

Corporate Autonomy:
Law, Constitutional Democracy, and the Rights of Big Business

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ABSTRACT

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Corporate Autonomy: Law, Constitutional Democracy, and the Rights of Big Business is a normative, interdisciplinary and analytical examination of the rights and internal governance of business corporations in constitutional liberal democracies. Drawing from political theory, economics and law, it concludes that corporations should not merit legal protections unless they first exhibit some internal democratic credentials.

In contrast to theories of collective moral personhood, I argue that the question of corporate ontology should not determine the kinds of legal rights it can claim. Rather, following Dewey (1926) and Habermas (1996), I maintain that the law, as a reflection of popular sovereignty, should respond flexibly to shifting social configurations by defending the principle of equal human worth (Arendt) regardless of whether or not corporations are properly understood as “real” entities with a will of their own, aggregations of individual rights-holders, or state-created legal fictions. I argue that corporations can make a *prima facie* case for legal autonomy rights based upon human beings’ associational freedoms. I then conclude that corporate legal autonomy rights are more likely to vindicate associational liberty if corporations first exhibit some internal democratic credentials. Permitting corporate members a voice in decision-making can ensure that corporate purposes align with the individual purposes upon which associational freedom derives. (Laborde, 2017)

Nevertheless, after consideration of the literature on group agency (*e.g.*, List and Pettit 2011) and group rights, (*e.g.*, Benhabib 2002; Levy 2014) I also conclude that autonomy rights founded on associationalism must be tempered to protect the equal rights and liberties of those that

might be harmed by corporate action. Given labor markets characterized by monopsony, financial markets characterized by the “forced capitalism,” (Strine, Jr., 2017) and the ongoing control exercised by corporate leadership under the constraints of product market competition, I find that ascribing associational rights to corporations is a tall order indeed. It may require that corporations assume further democratic institutions designed to protect those whose rights are vulnerable to corporate autonomy: *e.g.*, intra-corporate individual autonomy rights, accountability mechanisms, internal counter-powers, and systems of discursive justification.

I then argue that this theory of corporate autonomy rights incorporates the best, and jettisons the worst, of alternative theories of workplace democracy. In particular, it integrates and tempers the associationalist instincts of syndicalist, participatory democratic theories while building on the protective instincts of republican theories.

The dissertation concludes by addressing a common objection to workplace democracy: that it is so inefficient that it would destroy the very good its members mean to pursue as they exercise their associational freedoms. It finds that accountable representation, delegation of decision-making functions, and market exit can help a corporation maintain its democratic credentials while permitting it to respond to market constraint.

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Introduction

First erected by the state to provide public goods that the market could not deliver (Roy, 1997), the business corporation now controversially claims rights to speech and religion. (Winkler, 2018) The recent “weaponization of the First Amendment” (*Janus v. AFSME*, 585 U.S. ___ (2018)(Kagan, J., dissenting)) arms corporate bosses with the authority to assault democratic elections (*Citizens United v. FEC*, 558 U.S. 310 (2010)) and attack healthcare coverage (*Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)) in the name of rights normally thought to protect the equal worth of human beings: political speech and free exercise of religion. Constitutional law scholar Jedidiah Purdy (2018) suspects that such tactics are part and parcel of a larger, libertarian strategy to molest social rights and sabotage the redistribution of wealth from rich to poor. Each comprises a front in a larger campaign, a campaign that seems bent on delegitimizing democratic lawmaking altogether. Considered together with the multi-pronged attack on voting rights, public safety regulation, and anti-discrimination policies, it is indeed sometimes difficult to interpret the burgeoning arsenal of corporate liberty rights as anything but a siege on the constitutional liberal democratic state itself. For ascribing them to corporations will excuse many of the most powerful actors in society from the regulation of legitimate democratic lawmaking. (Cohen, 2015) The bombardment comes at a time of unique vulnerability. As radical, populist politics challenge historical political formations, a climate crisis barrels down on the entire human race. Just when citizens must rely most on their government’s capacity to tackle these formidable adversaries, (Purdy, 2015) corporate autonomy rights try to sweep it off its feet.

At the same time the U.S. Supreme Court gives them more autonomy, corporations themselves seem to grow more exploitative. No longer are they hemmed in by robust union

membership. No longer does the corporate veil defend enterprise, and the jobs it creates, from the stormy headwinds of globetrotting financial capital. (Useem, 1993) Offshoring, break-ups, liquidations, and rule-by-quarterly-financial-reports appease peripatetic equity investors who have no qualms about throwing their weight around in search of “shareholder value.” Recession and contingent employment arrangements ensure workers earn low wages under precarious and arbitrary conditions. (Anderson, 2017) Algorithms and I-9s paint a bleak future for labor indeed. And so ascribing autonomy rights to corporations sometimes seems like ascribing rights to a psychopath. (Bakan, 2005)

Yet much of normative political theory appears ill-equipped to deal with corporate autonomy. Liberals sometimes black box it, treating the corporate collectivity as individuals carrying individual rights and registering the harm its behavior inflicts on other individuals. (Bowman, 1996) Too often, this normative individualism degenerates into ontological individualism, leaving it without the vocabulary to systematically address the corporation’s social-level characteristics: its particular cultures; its durability; its outsized and ever-accumulating resources; its public functions. On other occasions, they address the corporation indirectly as they operate on the macro-level of social justice. They will have a lot to say about material inequality, the allocation of social offices, and the distribution of economic opportunity. They therefore imply that corporate autonomy ought to be constrained. But they do not explain why corporations ought to enjoy autonomy to begin with. Relying on principles of distributive justice, moreover, skips over the inequities that may transpire behind corporate doors. (Anderson, 2017; Marx, *Capital*, Vol. 1, Ch. 6) They ask about *post-hoc* redistribution, not intra-corporate pre-distribution. Further, at least until very recently, liberalism’s fear of totalitarianism perhaps steered it away from thinking deeply about the state and the nature of sovereignty. (Foucault, 2004, pp. 76-78;

Katznelson, 2003, p 134)¹ As a result, it fails to confront the possibility that the corporation's state-created legal skeleton carries significant moral and political implications. Instead, it presumes that legal rights, including corporate autonomy rights, should track universal norms derived logically from *a priori*, pre-political first principles. The state's absence is particularly heavy within the work of Dahl and Walzer, both of whom draw a too-quick equivalence between firms and governments.

Thinkers in the marxist camp, however, do little better. If they address it at all, they fold it into the abstract capital of capitalism, blinking at the moral implications arising from its institutional details as so much epiphenomenal fluff. (*E.g.*, Hilferding, 1981 [1910]; Gupta, 2001) The corporation is simply a repository for finance capital, just as banks are repositories for money capital. (Hilferding, 1981, p. 122) The things that make the corporation a unique social actor – public share ownership, managerial control, and the law's role in shaping corporate behavior and capacity (Pistor, 2019) – are sometimes the very things that have the greatest impact on human flourishing.² (Bowman, 1996) Rejecting Polanyi's insights about the embeddedness of the economy, they elide the role played by legitimate democratic lawmaking in setting the terms of this embeddedness.³ Moreover, as marxists, they rarely take seriously the liberty rights of those who understand corporations as part and parcel of their economic freedom.

Similarly, republicans seek to ameliorate the corporation's dominating aspects without accounting for the creative and liberating role it might play in contemporary life. (Gourevitch, 2013) Focusing on critique rather than justification, they offer no positive case in favor of the

¹ I thank my colleague, Nathan Feldman, for this insight.

² A notable exception is Ferreras (2017), who builds a theory of economic bicameralism from marxist underpinnings.

³ This point aligns with critical legal theorists' insight that law is often constitutive, not reflective, of political and economic conditions. (*E.g.*, Forbath, 1991; Kessler, 2016, p. 1536)

autonomy enjoyed by business. They only tell us how to make sure that corporate autonomy is not exercised arbitrarily. Moreover, because contemporary neorepublicans like Philip Pettit (2006) set forth an agent-centric account of domination, they have difficulty accounting for many unfree market conditions whose provenance cannot be traced to individual decision-makers and whose solutions do not involve fortifying exit opportunities through, for example, a universal basic income. (Pettit, 2007; Taylor R. S., 2017) As a result, they will neglect many harms commonly attributed to the corporation: hierarchical workplace control that exploits commodified human beings, each of whom is paid wages that are insensitive to her unique goals and values. Arguably, given open-ended incomplete employment contracts with terms that are filled in by management, every worker is dominated as a condition of her employment.⁴ They also have trouble answering for pollution and other harmful market externalities. Meanwhile, moral philosophers debate whether the corporation is itself an agent that can be held to rights and duties. (*E.g.*, French P. A., 1984; List & Pettit, 2011; Rafanelli, 2017; Wall, 2000; Ronnegard, 2015) But they have not yet concluded determinatively whether corporate agency amounts to the sort of agency that ought to enjoy the rights, and be liable for the duties, usually ascribed to human agents.

Some recent work in political theory does address the corporation directly. Generally, it starts with a definition. It sets forth what a corporation is, ontologically and empirically. It then derives moral conclusions based upon that definition. When it does so, it commonly applies analogical thinking that tracks the legal theories of corporate personhood. Of course, the usefulness of analogical thinking depends crucially on the strength of the analogy applied. Accordingly, their application often leads to solutions that are, at best, context sensitive and provisional. Some

⁴ I credit this conclusion to a conversation with Prof. Suresh Naidu, Columbia University Department of Economics, in Fall, 2016. A similar argument appears in the treatment of Coase (1937) in Singer (2018).

political theorists treat corporations as states or state-like agents and then conclude that corporate autonomy should be checked or liberated just as states should be checked or liberated. (Landemore & Ferreras, 2016; Dahl, 1985; Ferreras, 2017; Anderson, 2017) Thus, for example, if corporate coercion may be understood just like state coercion, it should be justified through democratic consent. If corporate autonomy is just like state autonomy, then it should enjoy all the trappings of political democratic self-determination. As I shall explain in Chapter 4, however, the corporation-state analogy is problematic because corporations and states differ in crucial ways. Perhaps most importantly, only the state can claim legitimacy and sovereignty, a moral right to rule. As a result, it leaves unanswered the question of whether the corporation, an entity not commonly understood to enjoy sovereignty,⁵ has a right to rule over its diverse constituency of workers, investors, customers, suppliers, and community members. It thus begs the question that much of political theory seeks to answer: what lends legitimacy to authority? Meanwhile, the dilemmas of corporate capitalism that such analogies seek to address (*e.g.*, workplace exploitation and worker autonomy) can be addressed without them.

Other recent work (Ciepley, 2013) instead creates a new ontological category for the corporation: neither public nor private, neither state nor private actor, but something in-between.⁶ As a result, the solutions to corporate autonomy that they offer will vary according to how state-like or how individual-like any particular corporation happens to be. Small companies with only a handful of employee-owners will likely receive human treatment; large conglomerates, state-like treatment. The former will benefit from the traditional array of political and liberty rights. The

⁵ Many political pluralists (*e.g.*, Levy, 2014; Muniz-Fraticelli, 2014) would likely disagree with this statement.

⁶ Levy (2014) and Singer (2018) describe them as “intermediate” associations, although Singer also correctly points out that Ciepley (2013)’s argument concludes that corporations are more state-like than they are individual-like, and thus fits comfortably with other firm-state analogies.

latter will not. But what do we do with the vast majority of corporations that are medium size? The new ontology seems to pose more answers than it solves.

The more promising work does not start from ontology and analogy. Instead, it takes its cue from John Dewey who, in a 1926 essay, argued that the question of corporate autonomy should not start with “some generic or philosophic concept of the personality.” (*Ibid.*, p. 658) Instead, we should apply the norms that we already have to whatever configuration of ever-changing social relations that happen to be present before us. It moves not from fact to norm, but instead from norm to fact. Schragger & Schwartzman (2016), carrying the banner of Dewey’s legal realist legacy, implore theorists to jettison the question of corporate ontology and simply ascribe to them the legal rights and duties necessary to best secure our interests. They do not, however, identify what those interests are and explain how they ought to be applied.

Happily, Singer (2018, 2017) provides some of the necessary elaboration. But he does so by conscripting a bit of analogical thinking. Consequently, the idea of what the corporation “is,” even if it – correctly – does not serve as the first principle of his normative argument, perhaps shapes its outcomes. In order to navigate the tension between views that “understand the corporation as an extension of state power” and views that “understand them as an extension of individual endeavor,” (2018, p. 11) Singer embraces a “relational entity” theory of corporate ontology that rightly draws our attention to the bilateral relationships shaped both by human volition and the law. The argument then creatively enlists a branch of feminist legal thought well-suited to interrogate those bilateral relationships and derive normative conclusions about them. Yet this tactic allows ontology to motor, through the back door, some of his conclusions. Thus, when he argues that the norms that we ought to apply to these relationships are ones that (1) respond to liberal democratic social concerns while (2) ensuring corporate efficiency, he relies on

analogies to the state and to the individual, respectively. As a result, the argument risks the same indeterminacy that analogical thinking tends to generate. It may also import, rightly or wrongly, all of the normative baggage that these analogies carry.

Singer, though, is on the right track. As Dewey (1999[1935]) pointed out long ago, deriving legal rights by moving from norm to fact allows constitutional liberal democracies to respond flexibly to complex, plural societies while nevertheless upholding their fundamental normative commitments. To be sure, facts are an indispensable part of the equation. Without facts, we cannot hope to know how particular laws and particular behaviors may impact human freedom and flourishing. Before we can know whether minimum wage laws will vindicate the norm of material inequality, we must know their impact on employment levels. We must know how a corporate speech right might disfigure or enhance public discourse before we can know whether that right vindicates the norms underpinning free expression. Moreover, marxists are not wrong when they insist that economic wealth and power will inevitably shape the amount of liberty we enjoy. Any rights-talk that turns a blind eye to social and economic inequalities risks all the perversions associated with *laissez-faire* Lochnerian liberalism. Where my argument departs from Singer, though, is how it selects on its facts and how it selects on its norms. It does not reach directly for corporate ontologies. Instead, it first unpacks them.

Each analogy, in other words, is burdened not just with facts, but also with values. Baked into the corporation-state analogy is an idea about what the state is and what it ought be about. Baked into the corporation-individual analogy is an idea about what a human being is, why she is important, and how she should be treated. These ideas may not necessarily hold water for everyone. The state does not mean the same thing to libertarian as it does to a communitarian. The former sees it as a necessary evil to be constrained; the latter, a legitimate expression of collective

autonomy. At the same time, liberal egalitarians might be comfortable limiting individual autonomy in order to ensure the equal enjoyment of autonomy for all. On the other hand, a libertarian might balk at this limitation, insisting instead on absolute rights. Meanwhile, the norms driving the analogy help select on the facts it incorporates. It will not, therefore, necessarily capture all the relevant data. As a result, straightforwardly accepting analogies in lieu of facts may lead to theories of corporate rights that express controversial norms without justification.

To get around these problems, then, it is first necessary to get the norms straight. I do this by committing, at the outset, to a theory of constitutional liberal democracy. I intend to apply it loosely and interpret it capaciously in order to appeal to anyone subscribing to a procedural notion of democracy and a constructivist accounting of rights: Rawlsians, Habermaseans, and anyone in-between. Broadly, it starts with a single, foundational moral commitment: equal individual human worth. Interpreted as an Arendtian “right to have rights,” it is a primordial right held by individual human beings who should be able to understand themselves as the collective authors of the laws that bind them. Some other principles can be derived from this original commitment: for example, to equal liberty, impartial treatment, and equal inclusion and consideration during the process of democratic lawmaking. Importantly for the question of corporate autonomy, also included is the freedom of association. Moreover, this view of constitutional liberal democracy understands the state as the final arbiter of social conflict, its sovereignty legitimized through its democratic credentials. And its law is its best effort to instantiate its normative commitments.

Once this throat-clearing is accomplished, it is possible to sift through the analogies for their consistency with constitutional liberal democracy’s normative schematic. What is left over will, hopefully, be the kinds of facts that are relevant to the enjoyment of equal human worth. And what will be gained, hopefully, is a theory of corporate autonomy rights that enhance, rather than

threaten, constitutional democracy.

The results of this sifting of facts and application of norms is a theory of legal corporate autonomy rights founded on associational freedom but hemmed in – sometimes substantially – in the interests of the equal rights and liberties of everyone else. Because corporate autonomy rests on the associational freedoms of individual human beings, I find that corporations are more likely to be able to successfully claim these rights if their internal governing institutions carry some democratic credentials. As Cécile Laborde (2017, p. 184) notes, “there must be a fit between the main purpose of the association and the main purpose of its members in associating.” Yet because, as an empirical matter, the exercise of corporate rights often threatens the equal liberties of those both governed by its internal rulemaking and affected by its actions, these rights may be quite limited. I then argue that corporations can make a stronger claim for autonomy rights if they undertake additional governing institutions that can protect these others – institutions which likewise bear strong resemblance to democratic institutions.

Because it provides clear guiding principles, this solution to the problem of corporate autonomy is not indeterminate. It is, however, deeply context sensitive. How the notion of equal human worth will cash out will depend upon, for example: the of homogeneity of corporate participants’ preferences; whether the exercise of the right requires collective corporate action and therefore corporate commands over members; whether and to what extent the right will impact outsiders’ freedoms; and, last but not least, whether corporations themselves have adopted accountability mechanisms.

This context-sensitivity carries an important implication. Namely, it suggests the need for a state apparatus that has the knowledge and wherewithal to ensure that constitutional liberal democracy’s commitment to equal human worth is vindicated within and around business

corporations. The ascription of corporate autonomy rights will require experts and investigators, arbitrators and lawyers. It may involve new Congressional committees, administrative agencies, and law enforcement divisions. It requires, then, exactly what many contemporary advocates of corporate rights reject: a strong democratically accountable state – perhaps the same kind of state envisioned by Adolph Berle and his fellow “clash of titans” New Deal liberals. (Lemann, 2019)

Methodology and Relevance

In providing this analytical answer to the question of corporate autonomy, the dissertation draws from a broad array of multidisciplinary sources both normative and empirical. In addition to political theory, it enlists scholarship in law, economics, business ethics and, occasionally, sociology, philosophy and history. This was done mainly because the literature on the corporation within political theory is few, new and still growing. Political theorists have not yet benefitted fully from the enormous amount of scholarship addressed to the corporation and existing outside the discipline. From political theory, law, and business ethics it finds the norms it must apply. From economics, history, law and sociology, it finds the facts to which those norms will be applied. As a result, the research is at times eclectic. But it is my hope that it has taken good advantage of the available scholarship and will, at the very least, point political theorists in new and useful directions as they also consider the problem of corporate rights.

It might also provide a starting point for theorists examining other important economic phenomena: from industry concentration to international finance; from precarious, temporary employment arrangements to drug pricing. By using democratic lawmaking as a bridge between social ontology and morality, (*see* Polanyi, 2001) theorists can assess not only corporations, but also other market “actors” that are simultaneously shaped by law and individual initiative. For example, although finance is certainly a legal fiction (Pistor, 2013) that has the power to devastate

households and states alike, it at the same time enables human beings to purchase those houses and fund state entitlements. By ascribing legal financial rights based not on their public/private classification, but instead on the principle of equal human worth as elaborated by constitutional liberal democratic lawmaking, theorists might help design financial instruments that are sensitive to both human liberty and the common good. Its focus on business law and its use of some heterodox economics, moreover, may serve some expositional value for those scholars who increasingly engage with the connections between state and market. (*E.g.*, Eich, 2018; Tooze, 2018; Fraser, 2015; Klein, forthcoming 2019) The remainder of this introduction will provide a summary of my arguments in a little more detail.

Chapter Summary

The first Chapter, “Excavating the Corporate Person,” unpacks some of the analogies invoked by political theorists addressing corporate autonomy. It does so by confronting the legal theories of corporate personhood that jurists invoke to justify corporate legal rights. Like anthropological accounts of human rights, they set forth ontologies of the corporation and derive normative conclusions from them. None of these theories, however, will satisfy those committed to constitutional liberal democracy. First, each elides certain facts that carry moral salience. Indeed, their suggested ontologies often help shape the very behavior they mean to merely describe. Depending on the theory selected, they will encourage corporations to become more publicly-minded, more efficient, more finance-friendly or more ethical. Meanwhile, their static ontologies fit uncomfortably over the corporation’s constantly changing character and consequences. They also rely on often-unstated theories of political legitimacy and moral rights that grate against constitutional liberal democracy’s normative commitments.

Despite their weaknesses, I argue with Singer (2018) that they are nevertheless useful to

political theorists considering the question of corporate autonomy. Unlike Singer, I argue that they are more properly understood as *critical* theories (Millon, 1990) that respond to the dilemmas of corporate capitalism during discrete historical circumstances. They can therefore be mined for facts and values consistent with contemporary notions of sovereignty, legitimacy, and equal human worth. When considered together under the appropriate moral and political orientation, they suggest a context-sensitive associationalist notion of corporate rights tempered by the equal rights and liberties of everyone else.

Chapter 2, “Corporate Personhood’s Three False Choices,” explains why the political theories driving the theories of corporate personhood are inconsistent with constitutional liberal democracy. First, they rely on a rigid ontological and normative separation between public and private. Of course, the private can become political as citizens debate and change their minds about what the notion of equal liberty means to them. The theories also draw from outmoded conceptions of political legitimacy, invoking early modern notions of organ-body sovereignty that either take too literally the idea of popular sovereignty or take too seriously the notion of natural rights juxtaposed against a potentially tyrannical state. As a result, they force an ontological classification: either the corporation is an expression of public power (whether legitimate or illegitimate) or it is the manifestation of private liberties (whether legitimate or illegitimate).

Second, corporate personhood theories erroneously draw a hardline distinction between positive law and moral truth. Some measure fallible, man-made law against the yardstick of *a priori*, pre-political moral truths. Others unthinkingly endorse democratic lawmaking as the people’s *volunté générale* without attention to the critical role played by constitutional liberal democracy’s commitment to equal human worth. Still others would ascribe the authority over legitimate lawmaking to corporations themselves. Finally, the theories of corporate personhood

misunderstand the co-originality of democracy and rights. They position one against the other in an intractable conflict. They therefore reject the public reason and deliberation that yield the menu of rights that citizens give themselves as co-equal authors of the laws that bind them. The consequences of these false choices: either the corporation, as a creature of law, is the associational conscript of a popular sovereign wielding legitimate and uncircumscribed power; or it is the expression of citizens' natural liberty and thus deserving of maximal protection from an interfering state.

Once considered in light of contemporary models of constitutional liberal democracy, however, the Chapter argues that the theories of corporate personhood set up a fruitful problematic. Each may be considered as an argument that citizens might make as they attempt to justify a particular notion about the appropriate form of corporate autonomy rights. These arguments, however, must be amended to respect notions of reflexivity and reciprocity. Once they are, they set up a series of competing rights claims: claims made by those seeking associational rights and claims made by those seeking protection from powerful associations.

Enlisting some political theory, Chapter 3, "The Democratic Anatomy of Corporate Rights," presents a solution to these competing claims. Relying on political theory's literature on group rights, group agency and multiculturalism, it argues that any laws protecting corporate associational freedom must successfully vindicate the liberties of corporate members while also respecting the liberties of outsiders. Given that corporations are collective agents characterized by an array of internal rules and decision-making procedures, it is possible – perhaps even likely – that they will exercise their associational liberty in a way that brings no benefit to many of the individual human beings whose own rights subtend that liberty. I therefore argue that corporations are more likely to be able to make a successful *prima facie* case for autonomy rights if those

internal rules and decision-making procedures carry democratic credentials.

This *prima facie* case, however, is vulnerable to an array of affirmative defenses. First, corporations must express agency to exercise many of their rights. But the internal rules and procedures necessary to express collective agency might very well run roughshod over the freedom of their members. Second, as Berlin famously notes, “freedom for the pike is death for the minnows,” and the corporation is a very fat pike indeed. The outsized power and wealth of corporations threaten the equal rights and liberties of third parties. Finally, associational freedom itself threatens a violation of political equality. Not everyone can receive the benefits of corporate membership. If corporations receive associational liberties, outsiders may therefore be relegated to a form of second-class citizenship.

There are ways, though, that corporations might rebut these affirmative defenses. In particular, they can adopt some internal governance reforms that ensure that they remain accountable for their actions and avoid violating important rights and liberties. Stated differently, they can adopt institutions that carry democratic credentials.

Chapter 3, therefore, introduces a theory of corporate democracy. It holds that the more democratic corporations are, the more likely it is that they can make a case for legal autonomy rights within constitutional liberal democracy. It is not, however, the first theory of workplace democracy ever offered by political theory. Chapter 4, “Workplace Democracy and Corporate Autonomy,” engages with these theories, mining them for insights that might elaborate my theory of corporate rights. I conclude that the associational liberty claimed by corporations should avoid the utopian, perfectionist and communitarian implications of syndicalist and participatory-democratic theories of workplace democracy. I suggest they might do so by incorporating, as I suggest, procedural protections for intra-corporate minorities and adopting representative

institutions that can relieve workplace members from the burden of invasive and intensive participatory decision-making. In fact, such procedural protections are offered by other theories of workplace democracy that seek to dilute the outsized role of finance in corporate decision-making. They do so by, for example, ensuring that worker representatives occupy seats on corporate boards. A theory of corporate democracy should also ensure, as these theories often do not, that the state remains available to arbitrate the inevitable rights conflicts that will arise amongst workers, shareholders, and consumers.

Other theories of workplace democracy draw from a firm/state analogy, and I use my examination of them to offer a defense of democratic sovereignty. Most of these theories rely on coercion as an equalisandum. I argue that although the state is indeed coercive, it is coercive in a unique way: in addition to a monopoly on force, it claims a moral authority to which firms cannot, and should not, have access. Namely, the state, unlike the corporation, assumes the ultimate responsibility to defend the notion of equal human worth. And it claims legitimacy to undertake this task because its defenses are justified by the participation of citizens through procedures that permit them to understand themselves as co-equal authors. Furthermore, relying on physical coerciveness to justify democracy leaves the theories vulnerable to empirical attack. Corporations are often more coercive than states, and states are sometimes less coercive than is commonly presumed.

After investigating republican theories of workplace democracy, I discover additional mechanisms that might help ensure that corporate associational freedoms do not violate others' equal rights and liberties. In particular, unions can act as effective counter-powers – including and especially unions that are not themselves participatory and democratic, but instead hierarchical and tightly organized. Moreover, supplementing workers' exit opportunities can help prevent

workplace domination. Nevertheless, the problem of domination cannot be addressed through corporate governance alone. State action, in the form of antitrust legislation, decommodification, and protective legislation may be necessary to offset forms of domination whose source does not arise from any one particular company.

Taking seriously the corporation's role as an economic actor, Chapter 5, "*Raison de la Marché: Market Constraint and Corporate Democracy*," responds to the most common objection lodged against workplace democracy and, therefore, what is likely to be the most common objection to my own theory of corporate rights: it is too inefficient to work. If democracy proves too cumbersome, my theory of corporate autonomy rights confronts a paradox. To ensure a corporate associational right vindicates its members' interests in making a living, it may have to assume a burden that guarantees that their ambitions remain unfulfilled. Moreover, democratic decisions made under conditions of severe market constraint may not deserve the protection of legal rights intended to vindicate not coercion, but human freedom.

After outlining some common reasons purporting to prove up the utter irreconcilability of democracy and economic constraint, of the instrumental rationality of exchange and the substantive rationality of politics, the Chapter first observes that corporations are not the only actors that face tough tradeoffs. Democratic states routinely confront the competing demands of markets and citizens. Meanwhile, they must also navigate the turbulent waters of national security and diplomacy. If states can somehow muddle through all these tensions, why corporations cannot requires justification. I argue, further, that decisions undertaken in response to economic concerns do not necessarily lack democratic credentials. All choices require tradeoffs; options are always limited. Just because a particular limitation has a market-based source does not deprive it of its voluntarism. Moreover, there is good reason to believe that corporate constituents would

democratically choose to make efficient choices and elect efficient leaders. And there is no good reason to presume that workers never would.

Perhaps more importantly, the idea that corporations cannot enjoy democratic autonomy relies on a crude economic determinism that belies reality. Within the corporate boardroom, there is plenty of space for political judgment. First, business rarely operates under perfectly competitive conditions. There is enough slack in the market, therefore, for choice. Second, even presuming that firms must produce profit or fail, “profit” is an underdetermined concept. It means different things to different people, people whose preferences can vary along the dimensions of time, risk, and quantifiability. The means adopted to pursue profit, third, are also subject to debate. Firms not only operate under conditions of substantial uncertainty. They also have control over the kinds of technology and, therefore, organization that they will develop and implement. Finally is the question of what to do with any profits they earn. Like states, corporations are subject to internal distributive politics. As a result, those who claim that corporations have no choice but to pursue a very particular course of action commonly speak not from an orientation towards the corporate public good, from a position of partisan bias.

Chapter 1: Excavating The Corporate Person

Introduction

Political theory has a pretty good handle on the autonomy rights of natural human beings. Accordingly, it has a lot to say about the purpose and form of the legal rights that should protect them. But, at least not until very recently,⁷ the same cannot be said for the business corporation. In contrast, U.S. legal scholarship has addressed corporate rights for well over a century. Couched as theories of “corporate personhood,” these “rationales” (Harris, 2007) for corporate legal rights occasionally address the political theory propelling their arguments about the purpose and form of corporate legal rights. More often, however, this political theory is implicit rather than explicit. It therefore requires a bit of excavation. This first Chapter will undertake the necessary spadework, drawing forth the political theory underlying legal thinking about corporate autonomy rights. At times, the theory will be attractive to those committed to constitutional liberal democracy. At other times, it will instead inspire libertarians, political pluralists, and communitarian populists. In all cases, nevertheless, the theories of corporate personhood serve as *critical* theories that invoke norms in response to historical challenges to human freedom. They therefore not only draw attention to the kinds of corporate behavior that the law of constitutional liberal democracy ought to address, but also suggest, at least superficially, plausible solutions.

Both ontological and prescriptive, the arguments underlying theories of corporate personhood assume the same structure. First, they describe what corporations are. Second, given

⁷ Recent work includes Ciepley, 2013; Singer, 2018; Ferreras, 2017; Isiksel, 2016.

what they are, they derive the rights and duties that ought to attach to them (Bratton, 1989, p. 1491; Dewey, 1926; Horwitz M. J., 1992) by enlisting, sometimes surreptitiously, normative political theory. Theories of justice and political legitimacy often rely upon the same kind of fact-value structure when justifying individual human rights.⁸ Many identify some empirical or ontological fact about human beings and then, building from this fact, derive normative conclusions about whether rights should be ascribed and what those rights should look like. Entwined with such arguments is a moral theory that identifies why the fact is important and illuminates the appropriate political or normative response to it.

There are three theories of corporate personhood. The “real entity” theory posits the corporation as a homogenous whole, a species of the primordial social unit: the human community. Invoking pluralist political theory, it suggests that corporations ought to enjoy the same kind of autonomy rights enjoyed by other human communities – including the political community that is the state. The aggregation theory of personhood views the corporation as a collection of individuals, the endogenous outcome of the exercise of individual rights, *e.g.*, as a “nexus of contracts.” Unlike the real entity theory, it often enlists libertarian sensibilities as it finds the connective tissue between the corporation’s human participants within their consensual association. It therefore vindicates the rights of the individuals when it ascribes rights to corporations. The third theory, defining the corporation as a “concession” of the state and a mere legal fiction, commonly enlists populist, communitarian intuitions when it suggests that corporations are creatures of, and are therefore constrained by, the outcome of liberal democratic decision-making.

⁸ Critical, performative theories of rights, however, attempt to avoid this foundational step. *See, e.g.*, Zerilli, Honig, Butler.

Though each of these theories rightly draws attention to vital values, they ultimately fail to set forth a convincing account of corporate rights vis-à-vis the constitutional liberal democratic state. Though corporate theory “tilts” towards a set of prescriptive conclusions, (Horwitz M., 1985, p. 176) it is not as determinant as one might hope. One cannot merely pick the most appealing ontology and move immediately to deduce normative conclusions. (Dewey, 1926)⁹ The leap from description to prescription is not an easy one, nor is it straightforward. (Barry, 2002, p. 22)

First, social conditions change. The corporation of 1776 neither looks nor behaves like the corporation of 2019. It may, therefore, challenge and vindicate different human values and interests at different times and places. Indeed, while the fact-value logic employed by theories of corporate personhood often makes sense when it comes to articulating human rights, it can become quite messy when it comes to articulating rights for social phenomena like business enterprise. A human being remains a human being through time. Ideas about why she is important and why she should therefore be protected can thus endure over centuries. Social phenomena, on the other hand, change continuously. Justifications about why they are important and should be protected must, accordingly, remain nimble and flexible. As a result, anthropological accounts of human rights will remain more durably salient than the theories of corporate personhood.

The empirical difficulties of the theories corporate personhood do not end with the corporation’s changeability. Two of them fail to account for the causal role played by man-made legal rules in corporate behavior.¹⁰ Economic bargaining always happens “in the shadow of the law.” Prospective business partners will strategize around the rules that shape both payoffs and

⁹ Cf. Horowitz (cited by Millon, 1990, p. 241).

¹⁰ For an excellent recent exploration of this concept, see Pistor, 2019.

procedures.¹¹ But the point perhaps goes even deeper than this Polanyian insight, than the acknowledgment that legal constraints shape economic incentives. Law also affects the practices and self-understandings of corporate participants themselves, just as the formal legal recognition of cultural groups risks essentializing and changing the nature of cultural practice. (Benhabib, 2002) Further, law is endogenous, constitutive of and constituted by the social practice of “corporation.” The very rules that provide structure to corporations change social expectations (Kukathas, 1995) which, in turn, drive changes in the law. They therefore help to create the “fact” of personhood which yields the “norm” of rights meant to protect that personhood. Yet, in constitutional liberal democracy, the role of the law is to *vindicate* moral rights – not to practice vigilant self-defense. The upshot of these theories: legal rights are invoked to, in effect, protect corporate law and thereby prevent the kinds of legal changes that might be necessary to protect human liberty.

Furthermore, our values and interests themselves change. In particular, when different conceptions of political legitimacy and morality are applied to any given concept of personhood, different normative conclusions may obtain. (Millon, 1990, p. 204) A communitarian sees the world differently from a libertarian, screening out certain phenomena as irrelevant while screening in others as morally salient. Indeed, each concept, like any foray into intellectual history, is tethered to “specific moments of strategic deployment.” They are “ideas [offered] as arguments” in discrete historical contexts. (Armitage, 2012) They draw attention to contingent historical problems perhaps at the expense of issues salient to contemporary circumstances and sensibilities.

¹¹ To illustrate, tax law often explicitly changes the expected outcomes of particular actions and “nudges” individuals in certain directions. (Thaler & Sunstein, 2009).

Despite the analytical labyrinth, each conception of corporate personhood is nevertheless worth exploring. All three provide a “critical perspective toward corporate doctrine,” uncovering significant interests and values that the law has been found to neglect at certain points of time and place. (Millon, 1990, p. 204; Dewey, 1926, p. 664; Horwitz, 1992, p. 72) When their strengths and weaknesses are considered together in historical context, the three theories suggest a framework for thinking about the political and moral standing of corporations. Specifically, for those committed to constitutional liberal democracy, each theory of personhood moves towards, in piecemeal fashion, an associationalist conception of corporate legal rights that protects collective autonomy while remaining attentive to the equal liberty rights of outsiders and internal minorities. It is an approach that does not first ask what corporations are and ascribe rights accordingly. It starts, rather, with the liberal democratic commitment to equal human worth. It then asks what laws should be in place to ensure corporate behavior vindicates equal liberty. It also suggests that the law, including the law ascribing corporate legal rights, should remain flexible and responsive to historical conditions that affect individuals’ enjoyment equal moral worth.

Choosing a Theory of Political Legitimacy

Before proceeding further, it will be helpful to set out the conception of constitutional liberal democracy (“CLD”) that will be deployed by this Dissertation. At its foundation, CLD has only one original moral commitment: that of equal individual human worth.¹² This commitment

¹² This relatively broad account of CLD is meant to capture the procedural connection between democracy and rights as elucidated by, *e.g.*, Habermas (1996), Rawls (2005), and Forst (2010). They set forth human beings as the figure of moral importance, each of whom hold a foundational set of abstract rights (*e.g.*, liberty and political participation (Habermas); human beings are free, equal, and society is a fair system of cooperation amongst them (Rawls); human beings have, *au fond*, a right to justification (Forst)). It will therefore exclude accounts of political legitimacy and liberalism that are not committed to normative individualism. (*See, e.g.*, Muniz-Fraticelli, 2014; Levy, 2014).

means, in Arendtian terms, a “right to have rights,” a right held by an individual to be a citizen and legal subject. It is a right held by individuals who should be able to understand themselves as the collective authors of the laws and political institutions that bind them. (Habermas, 1996) Certain additional principles may be derived from this fundamental commitment. Namely, a government’s lawmaking procedures must seek: (1) inclusiveness – incorporating the voices of all; (2) responsiveness – attending to the concerns of each; (3) equality – each voice and concern considered or treated in equal measure; and (4) liberty – all coercion must be justified or be reasonable justifiable in terms that all can reasonably accept. Other principles might then also be derived: non-discrimination, for example, and a promise to balance conflicting rights claims impartially. Apart from these abstract yet limited set of instructions, CLD’s fundamental commitment to equal human worth is left conceptually underdetermined. It is left to be fleshed out by actual publics in the process of democratic lawmaking. (*See, e.g.*, Habermas, 1996; Benhabib, 2006)

To be sure, other accounts of moral rights offer more satisfying detail. Traditional conceptions of human rights enumerate specific powers and protections based upon historical and non-universalizable conceptions of human agency, interests, dignity, capacities, or autonomy (*see, e.g.*, Forst, 2010). Natural rights theories likewise enumerate perfectionist goods that moral rights ought to protect. Positive laws are then assessed according to how well they fit with pre-defined list of moral entitlements and protections. For better or worse, though, these neat solutions are not available in the conception of CLD enlisted in this dissertation. Instead, citizens of CLD must take to heart the observations of jurist Oliver Wendell Holmes, Jr.: “abstract law does not decide concrete cases.” (*See also* Benhabib, 2009; Laborde, 2017, p. 162) They must elaborate CLD’s commitment to equal human worth with their own positive lawmaking. Its many blank spots are

filled in only when particular political communities undertake discursive democratic practices (or, in the Rawlsian iteration, public reason) as they seek an understanding of what equal human worth means to them. (Cohen, 2008, p. 589) Furthermore, the positive laws democratic citizens do promulgate, including both constitutional and ordinary law,¹³ remain open to democratic critique and dialogue. Citizens may always attack the law on the books for failure to uphold CLD's foundational normative commitment to equal human worth.

The Concession Theory of Corporate Personhood

The concession theory of corporate personhood starts by proposing two distinct but connected arguments. The first, and oldest, hails from ancient Roman law and posits that the corporate entity is but a man-made "fiction," with no substantial physical or social reality. Akin to the Hobbesian idea that no "people" exists without the state (Kalyvas, 2006, p. 585), it is an empirical supposition that proposes that a corporation's physical composition, without any legal additive, is nothing more than the sum of its individual (human) parts. Kelsen, for example, argues that statements attributing an action to a corporation

are obviously only figures of speech. It cannot be seriously denied that actions and forbearances can only be actions and forbearances of a human being. When one speaks of actions and forbearances of a [corporation as a] juristic person, it must be actions and forbearances of human beings which are involved. The only problem is to establish the specific character of those actions and forbearances of human

¹³ That rights are reflected both in constitutional and ordinary lawmaking is nicely illustrated by the historical trajectory of the Commerce Clause of the U.S. Constitution. "Social Rights," often explicitly codified in constitutions, appear in U.S. law as the lawful exercise of Congressional lawmaking power to, for example, set minimum wages, provide social insurance, and fund healthcare.

beings, to explain why those actions and forbearances of human beings are interpreted as actions or forbearances of the corporation as a juristic person.

(Kelsen, 1945, p. 97)¹⁴ Under the fiction theory, the implication is that something “extra” must be added artificially by the law in order to deduce some rights or obligations not otherwise available if one considers only these individual human parts and their own unique legal personalities. Sometimes, the “extra” is the assignment of a contrived legal personality, or collective volition, capable of acting in a legally cognizable manner with both the members of the group and with outsiders. (Freund, 2000 (1897), p. 11) For Kelsen, it is the legally imposed system of norms that organize and regulate mutual individual conduct within the legally defined corporation. (Kelsen, 1945, p. 98) These norms will identify decision-makers and allocate duties amongst otherwise unrelated individuals.

The second argument is more explicitly evaluative. It holds that this something “extra” is a form of delegated political power conceded by the state to the corporation, and, through the corporation, to individual actors with established leadership roles within the corporation. (Bratton, 1989, p. 1475) To illustrate, in Kelsen’s framework, the relation between corporation and state is a “relation between two legal orders, a total and a partial legal order...To be more specific, it is a case of delegation.” (p. 100) These delegated powers purport to permit it, through its human governing agents, to operate as a kind of sub-state governance organ. Jean Bodin articulated a similar point when he argued that corporations gained “a right of legitimate community under the sovereign power [where] the word legitimate conveys the authority of the sovereign, without whose permission there is no [corporation].” (Bodin, 1986, p. 178)

¹⁴ In Kelsen’s legal science, legal and sociological concepts arguably talk past one another. And so one should not perhaps regard Kelsen as a concession theorist that would deny any social reality to the corporation. Nevertheless, his juristic concept of corporate personhood is representative.

Meshing the two arguments together, the concession theory of corporate personhood thus holds that the corporation only exists if and when the state takes affirmative steps to create it. Corporate law, and therefore the corporate person, is a kind of public law (Millon, 1990, p. 211) and has only those rights and duties that government explicitly gives them. (Strine, Jr. & Walter, 2016, p. 881) It is, of course, possible to cleave the concept's two arguments. One can hold to the view that the entity is a "fiction," in so far as it has no physical reality apart from its individual human members, while also denying that its legal edifice is a form of political delegation. Indeed, as explained below, this is the position taken by aggregation theories of corporate personhood. Or one may also reject the notion that the legal additive midwifes a whole where not existed before while also maintaining that the law protecting is a form of delegated sovereignty. Such is likely the view of Thomas Hobbes, who elided the sociological reality of political pluralism as he vested all legitimate authority in one sovereign Leviathan.

Concession Theory's Historical Circumstances

As with the other theories of personhood discussed in this Chapter, concession theory has been invoked as a critical response to empirical, historical changes as well as to ethical dilemmas posed by the business corporation. Up until the mid 19th century, (Dewey, 1926, pp. 666-67; Strine, Jr. & Walter, 2016) the concession theory prevailed as the theory of choice amongst judges, lawyers, and scholars. (Bratton, 1989, p. 1484; Harris, 2007) In the Founding Era of the United States, legislatures, recalling horror stories of English monopolies past, tinkered with charters in the hopes of limiting the power and influence of early American corporations over their fledging republic. (Speir, 2012, p. 155; Millon, 1990, p. 209; Strine, Jr. & Walter, 2016, p. 895¹⁵; Hilt,

¹⁵ "Thomas Jefferson hoped that the new country could 'crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid

2017) In this, their concern mirrored that of Hobbes, who likewise worried that associations might threaten the sovereign power of the state. (Hobbes, 1994, p. 155) With provisions capping corporate life and capital assets, delimiting their board members, and specifying their particular purposes, corporate charters indeed appeared to birth very particular forms of synthetic group life. Chief Justice Marshall enunciated the concession theory's most notorious early version in his 1819 *Trustees of Dartmouth College v. Woodward*¹⁶ opinion:

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. These are such as are supposed best calculated to effect the object for which it was created.

(*Ibid.*, p. 636) Notably, Marshall took care to note that the corporation “does not share in the civil government of the country, *unless that be the purpose for which it was created*. Its immortality no more confers on it political power, or a political character, than a natural person.” (*Ibid.*) (emphasis added). Angell and Ames, publishing an early treatise on U.S. corporation law in 1861, similarly defined it as a “body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of individuals who compose it, and is, for certain purposes, considered as a natural person.” (Angell & Ames, 1861, p. 1) The idea stuck around even after incorporation replaced partnership as the most popular form of business organization – though its publicly assigned purposes were watered down to furthering the general welfare by contributing to economic growth. (Millon, 1990, p. 207; Hager, 1989, p. 638) And it lingered even after general incorporation became widespread

defiance to the laws of our country.” (citing Letter to George Logan, Nov. 12, 1816, in 12 The Works of Thomas Jefferson 42, 44 (Paul Leicester Ford ed., 1905))

¹⁶ 17 U.S. 518 (1819).

in the 1840s, especially as states reserved the rights to revoke or amend corporate charters. (Hurst, 2004 (1970), p. 56; Strine, Jr. & Walter, 2016, p. 895) Corporations were an evil necessary for economic development, and they were regulated and limited accordingly. (Strine, Jr. & Walter, 2016, pp. 896-7)

The use of the theory eroded in the third quarter of the 19th century (Horwitz, 1992; Harris, 2007; Strine, Jr. & Walter, 2016, p. 881). The introduction of general incorporation statutes, combined with a decline in the state's use of its chartering authority to impose substantive regulations on corporate activity (Millon, 1990, p. 202; Hilt, 2017), and the growth of American (corporate) industry finally camouflaged the state's visible hand. (Johnson L. , 2012, pp. 1138-39) Further, the "steady incorporation of institutionalized rationality" into working life appeared as something altogether alien to Americans, and certainly not something created by the legislative scribes housed in state capitols. (Trachtenberg, 1982, p. 65)

Nevertheless, concession theory continues to make appearances during periods of public suspicion of corporate power and influence. (Blumberg, 1993, p. Ch. 2 n. 9; Johnson, 2012, p. 1142) Often recalling the historical role of incorporation in the creation and governance of towns, boroughs, and even American colonies, progressive writers remind their audiences that the corporation need not, and thus perhaps should not, be understood as a private actor protected by the walls and schisms liberalism erects between state and society. They direct attention to the fact that legislatures, before making them widely available through general incorporation statutes, used to grant charters only for public purposes like building canals, railroads, turnpikes and public utilities. (Roy, 1997, p. 58; Blumberg, 1993, p. 6; Bratton, 1989, p. 1484) As public entities, they argue, corporations ought to serve the common interest. (Millon, 1990, pp. 202, 207) To illustrate, during the New Deal era, some scholars seemed to have concession theory in mind as they

suggested corporatist reforms meant to achieve stability, economic equity, and social welfare. (Bratton & Wachter, 2008, pp. 103, 123) Justice Stevens, in his *Citizens United* (558 U.S. 310, 428 (2010)) dissent, notes that historically, corporate rights (like speech rights) were and still could be limited by the state in the name of public welfare. Woodrow Wilson, in the Progressive Era of U.S. politics, encouraged the dismantling of corporate power while noting that the “corporation is merely a convenient instrument of business and way may regulate its use as we please...it is merely an artificial, a fictitious person, whom God did not make or endow, which we ourselves have made with our own hands and can alter as we will.” (Wilson, 1910, p. 617)

In contrast, supporters of corporate power occasionally argue that corporate law’s democratic provenance lends it legitimacy. (Bratton, 1989, p. 1487) As creations of the popular sovereign, they are useful instruments and reflections of collective autonomy. Legislatures thus permitted greater corporate freedom in the name of utility and growth. (Hurst, 2004 (1970))

The Political Theory of Concession Theory

Legal scholars, attorneys and judges that deploy the concession theory generally emphasize its second prong: the delegation of political power. They argue that the state’s necessary role in conferring legal rights, duties, and a certain amount of self-governing autonomy carries normative implications. (Parkinson, 1993, p. 26) The precise shape that these implications take, however, are determined by the underlying theory of political legitimacy to which the speaker commits herself. More often than not, however, these normative premises are left unstated and, therefore, undefended.

First, some concession-theory wielders implicitly hold the view that laws are legitimate only in so far as they vindicate democratically formed intentions. The corporation, whose own capacities and authority are a delegation of laws, must therefore, as the state’s associational

conscripts, fulfill the public purposes the democratic legislator chooses to ascribe to it. (Singer, 2017) The flip side is, of course, that the corporation may not undertake purposes *not* explicitly ascribed to it. (Bottomley, 2007, p. 42; Millon, 1990, p. 202) Dalia Tsuk, in her illuminating historical treatment of the modern U.S. business corporation, recalls the legacies of the New Deal as she describes the political processes by which corporations assumed responsibility for the provision of public goods like employment benefits and social insurance. (Tsuk, 2005)¹⁷ The unstated counterfactual is, of course, that large, powerful corporations were only permitted to survive such a transformative era in U.S. history because they fulfilled these important democratic mandates. (Bratton & Wachter, 2008, p. 136; Dodd, 1932, p. 1155) The normative inference is that they ought not to be permitted to exist should they fail to do so.¹⁸ More recently, dissenting Justices of the U.S. Supreme Court employed it to contest opinions granting Constitutional liberty rights to corporations.¹⁹ (Winkler, 2018)

Others, analogizing corporate power to political power rather than explicitly tying it to the state as a literal delegation of sovereign authority,²⁰ evaluate the legitimacy of corporate influence and action according to notions of republican liberty and democratic accountability. (Bratton, 1989, p. 1497) Nadel, adding his voice to the pro-consumer movement of the 1970s, argued that because corporations function like “private governments” they should therefore be subject to same

¹⁷ A similar delegation of public functions occurs even today, as corporations increasingly provide public services like hospitals, health care, prisons, preschools, libraries and public utilities. (Ravich, 2016)

¹⁸ Indeed, actions under *quo warranto* - where a corporation would fail to fulfill its state-designated purpose - were common until the second half of the 19th century. (Hovencamp, 1988, p. 1660)

¹⁹ *E.g.*, see Justice Ginsberg’s dissent in Justice Ginsberg, in *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014).

²⁰ This move reflects the form of arguments that some political theorists offer. They presume the fact of power, without first setting out a positive case for the existence for power as such, and then proceed to ask under which conditions that power can be made legitimate. As explained in a bit more detail in Chapter 4. Republican theories, in particular, assume this structure.

accountability constraints as public government. (Nadel, 1976; Parkinson, 1993; *see also* Anderson, 2017 and Landemore & Ferreras, 2016 for contemporary treatments)

More recently, concession theory may lurk behind the presentation of various “stakeholder” models of corporate governance by legal scholars and business ethicists. First developed within the academic field of organizational management, stakeholder theory holds that the legitimacy of the corporate form derives from how well it serves the quasi-public interest of those involved with the corporation. Although multifarious,²¹ its models generally assert that corporations ought to be governed in the interests of, or at least remain accountable to, a variety of constituencies in addition to the corporation’s stockholders. Offered as evaluative standards that sometimes loosely analogize the corporation to governments, (Gould, 2002, p. 3) these models respond to what critics understand as increasingly destructive pro-finance behaviors and practices within corporate boardrooms. The thought is that stakeholder models might provide an anecdote to the short-termist mentality within corporate culture that focuses neurotically on short-term share price fluctuations. (Strine, 2008) Often, it is offered as an unabashedly Burkean solution to corporate authoritarianism, appointing to the “representatives” of the corporation, the directors, the task of governing in the best interests of the corporation as a whole while taking into consideration the entirety of its variegated constituency. (Gould, 2002, p. 6; Moriarty, 2014, p. 821)

One need not only wield concession theory in the cause of further state regulation of business. Those on the libertarian end of the political spectrum will employ it to highlight the

²¹ One notable iteration is that of “enlightened shareholder value,” reminiscent of Tocqueville’s “self-interest rightly understood.” In this model, taking care of stakeholders can also be good for the shareholder’s bottom line. Several institutional investors (*e.g.*, Calvert, Hermes, TIAA-CREF Social Choice Equity Fund, *etc.*) explicitly adopt this model as an investment strategy.

vulnerability of individual rights to overweening state/corporate power. By identifying corporate power with state power – which is, almost by definition, suspect to such thinkers – they can draw in sharp relief the potential threats posed by business to individual liberties. A liberal legal positivist might therefore confront with skepticism any concession of power to a corporation that appears to curtail important liberal rights. (See Dyzenhaus, 1999, p. 10) As an illustration, in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), Justice Rehnquist opined that the economic advantages afforded to the corporation by virtue of statutory benefits like limited liability and perpetual life should not be exploited in a way that might impair the exercise of the political speech rights of less well-off individual citizens. (*Ibid.*, pp. 658-59) An economically-motivated corporate megaphone supercharged by the benefits of state-created privileges, in other words, would drown out individual voices. Accordingly, the regulation of corporate political speech was held to be constitutional. Rehnquist perhaps was channeling some of the founding-era suspicion of corporations. (Blumberg, 1993, p. 6) That historical suspicion is likewise palpable in the thought of Thomas Paine, who, in debates regarding the chartering of the Bank of North America, warned that corporate members would suffer unfreedom because

... [t]he government holds an authority and influence over them, in a manner different from what it does over other citizens, and by this means destroys equality of freedom...By this scheme of government any party, which happens to be uppermost in a state, will command all the corporations in it, and may create more for the purpose of extending that influence. (Paine, 1824, p. 397).

Thus, there exists within the historical discourse of concession theory a variety of normative applications. Those looking to it for a determinative account of corporate rights,

therefore, must first commit to and defend a particular notion of political legitimacy before it can do any real work.

Endogeneity of Theory and Practice

Concession theory's weaknesses extend beyond this indeterminacy. It is also an idea that also helps create its own object of evaluation. By shaping the very practices it means to justify and critique, concession theory does not just fail to offer a clear prescriptive account. It cannot provide a coherent ontological account, either.

For example, the stakeholder models described above arguably inspired real-life legal and political responses to perceived corporate harms.²² Legislators in many states amended their corporate codes to permit incorporators to form a new kind of corporation, a "B" ("benefit") corporation. Unlike their mainstream counterparts, B corporations grant corporate directors explicit permission to pursue purposes other than shareholder value maximization. Before these B corporation statutes, it was unclear whether and to what extent a court might punish directors for activities that had no immediate relation to stock price maximization. The law governing hostile corporate takeovers likewise betray this endogeneity. State court judges, recognizing that company officials owe fiduciary duties not only to stockholders but also to the broader corporate constituency, permit corporations to fend off hostile overtures from institutional investors who aim to threaten corporate purposes, policies, and human participants (Parsons, Jr., 2016; *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994)) Moreover, the notion that companies ought to be

²² More cynical commentators argue that this response was not, in fact, inspired by a desire to render corporations more socially responsible. They argue instead that they were meant to provide cover to directors wanting immunity from shareholder meddling in corporate affairs. (Bainbridge, 2003)

responsive to the broader public drove recent modifications to Federal financial reporting guidelines.²³ A significant number of politically motivated institutional investors formed self-regulatory bodies that encourage corporations to engage in environmentally sustainable and socially responsible business practices.²⁴ “Socially Responsible Investors”²⁵ likewise sought to leverage their financial resources to foster stakeholder-friendly practices. Most recently, Senator and Democratic presidential candidate Elizabeth Warren introduced a new bill, the Accountable Capitalism Act, that encourages corporations to become more socially responsible by, amongst other things, appointing elected worker representatives to corporate boards.²⁶

Meanwhile, these legal and behavioral modifications may be contributing to changing contemporary social expectations regarding the legitimate moral and political standing of corporations. In the post-Enron era, one witnesses in business periodicals a growing cleavage between Wall Street and company insiders. Equity investors of the “activist” variety are maligned as short-termist,²⁷ myopic, out-sourcing, and greedy. Company insiders, on the other hand, make “real” products in the “real economy,” innovate, and create jobs. (Cohn, 2015; Irwin, 2016;

²³ See, e.g., S.E.C. Release No. 33-9106, *Commission Guidance Regarding Disclosure Related to Climate Change* (February 2, 2010) (under Reg. S-K); Section 13(p), '34 Act (mandatory disclosure regarding the sourcing of certain “conflict minerals”).

²⁴ E.g., the Sustainability Accounting Standards Board (“SASB”), the Global Reporting Initiative (“GRI”); the Climate Disclosure Standards Board (“CDSB”) and the International Integrated Reporting Counsel (“IIRC”). Meanwhile, the Securities and Exchange Commission is currently seeking public comment on whether such disclosure ought to be required by law.

²⁵ Examples include Access Capital Strategies, Appleseed Fund, Azzad Ethical Fund, Calvert Capital, Epiphany Faith and Family Values, Gabelli SRI, Green Century, Legg Mason Social Awareness Fund, MMA Praxis, Neuberger Berman SRI, New Alternatives Fund, Parnassus Core Equity Fund, Pax World, Walden Social Balanced Fund, and Winslow Green Growth Fund.

²⁶ See “Warren Introduces Accountable Capitalism Act,” available at <https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act>.

²⁷ The New York Times provides a graphical illustration of this logic at <http://www.nytimes.com/interactive/2015/11/05/business/dealbook/Short-Term-Thinking.html>.

Lattman, 2013; Olson, 2016; Semuels, 2016; Lopez, 2016; Plender, 2015; Denning, 2014) Popular opinion, more and more often, appears to coalesce around the idea that the corporation does not just exist merely to earn profits for shareholders. Rather, it ought to contribute to economic growth in a more multifarious, robust way. Even Laurence D. Fink, Chair and CEO of notable hedge fund Blackrock, regularly issues public letters supporting pro-stakeholder business practices.²⁸ These changing expectations may yield further legal reform and thus further changes to the corporate persona.

Simply, concession theory posits that the corporation ought to become more attentive to the public good. And so corporate law changes to ensure that it does so, reinforcing the ontology offered by the theory: the corporation is a creation of public law attuned to the public good as articulated by democratic lawmaking. This conclusion then serves to further reinforce concession theory's normative implications: as creatures of public law, corporate rights *should* be constrained to further the public good as articulated by democratic lawmaking. As a result, what is offered is not so much a description and prescription of corporate moral and political standing but a circular argument.

Other Critiques of Concession Theory

In addition to concession theory's normative indeterminacy and endogeneity problems, the ontology it presents slides past a detail that liberals find indispensable: the individual. It similarly transgresses against communitarian values when it elides the part played by the corporation in constituting the identities of its members and in vindicating their collective autonomy. Thus, while

²⁸ Letters dated March 31, 2015 and April 10, 2016, available at <http://www.businessinsider.com/larry-fink-letter-to-ceos-2015-4> and <https://www.blackrock.com/corporate/en-gb/investor-relations/larry-fink-chairmans-letter>, respectively.

concession theory correctly hones in on the inescapable fact of law as a normative institution that orients and directs human behavior, (Deakin, 2012, p. 348; Orts, 2013; Roy, 1997) it screens out phenomena that constitutional liberal democracies find important.

First, by drawing attention to the state's role in creating the corporation, concession theory erroneously discounts the obvious causal role played by individual initiative, preference, and labor. Just as Kelsen's theory of citizenship attaches only to individual acts that are captured by law, the concession theory counts as "corporate" only those deeds performed by actors identified in corporate statutes. It therefore omits any analysis of the sociological reality of human beings and their intersubjective relations. Indeed, some scholars even dispute whether the corporation actually requires an explicitly "corporate" law to exist.²⁹ They argue that incorporators and corporate participants might instead construct a corporate-like entity by relying exclusively on the law of contract, agency and the like. (Hessen, 1979; Parkinson, 1993; *cf.* Ciepley, 2013) Regardless, even if the corporation could not exist without corporate law, one cannot deny the influence of individuals and markets when it comes to operating, growing and otherwise bringing the corporation to life. (*Ibid.*)

Concession theory's blindness does not only fail to register the existence of individuals. It also blinks at groups. It does not, therefore, properly account for the corporate cultures and practices that shape individual subjectivity. (Colombo, 2012; Kateb, 1998, p. 48) As far as concession theory is concerned, corporations, as purely legal constructs, do not exhibit any of the experiential effects often investigated by theories of recognition and misrecognition. (*E.g.*,

²⁹ There are, of course, enterprises that operate without the corporate legal form, or any other kind of legal personality. See Andrew Verstein, "Enterprise without Entities," The CLS Blue Sky Blog, Nov 8 2016 (<http://clsbluesky.law.columbia.edu/2016/11/08/enterprise-without-entities/>) (discussing reciprocal insurance exchanges that do operate like a literal "nexus of contracts"). But they are few and far between.

Honneth, Sandel, Taylor) It has a difficult time accounting for research explaining the 2008 financial crisis on failures of corporate culture or studying the impact of intra-corporate institutional change on that culture. (Thakor, 2016; Guiso, Sapienza, & Zingales, 2015)³⁰ Moreover, the concession theory denies the existence of autonomous group agency. (Levy, 2014) It further neglects the sociological fact, and sociological consequences, that people certainly act *as if* the corporation is a real social entity with a personality and existence apart from its legal infrastructure. (Maitland, 1911, p. 315)

These ontological holes create weaknesses in the theory's normative implications. By drawing attention to the creative role the law plays in the constitution of the corporation, concession theory screens out the liberty rights of participants. It is, in a word, too authoritarian. (Orts, 2013, p. 21) The first prong, the empirical argument, denies the possibility that individuals might form collectivities that can accrue collective interests strong enough to merit the protection of a legal autonomy right. Moreover, its blindness to informal, unrecognized heteronomy within the corporation risks glossing over possible intra-corporate injustice. The second, prescriptive prong of the concession theory presents a particularly inimical challenge to a liberal polity dedicated to an autonomous civil society. For it implies that if a (corporate) group is to have any rights at all, they must wait upon the state to grant them.

First, concession theory is inimical to the idea that the corporation ought to be a private, autonomous economic actor. By shelving any corporate collectivity in the fiction section, concession theory denies any collective rights that might be derived from, but not completely reducible to, individual rights. As pointed out by Margalit and Raz in their work on national self-

³⁰ In particular, Guiso, Sapienza, & Zingales (2015) note that an initial public offering leads to lower "integrity" amongst corporate leadership, which in turn impacts productivity levels.

determination, not all group rights can be reduced to the simple aggregation of fully formed, enforceable individual rights. (Margalit & Raz, 1990) Sometimes, we might deny a right to a single individual because she lacks an interest that is strong enough to deserve protection. But, if she combines that marginal, and perhaps indirect, interest with those of many others, a case can be made for a collective legal right. Concession theory, by eliding any *a priori* interpersonal connections between group members, would prevent the successful assertion of such a right.

In addition, if the entity has no social reality, it becomes difficult to attribute responsibility for collective wrongdoing. (Blumberg, 1993, p. 5 (citing Coke and Blackstone); Friedman, 2000, p. 848) A group might collectively create some social harm while no individual participant herself contributed sufficiently to that harm to justify holding her personally accountable. And so one is left with the possibility that no one can be held to account – or be made, justly, to rectify the ensuing damage. (Freund, 2000 (1897), p. 37;³¹ Pettit, 2007) Labor unions invoked this particular loophole to wiggle out of liability for damages caused by strikes. (Harris, 2007) Not to be outdone, financial institutions employed similar strategies in the fallout of the 2008 financial crisis. (See, e.g., *In re Citigroup Inc. S'holder Deriv. Litig.*, C.A. No. 3338-CC, Feb. 24, 2009³²; Stewart, 2015) Instead, corporate liability can only be attributed if the state takes affirmative steps to include liability in its corporate statutes.

Concession theory's attention to law, in addition, may inadvertently create illiberal power disparities. Corporate law implicitly empowers a statutorily mandated internal hierarchy. The manner in which corporate resources are used will be up to the human beings who hold the

³¹ “The fiction theory creates an artificial unit...it burdens with the specter of an imaginary person which may claim all power and disclaim all liability.”

³² Holding that Citibank directors breached no fiduciary duty, even though they bankrupted the company as a result of what can be charitably called negligent oversight.

corporate offices established by law. These controlling human beings can then legally use corporate resources to, *e.g.*, drive very hard and unfair bargains with loyal, long-term, and valuable employees, pocketing the savings for themselves.³³ Although the suffering employees might possess a colorable moral claim as a result, the law would remain deaf to their cause because it does not recognize them as corporate officers with standing to make any such claim.

Concession theory's inattention to underlying reality leads to an additional concern. Individuals, by virtue of their exogenous capabilities (wealth, charisma, *etc.*) can assume authoritarian leadership roles within the corporation that the law does not recognize at all and, therefore, does not address. Powerful individuals may wield their power regardless of whether or not an explicit corporate "concession" grants it to them. One example immediately comes to mind. In law, it is the board of directors that enjoy original, undelegated power to govern the corporation. (8 *Del. C.* § 141(a)) In reality, however, it is the Chief Executive Officer – an employee of the board – that usually rules. (Vasudev, 2010, p. 929) She is, indeed, an extremely powerful "undocumented" worker. Unless and until the law recognizes this reality, the CEO remains unaccountable for her behavior.

The second, prescriptive part of the concession theory also leads to normative difficulties. Most obviously, it suggests that the corporation has no legitimate claim to autonomy against the state. Even if the group is real, and even if it does have a corporate interest distinct from its individual members, the "delegation" part of concession theory would forbid that group any *a priori* rights that might protect it and that interest. But "[t]o condition the existence of rights...on

³³ Or a \$1.2m office renovation, as Merrill Lynch CEO John Thain did, just as his company was getting ready to lay off thousands of workers. I should note here, however, that shareholders, because corporate law recognizes them, *would* have a claim against the spendthrift corporate officer.

a political determination by the state flies in the face of group rights discourse.” (Jackson, 2015, p. 396) It therefore “conflicts with a contemporary viewpoint that accords basic respect to individual human rights, including positive freedoms of association and negative freedoms against arbitrary dispossession.” (Orts, 2013, p. 21) If a democracy is permitted to grant or rescind rights arbitrarily, those rights are not rights in a meaningful sense, but merely instances of formal legal privileges.

More alarmingly, the delegation prong of concession theory harkens to failed historical attempts at bureaucratic socialism. For if the state controls the levers of corporate legitimacy, it controls the corporation. It therefore controls the economy. But one might now view as axiomatic the argument that “...a desirable economic order would disperse power, not concentrate it.” (Dahl, 1985, p. 89) Indeed, many contemporary socialist movements emphasize workplace autonomy for just this reason. (*See* Ch. 4) The problem with concession theory is thus perhaps not so much that it denies original rights to groups, but that it cedes too much power to the state. Concession theory, on its own, does not offer a principled standard according to which one might constrain the contemporary state’s authority to control capitalist business.

Concession Theory’s Critical Potential

Given these weaknesses, concession theory fails, without modification, to provide a convincing account of corporate legal rights to those committed to CLD. Moreover, and despite its recent progressive deployments, it is beyond the pale in this day in age to suggest that an actor so ubiquitously understood as “private” (Bowman, 1996) derives its legitimacy at the mercy of the state. The theory, after all, was first deployed in an agrarian economy at a time when individuals did not rely upon corporations for employment and consumption in their private lives. (Blair & Pollman, 2015) It also addressed itself to the headaches of a recently defunct antidemocratic

government, including the discomforts associated with monarchy-sanctioned corporate overreach. But one need not consign concession theory to the historical dustbin.

Indeed, though an imperfect critical tool, the theory merits consideration. When contemplated in light of an acceptable theory of CLD, concession theory offers a discourse that can help the cause of human emancipation. First, as intimated above in the discussion regarding its libertarian potentials, the concession theory suggests that both corporate legal rights and the state ought to operate within a single moral framework – including one founded on CLD’s commitment to equal human worth. (*E.g.*, Kelsen, 2007; Bockenforde, 1991, pp. 57-8) Recall that the concession theory posits that the corporation may only (and can only) wield power legitimately if that power is delegated by the state. But if state power – namely, positive law and its enforcement – *also* ought to be exercised legitimately, whatever moral standards subtend the state’s legitimate lawmaking will likewise apply to corporate law, including the ascription of corporate legal personhood and other corporate rights. The privileges and trappings of state power, after all, come hand-in-hand with public duties, *viz.*, whatever democratic and liberal desiderata that are required to render its use legitimate. (Roy, 1997, p. 52) And so such constraints and requirements also ought to apply to the laws directed to corporations which, like other positive law, can endanger human freedom and equality contrary to CLD’s commitments. Thus, if positive law is the outcome of democratic deliberation meant to articulate citizens’ understanding of equal human worth, corporate legal rights can likewise only be the result of such normatively constrained deliberation. This may very well mean that corporations do merit autonomy rights – if necessary to vindicate the equal worth of the corporation’s human members.

Concession theory’s other insights can also serve as part of the critical democratic discourse meant to inform citizens’ interpretation of equal human worth in the context of big

business. For example, R. Edward Freeman, a leading advocate of stakeholder theory, invokes a universalist Kantian ethic as he argues in favor of contractarian workplace democracy because “stakeholder groups [have] a right not to be treated as a means to some end.” (Freeman, 2002, p. 47) Carol Gould applies an “all-affected” principle tailored with the notion of equal positive liberty. (Gould, 2002, pp. 9-10) Simon Deakin, a legal scholar, invokes a universalistic property right while Thomas Donaldson and Lee E. Preston, business academics, apply notions of distributive justice. (Deakin, 2012; Donaldson & Preston, 1995; Mansell, 2013, p. 55) In addition, the idea of the public interest embedded in concession theory’s genealogy suggests that whatever rights are afforded to the corporation, they ought also to take into account the equal rights of corporate outsiders and the public at large. In turn, taking these interests into account requires contending with the sometimes outsized social and economic effects the corporate person may have. Such an accounting can likewise be characterized as an effort to cash out the promise of equal human worth – this time, not in regards to corporate “insiders,” but to corporate “outsiders.” Each of these deployments of concession theory, in other words, can be described as arguing in favor of changing corporate legal rights because they fall short of CLD’s commitment to equal human worth.

Concession theory, however, does not articulate how to go about protecting individual associational freedoms and the sociological realities of group life. Specifically, a better theory of corporate personhood would: (1) account for sociological power disparities within the corporation; (2) address problems of collective responsibility; and (3) delimit a space for corporate autonomy and self-governance in the face of a consolidated, modern state. Fortunately, the other theories of corporate personhood show a path forward.

The Aggregation Theory of Corporate Personhood

The aggregation theory of the corporation, like the concession theory, conceptualizes the corporation as a “fiction” without any independent social existence. Unlike the concession theory, however, it does not locate the origin of its artificial life with the state. It finds it instead within the voluntary agreements made by and between individuals who “aggregate” themselves into joint enterprise. (Colombo, 2012, p. 14) They do not, in other words, wait for the state to aggregate them. And they do not wait upon the state to legitimate their collective interests. They merit protection, rather, because of the inherent, *a priori* rights of each participating individual.

Historical Circumstances of Usage

The aggregation theory first appeared during the democratization of the Jacksonian era. (Colombo, 2012, p. 14; Bratton, 1989, p. 1485; Blumberg, 1993, p. 22) It persisted through the late nineteenth century as “legal thinkers [tried] to create a sharp distinction between public and private law” (Horwitz M. J., 1982, loc. 1425) and reinterpret the common law as the defensive stronghold of a commercialized understanding of natural liberty. (*See, e.g.*, Pound, 1909) Public skepticism towards mounting state power, monopoly and corruption preceded the eventual elimination of the government’s special chartering of corporations. (Barkan, 2013; Johnson, 2012, p. 1146; Blair & Pollman, 2015, p. 1700) Indeed, by the mid 19th century, the special charter was seen to unfairly favor elite and corrupt interests. Yet states, perhaps fearful of throwing the economic baby out with the anti-democratic bathwater, did not eliminate the corporate form entirely. Instead, their populist response was to democratize the availability of the corporate form of legal personhood. (Barkan, 2013; Roy, 1997; Millon, 1990, p. 202) And so special charters were replaced by general incorporation statutes. In addition, by the late 19th and early 20th centuries, corporations outgrew their role as providers of public utilities and transportation infrastructure and

began colonizing U.S. manufacturing and industry. Meanwhile, states ceased using their chartering authority to impose substantive regulations on corporate activity.” (Millon, 1990, p. 202) These bare bones, widely available statutes enabled individuals to organize and self-order a corporation upon the filing of simple forms and the payment of modest fees. (Bratton & Wachter, 2008, p. 106) They thus made it difficult to argue that corporations were a product of affirmative state action. (Morawetz, 1882, p. 11) Instead, it was the product of the cooperative, voluntary choices made by individual incorporators – the kind of cooperative, voluntary action celebrated by Tocqueville as a uniquely American proclivity. (Krannich, 2005, p. 72)

At the same time, practically-minded judges were hunting for an idea of corporate legal personhood that could ground the legal residency of increasingly itinerant business enterprise. In particular, federal courts facing issues of diversity jurisdiction³⁴ and state courts confronted with claims against foreign corporations needed to lay their fingers on actual bodies that could be located in time and space. Such was necessary in order to determine whether they had jurisdictional authority to hear the claims at all³⁵ (Harris, 2007, p. 42) and, if so, which state’s laws might apply to the challenged transactions. The concession theory was unhelpful; it implied that out-of-state corporate transactions had no legal validity unless and until the foreign state recognized them as valid. After all, as the fictional creation of another state, the corporation does not actually exist outside of that other state and the purview of its laws, and so could not possibly enter into out-of-state transactions. (Hohfeld, 1910, p. 300)(discussing *Bank of Augusta v. Earle* (1839) (CJ Taney)).

³⁴ Under U.S. constitutional law, federal courts enjoy subject matter jurisdiction over claims sounding in state law only if the litigants hail from different states.

³⁵ Perhaps the earliest case considering corporations under the Constitution, *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) (1809), dealt precisely with this issue. There, the Court considered the corporation a “company of individuals” when the “general purpose” and “spirit” of jurisdictional laws seemed to require it.

As a result, an invocation of the concession theory might deprive a day in court to the out-of-state victims of fraudulent corporate actions.

Consequently, by virtue of historical political and economic changes, the concession theory required a conceptual replacement. That replacement came in the form of the aggregate theory of corporate personhood. Emerging indigenously, (Harris, 2007, p. 14) it defined the corporation as an aggregation of individual property owners who voluntarily combined their resources while undertaking a kind of business partnership. (Millon, 1990, p. 202; Strine, Jr. & Walter, 2016, p. 920) Thus we see Victor Morawetz, in his 1882 legal treatise, reinforce what he understood to be the prevailing view that “[a] private corporation is an association formed by mutual agreement of the individuals composing it.” (Harris, p. 44 citing Morawetz (1882) at p. 11) Justice Field of the U.S. Supreme Court was a particularly assiduous proponent, invoking the theory in several important opinions in order to protect corporate contract and property interests in the name of individual rights.³⁶ (Blair & Pollman, 2015, p. 1695; Blumberg, 1993, p. 28; Avi-Yonah, 2010, p. 1017; Strine, Jr. & Walter, 2016, p. 915) It was a pragmatic turn altogether consistent with the newly instrumentalized U.S. conception of judicial decision-making, tailored to facilitate a growing industrial republic. (Horwitz M. J., 1992)

The influence of this first incarnation endured until the 1930s and the successful Legal Realist and Progressive assault on *laissez-faire* policies. As described in some more detail below, increasing industrialization and professionalization, growing capital markets, and proliferating public share ownership stretched beyond credibility the analogy, suggested by aggregation theory, between corporations and property-based partnerships. (Colombo 2012 p. 14 (Blair &

³⁶ He was also socially connected to the “Big Four” railroad barons involved in these cases: Leland Stanford, Collis Potter Huntington, Charles Crocker and Mark Hopkins. (Blair & Pollman, 2015, p. 1705)

Pollman, 2015)) Meanwhile, the idea of the corporation as protected private individual property seemed to offer corporations too much rhetorical protection just as their influence in society was seen as increasingly oversized and pernicious. (Avi-Yonah, 2010, p. 1017) Attributing to the corporation indelible property rights would render the regulation of negative business externalities all the more difficult. As a result, the aggregation theory yielded for a time to the real entity conception of corporate personhood, discussed *infra*. (Millon, 1990, p. 203)

The aggregation theory made a comeback in the 1970s as the U.S. faced increasing international economic competition and recession. This more recent incarnation, perhaps most notoriously articulated by Alchian & Demsetz in their seminal 1972 article “Production, Information Costs, and Economic Organization” in the *American Economic Review*, donned “the garb of neoclassical economics.” (Millon, 1990, p. 203) Rather than describing the corporation as an assemblage of property owners acting as general partners, the new aggregation theory, known familiarly as “nexus-of-contracts” theory, defined the corporation as a set of relations amongst managers, shareholders, and other stakeholders that do not differ in meaningful degree from ordinary market contracting. (Bratton, 1989, p. 1478)

Inspired by Ronald Coase’s legendary 1937 essay, the contractual “transaction costs” theory of the firm argues that employees and other firm participants rationally and explicitly agree to hierarchical management given the uncertainty that necessarily renders contracts incomplete. The idea is that since neither party can predict the future perfectly, one will rationally agree to abide by the authority of another when it comes time to dealing with unanticipated events. A related version explains that parties who make specific, special investments in an ongoing business relationship will likewise agree to an authoritarian governance structure. Each can credibly extort the other by threatening to withdraw themselves from the relationship. A withdrawal would leave

the other party in the lurch, her pockets emptied after making specific and non-transferable investments in the relationship. To avoid such an outcome, the parties will either (1) inefficiently, avoid the special relationship altogether; or (2) efficiently, subsume the partnership under the control of a single authority. The theory was picked up by Oliver Williamson in the 1970s and exists to present day, including in the work of Oliver Hart, the recent Nobel laureate.

