The Beginning of History for Corporate Law: Corporate Government, Social Purpose and *The Case of Sutton's Hospital* (1612)

*David Chan Smith**

CONTENTS

* David Chan Smith is an Associate Professor of History and the Chair of the Department of History at Wilfrid Laurier University, Canada, where he teaches the history of capitalism and economic thought. Ph.D. History and Legal History, Harvard University, 2007; A.M. History, Harvard University, 2002; B.A. History and English Literature, York University, 2000. The author wishes to thank Charles O'Kelley and Harwell Wells for their invitation to the Berle colloquium and the insights of the participants there. Angus Burgin, Johann Neem and Ronald J. Colombo provided valuable commentary on earlier drafts. Evan Heaney and Matthew Reinikka patiently edited a work filled with idiosyncratic citations and I am deeply appreciative of their efforts. The Cambridge University Legal History Seminar offered important feedback on an early draft of the paper, and I am thankful for Sir John Baker and David Ibbetson's invitation to present. The Social Science and Humanities Research Council, Government of Canada, provided Insight Grant (435-2018-0689) funding for the manuscript research underlying this project.

THE PROBLEM: SOCIAL PURPOSE AND CONCESSION THEORY

"Largely incomprehensible in 1990" wrote Lord Templeman of Sir Edward Coke's report of *The Case of Sutton's Hospital* (1612).[1] Yet this case remains among the small number of still-cited pre-modern corporate law cases. This article uses new sources to investigate *Sutton's Hospital* and corporate development in England during the sixteenth and seventeenth centuries. By doing so, the analysis reveals overlooked connections between the history of corporate law, and religious thought and social purpose. The recognition of these connections, in turn, challenges the received history of pre-modern corporate law. Although this history shapes contemporary Anglo-American debates over corporate personality and purpose, few have scrutinized its underlying assumptions.[2]

The outlines of the narrative are well-established. A period of special chartering in Britain and America preceded the nineteenth century opening of access to the corporate form. Under the earlier legal regime, states incorporated groups in response to their direct petitioning of the legislature or monarch.[3] In return for this concession, the state expected these early corporations, which included colonial governments, charities, global trading enterprises, infrastructure companies, and municipalities, to pursue the public good as well as the self-interested motives of the corporate members.[4] Therefore, these charters often included restrictions that limited the legitimate purposes of corporate activity. A new regime, however, emerged during the nineteenth century in Britain and America as general incorporation took hold and opened access to the corporate form.[5] The

1. Hazell v. Hammersmith, 2 A.C. 1, 2 W.L.R. 372 (Jan. 24, 1991).

2. *See* David Gindis, *Conceptualizing the Business Corporation: Insights from History*, 16 J. INSTITUTIONAL ECON. 569–77 (2020); *see also* Simon Deakin, *The Corporation in Legal Studies*, *in* THE CORPORATION 47 (Grietje Baars & Andre Spicer eds., 2017); *see also* Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 UNIV. ILL. L. REV. 36, 788–95 (2013); *see also* David Millon, *Theories of the Corporation*, 39 DUKE L. J. 201–62 (1990); *see also* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441–83 (1987).

3. *See* RON HARRIS, INDUSTRIALIZING ENGLISH LAW ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 17201844, at 18 (2000); *see also* PAUL D. HALLIDAY, DISMEMBERING THE BODY POLITIC: PARTISAN POLITICS IN ENGLAND'S TOWNS, 16501730, at 38–47 (1998); *see also* Millon, *supra* note 1, at 206–207.

4. *See* Millon, *supra* note 1. *See generally The Hudson's Bay Company, Social Legitimacy, and the Political Economy of Eighteenth-Century Empire*, 75 WM. & MARY Q. 71 (2018).

5. *See* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility, The*, 30 J. CORP. L. 767, 787–97 (2005); *see also* Mark, *supra* note 1, at 1444, 1454; *see also* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173–224 (1985); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 111–14 (1977); *see also* David Chan Smith, *The Mid-Victorian Reform of Britain's Company Laws and the Moral Economy of Fair Competition*, ENTERP. SOC. 1–37 (2020); *see also* Michael Lobban, *Joint Stock Companies*, *in* THE OXFORD HISTORY OF THE LAWS OF ENGLAND. VOLUME XII, 1820–1914, PRIVATE LAW 613–673 (W. R.

older idea that the incorporated body was an "artificial fiction" created by law increasingly seemed out of step with new economic and political realities. Once jurists and lawyers in Europe and America understood the corporation as no longer primarily a concession from the state, they articulated alternative theories of corporate personality.

These alternatives—real entity and aggregate theories—accommodated the increasingly private and self-interested character of business corporations and their dispersed ownership.[6] Otto von Gierke in Germany stimulated perhaps the best-known discussion when he claimed corporations were not artificial creations of the state, but real entities composed of people whose group association the state simply recognized.[7] F.W. Maitland translated Gierke's writings for an English-language audience. Gierke's followers adapted this "realist" idea that the corporation was "no fiction, no symbol, no piece of the State's machinery . . . ." and launched a debate whose first wave lasted into the 1920s.[8] Meanwhile lawyers in America advanced aggregate views of the corporation in which the corporation was treated as a form of partnership composed of individuals contracting among themselves.[9]

The consequences of these developments—both conceptual and practical—were pivotal for the relationship between corporate purpose and social responsibility.[10] First, restrictions once explicitly written into charters to bound corporate activity as to purpose and scope slowly fell away and were replaced by regulatory law.[11] Second, business corporations were increasingly recognized as private entities and the expectations about public purpose that had arisen under the earlier corporate regime fell

---

Cornish ed., 2010); *see also* ROB MCQUEEN, A SOCIAL HISTORY OF COMPANY LAW : GREAT BRITAIN AND THE AUSTRALIAN COLONIES 1854-1920 (2009); *see also* TIMOTHY L. ALBORN, CONCEIVING COMPANIES: JOINT-STOCK POLITICS IN VICTORIAN ENGLAND (1998); *see also* Henry N. Butler, *General Incorporation in Nineteenth-Century England: Interaction of Common Law and Legislative Processes*, 6 INT. REV. L. ECON. 169–88 (1986); *see also* Geoffrey Todd, *Some Aspects of Joint Stock Companies, 1844–1900*, 4 ECON. HIST. REV. 46 (1932).

6. *See* Blair, *supra* note 1, at 800–16; *see also* Millon, *supra* note 1, at 216–19; *see also* Mark, *supra* note 1, at 1442, 1445, 1457–71.

7. *See* Blair, *supra* note 1, at 805–7; *see also* Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business Symposium: Understanding Corporate Law through History*, 63 WASH. LEE L. REV. 1421–1478 (2006); *see also* Avi-Yonah, *supra* note 4, at 798; *see also* Mark, *supra* note 1, at 1467–77.

8. This quote is from F.W. Maitland and his introduction to OTTO VON GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES xxvi (Cambridge, 1900)*;* OTTO VON GIERKE, COMMUNITY IN HISTORICAL PERSPECTIVE 105–09 (1990). The debate and its extensive literature is surveyed in David Gindis, *From Fictions and Aggregates to Real Entities in the Theory of the Firm*, 5 J. INST. ECON. 25–46 (2009).

9. Mark, *supra* note 1, at 1457–64.

10. *Id.* at 1454.

11. Mark, *supra* note 2, at 1442; Millon, *supra* note 2, at 208–09.

away. Corporations became intermediary institutions while governmental control took the form of regulation rather than *ab initio* stipulations in the charter. The rise of large-scale, powerful industrial corporations, however, stimulated renewed attempts to reconcile the problem of private interest with social welfare. Real entity theory provided the basis for novel approaches to social responsibility based on corporate citizenship and trust, most famously articulated by E. Merrick Dodd.[12] With the growth of the post-war corporatist state and the continuing influence of real entity theory, even Adolf Berle could admit that "[t]he argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention."[13]

The resurgence of aggregate theory during the 1970s and 1980s severed these links between corporations and social responsibility. Corporations were described as a "nexus for a set of contracting relationships," a position advanced by the law and economics movement.[14] Subsequent changes in management thought and corporate governance emphasized shareholder control and the reformulation of social responsibility within the context of value producing activities.[15] Corporations were decidedly private actors under this theory. While it was assumed that social benefits might arise in aggregate from corporate activity, corporate social responsibility should only be pursued by managers if it was ultimately in the financial interest of the shareholders.[16] Most recently, however, the growing recognition of the political influence of corporations after cases such as *Citizens United* and the lively management literature on corporate social responsibility have revived debates over corporate personhood and its relationship to social purpose.[17]

These historical debates over corporate personality have long held implications for understanding the source of a corporation's obligation to

12. *See* E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L REV. 1145–63 (1932); *see also* Millon, *supra* note 1, at 203, 216.

13. ADOLF BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954); *see also* Blair, *supra* note 1, at 808.

14. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976); *see also* Blair, *supra* note 1, at 808.

15. *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 22 J. APPL. CORP. FIN. 32–42 (2010); *see also* WILLIAM BAUMOL, PERFECT MARKETS AND EASY VIRTUE, BUSINESS ETHICS AND THE INVISIBLE HAND (1991); *see also* Peter F. Drucker, *The New Meaning of Corporate Social Responsibility*, 26 CAL. MGMT. REV. 53–63 (1984).

16. *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Profits,* N.Y. TIMES, Sept. 13, 1970. It is now described as "enlightened shareholder value," *see* Michael Jensen, *Value Maximization, Stakeholder Theory, and Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 32–42 (2005),

17. Citizens United v. FEC, 558 U.S. 310 (2010).

promote the social good.[18] Reuven Avi-Yonah argued in an influential article that all three theories of corporate personality have been present over time with emphasis among jurists shifting among them "[a]s the relationship of the corporation to the state, to society and to its members or shareholders changes."[19] During the period of special incorporation when corporate bodies were more explicitly held within the orbit of governmental power, this closer relationship made them appear as much public as private entities.[20] In this way, the concessionary grant of the state established explicit expectations and obligations about the social responsibilities of corporations. This assumption has led to proposals to revive concession theory in order to bolster state authority to regulate corporate purpose in the present-day.[21] Attempts to establish the basis for corporate social responsibility within theories of legal personality have led other scholars to reassert real entity theory.[22] In this way, the past serves as a seedbed for ideas about the law and corporate purpose, but also poses the problem of the need for an authentic reconstruction of historical ideas about the corporation absent of teleology or anachronism.

This article pursues this project by investigating special incorporation in sixteenth and seventeenth-century England to explore why lawyers assumed corporations ought to provide social benefits. The analysis challenges the established narrative about corporate law during this period by making three interconnected arguments. First, by examining the most famous corporate law case of the period, *The Case of Sutton's Hospital* (1612)*,* the article provides a new interpretation of the case grounded in a wider range of sources.[23] This historical reconstruction demonstrates both the incompleteness of historical knowledge of corporate thought and the deeply teleological character of narratives that have obscured more authentic historical reconstruction. Second, the discussion of the case is the entry point into an exploration of how contemporaries understood

18. *See* Millon, *supra* note 1, at 202; *see also* Blair, *supra* note 1, at 799; *see also* Mark, *supra* note 1, at 1454.

19. Avi-Yonah, *supra* note 4, at 812.

20. *See* David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139-58 (2013); *see also* Blair, *supra* note 1, at 787, 790; *see also* Millon, *supra* note 1, at 202 (the "public/private distinction" has been the "abidingly crucial issue in corporate legal theory").

21. *See* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327–62, 329, 333 (2013).

22. *See* Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1–34 (2015); *see also* Reuvan S. Avi-Yonah, *Citizens United and the Corporate Form*, WIS. L. REV. 999 (2010); *see also* Gindis, *supra* note 7; *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, VA. L. REV. 247–328 (1999); *see also* William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471–1527 (1989).

23. *Sutton's Hospital Case* (1612), 10 Coke Reports, 1a-35a ER 77 937–976.

corporations in their society as forms of government. Government and corporate theory, this article demonstrates, were deeply embedded within theological ideas. An important body of work has already established the close links between medieval canon law and religious thought, and early European corporate ideas.[24] This article builds on these insights to pursue a different direction, arguing that the emphasis that lawyers and judges placed on government in *Sutton's Hospital* was rooted in theological assumptions about order. Finally, this article's final section uses this analysis to sketch a different narrative of corporate history in which the key event was not the emergence of the paradigmatic for-profit shareholder corporation, but the nineteenth-century fission between for- and non-profits.

THE HISTORIOGRAPHY OF THE EARLY MODERN ENGLISH CORPORATION

This research joins other scholarship revising accounts of the early English corporation that are now over one hundred years old and yet often still relied upon as definitive.[25] The earlier historiography focused primarily on explaining the emergence of the joint-stock business corporation, the development of key corporate characteristics, and the genealogy of corporate ideas.[26] Among the many contributions of these earlier

24. *See* AMANDA PORTERFIELD, CORPORATE SPIRIT 9–61 (2018); *see also* ERNST KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY 196–271 (1998); *see also* J.P. Canning, *Law, Sovereignty and Corporation Theory, 1300–1450*, *in* THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C.350–C.1450 454–476, 473–476 (J. H. Burns ed., 1 ed. 1988); *see also* J. P. Canning, *The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries*, 1 HIST. POLIT. THOUGHT 9–32 (1980); *see also* BRIAN TIERNEY, FOUNDATIONS OF THE CONCILIAR THEORY: THE CONTRIBUTION OF THE MEDIEVAL CANONISTS FROM GRATIAN TO THE GREAT SCHISM 96–140 (1968); *see also* M.J. Rodriguez, *Innocent IV and the Element of Fiction in Juristic Personalities*, 22 JURIST 287–318 (1962).

25. *See* COLIN ARTHUR COOKE, CORPORATION, TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY (1950); *see also* ARMAND DUBOIS, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT, 1720–1800 (1938); *see also* C. E. Walker, *The History of the Joint Stock Company*, 6 ACCOUNT. REV. 97–105 (1931); *see also* GEORGE UNWIN, THE GILDS AND COMPANIES OF LONDON (2d ed. 1925); *see also* W. CUNNINGHAM, THE GROWTH OF ENGLISH ENDUSTRY AND COMMERCE (1925); *see also* W. S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382–407 (1922); *see also* Harold J. Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561–88 (1917); *see also* CECIL T. CARR, SELECT CHARTERS OF TRADING COMPANIES, 1530 - 1707 (1913); *see also* 2 WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720 (1910); *see also* M. EPSTEIN, THE EARLY HISTORY OF THE LEVANT COMPANY (1908); *see also* GEORGE UNWIN, INDUSTRIAL ORGANIZATION IN THE SIXTEENTH AND SEVENTEENTH CENTURIES (1904); *see also* FREDERIC WILLIAM MAITLAND, THE CORPORATION AGGREGATE: THE HISTORY OF A LEGAL IDEA (1893).

