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SHAREHOLDER OWNERSHIP IS IRRELEVANT FOR SHAREHOLDER PRIMACY

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A COMMENTARY ON Alan Strudler (2017), "What to Do with Corporate Wealth?", ***J Poli Philos*** 25(1): 108–126, https://doi.org/10.1111/jopp.12106

ABSTRACT

Strudler rejects shareholder primacy and argues that, once contractual obligations have been fulfilled and shareholders have received a reasonable return on investment, corporate executives may use corporate wealth for the general good. He seeks to establish this claim via an argument that, contrary to the received view, shareholders do not own corporations. After raising some questions about the latter argument, this commentary goes on to argue that the question of corporate ownership is a red herring. The argument for shareholder primacy that Strudler wants to reject does not rely on the premise that shareholders own the firm.

IN "WHAT TO Do with Corporate Wealth," Alan Strudler (2017) argues that, once contractual obligations have been fulfilled and shareholders have received a reasonable return on investment, corporate executives may use corporate wealth for the general good. For ease of exposition, I will refer to the opposite view (that corporate executives are morally obligated to maximize shareholder value, and hence are not allowed to use corporate wealth for the general good) as *shareholder primacy*. As Strudler sees it, the crucial premise in arguing against shareholder primacy is that shareholders do not own either corporations or corporate wealth. Strudler contends, instead, that

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corporations and their assets are unowned. I will begin this Commentary by raising some questions about Strudler's argument to that effect (section 1). Ultimately, however, the question of ownership is a red herring. Strudler admits that shareholders own something: their shares. Whether this is equivalent to owning the corporation, I argue, is irrelevant to answering the question of whether executives can use corporate wealth for the general good (section 2).

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Strudler begins with a discussion of Blair and Stout's (1999) argument that shareholders cannot be owners of the firm, because they lack the required control over it. Strudler finds this problematic for two reasons. First, he believes that the empirical question of how much control shareholders have is beyond resolution. Second, he disputes the conceptual link asserted by Blair and Stout between ownership and control. The easiest way to argue against this link would be to adopt a bundle theory of ownership, according to which ownership is nothing but a bundle of separate rights and powers, none of which is essential to the concept of ownership. But this is not Strudler's strategy. Instead, he argues that the kind of control shareholders may have cannot be sufficient to establish ownership. To show this, he points out that the directors of non-profit organizations have at least as much control over their organizations, which they clearly do not own, as shareholders do over corporations. This is a puzzling argument. Blair and Stout argue from the premise that control is necessary for ownership. Strudler's argument, if successful, shows that control is not sufficient for ownership. There is no reason to think Blair and Stout would disagree. Strudler (2017: 114) claims that his argument allows him to "sidestep the issue of control while nonetheless resolving the problem of shareholder ownership of the firm." But this does not work. His argument that control is not sufficient for ownership has no bite against a view according to which control is one of a number of individually necessary and jointly sufficient conditions for ownership. (An obvious candidate for another such condition is the power to sell; this would take care of the non-profit example, because although directors of a non-profit might control the organization, they lack the power to sell it.)

More generally, the problem with Strudler's discussion of control is that it leaves his readers without any clue as to the notion of ownership that Strudler himself is working with. He does not want to commit to a strong form of bundle theory and suggests that “anti-bundle theory” is wedded to “the idea of an ineluctable but complex connection between ownership and control” (Strudler 2017: 113). All he subsequently tells us about this relationship, however, is that control is not sufficient for ownership. This is problematic because, in the next step of his argument, Strudler attempts to establish that ownership of the firm is not transferred via the buying and selling of shares. He argues that acquiring shares does not involve being promised ownership of the firm (whether explicitly or implicitly). But assessing the plausibility of arguments to that effect requires an understanding of what ownership of the firm amounts to, and Strudler does not provide an account of that.

A second problem with Strudler’s argument that ownership of the firm cannot be acquired by buying shares is that his discussion throughout relies on examples involving someone buying a small number of shares. Strudler argues that such a person could not have a reasonable expectation to have ownership rights. As someone owning a small number of shares of several multinational corporations, this rings true to me. But we should also consider the case of someone who is acquiring a majority (or even all) of a firm’s shares. Apart from any notions of shareholder primacy, it seems rather intuitive to say that this is how, for example, one firm acquires another. And the acquiring firm is then able to do a lot of things with the acquired firm that are usually associated with ownership. If Strudler wants to deny that one can become the owner of a firm by buying all (or most) of its shares, it would be, again, helpful to know what notion of ownership he is working with. If, on the other hand, he was willing to concede that buying 100% of a firm’s shares does amount to becoming the owner of the firm, he would owe us an explanation as to why owning 0.01% of the shares does not amount to acquiring a 0.01% ownership stake in the firm.

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I pointed out that Strudler appears to be unwilling to commit, one way or another, on the question of the bundle theory of property. The overall structure of his argument, however, implies the rejection of bundle theory. After all, from the point of view of bundle theory, whether shareholders own the firm is not a well-formed question. Rather, a bundle theorist would ask which of the various rights and powers typically associated with ownership shareholders do or should have. Viewed from that perspective, any argument trying to establish shareholder primacy via the premise that shareholders own the firm is irremediably circular (see Heath 2011; von Kriegstein 2015).

