position as individual entrepreneurs in the times of Adam Smith (Dine 2000:114) and therefore achieves the inverse of methodological individualism, political liberalism and economic atomism.

### **3. Generic representation revisited**

On the basis of the points raised in this chapter, the idea put forward at the beginning of this chapter that the corporation produces a generic business representation can be examined. In the third discursive formation incorporation becomes indistinguishable from other types of business representation and the corporation becomes no different from any other type of organization, firm or institution. As argued in chapter 5, agency theory denied the reification, but retained the reified representation and continued to use all referents for this reified representation that came from the first and second discursive formation. The contemporary theory of incorporation can therefore take recourse to three different referents: it can refer to the ideal-type singular reified representation, to the natural entity or to the aggregation of individuals. The natural entity as a referent is needed for the holding company, as well as for the personification that led to the attribution of amendment rights. The aggregation of individuals as a referent dispels the formal attribution of agency and dispels hierarchy and denies the economic advantages that flow from the natural entity theory. The ideal-type singular reified legal agent is useful to work with as a referent when contracts are reconstituted into complete contracts. It is also useful to retain the reified legal representation in general and its associated perks as a ‘legal fiction’. This equalization of representation works on the basis of the reduction of the referent and the prioritization of the ideal-type referent with ideal-type agency.

This section will further explore the effects of the nominal equality of representations that is assumed in the third discursive formation.

### ***3.1 One-way equality***

The prioritization of the ideal-type referent ensures that the implied similarity between representations works only one way. Although a corporation can act as if it were a singular subject in the shape of a human being, a human being cannot act like a corporation simply by virtue of its existence as a legal subject. Similarly, although the third discursive formation reconstitutes the corporation into a contractual aggregation of individuals, it does not reconstitute it into a partnership (Horwitz 1985:189). Corporations can therefore pretend to be partnerships, but retains their perpetuity as well as their limited liability. The partnership, then, does not have the perks of the reified singular representation, while incorporation retains the best of both worlds (Ireland 2010:848).

This one-way equality also advantages public over closely held corporations. As argued above, the contemporary theory of incorporation similarly accepts a doctrinal equality between the closely held and the public corporation, based on the necessity to accept the *Salomon vs. Salomon* verdict and the basis it forms under the reification of the representation. However, in practice contemporary legal and governance theories make a distinction between closely held and public corporations (Dine 2000). The identification doctrine makes smaller incorporated companies more directly liable: “(...) the identification doctrine, as applied by the English courts, is also prone to disproportionately affect small organizations where the controlling mind is easy to identify” (Irish Law Commission 2005:29). Vice versa, in the public corporation it is less easy to attribute liability. As Wells (2005:17) puts it: “...[t]he larger and more diffuse the company structure, the easier it will be for it to avoid liability.” *Salomon* thus theoretically provides the perks provided by incorporation to all incorporated entities, but in practice this doctrinal decision is reserved for public corporations only (Dine 2000). In spite of *Salomon vs. Salomon*, British company law thus implicitly makes a distinction between ‘public’ and ‘closely held’. This distinction is based on a pragmatic recognition of the fact that closely held corporations have more concrete

referents. Ireland (1999:509) argues that this leads to two bodies of company law with two different objectives:

“One dealing with smaller private companies in which shareholding is personality-rich and central to which, as the courts have increasingly recognised, is the enforcement and protection of the essentially in personam, contract-based rights of shareholders; and another aimed at protecting the personality-poor income (property) rights of rentier shareholders in large, publicly quoted, joint stock corporations.”

While public corporations enjoy agency, ownership and rights attributions to the reified singular legal representation through the natural person and through the aggregations of individuals as its referents, these attributions in themselves cannot be used to establish these referents in the public corporation. Only the public corporation is therefore sufficiently diffuse that it can use the ideal-type representation as its dominant referent, making it possible to attribute (contractual) agency, ownership and rights to the ideal-type singular reified representation, while referring to the concrete referents only implicitly. The legal and economic advantages of the singular reified legal representation are therefore not in the same measure available to natural persons, partnerships or closely held corporations exactly because their referents are too concrete and they are, therefore, not identifiable as ideal-type singular reified representations. This establishes a one-way equality in which the public corporation is favoured over natural persons, partnerships and closely held corporations.

In this way, the denial of reification in the third discursive formation therefore functions to retain specific advantages for incorporation, while denying the theory that these advantages come from. In mundane terms, the corporation gets all the benefits of all the referents it implicitly refers to, while those referents cannot make use of most of the benefits that attach to the corporate form.

### ***3.2 Shareholder primacy***

A second aspect of the third discursive formation position that needs to be considered is the theory whereby it attributes ownership. Agency theory introduces shareholder

primacy for the attribution of ownership. Shareholder primacy explicitly prioritizes shareholders over other constituent groups: “Under the “shareholder primacy” or “profit maximization” principle, the interests of other constituencies must be incidental or subordinate to the corporation’s primary concern for maximizing shareholder wealth” (Ripken 2009:163). This is the most widely accepted contemporary idea of ownership attribution (Millon 1993:1374; Ripken 2009:163). On the basis of the previous chapters, a number of reasons can be given to reconsider this claim to shareholder primacy.

### **3.2.1 Changing ownership and control rights**

One reason to argue against shareholder primacy is the historical change in the nature of shareholding (Dan-Cohen 1986:18-19). As argued in Chapter Three, the concept of shareholding changed during the 19th century. Stockholders were increasingly less involved in the management of a corporation. When the fully paid up stock arrived, the nature of shares changed radically. Rather than giving cash to the company, this meant buying the deed to future revenue and giving money to the seller of that deed, rather than to the company (Ireland 2003:473). Their ‘ownership’ over the corporation was further estranged through the use of the separate legal entity, because through this entity “It required a still more abstract justification of corporate personality, divorced entirely from any pretence that, ultimately, the shareholders ruled” (Horwitz 1985:219).

This development led to a particular view during the second discursive formation in which shareholders lost most of their rights. Berle and Means argued that the distancing of shareholders and the formal separation of ownership and control had diluted their position from their previous position in the joint stock company as partners and entrepreneurs. Henderson stated in 1918 that: “the modern stockholder is a negligible factor in the management of a corporation” (Henderson in Horwitz 1985: 207). Similarly, rights to ownership over assets were traded for a steady income stream with shares becoming ever more free-standing rights to this revenue (Ireland 2003:481; Berle and Means 2007:244; Demsetz 1967:358-59; Horwitz 1985:207; Schrader 1993:140). It was exactly this loss of definite rights and the “liability, obligation and responsibility” they brought that put shareholders in a position where

they were entitled to become “passive recipients of income streams external to the company.” (Ireland 2003:477) Modern shareholders therefore engage in the trading of titles to revenue and as such can be seen as extremely well-protected lenders (Schrader 1993:139) debenture-holders (Ireland 1999:55) or ‘rentiers’ (Ireland 1999:480-481). The historical developments in the nature of the share thus led to a loss of the definite attribution of ownership and control rights to the shareholders alone. The rights to management and control (Blair 1995:224; Ireland 1999:480) were lost.

The changes to the nature of ‘ownership’ were thus based on a reconceptualization of the nature of control rights. Berle and Means argued that the use of financial cascading constructions like voting trusts made it possible to become the effective controlling owner of a large number of industries without actually owning the majority of their stock as a person (Berle and Means 2007:71). It was then possible to fully estrange the vote from shares. This meant that individuals were no longer in control, but that control was maintained in large measure apart from ownership, either through financial vehicles or through the management (Berle and Means 2007:110). Control thus came to refer to “the capacity to determine the composition of the board of directors, and hence management” (Bowman 1996:240). As a result, determining ‘control’ over corporations could only to be determined in a very pragmatic way (Berle 1931; Berle and Means 1932; Dodd 1931). It is based on a ‘mass of imponderables’ (Berle and Means 2007:84) including: “(...) the locus of power in a particular corporation, the relationship of the stockholding individual(s) or group to management and the board, the dollar amount of the stockholdings, and the possible influence of outside directors and financial institutions over broad corporate policy (...)” (Bowman 1996:240). To control a public corporation, it is not necessary to hold a majority of shares (Bowman 1996:241). The ‘control’ can be in the hands of controlling minorities, but it is not the exact percentage of stock that determines the factual control over the corporation: “By itself, a percentage of stockholding does not necessarily mean that an individual or group wields significant power nor does it tell us how (under what circumstances and constraints) this theoretical power might be significant” (Bowman 1996:243-244). Various margins are used under different circumstances, most as low as 10-20% (Bowman 1996:241).

The 'control' thus became "a separate, separable factor" (Berle and Means 2007:110), which took over the implicit claim to ownership. The working of 'ownership' and 'control' became based on a pragmatic yardstick, rather than a theoretical attribution of rights. In this way 'ownership' as well as 'control' shifted from being definite rights to the attribution of rights to a pragmatic coalition of influence groups within the corporate constituency: "individuals or controlling groups who have no necessary titular place in the corporate scheme. Nevertheless, their powers, for practical purposes, may be complete" (Berle and Means 2007:207).

### **3.2.2 Coalition of interests and stakeholder theory**

The changes to the nature of shareholding, the changes in the attribution of ownership and control and the pragmatic acceptance of the continuum underlying the second discursive formation pictured the corporation as a coalition of interests. This model was one of the foundations for stakeholder theory, a view that understood the corporation as a distinctly social institution, an arena for equal competing internal and external interests and claims (Mayer 1989: 642). Company law stated that management should have a loyalty to the company as a whole, rather than to the shareholders (Dine 2000:191). Understanding 'the company' through this lens then did not prioritize the shareholders or management as prioritized claimants, but divided rights evenly between constituent groups on the basis of social as well as economic aspects. In this theory "(...) shareholders are rarely the only residual claimants" (Blair 1995:238). Rather, different types of claims become important. For instance, employees invest in highly specialized skills that constitute non-transferrable human capital and are in this sense residual risk-bearers (Blair 1995:238). In the same way, communities can be seen as residual claimants through the incentives and investments with which industries are attracted to a particular community. The shareholder therefore becomes a far less privileged type of claimant: "The stockholder gets the right to receive some of the fruits of the use of property, a fractional residual right in corporate property, and a very limited right of control. The rights to possess, use, and control the property go to the managers of the corporation" (Votaw in Blair 1995:27).

### 3.2.3 Reinforcing shareholder rights

The separation of ownership and control was also interpreted in a different way. The arguments provided by Berle and Means for a less doctrinal understanding of the reified representation and a separation of ‘control’ were eventually reconciled with the aggregation of individuals position in the third discursive formation.

In this theory, the denial of the reification of the representation meant that the dispersed ‘ownership’ and ‘control’ could also be attributed to coalitions of individuals found within the aggregation of individuals. The idea of the corporation as a coalition of individuals and interest groups could then be used to understand the ‘control’ as the results of competing interests (Ireland 1999, 2003). Agency theory argued that shareholders in particular, through their distanced position from the corporation, were vulnerable to abuse of the funds they invested. On the basis of the ‘residual control rights’ that came with this investment and the lack of direct influence on the company, agency theorists claimed that the company had to be run in their interests.

These ‘residual control rights’ meant that ‘the control’ itself became a commodity that belonged to the shareholders. In turn, this commodity could be traded on the market. Agency theory put forward a view in which managers did not necessarily have the interests of shareholders at heart. In order to keep managers disciplined, the corporation as a market of interests then dictated that entrenched management was unwished for and that a lessening of oversight and control mechanisms was needed in order to enable a well-functioning market for control rights. Corporate managers thus became subject to market disciplines: “a market which operated so as to compel corporate executives to pursue profit-maximising policies, thus ensuring productive efficiency for the benefit of all.” (Ireland 2003:482) By making managers answerable to the needs of shareholders alone and by making ‘control’ a saleable commodity, the ‘market for corporate control’ thus put the whole corporation back ‘under the market’ (Ireland 2003:482). Rather than the exercise of direct control, this means that the implicit norms of the stockmarket exercised their disciplinary power at arm’s length (Ireland 2009:21).

The corporate executive is then transformed into a “swashbuckling, iconoclastic champion of shareholder value” (Khurana in Ireland 2009:21). Enterprises become “(...) mere bundles of saleable assets capable of being bought and sold at will.” (Ireland 2009:20) ‘Ownership’ thus turns into a predatory stance, ready to sell off parts which were not directly constitutive of corporate dividend and profit. As a result, the goals of corporate strategy became dictated by the short-term interest of capital, shifting the idea of entrepreneurship to the restructuring of corporate entities (Bratton 1989b:1517). The goal of the market for corporate control is then not to yield results by producing goods or services, but appropriating the highest return to a specific group within the shareholding constituency (Bratton 1989b:1521). These views about the residual claims of shareholders and the market for corporate control were still new in the beginning of the 1970s. By the 1980s, they set in motion a surge in take-overs and leveraged buy-outs.

### ***3.3 Ownership***

The reconstitution of the corporation, its management and its control as parts of a ‘market for corporate control’ that answers to shareholders’ interests alone is based on the idea that residual control rights can be put back in the hands of the shareholders and that on this basis they can claim ‘shareholder primacy’. This claim to shareholder primacy on the basis of residual control rights in the context of the third discursive formation finds its basis in two ideas of attribution of ownership. One idea claims direct ownership over the corporation as a whole, the second claim ownership over the corporation via the denied representation.

#### **3.3.1 Reduction into property**

The first claim to ownership is made on the basis that the relegation of the reified singular legal representation means that shareholders can claim ‘ownership’ over the corporation itself. Reconstituting the corporation as a piece of ‘property’, ‘ownership’ can be attributed to the shareholders on the basis of their residual claim rights as well as their residual control rights. Moreover, as the ‘owners’ of the representation as ‘property’, shareholders need not exercise direct ‘ownership’ over the corporation, nor need they be obligation-bearing investors (Ireland 1999) to be identified as prioritized claimants and to retain both residual ownership claims and residual control

rights (Blair 1995:27). As a piece of ‘property’, the corporation then offers a direct inroad into all functions of the previous models of representation at once:

“In misdescribing the joint stock company and the joint stock company shareholder, contractual theory also elides the distinction between the assets owned by the company and the shares (rights to revenue) owned by the shareholder. They are conflated under the rubric ‘capital’, a process which discretely reunites shareholders with the corporate assets and eliminates the corporate entity as an owner of property other than in a purely formal sense.” (Ireland 2003:474)

However, there are multiple reasons to reject these direct claims to ownership. First, as argued in chapter three and four, the reification of the representation is not the result of its historical development out of the *concessionized universitas*. Rather, this reification in the form of the *modern universitas* in the second discursive formation is a direct result of the idea that ownership and agency can be held and attributed outside the aggregation of individuals in a reified legal representation. Moreover, the idea of the *modern universitas* as a reified *owning* entity is necessary to retain the separation of shareholders and the representation (Ireland 2003:509) and thereby to retain the reconstitution of shares into “no-obligation, no-responsibility shares” (Ireland 2003:509). It is then exactly this reification and the attribution of ownership to this reification that distinguishes the *modern universitas* from all other forms of business representation in the second discursive formation and therefore becomes the defining element in modern theories of governance in legal and economic scholarship (Berle and Means 2007; Ireland 1996, 1999, 2003). The first claim to ownership in the third discursive formation, then, denies the results of the second discursive formation. This returns the corporation to a fully aggregated position, in which there is no reified representation to separate the corporation from the partnership. This also leaves the theory of incorporation in a state where it cannot be reconciled with any of the specific legal effects of the first and second discursive formation that come with the reification of the representation.