26. Though important work on borough corporations also exists. *See* BRITISH BOROUGH CHARTERS 1307–1660, (Martin Weinbaum ed., 1943); *see also* C. Patterson, *Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts*, 120 ENGL. HIST. REV. 879–906 (2005); *see also* Yoh Kawana, *Trade, Sociability and Governance in an English Incorporated Borough: 'Formal' and 'Informal' Worlds in Leicester, c. 1570–1640*, 33 URBAN HIST. 324–49 (2006). Of great interest to these earlier historians was the relationship of English corporate ideas to continental developments and the identification of indigenous innovation,

investigators was the recognition that guild and municipal corporations provided an intellectual foundation for the regulation of group life and economic affairs, and ultimately for the emergence of the business corporation.[27] Thus, the incorporation of merchant groups abroad during the fifteenth century made use of guild models that were further expanded upon in the sixteenth-century foundation of the Muscovy Company (1551–5) and then the East India Company (1600).[28]

This literature also argued that the emergence of the early modern nation-state was crucial to the evolution of the corporate economy. The state used incorporation during the sixteenth century to control groups through the concession of privileges and to create a national market better attuned to capitalist production.[29] The growth of incorporation during the sixteenth century consequently marked the transition from an older system of guild self-regulation to a more closely monitored concession from the state.[30] Because governments held the power to withhold chartering, they were supposedly able to demand that such corporations take into account the public interest. But the state's touch was, in time, withering. While advantageous for English competitiveness in the seventeenth century, rent-seeking and special chartering ultimately restricted corporate development, especially after the passage of the Bubble Act (1720).[31] Innovation proceeded through self-organization, such as unincorporated companies and the equity courts, until nineteenth century liberalization and the emergence of the modern business corporation.[32]

This narrative of the development of the corporation continues to be mapped onto assumptions about the period's economic thinking. Government recognition of incorporated economic bodies of tradespersons and merchants aided the emergence of more integrated national and international economies while also achieving mercantilist goals.[33] Ron Harris, for

---

see 2 SCOTT, *supra* note 25, at 2–3; *see also* C.T. Carr, *Select Essays in Anglo-American Legal History*, 3 166–82, 167 (1907); *see also* M. Schmitthoff, *The Origin of the Joint-Stock Company*, 3 U. TOR. L.J. 74 (1939).

27. *See* UNWIN, *supra* note 25; *see also* SCOTT, *supra* note 25, at 3–10; *see also* Laski, *supra* note 25, at 578–81.; *see also* Heinz Lubasz, *The Corporate Borough in the Common Law of the Late Yearbook Period*, 80 L. Q. REV. 228–43, 229–30 (1964).

28. SCOTT, *supra* note 25, at 13–15.

29. *See* Holdsworth, *supra* note 25, at 383; *see also* CUNNINGHAM, *supra* note 25, at 523.

30. *See* CUNNINGHAM, *supra* note 25, at 513–25; *see also* Laski, *supra* note 25, at 571–73, 582, 584.

31. "An Act for Securing Certain Powers and Privileges," 6 George I, c. 18, 8 THE STATUTES AT LARGE, OF ENGLAND AND OF GREAT-BRITAIN, 322–38 (John Raithby ed., 1811).

32. *See* Joshua Getzler & Mike Macnair, *The Firm as an Entity Before the Companies Acts*, *in* ADVENTURES OF THE LAW: PROCEEDINGS OF THE SIXTEENTH BRITISH LEGAL HISTORY CONFERENCE 267–88 (W.N. Osborough, Paul Brand, & Kevin Costello eds., 2003); *see also* DUBOIS, *supra* note 25, at 120–307.

33. *See* UNWIN, *supra* note 25,at 255–56; *see also* COOKE, *supra* note 25, at 52–54.

example, notes in the second half of the sixteenth century that the corporate form was more frequently "used for profit-oriented organization of business," but that the evolution of the corporation was restricted because it was a "medieval legal conception … nested in a mercantilist era."[34] Since the crown often granted trading companies monopolistic privileges, these corporations were instruments of the mercantilist policies supposedly dominate in the period—though "mercantilism" was not a term used during the seventeenth century.[35] Courtiers and rent-seekers soon appropriated monopolistic privileges and especially after the passage of the Statute of Monopolies (1623), used the corporate vehicle to control specific markets, such as comb making and soap production.[36] Their conventional justification was that the corporation and its monopoly served a public purpose, usually the regulation and "ordering" of a market or profession, but, as C.A. Cooke put it, "What was legally the purpose of order and good government had become in practical effect the pursuit of private gain."[37] Only over a long period of time through a "transition from public jurisdiction to private profit," did the trading corporation, originally a mercantilist tool, slowly lose its social purpose and the modern economic corporation emerge.[38]

This established narrative focuses on the evolution of the paradigmatic joint-stock company and its private organization of capital.[39] Nonprofit corporates are important only as the protean bed of basic corporate characteristics. The business corporation emerges from them and not alongside them, coming to maturity in the nineteenth century. This is also a teleological narrative in other ways, in which the economic corporation emerges from state control to unleash economic growth during nineteenth-century liberalization and ultimately to assume its place as the most prominent form of business organization.

---

34. HARRIS, *supra* note 2, at 39, 45.

35. For the debate over applying the term to the economic thought of the period, *see* Steven C. A. Pincus, *Rethinking Mercantilism: Political Economy, the British Empire, and the Atlantic World in the Seventeenth and Eighteenth Centuries*, 69 WM. & MARY Q. 3–34 (2012); *see also* D. C. Coleman, *Mercantilism Revisited*, 23 HIST. J. 773 (1980).

36. *See* HARRIS, *supra* note 2, at 41, 46; *see also* Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, VA. LAW REV. 1313–79, 1342–70 (2005); *see also* JOAN THIRSK, ECONOMIC POLICY AND PROJECTS: THE DEVELOPMENT OF A CONSUMER SOCIETY IN EARLY MODERN ENGLAND 51–105 (1978). Examples of these incorporations can be found in University of Oxford, Bodleian Library Bankes MS 12.

37. COOKE, *supra* note 25, at 51–2; Avi-Yonah, *supra* note 4, at 784; Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105–24, 110–11 (1888).

38. COOKE, *supra* note 25, at 61; HARRIS, *supra* note 2, at 58–59.

39. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439–68 (2000); Replies by historians include, T. Guinnane et al., *Putting the Corporation in its Place*, 8 ENTERP. SOC. 687–729 (2007); *see also* Leslie Hannah, *The Origins, Characteristics and Resilience of the "Anglo-American" Corporate Model*, 33 ESSAYS ECON. BUS. HIST. 1–25 (2015).

Since this triumph is assumed to be the ultimate end-state of corporate development, the earlier history of special incorporation appears as one of retarded growth or simply static conceptual development. As early as 1925, the legal historian W.S. Holdsworth observed "that the corporation is to be treated as far as possible like a natural man is the only theory about the personality of corporations that the common law has ever possessed."[40] Avi-Yonah has more recently argued that the early modern period was "one of relative stability in the development of the corporate form."[41] Citing *Sutton's Hospital,* he notes that the "real entity view . . . prevailed throughout this period . . . ."[42] Ultimately, English lawyers were stuck with a corporate form increasingly at odds with the economic realities around them. Their inability or unwillingness to innovate led to long-term consequences, such as a lack of clarity about whether shareholders are owners of a corporation or simply have a bundle of governance and profit-sharing rights. For example, David Ciepley's investigation into the East India Company argued that the association of shareholders with ownership followed from the failure of English lawyers to receive property theories of the corporation.[43] Ciepley concludes that "[t]he business corporation was a fundamentally different kind of corporation than the medieval church, state, and guild . . . and so [it] should not have been conceptualized as a 'body politic,' but as a more incorporeal kind of legal person."[44] These assumptions about a static conceptual world trapped in the mercantilist past, turns the period of special incorporation into a foil for the opening of the period of liberal change during the nineteenth-century.

REVISIONISM AND THE HISTORY OF CORPORATE LAW

Recent legal and historical scholarship has begun to question these narratives and their assumptions.[45] First, the problem of how English

40. Holdsworth, *supra* note 25, at 406.

41. Avi-Yonah, *supra* note 4, at 783.

42. Avi-Yonah, *supra* note 4, at 783. *See also* Frederick Pollock, *Has the Common Law Received the Fiction Theory of Corporations*, 27 L. Q. REV. 219–35 (1911).

43. David Ciepley, *The Anglo-American Misconception of Stockholders as 'Owners' and 'Members': Its Origins and Consequences*, 16 J. INST. ECON. 623–42 (2020). This literature includes, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. BUS. REV. 164–90 (2008).

44. Ciepley, *supra* note 43, at 629.

45. Important recent accounts include, RON HARRIS, GOING THE DISTANCE: EURASIAN TRADE AND THE RISE OF THE BUSINESS CORPORATION 1400-1700 (2019); WILLIAM A. PETTIGREW, FREEDOM'S DEBT THE ROYAL AFRICAN COMPANY AND THE POLITICS OF THE ATLANTIC SLAVE TRADE, 1672-1752 (2016); Philip J. Stern, *"Bundles of Hyphens": Corporations as Legal Communities in the Early Modern British Empire*, *in* LEGAL PLURALISM AND EMPIRES, 1500-1850 21–48 (Lauren Benton & Richard J. Ross eds., 2013); PHILIP J. STERN, THE COMPANY-STATE: CORPORATE

lawyers theorized the corporation during the early modern period is being reopened. There was vigorous debate about corporate ideas among lawyers during the period rather than consensus. Hans Lubasz's early reading of fifteenth and early sixteenth-century corporate cases, especially the extensive discussion in *Abbot of St Benet Hulme v. Mayor etc. of Norwich* (1481-3), led him to assert that, broadly speaking, "we are justified in speaking of a common law theory of corporations."[46] However, differing conceptions of the corporation among medieval English lawyers did not simply correspond to modern theories: "Year Book lawyers seem not to have held either a pure fictionist theory of [the] corporation or anything like the pure realist theory. . . ."[47] When David Seipp recently revisited this material, he likewise concluded that while he could "find distinct, persistent patterns of two types of opposing arguments," there was no dogmatic adherence to one or another theory of corporate personality among lawyers.[48] Fifteenth and sixteenth-century lawyers instead had a practical orientation, preserving a range of corporate ideas.[49] Their practicality also led to the assumption that corporations aggregate were ultimately composed of real people as a fifteenth-century commentator, for example, explained: "A town in itself is no corporation, and cannot be so."[50] A corporation was ultimately inseparable from those persons who composed it because if the "mayor and commonalty . . . were in some other place, the city or town would be nothing but an empty thing."[51] Sources like these led Lubasz to conclude that, to these lawyers, "the corporation is simply the community in its legal form, in its legal aspect. Its hallmark in this respect is not entity but capacity."[52]

Second, legal scholars have begun to analyze the non-economic influence of corporations in early modern society, departing from a focus on the development of the business corporation and its economic effects. This

---

SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA (2012); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA (2005); HARRIS, *supra* note 2.

46. Lubasz, *supra* note 27, at 243

47. *Id.* at 236.

48. David J. Seipp, *Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural*, *in* JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW : FROM ANTIQUITY TO MODERN TIMES 37–50 (Joshua Getzler & Paul Brand eds., 2012); and similarly, Susan Reynolds, *The History of the Idea of Incorporation or Legal Personality : A case of Fallacious Teleology*, *in* IDEAS AND SOLIDARITIES OF THE MEDIEVAL LAITY : ENGLAND AND WESTERN EUROPE. ED. REYNOLDS, SUSAN 1–20 (1995).

49. Seipp, *supra* note 48, at 50.

50. JOHN SPELMAN, JOHN SPELMAN'S READING ON "QUO WARRANTO": DELIVERED IN GRAY'S INN, LENT 1519 4 (J. Baker ed., 1998).

51. *Id.* at 4–5; Possibly echoing a claim by the medieval jurist Accursius, Canning, *supra* note 24, at 12–3.

52. Lubasz, *supra* note 27, at 241.

line of inquiry has fruitfully revised traditional interpretations of the political world of the seventeenth and eighteenth centuries as straightforwardly state-centered. In this older narrative, the key event is the expansion of the nation state and unitary sovereignty. Newer interpretations cast this process as more subtle, compromised and even incomplete. The early modern world was pluralist and composed of fragmented jurisdictions. Even as nation-states developed, they often did not uniformly consolidate jurisdictions, but rather asserted themselves through a negotiated, "diffuse sovereignty."[53] Thus, for example, Gregory Ablavsky finds in the dual structure of eighteenth-century American federalism not a rejection of unitary sovereignty, but rather a form of centralization.[54] Set against the backdrop of a world "with a complex patchwork of local institutions with independent authority," American constitutional development at both the state and federal level sought to restrain "competing claimants to authority within state borders – corporations, local institutions, . . . "[55] In this telling, corporations were manifestly political institutions not under the easy control of nation-building states, but sometimes competitors, sometimes partners, or part of the larger matrix of government.[56] Similarly, by focusing on the political status of early modern corporations, other scholars such as Nikolas Bowie have demonstrated how charter writing influenced early American constitutional ideas.[57] Literature in both corporate law and management studies have similarly returned to an analysis of the political character of corporate organization over time.[58]

---

53. *See* Greg Ablavsky, *Empire States: The Coming of Dual Federalism*, 56, 1796; *see also* Lauren Benton & Richard J. Ross, *Empires and Legal Pluralism Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World*, *in* LEGAL PLURALISM AND EMPIRES, 1500–1850 1–17 (Lauren Benton & Richard J. Ross eds., 2013).

54. Lubasz, *supra* note 26.

55. Ablavsky, *supra* note 53, at 1796.

56. *Id.* at 1818. For a discussion of institutional competition in Europe during the early modern period, *see* HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS: AN ANALYSIS OF SYSTEMS CHANGE (1996).

57. Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397–1508 (2019).

58. *See* CORPORATIONS AND AMERICAN DEMOCRACY (Naomi Lamoreaux & William J. Novak eds., 2017); *see also* Ciepley, *supra* note 20; *see also* DANIEL J. H. GREENWOOD, *The Semi-Sovereign Corporation*, (2005), https://papers.ssrn.com/abstract=757315 (last visited April 28, 2022); the literature on "political CSR" and corporate political activity is large, but surveys include Andreas Georg Scherer, *Theory Assessment and Agenda Setting in Political CSR: A Critical Theory Perspective*, 20 INT. J. MANAG. REV. 387–410 (2018); *see also* Jędrzej George Frynas & Siân Stephens, *Political Corporate Social Responsibility: Reviewing Theories and Setting New Agendas*, 17 INT. J. MANAG. REV. 483–509 (2015); *see also* Thomas Lawton, Steven McGuire & Tazeeb Rajwani, *Corporate Political Activity: A Literature Review and Research Agenda*, 15 INT. J. MANAG. REV. 86–105 (2013); *see also* Glen Whelan, *The Political Perspective of Corporate Social Responsibility: A Critical Research Agenda*, 22 BUS. ETHICS Q. 709–737 (2012); *see also* A.G. Scherer & Guido Palazzo, *The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy*, 48 J. MANAG. STUD. 899–931 (2011).

In their accounts of corporate development, historians also have moved away from straightforward assumptions about state building. The most recent historiography, similar to the literature in legal studies, investigates corporations as part of larger networks of negotiated power rather than extensions or creatures of centralizing states. Discarding an earlier generation's top-down model of corporate evolution, this historiography emphasizes that these corporations, including municipal, ecclesiastical, and commercial, were political parts of a cellular early modern English state and its "grids of power."[59] Corporations also were self-consciously political, often with direct responsibility for administration, especially in an imperial context. Thus, the directors of the East India Company understood their Company as a "company-state."[60]

Historians have likewise explored how corporate life shaped political institutions and culture. For Phil Withington, corporate citizenship in borough corporations was part of an experience of self-government that provided the constituent parts of the English commonwealth with their peculiar autonomy and constitutional culture.[61] This research is a reminder of the dynamism of the period's corporate form and the creativity of its lawyers. Incorporators used corporations for a multitude of practical purposes, including colonization, business, charity, and municipal administration.[62] Business corporations were only a small subset of corporate types in England and its Atlantic world.