Though the new aggregation theory of corporate personhood comes in many varieties, the most popular versions posit that corporate shareholders bargain for residual control rights while delegating most day-to-day decision-making power to managerial agents who, amongst other things, supervise workers hired through incomplete employment contracts. (Petrin, 2018) As principles, these shareholders monitor their agents, threatening to sell their stock to corporate raiders should they remain dissatisfied with corporate performance. Resulting in a contemporary “shareholder primacy” understanding of governance reminiscent of the first-generation aggregative views, these nexus-of-contract models hold that shareholders, as principles, monitor and discipline directors, their “managing agents,” who otherwise have incentive to self-serve and underperform.

Other models, though, favor non-shareholder stakeholders. Margaret Blair and Lynn Stout’s “team theory,” for example, understands directors as agents hired to protect the specific (contractual) investments of employees, creditors, long-time customers and partners as well as shareholders. (Blair & Stout, 1999) Stephen Bainbridge’s “director primacy” model flips the relationship, envisaging the board as a *sui generis* contractual nexus that hires factors of production, with residual control and income rights distributed to shareholders as a result of bargaining. (Bainbridge, 2003) Both explain intra-firm hierarchy in terms of efficiency: fiat replaces the transaction costs associated with market pricing mechanisms.

Though its origins lay perhaps in the sincere desire of academic economists to explain and predict corporate formation and behavior, (Colombo, 2012, p. 7) the nexus-of-contracts theory also deligitimized what was understood within academia as inefficient Post-war managerialist business models and government interference. Freedom of contract was making a comeback throughout intellectual thought, and this new theory of corporate personhood would help corporations get on the deregulatory train. (*Ibid.*; Vasudev, 2010; Bratton & Wachter, 2008, p. 145) What's more, it offered up the corporate takeover market as a proxy to waning product market competition as industry continued to concentrate. (Fama, 1970) Nexus-of-contracts theory predicted that savvy profit-hunting investors would pick and choose market "winners" and "losers" when the competitors themselves no longer had to compete with each other. (Bratton & Wachter, 2008, p. 145) Firms would therefore strive to innovate and economize to appease stockholders, even if such was no longer necessary to survive ordinary competition. The result was a new intellectual emphasis on capital markets as the primary drivers of economic growth.

The influence of these contractual models extend beyond academic circles, and was translated into legal discourse most notoriously by Circuit Court Judge Frank Easterbrook in his 1991 monograph, *The Economic Structure of Corporate Law*, jointly authored by the University of Chicago law professor Daniel Fischel. Judges routinely cite contractual theories when resolving disputes between shareholders and company executives.³⁷ Corporate participants themselves, moreover, take the theory to heart. The leadership of a burgeoning number of U.S. companies embraces the corporate "shareholder value" business model, a model buttressed by nexus-of-

³⁷ *E.g.*, *Haft v. Dart Group Corp.*, 671 A.2d 413 (Del. Ch. 1995); *Bird v. Lida, Inc.*, 681 A.2d 399 (Del. Ch. 1996); *Quadrant Structured Products Co., Ltd. v. Vertin et al.*, 115 A.3d 535 (Del. Ch. 2015); *In re EZCorp, Inc. Consulting Agreement Deriv. Litig.*, 2016 Del. Ch. LEXIS 14 (C.A. No. 9962-VCL).

contracts theories. (Bratton & Wachter, 2008; Bainbridge, 2003; Fortin, Zhang, Subramaniam, & Wang, 2014) Activist institutionalist shareholders likewise preach and practice shareholder primacy as they wage proxy campaigns to align internal corporate governance institutions according to the recommendations of those models. (Stout L. A., 2007, p. 800; Strine, Jr., 2007, p. 1773))

The Liberal Political Theory of Aggregation Theory

In whatever variety, aggregation theories have usually been invoked to protect the corporation from government interference by bootstrapping corporate activity to notions of individual economic freedom. Thus, the theory of political legitimacy underpinning the first generation aggregation theory is libertarian. Supporting the second generation, “nexus-of-contracts” variety is a functionalist version of Adam Smith’s liberal rights-utility synthesis. It is also associated with the atomized, interest-based liberal pluralism of post-war American political thought. (Bratton & Wachter, 2008, p. 113)

First Generation

The first generation aggregation theories appeared during the infamous *Lochner*³⁸ era of U.S. Supreme Court jurisprudence, when the Court awarded to the corporation substantive due process rights under the Fifth and Fourteenth Amendments. During the time, “substantive due process” meant precisely an inalienable right to private property. (*Bloomer v. McQuewan* (1852))³⁹ By defining the corporation, a productive enterprise, as nothing but the aggregation of such private property, the Court could thus shield the corporation from government regulation. (Dahl, 1985, p. 63) Indeed, “corporate property came to enjoy fewer fundamental challenges in the United States

³⁸ *Lochner v. New York*, 198 US 45 (1905),

³⁹ 55 U.S. (14 How.) 539, 553.

than perhaps in any other country in the world, and certainly than in any European country.” (Dahl, 1985, p. 72-73) Under this libertarian treatment, corporations did not only enjoy protections by virtue of their status as private property. The aggregative theory was also summoned to justify other Constitutional rights. (Blair & Pollman, 2015) The corporation was protected under the 4th and 14th Amendments against unreasonable search and seizure (*Hale v. Henkel*)⁴⁰ and discriminatory tax treatment (*County of San Mateo v. Southern Pacific Railroad Co.*)⁴¹ (Dahl, 1985, p. 73; Barkan, 2013) It thus drew a hard line between public and private, cementing corporate property and operations within civil society, not the state. (Horwitz M. J., 1982)

Second-Generation

The contemporary variant of aggregation theory provides a functionalist argument for those wanting to both (1) legitimize the corporate phenomenon; while (2) setting forth a critical standard aimed at encouraging efficiency-enhancing improvements to corporate governance. Positing the corporation as the outcome of free contracting, the theory suggests that contemporary corporate practice is nothing but the manifestation of individual economic freedom. It also makes much hay of liberalism’s rights-utility synthesis, arguing that the corporate “outcome” not only expresses individual liberty, but also maximizes social wealth creation. Accordingly, it invokes three competing theories of political legitimacy: (1) utilitarian, or consequentialist, and associated with legal pragmatism (Posner, 2004, p. 150); (2) democratic, thus bringing through the back door the public purposes that concession theorists once made explicit; and (3) libertarian, with its emphasis on *a priori* contract and property rights. The theory, however, does not serve solely as apologia for the *status quo* arrangement of corporate rights. It also points out inefficiencies in contemporary

⁴⁰ 201 U.S. 43 (1906)

⁴¹ 13 F. 722 (C.C.D. Cal. 1882)

corporate practice and is therefore, like concession theory, to a large extent critical rather than explanatory.

The unapologetically utilitarian justification of corporate rights is part and parcel of many second-generation theories that purport to set out the conditions under which business enterprise maximizes utility and minimizes transactions costs. Legal corporate autonomy rights are justified based upon the maximization of social welfare – full stop. Such justifications can be observed in the written opinions of judges overseeing litigation amongst corporate directors, managers and shareholders. For example, the Delaware Court of Chancery affords wide discretion to corporate chiefs in the management of corporate affairs because relying on their “business judgment,” rather than on the judgment of the judiciary or the shareholders, yields superior economic outcomes. (E.g., *In re Goldman Sachs Group, Inc. S’holder Litig.*, 2011 Del. Ch. LEXIS 151, *2 (C.A. No. 5215-VCG))⁴²

There are, however, versions of the theory that are less consequentialist. These inherited from the concession theory the idea that the corporation ought, because it is a creature of democratic law, to serve public purposes. But with their neoclassical understandings of economy and welfare, corporate law scholars and lawmakers came to believe that only by untethering the corporation from the state in a regulatory background of free competition could the public purpose

⁴² “Within the boundary of fiduciary duty, however, these corporate actors are free [under the business judgment rule] to pursue corporate opportunities in any way that, in the exercise of their business judgment on behalf of the corporation, they see fit. It is this broad freedom to pursue opportunity on behalf of the corporation, in the myriad ways that may be revealed to creative human minds, that has made the corporate structure a supremely effective engine for the production of wealth.”

of growth and abundance be achieved.⁴³ Thus, Milton Friedman once famously opined in the *New York Times Magazine* that “the social responsibility of business is to make a profit.”

Nor does the second-generation theory neglect the first half of the rights-utility synthesis. Like its earlier variant, nexus-of-contracts theorists invoke the theory to counsel against state regulation of business enterprise. Its legal edifices notwithstanding, proponents hope to show that the corporation is the creation of free individual contracting and therefore ought to be protected from state incursions. (*E.g.*, Hessen, 1979) Though washing state fingerprints from the creation of the corporation,⁴⁴ these writers will nonetheless argue that the law might serve a legitimate purpose by providing efficiency-enhancing tools that enable and streamline individual contract rights. (Millon, 1990, p. 230) For example, Easterbrook & Fischel argue that corporate law ought to serve as “off-the-rack” terms that incorporators would have bargained for anyway under ideal conditions. (Moore, 2016, p. 31; Bainbridge, 2003, p. 578)

Endogeneity of Theory and Practice

Consequently, depending on the political theory selected, aggregation theory can counsel different normative results when it comes to corporate legal rights. Some suggest that corporate law ought to maximize public wealth; others suggest protecting corporate autonomy regardless of its broader social consequences. Adding to the indeterminacy, aggregation likewise suffers from an endogeneity problem. It shapes – indeed, *was meant to shape* – the behaviors it is likewise means to evaluate. (Eisner, 2011, p. 25)⁴⁵ In the hands of many of their proponents, the nexus-of-

⁴³ To illustrate, the State of Delaware, on a public website, states that the broadly enabling structure of its corporate law “helps entrepreneurs, corporate managers, and stockholders create wealth through the corporate form.” <http://corplaw.delaware.gov/eng/statute.shtml>.

⁴⁴ For example, Jensen & Meckling wrote in 1982 that “the corporation is neither the creature of the state nor the object of special privileges extended by the state...Corporate vitality is in no way dependent on special dispensation from the authorities.” (Jensen & Meckling, 1982)

⁴⁵ Specifically referencing Oliver Williamson and transaction costs theories of the firm.

contracts theory is, in particular, a critical tool rather than an explanatory model. Explicitly aimed at contemporary corporate practices deemed inefficient and wasteful, the theory was cashed out to substantial effect. (Useem, 1993) As a result, the ontological sturdiness of aggregation theory, like its concession counterpart, is likewise undermined by the endogeneity of the theory and contemporary corporate practices. It therefore, even more so than concession theory, offers no clear path from ontology to normative prescription.

For example, these theories serve as the intellectual buttress for a recent market crusade known colloquially as “shareholder value” and “shareholder primacy.” Harvard Law professor Lucian Bebchuk, to take one notorious example, invokes a principle-agent model to argue for increased shareholder participation in corporate decisions about executive pay and political spending. Others argue for an increased role for institutional investors in corporate governance, as their sizable investments incentivize them to overcome the costs associated with monitoring erstwhile management. Not only do they have a right, as “owners” of the company, to direct business affairs; allowing them to do so will improve productivity. The movement was so successful that many blame it for the 2008 financial crisis. (Strine, Jr., 2007; Dallas, 2012) To explain, the principal-agent model in particular recommends that managers align their economic incentives with shareholders in order to mitigate agency costs. This counsel resulted in the implementation of incentive-based executive compensation schemes (*e.g.*, stock options). It also brought a change in corporate culture, orienting action towards the kind of improvements in quarterly financial statements that would yield increased company stock prices. (Thakor, 2016; Lazonick, 2013; Useem, 1993) The upshot, according to some scholars, was risky business practices designed to increase short-term share prices at the expense of long-term and stable value creation. (Stout L. A., 2007; Strine, Jr., 2017) It is also blamed for, among other things, the

accounting fraud scandals of Enron and Worldcom in the late 1990s. (Strine, Jr., 2007) Others condemn the theory because of its encouragement of the kind of cost-cutting that lead to the offshoring of jobs and intellectual property. (Lazonick, 2013) In a recent ethnographic study, Ho (2009) finds that investment bankers deployed the theory to deny that corporations were enduring social groups and so helped them publicly justify breaking up business, and destroying jobs, in the name of economic efficiency. (*See also* Urban & Koh, 2013, p. 140)

If these scholars are right, the second-generation aggregation theory is no ontology at all. It was never intended to explain and describe reality. It is instead a polemical movement that created economic disaster.

Other Critiques

Given the unsettled and occasionally neoliberal political theory subtending it, aggregation arguments for corporate autonomy rights will fail to satisfy many committed to CLD. There are, however, several more objections to this conception of corporate personhood. The ontology it invokes will elide values that proponents of CLD find important. Sharing with concession theory an endogeneity problem, it likewise can provide no final answer to the question of corporate autonomy.

Ontological Weaknesses

First, the ontology presented by aggregation theory suffers from several shortcomings. Like concession theory, it denies the sociological reality of the corporate group and corporate culture. Unlike the concession theory, however, it also denies the causal role played by law in creating that sociological reality. In addition, the second-generation theory's functionalist explanation for the corporate phenomenon ignores by definitional fiat any intra-corporate power disparities and, therefore, the possibility of heteronomy within the workplace. Many varieties of aggregation

theory, moreover, presume that the corporation is the property of shareholders. By law, it is not. Regardless, whether something is rightly considered property is a normative conclusion, not an empirical presumption. It therefore should not serve as the foundation of normative reasoning meant to justify the ascription of legal rights unless and until its own existence is adequately justified.

a. The Role of Law

Aggregation theories were offered during episodes of intellectual history that explicitly and self-consciously sought to reject state interference in civil society and, in particular, the economy. (Konzelmann, Wilkinson, Fovargue-Davies, & Sankey, 2010) Accordingly, it is no surprise that they glossed over the role of law in shaping the corporate phenomenon. This glossing, however, challenges common sense understandings of reality.

There are, of course, the usual objections stemming from Polyani. The market is never, notes sociologist Fred Block, fully autonomous. It is “always the product of a combination of state action and the logic of individual or institutional actors.” (Block, 1986, p. 180) No commercial activity whatsoever can exist without reliable norms solidifying trust and managing expectations amongst economic actors. (Bruland & Mowery, 2014, loc. 2576; Eisner, 2011, p.7; Campbell & Lindberg, 1990⁴⁶) Further, all bargaining happens “in the shadow of the law.” Even if market actors make no use of the state’s judicial enforcement mechanisms and the legal privileges and constraints it creates, they certainly modify their behavior in the expectation that they exist. Recently, Pistor (2019) argues that it is law that codes, and, therefore creates, productive capital by distributing to objects both real and intangible features like priority, universality, durability, and convertibility. Moreover, government has managed growth and capitalism for centuries,

⁴⁶ Describing the law as a “membrane” that connects state and market.

although to a greater or lesser degree from time to time. (Mazzucato, 2013; Cohen & DeLong, 2016) It is government that creates and maintains the economic institutions, funds the technologies, appropriates the territory, and educates the individuals necessary to make corporations what they are. It is difficult, therefore, to argue that law forms *no* part of corporate ontology. Rather, it shapes all economic behavior. Arguably, the law plays an even bigger role in distinctively corporate activity: an existential one. (Berle & Means, 1932, p. 141; Edelman & Suchman, 1997, p. 483) Without corporate law, corporations would not be as big, as long-lived, and as influential as they are today. (Pistor, 2019) This should come as no surprise, either. According to sociologist William Roy, the state intervened to cultivate the corporation precisely *because* regular contracting proved insufficient to accomplish big industrial goals. Specifically, “governments created the corporate form to do things that rational businessmen would not do because they were too risky, too expensive, too unprofitable, or too public, that is, to perform tasks that would not have gotten done if left to the efficient operation of markets.” (Roy, 1997, p. 41) As Gregory Dow wryly observes, even economists committed to methodological individualism “still lack a commonly accepted rationale for the prevalence of capitalist firms.” (Dow, 2003, p. 8)

For starters, it is likely impossible to create a corporation through contract alone, despite the creativity of corporate lawyers with access to all the resources that capitalism might provide. (Ciepley, 2013; Orts, 2013) Without corporate law’s universality, corporations could not deal with “third parties,” like tort victims, who never had an opportunity to consent to the corporate structure. By law, furthermore, the corporate charter – the corporation’s governing document – can be modified to amend corporate authorities’ *competenz-competenz* without everyone’s contractual consent. (Bottomley, 2007, p. 23; Strine, Jr. & Walter, 2016, p. 909) The law, in addition, adds fiduciary duties as mandatory supplements to any contractual provisions. Without these duties, it

is less likely that investors would trust corporate management enough to lend them the power they presently enjoy. As result, corporations might be significantly smaller than they are now. It is therefore perhaps more accurate to describe the charter not as a contract but instead as a state mandated “corporate constitution,” supplemented by any equitable principles developed through common law. (Bottomley, 2007; Blumberg, 1993, p. 30)

A shareholder, furthermore, has very little physical existence except in contemplation of law. She holds no tangible thing – not even, in this technological age, a piece of paper shaped into a certificate of stock ownership. She claims, rather, an assembly of legal rights. (Orts, 2013, p. 28; Pistor, 2013) Without the codification and enforcement of these legal rights, it is difficult to imagine a shareholder successfully claiming any role in corporate practice whatsoever. As Eric Orts argues, the “very idea of a shareholders depends on the legal recognition of an organizational entity... in which one may hold or own a ‘share.’” (Orts, 2013, p. 26)

More fundamentally, though, law also affects practices and self-understandings just as the formal legal recognition of cultural groups risks essentializing and changing the nature of cultural practice. As Orts points out, contractual parties cannot “belong” to a corporation unless and until the law recognizes them as corporate members. (Orts, 2013, pp. 98-9) (citing Kelsen, 1945) At the very least, some kind of institutional legal fulcrum, or nexus, is required that participants might hold in their minds as they write their contracts. Contract theorists elide the issue entirely. (Orts, 2013, p. 67). And some corporations have no existence at all outside of the law: shell companies used in complex financial transactions come to mind. (Orts, 2013, p. 38) Further, as discussed above, law is endogenous, constitutive of the social practice of “corporation.” The very rules that provide structure and legal standing to corporations thus determine, at least in part, social expectations about the corporation’s proper moral and legal and standing in society, *i.e.*,

expectations about social justice. These expectations occasionally circle back around, re-shaping the corporation's constitutive law, leading to further changes to social expectations.

b. Hierarchy and Authority

Aggregation theory does not just fumble its ontology when it comes recognizing the role of law. The second-generation theory's functionalist character elides or assumes away the existence of hierarchies within the corporation. By presuming that the corporation exists because its structure must necessarily be efficient, and by defining efficiency as the outcome of freely negotiated bilateral contracts, the theory obliterates the possibility that any one actor may enjoy a position of non-consensual command-and-control. As observed by noted corporate law scholar William Bratton, the theories hypothesize that “[t]he firm springs out of contracts in all of these markets [labor, securities, management] Since the contracts are bilateral, management power and corporate hierarchy, as previously conceived, disappear.” (Bratton, 1989, p. 1480)

Of course, the conditions required for these market-clearing outcomes rarely hold. As a result, even if the theories are analytically sound, they serve, at best, as unreliable evidence for the lack of internal power inequalities. They circumvent the possibility that actually existing corporate contracts might not reflect voluntary consent, but instead coercive conditions. Individuals enjoying attributes of power, charisma, and wealth may be able to drive very hard bargains, thus destroying much of the element of voluntariness of the counterparties of their contracts. (Orts, 2013, p. 26) For example, slack labor markets yield to management greater bargaining power, enabling it to demand unreasonable concessions. Some parties, like individual shareholders, might more easily

overcome collective action costs through statutory assists,⁴⁷ while employees must organize and vote before they may bargain collectively. In fact, inequalities in bargaining power arising from, *e.g.*, asymmetries in information, (Strine, Jr. & Walter, 2015, p. 352) underlie the equitable legal principles that protect minority shareholders. As another example, aggregative theories gloss over the relative distribution of risk amongst corporate constituencies. Shapiro (1999) observes that while stockholders can diversify their investment portfolios as a prophylactic against mismanagement, workers cannot. Moreover, stockholders may liquidate their investments in fluid capital markets with a tap of a button. Workers do not enjoy this kind of liquidity, as for them exit involves a generous menu of costs: re-training expenses, moving expenses, reputational expenses, *etc.* (164) Finally, even “bargained for” governance rights can themselves generate unfair contracts in the future. A control right can be exploited in later contracting iterations amongst parties not involved in the initial contracting round.

As a result, many respected scholars set aside contractual models entirely. For them, intra-corporate relations are in no substantial way the result of free and open contracting. Vining, for example, “observes that attributes of ‘power’ and ‘authority’ are involved as well as ‘wealth’ whenever dealing with ‘entities beyond the material or individually human.’” (Orts, 2013, p. 36) Others alternatively couch corporate decision-making in explicitly political terms. (Mitchell, 1992; Cyert & March, 1963) Jurist Stephen Bottomley, for his part, eschews the contractual model and argues instead that the corporation “...embodies an allocation of powers and responsibilities

⁴⁷ Shareholders have a statutory right to vote on the selection of directors and whether to approve major corporate transactions. They also have a statutory right to inspect corporate books and records, including to obtain the contact information of fellow shareholders. They also have the right to subsidized communication among themselves. *See, e.g.*, 8 *Del. C.* §112.

between the state and the corporation and, within the corporation, between the corporators.” (p. 64)

c. Shareholder Property

Other varieties of the aggregation theory likewise elide the problem of authority. They do not do so by purporting to distribute it equally amongst formally equal contractual partners. Rather, they make the existence of legitimate authority an assumption that braces their theory-building. The first-generation aggregation theory presents as self-evident the fact that shareholders are corporate “owners.” (Bainbridge, 2003, p. 564) Similarly, some principle-agent models of the second-generation variety (*e.g.*, Alchian & Demsetz, 1972) presume from the start that shareholders are principles of the firm and that managers, employers, and other corporate constituents are their agents hired to manage their property. (Bainbridge, 2003, p. 566) Those who argue that shareholders are simply contractual parties that bargained for residual control rights fail to justify why shareholders should have a seat at the negotiating table to begin with. (Pistor, 2019)

Whether or not shareholders actually are, in reality, the principles of a corporation is a matter that requires explanation – not one that can be undiplomatically buried in mathematical assumption. (Roy, 1997, p. 162) While the economists that build such models base them on the belief that shareholders are the “owners” of the corporation, by law, they are not. (Orts, 2013, p. 82) According to corporate statute, no one owns a company.⁴⁸ (8 *Del. C.* § 102(a)(4); Landemore & Ferreras, 2016; Ciepley, 2013) Shareholders own “shares,” financial instruments, which entitle

⁴⁸ Simon Deakin argues that because a corporation is a legal person, it cannot be owned. It is not an object, but a *person* with rights and duties. (Deakin, 2012, p. 356) Nor can one credibly argue that the shareholders ‘own’ whatever sociological reality that a corporation’s legal personhood reflects or captures since such would entail a claim involving the ownership of actual human beings. Regardless, this sociological reality, the “firm,” is not an object recognized by law and therefore cannot be owned in any case. *Id.*

them to certain rights – like dividends – that only occasionally reflect the rights typically associated with ownership. In some countries, these rights are even shared by non-shareholders. Moreover, as pointed out in Berle & Means’ celebrated 1932 treatise, share ownership does not look anything like a traditional property right. It does not include, for example, any of the responsibilities associated with property. Shareholders’ liability is limited by law. Nor may they control the corporation or its assets in day-to-day business operations. Rather, it is the board of directors *de jure*, (8 *Del. C.* § 151(a); Bainbridge, 2003, p. 569) and hired executives *de facto*, that control the business. (Roy, 1997, p. 51) Shareholder short-sellers, especially the “activist” variety, may actually work to *undermine* the corporate enterprise (Zhao, 2016) rather than cultivate it like a Lockean property owner. Similarly, some shareholders also invest in business competitors; indeed, a common ‘ownership’ structure is not unusual amongst institutional investors. (Karenfort & Kacholdt, 2016)

Regardless, unless the law identifies some object or phenomena as property, whether or not that object or phenomena amounts to property is generally a normative conclusion, not an empirical description. For example, we might say an apple is John’s property (the conclusion) because he received it in a fair exchange between moral equals or because doing so increases economic efficiency (the normative or ethical justification). As a result, the idea that the corporation is an assembly of shareholder property is actually a socially constructed belief – a belief unfortunately held by preeminent legal practitioners and scholars throughout the developed world. (Veldman, 2016) In any case, business corporations arose during a period of U.S. jurisprudence that had long ago eschewed the notion of natural property rights. (Horwitz M. J., 1992, p. 34) As a result, and as argued above, the aggregative property notion of corporate

personhood is a polemical theory, not an ontological one; it argues that the ontology *ought* to be arranged in such a way. (Roy, 1997, p. 162; Strine, Jr. & Walter, 2016, p. 932)

d. The Group Level of Analysis

With aggregation theory, we can also repeat a criticism presented above: conceiving the corporate collectivity as a sociological fiction denies the reality of community and group life. Accordingly, one can levy against the aggregative model the same species of ontological critiques levied by communitarians against methodological individualists. (Ewick, 1988) This is particularly the case when a group-level variable like “culture” works to change individual preferences and behavior. (Guiso, Sapienza, & Zingales, 2015)

Moreover, the aggregative account screens out the observation that the corporation is a constituted collectivity pursuing a collective purpose, a purpose whose content will change as internal rules, procedures, and membership change yet nevertheless retain its identity amongst the minds of both corporate constituent and outsider. (Bottomley, 2007, p. 30) It therefore fails to account for the fact that the corporation may pursue purposes that do not necessarily correspond to those of their individual members. (Ewick, 1988; *see* Pettit & List, 2011) Contemporary corporate law scholars Margaret Blair and Elizabeth Pollman acknowledge that while perhaps at one time corporations pressed interests derivable from the simple aggregation of the interests of founding members, such was no longer the case beginning in the mid-19th century:

American businesses were undergoing a dramatic transformation...Some of the larger corporations had thousands of employees. They were also quickly becoming publicly traded, with hundreds, and sometimes thousands of passive investors. They were becoming professionally managed, so that they no longer reflected the goals, aspirations, and efforts of a founder or a few individual investors. They were taking on identities – often tied to

brands – that were truly separate from any of their individual investors, directors, or managers, and their separate corporate identities were being promoted to facilitate their interactions with customers, suppliers, employees, and the communities in which they operated.

(Blair & Pollman, 2015, p. 1678) How and why a corporate purpose might be ascertained without the unanimous support of corporate members requires explanation. For example, corporate participants do not even reason like private contractual partners pressing individual claims. They often think of, and are occasionally required by law to think of,⁴⁹ the good of the enterprise as a whole. This kind of ‘public’ reasoning is precisely and politically oriented around ideas about the common corporate good. It is not the kind of reasoning that contractual models capture well, just as minimalist models of democracy fail to account for public reason within political society. (See Bottomley, 2007, p. 32). It is, however, a kind of reasoning that presumes some kind of social reality to the corporate group.

Normative Critiques

Given the empirical holes identified above, aggregation theory suffers from some weaknesses when it comes to identifying the proper nature and scope of corporate rights and duties. Specifically, they yield outcomes that are obnoxious to the norms generally accepted in CLD.

a. Failure to adequately protect the individual liberties it claims to vindicate

Those that invoke aggregation theories of corporate personhood, as mentioned above, often do so in order to make autonomy claims on behalf of the corporation. Doing so, they insist, in fact protects the liberty rights of the individuals that comprise it. It thus purports to satisfy libertarian

⁴⁹ E.g., corporate executives and directors, as fiduciaries, owe duties to the “corporation” as a whole, and shareholder actions against directors for bad behavior are “derivative,” brought on behalf of the corporation.

and liberal theories of liberty and legitimate government. But it is not at all clear that protecting a corporate right fulfills these promises.

First, the ontology's failure to register possible conditions of heteronomy within the corporation may yield a corporate autonomy right that does not so much vindicate the rights of individuals as illegitimately empower those that hold positions of authority. Specifically, corporate leaders may wield their power in a manner that violates, without consent, important individual liberty rights of the corporation's other members. To illustrate, if a corporation enjoys a right to political speech, a CEO may decide to exercise that right by donating funds to a favored political candidate. Another corporate member may find that candidate obnoxious but, given inequalities in bargaining power, has no choice but to see corporate funds flow regardless. (Strine, Jr. & Walter, 2015, pp. 342, 366; *Abood v. Detroit Board of Education*⁵⁰; Chambers, 2015, pp. 1166-67; Winkler, 2017) If such can be called consent, it is a consent devoid of normative meaning in a discourse meant to give expression to individual rights in an aggregative, joint context. (Jackson, 2015) More realistically, it is a direct infringement of the member's own right to free speech.

The issue is not merely the result of undemocratic internal corporate decision-making, though certainly such exacerbates the problem. Barring member unanimity regarding the corporate right claimed, even corporate democracy would yield results that would protect the individual rights of some at the expense of others. For there is no reason why tyrannies of majority and minority would not arise just as often in a corporation as they do in an explicitly political association. Given exit costs (Shapiro, 1999), simply leaving the corporation provides no satisfactory solution to the familiar and intractable conflict between liberty and democracy.

⁵⁰ 431 U.S. 209, 234-5 (1977) (addressing the political speech of unions and infringements of union member speech rights by making political contributions a condition of employment).

b. Abandoning Corporate Accountability

Aggregation theory, it should be remembered, denies any “reality” to the corporation. It is, just as with concession theory, a mere “fiction” or artifice. As a fiction, it cannot be held collectively responsible for any harms that it commits because the theory precludes any notion of corporate agency. Rather, it suggests that only individuals may be held to account. But it is often the case that no identifiable individuals can be fairly held responsible for that harm. The result is that the rights of injured parties will go without the compensatory measures required by justice. (French P., 1979; Pettit P., 2007)

c. Dealing Justly with Corporate Culture

Under aggregation theory, because the corporation is a fiction, it does not, by definition, possess any group-level characteristics. By denying the group-level reality of the corporation, the aggregative theory suppresses the empirical purchase required to sustain any normative investigation into how corporate life shapes, or misshapes, human identity. As persuasively argued by communitarian theorists from Axel Honneth to Charles Taylor, culture is an essential ingredient of human identity and self-understanding. Its emancipatory potentials enable the fulfillment of autonomy rights. Its dark side creates corrupting instances of misrecognition and psychological harm. Although typically addressed within political theoretical discourse as an issue uniquely relevant to ethnic, national, and religious minorities, culture is not a phenomenon indigenous to these collectivities alone. It exists within the business corporation, too. Certainly, corporate culture’s corrupting instances were recognized at least as early as J.S. Mill, who observed the deadening impact of industrial life on laborers. As Ewick forcefully states, if we “[relegate] organizational roles to the periphery of our selves we underestimate the destructive effects of bureaucracies on human lives.” (Ewick, 1988, p. 187) Despite such authors’ sociological

hopelessness, it should be noted that corporate cultures can also have salutary effects. (Johnson L. P., 2010; Ferreras, 2017)) People can and do find meaning in productive work, and often pursue non-pecuniary purposes simultaneously. Recently, for example, Ferreras (2017, pp. 83-84) finds that human beings enjoy may “expressive” goods within the workplace: (1) autonomy and self-respect; (2) inclusion in a community; (3) feelings of social usefulness and (4) satisfaction in engaging in compelling or interesting work. Ascribing a legal right to the corporation might protect these human goods. Companies can be innovative, creative, “green-friendly,” “community-oriented,” and even religious. But because aggregation theory fails to register corporate culture at all, it can offer neither protection for its beneficial effects nor shielding from its more harmful consequences.

d. The Value and Authority of Democratic Law

The theory’s failure to adequately acknowledge the role of law in the constitution, survival, and evolution of the corporation is likewise problematic. For it means that the normative prescriptions derived from it fail to acknowledge legitimate part the liberal democratic state might play when it comes to demarcating the contours of corporate autonomy rights. Yet if it is true that the corporation could not exist in its present form without law, as many scholars argue, then the corporation, as a creature of law, must abide by the usual liberal constraints. But setting aside for a moment the legal constitution of the corporation, even a libertarian would admit that the state serves a limited yet legitimate function in an otherwise anarchic society: the protection of basic liberties through, for example, the enforcement of criminal laws. Taken seriously, many iterations of the aggregation theory nevertheless seem to deny government even this restricted function. Meanwhile, the contemporary variations of aggregation theory, *i.e.*, those that acknowledge an implicit delegation of state power for reasons of social wealth creation, do not escape this criticism

unscathed. Simply, they too abruptly confine the scope of legitimate government “interference” by insisting that such interference must increase market efficiency. It thus prohibits the state from pursuing equally laudable but conflicting public ends. But liberal democracy is meant to protect the rights and liberties of all citizens, whether corporate or not.

Aggregation Theory’s Critical Potential

Despite its polemics, aggregation theory identifies a value essential to CLD: its respect for individual human worth. It reminds us that, no matter what else we think of corporate autonomy, we must keep front and center the protection and vindication of individual freedom. The work, inspiration, and innovation of individuals exercising their collective economic liberties together undoubtedly drive the corporation in a way the law does not. It therefore suggests that democratic citizens should, as they undertake the task of lawmaking, protect the corporation with legal rights if such rights help vindicate the justifiable autonomy claims of corporate participants. It implies that contemporary corporate capitalism might have a legitimate role to play in the vindication of associative freedom. What individual property and contract rights people enjoy, they ought also to be able to enjoy them together.

Further, aggregation theory, especially in its first-generation libertarian constructions, suggests that any legal regulation of the corporation ought not cause the violation of these basic individual liberties. It also correctly emphasizes the importance of maintaining a normative boundary between the political and the social, the state and society. By highlighting the voluntarist aspirations of associational life, aggregation theories support the kind of de-politicized social activity that at once (1) enables the democratic discourse and public opinion formation required by representative democracy while (2) providing space for people to go about their lives

unmolested by politics. (Cohen & Arato, 1994) Its arguments, therefore, should help democratic citizens articulate how they want to protect human autonomy from the intrusion of state law.

Finally, and especially in regards to the second-generation variant, aggregation theory offers a normative discourse that can help citizens articulate their commitments to equal human worth with regards to internal corporate governance. Modeling the corporation as a contract voluntarily undertaken by its constituents to obey an authority, the “nexus-of-contracts” theory suggests a “social contract” model of intra-corporate legitimacy. A pure “nexus of contracts” is direct democracy *par excellence*, the ideal that political theorists attempt to replicate given unfriendly empirical restraints and moral uncertainty. Its “transaction costs” variant, which justifies manager authority, might serve as its representative-democratic cousin. These models can help citizens critique and redesign corporations’ hierarchical governance structures consistent with equal human worth. After all, contractual models likewise base political legitimacy on this presumption.

Despite its ontological and normative frailties, therefore, aggregation theory helpfully augments some of the conclusions taken from the analysis of concession theory. Recall that one weakness of concession theory is that it paid insufficient attention to individual and associative autonomy rights. Aggregation theory partially fills in this gap. It suggests that, as citizens consider corporate legal rights, they must take into account these liberties as justifiable articulations of the idea of equal human worth. Second, and more consistent with contemporary social and economic structures, aggregation theory insists on a separation between state and society. A political theory of the corporation should divorce the corporation from tyrannical state control in order to cash out associational and economic freedom as well as limit state power.

Still missing from this account of corporate rights, however, is (1) a satisfactory treatment of intra-corporate power disparities; (2) the problem of collective responsibility; and (3) other corporate-level characteristics that provide goods and commit harms in a way that is not easily reducible to the microfoundational reasoning of aggregation theory. These holes can be filled by the third, and final, theory of corporate personhood.

The Real Entity Theory of Corporate Personhood

The real entity theory of corporate personhood defines the corporation as an autonomous actor with a living, internal life, “a real and natural entity whose existence is prior to and separate from the state.” (Horwitz M. J., 1992, p. 101) It thus mirrors the Schmittian idea of the state as a political unity that factually pre-exists the constitution and that, in fact, constitutional validity presupposes this prior ontological existence. (Bockenforde, 1997, p. 10) Eschewing the hyper-individualistic assumptions of aggregation theory, it is closely associated with early 20th century British and American political pluralists: *e.g.*, Harold Laski, G.D.H. Cole, John N. Figgis, and, more saliently for business corporations, the jurist Frederick W. Maitland.

Like concession theory, real entity theory contains several arguments. First is that associations are not made by the state, but by the natural, voluntaristic action and associative instincts of human beings. (Figgis, 1914, p. 47-8) Nor are they mere aggregations of individuals only made whole by the “fiction” of interpersonal contracts. Rather, corporations “exist by some inward living force, with powers of self-development like a person...[with] a real claim to a mind or will of her own.” (Figgis, 1914, p. 40; *see also* Ripkin, 2009; McLean, 2012, p. 71) This personality is, for real entity theorists, a sociological fact, and a fact first attributed to U.S. business corporations by legal scholar Ernst Freund in the late 19th century. (Freund, 2000 (1897), pp. 37-

8) In the early 1930s, industrial corporatist E. Merrick Dodd likewise embraced the idea, invoking the language of community, emotional ties and solidarity. (Dodd, 1932, pp. 1157, 1161)

Many respected scholars admit the logical purchase of this idea, despite its romantic, metaphysical flourishes. (Muniz-Fraticelli, 2014) For example, Philip Pettit and Christian List, perhaps picking up on Freund's early "representative" theory of corporate will formation, credibly argue that one can identify an independent, performativist concept of corporate agency not directly reducible to individual agency but nevertheless framed by it. In particular, they discover a corporate will that "supervenes" on individual wills when individuals undertake intra-group discourse under fixed decision-making procedures and norms. (List & Pettit, 2011, p. 59) Philosophers like Carole Rovane (2014) likewise argue in favor of the reality of joint intentions and group "will." Contemporary political pluralists van Dyke, Hirst, and Muniz-Fraticelli also argue in favor of non-magical group personality. Peter French, in *Collective and Corporate Responsibility* (1984), finds a corporate personality by focusing on internal decision-making structures, informal hierarchies, and substantive policies established through past corporate action. (French, 1984, pp. 41-50; Barkan, 2013)⁵¹

The second part is, like the other theories of corporate personhood, prescriptive. Like aggregation theory and unlike concession theory, the state does not grant the corporation autonomy through a delegation of political authority. Instead, the entity, like an individual, possesses its own authority. It is derived, at least for some pluralists, from the 'personality,' rational agency, or "will" emanating from the group as such. This will, agency or personality sufficiently resembles the will of a natural human being to merit the same kind of autonomy rights as do natural human beings.

⁵¹ French's conception also rests on a "foundational rule of recognition" that is invoked to discriminate between decisions made that can properly attributed to the corporation rather than to an individual in her own capacity.

(Muniz-Fraticelli, 2014, p. 199; Jones, 1999; *see* Schragger & Schwartzman, 2016) These prescriptions imply an altogether different theory of political legitimacy than invoked by the concession and aggregation theories: political pluralism.

Historical Circumstances of Usage

By the time the real entity theory entered the intellectual milieu, it was already recognized that burgeoning corporate capitalism was no simple construction of the state. (Roy, 1997) Rather, it was understood that private economic behavior and technological innovation had a significant part to play. (Blumberg, 1993, p. 28; Chandler, 1977(1990)) Moreover, as the corporation was used primarily for a source of private gain, it lost the appearance of serving the public purposes supposed by concession theory. (Johnson L., 2012, pp. 1138-9)

Concession theory was infeasible not just for empirical reasons. It was felt to be normatively inadequate, too. Left-leaning scholars dubious of the state's willingness to regulate capital did not want to rely upon concession theory, and thus legislative action, before setting limits on corporate misbehavior. (Hager, 1989, p. 638) But even if the state proved amenable, those scholars, as philosophical pragmatists eschewing the moral absolutes they associated with communism and fascism, were suspicious of its ability to arbitrate social conflict in an impartial manner. (Horwitz M. J., 1982, p. 1427; Posner, 2004) They would rather have disputants work out their own solutions according to their own freely adopted ethical principles. (Ernst, 1993) Progressives, meanwhile, sought a conception of the public good that did not carry the stain of totalitarianism and so embraced interest-group pluralism. (Horwitz, 1982, p. 1427) According to legal historian Dalia Tsuk Mitchell, Berle & Means' masterpiece, *The Modern Corporation and Private Property* (1932), although mostly known for its analysis of dispersed share ownership and its enabling impact on managerial power, "was inspired by a particular collectivist tradition that

immensely influenced the development of American law in the first part of the 20th century.” (Tsuk, 2005, p. 180)

The first-generation aggregation theories likewise proved unaccommodating because they suffered from empirical weaknesses. The same “steady incorporation of institutionalized rationality” (Trachtenberg, 1982) that discredited state involvement, and therefore concession theory, likewise denied credit to easily identifiable individual initiative. State corporate laws began to allow for holding companies, *i.e.*, corporate ownership of corporations, and the ensuing merger boom not only allowed business to avoid “ruinous competition” during recession. It also allowed them to shed their identities as the entrepreneurial projects of identifiable founding investors. (Blair & Pollman, 2015, p. 1707) The exponential growth of public share ownership, where corporate equity was held by a diverse, dispersed and often disinterested group, laid rest the idea that the corporation could be realistically analogized to a property partnership amongst engaged business associates familiar with both the enterprise and each other. (*E.g.*, Krannich, 2005, p. 74; Hovencamp, 1988, p. 1600) At the same time, early 20th-century organizational economists like Thorsten Veblen and John R. Commons rejected the severe methodological individualism of neoclassical theory and, incorporating empirical observational data, developed a richer, more socially embedded account of market behavior. (Ernst, 1993, p. 63; Bratton & Wachter, 2008, p.107⁵²) The “visible hand,” of professional, bureaucratic managerial direction, in Alfred Chandler’s terms, had replaced the “invisible hand” of the market. Firms, moreover, intentionally established social identities distinct from their investors, managers and founders as they poured resources into corporate branding. (Blair & Pollman, 2015, p. 1710) Finally, the structure of

⁵² Noting that Berle’s corporate theory was the mirror image of the industrial pluralism of Commons, who viewed the state as the enforcer of bargains entered into by self-constituted groups representing diverse economic interests.

corporate law itself resonated with the real entity theory. Its distinctive features, *e.g.*, limited liability and asset lock-in, made more sense if the corporation was understood to be an entity separate from investors and managers. (Johnson, 2012, p. 1154; Blair M. , 2003, pp. 389-94) With their phenomenal growth in size, complexity, and bureaucratization, corporations did seem to be more than the mere sum of their parts, more than the boilerplate statutes of general incorporation, and certainly more than the simple property of their owners. (Bratton, 1989, p. 213; Roy, 1997, p. 47)

As a result, a new “corporate realism” emerged, and it drew on Continental European ideas about the “spiritual reality of group life” (Bratton, 1989, pp. 29, 1490; Hager, 1989) that were themselves a critical reaction to neo-Kantian and legal positivist accounts of the constitution and the state/Rechtsstaat. (Seitzer & Thornhill, 2008, p. 12) Corporate law would focus on the social realities of corporate capitalism, in all its glory and distortions. The understanding of the corporation as a separate entity thus found its way into common law parlance at least as early as the *Bank of Augusta v. Earle* in 1839 and *Louisville, Cincinnati and Charleston Railroad Co. v. Letson*, in 1844. (Avi-Yonah, 2010, p. 1008)

Claimed by partisans from left and the right during the late 19th and early 20th centuries, the real entity theory served as a romantic battle cry for various crusades against status-quo powers. First, like aggregation theory, it was offered in response to a concession theory of corporation that was seen to empower a consolidated state against private economic actors. For some, the corporation, as an autonomous, ‘real’ entity, merited just as much protection as the human individual. It thus legitimated an anti-regulatory conception of corporate law and protected the growth of big business. (Millon, 1990, p. 241; Hager, 1989, p. 580) Accordingly, the theory appears in judicial opinions favoring business interests, including *Hale v. Henkel*, a 1906 U.S.

Supreme Court opinion affording the corporation rights under the 4th Amendment. (Harris, 2007, p. 48)

Progressive scholars also used the theory to support autonomy rights for industrial labor organizations in lieu of a communist alternative. (Ernst, 1993, p. 60; Dodd, 1932; Hager, 1989, p. 583) As explained in more detail in Chapter 4, guild socialists like G.D.H. Cole and Harold Laski evoked real entity theory as they argued for autonomous, democratic labor-controlled workplaces. Others argued that if the corporation was sufficiently human to merit autonomy rights, it would also, naturally, exercise that autonomy in a civically responsible, ethical manner – just like any other citizen. (Millon, 1990, p. 203; Bratton & Wachter, 2008, p. 123)⁵³ In 1932, E. Merrick Dodd, a Harvard law professor, famously clashed with Adolph Berle, a Columbia law professor and influential public intellectual, in a series of debates chronicled in the Harvard Law Review over this very issue. Dodd insisted that managers could be trusted to direct the “real corporate body” in the public interest because of the (human) emotional appeal and prestige of public service. (Dodd, 1932, pp. 1153-54, 1160-61)

Dodd’s opponent, Berle, was not quite so sanguine about the corporation’s capacity for civic virtue. Joining a cadre of legal realists fed up with the severe *laissez-faire* attitudes of the late 19th and early 20th centuries (Horwitz M. J., 1982, p. 1426; Hager, 1989), Berle instead insisted on the hammer of law and economic planning to keep business attuned to the public good. (Bratton & Wachter, 2008, p. 131) Berle and Means noted that the growing political and economic power of these “real” entities, at least in the hands of unaccountable management, merited regulation and restraint. (Tsuk, 2005, p. 181) When advising President Franklin D. Roosevelt in connection with

⁵³ Discussing Dodd along with other “business commonwealth corporatists” like General Electric’s president, Gerald Swope, and its chair, Owen D. Young.

the development of New Deal economic policies, Berle invoked corporatist ideas to support state mediation of the inevitable conflicts engendered by the clash of freewheeling business interests against both consumers and workers. (Bratton & Wachter, 2008, p. 112) Meanwhile, political pluralists attuned to the new “realist” political science of Schumpeter and Dahl trusted unions and other “countervailing powers”⁵⁴ to keep autonomous corporate power in check. (Jackson B. , 2012, p. *17) The regulation that emerged from the bargaining between these political pressure groups was not to be accomplished through the tinkering with corporate charters and, therefore, the “internal life” of the entity. It came instead from the federal and state “exogenous” regulation (Johnson, 2012, pp. 1147, 1158; Hurst, 2004, p. 162) that was meant to supplement the restraints of market competition amongst autonomous corporate entities. (Tsuk, 2005, p. 192; Bratton & Wachter, 2008)

It also came from the attribution of “real” personality to corporations, allowing the state to hold them responsible for their harms. (Hager, 1989) Unlike the concession and aggregation theories, which hold the corporate person to be a “fiction,” the real entity theory permits the allocation of blame to corporations for their antisocial behavior, even when it cannot be directly traced to the actions of individual members. (French, 1984) Thus, its presence is felt within U.S. case law attributing criminal and civil liability to corporations – liability that, by its nature, is contingent upon the corporate person possessing the requisite *mens rea*, or mental state. (Petrin, 2018; Hager, 1989)

The theory fell out of favor after the 1930s. First, it suffered from some devastating philosophical attacks. Accused of metaphysical mystification, the theory’s romantic flourishes proved too obnoxious for hard-nosed empirical philosophers and well-regarded jurists (Cohen M.,

⁵⁴ A term coined by J.K. Galbraith.

1919; Muniz-Fraticelli, 2014, p. 204 (citing a letter from Oliver Wendell Holmes to Laski)) Meanwhile, a resuscitated aggregation theory, because it focused on the individual, aligned with the generalized fear of totalitarian corporatism among the U.S. academy. (Tsuk, 2005, p. 182; Horwitz, 1982, p. 1427) It also meshed well with the interest group pluralism and the blending of public and private associated with post-war U.S. politics. (Tsuk, 2005, p. 182). Ideas about class and social structure had disintegrated into political theories describing the accumulation of private interests into intermediary political associations. Finally, it became clear that real entity theory could be wielded for a variety of conflicting political purposes. For example, it supported, at the same time, conservative religious and pro-capital movements as well as progressive attempts to democratize work and liberate labor. John Dewey's influential 1926 essay in the *Yale Law Review*, emphasizing the polemical and inconsistent deployments of corporate personhood, seemed to have nailed the coffin on its analytical usefulness. (Dewey, 1926; Hager, 1989, p. 635)

The real entity concept nevertheless experienced a renaissance in the late 20th century as critics of contemporary capitalism sought a theory that would hold increasingly powerful and multinational corporations to account for their misbehavior. They were supported by a growing body of influential legal and economic scholarship that rejected the severe methodological individualism of aggregation theory along with its neoclassical tenet of shareholder primacy. (Moore, 2016, pp. 6-7) Articulated most influentially by Peter French, the real entity theory was de-mystified and used to attribute sufficient agency and intentionality to a corporation such that it might be held to moral duties. (Muniz-Fraticelli, 2014, pp. 195-6; French, 1984; Ewick, 1988; List & Pettit, 2011; Rafanelli, 2017) Furthermore, by claiming the existence of corporate communities that transcend the contractual relations of investors, real entity theorists could make normative arguments incorporating the interests of a wide array of stakeholders like workers, taxpayers, and

the local community. (Johnson L., 2012; Hager, 1989) And so, in many respects, the instrumentalization of real entity theory has begun to resemble some of the contemporary, stakeholder-focused invocations of concession theory. More recently, however, real entity theory has also assumed a reactionary gloss. Political theorist Jean Cohen (2015) and legal scholars Reven Avi-Yonah (2010) and Seamus O'Melinn (2006), for example, locate the idea lurking behind the awarding to business of free exercise rights in *Burwell v. Hobby Lobby* and speech rights in *Citizens United v. Federal Election Commission*.

The Political Theory of Real Entity Theory

Like the other theories of corporate personhood, the contours of real entity theory's normative implications are scripted according to an underlying theory of political legitimacy. Unlike the concession and aggregation theorists, however, those adopting the real entity theory of corporate personhood often attach themselves to a single conception of political legitimacy, namely, political pluralism.

Political pluralists reject the idea that the state serves as the lone legitimate authority in society. (Muniz-Fraticelli, 2014, p. 18) Instead, the fundamental pluralist claim is that "free individuals must be guaranteed the opportunity to form and participate in diverse associations that stand independently of the state in order to enjoy liberty and self-government." (Jackson B., 2012) They argue that many associations apart from the state possess legitimate authority – even, perhaps, an authority with a better claim to people's loyalties than that enjoyed by the state. Thus, Figgis demoted the state. Far from a Leviathan, it was instead to be a provider of an institutional legal context in which sovereign, autonomous associations could operate. He denied it any other explicit purpose of its own. (Muniz-Fraticelli, 2014, pp. 20, 33, 89). G.D.H. Cole, at least in his early work, believed the state ought to represent only the general interest common to all members

of society – that of the consumer – and not the functional or sectarian interests that concerned them in their participation in other associations. (Muniz-Fraticelli, 2014; Cole, 1917) Pluralists argued that “the rapid growth of collective institutions challenged the liberal assumption that power was embedded in the state” even as they “sought to articulate legal doctrine to allow collective institutions to exercise their (public) power.” (Tsuk, 2005, p. 181)

The multiple authorities contemplated by pluralists often reference competing and inconsistent justifications for their power. Thus, whatever reasons legitimate state authority, those reasons may very well be incompatible with the reasons that legitimate corporate authority. It is a medievalist idea that recognizes that individuals may find themselves under the justified rule of multiple and at times competing sovereigns. Despite the obvious potential for conflict, pluralists celebrate this diversity of authority because it necessarily works to limit potentially overweening state power. (Muniz-Fraticelli, 2014, pp. 22, 43)

Given the political-pluralist background, the autonomy right afforded by real entity theory to corporate groups cashes out in several normatively salient directions. First, it implies that the corporation enjoys an authority, or a legitimate power, to govern not only itself but also, by logical implication, its component parts: its members. This is because the corporate person, as a person separate and independent from any human corporate members, may make claims against those members and must, at least in some instances, prevail on those claims. Otherwise its autonomy would perfectly overlap that of its members and so be reducible to members’ autonomy. Indeed, the very idea of real personality supposes that the corporate agent has a will and, accordingly, that this will can be asserted authoritatively over both in-group and out-group members. As Andrei Marmor explains, “for something to be able to claim legitimate authority, it must be the case that the authority is capable of forming an opinion on how its subjects ought to behave, distinct from

the subjects' own reasoning about their reasons for action." (Marmor, 2001, p. 51; Raz, 1986) After all, authority, according to Hobbes, requires an author. (Muniz-Fraticelli, 2014, p. 204) Authority over corporate members might even be crucial to the meaning that members ascribe to the corporate community. (Cohen J. L., 2015, p. 197) To illustrate, if the meaning of the corporation is that it is the "property" of a controlling shareholder, the shareholder-owner necessarily must enjoy control over its "property." As Robert Filmer once argued in reference to monarchical authority, this property right amounts to authority to direct the enterprise without the consent of the governed.

Second, the corporation's authority is original to itself and, therefore, often incommensurate with that of the state. To explain, whatever principles that legitimate state authority may not be those that purport to legitimate corporate authority. A corporation's own autonomy might be exercised, like that of a human person, in the pursuit of some "ethical" or "comprehensive" good. This ethical, comprehensive orientation will shape the norms that it promulgates in order to guide or constrain the actions of its members. It may very well be at odds with principles of constitutional liberal democracy, as it would be, for example, if it was governed by religious principles or, more saliently in market context, notions of utilitarian efficiency that yield dominating conditions. As a result, a member governed both by the corporation and by the state may face two conflicting authorities, one founded on utilitarian purposes, the other justified using liberal democratic principles. Thus, the arguably schizophrenic and perverse dilemma of the modern worker: to be politically free as a citizen and relatively unfree as a manipulated input of production.

Some self-proclaimed pluralists do not, however, insist on radical political pluralism. Those who value individual freedom above all, *i.e.*, "value monists" and "liberal pluralists," (Levy,

2014) support associational autonomy not just for its own sake, but also for the sake of individual rights and other universal values. For them, independent communities protect liberal liberty even as they serve as concrete, value-laden and collective expressions of it. Many of the mid-Century Anglo-American pluralists, studying industrial democracy in the shadow of fascism and Soviet communism, supported union independence precisely because unions provided an institutional buffer protecting the rights of individual workers against both employers and the state. (See Jackson B., 2012) For instance, Walter Milne-Bailey, in his 1934 *Trade Unions and the State*, asserted that “[e]very interposition of such a voluntary group between the individual and the state must...result on balance in an enlargement of freedom.” (p. 356) Hugh Clegg, a founder of the Oxford school of Industrial Relations, similarly supported free unions because they acted as countervailing powers against the otherwise domineering management of both state and property-owning industrialist. (Clegg, 1951) American labor economists like Clark Kerr, John Dunlop, Sumner Slichter and Richard Lester, working in the shadow of John Commons, couched themselves ‘liberal pluralists’ as they argued in favor of union independence because of its potential to constrain the power of authoritarian capitalists. (Stone, 1981) And Laski, despite his guild socialist background, embraced a universalistic notion of democratic legitimacy within both the state and the real entity. Though corporate autonomy was important to him, he thus subjected that autonomy to the higher moral imperative of individual freedom. Constant, the quintessential liberal and advocate of negative liberty, likewise believed that associational autonomy would best protect it. (Muniz-Fraticelli, 2014, p. 29) Berle and Means, for their part, left ample space for the state to constrain and regulate corporate power in order to protect outsiders’ individual freedoms. (Tsuk, 2005) Similarly, John Maynard Keynes, in his 1926 essay, “The End of Laissez-Faire,”

sketched a corporatist theory that subjected otherwise autonomous economic bodies to parliamentary supervision. (Keynes, 1963)

Presuming such iterations of political pluralism remain theoretically consistent, those ascribing to the real entity theory thus need not decide between the Scylla of potentially illiberal associational autonomy and the Charybdis of overweening state sovereignty. They would likely permit the liberal state to intervene with associational life in order to safeguard fundamental liberal democratic values – or simply to maintain order by assuring that divergent and minority voices receive public airing and attention.⁵⁵

Endogeneity of Theory and Practice

Like the concession and aggregation theories, real entity theory suffers from some endogeneity issues. Certain changes in corporate law supported the notion that the corporation is an entity distinguishable from its constituent members. Some argue, in fact, that the social practice of “corporation” emerged exactly because a sociologically lively legal definition treated the corporation *as if* it were a “person” separate from its constituents and its foundational statute. (Roy, 1997, p. 47) The corporation, then, became an autonomous, self-governing private activity because, in the public imagination, a legal edifice stood between it, the state, and corporate participants. (Roy, 1997, p. 47; Bowman, 1996, p. 25)

The most obvious social engineering was likely unintentional and came in the form of limited liability and asset lock-in.⁵⁶ If shareholders were truly the same as the corporate person,

⁵⁵ Ben Jackson (2012) argues that many such “liberal pluralists” took on a “Whiggish” story about how, thanks to unions, the gradual growth of Anglo-American liberty and democracy was adapted to an emerging constitutional governance of industry. As a result of unions and other such pressure groups, potentially totalitarian concentrations of power could be diffused.

⁵⁶ In 1816, Chief Justice Tilghman of the Pennsylvania Supreme Court argued that personality liability is ‘inconsistent with the nature of a body corporate.’ (Blumberg, 1993, p. 11)

then separating their personal debts from corporate debts makes little analytical sense. Indeed, many scholars came to believe that such limited liability was a constitutive feature of the corporation, necessary to the recognition of an independent corporate entity.⁵⁷ (Roy, 1997, p. 161; citing Horowitz, 1992) Yet in fact, limited liability was a “deliberate political decision in response to commercial pressures to achieve economic objectives,” namely, to attract middle class investors to fund further growth. (Blumberg, 1993, p. 17; *see also* Bratton & Wachter, 2008, p. 119) (citing Berle & Means, 1932) It was not meant, in other words, to create or protect a “real” corporate person.

Similarly, to achieve asset lock-in, which prevents investors from withdrawing their funds, some person must necessarily hold corporate assets other than the shareholders. (Blair, 2003) Asset lock-in permitted the corporation to exist and to grow despite the entry and exit of corporate constituents. It therefore left the impression that the corporate person was something separate and distinct from its fluctuating constituency. But the feature was in fact created to encourage long-term investment. (Stout, 2015)

General incorporation statutes, combined with state reluctance to control corporate behavior via detailed charter provisions in their corporate laws, (Hilt, 2017) also drove the real entity theory. Rather than regulate the corporation from the inside by dictating corporate charters, states restrained harmful corporate behavior from the outside. Beginning in the late-19th century, government used a burgeoning array of environmental, commercial, and criminal law to ensure corporations remained productive social actors. (Strine, Jr. & Walter, 2015, p. 342) But this change in regulatory strategy was not accomplished to respect a corporation’s internal life so much as it

⁵⁷ *Cf.* Blumberg 1993, p. 10 (arguing that limited liability is not essential to corporation and that, in fact, it is a relatively late-coming feature of corporate law). Roy (1997) recognizes a similar point (pp. 159-60).

was the outcome of “charter competition” among the states. The idea was that the most permissive corporate laws would attract the most incorporators and, therefore, the most corporate franchise tax revenue. Likewise, growing federal regulation of the corporation figured in as part-and-parcel of American state consolidation during the antebellum period, (Hurst, 2004 (1970), pp. 140-41) and was likely not an intentional effort to protect the “internal life” of business. Yet the unanticipated result was nevertheless to animate the idea that the corporation had its own unique and natural “inner life,” with its decision-making procedures and purposes determined internally.

Later, the influential “business judgment rule,” first appearing in 1888, protected managers’ decisions from judicial second-guessing. (Avi-Yonah, 2010, p. 218) Deriving, ironically, from a statutory delegation of authority to directors,⁵⁸ the rule permits corporations to conduct their operations largely unmolested. Indeed, the most compelling expression of the business corporation as a real entity came perhaps from the 1889 decision of the New York Court of Appeals in *Beveridge v. N.Y. Elevated R.R. Co.*⁵⁹ as it applied this rule. Moreover, it erected an impermeable layer of bureaucratic leadership between stockholders and business operations. (Roy, 1997, p. 154; Berle & Means, 1932))

Law, finally, cemented the corporation as a “real” entity existing independently of both state and shareholder when courts and legislatures abandoned the *ultra vires* doctrine. This rule had prevented business from straying from the explicit purposes set forth in its state-approved charter. The state’s refusal to enforce the rule,⁶⁰ instead permitting business to be conducted “for

⁵⁸ See, e.g., 8 Del. C. § 141(a); *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 746 (Del.Ch. 2005).

⁵⁹ 112 N.Y. 1, 22 (1889).

⁶⁰ Note, though, that the state reserves the right to alter corporate law and, therefore, a corporation’s internal governance procedures. From time to time it does do this.

any lawful reason,” amounted to a permanent concession of jurisdiction to corporate leadership. (Avi-Yonah, 2010, p. 1019)

Thus, the ontology offered by real entity theory suffers from the same kind of endogeneity problems that plague its cousin theories. The modern business corporation, as it exists, is just as much a creature of law as it is a real entity. The world might have looked very different had corporate law codes intervened more directly in the arrangement of corporate affairs and the selection of corporate purposes, had corporate liabilities been mirrored in individual’s personal balance sheets, and had shareholders been allowed to retrieve invested assets. Indeed, it is not only likely that the business corporation would not have assumed its colossal position within the economy. It is also not unreasonable to suggest that it would never have been considered to be a real entity at all.

Other Critiques

Real entity theory, like the other theories, elides some empirical facts that citizens of CLDs committed to equal human worth might find important. First, and most obviously, real entity theory’s early metaphysics makes short shrift of the individual and her rights. Second, it overlooks the role played by the law in framing corporate life. Finally, the corporation’s often instrumental, as opposed to substantive, purposes are neglected.

a. The Group and the Individual

By now, the descriptive weakness of organicist “body” metaphors invoked by the earlier variations of real entity theory is apparent. (List & Pettit, 2011; Waldron, 2002) They are suggestive of the Christian political theology that gave rise to the “body politick,” (Schmitt, 2010) a concept long since jettisoned by most liberal democratic theory. Corporate group life is not, or at least not simply, the instinctive, unrehearsed product of a natural human proclivity for voluntary

association and solidarity. (Cohen J. L., 2015, p. 196) Further, although their ostensibly natural personalities may resemble human personalities, they do so only in an analogical sense. (McLean, 2012, p. 81) As Muniz-Fraticelli observes, “associations develop under distinct historical conditions, as a response to concrete human needs, and not through a ‘spontaneous spirit of fellowship’” (Muniz-Fraticelli, 2014, p. 88) Corporate purposes do not rise *sui generis* from the earth, but as a result of internal procedures, power relations, and incentives that shape individual human behavior.

What is perhaps less well recognized is the particular fate the individual suffers under the organicist metaphor. For once a real entity theorist locates a group with an apparent “personality,” she declines on principle to open the organizational black box to inquire as to how that personality was formed and the impact that such formulation has upon the individual. An “unarticulated assumption of the pluralist tradition,” observes Daniel Ernst, is “that the groups themselves can safely be treated as organic, homogeneous, and voluntarily formed.” (Ernst, 1993, p. 60; *also* Freund, 2000 (1897), p. 39)

Sometimes, theorists argue that “socially embedded” individual identities are simply the product of, or subsumed under, group-level personality and culture. (Ewick, 1988, p. 180; Laski, 1916, p. 404⁶¹) As a result, it makes no sense to isolate them. Others presume, without deep examination, that corporate representatives accurately portray the group will. In fact, failing to suspend such an examination would amount to an inappropriate imposition of the observer’s ideas about the group will upon group members who might have very different ideas. (Cohen J. L., 2015) As a result, the voice of the corporation might come from an authoritarian leader, (Petrin, 2018)

⁶¹ “For man is so essentially an associative animal that his nature is largely determined by the relationships thus formed.”

or from a democratic council, or even from some unspeaking text. For purposes of real entity theory, it does not matter.

Consequently, the theory gives an insufficient account of internal power relations. For example, Morris Cohen, in his critical response to pluralist theory, argues that the real personality "... hides the fact that what we call group action is and must often be the result not of the unanimous agreement of all the members of the groups but only of a more or less limited part thereof." (Cohen M., 1919, p. 678) Assuming the existence of a metaphysical group will "[ignores] the reality of the hierarchical and bureaucratic management and the absence of effective shareholder participation in governance of the large public corporation." (Blumberg, 1993, p. 30) Further, its oversocialization of the individual risks essentializing the corporate personality and drowning out dissident voices in the same way that Benhabib (2002), for example, claims that certain communitarians essentialize cultures and over-determine the self.

b. The Role of Law

It is not just the individual that gets lost in the shuffle of organicist versions of real entity theory. Like aggregation theory, it does not acknowledge the constitutive role law plays in forming corporate purposes. Indeed, Gierke went so far as to claim that "neither scholarship nor the law had any creative role" whatsoever. But, as set forth above, law shapes not only the self-understandings of corporate participants, but also their behavior. It constitutes much of what we understand to be the corporate agent and the corporate personality.

More broadly, an institutionalized, legal context is essential to the recognition and development of the very idea of autonomous collective actors within a plural society. An "institutionalized arena of discursive interaction" is necessary before social phenomena like the corporation can be named, normed and included within a constitutionalized state. This arena

requires a legal “framework of rights, obligations and responsibilities.” (Preuss, 2015, p. 362) Simply, there is no corporation, and certainly no legal corporate autonomy right, without first giving people the legal capacity to talk about and assert them both. Further, just as law is required to constitute any given individual as a citizen, and required to ensure that she “is represented, recognized and protected qua his or her capacity to contribute his or her opinions, ideas...about common affairs to all the others,” so too the law is required to constitute the corporate person. The real entity theorist cannot slough off law as so much epiphenomenal fluff. The legal edifices that she wishes to demolish in the name of associational freedom are some of the foundations upon which protected group life is built.

The normative prescriptions of real entity theory present problematic outcomes driven, at least in part, by these empirical weaknesses. First, one critique has appeared before in the political theory literature: that touching on the liberal objection to communitarian group rights theories. By glossing over internal group hierarchies and failing to isolate the individual as the normative level of analysis, the prescriptive tenets of real entity theory risk violating liberal rights and enforcing domination. Second, and also previewed in political theory literature, is the incommensurability of conflicting sovereignty claims made by both autonomous real entities and the state. These claims likewise place individual liberties at risk. Third, the theory’s failure to acknowledge the constitutive role played by law in the formation of corporate agency calls into question the ascription of legal autonomy rights to corporations. A corporation’s instrumental purposes, in addition, might likewise disqualify it as “person” whose agency is as morally salient as a human being’s. Finally, even assuming that a corporation’s personality merits the attribution of rights of some kind, what form those rights might take remain indeterminate.

- i. Internal Domination

As intimated above, the assignment of original rights to corporations as such implies that their members have a moral duty to make good on them. It means the group as a whole may make rights-based claims upon its members who must, to respect those rights, obey. (Waldron, 2002) Given the indeterminateness of the corporate will (McLean, 2012, p. 78⁶²; Garfield, 2014, pp. 10-11) and the possibility that elites might usurp the job of forming it, real entity theory presents several dilemmas regarding individual rights. As set forth below, they are dilemmas similar to those posed by aggregation theory. Yet real entity theory would treat the corporation as private, hidden behind the edifice of moral personhood. (Gierke, 1990, p. 197, 201; Barkan, 2013⁶³; Maitland, 2003)

First, a corporation's hierarchical power structure, entrenched by law (but ignored by the ontology) and supported by market dynamics, may possess a monopoly on the formation of group personality and, therefore, the rights claimed by the corporation. (Blumberg, 1993, p. 30; Aviyonah, 2010)⁶⁴ Ernst Freund, writing in the late 19th century, detected many of illiberal dynamics engendered by this governing hierarchy:

What proclaims itself as a corporate act is nearly always an act based upon representative will, *i.e.*, an act induced by a will which is imputed to the corporation on account of presumptive and probable identity and accordance with what would be actual corporate will.⁶⁵

⁶² Citing Bernard Bosanquet.

⁶³ Barkan describes corporate sovereignty, understood in terms of Agamben's "ban," that carves out spheres of jurisdiction for corporations to go largely ignored by the state.

⁶⁴ Arguing that the business judgment rule effectively caused the courts to equate the corporate will with that of management.

⁶⁵ Arguably, issue of corporate will formation brings forth the same issues analyzed in the recent constructivist turn in theories of democratic representation.

(Freund, 2000 (1897), p. 42) “Presumptive and probable identity,” of course, begs the question. From where does this presumption derive, and according to which standards is it applied? As pointed out above in relation to aggregation theories, consent to this representative will cannot be presumed. It is not at all clear that ordinary contract rights, market dynamics, and legislation adequately incorporate the voices (Hirschman, 1970) of those who find themselves most vulnerable to the exercise of a corporate autonomy right. Further, the corporate will-determination apparatus may exclude – disenfranchise – corporate members *tout court*, leaving them without even the dubious protection of contract rights. For example, in the context of labor unions, Ernst observes that the historical regulatory deference to union “wills” regarding their own membership requirements excluded African Americans from the benefits of labor protection. (Ernst, 1993, p. 83) Moreover, corporate members come and go, along with their individual interests and values. Assigning rights to the corporation as such may therefore inappropriately empower status-quo group leadership without the consent of current and future members. (Kukathas, 1995, pp. 267-8) What’s more, the uncritical enforcement of a corporate will formed under undemocratic conditions will ratify, reinforce, and even exacerbate the imbalances of power within the corporation. (Ernst, 1993, p. 60) As a result, the vindication of corporate rights might very well violate the liberties of corporate constituents who, having no role in the formation of the group personality, may disagree with its dictates. (Waldron, 2002)

The fact that corporate authority does not depend upon its commitment to liberal, democratic norms exacerbates the danger. In the words of Muniz-Fraticelli, there are no “endogenous limits” to corporate will formation. (Muniz-Fraticelli, 2014, p. 41) Under real entity theory, principles of liberal justice do not constrain corporate authority as they do the state’s authority because those principles do not (necessarily) legitimize the corporation’s authority as

they do the state's. Unconstrained by liberal rights and democratic norms, the "real entity" concept of corporation thus poses some significant problems. Indeed, Adolf Berle famously warned that it would be naïve to expect that corporate princes would refrain from using their power for anything but their own personal benefit. (Berle, 1932) It is no wonder, then, that the "corporate realism" of real entity theory "proved congenial to management's interests." (Bratton, 1989, p. 1489)

Illiberal implications arise even when understanding the corporation as a kind of democratic association as does, for example, Gierke's notion of organic fellowship and the more contemporary philosophical accounts of group agency. Just as with democratic polities and nexus-of-contracts theories, we cannot presume a perfect identity of governor and governed. The formation of the corporate will may silence the unique voices of its members in the same way that Rousseau's *volonté générale* threatens to suffocate citizens' individual interests and opinions. Chief Justice Marshall, for instance, observed as early as 1853 that stockholders are "numerous unknown and ever-changing associates" who might dissent from the majority view and so prove an inappropriate reference when ascertaining how a corporation desired to exercise its rights.⁶⁶ (Strine, Jr. & Walter, 2016, p. 903; Blair & Pollman, 2015, p. 1723)⁶⁷ Corporate will formation, in addition, becomes tricky not just when a minority arises, but also when the constituency finds itself disinterested and ambivalent, or when they compromise their values to achieve democratic closure. Freund pointed out as much when he observed that the corporate will is:

the product of mutual personal influence and of the influence of a common purpose, frequently also the result of compromise and submission. But we are also justified in assuming a correct expression of corporate will, where of the associated persons only a

⁶⁶ *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 328 (1853).

⁶⁷ Both citing Justice White's dissent in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 804-5 (1978).

portion, representative in numbers, character, and position, act habitually, while the rest sustain a relation of acquiescence, dependence, or incapacity...It may even be urged that where a majority is clearly guided by the common interest, while the position of the minority is dictated by [personal interest], the corporate will is represented by the majority...

(Freund, 2000 (1897), pp. 39-40)

In addition, the ethical nature of a corporation's limited purposes, when combined with its superior resources, make it all the more likely that even unanimous, democratic corporate decision-making will invade individual rights. Corporations, as 'ethical' communities (for example, to pursue the good of profit) will necessarily take positions that grate against others' rights and conceptions of the good life. For example, corporate constituents might agree to donate sums to a particular candidate's campaign in an amount so significant as to offend notions of political equality. Or, as Ernst observes, recognizing and empowering a labor organization and a capital organization rightly empowers workers and property owners. But neither one is looking out for the consuming public. (Ernst, 1993, p. 68). Amounting to an overrepresentation of a certain ethical viewpoint, this is an objection routinely launched at corporatist theories of the state. (Alan Cawson, 1986, p. 146)

The threat posed by an outsized corporate capacity to assert rights cannot be disarmed simply by claiming such rights are civil, not political, in nature. As Schmitt pointed out, associational rights always threaten politicization. They "can easily lose their 'unpolitical character' (!) and then cease to be individual rights of freedom guaranteed as pre-political freedom in accordance with the principles of constitutional distribution of rights." (Bockenforde, 1997, p. 15) Freedom of assembly and communication mark the very transition from civil to political, as

human beings come together, form values and goals, and invariably attempt to pursue them through politics. It is no accident, after all, that corporate elites have always attempted to capture the political process. And it is perhaps no accident that business corporations have, according to some scholars, sought to “weaponize” the First Amendment. (Winkler, 2018)

Finally, the corporation’s ethical ends, especially given its immense resources, can contribute to illiberal epistocracy. As Bockenforde points out,

Whenever ethical and moral postulates or material values are given the status of legal obligations beyond the safeguarding of equal liberty for all and the basic requirements of organized social life, the inevitable result is a socialization of individual liberty and autonomy. They come under the domination of those who possess or appropriate monopoly of interpretation with regard to those postulates or values.

(Bockenforde, 1991, p. 68) Within the business community, the threat of interpretive monopoly is real and ongoing, especially when the “ethical” end is the maximization of company profits. Those with a claim to instrumental expertise can and do usurp democratic will-formation. Some contemporary examples stand out. Extraordinary business acumen, vouchsafed with references to career experience and the market for executive labor, is claimed not only to justify exorbitant executive compensation schemes, but also as credentials for those seeking elected political office and cabinet posts. Business executives and Wall Street financiers routinely run for President and occupy seats within executive agencies, central banks, and advisory councils.

ii. The Conflict between Corporate and State Authority

A corporation’s ethical purposes, set by hierarchy, thus risks the infringement of individual liberties. The dilemma, though, goes beyond rights violations. Real entity theory carves a chasm between the respective domains of corporation and the constitutional liberal democratic state. And

it is a division that runs deeper than the public-private boundary drawn by aggregation theories. As hinted above, real entity theory, and in particular its political pluralist underpinnings, pits two competing visions of sovereignty against one another: the democratic *demos* versus the group. (Cohen J. L., 2015; O'Melinn, 2006) For many pluralists, corporations are (or should be) the constituent powers of the modern state (*E.g.*, Cole, 1989; McLean, 2012, p. 75; Green, 2011, p. 445⁶⁸) By investing corporations with an infeasible, independent claim to legitimate authority, and leveling – or even elevating – that authority above the state, real entity theory implies an “ineluctability of latent conflict between the jurisdiction of associations and that of the state.” (Muniz-Fraticelli, 2014, p. 24) This conflict risks depriving group members of the protections the state might offer against corporate actions that nonetheless amount to liberal rights violations.⁶⁹ (Barkan, 2013) The pluralism of political authorities, furthermore, entails more than a division of authority. The conflict often becomes meta-jurisdictional. Autonomous, self-governing groups will invariably seek to define and even extend their own boundaries. (Muniz-Fraticelli, 2014, p. 25) The upshot is that members harmed by corporate action will not only have no appeal, but also risk losing in the future any individual rights-based protections they currently enjoy.

These illiberal implications are not merely theoretical. Legal recognition of the corporation as a “real” person often does amount to a jurisdictional boundary. (O'Melinn, 2006, p. 206) Large corporations possess, as a matter of reality, “powers and functions that are traditionally associated with the state, making corporations comparable to sovereign government-like bureaucracies.”

⁶⁸ “A state presupposes other forms of community, with the rights that arise out of them, and only exists as a sustaining, securing or completing them.”

⁶⁹ Though Figgis recognizes that some corporations are quite powerful (Figgis, 1914, p. 102), and so merit more regulation than individuals, he also states that “no power – not even a religious society – is absolute, but in the last resort his allegiance to his own conscience is final.” (*Ibid.*, p. 154)

(Ripkin, 2009, p. 142)⁷⁰ The simple allotment of a liberty right to a “government-like bureaucracy,” permitting it to operate in whatever manner it likes, amounts to a legally-sanctioned self-determination right. (O'Melinn, 2006) The point, however, is not confined to those business corporations whose footprint outsizes most sovereign states. For example, a small corporation might terminate an employee arbitrarily, citing “at-will” contractual principles according to which any party may quit the relationship at any time and for any reason. (Werhane, 1985; Anderson, 2017) According to these principles, the state may not offer the employee any redress because it may not examine the employer’s motives. When enforcing such principles between individuals, the state respects rights of voluntary association. In contrast, when the state similarly declines an examination of a corporate “person’s” will, it is in fact ratifying, or at least refusing to intervene, in internal institutional government. Recall that the “will” of the corporation is not like a human will. It is instead the end result of collective decision-making procedures that may or may not align with liberal democratic principles. Given the corporation’s often instrumental purposes, this is very likely to be the case.