### 3.3.2 Reduction into groups

The second claim to the attribution of ownership is made by claiming ownership over the ‘nexus of contracts’ as an implicit successor to the reified representation: “(...) leading advocates of the law and economics movement argued that while it did not make sense to speak of a “nexus” as having an owner, it was still conceptually useful and normatively correct to treat corporate directors and officers as shareholders’ agents. (...) Thus, as holders of both residual claim rights and residual control rights, shareholders play a role similar to that played by the owner of an individual proprietorship, and it is reasonable to refer to shareholders as “owners” even though technically no one can own a nexus” (Blair and Stout 2005:725-726). The claim is, then, that ‘ownership’ in a corporation works in the same way as in a sole proprietorship. Although the reified representation has become reconstituted as a ‘nexus’ it is nonetheless ‘useful’, ‘normatively correct’ and ‘reasonable’ to refer to shareholders as owners over this nexus, which then implicitly answers to the same characteristics as the reified singular legal representation.

Both the first and the second claim to ownership apply a double take on methodological individualism. Both dispel the reification of the representation into a ‘fictitious’ entity on the basis of methodological individualism. This implicitly argues for a firm that is constituted from similar component parts on the basis of an equal attribution of agency (Ireland 2003:472). Both claims therefore cannot properly explain the particularities of the reified nature of the representation, nor can they explain why the representation as ‘property’ is allocated in a prioritized way to the shareholders.

Moreover, in the second claim to ownership the reified legal representation is implicitly retained. A ‘nexus’ cannot be held in the same fashion as a person holds a sole proprietorship. As a nexus of contracts, it simply cannot be ‘owned’ without turning it into a reified representation. This claim either dispels the specificity of the corporate form or implicitly assumes that the legal representation is still a reified intermediate representation that holds ownership. This option, then, introduces the nexus as an implicitly reified intermediate entity to hold ownership. Moreover, ownership is not directly conferred upon the aggregation of individuals, but upon the

nexus as an intermediate representation. This position of the nexus introduces a layering of the attribution of ownership that mirrors the function of the earlier reified representation and that refutes the reason for the introduction of the nexus: to explain the reduction of the corporation into a homogeneous contractual aggregation of individuals.

The problems produced by this implicit reification are compounded by the fact that it relegates the problem of the attribution of ownership from the level of the corporation as a whole to a lower level in the corporate hierarchy, which is still constituted as a group. Identifying shareholders as prioritized owners constructs a corporation that does not consist of an aggregation of equally contracting individuals, but rather as a set of competing groups. Access to, and ownership over, the implicit reified legal representation is attributed on the basis of 'useful', 'normatively correct' and 'reasonable' claims to prioritized access by implicit interest groups, rather than the homogeneous set of individuals that methodological individualism, the contractual aggregation of individuals and the nexus of contracts theory presented as the basis for the corporation. This introduces a reversal into the constituent groups and group interests within the corporate structure that characterized the managerial corporation in the second discursive formation.

Both claims to ownership thus argue that constituent groups can put forward prioritized claims to an implicit legal representation portrayed either as a piece of property or as an implicit reified representation. While the first claim cannot explain what distinguishes the corporation and the partnership, the second claim implicitly understands the nexus as fulfilling the same role as the reified singular legal representation.

This introduces a dualistic division as the basis for the governance structure of the corporation. Methodological individualism is invoked to theoretically relegate the corporation into an aggregation of equal contracting individuals in the third discursive formation, but is followed by prioritized claims by groups. In this division, every natural person is therefore initially reduced to a homogeneous singular contractual agent within the corporate constituency, but shareholders and management reappear as structural interest groups with a prioritized claim to an implicit reified singular

legal representation that holds agency, ownership and rights for the corporation as a whole. Through this theoretical sleight of hand, two constituent groups have direct and prioritized access to all the functions and perks produced by the separate legal entity, while large swathes of the constituency of the corporation like labour, consumers, local communities, and society at large (Schrader 1993:143) are excluded (Dine 2000:119). The third discursive formation thus effectively negates workers and other external stakeholders that are not part of its privileged duality.

#### **4. Economic myth**

Dewey stated in 1926 that the ‘legal fiction’ should be seen as an artificial representation, which performs certain functions by its presence alone and therefore cannot be relegated to the position of an imaginary entity. The ‘convenient’ reified legal representation in the form of a deniable singular ideal-type economic agent in the third discursive formation produces exactly such an imaginary entity.

The convenience of this imaginary entity shows itself in the implicit acceptance of reification in the third discursive formation. Although the reification of the representation is explicitly denied, its effects are retained in terms of its ‘convenience’ as a singular contracting agent, in terms of the attribution of perpetuity or limited liability, in terms of the implicit conferral of agency, ownership and amendment rights to this singular reified representation and in terms of an implicit prioritization of claims to ownership by particular constituent groups.

The acceptance of this convenient legal entity is based upon three conceptual moves. The first conceptual move is the shedding of the attachment of ownership to a definite reified legal representation as well as to a definite aggregation of individuals. Accomplishing both, the imaginary entity comes to function as an ideal-type singular reified representation in the economic domain. This ideal-type singular reified representation can then be used to reconstitute the marketplace into an arena of intrinsically different types of representation, positing them as equal. The third discursive formation thus revises the laissez-faire liberal creed (Bowman 1996:79) by accepting a high degree of economic concentration through a transformation of the economy from small-scale competitive capitalism on the basis of the acceptance of a

representation that leads to the concentration of capital and financial wealth (Bowman 1996:82) in oligarchic institutions (Bowman 1996:76). Arguably, it was not the intention of Adam Smith to see corporations accepted as representations, nominally equal to natural persons.

With the redefinition of political liberalism in the third discursive formation comes a second conceptual move in the form of a redefinition of methodological individualism (Bowman 1996; Ireland 1999:500).

Since the reified singular legal entity comes to contract as a nominally equal representation to a natural person, methodological individualism serves to reduce the corporation to a generic singular reified representation that contracts with homogeneous natural persons on the basis of nominally equal contracting agency.

On the level of the corporation, this serves to reconstitute the corporation into an extended marketplace of contractual agents, shedding its boundaries and hierarchy and putting it 'back under the market'. It also reconstitutes the implicit reified representation into a singular economic representation that is only attributable with agency along the lines of a singular profit maximizer. On the level of the market, this serves to reconstitute corporations' reified singular legal representation in an atomistic concept of the marketplace, constructing a market in which extremely unequal economic entities contract on a nominally equal basis.

Subsequently, this use of methodological individualism reduces the corporation into a collection of homogenous natural persons with contracting capacity as well as an implicit reduction of the corporation into constituent groups. This produces a double take on the object for the attribution of agency, ownership and rights, which implicitly prioritizes shareholders and management as constituent groups, securing their access to and ownership over the implicit reified singular legal representation and which structurally excludes workers and external stakeholders as interest groups in the corporate constituency.

The third conceptual move in the third discursive formation is the continued prioritization of the attribution of ownership to one constituent group, even in the face of theoretical inconsistencies. Although residual control rights have been traded a

long time ago against an uninvolved kind of shareholding with limited liability (Ireland 2010:852-853) the positing of normative ‘rights’ of shareholders as primary claimants to corporate benefits (Ireland 2003:480) leads to acceptance of residual control rights. In the third discursive formation, company law therefore “(...) clings to shareholders as residual claimants, retaining their place at the centre of the governance stage” (Ireland 1999:45). Combining this position for shareholders with the change in the nature of shareholding a never ending “unearned or free income” by “absentee owners” (Ireland 2003:481) who have become “passive owners of claims to part of the labours of others with a resemblance to old-fashioned usurers” (Ireland 1999:54).

The renewed claim to residual ownership rights and the reconceptualization of the corporation as a company that should not be run in the interests of ‘the company’ but in the interests of the shareholders are results of the quite recent acceptance of the third discursive formation. These claims make little sense for the reasons I have stated above.

These three conceptual moves together create an artificial representation in the third discursive formation that leads to an unending access to and appropriation of surplus value (Ireland 2003:465; Ireland 2005; Marx 1990). Considering the divergences from legal theory, the reconceptualization of political liberalism and the abuse of methodological individualism needed for the creation of this artificial representation, it can no longer be considered a ‘legal fiction’, but should be interpreted as an ‘economic myth’.

## **5. Conclusions**

“The modern corporation is one of the most successful inventions in history, as evidenced by its widespread adoption and survival as a primary vehicle of capitalism over the past century.” (Butler 1988:99)

In the previous chapters I argued that distinguishing aspects of the concept of incorporation in the third discursive formation are based on doctrinal assumptions taken from the first and second discursive formations. The *concessionized universitas* is used to posit the representation of association as a contractual *societas* with an

external representation, the artificial entity theory is used for the transfer of ownership to the aggregation of individuals and the natural entity theory is used for a continued reification, the separation of ownership and control, majoritarian shareholding, the holding company, the attribution of ownership to a reified separate legal entity, continued singularization, personification and the attribution of amendment rights protections.

Moreover, as argued in Chapters Three and Four, ownership in the second discursive formation was inherently based on a continuum between the artificial and the natural entity position and revolved between the notions of the corporation as private property and as a social institution (Allen 1992:265; Berle 1954). As argued in those chapters, the coherence and effects of the *modern universitas* were based on the acceptance of both doctrinal positions in a continuum, while the acceptance of the continuum itself was based on a tacit acceptance of the corporation as a semi-public institution.

In Chapter Five I then argued that the continuing presence and use of three historical discursive formations leads to a contemporary theory of corporate law that can only work with inconsistent positions about incorporation.

In this Chapter I argued that the field of corporate law defines and regulates the corporate form and relationships of control within the corporation (Bowman 1996:30). The contemporary theory of incorporation, therefore, also informs theories of corporate governance.

I showed that contemporary theories concerning corporate governance are, to a large degree, informed by the dominance of a third discursive formation that rejects the theoretical basis for the reification of the representation in the second discursive formation while retaining its effects. Through these moves, incorporation in the third discursive formation provides a large number of distinctive features and perks, which separate it from a partnership and which make it the most dominant form of contemporary business representation, but the assumptions underlying the third discursive formation provide no grounds for the attribution of these features.

Moreover, the implicit acceptance of reification and its effects in the contemporary theory of incorporation import a theoretically irreconcilable legal and economic reified representation that goes against the grain of methodological individualism and the political liberalism that form the conceptual basis of the third discursive formation (Bratton 1989; Ireland 2009:21-22; Millon 1993). This leaves the third historical discursive formation in a very weak position with regard to the status of its assumptions.

Any theory of corporate governance based on the contemporary theory of incorporation therefore reflects explicit choices concerning the representation of referents in the legal and economic debate, the choice for a relative position between those referents and the choice for the attribution of rights and interests to those particular renderings.<sup>31</sup> In this sense, the choice for a particular theory of corporate governance is therefore also a choice regarding the attribution of ownership and the social division of wealth.<sup>32</sup> As Ireland argued “(...) property forms are not merely the objects, but the products of regulation and that this has important implications for our understanding of both company law and corporate governance” (Ireland 2003:453).

This puts the thrust towards ‘convergence’ in contemporary theories of corporate governance (Gourevitch & Shinn 2005) in a new light. It focuses on finding pragmatic distinctions and effects between legal and political regimes influencing corporate practice. It thereby focuses on the effects of incorporation, accepting the underlying theory of incorporation as essentially unproblematic. As a result, this convergence approach neglects the differences between the three historical discursive formations, accepts the prioritization of the third discursive formation, defends the economic myth and accepts the normative assumptions that underlie the third discursive formation, including the theoretically inconsistent assumptions that lead the division of agency, ownership and rights within the corporate constituency on the

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<sup>31</sup> Rethinking agency theory and doctrinal assumptions may well lead to the conclusions that stakeholders’ claims can well be made on a legal, rather than a moral basis: “If other stakeholders could be shown to share in the residual gains and risks, their interest in being able to exercise some control over corporations would be significantly legitimized” (Blair 1995:231).

<sup>32</sup> The importance of the understanding of the concept of incorporation became clear when agency theory was employed to protest the American Law Institute's Principles of Corporate Governance (Bratton 1989b: 1499-1500).

basis of shareholder primacy. By accepting the third discursive formation, the theory of corporate governance actively brings about governance regimes that reflect and favour particular interests over others. A theory of corporate governance that works with a convergence approach becomes a “key technology for controlling management in the interests of investors” (Ireland 2009:21). What corporate governance needs, then, is therefore certainly not more convergence around the current theoretical assumptions. What corporate governance needs is a justification for the choices that are necessary to retain the contemporary inconsistent and incoherent theory of incorporation. Only when *corporate* is defined, can a theory of corporate *governance* start to develop.

One final aspect with regard to the third discursive formation that needs more attention is the denial of the natural entity positions and the singular representation of association in its social, political, legal and economic aspects. I will do so in Chapter Seven.

## **Chapter 7: Representation of association**

“Corporate power was the great issue of the Progressive Era. Today, it is seldom recognized as an issue. Discrete instances of the exercise of corporate power often attract considerable public notice, but the issue of corporate power itself is rarely discussed. Indeed, the ideological conquest of the corporation has been so thorough that scores of influential academicians have accepted the romantic view of the corporation as an apolitical economic institution that enters politics only to protect its pecuniary domain.” (Bowman 1996:235)

The previous chapters have presented incorporation as the result of three discursive formations. In this chapter, I will discuss the relation between these discursive formations and the dominance of the third discursive formation to draw out the way in which the contemporary theory of incorporation can be related to its social and political aspects.

In Section One I will argue that the first and second discursive formations necessarily understood the representation as a reified representation with social and political aspects.

In Section Two I will argue that the dominance of the third discursive formation within the contemporary theory of incorporation leads to a denial of the social and political aspects of representations. I will then argue that the representation in the third discursive formation still refers to the aggregation of individuals as a referent and therefore cannot logically exclude the social and political aspects of the representation. Working with the effects described in Chapter Six, I will show that the exclusion of the social and political aspects of the representation leads to an equalization of all types of representation in terms of their nature and in terms of their purpose. I will then argue that this implicit equalization is important to recognize for all social sciences and organization studies in particular.