Strudler, by contrast, thinks that rejecting shareholder primacy requires rejecting the notion that shareholders own the firm. This implies that he accepts the following conditional: if shareholders own the firm, shareholder primacy is vindicated. In fact, he says as much when describing the view he opposes:

> On the prevailing view, that is, the shareholder-ownership view, shareholders own the firm; they are principals that hire managers to act as their agents, running the firm on their behalf. Managers therefore have an obligation to run the firm in ways that advance shareholder interest, and are thus presumptively required to maximize shareholder wealth (Strudler 2017: 111).

While Strudler denies that shareholders own the firm, he accepts the idea that such ownership would (counterfactually) entitle them to have the firm managed exclusively in their interest. The problem is that, once we accept that latter claim, it seems that we can derive shareholder primacy from the simple notion that shareholders own their shares and entrust executives with managing these investments on their behalf. Strudler (2017: 123) himself argues that managers are fiduciaries for shareholders, but thinks that the fiduciary obligations fall short of shareholder primacy:

> Because stockholders entrust managers to protect these investments, managers have fiduciary obligations that require them to protect shareholders; but because shareholders are not owners of the firm, the managers' fiduciary obligations can be satisfied consistently with their using substantial corporate assets for altruistic purposes even if their doing so does not benefit shareholders.

But this requires further argument. First, Strudler's argument here leaves unclear why returning less than the maximal possible return is consistent with a manager's fiduciary obligation to protect shareholders. After all, Strudler (2017: 121) accepts DeMott's (1988) contention that a fiduciary must act in the best interest of their client, and it might be argued that this entails shareholder primacy (see Marcoux 2003). More importantly, it is unclear why the type of property held in trust by the fiduciary should make a difference in determining whether the fiduciary obligation consists in an obligation to strive for maximal or merely reasonable returns on investment. In other words, why is a fiduciary I entrust with managing my firm required to deliver maximal returns, while a fiduciary I entrust with managing my shares in a firm is merely required to deliver reasonable returns? In either case I leave the management of my property in the hands of somebody I trust to enhance its value. In either case this leaves me vulnerable to this person's actions, which (as Strudler convincingly argues) gives occasion to a morally mandatory fiduciary relationship (see Marcoux 2003 for the same argument). How does the ontological difference between owning shares and owning a part of the firm effect a normative difference in what my fiduciary owes me?

One possible answer would be to claim that, while working as a manager for the owners of shares makes one a fiduciary, working as manager for the owners of a corporation makes one an *agent*. This might seem to be suggested by Strudler's description of the shareholder-ownership view (cited above) where he says that, on that view, shareholders hire managers as agents. In a second step, one could then argue that the obligations of agents are stricter than those of fiduciaries. While such an argument might succeed, it is not obvious how it would go. Fortunately, we do not need to pursue this question because it cannot be what Strudler has in mind. For one, he describes an agency relationship as one in which agents discharge a principal's concrete instructions (Strudler 2017: 123). To ascribe to his opponent the view that shareholders instruct managers on how to run the firm would be excessively uncharitable (not least because most shareholders never interact with the company's managers). And Strudler does not do this. Instead, he takes his opponents to share the idea that managers and shareholders are in a fiduciary relationship:

> On the shareholder-ownership view, shareholders own the corporation; managers owe shareholders an obligation to manage the firm on their behalf, protecting the property – the firm – that shareholders own; and that obligation is a fiduciary obligation (Strudler 2017: 122).

Thus, the question remains: what explains the presumptive normative difference between being a partial owner of the corporation and owning shares?

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I hope that these critical comments will prompt Strudler to elaborate on and clarify some of the lesser-developed aspects of his argument. His article provides a fascinating exploration of the question of exactly what it is that shareholders own. As the preceding discussion shows, however, the answer to this question is unlikely to help in answering the question that Strudler asks in the title of his piece. Strudler and his opponents agree that managers and shareholders are in a fiduciary relationship because the former are entrusted with managing something owned by the latter. Whether they own (a piece of) the corporation or simply their shares does not tell us what this fiduciary relationship requires. Either option is compatible with Strudler's claim that executives may use some corporate assets for altruistic purposes. And neither rules out arguments for the opposite conclusion.

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References

Blair, M. and L. Stout. 1999. "A Team Production Theory of Corporate Law." ***Virginia L Rev*** 85(2): 247–328, https://doi.org/10.2307/1073662

DeMott, D.A. 1988. "Beyond Metaphor: An Analysis of Fiduciary Obligation." ***Duke L J*** 1988(5): 879–924, https://doi.org/10.2307/1372643

Heath, J. 2011. "Business Ethics and the 'End of History' in Corporate Law." ***J Bus Ethics*** 102(1): 5–20, https://doi.org/10.1007/s10551-011-1192-3

Marcoux, A. 2003. "A Fiduciary Argument Against Stakeholder Theory." ***Bus Ethics Q*** 13(1): 1–24, https://doi.org/10.5840/beq20031313

Strudler, A. 2017. "What to Do with Corporate Wealth." ***J Poli Philos*** 25(1): 108–126, https://doi.org/10.1111/jopp.12106

Von Kriegstein, H. 2015. "Shareholder Primacy and Deontology." ***Bus & Soc Rev*** 120(3): 465–490, https://doi.org/10.1111/basr.12063