As a result, two competing governance regimes exist: the corporate and the state. There is every reason to suspect that these regimes are inconsistent. Arguably, the principles invoked and implemented in corporate decision-making – notions of efficiency and profit maximization – are not just offensive to liberal democracy. They are also, if we take seriously Weberian critiques of society’s instrumentalized rationality, universalistic in their pretensions and implications. (Cohen J. L., 2015, p. 198) Real entity theory would forbid the state from taking any defensive measures against this kind of colonization.

⁷⁰ Strine (2007a), for example, discusses how the exertion of state sovereignty over multinational corporations is “ludicrous” without a concerted, global effort, given the size and power of these corporations and the securities markets.

iii. Indeterminacy Issues

Finally, even if real entity theory justifies some kind of autonomy right, the contours of that right remain indeterminate. Though corporations may possess some human-like features, clearly they are not human. Their often impressive resources yield an inhuman impact on society at large, individuals, communities, and even the state. Given their profit-oriented nature, they pursue agendas that often seem sociopathic.⁷¹ As legal scholar Ronald Colombo remarks,

Just because the enterprise might now be considered a ‘real entity,’ it does not ineluctably follow that the entity should be endowed with free speech rights. There are many ‘real entities’ in this world, from tadpoles to trees, none of which enjoy constitutional rights or constitutional personhood.

(Colombo, 2012, p. 27) Real entity theory does not provide any tools with which to parse through, in principled manner, the illiberal implications of ascribing to them particular rights. (Cohen J. L., 2015, p. 186) Even if the corporation merits economic rights, it is not at all clear that it also deserves the freedom to involve itself in politics or to practice a religion.

Real Entity Theory’s Critical Potentials

Despite its problems, real entity theory does add insight into the problem of corporate rights. Recall that within the framework of CLD, concession theory suggests that corporate legal rights should be the outcome of democratic lawmaking framed by the principle of equal human worth. Within this same framework, aggregation theory suggests that the norm of equal human worth should include respect for property and contract rights, as well as for rights of free

⁷¹ A psychopathic “institutional personality” set by capital markets and aggravated by short-termist “shareholder primacy” tenets animate many public companies. (Ripkin, 2009; Davis, 2008;⁷¹ French, 1984; Strine, 2008; Hirst, 1989, pp. 19-20).

association. Group rights, in word, should be respected in so far as they vindicate individual freedom. Aggregation theory also teaches that any legal group autonomy right, at least to the extent that it amounts to an authority claim over corporate members, be legitimated through a consent mechanism. In addition, aggregation theory insists on a separation between state and society.

For its part, real entity theory provides several more good reasons why CLD's citizens might want to grant the corporation legal autonomy rights. It recognizes that human freedom cannot be adequately protected through individual legal rights alone. A corporation possesses cultural and relational characteristics that aggregative concepts might neglect in the process of tallying individual interests and registering contractual consent. For example, fellowship communities, based upon voluntary association, do not perfectly overlap nexus-of-contract theories of corporations precisely because they recognize the unique organizational dynamics, identities, solidarities, and informal relationships that atomistic views of corporations ignore. Real entity theory will therefore better satisfy those concerned with properly recognizing group-level characteristics than do the other theories of corporate personhood.

Real entity theory also provides a strong reminder of the importance of liberal neutrality, even if it, in its exuberance to emancipate associational life, perhaps goes too far in enervating liberal democratic political institutions. By consigning to government the task of inter-group dispute mediation, it prompts us to maintain a normative distinction between public and private. Indeed, simply by labeling a corporation a "person," we find a spot for it in the "private" sphere, enabling us to juxtapose collective economic enterprise against the state. (Bowman, 1996, p. 9) In this way, real entity theory counsels against the risks of economic Bolshevism. At the very least, and unlike concession theory, it helps legitimize corporate opposition to government action – a fact perhaps appreciated more by American progressives as we continue under the Trump

Administration. An empowered civil society with a diversity of strong actors does not just act as a prophylactic against totalitarian tendencies. A multitude of power centers will also tend to check themselves, preventing private tyrannies. Further, real entity theory supports a devolution in decision-making institutions that would permit local control of social life. (Hager, 1989, p. 611)(citing Durkheim) The net result is a likely a good thing when it comes to individual liberty.

Moreover, by affording to the corporation an original right that makes no commitment to traditional liberal values, it also reminds us that the state should serve as an impartial arbiter amongst the diverse interests of a plural society. It counsels the state against substituting its own comprehensive views for those of its citizens. As a result, the corporation can be seen as part and parcel of the practice of political liberalism among diverse societies where individuals are permitted to self-order according to their conception of the (here, economic) good. (Singer, 2015)

Responding as it does to the realities of the modern, industrialized, bureaucratized business corporation, the theory also draws attention to intra-corporate relations in a way the other theories do not. The traditional account of real entity theory acknowledges the corporation's inner "life," *i.e.*, the culture and values that it might express. It helps political theorists recognize and take account of the "myths and other circulating narratives, rituals, practices, beliefs, and worldviews," the culturally constitutive meanings, of the business corporation – in addition to "the dominant and overriding goal of profit making, systematically pursued." (Urban & Koh, 2013, p. 141) It thus provides a perch from which to investigate the impact of the corporate "social" on the individual corporate member. Unlike the other theories of corporate personhood, it therefore allows an analysis of the implications of that corporate culture for individual civil and political rights.

Further, in its more philosophical, contemporary accounts, real entity theory sets forth an intra-corporate will formation mechanism that does better justice to liberty than does the

aggregative, contractual model. While the contractual model would legitimize hierarchical corporate decision-making by reference to (often dubious) individual consent to authority, it fails to offer a method that enables participants to act together to achieve collective purposes. In contrast, accounts of group agency identify the decision-making procedures required to form a truly collective, corporate will. (List & Pettit, 2011) Because they are necessarily democratic, these procedures fit more comfortably within associationalist accounts of group rights because they incorporate individual voices into group decision-making.

Towards a New Theory of Corporate Legal Rights

Theories of corporate personhood thus have much to offer political theory. Reacting to historical dilemmas by applying values that are often consistent with constitutional liberal democracy, they not only point out where and why corporations can run afoul of equal human worth. They also suggest how constitutional liberal democracies might respond. Each theory on its own, nevertheless, will leave many proponents of constitutional liberal democracy dissatisfied. They elide important norms while effacing morally salient empirical circumstances. Often, the theories enlist theories of political legitimacy that many would reject. As examined in more detail in Chapter 2, they are often too communitarian, too libertarian, too pluralist. Finally, because they all reason from fact to norm, from ontology to prescription, they deploy static solutions to ever-shifting circumstances. They are nails, hammering the Jell-o of complex contemporary society into a wall. As a result, while they might have provided adequate solutions to the problem of corporate rights in particular times and places, they cannot hope to keep up as corporate capitalism continues to mutate. It is not clear, for example, how they might apply to multinational platform-based technological companies, worth billions of dollars in equity held by highly intermediated investors, yet involve only a handful of executives and contingent employees who are often guided not by

human will, but by computer algorithms worth millions only because protected by state-sanctioned patents. Can a corporate entity have a will that is created artificially? Is a company really a nexus of short-term, precarious, evolving contracts that begin and end in a matter of minutes? Can any state actually be said to “concede” authority to multinational enterprises operating through subsidiaries in 20 different countries? Can it be considered an aggregation of property protected by natural property rights when that property only has value because some patent office administrator says that it does?

If, instead, a theory of corporate legal rights starts not from what *is*, but instead from the values that law is meant to instantiate, it is possible to articulate a more flexible and satisfactory account. This is a tack suggested by Dewey in his seminal 1926 essay in the *Yale Law Journal*. (See also Schragger & Schwartzman, 2016) The law can then *respond* to already existing social formations to ensure they are consistent with our fundamental normative commitments to each other. Reversing the argumentative order does not just enable the law to react appropriately to ever-changing corporate formations. It also avoids some of the endogeneity problems detailed above. Recall that corporate theory often creates the behavior it means merely to describe. In particular, second-generation aggregation theories helped motor the transfiguration of post-war capitalism into the destructive financialized version that exists today. It is therefore invasive, creating social relations according to perfectionist values – rather than impartially protecting the ones that are actually already held by human beings.

CLD presumes from the outset that law should vindicate the principle of equal individual human worth, understood abstractly as a commitment to individual liberty, inclusiveness, responsiveness, equality, and state impartiality amongst conflicting claims to equal rights. Yet running the complexities of contemporary capitalism through these open-ended yardsticks may

not be particularly useful. It will at least require a lot of legwork. The theories of corporate personhood, fortunately, can help elaborate these abstract principles, giving them context and meaning even as none of them on their own offer a convincing account of legal rights. In particular, if one sifts through their conclusions for consistency with CLD's normative commitments, together they suggest an associationalist conception of legal rights that at the same time enables collective autonomy while also protecting the equal liberty rights of outsiders and those subject to internal corporate authority.

I distill the following desiderata from the three historical conceptions of corporate personhood discussed precisely because they (1) fit within my account of CLD, and (2) are responsive to some contemporary problems we associate with corporate capitalism:

- a. From concession theory, a universalistic moral framework that holds that both state and corporate action must satisfy the same liberal democratic desiderata, namely, that legal rights – including corporate rights – should respect constitutional liberal democracy's ("CLD") fundamental commitment to equal human worth;
- b. From aggregation theory, the notion that contractual consent can legitimate inter-corporate authority because it respects CLD's commitment to equal human worth; and that free exit, under certain empirical conditions, can satisfactorily proxy this consent;
- c. From real entity theory, a corporate right to autonomy, or self-governance, can be justified because human beings, each of whom enjoys equal worth, can and do exercise their equal freedoms by pursuing joint projects together;

- d. From aggregation and real entity theory, the notion that the state should refrain from controlling a corporation's ethical purposes, except that:
 - the state may intervene (1) in order to protect equal individual rights; and, perhaps, (2) for reasons otherwise strongly in the public interest (from concession theory); and
- e. From real entity theory, (a) – (c) should be analyzed not only in terms of formal legal relations, but also be attentive to “informal” group-level characteristics like culture and ‘exogenous’ power disparities.

More simply, this analysis of the legal theories of corporate personhood suggests that corporate legal rights should amount to the regulation of corporate members' self-regulation.

This Chapter, however, has presumed that readers will be convinced by its accounting of constitutional liberal democracy and that they will reject the theories of political legitimacy enlisted by the three theories of corporate personhood. For example, it has jettisoned the real entity theory notion that corporations ought to enjoy *sui generis* moral and political standing. It has likewise disregarded aggregation theory's intuition that the corporation amounts to the exercise of natural property and contract rights. In the next Chapter, I will justify these moves by giving a few *pro tanto* explanations for why their libertarian, communitarian, and pluralist inclinations should be dissatisfying to contemporary scholars and policymakers. It will also explain where and why CLD is different from these other theories of political legitimacy.

Chapter 2: Corporate Personhood's Three False Choices

Introduction

In the last Chapter, an historical and analytical examination of the legal theories of corporate personhood revealed their critical potential. Because each identifies and deploys values that are important to those committed to constitutional liberal democracy, they are helpful to theorists and policy-makers as they think about corporate legal rights. Nevertheless, it concluded that each theory, in its own way, effaced empirical phenomena that CLDs find morally salient. Some of the theories elided law as an explanatory variable for the corporate phenomenon. Others ignored the role of human initiative. Further, each of the ontologies presented by the theories endogenously shape the very same facts that serve as the analytical foundation from which they derive normative outcomes. The Chapter also pinpointed where the theories might disappoint those committed to CLD, either because they give too much discretion to the state or too much autonomy to the corporation. And it excavated the often-unstated theories of political legitimacy that subtended their arguments as they derived norms from fact.

As it turns out, many of the weaknesses of these theories arise precisely because they enlist theories of political legitimacy that misunderstand the relationship that constitutional liberal democracy establishes between rights, positive law, and empirical circumstances. They set up, in other words, the question of corporate rights by problematizing it incorrectly. Once properly situated, it is possible to translate their insights into an account of corporate legal rights that respects CLD's commitment to equal human worth.

The error committed by theories of corporate personhood can be characterized by a series of false choices. They require us to categorize the corporation as either public or private; they draw the wrong relationship between positive law and morality; and they present an irreconcilable difference between rights and democracy. How they would have us ascribe corporate rights depends upon how we navigate these bilateral conflicts. For example, if one buys into the first generation aggregation theory of corporate personhood, which understands corporate rights as protecting the individual contract and property rights of corporate participants, one must conclude that (1) corporations are private; and (2) protected by pre-political natural rights that are (3) antithetical to democratic regulation. If, on the other hand, one endorses concession theory, where corporations are legitimate expressions of state power, one accepts that (1) corporations are public; and (2) legitimate expressions of sovereign democratic authority that are (3) antithetical to notions of libertarian *a priori* individual rights. If real entity theory seems most appealing, one holds that (1) corporations are private entities that (2) carry their own legitimate moral authority that may be (3) antithetical to both rights and democracy.

These are all false choices. Contemporary notions of constitutional liberal democracy reject *sui generis* ontological categories, including those dividing the world into an organ-body sovereign and “private” subjects as a matter of argumentative assumption. They deny all sources of political legitimacy that bank upon ethical truths that are obnoxious to plural, diverse societies. And they rebuff accounts that deny the co-originality and mutual interdependence of rights and democracy.

When invoked in connection with a better understanding of what liberal constitutional democracy is about, it becomes clear that we need not – indeed we should not – choose amongst these theories. We should instead incorporate them into our constitutional practice as rights discourses, each making different but legitimate claims about how a polity can properly instantiate

the promise of equal liberty to individuals carrying equal moral worth. Further, knowing what we know about liberal constitutional democracy, and having the benefit of the kinds of claims people make when they invoke theories of personhood, we can make some predictions. In fact, when considered together, they suggest that corporate rights will be more likely to pass constitutional muster depending on the corporation's internal democratic credentials.

Sovereignty and the Public-Private Distinction

Theories of corporate personhood usually presume an antiquated conception of sovereignty, one that juxtaposes a powerful state agent against a governed mass of subjects who hold an array of pre-political rights. They posit the state as an agent or “body” claiming what Jean Bodin set forth in the sixteenth century: supreme, absolute, and indivisible power. (Bodin, 1576, p. 122) They then divide the social world between the state, on the one hand, and those over whom it rules, on the other. (Bodin, 1576, pp. 214-15) Finding themselves forced to slot the corporation into one of these two ontological categories, theorists then scope for evidence of its “public” or its “private” credentials. But there should be some discomfort with this bilateral taxonomy. The everyday operations of an independently managed Microsoft, Inc. are only awkwardly characterized as manifestations of state authority. At the same time, its power and social effects often seem too capacious to be fairly characterized as an exercise of private individual liberty. Its legal genome, in the form of limited liability, asset lock-in, and the like, likewise caution against such straightforward categorization. Thus, theorists understandably deploy hedging language to describe the corporation, attempting to locate it somewhere in between the ruler and the ruled: “franchise government;” “neither public nor private;” (Ciepley, 2013)⁷² “quasi-public;”

⁷² Ciepley (2013) takes the tactic of critiquing the public-private distinction but fails to elaborate an alternative ontological arrangement. Rather, his theory of “franchise government” seems to rest on the “public” side of this distinction, although he purports to identify a new ontological category.

“intermediary association;” and “private government.” (Anderson, 2017) They then proceed to argue for or against corporate rights by analogy (*e.g.*, Landemore, 2016; Hsieh, 2015; Singer, 2018⁷³; Bratton, 1989, p. 1497; Ripkin, 2009, p. 142), according to whether certain instances of corporate behavior seem more “state-like” or “individual.”⁷⁴ But, given the variation of corporate size, power, and wealth, it is difficult indeed to “[separate] out those corporations with government-like power from those without it.” (Winkler, 2018, p. 271) While such tactics undoubtedly provide traction into the problem of corporate rights, they leave the corporation in conceptual purgatory. When it exhibits characteristics of both the state and the individual, these analogies leave little principled guidance when it comes to ascribing or limiting corporate liberty rights. For example, when a corporation attempts to practice religion by promulgating workplace rules that incorporate religious doctrine, it is at the same time exercising private liberty rights *and* acting as a governing institution over subjects who may dissent. Applying any analogical reasoning to the problem requires an arbitrary choice between the corporation’s public and private credentials.

Fortunately, better ontological footing is available when it comes to locating the corporation vis-à-vis the state and the individual. The conception of sovereignty and the state presumed by those invoking corporate personhood is early modern one, and one that has been replaced. As explained below, more contemporary understanding of constitutional liberal

Similarly, while Landemore & Ferreras (2016) draw an analogy between firm and state, their argument proceeds by way of addressing objections rather than by making an affirmative case for the analogy.

⁷³ Singer argues that while the firm exhibits many state-like features, a political theory of the firm must account for “transaction cost economies” that explain why individuals choose to organize in a non-market organization, giving the firm a hybrid state/individualistic character.

⁷⁴ The corporation-state analogy is further unpacked in Chapter 4, *infra*.

democracy does not make such clean distinctions between ruler and ruled. As a result, it renders the theories of corporate personhood at once more tractable and less contradictory.

Corporate Personhood's Two-Body Problem: Ruler and Ruled

For much of modern Western history, sovereignty, understood as the right to rule, was thought to be held by a specific body: either the person of the monarch or a particular body of legislators. Hobbes, for example, imagined a state of nature full of individual human beings forming a covenant to authorize and relinquish their natural liberties to a “Mortall God,” *i.e.*, the modern state, represented (or re-presented) in the human bodies of the King or legislature – much in the way a Chairman and CEO represents the will of the corporation. Jean Bodin, to take another familiar example, understood sovereignty to rest with the King. This body (understood collectively or in the singular) would rule over subjects, another separate ontological phenomenon. As traced by Richard Bourke and Quentin Skinner (2017), while the relationship between sovereignty and particular historical state organs transformed over the modern age, it preserved the ontological gap between the body of ruler and the mass of the ruled.

After the democratic revolutions, however, some theorists attempted an analytical merger of this two-part ontology. Communitarians (Habermas’ term) imagined “the people” not only replacing the king or king-in-parliament as sovereign, but also governing themselves as subjects. They thereby endeavored to create an identity between ruler and ruled. Rousseau’s general will serves as a model for this kind of thinking. It is a sovereign-subject hat trick: the ruled become the ruler, the democratic “people,” understood as a body, a “unitary macro-subject,” (Kalyvas, 2005) come to possess what was once the body of the king. Carl Schmitt likewise endorsed this identity between governed and governor, although with some alarming, homogenizing implications. (Schmitt, 1988; *see also* Arendt, 2006, p. 60) Accordingly, populists in the 19th century U.S.

critiqued government officers and state laws precisely because they betrayed the imagined will of this sovereign people. (Canovan, 2005, p. 75) Indeed, such thinkers sometimes understand constitutionalism and liberal rights as illegitimate constraints on the people's sovereign power. (E.g., Novak, 2002, p. 253)⁷⁵

Of course, many have pointed out the flaws in this equation. The “people,” understood literally, cannot rule. (Lefort, 1988) The entire population of a diverse, plural community cannot be present within governing institutions. Nor would that population likely ever find a unanimous general will, no matter how constrained and qualified their public reasoning. As a result, they find that the old gap between ruler and ruled remains, even if the ruler might be staffed by democratically elected representatives or shifting democratic majorities, and even as actual power was split within constitutional systems, legal authority limited, divided, and separated into distinct offices. (Morgan, 1989, p. 53) In other words, the merger between ruler and ruled attempted by the democratic revolutions did not remove the danger of heteronomy. (Grimm, 105, p. 31; Canovan, 2006, p. 29). Some (body) would wield public power, and the rest would be subject to its rules.

At the same time, liberalism understood ruled subjects – those resting in the second half of the public-private divide – as a disaggregated, atomized and abstract multitude. (Ciepley, 2013, pp. 139-40) If it considered the relations amongst these subjects at all, it did so in terms of private, civil law: formal individual property and liberty rights and reciprocal exchange, (Barkan, 2013, p. 50) protected by absolutist notions of rights tethered to notions of possessive individualism.

It is in this two-sided political tapestry that theories of corporate personhood are woven. Concession theory imagines the corporation as the associational conscript or “franchise” (Ciepley,

⁷⁵ Addressing early 20th century critiques of obstructive *laissez-faire* legal systems.

2013) of the sovereign state, an outcome of the will of the ruling body holding or claiming sovereignty. Recall from the last Chapter that concession theory's ontological accounting identifies in the corporation something more than the sum of its individual participants. Honing in on this non-human remainder, it finds either a state-contrived legal personality (Freund, 2000 (1897), p. 11), a state-imposed system of legal norms (Kelsen, 1945, p. 98), or the "public law" (Millon, 1990, p. 211), each of which governs individual participants just like an organ-body sovereign state rules over its legal subjects. Some non-constructivist Rawlsians might also be included in this camp, at least in so far as they include the corporation as part of the "basic structure" that must be held accountable to pre-political norms. (*See, e.g.*, Hsieh, 2005) Revolutionary-era American jurists likewise employed such a conception when they sought to limit corporate prerogatives, associating them with an illegitimate tyrannical monarchy that usurped the place of the rightful ruling body: the "people," the sleeping sovereign. "Jeffersonians," observes legal scholar Adam Winkler, "were populists – opponents of corporate power who sought to limit corporate rights in the name of the people." (Winkler 2018, p. 36) They identified the corporation with an illegitimate unrepresentative colonial government, and they identified themselves as under-represented citizens denied both their political liberties and their right to rule as true sovereigns. (Speir, 2012, p. 155; Millon, 1990, p. 209; Strine, Jr. & Walter, 2016, p. 895 (citing Jefferson⁷⁶ among others); Blumberg, 1993, p. 6; Paine, 1824, p. 397 (regarding the chartering of the Bank of North America); Barkan, 2013, p. 45) As a result, the corporation-as-state-conscript had to be constrained in the same way any ruler must be constrained. Indeed, even

⁷⁶ "Thomas Jefferson hoped that the new country could 'crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.'" (citing Letter to George Logan, Nov. 12, 1816, in 12 *The Works of Thomas Jefferson* 42, 44 (Paul Leicester Ford ed., 1905))

after the Revolution, because “all government was the people’s” even as “the people had withdrawn from government altogether,” (Pocock, 1975, p. 517) critics of the corporation appealed to the sleeping popular sovereign in order to constrain corporate legal rights, understood as an illegitimate use of governmental power. States’ rights advocate Justice Rehnquist, in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), made a similar move when he argued against corporate speech rights. So too did the 19th century Jacksonian populists when they contended that “[w]hatever power is given to a corporation, is just so much power taken away from the State, in derogation of the original power of the mass of the community.” (Winkler, 2018, p. 91)⁷⁷ Overweening corporations, as creations of the state had to be controlled by “the people” as the true sovereign. (Barkan, 2013, pp. 47-8)

Some contemporary concession theorists, on the other hand, seem to conflate any ontological gap between ruler and ruled when it comes to the corporation. Perhaps buying into the Rousseauian fusion of sovereign and subject effected by the democratic revolutions, they presume that democratic lawmaking approaches popular consensus by facilitating the public interest. They might imagine the state-created corporate legal personality or state-imposed system of norms as the laws that corporate participants, as members of the public, give themselves. Given the identity between ruler and ruled, state regulation of corporations presents no dilemmas for individual liberty. It is merely the free exercise of the autonomous will of the people, understood as a collective whole. Thus, contemporary concession theorists deal suspiciously with any constitutional restraints urged upon the state. Such restraint might prevent free democratic citizens

⁷⁷ Citing the delegates at the 1837-38 Pennsylvania constitutional convention.

from asserting their collective political liberty for the common good.⁷⁸ (See Parkinson, 1993, p. 26⁷⁹; Singer, 2017) Accordingly, they would embrace Justice Ginsburg’s reasoning in *Burwell v. Hobby Lobby Stores, Inc.*: that Congress has the discretion to delimit the powers and protections afforded to business corporations in the public interest. (134 S.Ct. 2571, 2796-97 (2014))

Unsurprisingly, those insisting on the existence of an ontological gap between ruler and ruled reject theories of corporate legal rights that rely upon concession theory. Just as liberals might reject Rousseau’s sovereign-subject hat trick, critics of concession theory accuse it of totalitarian tendencies. (Orts, 2013, p. 21) It elides any normative questions that arise once one admits that the sovereign and subject are not always identical. Picking up on this elision, aggregation theory therefore catalogues the corporation not as state, but as subject carrying *a priori* natural liberties. (McCurdy, 1975; Horwitz, 1982, p. 1425; Krannich, 2005, p. 72; Ciepley 2013; Barkan, 2013, p. 74) Pointing out the obvious private individual involvement in building and maintaining business corporations (Jensen & Meckling, 1982), some even argue that incorporators and corporate participants can construct a corporate-like entity by relying exclusively on private contractual, not corporate, law. (Hessen, 1979; Parkinson, 1993; *cf.* Ciepley, 2013) They then imagine the sovereign “people” as a contrarian, inefficient foreign entity running roughshod over private associational and economic life. (Colombo, 2012, p. 7; Vasudev, 2010; Bratton & Wachter, 2008, p. 145; Konzelmann, *et al.*, 2010) For them, there is a fundamental distinction between, as Emmanuel Sièyes might argue, the people as *pouvoir constituant* and the government officers

⁷⁸ For example, the strong reactions against U.S. Supreme Court’s recent ascription of First Amendment rights to corporations. Nelson, 2017, p. 188: “But what exactly does it mean to say that, under a proper constitution, the people will possess ‘supreme power?’”

⁷⁹ “The importance of the concession theory is that it establishes a theoretical framework sympathetic to state intervention; the company is a creature of the state, existing to promote the public welfare, and as such the state has the right to interfere in its internal affairs and need not confine itself to external, general-law regulation.”

wielding the *pouvoir constitué*. Thus, when the *Lochner*-era pioneer and prophet, Justice Stephen Field, awarded “substantive due process” protections to corporations in order to protect shareholder property, he was openly hostile to “populist” government regulation of the economy. (Winkler, 2018, pp. 146-54; Dahl, 1985) Meanwhile, because they cling to an absolutist notion of private rights, aggregation theorists, like many libertarian defenders of markets, remain blind to inegalitarian, hierarchical relationships that form within the corporation. A corporation as “nexus of contracts,” as explained in the last Chapter, does not resemble anything so much as ordinary market contracting amongst firm inputs. (Bratton, 1989, p. 1478; Alchian & Demsetz, 1972). Nor do they attend to the ever-shifting transformations of corporate structure and size that reconfigure the cultures, communities, and opportunities experienced by human beings. Adam Smith’s pin factory is not Chandler’s hierarchical multidivisional multinational, and neither are the nimble, decentralized and platform-based businesses of today. Despite the differences, aggregation theorists understand each as normatively equivalent expressions of the private sphere, understood as a collection of atomized individuals undertaking contractualist self-ordering, of, as Marx once noted, “a very Eden of the innate rights of man” where rules “Freedom, Equality, Property and Bentham.” (Marx, *Capital* Vol. I Ch. 6)

Real entity theorists likewise understand the gap between ruler and ruled as large and irreconcilable. For them, the corporation is “a real and natural entity whose existence is prior to and separate from the state,” (Horwitz, 1992, p. 101) understood as enjoying an invasive and all-inclusive sovereignty. (Cole, 1917, p. 79; Figgis, 1914) The sociological fact asserted by real entity theory thus resembles the Schmittian idea of the state as a political unity that factually pre-exists the constitution and that, in fact, constitutional validity presupposes this the prior ontological

existence of the “nation” or *demos*. (Bockenforde, 1997, p. 10)⁸⁰ Unlike liberal aggregation theorists, however, they often invoke a political pluralist understanding of the state and society. They therefore juxtapose against the state not atomized individuals, but corporate bodies. They then reject any attempt to bridge the gaps between them, preferring instead perhaps an archipelago (Kukathas, 2007) of separate self-governing communities (Cohen, 2015) that carry their own cultures, norms, and authority (Kateb, 1998; Colombo, 2012; Ewick, 1988; Johnson, 2010).

The dichotomous ontology erected by these conceptions of organ-body sovereignty yield irreconcilable theories of corporate personhood. Concession theory situates the corporation within the body of the ruler (whether sleeping or awake and holding legislative power), pitting legitimate state action against wayward legal subjects. Aggregation and real entity theory classify it as ruled, countering illegitimate state action with superordinate pre-political rights claims. But when corporations can claim *both* governmental provenance and individualistic or social credentials, those interested in corporate autonomy rights are left with a conceptual mess in their laps. With their legal credentials and self-governing autonomy, they are neither public nor private, but a bit of both. They are located only awkwardly in political theories resting on such a bifurcated social reality. (Ciepley, 2013; Walt & Schwartzman, 2017)

Contemporary Notions of Sovereignty and Social Ontology

Contemporary understandings of liberal constitutional democracy blow up this bilateral framework. Although they ascribe the highest legitimate source of authority to “the people,”

⁸⁰ “The legal constitution—as well as the obedience to, and application of, its normative understanding—does not constitute the state; it is much more the case that the state—as a political unity—is the presupposition of constitutional validity. This is not to deny that the state by means of its legal constitution receives a fixed form, a more precisely determined regulation of governmental activities, and hence a higher degree of stability. The very existence and substance of the state, however, does not derive from its constitution.”

contemporary notions of liberal constitutional democracy do not understand “the people” as a reified, homogenous whole, existing in time and space, juxtaposed against legal subjects carrying superordinate rights. Rather, the “people” is no more a real body than “the corporation” is a human being. The notion of “the people” is not an ontological phenomenon at all, but instead an idea. It is a motivating principle of behavior and a critical normative standard meant to ensure that lawmaking occurs under conditions such that all can understand themselves as its joint authors. (Morgan, 1989; Habermas, 1996) It orients public discourse to CLD’s requirements: that laws be made inclusive and responsive to all, equally.

The question of sovereignty for constitutional liberal democracies, therefore, does not involve locating a right to rule in in any body at all. (Lefort, 1986) Instead, it is performative and immanent, arising during moments of democratic decision-making accomplished through constitutional procedures that reflect a particular political community’s notions of equal human worth. Kalyvas (2005), for his part, finds the “people” in the constituent power that founds a constitutional liberal democratic legal order, the “laws of lawmaking.” In the process of this lawmaking, as explained in more detail below, citizens create the laws that expand and restrict their freedoms.

As a result, it is not necessary to pigeon-hole the corporation in either public or private ontological spaces; “public” and “private” are *concepts* enlisted by democratic citizens in a plural, diverse civil society as they debate and clash over the meaning of their equal autonomy rights in the process of constitutional, democratic lawmaking. They are ideas that help citizens justify the laws they give themselves. The intellectual history of “public” and “private” supports this understanding. In the early-to-mid 18th century, citizens first associated “private” with physical property, tying it to possessive individualist models of the self. (Glendon, 1993, p. 24) Later, in

the New Deal era, they decentered the absolutist notion of private property rights as they accepted heavy regulation of otherwise freewheeling enterprise and the redistributive taxes required to maintain social rights within a welfare state. (Nedelsky, 1990) In the second half of the 20th century, the Supreme Court, in *Roe v. Wade*, (410 U.S. 113 (1973)) ascribed notions of privacy as decisional autonomy constrained by notions of collective good – a regulation of self-regulation. (Cohen, 2004, p. 66)

Thus, neither is it necessary to discover an entirely new “corporate” ontological category occupying the interstices between public and private. (Walt and Schwartzman, 2017; *cf.* Ciepley, 2013 and Barkan, 2013) Instead, like any other social phenomenon that captures the attention of CLD lawmaking, the corporation is the result of a constitutional normative ordering – just as all of civil society is normatively ordered by law. The form of contemporary individual contracts and property rights are, after all, the result of by the same laws and procedures that help constitute and regulate *all* of civil society. So, too, are privacy rights, political rights, and regulations aimed to enhance public safety and health.

a. Disassembling Organ-Body Sovereignty

CLD gives a procedural answer to the question of sovereignty. It is an answer that acknowledges that the “people,” without constituting law, are only “a disorganized multitude, that is, a fragmented conglomeration of disparate individuals lacking unity and legal content.” (Kalyvas, 2006, p. 585). Constitutional rules of lawmaking enable this ontologically open collection of individuals and groups to engage in rulemaking together under equal terms. They provide procedures and mechanisms of collective action, rules of the game that facilitate and enable normative ordering and decision-making. (Waldron, 1999, p. 277) “When a constituent assembly establishes a decision procedure, rather than restricting a preexisting will [of the

sovereign “people”], it actually creates a framework in which the nation can for the first time have a will.” (Holmes, 1995, p. 164) This constitution is comprehensive – but not in the sense that it is meant to regulate the minutiae of everyday life. It is comprehensive, rather, in the sense that no other kinds of lawmaking will enjoy legitimacy; no other source of values are permitted in lawmaking specifically and the exercise of public powers generally.

Accordingly, constitutional liberal democracy speaks of sovereignty in terms of the interaction of these disparate individuals with and within their constituting law. The “sovereign” is simply individuals working through and within constitutional democracy’s normative and institutional framework. The state, for its part, is not an organ-body possessing legitimate power, but a legal order sharing some affinity with Kant’s *Rechtsstaat*, Kelsen’s legal ordering, or List and Pettit’s (2011) group agent. It is an artificial person *par excellence*, one not governed by a Hobbesian sovereign representative but instead according to norms and procedures first established in the founding constitutional act.⁸¹ To the extent that it exists at all, the sovereign “people” is constituted and re-constituted immanently and continuously by virtue of individual acts of political participation within state’s constitutional framework – a framework that is itself subject to emendation according to the constitutional principle of equal individual moral worth. (See Webber, 2009, pp. 13, 30, 44) They assert rights claims against each other in elections, during judicial review of government action, as they form and dissolve legislative majorities against minorities, and even when they sue each other in civil court. Thus, unlike Kelsen’s pure theory, law plays a constructive, generative role in the formation of social and economic life. (Novak, 2002, p. 263; Barkan, 2013) As Neumann, Teubner, Bourdieu,⁸² Durkheim, Pound, and indeed

⁸¹ For a description of this institutionalist understanding of the state, see Eisner, 2011 pp. 17-18.

⁸² “The law is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world” (1987, p. 839)

even Weber argue, law changes subjects even as subjects – citizens – change the law in an endogenous cycle of sociolegal transformation.

It is true that in liberal democratic constitutional polities, sovereignty is ascribed to ‘the people’ as the highest and final legitimate public authority. (Cohen, 2015) It is also true that the people itself, by exercising its constituent power, is charged with the creation of a constitution which establishes, delimits, constrains and defines legitimate governmental powers and responsibilities.⁸³ But this does not mean that popular sovereign can rule as if it were a single person or homogeneous body. Rather, the idea of the popular sovereign serves as a regulatory principle when the constituted powers go about the business of ruling. (Cohen, 2017, p. 567) Specifically, all lawmaking must occur under conditions such that the subjects can understand themselves to be, even if indirectly, the collective authors of the laws that govern them. (Cohen, 2017, p. 569; Grimm, 2015, pp. 37, 73-4; Benhabib, 2009, p. 693⁸⁴; Webber, 2009, pp. 19-20; Habermas, 1996) At the same time, when citizens engage in lawmaking, they must do so with a public orientation. They are expected avoid exercising their political liberties in their individual self-interest alone. Instead, they must at least couch their arguments in terms of equality and the common interest or otherwise concede that their interests should at least occasionally give way to the equally important interests of others. Political institutions must accordingly attend to the fate of the equal basic rights and liberties of all. They must likewise remain accountable and responsive to popular complaints, seek inclusion rather than exclusion, and seek the public good.

⁸³ Before the constitution, there is only power; legality and normativity, when it comes to laws, comes only from this source. If the state is the exclusive source of law, its founding cannot be a legal act; its founding creates the right to make law in the first place. (Grimm, 2015, p. 44) (citing Carré de Malberg); *see also* Kalyvas, 2006.

⁸⁴ The “democratic sovereigntist” argument means “that there be clear and recognized public procedures for how laws are formulated, in whose name they are enacted, and how far their authority extends.”

Of course, contemporary notions of sovereignty acknowledge that there will always be a “gap” between government office-holders and legal subjects, and so acknowledge the possibility of heteronomy. (Lefort, 1988) But this gap is not something to be eliminated. As liberals rightly point out, doing so would force homogeneity upon plural, differentiated and continuously changing societies. Rather, we might understand the gap as productive of individual liberty. It encourages democratic citizens and institutions to remain attentive to claims for inclusion and responsiveness. It encourages them to deploy ideas like “public” and “private” as they debate the proper form and function of the legal autonomy rights they will give themselves. It reminds them that no person, group or indeed *any* body of people can claim sovereignty and so inspires governmental restraint and respect for difference. And it recalls to us the notion that all are regulated under the comprehensive constitutional authority – even those in charge. (Cohen, 2017, p. 568)

b. Locating the Boundary between Public and Private

Because sovereignty is ascribed to no “body,” it cannot be used to mark the boundary between public and private. Instead, the dividing line between state and civil society is not understood as an ontological boundary but instead as a normative one – and it is hotly contested territory. (Orts, 2013, pp. 115-16, 123 (citing Durkheim); Negri, 1988; Fraser, 2015; Roy, 1997) The personal becomes political not because state organs intervene illegitimately in independently operating, *sui generis* social spheres. Rather, citizens politicize privacy rights, their collective normative commitments to non-interference, when they find that their personal “private” experiences fail to align with the constitutional promise of equal liberty. They ask the state for protection against fellow citizens who violate what they understand to be their rights to equal dignity, political standing, and material goods. Despite the family’s historical categorization as

“private,” for example, women sought more equitable family laws that respected their property rights, protected them from domestic violence, and recognized their unpaid labor. (Cohen, 2004) Likewise, workers, located within the “private” sphere of the market, demanded a level playing field with bosses and minorities sought anti-discrimination measures against their employers and unions. Husbands, bosses, and employers will respond, and thus privacy and liberty rights become a matter of constitutional debate. In this way, empirical circumstances once thought safely lodged and protected in the “private” sphere become politicized and public, a matter of constitutional debate. Indeed, as Hegel understood long ago, state, civil society, and family are embedded systems; the negotiation of their borders is subject to the normative ordering (rationalization) provided by the constitutional framework. (Cohen, J. L., 2004; *see also* Barkan, 2013, p. 113)⁸⁵

In the U.S., the normative boundary protecting an independent realm of *laissez-faire* economic freedoms crumbled following the failure of the classical liberalism in the late 1920s.⁸⁶ (*See, e.g.*, Tooze, 2018; Negri, 1988, p. 7; Fraser, 2015; Eisner, 2011) In 1926, for example, John Maynard Keynes (1963, pp. 313-14)⁸⁷ jettisoned the idea of a natural private ordering that deserved robust rights-based protections. In his essay “The End of Laissez-Faire,” he opened up for modification the contemporary “agenda” and “non-agenda” allotted to the state by liberals who

⁸⁵ “[A]ny attempt to approach corporate power through the dichotomies of state and economy or public or private misses the ways that both corporate (Negri n.d.) and state power emerge at, construct, continually transgress, and occasionally consolidate the blurred boundaries of these social spheres.”

⁸⁶ Roy also explains that the “privatization” of the corporation was itself a response to crisis – when public/private partnerships of the early 19th century failed after the 1837 depression. (Roy, 1997, p. 72)

⁸⁷ Interestingly, Keynes in this essay proposes, as an alternative to *laissez-faire*, a form of economic corporatism of “Universities, the Bank of England, the Port of London Authority, even perhaps the Railway Companies” whose “affairs are mainly autonomous within their prescribed limitations, but are subject in the last resort to the sovereignty of the democracy expressed through Parliament.” (*Ibid.*, p. 314)

wanted to protect markets from state interference. He made a case for state intervention in the interest of human welfare – a case that, for decades, seemed to win the day. But even before Keynes, American Progressives challenged *laissez-faire* and its jealous defense of an ontologically distinct “private” market. (See Eisner, 2011, p. 34)⁸⁸ In 1909, Roscoe Pound offered a devastating critique of freedom of contract. He argued that courts, when deciding economic disputes, should not rely on ossified legal formalism to vindicate liberty. Instead, they should look to the consequences of applying legal doctrine to human lives, modifying it when necessary to cash out its commitment to equal liberty.⁸⁹ A half century later, Jurgen Habermas, in *Legitimation Crisis*, would systematically theorize these notions. He argued that democratic citizens would monitor the boundaries between the economic and the political. When market outcomes failed to fulfill the promises that justified the market organization of social life, they would politicize that system and, perhaps, come up with new norms to govern it. (See also Eisner, 2011, p. 29)⁹⁰ Indeed, CLDs throughout the world responded to the economy’s failure to fulfill its promises (liberty, material

⁸⁸ Citing, *inter alia*, the creation of the Federal Reserve Bank in 1913 and Federal anti-trust regulation.

⁸⁹ Pound explains the tendency to cling to ideas of natural rights as against the state by, among other things, “the sharp line between law and fact in our legal system which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes.” (*Ibid.*, p. 458) In other words, the normative barrier between what is protected by law and is regulated by law ought to be permeable, based upon consequences those laws bear for individual freedom.

⁹⁰ “[B]y the end of the New Deal, citizens looked to the government for unemployment compensation, old-age pensions, agricultural subsidies, protection of the right to organize in the workplace, and a host of government services that had been introduced in the prior decade. Popular expectations changed in response to this expansion of state authority. The criteria for judging performance of governmental institutions—and one might argue, the legitimacy of the state—were permanently transformed.” Eisner then goes on to identify several “regime” changes (involving changes in institutions, coalitions, and governing ideologies) in U.S. history: following the depression of 1893, the Great Depression that began in 1929, and the stagflation of the 1970s.

flourishing, equality and equal opportunity, and the like) by constructing social rights: welfare, pensions, social insurance, *etc.*, Likewise, following the 2008 financial crisis and the unprecedented state response to it (bank bailouts, atypical monetary policy, nationalization), a further reimagining of the boundary between public and private is well underway. (Eisner, 2011; Tooze, 2018) Thus, at least in moments of crisis, the contract and property rights that reinforce the walls erected around the “private” occasionally crumble before political movements that seek to vindicate notions of economic freedom and equality. The second movement of the “great transformation” (Polanyi, 2001) indeed brings to light the “embeddedness” of economic life within political configurations.

c. Locating the Corporation

As a result, the question of what a corporation “is” is not a matter of location in time and space, but instead a question of how a particular CLD has elected to normatively order corporate participants. In other words, the corporation is individuals within an ontologically open society acting with and within the laws they have promulgated that control corporate action in the interests of equal human worth: the Constitution, federal regulation, state law. Corporations are embedded within the wider legal and constitutional framework of liberal rights, democratic will-formation procedures, judicial review, and the like.

It is now possible to reconcile the apparently inconsistent ontologies suggested by theories of corporate personhood. Concession theory can no longer be understood as a delegation of legitimate governing power from the sovereign “people” to the corporation. Rather, its attention to the corporation’s legal provenance helps us to identify some of the legal norms and procedures that orient and manage the relationships between individual corporate participants with both each other and those in the broader polity. Aggregation theory, for its part, cautions citizens to pay

special attention to the experience and behavior of individuals within this normative legal order. In particular, that normative legal order is itself constrained; it must ensure the protection of each individuals' equal moral worth by, for example, allowing them some decisional autonomy as they make their economic lives for themselves. One therefore cannot credibly argue, as some critics of concession theory might, that regulative law obliterates private ordering. Much of the legal order, after all, aims precisely to protect and facilitate individual liberty. Meanwhile, real entity theory focuses on the relation between corporate associations and others within civil society. It recognizes that people can and do form their own *nomos* communities, that people are social, and that their sociality is an important value that CLD, with its commitment to equal human worth, should want to protect. (Garrett, 2008, p. 145) As a result, the normative legal ordering of CLD ought to enable such self-ordering so long as it is consistent with maintaining the equal liberties of all. Its normative individualism is not sociological individualism.

Eric Orts' (2013) institutionalist theory of corporate personhood, recently endorsed by Singer (2017), fits the bill remarkably well. He describes the corporation as a social institution framed not only by public law, but also by internal rulemaking that is itself regulated by public law. Meanwhile, individuals participate in the firm and order themselves according to the state's regulation of their self-regulation, creating institutional characteristics. Citing jurist Robert Cover, Orts explains that

[v]arious non-state institutions, including religions and other organizations, develop a plurality of normative systems or worlds (*nomos*). Governments then act through statutes and other legally enforceable rules to establish an "imperial" order in particular areas of social life and conduct. Courts and judges hold an intermediate position. They are

“jurispathic” in that they suppress associational norms when they conflict with “imperial” law.”

(Orts, 2013, p. 16). Accordingly, for Orts, “[g]overnance of firms refers to the operation of both (1) voluntary internally imposed rules created by founding documents and other agreements...and (2) externally imposed legal rules (such as the requirement that a large public corporation must have a board of directors).” (*Ibid.*, p. 45) These rules address, among other things, corporate-level social goods, *e.g.*, “intangible institutional assets” like firm reputation and branding. (*Ibid.*, pp. 76-7745) Thus, individuals order their social world collectively, both within and without the corporation, through norm-making procedures both at the corporate and the state level.

What CLD brings to Orts’ definition of corporate personhood is a normative standard that can be used to critique and amend the norms that order individuals’ behavior. It holds that whatever laws regulate the self-ordering corporation, they must remain attentive to equal human worth. It likewise holds that the law ought to intervene into internal corporate governance when that governance betrays this normative commitment.

An example may help illustrate these points. In a recent, but by no means exceptional, case, *Prairie Capital III, L.P. v. Double E Holding Corp.*, C.A. No. 10127-VCL (Nov. 24, 2015), the Delaware Court of Chancery explored the question of corporate ontology and found only the normative ordering of individual and associative actions. Specifically, the Court considered whether corporate officers who committed a fraud in the course of their official duties could be held personally liable for that fraud or whether it was committed by the corporate “person” that they represented. The Court’s answer: both. The corporation, as an association, must rely on its legally-recognized human agents to speak and act on its behalf. (*Ibid.*, pp. *32-33; Orts, 2013, p. 59) Meanwhile, individual rights-holders both within and without the corporation rely upon

democratically promulgated corporate law to enable the self-ordering of their private business affairs while also shielding them from corporate agents' frauds. Accordingly, the corporate person itself must assume responsibility for the torts of its leaders. Without legal corporate personhood, corporate participants could not act as a group with associative freedoms. But the public, at the same time, should receive an extra layer of protection from individuals committing fraud. (*Ibid.*, p. *33) Human corporate officers should not be able to hide behind the corporate veil when they commit torts; otherwise, limited liability would prove too much of a temptation for bad behavior and therefore threaten equal liberty. Thus, the corporate "person," in *Prairie Capital III*, was not a real entity, a mere aggregation of individuals, or a concession of governing power from the state. It was, rather, human beings acting within and around a normative ordering – constitutional democratic lawmaking meant to vindicate equal individual rights.

The constitutional concept of "public accommodation" is also illustrative. Normally, the U.S. Constitution is understood to place constraints only on state action. This "state action" requirement, however, has been modified to include constraints on ostensibly 'private' actors whose actions have a diverse and public impact. (Winkler, 2018, p. 267; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)) By this method, the U.S. Supreme Court does not understand state and corporation as separate ontological entities. Rather, it sees a constitutional ordering that regulates all persons, regardless of whether they hold government or corporate offices. (*See also Marsh v. Alabama*, 326 U.S. 501 (1946) (Black, J.))⁹¹

By now it should be clear that corporations are not special creatures, bizarre Frankenstein monsters assembled with chunks of law and hunks of individual, "franchise governments" (Ciepley, 2013) that exist on an ontological plane all their own. All human beings within liberal

⁹¹ Holding that a company town violated rights to free speech.

constitutional democracies interact with each other within, with, and around law that confers powers, liabilities, disabilities, immunities, and privileges. Thus, in a way, we are all “franchise governments.” Every person holding a property right can, with the assistance of the state, command others by enforcing that right. All of us, including corporate stakeholders, self-order according to our own lights within the normative framework the state provides. Polanyi’s insights apply to all. What distinguishes the corporation is not its ontology. Rather, it is the particular laws that address corporations alone, and the differential impact they have on individual rights and liberties. To be sure, that law may betray liberal constitutional democratic commitments. But the corporation is not thereby rendered an alien species. Concluding otherwise requires reliance, perhaps, on the same dangerous political-theological assumptions underpinning early modern conceptions of the state. (Schragger & Schwartzman, 2016, p. 346)

Higher Law and Legitimacy

Theories of corporate personhood do not just suffer from a two-body problem, an erroneous division of human life into two constituent elements. They also incorporate inconsistent and anachronistic sources of political legitimacy as they go about deriving normative prescriptions from their social ontology. When they do so, they pose another false dichotomy: between positive law and normative authority. As a result, theories of corporate personhood often pit irreconcilable understandings of truth and justice against each other – whether it is metaphysical notions of the “people,” natural law and pre-political rights, religious understandings of the good, or something else entirely. They then compare the law-on-the-books with their preferred source of legitimacy and often find it wanting. But when the prescriptive portions of personhood theory are given a contemporary update, one that internalizes rather than outsources political legitimacy, their critical potentials can be cashed out more fruitfully.

The Corporation's Outsourced Political Legitimacy

Sovereignty has never been invested without question. The sovereign was sovereign because its power was understood to be legitimate. In turn, its legitimacy derived from some higher, outside source of authority *legibus solutus*: in the West, typically God, an imaginary “will of the people,” or God-given natural rights. In the early modern period, Bodin argued that sovereignty, unlike tyranny, “was bound by the laws of nature prescribed by God.” Thus, even if a king’s sovereignty was juridically absolute and legally unaccountable, “it remained a morally subordinate power, “answerable for its conduct to the [divine] moral law.” (Bourke, 2017, p. 4) (citing Bodin, 1576, p. 211) The king’s divine mandate, for example, could be invoked to limit the power of non-divine government officials or critique some of the king’s less divine behavior. (Morgan, 1989, p. Ch. 1) At other times, usually during periods of religious conflict, political actors claimed as their source of legitimate authority an imaginary “people,” or, in Richard Tuck’s colorful vocabulary, “the sleeping sovereign,” who possessed inalienable, natural rights superordinate to the state. (*See also* Canovan 2005, ch. 2; Roy 1997, 73⁹²) Actors would then demand that the sovereign power respect these rights or else face legitimate rebellion. (Grimm, 2015, p. 30; Canovan, 2005, p. 17; Locke’s *Second Treatise* is also pertinent) For example, in Revolutionary Era America, partisans drew on a conception of popular sovereignty developed during the English Civil War, (Canovan, 2005, p. 20) whereby the monarch and parliament, limited by natural law, stood for the “people” as the ultimate source of political authority. (Morgan, 1989, p. 49) Meanwhile, the “people” retained their natural rights, rights which they understood to emanate from a higher moral law. Revolutionary colonists, however, objected to this state of affairs

⁹² Describing notions of popular sovereignty during the Jacksonian era, wielded against government seen as corrupt and beholden to powerful interests.

not in the least because they were seen not as part of the sovereign people, but rather as assets appended to empire (Nelson, 2017, p. 191; Bourke 2017, 10). After the democratic revolutions, this outside source of authority often remained with the “people.” The difference was that they could now assert their pre-political natural rights on their own behalf in popular government. (Canovan, 2005, p. 27) “The people” did not just legitimize government; it was hoped they would also control the actual business of governing. Regardless of the changing sources of legitimacy – God, ‘the people,’ or ‘God-given natural rights,’ – whether the sovereign power could claim legitimate rule would depend upon how well she fulfilled objective criteria of state legitimacy. The “stark normative juxtapositions” of “private and public, individual and democracy” (Novak, 2002, p. 253) were wielded as critical cudgels. Government action, including the Constitution itself, was judged according to how well it aligned with pre-political notions of justice, natural rights, the “people’s will,” or, indeed, religious moral authority. The state’s positive laws would be measured against higher law, and often found wanting. (Schragger & Schwartzman, 2016, p. 353)

Theories of corporate personhood often seem to employ these “outsourced” conceptions of higher law and legitimacy. When they move from ontology to prescription, they apply the standards of an outsourced moral order to assess the positive laws addressing the corporation. Concession theory counts on a voluntaristic, arbitrary concept of “the people,” an imaginative body, to justify or restrain state intervention over associational life. It is the “sovereign people,” through the state, that commands that the corporation serve its assigned public purposes. It is the “sovereign people” that delegates legitimate political power to corporate officers, (Bratton, 1989, p. 1475), just as a sovereign monarch, per Jean Bodin, granted the corporation “a right of legitimate community under the sovereign power [where] the word legitimate conveys the authority of the sovereign, without whose permission there is no [corporation].” (Bodin, 1986, p. 178; Muniz-

Fratlicelli, 2014, p. 106) And if someone believes that the law-on-the-books deviates from what “sovereign people” actually want, then she will deem it illegitimate.

Aggregation theory, after its liberal pigeon-holing of the corporation in the second part of the public vs. private dichotomy, often leans on pre-political natural rights discourse to delegitimize the interference of positive law with corporate affairs. (Miller, 2011, p. 953; Barkan, 2013, p. 72) It relies on “prior rights,” anterior to democracy and enjoying an “ontological basis” “altogether independent of democracy and democratic processes.” (Dahl, 1985, p. 24) to justify ascribing more freedom to business agents. Especially apparent during *Lochner*-era⁹³ ascriptions of corporate legal rights (Pound, 1909, pp. 457-64), theories of natural property rights, couched as “vested” or “unenumerated” rights (*Bloomer v. McQuewan* (1852),⁹⁴ Winkler, 2018, p. 159; Novak, 2002, p. 255; Dahl, 1985, p. 63) protecting Lockean “fruits of labor,”⁹⁵ subtended awards of Fourth, Fifth and Fourteenth Amendment protections to corporations. (Dahl, 1985, pp. 72-73) Later, when nexus-of-contracts theories became *en vogue*, some theorists presumed without justification that shareholder property rights should be protected. (Bainbridge, 2003, p. 564; Orts, 2013, p. 28) Other varieties relied on another outside source of legitimacy, material efficiency and social welfare, to justify corporate rights. (Barkan, 2013, p. 38) Some merge the two in the liberal rights-utility synthesis, justifying corporate rights with reference to both. For example, contractualist understandings of the firm show that the corporation, because of its transaction cost efficiencies, does a better job cashing out individual economic freedoms than do spot markets. (Singer, 2018; *e.g.*, Alchian & Demsetz 1972) More recently, Supreme Court justice Antonin Scalia, in his concurring *Citizens United* opinion, made appeal to pre-political understandings of

⁹³ *Lochner v. New York*, 198 US 45 (1905).

⁹⁴ 55 U.S. (14 How.) 539, 553.

⁹⁵ Justice Stephen Field (dissenting) in *Slaughterhouse Cases*, 83 U.S. 36, 90 (1873).

liberty rights to justify an (ironically) originalist interpretation of corporate speech rights. (Winkler, 2018; Strine, Jr. and Walter, 2016)

Real entity theory, understood as political pluralism, claims that corporations generate or embrace their own unique sources of legitimate authority. (Muniz-Fraticelli, 2014, p. 18) They rightly point out, along with liberal individualists, that there can be no agreement on the good. They depart from the liberal, however, when they argue that there consequently can be no single acceptable or shareable source of political legitimacy. They accordingly hold that each corporation should govern itself as its own sovereign, especially if that corporation has religious purposes. (Cohen, 2015) Other real entity theorists, analogizing the corporation to human beings, ascribe to the corporation the same basic rights and liberties held by those human beings – rights and liberties perhaps subtended by natural rights thinking. (Millon, 1990, p. 241 (citing Horwitz); Harris, 2007, p. 48; Dan-Cohen, 2016(1986), p. 58)

Keeping it In-House: Contemporary Notions of Law and Legitimacy

Where each theory goes wrong is their denial of any possibility of an internally generated political legitimacy that works across and through plurality and ethical disagreement. But this is exactly what contemporary notions of constitutional liberal democracy purport to give. When such polities confront the question, “under what conditions do we grant rights to corporations,” they must avoid relying on intractable conflicts between competing notions of the ethical good. They must instead rely upon the independent conditions subtending legitimate political authority. In a few words, they do not rely on finding moral truths. They rely on a fair process committed to cashing out the promise of equal moral worth.

As Weber diagnosed, the great problem of secular, rationalized modernity is the lack of confidence in any outside source of moral authority. Contemporary liberalism admits the fact that

there can be no consensus regarding notions of moral truth. It therefore quarantines the question, holding instead that the only legitimacy a governing authority can claim derives from an empirical, Rawlsian “overlapping consensus” regarding the norms according to which diverse people can arrange their collective life peaceably together. (Waldron, 1999, pp. 244-45) Indeed, as legal historian William Novak observes, the transformation of the American state during the turn of the 20th century witnessed a “[consolidation] around new positive and political conceptions of sovereignty.” (Novak, 2002, pp. 249, 268-9) This is not to argue that citizens must relinquish their own moral beliefs and conceptions of the good. In fact, it is expected that they will assert such arguments in public reasoning. (Waldron, 1999, p. 244) The point is that the legitimacy of authority does not depend upon its ethical correctness, but instead upon a fair decision-making process that attempts to cash out the promise of equal moral worth – while always remaining subject to critique along the same terms.⁹⁶ Justice is not bestowed from on high, but instead constructed politically by democratic citizens. It is manifested in the rules that they make through constitutional procedures, blending together the fact of positive law with the normative force of democratic consent given under fair conditions.

Though disavowing perfectionist conceptions of the good, liberal constitutional democracy is, however, committed to moral individualism. (List & Pettit, 2011, p. 170) It is to individuals that political power must be justified and made justifiable. This limitation on the source of rights claims is inherent to the notion of constitutional democracy itself. (Habermas, 1994) It is individuals who must consider themselves the authors of the laws that bind them, even as they vehemently disagree about what moral content they should give their lives. It is therefore individuals who engage in the

⁹⁶ Laborde (2017) notes that this understanding of legitimacy does, at the end of the day, rest on an important assumption: that human beings prioritize political justice before they value living a life according to their ethical beliefs.

discussion, compromise, and dialogue that lead to consensus regarding their collective norms, including and especially the rights that they claim against one another. And it is the judgment of individuals that bring closure to debate, who participate in the moments of democratic decision-making regarding the rights that they assert. It is the individual who has a “right” to claim legal rights, who has a claim to the equal moral worth subtending all of this.

Accordingly, in most contemporary political theory, rights are not of metaphysical origin. Neither natural nor of divine providence, they are not ascribed to entities – whether individual or corporate – because they possess some pre-designated morally important empirical quality like “rationality” or “agency.” (*cf.* Dan-Cohen, 2016(1986), p. 58) No longer can we reach to superordinate natural law theories, even those incorporated into social contract models, for instruction. (Grimm, 2015, p. 30) They begin rather as abstract concepts,⁹⁷ articulated by individuals within discrete, historical democratic polities whose institutions are oriented towards cashing out the promise of the equal liberty as they themselves understand it. (Habermas, 1996) Rights are the result of social movements that emerge within civil society and, after democratic discourse and procedure, are codified within the law through constitutional procedures. (Cohen & Arato, 1994)

As a result, aggregation theory cannot rely on pre-political natural rights to circumvent the constitutional process. Concession theory likewise cannot skate over legal restraint and electoral politics on the wings provided by some imaginary “will of the people.” Real entity theory cannot count on the corporation’s human-like rational qualities, nor its own internal normative order, to

⁹⁷ Democratic discourse invariably contains lingering meta-ideals of equality and liberty, justified using reason (whether analytical or through discourse) and ideas of “the common good.” In other words, liberal constitutional democracy does rely on an abstract *a priori* concept of equal moral worth.

justify any “original” (Dan-Cohen, 2016(1986)) right to autonomy without first facing the obstacles of democratic legislative approval and the inconveniences of judicial review. Rather, the theories’ normative prescriptions and rationalizations must be jettisoned unless they can be successfully incorporated into actual constitutional practices. In other words, they must successfully articulate colorable claims under actually existing constitutional frameworks committed to realizing equal moral worth.

Concession theory must therefore be modified. It cannot be rendered as a conclusive resolution about the legitimate yet revocable concession of a unified sovereign power to private individuals. It must instead be transformed into a defeasible argument that acknowledges constitutional limitation of power, the rule of law, procedures for democratic decision-making, judicial review, the Bill of Rights, *etc.* Thus, while state organs may grant and rescind legal powers and privileges, they cannot do so in a way that that is obnoxious to these commitments. This means that, as concession theorists often assert, the legal rights of corporations may not undermine the public interest. But public interest cannot be understood as the voluntaristic will of the popular sovereign, the “people” as highest authority. It is understood, rather, as the polity’s responsibility to recognize the equal rights and liberties claimed by all citizens under their constitutional framework. As a result, the “public will” ascribing and limiting corporate rights must itself pass constitutional muster.

Aggregation theory drills down the second side of this coin, helping to specify whether and to what extent any attempt to constrain corporate rights passes muster. It can be understood as the associational liberty rights claims of corporate participants against the conflicting rights of corporate outsiders, including those claiming to speak in the public interest. Aggregation theorists can therefore, for example, argue that corporate constitutional rights are necessary to vindicate

liberties as enumerated under the Constitution, but they must do so in a way that respects the equal moral worth of others. Legislation that has a rational basis for protecting the public interest – the rights others – may very well override these claims just as it can circumscribe any other rights claim. (*See, e.g.*, Miller, 2011, p. 921)⁹⁸

For its part, real entity theory cannot be used to command that a rights claim be resolved in favor of a collective entity on its own behalf as a distinct moral agent. As noted, liberal constitutional democracy is committed to moral individualism. Accordingly, every corporate right is “derivative” (Dan-Cohen, 2016(1986), p. 58), not because it relies upon the pre-political rights of its individual participants, but because it is only individuals who are capable of making rights claims in the constitutional framework. This is not, of course, to argue in favor of an individualized, atomistic conception of social relations. Moral individualism is not ontological individualism. (Tamir, 1996, p. 171; Cohen, 1996, pp. 196-97) Rather, it counsels against promoting empirical circumstances, like those surrounding how one enjoys her freedom jointly with others, to the status of an independent rights-holder. (Leader, 1992, p. 33) We may, without sacrificing this moral individualism, accept that the social shapes and constructs personality and so carries moral salience. (Taylor, 1994) We can accept that some goods are created and enjoyed in an irreducibly social way. (Margalit & Raz, 1990) We can even accept that corporations, like states, can exhibit human-like agency, rationality and collective intent. (Waldron, 1999, p. 276) We may also agree that to protect these social goods, groups should receive legal protection. (Margalit & Raz, 1990) What constitutional liberal democracy forbids, though, is that collectivities receive independent

⁹⁸ Arguing that concession theory is typically invoked as a ‘balancing test’ against the interests of non-corporate stakeholders

standing to make rights claims on their own behalf. (*Citizens United v. FEC*, 130 S Ct 876, 972 (2010) (Stevens, J., dissenting);⁹⁹ Schragger & Schwartzman (2016))

Nor can corporations, as real entities, claim exemption from the laws that govern all citizens simply because they subscribe to a different normative order. After all, individual citizens, who likewise hold to different conceptions of the good, can claim no such special exemption.¹⁰⁰ This is liberalism's legacy and foundational requirement. Instead, real entity theory can be reworked as an argument that liberal constitutional democracies take associational freedoms a little more seriously. They should also recognize that corporations, as entities, raise questions of "governance, decision-making authority, and control" (Orts, 2013, p. 36) that are normatively salient. Liberal constitutional democracy can therefore accommodate real entity theory if it is rendered as a claim that collectivities ought to be able to form their own *nomos* communities. And it can accept that claim so long as groups' internal norms do not unfairly infringe upon the rights and liberties of others, outsiders and insiders both.

As Muniz-Fraticelli (2014) points out, this risks normative mirroring, perhaps forcing groups to adopt the same norms and decision-making rules as those constraining the state itself. The risk is overblown. Corporate governance need not replicate state offices in order to pass constitutional muster. First, constitutional authority is comprehensive in its authority, not in the capaciousness of its reach. As Hobbes teaches, where the state does not regulate, subjects enjoy liberty. Second, the legal norms constraining state actors may not be appropriate for corporate actors. Constitutional democracy's liberal egalitarian principles will apply differently depending upon, *e.g.*, the availability of exit from the group; a lack of coerciveness of group norms; the small

⁹⁹ Corporations "are not themselves members of 'we the people' by whom and for whom our Constitution was established."

¹⁰⁰ Except for constitutionalized rights to the free exercise of religion.

scope of the group's asserted jurisdiction; the importance of the group to public welfare; the level of consensus among corporate members, *etc.* The regulation of self-regulation, in other words, fits within the liberal democratic constitutional polities and does not require institutional mirroring. (*See, e.g.*, J. L. Cohen 2004) (applying Teubner's notion of reflexive law)

Once rendered in this way, the question of corporate personhood no longer involves a choice between three competing accounts of corporate rights based upon irreconcilable theories of political legitimacy or perfectionist ethical goods. Nor does it require measuring positive law against perfectionist ideas of the good. Rather, it becomes a matter of mediating fairly between competing rights claims lodged by different but equally important citizens within a constitutional framework. (Miller, 2011)

And as it turns out, this is indeed how the U.S. Supreme Court has often understood claims related to corporate rights. When it ascribes liberty and property rights to corporations, it does so derivatively and on behalf of the individual rights claims of identifiable corporate members. (Blair and Pollman, 2015; Bloch and Lamoreaux, 2017; Maitland, 2017, p. 115; Winkler, 2018, p. 37) When it circumscribes corporate rights, it does so in the name of the equal rights and liberties of corporate outsiders. (*E.g.*, *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); *see also First National Bank v. Belotti* (Rehnquist, J., dissenting); Miller 2011, p. 921) And when it permits corporate participants to order themselves according to norms different than those set forth by the state, it takes care to check that the equal rights and liberties of others do not unfairly suffer by insisting on regulating their self-regulation according to constitutional principles. (*E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); Miller, 2011 (balancing test to circumscribe corporate rights). Indeed, U.S. Supreme Court treatment of corporate rights has, at least until

recently, sought to be neutral regarding the impact of the corporate form on the enjoyment of individual rights. (Buccola, 2016)))

Democracy and Rights: Partners or Competitors?

The mistaken dichotomy between positive and higher law drawn by theories of corporate personhood leads to another bilateral fallacy: between democracy and rights. The reason why constitutional liberal democracy can keep questions of political legitimacy in-house is because it relies, at least in part, on democratic mechanisms. Through popular engagement and discussion, citizens construct together the rights that they give themselves. Nevertheless, theories of corporate personhood present two apparently contradictory moral goods, finding themselves forced to argue in favor of the either the democratic public interest or the rights of corporations. One either sides with rights, aggregation and real entity theory; or with democracy and concession theory. The history of corporate rights, according to Adam Winkler (2018), trails the battle between “populists” that favor of democratic regulation and “corporationalists” that prefer economic freedom.

Democracy’s Janus-Face

This is an old conflict, and one that has long outstayed its welcome in corporate rights discourse. *See, e.g.*, (Habermas, 2001; Waldron, 1999, p. 282; Webber, 2009, p. 31)¹⁰¹ Given the democratic provenance of the contemporary corporate law that ascribes rights to corporations,¹⁰² abandoning the conflict at least seems reasonable. Without state-promulgated legal codes, corporations may not exist at all. (*e.g.*, Orts, 2013; Barkan, 2013; Roy, 1997) But an armistice

¹⁰² Commonly, Delaware’s General Corporation Law, 8 *Del. C.* §§ 101 *et seq.*

between democracy and corporate rights has even deeper philosophical and normative foundations.

At least since Kant, Western political thought has recognized the interrelationship between liberty and equality. It therefore accepts that rights and the state go hand-in-hand. Unless a legitimate authority guarantees the equal liberty of all, it can be enjoyed by none. As Isaiah Berlin quips, ironically channeling socialist R.H. Tawney, “freedom for the pike is death for the minnows.” And the state, often deploying concepts like “proportionality,” “rational basis,” and “compelling state interest,” (Webber, 2009, p. 63) is the referee that assumes responsibility for balancing everyone’s equal rights. For example, to secure the fate of the minnow, the U.S. embraced the intimate partnership between rights and government during the centralization of state capacity and constitutionalization of individual rights in the late 19th century. (Novak, 2002, p. 264) When several states allowed corporations more license to self-order their internal governance, the federal government, at the same time, augmented its external statutory constraints on corporate behavior. (Strine, Jr. & Walter, 2016, p. 881) Thus, the umpire state worked to maintain the careful, contextualized balance of equal liberty.

But constitutional liberal democracy is no Kantian Rechtsstaat. It involves no authoritarian central management delimiting and enforcing legal rights according to universally correct principles. (Webber, 2009, p. 37) The U.S. commitment to equal human worth is not accomplished by a supreme lawmaker with the unique authority, as Chief Justice John Roberts puts it, to call balls and strikes according to formulaic rules. (Winkler, 2018, p. 356) Rather, the delimitation of equal rights requires democratic input. (*See, e.g.*, Webber, 2009, p. 41¹⁰³; Benhabib, 2009;

Waldron, 1999) As Habermas points out, the West now understands rights constructively, as co-original with democracy. There cannot be one without the other. Rights serve not only a prerequisite of democratic practice, securing the political liberties required for democratic lawmaking. (*E.g.*, Urbinati, 2012; Waldron, 1999, p. 283) They are also an outcome of that very same democratic practice. Indeed, when majoritarian lawmaking appears to invade rights, the appropriate response is not to argue that the rights should “trump” legislation. Rather, the appropriate response is to recognize that “[p]rinciples of authority such as participatory majoritarianism are principles for governing social decision-making in circumstances where some members of the society think that rights require one thing and other members of the society think that rights require something else.” (Waldron, 1999, p. 248)

Specifically, to mediate rights conflicts impartially, constitutional liberal democratic states process them under conditions of equal liberty. Each individual may make rights claims, and those claims must be reconciled with any conflicting rights claims made by equally important others. When majorities form to pass a law, they do so in the name of vindicating their rights. When minorities take their defensive stance, they likewise do so in the name of shielding their rights against encroachment. Thus, when rights claims run up against democratic or state regulation, it is not a question of deciding which of democracy or rights holds more moral importance. Rather, it is a dispute between competing rights claims, *e.g.*, between those of corporate insiders seeking escape from regulation versus those of corporate outsiders seeking protection from rights-invasive corporate behavior.

One reason for the interdependency of rights and democracy is the underdetermined nature of rights themselves. According to constitutional scholar Grégoire Webber, constitutional rights are “incompletely theorized agreements on a general principle” that are “proposed and adopted

without resolving the great moral-political debates alive in the community.” (2009, pp. 1, 53) This openness serves as an invitation for constituted authorities “to engage in the task of completing the constitutional edifice.” (*Ibid.*, p. 54) Constitutional liberal democracies thus decide over time, through discursive procedures, to shape the abstract rights¹⁰⁴ that they try to give themselves equally, to concretize the terms of their relationships amongst one another in a framework of legal rights. (Habermas, 1994) At the same time, the abstract rights that democratic practice concretizes are not infeasible principles so much as “modes of problematisation” calling for democratic negotiation and discourse. (Tully, 2002, p. 207) People, after all, “disagree about what rights we have or ought to have,” and so “the specification of our legal rights has to be accomplished through some political process.” (Waldron, 1999, p. 243) Democracy is the process that we use to settle disagreements about the scope and meaning of rights because we, as rights-bearers, demand an equal voice when it is our rights that are at stake. (Waldron, 1999, pp. 247, 250) As a result, an “institutionalized arena of discursive interaction” is necessary before social phenomena like the corporation can be named, normed and included within a constitutionalized rights framework. (Preuss, 2015, p. 362)

a. What Rights Look Like

Within constitutional democracy, citizens give themselves both negative and positive rights. Their rights claims do not only involve protections against intrusions against interference. They likewise demand powers and capacities that cash out the value of their negative liberties. (Lefort, 1988, p. 23; Novak, 2002, pp. 249-50; Pound, 1909) Concrete rights, as Hegel reminds us, include the capacity to choose or enjoy the things that are meaningful to us. Or, as Lefort (1988, p. 32) argues, the “negative formula ‘which does no harm’, upon which Marx concentrates, is

¹⁰⁴ As noted by Oliver Wendell Holmes, Jr., “abstract rights cannot determine concrete cases.”

indissociable from the positive ‘being able to do everything.’” Thus, rights are also Janus-faced, involving both “freedom from” and “freedom to.” One upshot is that the wealth-enhancing potential of corporate rights need not be couched in terms of state-approved “public interest,” but instead in terms of positive liberty rights.

In turn, the positive and negative rights that liberal constitutional democracies give themselves target not just inegalitarian and oppressive law, but also private ordering. Constitutional liberal democracy recognizes rights as intersubjective and relational. Citizens attend to the inequalities and interferences caused by human beings who enjoy an outsized capacity to enjoy their own liberty rights. (*E.g.*, Webber, 2009, p. 23) If particular distributions of rights allow the pike to swallow the minnows, the constitutional democratic state reigns them in. Associational rights, in particular, are notorious for creating inequalities in the distribution of liberties. School segregation, to take one example, while justified in terms of “freedom of associational choice,” yielded grave political and material inequalities. Darrell Miller remarks:

An individual riding armed to defend himself or others is a cautious traveler; a hundred persons riding armed for the defense of themselves or others is a militia, or a job. A home buyer who covenants not to possess firearms is a respectful neighbor; a village of private covenants not to possess firearms is a zoning regulation.

(2011, p. 954) The balancing required to maintain equal liberty must be attentive to such phenomena.

Finally, the rights created by liberal constitutional democracy remain always contingent, contestable, and open-ended. (Urbinati, 2014) Whatever resolution may temporarily arrive in Congress or the Courts, uncertainty about both future factual circumstances and normative commitments precludes any final answer. It leaves the questions of rights always within the grasp

of democratic citizens. (Webber, 2009, pp. 7, 38) Indeed, the perennial openness of the question of rights preserves democratic practice; to settle on the truth about such things means relinquishing political legitimacy into the hands of something else entirely – namely, someone who claims a special expertise and authority about the correct interpretation of rights. Our permanent disagreement over rights motors our democracy.

b. The Role of Facts in Rights Discourse

The democratic provenance of rights also helps us to find the place CLD allots to historical circumstances in rights discourse. Recall that theories of corporate personhood move from fact to norm, deriving normative conclusions from factual assumptions about what corporations are. They are like anthropological accounts of human rights that select on an important empirical characteristic about human beings and then design a system of rights that protects it. For example, real entity theories analogize groups to individuals by pointing to their collective agency, and then move on to construct corporate rights and duties in a way that respects that agency. CLD turns this kind of analysis on its head. First, it starts from a fundamental normative commitment to equal human worth, individuals who carry “rights to have rights” *qua* individuals, regardless of their physiological or mental dimensions. These individuals then articulate their own understanding of equal human worth during democratic lawmaking. They concretize their rights not only with logical argument, but with facts. Certain empirical goods will be valuable to them, and so they will seek to protect them with legal and constitutional rights. Certain empirical conditions will prevent them from enjoying their rights, and so they will seek to circumscribe those conditions by amending the contours of their rights. Thus, for example, if human beings value life in a rule-governed society (fact), they will seek to protect the society with a group right. Others who find that the society blocks their own ends (fact) will seek to circumscribe the group right.

Some illustrations will inform these points. Democratically-formed state corporate law, often amended to keep up with changes in economic circumstances and normative commitments,¹⁰⁵ lays out the intersubjective rights of human beings involved in joint economic enterprise. Fiduciary law, to take one example, balances the contract and property rights of shareholders and managers against those of corporate stakeholders who remain vulnerable to their fiduciaries' frauds and mismanagement. Most recently, in Delaware, the state legislature is considering reforming corporate law to accommodate the impact of blockchain technology on shareholder franchise rights. (Pileggi, 2018) At the same time, the National Labor Relations Act and its implementing regulations protect the liberty and economic rights of corporate employees against corporate shareholders and managers who might deploy their superior bargaining power and corporate franchise rights to force wages to untenable levels, constrain speech and privacy rights, *etc.* Thus, ascribing rights is not a matter of measuring how well democratic law-on-the-books measures up against pre-political rights, understood as "trumps" over the public interest. Rather, all rights are legal rights and are the outcome of social struggle and discourse taking place on a democratic battlefield according to constitutionalized rules of procedure committed to equal human worth.