## **1. Second discursive formation**

During the first discursive formation, the concession was granted from outside by a sovereign to a distinctly individualistic *societas*. As a result, political and social aspects were not intrinsic to the representation. This changed drastically during the second discursive formation.

The second discursive formation developed partly on the basis of the natural entity theory. This led to the acceptance of reification and singularization, which in turn allowed for the construction of reified representations, attributable with agency, ownership rights and protections over and above the level of the individual. The economic success and dominance of incorporation was at least partly based on the acceptance of this reification and singularization of the natural entity theory. However, as argued in chapter three, this acceptance also imported social and political aspects that could be attributed to a reified representation. Gierke (1968) and Maitland (2003) described the conceptual problems with these aspects for a reified representation in the political and the social domain.

### ***1.1 Reified political representation***

Otto von Gierke (1841-1921) and Frederick Maitland (1850-1906) were concerned that the legal and political systems of representation were directly influenced by the acceptance of the ideas on incorporation that developed during the 19<sup>th</sup> century. As shown in Chapter Two, towards the end of the first discursive formation the idea of incorporation had become precarious to say the least. The political concession was formally still granted and held by the sovereign, but the position of the sovereign and the conception of sovereignty had been transformed, both by the emergence of the new nation-state and by the slow developments underlying the concept of the representation itself. In Gierke's analysis, this was the reason why the notion of incorporation was seen by the revolutionaries of the French Revolution as an intrinsic threat to a democratic system.

The French Revolution forcefully introduced the idea that men naturally organized in associations, rather than as a part of an organic unity with kings and popes on top. Any type of representation of association, including the State, therefore existed as an aggregation of individuals<sup>33</sup>. Citizens would be the only constituent parts for the conception of association, leaving the state and the individuals within that state as the sole carriers of agency: “the absolute State faced the absolute individual” (Maitland 2003:66). Any other type of representation of association would introduce a political entity, which would be hard to distinguish from the state itself. For this reason, the state exercised power “over all individuals equally and with equal directness and immediacy” (Gierke 1968:94), dealing with other representations through a “pulverizing, macadamising tendency (...) reducing to impotence, and then to nullity, all that intervenes between Man and State” (Maitland 2003:66). This flattened the political landscape to allow nothing but citizens and states to be represented legally and bonded the new citizens into the State as the only type of association (Davis *et al.* 1994). Above the State there was no room for a World-State, while below the State there would be only room for communes, not for associations with a legal representation for themselves (Maitland 2003:xiv; Gierke 1968:97).

The State then remained as the only type of representation over and above the individual citizen: “It was the State alone that became the exclusive representation of all the common interests and common life of the Community” (Gierke 1968:98).

As an aggregation of individuals, the state struggled to develop enough communality to become a proper political representation. Its aggregate, individual and contractual nature made it a very fickle form of representation, peculiarly intangible (Runciman 2000:93) and apart from its constituent members: “Like a ghost, the person of the commonwealth disappears if approached too closely” (Runciman 2005:19). This intangibility created issues with the attribution of sovereignty to the state and therefore created issues with the transfer of power, the status of state institutions, the ownership over domains and colonies and the attribution of state debt (Maitland 2003). The representation of the state therefore had to be apart from the aggregation

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<sup>33</sup> Gierke made a distinction between a spontaneous aggregation of individuals, a *Genossenschaft* or fellowship, and the contractual aggregation of individuals, the *societas*. The fellowship led to a representation of association that was understood through civil law, while the *societas* as a contractual representation was understood through private law.

of individuals if it was to provide enough communality: “The problem was that (...) a state cannot be made out of its constituent parts – its citizens, its laws, its government, even its constitution. It must be something more than the sum of its parts, if it is to be recognizably separate from them” (Runciman 2000:98-99).

The development of the *modern universitas* during the 19<sup>th</sup> century made the resolution of the matter of representation of the state even more urgent: “[Maitland] believed that the fundamental question of the state’s separate identity as a corporation, though abstract, was pressing, because it would be increasingly hard for the modern state to function without some clearer sense of what the modern state was” (Runciman 2000:100).

Understanding the State as a reified representation begged the question how this reification was to be understood. Since incorporation started to provide a reified representation as well during the second discursive formation, the reification of the representation of the state introduced the possibility for a multitude of intrinsically different sorts of reified legal representations. This provided two general possibilities for the status of reified representations of association: the representation could be of the same genus as the state or it could be of a different genus than the state. If the reified representation of association was of the same genus, the state would have to compete with the corporation as an association amongst others. This was obviously not an option, because it imperilled the status of the state as the granter of legal representation to other associations (Gierke 1968; Maitland 2003).

The reified representation could also be seen as a different genus than the state. This offered two possibilities. First, the reified representation of association could exist between the state and its citizens. However, this option multiplied the number of representations existing above the citizen and implicitly applied a hierarchy to those representations. Second, the reified representation could exist below the state without a hierarchy of representations. Given the strongly individualistic basis of the new constitutions the only logical solution left would be to constitute the reified representation in the legal and political slot of a singular citizen (Gierke 1968; Maitland 2003). What was at stake was the representation of the natural person, of the association, of the state, the relation between all these types of representation and on top of that the sovereign prerogative as a function of the state or as a function of the

law: “(...) the question of juristic personality has an essential bearing on the relation between law and state” (Hallis 1978:28). The philosophy underpinning the representation of groups and the state therefore forged an “intimate connection (...) between legal philosophy and political theory” (Gierke 1968:36). This put the concept of incorporation right in the middle of the understanding of the natural person, the association, the state and the system of law. The way one representation was conceptualized would have lasting impact on the representation of the other (Runciman in Maitland 2003:xii).

What Gierke and Maitland made clear was that the corporation as a reified representation of association presented a theoretical problem in the system of legal and political representations. The new reified representation could turn the representation of association into the slot of a singular citizen, it could turn the representation of association into a reified representation between the state and the individual, reimporting a medieval political hierarchy, or it could become a reified representation that in its nature would compete with the state. All three options directly threatened the liberal and democratic political tenets of the 19<sup>th</sup> century (Bowman 1996). In this light, it is no wonder that the French revolutionaries decreed on August 18th 1792 that:

“A state that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the patrie.” (Scruton and Finnis 1989:261)

## ***1.2 Reified social and political representation***

As a reified representation, the corporation constituted something different in the social and political sphere from a citizen, other types of associations and the state (Ireland 1999:481). Because the French and American revolutions had created a political system of representations that did not acknowledge intermediate reified representations (Bowman 1996; Gierke 1968; Maitland 2003), some sort of a solution had to be found:

“(…) some personality identical in essence, or with respect to “subjectivity,” must be discovered for all right-and-duty-bearing units, from the singular man on one side (including infants, born and unborn, insane, etc.) to the state on the other, together with all kinds of intervening corporate bodies such as “foundations,” “associations” and corporations in the economic sense.” (Dewey 1926:659)

Given the three options described by Gierke and Maitland, this provides a further explanation for the acceptance of the natural entity position during the second discursive formation. Although the representation developed during the second discursive formation used the aggregation of individuals as a referent, the political system of representations could not deal with this representation without introducing it into the slot of the singular legal ‘subject’. The second discursive formation therefore accepted the natural entity position for its singularizing qualities, leading to the implicit acceptance of the representation in the emergent entity position and the social and political aspects that came with the acceptance of this type of representation.

As argued in Chapter Three, this particular position of the corporation was seen as the result of a theoretical exception with regards to the natural entity theory. This exception of the reified singular representation in the slot of a natural entity within the social, political, economic and legal systems of representation that developed during the second discursive formation turned the corporation into a dominant economic, as well as a dominant social and political representation. Berle argued in 1932 that the corporation could potentially be regarded “(…) not simply as one form of social organization but potentially (if not actually) as the dominant institution of the modern world” (Berle and Means 2007:313). Many authors explicitly argued that the legal, economic, social and political dominance of the representation that followed from the acceptance of its anomalous position could only be justified on the basis of its nature as a semi-public institution. The corporation therefore needed to be accountable to the wider society and its members as a “semi-public power” (Schrader 1993:125) with “an eradicable political character (…)” (Schrader 1993:124). The corporation was portrayed, then, as a social and political representation of association, rather than a purely economic representation (Berle and Means 2007; Bowman 1996; Dodd 1926;

Drucker 2006). This idea lessened the tension between the artificial and the natural entity theory because it could now be argued that the political concession was replaced by an explicit adoption of public goals by corporations (Drucker 2006).

This idea of the corporation as a public institution hinged on a very particular view with regards to the attribution of ‘ownership’ over the corporation. As argued in Chapter Four, social and political aspects that adhere to an aggregation of individuals relate to the representation only if it appears either as an artificial, public concession or as an emergent representation. As an artificial, public concession the representation stands intrinsically apart from the aggregation of individuals. Whether made ‘by’ or ‘of’ the incorporators, it attaches to that aggregation externally, much as in the first discursive formation. This view entails a return to the joint-stock conception of incorporation of the beginning of the 19<sup>th</sup> century (Ireland 1999) and portrays incorporation as a fundamentally public concession. As an emergent representation, the aggregation of individuals appears as “(...) a social institution, a locus of collective action in which the varied interests of a number of individuals and groups are brought together and transformed into a more or less coherent pattern of group behaviour in pursuit of at least partially convergent purposes (...)” (Schrader 1993:8). In this view, the representation emerges from all individuals within the corporation in equal fashion.

Both as an artificial public concession and as an emergent entity, then, the possibility for prioritized claims by groups within the aggregation to the ‘ownership’ over the representation are without justification. In the public concession view, ‘ownership’ in the form of the grant of the concession is retained externally, like in the first discursive formation. In the emergent representation view, all individuals within the aggregation have a fundamentally equal part in constituting the representation. On the basis of both types of theory it is possible to argue for the fundamentally equal inclusion of all individuals as stakeholders within the corporate structure (Berle and Means 2007).

Both views that provided a justification for the introduction of a representation that in practice functioned as a “non-statist social and political institution” (Berle in Bowman 1996:204) with inherent social and political aspects in the second discursive

formation, then, functioned on the premise of the acceptance of intrinsically equal claims to agency, ownership and rights by all members of the corporate structure (Bowman 1996:234).

### ***1.3 Effects of a reified social and political representation***

As described above, the second discursive formation for all intents and purposes constituted a singular, reified representation in the legal and the economic, but also in the social and the political system of representations. Reification and singularization, then, produced a representation constituted as a reified representation of association with social and political aspects. In the legal sphere, this singular reified representation was recognized as a representation of association, but inserted into the slot of the singular legal subject. In this way, the *modern universitas* introduced a representation that functioned as a reified representation of an aggregation of individuals with social and political aspects.

In this way, the legal singular reified representation with social and political aspects attains a position that was formerly reserved for the association of individuals. The social, political, legal and economic representation of the association within the legal sphere becomes attached to the reified singular representation, which in this way doubles up its original position of representation outside the aggregation. In this way, the representation becomes what it was explicitly not intended to be in the first discursive formation: a reified singular representation of association. The attribution of amendment rights and legal agency to this implicitly reified representation, then, amounts to a delegation of legal as well as political rights to a representation that occupies an unknown political position between citizens and the state. This is exemplified in the *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) case, in which it was ruled that corporations could express a right to ‘free speech’ and that this right included the possibility to influence the political process. Bowman (1996:154) notes that *Bellotti* in this way attributed not just legal, but also political rights to the ‘corporate individual’. Justice Rehnquist argued this point when in his dissent he made the point that granting political rights, perpetual life and limited liability to political representations may “pose special dangers in the political sphere”

and could lead to an advantage of corporations over other participants in the political arena (Nace 2003:188).

The representation, then, functions in the political sphere in the same way as it did with regards to models of corporate governance. Through the allusion to methodological individualism the representation in theory represents all individuals within the aggregation equally. However, because not methodological individualism but a prioritization of group interests is used for the access to the representation, the reified singular representation in practice functions to delegate legal and political agency from individuals to the intermediate reified singular representation. In this way, the assumption that the representation represents all individuals within the aggregation in equal measure accepts an implicit reified representation with agency and amendment rights as a political tool in the hands of a controlling minority.

This is exemplified by the acceptance of Political Action Committees<sup>34</sup> (Bowman 1996:145-146) in contemporary legal practice in the USA. The acceptance of these PACs within the corporate structure is based on a philosophy that attributes political agency to individuals within the corporate structure, viewed as an aggregation of individuals. This negates the context, in which the expression of political rights takes place through a reified legal representation that is not accessible in equal measure by all individuals within the aggregation. As Mayer notes, speech uttered by corporations is actually managerial speech (Mayer 1989:653). An even clearer example is the attribution of direct political representation to the corporation as a ‘functional constituency’, which has happened when Hong Kong’s legislature was elected in 1997<sup>35</sup>.

While purporting to act on behalf of an aggregation of individuals, the reified singular representation in this way allows a taking of political agency from those natural persons within the aggregation who do not have controlling power over the

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<sup>34</sup> Political Action Committees (PACs). Committees set up within corporations to influence politics. Theoretically, these committees act on behalf of individuals within that corporation (Nace 2001).

<sup>35</sup> 30 out of the 60 seats in Hong Kong’s new Legislature after British rule were reserved for ‘functional constituencies’, which included corporations (Nace 2001:221).

representation that legally and politically represents them. Therefore, when legal and political rights are granted to the corporation as a singular reified representation the attribution actually takes rights away from that part of the aggregation of individuals who cannot act through the singular reified representation. Since not all individuals within the corporation do have equal representative voting systems to express their political choice, this leads to a loss of legal and political rights for individuals.

The reified singular representation, then, “unfairly promotes the power of corporate managers while diminishing that of shareholders, workers, and communities” (Mayer 1989:656). This leads to a doubling of political agency for a controlling minority and “the overrepresentation of corporations, and their managers or owners, in politics” (Mayer 1989:657). The reified singular representation in the political sphere, therefore, leads to a system that delegates disproportionate political power to the control in a corporation.

#### ***1.4 Legal and political systems of representations***

The reified singular representation that is produced in the second discursive formation produces a representation that is not just present as a theoretical legal representation, but also functions in the legal, political and social domain as a reified singular representation. During the second discursive formation, this reified singular representation needed a slot in the legal, political and social system of representations. Given that the political system of representations formally accepts no other reified representation than the natural person and the state, the contemporary concept of incorporation produces the only representation that directly vies for the position of sovereignty with the state within the framework of political theory. This fact, combined with the projection of social and political rights in the second discursive formation and the allusions to the natural person as a referent in the third discursive formation serves to keep the singular reified representation firmly locked in the slot of the singular legal subject. Subsequently, the singular legal subject is inserted into the political system of representations as a ‘citizen’. Since the political system of representations uses the natural person as the direct referent for the citizen, this creates a further move towards the nominal similarity of corporations and natural persons.