As legal scholars and historians have begun to probe the political meaning of corporate life, they have also highlighted a characteristic of these early corporations that was remarked upon by even the earliest historiography: the role of the corporation in early modern society as a form of government.[63] But what did this mean to contemporaries, and how did this shape their expectations about social purpose? This is the key question this article interrogates as it reconstructs the corporate theory of the period of *Sutton's Hospital*.

---

59. *See* M. J. Braddick & John Walter, *Introduction: Grids of Power; Order, Hierarchy, and Subordination in Early Modern Society*, *in* NEGOTIATING POWER IN EARLY MODERN SOCIETY: ORDER, HIERARCHY AND SUBORDINATION IN BRITAIN AND IRELAND 38–40 (2001); *see also* MICHAEL J BRADDICK, STATE FORMATION IN EARLY MODERN ENGLAND, CA. 1550–1700 19 (2000); *see also* STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, C.1550–1640 16–28 (2000).

60. Philip J. Stern, *"A Politie of Civill & Military Power": Political Thought and the Late Seventeenth-Century Foundations of the East India Company-State*, 47 J. BR. STUD. 253–83 (2008).

61. PHIL WITHINGTON, THE POLITICS OF COMMONWEALTH: CITIZENS AND FREEMEN IN EARLY MODERN ENGLAND 7–13 (2008).

62. Stern, *supra* note 44, at 23–24, 27–28.

63. *Id.*at 32–37.

EARLY MODERN GOVERNMENT AND *THE CASE OF SUTTON'S HOSPITAL*

The meaning of corporate government was crucial to *The Case of Sutton's Hospital* (1612) and provides an opportunity to explore this idea so conventionally repeated throughout the early modern period in England. *Sutton's Hospital* is arguably the oldest, still-cited case in Anglo-American corporate law.[64] Knowledge of the case depends on the report by the prominent judge and lawyer Sir Edward Coke.[65] Coke explicitly published his report of the proceedings in 1614 to clarify the law related to charitable corporations.[66] His didacticism has made the case a convenient statement of legal ideas about corporations during the period, and modern commentators have claimed that Coke's account "settled for later centuries the general English legal theory of corporations."[67] Discussions of corporate law during the seventeenth and eighteenth-centuries frequently referred to the case, and other authorities such as William Blackstone used *Sutton's Hospital* as an authority throughout his account of corporate law.[68]

Coke's report of *Sutton's Hospital* is famous, in particular, for his definition of the corporation. Though not original to him, this is something of a potent quotable and has entered into popular critiques of the "sociopathic" corporation. The corporation, according to Coke, is, " . . . invisible, immortal, and rests only in intendment and consideration of the law . . . [corporations] have no souls, neither can they appear in person, but by attorney . . . "[69] The soulless corporation was an artifice of law with a separate legal existence from its members.[70] Blackstone paraphrased

64. For example, U.S. v. Detroit Med. Ctr., 833 F.3d 671 (6th Cir. 2016); Liberty Northwest Ins. v. Oregon Ins. Guarantee, 136 P.3d 49 (Or. Ct. App. 2006); SEC v. John Adams Trust Corp., 697 F. Supp. 573 (D. Mass. 1988); Commonwealth v. McIllwain, 1979 Pa. Super. LEXIS 2452, 270 Pa. Super. 612, 417 A.2d 777 (Pa. Super. Ct. January 1, 1979); Sierra Club v. Morton, 405 U.S. 743 (1972); recently in Canada by the Supreme Court, Communities Econ. Dev. Fund v. Canadian Pickles Corp. (1991), 3 SCR 388, at 401.

65. *Sutton's Hospital Case* (1612), 10 Coke Rep., 1b ER 77 937, 960. The major historiography on Coke includes DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578–1616 (2014); ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE (2003); CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552–1634) (1957).

66. *Sutton's Hospital Case* (1612), 10 Coke Rep., 35a ER 77, 976.

67. COOKE, *supra* note 25, at 66. Williston, *supra* note 37 ,at 113. Holdsworth, *supra* note 25, at 382.

68. WILLIAM BLACKSTONE, THE OXFORD EDITION OF BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND 1, 306–10 (Wilfrid Prest & David Lemmings eds., 2016).

69. 10 Coke Rep. 32 b, 77 ER 973. Coke himself suggested that he had the definition from Sir Roger Manwood (1525-1592), chief baron of the Exchequer, *see Tipling v. Pexall* (1614) 2 Bulstrode 233, 80 ER 1085.

70. *See* Laski, *supra* note 25, at 587; *see also* Avi-Yonah, *supra* note 22, at 1002. For discussions of the influence of the "soulless" corporation and attempts to shift this language, *see* ROLAND MARCHAND, CREATING THE CORPORATE SOUL : THE RISE OF PUBLIC RELATIONS AND CORPORATE

Coke's definition, and John Marshall, without identifying his source explicitly, declared in the *Trustees of Dartmouth College v. Woodward* (1819):

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.[71]

Though influential as a statement of the law of corporations of the period, there have, in fact, been few scholarly investigations of *Sutton's Hospital*. Henry Turner has recently argued that the case demonstrated a conflict between two different theories of corporate personality and that "the question before the court was whether an artificial person could displace a natural person as heir to one of the wealthiest citizens in England."[72] In contrast, a more extensive reading of the sources for *Sutton's Hospital* suggests not only different arguments made by each side, but that the question of government was the key issue in the decision.

SUTTON'S HOSPITAL AND THE CHALLENGE OF HISTORICAL CORPORATE LAW SOURCES

Sutton's Hospital provides an apt example of the problem of sources in the history of corporate law. All readings of the case have relied upon the single report published by Coke, who was involved in the hospital in ways that would now implicate significant conflicts-of-interest, including as one of its governors. However, prior to the nineteenth century in England, most reports of cases were unpublished. After the ending of the anonymous Year Books in 1535, reports of cases depended on the circulation of the scribbled reports of lawyers, law students, and judges, and their occasional printing.[73] Lawyers penned their reports during the sixteenth and

---

IMAGERY IN AMERICAN BIG BUSINESS 7-10 et passim (1998); *see also* EUGENE MCCARRAHER, THE ENCHANTMENTS OF MAMMON: HOW CAPITALISM BECAME THE RELIGION OF MODERNITY 196–209 (2019).

71. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), 636; BLACKSTONE, *supra* note 68, at 1, 309; Avi-Yonah, *supra* note 4, at 787–88.

72. HENRY S. TURNER, THE CORPORATE COMMONWEALTH: PLURALISM AND POLITICAL FICTIONS IN ENGLAND 1516-1651 14, (2017).

73. *See* W. Hamilton Bryson, *Law Reporting in the Seventeenth Century*, *in* ENGLISH LEGAL HISTORY AND ITS SOURCES: ESSAYS IN HONOUR OF SIR JOHN BAKER 44–3, 44–5 (D. J. Ibbetson, Neil Jones, & Nigel Ramsay eds., 2019); *see also* John Baker, *Law Reporting in England 1550–1650*, 45 INT. J. LEG. INF. 209–18, (2017); *see also* Alain Alexandre Wijffels & D. J. Ibbetson, *Case Law in the Making*, *in* CASE LAW IN THE MAKING : THE TECHNIQUES AND METHODS OF JUDICIAL RECORDS AND LAW REPORTS 13–35, 28–33 (1997); *see also* D. J. Ibbetson, *Report and Record in Early-Modern Common Law*, *in* CASE LAW IN THE MAKING : THE TECHNIQUES AND METHODS OF JUDICIAL RECORDS AND LAW REPORTS 55–68 (Alain Alexandre Wijffels ed., 1997); *see also* David J. Ibbetson, *Law Reporting in the 1590s*, *in* LAW REPORTING IN BRITAIN 74–88, 80–4 (Chantal Stebbings ed.,

seventeenth-century reports in Law French, a technical language derived from Norman French.[74] Oral remembrance and the circulation of these manuscript reports met many of the small profession's needs for accounts of cases during a period when precedential authority was still emerging.[75] Publishers printed some of these reports, especially those by leading practitioners.[76] However, only a small percentage—and very few, for example, for the eighteenth-century—of these reports made their way into print.[77] Coke's *Reports* were among them and, due to his professional reputation during his lifetime, lawyers quickly adopted them for citation.[78] Coke wrote explicitly to continue the project of Edmund Plowden, whose *Commentaries* were published in 1571, to provide authoritative reports to reveal the "right reason and rule of the judges" in controverted cases.[79] That is, Coke was not providing an objective account of arguments in cases, but rather he used the reports to present his understanding of what the law actually was during a period when legal change had been rapid and a cause of confusion for practitioners.[80]

There are also at least three manuscript reports of *The Case of Sutton's Hospital* and they provide different accounts of arguments and judicial discussion. They are also less obviously partial than Coke's version. In addition, there are case notes from the hospital's counsel surviving in the London Metropolitan Archive—a rare find for the period.[81] The arguments in the case, in fact, became so detailed on both sides that a "paper Book" containing "eight score sheets of paper" was produced of them, although this book has not been found.[82] This manuscript evidence provides

---

1995); *see also* W. Hamilton Bryson, *Law Reports in England from 1603 to 1660*, *in* LAW REPORTING IN BRITAIN 113–22, 114–19 (Chantal Stebbings ed., 1995); *see also* JOHN HAMILTON BAKER, JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW (1989); *see also* James Oldham, *Eighteenth-Century Judges' Notes: How They Explain, Correct and Enhance the Reports*, 31 AM. J. LEG. HIST. 9–42 (1987); *see also* L. W. ABBOTT, LAW REPORTING IN ENGLAND 1485–1585 (1973).

74. Ibbetson, *supra* note 73, at 56–57.

75. *See* Ian Williams, *Law, Language and the Printing Press in the Reign of Charles I: Explaining the Printing of the Common Law in English*, 38 L. HIST. REV. 339–71 (2020); *see also* Wijffels and Ibbetson, *supra* note 73, at 28–29; *see also* Ian Williams, *Early-Modern Judges and the Practice of Precedent*, *in* JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW 51–66 (Paul Brand & Joshua Getzler eds., 2011).

76. Bryson, *supra* note 73, at 114–19.

77. *See* Ibbetson, *supra* note 73, at 80–81.

78. Bryson, Law Reporting in the Seventeenth Century, *supra* note 73, at 45.

79. EDWARD COKE, THE REPORTS OF SIR EDWARD COKE 1, p. xxvii (J. H. Thomas & John Farquhar Fraser eds., 1826). *See generally* SMITH, *supra* note 65; J. H. Baker, *Coke's Note-Books and the Sources of his Reports*, 30 CAMB. L.J. 59–86 (1972); and Theodore F.T. Plucknett, *The Genesis of Coke's Reports*, 27 CORNELL L.Q. 190–213 (1942) for discussion of Coke's reporting practices.

80. *See* Baker, Law Reporting in England, *supra* note 73, at 215.

81. *See* London Metro. Archives ACC/1876/L/02/25, 35–40; *see also* Yelverton's notes in "Mr Yelverton's Argument in the Case of Suttons Hospital," Brit. Libr. Hargrave MS 15, ff. 45–54.

82. *Instructions For a Motion*, London Metro. Archives ACC/1876/L/02/25.

new insights into *Sutton*, revealing both the wider context and history of the case, and demonstrating that Coke's claims about corporate fictions were not important to the decision. While lawyers used both "realist" and "formalist" arguments, the manuscript reports demonstrate that the judges focused on the governmental status of the body politic to determine whether the corporation had come into existence.

WHAT WAS A CORPORATION IN EARLY MODERN ENGLAND?

Corporate ideas were still in flux when the arguments were made in *Sutton's Hospital*. Coke's confident recounting of the rules applied in *Sutton's Hospital* obscures a legal world that was still pioneering its intellectual exploration into corporate theory. Even though the term "corporation" appears in the medieval Year Books beginning in 1429 and lawyers had debated the powers, capacity, and personality of incorporated groups since the fifteenth century, common law learning about corporations was still "uncertain" in the early sixteenth century.[83] This was partly due to the variety of corporate types. One serjeant-at-law joked in 1519 that "[d]efining the qualities of a corporation" might take weeks on account that "there are various kinds of corporation, and their qualities are different."[84] Over the century lawyers faced increasing analytical challenges with the emergence of newer corporate forms such as professional societies and trading corporations, and as the overall number of incorporations grew.[85] For example, while there were only 38 incorporated towns in 1500, by 1600 there were 130 in existence.[86] Despite the increase in corporate groups and their types, the statutory framework remained limited. Only two or three statutes explicitly regulated corporations in 1612.[87]

Both the volume of legal analysis and development of common law rules to regulate corporations expanded during the later 1500s. These shifts were likely in response to the proliferation of incorporations and to address disputes over their powers. Thus, for example, accounts of corporations in early sixteenth century lawbooks were parsimonious and merely entries abridged from the Year Books with little or no analysis. Anthony Fitzherbert's *La Graunde Abridgement* (1516), one of the period's most important printed reference works, did not have a separate section for corporations

---

83. J.H. Baker, THE OXFORD HISTORY OF THE LAWS OF ENGLAND: 14831558, 622 (2003); *see* Seipp, *supra* note 48, at 40.

84. SPELMAN, *supra* note 50, at 154.

85. BAKER, The Oxford History of the Laws of England, *supra* note 83, at 622; Reynolds, *supra* note 48, at 12–13; BRITISH BOROUGH CHARTERS 1307–1660, *supra* note 26, at xxvi.

86. WITHINGTON, *supra* note 61, at 18.

87. 19 Hen. 7, cap. 7; 39 Eliz. 1 cap. 5 and the statute of artificers was usually considered to regulate corporate activities, 5 Eliz. 1 c. 4.

until Sir Robert Brooke produced his revision (1573).[88] Similarly John Rastell's dictionary of law terms (1523) omitted to define a corporation, whereas a later edition (1579) included a specific entry on corporations.[89] By *Sutton's Hospital* common law treatises had schematized the variety of corporate forms that had once exasperated their predecessors. Corporations were either lay or temporal, and depending on the number of members, either sole or aggregate.[90] Coke himself approved this classification in his *Institutes* (1628).[91] Three decades later, William Sheppard (1659) finally wrote a sustained analysis of the corporate entity that summarized the legal developments of the preceding century. Sheppard was even then able to muse that "no mans pen amongst us, has bin employ'd on this subject before . . . ."[92]

Sheppard's assertion was partly true: while Elizabethan and early Stuart lawyers debated corporate powers and capacities at length, they faced an absence of detailed analysis in the common law literature. Instead judges and lawyers depended on passing statements and dicta in the Year Books, which they mined to support different ontologies of the corporation with roots in medieval canon law. On one account, the corporation was a "body politic" composed of a head and a body. This idea traced back to medieval writers such as John of Salisbury, who in the twelfth century likened the commonwealth to the human body.[93] Other medieval writers, including Thomas Aquinas, applied the anthropological metaphor of the *corpus mysticum* to the Catholic Church, in which Christ was the head of the body of believers.[94] The Church itself was thus conceptualized as a corporate structure. The famous bull of Boniface VIII, *Unam sanctam* (1302), expressed this idea in juristic form by adapting the structure to the claim that the pope was the head of the body of the Church as the representative of Christ.[95] Later jurists used this concept to represent the authority of temporal princes as heads of the body of their realms, and so the fifteenth century English judge, Sir John Fortescue could write that a

88. ANTHONY FITZHERBERT, LA GRAUNDE ABRIDGEMENT, "Tabula" (1516); ROBERT BROOKE, LA GRAUNDE ABRIDGEMENT 188–193 (1573).

89. JOHN RASTELL, AN EXPOSITION OF CERTAINE DIFFICULT AND OBSCURE WORDS (1523); JOHN RASTELL, AN EXPOSITION OF CERTAINE DIFFICULT AND OBSCURE WORDS 52–3 (1579).