Some Objections

Those accustomed to defending corporate freedom against state regulation may balk against co-originality, fearing the prospect of populist mob rule. But liberal constitutional democracy's appeal to democratic lawmaking in the construction of rights need not lead to Schumpeterian legal positivism. Just because law is man-made, constructed and not discovered

through reason or revelation, it does not follow that it is reducible without remainder to majoritarian power and interest, a clash of wills reminiscent of Schmittian friend-enemy politics, populism, and devoid of normative saliency. First, and most obviously, democratic decision-making must first run the gauntlet of constitutionalism – separation of powers, checks and balances, *etc.* Regardless, we should not always be afraid of popular power. It arises when democratic citizens respond to social change, articulate new conflicts, and defend against new challenges to their individual autonomy. (*See, e.g.*, Waldron, 1999, p. 102; Webber, 2009, p. 12)

As the great jurist Oliver Wendell Holmes, Jr. lectures,

[t]he life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

(Holmes Jr., 1992(1881), p. 237) Without a space for power and interest to infiltrate lawmaking, it would remain deaf to the complaints of those left unprotected from the sometimes turbulent winds of economic and civil transformation.

Second, the democratic resolution of clashing interests carries significant normative salience. Certainly, not all democratic citizens will agree with any new rights claims that arise. Liberal constitutional democracy, however, arbitrates their disagreement not by appealing to any “true” understanding of rights, but through a process that respects each individual as an equally important participant. Indeed, Waldron argues that

[e]ach of us... must face the prospect that the values *he* takes seriously, the priorities *he* has, the principles to which *he* has a strong attachment, may not be the values, priorities, and

principles held by the voter in the next booth. We can try if we like to suppress these disagreements, to denigrate the other's views as selfish or irrational and exclude them as far as possible from our politics. But, as I have argued, we can hardly do this in the name of *rights*, if it is part of the idea of rights that a right-bearer is to be respected as a separate moral agent with his own sense of justice. If, on the other hand, we resolve to treat each other's views with respect, if we do not seek to hide the fact of our differences or to suppress dissent, then we have no choice but to adopt [democratic] procedures for settling political disagreements which do not themselves specify what the outcome is to be.

(Waldron, 1999, pp. 303-304)

Third, though rights are historically contingent and changing, it is good that it is so. Only then can they respond to the frustrations and obstacles faced by actual people as they attempt to pursue their own purposes and values in a complex and plural society. (Llewellyn, 1930, p. 461; Webber, 2009) When old law laid over new conditions no longer allows them to pursue their ends in equal fashion, it must be thrown away. And if law-on-the-books yields outcomes that democratic citizens find offensive to their liberties, certainly they will address it politically. Actual people will investigate whether conditions leave them sufficient space to pursue their own ends. Others, finding that space intrusive, will fight back. The outcome of the battle ends up in the law as a tentative solution to the challenge of realizing equal basic liberty. Still, some polities may nevertheless decide to enshrine particularly weighty values into higher law that is difficult – though not impossible – to amend. (Taylor, 1994, pp. 57-8)

Fourth, when democratic citizens champion their own interests during rights discourse, the result is not purely egoistic and thus normatively vacant. *Pace* Kenneth Arrow and social choice theory, democratic citizens themselves, assuming the 'burdens of judgment,' may not participate

according to their self-interests alone. Rather, CLD's commitment to equal human worth requires they assume a moral "we-perspective," akin to the orientation required of citizens undertaking to discover Rousseau's *volonté générale*. They argue about "what justice requires, and what the common good amounts to, motivated in their disagreement not by what's in it for them but by a desire to get it right." (Waldron 1999, 305). Lefort accordingly comments that "one of the preconditions for the success of any demand [regarding rights] is the widespread conviction that the new right conforms to the demand for freedom enshrined in existing rights," that they speak not to injury, but to wrong. (1988, pp. 36-37) A fifth response is that the self-interest pursued by the democratic citizen is not something to be avoided or held in contempt. Rather, it is a legitimate claim to autonomy, an articulation in the citizen's own words as to what is required for her to lead her life according to her own lights. American corporate law scholar Ernst Freund, writing in at the end of the 19th century, perceived that "[t]he rule of law arises out of the conflict of human interests, which it tempers and regulates in accordance with the necessities of social existence." (Freund, 2000 (1897), p. 13) Rummens (2008, p. 393) likewise cautions that these interests must be taken seriously "[b]ecause human beings are always concrete others, living in their own particular social and historical circumstances and responsible for their own interests and values." We cannot say we are taking someone's rights seriously, declares Waldron, if "we ignore or slight anything *he* has to say about the matter." (1999, p. 251) A citizen's self-interest is then reconciled with the conflicting self-interested autonomy claims of others in the messy complex of log-rolling, negotiation, compromise and settlement that is democratic will-formation. The result, it is hoped, is something approaching a fair and impartial resolution that respects all rights equally. In contemporary liberal constitutional democracies, likely all responses hold true. (Webber, 2009, pp. 27-28)

Co-Originality and Corporate Personhood

Given the co-originality of democracy and rights, theories of corporate personhood should not force a decision between them. Rather, they can be used as a way to problematize the rights claims at stake and ask that they be mediated. Corporate stakeholders seeking to escape democratic regulation argue that their property, associational and other liberty rights require state non-interference. Others, on the other hand, argue that regulation serves the liberty interests of corporate outsiders. Harold J. Laski puts the point well: “It is the harmonization of warring interests with which we are concerned. How to evolve from a seeming conflict the social gain it is the endeavor of law to promote – this is the problem by which we are confronted.” (Laski, 1917, p. 135) Thus, for example, *Burwell v. Hobby Lobby, Inc.* (523 U.S. ___, (2014)) involved the arbitration of shareholders’ collective religious and property rights against employees’ conflicting rights to healthcare under the Affordable Care Act. The shareholders argued, consistent with real entity theory, that the religious liberty should be applied to the corporate person (group) as a whole because the group, when “recognized as autonomous from both the state and the shareholders,” enabled them to fully exercise their religious liberties. Consistent with aggregation theory, Justice Alito noted that “[w]hen rights, constitutional or statutory, are extended to corporations, the purpose is to protect the rights of [the people, including shareholders, officers, and employees, who are associated with a corporation].” (523 U.S., *18) Meanwhile, employees and the public conscripted concession theory to argue that the shareholders’ rights, if enforced without limitation, would unfairly undermine their positive liberty rights to healthcare (Gedicks & Koppelman, 2014) and their own liberty to freely choose the religious tenets to which they subscribe. (Garfield, 2014)

Theories of corporate personhood, considered together, thus set up the problematic rather well. They do not, unfortunately, tell us how to resolve it. But that is as it should be. This tangle,

like any other normative rights dispute within liberal constitutional democracy, can only be resolved by democratic citizens themselves as they consider what kind of legal response would best protect CLD's commitment to equal human worth.

Conclusion: Corporate Personhood's Place in Liberal Constitutional Democracy

As typically invoked, theories of corporate personhood force the analysis of corporate rights into at least three misleading dualisms: sovereign vs. subject; morality vs. positive law; and democracy vs. rights. "The history of public law," observes legal scholar Darrell Miller, "is one of desperate attempts to shoehorn the business corporation into an older set of legal models, often with incongruous results." (2011, p. 952) An updated political theory denies these dichotomies. It refuses any *sui generis* public/private distinction that is then fortified with moral rights, forcing us to make false analogies. It melds fact and norm through democratic consensus while quarantining questions of ultimate ethical truth. Accordingly, it rebuffs corporate personhood's reliance on pre-political rights or popular sovereignty to forever settle the question of corporate rights. Finally, it accepts the democratic construction of rights. It therefore rejects the false choice between democratic regulation and individual rights and instead invites citizens to deliberate about the kinds of rights corporations ought to get given CLD's commitment to equal human worth.

The solution presented by liberal constitutional democracy to corporate rights is thus a problematization and a procedure. It holds that democratic citizens, acting within and through their constitutional framework, present rights claims based upon reasons grounded in the notion of equal human worth. They present their claims in an ontologically open and changing world as they react, in real time, to phenomena that they believe interferes with their liberty. In turn, other citizens may make their own conflicting rights claims. But rather than picking sides by accepting one conception of rights over the other, liberal constitutional democracy instead seeks to mediate the conflict

through fair and impartial lawmaking procedures committed to notions of equal moral worth. It is, in fact, the resolution of conflicting rights claims through these procedures that motivates political discourse itself.

Dewey, indeed, was right when he argued in 1926 that the problem of corporate rights was an issue for politics, not science and ontology. (*See also* Barkan, 2013, p. 68) The important thing is not what corporations are, but what they do – and what impact such doings have on individuals who can bring their own rights claims into public reasoning. (Schragger & Schwartzman, 2016, pp. 359-60) Ascribing or denying legal rights to corporations undoubtedly affects how others enjoy their own legal rights. Conflicts may arise. They must be resolved through constitutional processes committed to equal human worth. And we should be wary of shutting down the debate by appealing to higher moral and empirical truths, including those provided by theories of corporate personhood.

So what, then, of corporate personhood? The theories are properly understood as critical discourses (Millon, 1990) used by partisans to justify their rights claims in their own words within a constitutional framework. They identify empirical phenomena that citizens find relevant to the enjoyment of their rights. They articulate reasons why we should reject or ascribe rights in a certain way. For some, personhood theories are retroactive, discursive attempts to justify the *status quo* using liberal sensibilities. (Barkan, 2013, p. 68) And they are successful insofar as they have helped us identify and come to agreement on the values that legal rights ought to protect.

They can also allow us to make some predictions. They offer guidance as to what kinds of political reactions we can expect from human beings should rights be ascribed to or denied corporations. We can then do some legwork beforehand to make sure their complaints are minimized. For example, those who articulate their rights claims using aggregation theory tell us

that corporate rights protect their individual liberties as they associate together. Nevertheless, because many diverse individuals involve themselves with a corporation, they may not always agree about the rights the corporation should claim or how those rights should be exercised. Indeed, given the separation-of-ownership-from-ownership and “forced capitalism” that characterizes institutionalized pension investing, ascribing rights to corporations may do very little to vindicate the individual rights claims of shareholders. (Strine Jr., 2016) Accordingly, the law could attempt to better accommodate possible dissenters by, for example, guaranteeing voice (better corporate democratic governance) or exit (other investment options that do not involve commitment to objectionable corporate decisions). Or, law might constrain the scope of corporate legal rights off the bat. In *California Bankers Ass’n v. Shultz*, 416 US 21 (1974), Chief Justice Rehnquist, citing concession theory, refused to ascribe to banks 4th Amendment protections against search and seizure. He thereby protected the right of the public against frauds. To be sure, concession theory teaches us that citizens may very well object to corporate rights should they be exercised in a capacious manner. Given corporate resources, corporate leaders can indeed “functionally replicate [early modern] sovereignty” in a way that violates understandings of individual liberty. (Miller, 2011, p. 949) For non-shareholder stakeholders like workers, consumers, and taxpayers, whose interests may diametrically oppose shareholder profit-seeking, limiting corporate rights may be the only way to protect their liberty. But if they, too, are given voice and exit rights, their objections might be ameliorated. We can at least *predict* that the more democratic internal corporate decision-making is, the more likely it is that we can ascribe extensive liberty rights to corporations without running into dissenting voices.

The next Chapter will elucidate these predictions by enlisting a little more political theory. Applying ideas about group rights, group agency and democratic accountability, it will suggest a

framework that democratic citizens might find helpful as they consider the kinds of legal autonomy rights that they ought to grant to business corporations.

Chapter 3: The Democratic Anatomy of Corporate Legal Rights

Introduction

This Chapter will set out a normative framework for the ascription of corporate legal rights. In the first two Chapters, I explained why the legal theories of corporate personhood should frustrate those committed to constitutional liberal democracy. Chapter 1 argued that these theories, moving from fact to norm, often effaced empirical circumstances relevant to the enjoyment of human liberty. They also have a role in shaping the very behavior they mean to name, norm, and regulate. Moreover, because they move from fact to norm, they are each, on their own, inflexible and therefore ill-suited to guide the law as it responds to ever-changing social and economic circumstances in complex societies. Each theory, furthermore, relies upon an often-unstated political theory that is inconsistent with the theory of constitutional liberal democracy underlying this dissertation. Nevertheless, each theory, if understood as a *critical* theory, has something to offer. They not only identify and employ norms relevant to constitutional liberal democracy, but also suggest how corporate capitalism might run roughshod over them while proposing plausible legal solutions. Chapter 2 explained why the political theory subtending the theories of corporate personhood should be dissatisfying. Each relies upon a hard ontological boundary between public and private and between sovereign and subject. They propose an outsourced normative order rather than the constructivist account accepted by contemporary notions of CLD. Finally, they deny the co-originality of democracy and rights. It then suggested that if they are laid atop a better conception of CLD, the theories of corporate personhood suggest an associationalist theory of corporate legal autonomy rights that are circumscribed in the interests of the equal liberty rights

of others. This Chapter will elaborate on this insight, enlisting political theory addressing group rights, group agency, and democratic accountability to suggest a principled framework that can guide thinking about corporate legal rights.

Unlike the theories of corporate personhood, the argument offered by this Chapter moves from norm to fact. It does not derive corporate legal rights from ontology. As mentioned earlier, this is not a new move. Other scholars, noting the instability of social conditions and the resulting ambiguity of any normative prescriptions derived from them, frame the question of corporate legal rights in the same way. They ask, as H.L.A. Hart once asked: “[u]nder what *conditions* do we refer to numbers and sequences of men as aggregates of individuals and under what conditions do we instead adopt unifying phrases [like “corporation”] extended by analogy from individuals?” (Hart, 1983, p. 41) (emphasis added) John Dewey, in his seminal 1926 essay in the *Yale Law Review*, similarly beseeched jurists to gaze away from the internal, Platonic essence of the corporation, to give up on discovering a moral personality worthy of rights. (Dewey, 1926, p. 661) Rather, he thought we should examine the consequences of affording them legal rights. More recently, Schragger and Schwartzman (2016) likewise argue that the question of corporate rights should not start with what is, but instead with the norms that should be instantiated:

The question for us is the [legal] realist one—that is, what interests, values, and relationships do various kinds of groups, in fact, promote, and are they worth protecting with rights? Answering this question requires considering many different features of associations, organizations, and institutions—not to divine their ontological status, but rather to determine whether they function in ways that might warrant assigning rights to them.

(*Ibid.*, p. 347) Stated more simply, the question is this: given our normative commitments and the empirical circumstances before us, does it make sense to treat the corporation *as if* it were a legal person carrying legal rights? (*Ibid.*, p. 357)

Inquiring into the conditions and effects of ascribing corporate legal rights is not an indirect strategy aimed at gaining traction into the more fundamental question of the ethical status and nature of corporations. Nor do these thinkers set aside enquiry into the essence of corporations merely on account of its difficulty – though indeed it is a difficult problem, and one chewed over by many moral philosophers investigating the question of group agency. Instead, they quarantine the matter of corporate ontology perhaps because, at the end of the day, it is secondary to the deeper questions asked by constitutional liberal democracy. In CLDs, rights are not pre-political or natural, distributed based on an external moral order to entities singled out for special treatment. Instead, legal rights, and to what (or whom) they are ascribed, are political responses to social and moral change. Thus, in CLD, one never asks: is this creature a person that deserves rights? Instead, one asks: given the normative commitments of constitutional liberal democracy, under what conditions, and based upon what consequences, do we ascribe legal rights? In other words, it answers the question of corporate rights on a register entirely different from the one played by theories of corporate personhood. It frames the question of corporate rights as a problem of legitimate lawmaking, not as a derivation from social ontology, philosophy of the [collective] subject, or some variation on the theme of an anthropological accounting of human rights. In doing so, it escapes the ontological thicket created when one considers the fact that corporations are inevitably creatures of both individual initiative (Hessen, 1979) *and* law (Ciepley, 2013), and so cannot fit neatly into any theory of corporate personhood. (Orts, 2013)

This Chapter will formalize the intuitions of Chapters 1 and 2 by giving an answer this question. Picking up where Dewey,¹⁰⁶ Hart, and Schragger and Schwartzman left off, it will elaborate the legal rights corporations might claim given CLD's commitment to equal human worth. In pursuing these answers, it finds that empirical circumstances are indeed important, but not because they possess *sui generis* moral salience. Rather, it finds that certain empirical and ontological conditions must be met before corporate rights can successfully vindicate the individual liberties that CLDs embrace. Those conditions may hold more or less fully depending on historical context and, in particular, on the democratic credentials of corporations' internal governance. Namely, to ensure that corporate autonomy rights cash out equal human worth, their internal decision making must yield results that (1) are held as a good by a corporation's human members; and (2) respect the equal rights and liberties of dissident minorities and corporate outsiders. Given the empirical requirements of collective agency and the techniques that can be used to ameliorate the illiberal risks of group rights like corporate rights, corporations will be able to make a stronger case for legal autonomy rights if their decision-making first fulfills some democratic desiderata.

The State's Normative Commitments

Following Dewey, to begin to articulate a theory of corporate legal rights means to begin with CLD's normative commitments. As previewed in earlier Chapters, CLD's primary commitment is to equal human worth, understood abstractly as a commitment to liberty, inclusiveness, and equality. With a little elaboration, actually existing CLDs extend these concepts

¹⁰⁶ Dewey (1926, p. 663) explicitly refuses to resolve the problem.

by including liberal value impartiality,¹⁰⁷ equal protection and anti-discrimination,¹⁰⁸ (Taylor, 1994); and the protection of individual autonomy, including enumerated rights, a preservation of a meaningful range of choice (Patten, 2014, p. 73) and non-domination. (Levy, 2014, pp. 30-31)¹⁰⁹ These commitments derive from CLD's constitutive orientation towards the political and moral equality of human individuals attempting to implement rules that will fairly govern their collective coexistence. (See Rawls, 1972) Importantly, CLD cannot recognize any unlimited freedoms, for liberties can be wielded in a way that harms the equal liberties of others. (Grimm, 2016, p. 345; Galston, 2002, p. 3) It is therefore not enough that the state identifies and protects rights. It must weigh them against the competing claims of other rights-holders, giving to each equal concern. (Leader, 1992, p. 16; Dworkin, 1986; Galston, 2002, p. 3) The balancing to be done, however, given the state's commitment to impartiality, cannot hinge on any substantive ethical judgment about citizens' purposes and interests. (Galston, 2002; Laborde, 2018; Dworkin, 1986) Rather, the state may only consider the actual preferences held by people, and then only to the extent that they are treated unfairly. (Patten, 2014, pp. 101-103) Further, the state cannot permit liberties that contradict or undermine the constitutional order itself – whether substantially or procedurally. (Grimm, 2016, p. 353). Its impartiality is therefore *not* neutral regarding its commitments to equal human worth. (Laborde, 2018)

¹⁰⁷ Note that Patten (2014) defines neutrality as a “downstream” value, subordinate to and derived from the state's commitment to providing equal autonomy rights, *i.e.*, “fair opportunity for self-determination.” Neutrality, however, can also be conceptualized “upstream,” as part of a foundational commitment to moral skepticism.

¹⁰⁸ Also understood as equal respect and consideration (Kymlicka, 1989); a commitment to the equal and maximal distribution of primary goods – things that we need no matter what conception of the good we have; and fair opportunity for self-determination. (Patten 2014, p. 104)

¹⁰⁹ Arguing that the liberal state really centers around a concern for domination, not a perfectionist account of autonomy rights.

CLD's Fundamental Normative Commitment is Not to Groups

Though we can no longer circumvent democratic constitutional practice by relying on superordinate moral truths or perfectionist accounts of human interests to justify rights regimes (Grimm, 2015, p. 30), CLD is nevertheless committed to liberalism's moral individualism. Specifically, all lawmaking must occur under conditions such that individual human subjects can understand themselves to be, even if indirectly, the co-equal authors of the laws that govern them. (Habermas, 1996; Cohen, 2017, p. 569; Grimm, 2015, pp. 37, 73-4; Benhabib, 2009, p. 693¹¹⁰) Recall from Chapter 2 that sovereignty is ascribed not to God, or moral truth, or natural law, but to "the people" as the highest and final legitimate public authority. (Cohen J. L., 2015) Of course, and *pace* Rousseau, "the people" cannot speak as a single entity with a single will. Instead, as Stephen Holmes argues, it is the constitution that gives the people a voice by providing decision-making procedures that purport to include the voices of all individuals equally. (Holmes, 1995, p. 164;¹¹¹ Waldron, 1999, p. 277) Moreover, citizens engage in lawmaking not only through formal constitutional mechanisms, but also by making use of their constitutionalized political liberties: participating in public reason and forming social movements while they attempt to convince their fellow citizens of the importance of proposed legal and constitutional rights.

Consequently, in CLD, corporations (and other associations) cannot claim moral footing equal to that of human beings. Chapter 1, in its treatment of real entity theory and the political pluralism on which it relies, offered a few reasons explaining why. Granting equal moral standing

¹¹⁰ The "democratic sovereigntist" argument means "that there be clear and recognized public procedures for how laws are formulated, in whose name they are enacted, and how far their authority extends."

¹¹¹ "When a constituent assembly establishes a decision procedure, rather than restricting a preexisting will, it actually creates a framework in which the nation can for the first time have a will."

to groups might amount to a sovereignty bid that can challenge the state and, therefore, threaten its ability to fulfill its commitment to equal human worth. Furthermore, scholars occasionally claim, in the “standard argument” for group rights (Schragger and Schwartzman, 2016), that corporations and other associations merit moral standing on account of their human-like characteristics: rationality, personality, agency, *et cetera*. CLD has, however, jettisoned anthropological accounts of human rights because, among other reasons, they often favor culturally biased values. (*E.g.*, Young, 1989) It therefore does not distribute moral status based upon capacities like rationality, personality, or agency.¹¹² Instead, its moral core is centered square on the individual human being *qua* individual human being – no matter her mental and physiological dimensions. To be sure, agency, rationality and other empirical characteristics can be invoked to identify goods that individuals would like to protect with legal rights. They might argue, for example, that the fact of human rationality justifies a system of public education and a broad array of economic opportunities. But rationality is not the permission slip granting an individual the right to make and receive such justifications. Similarly, even if corporations are rational agents (Pettit, 2017) or have “real personalities” (F. W. Maitland, 1911), these characteristics cannot be conscripted as justifications for the ascription of an independent, underived moral status. Moreover, consider that the state itself – a group agent, after all – can be counted a moral person under this schematic. But it is precisely state action that rights-talk is meant to circumscribe. (Laborde, 2017, p. 172)

¹¹² This conception of rights might also exclude other non-human participants and, perhaps, those with developmental or mental disabilities. For a good discussion on this issue, *see* Clifford 2012. My position is that the capacity to engage in agency or rationality is conceptually separated from the importance of the human being who so engages. Using Forst’s theory as an example, a human being has a right to justification regardless of whether or not she can actually participate in justificatory processes.

In addition, if individuals may sort themselves into associations that enjoy independent sources of moral worth, their status as political equals would be undermined. Association members, by virtue of their membership, might thereby assume a derivative moral status not allocated to non-members. (Barry, 2002) This kind of status sorting is reminiscent of feudalism, a political arrangement that CLD dismantled years ago.

There is another reason to reject granting equal moral worth to associations. In most conceptions of CLD, the state cannot dictate the kinds of rights-protected ethical goods citizens ought to adopt. Its intervention would amount to an illiberal interference with their determination about their own ethical ends. (Habermas, 1994, p. 125) Thus, if corporations have stand-alone moral status, they too can decide on how they would like to exercise their ethical autonomy free from state interference. In order to exercise this autonomy, however, they require some internal decision-making procedure that can settle on the ethical purposes they will embrace. This decision-making procedure may very well run roughshod over the various and variable ethical commitments of individual corporate members. Yet dissenting members will have no claim for the redress they might usually request when their own rights run up against the conflicting rights of others. For if the corporation has equal or better moral standing, the state may not intervene with its ethical choices. And this is precisely what the state would be forced to do if it compelled the corporation to make choices more amenable to dissenting corporate members. A claim for equal corporate moral status, therefore, amounts to a claim to govern. It is a claim to authority over members that does not derive from the constitutional state, but from its own conception of the good. (Cohen, 2017, p. 55) At the extreme, it may provoke a sovereignty bid that threatens to displace the liberal

democratic state with corporate rulemaking. (Cohen, 2015; Kymlicka, 2016;¹¹³ Laborde, 2017, 163)¹¹⁴

Finally, ascribing moral standing to groups muddies analytical waters when it comes to arbitrating conflicting rights claims, (Leader, 1992, p. 33) occluding the fact of individual experience within the group. (I. Maitland, 2017, p. 107) It sets up a problematic involving ostensibly homogeneous group preferences (Freund, 2000 (1897), Benhabib, 2009, p. 25) against those of the outsider or dissident. Of course, no group is completely homogeneous. Invoking a simplified bilateralism of group v. individual might therefore hobble our ability to confront hard questions about the relative priorities of the competing rights claims of all the individuals implicated. (Leader, 1992, p. 33) Relatedly, as Seyla Benhabib (2002, p. 4) argues, it may also lead to a fetishization of the group that places it outside critical analysis. It might furthermore, according to Kukathas (1992), improperly empower elites who might claim without justification to speak the views of all group members. Thus, unless the black box of the corporation is opened, it will be difficult to tell whether and to what extent a corporation's moral standing will promote human emancipation and welfare. (List and Pettit, 2011, p. 182)

The Place Allotted to the Empirical Premises of Associational Life

There are, therefore, several reasons to avoid ascribing equal, independent moral standing to corporations. Although my argument will nevertheless dissatisfy political pluralists and others who adopt views that accord independent moral and political standing to groups, it is not hostile to group life. As Tocqueville pointed out long ago, human beings in modern society often arrange

¹¹³ Arguing that allowing immigrants self-governing rights “would in effect be allowing them to colonize a part of the territory of the state.”

¹¹⁴ Laborde (2017) notes that this conclusion entails an important assumption that human beings have a higher-order interest in living in justice on this earth rather than by the ethical values of the corporation.

themselves into associations – teachers’ unions, business partnerships, churches, and even political associations. And these associations can be and often are valuable to them for a variety of reasons. My argument holds, though, they are morally valuable only if they help bring to fruition the ideal of equal moral worth. They are goods only because they are good for individual human beings. This, and not the process of ascribing moral standing to groups, is where empirical facts and social reality of associational life find their place in CLD’s normative schematic. Historical circumstances, like those surrounding associational life, inform how citizens interpret their commitment to equal moral worth and thus help frame the laws they give themselves. Moreover, circumstances do not just give content to human goods. As explained below, they also condition whether and to what extent legal rights might run up against CLD’s commitment to equality. Roscoe Pound, an early 20th-century American progressive and legal realist, for example, argued in favor of tempering *laissez-faire* contract rights because of their empirical consequences on the enjoyment of equal liberty. The space allotted by CLD to historical circumstance allow it to remain morally individualistic while also rejecting an atomistic conception of social relations. (Tamir, 1996, p. 171; Cohen, 1996, p. 196) Though not the foundation of CLD’s normative order, empirical facts and ontology are not of secondary importance. Indeed, it is only through social reality that citizens can come to articulate their legal rights with any specificity.

Legal rights, therefore, can certainly attach to corporations and other associations – so long as they are consistent with the vindication equal individual worth. (See Sepinwall and Orts, 2015, pp. 2288-92) For example, as Ciepley (2013) notes in his seminal *American Political Science Review* essay, legal rights to asset-lock in, limited liability, and entity shielding can bring “great benefits” to a corporation’s human members. U.S. Constitutional jurisprudence likewise shores up this conclusion. When the U.S. Supreme Court ascribes or delimits rights in the corporate context,

it does so derivatively and on behalf of individual interests. (Blair and Pollman, 2015; Bloch and Lamoreaux, 2017) Further, corporate legal rights need not even mirror the specific individual rights they are intended to protect. (Margalit and Raz, 1990, p. 450)¹¹⁵ For example, a collective right to property (*e.g.*, to buy land) may help vindicate individual religious liberty (providing a place to worship to a church community). Indeed, legal rights come in many shapes and sizes and can even be ascribed to non-human things. Public parks, waterways and animals might also be protected with legal rights consistent with CLD's commitments. But parks, waterways and animals, like corporations, do not have a "right to have rights." Their legal rights rest derivatively on the moral importance of human beings.

The question of corporate legal rights, therefore, should be framed as follows: given CLD's commitment to equal moral worth, what legal rights can citizens claim for business corporations? The answer will very much depend upon the facts at hand. It turns out that making a case for corporate legal rights that respect CLD's commitments will be much easier if they first fulfill some democratic conditions.

Freedom of Association: The *Prima Facie* Case for Corporate Autonomy Rights

The most apparent liberty that might be claimed on behalf of a corporation is the freedom of association. CLD's commitment to equal human worth generally includes this freedom. (Gutmann, 1998; Laborde, 2017; Mill, 1910, p. 75)) It is codified in the European Convention on Human Rights and is generally understood to be included in the U.S. Constitution. (Bloch and

¹¹⁵ Noting that group rights are conceptually connected to the interests of members but also that "such connections are nonreductive and generally indirect." Thus, a group legal right to self-governance can cash out individual interests in dignity or economic prosperity. For an excellent discussion, *see* Sepinwall and Orts, 2015, pp. 88-95.

Lamoreaux, 2017, p. *11).¹¹⁶ For those less committed to discursive democracy, it might also be deduced analytically from CLD's normative commitments, *e.g.*, from Rawls' (1972) original position. Because corporations involve collections of human beings, the freedom of individual association seems an appropriate choice to ground legal protections for corporate activity. Moreover, freedom of association will likely justify many, if not most, of the kinds of legal rights that individuals might want to claim in the context of the business corporation.

Democratic citizens might also find other reasons to ascribe legal autonomy rights to corporations. Citizens might give them independence based upon their service to the stability of constitutional democracy. A separation of economy from the state can work against the centralization of power. As Milton Friedman argued, economic association can act as an important division of power as against a potentially tyrannical state through what Jacob Levy calls "vertical rivalry." (Levy, 2017, p. *6)¹¹⁷ Corporations are, observes Judith Shklar, one way "of limiting the long arm of government and of dividing social power, as well as securing the independence of individuals." (Shklar, 1989, p. 31) History has indeed witnessed the dangers of consolidating state power with economic power. More recently, some corporate actors have deployed their considerable resources to challenge illiberal state action under the Trump Administration. (Sorkin, 2018)¹¹⁸ Some tech companies have similarly resisted controversial state attempts at citizen surveillance. (Patrice, 2017)

¹¹⁶ Although the U.S. Constitution contains no explicit right to association, it is typically understood as including one. *E.g.*, Bloch and Lamoreaux 2017, *11-*12. In dicta, *Pattern Makers League of North America v. NLRB*, 473 U.S. 95 (1985); *NLRB v. Granite State Joint Board, Textile Workers Union*, 409 U.S. 213, 216 (1977).

¹¹⁷ Also arguing that regressive, traditionalist or conservative plural associations may have more motivation to counteract state power than "open access" voluntary associations that adopt a vision of human nature that is individualistic and "modular," in Ernest Gellner's terminology.

¹¹⁸ "In a candid assessment of what's happening in the business world — and perhaps taking a veiled shot at Washington at the same time — Mr. Fink [the CEO of hedge fund giant BlackRock]

Second, widely distributed corporate rights can also divide potentially dangerous power centers within civil society through organizational competition. (Levy, 2017) Competitive product markets ensure that no one firm enjoys monopoly powers that can be used to dominate others. Trade unions can be an “equilibrium of power” against otherwise overweening capitalistic interests. (Leader, 1992, p. 35) Corporate rights can therefore serve to protect not just the underlying liberty rights of their own members, but those of all citizens.

They might also facilitate the provision of public goods and perform essential civic functions. Through corporations and other legal entities, Americans can access education, health care, and legal representation. (Gutmann, 1998, pp. 3, 6; Tsuk, 2005) Denying corporations the protection of legal rights might, as a result, deny citizens the opportunity to enroll in private colleges, benefit from hospital services, and hire a well-resourced law firm.

Finally, corporate legal rights can help devolve public decision-making power away from the state. (Cohen J. L., 2012, loc. 2704-23) Within the corporate context, human beings may have a better chance at determining the conditions of their social existence than they would enjoy as political subjects alone. When people can make at least some choices at the corporate level regarding how they would like to govern their lives together, they need not reach to politics. And so they need not risk majoritarian political decisions that they might find intrusive. (Kelsen, 2007, p. 312)

Each of these justifications can be enlisted by CLDs as they make decisions about the form of legal rights they will ascribe to corporations. None of them, however, purport to set forth a

wrote that he is seeing “many governments failing to prepare for the future, on issues ranging from retirement and infrastructure to automation and worker retraining.” He added, “As a result, society increasingly is turning to the private sector and asking that companies respond to broader societal challenges.”

corporate autonomy right for its own sake. This, only freedom of association can do. It is therefore the freedom upon which this Chapter will focus.

Three Notions of Associational Freedom

Freedom of association can be understood in at least three ways. First, the freedom protects an association of individuals as such (Kateb, 1998) as well as irreducibly social values enjoyed by human beings that would remain vulnerable in a regime of individually ascribed legal rights. Irreducibly social values are empirical circumstances that people can only enjoy while in association or create through associational interaction.¹¹⁹ (E.g., Margalit and Raz, 1999, pp. 448-50; Reaume, 1997) Aligned with “interest” or “benefit” theories of rights, (Muniz-Fraticelli, 2014, p. 219) individuals can enjoy these freedoms simply by joining or remaining members of the group. (Margalit and Raz, 1990; Patten, 2014, p. 95) Legal rights protecting religious self-governance serves as the paradigm here, yet those involved with business corporations may also claim them. (Kateb, 1998, p. 39; Johnson, 2010) As legal scholar Susannah Ripkin (2009, p. 146) observes, “to the extent that so many people spend most of their day working in or interacting with corporate organizations, the corporation represents a value-laden institution that outranks the local community as a focus of loyalty and a medium for self-realization.”¹²⁰ Likewise, sociologists find that people enjoy goods of autonomy and community in the workplace. (Rothschild and Whitt, 1986; Greenberg, 1986) As recounted in Chapter 1, Ferreras (2017, pp. 83-84) finds at least four such goods within economic enterprise: (1) autonomy and self-respect; (2) inclusion in a community; (3) feelings of social usefulness and (4) satisfaction in engaging in compelling or interesting work. Ascribing a legal right to the corporation might protect these human goods.

¹¹⁹ Examples include “participatory” (Reaume, 1997) and other public goods (the good can only be enjoyed by an individual if also produced and enjoyed by others).

¹²⁰ Also Johnson, 2010; cf. Levy, 2014, p. 12.

Second, freedom of association holds that what citizens may do alone, they may also do together. It can therefore also be characterized as a species of CLD's anti-discrimination principle, directing that the state cannot forbid individuals from doing jointly the same freedoms they can enjoy alone unless good reasons exist to treat the group differently. (Leader, 1992, pp. 25, 45) The state, in other words, cannot arbitrarily discriminate against groups pursuing the same kinds of things individuals are free to pursue. It may not, accordingly, impose any unjustified disabilities on those choosing to exercise their regular array of liberties as members of a corporation. (Leader, 1992, p. 47). It is also a second-order freedom, reliant upon other individual liberties exercised in the context of association. (E.g., Dan-Cohen, 2016, p. 66; Blair & Pollman, 2015) For example, Justice Antonin Scalia, in his concurring *Citizens United v. FEC* opinion, observed that "activities are not stripped of First Amendment protections simply because they are carried out under the banner of an artificial legal entity." (558 U.S. 310, 390 (2010)) In further illustration, a corporation specializing in internet services might claim a right of privacy or due process to protect from government search and seizure the confidential information of its customers. (Robinson, 2015, p. 2309) Only the corporation is in the position to shield their interconnected communications.

A third and important notion of associational freedom is instrumental. Members claim it because they seek to exercise their individual liberty by working together towards a specific purpose. Instrumental associational rights therefore often borrow from the logic of Hart's "choice" theory of rights because they afford the group the option of holding others to a duty to respect their collective efforts. (Preda, 2012) Coordinated, instrumental association amplifies individuals' joint efforts and facilitates the achievement of their ends, whatever they might be. (Leader, 1992, p. 27) For example, individuals may better exercise their respective political rights of free speech by pooling their resources and synchronizing their public messaging. Likewise, they may take

advantage of a division of labor and their variety of expertise, thereby making fuller use of their economic freedoms as they work interdependently. (Kukathas, 2007, p. 68) To achieve these goods, protecting their joint enterprise and its fruits with legal rights may be necessary. As illustration, corporate legal rights to personhood, property and contract are necessary before individuals can function collectively as an economic actor. (Winkler, 2012, p. 47; Orts, 2013)

Importantly, none of these associational freedoms are ascribed to the corporation as a distinct moral entity. As explained above, corporations do not enjoy independent moral status under CLD. Freedom of association springs, rather, from the individual liberties claimed by their human members. Accordingly, CLD associational rights are derivative. (Cohen, 2015, p. 208; Blair and Pollman, 2015; Bloch and Lamoreaux, 2017; *see also* Dan-Cohen, 2016, pp. 65-66) It is a right *to* association, not a right *of* the association. That said, CLD recognizes that *legal* rights might be ascribed to the corporation as such – its only requirement is that those legal rights are sensitive to equal human worth, not equal corporate worth.

Unlike religious or cultural organizations, the most common associational rights claimed for business corporations are of the instrumental variety and derive from some other individual autonomy right, *e.g.*, contract, property and other economic rights. Corporate members, exercising their personal autonomy rights, will self-consciously and collectively pursue identifiable purposes like product creation, investment, research, advertising, and, of course, profit generation.

The Agency Condition of Instrumental Associational Rights

Thus, it appears that individuals can invoke freedom of association to protect their corporate activity with legal rights. Indeed, this kind of freedom is implicit in aggregation theories of corporate personhood. But this is not, as aggregation theories might suggest, the end of the analysis. It is just the beginning. At the outset, certain empirical conditions must hold before a

group may exercise an instrumental associational right like a collective right to contract and property. Namely, the group must exhibit or express some kind of collective agency. (Nickel, 1997, p. 249)¹²¹ By agency, I mean that the group is able to act in a purposeful way. If the group cannot act with purpose, it cannot, as a matter of practicality, exercise a legal right whose function is to protect instrumental behavior that benefits human beings in some way. For example, one cannot exercise a property right to transfer an asset unless (1) an asset is selected for sale; (2) a contract is negotiated and agreed; and (3) actions are undertaken to complete the transaction.

Using List and Pettit's (2011, pp. 20, 32) definition, to accomplish the kind of agency required to exercise an instrumental right, the group must have (1) representational states (depicting how things are in the environment); (2) motivational states (depicting how it requires things to be in the environment); and (3) a capacity to process (1) and (2), leading it to intervene suitably in the environment whenever that environment fails to match its motivating state. (*See also* Rovane, 1997; Preda, 2012) Unless the group can form motivations and act on them, it cannot exercise a collective contractual right to enter into agreements with delimited purposes, sell particular assets to identified buyers, or, indeed, take any actions that achieve a specific end through the exercise of a legal right that protects a collective effort. If legal rights protect autonomy by permitting human beings to pursue ends that they purposely choose, as does an instrumental associational legal right, then group agency appears necessary. Indeed, without some kind of

¹²¹ I do not intend to take a position of whether the corporation *is* an agent or acts as an agent only metaphorically. Whether groups can be agents, or whether they can only express indicia of agency, is a matter of some philosophical contention, with many arguing for (*e.g.*, French, 1979; Hess, 2014; List and Pettit, 2014) and against (*e.g.*, Wall, 2000; Ronnegard, 2013) an ontologically real corporate agency. It is sufficient for my purposes that its agency be functional or empirical, *i.e.*, that it express agency by pursuing goals. Regardless, even if corporations are ontological agents, those agents, as explained *supra*, are not entities that carry the same moral worth as the individual within CLDs.

collective intent backed up by rational action, the corporation would involve an assembly of individuals pursuing their own independent ends, resemble a spot market, (Coase, 1937) and therefore be adequately protected by individual legal rights. Pettit (2014) even notes that it is unlikely that members would ever join a corporation unless it could successfully act as an agent that could achieve their shared goals.

Before individuals can claim an instrumental, derivative associational right, therefore, they require the capacity to act with collective purpose, the ability to form and follow through on a collective intention, to make accurate factual representations about the world, and process to them as it goes about achieving a practical agenda. (Pettit, 2014; Rovane, 1997; Preda, 2012) A group agent, furthermore, cannot act and speak for itself. Instead, it can only speak and act through the human beings that comprise it. (May, 1983, p. 73; *N. Assur. Co. v. Rachlin Clothes Shop*, 125 A. 184, 188 (Del. 1924) (Wolcott, C.)) Consequently, it also requires a system of authorization that permits its human delegates to speak and act on its behalf with both outsiders and its own members in their individual capacities. Members must furthermore accept that these delegates speak and act on their behalf, committing themselves to behavior consistent with their speech and action. (Pettit, 2017, p. 19; Hobbes, Ch. 15). And finally, members must recognize each other having the capacity to do this kind of authorizing. (Pettit and List, 2011, p. 35; Nickel, 1997, p. 238)

Importantly, the corporation must possess regulatory norms that permit it to accomplish all of these things. (*E.g.*, French, 1979; Rafanelli, 2017, p. 284) In Kelsen's terminology, the mutual conduct of individuals must be "regulated by an order, a system of norms." (Kelsen, 1945, p. 98) List and Pettit (2011, p. 33), surveying the literature on group agency, note that forming the joint intention necessary to achieve agency requires that group members: (1) have shared goals and intend that they together promote that goal; (2) intend to contribute to the achievement of those

goals; (3) form these intentions at least in part because others are forming them, too; and (4) are commonly aware of each of these three conditions. Notably, the group must have some recognized decision-making procedure that permits individuals to form a joint intention based upon a joint judgment about the state of the environment. It requires an aggregation procedure that somehow combines members' own intentions into a collective intention that is accepted or shared by them. (*Ibid.*, p. 38) Members' mutually interdependent contributions towards that goal, further, requires a coordination mechanism that allocates responsibilities and permits them to recognize their individual actions as mutually interdependent contributions towards that goal. (*Ibid.*, p. 33; Rafanelli, 2017, p. 287) In addition, members must acknowledge and obey a "rule of recognition" that allows a determination of whether any actions taken by the corporation's human delegates are valid for the entire group. (*E.g.*, May, 1983, p. 74) The authorization of delegates, moreover, requires a rule governing membership criteria (Nickel, 1997, p. 240) because is necessary to know not only for whom the delegate acts, but also for those members to accept the delegate's acts as legitimate expressions of the group. For example, according to Philip Pettit (2017, p. 22), the authority of corporate delegates derives

from the fact, long registered in the law, that the other members of the corporation ascribe that authority to them, implicitly or explicitly committing themselves as individuals to rally behind the words of their spokespersons on any relevant issue; they treat those words as expressions of attitude that they have to live up to, on pain of corporate failure, in their actions as corporate members.

To achieve collective agency, corporate members thus must obey a variety of rules: procedures that structure decision-making, responsibility allocation, and authorization.

The Democratic Implications of Agency

The observation that a group agent is a rule-laden institution leads to another condition that must be met before individuals can claim an instrumental associative (corporate) legal right. Namely, these rules and procedures should satisfy some democratic desiderata because it is the individuals' own objectives, their own conceptions of the good, their own liberties, that associational rights are supposed to protect.¹²² (Barry, 2002, p. 148; Benhabib, 2009, pp. 25-26; Pollman, 2016, p. 614) Associational rights will not do the work of cashing out individual liberty if these procedures force members into roles and projects they reject. Their cooperation cannot be coerced, manipulated, or extracted unwillingly. Not, at least, if the collective right must depend on their moral worth. Nor can decision-making processes break down and sever any connection between corporate purposes and actual human objectives. (Bratman, 2017, p. 45) Rather, corporate members must agree, at least to some degree, with corporate action. Only then will an exercise of a corporate right plausibly serve the human beings whose moral worth the law is obliged to respect. As a result, corporations will be more likely to successfully claim associational freedoms if the group agent's decision-making procedures carry democratic credentials. The more voices are incorporated into corporate decision-making and action, the more likely it is that those decisions and actions will vindicate members' individual liberties.

The Democratic Desiderata of Corporate Goal Formation

First, corporate goals should track, at least to some degree, the objectives or interests of corporate members. Otherwise, it becomes difficult to claim that a corporate legal right protecting

¹²² Cf. Rafanelli, 2017, arguing that individuals' willing cooperation is necessary for them to create collective agency as such. My argument does not turn on the ontological status of corporations as moral agents. My more modest point is that decision-making processes must fulfill the desires of all members if the corporation would like to benefit from a right derived from those desires.

corporate purposes is doing human beings any good at all. (Laborde, 2017, p. 184) Accordingly, a decision-making process that severs any connection between the two (*e.g.*, a roll of the dice¹²³), even if recognized and accepted by members as a valid decision-making procedure, is not terribly likely to help vindicate the individual liberties subtending the associational right. (*See* Bratman, 2017, p. 45) On the other hand, if internal decision-making procedures are democratic, corporate purposes are more likely to reflect the objectives, purposes, and interests of members. Members might shape them so that they further their own personal objectives.

To illustrate this first point, consider the case of a corporation exercising religion not on account of members' own objectives, but because of an inherited decision-making procedure. The managers, employees and investors of a butchery business find themselves following old rules, implemented long before they joined the corporation, that require them to deal only in kosher products. None of them care very much about following the prescribed religious tenets. Rather, they each follow the rules mechanically out of path dependence. Given their apathy on the subject, protecting the corporation with a legal religious right to free exercise would not vindicate their own religious liberties. It would not protect the religious liberty of any member at all. Indeed, they might all subscribe to a different faith altogether. The claim to a corporate religious right would, therefore, be stronger if its religious purposes were not set by some ancient charter, but instead by members consciously choosing them through a democratic decision-making mechanism. This is not to argue that a corporate right protecting their activity may never be justified. Perhaps the corporation operates in a neighborhood populated with many people who prefer to buy kosher products. Protecting the corporation's ability to deal in kosher meat might therefore help fulfill the

¹²³ Unless members value such procedures for their own sake, and not for any outcome they tend to produce.

members' *pecuniary* objectives. But the legal right would not be founded on current members' *religious* liberty.

In further illustration, consider a corporation seeking to assert a collective right to free speech by donating money to a political campaign. In order to exercise this right, it must first decide how much to spend, and on whom. Now consider that a CEO makes the decision unilaterally and without regard to the views of either the company's shareholders and employees. Although the donation might be characterized as an activity of a group agent (albeit, according to List and Pettit (2011), a degenerate case)(*see also* Preda, 2012, p. 249; *cf.* Rafanelli, 2017), it is not an activity that can be fairly said to vindicate very many individual freedoms to speech. Indeed, the only individual whose speech interests are enhanced are those of the CEO. (Pollman, 2016, p. 628) This freedom would likely be adequately protected with an individual legal right, a right that, as explained in the sections below, offers less risk of offending the liberties of the workers and investors compelled to carry out its exercise. (Strine, 2016)¹²⁴ The corporation would have a *stronger* claim to a speech right if workers and investors supported its exercise as fulfilling their own autonomy; the right would be protecting more human interests in free speech. This is perhaps why we are more comfortable affording First Amendment protections to corporations like the NAACP, whose members are more likely to embrace its political objectives, than to business corporations, whose diverse membership is less likely to consent.

This is not to say that members must share goals for the same reasons, that the collective decision setting corporate intentions have "integrity." (Dworkin, 1986, Ch. 5) Members of groups need not share exactly the same interests before they may claim associational rights as a corporate

¹²⁴ Chief Justice of the Delaware Supreme Court and widely acknowledged as a corporate law expert.

collective agent. (*E.g.*, Bratman, 2017, p. 40; Muniz-Fraticelli, 2014, p. 196) In fact, “when we undertake to aggregate the views of the group members, it may be logically impossible to line up reasons and outcomes.” (Kornhauser and Sager, 2004, p. 250) Even if members universally support corporate action, they may not agree with the justifications subtending it. Voting motives are often complex in politics, and so will prove to be complex in corporations. (List & Pettit, 2011, p. 63¹²⁵) They are riven with the same polyvocal, multilayered, and sometimes fractured systems of action and signification found in political association. (Benhabib, 2009, p. 25; Cyert & March, 1963) Members join for different reasons – to pursue a vocation, to pay off student loans, to cover household expenses, to follow a dream. Yet they may all assent to a particular exercise of a corporate contract right because it, in some way, fulfills their own unique purposes. Nor is it to say that each member must engage in discourse and consensus-building before they propose and judge group intentions. Approval after-the-fact may suffice. (List and Pettit, p. 38) The corporate agent might even delegate, form and implement sub-intentions shared only by parts of the whole, (Bratman, 2017, p. 47) at least so long as members are able to recognize them as serving the goals of the larger body.

Of course, universal consent for corporate goals is probably impossible, at least if it is to be considered fully rational. Either viewpoints or persons holding those viewpoints must be excluded, or propositions must be made conditional upon one another. (List and Pettit, 2011, ch. 2) To illustrate, and as explained in more detail in Chapter 5, shareholders and executives often have very different ideas not only about how the corporation might maximize its profits, but also

¹²⁵ “[T]he attitudes expressed by members may be driven not – or not only – by their individual judgments or preferences on the propositions in question but by their judgments that it is better for the group to form certain judgments or preferences or by their preferences over what the group should judge or prefer.”

how those profits are to be distributed among the corporation's various constituencies. The problem presented by possibility of intra-corporate minorities is dealt with in some detail below. Yet even minorities may nevertheless agree to a compromise. They may want to be team players, recognizing that they must at least occasionally yield to their fellows if they want to retain the benefits of group membership in future. As a result, it is plausible that even democratic compromise helps to vindicate individual liberties.

Though this associational right has a strong voluntarist flavor, it thus does not involve the fully rational, intentional universal consent imagined by Rousseau. As List and Pettit argue, the relation between collective and individual intent may be so intricate and convoluted that analyzing a group agent using only the tools of methodological individualism may be a fool's errand:

The agency of the group relates in such a complex way to the agency of individuals that we have little chance of tracking the dispositions of the group agent, and of interacting with it as an agent to contest or interrogate, persuade or coerce, if we conceptualize its doings at the individual level... We will fail to see the wood for the trees.

(List & Pettit, 2011, p. 76) Accordingly, the corporate purpose must supervene on individual desires, but it need not – and perhaps can never (Pettit, 2007, p. 184) – do so perfectly. Instead, it is enough that members recognize, accept and pursue the goal as a shared one that fulfills, however indirectly, purposes, values, and interests they embrace. Because if they can, the corporation can make a plausible case that a legal right protecting that goal is vindicating, in some fashion, its members' human worth.

The Democratic Desiderata of Corporate Action

To make a *prima facie* case for associational rights, it is not enough that corporate purposes track member interests. It is therefore not enough that a corporate agent's decision-making

procedures include the voices of members. Some of the rules entailed by the fact of corporate agency entail not goal formation, but instead serve as commands that members perform certain actions in order to fulfill those goals. Recall that an agent, to successfully exercise a right, must not only settle on an idea about how it wants exercise the right, *i.e.*, to adopt a “motivational state.” It must also undertake actions to realize its motivations. If the agent is collective, these actions are distributed amongst its members. Taking action, accordingly, requires procedures allocating various duties and responsibilities between them. If members’ cooperation with such procedures is coerced or manipulated, it becomes difficult to justify the ascription of corporate legal rights based on their individual liberties. On the other hand, if members first have a chance to shape these directives, a corporate legal right is more likely to serve, rather than offend, their equal moral worth.¹²⁶ (Barry, 2002, p. 148; Benhabib, 2009, pp. 25-26; Pollman, 2016, p. 614)

To illustrate the point, consider a corporation that seeks to exercise a right to enter into a contract with a new client. Presume further that all members of the corporate collective agent – managers, investors, workers – helped to shape the goal, approve of the goal, and are willing to do their part to achieve it because it will lead to revenues that can fund salaries and dividends. The CEO, however, directs particular employees, on pain of dismissal, to work 120-hours/week towards this end. Objecting to these onerous demands, the employees nevertheless comply because no other employment opportunities are available. Enforcing the corporate contract right seems to help fulfill these objectors’ admitted purposes, along with those of other corporate members. At the same time, however, it does not do much to vindicate the dissenting workers’ liberty since, if

¹²⁶ *Cf.* Rafanelli, 2017, arguing that individuals’ willing cooperation is necessary for them to create collective agency as such. My argument does not turn on the ontological status of corporations as moral agents. My more modest point is that decision-making processes must fulfill the objectives of members if the corporation would like to benefit from rights derived from them.

they had a choice, they would rather forgo that purpose in favor of another that entailed a lighter workload. The claim to the contract right would be stronger if these overworked employees instead had an opportunity to determine the scope of their job duties.

Notably, this conundrum only arises in the context of collective agency, when decision and action are distributed differentially amongst individuals. When a single person decides to pursue her own goal, she will typically weigh the costs and benefits of pursuing it and amend it as appropriate. If she would like ice cream for dessert, but is loathe to walk a mile to purchase it, she may opt for the less desirable cookies presently sitting in the kitchen pantry. When corporations settle on goals, however, the costs and benefits of achieving them may not be evenly distributed amongst members. (Bowles, Carlin and Stevens, 2017, Ch. 6) As a result of this disjunction, it is important to avoid the assumption that members embrace the burdens entailed by the exercise of a right just because they otherwise desire its benefits. In their view, those burdens may very well cancel out the benefit. Further examination is needed to determine whether protecting such collective decisions with a right does, in fact, cash out the liberties of those upon whom burdens are placed.¹²⁷ (Cf. Cowen, 2017)

The Democratic Desiderata of Corporate Authorization

Finally, the authorization of the corporation's human agents begs the same tangled questions that bedevil democratic political representation. (Orts, 2013, p. 44) Since human delegates must act for the corporation, they have the power to bind the whole against third parties

¹²⁷ This problem also arises in the context of contract. Parties will make tradeoffs, giving up some good in order to receive another. But a contract right does not protect these goods. Instead, it will protect the agreement as such because binding oneself on terms one accepts is an expression of autonomy. It is quite different to argue that the contract is *also* protecting the specific goods identified in its terms. Often, contracts involve *relinquishing* a right to goods. Thus, the "right to work" implied by a labor contract does not protect the disutility of labor as such. Rather, it protects the *decision* of a worker to temporarily relinquish her right to free time in exchange for a wage.

and to direct members' actions. The corporation's internal authorization process must therefore contain some kind of democratic accountability mechanism that ensures that they do not act at cross purposes to group members' own objectives. Otherwise, the transactions into which these delegates enter might reflect nothing so much as their own preferences (Maitland, 2017, p. 117) and so would be better served through a system of individual, rather than collective, legal rights. Furthermore, since members must accept that authorized agents act and speak for the whole, there must be a means for them to recognize this acceptance, *i.e.*, a "rule of recognition" (Nickel, 1997, p. 240) to which they assent. Unless it is voluntarily given, the actions of the delegate are unlikely to vindicate members' individual liberties. For example, a CEO cannot claim a corporate religious right based upon the religious liberties of employees if employees did not authorize her to make such decisions on their behalf.

The Democratic Desiderata of Corporate Membership Rules

Moreover, recall that agency requires clear group membership criteria. (Nickel, 1997, p. 240) If those criteria admit some individuals over the objection of others, it is possible that the benefit brought by the associational right might be undermined for some of its members. (Gutmann, 1998; Kateb, 1998) To illustrate, if the Black Law Student Association starts to admit Caucasian students, some of its members may no longer understand the group as providing support to them as members of the African diaspora and the broader Black community. In a more benign example, those engaging in an accounting software company might object to admitting members whose only skills are in the visual arts and so will undermine their intent to enter into a long-term payroll contract with a client. Here too, then, there are democratic desiderata.

Non-Instrumental Associational Rights and Their Democratic Implications

It is not just instrumental, derivative associational rights that should fulfill democratic desiderata. Although non-instrumental associations may not be group agents, they nevertheless operate under a set of regulatory norms. (Levy, 2014, pp. 36, 71) Members will share behaviorally instrumental beliefs like commitments to religious tenets. (List and Pettit, 2011, p. 32; Patten, 2014, p. 59¹²⁸) Mutually aware of these behaviorally instrumental norms, members will value achieving their respective ends in a community of shared norm-holders. (Cohen, 2015, p. 208; Patten, 2014, pp. 95-96) Perhaps they even understand their personal identity as bound up in these shared norms. Indeed, their collective behavior under behaviorally instrumental norms can amount to a *nomos* community whose rules entail the very good it is that free individuals are enjoying together. (Cohen, 2015, p. 208; Patten, 2014, pp. 95-96) This behaviorally instrumental trait will thus amount to internal group self-determination.

Indeed, all group legal rights seek protection of a group's self-determination, whatever else they require. (Reaume, 1997, pp. 258-59)¹²⁹ It is this internal cooperation, the intersubjective fact of association that yields something that people find valuable, that often cannot be vindicated simply with individual rights and therefore underpins associational freedoms. To illustrate, all group rights, whether derivative, instrumental or otherwise, can be categorized according to the kinds of actors against which they mean to protect. First, theorists often characterize associative rights as rights against the state, or as "self-determination" rights. They protect groups from higher law in favor of the group's own norms and standards. Second, "external" rights address the rights

¹²⁸ To have an identity as a member of a culture means that membership is considered "as a factor in one's practical reasoning in appropriate contexts."

¹²⁹ Arguing that autonomy is integral to the idea of a group right, which is a claim "that the group be allowed to pursue and develop its own practices, norms, ways of doing things even when these do not conform to those of the mainstream majority."

of the group against non-members. They will shield the group from the outside interference of non-state actors. One example is Reaume's (1997) "participatory good," which protects a group practice from third party intervention. Third, "communitarian" rights will hold individual group members to a duty vis-à-vis the group. It will protect group decisions from the objections of dissenters. Yet despite their distinctive targets, each class of rights necessarily involves some amount of internal self-determination. Before asserting their associational rights, group members must always settle on how they would like to behave or what they would like to enjoy. Only then can they compare their desired behavior against the behavior demanded of them by an outsider, a dissident, or the state. At least with regards to this logic, associative rights resemble individual rights. An individual right will protect the autonomy of a person, *i.e.*, the ability to make her own decisions and to act on them – or not. Similarly, a group right will protect the autonomy of a group – the ability to make a decision, through self-determination, and the ability to act on it, or simply to do nothing at all. Indeed, the importance of self-determination, and the decision-making authority that often attends it, leads Muniz-Fraticelli (2014) to argue that these associative rights amount to a jurisdictional dispute between two antagonistic powers: those of the group, and those of the state.

But self-determination, like agency, carries a crucial moral implication. Because rights in CLDs inure to the benefit of individuals, and not to groups as such, the corporate right claimed must vindicate the worth of human individuals. For this to be the case, the necessary internal rules or self-determination of the group must actually be held as a good, or be accepted as facilitative of that good, by group members. (Barry, 2002, p. 148) There needs to be, accordingly, a "freedom to say yes or no." (Habermas, 1994, p. 130) As Laborde (2017, p. 184) puts it, "there must be a fit between the main purpose of the association and the main purpose of its members in associating."

Otherwise, there is no interest for the right to protect, and no reason for the individual to exercise it.

Conclusions

Consequently, corporate legal rights that are supported by associational freedom carry democratic desiderata. Exercising both collective instrumental and self-determination rights entails the operation of norms, rules, and procedures. These norms, rules and procedures might yield collective decision-making that offends members' own notion of the good or bring them no benefit. Indeed, the decision might even harm them. Further, these norms, rules and procedures might oblige members in ways that they would rather avoid, regardless of whether the outcome of corporate goal-formation procedures serves their interests. Democratic mechanisms can help corporations side-step these risks. If their internal rules incorporate the voices of their members, then it is more likely that both corporate decisions and corporate regulations will help vindicate their liberties. As a result, corporations will be able to make a stronger case for legal autonomy rights if their internal governance can claim some democratic credentials.

The Rights of Others: An Affirmative Defense Against Corporate Associational Rights

Thus, democracy can make the case for corporate rights stronger. There is good reason to be concerned about the strength of corporate rights: they often run up against the equal rights and liberties of others – and may give way unless steadied by a formidable foundation. Freedom for the pike is death for the minnows, and the corporation is a very fat pike indeed. Their rights must therefore be carefully tailored to avoid undermining the protections that CLD affords to all citizens equally.

This tailoring is no small task. It requires a fact-intensive analysis of actual individual desires, real-life power disparities, and the social effects of law on-the-books. (*See* Laborde, 2017)

First, a legal right enabling the corporation to act collectively may involve imposing a duty on members to abide by corporate purposes they reject. The state must ensure that this duty does not violate its commitment to uphold equal individual liberty. Second, it's not just group members at risk. When acting as collective agents, corporations often enjoy capacities not available to outsiders. Enforcing the contract rights of a multi-divisional telecommunications giant against one of its frustrated household cellphone customers may yield a very one-sided relationship. Accordingly, the state must ensure that the exercise of corporate rights will not entrench power imbalances in society that are obnoxious to individual autonomy and equality. This may require circumscribing corporate rights in a way that would be inappropriate with regards to an individual. Third, the simple ascription of distinctive legal rights to corporations risks betraying CLD's principles. Not all individuals are members of corporations, and so not all individuals will benefit from corporate legal rights. This presents a challenge to CLD's commitment to political equality.

These risks, and potential ameliorative strategies, are elaborated in the next few sections. In the elaboration, it will become evident that corporations may be able to make a stronger case for a robust array of legal protections if they fulfill democratic desiderata. This is the second way internal corporate democracy can help make a case for corporate legal rights.

The Majority-Minority Problem

First, CLD must ensure that corporate legal rights do not violate the liberties of corporate members. As Charles Taylor (1994, p. 55) observes, the pursuit of "collective goals may require restrictions on the behavior of individuals that may violate their rights." The risk arises because vindicating rights often entails the imposition of correlative duties upon others. (Tamir, 1996, p. 161; Mitnick, 2006, p. 36) To vindicate associational rights, minority dissenters may have to abide by intra-corporate majority decision-making against their will. To illustrate, imagine that some

members of a software development team refuse to sell a jointly developed product to venture capitalists. Others on the team decide to proceed with the transaction over their protest. If the sale holds up in court as a correct vindication of the majority's associational rights, the dissenters' own claim to the property will have been overridden. If the transaction is voided, on the other hand, those of the rest of the team will have been impugned. The hazard grows more acute given the agency requirements of instrumental rights. Exercising them will inevitably involve telling people what to do – whether they like it or not.

A related dilemma arises if decisions are not taken by corporate majorities, but by its authorized agents. Corporate representatives may wield the corporate right in a way that dominates the corporate agent's members whom they govern and in whose name they purport to speak. (Kukathas, 1992; Tamir, 1996, p. 163) If the corporate group, through its human agent, can bind itself as a single legal (corporate) person vis-à-vis others, it will also bind, at least indirectly, its members.¹³⁰ It may well be the case that many members never agreed to such a binding. Compounding the problem, ascribing new corporate legal rights may further empower a human agent that already enjoys many competences and privileges. (Levy, 2014, p. 77) The human agent can exercise the new right in ways that risk even more domination. Rent-seeking provides an illustration of this problem. Corporate officers enjoy command over corporate resources by virtue of their authority within the corporate group agent and a corporate property right. Using this authority, the officers might refuse to share the fruits of those resources with members unless they

¹³⁰ This is a reason why, as argued by Hasnas, 2017; Maitland (2017, pp. 109-10) and Rakoff (2014) criminal liability for corporations as such is unattractive. Any penalties would inevitably fall on human beings, like the corporation's employees, shareholders, and customers, who had little to do with the harmful behavior punished or indeed may even have been its victims. "Corporate punishment necessarily falls indiscriminately on the innocent as well as or, more frequently, in place of the guilty. Corporate punishment is inherently vicarious collective punishment." (Hasnas, 2017, p. 100)

first cough up some form of ransom. (*See ibid.*, p. 76)¹³¹ The ransom demand certainly did not gain the consent of all members. Nor does it inure to the benefit of the corporation as a whole, such that consent might be reasonably imputed. Instead, it goes to line the pockets of corporate executives. Members are nevertheless coerced into playing the game upon pain of dismissal or some other penalty.

These risks suggest that corporate legal rights may very well violate CLD's commitment to equal moral worth by impermissibly invading the rights of minority dissenters and other members of the corporate agent. Democratizing the corporation can, however, alleviate these risks. As explained below, if provided an opportunity to discuss and consent to corporate action, dissenters will be less likely to successfully claim liberty violations. Alternatively, the scope of corporate decision-making could be limited to avoid overstepping the equal autonomy rights of its members.

Reasons to Impose Corporate Rights on Dissenters

As I shall argue, the state, given its normative commitments, may be able to impose duties on dissenters to respect corporate legal rights. My argument, however, is controversial. According to a voluntaristic theory of associational rights, no group may hold its members to a duty to obey. John Locke, for example, famously argued in his *Letter Concerning Toleration* (1689) that obedience to any associational authority must be freely given before the association can claim to vindicate members' religious values. I find this solution, however, to be both unhelpful and incorrect. It is unhelpful because it might undermine collective enterprise generally, and thus radically challenges contemporary economic arrangements. If dissenters' rights are always

¹³¹ Arguing that group leaders, with control over group wealth, can abuse and dominate weaker group members. The problem is not confined, in other words, to business corporations.

enforced against the corporation, they have the power to hold up all corporate activity. This danger was illustrated recently by *Janus v. AFSME* (585 U.S. ____ (2018)), where the U.S. Supreme Court jeopardized public unions by opining that they cannot collect agency fees from members objecting to union speech. It is incorrect because it misunderstands the problematic introduced by liberal rights.

Under liberal theories of group rights, the group right itself derives from the ostensibly *equal* rights of all group members. If a dissenter's cooperation is necessary for the realization of other members' rights, refusing *ab initio* to hold her to a duty would afford her a veto over their liberty rights, creating a tyranny of the minority. As Rainer Baubock (1999, p. 135) puts it, "one would have to make the further claim that individual rights always trump collective ones." Doing so without justification would amount to a violation of equality in favor of the dissenter. To continue the previous example, permitting individual union members to opt-out of union agency fees may undermine the collective labor rights of everybody else through the logic of free-riding.¹³² (Leader, 1992) Presumably, voluntaristic liberals side in favor of the dissenter because they hold that although people may agree to bind themselves in ways that are inconsistent with liberalism's foundational moral schematic, it is not clear that they have any authority to bind others in the same way. Yet, the question remains as to whether the binding can in fact be made consistent with the schematic offered by CLD.

Indeed, there are several kinds of justifications that can be enlisted by citizens considering the problem of corporate minority rights. Many involve democratizing the corporate agent.

¹³² For a discussion, see Jackson, 2018.

Consent to Corporate Authority

First, people might be held to a duty to abide by corporate decision-making if they first consent to corporate authority, if not to the decision itself. Because consent reflects the will of participants, binding them to authority may simply entail the just expectation that they act in accordance with their own choices. (Cowen, 2017) It might reflect a “second order preference” for a life lived under rules despite her extant objections. (Levy, 2014, p. 43) A group member might want to be a good teammate. Or she might agree to authority because she knows her compromise saves transaction costs and so results in greater group and individual benefits. (Kukathas, 2007, p. 220) She might want to be directed by an expert or charismatic leader willing to assume the burdens of leadership. (Cowen, 2017)

There are, however, a few reasons why this justification may not satisfactorily ameliorate the illiberal risk to minorities. First, authorization is not necessarily capacious in its scope. Accordingly, if employees and shareholders do consent to corporate authority, the kinds of decisions they authorize may be more qualified than corporate leaders might like. Agreeing to work for a wage in an “incomplete contract” may not entail consent to robust employer restrictions regarding behavior outside the workplace, the exercise of political and privacy rights, and the like. Indeed, they may consent to very little if most employment and investment opportunities entail submission to some kind of corporate authority. Their cooperation may reflect, rather, resigned acquiescence.¹³³ Second, it might be unreasonable to presume that members consent to authority exercised in an absolute and arbitrary way. (Levy, 2014, p. 48) Third, authority generates power over others. (*Ibid.*, p. 72) Even if that authority is initially accepted by its subjects, the

¹³³ Examination of the moral salience of such “consent” highlights the tension between pluralist and Marxist social/normative theories – a tension that is also relevant to the corporate authority working within capitalist systems. This issue is addressed further in Chapter 5.

compounding growth of its power threatens that it will make decisions inconsistent with their liberty. Legitimizing this authority by offering it as a reason to compel members to obey can only exacerbate the threat. Fourth, holding a member irrevocably to her prior consent amounts to denying her a right to disassociate. It might therefore undermine the autonomy rights implicated in the freedom of association itself. But if consent is not irrevocable, one begs the question. One is forced to consider the conditions under which consent may be legitimately withdrawn.

A stronger argument is that others might have relied to their detriment on her promise to abide by authority. Thus, their own rights might demand that the dissenter play along. This intuition hints at a second reasonable and democratically-inflected solution to minority rights.

Contractarian Solutions

Indeed, much of political theory recognizes the disadvantages of grounding authority on voluntary consent. Accordingly, it confronts directly the problem of whether subjects can be held to a duty to abide by rules even if their willing cooperation remains unavailable. Rather than await unanimous consensus amongst subjects, it offers instead contractarian solutions to rights conflicts. These solutions, once modified for the corporate context, can help democratic citizens confront the dilemma of minority rights as they consider ascribing legal rights to corporations.

Contractarian thinking generally holds that laws are legitimate if distributed in a way that is universally justifiable to a community of moral equals. Thus, community members can be held to duties if they fulfill requirements of generality and reflexivity (the discursive version), reasonability (the Rawlsian variety) or universalized rationality (the Kantian iteration). If corporate decision-making respects this kind of contractarian thinking, it is at least plausible that CLD would not violate its normative commitments if it enforces corporate rights against dissenters. Decisions to exercise corporate rights would not be taken unless the interests of all members were taken into

consideration, or if corporate members first have a chance to articulate ‘fairness’ in their own words and according to their own understandings in a reflexive and reciprocal fashion.

Of course, borrowing from Hegel, corporations are particular and the state is universal. Corporations pursue specific ethical goals that might be forbidden to a state committed to CLD’s norms. As a result, if contractarian thinking is applied unmodified to corporations, they may be unable to remain devoted to their particular purposes. However, it may be possible to modify it to accommodate a corporation’s ethical aims. One assumption of contractarian thinking is that diverse community members recognize themselves as part of a larger social project committed to moral equality. For example, Rawls presumed that individuals are committed to a fair system of social cooperation given reasonable ethical diversity. This assumption can be modified, rendered instead as a community of individuals committed to a fair system of cooperation as they pursue profit-making activities. Indeed, non-state collectivities often possess a “central value” (Newman, 2011) that could be used to modify Rawls’ starting assumptions. And members join associations precisely because they have this value. Using this qualifier, the reasons that must be given to justify duties to obey can diverge from those given for state action. For example, behavior that undermines a shared commitment to profit-making might be policed using justifications that are reasonably acceptable to all, given the shared goal of profit-making. An employee shirking on the job, or an executive spending too much money wining and dining potential clients, could be held to a duty to abide by rules forbidding idleness and lavish business development expenditures – even if the state could not impose such duties on its own.

Another real-life example emerges from U.S. labor law. In closed shop unions, all members must submit to the collective bargaining authority of a single union representative. Their mandatory submission prevents them from free-riding off the benefits earned in collective

bargaining and therefore helps ensure that unions fulfill their primary purpose: the negotiation of strong contracts with employers. This restriction on union members' liberties serves the purpose of the union in an arguably reasonable and justifiable way: it improves the terms of employment for everyone.

The benefit of this solution is that it necessarily considers the rights of each and every group member. Duties must be justified or made reasonably justifiable to all. It also recognizes that the corporation may have rights that at least occasionally trump the subjective desires of dissenters with unreasonable motivations. It likewise recognizes that the dissenter may sometimes win against the corporation if the corporation cannot set forth a sufficiently reasonable, reflexive, or reciprocal justification for its claims. The solution, given its attention to all subjected to corporate rules and action, may therefore satisfy CLD's obligation to respect their equal human worth.

Contractarian solutions nevertheless carry a few drawbacks. First, they fail to explain how a corporation may come to have a central value that might be used to modify the contractarian schematic. If corporate founders set this value, it may ossify and leave no space for corporate members to change that value in the future. On the other hand, if no specific purpose is set, the reasoning might slip back into Rawls' assumption without modification. This slippage might deny members the enjoyment of associational rights meant to help them pursue their particular conceptions of the good. To set a particular corporate purpose, one may therefore be tempted to tally the aims of member majorities and disregarding those of dissenting minorities. This strategy, of course, creates the same kind of problem that it means to resolve.

Republican Solutions

A republican solution premised on the idea of non-domination might also justify holding dissenting members to a duty towards the corporation. Corporate decision-making procedures might be designed to avoid arbitrary outcomes. (List and Pettit, 2011, p. 146) They could, for example, include the separation of powers and judicial review according to commonly accepted impartial and consistent standards. They could involve democratic accountability mechanisms and counter-powers, like unions or co-determination, that encourage and sustain the fair application of these rules. (Estlund, 2018, p. 806) Exit rights, perhaps facilitated to compensate for labor market imperfections like monopsony, can likewise provide republican accountability. (R. Taylor, 2017; Cowen, 2017) This is the solution that the United States seems to have attempted with its New Deal era reforms. These reforms sought to prevent domination within the corporation by facilitating and funding accountability mechanisms, counter-powers and exit opportunities: the Social Security Act, workers compensation laws, the Securities Act, the Wagner Act, *etc.*

Republican solutions have the advantage of accounting for structural market dynamics that other solutions might elide. (Gourevitch, 2013) Further, neo-republican theory would protect corporate decisions taken in rational response to economic conditions, even if they might otherwise violate members' rights, so long as they are not the result of individual idiosyncrasies or abuses of power. It would not therefore hobble business in the interests of troublesome minorities.

Rights-Based Solutions

As another alternative, certain kinds of decisions might be left decisively within the individual's control, weighing her autonomy right over those of other group members only for rights considered intrinsically important to human well-being. (C. Taylor, 1994, p. 57) Margalit and Raz (1990) and Van Dyke (1982), for example, allow for a balancing of competing rights that

accounts for the urgency of the interests at stake. It might reserve to the dissenting individual those rights enumerated in the U.S. Bill of Rights, or rights whose vindication requires her intimate personal knowledge or experience. (List and Pettit, 2011, p. 131) This solution is especially attractive when corporate membership hails from a diverse constituency that is unlikely to achieve the kind of consensus required for contractarian solutions. Indeed, U.S. federal employment law implements an enumerated rights-based answer to the minority problem. Anti-discrimination, safety, and minimum wage legislation protect specific autonomy rights against corporate decision-making. (Estlund, 2018, p. 803)

This solution, however, offers no guidance should the majority wish to exercise a compelling right and can only do so by violating an equally compelling right held by minorities. The state confronts strong but conflicting reasons to vindicate each right. For example, some corporate members might find that a legal mandate directing that corporate resources be spent providing contraceptive medical care to employees violates their religious rights. Meanwhile, employees might find such care part and parcel of their rights to privacy, dignity, and wellbeing. Presuming such rights are rival and equally compelling, we seem to have arrived at an impasse.

Alan Patten (2014), modifying Rawls' "basic proceduralism," suggests a liberal egalitarian bridge over this impasse. He would direct the state to allocate legal rights in a way that ensures fair opportunity of self-determination. (*Ibid.*, p. 125) If a dissenting member's cooperation is necessary for the vindication of the other members' rights, that cooperation cannot be compelled at the expense of her own equal opportunity to self-determine. The state can therefore explore whether any treatment is available that adequately compensates her for her loss of freedom in a kind of "even-handed entanglement" that preserves the state's overall neutrality of treatment amongst rights-holders' rival goods. (*Ibid.*, p. 161) For example, if corporate revenues are used to

lobby for a political cause to which a member objects, she might be given an appropriately prorated amount of funds with which she can lobby for her own cause. (*Ibid.*, p. 162)

One problem with this kind of solution, however, is that it is unclear which goods are “rival” and thus relevant to self-determination. As Laborde (2017) argues, offering neutral treatment between obviously rival goods, like two religious practices, seems straightforward. But it does not provide much guidance when a choice must be made between non-rival goods like ‘mere preferences’ and religion. For example, a religiously motivated business might ask its employees to work on a Saturday rather than on a Friday. An employee, on the other hand, might want to take a beach vacation on the same day. Intuitively, it seems odd to allow the employee the time off, giving her an opportunity to self-determine according to vacation preferences when those preferences do not rise to the same “ethical salience” as does religion. Yet doing otherwise amounts to favoring religion over vacation – a kind of ethical judgment many liberals would forbid the state.

Here, too, a little democracy can help. If allowed to articulate in their own words the goods they hold to be important to their self-determination, corporate members obviate the need for the state to do the judging. While some corporate members may care very deeply that their activities do not violate religious tenets, others may care very deeply, and find it important for their happiness and fulfillment, that they take vacations with their children. Once members have an opportunity to articulate what opportunities to self-determine would look like for them, the state can go about ensuring that these opportunities receive equal treatment. But before the state can do this, it needs information about existing preferences – and this, in turn, requires some procedural mechanism that elicits the relevant information. Patten (2014, p. 147) seems to endorse this kind

of solution when he suggests that a fair opportunity to self-determine must include choices that people actually want.