The use of terms like ‘legal subject’ in a legal system of representations and ‘citizen’ in a political system of representations in conjunction with the allusions to the natural person through methodological individualism in economic scholarship obscure the fact that political and social rights are conferred to a theoretically reified and singularized legal representation. This reified singular representation stands between the aggregation of individuals and the legal system as an intermediate reified singular representation with its own attributions of agency, ownership and rights, not with agency, ownership and rights delegated from those individuals. As an intermediate representation, it thus factually represents a supra-individual reified representation within the legal and political system of representations.

In line with the analysis by Gierke and Maitland, importing such an implicit reified supra-individual representation in the political sphere constitutes a political anomaly. It leads to a displacement of the human individual as the basic referent and thereby to a taking of rights from the ‘legal subject’ and the ‘citizen’ as basic constitutive referents within the legal and political system of representations. In this way, the transfer of legal and political rights to such an intermediate reified representation with social and political aspects achieves a delegation of political powers to these representations and paves the road “(...) for a steady erosion of state sovereignty over corporations, allowing them to begin carving out a legal zone of immunity from state legislatures” (Nace 2003:104). This leads to increasing autonomy against the state (Dan-Cohen 1986:176-179) and thereby an increasing autonomy for the reified representation to govern its own affairs (Bowman 1996:71). The representation, then, vies with the representation of the state at the national level, because of its anomalous position within the political system of representations. This leads to the acceptance of reified representations with social and political rights between citizens and the state. This leads to an erosion of the nation-state (Bowman 1996:293) and recreates a political hierarchy (Gierke 1968).

This transferal of agency, ownership and rights, becomes even more poignant in the international sphere. In Chapter Six I showed how in an international context the concept of the state and the corporation are fundamentally constituted on an equal

level (Berle and Means 2007:313; Van den Heuvel 2009). This theoretical comparison essentially also holds in a national context. As Rathenau stated in 1918:

“The depersonalization of ownership, the objectification of enterprise, the detachment of property from the possessor, leads to a point where the enterprise becomes transformed into an institution which resembles the state in character.” (Rathenau 1918 in Berle and Means 2007:309)

As a result, in the international sphere the representation is more than an implicit reified singular legal subject with an unclear status, vying with the state. As a ‘natural entity’ on the intra-state level without a clear theory about where it resides the representation comes into its own as a fully reified singular reified legal subject, which has no recognizably different character from a state.

## **2. Third discursive formation**

The contemporary theory of incorporation is based upon the understanding of reification and singularization that follows from the first and second discursive formation. In Section One of this chapter I showed that this reification led to major political and social issues. In Chapter Five I showed how this reification functions in practice as a reified singularized idea of representation in law and in economics. In Chapter Six I showed how the contemporary theory of incorporation factually produces and accepts a reified singular representation in the domain of corporate governance. I showed what the effects are of this contemporary theory of incorporation for the internal constitution of the corporation. The contemporary theory of incorporation therefore accepts the factual reification of the representation along with all the political and social issues described in section one.

In the following section, I will show that the third discursive formation did not solve those tensions, but hid them. Moreover, I will show how the third discursive formation aggravated the theoretical difficulties that produced the social and political problems by structurally excluding the possibility for any attribution of social and political agency to the representation.

## ***2.1 Hiding the reified representation***

After the 1920s the explicit influence of the natural entity theory started to wane (Mayer 1989:646), notably as a result of an essay by Dewey (1926). He argued that the representation created by incorporation was inherently indeterminate and, therefore, could not be resolved by relating to the previously dominant theories. This put pressure on the theory of incorporation to establish a rationale for the effects of reification.

One way to deal with the tensions of the reification of the representation in the second discursive formation was to reduce the representation to the status of property, enabling the reified representation to be seen as an effect of private law. This reconstitution of the representation as property led to a situation in which the natural entity idea became increasingly untenable in the legal debate after the 1920s. However, this introduced a problem. A natural entity constituted as ‘property’ was hardly a singular representation that could be endowed with amendment rights.

Another way to deal with this problem, as shown in Chapter Five, was the assumption that the representation was directly attributable as a singular and reified, but not personified object of rights: “The dialectic of the courts, under the pressure of social facts, was equal to declaring that corporations, while artificial and fictitious, nevertheless had all the natural rights of an individual person, since after all they were legal persons” (Dewey 1926:669). As a result, the American courts during the 20<sup>th</sup> century steadily moved away from the natural entity conception and towards an understanding of incorporation that granted primacy to the representation itself.

This explains why in *Bellotti* the Supreme Court dismissed the idea that natural persons enjoy broader first amendment rights than corporations as “an artificial mode of analysis”:

“The Court below framed the principal question in this case as whether and to what extent corporations have first amendment rights. We believe that the Court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The first amendment, in particular,

serves significant societal interests. The proper question therefore is not whether corporations “have” first amendment rights, and if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the first amendment was meant to protect. We hold that it does.” (*Bellotti* in Mayer 1989:633)

This case explicitly shows how the ideal-type singular representation itself became the primary referent in the legal system, rather than the natural person or the aggregation of individuals. In terms of the representation of association, this establishes the representation not as the representation of the aggregation per se, nor as representation of political or social agency, but rather as a representation of the rights adhering to that association. This type of reasoning underlies the opinion of the Court in *Bellotti* that corporations should be seen as ‘elements of our society’ that should be treated as equal to other legal entities (Nace 2003: 188).

## ***2.2 Political and social representation in the 3<sup>rd</sup> discursive formation***

The examples above further exemplify the theory underlying the representation in Chapters Three and Five. In the approach taken in the third discursive formation, there is no longer an external referent for the representation of rights but only a set of legal relations that establishes a primacy of those rights themselves. The representation of the aggregation of individuals therefore appears as a representation that is defined by its understanding in the legal system.<sup>36</sup>

As argued in Chapters Five and Six, this leads to the use of an ideal-type reified singular representation that theoretically stands apart from the aggregation of individuals.<sup>37</sup> Because this ideal-type representation does not have the natural person

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<sup>36</sup> This creates a particular position for the jurists, because they then act as the dispensers of legal representation to all associations: “the legal existence of a corporation aggregate did not depend upon the activities of its living members but simply and solely upon the act of the legal authority which created it” (Coke in Hallis 1978:xliii).

<sup>37</sup> It is for this reason that I do not address the personification model in detail in this dissertation. The personification model just flags up the representation as a further application of the singularization and reification of the representation, not a valid model in itself. Imputations of morality and ethics to a corporate ‘person’ or

or the aggregation of individuals as its direct referent, it becomes indistinguishable in legal theory whether it is the representation in itself, or that which is represented which exhibits agency as a singular reified representation. A reified singular legal representation is therefore assumed outside the aggregation of individuals that is fundamentally unknowable as a holder of ownership, amendment rights and as a contractual agent. The only route to understand this representation is through the ideal-type assumptions of legal and economic scholarship. However, this route leads back to the ideal-type reified singular representation, rather than to the aggregation of individuals or the natural person as the referent. A concrete attribution of agency to the other referents, i.e. the aggregation of individuals or constituent groups within that aggregation becomes virtually impossible. Similarly, the attribution of political and social agency, either to the natural person or to the aggregation of individuals itself therefore remains impossible.

Although the direct attribution of rights, ownership and agency to the legal representation achieves a formal singularization and reification of this representation as well as the attribution of legal and political rights to this representation, any direct attribution of legal, economic, social and political agency can thus be excluded.

The assumptions underlying the third discursive formation, therefore, allow for a *structural* exclusion of the social and political dimensions of the reified singular representation. The third discursive formation creates a conceptual legal and economic, as well as political and social universe that is populated by ideal-type agents that function through perfect contracts. The third discursive formation thus excludes the representation from communitarian norms (Bratton 1989:455) and imports an ideal-type singular reified representation that does not care for groups, classes, wider interests or longer term goals that are beyond the interest of the contracting individual (Bratton 1989b:1499-1500). As Bratton notes “[n]o other values exist in group economic life other than self-interested rationality.” (Bratton 1989:429).

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‘individual’ do not address the real issues. In fact, they serve to further legitimize the current situation.

### ***2.3 Nominal equality***

The third discursive formation effectively negates the reification and singularization of the earlier discursive formations. Although the third discursive formation accepts and works with the effects of reification and singularization, it does not recognize this reification in itself, or the intrinsic difference it imports between types of representations in the legal, political and economic systems of representations by importing reifications with very different types of referents. The exclusion of these intrinsic differences means that every kind of representation of association can be reconstituted into an outward outcome of individual agencies as a contractual *societas*:

“It is important to recognize that most organizations are simply *legal fictions which serve as a nexus for a set of contracting relationships among individuals*. This includes firms, non-profit institutions such as universities, hospitals and foundations, mutual organizations such as mutual savings banks and insurance companies and co-operatives, some private clubs, and even governmental bodies such as cities, states and the Federal government, government enterprises such as TVA, the Post Office, transit systems, etc.”  
(Jensen and Meckling 1976:310, emphasis in original)

The basic ideal-type reified singular legal representation with contractual agency is, then, not only applicable to the corporation, but can be used to expand ideal-type representation and agency onto other types of representation that function as nominally equal representations between the legal, economic, and political systems of representation. In this way, the behavioural assumptions behind agency theory become the building blocks for the understanding of all types of organizations and society more broadly (Meckling 1976). Intrinsic differences between the incorporation of business, civil and religious corporations (Williston 1888) and between citizens, associations, incorporated representations, public and private institutions and states thus become irrelevant.

This projection of ideal-type assumptions about the agency of singular reified representations onto every type of representation of an aggregation of individuals

means that not only corporations, but every type of representation can be put ‘back under the market’. This means that the strategy of every type of institution, including public institutions and the state, becomes translatable through microeconomic assumption and comes to reflect the efficiency hypotheses usually applied to private parties.

Arguably, the denial of the reified representation and the implicit similarity between the state and corporation as a contractual *societas* means that states have little reason for regulating these business representations:

“Finally, the contractual theory of the corporation offers a new perspective on the corporation and the role of corporation law. The corporation is in no sense a ward of the state; it is, rather, the product of contracts among the owners and others. Once this point is fully recognized by the state legislators and legal commentators, the corporate form may be finally free of unnecessary and intrusive legal chains.” (Butler 1989:123)

The nominal equality of different types of representations, then, serves to reconstitute all types of representation as essentially the same, i.e. as representations that essentially follow or should follow behavioural assumptions taken from microeconomic theory. As Bowman remarks, this may reduce control from the side of the state, but leads to a dominance of corporations: “The intersecting of public (governmental) and private (economic) functions within the framework of constitutional government facilitates corporate domination, not statism” (Bowman 1996:281).

### 3. Conclusions

In this chapter I showed that the contemporary theory of incorporation contradicts assumptions about social and political aspects of representation in the first and second discursive formation.

The contemporary theory of incorporation constructs a representation that is the opposite from the *concessionized universitas* in the first discursive formation. The *concessionized universitas* at the start of the first discursive formation was explicitly a political construct, meant for public purposes; it did not attribute limited liability; it was strictly bound in purpose; its charter was conditional; it was created and held by a sovereign, not within an aggregation of individuals; it was explicitly not a singular legal entity with its own agency and it was explicitly different in nature from political representations. Although the third discursive formation nominally accepts the return to the *societas*, it negates all these other aspects of the first discursive formation.

The contemporary theory of incorporation also constructs a representation that is the opposite from the *modern universitas* in the second discursive formation. The social and political aspects of the representation that were essential to the acceptance of the *modern universitas* have become the direct antithesis to the concept of incorporation in the third discursive formation.

The third discursive formation rejects the social and political aspects of incorporation through a theoretical reduction of the representation, but retains the reified and singularized representation in order to maintain contractual agency and the attribution of ownership, agency and amendment rights. Although the reified singular representation in the third discursive formation ostensibly functions as a supra-individual reified representation with social and political aspects, any attribution of agency can only take place on the basis of the attribution of ideal-type economic and legal agency to a singular reified referent in the economic and legal systems of representation.

The third discursive formation, then, produces a theory of incorporation that accepts the reification of the representation in myriad ways and wholeheartedly embraces its effects in the form of all the advantages introduced by the first and second discursive formations for the contemporary concept of incorporation, but denies the basis for those advantages and removes their justification. The dominance of the third discursive formation in the contemporary concept of incorporation therefore introduces and defends an anomalous type of reified singular representation in a modern social and political setting.

This reified singular representation is based on the continued implicit acceptance of the natural entity theory to posit a reified singular representation that in many respects functions as a fully reified singular representation in the legal and economic systems of representation. The increasing attributions of agency, ownership and rights to this singular reified representation means that this representation interacts with other singular reified representations in these systems of representation as well as within the social and political systems of representation. Using the assumptions prevalent in the third discursive formation an ideal-type singular reified representation is imported into the social and political systems of representation, based on a nominal equality of all representations, including natural persons, corporations, public institutions and the state. This leads to the projection of a society that consists of nominally equal types of representation with nominally equal contracting agency in the economic, legal, social and political spheres, answering to the same sets of behavioural assumptions.

## **Chapter 8: Discussion and Implications**

This chapter will wrap up the previous chapters in order to crystallize the problem and answer the research questions. The answers to the research questions will provide the background for a discussion of the implications of this research. This discussion will be used to provide conclusions and directions for further research.

### **1. First research question**

This dissertation provides a first contribution to the understanding of the contemporary theory of incorporation by providing a description of three discursive formations, a comparison between these three discursive formations and the establishment of the dominance of the third discursive formation.

#### ***1.1 Three discursive formations***

The first two steps provided by Foucault (2008) in his ‘Archaeology’ asked for the development of historical discursive formations. By following these two steps, I have developed a historical framework in which three historical discursive formations about incorporation can be distinguished. Chapters Two, Three Four and Five describe these discursive formations.

The formal answer to my first research question ‘what is incorporation?’ is now addressed. Incorporation, as I have shown, is a concept that appears differently in three historical discursive formations: a pre-1800, a post-1800 and a post-1970 formation. These three discursive formations provide different assumptions regarding the political or legal origin for this reification, regarding the attachment of rights, agency, ownership and control, and regarding the use of referents. I will summarize the most important results of these formations.

The first discursive formation could be discerned in the 13<sup>th</sup> century in the form of the *concessionized universitas*. In this formation, incorporation was devised as a formal political bestowal of a concession on an aggregation of individuals. The concept of ‘ownership’ then designated a direct and irrevocable relationship of the sovereign or

state over a concession or grant. Agency, ownership and rights could therefore not be attributed to the concession itself and incorporation remained constrained by political motives.