90. RASTELL, *supra* note 89, at 52b–53a.

91. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 2a, 250a (1985).

92. WILLIAM SHEPPARD, OF CORPORATIONS, FRATERNITIES, AND GUILDS sig. A3 (1659). The term "corporate" appears by 1408. Seipp, *supra* note 48, at 40.

93. KANTOROWICZ, *supra* note 24, at 199–200.

94. *Id.* at 200–02.

95. *Id.* at 194.

kingdom "exists as a body mystical, governed by one man as head."[96] Other English judges such as John Prisot, chief justice of the Common Pleas, generalized the corporate anthropomorphism when he explained in 1460 in a case over an annuity involving a dean and chapter that, "I have not heard of such corporation to incorporate a body without a head."[97] Sir John Fyneux's statement in *Hecker's Case* (1522) while he was chief justice of the King's Bench, was the most authoritative among later lawyers: "A corporation is a combination of head and body, and not only a head or only a body. And it must be consonant with reason or else it does not avail."[98] In *Willion* v. *Berkley* (1562) Serjeant John Southcote had similarly described the king's body politic: "he and his subjects together compose the corporation . . . he is incorporated with them, and they with him, and he is the head, and they are the members, and he has the sole government of them."[99]

Yet there was also support for a more fictional view of the corporation as a mere artifice of law rather than a composite of individuals. The sense of the corporation as a *persona ficta* is usually traced to Innocent IV (1243-1254) and subsequent canon lawyers.[100] The English Year Books likewise contained passing evidence for fictional ideas about corporations, such as a statement by Serjeant Richard Pygot in the *Abbot of St. Hulme* (1481-1483) that "a corporation was only a name and could not be seen and did not have substance."[101] Lawyers in *Sutton's Hospital* relied on both Fyneux and Pygot.

One of the notable characteristics of the early legal literature, as David Seipp suggested for the earlier medieval discussions, was that lawyers held both views of the corporation. Rastell's *Expositions* relied on Fyneux*:*

> A corporation is a permanent thing that may have succession: And is an assembly and joining together of many into one fellowshipp, brotherhoode and minde, whereof one is hedde and cheefe, for the rest are the body and this hedde and body knitte together make the corporation.[102]

---

96. JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 20 (Shelley Lockwood ed., 1997); *see* KANTOROWICZ, *supra* note 24, at 218, 228; *see also* MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 42–45 (2010); *see also* Howell Lloyd, *Constitutionalism*, *in* THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT, 1450–1700, 262–63 (J. H. Burns & Mark Goldie eds., 1991).

97. Y.B. 39 H. 6. 13b. Trans. David Seipp; *see* Seipp, *supra* note 48.

98. Cambridge U. Libr. MS Hh.ii.2, ff. 102r-v; YEAR BOOKS OF HENRY VIII: 12 - 14 HENRY VIII 101–02 (John Baker ed., 2002).

99. Willion v. Berkley, 1 Plowden 234, 75 ER 355-6 (K.B. 1562).

100. Recent scholars have rejected the claim that Innocent IV articulated a modern fiction theory. *See* Canning, *supra* note 24, at 15–17; *see also* Rodriguez, *supra* note 24, at 316–18.

101. Mich. 21 Edw. 4, pl. 4, fol. 12b–15a; *see* Seipp, *supra* note 48.

102. RASTELL, *supra* note 89, at 52a–b.

John Cowell, a civilian, in his dictionary of terms of the law written in 1607, observed that a corporation was a body politic with a "head officer, one or more, and members able by their common consent, to graunt or to receive in law any thing within the compass of their charter . . ."[103] Coke in his *Institutes* likened a corporation to a "body incorporate, because the persons are made into a body, and are of capacity to take and grant, etc."[104] However, the earliest dedicated treatment of corporations in the common law literature, which was written under Elizabeth I, preferred Pygot's abstraction that a corporation was a "body without a sowle that never dyethe."[105] Similarly, Coke in *Sutton's Hospital* described a corporation as " . . . invisible, immortal, and rests only in intendment and consideration of the law . . . ."[106]

The treatise literature over the next decades sometimes ascribed a fictional definition to the corporation in general, while describing the essence of aggregate corporations as the real persons who made up the head and body. Henry Finch's posthumous *Law* (1627) explained that a corporation was "a bodie in fiction of Law, that indureth in perpetual succession."[107] In the same treatise he also drew upon Fyneux's definition of the corporation when he described corporations aggregate as, "of many persons, that is to say, of a head and body . . . ."[108] When Sheppard published *Of Corporations, Fraternities, and Guilds* (1659), he explained that the corporation was a " . . . Body, in fiction of Law; or, a Body Politick that indureth in perpetuall succession."[109] He went on to describe how a lay corporation aggregate was, "An Assembly or Cominalty, of many men, gathered or joined together in a City, Town, or Burrough, into one fellowship[.]"[110] Even Coke in an early case on the naming of a corporation, *Marriot* v. *Pascal,* argued that a corporation aggregate could not be a pure fiction, but needed a place certain "of their abiding, or otherwise it cannot be discerned by the law, and it is but a mathematical thing, and nothing else but a fiction, and they cannot be otherwise considered in law, but as they are . . . within the bounds of their house."[111]

---

103. JOHN COWELL, THE INTERPRETER sig. T2 (1607).

104. COKE, *supra* note 91, at 250a.

105. Oxford U. Bodleian Libr., MS Rawlinson B 410, f. 6v; the medieval precedents for this description are described in Seipp, *supra* note 48.

106. 10 Coke Rep. 32 b, 77 ER 973.

107. HENRY FINCH, LAW, OR, A DISCOURSE THEREOF IN FOURE BOOKES 87, 91–94 (1627).

108. *Id.* at 91.

109. SHEPPARD, *supra* note 92, at 1–2.

110. *Id.* at 4.

111. JAMES GRANT, A PRACTICAL TREATISE ON THE LAW OF CORPORATIONS IN GENERAL, AS WELL AGGREGATE AS SOLE 565, *citing* Marriott v. Pascal, 1 Leonard 126, 74 ER 149 (1588); *see* Yarmouth Borough, 2 Brownlow & Goldesborough Reps. 292, 123 ER 949 (1609).

The predisposition to analyze corporations as groups of real persons related to practical problems facing lawyers of the period, especially corporate power over people. Lawyers were less concerned about issues of legal personality than corporate jurisdiction.[112] Towards the end of the sixteenth century there was a surge of cases testing the extent and exercise of corporate authority to govern trades and people. Lawyers routinely cited many of these foundational cases well into the eighteenth century and beyond.[113] These cases reveal the preoccupation among judges and lawyers with thinking about corporations foremost as a body politic needing government and as an instrument of wider government beyond its body politic. By exercising political power, corporations were more than fictional entities, but people involved in a form of government, an expectation that imposed upon them an obligation to promote a wider social interest.

Lawyers routinely stated that corporations were a form of government. As Sheppard noted, the corporation was a tool of human reason that "consists in fitting Laws and Polities for our better Government, and the best of Polities is that Invention whereby men have bin fram'd into Corporations, Guilds, or Fraternities . . . ."[114] Similarly, in a case involving the incorporated Joiners Company of London (1582), the lawyer William Fleetwood explained that,

> The king has here founded a corporation, and granted government and power to make reasonable, wholesome and meet ordinances for government . . . To make corporations – which are only a name, shadow or imagination – and not to give them order and government, and correction, is nothing but a vain thing. Therefore order, rule and government belong as a necessary incident to incorporation . . . Take away government, and they are left as a dead body and shadow . . . .[115]

Coke observed he made the same connection between corporations and government while he was attorney general in the case of *Davenant* v. *Hurdis* (1599). He explained that corporations make by-laws since it was not possible by the general law to provide government "for each particular society" given the diversity among cities and geography.[116] Thomas

112. For a similar claim about an earlier period, *see* Canning, *supra* note 24, at 18.

113. The best known were Davenant v. Hurdis, Moore 586, 580 (K.B. 1599); Bonham's Case, 8 Coke Rep. 113b (1610); and The Case of the Ipswich Tailors, 11 Coke Rep. 53, Godbolt 252 (1614).

114. SHEPPARD, *supra* note 92, at sig. A3r-v. See also the statement by Humfrey Starkey sjt. Y.B. Mich 18. Edw. 4, pl. 17, ff. 15b-16a and COKE, *supra* note 91, at 2a.

115. Attorney-General v. Joiners' Company of London (1582), *printed in* J.H. BAKER, THE REINVENTION OF MAGNA CARTA 1216–1616 473 (2017).

116. Davenant v. Hurdis, Moore 586, 580 (K.B. 1599); *compare* Coke's comments in *The Portreeves of Gravesend (1612)*, acknowledging that "there is no question" of the by-law making power of corporations. *See also* Harv. L. Sch. MS 114, f. 65v.

Fleming, who was solicitor general in the same case and later chief baron of the Exchequer, explained that trade corporations did not manage their trades or members in isolation from broader governance. London's size made it difficult to administer, and so companies were needed for its government, " . . . thus in such city it is convenient to have inferior rulers that should be vigilant each in the performance of their duty . . . ."[117] Francis Moore added that by-laws were necessary because of the limitation of making a general law "for apt government for each particular society." Moore continued,

> . . . the same reason that appoints general reason to govern kingdoms ought to allow particular laws for governing particular societies, for it is admitted that discipline is requisite in both . . . for which princes invented discipline by government in nations, societies, and private families.[118]

Societies, like companies, needed to create by-laws for the government and control of "iniquities" that would arise from "any assembly of people."[119] Through the application of their government, corporations benefitted society through regulation. It was admitted in the *Case of the Weavers of Newbury* (1617) that the corporation was "able to make by laws and ordinances for the better ordering of their society for avoiding deceit in the trade of weaving and for direction of their apprentices . . . ."[120]

The functioning of corporations as forms of government stimulated significant litigation during the late sixteenth and early seventeenth centuries, especially over the limits of corporate powers and whether they favored private interests.[121] Most cases resulted from challenges to the exercise of quasi-public regulation by corporations. Litigants often contested the warrant for specific corporate powers, alleged the repugnancy of their exercise, and raised public interest arguments. For example, although by Coke's time it was accepted that incorporation required a royal or parliamentary charter, many corporations claimed their privileges through prescription and the presumption of a fictional, lost charter.[122] In 1598, the Privy Council queried the judges whether boroughs might prescribe

---

117. Davenant v. Hurdis, Moore 586 (K.B. 1599); *see also* Brit. Libr. Additional MS 25203, f. 145r.

118. Davenant v. Hurdis, Moore 586; *see also* Brit. Libr. Additional MS 25206, f. 112v (K.B. 1599).

119. *Id.*

120. *The Case of the Weavers of Newbury*, Brit. Libr. Harley MS 5149, f. 15r (1617).

121. Attorney-General v. Joiners' Company of London (1582), *printed in* BAKER, *supra* note 115, at 468–76. *See* Chamberlain of London Case, 3 Leonard 264, 74 ER 674 (1591); *see also* The Case of Corporations, 4 Coke Rep. 78a, 76 ER 1052 (1598); *see also* The Portreeves of Gravesend, Harv. L. Sch. MS 114 f. 65r (1612); *see also* Norris v. Staps, Hutton 5, 123 ER 1060 (1617).

122. HALLIDAY, *supra* note 2, at 32.

against their charters. The judges opined that they could.[123] Lawyers questioned the extent to which corporate powers based on prescription or custom might be exercised, even if they were supported by statute.[124] Many of these disputes arose over hotly contested corporate powers to imprison or seize goods, and to restrict the vending of goods.[125]

Aggrieved litigants claimed that individuals or groups exercised corporate power for their private economic gain or sought to control commerce that, as the anonymous author of an Elizabethan treatise on corporations explained, "ought to bee free and common to all citizens of the same commonwealth."[126] The commentator continued that rights " . . . ought not to bee taken from any members of the same state without the apparent utility and profit of the whole Bodie of the Comon wealthe."[127] Public interest justified corporate government of manual trades, which were "verie needefull that order bee taken" to ensure that tradesmen had the requisite skills.[128]

This distinction in corporate government between public and private interest animated the period's controversy over monopolies.[129] Nicholas Fuller, counsel for the defendant in *The Case of Monopolies* (1602) and no friend to crown policies, contrasted patents held by individuals that restrained trade with government by incorporated trade societies. While the former was a monopoly because it functioned for private advantage, the latter provided public benefits by helping people follow the biblical injunction that "every man should live by labour."[130] There were, he added, "several arts, manual occupations and trades whereby we may have the mutual help one of another, and all governed in due order by the wardens and governours of the same society and fellowship."[131] Though these

123. *See* The Case of Corporations, 4 Coke Rep. 78a, 76 ER 1053 (1598).

124. *See, e.g.*, Weavers v. Browne, Brit. Libr. Additional MS 25203, f. 292r; Davenant v Hurdis, Moore 576, 72 ER 769 (1599); Davenant v. Hurdis, Brit. Libr. Additional MS 25206, f. 216r; Davenant v Hurdis BL Additional MS 25203, f. 93r; Bonham's Case, 8 Coke Rep. 107a, 77 ER 638 (1610); College of Physician's Case, 2 Brownlow & Goldesborough 255, 123 ER 928 (1609).

125. Attorney-General v. Joiners' Company of London (1582), printed in BAKER, *supra* note 115, at 468–76. Clark's Case,5 Coke Rep. 64a, 77 ER 152 (1598); Waltham v. Austen,, Brit. Libr. Additional MS 25203, f. 75r-77v (1599); Davenant v Hurdis, Moore 576, 72 ER 769 (1599); Franklin v. Green,, 1 Bulstrode 12, 80 ER 717 (1609); The Case of the City of London,8 Coke Rep.121b, 77 ER 658 (1610); Ipswich Tailors Case,, 11 Coke Rep. 53a, 77 ER 1218 (1614); Bagg's Case,11 Coke Rep. 93b, 77 ER 1271 (1615), and a fuller report in Brit. Libr. Additional MS 25213, f. 176v; Attorney-General v. Cusack and Citizens of Dublin,, Brit. Libr. Lansdowne MS 1077, f. 6r. (1617).

126. Brit. Libr. Lansdowne MS 811, f. 83r, 94v.

127. Brit. Libr. Lansdowne MS 811, f. 85r.

128. Brit. Libr. Lansdowne MS 811, f. 101r.

129. For the distinction between monopoly and legitimate restraint, *see* Nachbar, *supra* note 36, at 1339–40; ANDREA FINKELSTEIN, HARMONY AND THE BALANCE: AN INTELLECTUAL HISTORY OF SEVENTEENTH-CENTURY ENGLISH ECONOMIC THOUGHT 67 (2000).