A Corporation's Outsized Resources

Ascribing legal rights to corporations not only endangers the autonomy and equality rights of dissenting corporate members. Legal rights also enable corporations to aggregate more resources and capacities than they otherwise might enjoy. After all, modern business corporations “owe their character and power to the laws.” (Shklar, 1989, p. 31) Legal devices like limited liability, asset lock-in, and perpetual life facilitate the accumulation of wealth. (Pistor, 2019) Corporations can wield their wealth to dominate and interfere with members and non-members alike. As Jacob Levy (2014, p. 35) observes, corporate decision-making can “become a kind of law outside the state’s control, at least for their members and often for others.” Its choices can shape the lives not only of its shareholders and employees, but also the community members, taxpayers, customers and suppliers who interact with it. Indeed, they need not even make use of their capacities before having a quieting effect on others’ rights. State governments, employees, and customers alike modify their behavior for fear that a corporation might intervene. (List and Pettit, 2011, p. 184) Nor need the danger arise from any nefarious intent. As demonstrated by contemporary social networking scandals surrounding the 2016 U.S. presidential election, a corporation’s decisions regarding product development and marketing, meant to appeal to customers, can re-shape cultures, social interaction, and even democratic political practices in unanticipated and harmful ways.

Given CLD’s normative commitments, it should not enforce corporate legal rights if they will be wielded in a way that exploits these power disparities. Several reasonable strategies can mitigate the risk of such exploitation. First, the state can circumscribe corporate legal rights. It

might, for example, allow corporations to form contracts but delimit their terms to protect the autonomy rights of counterparties. Examples include laws disabling contracts of adhesion, mandatory warranties, and punitive damages for exploitative contractual behavior. Indeed, the state often curtails corporate legal rights to protect the autonomy of those affected by such “externalities.” (Schwarcz, 2016)

The state has a second, less paternalistic option. It may instead require the corporation adopt accountability mechanisms that permit potential victims of corporate exploitation to speak for themselves as to how they would like to be treated. (Richardson, 2003) Examples include labor unions and class-action lawsuits. Thus, here too does corporate democracy come into play.

Special Privileges and Status Inequality

The constitutional liberal democratic state faces at least one more risk when it considers the ascription of corporate legal rights. As Brian Barry (2002, p. 10) argues, group legal rights carry inegalitarian implications. They are rights given to benefit group members, but not to those uninvolved in any group. It is not obvious that some people, simply because they associate, merit more rights than those who do not. (Hussain, 2017, p. 67)

Furthermore, not everyone enjoys equal opportunity to create and join an association. Jacob Levy (2014, p. 47) observes that once historical groups colonize social space, it becomes less available for new and different groups to enter. First-mover advantages mean that individuals enter a social world already occupied by established corporations and can only with difficulty establish equally beneficial competitor institutions. Arguably, lawmakers’ historical ascription of corporate rights to investment-based economic associations crowded out worker cooperatives. (Bloch and Lamoreaux, 2017; Roy, 1997) Individuals who might like to join such associations thus lost out to their capitalist neighbors. Kukathas (2007) elaborates on this conundrum, concluding that

ascribing corporate rights to a particular group will also “restrict[] the opportunity of minorities within the group to shape the... community, whether directly or through its interaction with those outside the group.” (2007, pp. 88-89) Group legal rights may “juridify” the corporation as an agent with a fixed array of offices and responsibilities. (Pettit, 2017, p. 16) Under existing corporate law, for example, directors and shareholders can shape bylaws and charters to restrict membership and delimit corporate purposes. These structures persist over time, not only screening out future participants but also their changing interests.

Further, the equal distribution of associational freedom requires not only the availability of a group appealing to the individual, (*see* Kymlicka, 2016)¹³⁴ but also that the group permit her entry. The danger to equal liberty compounds when denial of entry closes the door to other individual rights. If a minimum income is an essential right, and the only income available is through employment with a corporation, affording the corporation rights to exclude may amount to a liberty violation. (Gutmann, 1998, p. 7)

To alleviate the dangers posed to political equality, CLD has several resources at its disposal. Inspired by liberal multiculturalism, some solutions aim at neutralizing corporate rights’ unequal effect. (*See, e.g.,* Galston, 2002; Patten, 2014) First, group rights can be made available to any and all comers, not just the financially privileged and historical first-movers. Most states have promulgated, for example, general incorporation statutes permitting corporate formation upon the payment of a modest fee. The Delaware Department of State even provides user-friendly instructions, prepared forms, and template bylaws to enable the democratic distribution of corporate rights. Nevertheless, formal availability of corporate legal rights only mitigates, but does

¹³⁴ A secure “cultural setting” for individual choice must be available when it comes to associational freedoms.

not eliminate, the problem. The state can ease the inequalities of first-mover advantages through public investments, grants, and other methods of “even-handed entanglement” (Callan, 2016, p. 45; Patten, 2014) with economic life. Second, corporate rights might be shaped to enhance the autonomy enjoyed by all citizens, thus softening some of their inegalitarian implications. For example, corporations might be taxed in order to provide social benefits like healthcare, housing (see Wakabayashi, 2019) and retirement funding to those who cannot enjoy the benefits of membership. Not everyone, after all, can enjoy the pecuniary rewards that come with membership at Google or Goldman Sachs, firms that pay out a wage premium. (Song, Price, Gevenen, Bloom, & von Wachter, 2018) But Google and Goldman Sachs can dampen this inequality by funding public goods demanded by citizens. At the very least, the state could forbid members of these from forcing people out of the group, via outsourcing and contracting, precisely in order to raise their own pay. (Dube & Kaplan, 2010) The more capacious the scope of liberties the corporate right promises to vindicate, the proportionally less violations of political equality may obtain.

Internal corporate democracy can also assuage the concern that corporate rights may crystallize *status quo* corporate purposes and decision-making procedures at the expense of the equal liberties of future members. If democratized, corporations can ensure their duration only by “convincing those whose personality structures they shape, that is, by motivating them to appropriate productively and continue their traditions.” (Habermas, 1994, p. 130)

Implementing The Democratic Conditions of Associational Freedoms

Exercising corporate associational rights, then, appears to be a daunting and context-sensitive endeavor. (See Pollman, 2016, p. 602) Where and when legal rights are appropriate for groups will depend crucially on empirical circumstances that require investigation. (Pollman, 2016, p. 602) Indeed, group rights are often specific to the “distinctive identities and needs,”

(Kymlicka, 2001, p. 42) and create policy-making headaches. But if my argument holds, it will only aggravate the malady. A judge, before enforcing a run-of-the mill corporate contract in court, might find herself having to take a straw poll of each and every corporate investor, worker, and manager before she can verify that the contract right does, in fact, track their objectives and interests. Litigants might find themselves facing onerous pleading requirements proving up the corporations' democratic credentials, akin to class action complaints, just to scrap and sell old equipment for parts. They might then find themselves scrutinizing society as a whole for possible harms to outsiders' equal rights and liberties. There are, fortunately, several reasons that soften this otherwise alarming conjecture.

First, in many cases, it may not be necessary to ascribe legal protections to the corporation. (Bloch & Lamoreaux, 2017, p. *6)¹³⁵ *Laissez-faire* was and remains an effective rights-enabling mechanism. All the state must usually do to vindicate associational freedoms is refuse to intervene. Indeed, a successful claim to an associational right generally means that the state should not interfere with the association unless it has a justification to do so based upon its normative commitments. In fact, Chandran Kukathas makes the emancipatory case for this kind of "benign neglect" in *The Liberal Archipelago*. Instead, as with any other legal right, protective and facilitative laws are appropriate when actual conflicts arise regarding the proper parameters of competing or overlapping rights claims. (Barry, 2002) As Jean Cohen (2012, loc. 1829) shows, law is a "meta-language" that solves these claims according to the state's various normative commitments. To put the point in Hohfeldian terms, human beings enjoy a privilege to do anything that the law does not explicitly forbid. Only when this privilege to associate runs up against a

¹³⁵ "Being deprived of corporate rights did not mean that such associations could not exist or, in some cases, even thrive. American citizens were remarkably free as individuals to create or join organizations of mot types without having to hide from the government."

conflicting privilege, right or immunity does it make sense for the state to create for the group, through law, claim-rights and immunities, and the corresponding liabilities and duties of non-interference. Thus, for example, no law is usually necessary to protect the liberty of a group of friends to go to the movies together. Not, at least, unless a theater manager attempts to bar their entry. And once the state does intervene, parties may then self-order according to the law's requirements but without direct state supervision. (Pistor, 2019)

Regardless, as proof of concept, a large part of the law already incorporates some democracy without immobilizing either capitalism or the courts. Delaware corporate law, elaborated by U.S. securities law, requires informed majority shareholder consent for mergers and sales of significant corporate assets. (8 *Del. C.* §§ 251(c), 271(a); 15 *U.S.C.* § 78(n)) Similarly, unions often require membership approval of collectively bargained employment contracts. Shareholders must also democratically approve changes to the corporate charters which delimit corporate purposes and distribute voting rights. (8 *Del. C.* § 241(b))

Second, in making this case for corporate democracy, I do not mean to argue that *all* decision-making within the corporation should involve direct, participatory democracy. Nor, given the market constraints, would members desire such a cumbersome limitation. Direct democracy re-introduces the transaction costs that hierarchical firm structures promise their members to avoid. (Coase, 1937; Rock and Wachter, 1996, p. 1935; Singer, 2018) As further explored in Chapter 5, members might instead value non-democratic decision-making procedures because of their tendency to advance desired aims.¹³⁶ For example, corporate members may accept the recommendations of a computer algorithm or an appointed expert regarding the deployment of resources because doing so increases corporate profits. Nevertheless, a democratic procedure that

¹³⁶ *E.g.*, Rawls' "perfect procedural justice."

both registers the desire for profits and vouchsafes the decision maker's accountability to this desire would ensure that their use tracks members' actual interests. Indeed, the law already requires not only director elections but also, to enable an informed vote, the regular publication of corporate information. (*Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 279 (Del. 1977); 12 C.F.R. Pt. 11)

Delaware law, to give another practicable, real-life suggestion, provides *post-hoc* judicial review for members unhappy with decisions taken by corporate directors and officers. (*Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)) It thus provides *post-hoc* accountability in lieu of decision-making bottlenecks. Members' complaints may include claims that corporate officers acted beyond permissible corporate purposes, or were "ultra vires," at least as set forth in the corporate charter. They can claim that directors violated the legal fiduciary duties that require that they govern the entity according to collective interests.¹³⁷ They might argue that, for example, leaders entered into wasteful transactions that squandered shareholders' investments. They might also include claims that corporate leaders acted in a self-interested manner and at the expense of members' common good. (*E.g., Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984))

A reasonably available exit option, furthermore, might satisfactorily proxy member voice provided there is an acceptable array of exit options (Barry 2002, 149; Shapiro, 1999) and transparency in corporate decision-making. (Anderson, 2017, p. 59; Barry, 2002, p. 149; Strine, 2016¹³⁸; Galston, 1995) The degree of exit availability, however, is important. (Barry, 2002, pp. 149-52) It easy to argue that an employee burdened by a non-compete clause does not consent to

¹³⁷ *But see* Tamir (1996, p. 161), arguing that leaders might also be motivated, because of their legal fiduciary duties, to guarantee the existence of the corporation even when members grow indifferent and hostile to it. This outcome would offend the associational freedoms underpinning the legal corporate right.

¹³⁸ Also noting that the vast majority of shareholders, beneficiaries of institutional investors, are never adequately informed.

corporate purposes, at least when compared to a worker is not so encumbered. The unencumbered worker is more likely to quit the enterprise when she encounters corporate behavior that she finds contrary to her own purposes. It is even easier to presume the accord of a shareholder of a public company whose equity is relatively liquid. Exit requires perhaps a phone call to a broker and a marginal loss to her initial investment.¹³⁹ (Shapiro, 1999) Furthermore, easily available exit options cannot serve as reliable evidence of consent if they do not offer meaningfully different experiences. (Anderson 2017, 59; Barry 2002, 149, Kukathas 1992; Estlund 2018, 799) For example, a worker cannot be presumed to consent to workplace sexual harassment policies if all alternative employers institute similar policies.

Despite these streamlined options, direct democratic approval may nevertheless be required before a corporation's authorized agent can exercise a corporate right in a manner significantly related to members' primary interest in the corporation. For example, Delaware corporate law, elaborated by U.S. securities law, requires informed majority shareholder consent for mergers and sales of significant corporate assets. (8 *Del. C.* §§ 251(c), 271(a); 15 *U.S.C.* § 78(n)) Because shareholders are (presumably) primarily interested in the corporation as an investment, a person-by-person roll-call is necessary before they can be forced to relinquish any future hope of profits.¹⁴⁰ Similarly, unions often require membership approval of collectively

¹³⁹ Shareholders, of course, also face costs associated with information gathering. They cannot be presumed to agree to corporate purposes of which they are unaware. Becoming aware, in turn, might require an unreasonable amount of time and resources.

¹⁴⁰ Shareholder franchise rights, of course, do not include non-shareholding employees who arguably have equal or greater "residual claims" to ongoing corporate profitability. (Blair and Stout, 1999) They are also distributed in the U.S. on a "one share, one vote" basis. Many objections based upon the idea of equal individual moral worth can be lodged against this voting procedure. It affords rights based upon the amount of pecuniary investment while ignoring both the contributions of workers as well as the disproportionate impact the decision may have on them. Thus, I include it for illustrative purposes only, showing that internal corporate democracy is both

bargained employment contracts, often the *raison d'être* of unionization. Member referenda may also be appropriate when internal decision-making procedures are at stake. Amendments may impact members' ability to consent to such existential questions. To illustrate, shareholders must approve changes to corporate charters which delimit corporate purposes and distribute voting rights. (8 *Del. C.* § 241(b))

But even this heavy task of proving up a corporation's democratic credentials would be made lighter if corporations first incorporated democratic institutions into everyday decision making. It could adopt a constitution, bylaws and other norms that not only identify the members whose liberties subtend the rights claim, but also consider their intentions in collective decision-making. As a result, the state need only check whether such procedures are in place and functioning adequately.

The Bifurcated Corporate *Demos*

Ascribing legal corporate associational rights thus generates many obstacles to CLD's commitment to equal human worth. Despite their democratic credentials, corporate associational rights might run roughshod over dissenting corporate minorities and outsiders alike. Corporate rights also present a challenge to CLD's commitment to political equality because they necessarily benefit some but not others. As described above, however, democratic and rights-based mechanisms can mitigate many of these perils. It can therefore make it more likely that a corporation can successfully assert a legal autonomy right without running afoul of CLD's commitments to equal human worth.

feasible and not so cumbersome so as to prevent productive business activity. I thank an anonymous reviewer for making this point clear.

Before moving on, the issue of group membership, briefly touched on above, merits some further reflection. The issue carries implications beyond the impact that a group agent's particular membership rules might have on members' enjoyment of their associational rights. If the associational right is meant to vindicate the liberties of individual members, it seems necessary to first determine who, exactly, those members are. In other words, associational rights, like democracy, prompts the question of borders. (Näsström, 2011) As I shall argue below, while identifying this population is necessary, it is not a task that CLD should undertake on its own initiative. Instead, it should wait until members identify themselves by claiming an associational right. Then, and only then, should it evaluate its claim according to its normative commitments, *i.e.*, for its democratic desiderata. Second, it is also necessary to determine the identity of those who might be harmed by the right claimed. This is the population that may be able assert an affirmative defense to the corporation's *prima facie* case for associational rights. As explained in the previous section, the fate of this population may provide reasons for CLD to temper and constrain corporate rights. As a result, there is not one, but two populations that help shape the form of corporate legal rights.

Why Membership Matters

First, the identity of who counts, and who does not, when the corporation makes its *prima facie* case may not only change the shape of the right claimed, but also how it will be exercised. This is especially the case for group legal rights that carry democratic conditions like the theory of corporate legal rights offered here. A dinner party may jointly agree to dine at a steakhouse if their vegetarian friend is unavailable. If the friend does tag along, however, the group may instead select an Indian restaurant. Similarly, a corporation might exercise its property and contract rights to sell its assets to another company if the population making the decision consists of shareholders alone.

If workers facing the threat of redundancy are included, though, these rights will likely be exercised in an altogether different manner.

Who counts, and who does not, when CLD goes about constraining corporate associational autonomy will likewise help shape the contours of corporate legal rights. If consumers' interest in affordable lifesaving drugs counts, then a corporate right to property might be limited, for example, by state-mandated price controls. If workers do not count, on the other hand, a corporate legal right to contract might remain unmolested from minimum wage legislation.

Unsatisfying Membership Criteria

Unfortunately, liberalism is notoriously bad at drawing political boundaries. Once people merit rights, it becomes difficult to argue that only “insiders” may claim them. (Walzer, 1984) Rights are meant to be universal, to be claimed by all equally. And so the proposition that some ought to be included in an associational right, while others ought to be excluded, fits awkwardly into rights discourse. Yet refusing to draw boundaries at all risks an alarming kind of cosmopolitanism that would repress democratic decision-making and associational freedom. As political theorists have concluded,¹⁴¹ however, democratizing the decision over boundaries provides little relief. Rather, it presents a problem of infinite regress: which population is to vote on the inclusion rules? Which population is to vote on the inclusion rules for the population to vote on the inclusion rules? It “assumes beforehand,” as Näsström (2011) observes, “the very issue that is under consideration.” It posits, as Rousseau once noted, a population that must paradoxically exist prior to itself. But borders must nevertheless be drawn. No group decision can ever be taken

¹⁴¹ See, e.g., Honig, 2007; Mouffe, 2000.

unless and until a specific population comes together to determine how they would collectively like to exercise their rights. (*See* Cohen, 2008; Sepinwall and Orts, 2015, p. 2317)

In answering this question, it is tempting to refer to social ontology while invoking “thick communitarian and republican” conceptions of membership. (Benhabib, 2002, p. 153) For example, Margalit & Raz (1990) would draw political borders around historical characteristics: “peoples” or “nations,” understood as groups that already share common characters and cultures and mutually recognize each other as members who value their membership. Such criteria may, of course, exclude immigrants and minorities from citizenship and thereby deprive them of their “right to have rights.” Often, these borders are themselves products of injustice: conquest and occupation. Further, they might deny associational autonomy to those groups whose internal diversity prevents them from sharing any obviously important cultural characteristics or interests. It is therefore obnoxious to many proponents of CLD.

Similarly, when it comes to corporations, because we have preconceived notions of what a corporation “is,” we draw borders based upon them. Those holding on to a 19th century understanding of the corporation as an “aggregation of property owners,” for example, will erect the boundary around shareholders alone. Those favoring a real entity theory might possess a more expansive frontier, including workers and other stakeholders whose involvement with the group inform its “inner life.” Nexus-of-contact theory, for its part, draws no boundaries at all because it sees the entire world as a web of individualized agreements. (Jensen & Meckling, 1976, p. 311; Fama, 1980, p. 289) It shares an ironic similarity with some Marxists, who see the corporation as the “legal embodiment of capital” distinct from any human participant. (Barkan, 2013, p. 57) Recently, sociologist Ferreras (2017) imagines the corporation as a two-body entity, bifurcating the corporation into “bodies” of shareholders and labor while keeping the two ontologically

separate. Like theories of political membership, this kind of line-drawing will either prevent some from enjoying associational freedoms or force others to compromise their associational freedoms for the sake of those they would rather avoid. They might respect borders whose provenance was the result not of individual liberty, but of injustice.¹⁴² Or they might deny collective autonomy altogether.

Regardless, as explained earlier, CLD does not ascribe moral standing based upon such ontologies. CLD is committed to normative, not ontological, individualism. Its laws are oriented around protecting equal human worth, no matter the historical social formations into which human beings arrange themselves. Its task, then, is to vindicate equal liberty while remaining noncommittal regarding any particular social ontology. It starts with norms, not facts. In this way, CLD can remain responsive to the ever-shifting circumstances that will change the extent to which individuals enjoy their equal liberties. As explained using the dinner party example, the identity of corporate membership will help shape any associational right claimed. If CLD approaches the problem based upon preconceived notions of membership, it would thus be ascribing a group right based upon ontology, not the principle of equal moral worth. Preemptively counting some people in and count some people out, it would thus efface the rights and liberties of many whom it is tasked to protect.

Some business corporations like Patagonia, for example, possess internal governance institutions that explicitly incorporate employee feedback.¹⁴³ To presume as a matter of argumentative fiat that any associational rights asserted by Patagonia *cannot* include the interests

¹⁴² For example, presuming that shareholders are owners, and that a corporation is property, may amount to an illegitimate claim to govern based upon property rights. (See Walzer, 1984, p. 301)

¹⁴³ See <https://www.patagonia.com/blog/2018/11/giving-workers-more-of-a-voice/>.

of these workers would amount to denying workers their associational freedoms without justification. The example is not a one-off. Business often expresses divergent ideas about how they place their organizational boundaries. (Davis, Diekmann, & Tinsley, 1994, p. 551; Dow, 2003) Parsons, Inc., a large multinational engineering firm, is not the only corporation with an Employee Stock Option Plan that staffs itself with employee-shareholders carrying franchise rights. Law firms are likewise owed and governed by many of their workers. Before the 1970s, corporate leaders understood shareholders as outsiders, “barbarians at the gate.” (*Ibid.*, p. 555; Parsons, 2016) Now, many believe these once-barbarians are card-carrying citizens of the corporate republic. (Strine, Jr., 2007) Yet other corporations, like Columbia University, have no shareholders at all and instead raise funds using debt and retained earnings. (Blair, 1995, p. 39) Meanwhile, shareholders themselves may sort into different constituencies with conflicting rights claims. (Orts, 2013, p. 26) Some of these conflicts even make their way to the courts through derivative litigation.

CLD must be able to entertain the possibility that each vision of corporate membership is true. After all, corporate legal rights generally work to the benefit of many diverse constituencies. It is therefore plausible that they will assert these rights together in association. Shareholders do not pool their capital simply for its own sake. Instead, they expect to deploy their capital productively by hiring workers and managers. Their purpose in partaking in corporate organization, in other words, is precisely to engage in a cooperative effort with workers. Workers, for their part, likewise join the corporate organization to engage in that very same productive effort by contributing their labor. This “team” effort can be protected with a legal (corporate) right. To illustrate, a venture capitalist might provide funding to a group of software engineers developing a new smartphone application. In this case, ascribing a legal corporate property right protecting

the smartphone application vindicates the interests of each participant. Selling the application would allow the capitalist a return on her investment and while creating the revenues required to pay engineers for their work. They may therefore decide to assert the corporate right together.

The Two-Part Corporate Population

But this does not mean that CLD cannot enlist *any* criteria when it comes to determining the corporate *demos*. It just cannot apply these criteria right off the bat. Instead, it must respond in a principled manner to particular claims to associational freedom. Its response, as shown below, will involve two distinct corporate populations. First, the CLD state must wait until a particular assembly of corporate members make their *prima facie* case for an associational right. Then, CLD must consider whether this claim to associational liberty does, in fact, vindicate the liberties of members consistent with equal moral worth – including whether any membership rules vitiate or enable individual members' enjoyment of their own liberties. Finally, CLD must determine whether the right runs afoul of the equal rights and liberties of those who do not benefit from and, in fact, may be harmed by, the associational right. In other words, the two corporate populations track, respectively, the *prima facie* case for corporate associational rights and the affirmative defenses that can be lodged against it.

Recall from earlier Chapters that the question of corporate legal rights should begin with norms and then apply those norms to the facts at hand. Here, the facts at hand consist of actual individuals who have already (1) combined together in association; and (2) claimed an associational right that might (3) impact others' enjoyment of equal liberties. Once confronted with these facts, the state can consider whether that association merits the protection of a legal right by, amongst other things, determining whether its collective agency and self-determination carries democratic credentials and whether it impermissibly infringes upon the equal rights of others.

The First Corporate Demos

Consider a CEO claiming a speech right on behalf of shareholders by making a donation to a political campaign. In this case, the collective right implicates the speech rights of shareholders alone while excluding employees. CLD will therefore look for democratic desiderata between the CEO and the shareholders while ignoring, at least for the time being, the impact the right may have on the equal liberties of workers and any others who might be impacted. As a result, the corporate speech right will be subtended by the political liberties of shareholders who assent to the exercise of the right – but none others.

The rights of these others are not, however, irrelevant. First, the right can be made more or less compelling depending upon how many shareholders have signed on to the donation. Second, as explained above, the rights carried by them may provide good reason to circumscribe the corporate associational right claimed. The company's workers may be suffering from coercion and domination. Certainly, their rights and liberties would not subtend the corporate speech right if their assent to this donation was given only grudgingly. If a corporate executive can only secure the cooperation of others through the crack of the whip, there may be no case for a *corporate* legal right whatsoever. Instead, the right is more properly described as personal to the CEO. Furthermore, if the corporate property (also a legal right) to be used in the donation is supported not by the liberties of shareholders alone, but by a broader corporate constituency,¹⁴⁴ CLD may likewise counsel against ascribing the corporate speech right. It might amount to theft rather than

¹⁴⁴ As argued in Chapter 1, whether something is property is a normative conclusion and not an assumption. It is possible, therefore, that a corporate property right is ascribed because it cashes out the liberties of both workers and shareholders. For example, it could be argued that because both workers and shareholders bear residual risk of firm failure, both ought to be able to claim a corporate property right. It is also possible that it is ascribed to cash out the liberties of shareholders alone. I remain agnostic about either possibility.

the vindication of associational political liberties. Corporations therefore have an incentive to include these workers in their decision-making about how they would like to exercise their associational rights. But they play no part in the *prima facie* case for corporate legal rights. Rather, they assume the role of affirmative defense and, as explained below, will help comprise the second part of the bifurcated corporate *demos*.

To be sure, this definition does not necessarily overlap with the membership roster of the collective agent undertaking the actions necessary to exercise the speech right.¹⁴⁵ It is possible that workers obey the CEOs commands apathetically or reluctantly. Perhaps they embrace different political ideologies and support different candidates. They might believe that a business corporation has no business donating to political campaigns at all. Nevertheless, as members of the corporate agent, they are subject to its internal normative ordering and undertake the activities required to effect the campaign contribution. In Walzer's words, workers are "participants in the enterprise," "bound by the rules" that coordinate each member's respective efforts. (1984, p. 293) For a corporate associational right to be exercised, workers will necessarily be conscripted into service. Without assenting to this conscription, the right may very well run up against their rights and liberties. Likewise if her consent is given under coercive circumstances. Furthermore, if a worker continuously finds herself in the position of having to help instantiate other people's rights while never enjoying an opportunity to exercise her own, her status may devolve into that of *metic*. It may therefore betray CLD's commitment to political equality. Thus, many workers and other

¹⁴⁵ A similar argument is made by Preda (2012, p. 250) in the distribution of individual member responsibility for actions ascribed to the corporation. Whether or not individuals should be held liable for corporate harms entails an analysis separate and distinct from the analysis ascribing corporate liability.

members of the corporate agent are certainly *affected* by the corporate decision. And so they will be included in the second corporate *demos*, discussed below.

Many may balk at this constrained definition of the corporation's first population. It conjures Schumpeter's blasé attitude about defining the democratic people because it "leav[es] it to every *populus* to define himself." (Schumpeter, 2003[1941]) Assigning the question to particular communities may yield uncomfortable results. Citizenship criteria may exclude women, slaves, metics, racial and cultural minorities, and refugees. It might even permit one-party democracies to call themselves democratic so long as their single party possesses democratic decision-making institutions. (Dahl, 1991) After all, in CLD, citizens are supposed to enjoy an equal right to participate in the rules that bind them. Thus, in regards to economic organizations, Dahl (1985) posits an equal right to participate in collective workplace rulemaking as a fundamental moral right derived from (1) the moral equality of human beings who are both equally qualified to make decisions and entitled to be the final judge of their own interests; and (2) the need for making collective decisions. Dahl also presumes (3) that "binding collective decisions ought to be made only by persons who are subject to decisions." (Dahl, 1985, p. 57) Assuming that the normative ordering of the corporate group agent indeed consists of binding rules, it may thus seem right that the disgruntled workers described above ought to be included in the decision-making that leads to the exercise of the corporate speech right. Indeed, Ellerman (1990, p. 71) rehearses Dahl's argument as the "Democratic Principle," which holds that all those governed by the corporation ought also to have a voice in that governance. (*See also* Gould, 2002, pp. 12-13)

This "all-subjected" (Näsström, 2011) theory, however, carries its own problems. First, it excludes those not directly targeted, or "governed," by collective rulemaking but nevertheless harmed by it. A corporate decision to open up a new coal-fire power plant could very well include

the voices of the shareholders and workers subject to the rules required to implement it. But it will exclude the voices of the community members and consumers who might be harmed by the new plant's pollution. Second, the presumption that "binding collective decisions ought to be made by those subject to decisions" begs the question: why? The answer usually comes in the form of an abstract right: excluding people from decision-making would violate their equal status as human beings carrying the same moral worth as those privileged to participate in rule. It is not clear, however, that forbidding people participation rights in an intermediate association, like a corporation, violates their equal moral worth. Indeed, authorities might be appointed for reasons that respect equal human worth, *e.g.*, based on merit; because their expertise enables the group to better pursue its members' good, *etc.* Meanwhile, the governed members may enjoy so many other rights and privileges that this exclusion does not amount to a status inequality more generally.¹⁴⁶ This points to a third objection, elaborated in more detail in the next Chapter. The principle makes an inappropriate analogy between the business enterprise and the state. In CLD, citizens must be able to see themselves as the co-equal authors of the laws that bind them because this is required for the state to maintain legitimate sovereignty. State laws are binding not only in terms of their coerciveness, but also in terms of their moral authority. Corporations do not claim this moral authority. And even if they do (*e.g.*, a religious corporation), obeying decisions made by authorities may comprise the very good members seek in association. (Cohen, 2015; Levy, 2014)

¹⁴⁶ Here, Ypi's (2012) notion of permissive rights may be relevant. Permissive rights are those rights that "justify actions incompatible with principles of right, subject to a commitment to bring about states of affairs which realize the idea of equal freedom, and for as long as principles of right are not in place. A similar way of putting the question implies that it might be possible that, at T1, an action is incompatible with principles of right but justified because it is the only way through which those principles could be realized." (p. 290)

Recent political theory has thus turned to the all-affected principle for border-drawing guidance. (Näsström, 2011) The idea here is that borders should follow power relationships, not membership criteria. (Shapiro, 1999, p. 38) Those impacted by collective governance should be included in collective decision-making regardless of whether they helped form and were specifically targeted by collective decisions. Otherwise, there is a risk of exploitation and domination. This principle has also been extended to the question of corporate constituencies. Ellerman (1990, p. 71) describes an “Affected Interests Principle” whereby “[e]veryone whose rightful interests are affected by an organization's decisions should have a right of indirect control (e.g. a collective or perhaps individual veto) to constrain those decisions.” (*Ibid.*, p. 47) Similarly, many “stakeholder” theories of corporate governance rely on some variation of the all-affected principle when they argue for the inclusion of all those whose interests might be impacted by corporate decision-making. (Moriarty, 2014, p. 829; Millon, 1990, p. 227)

As Kukathas (2007, p. 157) points out, not only is this principle indeterminate and onerous to implement, (*see also* Gould, 2002, p. 9; Millon, 1990, p. 259) but it can also result in a substantial loss of autonomy for those claiming associational freedoms. Business might claim a voice in union governance; consumers might claim a right to indigenous governance; and foreign farmers might claim a voice in domestic agricultural policy. It therefore should be applied discriminately, with attention to the relative power disparities, opportunities and structural advantages available to the affecting actor and the affected subject.

It is important to note, however, that the idea of self-rule under the all-affected principle is understood not in a positive and associational sense, but in a *negative* and reactive sense. (Näsström, 2011) It holds that individuals should be able to control or constrain decision-making that is *already taking place*. It is thus inconsistent with the Rousseauvian, communitarian intuitions

that drive associational rights. The point is not to enable more participation when it comes to forming a voluntaristic *volonté générale*. Rather, the point is instead to ensure that the collective will, whatever it may be, does not undermine their freedoms.

The Second Corporate Demos

This is precisely the function CLD will fulfill as it turns to the second corporate *demos*. This *demos* consists of those whom corporation associational rights may harm. It may include members of the corporate collective agent. It may also include “outsiders,” consumers, taxpayers, and community members whose equal liberties are vulnerable to corporate action. By ensuring the decision already taking place – the decision supporting the corporation’s *prima facie* case for associational rights – does not dominate or coerce those subject to it, CLD can reap the benefits provided by the all-affected principle without being overly invasive of associational autonomy. As described above, this second corporate *demos* might be protected via rights-based, republican, and contractarian mechanisms that purport not to sound the associational voice, but only to moderate its tone, timbre and tempo.

The Plausibility of the Solution

This two-part, responsive and flexible solution to the question of corporate membership should not appear overly eccentric to political theorists. First, the law governing corporations already defines it in this flexible and context-sensitive way. As Orts (2013, p. 223) notes, in the eyes of the law, “the boundaries of the firm depend on the question asked and the purpose of asking the question.” The contours of “the people” considered will depend on the values and interests at stake. It may very well include ostensibly “third parties” harmed by corporate behavior. It sometimes includes workers when it voids corporate contract and property rights exercised in a

way that violates its anti-discrimination principles. The uncertainty of corporate borders in the law, quips Orts, is “analogous to Heisenberg's uncertainty principle in physics.” (*Ibid.*)

Second, political theory itself often deals in terms of a bifurcated population. When it comes to the practice of democratic lawmaking, for example, there is commonly a majority (a first *demos*) whose success in lawmaking vindicates its own partial interests while also threatening the liberty of the governed minority (a second *demos*). (Urbinati, 2014) CLD protects the minority by constraining the majority’s decision-making in ways similar to those proposed by this Chapter. It provides a menu of important rights; it requires the majority to justify its decisions reflexively and reciprocally; and it implements procedures to ensure that state action is not dominating or arbitrary. Of course, some of the protections afforded the minority bear close resemblance to the positive will-aggregation mechanisms used to form a majority-supported collective decision. In particular, those solutions based on contractarian and republican thinking may require the inclusion of minority voices, interests, and viewpoints in democratic decision-making.

This resemblance, however, does not eliminate their different orientations. The first is meant to reflect associationalism’s communitarian intuition: to give voice to collective autonomy as a positive liberty. The second is meant to reflect liberalism’s protective instincts: to ensure that voice will not overwhelm negative liberty by invoking universal values whose validity transcends the political community. (Habermas, 1994) Certainly, notions of political equality (Barry, 2002, p. 77) and CLD’s claim to sovereignty and legitimacy might require that they be bundled into a single conception of citizenship. Because rights aspire to be universal, or at least universal within particular political associations, all citizens must be able to understand themselves as their co-authors and so permitted a voice – even if they form no part of a particular governing majority. Every citizen is both a possible victim of the majority and a possible member of the majority.

There is, however, no such overlap within the corporation. Its exercise of associational autonomy might be ethical and partial, reflecting the interests of only a small subset of society. It does not even pretend to reflect the views of an entire political community. Meanwhile, the protections offered the second *demos* are based on CLD's broader normative commitments – commitments it makes to every citizen equally.

Nevertheless, each *demos* plays different roles in the arguments offered by political theory when it examines the legitimacy of lawmaking. They mirror the Habermasian janus-face of democracy and rights. Indeed, both notions even appear in Benhabib's solution to political boundaries. Exploiting the "constitutive tension" between democratic sovereignty (a state's *prima facie* case for autonomy) and human rights (the affirmative defense of those vulnerable to that autonomy), Benhabib constructs a notion of citizenship that balances "a people's right to self-assertion" with "its commitment to universal human rights" (2002, p. 154) in a "jurisgenerative politics" that mediate between universal norms and the will of democratic majorities. (Benhabib, 2006, p. 49)

Conclusion: Intra-Corporate Democracy and the Legal Rights of Business

The problem of corporate legal rights has no easy answers. At best, CLD provides an imperfect heuristic – the more democratic a business corporation looks, the more likely that its claimed legal rights will stand up upon further examination. Taking the analysis any further requires a fact-intensive analysis of not only internal decision-making processes, but also market conditions, members' individual characteristics and the specific public impact of corporate decision-making. For all but the smallest corporations, such analyses would challenge the capacity of any state – nevermind the competences of judges appointed to oversee rights disputes. Arguably, corporation-specific charters were jettisoned in favor of general incorporation in part because

states did not have the resources to police them in their specificity. (Hilt, 2017, p. 52) Indeed, this theory of corporate legal rights may even call for a rethinking of our political institutions. It might require, for instance, Federal chartering authority and a new administrative agency tasked to supervise corporate decision-making.

Nevertheless, one might at least observe with confidence that there is an alarming lack of democracy in today's array of deregulated, bureaucratic, hierarchically-managed businesses riddled with opaque financial intermediation, secrecy and declining unionization. At the same time, patterns of labor monopsony, industry concentration, and business practice replication prevent the exit that might satisfactorily proxy member voice. Judicial review of the democratic credentials of corporate decision-making is weak and getting weaker as courts limit class actions, circumscribe derivative litigation, and enforce private arbitration. Capping it all off, only dubious property-based justifications of management and shareholder authority are proffered in defense. (Ciepley, 2013) So the chance that these corporations can claim anything more than a circumscribed legal right to market participation? Not that great.

The arguments set forth in this Chapter are not the first to make a case for corporate democracy. Syndicalist, socialist, participatory democratic, and republican theorists have likewise offered their own justifications for workplace democracy. It may be worth turning to them in the hope of finding flaws and improvements. The next Chapter will do just this.

Chapter 4: Workplace Democracy and Corporate Autonomy

The last Chapter offered a justification for workplace democracy: corporations can make a better claim for legal protections in constitutional liberal democracies if those legal protections successfully vindicate individual liberty rights. Democratic mechanisms are the most straightforward way to determine whether such might be, in fact, the case. To make its *prima facie* case for associational freedom, corporations would benefit from democracy because incorporating the voices of participants would make it more likely that this freedom would help vindicate the individual liberty rights on which it relies. To survive the affirmative defenses against its claim to autonomy, internal corporate democracy might help it avoid violating the equal rights and liberties of those who might be harmed by corporate action.

This is not the only justification that can be offered for workplace democracy. Indeed, it ascribes to democracy a rather modest role when it comes to the vindication of rights – at least when compared with other theories of workplace democracy. When theorists argue in favor of workplace democracy, they usually do not have the ascription of corporate legal rights in mind. Rather, they hope that it can serve as a powerful tool that can overcome a variety of social and political ills: capitalist domination and exploitation; economic inequality; the alienation entailed in our working lives; the corruption of democratic politics. Adding to this already capacious menu of benefits, some contend that workplace democracy will eradicate economic inefficiency and promote growth and innovation. Workers, empowered by influence over corporate decision-making, will not only work harder and smarter, but also spend their larger paychecks and increase consumer demand. (Lazonick, 2013)

Because of its allure as a possible antidote for ailments both political and economic, the idea of workplace democracy resurfaces periodically not only amongst scholars. Policy-makers, politicians and even some business leaders likewise invoke its curative benefits. The Anglo-American political left, searching for a new intellectual orientation after the 2008 financial crisis and its populist backlash, are, at present, exhuming the guild socialist and syndicalist ideas of the early 20th century. (O'Neill & Guinan, 2018) Meanwhile, U.K. Labour Party leader Jeremy Corbyn offers producer cooperatives, shared ownership, and workplace democracy as part of a new plan to change the otherwise extractive and centralized institutions of contemporary oligopolistic capitalism. (*Ibid.*, p. 6) Senator and Democratic Presidential Candidate Elizabeth Warren recently introduced a bill, the Accountable Capitalism Act, that would place worker representatives on corporate boards in a permutation of German co-determination. The potential benefits of workplace democracy also influence the management practices of contemporary “socially responsible” firms like Patagonia, Zappos, São Paulo-based Semco Partners, California-based agribusiness Morning Star, and the Swedish music-streaming platform Spotify. (Foss & Klein, 2019) In a more parochial example, I have seen theories of workplace democracy influence the recent organizing of graduate student workers at Columbia University. Democratizing the University, it is thought, will not only rescue higher education from neoliberal transformation, but also allow its academic staff to shape the university’s mission (generally, away from professionalization and towards the liberal arts and social justice) while also protecting them from harassment, discrimination, and exploitation.

The lofty aspirations held for workplace democracy are not entirely unfounded. Both theory and evidence suggest that democratizing industry may help ameliorate a wide menu of evils. But, as I shall argue below, it is no silver bullet. Democracy in the productive association will

mirror the same problems and pathologies of democracy in the political association. (See Urbinati, 2014) In practice, it can suffer from populist, oligarchic, technocratic, and irrational disfigurements that can disrupt the achievement of equal liberty for all citizens. What's more, democracy is, according to Gallie's 1955 masterpiece, an "essentially contested concept." It used both aggressively and defensively to critique one form of governance over another; its diverse proponents hope that it will achieve ambivalent and sometimes conflicting goals; and no universally acceptable criterion exists that can help distinguish "real" democracy from its imperfect lookalikes. Thus, the existence of the many theories of democracy: communitarian, discursive, procedural, minimalist, representative, republican, participatory, epistemic, *etc.* Because each conception of democracy promises to achieve different results, whether or not workplace democracy will solve any particular problem will depend crucially on the theory of democracy implemented. Further, each conception of democracy makes different assumptions about human nature and how ambitious politics can be about the kinds of goods it can achieve. Accordingly, the success of workplace democracy in achieving its promised results likewise depends upon whether such assumptions hold. For example, this dissertation subscribes to a procedural, discursive understanding of representative democracy within the political association (*see* Chapter 2). It therefore aims to achieve public consensus on a *demos*' particular understanding of equal liberty, not the implementation of any perfectionist, objective conception of justice. It recognizes that achieving consensus is difficult, especially under conditions of social and economic change. As a result, it (1) accords a place for "higher" law, through constitutional norm-making, that protects individuals from majoritarian politics; and (2) subjects all laws to critiques based upon both the abstract principle of equal human worth and the idea of popular sovereignty,

understood as a commitment to lawmaking processes that allow citizens to understand themselves as the co-equal authors of the laws that bind them.

In contrast, and as explained further below, many theories of workplace democracy often rely, explicitly or implicitly, upon participatory (or communitarian) democracy that rest their case on Rousseauian models of collective autonomy. Invoking associationalist theories of group rights, they hold that a group's collective self-determination rights will cash out the rights of the group's individual members, at least so long as there is a perfect "fit" between group and individual purposes. (See Laborde, 2017) They presume, in other words, that a group of individual workers can come together in consensus to pursue joint projects, following only those rules that each and every one of them have agreed to give themselves. By identifying the workplace ruler with the workplace ruled, workers can escape the unfreedom of capitalist enterprise. The theories' success therefore relies on two normatively significant assumptions: first, that corporate constituents' diverse and conflicting interests can be successfully integrated without violating the equal rights and liberties of their members; and second, that the outcomes of collective decision-making will comport with CLD's fundamental commitment to equal human worth. As I shall explain, there is good reason to suspect that these assumptions do not hold except for very small workplaces. And if they do not hold, then workplace democracy puts the equal rights and liberties of their constituents at risk. If they do not hold, furthermore, it is equally the case that justifications for corporate legal rights that rest solely upon communitarian democracy's ability to vindicate these constituents' liberty rights likewise may not hold. At the very least, one must – as I do – build into such theories protections for those who do not consent to the outcome of group decision-making.

Other justifications for workplace democracy, however, rest upon more stable footing. These theories do not rely on the formation of some group-level *volonté générale*, but instead

identify democracy's capacity to soften the harms that arise within capitalist enterprises. It can hold arbitrary power accountable and prevent domination. It can ensure that particular interests are not enforced at the expense of others' equal rights and liberties. It can guide corporate decision-making in directions that are more consistent with the public good as determined by democratic publics. And it can help vindicate important human interests. In other words, while workplace democracy may not always generate an enterprise-level general will, it can at least ensure that corporate decisions are made in a way that respects CLD's commitment to equal human worth. Accordingly, if CLDs protect those decisions with legal rights, they are less likely to violate their fundamental normative commitments.

This Chapter will proceed as follows. It will first set forth the various theories justifying workplace democracy and identify the empirical and normative critiques levied against them. It will then specify whether and when their respective strengths and weaknesses are relevant to the theory of corporate legal rights offered by this dissertation. Specifically, it will first outline the associationalist arguments in favor of workplace democracy: those that arise from revolutionary socialist and democratic aspirations. Next, it will examine theories that rely on analogies drawn between firms and states. It will then address the "defensive" arguments in support of workplace democracy: those that highlight its instrumental value in countering domination, alienation and the harms of financialized capitalism. It will afterwards touch on those theories that hold that workplace democracy may foster important human interests. The Chapter will conclude by integrating its insights into the theory of corporate legal rights set forth in Chapter 3.

Part I: Associational Theories of Workplace Democracy

Some theorists identify workplace democracy as a tool of revolutionary socialist and democratic political transformation. They seek to dismantle capitalism and democratize society by

replacing hierarchical capitalist firms with self-governing industrial enterprises. Offering an associational version of collective freedom, they suggest replacing the lop-sided autonomy of the capitalist entrepreneur with participatory collective self-determination. They predict that this industrial makeover will also generate a host of other benefits: more developed individual human beings; a more democratic political order; economic equality; *etc.*

While offering an appealing alternative to capitalism's heteronomy, these justifications for workplace democracy suffer from several objections. In particular, they make some troublesome communitarian assumptions about human nature and society. Thus, the theories of freedom that subtend them depend upon unlikely empirical conditions and challenge CLD's commitments to equal human worth. In addition, they occasionally rely on perfectionist values that are ill-suited to liberal societies. Some, given their pluralist credentials, even threaten the authority of the CLD state itself.

In exploring these objections, it becomes clear that a theory of corporate legal rights that relies exclusively upon associational theories of freedom – without any provision for the protection of company outsiders and dissident insiders – may violate CLDs commitment to equal human worth. Although democratizing corporations will certainly make it more likely that they can make a compelling case for legal protections, that case is not conclusive. Whatever collective autonomy rights corporations might successfully assert, those rights must be balanced against the equal liberty rights of others.

A. The Argument from Revolutionary Socialist Aspirations

One common argument for workplace democracy carries revolutionary socialist aspirations. By its advocates, it is understood as a less fraught alternative to revolutionary vanguardism and the authoritarianism of “intellectually bankrupt” (Cole, 1917, p. 4) state-

managed socialism. Self-governing democratic workplaces are thought to provide, instead, “socialism with a human face.” (Greenberg, 1986, p. 20) If the ownership of the means of production is to be socialized, it should be socialized in such a way that it is controlled not by any centralized state, but instead by democratic self-management within each individual enterprise. Once so socialized, the theory goes, social conflict and, therefore, any need for both state and politics, will wither away. The political community might then be governed, if at all, via technique: a centralized agency might, for example, ensure that the function of one autonomous workplace would not conflict with the functions of the others. These ideas trace their intellectual foundations to utopian socialists like Pierre-Joseph Proudhon, G.D.H. Cole and the guild socialist movement, left anarchists (Greenberg, 1986, p. 22) as well as, arguably, Rosa Luxemburg, Gramsci and other Marxist dissidents of Stalin. (Nettl, 2019; Greenberg, 1986, p. 134) More recently, Cornelius Castoriadis (1988) has argued that democratic mechanisms within individual workplaces might provide a self-managing counter-regime to the bureaucratic domination implicated in *both* corporate capitalism and state socialism.

One evil that workplace democracy is thought to rectify is the evil of capitalistic alienation. In *Capital Vol. I*, Marx famously made a trenchant observation about certain changes wrought to the “physiognomy” of working people after they pass through the factory gates. Once they cross “outside the limits of the market and the sphere of circulation” and into the “hidden abode of production,” employees metamorphose from free contracting agents enjoying an “Eden of the innate rights of man” into instrumentalized producers of surplus value subject to the arbitrary whims of both bosses and the economic laws of competitive survival. (Ch. 6) Work and production under capitalist relations “separate people from their essence as free, creative beings.” (Greenberg, 1986, p. 15) Workers are thereby “degraded,” robbed of their individuality – not because they

follow orders, but because they follow the orders of a power alien to them. (Polanyi, 2018, loc. 668) To be sure, “alienation” has since taken on a capacious definition, signifying (1) the worker’s deadened psychological state; (2) her disassociation from her fellows; as well as her (3) unenviable position within capitalism’s structural constellation, which forces her to accept unwanted work, follow other people’s orders, relinquish the fruits of her labor, and thereby relinquish her natural inclination towards creative activity. (MacPherson, 1973, p. 5; Greenberg, 1986, pp. 66-67) Alienation is thus understood as both the deprivation of the ability to determine one’s own life by one’s own lights and as the corruption of one’s true sense of self caused by that deprivation. It is therefore also an impairment of one’s autonomy and identity. Carnoy & Shearer (1980, pp. 26-7) and Greenberg (1985, pp. 26-7), for example, associate alienation with absenteeism, high rates of drug use and alcoholism, as well as strike activity. More recently, William Davies (2017) correlates capitalist entrepreneurial governance not with alienation *per se*, but instead with negative psychological “externalities” like depression, anxiety and stress.

Workplace democracy has been held to offer a palliative to alienation by placing into workers’ own hands the ability to control their own destinies: to give them voice in the conditions of their labor as well as the products it produces. (Greenberg, 1986, p. 17) In an early essay, for example, Karl Polanyi asserted that

[i]f the worker’s past labour (the means of production) were not alienated from him, there would be no ‘capital’; if the workers were not alienated from each other through the private capital of the owners of companies, and if they only produced in a cooperative way, there would be no ‘commodity price.’ The estrangement of man from man and the estrangement of things (‘commodity’, ‘capital’) from man are both thus consequences of private ownership in a society based on a division of labour.

(Polanyi, 2018, loc. 684) To overcome the ostensible “natural laws” of capitalist production, therefore, workers must be able to intentionally and collectively assert their will, via workplace democracy, as they produce and distribute the fruits of their labor. And this collective will, argues Pateman (1970, p. 27), will not appear as a will existing separate and above them because democratic participation “enables collective decisions to be more easily accepted” as “no man, or group, is master of another, [and] all are equally dependent on each other.” (citing Rousseau) They might then become reacquainted with their own humanity while recognizing their colleagues as fellow human beings rather than isolated, competitive cogs in the corporate machine. (Cole, 1917, p. 21) Davies (2017), for his part, argues that the positive psychological feelings generated by cooperative decision-making in the workplace stands in stark contrast to the stress and anxiety created by the gaming, striving, excessive self-interest, short-termism and “individualist psychology of optimization” associated with the “neoliberal corporation” which secures workers’ cooperation via psychological manipulation.

For many supporters, workplace democracy is not just a means to assert workers’ collective autonomy and eliminate alienation. It is also a means by which to achieve a comprehensively socialist society. The gradual, bottom-up democratization of individual workplaces is thought to open up a clearer path to socialist society than does reliance upon top-down, elite-driven movements struggling for power within liberal democratic parliamentary politics. (Greenberg, 1986, p. 20) Its advocates believe “that by building brick by brick, workplace by workplace, a democratic socialist edifice will in time be constructed.” (*Ibid.*) Erik Olin Wright (2015), for example, has suggested that if worker cooperatives and other egalitarian, democratic practices were to sprout in the “spaces and cracks” within our complex, mixed, but still largely capitalist-oriented economies, capitalism might be “eroded from within.” “[W]hen you talk about

introducing democracy [into the workplace],” writes Peter Frase in socialist magazine *Jacobin*, “you’re talking about giving people control over their lives that they didn’t have before. And once you do that, you open up the possibility of much more radical and disruptive kinds of change.” (Frase, 2017) Carnoy & Shearer (1980, p. 194) suggest a more detailed causal mechanism, arguing that worker-controlled firms can act as role models for social movements that seek to challenge capitalist production. As workers come to appreciate the possibilities of economic democracy through first-hand participatory experience in their own workplaces, they might join and serve as inspiration for further revolutionary movements that could escalate into radical change. (Gorz, 1973; Horvat, 1982) G.D.H. Cole (1917) hoped, at least in his early work, that industrial unions would embrace democratization and constitutionalize themselves to include the voices of the “rank and file.” They might thereby add steam to their organizing strength as they prepare to take on the bosses and the oligarchs in a polity-wide guild socialist transformation. Combined with the further democratization of political regimes and the equalization of material wealth (Cole, 1917, p. 4; Wright, 2015; Pateman, 1970, p. 39), workplace democracy might thus constitute an important third pillar of a revolutionary socialist political movement.

These socialist justifications for workplace democracy offer a voluntaristic, associational theory of freedom. *Au fond*, they imply that workers, by framing their own industrial lives via participatory consensus, will not only rid themselves of their capitalist bosses, but also overcome their alienation from their productive lives, rid themselves of any need for a state to supervise class-based conflict, and jettison the false consciousness that stifles revolutionary transformation.

Objections

Several objections can be offered. First, because of its under-specification, it is not always clear precisely how the socialism envisioned by the theory differs from contemporary capitalist

arrangements. Given the public ownership of private enterprise and the need for at least some state control to protect public welfare, the guild socialist prescription for change may amount to tinkering around the edges of actually existing industrial organization. Relatedly, because it makes some ill-founded empirical assumptions, it is not certain that democratizing the workplace will lead to the revolutionary social transformation it seeks. Instead, evidence suggests that cooperatively governed workplaces might *enhance* workers' entrepreneurial and pro-capitalist spirit. Finally, by granting autonomy rights to individual workplaces without providing for the protection of the equal rights and liberties of dissidents and outsiders, it would deprive individuals of the protections offered by the CLD state.

Definitional Concerns

First, as an instrumental justification, the theory holds only insofar as one ascribes to its ultimate purpose: revolutionary, socialist transformation. It would therefore certainly fail to convince those whose allegiance is to capitalist free markets and the private ownership of the means of production. At this point, however, some definitional concerns arise. It is not at all clear how many such authors define "socialism" and how they differentiate socialism from welfare state corporate capitalism. First, if "socialism" entails the elimination of private ownership in favor of public ownership, it is unclear whether workplace democracy is properly socialist. The theory, especially given its libertarian credentials (Laborde, 2000, p. 79), anticipates that the employees of enterprises, rather than the state or society-at-large, will control productive enterprises. Therefore, the workplace would remain in "private," non-state hands. These private hands, even if the hands of workers themselves, would presumably pursue ends that at least occasionally conflict with the public good or otherwise lack sufficient "social sensitivity." (Gindin, 2019) Individual workplaces might choose to sacrifice productivity and efficiency, leading to an undersupply of

necessary goods. They might, like monopolistic and oligopolistic capitalist firms, exploit their market position to harm consumers. For example, Beatrice and Sidney Webb, in their arguments against guild socialism, pointed out that unless government could control pricing through the nationalization of industry, individual producer cooperatives might restrict their output to increase their profits at the expense of the community. (Webb & Webb, 1975, p. 156) Even both Cole and Laski struggled with how much autonomy could be trusted to workers' associations. Their recommendations regarding the design of state institutions vacillated between light-handed and limited in scope to parliamentary sovereignty to interventionist collectivism. (See Laborde, 2000, pp. 87-89) As a result, guild socialism might not, without further cultural and ideological transformation, eliminate the anti-social, self-centered behavior typically associated with capitalist industry.¹⁴⁷ Indeed, it appears to rely upon an Aristotelian notion of institutions' capacity to transform individual psychology – such that workers would always willingly choose to act in socially responsible ways.¹⁴⁸

This objection gives rise to a related critique. Admittedly, guild socialism would eliminate capital providers' power to extract "surplus value" from labor that is not their own. It might thus very well eliminate much contemporary intra-workplace oppression. But it cannot eliminate the possibility of surplus value extraction and alienation entirely. Presuming some kind of state mechanism should exist to prevent inequalities and exploitation from arising between both worker-

¹⁴⁷ Laborde (2000, p. 80) notes that: "To the Fabians who feared that such self-governing guilds would have no incentive to produce quality goods efficiently, and that they would inevitably be sectional and selfish, Cole retorted that the democratization of industry would promote a new spirit. Given the opportunity freely and collectively to fulfil a function felt to be essential to the good of the whole community, individuals would be animated no longer by fear, apathy or greed, what R.H. Tawney called 'acquisitiveness', but by a spontaneous inclination to service." (See also Gindin, 2019)

¹⁴⁸ The possibility of such beneficial psychological transformation was picked up by participatory democrats. (Laborde, 2000, p. 80) This is discussed in the next section.

controlled firms themselves and between them and their consumers, some of their surplus will be taxed. These taxes could, *e.g.*, fix consumer prices, fund social goods, and provide investment capital for other workplace democracies. Similarly, the state might attempt to serve the public interest by forcing different, perhaps more efficient, methods of production onto workplaces over worker objection. (Webb & Webb, 1975, p. 161) Socialism might, therefore, merely displace the value-extraction dynamic from the capitalist to the state. Still remaining are the incentives both to put to use the fruits of one person's labor for another's benefit and to direct workers' activities. (Gindin, 2019) Additionally, while state-managed value extraction might benefit a wider variety of people than one would typically associate with a classic entrepreneurial capitalist firm, contemporary public corporations present a different creature entirely. They *already* "socialize" value in a way that comes close to the socialization of capital through the state, dividing it between a wide population of day traders, portfolio managers, retirement account owners, pensioners, college-savings-account holders, and other institutional investor beneficiaries. It is up to this corporate "shareholder republic," often numbering in the millions, to democratically determine how that surplus value might be used and distributed. And, given the wide dispersion of stock ownership, they typically do so in a way that is non-invasive of corporations' internal governance. It is thus an open question whether state institutions would do a better job both distributing the surplus fairly or ensuring that firm governance respected workers' freedoms.

Some versions of guild socialist and syndicalist theory, nevertheless, elide such problems by presuming that no central administration will be available or necessary. Indeed, as explained more below, their political pluralist credentials explicitly lead them to reject the state because they see it as a universalizing, monolithic obstacle to human freedom. They accordingly eschew any

active state management of the economy. (Laborde, 2000, p. 76)¹⁴⁹ For example, as Cecile Laborde observes, Cole belonged to a “strand of British socialism hostile to the existing state, deeply individualistic, and concerned to rehabilitate grassroots democracy as a prophylactic against the new Leviathan, be it capitalist or socialist.” (Laborde, 2000, p. 70) Instead, market mechanisms like bargaining will presumably circulate the fruits of workers’ labor. (Gindin, 2019) Yet the introduction of market mechanisms will lead to material inequalities, competition, and other capitalistic pathologies that, at the end of the day, will be experienced as alienating and coercive.

As a result, workplace democracy may not supply the revolutionary transformation imagined by its advocates. At least as it is articulated by guild socialists, it may amount instead to a technical reconfiguration of contemporary corporate governance arrangements – perhaps something akin to German co-determination. At the very least, much more needs to be said about what revolutionary socialism might look like. Indeed, perhaps it no longer makes any sense to divide economic regimes into clear-cut “socialist” or “capitalist” varieties at all. (Jackson B., 2012; Wright, 2015) Regardless, if workplace democracy is to achieve socialist goals, it is incumbent on its advocates to better articulate exactly what it is they believe that goal, “socialism,” to be.

(In)egalitarian Implications

To flesh out a point mentioned briefly above, should guild socialism eschew the state and its taxing power, the effects of autonomously governed workplace democracies might betray some of its egalitarian values. First, presuming that effective communitarian democracy requires small populations and, therefore, small-scale enterprises, democratizing an entire economy may yield significant material inequalities. As sociologist Gerald Davis observes, economies populated by small companies tend to grow more unequal over time, all else being equal. (Davis G. F., 2013, p.

¹⁴⁹ Describing the syndicalists.

293) (citing Davis & Cobb, 2010) In addition, without some centralized mechanism to redistribute the surplus of individual workplaces, there remains a risk that more efficient worker-controlled firms will come, over time, to enjoy significantly more wealth than others. (Gindin, 2019) To reduce material inequalities, then, an economic system characterized by nationalization or central planning and control seems imperative. But then, as guild socialists themselves might point out, the risk is that such a scheme would have too much in common with the “new model of multinational corporations, in which power is centralized: in the state, rather than in the “hands in Silicon Valley, or the City of London.” (O’Neill & Guinan, 2018, p. 13)

The Facts Can Dash Revolutionary Hopes

Critiques of this justification for workplace democracy extend beyond its conceptual weaknesses and inegalitarian implications. At least some empirical evidence suggests that workplace democracy does not, in fact, encourage labor to overcome “false consciousness” and learn to appreciate, and come to advocate for, cooperative, democratic, and egalitarian relationships at work and in society as a whole. Greenberg (1986) finds, for example, that cooperatives are characterized by, ironically, a pro-capitalist selection bias amongst their workforce. They tend to attract people who embrace the entrepreneurial spirit, who want to have a hand in growing and managing a business but, given a lack of resources, cannot strike out on their own. What’s more, Greenberg concludes that “the experience of self-management within enterprises oriented to sales in a competitive marketplace largely fails to counteract” these original orientations. (*Ibid.*, p. 137) In many cases, he observes, the experience “seems to enhance and nurture their small-property/petit-bourgeois orientations.” (*Ibid.*) The cooperative, problem-solving solidarity that does develop is “entered into and maintained for the pursuit of small-property ends,” not because employees develop class-consciousness. In fact, they were more likely

than their conventional firm contemporaries to identify themselves as “middle-class,” “Republican” and anti-union rather than “working class” and “Democrat.” (*Ibid.*, pp. 138, 140) And their time in the co-op made workers *less* likely to see other working-class people as capable of industrial self-management (*Ibid.*, pp. 138-9) Nor does Greenberg find any evidence that working for a cooperative fostered dissatisfaction with prevailing political and economic arrangements. (*Ibid.*, p. 141) Although these conclusions may arise as a result of the unique market-capitalist ideological orientation characteristic of the United States, they require explanation and justification on the part of workplace democracy’s revolutionary supporters. Perhaps its promise can only be achieved, suggests Greenberg, if it is accompanied by “a larger struggle for popular democracy and equality.” (*Ibid.*, p. 171) At any rate, the risk is that workplace democracy might not eliminate capitalism’s less desirable pathologies. It might simply relocate them from shareholders and managers to workers themselves.

Eschewing the Benefits of the State

Setting these conceptual and empirical issues aside, there is an important additional reason for concern. As mentioned briefly above, the guild socialist tradition, at least as articulated by political pluralists like G.D.H. Cole in his early works, carries with it a deep suspicion of state power. Because moneyed interests tend to colonize government, guild socialists sought to jettison the state as well as the oligopolistic capital that corrupted it. Indeed, they wanted *no* institution to hold sovereign political power at all. For them, workers and their democratized workplaces could enjoy autonomy only if *both* industrial and politically-appointed bosses vanished from the earth. Instead, at least in Cole’s earlier rendering, the “state” should act as an interest-group association whose only function would be to advocate on behalf of consumers in matters of “common want.” It would negotiate and compromise “on equal terms” with equally autonomous worker-controlled

productive guilds. (Cole, 1917, p. 85) If, according to Cole and Laski, no association can realistically claim to represent the whole of a single will – let alone the will of an entire people – then the best one could hope for was the representation of everyone’s particular but conflicting interests and loyalties through competing associations. (See Laborde, 2000, pp. 73-75) This kind of “balance of power” (Cole, 1917, p. 91; Laborde, 2000, p. 87) *realpolitik*, however, eradicates the *moral* role that the constitutional liberal democratic state plays in articulating and enforcing equal individual human rights. Social life might devolve, under the guild socialist schematic, into a world of might-makes-right.

More specifically, the risk that Cole, Laski and other pluralists invite is that autonomous workplaces, each curating its own unique version of the good life, might violate the human rights of their members with impunity – for there would be no sovereign with the competence and legitimacy to challenge them in a principled, norm-based manner. (See Cohen J. L., 2015) There would, further, be no way to ensure that “workers’ particular interests [might] be mediated with the social interest.” (Gindin, 2019) The problem engendered by the guilds’ autonomy from state oversight becomes even keener given Cole’s functionalism. The guilds, for him, were meant to represent their constituents according to their objectively given interests, as derived from their social “function.” He does not contemplate that the guild constituents themselves might like to deviate from these pre-determined purposes. As Cecile Laborde puts it,

Cole’s functionalist democracy implicitly denied that individuals could have purposes and interests, not to mention opinions, outside the specific functions they were engaged in. Obsessed by the risks of the substitution of wills inherent in universal representation, Cole paradoxically ended up confining individual to a narrow sphere of democratic expression.

(2000, p. 92) As a result, workers might find themselves represented within the guilds according to interests they do not hold, bound to follow workplace decision-making that they disagree with – all without any appeal or redress.

Pace Cole’s anti-statist alarmism, however, a strong, constitutionalized democratic state might very well prove compatible with relatively autonomous workplace democracies, at least so long as: (1) these worker mini-publics respect CLD’s liberal egalitarian values; and (2) state institutions accommodate the separation of powers – including economic powers – even as they remain loyal to the constitution’s fundamental value of equal human worth. Grady (1990, p. 162), for example, suggests a corporatist model that would have democratized workplaces supplement, but not replace, traditional geographical representational units within pluralist constitutional democracies. Workplace democracy, in other words, can occur in a regime adopting the “regulation of self-regulation.” (Teubner) Indeed, even Cole and Laski’s ostensible pluralism embraces a liberal “value monism,” (Levy, 2014) and so, arguably, is compatible with constitutional liberal democracy. After all, if the compromises to be netted between worker and consumer are to be done under fair processes and according to neutral standards that respect equal individual liberties, there seems to be space in their political schematic for an “umpire” (Berlin, 2002) that might claim final decision-making power should there arise any conflicts between workers and consumer groups.

Indeed, just such a solution is anticipated by the theory of corporate legal rights offered by this dissertation. It would ascribe legal protections for internal corporate decision-making so long as those decisions comport with liberal egalitarian norms.

B. The Argument from Democratic Aspirations

A related justification for workplace democracy, explicitly invoking communitarian, associationalist ideals, points to democracy's usefulness in helping human beings achieve collective autonomy. Participatory democrats, most often finding their intellectual inspiration in traditional (or "classical," in Schumpeter's schematic) democratic theory (Greenberg, 1986, p. 17), offer workplace democracy both as a panacea for capitalism's destruction of the "freedom and individuality in the worker" (Cole, 1917, p. 24) and as an antidote to totalitarianism. (Arendt, 2006) For many, workplace democracy, in addition to promoting individual and collective autonomy, also serves a purpose similar to those holding revolutionary socialist aspirations. Namely, they hope it might play an instrumental,¹⁵⁰ socially transformative goal: achieving a more fully just, democratic (as opposed to explicitly *socialist*) society. Participatory workplace democracy, for them, "forms the basis for an educated and efficacious citizenry, represents the fulfillment of the democratic idea, and embodies the essential foundations of the good society." (Greenberg, 1986, p. 17) As G.D.H. Cole once noted, "Political democracy is a farce and a pretense" so long as "industrial autocracy remains almost unchallenged." (Cole, 1917, p. 3) As a result, productive work must be democratized before the promise of democracy can be realized.

First, advocates argue that providing employees a voice in workplace governance can help vindicate positive autonomy rights, understood variously as rights to self-determination, self-governance, self-realization or self-fulfillment. (Mayer, 2001, p. 225; Dejours, Deranty, Renault, & Smith, 2018)¹⁵¹ These autonomy rights are enjoyed not just by the collective constituents as a group. They are enjoyed by the individual as well. For such thinkers, "a necessary condition for

¹⁵⁰ (Mayer, 2001, p. 223 n. 4) calls her theory "consequentialist."

¹⁵¹ For more examples of the autonomy argument, see Patricia Werhane (1985, pp. 133-35), Gould (1988, pp. 84-85, 143) and Hyland (1995).

one's freedom to be respected is that one enjoy a right to participate in the decisions of organizations of which one is a member.” (Brenkert, 1992, p. 252; Pateman, 1970, p. 26; Dahl, 1985) Tom Malleson (2013, p. 13), for example, argues that the practice of collective self-rule is an instance of a suitably active conception of freedom because it requires “doing, acting, and cooperating with others.” One labourist permutation holds that human autonomy cannot be realized unless one can participate in a “meaningful job,” which is itself contingent on participation in the decisions that define its contours. (Werhane, 1985, p. 135) Still another version, invoking J.S. Mill, holds that an individual cannot develop her full capacities and identity unless she can participate in collective decision-making. (Christie, 1984, p. 115; Macpherson, 1977, p. 114) Some critical theorists point out the expressive potential of work, contrasting it with instrumentalist conceptions that fail to generate self-respect amongst workers in most contemporary institutions. (Frega, Herzog, & Neuhauser, 2019) Laski and Cole also articulated a concept later reprised by Margalit and Raz (1990) in their justification of group rights. Some individual goods, they argued, are irreducibly social because they are created and enjoyed by people acting together. Workplaces would be better tailored to provide these goods if they are governed democratically. (Laborde, 2000, p. 82)

Carole Pateman, articulating perhaps the most robust version of this argument in her 1970 *Participation and Democratic Theory* (1970), emphasizes the educative and developmental function of participatory workplace democracy. (pp. 24-5) It aims at a conception of individual self-realization that includes a sense of moral duty, justice, and public-mindedness. Through workplace democracy, human beings can achieve a level of self-realization otherwise unavailable to them. Citing Rousseau, channeling Laski (1919, p. 108), and rendering her argument with a Tocquevillian appeal, she observes that engaging in the kind of public reason required to

accomplish collective, consensus-based decision-making teaches individuals to embrace notions of justice while allowing themselves to be enlightened by the exposure to others' thoughts and ideas. Similarly, Polanyi tied workplace democracy to an ethical notion of human freedom that involved the internalization of responsibility towards others in a complex society where the ill-effects of our actions are often occluded from our view and thus our decision-making. (Polanyi, 2018) Indeed, even Dahl (1985, p. 99) argues that hierarchical, undemocratic corporate capitalism may narrow "the domain of moral responsibility to the vanishing point." One potential upshot of this enhanced sense of justice and sensitivity to community solidarity is a migration away from elitist, merit-based understandings of justice and purely instrumental profit-based reasoning. (Grady, 1990, p. 148) Across all these permutations of workplace democracy's educative function, there resides a belief that "the emergence of democratic and fully developed human beings is possible only in a fully democratic, participatory society," where all social institutions are democratic. (Greenberg, 1985, p. 19)

Authors promoting this variety of workplace democracy also emphasize the autonomy workplace democracy can bring to groups. Invoking Rousseauian and contractarian concepts, Cole and Laski thought it possible for individuals within groups to come to consensus and then to assert this consensus as a collective will, or "function." The protected, free exercise of this function, particularly if represented in state institutions, would likewise serve liberating purposes. (Laborde, 2000) The workplace "people" will rule themselves through a social contract – rendered in miniature.

These justifications for workplace democracy do not rest entirely on the direct benefits it brings to collective autonomy and individual development. For many, it also holds a revolutionary, transformative promise for society as a whole. (Grady, 1990, p. 162; Christie, 1984, p. 114) Robert

Dahl, in *A Preface to Economic Democracy* (1986) believed that democratizing workplaces might “help to strengthen political equality and democracy by reducing inequalities originating in the ownership and control of firms.” (p. 4) The outcome of implementing workplace democracy, in other words, would help bring to fruition the long-delayed promises of political democracy. Carnoy and Shearer (1980) and Ellerman (1990, pp. 54-55), echoing sentiments articulated by Cole and Laski fifty years earlier (1917, p. 66),¹⁵² stress that democratization of the workplace is a natural step forward in the long march of democratic progress. Through such a progression, emancipatory social transformation might be achieved without any abrupt, and perhaps utopian, ideological shift in political preferences and institutions. (Grady, 1990, p. 147; Laborde, 2000, p. 80; Gould, 1989) These ideas are being articulated once again as people seek to repair the economic and political disfigurements of the post-2008 world. Certain sectors of the British Left offer workplace democracy, combined with a decentralizing of regional and local economic governance, as an alternative to a corrupted politics held hostage to “footloose, extractive

¹⁵² “But if democracy is assumed to be good in politics, can industrial autocracy hope to remain unchallenged? The growth and power of Trade Unionism are the form and substance of the challenge; and the case in their favour is precisely the case which was put forward by advocates of representative government when the very notion of popular sovereignty was a revolutionary political concept. May we not, then, expect that the development of self-government in industry will be marked by stages similar to those by which our political system has been developed? Beginning as a half-articulate challenge to autocracy, then gaining recognition as a critical force, Parliament became after centuries of struggle the legislative body and subordinated to itself the executive. Moreover, the paralysis of government was greatest at those times when Parliament possessed a recognised right of criticism, but had not yet secured full legislative power or direct control of the executive — in fact, while Parliament was a negative and restrictive force. In the same way, the self-government of the workers begins in a half-articulate form in the early struggles of the Trade Unions, and becomes a recognised critical force with their rise to power and influence. But, at this stage, their influence is still restrictive, because they have no direct power of industrial legislation and no direct control over the industrial executive. Only with the concession of this direct and positive power will the restrictive period end, and democracy become the ruling principle.”

multinational corporations” and their allies in international governing institutions. (O’Neill & Guinan, 2018, p. 10) It is a chance for the people to “take back control” of their lives. (*Ibid.*)

Despite their aspirations for structural transformation, however, many authors identify the agent of such change with the individual worker herself. Invoking an Aristotelian belief in the educational function of political and social institutions, they hope that democratic workplaces will mold democratically-minded citizens who, thus armed and educated, might re-make the political order. (Christie, 1984, p. 115; Mason, 1982, pp. 48-85; Pateman, 1970, p. 29; Laborde, 2000, p. 80 (citing Laski and Cole)) “A worker,” quipped Laski in 1922, “cannot respect the obligations of citizenship if he is simply and solely an unreflecting unit in the productive system.” (p. 5) For such thinkers, “individuals and their institutions cannot be considered in isolation from one another,” (Pateman, 1970, p. 42) and so a democratic society requires not just democratic forms of government, but also democratically-minded citizens both confident in their own competence to decide on public affairs and committed to building solidarity within their communities. Pateman argues that the autonomy encouraged by collective, consensus-based decision-making within the comparatively small space of the workplace would encourage citizens to embrace civic participation within the wider political system. Workplace democracy might, for example, help citizens overcome subjective beliefs in their political inefficacy. (Christie, 1984, p. 110; Pateman, 1970, p. 66) It might also teach them how public policies impact their everyday lives. (*Ibid*; *see also* Macpherson, 1977) In particular, as citizens learn that they can control their own destinies in the workplace, they will at learn – as J.S. Mill predicted – to shape public policies through more robust participation in elections and social movements. (Grady, 1990, p. 148))¹⁵³ Cole, along with other guild socialists, hoped that workplace democracy might eliminate the submissive, apathetic

¹⁵³ Citing Bachrach, 1967, pp. 71-79.

attitudes, as well as the material inequality, that reinforce oligarchic leadership patterns in liberal democratic polities. (Cole, 1917) It would at least help counteract the stultifying tendencies of capitalist authoritarianism. (Laski, 1922, p. 4) Echoing these points, Senator Robert Wagner, in a 1937 op-ed in the *New York Times*, supported democratizing labor law reforms precisely because they would encourage workers to adopt attitudes antithetical to more troublesome regimes:

Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship. Fascism begins in industry, not in government...But let men know the dignity of freedom and self-expression in their daily lives, and they will never bow to tyranny in any quarter of their national life.

Similarly, Philip Murray, President of the Congress of Industrial Organizations (“CIO”), argued that greater worker involvement in industrial decision-making might teach workers about the value of democratic citizenship. (Jackson B. , 2012) Pateman (1970, p. 53) shares the sentiment, arguing that “an individual’s (politically relevant) attitudes will depend to a large extent on the authority structure of his work environment.”

Although not conclusive, empirical evidence tends to support some of these claims. (Frega, Herzog, & Neuhauser, 2019) People who enjoy democratic participation at work do tend, though weakly, to participate in community and political affairs more often than those who do not. (Greenberg, 1986, p. 119; Mason, 1982, p. 100) Those that enjoy participation and autonomy at work, moreover, tend to have stronger beliefs in their own competence and efficacy to weigh in on public affairs. (Pateman, 1970) The evidence, however, is not entirely conclusive. For example, Greenberg (1986, p. 122-30), following a five-year case study, finds that it failed increased workers’ sense of political efficacy and their public-spiritedness.

Objections

Undoubtedly, this argument in favor of workplace democracy will appeal to those committed to democratic values. It proposes a plausible solution to citizen apathy and a path towards the further democratization of society. It might teach people to critically examine their leaders and representatives as political equals. Further, it offers a tempting cure to those frustrated with what they understand to be excessive materialist self-interest on the part of democratic citizens. Unfortunately, at least as it is configured by the authors reviewed above, it will also only appeal to those committed to teleological conceptions of individual development. Relatedly, it presumes that individuals will not, or do not wish to, sacrifice other perhaps more important interests in order to reap the benefits of workplace democracy. As explained in the last Chapter, it would be a mistake to protect workplace (and corporate) decisions with a legal right unless workplace constituents actually embrace these values. Finally, because it relies on communitarian assumptions about human nature, its implementation risks the violation of individual liberty.