The second discursive formation was a result of 19<sup>th</sup> century developments resulting in a new concept of representation, the *modern universitas*. The *modern universitas* was completely different from the *concessionized universitas* because of its purely legal nature, its reification and singularization of the representation and its position within the aggregation of individuals. The reliance on the natural entity theory to accomplish this reification and singularization led to a continuum between two mutually exclusive theories, the natural entity position and the aggregation of individuals' position.

This provided a paradoxical situation regarding the doctrinal understanding of this representation. The natural entity theory provided reification and singularization to the representation, which was based on its understanding as a representation with social and political aspects. The artificial entity theory, on the other hand, provided ownership within the aggregation and a legal representation that could be treated as 'property'. This excluded the social and political aspects of the representation.

Both positions were necessary to retain the effects of the *modern universitas*. Because the singular reified representation presented a political anomaly the acceptance of the anomaly that the *modern universitas* represented was based on a political and theoretical trade-off, leading to an emphasis on the corporation as a semi-public and social institution. In this way, both the natural and the artificial entity theory were retained in the second discursive formation to develop models of governance, but the emphasis remained on the social and political aspects of incorporation.

A third historical discursive formation could be discerned after the 1970s. This formation dismissed the reification and personification of the representation by dismissing it as a 'legal fiction'. However, rather than returning the corporation to the status of an unincorporated association or a partnership, it invoked 'pragmatism' to retain the 'convenient' effects of the singular reified representation taken from the first and second discursive formation. This invoked a 'legal fiction' that differed starkly from the reification that was inherent to the second discursive formation, which had until then been accepted and used by legal scholars. This representation did

not have a concrete referent but functioned pragmatically as an ideal-type singular reified representation in the economic and legal systems of representation. By reconnecting this ideal-type singular reified representation to the natural person assumed by methodological individualism, the reified singular representation was developed into a singular ideal-type equalized representation that comprised human beings and corporations alike as ideal-type agents with contractual agency that closely followed micro-economic behavioural assumptions. This position portrayed the corporation as constituted out of nominally equal agents and used convoluted attributions of ownership to argue for shareholder primacy.

These three discursive formations relate to internally consistent sets of assumptions (Purvis and Hunt 1993). Each discursive formation presents its own assumptions about the nature of representation. Describing these formations against the background of their own political and legal assumptions, this dissertation makes these formations accessible from a perspective that starts with the assumptions underlying the discursive formations themselves, rather than immediately assessing those assumptions through a contemporary lens. This dissertation, then, provides a contribution to the contemporary theory of incorporation through an acknowledgement and a description of three intrinsically different historical discursive formations.

## ***1.2 Comparison and relative position***

The third and fourth step provided by the archaeological approach ask for a comparison between the three discursive formations, while the fifth and last step of the method asks for a comparison with regards to their relative position in the contemporary theory of incorporation.

I first showed how the first discursive formation produced a distinctly political concession that was constitutive for the idea of the *concessionized universitas*.

I then showed how the second discursive formation took its justification for the reification of representation from the first discursive formation, but inserted this reified representation into a legal system of representations. For this reason, it became

acceptable to assume that incorporation was not the result of an external act of incorporation but, rather, the result of a voluntary act of the individuals that formed the corporation. The continuum between the natural entity position and the aggregation of individuals' position became necessary for a justification of the attribution of ownership, agency, and amendment rights and for the theoretical as well as the political justification of the corporate form as an extraordinary social and political institution in a democratic society. In comparison to the first discursive formation, the second discursive formation thus introduced the reification and singularization of a legal representation, formed and held by the incorporators as well as a delicate balance of interests. This comparison makes clear that reification and singularization of the representation in the second and discursive formation are produced in a fundamentally different way to the *concessionized universitas* of the first discursive formation. The habitual reference to the *concessionized universitas* by contemporary legal and economic scholars for their use of reification and singularization, then, appears as only a token justification. Reification and singularization in contemporary legal scholarship are predicated on the continuum underlying the *modern universitas* developed during the second discursive formation, not on the *concessionized universitas*.

Finally, I showed how the third discursive formation implicitly accepted the assumptions about reification and singularization of the representation that originated in the second discursive formation. While in the second discursive formation the reification, singularization and internalization of the representation relied on the acceptance of a continuum, the third discursive formation completely negated this continuum by acknowledging only the aggregation of individuals. The third discursive formation denied the political and social nature of the representation that the first discursive formation imposed and denied the natural entity theory that led to reification and singularization in the second discursive formation. In both cases, this denial did not lead to a rejection of their effects. By returning to a full aggregation of individuals' position, the third discursive formation appropriated the representation and its effects as 'property' in the hands of a particular part of the corporate constituency.

The third discursive formation therefore relates only on the most superficial level to the first and second discursive formations. It implicitly retains the singular reified representation and accepts its ‘convenient’ effects, but rejects the justifications provided by the first and second discursive formations and provides no justification by itself for its appearance in an economic system of representations.

The systematic comparison of the three discursive formations shows that they nominally refer to the same concept, but that incorporation changes its meaning between them. Moreover, it shows that the third discursive formation provides a dominant way to understand incorporation, relegating the assumptions from the two previous discursive formations. This dissertation, then, contributes in a second way to the existing theory of incorporation by comparing the three discursive formations and showing the relative importance of each discursive formation.

### ***1.3 Answer to the first research question***

To answer the first research question I have provided an archaeology of incorporation. The three discursive formations provide equal systems of representations. It is only in the comparison of ideas, assumed to be stable through these discursive formations that discontinuities appear and the discursive formations become disjointed. It is through the dominance of one particular discursive formation, through the way it disregards the specifics of other discursive formations, while still using elements and effects of those other discursive formations, and through the theoretical justification for the fissures and the cracks between the three internally coherent discursive formations that the theoretical inconsistencies and incoherence of the contemporary theory of incorporation become visible and explicable. By establishing the three discursive formations, comparing them and establishing their relative importance, it thus becomes possible to provide a coherent description of the contemporary theory of incorporation.

The first discursive formation is based on a political concession to an aggregation of individuals, that the second discursive formation uses both the aggregation of individuals and the singular legal person as its referent and that the third discursive formation uses a reduced ideal-type economic agent as its referent. The discursive

formations are, then, all three based on different systems of representation. Given this situation, the question concerning the representation of incorporation becomes a result of a description of the way in which legal, economic, social and political systems of representations relate to different types of referents.<sup>38</sup>

The dominance of the third discursive formation fulfils an important role in the answer to the research question. The third discursive formation can only relate to incorporation as a representation within its own system of representations by using methodological individualism, leading to a nominal equation of different underlying referents and ideas concerning representation. This turns the singular and reified representation into an ideal-type singular reified representation that becomes accepted in the economic system of representations, but only in so far as it conforms to the behavioural assumptions of agency theory. In this way, the representation in the third discursive formation, and in the contemporary theory of incorporation more generally, relates to all ideas of referents and representation that originate in the previous two discursive formations by relegating them and turning them into ideal-type representations in the economic system of representations. The contemporary theory of incorporation thus accepts a dominant economic and legal idea concerning representation that is internally inconsistent and incoherent. The dominance of this idea of representation severely affects the broader social and political systems of representations.

Through the first research question, this dissertation thus provides a contribution to the contemporary theory on incorporation by identifying three different historical discursive formations, by providing a comparison of the concept of incorporation between these historical discursive formations and by providing a relative ordering between the historical discursive formations. In this way, this dissertation shows the effects of the dominance of the third discursive formation, and, probably for the first

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<sup>38</sup> The notion of ‘personification’, then, appears as just the tip of the iceberg. The question how a reified and singular representation can be understood by comparison to the representation of a natural person points to underlying issues with a representation that uses both singular and aggregate referents within a wider legal, economic and political system of representations. This shows the futility of the personification argument that has mired the debate over incorporation in legal and corporate governance scholarship for the last decades.

time, provides a coherent framework by which the inconsistency and incoherence of the contemporary theory of incorporation can be explained.

## **2. Second research question**

“(…) the question is not academic.” (Berle and Means 2007:220)

The first research question allows for the development of a framework in which three historical discursive formations provide a consistent background against which assumptions regarding incorporation in the contemporary theory of incorporation can be gauged. This framework allows the practical and theoretical consequences of the use of three historical discursive formations and the dominance of the third discursive formation in the contemporary theory of incorporation to be shown. This enables an answer to the second research question:

· What are the consequences of the contemporary theory of incorporation?

### ***2.1 Practical consequences***

I will summarize the practical consequences of the contemporary theory of incorporation here.

#### **2.1.1 Legal effects**

“The first thing we do, let's kill all the lawyers.”

(Shakespeare (1994), King Henry VI Part 2, Act 4. Scene II)

The example of Royal Dutch Shell in Chapter One shows the extent to which attributions of singular agency are made in practice. The reified singular representation itself constitutes an ‘accused’ or ‘defendant’, attributed with a singular form of agency. The attribution of agency to the reified singular representation as a representation of association therefore creates a ‘presence’ of the reified singular representation in criminal proceedings that in some form comes to stand in between the prosecution and the aggregation of individuals accused. Since the reified singular representation is attributable with ideal-type legal and economic agency, this makes it at least theoretically attributable with agency in criminal law. As argued in Chapters

Four and Five, this theoretical attribution of responsibility is mainly based on the individualistic bias of criminal law (Wells 2005) and the needs of the legal system to maintain the use of a singular reified separate legal representation for the attribution of liability.

As argued in this dissertation, the attribution of an anthropomorphic type of singular agency to the representation is generally based on spurious reasoning regarding the nature of representation. Common sense as well as the history of incorporation show some quite distinctive differences between human beings and corporations. Even as a reified legal construct it does not present a reified singular body that can be kicked, incarcerated or hanged (Clarkson 1996). There is, then, no direct referent for the representation that would allow for these attributions. As Savigny stated:

“It is a dead form, not a living reality, a concept which can enter into jural relations only so long and in so far as the state breathes into it the power of jural capacity. [...] But if it attempts to go further and attributes to them all the rights and obligations which natural persons enjoy, it errs in theory and invites practical absurdities.” (Savigny in Hallis 1978:8)

Incorporation, then, produces a purely theoretical reified ideal-type representation. Although it undeniably constitutes a theoretical reified singular agent within the legal system of representation, this position does not connect to a referent outside the system of law. This means that the chances of finding agency on the part of the corporate representation through an individualistic lens are very slim for two clear reasons.

First, the representation itself in the second discursive formation is based on a continuum. This means that any referent is paradoxical at best, while in the third discursive formation it is bereft of any kind of direct referent. The presence of the illusion of a direct referent for the reified singular representation means that the attribution of agency, responsibility and liability to a reified singular legal representation leads to a situation in the legal sphere in which concepts like direct liability and corporate manslaughter are mainly directed at direct liability of the corporation rather than vicarious liability for such offences. Common law crimes,

more particularly manslaughter, are generally not considered to apply to these models (Law Reform Commission (Ireland) 2002:21-23). Therefore, it must be recognized that any attempt to attribute human or criminal liability, whether singular or aggregate, to this reified representation is doomed to fail and will only work to strengthen the illusion of a direct referent.

The allusion to a direct referent is problematic for another reason. Accepting the contemporary theory of incorporation and applying concepts like individual liability, responsibility and accountability unaltered to the representation of a corporation assumes the presence of a reified legal representation with its own agency. Because this representation is also assumed to relate to a reified referent, this leads to an implicit doubling of attribution of agency and thereby to an obfuscation of the direct attribution of such agency. In this respect, the ‘corporate veil’ obscures the agency of individuals through the creation of a ‘legal fiction’ that acts as a smokescreen by introducing multiple types of representation to which agency can be attributed. Moreover, in the third discursive formation it leads to the hiding of agency because it assumes the possibility of attribution of agency to a singular actor that only reflects ideal-type assumptions about its agency. Using this representation in criminal law effectively deflects liability by using the representation as an ideal-type singular economic representation while reducing agency attribution to the actual aggregation of individuals. This means that the *ultra vires* doctrine is reintroduced in an inverted way: rather than functioning as a check on the domain of operations, the representation deflects the attribution of any type of agency to the corporation, represented through a reified singular ideal-type representation. As Mayer argues:

“The legal system thus is creating unaccountable Frankensteins that have superhuman powers but are nonetheless constitutionally shielded from much actual and potential law enforcement as well as from accountability to real persons such as workers, consumers, and taxpayers.” (Mayer 1989:658-659)

In this sense, the use of a singularized reified in combination with the granting of amendments rights creates “a new class of constitutionally protected actors” (Mayer 1989:645).

These effects are exacerbated in the international sphere. As shown in Chapter Six, the natural entity theory produces the transnational corporation as a very peculiar representation between national legislations and beyond international law. Its international nature as a singular ‘legal subject’, the absence of an international legal system, the continuing lack of clarity regarding the ‘real seat’ or the place of operation theory in combination with the individualistic bias in criminal law, the burden that lies with claimants to find a way to deal with multiple ideas about representation, the unclear nature of subsidiaries in the holding structure, the unclear attribution and status of ownership to subsidiaries and operating companies, the obscurity of relative positions of responsibility within the holding company, the use of empty shells, the unclear nature of ownership and responsibility by the holding company and the reification of the reified singular representation between three historical discursive formations provides layer upon layer of legal obfuscation. This list might provide some theoretical legal background for the very practical problems that citizens of third world countries experience in these examples when dealing with multinational companies, as exemplified by the examples relating to Bhopal and Royal Dutch Shell in Chapter 1.

The combination of a singularizing bias and the move towards an anthropomorphical attribution of agency in criminal law, together with the international nature of incorporation, then, explains why the contemporary theory of incorporation leads to a marked under-reporting of corporate crime (Coffee 1981:390), a difficulty of detecting corporate crimes against the public or for instance tax evasion (Coffee 1981:391), difficulties with the prosecution of individuals behind the ‘corporate veil’ (Fisse and Braithwaite 1988:469), tortuous legislation in the form of the time-consuming and cost-intensive nature of prosecuting corporations (Fisse and Braithwaite 1988:471), and convoluted organizational accountability and jurisdictional complications (Fisse and Braithwaite 1988: 490). In turn, it might explain how the contemporary theory of incorporation in the legal sphere leads to enforcement overload, opacity of internal lines of corporate accountability, expendability of individuals within organizations, corporate separation of those responsible for the commission of past offences from those responsible for the prevention of future offenses, and corporate safe-harboring of individual suspects (Fisse and Braithwaite 1988:490).