130. Darcy v. Allin, Noy 179, 74 ER 1131, 1137 (1602).

131. Darcy v. Allin, Noy 180, 74 ER 1131, 1137 (1602).

corporations regulated trades and limited access to employment they were not monopolies. Their members sold on their own account and corporate organization provided "settled governments, and wardens and governours to keep them in order…"[132] In the *Case of the Tailors of Ipswich* (1614), the judges explained the distinction that a corporation "may make ordinances for the ordering and government of any trade; but thereby they cannot make a monopoly for that is to take away free-trade, which is the birthright of every subject."[133]

Finally, these debates over corporate powers led to more subtle wrangling over appropriate forms of corporate government for different trades in different places.[134] Economic writers of the period assumed that trade needed to be "governed" or regulated in the public interest. The most prominent among them, Thomas Mun, Edward Misselden and Gerard Malynes, all believed in the necessity of governed trades even as they disagreed about much else. Misselden observed that, "The trades of this Kingdome which by his Majesty . . . are reduced under Order and [Government] into Corporations, Companies, and Societies, [do] [certainly] much [Advance] and [Advantage] the Commerce of this Common-wealth…"[135] Malynes, supposedly a "free trader," objected to those who "would ha[v]e all things at large in the course of Traffique, and that there should be no societies or corporations of Merchants for any places of Trade…"[136] The disagreement among these early political economists was over how commerce to a region or within a region ought to be governed: how traders might be licensed, how infrastructure for the trade would be built and maintained, and even the diplomatic relations with the rulers of overseas markets might suggest the need for specifically corporate government.[137] Debate continued over the exact form of corporate organization needed to govern particular trades or markets.[138]

---

132. Darcy v. Allin, Noy 183, 74 ER 1131, 1139 (1602).

133. The Clothworkers of Ipswich, Godbolt 253, 78 ER 147, 148 (1614); The Case of the Tailors of Ipswich, 11 Coke Rep. 54a, 77 ER 1220 (1614).

134. Carlos Eduardo Suprinyak, *Dreams of Order and Freedom: Debating Trade Management in Early Seventeenth-Century England*, 40 J. HIST. ECON. THOUGHT 401, 418 (2018).

135. EDWARD MISSELDEN, FREE TRADE. OR, THE MEANES TO MAKE TRADE FLORISH WHEREIN THE CAUSES OF THE DECAY OF TRADE IN THIS KINGDOME, ARE DISCOUERED: AND THE REMEDIES ALSO TO REMOOUE THE SAME, ARE REPRESENTED 53–54 (1622).

136. GERARD MALYNES, THE MAINTENANCE OF FREE TRADE ACCORDING TO THE THREE ESSENTIALL PARTS OF TRAFFIQUE 67–68 (1622).

137. The need for the government of markets by corporations was surprisingly durable. Even Adam Smith, who opposed corporate monopolies, could admit corporate government for some particular trades such as commerce with the Hudson's Bay region. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 744 (V.i.e. 21) (1982).

138. William A. Pettigrew & Tristan Stein, *The Public Rivalry Between Regulated and Joint Stock Corporations and the Development of Seventeenth-Century Corporate Constitutions: Public Rivalry Between Regulated and Joint Stock Corporations*, 90 HIST. RES. 341–62 (2017).

These disputes stimulated the development of a jurisprudence to regulate corporate government. The common law judges explicitly required that by-laws or their exercise must be consonant with reason and with the existing common law. There could not be a "repugnancy," a restriction that was written into corporate charters. As Sir John Popham, chief justice of the King's Bench, explained in *Payne v. Haughton* when discussing the validity of a by-law: "I hold that these ordinances to be against the common law . . . against reason . . . ." he wrote, since they would enable the mayor to establish monopolies even of "all arts and sciences in the city which is against the public good and against reason."[139] It was similarly declared in *Norris* v. *Staps* (1617) that "as reason is given to the natural body for the governing of it, so the body corporate must have laws as a politick reason to govern it, but those laws must ever be subject to the general law of the realm as subordinate to it."[140] These disputes over corporate government and the jurisprudence that emerged from them had far-reaching implications. Mary Sarah Bilder, for instance, has explored how repugnancy was used as a means of controlling colonial governments, many of which were incorporated and included repugnancy clauses in their charters.[141]

Far from a period of settled law, the legal debate over corporations, jurisdiction, and government during the decades on either side of *Sutton's Hospital* lay behind significant constitutional developments. When litigants contested corporate powers to imprison or to seize goods during the late Elizabethan period, they increasingly made these claims based on "fundamental rights" enshrined in statutes such as Magna Carta and the writ of *habeas corpus*.[142]

The significance of this history is twofold. First, lawyers explicitly connected corporate government with the public good. The "public purpose" of the corporation arose not because incorporation was a concession of the state, but rather because a corporation was a form of government that reproduced order within society for public benefit. Second, the liveliness of the debates over corporate powers made clear the importance of government to the existence of a corporation aggregate. This was the key issue in *Sutton's Hospital.*

139. Payne v. Haughton, Brit. Lib. Additional 25203, f. 203r.

140. Norris v. Staps, 80 Eng. Rep. 357, 358 (C.P. 1616).

141. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 566 (2006).

142. BAKER, *supra* note 115, at 311–22; *see* SMITH, *supra* note 65; PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 146–52 (2010).

THE FACTUAL BACKGROUND TO THE "INCOMPREHENSIBLE" *CASE OF SUTTON'S HOSPITAL*

Sutton's Hospital was both a high-stakes legal drama in its time, as well as one of the most important discussions of corporate ideas during the period. The donation of Thomas Sutton (1532–1611), among the wealthiest commoners of the early Stuart period, transformed a disreputable money lender into a Protestant hero, "the right Phoenix of Charity in our times."[143] Protestant contemporaries applauded Sutton's donation of the majority of his estate to found an almshouse and school in the London Charterhouse (formerly a Carthusian priory) as a magnanimous example of piety. The gift made "Gods poore Saints . . . the Heyres of all tho[s]e great riches."[144] Professional letter writers reported on the news from London and even minor provincial clergymen took notice.[145]

The beginnings of the story are found in Sutton's climb from obscurity to great wealth. He rose first in the service of the earls of Warwick and Leicester who noticed his abilities as a prudent administrator.[146] Backed by Warwick's favor, he was appointed Master of the Ordnance in the North and then distinguished himself in that position during the suppression of the 1569 Northern Rising.[147] Through service and patronage, he secured leases of ecclesiastical lands, which he diligently improved in keeping with the most advanced estate management practices of the time.[148] It was not in land, however, where he made his vast wealth. Although erroneously remembered as a "great merchant," Sutton was a successful moneylender for which he was the target of contemporary criticism and possibly also the satire of Ben Johnson in his portrayal of the crafty

143. JOHN STOW, THE SURVEY OF LONDON 478 (1633).

144. THOMAS SUTTON, THE CHARTERHOUSE WITH THE LAST WILL AND TESTAMENT OF THOMAS SUTTON ESQUIRE 6 (1614); PERCIVAL BURRELL, SUTTON'S SYNAGOGUE OR, THE ENGLISH CENTURION 3 (1629); *see generally* STEPHEN PORTER, THE LONDON CHARTERHOUSE 10–11, 17–18 (2009).

145. For example, the entry of Thomas Wyatt, rector of the village of Ducklington, Oxford U. Bodleian Libr. MS Top Oxon. c. 378, p. 225; *see generally* JOHN CHAMBERLAIN, THE LETTERS OF JOHN CHAMBERLAIN 1, 323–24 (Norman McClure ed., 1939).

146. Biographical information is drawn from Hugh Trevor-Roper, *Sutton, Thomas (1532–1611)*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, https://doi.org/10.1093/ref:odnb/26806 (last visited Apr 26, 2021); *see also* Neal R. Shipley, *Thomas Sutton: Tudor-Stuart Moneylender*, 50 BUS. HIST. REV. 456–76 (1976).

147. Shipley, *supra* note 146, at 458.

148. Paul Warde, *The Idea of Improvement, c.1520–1700*, *in* CUSTOM, IMPROVEMENT AND THE LANDSCAPE IN EARLY MODERN BRITAIN 127–48, 127–32 (Richard Hoyle ed., 2011); *See* Richard W. Hoyle, *Estate Management, Tenurial Change and Capitalist Farming in Sixteenth-Century England*, *in* IL MERCATO DELLA TERRA, SECC. XIII-XVIII: ATTI DELLA TRENTACINQUESIMA SETTIMANA DI STUDI, 5–9 MAGGIO 2003 353–82 (Simonetta Cavaciocchi ed., 2004).

but greedy figure of Volpone.[149] Sutton was more than the average usurer, however, and while his ledgers have been lost, his surviving papers demonstrate the range of his friendships and associations with powerful individuals in Stuart England. He loaned money to Thomas Cecil, Lord Burghley, the brother of James VI and I's chief minister, and his stepdaughter married the son of Sir John Popham, the future chief justice of the King's Bench, in 1590.[150] His relationships with leading lawyers and judges were important to a man whose business was morally suspect in the culture of the period.[151] They proved especially useful when Sutton decided to erect his hospital and named several leading judges, including Coke, as governors.

Sutton's foundation of the Charterhouse was a long-standing ambition for a man who had no legitimate children.[152] He established a trust and assigned his lands for a hospital in Hallingbury, Essex as early as 1594, naming Popham and Thomas Egerton, the future lord chancellor, as trustees.[153] Yet, Sutton, for unknown reasons, did not commence construction at Hallingbury and waited to establish his project on a firmer legal basis by securing a statute incorporating the hospital there in the February of 1610.[154] The delay gave occasion for friends and associates to warn him of the urgent need to settle his arrangements. Anne Laurence wrote to urge Sutton on to charitable works, "your gray hairs are messengers sent to bid you prepare your body for the grave and your soul for God."[155] Subsequent events proved the wisdom of this advice, because Sutton's untimely death meant that it was possible to challenge the legal foundation of his hospital.

Sutton seems to have been seeking a bolder stroke by placing his hospital closer to London. He found his opportunity through the purchase of the Charterhouse from Thomas Howard, Earl of Suffolk. Suffolk, who likely played a hidden but important role in the subsequent litigation, was one of the most grasping individuals in a period well-known for official

149. Robert Evans, *Thomas Sutton: Ben Jonson's Volpone?*, 68 PHILO. Q. 295, 301–02 (1989); Shipley, *supra* note 146, at 461–62.

150. *Thomas Burghley to Sutton*, London Metro. Archive, ACC/1876/F/03/001 (23 December 1602); Sutton married the heiress, Elizabeth Dudley.

151. For example, see his agent's intervention with Lord Egerton, *John Harrington to Sutton*, London Metro. Archive ACC/1876/F/03/5/2/23 (Sept. 7, 1607).

152. His only son was illegitimate and not mentioned in Sutton's will (he pursued a military career). *See* Trevor-Roper, *supra* note 146.

153. PHILIP BEARCROFT, AN HISTORICAL ACCOUNT OF THOMAS SUTTON ESQ; AND OF HIS FOUNDATION IN CHARTER-HOUSE 13 (1737).

154. *See* HOUSE OF COMMONS OF GREAT BRITAIN, THE STATUTES OF THE REALM 1155 (Dawsons of Pall Mall, vol. 4, pt. 1, 1963) (1819).

155. *Anne Lawrence to Sutton*, London Metro. Archives ACC/1876/F/03/5/3 (June 1610); *see also John Lawe to Sutton*, London Metro. Archives ACC/1876/F3/05/2/27 (Mar. 21, 1610).

corruption.[156] He reached the apogee of his power in 1614 when he was appointed Lord Treasurer, only to fall in 1618 in a sensational trial for abuse of office, bribe-taking, and extortion.[157] Suffolk's extravagance fueled his greed and in 1610 he was constructing Audley End, one of the great Jacobean manor houses.[158] In need of funds and interested in lands adjoining Audley End owned by Sutton, Suffolk offered the sale of the Charterhouse. Seizing his chance, Sutton became an "earnest suit[or]" to the earl and bargained to purchase the Charterhouse for £13,000 on 9 May 1611.[159] Renovations and the eviction of tenants caused further delays.[160]

In order to give the hospital in the Charterhouse a legal foundation, Sutton petitioned for letters patent of incorporation from the king, which passed the great seal on June 22, 1611.[161] The governors named in the letters patent were a parade of seventeenth-century political luminaries, and included the archbishop of Canterbury; the lord chancellor (Egerton); the earl of Salisbury (the kings leading minister); two judges (Coke and Sir Thomas Foster); and the attorney general.[162] Already aged and becoming ill in October, Sutton moved to complete his arrangements, nominating a master on October 30 and, by bargain and sale on November 1, transferred his property to the governors of the hospital for the sum of £5.[163] Although at the time of Sutton's death, on December 12, 1611, he had appointed governors of the hospital and named a master, the hospital did not receive students or residents until October 3, 1614.[164] Through his will, Sutton gave a large number of other charitable bequests, but the residue of his estate, some £50,000 was given to the hospital with £1,000 set aside for the legal defenses that were expected.[165] The money was needed; delay was nearly the hospital's undoing. The shifting of the hospital to the Charterhouse, the wording of the charter, and the founder's death before the hospital was in operation all gave determined heirs openings to attempt to defeat the settlement of Sutton's lands on the charity.

---

156. LINDA LEVY PECK, COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND 156–57 (1990).

157. Andrew Thrush, *The Fall of Thomas Howard, 1st Earl of Suffolk and the Revival of Impeachment in the Parliament of 1621*, 37 PARLIAM. HIST. 200–09 (2018).

158. *Id.* at 202–03.

159. STOW, *supra* note 143, at 479.

160. *To the Worshipful My Very Good Friend*, London Metro. Archives ACC/1876/F/03/5/2.

161. *To the Worshipful Mr. Sutton,* London Metro. Archives ACC/1876/F/03/5/2/50.

162. The other governors were the bishops of London and Rochester; the deans of St. Paul's and Westminster; a master in Chancery; the two executors (John Lawe and Richard Sutton); two gentlemen; and the master of the hospital. Brit. Libr. MS Additional 12496, f. 306r. The governors were also active in defending the hospital, *see The Governor's Letters to the Executors*, London Metro. Archives ACC/1876/L/02/8a.

163. The Case of Sutton's Hospital*,* 10 Coke Rep. 16a–18b, ER 95355.

164. STOW, *supra* note 143, at 481.

165. SUTTON, *supra* note 144.

LITIGATION IN *SUTTON'S HOSPITAL*

Although litigation continued into the 1620s over the estate, it was Sutton's closest heir-at-law, Simon Baxter, who risked his legacy of £300 by challenging the validity of the incorporation and the endowment of the hospital. Though sometimes described as a "cousin," a word with a looser meaning at the time, Baxter was Sutton's nephew by his sister.[166] Baxter's audacious challenge to the charity, which had £1000 to defend itself and some of the most powerful and legally adept people in England as governors, is puzzling. He was unlettered and the legal expense of contesting Sutton's will was tremendous.[167]

The riskiness and expense of the lawsuit may explain why Baxter's initial legal strategy was to take the Charterhouse into his possession quickly and seek a summary decision. Baxter retained two leading barristers (and future judges), Humphrey Davenport and Henry Yelverton, to begin litigation in the Court of Wards. The early modern English legal system was highly pluralist with many overlapping jurisdictions, each potentially competing with the others for litigants. The choice of venue was, therefore, revealing. Wards heard cases that touched on the king's revenue as lord paramount and protected his feudal rights over tenancies-in-chief.[168] These incidents included wardship and livery of seisin. Upon the death of a tenant-in-chief, an inquisition post-mortem occurred to discover whether the king had any rights to wardship or entry fines. Baxter, who was not underaged, sought to take advantage of proceedings in Wards to strengthen his right to Sutton's estate. Baxter likely claimed that the governors were obstructing him from possession, and he was consequently unable to take livery and seisin, and pay the entry fine. Given James VI and I's well-known need for money and later direct appeals to him by Baxter's advocates, the offering of the fine may have been intended to attract the interest and even intervention of the king in thwarting Sutton's settlement.