The Illiberal Cultivation of Perfectionist Ethical Values

Robert Dahl lays out perhaps the most trenchant critique of this justification of workplace democracy. According to him, it exerts a “magical power on the utopian imagination,” sharing with communists, fascists and, indeed, even Nazis a desire to cultivate a better, more properly educated citizenry. (1985, p. 95) Stated less polemically, these authors’ particular vision of human autonomy and democratic citizenship may grate against those committed to liberalism’s promise of value neutrality, non-interference, and personal privacy. (Jacob & Neuhauser, 2018) It fits within Berlin’s nightmarish rendition of “positive liberty” and resonates with the basic intuitions of Idealist philosophers like T.H. Green and F.H. Bradley. (Laborde, 2000, p. 81) Its Aristotelian, perfectionist undertones likewise recall Rousseau’s demand that, in a democracy, we find

ourselves “forced to be free.” (*Ibid.*, p. 14) It is, perhaps, an invitation to tyranny. To those who think they know better, it is an enticement to cajole, coerce, bully or even repress people who not only refuse to recognize their “real” interests, but also to get with the democratizing program. And it reflects the New Left’s romantic, “conservative and moralized criticism of markets” that “the capitalist market found particularly easy to absorb and repackage—as consumer options.” (Forrester & Purdy, 2018) Rawls, perhaps aware of these dangers, thus downplayed the importance of democratic self-determination precisely because he wanted to avoid the civic humanism that held participation to be the “privileged locus of our (complete) good. (Malleon, 2014, p. 142)

While it is important to avoid the worst outcomes of this slippery slope argument,¹⁵⁴ there is in fact good reason to suspect that workers might not welcome workplace democracy’s educative function and its designs on their individual psychology. For one, it plays into the exacting, 21st-century zeitgeist of personal development, self-actualization, resilience and fulfillment. (Griffith, 2019) Workers, especially those new to the workforce, face pressure to pursue their passions and discover their true vocational “calling.” And they must do so, if these arguments for workplace democracy are adopted, with a sufficiently spirited public-mindedness. Many might see this kind of identity narrative not as a liberating ideology, but instead as an additional burden laid atop an already challenging, anxiety-inducing array of domestic and professional obligations within labor markets that grow increasingly contingent and unstable.

Further, workers might ascribe more importance to values that are inconsistent with the civic-mindedness prescribed by these workplace democrats. Workers’ notion of the good might

¹⁵⁴ Indeed, Laborde (2000, p. 82) argues that’s Laski and Cole, in distancing themselves from J.N. Figgis’ cramped notion of freedom as allegiance to one’s “best self,” attempted to avoid such conclusions by redefining freedom as a psychological, subjective *feeling* of freedom that is connected to free choice, an individual’s own ethical judgment, and “a Millian notion of a multiplicity of experiments as a condition of liberty.”

drive them instead to focus exclusively on their own material comfort and professional success. (Schweizer, 1995, p. 374)¹⁵⁵ For many Americans, possessive and competitive individualism provides a compelling source of identity – especially for the middle class – and workers may not welcome institutions that force them to relinquish such values. They might balk, for example, at workplaces that value civic participation over merit-based paths to leadership positions. (Davis, 2013, p. 294) Success-oriented individuals might, like Weber’s ethical Protestant, prefer an expert-managed meritocracy that rewards (ostensibly) objective achievements like hard work and skill. (Christie, 1984, p. 124; Wu, 2019) Concomitantly, they might resent placing difficult and important decisions in the hands of their apparently inexpert or slothful colleagues. For others, liberty may not consist of collective self-determination rights. Instead, it might entail precisely the opposite: the freedom to opt out of collective life – including the public life of the workplace. (Crosland, 1974, p. 65) Workers might therefore choose the liberal separation between public and private, preferring to keep their personal economic concerns to themselves. Or they might rather authorize representatives to make decisions on their behalf in lieu of participating themselves – especially if their abdication comes with a salary bump. (Thomas, 2016) They might be better satisfied by some of the alternatives to direct, participatory workplace democracy that were outlined in Chapter 3.

Stated in another way, this argument for workplace democracy, like Rousseau’s vision, relies upon a robust notion of civic virtue. It also understands democracy as instrumental to the achievement of perfectionist ethical values. Liberals committed to ethical value neutrality might therefore object to its forcible imposition on workplaces. They would protect workplace democracy only if actual individuals, exercising their negative liberties, choose to pursue it. The

¹⁵⁵ Citing Bachrach (1967, pp. vii, 5, 97).

downside of this position, however, is that the possibility of self-determination in the workplace might be repackaged as merely another consumer choice available to workers, another commodity that they might accept or reject as they make tradeoffs within the market. The risk is that one might conclude that if democratic development of identity really was important to workers, they would have simply bargained for it as they negotiated their employment contracts. And because very few workplace democracies exist, one might presume that there was nothing – in terms of wages and working conditions, for example – that workers were willing to give up to obtain it. And thus the desirability of workplace democracy may very well disintegrate beneath the law of supply and demand.

In any event, some empirical evidence suggests that workplace democracy is unlikely to achieve the psychological and ethical changes anticipated by its advocates. In a review of several contemporary studies, Dahl (1985, p. 96) finds, for example, that evidence of workplace democracy’s transformative potential is “mixed.”¹⁵⁶ Notably, participatory workplace democracy may *dissuade* individuals from appreciating the value of communal decision-making. For example, employee-citizens may grow frustrated and disillusioned when their more active colleagues dominate decision-making discussions. In his study of the Pacific plywood cooperatives, Greenberg concludes that the lack of civic-mindedness in the workforce is the result of the “powerful educative tool” of the market, which is more influential “than is the cooperative experience itself.” Since the well-being of workers depends upon their success in the market, Greenberg speculates, their appreciation for democracy pales in comparison to their need to

¹⁵⁶ While evidence suggests that democratizing workplaces can reduce feelings of alienation and improving mental and physical health, it may not be necessary nor sufficient to accomplish such goals. (Frega, Herzog, & Neuhauser, 2019) Further, the available evidence does not support claims for the kind of psychological transformation required for broad democratic social transformation.

develop behavior conducive to business success. (Greenberg, 1981b, p. 41; *also* 1981a, pp. 977-81) His evidence suggests that if the individual moral development offered by democracy acts as but one choice amongst many that workers must trade off against, they would rather choose higher wages, technical skill development, and the like. Indeed, Greenberg does not find any evidence that working for a cooperative fostered dissatisfaction with prevailing political and economic institutions and ideologies. (1985, p. 141) Workers in cooperative and conventional firms alike “are highly patriotic and contented with the American system.” (1985, p. 143) Most respondents in his 1983 poll “showed strong support for the verities of contemporary conservatism as articulated by Ronald Reagan and others.” For example, 90% agreed that government had grown too big and expensive, and many were hostile to welfare entitlements. (*Ibid.*, pp. 143, 147) They affirm classical liberal values of possessive individualism more strongly than those in conventional firms, and their affirmation only *increased* over the time spent in the cooperative. (1985, p. 145)

This justification for workplace democracy not only expects to transform individuals’ psychological disposition within their workplaces. It hopes to eliminate workers’ apathetic attitudes towards all participation, including as democratic citizens. Empirical evidence, however, likewise suggests that the anticipated “spillover effects” of democratic attitudes may rest on shaky foundations. (Schweizer, 1995; Greenberg, 1986)¹⁵⁷ It shows that workers do not always export

¹⁵⁷ See also Maxwell Elden, “Political Efficacy at Work: The Connection Between More Autonomous Forms of Workplace Organization and a More Participatory Politics,” *American Political Science Review*, 75 (1981): 41-58; Menachem Rosner, *Participatory Political and Organizational Democracy and the Experience of the Israeli Kibbutz* (Haifa: University of Haifa, 1981), pp. 47-50, and “Participatory Political and Organizational Democracy and the Experience of the Israeli Kibbutz,” in *Organizational Democracy and Political Processes*, ed. C. Crouch and F. Heller (Chichester: John Wiley and Sons, 1983), p. 479; Stephen Smith, “Political Behavior as an Economic Externality,” in *Advances in the Economic Analysis of Participatory and Labor-Managed Firms*, ed. Derek Jones and Jan Svejnar (Greenwich: JAI Press, 1985), *passim*; Ronald Mason, *Participatory and Workplace Democracy* (Carbondale: Southern Illinois University Press, 1982), pp. 83-84.

their democratic learning outside the job by becoming more active and engaged citizens. Some argue that the disappointing result might be attributed to the pervasive ideology of ‘possessive individualism,’ a worldview too strong to bend before a single and isolated experience within a democratic workplace. (Grady, 1990; Schweizer, 1995) Others note that the type of learning required for engagement the representational politics of national political institutions is fundamentally different from the learning required for participatory, communitarian workplace democracies. (Schweizer, 1995) Simply, citizens recognize that the politics of the workplace require different things of them. They know, perhaps, that “[p]olitical participation in republican systems is less meaningful and behave accordingly.” (Schweizer, 1995, p. 369). In fact, they might become even *further* disillusioned about the prospects of participating in national politics after experiencing meaningful participation in the workplace. (Schweizer, 1995, p. 377) As a result, other mechanisms of public education, like the U.K. Labour Party’s plan for the National Education Service (O’Neill & Guinan, 2018), might be more suited to encourage citizen engagement.

To be sure, this evidence stems from short-term studies of isolated democratic firms. Undoubtedly, changes to the culture, habits and mores of human beings cannot occur overnight. Thus, the results of institutional change on the psychology, preferences, and self-understanding of workers may prove more hopeful as democracy expands and endures over time. (Dahl, 1985, p. 98) Further, given that most workers do not have a choice to enter democratically managed firms, concluding that they would never choose to do so is jumping the gun. (Frega, Herzog, & Neuhauser, 2019) Nevertheless, unless and until human psychology does change, it is a mistake to think that imposing participatory democracy on individuals will unambiguously serve democratizing purposes.

Democracy's Unrealistic Expectations for Citizen Engagement

Workplace democracy's educative, perfectionist function on the individual is not its only illiberal implication. Relatedly, it also suffers from a critique commonly lodged against any communitarian, or in Schumpeter's language, "classical," model of democracy. Simply, it demands higher levels of commitment, political engagement, and participation that human beings are wont to give. Relying upon them to do so is, therefore, perhaps ill-considered. For if we protect workplace democracies precisely because they are democracies, we may be protecting not collective self-determination but the preferences of a few self-selected elite activists.

Citizens in the workplace might be just as recalcitrant, apathetic, and autocratically disposed as they are in the broader polity. (Brenkert, 1992, p. 253) In fact, the post-war scholars of the Oxford School of Industrial Relations, convinced by the new "realist" theories of democracy articulated by Dahl and Schumpeter, distanced themselves from radical democratic workplace reforms at least in part because "all experience shows that only a small minority of the population will wish to participate" in collective self-governance. (Jackson B. , 2012) (quoting Crosland, 1974, p. 229) As Malleson (2013, p. 628) observes, employees might even prefer undemocratic work because ceding authority to managers helps them avoid the commitment, and any attendant anxieties, implicated in making responsible decisions in a complex environment. Surely, not everyone will happily allocate their leisure time to the demands of collective dialogue and discussion about the proper size of product inventories, sales numbers, and quarterly cash flows. They might rather place authority in the hands of expert managers whom they trust to make smart decisions. As Jacob Levy (2014) and other contemporary pluralists have often pointed out, and as discussed above, not everyone values democracy for democracy's sake. Adding to the challenges,

employee “deskilling” and consumerist values perhaps renders workers too apathetic to take on the responsibility of workplace participation. (Grady, 1990)

Some empirical evidence backs up these intuitions. Greenberg (1986, p. 90) finds, for example, that many workers in the plywood cooperatives would not choose to work for another democratic cooperative again. He concludes, in addition, that cooperative workers became less willing, over time, to support democratic control of the economic life of the nation (1986, p. 170) and less confident of their fellow workers’ ability to democratically self-manage their economic lives. (*Ibid.*, pp. 138-9) Robert Dahl (2001, p. 252) observes that employees do not yet appear “deeply concerned about re-casting the structures of ownership and control” along the lines proposed by enthusiasts of workplace democracy. Other empirical studies show, furthermore, that workers care more about creating something valuable, and having some autonomy when they do so, than they do about democratic participation rights. (Jacob & Neuhauser, 2018; Michaelson, Pratt, Grant, & Dunn, 2012; Shapiro, 1999, p. Ch. 6)

As a result, those seeking to establish participatory workplace democracy might have to impose, in paternalistic fashion, rules that mandate active and time-consuming civic engagement. (Malleon, 2013, p. 610)¹⁵⁸ Otherwise, only some subset of the workforce would self-select into collective decision-making. The risk is that these individuals might recreate the very hierarchical, authoritarian institutions that workplace democracy was meant to eliminate. “Few of us today,” warns Hugh Clegg (1951, p. 34), “have the courage to be anarchists,” to participate in collective self-government without the tutelary expertise of some expert leader or another. Democratizing workplaces might amount, in other words, to a simple substitution of one set of industrial oligarchs for another. On the other hand, forcing people to participate when they are uninformed, lack

¹⁵⁸ Citing Arneson; Nancy Rosenblum, *Membership and Morals*, 53-54.

enthusiasm, or are otherwise disengaged likewise carries some undemocratic, illiberal implications. It would invite bad actors to persuade members based on ideas and rhetoric that did not serve the common good. Meanwhile, substituting direct participatory democracy for representative democracy, an alternative less burdensome on the citizen, does not entirely solve the problem. Mauk Mulder, in a 1971 empirical study, finds that workers' democratic representatives tend to form an elite oligarchy, alienating others from participation. And, as Castoriadis (1988, pp. 144, 98) teaches, representative democracy itself "inevitably contains a kernel of political alienation," where "to decide who is to decide is already not quite deciding for oneself." Representative democracy, though it may achieve many things, does not enable people to, in Rousseauian fashion, obey only those laws that they, literally speaking, give themselves.

If it is true that only some subset of workplace constituents will actively involve themselves in democratic decision-making, then it may be the case that any legal rights protecting these decisions will benefit this subset alone. One must, therefore, tread carefully before ascribing legal rights to these workplaces according to their apparent participatory democratic credentials. Further examination may be necessary to ensure that collective decisions actually facilitate projects that corporate constituents find valuable – and that those projects do not trample the equal rights and liberties of those who do not, in fact, find those projects valuable. In other words, a theory of corporate democracy, like the one offered by this dissertation, has to account for the fact that not everyone will sign on to participation in collective decision-making and that, therefore, such decision-making will (1) reflect the autonomy of only a subset of constituents; and (2) may violate the rights and liberties of those who do not participate.

Nevertheless, preferences can change. It is neither inevitable nor necessary that workers remain forever disengaged from industrial self-governance. Before writing off workplace

democracy, one must account for “the readily apparent and circular problem of inculcating democratic values in workers, whose civic lives reinforce self-interest and nonparticipation, without first attaining participatory democracy within the polity.” (Grady, 1990, p. 151) Workers’ adoption of civic virtue suffers from an institutional endogeneity problem. Just because they, at present, would not choose to participate does not, therefore, mean that they never will. It is possible that incorporating democratic mechanisms within workplace governance structures will encourage more participation over time. If this is the case, the legal rights that protect workplace collective decision-making have the potential to vindicate the rights of more people than they do at present.

Burdening the Individual to Achieve and Maintain Transformative Change

Another objection to this justification of workplace democracy is the moralized demands it places on the individual worker who is innocent of the problematic economic and political system in which she finds herself. Barring the spontaneous transformation of work anticipated by J.S. Mill in his *Principles of Political Economy*, it is the worker herself that must undertake the burden of change. She must not only allow herself to be sufficiently educated in democratic principles by participating in workplace democracy. She must then arm herself with these principles to take on the weighty task of social transformation. It asks individuals to undertake a crusade against *status-quo* wealth and power – a task that is anything but easy.

For example, Cole believed that the liberal democratic state was inescapably corrupted by the power constellations existing within the economy and civil society. (1917, p. 75) Not until the democratization of industry disrupts these constellations and material inequalities could the state hope to transcend capitalist oligarchy. Capitalism, notes Cole, funds the political machinery and controls public opinion through the press. (*Ibid.*) Capitalism must be dismantled so that the social, political, and material inequalities leading to such corruption might end. (*Ibid.*) This dismantling

would be achieved via democratizing workplaces. Secondly, Cole thought that democratizing workplaces might abolish workers' fear of unemployment. It would therefore abolish the other "great status distinction, inequality in security of tenure of employment." (Pateman, 1970, p. 40) But the democratization of workplaces, the cure-all for all these social ills, was a task allotted to the individuals who must embrace a robust form of civic engagement. It seems a tall order to place on those who are the *victims* of undemocratic economic regimes.

In contrast, the theory of corporate rights offered by this dissertation anticipates that the state will have an important role to play in democratizing the workplace. Indeed, it anticipates that the state should instantiate a regime of corporate legal rights that respects CLD's commitment to equal human worth. As explained in Chapter 2 and discussed briefly below, the state enjoys sovereignty and legitimacy precisely because it is the only governing body committed to instantiating this principle. It is not a task it can outsource to intermediary bodies like workplaces. To fulfill this task, I argued in Chapter 3 that the state should not ascribe legal rights to corporations unless they fulfill some democratic credentials. This would thus force economic participants, including the owners of capital, to democratize – at least if they wish to enjoy the benefits of corporate legal personhood.

Unrealistic Communitarian Assumptions

One may thus look askance at this justification for workplace democracy because it requires individual workers to adopt a particular ethical orientation, engage in active participation, and achieve transformative social change. But these are not the only burdens they must assume. The theory, like other associational accounts of group (corporate) rights, relies on often unstated communitarian, integrationist assumptions about human nature and the possibility of social consensus. Specifically, it presumes that the constituents of a workplace democracy can adopt a

will that coalesces with the will of all others, such that each might obey only herself when obeying the decision taken by all. For this communitarian conception of democracy, subjection becomes impossible as the tension between rule and individual wills reduces to zero. (See Kelsen, 2013, pp. 28-30) It demands, as Kelsen notes, “that the possibility of being overruled be minimized.” (*Ibid.*, p. 29) Only then will a workplace democracy realize human autonomy, both individual and collective. Thus, the individual must accept not only the responsibility for revolution, participation, and personal education; she must also revise her preferences to accord with those of the larger community – or face unfreedom.

Yet the history of labor organizing shows that finding a single ‘class consciousness’ that would yield harmony in collective decision-making is no easy task. The sectionalism dividing the trade union movement “holds apart grades whose interests” who, according to G.D.H. Cole, ought to be “one and indivisible.” (1917, p. 11¹⁵⁹) At the end of WWI, for example, Cole observed that

[d]espite the strength of the Amalgamated Society of Engineers, organization in the engineering industry is chaotic. A vast number of sectional societies still compete for the adhesion of the skilled workers, while the mass of the unskilled are divided among a number of general labour Unions which have no basis for co-operation with the skilled Unions.

(1917, p. 11) (*see also* Flanders, 1968, p. 23) Indeed, the division between low- and high- skill workers continues to beleaguer the labor movement to this day. The plywood cooperatives of the

¹⁵⁹ This oversight in Cole’s thought is ironic given his critique of Rousseauian notions of the “general will” within political associations. He thought it was impossible for human beings, given their divided loyalties and interests, to be universally represented within national governing bodies. Accordingly, he divided representation and sovereignty along “functional” lines. Yet he did not foresee that divided loyalties and interests might also entrench themselves within functional organizations and, as a result, merit their own separate autonomy rights for the same reasons.

Pacific Northwest, for example, employed an “underclass” of wage laborers who did not enjoy the same rights of participation, job security, and salary as the rest. (Greenberg, 1986) There is no guarantee, in other words, that workers within democratized industries will see eye-to-eye on material matters of common concern.

Economic divisions are not just distributed amongst workers. They are also distributed over time. As Elster and Moene (1989) point out, the long-term health of the enterprise may require cost-cutting measures that work against the short-term interests of individual workers. The downsizing, cost-cutting, and capital investments necessary to maximize enterprise wealth over the long-term may circulate company resources away from individual workers’ salaries and towards collective assets. The challenge to workplace and individual autonomy presented by market conditions and conditions of scarcity is addressed briefly below and more thoroughly in the next Chapter. Nevertheless, it should suffice for now to note that even worker-controlled workplaces might find themselves in need of unions. (*Ibid.*, pp. 34-35; Shapiro, 1999, p. 180¹⁶⁰).

Material divisions do not just exist amongst workers. Unless workplace democracy anticipates the prior abolition of capitalist ownership of productive assets,¹⁶¹ the success of communitarian formations of workplace democracy will depend on the whether the antagonism between capital and labor might be overcome. The question is not rhetorical; it is worth posing. Many business sociologists have been sanguine about the possibility of a reconciliation between capital and labor. They and others adopting an “integrationist” understanding of society trust that each class will learn to recognize their interdependency and find common ground because neither

¹⁶⁰ Critiquing the “Enterprise Compact” model found in Bluestone & Bluestone, 1992.

¹⁶¹ Not all theories of workplace democracy require the abolition of capitalist ownership or require that workers not only control workplaces, but also “own” them. (Frega, Herzog, & Neuhauser, 2019)

can profit from productive activity unless each cooperates. Peter Drucker, for example, pointed out that labor becomes even more cooperative with capital if capital, in turn, promises the possibility of promotion and security. Bluestone & Bluestone (1992) suggest an “Enterprise Compact” model of industrial relations that imagines both unions and management recognizing their joint interests in long-term firm profitability and competitiveness. Further, as explained in detail in Chapter 1, many contemporary legal and economic scholars are hopeful that shareholders will, in Tocquevillean form, come to understand their long-term self-interest, at least if “rightly understood,” to include worker-, environment- and community-friendly “socially responsible” decision-making. Many shareholders are, after all, also workers. They share public resources and their welfare is intertwined with society’s overall economic vitality. (Strine, Jr., 2017) Finally, at least one reasonable explanation for the failure of revolutionary socialism is that labor and capital have indeed found a way to get along – even if their cooperation was facilitated by Keynesian demand management and welfare state reforms.¹⁶² At the very least, managers and workers must find some common ground, for they “are engaged in a common enterprise whose success depends on working together, even if unwillingly.” (Clegg, 1951, p. 23) Nevertheless, given our continued struggle with short-term institutional investing, inequality, and labor exploitation, it appears that hopes for consensus within industry remain somewhat quixotic. Society continues to cleave along the axis of material interest.

It is, of course, bifurcated along more lines than just economic class and material interest. Race, religion, gender, sexual orientation, ethnicity, educational status, and other cultural divisions can destroy democratic unity in the workplace. The U.S. labor movement, to cite one trenchant

¹⁶² For an excellent Hegelian analysis of this Keynesian solution to the seemingly intractable conflict between capital and labor, *see* Mann, 2017.

example, boasts an embarrassing history of blatant racial discrimination. Moreover, there exists a risk that cooperative members might cynically exploit the language of democracy and community to paint over degrading demands that collective rulemaking and culture may make of fellow workers. (Garneau, 2019)

Workplace politics thus may be characterized by both material and identity-based divisions. If so, then a significant possibility exists that internal tyrannies might arise to control the rest. No obvious reason presents itself to explain why worker-controlled industry would not prove immune to majoritarian, interest-based pluralist politics. Yet, unless cooperation is voluntarily achieved and such divisions peaceably and fairly negotiated, workplace democracy has no legitimate claim to any democratic credentials. For if consensus is forced, it merely substitutes one form of unfreedom for another. As Brenkert (1992, p. 262) notes, “[i]f the right to freedom were exercised in a social situation by imposing one’s ways on others, one would violate other people’s rights and undercut the moral system within which such a right is possible.”

Some advocates of workplace democracy waive away such divisions by blaming them on, among other things, capitalistic domination, ideological hegemony, a corrupt press, and opportunistic politicians that mold public opinion to their will. (Cole, 1917, p. 14) They may also blame worker ignorance, believing that labor would unanimously find its collective interest once it learns just how much wealth is available to share when it is not usurped by elites in the service of “useless” activities like war-making and financial speculation. (*Ibid.*, p. 17) Such thinking, of course, tends to assume the existence of some objective interest that we all would hold, if we but knew ourselves better. It is, as Berlin (2002) once pointed out, a dangerous kind of assumption to make. For it invites self-appointed leaders not only to educate us about our proper interests but, in the extreme case, to force us to embrace them. This kind of risk has not gone unappreciated. Lefort,

for example, (1975, p. 80) perceived them when he argued that Cole's theory offers not freedom, but a totalizing, institutionalizing and completely transparent and legible society that can comprehensively master its own affairs – at least after it is properly articulated by the authorities. Hugh Clegg likewise took them seriously when he challenged the totalitarian and utopian implications of guild socialist theory. (Clegg, 1951, pp. 28-34; Ackers, 2007, p. 87)

Obstacles to democratic consensus within the workplace are presented not only by divided interests and identities, but also by structural factors. Contemporary industrial organization itself may prove hostile to the development of the commitment that consensus requires. Many companies, especially those in the technology sector, are short lived and outsource many, if not most, of their operations. Employees therefore have little incentive to invest in firm specific skills and make the long-term attachments required for democratic dialogue and agreement. (Davis G., 2013, p. 290) Further, meaningful deliberative participatory democracy might require a scale much smaller than that taken on by today's unwieldy, peripatetic multinational enterprises. After all, it is not uncommon for “[d]emocratic political theorists [to] argue that democracies must have a relatively small population and territory that allows the citizenry to share a common and more extensive set of values.” (Schweizer, 1995, p. 366) Consequently, as Rousseau pointed out, constituents will lose their love of “country,” and must be managed by greater repressive force. Finally, and perhaps most importantly, the complexity and pace of contemporary capitalism may not always be amenable to direct democratic decision-making, especially when important decisions need to be made quickly. Workplace participatory democracy, as a result, may require significant sacrifices in efficiency and technological development. Thus, even if material- and identity-based divisions might be overcome, workplace democracy might further require a drastic overhaul of an economy's entire industrial organization.

Any theory of corporate legal rights, like the one offered in this dissertation, must confront the communitarian assumptions subtending this kind of associationalism. If corporate legal rights cannot be ascribed unless they vindicate the liberties of actual human beings, then, like theories of associational group rights, they too might depend upon the perhaps slim possibility of consensus amongst corporate participants. If consensus can be reached at all, it may prove thin indeed. One implication is that workplaces relying on platform technologies and temporary labor may enjoy a very limited array of autonomy rights. They involve only a few people that actually come together long enough to form some kind of collective intention. Meanwhile, their second constituency – those millions of contractors and consumers that may be harmed by their associational freedom – may be very large indeed.

There is reason to believe that the theory of corporate legal rights offered by this dissertation tempers the communitarian assumptions of associationalism. First, it does not depend upon a thick concept of collective consensus. It does not require, in Dworkin's terms, that decisions enjoy "integrity." Arguably, given its rigid demands for civic virtue, the kind of consensus demanded by participatory democratic theory would demand as much. Rather, my theory holds that corporate legal rights might be justified because corporate participants believe, for whatever reason, that a particular exercise of a corporate legal rights will help vindicate their personal liberty rights by, for example, bringing them some kind of benefit. It is enough for them to indicate yes or no to the proposals set forth by delegated leadership. Stated more simply, it does not require a community of like-minded citizens sharing the same culture, ethical values, and the like. Its prerequisites might be adequately satisfied via representational systems, referenda, and other non-deliberative mechanisms.

Second, and more importantly, my theory of corporate legal rights does not require that *all* corporate members agree to corporate action. Rather, it holds that in the event that some subset of the corporate membership disagrees with a particular exercise of corporate legal rights, those legal rights must be limited out of respect for this subset's equal rights to autonomy. To achieve this limitation, in Chapter 3 I argued that corporations might adopt some accountability mechanisms; for example, preventing decision-making from invading certain particularly important rights; to exercise only those rights that be reflexively and generally justified to corporate members, *etc.* Meanwhile, my theory acknowledges that the legal right at issue is subtended only by those members who have, in fact, consented – not the entire two-part corporate *demos*. To be sure, this condition will limit the scope of corporate legal rights. Yet in exchange for this limitation, there is less risk of the illiberal, totalizing implications inherent to associationalism.

Part II: The Argument from the Firm-State Analogy

Taking a completely different tack, some advocates justify workplace democracy not by pointing to its revolutionary socialist and democratic aspirations. Instead, similar to the concession theorists addressed in Chapter 1, they analogize the firm to the state. Robert Dahl, Michael Walzer, and David Ellerman, to cite some well-known examples, imply that organizational employers, like states, pose risks to *a priori* values like equality or individual autonomy.¹⁶³ For such authors, the common denominator shared by corporations and states is their parallel¹⁶⁴ use of autonomy-limiting coercion. Each can limit choices, forcibly compel, threaten, or otherwise serve as the A that can cause B to do things she would not otherwise do. (Dahl, 1957) According to Walzer (1984, p. 293), employers, like states, are “public” insofar as each exercises power over their

¹⁶³ Ellerman, 1992; Walzer, 1984; Dahl, 1985, p. 115.

¹⁶⁴ Arneson (1993, p. 138) dubs these “parallel case arguments.”

“constituents.” Each thus has the capacity to curtail citizens’ enjoyment of their equal rights and liberties. Dahl (1985, pp. 111 *et seq.*), meanwhile, emphasizes the empirical, physical bindingness of workplace decisions. He points out that the orders of management are often equally, if not more, coercive than the orders of state officials. As a result, if democracy is required within the state, it ought also to apply within the firm. The implication is, then, that democracy’s original and most important justification is the elimination or justification of coercion – wherever it may be found. Other authors, however, invoke a different common denominator between firm and state. They observe that corporate employers, like states, provide essential goods and services. They therefore create public consequences that render it a “quasi-governing agency.” (Ciepley, 2013, p. 152; Berle, 1954, p. 104; Hahn, 1990, p. 153) Democracy can ensure a just distribution of these goods and services. Accordingly, for such authors, democracy’s original and most important justification is to secure conditions of justice.

Although often underspecified, these “parallel case arguments” (Cohen J. , 1989; Arneson, 1993) usually emphasize the risk that power, wherever it may be found, poses to *a priori* (or natural) freedoms. They therefore rely on a liberal¹⁶⁵ political theory that, in its typical formulation, holds the state’s use of force is, *au found*, suspect. It must therefore must be legitimized through democratic consent or public reason. (*See, e.g.*, Malleon, 2013, p. 609) Because the corporation poses the same risk to *a priori* freedoms as does the state, its power must vanquish the same gauntlet of legitimization requirements. Joshua Cohen (1989), for example, holds that corporate decisions should be the deliberative product of those affected by them.

¹⁶⁵ By “liberal,” I mean to denote those thinkers that give the state a protective role over rights and hold that democracy can ensure that it serves this role: Locke, James Mill, Jeremy Bentham, John Rawls, *etc.* (*See* Macpherson, 1977)

Seductive in their familiarity and simplicity, such arguments resuscitate early 20th-century progressive assaults on formalist, *laissez-faire*, *Lochner*-era justifications for the minimalist night-watchman state. Legal Realists and Progressives like Robert Hale, Roscoe Pound and Morris Cohen¹⁶⁶ were quick to point out the rather obvious fact that the state has no monopoly on coercion, that it is not the only source of unfreedom in society. If pro-market liberals really cared about freedom, the Progressives argued, they therefore ought to turn their attention to the “private” actors who did more to interfere with workers’ freedoms than did pro-labor legislatures passing minimum wage laws.

Objections

The workplace-state analogy breaks down as soon as one considers the upshot of these kinds of arguments. For even presuming both state and employer can interfere with natural liberty in the same way, and even presuming that each are obliged to respect equal rights and liberties of all, to whom should citizens turn to enforce such obligations? When parties disagree as to whether and to what degree their actions amount to an impermissible violation of human freedom, to whom should they appeal? In constitutional liberal democracies, it is the state – and only the state – that possesses the requisite legitimacy to make final decisions about these issues. (Cohen J. L., 2015; Jacob & Neuhauser, 2018) For it is the state, and not the workplace, that commits to the principle that each and every democratic citizen must understand herself to be a co-author of the laws that bind her. Indeed, the constitutional liberal democratic state’s Weberian monopoly on the *legitimate* use of force arises because it is the only agent that purports to resolve such disputes in a manner that respects the equal rights of everyone within its jurisdiction (Berlin, 2002), that aspires to

¹⁶⁶ For a thorough and thoughtful review, *see* Fried, 1998, ch. 2.

universality, that can claim the support of popular sovereignty.¹⁶⁷ The state is not *au fond* suspect because its coercive character cannot help but interfere with primordial liberty rights. *Pace* libertarian suspicions, the state is, instead, a necessary condition of security and liberty. As Tom Malleson (2013, p. 608) notes, the state is “the sole association with the power and *responsibility* to oversee all other associations.” (emphasis added) Jacob & Neuhauser (2018) similarly note that the state, unlike firms, have “ultimate authority” to make binding rules. The state, in other words, aspires to guarantee an equal distribution of rights and liberties. This, a corporation as an “intermediate,” “meso” (Levy, 2014) or “ethical” association, cannot do. But those that analogize the workplace to the state do not recognize and adopt these Hobbesian and Kantian insights.

Corporations, without claim to popular sovereignty and legitimacy, possess neither the moral authority nor moral responsibility to determinatively arbitrate social conflict. They are not, in Kantian terms, the necessary condition of security and liberty. Accordingly, Dahl’s argument that states and firms are binding in the same way is not quite correct. The state’s legitimate lawmaking possesses a *moral* bindingness that a corporation cannot hope to obtain – even if both can, empirically speaking, coerce individuals with the same efficacy. Indeed, this essential difference between state and workplace coercion was implicitly recognized by Progressive-era theorists who first analogized corporation to state based on their shared coercive characteristics. They did not invoke the firm-state analogy to justify the democratization of workplaces. Nor did they do it to liberate workplaces from government control. Instead, they pointed to corporations’ coercive character to buttress their case for building a capacious and centralized *state*

¹⁶⁷ As a result, when liberals like Ludwig von Mises hammered the progressives for their failure to appreciate the qualitatively different nature of authorized state coercion, he had a point. (*See, e.g., von Mises, 1953*)

administrative apparatus. Their arguments, indeed, subtended the New Deal reforms that did just that.

To put a point on things, consider a democratized multinational corporation that, after a generous time period allowing for vigorous and fair debate amongst its various stakeholders, decides by a majority vote to require its employees to maintain a vegetarian diet on pain of dismissal.¹⁶⁸ An objecting employee then denounces the decision as illegitimate because she never accepted the corporation's authority to make such decisions on her behalf and believes it would require her to violate her religion's dietary requirements. She therefore appeals to the state for redress because she is more certain that it will provide her a fair hearing that respects constitutional norms.

Those that would deny the employee her appeal must either (1) have faith that democratized corporations will always make decisions that comport with CLD's normative commitments; (2) ascribe sovereignty, or final decision-making power, to corporations; or (3), as is likely most appealing, concede that democratizing the corporation is no perfect prophylactic against the illegitimate use of coercion. First, placing such faith in workplace democracy may disappoint those with strong individualist commitments. Even if a corporation's written constitution perfectly mirrors the state's, its *demos* would not. The corporation therefore cannot make an infeasible claim to universality and impartiality; its decisions, reflecting the voices of its limited citizenry, might very well cut against the grain of citizens' understandings of their basic rights and liberties. Jacob & Neuhauser (2018) provide a compelling illustration. They ask us to imagine a workplace

¹⁶⁸ Recently, WeWork, Inc. required vegetarianism of its employees. (Gelles, 2018). Miguel McKelvey, co-founder and chief culture officer, "said the decision was driven largely by concerns for the environment, and, to a lesser extent, animal welfare."

comprised of 60% high-skilled software engineers, 20% skilled technicians, and 20% low-skilled service staff. They then ask us to consider whether any democratically formed governance rules might violate the rights and preferences of the low-skilled minority. Second, ascribing sovereignty to the corporation means either adopting an extreme political pluralism or, if corporate sovereignty over its constituents is conditioned on ideas of popular sovereignty, universal justice, and legitimacy, a radical reconfiguration of contemporary political forms – an order without the Westphalian state.

But if one accepts that workplace democracy is no guarantee of equal liberty, one must also accept that some other organ must serve as the final and ultimate appeal for those whose freedoms have been impugned. Further, if one accepts that the state assumes this role as equal liberty's final line of defense, one must also entertain the possibility that it may be required to *interfere* with the operation of workplace democracy in the service of equal rights. To illustrate, consider that, to prevent an unacceptable level of material inequality, the state undermines a workplace's democratic decision regarding its distribution of wages. (Christie, 1984, p. 120)

Workplace democracy, in other words, does not legitimize corporate decisions in the same way political, constitutional democracy legitimizes lawmaking. There is still a legitimacy gap in the firm's use of coercion. What's more, democratizing the corporation's decision-making risks painting over this legitimacy gap. Decker with the trappings of false legitimacy, workplace decision-makers might, perhaps, exploit their democratic credentials by claiming popular support for policies that compete with the state's constitutional lawmaking. Imagine Elon Musk, CEO of SpaceX, Inc., claiming a democratic mandate to privatize all space exploration initiatives. At the extreme, workplace democracy might even encourage a corporate sovereignty bid against the state. (See Cohen J. L., 2015)

An analogous objection might be lodged against those authors whose firm-state analogies rely not on the use of coercion in violation of natural liberty, but on their parallel provision of social benefits. Landemore & Ferreras (2016),¹⁶⁹ to provide one example, note that both the corporation and the state aim to increase the welfare of their respective memberships. Berle & Means (1932), in their iconic monograph, argue that the corporation should be governed in trust for the public because it provides public goods like income security, disability benefits, and health insurance. Egalitarian liberals might argue that the state must provide such benefits as part and parcel of citizens' positive liberties, providing the material conditions necessary to vindicate equal individual freedom. They might further argue that the scope and content of these liberties are best fleshed out democratically, according to citizens' own understandings about what is required for them to lead their lives according to their own lights. Since workplaces also provides such benefits, supporters of workplace democracy find no reason to avoid demanding the same democratic credentials of these publically salient non-state entities. Democratizing the workplace, however, provides no guarantee that employers will fulfill members' positive liberties in a manner that passes normative muster. It is the state, not the firm, that remains ultimately responsible for such a task.

It is possible that firm-state analogies neglect the unique moral bindingness of state decision-making because they rely on an understanding of democracy that is different from the one taken by this dissertation. As it is presented here, CLD is deeply concerned with coercion,

¹⁶⁹ These authors defend their firm-state analogy by making a negative argument, *i.e.*, by critiquing common objections lodged against the analogy: that firms and states apply different levels of coercion; that firms have specific purposes while states do not; that firms are property; that firms require greater levels of expert governance; and that firms require efficiency for survival. As elaborated in the next Chapter, I believe they are successful in much of their critique. (*See also* Jacob & Neuhauser, 2018) Nevertheless, they do not address the critique outlined in this Chapter: that firms do not have the legitimacy that states enjoy.

both public and private, because coercion poses substantial risks to individual freedom. But the solution that it provides is not to *eliminate* coercion by deploying a social-contract hand-waive. The purpose of democracy, as I understand it, is not to elicit explicit consent to law such that the fact of state coercion might collapse into some notion of the people's will, leaving in its place a perfectly free utopia. If it *were* the case that democracy was meant to eliminate coercion by securing universal consent and articulating the *volonté générale*, then of course it would make sense to argue that objectionable workplace coercion might likewise be eliminated if similar consent-generating mechanisms were in place. But this is not what democracy does for us under contemporary notions of political legitimacy. First, securing universal consent is, as even Locke was forced to recognize, patently unrealistic. Those subscribing to this understanding of democracy thus find themselves relying on argumentative gymnastics, deploying concepts like tacit consent, mistaken preferences, and rationality to obscure the lack of informed and affirmative popular endorsement to lawmaking. Instead, CLD takes seriously Berlin's observation that, unless one lives alone on a desert island, one's choices and opportunities will *always* be limited by the presence of others carrying equally important liberties. It thus promises not to expunge the world of coercion by securing universal consent. Rather, it promises to shape coercion productively. It tries to ensure that any coercion that exists maximizes the availability of equal liberty. It performs this task by making sure that coercion is reciprocally justified or justifiable, that it has some claim to universality because it incorporates the voices and interests of all, equally.

It also ensures that citizens enjoy equal rights to participate in the laws that structure coercion itself – whether that coercion comes directly from the state or whether it is produced by private actors – so that citizens can understand themselves to be co-equal authors of the laws that bind them. As Colin Bird (2013) argues, laws are not legitimized because the state justifies its

coercive actions with public reasons that somehow denature the force of coercion and therefore preserve individual agency. Instead, they are legitimate because lawmaking procedures aspire to give citizens the ability to condone otherwise objectionable laws. They are able to condone these laws because they are laws enacted in their name and which they helped create as moral and political equals. Indeed, Bird even goes on to argue that the state's coerciveness need not have anything to do with why equal participation in public reason is required.¹⁷⁰ To argue otherwise would mean accepting that non-coercive laws do not require democratic justification. Instead, for Bird, democracy is required because each and every citizen, as a member of the popular sovereign, is *complicit* in making the public laws enacted in her name. This compulsory complicity requires that those laws be shaped by her input in a fair and equal way – else violate her right to equal civic standing.

This is not to argue that workplace democracy is irrelevant to the state's duty to vouchsafe equal liberty. Workplace democracy might, for example, prevent some forms of coercion *ab initio* by ensuring that at least a majority of employees first freely consent to its decisions. Indeed, this is precisely what I argue in this dissertation. Workplace democracy might also ensure a more equal distribution of the material conditions required to enjoy liberty. And the constitutional liberal democratic state might even be justified in *requiring* the democratization of workplaces because doing so plausibly maximizes the enjoyment of equal liberty – particularly when corporations assert legal rights on their own behalf.¹⁷¹ But those interested in liberty must nevertheless remain

¹⁷⁰ This point is controversial. *See* discussion in Bird, 2013.

¹⁷¹ Malleson (2013) makes this sort of argument; giving people a genuine choice between hierarchical and democratic work opportunities will maximize individual freedom without the risk of state paternalism. Similarly, McMahon (2008, p. 115) argues that firm decision-making can be made legitimate not because of its own internal democratic credentials, but because it has been made legitimate through the operation of the legitimate state. This means, therefore, that undemocratic firms can also be legitimate – so long as “the top-most political authority can decide

vigilant in the face of such consequentialist¹⁷² justifications for workplace democracy. Corporate decisions, even democratic ones, cannot be legitimate in the same way that laws are. They therefore remain vulnerable to state oversight.

Unconvincing Objections

Many authors reject the workplace/state analogy not because of the state's unique role in wielding the legitimate, sovereign use of power. Rather, using libertarian arguments, they cite the empirical differences in exit opportunities available to their members. Authors like Richard Arneson (1993, p. 140) and Tom Malleson (2013, p. 608)¹⁷³ maintain that the corporation is unlike the state so long as its members may easily quit the corporation's coercive grasp. Robert Mayer (2001) reverses the argument, concluding that corporations are unlike states because workers have an option to choose or reject workplace subjection. Meanwhile, citizens face state coercion without any choice. Stated differently, the state and corporation do not (or need not) share coercive characteristics because the option to join or leave tempers corporate coercion. Crafting the argument a bit differently, those like Jacob & Neuhauser (2018) argue that corporate decision-making does not carry the same stakes for different workplace constituents. The risk that decision-making poses to liberty is different for lightly invested short-term public shareholders versus long-term employees who cannot easily leave. There may be coercion within the firm, but it is of such

that the public good would best be served by allowing non-democratic forms of corporate organization." *Ibid.* As Jacob and Neuhauser (2018) observe, "[i]f private companies operate within a democratic state that regulates their actions, then it is legitimate for these companies to exercise authority within the limits set by these democratic regulations."

¹⁷² See, e.g., Dahl, 1985, pp. 84-110, for other consequentialist justifications. This is in fact the approach Dahl took to the question before he worked out his theory of procedural democracy. In *Politics, Economics, and Welfare* (pp. 116-17) he and Charles Lindblom argued that with regard to the governance of the firm, "there do not seem to be any *a priori* grounds for preferring one organizational form to another or for prescribing any single solution for every enterprise."

¹⁷³ See also González-Ricoy, 2014; Moriarity, 2005.

a lighter touch that it cannot be compared with the state. Without the presence of coercion, democratic rights are not necessary because there is nothing to justify to citizens equally. Thus, if workers enjoy a reasonably available option to become self-employed or join a democratic workplace, hierarchical corporations need not change their authoritarian structures.

Nevertheless, as Landemore & Ferreras (2016), Walzer, Dahl (1985), Anderson (2017), Hsieh (2005) and Mayer (2001, p. 234) point out, citizens can quit many political associations with relative ease. Moving from one municipality to the next may yield less friction than finding an alternative source of employment. Similarly, immigrants coming to a country that would deny them a voice in collective governance often enjoy a reasonable option to remain in their prior state of residence. As a result, if democratic rights arise only under coercive circumstances, citizens would not enjoy them when it comes to local government. And immigrants might remain permanent *metics* (Walzer, 1984). One would be forced to admit that the importance of democratic rights would decline along with the prices of international airfare. Meanwhile, as Marx first pointed out and as others have repeated continuously ever since,¹⁷⁴ the ability to quit one hierarchical workplace is often contingent on labor market conditions. Regardless, quitting one invariably entails entering another that remains equally hierarchical.

Consider also that coercion is not solely conditioned on the mere presence or absence of exit options. It is also conditioned on how often and how assiduously someone with power attempts to exercise it over others. Many firms are structured *specifically* to encourage the supervision and manipulation of employees in a detailed and often micro-managing manner. They explicitly seek to interfere with their members on a continuous basis in order to, *e.g.*, streamline production, reduce costs, and discourage slacking. They monitor emails and web browsing histories; they hire

¹⁷⁴ See, *e.g.*, Malleson, 2013; Mayer, 2001; Cohen G., 1982.

managers to monitor employees; they track hours worked, output produced, and condition continued employment and promotion on the attainment of pre-set benchmarks. They implement state-of-the-art incentive systems to encourage workers to perform better and faster. Amazon, for instance, notoriously monitors even employees' bathroom breaks. Liberal democratic states, on the other hand, typically do not seek to manage their subjects quite so invasively. It is therefore not unreasonable to conclude that a corporation is, at least sometimes, *more* coercive than a state. And so, if the simple fact of coercion is indeed the most significant element subtending the ascription of democratic rights, workers might have a stronger claim to them in the workplace than they do in their own governments.

Regardless, conditioning the existence of moral and political rights on historical circumstances fits awkwardly into rights discourses. Democratic participation rights do not normally operate on a sliding scale, becoming more or less necessary depending upon the empirical onerousness of a particular piece of legislation on human autonomy. They do not vary in proportion to one's ability to evade the hand of the state. If democratic participation is a right, it should hold regardless of circumstance.

Other unconvincing arguments reference additional points of disanalogy: the existence of property rights over firms; the relevance of expertise; and the nature of the goals pursued. (Frega, Herzog, & Neuhauser, 2019) As explained by Landemore & Ferreras, (2016) none of these objections proves convincing. Demonstrated most recently by the 2008 financial crisis, states, like firms, require expertise to manage policy effectively. Meanwhile, as I explained in Chapter 1, whether someone ought to hold property rights over a firm is a normative conclusion requiring justification, not an *a priori* moral assumption. And finally, as explained by Ciepley (2013) and Landemore & Ferreras (2016), both workplaces and states, as agents, pursue many similar goals.

Part III: Defensive Arguments for Workplace Democracy

Some arguments for workplace democracy do not suffer from the weaknesses described above. Rather than invoking rough analogies to the state, incorporating problematic communitarian assumptions, or seeking to impose some perfectionist or utopian view of human freedom and liberation, they see democracy within the workplace as a tool that can help realize CLD's commitment to equal human worth. As a tool, it is only as valuable as it achieves the end towards which it is employed. Indeed, as will be explained below, these arguments suggest that workplace democracy should be supplemented or replaced by other institutional mechanisms when those other mechanisms do a better job at protecting equal human worth. And, as a tool, it is meant not to replace the CLD state, but instead to help it fulfill its normative mandate.

These arguments for workplace democracy hold that it can help prevent domination and rectify some of the evils of institutionalized, financialized, capitalism. By and large, they do not attempt to assemble a corporate *volonté générale*, but instead to articulate the conditions under which the exercise of associational freedoms can be reconciled with the equal liberties of associational members and outsiders alike.

The Argument From Preventing Domination

Some proponents of workplace democracy contend that it, when understood in a republican sense, offers a solution to certain forms of unfreedom generated by capitalistic, for profit business. These theorists argue that, despite submitting to corporate authority in their employment agreements, workers face the harm of domination when property owners, managers, and others in a position to control an enterprise exercise their own autonomy. (*See, e.g.*, Gonzalez-Ricoy, 2014; Breen, 2015) By affording workers an opportunity to help shape their collective lives together, workplace democracy can help bring self-respect and self-direction back to those who labor for

wages. It can also check the overweening autonomy of those in power. Balancing one positive freedom against another, it thereby enhances the enjoyment of autonomy rights for those who typically hold very little and will, therefore, serve the principle of equal liberty. Democracy, therefore, plays an instrumental role in achieving the desired end of equal human emancipation. But, because it only plays an instrumental role, other alternatives are available that may do as good, or a better, job.

Understood in the republican sense as structural dependence, domination is typically associated with the condition of being subject to the power of a master who enjoys a capacity to interfere with a person on an arbitrary basis. (Pettit, 1999, p. 165) It not only circumscribes workers' negative liberties, but, more importantly, relegates them to the status of uncertainty and servitude. For example, Malleson (2013, p. 617) argues that the average worker becomes a servant, taking on the duty of general obedience, once she agrees to an open-ended, incomplete employment contract. Employees become "tools whose hands and brains are directed by others, for projects determined by others, and towards goals selected by others." (*Ibid.*) The result is not just the manager's physical interference with the worker's freedom, but also psychological harm and a violation of political equality. It creates subservience, fear, fawning, helplessness and dependence. (*Ibid.*) Authors also emphasize the unaccountability of power held by supervisors, noting that it can be wielded arbitrarily and according to their whims and cruelties. (Brenkert, 1992, p. 258)

Democratizing the workplace is thought to eliminate domination by equalizing the status of workers and decision-makers. Every participant in the enterprise would be both a decision-maker and a decision-follower, each a self-determining equal who can choose and remove managers – should they wish. (Malleson, 2013, p. 618; Anderson, 1999). As a result, a

psychological change will take place in the mind of workers: they will learn to become less servile and more confident in their competence to make decisions. (Pateman, 1970, pp. 45-46) Further, workplace democracy might hold power accountable to those it affects, permitting workers to demand acceptable justifications and to impose non-arbitrary criteria for any management decisions and actions. (Brenkert, 1992, p. 258) An upshot is that decisions will be more likely to track the interests – objective and subjective alike – of those subject to their effects. (Frega, Herzog, & Neuhauser, 2019) Brenkert further argues that workplace democracy, rather than some other (potentially paternalistic) accountability mechanism, facilitates reasonable and uncoerced judgment and action. (*Ibid.*, p. 260) Workers “are placed such that they know firsthand the nature and effects” of power wielded by managers. They also know how it can impact their identity, self-esteem, values, and rights. (Brenkert, 1992, p. 260) They are therefore better suited than the state, the courts, or other outside agents to police dominating behavior.

Indeed, guild socialist G.D.H. Cole attributed the growth of Trade Unionism in the 19th century as a democratizing, “half-articulate protest against autocratic control in the workshop, the factory and the mine.” (Cole, 1917, p. 5) Recently, Alex Gourevitch excavated the republican ideals invoked by 19th-century organized labor in the U.S. as it pressed for self-government at work. Through cooperative self-management, workers might avoid the servility and dependence engendered by the system of “wage-slavery” of industrial capitalist production. (Gourevitch, 2013, p. 594) Democratic self-governance was thought to offer a prophylactic against the dyadic, arbitrary interference perpetrated by modern masters: the bosses, managers and owners of factories. If each enjoys equal control over interdependent workplace relations, none can dominate another. (*Ibid.*, p. 609) Workplace democracy also promised to end *structural* domination: the heteronomous imposition of control across all sites of production and its generation of a new

underclass of laboring, property-less participants who must inevitably choose to work at the mercy of some employer or other. (*Ibid.*, p. 596) By participating equally in firm governance and sharing equally in productive output, workers would enjoy the psychological benefits of “[feeling] that he is a proprietor...that his brain and muscle weights equally in the scale.” (*Ibid.* p. 597, quoting *Journal of United Labor*) They might also avoid the relations of dependency created by an unequal distribution of ownership and control of productive resources. Slipping conceptually between individual and collective autonomy, labor republicans also held that equally distributed decision-making rights would allow the working person to be “his own master,” akin to the independent farmer or artisan of earlier ages.

Workplace democracy, in this model, does not suffer from many of the objections pertinent to the associationalist justifications described above. First, it does not rely on perfectionist accounts of liberty. It does not demand that workers actively participate in firm decision-making in order to achieve a particular account of self-fulfillment and autonomy. Unlike participatory democratic arguments, its vision of freedom is one of equal status, lack of arbitrary interference, and, perhaps, some assurance that workplace decisions will serve the interests (both objective and subjective) of more firm stakeholders. It does not promise more. Notably, it does not promise perfectionist self-actualization or, at least in most versions, the instantiation of any actually existing collective general will.¹⁷⁵ The republican conception of workplace democracy demands status equality, not consensus. Nor does it, like socialist arguments, seek to realize any as-yet ill-defined utopian outcome. Instead, it seeks to end domination as it appears in particular historical circumstances. It

¹⁷⁵ As described below in the next section, The Labor Republicans, at least as described by Gourevich, do seem to have embraced this concept.

likewise does not eschew the role of the constitutional liberal democratic state in guaranteeing to each citizen her equal basic rights and liberties.

Objections

While its advocates make a compelling case for democracy's utility in reducing or eliminating domination in the workplace, workplace democratic republicans may not offer the prophylactic solution to alienation and domination that they seem to anticipate. Nevertheless, many of the theories' weaknesses can be remedied by supplementing workplace democracy with additional liberty-protecting institutional mechanisms.

The Rights of Others

One objection to democracy as a solution to domination mirrors the communitarian assumptions that subtend theories participatory workplace democracy. Any republican theory of workplace democracy must address the risk that democratic decision-making might impose a "foreign will" upon objecting minorities in a manner that is experienced as dominating. Indeed, the success of workplace democracy as a prophylactic solution to domination seems to depend upon (1) eschewing a communitarian conception of democracy in favor of one that emphasizes equality in decision-making; (2) avoiding the kind of permanent minorities and majorities that can crystallize into unequal status differentiations; (3) participation in decision-making sufficiently robust to overcome feelings of alienation and servitude; and (4) sufficient consensus among the corporation's constituents such that they feel, even when they do not win every argument, that they are participating equally in creating the rules that they give themselves – that they are not subject to some "mysterious collective will and an almost mystical 'collective person,' each "differentiated from the wills and personalities of individuals." (Kelsen, 2013, p. 32) If such is not accomplished, warns Clegg, "those whose actions and ideas seem contrary to the 'general will'

[might be] regarded as evil, and soon suppressed as disruptors of the common purpose.” (1951, p. 34) Accordingly, even if worker institutions “became the government of industry,” they might nevertheless amount to “involuntary association[s]” and “[a]ll of the shortcomings of its internal democracy...would become powerful engines of oppression” (Clegg, 1951, p. 28)

Like those supporting workplace democracy for its potential to increase autonomy and self-determination, some labor republicans seek to avoid this problem by drawing from communitarian, integrationist, associationalist – and perhaps even paternalistic (Clegg, 1951, p. 32) – assumptions about the possibility of democratic consensus. They seem to anticipate, perhaps a bit optimistically, some psychological, Hegelian transformation occurring within the minds of workplace constituents. Individuals, they hope, will come to understand themselves as free in solidarity with others, to see them “not as the obstacle to our own achievement nor even just as equally important contributors to social life, but as potential ‘co-operators,’ as fellows in a joint enterprise.” (Gourevich, 2013, p. 609). Or they presume, in marxist fashion, that labor of all kinds will overcome their particular interests and follow their objective, class interests happily and in lock-step – an assumption that, as recounted above, has been challenged by the long history of conflict between skilled craft unions and industrial labor. The assumption is admittedly “unsettling and demanding.” (Gourevich, 2013, p. 609) It presumes that democracy in the workplace can overcome what democracy in the political association often cannot: division, particular interests, and partisanship. It likewise enjoys an uncomfortable resemblance to the employer who seeks, in top-down fashion, to foster cooperation (or co-optation) by encouraging managers to become benevolent despots tasked to look after “stakeholder” interests by constituting focus groups and

the like. (Shapiro, 1999, p. 180; Clegg, 1951, p. 33; Adolph A. Berle, 1959)¹⁷⁶ Such a defanged workplace democracy might serve only to legitimize decisions previously taken by those in power.¹⁷⁷ The Whitley Committees and other statutory employee consultation regimes of UK wartime production confronted just this sort of criticism. (Clegg, 1951, pp. 11, 90; Grady, 1990, p. 153; Cole, 1917, p. 52))¹⁷⁸ Further, given the complexity and size of contemporary business operations, direct democracy is likely infeasible for all but the most basic strategic decisions. (See Chapter 5) If the organization is sufficiently large, any further serious attempt at direct democracy might “become[] a sham and a cover for authoritarianism.” (Clegg, 1951, p. 121) And so company “citizens” would find themselves subject to the decisions of elected representatives whose own wills might very well diverge from their own. At the very least, an elected aristocracy is still an aristocracy. It thus will exhibit the usual challenges presented by representative systems: status inequality, heteronomy, oligarchy, *etc.* Such conditions may make one think twice about workplace democracy’s potential to unshackle labor from its chains under contemporary conditions. It may simply replace one appointed boss for another. There will remain a need not just to facilitate democratic consensus, but also to encourage democratic opposition. (Clegg, 1951,

¹⁷⁶ A view held notoriously by corporate management expert Martin Lipton, the inventor of the “poison pill,” a legal device meant to protect directors from hostile shareholder takeovers.

¹⁷⁷ Stein (2019) makes a similar argument with regards to “stakeholder” commissions that, on paper, purport to incorporate community interests into urban planning but, at the end of the day, serve only to paper over pro-capitalist development policies.

¹⁷⁸ At first, the example may not seem apposite because the Whitley Committees were implemented in capital-owning firms. As a result, one would expect the Committees to be co-opted by capitalist owners. Nevertheless, under more contemporary models of the firm, a “team” of workers is described as rationally hiring expert management to coordinate and supervise their activities. (Alchian & Demsetz, 1972) The fact that company equity is held by management is the endogenous outcome of the team’s democratic choice to put authority into the hands of a single entrepreneur.

p. 30) There will be a need, in other words, to institute some form of procedural democracy – or unionization – that can adequately safeguard the rights and liberties of all, equally.

But even theories of workplace republicanism that avoid this kind of communitarian thinking are not immune to criticism. If domination, alienation and other forms of unfreedom are thought to be perpetrated by a class of capitalist investors, these investors will be casualties of republican transformation. Their interests – even their legitimate ones – might be impugned by the reversal of fortune (*i.e.*, the property appropriation) contemplated by workplace democracy. Yet advocates of this form of workplace democracy do not appear to articulate any principled accounting of their fate other than simple dispossession. Mayer (2001) argues, for example, that workplace democracy would lead to a usurpation of their property rights as employees seize control of company assets and deploy them for their own benefit. Mayer’s point becomes even more troubling once one recognizes that the retirement security of many Americans relies upon the success of such investments. (Strine, Jr., 2017) Workplace democracy might hold those investments hostage to workers who have no reason to do anonymous retirees and pensioners any favors. Yet many theories of workplace democracy that rely upon domination and alienation “don’t even pretend to try” to account for their compelling interests in financial security. (Mayer, 2001, p. 229) Perhaps for good reason. After all, if labor tried to hire necessary capital in extant markets and first secure investors’ contractual consent (*see* Ellerman, 1990, p. 64), they might be subject to the same inequalities of bargaining power presently enjoyed by financial intermediaries, the same pressure to kowtow to moneyed interests, that workplace democracy seeks to avoid. (Mayer 2001, p. 243) In other words, financial actors can protect their interests exogenously and without any institutional protections beyond the contemporary constellation of legal contract rights – including the right to exit entailed by the “Wall Street Walk.” (Block, 1992, p. 285) Investors can,

in other words, demand control over production as a condition of their cooperation. Without an express redistribution of these investors' rights to workers, workplace democracy might not be an effective solution to domination and alienation. And so workplace democrats must either admit that a violation of investor rights is a price worth paying – or set forth proposals that provide for investors' compelling human interests in financial security while also offering an efficient scheme to finance economic production. Not an impossible task, but not one that can be waived easily away.

Capital asset owners are not the only parties whose interests might be sacrificed to workplace republicanism. “Industrial managements elected by workers,” observes Clegg, “might well exploit the consumer” who, in most schemes, receive no democratic input into collective decision-making. (1951, p. 23) A democratic workplace, for example, might package its products with cheap single-use plastics in order to maximize worker compensation. Yet its customers might prefer a more environmentally-friendly solution. As a result, workplace democracy might not eliminate the need for a state, or some other agent, that can protect the rights of the consuming public against exploitation and harm – a result that those with revolutionary aspirations might find disappointing. Democratic workplaces, in other words, cannot enjoy unlimited autonomy if the equal rights and liberties of everyone are to be respected.

Workplace Democracy Competes with Economic Competition and the Necessity of Efficiency

There is another objection to this justification of workplace democracy. To the extent that economic actors find themselves bending inevitably to the so-called laws of competition and efficiency, and to the extent that this subjection causes domination and other forms of unfreedom, workplace democracy can only offer small consolation. Workplace democracy does not, after all, purport to eliminate markets or expand the limits of technological feasibility. It only democratizes

the actors navigating the economic system. And all firms, whether democratic or entrepreneurial, must survive that system – whether it takes the form of market-based or planning-based coordination.

Robert Dahl, in making his case for economic democracy, observes that autonomous productive institutions within complex economies cannot obtain the efficiency necessary to achieve society-wide material prosperity unless their actions are coordinated. This coordination must come either from a central¹⁷⁹ planner or through market relations. But market systems and the efficiency requirements of central planning “would function as [a] critical external limit[s] on enterprise decisions.” (1985, p. 90; *see also* Singer, 2018) As a result, workplaces may not enjoy sufficient decision-making discretion to make democratizing them worthwhile – not, at least, if we are committed to an integrated, interdependent economic system that takes robust advantage of the division of labor and adequately fulfills human material needs. With regard to market economies, further, the question of workplace democracy faces an irony: the more competitive and decentralized the market, the more likely it is that workplaces will be price-takers, not price-makers. Accordingly, there will be less room for democratic firm decision-making. In other words, the possibility of workplace democracy relies upon the existence of non-competitive market conditions like monopoly and oligopoly. Yet the less competitive are market conditions, the more likely it is that those with power to shape the economy will abuse it and thus create dominating and alienating conditions for everyone else.

As will be elaborated in more detail in Chapter 5, classical and neoclassical economists alike theorize that firms, to succeed in competitive markets, must follow a production function that

¹⁷⁹ Stein (2019) contemplates, for his part, a regional planning schematic that would defang much of the authoritarian flavor associated with central state planning.

incorporates exogenously given market prices for both inputs and outputs, minimizing opportunity costs whenever possible. (Cyert & March, 1963; Kroszner & Putterman, 2009, p. 7; Team, 2017, Ch. 6.2; Williamson, 1980, p. 6) That is, a firm's production process is represented by a function, $y = f(x_1, x_2, \dots, x_n)$. The given inputs, x_1, x_2, \dots, x_n , comprising the price and quantity of capital, labor, land, *etc.*, yield an output y and should be optimized so that y generates the greatest profit. It suggests that there exists an ideal solution to the arrangement of both human and material inputs that firms must inevitably adopt or else face market failure. Adding to the deterministic flavor, some economists similarly argue that "gadgetry," (Drucker, 1993(1946); Chandler, 1977) or technology, determines not only the products that companies will make, but also the organization and tempo of human activity, *i.e.*, the division of labor, within their confines. Some push the point even further, insisting that technology will also drive the legal and political form of firm management and authority. Marx (*Capital*, Vol. 1 Ch. 14), as one notable example, argued that "[t]he division of labour in the workshop implies the concentration of the means of production in the hands of one capitalist." In other words, technology determines the private ownership and control of the means of production.

If these economists are right about such determinism, it hardly matters that a firm's decisions are made democratically or not. They must converge on the solutions and actions that will ensure survival and profitability. (See Greenberg, 1986, p. 77) Their decisions will be a matter of *episteme*, of science and engineering, not human volition. Whatever liberty is adduced in democratically 'choosing' to pursue these solutions looks a bit like the sort of 'liberty' enjoyed by Hobbes' man as he quits the State of Nature: the inevitable renunciation of natural liberty in exchange for survival. Indeed, governance structures themselves may be chosen not because they reflect democratic ideals, but because they can successfully implement the division of labor

demanded by markets and technologies. (Thompson, 2015, p. 70) Not even workplace owners and bosses would enjoy liberty under such conditions. “Free competition,” observed Karl Marx, “brings out the inherent laws of capitalist production, in the shape of external coercive laws having power over every individual capitalist.” (*Capital*, Vol. I, Ch. 24; *see also* Williamson, 1985, p. 211) Karl Polanyi likewise notes that

[t]he capitalist is just as powerless in the face of the laws of competition as the workers are. Capitalists and workers alike, human beings in general, appear as mere players on the economic stage. Only competition, capital, interest, prices and so on are active and real here, object facts of social being, while the free will of human beings is only a mirage, only a semblance.”

(2018, loc. 644) Under perfect competition, workplaces are passive price-takers whose activities are dictated by exogenously given technology.

Consequently, the firm’s worker constituents will find themselves making instrumentally rational decisions based on consumer demand, the requirements of technology, and the costs of relevant inputs like land, labor, and capital. (Davis G. F., 2013, p. 285) Against their inclinations, they must adopt the most efficient production techniques, even if they entail mind-numbing labor or, indeed, produce negative externalities like pollution and environmental degradation. (Dahl, 1985, p. 99) To illustrate, Edward Greenberg (1985, p. 81), in a case study of the plywood cooperatives of the Pacific Northwest, finds that democratization did little to alleviate the boredom and frustration experienced by workers going about their daily tasks: feeding planks of wood into machines. As Greenberg observes, “there is no great variation in day-to-day governance of the work process between the plywood cooperatives and ... conventional firms.” (1985, p. 40) In both cases, the work is “universally noisy, dirty, dangerous, monotonous, and relentless.” (*Ibid.*, p. 81)

The slavish orientation of behavior around the firm's technology, further, likewise militates against the possibility that workers might overcome their alienation from each other. (*Ibid.*, p. 88) As a result, workplace democratization may not protect and develop the capacities for human creativity and development as much as one might have hoped. The only way to avoid calling such conditions dominating is to define domination as Philip Pettit does: a condition of non-liberty that is the result of actions taken by intentional agents who abuse their power in arbitrary ways. This cramped conceptualization screens out the demoralization of those who feel enslaved by machines and markets.

Moreover, even adopting this constricted definition of "domination" does not eliminate risks to liberty presented by the efficiency requirements of central planning and markets. The operational requirements of some large-scale industrial production may require bureaucracy and some kind of coordinating hierarchy that divorces workers from freedom and responsibility. (Cole, 1917, p. 53; Foss & Klein, 2019) They therefore place in the hands of managers the power to arbitrarily interfere with labor. In larger industries, for example, democratic workplace constituents might find themselves implementing the latest in "management science," (like contemporary uses of computer algorithms to schedule and divide labor), as they organize persons and tasks through hierarchical bureaucracy rather than in ways they find congenial to their temperaments and preferences. (Drucker, 1993(1946); Cole, 1917, p. 21) They might even decide to hire, or elect, outside management and defer to its expertise and discretion. (Grady, 1990, p. 152) This is an especially attractive option when companies face turbulent market conditions that require swift and knowledgeable decision-making. It becomes even more attractive when decisions are interdependent, cascading to effect multiple departments whose own response will cycle back and elicit counter-responses. Waiting for democratic consensus at each stage could be crippling.

(Foss & Klein, 2019) What's more, when democratic decision-making does facilitate firm efficiency, as it does for decentralized, discretion-dependent activities that require skill and flexibility (Thompson, 2015, p. 98), democracy is not adopted as a matter of human autonomy, but as a matter of necessity. Workers might, therefore, see their participation in meetings as a chore wherein useful information is to be laboriously extracted from them, rather than as an expression of their liberty.

Another aspect of the dominating implications of economic determinism likewise deserves a special note. As alluded to above, worker-citizens might find themselves accepting the demands of the owners of scarce capital resources. They might be forced to grant creditors and investors outsized oversight powers and an exorbitant share of company income – even if they are ostensibly democratic. (Mayer, 2001, p. 243) Workplace republican democracy is no panacea to the significant influence of high finance on the economy. Certainly, if extant capital markets refuse to fund democratic workplaces on fair and non-dominating terms, other solutions present themselves: government funding, subsidies, and regulation. Gindin (2019) argues, for example, that one essential governmental function within a socialist state is precisely the financing of productive enterprises. But the problem of start-up and operating capital is not a problem that can be ignored.

As a result of these obstacles, eliminating the risk of domination arising from the internal firm hierarchy and coordination necessary to successfully compete in markets might require a substantial retooling of production techniques and technology development. Grady (1990, p. 153), in fact, argues that the elimination of dominating conditions requires a significant scaling down of industrial production – a change that would, in turn, require the invention of new production technologies that could ensure that such organizational changes could meet society's material needs. In a panel discussion, "In Conditions of Freedom and Dignity: Decent Work for

Tomorrow’s Workers,” held at Temple University on April 17, 2019, Kelly Ross, Deputy Director of Policy at the AFL-CIO, argued that democratic publics must take control of the development and introduction of new technologies precisely in order to control their effect on freedom within the workplace. The algorithms of Amazon and Uber, driving employees relentlessly and mercilessly, might be modified to ensure people enjoy adequate break-time, receive sufficient prior notice of their work schedules, and maintain a reasonable pace of physical labor. This might be done by, for example, subjecting new technology to government approval after empirical study and democratic notice and comment – akin to how states currently handle new drug approvals.¹⁸⁰

Finally, democratizing workplaces fails to eliminate the possibility that, as a result of competitive market dynamics, productive resources will be distributed unequally between firms and between firms and outsiders. (Dahl, 1985, p. 107) Some firms may be more successful than others – and the losers may find themselves in the position of begging for help. As mentioned in Chapter 3, successful companies like Google often pay a significant wage premium. Further, those who are not collective owners of productive property – the “unemployed” – will remain dependent on others for jobs, wages, and livelihoods. After all, those who work, even if they are democratically organized, would presumably refuse to freely distribute the fruits of their labor to those who do not contribute to production. Nor would they admit new members to their ranks unless doing so benefitted the enterprise in some way. One might therefore imagine a social world divided between the productive and unproductive, with the latter continuously scraping and cowering, in servile manner, to convince the former to give up some of their wealth, to include them in their productive activity, to entice them to do business in their communities, and to engage in other “acts of economic prostration” (Gourevich, 2013, p. 603) – just as they do under capitalist

¹⁸⁰ I thank my brother, Chris Jackson, Esq., for this innovative insight.

systems. And the unemployed's *de jure* freedom to start a new productive association provides only cold comfort. As Levy (2014) argues, once the world is populated by established groups, it becomes ever more difficult for outsiders to create new ones. (*See also* Chapter 3; Jacob & Neuhauser, 2018) The public at large also faces risks. "It is too much to expect," argues Robert Dahl, "that self-governing enterprises would always act to prevent the displacement of adverse consequences on others," (1985, p. 99) even if workers might be more likely than elite and wealthy managers to guard against activities that harm local communities. And so workplace democracy is no panacea against pollution and other negative externalities that firms might be motivated to produce. Nor does it eliminate the possibility that a workplace might collectively decide to arbitrarily interfere with the liberty of outsiders by exploiting outsiders' need to earn a livelihood. As a result, there will be a need for the state, with its commitment to equal human worth, to ensure that all citizens enjoy equal moral worth. It might, for example, provide a universal basic income, a jobs program, environmental and consumer protection regulation, and other institutional solutions.

In the next Chapter, I will explain why many of these objections are a bit overblown. Except in the view of a handful of hardline libertarians, perfect competition, like the state of nature, is and always has been a utopian construct meant to gain insight into empirical and normative truths. As will be explained in more detail in the next Chapter, there is therefore in the economy likely sufficient "slack," uncertainty, and thus room for choice to make at least some autonomous democratic decision-making feasible and worthwhile – even within large scale enterprises. (Cyert & March, 1963; Parkinson, 1993; Schumpeter, 2003[1941]) Indeed, much recent economic scholarship has eschewed general equilibrium models of perfect competition *precisely* because

they fail to accurately describe actually existing economics.¹⁸¹ For example, firms enjoy some discretion in choosing to develop or adopt not only new forms of technology, but also the organizational form around which to implement them. (Thompson, 2015, p. 70; Schumpeter, 2003[1941])¹⁸² They may even possess the voluntaristic capacity to form their own distinct cultures. (Thompson, 2015, p. 69) Some forms of modular technology, furthermore, may actually support, rather than undermine, the democratic decentralization of firm decision-making. (Foss & Klein, 2019) Electoral accountability, in addition, can at least help eliminate or discourage any irrational, discriminatory, and arbitrary behavior on the part of managers that does not serve to enhance workplace productivity. Furthermore, not every choice taken under constraint amounts to unacceptable coercion or domination. (Kukathas, 2007) A prospective student accepted by Harvard, Yale, and Stanford, but rejected by Princeton and Brown, enjoys several good options when it comes to pursuing her goal of higher education. It is hard to argue that the constraints on her decision dominate her. Nevertheless, given that firms do face at least some market constraints, one should not count on workplace democracy alone to completely eliminate domination and alienation.

Overcoming Domination Without Democracy

In fact, many other guards against domination are available. If domination is understood as the imposition of uncontrolled, arbitrary power, there may be more direct solutions on offer.¹⁸³ Workplace republicanism need not always be democratic. And because democracy is here justified only instrumentally (*see* Jacob & Neuhauser, 2018), because it is valuable only insofar as it is a

¹⁸¹ From a conversation with Prof. Suresh Naidu, Columbia University Department of Economics.

¹⁸² *See also, e.g.,* Sabel & Zeitlin, 2002; Williams & Edge, 1996.

¹⁸³ This reflects a critique of Pettit's earlier articulations of neorepublicanism: it provides too weak a justification for democracy.

means to end domination and alienation, it remains vulnerable to critiques that offer other, more effective strategies. Hsieh (2005) and Werhane (1985) argue, for example, that distributing individual rights within the workplace can protect workers from arbitrary interference. Van Parijs (2004) and Taylor (2017) note that an expansive welfare state and a universal basic income might render *de facto* the *de jure* protections afforded by contractual exit rights. Notably, many strategies that can counteract domination are patently *undemocratic*. Indeed, their lack of democratic credentials suggest that workplace democracy is perhaps neither sufficient nor necessary to secure the conditions of human freedom in productive life.

(1) Unionism

As one alternative to workplace democracy, unionism can serve as an effective counterpower against management's arbitrary interference with employees. In addition to achieving higher wages for their members, collective bargaining can secure "non-material interests in order and equity, in security and status," thereby "diminishing a degrading dependence on market forces and arbitrary treatment." (Flanders, 1968, p. 17) Yet, as early "Oxford School" industrial relations expert H. A. Clegg (1951, p. 23) observes, unions are most effective and powerful when they are *less* democratic in their governance. As Clegg observes, "if their internal democracy were more perfect, industry would be less democratic, since its opposition would be too weak." (*Ibid.*) Discipline and an absence of the internal dissent typical of democracy allows unions to present a united front against intransigent employers. They might, for example, foreclose a "divide and conquer" strategy commonly adopted by anti-union employers. They might better weather the hardship of maintaining successful strike activity. "The main defense" of unions' limited democratic credentials, as Clegg famously argues,

is the same as that of the limited democracy of our political parties. The primary task of unions is to protect its members, and to protect them against someone – the employer. The trade union is thus industry’s opposition – an opposition which can never become a government.

(Clegg, 1951, p. 22) This consolidated, undemocratic industry opposition could then lever its power – its credible threat to cause the withholding of labor amongst the workforce – to demand influence in collective bargaining, the rule-making process¹⁸⁴ establishing the outside parameters of individual employment contracts. (Flanders, 1968, p. 7) Even guild socialist G.D.H. Cole observed that only industry-wide unionism might hope to challenge capital for control of production, and that industry-wide unionism required the closing of ranks, complete solidarity, and close co-operation. (1917, p. 12) “Disunity,” argued Cole, is one of the “greatest dangers” in task of liberating labor. (1917, p. 12) None of these attributes is, of course, precisely *democratic* – at least if workplace democracy is understood to include free discussion, dissent, lack of closure, and the peaceful transition of power between opposing groups.¹⁸⁵ Instead, it carries an almost populist flavor as it anticipates workers rallying around a leadership organization that articulates collective demands.

Furthermore, as unions seek to counter domination, they rarely make any effort to exercise comprehensive control over workplace activity. They are not, like schemes to establish workplace

¹⁸⁴ See Flanders, 1968 for the notion of collective bargaining as a “rulemaking process” rather than a “bargaining” process, whereby the latter notion is understood as the negotiation of interests between buyer and seller before an act of exchange is executed. Collective bargaining is instead the constitutionalization of the terms and circumstances under which buyers and sellers of labor perform their individual exchanges.