A second effect of the third discursive formation in the legal sphere is the reconstitution of the singular legal representation that comprises the natural person. As shown in Chapters Five and Six, the contractual aggregation of individuals and the natural person both occupy the same legal slot through the ideal-type singular reified representation. This means that not the natural person, but the ideal-type reified representation becomes the primary referent for the legal slot that constitutes the singular 'legal subject'. Natural persons only come to relate to this slot by adapting to the characteristics of the ideal-type reified singular representation. The attribution of singular agency to the singular legal representation is no longer based on the agency of the natural person as a referent but on the imposition of ideal-type contractual agency to natural persons and corporations as nominally equal singular reified legal representations. This elevates externally imposed postulates of ideal-type agency to a standard for a singular reified legal subject, relegating the legal representation and agency of natural persons to a very precarious position.

A third effect in the legal sphere is the unequal attribution of advantages to different types of representation. The contemporary idea of incorporation produces a very particular idea of business representation that attributes perpetuity, limited liability, amendment protections and holding structures. The reified singular legal representation thus offers distinct advantages to the representation as an economic representation.

In practice, these advantages are only applicable to public corporations. As shown in Chapter Six, they are less applicable to closely held corporations, while they are withheld from other types of representations, like ordinary partnerships and labour unions. In the USA, cases between 1906 and 1960 largely employed and reinforced the natural entity theory for commercial entities, while at the same time the aggregation theory was largely employed for labour unions arguing that in their case, agency was easy to attribute to individual human beings (Mayer 1989:628-629). As a result, members of labour unions were held individually accountable for their actions, the assets of the labour unions were not protected by limited liability and their structure could not be understood through a separation of ownership and control, nor could agency be relayed to an external reified singular representation. The

aggregation of individuals position is therefore strictly applied in the case of labour unions (Bowman 1996), while in the case of corporations a legal veil is assumed to exist that shields them from direct attributions of legal and economic responsibility. This indicates an explicit arbitrariness regarding the attribution of advantages to different types of representation.

A fourth effect of the contemporary theory of incorporation is the acceptance of the third discursive formation and its rejection of reification. This acceptance functions as a legitimation for a theory that refutes the basis of the legal understanding of incorporation in the second discursive formation and the basis for the particular way in which legal reification came about. Considering the constitutive role of legal theory in the production of the theory of incorporation (Bowman 1996:245) this means that legal scholars are directly involved in the production of a discursive formation that lets economic scholars, rather than legal scholars, determine the nature and agency of legal representations.

In general, it can be said that incorporation creates an elusive representation in the legal sphere about which “Nothing accurate or intelligible can be said except by specifying the interest and purpose of the writer” (Dewey 1926:673). The multitude of underlying referents results in an “elasticity”, which makes these imaginary representations “notoriously nimble” (Dewey 1926:669). This “(...) gives a corporation considerable room in which to manoeuvre” (Dewey 1926:667-668), allowing corporate lawyers to strategically exploit the resulting “metaphysical gap” (Wells 2005) in a “corporate vanishing trick” (Ireland 1999:56). The contemporary theory of incorporation, then, produces a very elusive representation that is best characterized as a schizophrenic Cheshire cat (Allen 1992; Naffine 2003).

### **2.1.2 Governance effects**

“I am of opinion, upon the whole, that the manufacturing aristocracy which is growing up under our eyes is one of the harshest which ever existed in the world; but at the same time it is one of the most confined and least dangerous. Nevertheless the friends of democracy should keep their eyes anxiously fixed in this direction; for if ever a permanent inequality of conditions and

aristocracy again penetrate into the world, it may be predicted that this is the channel by which they will enter.” (Alexis de Tocqueville in Bowman 1996:35)

The simultaneous use of three discursive formations, together with the dominance of the third discursive formation, means that the field of corporate governance relies on a structurally incoherent, inconsistent and paradoxical concept of incorporation as a basis to attribute agency, ownership, and rights. The contemporary theory of corporate governance starts from the perspective of the third discursive formation and its return to a full aggregate position, the explicit denial of the reification, the use of complete contracts and the behavioural assumptions of agency theory. At the same time, corporate governance theories continue to refer to the attribution of perpetuity and limited liability by referring to the first discursive formation as well as to a concept of ownership that assumes the transfer of ownership to the aggregation of individuals and the existence of a reified legal representation that is taken from the second discursive formation. It relates directly to this reified representation for the separation of ownership and control, majoritarian shareholding, the holding company and the singularization, personification, and amendment rights protections that were applied to the reified singular representation. This state of the theory of corporate governance produces a copious number of effects.

First, the implicit use of the natural entity theory without a clear legal understanding of this reified representation in the international sphere in the second discursive formation and the denial of this reified representation in the third discursive formation means that the status of multinational corporations becomes very hard to theorize. Holding companies, subsidiaries, empty shells and operating companies present themselves as *de facto* different kinds of reified representations, but no consistent theory underlies these differences.

Second, the third discursive formation produced an idea of nominally equal contractual representations. This leads to the reconstitution of the basic economic actor, corporations and the market. The basic economic actor is reconstituted as a singular reified legal representation with contractual agency that reflects behavioural assumptions taken from agency theory. This leads to the use of the ideal-type singular

reified representation as the referent and the idea of natural persons and corporations as nominally equal reified singular agents with contractual agency in the legal and economic sphere.

Corporations are reconstructed in four ways. First, the nominally equal contractual agency flattens the corporate hierarchy. Not hierarchy but contract becomes the principal mode of internal regulation. The corporation then becomes a mass of contracts that extends outside as well as inside, blurring its boundaries. Second, the notion of incorporation itself does not produce representations that are fundamentally different from other representations anymore. This means that the theory applicable to corporations becomes a generic theory for firms, state institutions and associations. Third, retaining the effects of the second discursive formation leads to a singularization and personification of the implicitly reified representation. In its function as a contractual agent, it functions as an ideal-type singular profit maximizer. Fourth, the nominal equality of corporations and natural persons through their ideal-type representation also reconstitutes the market by turning it into a network of conceptually equal singular reified representations. Because the representation ultimately relates to natural persons and corporations in similar fashion this constructs a market that is theoretically constituted by nominally equal ideal-type reified singular representations, but in practice relates to unequally constituted representations with unequal contractual starting positions and unequal bearing of risk. The implicit equalization of unequal contractual representations and the theoretical use of complete contracts are, therefore, detrimental to the comparative legal and economic status of natural persons.

Based on these notions, it becomes possible to argue that it is this reconstitution of natural persons and corporations that very likely facilitated the great merger movement after the 1890s and helped create the change from a landscape of mostly small, privately owned enterprises at the beginning of the 19<sup>th</sup> century into a small number of overpowering institutions that concentrate capital and monopolize the market at the end of the 20<sup>th</sup> century. Rather than a marketplace based on human individuals freely contracting on the basis of individual risk, and rather than an economic landscape that is based on individual responsibility and entrepreneurship, the nominal equality of the ideal-type representation then leads to centralization, monopolization and oligopoly (Bowman 1996; Lazonick 1993).

A third effect of the dominant third discursive formation is the questionable status in the contemporary theory of corporate governance of the reified singular representation as a contractual agent. The acceptance of the separate legal entity as a representation with contractual agency was explicitly based on its increasing reification during the 20<sup>th</sup> century. As a reified representation, its referent in the second discursive formation oscillated between natural entity and the aggregation of individuals. Whereas this oscillation between the extreme positions in the continuum made the attribution of (contractual) agency difficult enough, the third discursive formation introduced another layer of complexity. If the reification of the representation is denied, then it becomes very unclear what constitutes the contractual agency for the corporation in the economic sphere. In whose name does 'the nexus' speak and contract and who or what is it that speaks and contracts in the name of the nexus?

Fourth, the step outside the theoretical balance that upheld the continuum and its effects in the second discursive formation led to a reconstitution of the corporation as an aggregation of individuals, the reconstitution of the singular reified representation as 'property' and the re-appropriation of this property for the shareholders. These moves did not lead to a reconsideration of the corporate form with its advantages, nor to a full return to partnership law. The effects of the second discursive formation were thus retained, whereas, the justification for those effects was rejected.

The contemporary theory of corporate governance is thus based on a dominant third discursive formation that cannot explain or justify the reification and singularization of the representation and its effects in the contemporary theory of incorporation. Yet, this representation results in the use of an ideal-type singular reified representation that enhances the economic advantages of incorporation by prioritizing the attribution of ownership to shareholders on conceptually unclear grounds; by doubling the legal and economic agency and rights of 'the control'; by creating an elusive legal and economic representation; by excluding the attribution social and political agency to an ideal-type referent; by producing a corporate veil that makes the 'control' disappear between the natural entity theory and the aggregation of individuals theory and by enhancing the contractual position of the representation as a singular contractual

agent, nominally equal to other market actors. A contemporary theory of (corporate) governance that is based on the third discursive formation therefore produces governance regimes that are not only based on an incoherent and inconsistent use of theory, but also favours particular interests over others.

Given the inconsistencies underlying the contemporary theory of incorporation, the acceptance of the third discursive formation in the theory of corporate governance, therefore, reflects highly normative choices. The contemporary thrust towards ‘convergence’ in corporate governance debates and its focus on finding pragmatic distinctions between legal and political regimes influencing corporate practice (Gourevitch & Shinn 2005; Ireland 2009) only reinforces the existing justifications for the use of incoherent theory and its effects. This leads to an incoherent justification for its use of referents, its choice for the relative position of those referents and its choice for the attribution of agency, ownership and rights on the basis of those ideas. To understand what is specific about corporate *governance*, it is necessary to first find out what *corporate* entails.

### **2.1.3 Political effects**

The contemporary theory of incorporation, for all intents and purposes, also constitutes a reified singular representation in the political system of representations attributable with political rights and protections over and above the level of the individual. The contemporary theory of incorporation thus constitutes a singular, reified representation in the political system of representations. This has three effects.

First, it imports an implicit difference between types of political representations. As argued in Chapters Two and Seven, the reified singular representation is present as a political representation between the state and its citizens (Gierke 1968). This can lead to direct political representation for a reified singular legal representation within the system of political representations. The representation itself has no clear status, but nevertheless becomes endowed with political agency and rights.

Accepting the reified singular political representation, then, leads to an implicit hierarchy of representations. The reified singular political representation leads either to a displacement of the natural person as the only basis for a democratic state,

presenting a threat to the conceptual understanding and positioning of both natural persons and the state within the political system of representations or to the displacement of natural persons and the state. In all cases, accepting the reified singular representation in the legal and economic spheres leads to a transfer of representation, rights and sovereignty to these reified singular political representations.

Second, the contemporary theory of incorporation leads to an internal delegation of political representation without direct and equal representation by individuals. As argued in Chapter Six, conflating the reified legal entity with the representation of association directly leads to a representation of the agency of an aggregation of individuals by the separate legal entity itself. Chapter Seven showed how in the example of Political Action Committees this means that political agency becomes delegated. The attribution of rights to the representation then leads to a delegation of those rights to a constituent group rather than to individuals. This creates a political tool in the hands of a controlling minority and implicitly constitutes an attribution of extra rights to individuals who occupy a controlling position in the corporate hierarchy, leading to a delegated political system in which the individuals within the corporation involuntarily surrender representative voting rights and do not have representative voting systems to express their political choice through the new intermediate representation. This shows why “Legislatures have long worried about the overrepresentation of corporations, and their managers or owners, in politics” (Mayer 1989:657).

Third, in the third discursive formation the corporation as a ‘citizen’ becomes attributable only with ideal-type agency. The third discursive formation structurally excludes the political and social dimensions of the representation, but nevertheless retains the attribution of agency in these domains. Through the exclusive attribution of ideal-type agency to a singular entity, a concrete attribution of agency to an aggregation of individuals or constituent groups within that aggregation of individuals repeats the problems with attribution of agency and ownership in the legal domain and the domain of corporate governance, meaning it is in practice invisible as an attribution to a ‘real’ referent for the reified singular representation. Its political agency is, therefore, not attributable to an aggregation of individuals or to a singular

natural person, even when the representation is assumed to be reified and singular and represent the aggregation of individuals in cases like *Bellotti*. As a result, the representation becomes a reified singular representation in the economic, legal, social and political domain, but is recognizable only as an ideal-type legal and economic actor.

The conflation of the representation of association with the reification of the representation and the attribution of singular agency thus creates a very potent political representation. As a singular reified representation it represents only its 'own' agency, not the agency of an aggregation of individuals. Because of the elusive nature of this representation and because of its constitution as an ideal-type singular reified representation with a reduction of agency to ideal-type legal and economic agency in the third discursive formation, the attribution of social and political agency to this representation is almost impossible. As a representation of an aggregation of individuals it theoretically represents all individuals equally while, in practice, only a small part of the individuals represented has controlling power over this singular reified political representation. The reified singular representation produced in the contemporary theory of incorporation, therefore, becomes almost invisible in the social and the political system of representations.

#### **2.1.4 Consequences and effects**

The intrinsically incoherent theory that underlies the contemporary theory of incorporation therefore leads to major practical and theoretical effects in the legal, economic, social and political sphere. Showing these practical effects provides a second contribution to the contemporary theory of incorporation.

### **2.2 Theory**

The practical consequences in the legal, economic and political, stated above, showed how the contemporary theory of incorporation constitutes the corporation as an extraordinary representation within the contemporary legal, economic and political systems of representations. This leads to a second set of consequences in terms of the effect of the contemporary theory of incorporation in a wider theoretical framework.

### **2.2.1 Elusive representation**

The contemporary theory of incorporation produces an elusive representation for three reasons.

The first reason for this elusive nature of the representation is that incorporation and the representation it assumes can be understood differently between the three discursive formations. These formations allow for different attributions of its legal, economic, social and political nature. The third discursive formation is, therefore, not based on an ‘evolution of concepts’ (Bowman 1996), in which the best concept survives, but hinges on different forms of justification for its thinking about reification. As a representation, the corporation in the third discursive formation can refer to singular, multiple and ideal-type referents in the form of a singular reified legal representation, an aggregation of individuals and an ideal-type singular or aggregate representation, but also to ‘property’. The representation in the contemporary theory of incorporation is, therefore, inherently incoherent.

A second reason is the use of methodological individualism in the third discursive formation. As argued in this dissertation, the third discursive formation reconstitutes the basic referent in methodological individualism to an ideal-type singular reified referent. This referent reflects ideal-type assumptions regarding singular representations and hides the implicit and necessary use of a multitude of referents. The introduction of the ideal-type reified singular representation as a referent in itself then combines the natural person and the corporation as its referent. As a result, the representation appears as a singular reified representation of the corporation and the natural person alike. The singular reified agent then seems to answer to the assumptions about methodological individualism that underlie the social sciences in general (Elster 2007) and organization studies in particular (Zey 1998) but, in fact, reflects assumptions regarding the representation and agency of ideal-type singular reified representations prevalent in legal and economic scholarship (Schrader 1993).