By January of 1612, the court was ordering all documentary evidence brought in for consideration.[169] Near the end of February, Baxter and a large group went to the Charterhouse to seize possession. Richard Birde, the porter, barred the gates and prevented their entry. Baxter and his men then threatened Birde that "unless he would deliver the keyes of the said

166. *A Copy of the Verdict*, London Metro. Archives ACC/1876/L/02/42/7.

167. He signed with a mark, *see Symon Baxters Petition*, London Metro. Archives ACC/1876/L/02/60; and was described as a tanner, *see Secretaries of State: State Papers Domestic, James I,* Nat'l Archives vol. 68, no. 18.

168. 6 BAKER, *supra* note 80, at 229–31; H. E. BELL, AN INTRODUCTION TO THE HISTORY AND RECORDS OF THE COURT OF WARDS & LIVERIES 75–80, 103–08 (1953).

169. *William Atkinson to Butler,* London Metro. Archives ACC/1876/L/02/01.

house . . . he should stay no longer there but be cast into the Fleete."[170] The porter refused, and a smith was summoned to break the locks of the gates. Yet by the time Baxter and his accomplices entered, Birde had already barricaded the lodge and rooms in the main house. For the next year, the Charterhouse was divided between the two hostile camps and began to fall into "great decay" as Baxter and his men allegedly carried away fountains, cisterns, and even five apricot trees.[171] Around the same time, Baxter's solicitor Israel Fryer entered into various manors and lands given to the hospital.[172]

Baxter petitioned the king and the Privy Council for a summary hearing while the governors of the hospital sought to refer the dispute to the common law.[173] The king was not, however, willing to intervene directly, and the Privy Council directed the parties to arbitration to avoid "the longe circuite of lawe." The Council appointed the Chief Justice of the King's Bench, Thomas Fleming, Chief Baron Lawrence Tanfield, and Henry Hobart and Francis Bacon, the attorneys and solicitors general, to hear the matter.[174] The choice of Hobart and Bacon involved protagonists for each side among the arbitrators: Hobart was a governor of the hospital and Bacon would later be counsel to Baxter. After many delays caused by the inability or unwillingness of Baxter's counsel to attend, the arbitrators heard arguments in May 1612, but refused to provide a determination in June because they believed the issue should ultimately be resolved at law.[175] Around this time, Bacon wrote to James I attempting to persuade him to intervene in the case and remodel the charity, calling it a " rude mass and chaos of a good deed."[176] Turning the virtue of Sutton's immense gift of property into a vice, Bacon likened it to the donations given by Catholic benefactors, presumably to monasteries, that began in "ostentation… to end in corruption and abuse."[177] Instead, Bacon suggested the donation be redirected to colleges and to improve church livings.[178]

---

170. *Witnesses of the Hospital,* London Metro. Archives ACC/1876/L/02/58. The Fleet River is near to the Charterhouse.

171. *A Copy of the Last Order in Chancery,* London Metro. Archives ACC/1876/L/02/47; *A Copy of the Petition ex Hospital to the King*, London Metro. Archives ACC/1876/L/02/7; *A Breviate for the possession of the Charterhouse*, London Metro. Archives ACC/1876/L/02/46B.

172. *Baxter*, London Metro. Archives ACC/1876/L/02/9.

173. *A Copy of the Petition ex Hospital to the King*, London Metro. Archives ACC/1876/L/02/7.

174. *Baxter*, *supra* note 173.

175. *The Right Honourable our verye good lords,* London Metro. Archives ACC/1876/L/02/13A; the Privy Council's direction on 16 June 1612, London Metro. Archives ACC/1876/L/02/13B.

176. 4 FRANCIS BACON, LETTERS AND LIFE 250 (James Spedding ed., 1868).

177. *Id.*

178. *Id.* at 254.

Bacon's approach to the king suggests that those who sought to unpick the donation were keen to avoid scrutiny at law.

It also seems likely that Baxter was backed by other interests, which explains his willingness to hazard such a difficult legal challenge. Baxter himself, after the defeat of his case, wrote to the governors to explain that he was "seduced by wicked councell and being an unlearned man was contented (to his now great grief) to yield his consent..."[179] Baxter partly blamed the lawyers who convinced him of the possibility of prevailing at law though he had, of course, done a great deal more in the proceedings than offering his name. The lawyers now wanted their money and Baxter noted that he spent a "great part of his estate and is likely to pay great sums of money for [sic] his Seducers in a manner to his undoing."[180] Yet the records of the hospital also suggest there were other players involved who perhaps gave Baxter the confidence to attack a well-defended settlement. Israel Fryer is laconically described in these manuscripts as "my Lord Chamberlyns man."[181] Suffolk was the lord chamberlain at the time and, having sold the Charterhouse to him, was well-aware of Sutton's activities.

With the case referred to the common law courts, litigation commenced in the court of Chancery in the fall of 1612.[182] The hospital could not defend itself without the evidence detained in the court of Wards.[183] A request to the Privy Council was needed to recover the documentation, which Baxter claimed belonged to him as title to the Charterhouse.[184] The governors also sought an injunction for payment from tenants who, with a little convincing from Baxter, were refusing to pay rents and wasting the lands.[185] The division among the crown's law officers was now open, with Bacon serving as counsel for Baxter and Hobart for the hospital. The Chancery ordered the case to be tried at the common law by trespass and once a verdict was found, the case was referred to the Exchequer Chamber before all the judges of England. Importantly, the Chancery, where Egerton was judge, placed its thumb on the scales in favor of the hospital, enjoining that if judgement passed for the governors in the Exchequer

179. *Simon Baxter's Petition*, London Metro. Archives ACC/1876/L/02/60.

180. *Id.*

181. *A Copy of the Petition to the Lord Grace of Canterbury,* London Metro. Archives ACC/1876/L/02/8; *see also State Papers Domestic*, *supra* note 167 ("wants not abettors.").

182. *A Copy of the Late Order in Chancery*, London Metro. Archives ACC/1876/L/02/47.

183. *A Breviate for a Motion in the Court of Wards,* London Metro. Archives ACC/1876/L/02/16.

184. *A Petition of the Hospital*, London Metro. Archives ACC/1876/L/02/06; London Metro. Archives ACC/1876/L/02/18, 19.

185. *To Our Loving Friend*, London Metro. Archives ACC/1876/L/02/17; *Mr Sutton's Hospital in Chancery*, London Metro. Archives ACC/1876/L/02/59; *see also Poynts to Be Advised,* London Metro. Archives ACC/1876/L/02/18.

Chamber the matter was settled, but if for Baxter, then "the equitye of the cause was still retayned in this Court."[186]

The common law case was brought on an action of trespass in the King's Bench in November 1612 by Baxter against the two executors of Sutton's will, Richard Sutton and John Lawe.[187] Once the jury delivered its verdict of fact, the case was adjourned for special judgment into the Exchequer Chamber where it was heard by all the common law judges of England over four days in May 1613. Both sides retained highly skilled counsel, with John Walter and Henry Yelverton joining Bacon to argue for Baxter.

ARGUMENTS IN *THE CASE OF SUTTON'S HOSPITAL*

Only Coke printed his report of the case and his hostility to the plaintiff's argument is evident from the text. Baxter's suit was an assault on an "honourable work of charity," his arguments, according to Coke, were "hatched out of mere conceit and new invention" and "not worthy to be moved at the Bar, nor remembered at the Bench."[188] In keeping with this assessment, Coke provided only the briefest description of their content in his report.[189] Nor did he report on the opinions of the individual judges in the case, two of whom sided with the plaintiffs. Coke's partisanship is evident in other ways: he was advising the governors during the early equity court proceedings and had been a debtor to Sutton.[190]

The manuscript reports of the case balance Coke's account. The notes of the counsel and their early discussion of the case make clear that the major question was whether the governors were incorporated as a body politic on the death of Sutton or "[w]hether there was an hospital fownded at or in the Charterhowse by the said Letters Patent,… without anie further Acte to be donne by Thomas Sutton afterwards . . . ."[191] The defendant's position was that the King had nominated and appointed governors, "and made them a bodye politique and gave them license and capacity to take of the said Thomas Sutton."[192] The opinion that the governors solicited in 1612 from leading lawyers, including Robert Houghton, Richard Hutton, and Francis Moore, likewise concluded "that those sixteene governors for the time being shalbe incorporated and have a perpetuall succession forever in deede, fact and name and shalbe one bodie corporate and

186. *Mr Sutton's Hospital in Chancery*, *supra* note 185.

187. Mich. 10 Jac. Rot 574; for dating of the Exchequer Chamber, *see* Brit. Libr. Hargrave 15, f. 50r.

188. The Case of Sutton's Hospital, 10 Coke Rep. 24a, 29a, ER 962, 968.

189. The Case of Sutton's Hospital, 10 Coke Rep. 23b24b ER 96162.

190. *A Note of Diverse Statutes,* London Metro. Archives ACC/1876/F3/05/11.

191. *Objections Against the Hospital*, London Metro. Archives ACC/1876/L/02/10c.

192. *A Copy of the Petition ex Hospital to the King,* London Metro. Archives ACC/1876/L/02/7.

politique."[193] Though Sutton had not actually erected a physical hospital, he nominated a master and thus the foundation was valid.[194] Similarly, the author of the incomplete manuscript report of the case came away believing that the question largely turned on whether the Charterhouse was merely a hospital in intention and therefore insufficient, or whether the incorporation had some real existence despite there being no actual hospital "but I did not continue to the end etc."[195] This was the crux of the case. Were Sutton and the King's acts sufficient to incorporate a body politic?

The fuller manuscript reports detailed the three major arguments that Baxter's counsel made, to prove that the governors were not a corporation at the time of Sutton's death. First, they claimed that the legal foundation of the Charterhouse was somehow deficient. The Act of Parliament had established a hospital at Hallingbury and the lands had been granted to that incorporation; therefore, the King could not grant Sutton's lands to the Charterhouse and the letters patent were of no force. Moreover, the letters patent had established the hospital in the present, but Sutton did not nominate a master until October 30th. The description in the letters patent of the location of the corporation was also too vague and therefore there was no place certain. In fact, until Sutton had built his hospital, "there is not any certainty of the place, and by consequence no corporation."[196]

Second, Baxter argued that Sutton had not founded an "actual" or "mechanical" hospital prior to his death. Even if the letters patent were valid, Sutton did not perform the terms of the license granted by the charter, which had referred to a present incorporation. In fact, the present incorporation suggested that Sutton should have founded a hospital and nominated a master prior to the patent. Even by his death the corporation was incomplete: Baxter's counsel argued that there could be no governors or a master without an actual hospital with poor in it. At best, this was only a theoretical or "mathematical" hospital, and therefore did not fulfill the license by the time of Sutton's death. This was the most debated point. Third, the bargain and sale of the lands to the governors was also void. Since no hospital had been founded, the sale was ineffective. The consideration of five pounds had been paid for by private persons, but not in any politic capacity.

Bacon and Walter argued that a corporation needed to have a distinct reality and could not simply be a fiction of law. As Walter explained: "there was no hospital, because it was not well incorporated . . . [only] one

193. *Copy of the Case Touching the Hospitall,* London Metro. Archives ACC/1876/L/02/20B.

194. *Id.*

195. Brit. Libr. Additional MS 25213, f. 149r. All law French translations are my own unless otherwise indicated.

196. Harv. L. Sch. MS 114, ff. 90v-91v.

intended in reputation or expectancy . . . ."[197] Baxter's other lawyers rehearsed a similar line of reasoning: there was no valid incorporation because no working hospital was established when the letters patent were granted or at the time of Sutton's death. The Charterhouse, as Bacon pointed out, was "not an actual hospital, but a hospital solely in intention (for it remained in the will and pleasure of Sutton to make it or not . . . ."[198] If the body of the corporation had not been made prior to the act, then Sutton only had a license to found the hospital. But he had failed to fulfill those conditions that would have perfected the corporation prior to his death.

Walter explained that there were three conditions that were necessary for a corporation to come into existence: persons living who make up the body politic; the designation of a place certain; and a corporation house (e.g., a working hospital).[199] To prove that there was no body politic, Bacon, Walter, and Yelverton aimed at the governors. They began by acknowledging that the authority to grant incorporation was the King's and could be granted for either "purchase" or for "government."[200] The King, however, could not simply do as he pleased in the making of corporations. The King could not incorporate a town or a group that did not exist.[201] Such acts would be unreasonable and, therefore, void. Moreover, there were several things the King could not have done by the patent and that instead Sutton had needed to accomplish to perfect the corporation. For example, the King had no power to include Sutton's lands within the incorporation, since by doing so, he would have injured the possession of his subject. Sutton had to convey the lands and property himself. Yet to convey the lands, there needed to be body politic capable of receiving these lands. Baxter's counsel argued that no such body politic existed at the time of Sutton's death, since the King could not make a corporation for government without a head and body, or a place certain.[202]

The authority for Baxter's lawyers was the statement by Fyneux in *Hecker's Case* (1522) that "[a] corporation is a combination of head and body, and not only a head or only a body. And it must be consonant with

197. Brit Libr. Additional MS 25213, f. 149v; Harv. L. Sch. MS 114, f. 90v.

198. Harv. L. Sch. MS 114, f. 107r.

199. Cambridge U. Libr. MS Hh.ii.2, f. 102r; Harv. L. Sch. MS 114, f. 91v.

200. Cambridge U. Libr. MS Hh.ii.2, f. 104r; Harv. L. Sch. MS 114, f. 90v, *relying on King's College Cambridge* v. *Hekker* (1522), *in* J.H. BAKER, YEAR BOOKS OF HENRY VIII, 12-14 HENRY VIII (1520-1523), 98-102 (Baker ed., London, 2002); *Hecker's Case,* Y.B. Pasch. 13 Hen. VIII, pl. 2; Mich. 14 Henry VIII, pl. 2; HENRY FINCH, LAW, OR A DISCOURSE THEREOF (London, 1627), STC 10871, 91.

201. Cambridge U. Libr. MS Hh.ii.2, f. 102r.

202. Cambridge U. Libr. MS Hh.ii.2, f. 102r-v (Walter); Harv. L. Sch. MS 114, 107r (Bacon).

reason or else it does not avail."[203] Thus, Walter explained that "Fineux defined a corporation that is aggregate as a body [and head], therefore this is a thing requisite to found the hospital . . . ."[204] The Charterhouse had no head in law for several reasons: the corporation was made without the nomination of a master; and, even though one was later nominated, the governors had no body to rule over since there was no body of residents at the Charterhouse. How could there be a head without a body? The King could not make a corporation for government without a head as this would not be consonant with reason.[205] A head needed something to rule over for "governors and the thing to be governed were relative" and without "living persons" to compose the body, the governors governed only "imaginary things."[206] If there was no head, there was no corporate capacity, and if there was no corporate capacity, no land could be transferred under the license of the patent; therefore, no place certain.