¹⁸⁵ This understanding of unions’ function, however, might fit into the pluralist understanding of democracy held by Dahl or Schumpeter. (Jackson, 2012; see also Urbinati, 2014) Indeed, Ackers (2007) argues that Clegg theorized industrial relations with precisely this normative and empirical understanding of contemporary democratic regimes.

democracy, political institutions meant to instantiate comprehensive self-governing collective autonomy in the workplace. They do not, as Cole once hoped, press for a “positive plan for the control of production.” (Cole, 1917, p. 40) They do not purport to be mini-Rousseauian republics instantiating an industrial *volonté générale*. Rather, their historical mission has largely targeted the usual bread-and-butter issues (increasing and guaranteeing wages and benefits) while guaranteeing their members due process protections against unfair, discriminatory and irresponsible treatment by management. (Carnoy & Shearer, 1980, p. 26)¹⁸⁶ In Cole’s words,

Trade Unionism is largely a critical force imposing negative restrictions. The effect of this is obvious. As long as the only power of the Trade Unions is to deny, they will inevitably remain to a considerable extent restrictive forces, and their effect on industry will be, in some degree, that of limitation.

(1917, p. 61) This *neorepublican* notion of unions’ role in limiting and countering employer power has been described by Anglo-American labor pluralists as introducing “rule of law” to industrial relations. (Flanders, 1970, p. 225) In fact, unions’ collectively bargained agreements with employers usually contain some kind of “management clause” that explicitly assigns decision-making power about products and production to the employer alone. (Malleon, 2013, p. 616) At best, then, unionism offers a constitutionalization of workplace power whereby capital owners and their hired agents are bound by due process and other negative constraints. (See Jackson, B., 2012, p. *14)¹⁸⁷ Collective bargaining agreements rationalize the regulation of workplace relations between management and labor, setting transparent rules and procedures governing worker

¹⁸⁶ Cf. Flanders (1968) and Ackers (2007), each of whom notes that collective bargaining is a form of governance and regulation through which workers, via their unions, can help frame the rules that bind them.

¹⁸⁷ Describing the view of post-War British labor pluralists like Clegg, Flanders, Milne-Bailey, and American labor economists Clark Kerr, John Dunlop, Sumner Slichter and Richard Lester.

dismissal, promotion, discipline, training, *etc.*, each subject to “judicial review” via independent arbitration and grievance mechanisms. (Flanders, 1968) The result of unions’ efforts, it is hoped, is to foster in workers not just a sense of independence and equality because they are treated with more respect. It is also to facilitate their willing cooperation with management because they have accepted employment under terms that are not extortionary or demeaning and under conditions where their interests are institutionally protected. (Clegg, 1951, pp. 31, 121)

Although those hoping for more radical transformations of work are often frustrated with the limited role ascribed to unions, workers’ lack of control over workplace governance can serve a liberating purpose. As permanent “negative” counter-powers to any workplace authority, (Cole, 1917, p. 40) unions can protect workers against arbitrary treatment not just in capitalist firms, but also in nationalized and socialized economic systems where the interests of the state, the taxpayer, and the consumer may not always align with the well-being of workers. (Clegg, 1951) Indeed, Clegg, a student of Cole and a reformed Communist fearful of the totalitarian undertones of utopian ideology, recommended unionism because unions could protect minorities even against unfair decision-making in the radically democratized workplaces imagined by guild socialists. (Ackers, 2007, p. 87) Because they do not assume a monopoly in governing authority in the workplace, unions do not put themselves in the position to control workers. They do not ask employees to work longer hours and assume unattractive tasks so that the enterprise might meet production targets. They try not, in other words, to assume the role of capitalist “boss.” Consequently, they can concentrate on limiting arbitrary power, wherever it may be found, rather than risk becoming arbitrary powers themselves. (Clegg, 1951, p. 131) Further, by remaining independent counter-powers, unions might also side-step any accusations of collusion with management. (Jackson B. , 2012, p. *16)

Moreover, unions' focus on issues like wages, benefits, and discrimination helps improve working conditions for everyone – not just those benefitting from improved governance in their own workplaces. For example, by raising wages not just within particular workplaces and industries, but throughout the economy, unions can help reduce employers' increasing monopsony power. (Bahn, 2018; Robinson J. , 1933; Manning, 2003) Monopsony is the condition where workers find themselves with few employment options: as an extreme case, an isolated company mining town. Firms enjoying monopsony power will set wages below typical market rates and, consequently, drag them down for the economy as a whole. At the same time, employers will enjoy more power to demand outrageous and arbitrary concessions of their workforce. Unions can reverse such trends, holding monopsony employers to higher standards while also compelling other employers to offer more competitive wage and benefits packages in order to attract their own workers. Without unions, in other words, economy-wide income inequality and exploitation increase as industry concentrates. Stated a little differently, unions can proxy *both* competitive labor markets *and* workplace democracy in securing against domination. (See Cowen, 2017)¹⁸⁸

(2) Other Agents Can Hold Employers Accountable

Unionism is not the only alternative available to contest domination in the workplace. The state might also do so. Early 20th-century American Progressives believed, for example, that antitrust regulation would equalize bargaining power between employers and their employees, giving labor more room to negotiate not just higher wages, but protections against exploitative workplace conditions. Managerial power might also be made accountable by judicial review, just

¹⁸⁸ Arguing that competitive labor markets can help secure against domination by ensuring that employment contracts are not only substantively fair, but also the product of just procedures, *viz.*, the negotiated relationship between two parties of equal power.

as the power of a guardian over a child, or of a corporate board over shareholders, is subject to oversight by courts of equity. (Brenkert, 1992, p. 258;¹⁸⁹ Clegg, 1951, p. 79)

The state is not the only agent that might limit the unaccountable power of corporate bosses. Shareholders, by overseeing and electing boards of directors, can also police management and ensure their behavior is rational, non-arbitrary and justifiable. Their interests in corporate profitability may at least encourage corporate leadership to avoid the kind of harassing, troubling management styles that lead to demoralized, inefficient workforces. Moreover, shareholders are continuing to demand better behavior of directors. Their interests in corporate environmental and social responsibility have led to beneficial reforms: more workplace diversity, sustainable production techniques, and anti-harassment and discrimination policies. (Jackson, 2011) Socially Responsible Investors (“SRI”) continue to increase their numbers, and activist union pension funds regularly fight corrupt corporate practices like nepotism, accounting fraud, and outsized CEO pay. Such goals not only improve working conditions, but also, arguably, help ensure the company’s long-term success in the product market. Accordingly, one solution to workplace domination is to further empower socially responsible shareholders by, for example, eliminating staggered boards, demanding the appointment of independent directors, and increasing their access to proxy ballots. Of course, empowering shareholders can create its own ill effects, particularly if they are managed by institutional investors whose priorities are not long-term value creation but instead destructive short-term gains. This possibility is addressed further in the section below.

¹⁸⁹ Such oversight, however, may prove too slow, expensive, and cumbersome to provide effective relief in all cases. (Brenkert, 1992, p. 259)

(3) Employee Exit and other Market-Based Solutions

At least one other mechanism can help prevent workplace domination. Some libertarian-minded republicans argue that the appropriate redress for exploitation in the firm is not democracy or direct state action, but the equalization of bargaining power between capital and labor. “If consent to subjection has been rendered hollow through the reduction of effective options, then the proper remedy,” argues Mayer (2001, p. 243), “is to make consent robust again by enhancing labor’s choices.” The solution, for such thinkers, is a generous welfare state, a universal basic income (Pettit, 2007), or, radically, a significant redistribution of property. Tyler Cowen, in his rebuttal to Elizabeth Anderson’s 2017 monograph on workplace governance, argues that sufficiently competitive labor market conditions can protect employees against management abuses. If workers can credibly threaten to leave a job because they have good outside options, management will take care to treat them responsibly and fairly.¹⁹⁰ (See Hirschman, 1970) Further, if workers are able to negotiate because they have outside options, they face a lower risk of the kinds of status inequality that lead to servility and self-abasement. Robert Taylor (2017) likewise promotes “resourcing exit” from dominating relationships and encouraging competition. For some, efficient markets offer an ideally non-dominating environment: outcomes are the result of individuals’ mutually rational responses to each other’s choices. The task of reformers, then, is simply to ensure that markets are efficient. As Adam Smith once observed in *Wealth of Nations*,

¹⁹⁰ Gourevich (2013, p. 608) offers a convincing counter to such arguments: leaving a job is never costless, and so threats to quit upon maltreatment are rarely taken seriously – especially for low-level disagreements. Meanwhile, bosses still retain control over working conditions, even if they are not exploitative. As a result, workers remain a permanently governed “underclass.” They must still work, whether they will or no, as neither a universal basic income nor welfare payment are sufficient to maintain comfortable lifestyles. Nevertheless, it is unclear that democratizing the workplace will solve all these conundrums. Without unanimous consent to collective decisions, workers will still face rules they did not choose themselves. And they must still work – even if for a democratically managed firm.

if each derives her subsistence not on one, but on many, though she is in some measure obliged obliged to them all, she “is not absolutely dependent upon any one of them.” (Book 3, Ch. 4)

Other market-based mechanisms are available, furthermore, to reduce domination and alienation. Simply, arbitrary treatment may not be efficient. Treating workers with respect by valuing their insight can lead to productivity gains. Managers might lighten their touch, giving more autonomy to workers by not micromanaging or specifying precise tasks and techniques, but by instead setting goals that employees can seek according to their own lights. (Foss & Klein, 2019) This kind of freedom can be policed by its efficiency credentials: it motivates workers to actively and creatively engage with their work.

Lacks an a priori Justification for Workplace Power

At least one more objection to this justification for workplace democracy can be lodged. Simply, it fails to explain why there should be power within the workplace at all – let alone whether it should be democratically wielded. Rather, it offers a kind of second-best solution to an industrialized, concentrated, property-based and market-oriented *status quo* whose claims to legitimacy remain to be filled in. It presumes that private property, even if jointly held by workers, is legitimate. (Ellerman, 1990, pp. 1, 39) It presumes that employees ought to be able to wield joint power over both themselves and others. It presumes that they may even compete with each other in a market over the business of consumers (Ellerman, 1990, p. 3) whose interests, in most schematics of workplace democracy, remain unrepresented.¹⁹¹ It says nothing about whether advanced industrialization, even if democratic, has the right to pollute the earth or usurp production in foreign economies by moving their operations abroad. It does not address the possibility of intra-

¹⁹¹ Cole (1917) argues that it is the task of the state to represent consumer interests against democratized national guilds.

firm income inequalities, nor the carnage wrought by de-industrialization in many sectors of the U.S. economy. Instead, it offers only this: *if* we are to have an advanced market economy populated by firms, domination and alienation might be ameliorated if workers had the right to participate equally in corporate decision-making.

The argument for corporate rights presented by this dissertation remedies this lacuna by incorporating the strength of associationalist theories of workplace democracy. It explains why and how enterprises might justify their autonomy rights in the first place: such rights can vindicate the equal liberty rights of their members – so long as those members hold that the exercise of such rights works to their benefit. If this argument is correct, then any republican solution to workplace domination must account for the individual rights subtending this associational autonomy right. The domination analysis must recognize that constraining workplace power might also mean constraining the legitimate liberty rights of others. Such will require a context-sensitive balancing that acknowledges and respects, reciprocally and generally, the sometimes opposing interests of members in producing and in remaining free from arbitrary control. This is exactly what my theory of corporate autonomy rights hopes to accomplish.

Diluting the Harms of Financial Capitalism

Another justification for workplace democratization brings into relief the hazards of grounding corporate legal rights in the voluntary associationalism implied by guild socialist and participatory democrats: when there is no homogeneous corporate *demos* with a clear *volonté général*, group rights based on associationalist theories risk benefitting elites alone while imposing particular ethical goals on unwilling others. This justification targets corporate rights subtended by associationalist theories that award corporate legal protections and privileges based upon the aggregated property rights of capital market participants – without bothering to ask about those

who might disagree with their plans. As explained in Chapter 1, while aggregation theories of corporate personhood purport to protect the liberty rights of stockholders, they elide not only the rights of non-stockholders, but also ignore the diverse preferences held by stockholders themselves. Not uncommonly, they serve instead as ideological cover for self-interested corporate leaders. Thus, a better structure of corporate governance is not the associationalism of this “shareholder democracy” - the same variety of associationalism suggested by guild socialism and participatory democrats - but instead a system of counter-powers, pluralism, and representation that ensures stable, fair and non-dominating decision-making outcomes.

The predicament driving this justification for workplace democratization is the short-termist and sometimes perverse economic incentives held by institutional investors who enjoy too much influence on corporate decision-making. Meanwhile, the rights and interests of both workers and institutional investors’ middle-class human beneficiaries hold very little sway. As a result, when corporations act, their welfare suffers while that of Wall Street is buoyed unfairly. When it comes to the internal distributive politics of the corporation (Team, Ch 6.1), the shareholder activists always seem to win. Thus, if a corporation is an association that merits legal rights, they are legal rights that seem to benefit money managers, financial fiduciaries, venture capitalists, and CEOs with stock options – not the corporation’s human stockholders and workers.

More specifically, although under state law,¹⁹² corporate board members must govern in the interests of “the corporation and its shareholders,” critics contend that corporations are often governed in the interests of overpaid CEOs, investment managers, and speculators – interests that sharply conflict with those of everyone else. At least one reason for this distortion in corporate governance is the fact that, under state law, only shareholders may elect corporate leadership.

¹⁹² See, e.g., Model Business Corporate Act § 8.30 (1984); Committee on Corporate Laws, 1978.

Exacerbating the problem, capital markets have been institutionalized and concentrated in a way that transfers decision-making power away from individual human shareholders and into the hands of commercial fund managers who are incentivized to ignore the long-term interests of their individual beneficiaries. (Davis G.F., 2013, p. 289; Paine, 2014, p. 38; Strine, Jr., 2017)¹⁹³ When a corporation is successful, these fund managers often find a way to redirect profits away from company re-investment and into their own accounts. (Strine, Jr., 2017, p. 1899)¹⁹⁴ Further, fund managers, unlike individual beneficiaries, do not make the bulk of their profits on account of long-term success of the real economy. Rather, their profits derive from short-term swings in stock prices otherwise determined, on average, by underlying company value.¹⁹⁵ (Tobin, 1990; Strine, 2017) Instead of using their franchise rights to help turn around struggling companies, therefore, they target profitable enterprises for what amounts to a shake-down, pressuring the board to implement stock buy-backs and sell off productive corporate assets. They will also push for “accounting gimmickry” and other actions that rattle stock prices, rather than the long-term growth that benefits their long-term human beneficiaries and other corporate stakeholders. (Strine, Jr.,

¹⁹³ There are many competing and overlapping explanations for this change in capital markets: the globalization of capital markets after the collapse of Bretton Woods; the decline of labor unions and defined-benefit pension funds, including the privatization of South American pension funds following the endorsement of the Washington Consensus; the globalization of labor markets, degrading the bargaining power of workers to shape corporate priorities; the interest rate policies of the Federal Reserve; a change in tax law that encouraged corporate reliance on debt financing (Tobin, 1990); and contracts that allow hedge funds’ human participants to cash out quickly. (Strine, 2017, p. 1893; Lazonik)

¹⁹⁴ One recent example was described by William Cohan (2019) in a recent *NY Times* editorial. Certain hedge funds, after buying company debt securities for a discount, will then purchase “insurance” against the decrease in those securities’ value in the form of a “credit default swap” (CDS). “These wiseguys then do everything they can to force the company into a bankruptcy filing, which contractually triggers the insurance payoff on the debt,” a payoff worth more than the purchased securities. In other words, investors are often incentivized to see a company *fail*, rather than succeed.

¹⁹⁵ Usually determined by the present value of expected future corporate cash flow. *See, e.g.,* Brealy *et al., Principles of Corporate Finance* (9th ed., 2008, 115).

2017, p. 1883) Even the initial public offering (“IPO”), long understood as a way for corporations to raise the capital necessary to grow and create jobs, has mutated into a payout mechanism for early-round investors. (Davis G. F., 2013, p. 292)

Thus, given contemporary corporate governance institutions, when board members are elected and CEOs are selected, they are often held accountable solely to Wall Street elites whose interests conflict with everyone else’s. The issue, however, does not confine itself to an internal dispute between corporate constituents. Another upshot, argue some, is the destabilization of the economy itself. They blame shareholder activism for the extinction of long-term, stable M-form corporations that characterized the Post-War years. Instead, “turnkey” corporations, worth billions in capital market value for their insiders but employing very few people, populate the economy. (Davis G. F., 2013, p. 284) Further, while long-term corporate success often depends upon public goods like education, environmental health, and infrastructure, shareholder-centric governance tends to drive corporations into competitive, rather than cooperative, relationships with governments and society-at-large. (Paine, 2014, p. 41)

If corporate boards represent both works and human investors, so the argument goes, they might dilute the outsized and pernicious influence of self-interested institutional investors who, at best, emphasize short-termist strategies that harm long-term corporate success and, at worst, serve as rent-seeking vehicles that benefit investment managers at the expense of workers and communities and, in the extreme, may lead to financial crises. (Davis G. F., 2013, p. 290; Lazonick, 2013) The employee franchise can serve, in other words, as a stabilizing and liberty-enhancing intra-corporate counter-power. They can help corporations make epistemically better decisions while also serving as a prophylactic against self-interested and corrupt leadership. And they can do so by forcing elected corporate leadership to balance the conflicting, plural preferences of

corporate constituents, implementing policies that reflect shared long-term interests. They could stand, in Madisonian fashion, as a faction countering financialized faction, helping representative governance bodies implement the “true interests” and “public good” (*Federalist 10*) of the enterprise.

To explain, this justification suggests that worker voice on corporate boards would serve the collective corporate good – at least if it is understood as the shared interests of ordinary human investors, consumers, taxpayers and, of course, the workers themselves. As Delaware Supreme Court Justice and corporate law expert Leo E. Strine Jr. argues, human investors would actually prefer a range of policies that comport with the common good:

... a corporate governance system that encourages investment in the development of useful products and the delivery of useful services because it is the purchase of products and services that must ultimately be the source of sustainable profits. Over the long term, you must sell something customers need or want. Whether you are a pure play or have a strong stock buyback program won't matter if you can't do that. Simply squeezing the corporate lemon to get the most juice right now at the expense of growing future lemons does not help human investors build wealth, as they risk employment opportunities and cuts in long-term portfolio growth... Corporate finance gimmicks won't generate jobs or a retirement fund for workers outside the industry space coming up with the gimmicks.

(2017, p. 1884) Because the vast majority of human investors still derive most of their wealth from their labor in the form of wages, they would likely prefer that corporations use their autonomy rights to make decisions that tended to stabilize long-term economic growth throughout the entire economy. (*Ibid.*, p. 1877) Both human investors and workers would favor instead long-term, low-

risk, sustainable growth in product markets. (Bowles & Gintis, 1993, p. 78)¹⁹⁶ They would like companies to re-invest some of their earnings so that those earnings might continue in the future. For it is these future earnings that will fund jobs as well as long-term retirement and college savings accounts mature.

Justice Strine simultaneously illustrates the wide gulf between the preferences of activist institutional investors and the rest of the corporate constituency who, he presumes, have much more in common than socialist and Marxist critiques of capitalism tend to believe:

Investing in [corporate] workers' productivity to increase profits over the long term takes more time than offshoring jobs to nations where workers receive pay that none of the advocates of stockholder power would accept for themselves or their children.

(2017, p. 1933) Similarly, William Cobb, CEO of pharmaceutical distributor JM Smith Company, speaks of the need for “balancing” the interests of “shareholders, customers, employees, vendors, and the community we live in.” (Urban, 2014, p. 34) And the only way to ensure such balance is to enfranchise, typically in some elected representative fashion, these stakeholders. Likewise, economist Bill Lazonick has long argued for the disenfranchisement of shareholders given their influence on offshoring, pollution, and other socially destructive corporate behavior.

Most recently, Senator and Democratic Presidential Candidate Elizabeth Warren, along with a collection of supportive progressive corporate law scholars,¹⁹⁷ made an argument for the democratization of workplaces along these lines when presenting her Accountable Capitalism Act (“ACA”). Under the ACA, elected worker representatives would comprise 40% of board seats for all corporations with annual revenues greater than \$1 billion. This idea, however, is nothing new.

¹⁹⁶ For the idea that workers are much more risk-averse when it comes to corporate decision-making than are shareholders.

¹⁹⁷ <https://www.warren.senate.gov/download/federal-corporate-charter-letter-of-support>.

The ACA explicitly makes reference to German co-determination, put into place as an industrial compromise following the instability of World War II.¹⁹⁸ Ralph Nader, Mark Green, and Joel Seligman presented similar ideas in their 1976 *Taming the Corporate Giant* through a scheme of federal chartering. And they themselves had resuscitated arguments asserted by movements endorsing the federal chartering of corporations at the turn of the 20th century.

It is not just corporate boardrooms that face reformist challenges. Beneficiaries, sometimes pejoratively labelled “indentured investors,” are forced into funds pre-selected by their employers’ 401(k) programs and penalized via tax law for withdrawing their savings. They have little choice about the location of their investments. (Strine, 2017, p. 1878) Their constituents lacking both exit and voice, fund managers, like political party bosses, enjoy unaccountable influence in corporate boardrooms. Not until institutional investors themselves are held to their fiduciary duties will their individual human beneficiaries enjoy the benefits of their economic freedom to invest their hard-earned savings in productive enterprise. Strine (2017) thus recommends regulations that would hold money managers accountable to their human beneficiaries, akin to how political parties opened their governance to primary elections. Davis, Lukomnik, & Pitt-Watson (2016) recommend transparency laws and independent supervisory boards. Investment funds themselves, in other words, must become more democratic.

Regardless of whether reforming corporate governance institutions will prove effective in reforming these diagnosed economic ills, enfranchising workers and communities will certainly go some way to make sure corporate purposes benefit not just Wall Street, but also workers and human shareholders. And, as I have argued in the last Chapter, if corporate purposes benefit this

¹⁹⁸ See <https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act>.

broader array of human beings, they will have a stronger claim that their purposes ought to be protected by legal rights. For at present, corporate rights tend to best serve the interests of only one corporate constituency: the bankers. The problem with corporations, therefore, is not that they shouldn't have autonomy rights at all – as some socialists and radical democrats might argue. It is that that they are governed in a way that their freedom tends to advantage Wall Street and a few of its co-opted corporate executives at the expense of their “real,” very human stakeholders.

Objections

This justification for workplace democratization is self-consciously limited. It promises only to rectify one evil: the outsized, factional influence of Wall Street on corporate capitalism. It will therefore disappoint those seeking revolutionary transformation and radical liberation. Indeed, its impact on economic formations may prove quite modest, leading to a regime resembling that already enjoyed by industrialized countries in the Post-War years.

It is also perhaps too sanguine about the possibility of reconciling the historically conflicting interests of capital and labor. Perhaps nostalgic of the post-War economic boom, it adopts a Tocquevillian notion of “self-interest, rightly understood.” Namely, it anticipates corporate representatives finding common ground between investors and workers so long as they adopt a sufficiently long-term time horizon. Once the institutional investors are defanged, the thought goes, these workers and human investors will, through their representatives, come together to maintain stable, growth-oriented, and socially responsible enterprises that respect the interests of all involved – including taxpayers, community members, and, indeed, every member of the entire economic ecosystem. This assumption is perhaps plausible – *pace* Marxists – only if constituents elect the kind of sufficiently publicly-minded elites of the variety anticipated by Madison. This, they may not do unless a system of civic education exists that, at a minimum, leads

to a widespread understanding of the interdependency of economic actors. Conditions like these can, of course, have undemocratic, paternalistic, and illiberal implications. If people refuse to or cannot be educated, they might perhaps be forced to become so. Moreover, leaving the fate of consumers and taxpayers to the good judgment of elected corporate leadership may not be adequate. Thus, the theory is not comprehensive; it relies upon, for example, a state that will not only safeguard individual rights and public welfare, but also provide macroeconomic planning.

Finally, some might object that reserving board seats for worker representation might undermine the innovation and efficiency of capitalist firms. These objections are dealt with more directly in the next Chapter.

This justification for workplace democracy nevertheless provides some useful elaboration for my theory of corporate autonomy rights. It suggests that the associationalism on which the *prima facie* case for corporate autonomy depends remains vulnerable to colonization by the worst of Wall Street. Accordingly, it must account for the possibility that institutional investors might usurp a corporation's democratic decision-making mechanisms. It can counter this risk by, for example, ensuring that workers enjoy a voice on corporate boards, enabling unions as counter-powers, or requiring the democratization of investors themselves.

Part IV: The Argument for the Provision of Important Human Interests

One last justification for workplace democracy tracks much of the argument found in this dissertation. In this iteration, workplace democracy is offered as a means by which society might protect important individual goods and liberties. When compared with contemporary corporate governance arrangements, democratic institutions will do a better job at, for example, maintaining material equality, preventing violations of liberty rights, and ensuring fulfilling jobs. Democracy, in other words, is not valued as a good in itself. Nor is it intended to work a revolution on the entire

economic and political system. Rather, it is an instrument that can be wielded as a CLD undertakes to fulfill its normative commitments. If my argument is correct, if corporations merit legal autonomy rights only if those rights protect actual human liberties and interests, then workplace democracy is a means by which corporations might come to deserve them.

As a recent example, Tom Malleson (2014, p. 10), channeling Rawls, argues that swapping out hierarchical, authoritarian relations for cooperative workplace decision-making might lead to a more ideal – and equal – distribution of the “social bases for self-respect” and “the powers and prerogatives of offices and positions of authority and responsibility.” Robert Dahl, in *A Preface to Economic Democracy* (1985, pp. 54, 84), similarly contends that hierarchical capitalist firms lead to inequalities in wealth, skills and education, which in turn lead will lead to political inequality. Workplace democracy, in contrast, would generate a more ideal distribution of political resources, like access to material goods and information, and therefore support political equality and political rights. For these authors, often relying implicitly on Rawls’ theory of justice, property-owning democracy, or liberal socialism – each of which involve the democratic management of productive firms – would do a better job than market capitalism or state socialism in realizing his principles of justice. (Rawls, 2001, pp. 136-40) David Ellerman (1990), in contrast, invokes the classical laborists’ theory of natural property rights¹⁹⁹ as he argues that democratizing firms will vindicate workers’ inalienable rights to the fruits of their own labor. For Ellerman, the output born at the end of the production process is a “new” form of property which only those involved in that process may fairly appropriate. (*Ibid.*, p. 16) As the intentional output of autonomous human beings, this product must be left in their hands if they are to enjoy liberty. (*Ibid.*, p. 22) Michael Walzer, for his part, suggests that workplace democratization might serve the goal of political equality. He

¹⁹⁹ *E.g.*, Proudhon, William Thompson, Thomas Hodgskin.

argues that hierarchical workplaces might create a permanent class of servants within civil society – a status that will inevitably bleed over in the sphere of politics. (Walzer, 1984) More recently, one major justification found in the U.K. Labour Party’s new economic manifesto²⁰⁰ is that workplace democracy would reduce wealth inequality through intra-firm “pre-distribution,” an alternative to tax-and-spend “redistribution.” (O’Neill & Guinan, 2018)

Objections

Presuming that these theories correctly identify human goods worthy of protection, the existence of workplace democracy might provide a good reason to ascribe legal autonomy rights to corporations. Nevertheless, this justification for workplace democracy, and thus corporate legal rights, only holds if democracy actually serves these human goods. Indeed, Rawls (2001, pp. 136-7) explicitly considers the possibility that other regimes might do a better job. It is therefore, like the republican theories described above, subject to empirical attack. For example, recent economic scholarship shows that workplace democracy may not eliminate wealth inequalities given the “superstar firm” phenomenon. While incomes might be equalized within any single firm, it might continue to grow between firms. (*E.g.*, Autor *et al.*, 2017)

Perhaps more importantly, the justification leaves unspecified the precise human interests that workplace democracy is to serve. Without first explaining why these interests deserve support, the theory deflates. Furthermore, without first identifying such interests, it is impossible to establish with any confidence that workplace democracy will indeed serve them.

²⁰⁰ Entitled *For the Many Not the Few*.

Conclusions: Combining the Best and the Worst in a Theory of Corporate Legal Autonomy Rights

As explained in this Chapter, associationalist accounts of democratic workplace governance present challenges to those committed to constitutional liberal democracy. Theories that rely on syndicalist and participatory democratic aspirations risk imposing perfectionist ethical values on minority workplace constituents, presume the homogeneity of preferences, and fail to account for the risk of oligarchy as subsets of workers self-select into leadership positions. In other words, they carry all the profits and problems of communitarian democracy. Meanwhile, theories that directly analogize workplaces to states overreach their otherwise laudable goal of eliminating illegitimate coercion. Presenting democracy as a way to limit power and hold elites accountable to those affected by their decisions, they elide the normative and empirical fact of sovereignty. CLD states do not just coerce; they also aim for legitimate coercion. They are tasked with the instantiation of popular sovereignty and liberty as they vindicate the principle of equal human worth. This, workplaces are ill-equipped to provide – barring a radical reconfiguration of the political order.

The Chapter also argues that stronger justifications for workplace democracy carry more modest aims. Republican accounts provide a means to limit unfreedom without carrying the pretensions of firm-state analogies – as do theories that offer democracy as a way to mitigate exploitation and better vindicate important human rights and interests. But they too suffer from several weaknesses. Most importantly, they do not justify the fact of workplace autonomy to begin with. Their starting assumption is that workplaces ought to have autonomy – so long as it is practiced in a manner that does not violate other important ends. In addition, their justifications are instrumental, and therefore conditional. In these theories, democracy is valuable only insofar as it is useful in achieving other indispensable ends. To the extent that other governance

mechanisms (*e.g.*, unions, state regulation, etc.) prove more efficient in achieving those ends, they should be preferred.

Finally, most accounts of workplace democracy proscribe a bleak future for capital-owners, perhaps presuming the benefits of democratization are worth the costs of dispossession. Yet capital markets are not just populated by the ultra-wealthy. Ordinary citizens rely upon their pension funds for their retirement. (Davis, Lukomnik, & Pitt-Watson, 2016) And the fact of investment property is not a prior antithetical to CLD's normative commitments. Indeed, John Rawls' "property owning democracy" presumes its widespread distribution.

The theory of corporate legal rights offered by this dissertation can combine the best and address the worst of each of these theories. Associationalist accounts seek to instantiate robust conceptions of individual and collective freedom, both within the workplace and in the broader political system. My account of corporate legal rights would permit workplace constituents the ability to claim a legal right protecting these associationalist goals. As argued above, it may even accommodate corporatist, but value-monist, reform of state institutions. It would therefore go some way towards addressing the concerns of those who would like to see more autonomy for these "intermediate" associations. (*See* Grady, 1990) But, unlike associationalist accounts, it would limit their legal autonomy rights by withholding or constraining them if their exercise would violate the equal rights and liberties of dissidents and outsiders. Because unlike associationalist accounts, my theory is not sanguine about the possibility of collective consensus and publicly-minded decision-making. It does not require, in Dworkin's terms, that workplace decisions enjoy "integrity" or presume that workers will always seek goals consistent with the public good. Rather, it holds that in the event that some subset of the corporate membership disagrees with a particular exercise of corporate legal rights, those legal rights must be limited out of respect for the dissenters' equal

rights to autonomy. To achieve this limitation, in Chapter 3 I argued that corporations might adopt some accountability mechanisms; for example, protecting particularly important freedoms with rights against collective decision-making; to require that decisions be reflexively and generally justified to corporate members, *etc.* To this menu of options, the possibility of unions as counter-powers to corporate leadership can be added. So, too, can the democratization of institutional investors and the apportionment of board seats to workers. Certainly, this condition will limit the scope of corporate legal rights. Yet in exchange for this limitation, there is less risk of the illiberal, totalizing implications inherent to associationalism.

This respect for individual rights also guards against some of the risks presented by the threat of intra-workplace oligarchy, *i.e.*, when certain constituents self-select into leadership positions and take advantage of the apathy and ignorance of their colleagues. It provides further protection by ascribing to the state the task of ascertaining whether and when the exercise of corporate legal rights actually serves the interests of corporate constituents.

Theories of workplace democracy that analogize the workplace to the state aim to limit illegitimate coercion. My account of corporate legal rights would likewise limit coercion by ensuring that workplace power, if it does not obtain the consent of affected constituents, at least does not violate their equal rights and liberties. Unlike these “parallel case” arguments, however, it does not aspire to relocate state sovereignty. Instead, it affirms the CLD’s state’s ultimate responsibility to guard the principle of equal human worth. Indeed, it anticipates that *only* the state can instantiate a regime of corporate legal rights that respects CLD’s commitment to equal human worth. As explained in Chapter 2, the state enjoys sovereignty and legitimacy precisely because it is the only governing body committed to instantiating this principle. It is not a task it can outsource to intermediary bodies like workplaces.

Meanwhile, unlike republican and the other defensive justifications for workplace democratization, the theory offered by this dissertation sets out a positive account of workplace autonomy. It argues that economic associations, like corporations, ought to benefit from legal protections if those protections vindicate individual freedom according to constituents' own lights. But it does so without first presuming either perfectionist accounts of human autonomy or communitarian ontology. Rather, it recognizes that workplace constituents will face conflict and addresses this conflict by insisting that legal autonomy rights never overstep the equal liberties of minorities.

Moreover, it does not leave the value of workplace democracy in a state of ambivalence. If corporations would like to claim legal protections, then they must democratize sufficiently such that the state, before it ascribes those protections, can be assured that they serve actual human interests. But, unlike participatory accounts of workplace democracy, this aim can be realized without onerous burdens on the individual – who may have better things to do with her time than to engage in robust collective self-governance. Representative institutions, regular elections, individual rights, and collective bargaining can ensure that corporate decision-makers follow shared goals and avoid some of the economic inefficiencies of deliberation while also respecting the equal rights of dissidents. For smaller firms, the consent found in employment and investment contracts – presuming sufficient market slack – may suffice. *Ad-hoc* referenda during major corporate decisions (downsizing, new product lines, entering new markets, mergers), like those already taken to incorporate shareholder voice under present corporate laws, can supplement ordinary decision-making. Workers, investors, and other members of the corporate constituency might even choose to delegate decision-making power to experts so long as they are held accountable to individual goals and others' equal liberty rights.

Moreover, the theory offered by this dissertation addresses the underspecificity of theories that justify workplace democracy because it helps to instantiate important human values. Those theories do not generally provide an explanation as to why these values are important enough to merit protection – whether via democratic institutions or otherwise. My theory of corporate legal rights, on the other hand, allows corporate constituents themselves define the goods and interests that they would like to have protected. As such, collective ends are valued because they are, in fact, valued by actual human beings and are thus consistent with CLD’s commitment to equal individual liberty.

Finally, the theory of corporate legal rights offered by this dissertation does not presume to dispossess capital owners. Similar to theories of workplace democratization that seek simply to dilute the harms of financial capitalism, it aims only to ensure that capital owners’ legal rights: (1) actually reflect the interests of human capital owners; and (2) do not violate the equal rights and liberties of others. To illustrate, if a company’s shareholders wish to exercise a corporate property right by downsizing and outsourcing in order to better fund their retirement, they must first account for whatever equal liberty rights are held by the communities and workers that might be harmed by their decision. They might, for example, pledge to workers and affected communities a portion of their increased profits or provide re-education and training programs. Or, if capital markets enjoy sufficient market power that they can extract unreasonable or demeaning concessions from workers and other corporate constituents, the state might provide a public financing alternative.

One remaining obstacle to justifying the democratization of corporations remains outstanding: the problem of efficiency. This is addressed in the final Chapter.

Chapter 5: *Raison de la Marché*: Market Constraint and Corporate Democracy

In Chapter 3, I argued that corporations are more likely to be able to make a strong normative case for legal rights in constitutional liberal democracies if they first exhibit some internal democratic credentials. Chapter 4, in exploring theories of workplace democracy, emphasized an important limitation on this theory of corporate rights. Namely, theories of collective economic rights founded on associationalism must be tempered by protections for minority insiders and outsiders alike. Such tempering can be accomplished through, for example: unions; the distribution of individual rights; the adoption of reflexive and reciprocal democratic decision-making requirements, *etc.* Yet an obvious objection presents itself. As Abe Singer (2017, 2018) recently points out, given that corporations typically operate within markets, they face constraints that may foreclose the very possibility of democratic decision-making.

First, a corporation's democratic decision-making may not yield economically efficient decisions. Inefficient decisions can lead to insolvency and dissolution, thus paradoxically undermining many members' purpose in joining the corporation in the first place. Corporate legal rights will thus fail to vindicate individual autonomy rights they are meant to fulfill. Second, and in similar light, the time-consuming process of democratic decision-making may lead to "transaction costs" that likewise undermine members' purposes. Indeed, many critiques of workplace democracy point to its inefficiency while justifying corporations' contemporary constellation of hierarchical, expert-based governance. (*E.g.*, Williamson, 1980). Third, even if corporate members democratically agree to undertake efficient behavior, their decisions seem morally vacant. They may not be the result of autonomous decision-making, but instead a choice

reluctantly taken under coercive market circumstances. Consent may not worth its name if it is given unwillingly. Corporate democracy, as a result, cannot hope to be as robust as the democracy found in political association. To nevertheless insist on corporate democratization, as Singer argues, risks “pure utopianism or science fiction.” (Singer, 2018, p. 3) The necessity of efficiency, is, as Singer puts it, is a “constitutional constraint” for business in a way that it is not for a state.

Singer may be the most recent political theorist to set out such observations. But he is certainly not the first. Neoclassical economists, for their part, black box the firm. They model business not as an organization of autonomous human beings possessing diverse and conflicting interests, but as a single rational agent minimizing opportunity costs implementing a production function that incorporates the predetermined market prices of inputs and outputs – whether human or material. (Cyert & March, 1963) In contrast, the more recent “new institutionalist” theories of the firm identify and examine the diverging interests and incentives of some of a firm’s internal actors. These diverse motivations may yield inefficient collective decisions that diverge from a firm’s outcome-maximizing choices. Nevertheless, they immediately close the lid of the box they just popped open. They do so by either (1) showing how current corporate governance regimes solve this collective action problem by re-aligning individual incentives; or (2) offering advice about how institutions might be reconfigured in order to align the outcomes of corporate decision-making with neoclassical models. The mission they give to firm managers, in other words, is to find a way, through intelligent institutional design, to render member preferences consistent with firm profit maximization. Using side payments, surveillance, and threats of exile, shareholder-managers can make sure that those whose interests deviate from profit maximization toe the line. At the end of the day, they, like neoclassical economists, want to ensure that the company’s collective decision-making is efficient and therefore fully determined by market constraint.

It is not just liberal and neoliberal economists who share this constrained view of firm decision-making. Even after opening the factory door to peer at its infernal insides, Marx likewise found that capitalism's ineluctable forces constrained the entrepreneur just as much as the worker. (Marx, Vol. 1, Ch. 14)²⁰¹ All business must inevitably bend to the laws of competition and the pursuit of profit – or perish. Whether and to what extent any capitalist must exploit employees, competitors, consumers, and even the earth and its resources, is left outside her discretion.

Though spanning the ideological spectrum, each model of the capitalist firm is a species of economic determinism. “[I]n economics,” observes Hirschman in *Exit, Voice and Loyalty*, “one assumes either fully and undeviatingly rational behavior or, at the very least, an unchanging level of rationality on the part of the economic actors.” (p. 1) No matter what corporate participants might prefer, market competition requires them to forgo Weberian substantive rationality in favor of an instrumental rationality oriented around the market's inexorable demand for profit. Their ends set beyond their control, the corporation can then only hope to successfully implement the means to achieve this end according to profit's epistemic requirements.

If true, these conclusions evacuate the space for democracy within the corporation. They pave the way for the legitimation of intra-corporate authority based upon expertise, necessity, and existential emergency. Expert corporate leaders must respond adequately to objective market signals; employees and investors must absorb and obey their wisdom – else face insolvency, dissolution, loss, and unemployment.

²⁰¹ “Free competition brings out the inherent laws of capitalist production, in the shape of external coercive laws having power over every individual capitalist...In a society with capitalist production, anarchy in the social division of labour and despotism in that of the workshop are mutual conditions the one of the other...”

This Chapter will push back on this depoliticization of the business corporation. I will argue that any conclusion that the corporation cannot be democratic because of market constraint engages with too many hobgoblins. I conclude that *raison de la marché* does not undermine the case for giving corporate members' a voice in corporate decision-making. At the outset, firms are not the only social actors whose autonomy is challenged with threats of constraint. States themselves must navigate markets, yet we nevertheless expect them to maintain their democratic legitimacy. Indeed, the neoliberal project of institutionally “encasing” (Slobodian, 2018) market organization against democratic encroachment presupposes that non-market values and non-market behavior need not always bend to the wind of free capital flows.

Second, the classical economic models that describe the corporation as a passive price-taking agent subject to the whims of exogenous technological advancement have obsolesced alongside the rational actor model of international politics scholarship. (See Alden, 2017) More recent scholarship holds that corporations are not automatons slavishly following the dictates of market conditions, but coalitions of diverse individuals (Cyert & March, 1963; Jensen & Meckling, 1979) who may – or may not – undertake activities that lead to business success. In fact, *whether and under what conditions* they do so requires explanation. And so we cannot assume that there is no room for democracy within the gears that process a firm's production function against consumer demand. Moreover, because contemporary business corporations do not exist within perfectly competitive, market-clearing conditions, this coalition of individuals might very well enjoy significant wiggle-room, or “slack,” to make choices that do not appear to have any direct relation to profitability – without risking existential crisis. (Cyert & March, 1963; Parkinson, 1993; Schumpeter, 2003[1941])

Third, and *pace* Marx, “profit” is an underdetermined concept. Often its meaning is self-consciously politicized. Democratic decision-making can help make it concrete in a way that respects all members’ rights equally. Though all the world might agree that profits equals revenues minus costs, each variable can be unpacked, disaggregated, expanded, nuanced. The meaning of “maximizing profits,” for example, will change depending on the relevant time horizon and the parties in whose interest it is maximized. It can include “external” costs like pollution and “external” benefits like public goods. Whether these are included on balance sheets can become very political indeed. If costs are offloaded onto “outsiders,” for example, there is more for insiders to enjoy. Profit might also include both non-pecuniary goods as well as cash; it can incorporate non-pecuniary losses (suffering) as well as costs measured in hard currency. It can be valued more or less highly depending on the certainty of its accrual and the risk appetites of its beneficiaries. People may even calculate expected profits differently – discounting cash flow is sometimes more of an art than a science.

Fourth, and relatedly, “profit” can look very different depending upon to whom it is to be distributed after it is earned. Although stock prices are supposed to reflect the discounted expected future cash flow of the business as a whole, it is also at least as likely that they reflect short-term payoffs to shareholders that do not, in fact, derive from behaviors that ensure the long-term viability of the firm. (Lazonick, 2013) Especially given the proliferation of financial intermediation, it is at least arguable that the corporate actions presented as necessary to maximize shareholder returns, and thus firm profits, is really just self-interested grandstanding. It may end up favoring, without good reason, the inefficient distribution of corporate resources to some parties rather than others. It may not favor corporate interests, but instead partial and short-term interests. Indeed, intra-corporate distributive conflict often becomes deeply political: between managers and

shareholders, between shareholders and labor, and even occasionally between shareholders and customers. Once a corporation makes money, it must, after all, decide what to do with it.

Fifth, even presuming settlement on the meaning of profit and its distribution, there is the question of means. The point is not insignificant; some of the more intransigent political conflicts within CLDs boil down to a question of implementation of widely accepted goals. Although citizens might agree that GDP growth is important, they disagree vehemently on the best way to achieve it. The choice between, for example, trickle-down economics and the stimulation of aggregate demand forms a major fault line between political parties. Within a corporation, members might, for example, disagree about whether investment in brand new technology or a slight modification of old technology might better serve the bottom line. (See Hansmann, 1996, p. 39) Moreover, as Mariana Mazzucato (2013) has memorably pointed out, even the array of available technology is not predetermined. It is a conscious choice made not only by private sector entrepreneurs, but by states themselves when they invest in the projects that have resulted in the internet, global positioning services, life-saving drugs and other world-shifting innovations.

Sixth, one should also consider that corporations *already* possess a democratic skeleton. Indeed, “American corporate law has a strong republican character.” (Strine, 2014, p. 236; Tsuk, 2005, p. 182) Further, as Chicago-school economists pointed out nearly fifty years ago, nexus-of-contracts models of the firm elegantly describe a social contract *par excellence*. (Jensen & Meckling, 1979) Through “side payments,” (wages and policy “paid” to workers and investors), corporate managers solicit voluntary cooperation with corporate constituents. They also illustrate why it is not necessarily anti-democratic for members to choose to appoint an authority to govern them, especially if that authority is more likely to make the kinds of choices that vindicates their

interests. Arguably, citizens of CLDs agree to independent central banks for the same kinds of reasons.

And finally, as pointed out by Bowles and Gintis in their seminal essay, *A Political and Economic Case for the Democratic Enterprise* (1993), workplace democracy also boasts some efficiency-enhancing features.

This Chapter will proceed as follows. First, it will outline the arguments made against corporate democratization because of its alleged inefficiency. It will then, as previewed above, detail the critiques that can be offered.

Part I: The Case Against Corporate Democracy

Objections to workplace democracy on account of its ostensible inefficiency are commonplace. (Dow, 2003, p. 124) When critics make this kind of objection, likely lingering in the back of their minds is the standard neoclassical, microeconomic notion of the corporation as a single agent that seeks to maximize a production function under exogenously given prices. (Kroszner & Putterman, 2009, p. 7; Team, 2017, Ch. 6.2) They envision an actor that must, to meet success within competitive markets, economize choices regarding the acquisition and use of various factors of production. (See Williamson, 1980, p. 6; Parkinson, 1993, p. 11) They therefore argue against workplace democracy because, given corporate constituents' diverse individual interests, their democratic decisions will inevitably deviate from the optimal solution to this production function.²⁰² Economic success, in other words, is a matter of science, not democracy. And so there is no place for politics within the corporation. It is the market's price system that

²⁰² This sort of reasoning is not confined to the firm. Within international relations scholarship, for example, many presume that the state is a rational actor that maximizes its utility as a single agent – and then go on to show how domestic politics might then cause states to deviate from rational action.

coordinates market activity. (*See also* Habermas, 1973) Even the newer economic theories that avoid single-actor models present arguments about the inefficiency of intra-firm democracy. In particular, the “New Institutional Economics” microfoundational research tradition, while it acknowledges that companies are relational phenomena involving human relationships that must be negotiated by imperfect individual human beings, advances several additional arguments against corporate democracy. These arguments rely on several assumptions about (1) the nature of how “democracy” is operationalized or understood to work within the firm and (2) the nature of the individual identity, incentives and preferences of workers versus capital investors.

Economic Determinism: Maximizing the Production Function Forecloses Democratic Decision-Making

Of course, business corporations operate within markets. Participants must ensure the going concern remains economically viable. Undeniably, if constituents want to pursue their economic rights cooperatively within market societies, they must ensure their cooperative endeavor is attentive to market circumstances. If they do not, they will not be able to enjoy their economic liberties. Business cannot serve the purposes of providing income if it fails. Thus, the fact that corporations act competitively within markets will narrow the scope of topics that are up for contestation during democratic decision-making. Market necessity, like political necessity, “can set an agenda and compel the means for its fulfillment,” (Crocker, 2011, p. 1552) heedless of what democratic citizens might otherwise want. Indeed, it is in terms of necessity that many frame (or, rather, constrain) the scope of corporate decision-making. Theorists at least since Marx and Smith have argued that to succeed within market capitalism, economic agents must economize on their use of capital, land and labor. Neoclassical economists likewise predict firm success and failure on the basis of the production function, a function that addresses the allocative efficiency in the use of, and payment for, factor inputs. Maximizing the production function given market

prices and given technology is imperative; there is a right answer that can be found by experts. Democracy can only get in the way. It is therefore better to have a properly incentivized manager, like a single entrepreneur, making all the decisions.

Relatedly, “technological determinists” like Chandler (1977) argue that human activity and behavior, *i.e.*, the division of labor, is substantially determined by exogenously given technology. Governance organizations, in whatever form, must ensure they make decisions that coordinate labor and capital in a way that comports with the most efficient use of that technology – or else watch the firm fail. (Thompson, 2015, pp. 70-74) They further argue that governance organizations will be more likely to hone in on the technologically correct decision if they take on an undemocratic, hierarchical, and expert-based form. Here, too, would democracy and its messy irrationality only get in the way.

Democracy, these critics argue, cannot help but deviate from optimal decision-making. Henry Hansmann (1996, pp. 41-42), to provide one example, references the phenomenon of cycling. This familiar voting paradox may not only lead to unstable and irrational collective action, but also provide more opportunity for members to manipulate the agenda. (*Ibid.*) Well-organized interest groups, further, might usurp control because they can solve their collection action problems more easily than others. (*Ibid.*, p. 41) They may then make decisions to inure to their own partial benefit at the cost of firm-wide competitiveness. (*See also, e.g.*, Bainbridge, 2003) Others assume that coordinating leadership roles will be assigned by rotation, and not to specialist managers, to avoid internal hierarchies. (Williamson, 1980, p. 16). Proceeding via election by lot, firms would be led by inexpert laymen who will make poor choices.

The Time-Consuming Inefficiency of Democratic Decision-Making Procedures

Other arguments against the market feasibility of corporate democracy point not to the outcomes of democratic decision-making, but to its inefficient procedures. Critics assume that all decisions will be taken only after time-consuming deliberation and consensus-building. Oliver Williamson, for example, targets the horizontal “radical” “New Left” understanding of workplace democracy for its myopic understanding of the time constraints under which firms must operate. (Williamson, 1980, p. 10; Hansmann, 1996, p. 41). To come to a consensus that approaches the best or most rational decision, members will need to spend considerable time and effort in obtaining knowledge, understanding and changing others’ wrong-headed viewpoints, and attending meetings. Of course, deliberation and consensus can take up take time that might have been spent undertaking actions necessary to remain competitive. (Dow, 2003, p. 120; Moriarty, 2007, p. 344) On the other hand, while simple majority voting may take less time and thus involve less opportunity cost, it tends to favor the median, not the average, voter. So, if the preferences amongst members are distributed in a lop-sided way, an outcome may result that does not yield the best collective result. (Hansmann, 1996, pp. 41-42) It also involves the costs associated with cycling, referenced above.

Democracies Afford Too Much Individual Freedom

Some critics object to workplace democracy because they associate democracy with a wide distribution of individual freedoms. Affording workers discretion to conduct themselves as they see fit, however, will negate the efficiencies that come with hierarchy. In classical principal-agent models, for example, economists explain the existence of hierarchical firms precisely because authority is necessary to overcome collective actions problems amongst firm members. Each individual has an incentive to slack off and free-ride off of the efforts of others. (Williamson, 1980,

p. 26) As a result, unless authority exists to enforce allotted tasks, nothing will get done. Coase's (1937) rendering, in contrast, allocates decision-making authority over individual action to save on the transaction costs involved when free employees negotiate their respective tasks amongst each other in piecemeal fashion. Transaction costs models are discussed in a bit more detail below. Simon (1991, p. 32), in another permutation, worries that employees would not choose to specialize and take advantage of the division of labor. To take advantage of the division of labor requires someone be given authority to coordinate the actions of everybody else. (Lindblom, 1977, p. 67)

Inefficient Incentives of Non-Shareholder Corporate Members

Other arguments against corporate democracy drill down on the exogenous preferences of non-investors. The idea is that only entrepreneurial owners, like shareholders, possess the incentive to make decisions that abide by market constraints. Accordingly, if democracy would allow non-investors (particularly, employees) a voice in decision-making, collective decisions will yield inefficient and therefore uncompetitive outcomes.

Workers' Preferences Are Not Conducive to Firm Profitability

Economic literature identifies several inefficiencies arising from the unique preferences and incentives of workers. The first that I will recount is within the "transaction costs" school of New Economic Institutionalism most notably associated with the work of Oliver Williamson and Henry Hansmann. Transaction costs economies attempt to ensure that "transactions, which differ in their attributes, are aligned with governance structures, which differ in their costs and competence, in a discriminating – mainly, transaction cost economizing – way." (Williamson & Masten, 1999, p. xiii) Transaction costs are costs incidental to buying and selling a good or service, usually involving informational asymmetries that lead to moral hazard and adverse selection

problems. These theories presume, sometimes without any justification, that workers will seek to pay themselves more than what is required to maximize the benefit to the firm as a whole, *i.e.*, based on each worker's marginal product or the company's average product. (Williamson, 1980, p. 16) To explain, each worker will perhaps pretend to work harder than she actually does or lie about the amount and quality of work she intends to undertake. Recognizing that workers may be devious in this way, others will slack off. Why put in the effort when others won't? This kind of dynamic, it is thought, will lead to worker shirking and free-riding because it is difficult to measure a worker's relative input into production. There is no way, in other words, to test for lies. They also predict that workers cannot credibly promise that they will refrain from expropriating the investments of outsiders. Outsiders will therefore demand control over the company before they are willing to invest. (Williamson, 1985, Ch. 12; Dow, 2003, p. 131) Other models assume that workers will choose to retain jobs rather than undertaking necessary layoffs. (Bowles & Gintis, 1993, p. 94) Workers, moreover, have a "horizon problem," *i.e.*, they have too little incentive to make decisions that maximize long-run results because they cannot easily sell, and thereby realize the present value of, their membership on secondary markets. (Hansmann, 1996, p. 79)

Similarly, contractual or "principle-agent" models find that workers, without "residual claim" to corporate profits, will likewise have insufficient incentive to ensure corporate profitability. In these models, the focus is not on eliminating transaction costs but on eliminating agency costs, or those costs which arise because each counterparty has a personal incentive to renege on the bargain made between them. Only shareholders, those with a contracted-for residual claim to corporate profit, will have the proper incentive to ensure that the company is run as

efficiently as possible. Workers, on the other hand, will rationally choose to shirk if they can get away with it. (Alchian & Demsetz, 1972)²⁰³

Other theories derive the inefficiency of workplace democracy from the endowments corporate members bring with them. Because capitalists are asset-rich, they will have a greater tolerance for the kinds of risky investments that lead to strong economic growth. (Bowles & Gintis, 1993, p. 78)²⁰⁴ Further, because they can diversify their investments and thus hedge their risks, capitalists can take more of them. (Hansmann, 1996, p. 44) Workers, on the other hand, will make decisions that are too conservative because they are asset poor and because their income is derived largely from their wages – wages that will disappear if the company fails. (*Ibid.*)²⁰⁵ As a result, democratic companies will not be sufficiently dynamic and innovative. Workplace democracy, indeed, might therefore undermine the strength of the entire economy.

Worker Preferences Are Too Heterogeneous

Some theories point not to workers' time horizons and perverse incentives, but to the sheer heterogeneity of their individual preferences. The variability amongst them exacerbates the irrational tendencies of democratic decision-making, increasing the risk of cycling and the like. As Hansmann (1996, p. 39) observes, “serious differences arise...when the outcome of [corporate decisions] will affect different [people] differently.” While shareholders generally share the same financial fate arising from a corporate undertaking, the employees who perform that undertaking

²⁰³ This presumes that all decision-making is collective and that workers do not democratically appoint a supervisor with residual rights, or that they themselves do not retain residual rights. One critique of these arguments against corporate democracy, explored further below, is that they presume that workers will not themselves recognize such problems and solve them – democratically.

²⁰⁴ Drawing from Frank Knight's famous work.

²⁰⁵ Hansmann notes, however, that “the existing literature often imputes a greater degree of risk aversion [on workers] than they actually seem to exhibit.” (*Ibid.*, p. 45)

will be tasked with a variety of different responsibilities and liabilities. While shareholders seek only pecuniary returns,²⁰⁶ workers will be concerned about issues like social justice, working conditions, and the character of the company's products. (*Ibid.*, p. 40) As pointed out in Chapter 3, when workers make decisions, they will consider not only the potential benefits of certain corporate actions, but also their costs – including those costs that may be distributed differentially amongst them. Some workers might have to work overtime or undertake dangerous activities. Others might not. Meanwhile, shareholders need simply do nothing at all. “Investor-owned firms have an important advantage,” notes Hansmann, “that their owners generally share a single well-defined objective: to maximize the net present value of the firm's earnings. The costs of collective decision making are thus relatively low for investor-owned firms.” (*Ibid.*, p. 62)

Inability to obtain outside financing

Finally, corporate democracy may be a suboptimal form of economic organization because it will be unable to secure the financing necessary to achieve economies of scale. Some models presume, for example, that asset-poor workers, in addition to being too conflict-averse, will prove unable to obtain financing because they present a bad credit risk. Meanwhile, capital owners, being asset rich, can borrow on better terms than asset-poor workers. (Bowles & Gintis, 1993, p. 90)

Part II: Challenges to the Efficiency Critique

Thus, many argue that corporate democracy is undesirable because it is inherently inefficient. This argument is relevant to the question of corporate autonomy rights for at least two reasons. First is that an inefficiently operated corporation, if given rights, might fail to fulfill the purposes ascribed to it by its members. Therefore, it would not vindicate members' individual

²⁰⁶ As discussed below, assuming a homogeneity of preferences amongst shareholders is problematic. *See, e.g.*, Strine, 2017.

liberties as much as might be hoped. (See Werhane, 1985²⁰⁷; I. Shapiro, 1999, p. 167²⁰⁸; Singer, 2018) It is an argument akin to arguments critiquing legal formalism. An abstract property right intended to increase individual autonomy does no good for those without any property to call her own. A criminal law that forbids sleeping under a bridge does not impugn the liberty of anyone save the poor and homeless. Likewise, a corporate right to pursue wealth in joint production does no good if the business cannot be operated effectively. Second, a lack of corporate efficiency has drawbacks for overall social welfare. If corporations are not competitive, they will not play their part in increasing overall social wealth. This second, utilitarian argument is not perhaps relevant to the question of justifying corporate rights *per se*, but it should certainly concern policymakers and democratic citizens who find themselves balancing corporate rights against other important social concerns. To illustrate, if a CLD embraces social rights like a right to a minimum basic income, and if it funds this right through income tax receipts, it should take steps to ensure taxpayers – including corporate taxpayers – are generating sufficient taxable income.

Nevertheless, each of the arguments against corporate democracy may be challenged. These challenges can be sorted into two categories. First, detailed in Part II(A) below, are those that push back against the idea that democracy and efficiency are irreconcilably incompatible goods. One holds that operating under conditions of market constraint does not provide a compelling reason to avoid democracy if democracy enjoys a superior normative status. States always operate under constraint – both political and economic – and nevertheless remain (or should remain) committed to upholding their constitutional, liberal and democratic obligations. Another

²⁰⁷ Arguing that a right to participate in corporate decision-making must be balanced against other equally important interests, like security, subsistence, and life.

²⁰⁸ “The central complaint is one we always find when democracy confronts hierarchies [necessary to achieve firm efficiency]: that the hierarchy in question is essential to the relevant good’s provision, and too much democracy will destroy it.”

holds that even if such constraints are inescapable, there is no reason to expect that corporate participants will choose to pursue strategies that do not accommodate them. There is no reason, for example, to assume that corporate participants (a) will choose to avoid paying themselves based upon marginal product or otherwise find solutions to freeriding problems; (b) must have problems obtaining financing; or (c) make myopic decisions regarding future investments. Relatedly, although direct, discursive and participatory democracy may prove time-consuming, other more efficient mechanisms are available that likewise carry democratic credentials. The proof is provided by actually existing corporate democracy: shareholders of diverse preferences already participate through democratic institutions. In any case, evidence suggests that democratic workplaces can indeed make efficient choices by virtue of workers' unique endowments in knowledge and incentives.

The second category of challenges, outlined in Part II(B), pushes back against the notion that business corporations suffer from the kind of economic determinism that precludes autonomous decision-making. Corporations very rarely operate under perfectly competitive conditions. They do enjoy a space for maneuver, and there is no reason to expect that such maneuvers cannot be democratically directed. Furthermore, maximizing the production function is no simple, straightforward task. In undertaking to "maximize profits," firms must collectively decide what "profit" means over time and over whom it is to be distributed. They must also decide on how to maximize that profit – an undertaking subject to uncertainty, risk, and, therefore the kind of judgment that democracies often exercise.

Each of these challenges are outlined in the sections that follow.

Part II(A): The Compatibility of Efficiency and Democracy

Challenge 1: The Market's Sovereignty Bid

Neoclassical economic theory makes the case that democratizing the corporation would undermine the very function its members expect it to fulfill: profit, development, prosperity. Yet these are the very same expectations democratic citizens came to levy on their governments during the Post War period. (Streeck, 2011)²⁰⁹. Indeed, business corporations are not the only form of human association that faces ostensible tradeoffs between democracy and market necessity. Governments, like firms, find themselves grappling not only with internationally mobile capital, labor markets, and inflation, but also international institutions specifically designed to limit their democratic sovereignty. (Lafont, 2018: 317; Slobodian, 2018) Domestic governments, like firms, face hard choices: between enticing private capital investors or fulfilling democratic social welfare demands with tax and debt. Only the most radical democrats and the most faithful market anarchists, however, insist that one must choose between the two. The rest struggle to find some pragmatic settlement between conflicting demands of democracy and market, yielding to efficiency when necessary while nevertheless insisting that the state fulfill its duty to obtain democratic legitimation. If the state can handle this burden, why the corporation cannot and should not requires justification.

²⁰⁹ “Post-war democratic capitalism underwent its first crisis in the decade following the late 1960s, when inflation began to rise rapidly throughout the Western world as declining economic growth made it difficult to sustain the political-economic peace formula between capital and labour that had ended domestic strife after the devastations of the Second World War. Essentially that formula entailed the organized working classes accepting capitalist markets and property rights in exchange for political democracy, which enabled them to achieve social security and a steadily rising standard of living. More than two decades of uninterrupted growth resulted in deeply rooted popular perceptions of continuous economic progress as a right of democratic citizenship—perceptions that translated into political expectations, which governments felt constrained to honour but were less and less able to, as growth began to slow.”

The Shifting Front between Market and State

To be sure, some political theorists respond to the “perennial tension between capitalism and democracy” (Azmanova, 2013) by erecting inviolable normative and ontological barriers between them. They seek to quarantine one from the corrupting influence of the other. They would, therefore, perhaps agree that the corporation ought to focus on efficiency rather than respond to CLD’s commitment to equal human worth. The fortress hoisted between state and market is not just maintained by Hayek, von Mises, and other neoliberal workhorses who would bind the hands of democratic polities through market-protecting law and democratically independent political institutions. (Slobodian, 2018; Lafont, 2018) Michael Walzer, for example, locates the state and the market in entirely different spheres of justice. Jurgen Habermas, for his part, cordons off an autonomous, norm-free economic “subsystem” from the communicative lifeworld, allowing the state to steer only from the outside using Keynesian counter-cyclical and redistributive interventions through the medium of power and the language of law.²¹⁰ More recently, Wolfgang Streeck drew a hard line between the “utterly” conflicting principles ordering democracy and market: “one operating according to marginal productivity, or what is revealed as merit by a ‘free play of market forces,’ and the other based on social need or entitlement, as certified by the collective choices of democratic politics.” (Streeck, 2011) Hannah Arendt, categorizing the modes of human affairs, sets the bare biological necessity of the *oikos* separate,²¹¹ and somewhere below,

²¹⁰ Markets are steered by money, not linguistic communication, and this steering is anchored in private law because “Private law creates a sphere in which individuals are exempt from providing justifications for their actions, providing a mechanism for transferring ‘structures of mutual recognition that are familiar from face-to-face interactions...in an abstract but binding manner, to the anonymous, systemically mediated interactions among strangers’.” (Klein, 2019, p. 9) (quoting Habermas, 1996, p. 448) Klein argues in response that because law entails power, and because power requires legitimation, it is thus sensitive to democratic justification.

²¹¹ What Hannah Arendt calls the “rise of the social,” in which the animal needs of the private household, or *oikos*, come to preoccupy the public sphere (Arendt, 1998, pp. 38–49).

the pure creation of the rare, extraordinary “political.” (Arendt, 1958, p. 42; *cf.* Klein, 2014) Aristotle similarly posits politics as moral and even heroic action, existing on some plane above the pedestrian economic. For all such thinkers, the political can start only when capitalism, literally, stops.

Other authors, however, sport a Polanyian mantle. For them, markets are not primordial and exogenously given but historical, “embedded” in the same ontological and normative plane as occupied by the state. For many such thinkers, markets are constituted by political action, shared norms, and state “intervention.”²¹² They observe that markets themselves rely on the establishment of social conditions that produce and incubate their human and material components. (Fraser, 2013) The creation and maintenance of Polanyi’s “fictitious” commodities (land, labor, and money), for example, requires that political systems legitimize the integration of human beings, land, and moral obligations into the economy. As an example, Singer (2018) argues that corporations have a responsibility to uphold the political and social conditions that enable their existence by ensuring that they do not undermine important norms like individual autonomy and equality. Others emphasize the “morality” within the market that tames capitalism’s more brutal tendencies in the interests of human autonomy. They point out that the economy is not norm-free, but a social configuration that is meant to operate both efficiently *and* fairly, exhibiting values like reciprocity, merit, and equal opportunity. (Jutten, 2013, p. 595; Forst, 2017, Ch. 7; Honneth, 2014, p. 191) Christopher McMahon, a business ethicist, notes that even business firms are thoroughly “moralized,” as “moral considerations are relevant both to the choice of ends for an organization

²¹² For an original and critical analysis of Polanyi’s politicization of the economy, *see* Steven Klein, “The Power of Money: Critical Theory, Democracy, and Capitalism,” Working Paper, Association of Political Theory, October 19, 2018 (ms. on file). For an explanation why ‘intervention’ incorrectly implies that the state is artificial and the market primordial, *see* Streeck 2011.

to promote...and to the choice of means to those ends.” (McMahon, 1994, p. 275) Each of these values provide points of entry for the instantiation of CLD’s commitment to equal human worth.

Still others emphasize the reverse, finding the economic in the political. They suggest that human freedom cannot be obtained unless and until the CLD state considers the material conditions of human life. Steven Klein (2014), for example, argues that even Arendt carves out a space for produced objects in the political world of appearance. In this space, the inventions of work take on meaningfulness that transcends their usefulness and thus becomes fodder for the world-building of democratic politics. Other theorists address not the political importance of material resources for fulfilling human rights, but for their tendency to drive the political conflicts that subtend a lot of thinking about political legitimacy and institutional design. Charles Lindblom, in *Politics and Markets*, for example, points out the noncontroversial fact that control of productive resources and the distribution of their products is often “why there is so much to conflict about and such a great stake in the outcomes.” (Lindblom, 1977, p. 8) Politics does not just serve as the battleground for economic fights. It also offers itself as a solution to their destabilizing tendencies. Theorists accordingly give the state an explicitly Keynesian function, trusting that expert political management and planning can indemnify a financialized, corporatized capitalism against its own crisis tendencies and thereby assure that both state and market together might successfully reproduce the material conditions of human life.²¹³ By managing systemic economic risk and failure through countercyclical spending and monetary intervention, democratic states can ensure markets maintain the material conditions necessary not only for biological survival, but also human flourishing. It is the “policy autonomy” guaranteed by, for example, capital controls and floating exchange rates that allows democratic citizens to manage their collective welfare in the face of

²¹³ See, e.g., Eichengreen (2018). The argument is reminiscent of Habermas’ *Legitimation Crisis*.

international economic headwinds.²¹⁴ Geoff Mann (2019), taking an Hegelian approach, explicitly paints a normative gloss on the state's responsibility for the economy when he concludes that Keynes believed such steering to be a condition of possibility for social peace. Historian Adam Tooze recounts how the political class in Weimar Germany created a new system of economic statistics both justifying and serving as the intellectual foundation for a new regime of economic policymaking meant to shepherd the country through the hazardous inter-war period. It thereby reconceived the state's relationship to civil society "in the medium of economic information." (Tooze, 2008, p. 1925) After the war, New Deal America and Scandinavia likewise "creatively repurposed the state for interventionist management of the economy." (Tooze, 2018)

Some theorists go even further as they trace the admixture of market and state. They jettison the state/market dichotomy altogether: society is a metasocial actor, knowable to itself and therefore formed by itself. The human universe is, for them, is "all lifeworld, no system." (Klein, 2018, p. 10) Pocock, (1990) for example, after concluding that the rise of the state and the market occurred simultaneously as tradition no longer governed both *oikos* and community, observes that

[m]odern politics and economics are part of the process of this historicization, and from my point of view it does not matter much whether the state regulates the economy or leaves it to the invisible hand. We can resist this line of argument only if we are prepared to believe (as some still are) that there is still a natural law operating through historical change, and that this natural law authorizes the workings of the market.

(1990, p. 128) He goes on to suggest that perhaps lurking behind the very idea of possessive individualism, the bedrock of both the market and the liberal constitution, is a more fundamental

²¹⁴For an introduction to this classic macroeconomic concept, *see* The Economist, 2016.

idea. An idea that in the pursuit of profit we have somehow lost control of ourselves and that politics exists, at least in part, to retrieve it once again. (*Ibid.*, p. 129)

At the other end of the ideological spectrum, liberals (of both the classical and neoclassical variety) find that when market actors have the power to constrain state action, they serve the individual liberty that constitutional liberal democracies are meant to protect. (Hirschman, 1970, p. 7; North & Weingast, 1989) To the extent that the state's jurisdiction is limited by markets, it is not for the mere sake of separating state and market. Rather, it is because this limitation is believed to best cash out individual freedom. As Sir James Steuart (1966, p. 279) noted in 1767, the "modern oconomy...is the most effectual bridle ever was invented against the folly of despotism." Accordingly, market constraint is baked into CLD's normative skeleton, a feature and not a bug of the political order, and thus ought to be embraced by democracy.

Regardless of how one imagines the normative and ontological boundary between state and market, it is noncontroversial that the day-to-day democratic rulership is one of "police," and invariably involves economic concerns. (Pocock, 1990, p. 139) At the very least, argue Landemore & Ferreras (2016, p. 59), we should follow Machiavelli's insight: "growth is arguably the condition of the long-term stability and viability of a state, as is possibly the long-term balancing of the budget." Indeed, the pedestrian, daily tasks of governing bely any neat, ongoing, and ideologically clean separation between market and state. To Robert Dahl (1990, p. 227), advising the newly democratized countries of East Europe in the early 1990s, "[i]t seems obvious...that the search for solutions to the problems generated by a predominately privately owned, market-oriented society has been and will continue to be a major element in the political agenda of every democratic country." For Dahl, "the search will take place amidst political controversy" because neither the pursuit of technical economic solutions, nor the implementation of shared liberal, egalitarian

values, will ever come to any final resolution. (*Ibid.*) Society simply changes too fast and too frequently to pretend that any solutions, both technical and normative, will hold over the long run. Perhaps we cannot ever talk about the relation between market and state in terms of principle. Perhaps, in the words of economist James Tobin, any settlement between them can only be “pragmatic,” as needs, values, and constraints clash time and time again, (Tobin, 1990) an improvised duet run through a permanently stereoscopic amplifier. Thus, despite philosophers’ perhaps nostalgic best efforts to re-enchant the political,

[t]o think seriously about modern politics can never be solely to think about production, distribution, and exchange. But it can never be to neglect these considerations for any length of time, and its assessments of even apparently rather distant issues will always be framed, openly or covertly, by an understanding of the constraints imposed by, and the options afforded by, economic organization.

(Pocock, 1990, p. 133) CLDs thus have national treasuries and ministries of economic affairs, central banks and offices of regional development. Some, like the Scandinavian countries, enlist corporatist arrangements between industry, labor and consumers to blunt capitalism’s harsher edges while avoiding the authoritarian dangers of centrally planned socialism. Some rely on social welfare, redistributive taxation, and macroeconomic demand management. Despite objections that warn against sacrificing democracy at the altar of technocracy and epistocracy, or the ceding of popular sovereignty to “international markets,” democratic politics often square themselves on the topic of economy. Campaigns are spattered with arguments purporting to balance market constraints against commitments to social and political rights. They weigh fiscal spending against capital markets, monetary policy against labor markets, GDP growth against redistribution, immigration against unemployment, minimum wages against entrepreneurial investment. Even

social movements are charged by pecuniary concerns: Occupy Wall Street, the Battle in Seattle, the Greek Agora. If constitutions are understood to be norm-based institutions that frame collective decision-making, states ensure that their constitutional procedures permit them to recognize and address the ever-changing economic realities that influence not only the enjoyment of citizens' rights and liberties, but also national security and regime stability. They can and do allow citizens to argue about how best to manage their collective wealth given an imperfect world full of obstacles, confusion, uncertainty, conflicts of interest, and a commitment to equal rights.

Addressing Some Objections

If the CLD state itself must find a way to incorporate market realities while remaining loyal to its commitment to equal human worth, there does not seem to be any good reason why that state might not hold corporations to the same kind of standard. Corporations, like states, can and do find themselves confronting the tensions between lifeworld and market. Of course, I do not contend that the corporation is *no different* from the state when it comes to balancing normative commitments against the empirical constraints of the market – indeed, I argued in previous Chapters that the state is unique in that it carries sovereignty and is, at the end of the day, ultimately responsible for protecting equal liberty. But they are perhaps not so different so as to unburden corporations from any responsibility for vindicating CLD's normative commitments. The state, given its commitments, must ensure that they do. Still, several objections will be addressed here.

Objection 1: Corporations are Unpolitical and Incompatible with CLD's Normative Desiderata

First, it might be objected that corporations, unlike states, do not face CLD's normative constraints because they, as private market actors, are subject to different, incompatible moral requirements – or to none at all. It is the responsibility of states to protect human rights, to guarantee respect for equal human worth, to make sure citizens understand themselves to be co-

equal authors of the laws that govern their lives together. Markets and market actors, it is asserted, do not carry this burden. For Habermas, the market is instead mediated with non-linguistic price signals. For Walzer and others, the “market justice” that sets normative standards for corporations looks very different from political justice. It requires integrating norms like reciprocity, efficiency, utility and property ownership, not democratic consent and equality. As a result, it is argued, corporations are not only more free than states to bow to market constraint. They are also, if market justice depends at least in part on efficiency, required to do so. Political pluralists inspired by Jacob Levy and Victor Muniz-Fraticelli, for their part, might argue that since corporations are “intermediate,” ethical associations, they are part of the diverse plural society that CLDs must protect, not agents of liberal justice that must do the protecting themselves. Indeed, as I argued in Chapter 3, corporations are permitted to pursue ethical goods forbidden the state. They do not have the same responsibilities to ensure, for example, liberal neutrality, equality, *etc.* for all citizens. Instead, associations of individuals might choose to maximize profit while sacrificing other goods; a state committed to equal moral worth often cannot.

Nevertheless, if one takes the Polanyian insight seriously,²¹⁵ because markets are embedded in the polity, because they are made and not natural, they should be subject to the state’s normative schematic. The CLD state must, in other words, ensure that corporations pay heed to its fundamental commitment to equal human worth. Even though CLDs might apply “market justice” to actions and relationships they characterize as “market behavior,” that justice must respect equal human worth even as it also respects reciprocity, efficiency, utility and property rights.²¹⁶

²¹⁵ An excellent recent example of this insight is Pistor, 2019.

²¹⁶ Here, I depart from Streeck (2011) and others who find that notions of efficiency and rights are fundamentally incompatible. On the contrary, my position is that sometimes efficiency is required to vindicate rights. How else to ensure a living wage and healthcare for all? How else to fulfill positive liberties *to* do things but to ensure one’s actions have their intended effect? My intuitions

As it turns out, reality reflects the Polanyian insight. Firms do not in fact act like robotic, black-boxed maximizers of their respective production functions as modeled by neoclassical economists. They do not operate unthinkingly and according to product market price signals. And they do not simply maximize efficiency, bowing solely to instrumental rationality. (Singer, 2018) Rather, they are organizations of human beings (Coase, 1937) interacting with each other over time. As such, they have already incorporated procedures that respond to notions of equal human worth. Their leaders, facing the competing demands of their diverse members (Cyert & March, 1963), must justify their decisions in terms that incorporate notions of fairness, non-arbitrariness, and responsibility. (Dahrendorf, 1959) Corporations use “noumenal power” (Forst, 2015); their movements of goods and their relationships are interwoven with practices of justification. Human resources departments, for example, answer their members’ calls for justice in pay, dismissal, and promotion even as their executives must fulfill their duties as fiduciaries or else face exile. C-Suites develop social responsibility platforms (“CSR”) to appease not only investors’ demands (“SRI”), but also employee demands – as seen recently by Google employees’ objections to certain government contracts. Moreover, because corporations are communities of individuals shaping their shared economic experiences together, they often politicize their decision-making. Members are not price-taking automatons insusceptible to planned coordination. Rather, they negotiate their interactions over time. Even accounting practices involve more than mechanical computation. Their stylized measurements capture value judgments about persons, products and relationships and are incorporated into practical judgments. (Simon, 1991, p. 37)

align better with the philosophical pragmatists, like John Dewey, who find a continuum between substantive and instrumental rationality, and with Habermas (1996), who acknowledges the material conditions of possibility for many rights.