As a result, both referents become reconstituted to answer to ideal-type assumptions regarding agency that is equally attributable to a singular reified representation. In the case of the natural person, this leads to a reconstitution of its agency along the lines of

ideal-type contractual agency in the legal sphere. In the case of the corporation, this leads to a theory that argues for singular reified supra-individual legal representations that contract on an equal footing with natural persons, that can be attributed theoretically with agency, ownership, and rights and that bear political power as a supra-individual reified representation.

A third reason for the elusiveness of the representation is the difference between assumptions about representation in legal and in economic scholarship. In legal scholarship, there is not a direct necessity to find the referent. The representation in legal scholarship explicitly retains its reification and singularization to attach agency, ownership and rights. This reification and singularization is justified by referring to the first and second discursive formation. The jurists, therefore, allow for all referents, only delimiting their use by an understanding of their historical usage.

The combination of these assumptions about representation in legal scholarship with methodological individualism in agency theory turns the link between representation and referent around. The referent is no longer the point of departure, but rather the theory that constructs this referent as an ideal-type construct. The assumptions of legal and economic scholars come to define the representation by its rights and its agency, rather than by its referent (Mayer 1989:650).

The representation thus comes to relate to an ideal-type referent that combines all the previous referents as well as their effects, is comprehensible only by accepting and working with assumptions internal to assumptions endemic to legal and economic scholarship in the third discursive formation and functions to relegate all other types of referent. All of the underlying ascriptions to the representation that stem from the first and second discursive formations can then be used to justify an ideal-type singular reified singular representation that comprises both the natural person as well as the corporation and to justify the ascription of agency, ownership and amendment rights to this representation.

In this way, the representation accepted in the third discursive formation comes to act as a point of ascription for assumptions about nominally equal ideal-type actors interacting in an ideal-type world.

### 2.2.2 Testing assumptions

“(…) if life will not fit concepts, it must be made to do so.” (Hallis 1978:45)

The third discursive formation, therefore, reconstitutes legal subjects into narrow ideal-type economic agents (Bratton 1989:430) through untestable assumptions concerning the validity of the status of its agents (Zey 1998)<sup>39</sup>, its behavioural assumptions (Bratton 1989), the reductions leading to this ideal-type world (Mackenzie 2007) and the notion of contract (Bratton 1989:460).

Any attempt to test these ascriptions rigorously immediately encounters the multiplicity of referents and the large set of reductions that is needed in the third discursive formation to retain the continued use of the attachment of agency, ownership and amendment protections to nominally equal reified and singularized representations.

The concept of incorporation in the third discursive formation then appears in its ideal-type state *precisely because* the representation constitutes the reified singular representation in the position of a fiction, a “constructed reference point” (Bratton 1989:428), a cipher and a purely ‘metaphysical’ idea that produces an inconsistent and incoherent representation that excludes everything that contradicts ideal-type representation and agency.

The model, then, precedes reality in the contemporary theory of incorporation. On this basis, it can be argued that the contemporary theory of incorporation is based on a distinct lack of testing of assumptions. The ideal-type legal and economic assumptions about representation and agency find their basis in a search for justification, rather than falsification: “(…) rational choice theorists construct beautiful, predictive models and tend to overlook data that do not fit” (Zey 1998:53).

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<sup>39</sup>“(…) RCT [Rational Choice Theory] works well only in an ideal, theoretical, model-building context (…)” (Zey 1998:32)

Popper (2004) argues that this search for justification serves to (re)produce the projection of ideal-type assumptions, rather than to check whether those assumptions hold true outside the realm of theory. Since the assumptions behind this pragmatism are not empirically tested, the theory becomes irrefutable. Bowman (1996:36) lambasts such lack of critical rigor:

“We must ask the social scientist whether one can adequately understand a subject within a conceptual framework that seeks to provide moral justification for that object of study, or that in other ways encourages the analyst to ignore empirical reality and to employ concepts that preserve and perpetuate the illusions of the past. What one sees but cannot explain or accept without relinquishing or revising ideological beliefs becomes, through a familiar method of rationalization, what one wants to see, and therefore believes, despite the incongruity between the vision and the world we experience.”

### **2.2.3 Pragmatism**

It has been argued that we should take the indeterminacy of the contemporary theory of incorporation as a given and work with the concept as it stands:

“Why do we have to have a single, unitary theory of the corporate person? (...) if we are to understand its nature and purpose in our world, we must be open to seeing it from many different vantage points.” (Ripken 2009:167)

Incorporation should then be dealt with on a pragmatic, rather than a ‘dogmatic’ basis (Pollock 1911). Such ideas exemplify the assumption that “what works must make sense, rather than that something must make sense if it is to work” (Runciman in Maitland 2003: xix). Rather than looking for a unitary theory of incorporation, we should therefore accept its fragmented, untheoretic nature as something inevitable or even a beneficial condition (Ripken 2009). Three main reasons can be found in the literature to accept the indeterminacy that surrounds the contemporary concept of incorporation on the basis of pragmatism.

The first reason for this pragmatism is the economic importance of incorporation. Stressing this importance has become a staple of legal and economic scholarship on incorporation (Grantham and Ricket 1998:2-5). Not the theory behind incorporation but the results it achieves should be guiding our understanding of the corporation (Osborne 2007). Henderson argued explicitly that not the notion of ‘rights’, but the notion of ‘interests’ should be central to the understanding of the separate legal entity: “All legislation must be tested (...) by the fundamental criterion whether it is reasonably adapted to securing these interests (...)” (Henderson in Horwitz 1985:221). We should therefore offset the economic progress this concept has brought to the reasons for a dogmatic search regarding its problems.

The second reason for pragmatism is the importance of the concept as it stands to keep the existing structure of law intact, as was argued extensively in Chapter Five.

The third reason for pragmatism is that the contemporary state of theory can be attributed to ‘juristical laziness’ (Berle and Means 2007:149). Runciman states that “English lawyers were ever sceptical of philosophical speculation and politicians were too busy to look beyond the matters of the day” (Runciman 2000:94), while Allen (1992:261) mentions that: “Judges are rarely scholars. In many instances they have no taste for scholarship.” Hallis (1978) talks of a general neglect of interest in philosophical issues: “The English jurist does not recognize certain problems which they regard as fundamental for juristic science. To put the matter somewhat bluntly, he does not see that the jurist has to face certain philosophical difficulties and requires philosophy for their solution” (Hallis 1978:xvi).

Economic and legal necessity, as well as an explicit rejection of philosophical reasoning, then, underpin a current in contemporary scholarly thinking about the corporation that argues for ‘pragmatism’. These three reasons for pragmatism can be countered by three arguments.

First, given the lack of empiricism concerning the contemporary concept of incorporation, the call for pragmatism puts legal and economic scholars in a position where their inconsistent and incoherent assumptions about incorporation become the unavoidable reference points for the understanding of the nature and attribution of

agency, ownership and amendment protections. Since this theory relates to ideal-type assumptions about representation and agency, legal, economic and corporate governance scholars beget a determinative influence on the logic of production relations (Ireland 2002: 128) and the social division of wealth (Ireland 2005) through their particular understanding of representation and agency, as well as on the relative attribution of agency, ownership and amendment protections to different types of representation through their choices for the theoretical underpinnings of incorporation.

Second, the call for pragmatism constitutes a defence for the continuing use of an incoherent and inconsistent type of contemporary legal, economic, social and political representation in the face of its construction through the tenets of political liberalism, economic atomism, methodological individualism and legal individualism. Accepting the contemporary theory of incorporation under the header of ‘pragmatism’ defends the use of ideal-type contractual agency and representation as the standard for natural persons in the legal sphere. This presses the natural person into the mould of a singular economic agent with ideal-type contracting agency based on a utilitarian norm of wealth maximization (Bratton 1989: 457-458); excludes the political and social aspects of the agency of corporations; defends the legal and economic vanishing trick of liability and responsibility; and reconstitutes the theory of organizations as well as the market.

Third, pragmatism leads to the continuing reproduction of existing interests. The corporation as an anomalous reified singular representation in the economic sphere (Schrader 1993) leads to the acceptance of a separate and better-protected class of representation in the legal, economic, social and political domains. Moreover, it leads to an indefensible and elusive attribution of agency, ownership and rights to a reified singular legal representation in these domains, with prioritized access by particular parts of the corporate constituency. Pragmatism thus leads to an ongoing appropriation of wealth by these representations, leading to continuing economic concentration and the reconstitution of the marketplace into an oligopolistic system (Bowman 1996). Pragmatism thus facilitates the exploitation and expropriation of large parts of society and leads to a form of class domination:

“The structure of power in the United States in the era of corporate capitalism does not evince a slow and inexorable movement toward an authoritarian capitalist regime – a corporate state – but an accelerating movement toward a systematic and pervasive form of class domination consistent with the displacement of democratic by oligarchic rule throughout society, a development that increasingly takes on an international character with the rise of the transnational enterprise.” (Bowman 1996:281)

Pragmatism in general, then, serves as a justification of choices in the use of theory, effects a naturalization of existing arrangements (Alvesson and Deetz 1999:193-194) and leads to the justification of the practical results that flow from these choices and arrangements.

#### **2.2.4 Consequences and effects**

The discussion of the contemporary theory of incorporation shows that the dominance of the third discursive formation is based on pragmatism and a lack of testing of assumptions. This leads to the acceptance of an ideal-type representation with an ideal-type referent and attributions of ideal-type agency that relegates the natural person as well as the aggregation of individuals as its referent.

The contemporary theory of incorporation thus introduces an ideal-type reified singular referent within the legal and economic systems of representation. Through this reconstitution of the basic referent, this referent constitutes a nominally equal ideal-type representation with contractual agency within the economic and legal system of representations. Concepts like ‘the legal subject’, ‘the economic actor’, and ‘the citizen’, are affected in such a way that they become incompatible with the natural person and the aggregation of individuals as their referent. The singular reified ideal-type representation, then, not only reduces, but also nominally equalizes representations that ostensibly cannot be reified, singularized or equalized, by relating to their referent or by relating to the philosophies that underpin their wider systems of representation.

The ideal-type representation fundamentally affects the philosophy underlying methodological individualism, political liberalism, economic atomism and criminal individualism by shedding their intrinsic relation to the natural person as the only possible referent. In this dissertation, I have shown, extensively, the practical and theoretical consequences of this ideal-type representation and the pragmatism that sustains it. These effects exemplify that the intrinsic relation between the basic referent and the natural person not only serves methodological goals as in methodological individualism but also serves to retain a normative emphasis on the natural person over the supra-individual representation in criminal individualism, serves to retain the idea of a market constituted out of fundamentally equal agents in economic atomism, and serves to retain a coherent democratic system in political liberalism. By changing the referent for these systems of representation from the natural person to an ideal-type reified singular representation, concepts like ‘the criminal legal subject’, ‘the organization’, ‘the market’ and ‘politics’ are reconstituted in such a way that they become the factual opposite from what they were methodologically, normatively, economically, legally and politically meant for.

This dissertation, then, makes a third contribution to the contemporary theory of incorporation by showing that the third discursive formation has major theoretical effects by introducing a change to the natural person as the referent in methodological individualism, political liberalism, economic atomism and criminal individualism.

### **3. Reflections**

As argued in the method, the development of the three historical discursive formations is based on a treatment of texts and court cases as both the producer and the effect of the historical discursive formations. This requires a degree of reflexivity regarding the construction of different historical formations that leads to the identification of a number of readily identifiable shortcomings.

Looking back, it could be argued that the present description of the first discursive formation is not consistent enough as a discursive formation, since it includes a rather diverse set of representations, ranging from the *concessionized universitas* to the trust. Conversely, it could also be argued that this discursive formation does not allow for

enough types of representation. The use of different types of incorporation for public and private representations and the use of incorporation for municipal and colonial uses arguably provide even more types of understanding of the representation that have not been addressed in the first discursive formation as I identified it. Likewise, it could be argued that the second discursive formation is too much focused on the development of the concepts in the late 19<sup>th</sup> century and takes too little account of the developments around the joint-stock company in the early 19<sup>th</sup> century or that the description of the second discursive formation in this dissertation does not address the rise of the managerial corporation in the 20<sup>th</sup> century and the emergence of (neo-) institutionalist theory with the specificity that it deserves. Furthermore, the dissertation probably misses out on most of the intricacies of the wider debates in the third discursive formation generally and in corporate governance debates more specifically.

My justification for these weaknesses and omissions has to do with scope and focus. I am convinced that a further or different subdivision of the discursive formations will not substantially change the larger description of the movement in understanding of incorporation as a concept. The main shifts in the concept of incorporation were linked to the American and French revolutions, which changed the concept from a primarily political concept into a primarily legal concept and by the acceptance of a very specific kind of economic reasoning in American and British legal scholarship during the 1970s. These main shifts provided a primarily political, legal and economic concept of representation that linked directly to a wider historical background that grounded the shifts in emphasis. Moreover, these shifts were explicitly mentioned in the writings of many scholars arguing for and against the different concepts as particularly decisive moments. I, therefore, went with these discursive formations as working definitions. When the project progressed, it still seemed these shifts worked best to describe the most important changes to the interpretation of incorporation.

Concerning the omissions in the third discursive formation, again, I have to rely on the defence of reduction of scope. I have made my selection on the basis of an identification of the status of authors in the contemporary field of scholarship on corporate governance and their relative influence on the contemporary debate on incorporation. However, living in a particular discursive formation removes the

benefit of hindsight, which always leaves room for the omission of authors or the misrepresentation of an argument. In this respect, only the author is to blame if he selected the authors that put forward the most loudly voiced arguments, rather than the strongest or the most widely accepted ones.

#### **4. Directions for future research**

Jensen and Meckling state that:

“It will not pay the individual citizen to invest much in understanding the issues surrounding the corporation controversy. If he is at all realistic he will understand that he is virtually powerless to do anything to effect the outcome.”  
(Jensen and Meckling 1983b:9)

In contrast to this rather ominous warning I argue with Berle and Means that leaving the theory of incorporation as it stands will:

“(...) grant the controlling group free rein, with the corresponding danger of a corporate oligarchy coupled with the probability of an era of corporate plundering.” (Berle and Means 2007:311)

This concern for the practical effects of the contemporary theory of incorporation becomes more acute when it is coupled to the impact of the inconsistent and incoherent assumptions underlying the contemporary theory of incorporation and their wider effects on the legal, economic, social and political systems of representation. Therefore, I strongly believe that more research is needed on the theory and effect of the contemporary theory of incorporation. On this basis a number of suggestions for further research can be made.

As argued in the introduction, the contemporary understanding of incorporation directly influences court cases against multinationals. A further research of these cases and the basis for particular forms of attribution of agency, ownership and rights within international holding structures could help to bring such cases forward. Then, this research could be linked to research in other disciplines, like accounting, to

establish the effects of shifts in thinking about the attribution of agency, ownership and rights to particular constituent groups within the corporate constituency. Also, it would be worthwhile investigating how far the contemporary theory of incorporation facilitates the rise of a particular type of theory that leads to the financial crises that we have witnessed at the end of the first decade of the second millennium.