Baxter's lawyers were not reaching at straws; Fyneux's dictum appeared in law treatises and dictionaries. As Bacon explained, corporations were called bodies politic and "framed by the policy of the law, but to frame a body politic where it is not of any use is of little policy . . . ."[207] From the King, Bacon noted, came all government and all corporations, but the King could not make a corporation with governors who governed no one. A governor was only a governor if they had people to govern over, such as dean and chapter or mayor and communality.[208] As Bacon noted, "governors and the thing governed" were akin to relatives like father and child.[209]

JUDICIAL REASONING IN *THE CASE OF SUTTON'S HOSPITAL*

Coke's report largely describes the successful defense, which argued, *inter alia*, that an incorporation needed to precede the licenses because, in order to accomplish the foundation of the hospital, a capacity was needed that allowed for succession. These arguments assumed a more practical rather than theoretical cast, as Coke wrote, somewhat commonsensically, there needed to be a corporate capacity in order for many early functions

203. Cambridge U. Libr. MS Hh.ii.2, ff. 102r-v; Harv. L. Sch. MS 114, f. 107v. For authority, Baxter's counsel cited Y.B. 22 Edw. 4, *The Corporation of 9 Angels,* and John Fyneux; *see* YEAR BOOKS OF HENRY VIII, *supra* note 200, at 101.

204. Brit. Libr. Additional MS 25213, f. 149r; Cambridge U. Libr. MS Hh.ii.2, f. 102r-v.

205. Cambridge U. Libr. MS Hh.ii.2, f. 102r, relying on a statement by William de Thorpe, Chief Justice of the King's Bench in 1348.

206. Cambridge U. Libr. MS Hh.ii.2, f. 102r-v.

207. Harv. L. Sch. MS 114, f. 107v.

208. Cambridge U. Libr. MS Hh.ii.2, f. 102v.

209. Harv. L. Sch. MS 114, f. 107r.

to be performed.[210] The incorporation, as the defense argued, was preparatory to the subsequent government as Thomas Coventry explained, "and if this hospital should be a hospital in reputation this is sufficient."[211]

This claim that a corporation in reputation or expectancy was sufficient to provide a politic capacity relied on an interpretation of another line of cases that was ultimately rooted in the idea of a *persona ficta*. Coke explicitly rejected the interpretation of Fyneux and Prisot. He wrote that their claim, that a corporation aggregate of many cannot be a body without a head, was "utterly denied" and observed that most of the earliest corporations were "bodies without any head."[212] He argued instead that even if an incorporation by letters patent created a corporation "in abstracto, but not concreto, [un]til[] the naming of the master" that was sufficient to take land.[213]

Even Coke, however, did not deny the importance of real people to incorporation. He noted that in the present case there was already a "lawful corporation of the governors . . . ."[214] He also explained that "the essence of the incorporation, are persons to be incorporated."[215] These comments echoed those of the hospital's counsel. Coventry had also observed that, "It is not the place that makes them a corporation, but the persons," and he and the hospital's other lawyers all argued for the legitimacy of the corporation's governors as an incorporated body politic.[216] To counter the claim that the corporation could not have governors without governed, and therefore could not take the lands, the defendant's counsel explained that the King might appoint the general of an army without an army. You could still have a head even while the body was in expectancy. If you had a head, you had a body politic, and you could receive lands and perform other corporate functions.

The judges might simply have accepted that the corporation existed as a fiction even though the hospital and its body politic were still incomplete; however, they did not. They remained committed to the reality of the body politic without which the corporation could not be said to have come into existence. The majority of judges recognized that the hospital was only in expectancy, but Sutton had nonetheless, before his death, composed the corporation of real people who had been nominated as the head of the corporation.

---

210. The Case of Sutton's Hospital, 10 Coke Rep. 26a–26b, ER 964-65.
211. Harv. L. Sch. MS 114, f. 92r.
212. The Case of Sutton's Hospital, 10 Coke Rep. 30b, ER 970.
213. The Case of Sutton's Hospital, 10 Coke Rep. 31a, ER 971.
214. The Case of Sutton's Hospital, 10 Coke Rep. 32b ER 973.
215. The Case of Sutton's Hospital, 10 Coke Rep. 29b ER 968.
216. Harv. L. Sch. MS 114 f. 92r.

Sir John Croke and George Snigg were the only judges who dissented from the judgment in favor of the Charterhouse. Their reasoning was largely technical. Croke believed that the statute had priority and had established a hospital at Hallingbury thus, there was nothing further to give to the Charterhouse. Moreover, he accepted the argument that the patent was defective, because while sixteen governors were described by the patent, only fifteen were named.[217] Snigg's recorded comments are short, but he explained that Sutton had not performed the license and had failed to appoint a schoolmaster, suggesting the need for a real existence of the corporation.[218]

The majority reasoned the corporation aggregate was a body politic that was in partial existence at the time of Sutton's death and found in favor of the Hospital.[219] They followed the line set out by Baxter's lawyers, but rejected the more extreme interpretation of the head and body argument. Specifically, the majority acknowledged that the King was, in John Dodderidge's words, the "maker of all corporations."[220] Sutton had merely pursued the license of the King and he had done so sufficiently to make the Charterhouse a corporation valid under law. There was, Dodderidge noted, no place certain and only a foundation by implication, but none of this was essential to an "embryonic" corporation. The King had incorporated the governors and their successors wanting nothing but the donation. Although only fifteen were named, this too was sufficient. Though there was a head without a body at the time of Sutton's death, their nomination was enough. A general of an army might have power granted to them over a body of soldiers, without the host having been summoned.[221]

Similarly, Edward Bromley observed that a corporation with governors, but without an immediate government, was still valid. The governors of the Charterhouse were in expectation of government, and they "are the corporation, they are persons who have the ordering of the government and have office."[222] Robert Houghton concurred, observing that once the governors and master were nominated, then this was a body capable in law.[223] Governors should, in fact, be created prior to that which they should have authority over. The place certain and the hospital house were not of the essence of a corporation though they were elements that were

217. Cambridge U. Libr. MS Hh.ii.2, f. 109r.

218. Cambridge U. Libr. MS Hh.ii.2, f. 110v.

219. Coke's reasoning is not described in detail, but one manuscript report indicates that he spoke "to the same intent" as the majority. Cambridge U. Libr. MS Hh.ii.2, f. 112r.

220. Cambridge U. Libr. MS Hh.ii.2, f. 108r.

221. Cambridge U. Libr. MS Hh.ii.2, f. 109r.

222. Cambridge U. Libr. MS Hh.ii.2, f. 109r.

223. Cambridge U. Libr. MS Hh.ii.2, f. 107v, and Harv. L. Sch. MS 114, f. 111r.

ultimately necessary. Augustine Nicholls agreed and noted that this was a corporation with the nomination of the master: in consideration of its future government this was a good corporation in the present.[224] James Altham and Laurence Tanfield adopted the same line of reasoning.[225] Altham clearly asserted that the masters made up the corporation and cited prior cases where there were no lands attached to the corporation, but there were nonetheless governors.[226] Tanfield argued that although there was a need for a place certain, the naming of the governors and the master was the founding. Only one manuscript report mentions Coke's comments from the bench, and it is brief, noting that he spoke to the same "intent" as the others.

The reasoning of the majority of the judges suggests that they believed that government was essential to the existence of the corporation. Baxter's counsel had claimed that Sutton's incorporation was incomplete at his death because it lacked government. These lawyers and judges shared the same taken-for-granted belief about the purpose of corporations in their society that had been debated in numerous cases prior to *Sutton's Hospital.* What is less evident is the extent to which religious ideas ultimately legitimated these assumptions and wrapped even early business corporations within an "economic theology."[227]

THE ECONOMIC THEOLOGY OF CORPORATE GOVERNMENT

Nicholas Fuller's invocation of the Bible in the *Case of Monopolies* mentioned above was a reminder that contemporaries framed even economic activities within their wider religious values.[228] When the judges and lawyers referred to corporate government, and keeping trades and people in order, they were repeating cultural truisms articulated in sermons before them at assizes, in popular advice books, and in religious and political disputation. Corporate government was, in fact, naturalized within a nested, taken-for-granted scheme, of providential organization that was thought necessary to social order. Persons across the political spectrum—whether defenders of the royal supremacy or their Catholic critics—

224. Cambridge U. Libr. MS Hh.ii.2, f. 107v-108r.

225. Cambridge U. Libr. MS Hh.ii.2, f. 107v-108r; 111r-v.

226. Cambridge U. Libr. MS Hh.ii.2, f. 110r.

227. Economic theology is an emerging area of study that explores "the role that theology played in shaping economic concepts and the social presence of the sacred in economic life." Stefan Schwarzkopf, *Introduction*, *in* THE ROUTLEDGE HANDBOOK OF ECONOMIC THEOLOGY 1 (Stefan Schwarzkopf ed., 2020).

228. *See Ecclesiastes* 3:13 (King James); Darcy v. Allen, Noy 179, 74 ER 1131, 1137 (1602).

lawyers or non-professionals; and both clerics and lay people, believed in the theological warrant of social order created by forms of government.[229]

Historians have long noticed the period's concern with social order and the religious foundations of this preoccupation. W.H. Greenleaf provided the classic examination when he investigated early modern England's "world-view of order which was fundamentally based on a Christian-inspired metaphysic."[230] This "world-view" assumed fundamental correspondences between the divine, natural, and human worlds. According to Greenleaf, the commitment to this social order and its religious foundations were used to buttress "absolute monarchy"[231] and fell into decay with the growth of skepticism and the empiricism of writers like Francis Bacon (the lawyer and natural philosopher).

This worldview underscored the necessity of active government in the reproduction of social order. As church theologians, such as St. Augustine had taught, government was necessary to produce social order because of the inherent sinfulness of humans.[232] Order would not simply occur through self-regulation by individuals or their natural harmony. God had therefore implanted a desire for government among people. Humans and animals, even the natural world, instinctively sought after it.[233] Hence the prominent clergyman Robert Bolton could preach to the judges at assize that "Government is a goodly thing," and was natural to humans.[234] Government produced order and order was deemed essential both to the natural world and to human society – it was "the greate[s]t happine[ss][] of life."[235] In a sermon preached before James I, John Buckeridge, later bishop of Ely, explained that, "Order is the good of e[v]ery creature"[236] from which flowed the benefits of "Peace, Protection, [J]u[s]tice, Religion and the like, which man receives by go[v]ernment . . . ."[237]

---

229. *See* JOHANN P. SOMMERVILLE, ROYALISTS AND PATRIOTS: POLITICS AND IDEOLOGY IN ENGLAND 1603–1640, at 18–23 (1999).

230. W.H. GREENLEAF, ORDER, EMPIRICISM AND POLITICS: TWO TRADITIONS OF ENGLISH POLITICAL THOUGHT 1500-1700, at 8 (1964); Keith Wrightson, *Two Concepts of Order: Justices, Constables and Jurymen in Seventeenth-Century England*, *in* AN UNGOVERNABLE PEOPLE? THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 21–46 (John Brewer & John Styles eds., 1980).

231. GREENLEAF, *supra* note 230, at 56.

232. *See* ANTHONY MICHAEL C. WATERMAN, POLITICAL ECONOMY AND CHRISTIAN THEOLOGY SINCE THE ENLIGHTENMENT: ESSAYS IN INTELLECTUAL HISTORY 124 (2008).

233. *See* WILLIAM SCLATER, A SERMON PREACHED AT THE LAST GENERALL ASISE HOLDEN FOR THE COUNTY OF SOMMERSET AT TAUNTON 3 (1616).

234. ROBERT BOLTON, TWO SERMONS PREACHED AT NORTHAMPTON AT TWO SEVERALL ASSISES 6 (1635).

235. JOHN BUCKERIDGE, A SERMON PREACHED AT HAMPTON COURT BEFORE THE KINGS MAIESTIE 19 (1606).

236. *Id.* at 2.

237. *Id.* at 3.

Human government and the order it produced mirrored the deeper providential ordering that God had inserted into the universe for, as Buckeridge put it, "the Lord calls him[s]elf[], The God of Order, not of confu[s]ion."[238] Belief in the working of providence was normative in early modern England and encompassed God's government of the cosmos.[239] This belief included the deity's implanting of regularity in the workings of nature (general providence) and their intervention in secular time to manage that creation (special providence).[240] Thus, order resulted both from God's "secret disposition" and secondary causes, and by "expre[ss][] warrant of his ordinance."[241]

Providence was a sense-making lens, explaining both the fundamental order of the universe as well as specific, otherwise bewildering events. The motions of natural bodies, such as the sun, the moon, and the seas, obeyed ordered courses determined by providence.[242] Human government too was a product of providential foresight as an instrument to restrain human sinfulness and part of the chain of government that (ideally) instilled order and harmony in the universe.[243] Lawyers and judges held these same assumptions about the working and immanence of providence. When Coke fell from his horse in 1632, he gave thanks in his notebook to "the providence of almighty God though I was in the greatest danger yet I had not the least hurt . . . ."[244] Although histories of the period's law are typically written from a secular context, the judges were themselves deeply religious people who applied taken-for-granted assumptions from their culture's religious context.[245]

Government depended on hierarchy, and the principle of obedience and subjection was found among social creatures and the natural world. There was always a head that ruled and a body that obeyed, language that was familiar to the judges in *Sutton's Hospital*. The point was

238. *Id.* at 2.

239. *See* ALEXANDRA WALSHAM, PROVIDENCE IN EARLY MODERN ENGLAND 2 (1999).

240. *Id.* at 9–11.

241. SCLATER, *supra* note 233, at 2.

242. WILLIAM DICKINSON, THE KINGS RIGHT BRIEFELY SET DOWNE IN A SERMON PREACHED BEFORE THE REUEREND JUDGES AT THE ASSIZES HELD IN READING FOR THE COUNTY OF BERKS B2r (1619).

243. *See* THOMAS JACKSON, THE WORKS OF THOMAS JACKSON 311 (1844).

244. Brit. Libr. Harley MS 6687A, f. 16r; *See also* Dodderidge's comments on predestination in *Bricklayers and Plasterers of London*, 2 Rolle Rep. 391-2. Many judges and common lawyers had strong religious commitments and worked to reconcile the divine with human law, *see* Richard J. Ross, *Distinguishing Eternal from Transient Law: Natural Law and the Judicial Law of Moses*, No. 217 PAST & PRESENT 79–115 (Nov. 2012).

245. See, for example, the essays in GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY (Mark Hill & R. H. Helmholz eds., 2017).

conventionally noted that even in heaven there was hierarchy among the angels.[246] The stars also gave witness to the principles of hierarchy and obedience that were necessary to order for, "there are greater and le[ss]er lights, rulers among[s]t the re[s]t . . . ."[247] This was held even down to the structure of the human body, "So ha[d] God tempered him in his fabric[] and con[s]titution, that we [s]hall [s]ee in e[v]ery part of his nature [s]omething that rules, [s]omething made to be ruled."[248] What was true in heaven was also true in human society. Human societies did not simply self-regulate, but were prone to dissension and violence without the controlling hand of government: "men assembled cannot go[v]ern[] them sel[v]es, [u]nlesse some comma[n]d, some obey, some direct, some be directed: it follow[s], that this societ[y] ha[s] power to go[v]ern[] itself, and that this power is also of God."[249] Without government chaos and confusion would erupt. If the sun and moon were to wander from their courses, "the times and [s]ea[s]ons of the year[] would blend themselves, by dis-ordered and confu[s]ed mixture."[250] Government restrained the "unbridled corruption" [251] of humans who were "so prone to blo[o]d and violence . . . " that left to their own desires "there will soone be an end of all civill society."[252]

These world-views, which served to naturalize government within a religious frame, underwrote the corporate ideas of the period. Corporate government produced order in the particular situations of local societies, markets, companies, and trades. Corporations were one mechanism to facilitate and order the social instinct of humans.[253] This instinct came from both the sense of pleasure from being in the company of others and the human need to co-operate to provide for economic needs or "profit and commodit[y]." [254] Humans were dependent on the help of others for their survival and economic benefit.[255] Indeed, providence had divided the resources of the world in such a way as to encourage human commerce,

246. BUCKERIDGE, *supra* note 235, at 19; CALUBYTE DOWNING, A DISCOURCE OF THE STATE ECCLESIASTICALL OF THIS KINGDOME68 (1634); MATTHEW KELLISON, THE RIGHT AND JURISDICTION OF THE PRELATE, AND THE PRINCE 40 (1621).