Then there are a number of aspects of the history of incorporation that need to be further developed. One aspect of history that needs more attention is the attribution of limited liability and perpetuity. As Handlin and Handlin (1945) as well as Kraakman *et al.* (2004:10) make clear, both are not necessary elements of incorporation. The justification for their continued use and the effects of their use in a comparative sense to other types of representation therefore needs more attention.

A second aspect of history that needs to be developed further is the connection between colonization and incorporation. The colonization era forms a fascinating hinge between the *concessionized universitas* and the *modern universitas*. Incorporation for the colonizing corporations was seen under the same header as municipal corporations rather than as a representation of business (Handlin and Handlin 1945). The incorporation of colonies provided these municipal corporations with colonies that acted as corporations in themselves. The colonizing corporations were charged with the management of these colonies, providing them with tasks of a public nature that in many respects allowed them to stand in the place of the state. It would be interesting to compare these examples to the contemporary understanding of municipal incorporation and to expand these understandings to the bearing of a delegated form of sovereignty through owning land, administering people, making bylaws and the attribution with a right to privacy or by providing private military services. An example that comes to mind would be Blackwater in Iraq.

A third aspect of this history that needs further research is the demise of the managerial conception of incorporation (Berle and Means 2007; Chandler 1990; Drucker 2006) and the subsequent demise of the understanding of the corporation as a social institution (Bratton 1989). In the light of the discussions in Chapter Seven, it is worthwhile to take a closer look at the historical understanding of the business

corporation as a social institution and to compare the assumptions behind the contractual aggregation of individuals with the medieval conception of the *societas*.

A fourth aspect of the history of incorporation that needs further research is the unresolved dispute about the sudden and remarkable success of the corporate form at the end of the 20<sup>th</sup> century and its continued rise to dominance (Guinnane *et al.* 2007). The rise of managerial capitalism and the resulting corporate oligopoly by the 1920's (Lazonick 1993; Berle and Means 2007) has been attributed to coordination and efficiency (Chandler 1990; Lazonick 1993), to the development and wide availability of a new financial superstructure (Roy 1999) and to the new legal understanding of incorporation during the 19th century (Horwitz 1985). Without neglecting the reservations to this theory brought forward by Bratton (1989) and Roy (1999), I subscribe to the arguments brought forward by Horwitz (1985) that the development of the legal understanding of incorporation is not just the sufficient but, indeed, the necessary factor to understand the drastic changes in the business environment at the end of the 20<sup>th</sup> century. As argued in this dissertation, it seems that the development of the legal understanding of the separate legal entity serves as a very central element in the development of capitalism during the end of the 20<sup>th</sup> century, particularly through the possibility to acquire other legal representations as 'property', allowing for hierarchical control structures, amassing of wealth and resources, while retaining the perks of incorporation. The question, then, is whether the reification and singularization of the legal representation can be understood as the defining factor in the changes to the position of the business corporation.

A fourth aspect of history that needs further attention is the way in which the concept of sovereignty relates to the concept of incorporation. Chapters Two and Seven provided evidence to suggest that there is a direct connection between the representation of the state and the representation of the corporation as an association. Given that the third discursive formation administers contractual thinking on governance to all representations in equal measure (Blair and Stout 2005), which leads to an equalization of natural persons, associations, partnerships, labour unions and public institutions and states, it becomes an interesting question to what extent the theory of political representation is affected by these assumptions and what effect this has on the representation of the state and state institutions. This opens up a line of

research into the phenomenon of ‘corporation creep’ and ‘contract creep’ into the public sector, particularly through a more detailed inquiry into the acceptance of the rational choice model and New Public Management into public policy and administration (Wedel *et al.* 2005). More broadly, it opens a line of inquiry into the ways the contemporary theory of incorporation and the dominance of the behavioural assumptions of agency theory influence thinking about every other type representation, leading to corporation creep both in the public and the private sector (Guinnane *et al.* 2007).

A related question that could use further investigation is a research into the effects of the increasing dominance of microeconomic assumptions about ideal-type agency and the primacy of contractual relations as a generic understanding of representation. The question is, then, how unequal contracting between homogenized reified and singular legal ‘agents’ and the implicit doubling of contractual agency that the reification of the representation brings are justified in economic terms. This question concerns itself with the transformation of the marketplace on the basis of a supposed equality between natural persons and oligopolistic aggregations as reified singular legal representations and asks for a reappraisal of basic tenets of political liberalism and economic atomism.

Interesting issues are also raised by the lack of conceptual clarity regarding incorporation in the governance debate. As a legal representation, it functions as a ‘holder’ of ownership within the corporation as well as over a holding; as a subsidiary it can be seen as an intermediate entity or as an operator; as a subsidiary it can also function as the ‘property’ of another natural entity, while still functioning with limited liability and amendment protections in and for itself; as a contractual agent it can relate to other contractual agents both as legal agents and as objects of property. The question is how exactly this multiplicity of positions influences the understanding of holding structures and their main seat, the understanding of ‘ownership’ within a holding structure, the status of holding companies vs. subsidiaries, the theoretical position of empty shells, and the attribution of agency between different types of legal representations within joint ventures. This question then asks how exactly international holding structures and their operations can be interpreted in a legal and economic framework (Dine 2006).

More research also needs to be done on shareholder primacy. As I showed in Chapter Six, shareholder primacy is a very recent invention that relies on an inconsistent acknowledgement and prioritization of particular constituent groups. Since both methodological individualism and classic economics would actually argue against this prioritization of one specific group, more research is needed on the justification for this acceptance.

#### ***4.1 Alternatives***

“Science as a productive force can work in a salutary way when it is infused by science as an emancipatory force... The enlightenment which does not break the (mythic) spell dialectically, but instead winds the veil of a halfway rationalization only more tightly around us, makes the world divested of deities itself into a myth!” (Habermas in Willmott 1999:88)

The discussion of further research introduces the issue of how social theory in general and organization theory more specifically can deal with the ideas raised in this dissertation of reified representation and agency on the part of individuals, aggregations and ideal-type referents.

One way to deal with this issue would be to advocate a return to the *concessionized universitas* as it was conceived in the first discursive formation. This would turn the corporation into a *societas* with an external reified representation. It would also remove limited liability (Ireland 2010:849). The reified representation, whether political or legal, would have to be seen as an advantage in the economic sphere over other types of representation like the partnership. Therefore, the representation could be granted in a limited and controlled way, as it was before the 19<sup>th</sup> century. This would reintroduce the possibility to limit the grant of this sort of representation in time, place and scope and it would include the possibility to limit this grant to public institutions or projects with a public character. Moreover, this alternative would position the ‘ownership’ over such a representation outside the aggregation of individuals. The discussion over shareholder primacy would then become a moot point, since ownership would not reside within the aggregation, but outside,

presumably with the state. Furthermore, this would mean an abdication of all anthropomorphical allusions to the corporation, which means that it would be stripped of its amendment rights protections and of all other implicit and explicit advantages which the contemporary representation enjoys when it is understood as a ‘citizen’ or a singular legal ‘subject’. Also, this alternative would mean that the representation can no longer be attributed with general or contractual agency in its own right. Finally, this would equalize the corporation to an unincorporated association or a partnership as a group representation and thereby remove all prerogatives from the corporation, including the separation of ownership and control, the holding company and majoritarian shareholding.

A second consistent way to approach incorporation would be to advocate a consistent aggregate position. This would mean the return to a partnership, an aggregation of individuals or a fellowship. This position would also entail the abdication of the attribution of agency and rights. In practice, this would do away with the specifics of incorporation for business representations altogether. As argued throughout this dissertation, only this alternative would do justice to the principles of methodological individualism, the primacy of human agency and rights in a democratic society and the individualist basis behind the economic thinking of Adam Smith. Can a society be envisaged that would return to a strict version of the aggregation of individuals’ position and would, thereby, radically embrace individual economic and legal liability, individual ownership, and agency and amendment rights?

Both these alternative put stakeholder theory in a new light. By looking again at the justification for the contemporary division of agency, ownership and amendment rights in contemporary legal and governance theory, stakeholders’ claims can arguably be made on the basis of the underlying theory: “If other stakeholders could be shown to share in the residual gains and risks, their interest in being able to exercise some control over corporations would be significantly legitimized” (Blair 1995:231). A return to a consistent aggregate position would take the dispute away from the conservative claims (Ireland 2010:853) to ‘morality’ that dominated claims for ‘corporate social responsibility’ for so long. Instead, a thorough discussion of the legitimacy of shareholder primacy and the grounds for the current prioritized

attribution of agency, ownership and rights in the third discursive formation would become necessary.

A third, and last, theoretically consistent way to deal with incorporation would be to take the natural entity theory seriously. Rather than taking the individual's agency and rights as a point of departure, this approach would theorize groups as reifiable quantities and work with the agency and rights of such groups. This would entail a rethinking of the basic concept of group representation in western society. Such thinking about group representation and group rights has been received with hostility in 20<sup>th</sup> century writing on incorporation (Runciman 2005:198). It has been argued that authors like Gierke provide a 'chilling' (Dan-Cohen 1986:25) account of the representation of association, which leads to the subordination of the individual to the state (Hallis 1978). For this reason, this approach to group rights has been connected to Nazism, fascism and the concentration camps (Latham in Mason 1966:219) and has thus been placed outside the mainstream type of thinking and writing on incorporation as well as social and political representation. Rethinking could be very useful, either to provide a new basis for an equal attribution of agency, ownership and rights to different types of group representation or to argue that methodological individualism, political liberalism, economic atomism and criminal individualism can only function as a basis if the natural person is fundamentally reinstated as the only acceptable referent for the social sciences.

Nevertheless, it must be noted that the philosophical alternative, methodological individualism, has not prevented the rise of the contemporary theory of incorporation. As this dissertation showed, during the second discursive formation the corporation was tacitly accepted and naturalized as a 'social' institution through its size and position in society. During the third discursive formation a smokescreen of economic atomism and methodological individualism led to the defence of a convenient reified and singularized concept and the reconstitution of the referent. The doctrinal acceptance of methodological individualism with the natural person as a fixed referent left the social sciences with a conceptual apparatus that allowed it no more than a glimpse of the factual development and use of singularization and reified social and political representations with severe practical and theoretical effects in the second and third discursive formation in other academic disciplines. Social science based on

methodological individualism, therefore, have failed to recognize the effects that flow from the reification and singularization of the representation. As a result, the reified singular legal representation hardly appears on the map of the social sciences as an anomaly in terms of its theory and in terms of its effects. Indeed, methodological individualism has been employed in the third discursive formation to defend these reified legal representations. It then appears that methodological individualism is too weak to function as a methodological, normative and political starting point to counter the tendencies to attribute rights, agency and ownership to reified representations, to defend the natural person as the basic referent or to preclude the nominal equalization of ostensibly unequal referents.

Therefore, I argue that the social sciences in general and organization studies in particular need to look beyond methodological individualism. Reification and singularization of representations must be taken seriously and examined for its effects in a wider system of representations. It is, then, relevant as well as necessary to further examine the particular ways in which legal and economic scholarship construct their ideas of reification and singularization of the representation, how these lead to particular systems of representation and the coherence of the assumptions between these systems of representation. On the basis of such an approach, the social sciences must further examine the effects of these systems of representation, their consistency with other systems of representation and the effects of the apparent inconsistencies shown in this thesis.

Rethinking these attributions could then entail a rethinking of the ways in which supra-individual representations like corporations, associations, partnerships, cooperatives, state institutions, labour unions, churches, states, armies, the European Union and the United Nations relate as reified representations to one another and to natural persons in terms of their understanding as reified singular representation. Moreover, this could lead to a rethinking of the relative attribution of agency, rights and ownership to different types of reified representation with social and political aspects and how this relative attribution relates to wider systems of representations.

Within the context of the contemporary theory of incorporation, rethinking group rights and group representations then provides a valid point of departure to rethink

relative attribution of rights, agency and ownership to supra-individual representations. Such a description is very relevant to organization studies to compare and order the way in which these representations are reified and to start gauging the consistency of the underlying assumptions. It is also very relevant because it opens up a large number of possibilities to theorize alternatives to the contemporary understanding of the representation and to take them serious as ways of seeing possibilities to attribute agency, ownership and rights.

## **5. Conclusion**

My interest in incorporation started with my personal curiosity in the reification and singularization of the corporation as a legal representation. I therefore started to develop the legal forms found in Chapter Four. When I had developed these models, I had to contend with the notion underlying most contemporary legal discourse that reification was inevitable for pragmatic reasons and was justifiable on the basis of the *concessionized universitas*, while on the other hand I was confronted with the notion that this reification did not produce anything ‘real’ and that it existed only as a ‘legal fiction’ in which the ‘fiction’ was translated as a ‘myth’. To find out more about this reification, I started to develop a history of incorporation. In this history, the 19<sup>th</sup> century jurists appeared to employ the medieval concept in ways that would not have been possible with the concept as it was devised in the 13<sup>th</sup> century. This led me to develop three versions of incorporation on the basis of a minimal set of assumptions about reification and singularization. Between these discursive formations, these assumptions tended to relate to earlier discursive formations while simultaneously developing a new discursive formation. This asked for a constant reading of secondary historical texts in legal, economic, political and social theory and led me to ‘delay the verdict’ as long as I could, in order to provide a description of incorporation that would be detailed and accurate enough.

In this way, the dissertation provided three major contributions to the contemporary theory of incorporation. First, it provides a contribution to the contemporary theory of incorporation by producing three different historical discursive formations, by providing a comparison and by providing a relative ordering. This shows the effects of incorporation in the third discursive formation and, probably for the first time,

provides a coherent framework by the inconsistency and incoherence of the contemporary concept of incorporation can be understood. The dissertation provides a second contribution by showing the major practical and theoretical effects in the legal, economic, social and political of the intrinsically incoherent theory underlying the contemporary theory of incorporation. The third and final contribution to the contemporary theory of incorporation is provided by a description of the practical and theoretical effects of the acceptance of the reified singular representation and the change to the natural person as the referent in methodological individualism, legal criminal individualism, political liberalism, and economic atomism.

The three contributions together provide a sufficiently convincing description of the corporate condition to argue that the contemporary theory of incorporation is intrinsically incoherent and inconsistent. Moreover, these three contributions show how this incoherent and inconsistent contemporary theory of incorporation is defended and justified on the basis of its legal and economic ‘convenience’. As I argued in this dissertation, this defence and justification leads to major effects in the legal, economic, political and social system of representations. These effects are rapidly making the world less hospitable to natural persons and more hospitable to ideal-type singular reified representations. This provides sufficient reason to stop delaying the verdict on the corporate condition.

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