247. SCLATER, *supra* note 233, at 3.

248. *Id.*

249. KELLISON, *supra* note 246, at 42.

250. BOLTON, *supra* note234, at 10.

251. *See* SCLATER, *supra* note 233, at 3.

252. DICKINSON, *supra* note 242, at sig. D3r; BOLTON, *supra* note 234, at 10; EDWARD BOUGHEN, A SERMON CONCERNING DECENCIE AND ORDER IN THE CHURCH PREACHED AT WOOD-CHURCH 15 (1638).

253. *See* KELLISON, *supra* note 246, at 39–42.

254. *Id.* at 41.

255. JACKSON, *supra* note 243, at 310.

interchange and peace.[256] Government was important not only because it produced a type of order, but by restraining human's corrupt nature, this order was productive. Thus, as Bolton explained, government "give[s] opportunity by GODs blessing, for the free exerci[s]e, and full improvement of all human[] abilities … Trades, traffi[c]k[], law[]s, … all Arts and excellencies thrive and flouri[s]h with much happine[ss]e and succe[ss]e, under the wings and warmth of a godly government."[257]

Similar statements, as we have seen, were made in the legal argument of the period and endured well into the eighteenth century. As one treatise on law and economic matters noted in 1712 noted: "The same Reason which appoints general Laws to govern Kingdoms ought to allow particular Laws for governing particular Societies, it being admitted that Discipline is requisite in both."[258] Blackstone likewise linked the origins of the corporation with government and order, recounting how Numa Pompilius had first created them in ancient Rome to calm civil strife.[259] As they had in Numa's time, Blackstone explained that corporations "may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic . . . ."[260] Corporations were, he claimed, "political constitutions" for government. The conceptualization of the corporation in *Sutton's Hospital* and the implications of corporate government contended over by litigants during the same period, had a long life.

RESEARCH AGENDA: TOWARDS CORPORATE FISSION

This paper's analysis of *Sutton* has demonstrated the need to rethink how corporate history is written to avoid anachronism and teleology, and to widen the sources that historians and legal scholars rely upon to reconstruct earlier jurisprudence authentically. Early modern lawyers brought religious and cultural values and ideas to their thinking about corporations that are largely alien to modern analysis. Corporations were forms of government from which their social responsibility arose. A theological worldview authorized this belief with taken-for-granted currency among early modern English lawyers. Can this reconstruction help to think about corporate history differently? It certainly poses a problem: if early modern corporations were conceived as forms of government contributing order in

256. ISTVAN HONT, JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE 47–51 (2010); JACOB VINER, THE ROLE OF PROVIDENCE IN THE SOCIAL ORDER: AN ESSAY IN INTELLECTUAL HISTORY 32–54 (1977).

257. BOLTON, *supra* note 234 at 10–11.

258. LAWS CONCERNING TRADE, AND TRADESMEN 2 (1712), *citing* Davenant v. Hurdis, Moore 586 (K.B. 1599).

259. BLACKSTONE, *supra* note 68, at 304. The source was PLUTARCH, PLUTARCH'S LIVES 245 (John Dryden trans., 1700).

260. BLACKSTONE, *supra* note 68, at 303.

society, how did the business corporation become primarily a vehicle for private interest?

The usual answer is that liberalization freed the corporate form from an outdated framework of government control.[261] Yet many corporations have remained governmental, such as municipal corporations, and others continue to have public interest functions. From the perspective of a period when the principal division among corporate types was temporal and lay, the key change that lay in the future was the division into for-profit and non-profit corporates during the nineteenth century.

The history of this process is yet to be written. Behind this fission of corporate types into for-profit and non-profit were certainly practical pressures for changes in business organization. Intellectual shifts, however, were also important preconditions. They reveal the connection between corporate law and cultural values. The usefulness of understanding early modern corporate ideas could extend to recognizing this transformation of corporate thought. In other words, what would the separation of for-profit and non-profit corporates look like if we described the process using the historical perspective of government rather than focusing on the emergence of the modern business corporation?

Since government was thought to be necessary and pervasive throughout society during the early modern period, contemporaries were also sensitive to different governmentalities. Political and economic government were the two forms of government: the former being the domain of public affairs and the latter of private households. The word "economic" during the period was primarily understood in this sense as the management of a household and the relationships there.[262] Early modern writers found the distinction between political and economic government in Aristotle.[263] Economic government was "exercised within the limits of a family" while "political[] over a great societ[y] . . ." and was distinguished by the nature of its rules.[264] Economic government produced order, but within

---

261. *See* WILLIAM SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 438 (1910); *see also* WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 8, 221–22 (Vol 1. 1922); *see also* H. A. Shannon, *The Coming of General Limited Liability*, 2 ECON. HIST. 267, 267–68 (1931); *see also* BISHOP CARLETON HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, 1800–1867 6–9, 116–17 (1936); *see also* Butler, *supra* note 4 at 169–70, 172–73; *see also* HARRIS, *supra* note 2, at 9.

262. The term "political economy" likely appeared between 1611–1615, *see* Richard Drayton, *Foreword*, *in* THE POLITICAL ECONOMY OF EMPIRE IN THE EARLY MODERN WORLD vii (S. Reinert & P. Røge eds., 2013); *see also* A. M. C. Waterman, *The Changing Theological Context of Economic Analysis Since the Eighteenth Century*, 40 HIST. POLIT. ECON. 123 (2008).

263. Xenophon's *Oeconomicus* was rarely mentioned though it was available in print in English during the sixteenth century.

264. WILLIAM TOOKER, OF THE FABRIQUE OF THE CHURCH AND CHURCH-MENS LIVINGS 98 (1604); BARNABE BARNES, FOURE BOOKES OF OFFICES ENABLING PRIVAT PERSONS FOR THE SPECIALL SERUICE OF ALL GOOD PRINCES AND POLICIES 57 (1606).

the family: "Christian [E]conom[y], is a doctrine of the right ordering of a [f]amil[y]."[265] The family was meant broadly to encompass the authority of a husband over a wife, father over children, and master over servant.[266] It was a "society" of persons who were "[u]nder the pri[v]ate go[v]ern[]ment of one."[267] Economic government involved the ordering and disposing of "those goods which God giueth for the succour & profit of his creatures" or the private management of people and resources.[268]

Though of narrower range, economic government preceded political.[269] Lawyer John Selden explained that, in the earliest societies, all persons were under "[e]conomi[c] rule" and turned to political government to resolve disputes among families.[270] Economic and political government were related because they both involved prudence – a word prominent among the first classical economists – and so the rule of a family was preparation for political knowledge and "the art of skilfull governing & ruling a multitude of men."[271] Society was a composite of different institutions, including households and corporations, that exercised these forms of political and economic government: "Family is a part and member of the Town[] and Cit[y], and the Cit[y] is a part, and member of the whole Common-wealth, or Kingdom[]."[272] The essence of nineteenth-century fission was the migration of business corporations from political to economic government. Corporations were no longer conceived as forms of political government with social responsibilities unlike other corporate forms like towns. Why this shift?

This paper has argued that English lawyers conceptualized corporations through a political-theological lens in which authority was needed to produce social order. These assumptions changed alongside the transformation of providential ideas about order in the course of the eighteenth and nineteenth century. This development can be linked to wider intellectual currents and religious ideas. During the eighteenth century the concepts of economy and even of providence began to change. Where providential government had previously involved the intercession of an active deity, the universe was increasing recognized by natural philosophers as a

---

265. WILLIAM PERKINS, CHRISTIAN OECONOMIE: OR, A SHORT SURVEY OF THE RIGHT MANNER OF ERECTING AND ORDERING A FAMILIE ACCORDING TO THE SCRIPTURES 1 (1609).

266. *Id.* at 164.

267. *Id.* at 2.

268. PIERRE DE LA PRIMAUDAYE, THE FRENCH ACADEMIE, 526 (1618).

269. *See* PERKINS, *supra* note 265, at *Epistle Dedicatorie*, ff. 3r-3v; *see also* KELLISON, *supra* note 246 at 44.

270. JOHN SELDEN, TITLES OF HONOR BY IOHN SELDEN 2 (1614).

271. *See* LA PRIMAUDAYE, *supra* note 268, at 106, 491, 523; *see also* BARNES, *supra* note264, at 57; *see also* PERKINS, *supra* note 265, at f. 3r.

272. THOMAS PRESTON, ROGER WIDDRINGTONS LAST REIOYNDER TO MR. THOMAS FITZ-HERBERTS REPLY, 231 (London, 1619).

place of self-regulating order. The research of A.M.C. Waterman, Margaret Schabas, and others has shown how this idea of the economy changed from the late seventeenth into the nineteenth century.[273] Through the study of the natural world or the "economy of nature," natural philosophers and political economists discovered self-regulating patterns that they interpreted as placed there by a benevolent deity. These insights were slowly turned to social analysis and a tendency towards equilibrium could be discerned in the seemingly disordered and self-interested actions of humans.[274] Active, interventionist government was no longer needed to regulate markets, but rather, they self-regulated through the transactions of self-regarding individuals and the "invisible hand."[275]

The growth of ideas about the economy as a distinct sphere of human action were connected with growing knowledge about the natural world and its "spontaneous order."[276] Instead of signifying God's transcendent government over creation, political economists, like Adam Smith, found providential order to be immanent in nature as a self-balancing system with which the market might be analogized.[277] No longer needing to govern markets in a political, interventionist sense, some corporate types could intellectually slip into the economic sphere where they governed or managed private resources and individuals.

This history is still to be written. It would describe the emergence of the corporate scheme of for-profit and non-profits, the relationship of this split with underlying intellectual ideas about order and government in society, and analysis of the significance of these changes for legal thought. Investigations have already begun. One recent writer has suggested that the for-profit and non-profit split occurred in the second half of the nineteenth century as "corporations increasingly became defined with respect to profit."[278] A history centered on fission would also direct attention to the importance of non-profit corporates in shaping broader corporate ideas. Non-profit corporates continued to function as intermediary

273. KEITH TRIBE, LAND, LABOUR AND ECONOMIC DISCOURSE 80–145 (1978); GILBERT FACCARELLO, THE FOUNDATIONS OF LAISSEZ-FAIRE: THE ECONOMICS OF PIERRE DE BOISGUILBERT (1999); Margaret Schabas & Neil De Marchi, *Introduction to Oeconomies in the Age of Newton*, 35 HIST. POLIT. ECON. 1–13 (2003); MARGARET SCHABAS, THE NATURAL ORIGINS OF ECONOMICS (2007); Waterman, *supra* note 262.

274. FACCARELLO, *supra* note 273, at 13–75; SCHABAS, *supra* note 273, at 4–5.

275. *See, e.g.*, SMITH, THE WEALTH OF NATIONS, *supra* note 137.

276. SCHABAS, *supra* note 273, at 30–34; 80–101.

277. Lisa Hill, *The Hidden Theology of Adam Smith*, 8 EUR. J. HIST. ECON. THOUGHT 1–29 (2001); Waterman, *supra* note 262; A. M. C. Waterman, *Economics as Theology: Adam Smith's Wealth of Nations*, 68 SOUTH. ECON. J. 907–921 (2002); THE ROUTLEDGE HANDBOOK OF ECONOMIC THEOLOGY, 21–22 (Stefan Schwarzkopf ed., 2020).

278. Jonathan Levy, *From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 37–73, 217 (Naomi Lamoreaux & William J. Novak eds., 2017).

institutions of political government, serving wider public purposes, and as vehicles for social causes. The early years of the Republic, for example, saw debates over the relationship between these corporates and state governments. Thus the pioneering research of Johann Neem on *Dartmouth College* has explored how the case revealed concerns over the new realities of factionalized politics and their interference in corporate life.[279] Alyssa Penick has similarly illuminated the importance of post-Revolution disestablishment debates in corporate law cases, noting that, "Many states sought to level the playing field among denominations by passing general statutes of incorporation that allowed all religious societies to become incorporated."[280] The consequence, during the nineteenth century, was that charters for non-profit corporates increasingly allowed for broader public purposes, and as Neem has argued, "a new conception of civil society in which independent institutions would pursue their own, and the public's, good."[281] A history of corporate fission would compare the relationship of these changes to those of for-profit corporates and further excavate the deeper intellectual changes that made these fundamental transformations in corporate law possible.

CONCLUSION

Baxter lost *The Case of Sutton's Hospital.* The next year he is found begging for the legacy that he had forfeited by contesting the will. The Archbishop of Canterbury responded that since Baxter "seemeth sorowfull for his error[,]" the legacy would be granted.[282] It may have been in the self-interest of the governors to quiet Baxter, but it was also a charitable act that made sense in the different values of the early seventeenth century.

This paper has attempted to bring more historical sources and interpretation to bear on *Sutton's Hospital* and the legal concepts about corporation during the period. These new sources offer new evidence about debates over corporate personality and the commitment by the judges in the case to the idea that the corporation aggregate was a form of government. The foundation of these ideas during the period of special incorporation was theological. Government was part of God's providential scheme and corporations were a form of political government. This underlying theology explains the association of corporations with the public interest and

279. Johann N. Neem, *Politics and the Origins of the Nonprofit Corporation in Massachusetts and New Hampshire, 1780–1820*, 32 NONPROFIT VOLUNT. SECT. Q. 344–65 (2003).

280. Alyssa Penick, *From Disestablishment to Dartmouth College v. Woodward: How Virginia's Fight Over Religious Freedom Shaped the History of American Corporations*, L. HIST. REV. 11 (2021).

281. Neem, *supra* note 279; OLIVER ZUNZ, PHILANTHROPY IN AMERICA: A HISTORY 8–43 (2012).

282. *Symon Baxters Petition*, London Metro. Archives ACC/1876/L/02/60.

social responsibilities. Yet, there were also significant tensions within the assumption that corporations were forms of government, especially because companies regulating markets and trade attracted criticisms of self-interest. As we have seen, during the period of *Sutton's Hospital* there were numerous such cases, and the common law judges attempted to restrict the powers of corporate regulation to avoid self-dealing.

Imagined in this way and using new legal sources, the history of corporate law can be reconstructed along different lines and within shifting cultural values. Rather than developing straightforwardly alongside mercantilist theory or the business corporation emerging from non-profit corporates, this history emphasizes that the business corporation developed in tandem with other corporate types until new ideas about self-regulating markets and spontaneous order emerged. The business corporation could then become an instrument of economic government or management. These links between corporate development and wider cultural and religious ideas are suggestive, not only of how the Anglo-American history of corporate law is remembered in a particular way, but how it can be re-remembered. This article is an invitation to rethink this history from these different perspectives.