Given the ubiquity of ethical and practical judgments, there is certainly room for the state to ensure those judgments respect its normative commitment to equal human worth. It might, for example, verify that when corporations exercise legal rights, they do so in a way that members find beneficial. Particularly when rights are exercised in a manner that deviate from CLD notions of liberty rights, it might be careful to screen the corporation for individual consent. For example, the state could ensure that employees give knowing, voluntary consent to corporate surveillance policies that would offend traditional notions of privacy rights. It might also ensure that the equal human worth of objecting minorities and outsiders is adequately respected by deploying the instruments outlined in Chapters 3 and 4: *e.g.*, using individual rights to constrain corporate behavior, demanding that the corporation employ contestatory mechanisms like due process, *etc.*

Objection 2: States are Less Constrained by Markets

A second objection is empirical and practical. It notes that markets do not constrain states as much as they constrain business corporations. Unlike corporations, states can opt-in or opt-out. They can choose autarky, self-sufficiency, and alternative economic regimes. These options mean that CLD's citizens enjoy more autonomy than do corporate participants, who cannot help but operate under the laws of supply and demand. There is simply no room for CLD's commitment to human worth to percolate corporate decision-making because, simply, markets inhibit them to a significantly greater degree. To be sure, many states may have more power than business corporations to set the terms of their interaction with markets. If Polanyi is right, markets are both embedded within a wider social normative ordering and at least partially incorporate that ordering. This is an ordering over which the sovereign democratic state can claim some legitimate and practical control. It can choose, in theory, to draw boundaries around what kinds of human activity

will be subject to that ordering. It can, in other words, choose to relieve itself of the burdens of the market. This is a capacity denied the corporation.

Nevertheless, one should not be too quick with these kinds of empirical assumptions. Choices have consequences – even the choices of a sovereign state. It may find itself buffeted by economic headwinds no less than an individual firm. It is no accident, after all, that the academics first calling for global economic government were economists hailing from small countries who found themselves thrown about by international market storms. (Slobodian, 2018) In the wake of the 2008 financial crisis, not even the hegemonic United States could afford to ignore the astonishingly interconnected capital flows between itself and Europe, and between Europe and the rest of the world. (Tooze, 2018) Over democratic objection, it had to resort to unprecedented bailouts and rapid, substantial state intervention. In capital markets as in product markets, both state and firm find themselves price-takers, not price-makers. (*See, e.g.,* Hont, 1990, p. 50) (citing Pocock’s *Machiavellian Moment*)²¹⁷ Thus, the problem introduced by Europe’s recent sovereign debt crisis: whether and to what extent national democratic governments, like Greece, would obey ostensibly best fiscal practices in order to calm foreign investors – or whether they would instead retreat from international financial markets entirely. (Streeck, 2011)

What’s more, states face constraints that corporations do not. They must attend to national security concerns and fulfill the enduring need for human sustenance all the while avoiding any

²¹⁷ “Pocock, in *The Machiavellian Moment*, shows how English political history was affected by worries about public debt and the power of the financier class, “which could exercise power without enjoying a proper and legitimate place in the politics of the country; it also meant that the fate of the nation now rested on a most delicate and uncertain foundation. In the eyes of these critics of the English financial revolution, credit – and particularly paper credit – was among the last stable and dependable institutional expedients ever invented. In comparison with it, even trade, the exchange of real goods, satisfying the mutual needs of agents in the market, appeared altogether more benign and less disquieting.” (p. 50)

violation of their normative commitments – else risk their capacity, sovereignty and legitimacy. (Dunn, 1990, p. 24)²¹⁸ War does require, after all, “the fostering of a surplus economy.” (Hont, 1990, p. 68) And Thomas Jefferson noted that “[t]he laws of necessity, or self-preservation, of saving the country when in danger, are of higher obligation.”²¹⁹ Indeed, corporations depend upon the state successfully performing these necessary tasks. (Olson M. , 1993) Economic success is thus a matter of existential importance for both the state and for the corporation.

Meanwhile, businesses at least sometimes find themselves able to set the terms of their own embeddedness in society. Aided by international political organizations enforcing their right of exit, “private” economic actors can extract policy concessions from states well beyond the normal range of influence granted democratic citizens. (Lafont, 2018; Slobodian, 2018) Amazon can successfully insist on financial subsidies and favorable tax treatment from state legislatures eager for a new warehouse and the employment it can bring; cellular phone providers need not offer up their customer contracts for lengthy dickering. Multinational enterprises set the terms of their own governance through international investment agreements. (Arato, 2015; *see also* Garrett, 2008) Some empirical social science research even explains the creation of constitutional government itself by reference to demands made by market actors. (North & Weingast, 1989)

At the very least, the question of whether a corporation faces *more* constraints is an empirical and practical one. It will therefore not sway those thinkers that embrace ideal political

²¹⁸ “...the great majority of serious political thinkers in the liberal and socialist tradition, however virulently they may and do disagree over other matters, agree closely on one particular judgment. They agree that it is the requirements and possibilities of economic organization that lie at the very center of modern politics. It is these requirements that set the acceptable limits to modern politics and prescribe the key problems which any modern political community must solve for itself.” An enduring need for sustenance for the human population ruled; authority perhaps arises because of this urgent need.

²¹⁹ Letter from Jefferson to John B. Colvin, Sept 20, 1810, in *The Works of Thomas Jefferson*, 11, pp. 146, 147 (Paul Leicester Ford ed., 1905)

theory. As a matter of political realism, on the other hand, the fact of constraint is of course important. If political theory must accommodate itself to the world in which we live, then our practical thinking must acknowledge and address it. There is a risk, though, that comes with this kind of thinking: political theory may become too accepting of the *status quo*, believing the facts more immutable than they actually are. It may fall prey to a vulgar kind of economic determinism. It seems more fruitful to at least pose the question: *can* corporations and states buck what might be taken to be market necessity? Attempting to answer the question honestly can motor productive normative and political discourse.

Objection 3: Decisions Taken Under Constraint Lack Democratic Credentials

Finally, it might be objected that neither states nor corporations are displaying any kind of democratic norm when they take actions in response to market signals. That, indeed, the political and economic are separate, at least insofar as they invoke decisions made according to different and incompatible rationalities. (*See, e.g.,* Streeck, 2011) This is why, after all, Arendt separated action taken according to need and necessity from political action. As a result, asking a corporation to be democratic, given their orientation towards profit-making, is too utopian to be useful to a normative political theorist.

As I argue in more detail below, responding to market constraint is not just politically salient. It is also a choice that can be subject to democratic decision-making. The orientation of human behavior towards efficiency does not necessarily require antidemocratic foundations. We need not equate instrumentally rational behavior with illiberal, coercive or utilitarian reasoning alone. There is no good reason to call a decision anti-democratic just because it is responding rationally to economic signals. Indeed, a democratic decision to fulfill certain social rights like a right to healthcare entails an acceptance of the technical means required to distribute medical

services. What is required, however, is that when a democratic decision and the calls of the market conflict, democracy should be prioritized. Only then can it be said that the decision vindicates equal human worth, for then can it be said to serve actual human interests, objectives, and purposes.

It might further be objected that consent given under market constraint is not consent that is worth its name. If, for example, workers and investors consent to corporate authority because it is necessary to achieve a livable income, and if firm profit maximization is necessary for the firm to remain competitive and therefore provide that income, it seems that such consent is given under conditions of extortion. (Landemore & Ferreras, 2016, p. 67; Ellerman, 1990) It thus provides no firm basis for an account of corporate rights that derives ultimately on the liberties of individual corporate members. This is what I call the “Hobbes Problem.” Under Hobbes’ social contract theory, would-be citizens cannot help but consent to an absolute sovereign because to refuse would yield life that is “brutish, nasty, and short.” Human beings, if they are rational and therefore seek peace and the avoidance of death, must give up their natural rights (liberty) to the state. Hobbes betrays the lack of human volition entailed by such consent when he calls the original social covenant a “Lawe of Nature.” Similarly, it might be objected that workers only consent to workplace authority because to refuse would yield wages whose value could not make up for the disutility of work – or, at the extreme, poverty and starvation. As Marx points out, such consent cannot credibly pretend to be the exercise of individual freedom.

Yet rarely does the employment contract involve the exceptionally coercive circumstances imagined by Hobbes in his brutal state of nature. Further, there are things that we can do to make consent less begrudging – although never, perhaps, perfectly seamless, because all choice involves

tradeoffs²²⁰: a universal basic income, unemployment benefits, and the like. Regardless, constraint in decision-making is the rule, not the exception, of human experience. None of us face a world of infinite possibility. Aside from the noncontroversial fact of our physical, biological, and technological limits, human beings inevitably face the constraints imposed by virtue of occupying a world likewise occupied by other people. It is, perhaps, the limits posed by the very fact of sharing the earth with others that drives the unsocial sociability subtending Kantian rights. (Muthu, 2015) Even ostensibly voluntary contracts between two willing parties necessarily involves some amount of coercion: each must give up something to get what the other has. This is no less true of politics than it is of economics. As John Dunn points out,

In the perspective of agency, however, limits clearly occupy a far more important and privileged position. For an agent to fail to consider limits except for extremely strong and specific reasons, is necessarily perverse, irresponsible, or inept. The limits on possible outcomes define the space of possibilities for human actors or agencies, establish what these can or cannot bring about, inform them of what there really is for them to fear or hope for, and focus, as nothing else could, the question of what they do in fact have reason to do. Nowhere is this more evident or more important than it is in the case of politics.

(Dunn, 1990, pp. 5-6) Indeed, even the very notion of public reason involves constraints: reflexivity and reciprocity. Therefore, unless we are prepared to argue that no choice can be considered free unless taken by someone with superhuman powers, without any possible interference from man or nature, and facing no tradeoffs whatsoever, then we must admit that some

²²⁰ Bowles and Gintis (1993, p. 85-6), for example, argue that it is likely unfeasible to completely eliminate exit costs. Employers would always have an incentive to offer a wage higher than the benefits enjoyed by unemployment in order to incentivize work. It might also lead to undesirable outcomes like inflation.

amount of constraint is acceptable when citizens undertake the judgments required during democratic decision-making. There must be a sweet-spot somewhere between Hobbes' coercion and Locke's explicit voluntarism. Or, in social-scientific terms, whether the "revealed preferences" observed in coercive real-life contracts actually do a better job indicating the will of actors than do the seeking, open-ended questionnaires of the sociologist. (See Williamson, 1980, p. 34) There is a difference between voluntary consent and, as early U.S. corporate law scholar Ernst Freund notes, those who "sustain a relation of acquiescence, dependence, or incapacity" because they have no other options. (1897, p. 40) The question of whether decisions taken under constraint merit the name of "free will," therefore, is a matter of degree. (Kukathas, 2007, p. 203) Within political theory, whether certain kinds of constraint eliminate the voluntariness of choice, and therefore its moral credentials, can depend upon historical social expectations, subjective experience, the quality and number of available outside options,²²¹ and whether those options have been deemed fundamentally important to human beings and, therefore, are counted as constitutional rights.

Challenge 2: The Democratic Credentials of Hierarchy

As argued above, the fact of market constraint does not alleviate CLDs from their normative burdens. Indeed, political theory from Locke to Kelsen often accommodates a state's need to handle existential crises by providing for executive emergency powers that coexist along with liberal democratic desiderata. If market (or other social and political) constraints do not unburden the state, then nor should they unburden the corporation from any relevant normative requirements. To argue otherwise means accepting either that corporations face so many constraints that applying normative criteria would be futile or that their normative criteria are in

²²¹ For instance, Shapiro (1999, p. 184) colorfully illustrates the outside options of workers as a continuum between "surfer's paradise" and a "Dickensian nightmare."

some way not very binding – a conclusion that would sit uncomfortably within rights discourses that presume rights are rights precisely because they trump other compelling values. (Dworkin, 1986; *see also* Anderson, 2017, p. 67)

In this section, I argue that the choice to delegate authority to corporate hierarchy can indeed carry democratic credentials. Institutional economic scholarship explicitly models how collections of individuals might choose together how to maximize joint utility. Many large corporations, observes economist Henry Hansmann, because they have numerous people, “must employ some form of collective choice mechanism through which [they] can exercise control.” “[A]ll such firms,” as a result, “necessarily have a strongly governmental, or political, character” (Hansmann, 1996, p. 4) regardless of whether they are specifically democratic. Second, democratic citizens might, and often do, give up some of their direct involvement in decision-making in order to better achieve their goals. Such choices do not deprive a polity of all its democratic credentials. Not unless we are prepared to call representative government, judicial review, independent central banks, and executive administrative agencies inherently undemocratic. (Rahman, 2011 and 2018; Moore, 2017; Michaels, 2017) Likewise, corporate members might also choose to delegate authority to leaders precisely because they are in better position to achieve efficiency. They might elect an executive that enjoys broad decision-making authority and accept an administrative organization of tasks. (Elster & Moene, 1989, p. 25) If they do so, Henry Hansmann argues, democratic control “offers much stronger efficiencies than it is generally credited with, and would be far more widespread.” (1996, p. 5) Just because a group – whether a firm or a state – is run efficiency does not mean it is run undemocratically. What is important, instead, is that ultimate

authority redounds to the members themselves. (See Brenkert, 1992, p. 265)²²² In the next section, I shall further argue that workers can and do have an incentive to make efficient choices even when they fail to delegate authority.

There should be nothing controversial about this. Even economic scholarship that critiques the desirability of horizontally-governed workplace democracy explicitly gives workers a voice when they model the optimal mechanisms for firm governance. (Alchian & Demsetz, 1972)²²³ For example, “nexus of contracts” models often presume that labor markets clear, such that the wages paid workers are equal to the benefit that they would receive without a job. Thus, in such models, participation in the firm is completely voluntary; given a seamless exit option, workers’ consent may be fairly presumed and management can exercise no real power over them. (Bowles & Gintis, 1993, p. 81) This consent is manifested via workers’ employment contracts, contracts that typically delegate decision-making authority on account of its firm-wide efficiency benefits. This is the Lockean social contract *par excellence*: the subject (worker) becomes the sovereign because she freely adopts the will of the authority as her own. It is also, arguably, direct democracy *par excellence*; if a worker objects to leadership at any time, she may withdraw her consent and thus her membership. (See Hansmann, 1996, p. 20) Thus, aggregation theorists of corporate personhood are able to plausibly argue that corporate rights vindicate the liberties of each individual contracting member. That this consent is not manifested through voting and other mechanisms that we typically associate with representative democracy does not eliminate its underlying democratic

²²² “My contentions here do not imply that one cannot subordinate oneself to someone else, *e.g.*, in a social or political settings or the corporation. Though the authority of the corporation has to be more focused than in the state, this does not mean that the particulars of jobs and even general outlines of the corporation cannot be subject to employee participation. It simply means that once those features are decided, then people must do as it has been decided.”

²²³ The authors in fact go to some lengths to show why intra-firm hierarchy might be freely chosen by employees.

justification. Though their interest may not be brought to bear by voting, contract and legally imposed fiduciary duties will ensure their voices are heard. (Hansmann, 1996, p. 63) Presuming that the market-clearing assumptions hold true, the firm may have even better democratic credentials than do real-life CLDs. As Elster and Moene observe, “[i]f some workers prefer working in capitalist firms, why not let them be allowed to do so? In the absence of externalities, there are no good reasons to deny them this option.” (1989, p. 26)²²⁴

Of course, the assumptions underpinning the freely negotiated contracts in such models are often incredible. (Shapiro, 1999, p. 167) Bargaining power is commonly unequal, and so the quality of consent can be accordingly interrogated. Likewise, the cost of enforcing contracts lies more heavily on the shoulders of some rather than others. (*See* Bowles & Gintis, 1993; Dow, 2003, p. 128-9) Often, management and capital have the capacity and incentive to cheat on their contracts with impunity.²²⁵ This risk grows as state labor boards face budget cuts, unions face dwindling numbers, and judicial enforcement remains prohibitively expensive for most ordinary people. They therefore might, for example, commit wage theft without fear of reprisal or take advantage of workers’ fear of dismissal by acting arbitrarily. Meanwhile, wielding the power of dismissal, they can hold workers to their word with relatively more ease. Under such conditions, the democratic credentials of such models are undermined. Some corporate stakeholders would face decisions and decision-making structures to which they did not consent. Nevertheless, the overall point holds, as these conditions are seen as market failures that can and should be rectified. For example,

²²⁴ They might do so, for example, if they wish to work in industries that require much fast-paced decision-making to keep up with a dynamic market – the tech sector, for example.

²²⁵ Bowles and Gintis call this phenomenon a “contested exchange.” It occurs when it is in a contractual party’s self-interest to cheat on a contract. For example, an insurance company has a pecuniary interest in refusing to pay claims it contractually agreed to pay.

economists offer up bonding, surveillance, electoral accountability, incentive-aligning compensation plans,²²⁶ reputational effects, and other “endogenous enforcement” mechanisms.

The Democratic Credentials of Delegated Authority

Even presuming delegated authority is necessary to achieve corporate market efficiency, there is no reason to think that a democratically-organized firm would eschew such authority. (Thompson, 2015, p. 78; *see also* Kukathas, 2007, p. 220) “No one,” observes Drew Christie (1984) as he reviews the literature supporting workplace democracy, “thinks that a modern office or factory could work with everyone voting on everything. Of course, considerable use would need to be made of representational democracy.” Indeed, there is *good* reason to think that firms that give formal governance rights to workers and other stakeholders will appoint hierarchical leadership that is better placed to make the kinds of decisions necessary to achieve competitiveness. (Dow, 2003, p. 120; Jacob & Neuhauser, 2018) This is especially the case when the corporation’s internal division of labor requires top-down coordination. (Thompson, 2015, sec. 4.2.7) The costs of continuous collective decision-making apply to non-shareholder stakeholders and shareholders alike. Shareholders thus manage to delegate authority to directors (Hansmann, 1996, p. 36; Bainbridge, 2003, pp. 15-16; Bratton, 2005, p. 67) who then delegate authority to expert managers. (Balotti & Finkelstein, 1998, p. 4.31) Workers and others may do this, as well. (Moriarty, 2014, p. 829; Greenberg, 1986)²²⁷ They might even, as shareholders presently do, elect slates so homogeneous in their preferences that they can operate swiftly and via consensus. (Strine, Jr., 2007, p. 1781) Or they might, as shareholders sometimes do, require their elected directors to possess special qualifications regarding expertise and experience (8 *Del. C.* § 141(b); *Stroud v.*

²²⁶ *E.g.*, stock options or profit-sharing bonuses.

²²⁷ Studying worker cooperatives that hired outside managers, accountants, and the like.

Grace, C.A. No. 10719 (Del. Ch. Nov. 1, 10990), slip op. at 23, *rev'd on other grounds*, 606 A.2d 75 (Del. 1992)) and form specialized, expert committees with limited jurisdictions. (8 *Del. C.* § 141(c)) Indeed, workers already delegate authority in a quintessentially worker-controlled organization: the union. As Moriarity (2007, p. 343) notes, “workers may be eager to cede control” because “they can see that the well-being of their firms, in which they have an interest, depends on their efficient operation.”

To illustrate using a neoclassical model, collective enterprise necessarily involves what economists call “incomplete contracts.” (Anderson, 2015, p. 60) This means that the terms of everyone’s relationships must be left unspecified. No one knows the future, and so no one can spell out what should be done ahead of time. Nor is it possible to set out in fine-grained detail every possible problem arising from the implementation of particular democratic decisions. Further, collective action always involves a freeriding problem. Everyone would prefer that everybody else undertake the costs to achieve collective benefits. Aware of these drawbacks, members will agree to delegate decision-making power to a leadership body, subject to some kind of accountability mechanism. Even democratic polities, after all, delegate lawmaking to representatives. Representatives, in turn, often delegate implementation and elaboration to executive agencies.²²⁸ In addition to public notice and comment requirements, these agencies can be overseen by independent oversight committees responsible to the corporate constituency – just as corporate executives are subject to outside auditors responsible to the corporation as such. (Kahan & Rock, 2010, p. 1029) Thus, as in political democracies, corporate democracies might be structured such that each corporate member can understand corporate decision-making as

²²⁸ For robust defenses of the democratic credentials of executive agencies, *see* Vermuele, 2016; Michaels, 2017 and Rahman, 2018.

responsive to her preferences as a member of the corporation. This may require, for example, opportunities for the post-hoc judicial contestation of decisions according to agreed-upon standards, regular elections under fairness rules, party organizations, *etc.*

To maintain the democratic provenance of this kind of delegation, there must be, of course, a way to ensure that delegated leaders can be held accountable to their constituents, that they are indeed pursuing goals embraced by the membership. (*See* Bowles and Gintis, 1993, p. 86) Their claim to authority must match the belief and values that the authority relationship is meant to vindicate. (Moore A. , 2017, p. 64) But it is important not “to confuse the administrative structure of the firm with its political structure.” (Elster & Moene, p. 25²²⁹; *ibid.*, p. 88;) “While participatory democracy may be inefficient,” notes Anderson (2015, p. 61) “it does not follow that the workplace cannot be governed as a representative democracy, with workers electing managers, and managers limited by rule-of-law constraints on the orders they issue to workers.” Relatedly, Dahl argues that “the strong principle of [political] equality does not require that citizens be equally competent in every respect.” Rather, it requires only that they be “qualified enough to decide which matters do or do not require binding collective decisions to set the terms on which they will delegate... decisions to others.” (1985, p. 118) As Moore observes, while we may eschew constant and continuous democratic participation, we should maintain procedures that permit participation when authority becomes questionable, *i.e.*, when it “makes decisions no longer functionally specific to the goods that they serve.” (Moore, 2017, p. 67)

²²⁹ “As long as the members do not abdicate their fundamental right to govern the enterprise, they can choose to have very widespread delegation of powers.”

Confronting the Risk of Epistocracy

As Bernard Manin (1990) points out, electoral representation inevitably involves aristocracy: leaders are selected according to some special characteristic – even if that characteristic is electability. Moreover, within states and particularly within business corporations, there is a very real risk that representatives will claim legitimate authority not based upon democratic support, but upon one particularly special characteristic: expert knowledge. (Moore, 2017; Kahan & Rock, 2010, p. 991)²³⁰ “It is politically important,” notes John Dunn (1990, p. 3), that the conditions of economic flourishing “are extremely difficult to understand—that they are as extravagantly complicated as they are cognitively elusive.” For business corporations seeking success in sometimes brutally competitive markets, there must be “men willing to do what Herodotus was the first to undertake consciously...to say what is.” (Arendt, 1967) Business will fail if it is unresponsive to market signals, just as political associations fail if they are unresponsive to challenges to their security and capacity. (Hirschman, 1970) It is thus sometimes too easy for citizens to place so much of their trust in experts that they effectively delegate their political voice to them – or vice versa.²³¹ As Alan Trachtenberg points out, the expertise required to design and maintain capital machinery is, perhaps, one reason why unskilled labor often fails to accumulate power within the workplace. (Trachtenberg, 1982, p. 68) The need for expertise is, furthermore, a reason commonly invoked to deprive workers, in Platonic fashion, of decision-making power. (Landemore & Ferreras, 2016, p. 70; Arendt, 1967)

²³⁰Describing the risk of CEO-led epistocracy in current U.S. corporate governance. *See also* Lichtenslein, 1986 and Stephen, 1984.

²³¹ “One can understand that the philosopher, in his isolation, yields to the temptation to use his truth as a standard to be imposed upon human affairs; that is, to equate the transcendence inherent in philosophical truth with the altogether different kind of ‘transcendence’ by which yardsticks and other standards of measurement are separated from the multitude of objects that are to measure...” (Arendt, 1967)

Nevertheless, one should be careful not to become too cynical. As Landemore & Ferreras (2016, p. 70) wryly note, this objection to democracy from citizens' lack of expertise, "which turned out not to be decisive in the case of states, could equally be toothless in the case of firms." In Part II(B) of this Chapter, I dismantle some concepts that, although traditionally held as the province of experts, actually require the kind of political judgment that workers and other corporate constituents are perfectly capable of making successfully. The field of inquiry where "reason compels a unique result" (Galston, 2002, p. 69) is perhaps smaller than one might expect.

Despite the importance of avoiding the temptation of epistocracy, as Dahl (1990, p. 227) notes, democracy has got to work with technical specialists. "[I]ntelligent choices" taken within a complex society "require both technical understanding and sensitivity to the values involved." Policy specialists, with expertise both in instrumental reasoning and the ends such reasoning is meant to serve, are a permanent characteristic of contemporary CLDs. According to Dahl, to prevent an unacceptable concentration of knowledge and, therefore, power, it is necessary that specialists are distributed not only amongst partisans and different branches of government, but also the constituents that government means to serve and the scientific bodies from which it draws.²³² Moore (2017) echoes the point within the context of deliberative models of democracy, maintaining that CLDs must maintain ongoing opportunities for citizens to oppose, scrutinize, and protest expert conclusions. Furthermore, argues Moore, incorporating expert authority in democratic deliberation can involve a critical, active "reflective acceptance," rather than unthinking belief. It therefore accommodates citizen participation, even if that participation is more limited than ordinary political judgments. (2017, pp. 72-73) Bobbio (1987, p. 60) adds that oligarchies out to be countered by competing oligarchies to prevent a concentration of power.

²³² See Brown, 2009 for this last point.

Finally, constituents must reserve to themselves important decisions about collective ends, so that their “putative guardians” stick to pursuing the best means to accomplish them. (Dahl, 1990, p. 119; Rahman, 2011). As Rahman (2011) argues, there can be a way to “embed” expertise within democratic institutions and democratic reason.

Nevertheless, distributing knowledge, and thus power, may come with some efficiency costs. Expertise is an asset that, like any other business asset, can be economized. (Caliendo, Mion, Opromolla, & Rossi-Hansberg, 2015) Deploying it to maximize democratic credentials and guard against abuse may mean, consequently, that it is not always deployed in a way that maximizes investments.

Challenge 3. Worker Preferences Are Not Inherently Inefficient

Business corporations, accordingly, cannot reliably point to market constraint to unburden themselves of any relevant democratic requirements. Nor can they use as an excuse the necessity of expert leadership and hierarchy to guide them through that constraint. Democratic citizens can and do delegate decision-making to policy makers and technocrats to fulfill their demands while retaining ultimate authority through, for example, judicial review and regular elections. It still may be objected, though, that corporate constituents – and workers in particular – will inevitably make decisions that lead to firm failure because their exogenously given preferences are ill-suited to competitive markets. Accordingly, even if they are willing to elect a management, they will demand that it fulfill objectives that are inconsistent with successful business behavior. Indeed, while it is common in casual language to encounter the notion that worker-controlled businesses are rare because “they are inefficient,” (Dow, 2003, p. 124) both theoretical and empirical support for this conclusion is subject to critique. (Landmore, 2016, p. 70)²³³

²³³ Citing Hansmann, 1996 and Freeman, 1984, amongst others.

As some initial throat clearing, it should be first noted that many of the efficiencies attributed to corporations derives not from their capital structure (the distribution of franchise rights to shareholders alone), but through their non-market coordinating and organizing features (Drucker, 1946; Caliendo, Mion, Opromolla, & Rossi-Hansberg, 2015) that not only generate loyalty (and thus harder work) amongst participants, (Simon, 1991; Team, ch. 6.4)²³⁴ but also incorporate workers' informational advantage into management decisions. (Lazonick, 2013, p. 861) Michael Useem, (1993)²³⁵ for example, documents the widespread devolution of corporate decision-making power caused by profit-seeking *shareholders* intending to exploit these advantages – advantages also reflected in the collective intelligence models driving some recent democratic political theory.²³⁶ Making a related point, Thompson (2015) argues that technology may support democratic forms of company governance. If it involves complex tasks that require high levels of discretion, skill, uncertainty or teamwork, the intellectual property that serves as the source of so much contemporary economic value may be quite amenable to democratic, participatory governance. (Thompson, 2015, p. 74) Indeed, even capitalist-governed firms might see fit to adopt such decision-making mechanisms precisely because they do a better job. (Wirthman, 2014) Democracy itself, in other words, might be technologically determined.

There is, furthermore, evidence showing that affording control to labor does not doom the business to failure. Such firms “exist, they have often survived in competitive environments for

²³⁴ “For many people, doing a good job is its own reward, and doing anything else would contradict their work ethic. Even for those not intrinsically motivated to work hard, feelings of responsibility for other employees or for one’s employer may provide strong work motivation.” Moreover, there is no reason why worker-controlled firms cannot threaten to fire those who fail to meet expectations. They can therefore, perhaps ironically, benefit from any efficiency gains to be made by such threats.

²³⁵ Professor of Management at the Wharton School of Business.

²³⁶ *E.g.*, Landemore, 2017.

long periods of time, and a large amount of information is available about them.” (Dow, 2003, p. 12; Hansmann, 1996)²³⁷ For example, Edward Greenberg, in his study of the plywood cooperatives in the Pacific Northwest,

prove[d] conclusively that ordinary working people are capable of managing the business and production aspects of complex, modern industrial enterprises and in a way that has resulted in stability and prosperity in an industry characterized by instability and hard times. Complex, modern institutions can be successfully operated on the basis of democratic, egalitarian, and nonhierarchical principles even in an environment that is hostile to such principles in the workplace such as in the United States...given the proper incentive system and social environment, workers can do quite well without a great deal of supervision, invent imaginative solutions to production problems, develop a sense of responsibility toward the work group and the enterprise, gain detailed knowledge about and interest in a broad range of business (marketing, purchasing, financing) and production affairs affecting their enterprise, and learn to keep their leaders responsible and responsive to their needs and interests.

(1986, p. 170) Regardless, economic scholarship is not able to find systematic, predictable, one-size-fits-all differences in efficiency and productivity between profit-making, non-profit, and publicly-controlled organizations. (Simon, 1991, p. 38) At the very least, it seems impossible to posit, as a matter of settled theory, a single, hierarchical form of corporate management will maximize wealth for all firms under all situations. (Brenkert, 1992, p. 253)

²³⁷ In addition to conventional worker cooperatives, there are professional partnerships (investment banking, legal services), employee stock ownership plans (ESOPs), farmer-owned producer cooperatives, consumer-owned utilities, mutual companies, and non-profits that have no shareholders (universities, hospitals).

These initial challenges aside, many nonetheless assume that workplace democracy is inefficient because it involves time-consuming deliberative decision-making (Hansmann, 1996) and job rotation, neither of which carries any guarantee of rational outcomes. But, as pointed out above, there is nothing about workplace democracy that prevents the use of representative bodies, delegation, and other institutional structures that can alleviate such problems. Further, nothing prevents capital-managed corporations from suffering from the same problems of cumbersome decision-making – particularly if shareholding is wide and diverse. (Dow, 2003, p. 120) Yet they seem to navigate these dilemmas successfully. Regardless, the evidence used to shore up this argument – the lack of employee-run firms in existence – is, at best, non-conclusive. Whether or not, therefore, corporate democracy is too inefficient to be economically successful is a matter subject to empirical verification.

Challenging the Inefficiency of Democratic Decision-Making

Attempting to explain why so much economic literature remains dubious about the efficiency credentials of democratically managed firms, Bowles and Gintis (1993) observe that studies often “[suffer] from serious methodological biases.” They treat “the capitalist firm as embedded in an environment free from market failure, and the democratic firm as embedded in an environment of contrived restrictions leading to systematic inefficiencies.” These biases arise “from some restriction placed on the democratic firm limiting its ability to achieve optimal allocations, but not entailed by any general prerequisites of democratic governance.” (1993, p. 76). Some of these biases and assumptions are unpacked below.

Tenuous Assumptions about Employee Preferences’ Against Profit-Making

Theories that predict the inefficiency of corporate democracy make some assumptions about worker preferences that require further justification. Some models presume, for example,

that workers will choose to operate the firm so as to maximize revenue per worker rather than pay themselves efficiency wages. This will lead to underemployment, or workers choosing to produce and work less, not more, if product prices rise. This assumption ascribes perhaps an unflattering degree of myopia to workers, a myopia perhaps better attributed to a corporation's diversified shareholders. It also fails to account for the fact that if workers can also claim a piece of the company's residual income (because, for example, they are also shareholders), they might behave more like owners. They would have greater incentives to invest, increase productivity, and innovate. (Elster & Moene, 1989, p. 13)²³⁸ Indeed, all the people comprising the firm – owners, managers, and employees, “are united in their common interest in the firm's success,” (Team, ch. 6.1) and the profit motive attributed to shareholders will work on all participants at least indirectly. (Simon, 1991) It also fails to account for the loyalty and identification with corporate purposes that likely does most of the leg-work in discouraging free-riding, shirking, and other inefficient behavior. (Simon, 1991, p. 37) Some economists even point out that when such biases are removed, worker- and capital- controlled firms may achieve equally or more efficient outcomes. (Dow, 1986, 1992; Samuelson, 1957²³⁹) At the very least, empirical literature suggests no systematic link between a firm's capital structure and productivity outcomes. (Simon, 1991, p. 38) Therefore, even presuming that there are decisions that are certain to maximize efficiency, there is no *a priori* reason that one must conclude that workers would always choose to make different ones. (See Bowles and Gintis 1993, p. 88)

²³⁸ Stated more precisely, models that presume that workers will maximize net revenue per worker hold that a firm's production function is independent of its institutional arrangement. See Jensen & Meckling, 1979.

²³⁹ In “a perfectly competitive model it really does not matter who hires whom,” since an economy of “workers renting machines is indistinguishable from an economy of capitalists owning machines and hiring workers.”

Diversity of worker preferences

Other New Institutional Economics models predicting the inefficiency of workplace democracy presume that worker interests are irreconcilably diverse and conflictual, at least when compared to average capital market investor. (E.g., Moriarity, 2014, p. 829)²⁴⁰ Their democratic decision-making, therefore, will be riddled with inefficiencies as members haggle, debate, and work out compromises. The extent of intra-firm preference diversity, however, has been challenged by the “integrationist” school of business sociology. Peter Drucker (1993(1946)), widely acknowledged to found the school of modern management science, and sociologist Mary Parker Follett, who studied modern workplaces in the 1920s, launched a generation of studies that cast doubt on the assumption that workers, capitalists and other firm stakeholders are too conflicted to come to a consensus about workplace affairs. At the very least, because workers are generally (1) in closer proximity to each other and (2) fewer in number than are shareholders, they will have better opportunity to discuss and come to agreement on business affairs. (Hansmann, 1996, p. 36)

Second, institutional mechanisms exist that can alleviate or manage conflict in a fair, impartial manner that is accepted by stakeholders as legitimate. First, companies can use mediators, like independent members of a board of directors, to negotiate conflicts of interest. For example, when companies issue “targeted stock” that pays dividends based on upon particular lines of corporate business, investors may find themselves at odds. Because all corporate assets are used as collateral, and because managers can shift retained earnings from one line of business to another and thereby influence the value of each targeted stock in a zero-sum manner, members

²⁴⁰ “Owners want more financial returns, while customers want more money spent on research and development. Employees want higher wages and better benefits, while the local community wants better parks and daycare facilities.” These divergent preferences must be somehow combined to reach a single coherent decision.

holding that stock may find themselves facing intractable disagreement. In a move approaching the universalizing aspirations of CLD's judicial functions, companies use neutral mediators to come to a fair and impartial resolution. (Hansmann, 1996, p. 64) Political democracies likewise make use of institutions that facilitate compromise. In the U.S. Congress, for example, logrolling comes immediately to mind.

Third, there is no reason to expect that the interests of shareholder-voters will be any less diverse than those of workers. “*Any* collectivity which has an economic goal,” observes William Ouchi²⁴¹ (1980), must “find a means to control diverse individuals efficiently.” (p. 130) (emphasis added) Yet they often manage to overcome enough of their diversity to ensure that the business remains successful. As explained in more detail below, even when presuming that shareholders only seek pecuniary gain, they will differ according to their tolerance of risk and when they would like their investments to pay off. (Strine, Jr., 2017; Davis, Lukomnik, & Pitt-Watson, 2016) Regardless, shareholders are human beings that seek a variety of ends. As Justice White observed in a dissenting opinion addressing corporate political speech, shareholders in for-profit corporations “do not share a common set of political or social views.” (*First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 805 (1978); Blair & Pollman, 2015, p. 1723) They routinely submit proxy proposals that suggest corporate activities that are not obviously related to profit generation.²⁴²

Given the wide diversity of shareholder preferences, anti-democratic mechanisms have arisen to address them when they distract from corporate profit-making purposes. At the outset, most shareholders invest through intermediaries who flatten (and sometimes misrepresent) their

²⁴¹ UCLA Anderson School of Management.

²⁴² See Tonello, 2018 for a survey of shareholder proposal trends from 2015-2018.

diverse preferences through their own internal aggregation mechanisms.²⁴³ (Hirst, 2018) Further, federal securities and state corporate laws *repress* them in order to unburden management from the time and effort to address their concerns. (*See, e.g.*, 12 C.F.R. § 240.14a-8) (regarding shareholder proposals during annual meetings) Many shareholder proposals are excluded from annual corporate meetings, for example, because they overstep management’s prerogative to direct all “ordinary business” (*Ibid.*, § 14a-8(i)(7)), implicate less than five percent of company assets, (*Ibid.*, § 14a-8(i)(5)) or conflict with a competing proposal submitted by management. (*Ibid.*, § 14a-8(i)(9)) Under state law, shareholders may only inspect a company’s books and records for a “proper purpose,” *viz.*, “a purpose reasonably related to her interest as a stockholder.” (8 *Del. C.* § 220) Courts seem to interpret this interest narrowly: whether she has a colorable claim against company management for a breach of fiduciary duty that led to a drop in stock price. Given the limited amount of information provided to them, shareholders cannot even form preferences, let alone diverse ones. (Jacoby, 2005) Regardless, state law may require that company management undertake actions that maximize share price – whatever shareholders might have to say about the matter. (Johnson L. P., 2010, p. 99) Still more, state law often shields management from shareholder input altogether when,²⁴⁴ in the words of Vice Chancellor Parsons of the Delaware Court of Chancery, they appear more like “barbarians at the gate” than they do loyal corporate citizens. (Parsons, Jr., 2016; *see also, e.g., Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989)) Generally speaking,

²⁴³ Indeed, they are required to do so by virtue of fiduciary laws that require them to maximize the value of their portfolios. *Ibid.*

²⁴⁴ *E.g.*, through poison pills and other protective devices.

stockholder disenfranchisement through vote dilution is in fact permissible under state law.²⁴⁵ (Balotti & Finkelstein, 1998, p. 7.49) Put in more political-theoretical terms, the courts imply an authority relation between directors and shareholders that comes about precisely because, in Raz's (1990) terms, the existence of dissensus and plurality would otherwise lead to undesirable outcomes. (Moore A. , 2017, p. 61) Commentators apologize for this undemocratic state of affairs by noting that shareholders, once company profits have been maximized and distributed, can use their returns to pursue their individual concerns individually. (Strine, Jr. & Walter, 2015, p. 351) Johnson (2013, p. 435) suggests that the law has incorporated perhaps too literally economic models of the firm that presume that shareholders always seek to maximize the present value of their investments. In turn, the law may have served as a "constitutive influence," working to homogenize the preferences of the actual human beings holding shares – or, at least, their investment advisors. (Mitnick, 2006) The point I wish to make, however, is this: if diversity of preferences threatens the achievement of a good held by the collective, then mechanisms already exist that can ameliorate that threat. One such mechanism has, in fact, already been addressed in Chapter 3: a modified Rawlsian public reason that would demand justifications that can convince reasonable people committed to a fair system of profit-making activities. This procedure will no doubt remove some viewpoints from corporate decision-making processes. What's more, these mechanisms do not appear appreciably more anti-democratic than those that exist to facilitate collective decision-making in Congress: omnibus bills, budget reconciliation, closed rules, the padding of amendment trees, and the like.

Preference-suppressing mechanisms do not just exist within shareholder organizations and government legislatures. They exist in labor organizations, too. Collective bargaining agreements,

²⁴⁵ Poison pills are, on the other hand, impermissible in the U.K.

negotiated by representatives and not amongst the entire workforce, take worker diversity off the table – at least until periodic renegotiations. As Williamson, Wachter, & Harris (1975) observe, “[o]nce wages are expressly removed from individual bargaining, there is really no occasion for the worker to haggle over the incremental gains that are realized when adaptations of degree are proposed by management.” Governmental in character, the collective bargaining agreements themselves govern “complex, many-sided relations between large numbers of people in a going concern for very substantial periods of time.” (Cox, 1958, p. 22). Meanwhile, pecuniary incentive schemes can align previously heterogeneous preferences. (Williamson, Wachter, & Harris, 1975) Commissions, stock options, promotional incentives, and other “side payments” can ensure that individual workers sign on to previously determined collective purposes. Employee Stock Option Plans, for example, are sometimes thought to mitigate the classic conflict between capital and labor. (Shapiro I. , 1999, p. 171)

Short Time Horizons

In addition to their inefficiently diverse preferences, workers are thought to be non-ideal stewards of business because they have short time-horizons. Wanting to maximize their payout sooner rather than later, they will forego the kind of risky and capital-intensive investments that assure long-run success. More specifically, some economic theories predict that because workers cannot easily liquidate their membership interests in the firm, they cannot realize the present value of future investments, and so will be less likely to invest in future projects. However, in real life, if workers depend upon their employer for bulk of their lifetime income, they have a keen interest in maintaining its long-term viability – unlike liquid, peripatetic shareholders. (Dahl R. A., 1985, p. 123)

More often than not, contemporary critiques of corporate governance emphasize not the short-term mentality of workers, but of *shareholders*. (Ciepley, 2013; Bowles & Gintis, 1993; Strine, Jr., 2017) The evaporation of “patient capital” is blamed for financial crises, macroeconomic weaknesses, and a significant reduction in research and development. (Ciepley, 2013, pp. 148-9) As a result, these critiques suggest ways to incorporate more *employee* voice into corporate decision-making. (*e.g.*, *Ibid.*; Lazonick, 2013; *see also* Chapter 4) In a compelling example, Mariana Mazzucato (2013) argues that not even ostensibly long-term and risk-hungry venture capital has a sufficiently lengthy time horizon to make the kind of investments that lead to real innovation. It was government, not capital, that brought us the internet and GPS. In fact, many employees own and control very risky industries like farming and investment banking.

As a result, the fact that a worker might have an undesirable short-termist mentality may not be a result of her fixed, exogenous preferences but instead of her precarious employment circumstances. Why make the team-specific investment of foregoing present wages for future returns when one half-expects to be laid off in the future and when living paycheck to paycheck? But, as Elster and Moene point out, “it may be possible to organize the production process to minimise [this] obstacle[] to cooperation.” In fact, Oliver Williamson, Michael Wachter and Jeffrey Harris, in their influential 1975 essay, observe that employers can create long-term incentives by tying workers’ increasingly firm-specific specialized knowledge to pay raises. (Williamson, Wachter, & Harris, 1975) They can elect a supervisor that can help them overcome the collective action problem that incentivizes them to maximize their own short-term returns at the expense of long-term group utility. (Alchian & Demsetz, 1972)

Risk Aversion

In a conflicting argument, some argue against corporate democracy not because workers are too short-termist, but because they are too averse to risk-taking. Counting on steady employment in both the short and long term, they will not undertake the kinds of innovation necessary to remain competitive and to grow the economy. But, as Strine (2017) points out, all employees bear a great deal of risk in an economy oriented around at-will employment. Job security is very low, and yet workers still depend on employment for the vast majority of their income. Moreover, limited liability, insurance, tax credits and other devices can incentivize risk-taking if it is deemed beneficial.

As a result, a shift to democratic companies “might not cause employees to bear substantially more risk than they do already.” (Hansmann, 1996, p. 78). Regardless, much of the growth in financial markets over the last decade arose precisely to address the risk-aversion of capital market investors. Credit default swaps are, after all, a form of insurance against stock market bets gone bad. Retirement savings accounts are kept in diversified portfolios precisely to insulate investors from risks. Moreover, at least one of the reasons that venture capital will not invest in the truly wild, “game-changing” ideas, argues Mazzucato (2013), is because not even they can bear the risk. Accordingly, financial innovation and the state might step in to bear the risks that democratic workplaces will not. Finally, some argue that while workers may be too averse to risk, some capital market participants may instead embrace too much. (Bowles & Gintis, 1993)

Securing Outside Financing

One of the primary pieces of evidence offered in support of the infeasibility of corporate democracy is its difficulty in securing the outside financing required to achieve economies of scale.

New Institutional Economics typically explains the lack of workplace democracies in terms of their failure to provide capital investors with a credible commitment against appropriating or misusing invested funds. Investors therefore require control rights over the firm or else they will undersupply capital. (Dow 2003, p. 14) Others, inspired by Frank Knight's 1920 opus, *Risk, Uncertainty and Profit*, explain corporate democracy's difficulty in securing financing on workers' risk aversion. There are, however, several reasons why these arguments are not entirely convincing.

First, many economists observe that affording shareholders an exclusive franchise (*i.e.*, control) right is perhaps unnecessary to attract their capital investment. In particular, shareholders primarily protect their interests using "the Wall Street Walk." (Hansmann, 1996, p. 55) If they are unhappy with how the company is run, they may take advantage of broad and liquid secondary capital markets to divest. Meanwhile, corporate leadership has an interest in maintaining the price of these assets in order to, for example, use it as collateral for obtaining future funding. The financing market can therefore incentivize both democratic and undemocratic firms to keep their bankers happy and thus holding on to their investments. "Knowing this, present sharebuyers will not be deterred by the fact that the cooperative is formally free to reduce the dividend to zero." (Elster & Moene, 1989, p. 33; Hansmann, 1996, p. 54)

Further, as Hansmann (1996) observes, many mechanisms other than an exclusive franchise right can credibly assure investors that assets will not be misappropriated. For example, formal and informal legal and cultural mechanisms operate to prevent abuse and exploitation. Democratic companies can always raise financial wherewithal using debt, an instrument not tied to any voting rights. To attract investment and assure creditors that their contributions will not be misused, they can offer corporate assets as collateral (Hansmann, 1996, p. 54) and take advantage

of secondary markets in debt instruments to assuage investors who want an escape hatch should they disapprove of how companies use the proceeds. The liquidity and size of contemporary corporate bond (debt) markets demonstrate that this solution is at least feasible.²⁴⁶ (Hansmann, 1996, p. 66) Beginning the 1980s, new financial technologies facilitated the creation of the corporate “junk” bond market and gave rise to specialization within investment banks and other financial market actors who became experts in issuing and designing these debt instruments. Indeed, even Columbia University, a non-profit educational institution without shareholders, manages to secure financing in this manner. And investment banks themselves raise money using commercial paper, money markets, and repo (repurchase agreements). (Tooze, 2018) Corporate democracies might make use of the same resources.

There are a few reasons offered that explain why such financing is deemed less desirable, and thus less efficient, than its equity counterpart. First, investors will assume the risk of inflation because their income stream is fixed but the value of currency is not. As a result, the risk of inflation might dissuade the optimal amount of investment, particularly when investors expect inflation rates to increase. Contractual payments under bond instruments, however, can be pegged to inflation. Meanwhile, interest rate swap markets can help make up for any undesirable risk. Second, companies need not pay back equity; investments are thus “locked in.” On the other hand, debt must be repaid regularly. Stuck on a regular payment schedule, a company using debt financing might therefore refrain from taking on riskier but more lucrative investments. But it is

²⁴⁶ “The resulting reduction in the cost of borrowed capital, by facilitating corporate control transactions and restructurings, has presumably increased the efficiency of large investor-owned business corporations. But the same development renders feasible the ownership of large firms by classes of patrons other than investors. In particular, by permitting most of a firm’s invested capital to be obtained on the market through debt, it has helped to make employee ownership financially feasible even for large industrial firms.”

perhaps important not to overstate this problem. As mentioned above, even companies that finance themselves with locked-in, risk-friendly venture capital investment have trouble making long-term, risky, and market-changing investments. (Mazzucato, 2013) More concerning is the fact that companies using debt financing might chance rolling over short-term debt on a regular basis in order to fund large, risky adventures – and then subject themselves to the peril of “bank runs.” (Hansmann, 1996, p. 55; Tooze, 2018) Debt-financed democratic corporate capitalism might, therefore, find itself in need of central bank bailouts – and, therefore, a state committed to and capable of maintaining macroeconomic stability.

Finally, those cooperatives that found successful alternative self-financing mechanisms, like Mondragon in Spain and La Lega Nazionale in Italy, have achieved much success. (Dow, 2003). This suggests that cooperatives’ failure to secure traditional financing may not have any determinative bearing on their market credentials in any event. “Consequently,” observes Hansmann, “there is good reason to believe that capital accumulation is not an insuperable obstacle to employee ownership in most industries.”

Inconclusive Evidence

Regardless, the evidence cited to support the notion that corporate democracy is inefficient is far from conclusive. (Malleon, 2013, p. 624) Pointing to a few failures to argue for or against the efficiency of workplace democracy is a logical mistake. One generalizes from specific instances only at her peril. (Elster & Moene, 1989, p. 15) Indeed, some of the arguments presented against corporate democracy is explicitly functionalist: since few corporate democracies can be observed, they must be inefficient. But this is to explain causes with consequences. Further, Henry Hansmann (1996) purposely selects on the dependent variable as he investigates the rarity of democratic business. He and other scholars neglect to count the proliferation of worker-owned

professional partnerships like law firms and accounting agencies, employee stock ownership plans, non-shareholding non-profits²⁴⁷ like universities and hospitals – all of which manage to turn a profit despite deviating from traditional corporate capitalist structures. Other research shows that while the creation of business democracies is rare, once they are set up, they achieve higher longevity rates than their capital-controlled counterparts. (Dow, 2003)

Explaining the Rarity of Corporate Democracy

There are several explanations for the rarity of workplace democracies that have little to do with their inefficiency. First, most entrepreneurial enterprises require a broker or promoter before they can get off the ground. To illustrate, a small business requires the support of an investment bank to underwrite its shares before it can go public. Likewise, worker co-operatives require a promotor to make an initial investment and solicit members. One reason for the rarity of workplace democracy, then, is the lack of sufficient brokers with the skills and incentives to provide them these services. Banks, to give one example, may be unwilling to loan money at affordable interest rates to workers.²⁴⁸ (Team, ch. 6.9) And it is at least possible that their motivations arise for a reason other than the efficiency of corporate democracy. (Landemore, 2016; Roy, 1997; Bowles & Gintis, 1993; Thompson, 2015) “Strategic non-lending” and “capital strikes” have been, according to sociologist Fred Block, means by which investment banks repress democratic institutions. (1992, p. 285) For example, because financial markets are highly intermediated by a few large actors, these actors can demand concessions (like control rights)

²⁴⁷ These enterprises are called non-profit because profits may not be distributed to those who control the enterprise – not because they do not earn more revenue than they expend in costs. Columbia University’s growing endowment is a case in point.

²⁴⁸ Unlike asset-poor home purchasers – who received the benefit of financial instruments (mortgage backed securities) and federal subsidies (Fannie Mae, Freddie Mac) and thus were able to obtain financing.

regardless of whether those concessions serve efficiency purposes. In other words, shareholder control rights might be a form of “price exploitation” arising from financial market power. (See Hansmann, 1996 p. 25) Path dependencies, first-mover advantages, culture, and the institutional *status quo* (Thompson, 2015, p. 98; Roy, 1997; Block, 1992), furthermore, ensure that individual investors will find themselves channeled to mutual funds and other investment vehicles that specialize in traditional corporate equities, leaving them no good opportunity to invest in democratic companies. Meanwhile, legal regulation may encourage investment in stocks rather than debt issued to democratic companies. Finally, investors may not invest simply because society expects them, without justification, to fail. And so democratic firms may encounter problems finding support because of the Wall Street “beauty contest,” not because of their underlying financials.²⁴⁹

Second, the demand for corporate democracy might already be absorbed by another important market actor: the labor union. According to Elster and Moene (1989), those corporate participants interested in self-governance will, instead of undertaking the extraordinary costs of starting a democratic firm, opt instead to participate in a union. And union leaders, who might otherwise be in favor of workplace democracy, will have a vested interest in maintaining the status quo. (*Ibid.*, p. 35) This dynamic might explain why the Mondragon group has been so successful in Spain while union-heavy Scandinavia has no such success stories.

The Efficiencies of Corporate Democracy

Regardless, even if corporate democracy involves some inefficiencies, empirical literature suggests, although not always unambiguously, that corporate democracy carries competitive

²⁴⁹ A counter-argument is that competitive financial markets have an incentive to clear up such unsubstantiated stereotypes.

advantages that capital-controlled companies do not. (Elster & Moene, 1989, p. 29) Workplace democracies face lower turnover, less absenteeism, and much fewer production losses resulting from strikes and lockouts. (*Ibid.*) Further, as mentioned above, once operational, democratically-governed firms enjoy more longevity than their capitalist counterparts. As a result, according to Simon, (1991, p. 38) it is difficult to identify differences in productivity and efficiency between corporations managed by capitalist owners and those controlled by workers. It may be that the economic theories that purport to prove up the efficiency benefits of manager-led firms rely on market failures that could very well be fixed. (Dow, 2003, p. 11)

Several reasons explain why worker-managed companies may enjoy some efficiency advantages. Some of these reasons arise on account of workers' "residual claimancy" on corporate wealth, meaning that they, like shareholders, have an incentive to maximize profits to safeguard the long-term viability of the firm. Others arise because workers have some control over corporate decision-making and so need not fear the incredible commitments of management. First, within corporate democracy, workers, if they have control over the distribution of firm profits, will have the incentive to monitor each other because they will receive the benefit of the group's productivity.²⁵⁰ Indeed, their incentive to ensure that their managers and colleagues remain

²⁵⁰ This conclusion will be tempered by the freerider effect because firm profits may take on the aspect of a local public good. Each worker would prefer the rest put in greater effort while she herself did less. But shareholders themselves are also subject to this same problem. While monitoring management might increase profits, none has an incentive to take on this task on her own. Moreover, shareholders' difficulty in overcoming the freeriding problem is exacerbated by their comparatively large numbers. (*See* Olson, 1965; Hansmann, 1996, p. 57) Nevertheless, empirical research shows that the freerider effect may be minimal in worker-run cooperatives perhaps because they are able to overcome a multiplayer prisoner's dilemma in repeated game situations. (Weitzman and Kruse 1990; Pencavel) "Profit sharing is often quite effective at inducing high levels of effort, typically with less need for monitoring." (Kroszner & Putterman, 2009, p. 24) Regardless, a similar problem arises regarding shareholders. Shareholders will fail to monitor business operations to safeguard profitability, each hoping the other will complete the task.

productive is greater than that of dispersed, diversified shareholders because the vast majority of their income depends upon the company's profitability. (Hansmann, 1996, p. 78) As a result, workers can be expected to work harder per hour because losing their job would be all the more painful. Further, unlike dispersed shareholders without any close proximity to productive activities, they are in a better position to both discover and discuss whether their colleagues are putting in their best work effort – and to do something about it. (Hansmann, 1996, p. 78) This “mutual monitoring effect” therefore saves on the costs of monitoring associated with capitalist firms: foremen, technological surveillance, and other such mechanisms. (Hansmann, 1996, pp. 36, 70; Bowles & Gintis, 1993, pp. 78-79) It is especially useful when firms are involved in activities that are not easily measured by strict, objective benchmarks that can be used to assess employee performance. (Alchian & Demsetz, 1972)

Second, democratic corporations can better command two important assets: loyalty and trust. (Simon, 1991) When ongoing, deep-level cooperation is required for efficient outcomes, workplace democracies have a distinct advantage. (Thompson, 2015, p. 98) They more easily develop and maintain the informal norms required to ensure workers exercise their discretion in a way that facilitates the flexibility required to take advantage of advanced technology. As Thompson puts it, they can overcome the typical trade-off between cooperation and top-down coordination that more conventional firms must undertake. In addition, democratic firms are more likely to develop a “cultural or ideological component” that drives employees to identify with corporate goals and behave consistently with those goals by, for example, foregoing excessive numbers of breaks. (Simon, 1991) This feature may also go some way towards alleviating the inefficiencies implicated in preference diversity described in the previous section. In addition, allotting control rights to workers can eliminate the moral hazard, or “intertemporal incredibility,”

that incentivizes management to exploit them after they have already agreed to take on work and make company-specific investments. As Dow explains, “[i]f the investor-controllers... can discover a way to increase their payoffs while imposing costs on employees, they will take advantage of this opportunity.” (2003, p. 13) Because a capitalist has claim to firm profits, she has an incentive to renege on any promises she makes regarding future employment, work intensity, raises, and the like. Workers, knowing this, cannot trust managers to fulfill its promises. They accordingly have an incentive to withhold information about their abilities and working conditions while contributing lower levels of effort than they might otherwise. If workers have a voice in governance, on the other hand, they are more likely to be forthcoming about their skills because they need not fear that managers beholden to shareholders will exploit that knowledge by using it against them – *e.g.*, by making working conditions more miserable than workers would like. (*Ibid.*; Dow 2003, pp. 14-15; Hansmann, 1996, pp. 28-29; Williamson, Wachter, & Harris, 1975) They might also be more likely to invest in firm-specific skills and undertake other costs (*e.g.*, like moving, training, *etc.*) because they would have more assurance that the firm will continue to compensate them for their sacrifices in the future. (Dow, 2003, pp. 14-15; Bowles & Gintis, 1993, p. 79; Hansmann, 1996, p. 25; Blair & Stout, 1999) The point is not merely theoretical. Corporations have voluntarily incorporated employee voice into decision-making in order to make the credible commitments required to solicit these firm specific investments. (Williamson O. E., 1984) Relatedly, corporate democracy can also alleviate the costs associated the propensity to hide information about their preferences to gain strategic advantage during bargaining. In fact, the costs associated with strikes and lockouts are undertaken precisely in order to bring this kind of information to light. (Hansmann, 1996, p. 30) Further, when workers’ preferences about pay and benefits diverge, a capitalist manager is motivated to accommodate the marginal worker, or the

worker who is indifferent to any tradeoff between pay and benefits. It would be more efficient, however, to accommodate not the marginal worker, but instead the average worker. Workplace democracy can help reveal the average preference. (Hansmann, 1996, pp. 30-31)

Third, workers may be in a better position to discover cost-saving advantages in the production process. (Edmans, 2011) “Because of their intimate knowledge of the production process,” workers might “perceive potential improvements that might be missed by engineers.” (Elster & Moene, 1989, p. 31) None other than Adam Smith (1776) identified this feature of innovation long ago:

A great part of the machines made use of in those manufactures in which labour is most subdivided, were originally the inventions of common workmen, who, being each of them employed in some very simple operation, naturally turned their thoughts towards finding out easier and readier methods of performing it. Whoever has been much accustomed to visit such manufactures, must frequently have been shewn very pretty machines, which were the inventions of such workmen, in order to facilitate and quicken their own particular part of the work.²⁵¹

(Bk. 1 Ch. 1) The point was picked up by Hayek (1945) nearly 200 years later when he emphasized that useful information is always decentralized and, accordingly, often inaccessible to top-down hierarchies. It is workers, not managers and shareholders, that have access to the information upon

²⁵¹ The example cited by Smith: “In the first fire-engines, a boy was constantly employed to open and shut alternately the communication between the boiler and the cylinder, according as the piston either ascended or descended. One of those boys, who loved to play with his companions, observed that, by tying a string from the handle of the valve which opened this communication to another part of the machine, the valve would open and shut without his assistance, and leave him at liberty to divert himself with his play-fellows. One of the greatest improvements that has been made upon this machine, since it was first invented, was in this manner the discovery of a boy who wanted to save his own labour.” (*Ibid.*)

which the corporation can make informed decisions. They are the ones collecting and constructing the mechanisms that process such data. (*See* Simon, 1991, p. 32) If workers have a claim to residual profit, and if their control rights assure them that their knowledge will not be exploited against them, they are more likely not only to make such discoveries, but also to share them.

As a result of these efficiency advantages, worker-controlled corporations may even be tempted towards self-exploitative “team Taylorism.” They may drive themselves so hard, notes Shapiro (1999, p. 180), that they may find themselves, ironically, in need of unions that can protect them from long hours, onerous work requirements, and invasions of privacy. Profit-sharing, for example, can “breed the temptation to speed up productive to an excessive pace or forego reasonable, protective work rules in the drive to reduce costs and make bonus payments more likely.” (*Ibid.*, citing Bluestone & Bluestone, 1992))

Part II(B): Political Judgment in the Corporation

Democratizing the corporation, then, does not mean relinquishing any hope of achieving economic efficiency. After all, even constitutional liberal democratic states must find a way to embed economic realities within their normative commitments. Furthermore, nothing prevents democratized workplaces from exploiting the economizing advantages of representative leadership and expert guidance. Workers themselves, moreover, possess the incentives to manage their affairs competently within a competitive market. To the extent they do not, creative institutional design can remedy any defects.

Yet whether or not democratized corporate citizens can satisfactorily proxy the black-boxed production function imagined by classical economists will disappoint those who expect democracy to exhibit more voluntarism than it does technological determinism. In this Part, I will try to assuage some of that disappointment. First, even within contemporary markets, many

corporations enjoy considerable freedom from market constraint. There is thus enough slack for corporate citizens to enjoy collective autonomy, for them to determine whether and how they would like to vindicate their liberty rights together. Second, the production function described by classical economists is not as determinative as one might think. Even within profit-oriented business corporations, value-laden choices must be made – choices about which neither technocratic managers nor markets possess any particular expertise. They are choices that are subject to political judgment, prudence, or *phronesis*. As such, they are choices amenable to democratic input.

Challenge 4: The Slack in the Market

As addressed in Part II(A), those objecting to workplace democracy occasionally point out that corporations, unlike states and other agents in the public sphere, lack autonomy because they are subject to ineluctable economic forces. For example, some marxists argue that capital cannot help but force both capitalists and workers to maximize surplus value at all times and upon pain of insolvency – or worse. The capitalist must pursue profit and cut costs lest she be put out of business. The laborer must abide the inescapable goals of the capitalist or else starve. Similarly, neoclassical “agency cost” theories of the firm presume that shareholders, as “principles” seeking to maximize profits, must hire and surveil worker and management “agents” to ensure their one-dimensional goal is met. (Jensen and Meckling, 1976). Team production theories (Alchian & Demsetz, 1972), for their part, assume that all the firm’s human inputs seek, even as they agree to abide by intra-firm authority, to maximize income. Meanwhile, all labor is classified as “disutility,” a fate to be avoided unless cash is in the offing. (Lane, 1999, p. 42) Finally, the Weberian bureaucratic model of instrumental rationality suggests that actors, taking “substantive rationality” as a given, focus only on discovering the most efficient means to achieve the end of

corporate profit. Indeed, the power of instrumental rationality is so strong it effects a reversal of means and ends as human beings pursue economic efficiency at the cost of all other values.

But economic theories that explain the form and governance of corporations suffer from functionalist fallacies. They presume that “whatever is, is right” when it comes to the roles and activities – the authority, tasks, and legal rights – assigned to firm participants. (Ogilvie, 2007) Their explanations tacitly rely on some market oriented “natural selection,” concluding that not only the product of commercial activity, but the relationships between the human beings performing it, is the streamlined end-result of idealized market competition amongst human beings single-mindedly pursuing one-dimensional goals. Either they are price-takers, subject to the overwhelming force of the invisible hand, or their behavior is strictly determined by exogenously given technology. Both these theses will be rebutted in more detail below. Corporations do, in fact, enjoy sufficient discretion to make democratic decision-making worthwhile.

The Invisible Hand

Economist James Tobin once wrote that “The Invisible Hand, especially in the general equilibrium version of formal theory, requires that agents lack market power and take parametrically the prices determined for a predetermined list of commodities.” (1990, p. 231) It is, he asserted, a “big logical jump” to extend that Hand “to all market structures.” (*Ibid.*) In his magisterial *Capitalism, Socialism and Democracy*, Joseph Schumpeter pointed out that one feature of business concentration and the market’s oligopolistic tendencies was the alleviation of product market pressures that work, ironically, to stifle innovation. (Schumpeter, 2003[1941], pp. 95-97) A for-profit company’s power as a price-maker rather than a price-taker affords it some wiggle-room to invest in research and development, develop cushions for rainy days and experiment with innovative products. The lack of perfectly competitive markets, in other words, is not just a reality

of actually existing capitalism. It is also a *good* thing: it allows business to “make fortresses out of what otherwise might be centers of devastation” in capitalism’s battlefield of creative destruction. (*Ibid.*, p. 95) Thus, sacrifices in short-term consumer prices and product quality yield long-term gains. Writing 50 years later, corporate law scholar John Parkinson noted that, “[i]n reality many companies operate in conditions which are to a greater or lesser extent uncompetitive.” The effect of market imperfections, he wrote, is to “cede to companies a zone of discretion in relation to products and prices and the wide range of factors connected with the production process.” (1993, pp. 10-12) To illustrate the point, Parkinson unpacks the theory of “consumer sovereignty,” the demand-side corollary to perfect competition that compels corporations to produce consumers’ preferred items at the largest possible quantity and the lowest possible price. At best, Parkinson argues, that sovereignty is shared with companies who enjoy discretion not only to tinker with quality, price, and quantity. They likewise enjoy discretion to pick and choose which products actually make it to market and, through promotion, to shape consumer demand in order to ensure that the market will accept those products – ideas associated with James K. Galbraith. (*Ibid.*, pp. 13-14) (citing Galbraith, 2007) This shared sovereignty is one that might be controlled democratically.

Technological Determinism

Other economic theories challenge the possibility of corporate autonomy not based on product market pressures, but through technological determinism. The idea is that machines demand their own improvement, control the form of production, shape company governance institutions, and compel the behavior of owners and workers alike. (Trachtenberg, 1982, p. 54; Chandler, 1977(1990)) Thus, even if corporations democratize, the machines will be calling the shots regardless.

Schumpeter, in rebuttal, argued that innovative development arises precisely *because* firms can “mutate.” (2003[1941]) Growth happens *because* they can experiment with new “combinations” (1911) of people and things, despite any given array of technology. Indeed, by Knight’s (1921) account, this is the very definition of “entrepreneurship” celebrated by market-oriented societies. (*See also* Kogut & Zander, 1992) Indeed, some have even argued that mass production technologies were selected precisely because they facilitated one kind of governance (hierarchy) over others (decentralization) – not because the machines shaped capitalism’s institutions. (Thompson, 2015, p. 73; Marglin, 1974) Contributing to the decidedly anti-Marxian idea that technology is made and not predetermined, Gerschenkron (1962) famously argued that change can happen not as the inevitable, evolutionary result of free markets, but through voluntaristic intervention. Moreover, business forms persist not always because they are a best fit with technology, but also because of path dependency, culture, distributive conflict and “bounded rationality.” (North,1990; Veblen, 1904)

Thompson, taking a more balanced view, notes that:

when it comes to the interaction between technology and institutions on the one hand and the internal organisation of the firm on the other, there are likely to be multiple ‘equilibria’ (or ‘paths’), each of which is ‘locally stable’ but not necessarily ‘globally optimal’.

(2015, p. 90) Further, as Weber (1922) recognized, modern bureaucracy cannot entirely repress moral rationality. (Rothschild & Whitt, 1986, p. 49) All business organization contains culture; indeed, firms not uncommonly try to form these cultures anew. To achieve the cooperation and coordination necessary for success, argues Thompson, firms must accommodate social norms and substantive rationality. (*Ibid.*, p. 75) In making this point, Thompson differentiates between “technology, conceived as a kind of abstract ‘blueprint’ of information, and productive knowledge,

which is embedded in social interaction.” Productive knowledge, where ideas are put into action, implicitly incorporates substantive rationality. An innovation cannot result in a product brought to market unless and until plans are made that explain how human beings can be brought to implement it. In a cynical illustration, economist Frank Hahn remarks that companies can deploy status competition to entice labor:

...the economist’s model of the supply of effort is in many ways unpersuasive since attitudes to work and reward are almost certainly richly influenced by the social setting. One can think of many reasons why relative rewards, that is, relative to others, rather than absolute rewards, are central to the incentive question. Rewards are not just a means of transforming work into consumption, but indicators of social esteem and a source of self-esteem. Keynes argued that it is only the rank order of rewards rather than the absolute gaps which are important for incentives.

(1990, p. 156; *see also* Ferreras, 2017) As a result, even if technology demands a specific division of labor, including one that involves hierarchy, firms must leave some slack for human concerns – concerns that can be democratized. The enticement to work need not always entail destructive status competition. Although much classical and neoclassical economic theory is blind to communicative rationality, (Dryzek, 1992), the economic “sphere” must deal on the terrain of political engagement, no matter its commitment to strategic action. (Walter, 2011)

Regardless, if Gerschenkron (1962) is right, and if technology is made and not predetermined, corporations can develop and select technologies that work well with their system of governance. The relatively recent “endogenous” or “new growth” theory in economics (Romer,

1994) supports this conclusion by illustrating the micro, firm-level foundations of technological development. (Thompson, 2015, p. 80)

Although institutional and economic change may be difficult to explain and predict, and although the social sciences continue to grapple with it, none can deny that it does happen - nor that human volition assumes some role in it. And where there is room for human choice, there is room to democratize that choice. (See Singer, 2018) As a very recent example, public discourse is now turning to the regulation of companies like Facebook, Amazon and Uber whose technology has created as-yet poorly understood and unanticipated social harms. By changing the technology, democratic publics can change economic structures and, accordingly, the impact those structures have on human welfare.

The Evidence: Firm Participants Express Non-Instrumental Rationalities

To be sure, some marxist accounts of capitalism, neoclassical economic accounts of the firm, and Weber's ideal type of bureaucratic rationality deny the possibility of human beings bringing what Isabelle Ferreras (2017) calls "expressive rationality" to the place of business. Even Hannah Arendt, in *The Human Condition*, finds in the economy only human behavior coerced by material necessity. (Arendt, 1958, p. 40) Reality puts paid to this kind of thinking. Corporate actors can and do pursue goals other than profit. Before the U.S. Supreme Court, corporations are seeking to enforce not economic rights – as economic determinists might predict – but liberty rights to political speech and religion. (Winkler, 2018) The shareholders of Hobby Lobby Stores, Inc., for example, brought suit before the U.S. Supreme Court precisely because they wanted to pursue something other than profit. Namely, they sought to enforce a right to religious freedom against a government mandate to provide contraceptive care to employees. Investors form and operate

“socially responsible” funds,²⁵² choosing with some amount of intentionality to support corporations that are in the business of more than just business as usual.

Headlines do not just bring to attention to the expressive values of capital market participants. Employees of Microsoft, Inc. recently petitioned management against doing any further business with U.S. Immigration and Customs Enforcement because of their political disagreement with U.S. immigration policies. (Frenkel, 2018) Workers at Amazon protest against providing government law enforcement authorities facial recognition software because such tools, although they bring profit, “violate human rights.” (Vincent, 2018) Recent labor movement demands strive not just for gains on bread and butter issues, but also protections against workplace harassment and discrimination²⁵³ even as they push for publicly valuable firm output.²⁵⁴ Professional U.S. football players kneel and raise fists during the playing of the National Anthem, bringing attention to racially inflected police misconduct while at work.

Evidence of business involvement in non-economic concerns does not just show up on the front page of newspapers. It is directly acknowledged by academic scholarship. Law professors Lyman P.Q. Johnston and Cynthia Estlund note not only practices of religious and political speech rights in business, but also that people bring their “moral sentiments” with them to work. (Johnson L. P., 2010; Estlund, 2006) Likewise, sociologists have long noted the existence of expressive rationality in economic cooperation. Empirical social scientists observe human conceptions of

²⁵² Examples include Access Capital Strategies, Appleseed Fund, Azzad Ethical Fund, Calvert Capital, Epiphany Faith and Family Values, Gabelli SRI, Green Century, Legg Mason Social Awareness Fund, MMA Praxis, Neuberger Berman SRI, New Alternatives Fund, Parnassus Core Equity Fund, Pax World, Walden Social Balanced Fund, and Winslow Green Growth Fund

²⁵³ Indeed, many civil rights won by the LGBTQ community first began in the workplace as unions fought for and won same-sex partner benefits. Interview with T. Santora, Chairman, CWA Southern California Council, July 1, 2018.

²⁵⁴ Notably, the recent wave of wildcat teacher strikes name among their demands improvement in public education for children to ameliorate inequalities of opportunity. (Asbhy & Bruno, 2016)

justice at play in the workplace between managers and employees alike. Sociologists studying worker cooperatives find that people enjoy goods of autonomy and community as they successfully compete with their for-profit brethren. (Rothschild & Whitt, 1986; Greenberg, 1986) More recently, Ferreras (2017) counts at least four forms of expressive rationality within economic enterprise. Employees seek and enjoy: (1) autonomy and self-respect; (2) inclusion in a community; (3) feelings of social usefulness and (4) satisfaction in engaging in compelling or interesting work. (Ferreras, 2017, pp. 83-84) To boot, the entire academic field of business ethics holds real estate in nearly every business school in the country, implying that corporations can and do pursue goods other than single-minded profit maximization. (See Singer, 2018) Indeed, a firm's economic success may very well ride on how successfully its participants manage to implement these ostensibly non-economic values. Unless workers and managers can "get on," (Follett, 2012, p. 11) unless they can achieve a sense of successful cooperation and workplace justice, the teamwork necessary for productive activity may falter. After all, a corporation exists precisely because some market goals can only be achieved cooperatively and not through individualized spot markets. (Singer, 2018) At the same time, anthropologists confirm that corporations are characterized by a "rich diversity" of "myths, rituals, beliefs, norms, and practices" that diverge from pure profit-seeking motives. (Urban & Koh, 2013, pp. 140-41) Business leaders sponsor reflexive, in-house ethnographic research to study and change corporate culture even as academic management studies publishes anthropological research on intra-corporate social relations, values, and identities. (*Ibid.*, pp. 150-51) Notably, such investigations have markedly increased on the topic corporate social responsibility, studying how companies "self-consciously attempt to fashion themselves into 'good' citizens by modifying their practices." (*Ibid.*)

Whether labor or capital, corporations' human inputs do not follow the tidy instrumentalism suggested by reductionist marxist, neoclassical and Weberian theorists. Thus, even if the corporation *can* be depoliticized on account of economic concerns, it is not and never was fully depoliticized.

Challenge 5: Political Judgment and the Underdetermined Production Function

It must be admitted that business corporations, like states, face constraints on their behavior even if their activities are not wholly determined by market forces and technology. Even granting this, however, the question of how best to maximize a corporation's production function is sometimes more of an art than a science. What the "market requires" is often open to interpretation. There will be trade-offs between different kinds of efficiency (Elster & Moene, 1989, p. 5) that can only be resolved through experience (Williamson, 1980), learning, prudence and what can only be called political judgment.²⁵⁵ Thus, at least on occasion, actors assert "market constraint" to bring premature closure to debates over questions whose solutions cannot help but remain indefinite, uncertain and thus open to democratic decision-making.

Indeed, while most involved in the corporation might agree that the corporation must and should seek profitability, they may disagree vehemently on how one might best pursue it. The signals of the marketplace, after all, are the sorts of "facts" that, as Arendt (1967) instructs, "concern[] events and circumstances in which many are involved" and are thus political. Requiring interpretation, they are "picked out of a chaos of sheer happenings (and the principles of choice are surely not factual data)" and then fitted into a story than can be told only in a certain

²⁵⁵ I mean to use this term capaciously, including the Aristotelian *phronesis* or the Rawlsian "burdens of judgment." It involves practical decision-making based on both fact and norm when no obvious answer presents itself and therefore can accommodate democratic input.

perspective.” What proscriptions may be derived from these signals are not “beyond agreement, dispute, opinion, or consent.” (*Ibid.*)

First, corporate participants disagree on the meaning of profitability, a characteristic that operates on at least two dimensions: (1) the quantitative amount of cash remaining after expenses and (2) time. Constituents may weigh each dimension differently. For some, profitability means flush short-term cash flows. For others, long-term viability and growth. Others may add further dimensions, *e.g.*, (3) whether any costs and benefits of human well-being should be included; (Landemore, 2016, p. 72) and (4) whether corporate decisions to maximize benefits to the whole will unacceptably harm some of its parts by, *e.g.*, unfairly diluting the value of members’ investments. The dilemma thickens when, in the interest of maximizing value for some, the whole can be modified by jettisoning corporate members through layoffs and share repurchasing schemes. Indeed, corporate leadership has been known to exile not just workers, but also shareholders (through stock purchases and mergers), creditors (through bankruptcy) and customers (by cancelling contracts).

The future, furthermore, is uncertain. Often, it is not at all clear what steps should be taken to achieve profit (during any time period and over any assembly of corporate constituents). Though markets can certainly price risk, a decision must be made as to how much risk constituents choose to bear. Finally, even presuming consensus on the meaning of profitability and how it is to be best achieved, corporate participants disagree vociferously on how any profits are to be distributed. The legacy of such battles appears not just in the law regulating labor relations and collective bargaining, but also in state corporate and federal securities law.

As a result, what is set forth as objective market constraints may really just be self-interested, partial preferences of particular financial market actors. Rather than an imperative

ignored only at the risk of firm insolvency, they might be heuristics that favor intermediary institutions at the expense of human shareholders, workers, and the longevity of the enterprise.

Judgment 1: Qui Bene? For Whom Should Profit Be Maximized

Within market societies, it is often taken as axiomatic that firms should maximize profit. When it comes to individual market participants, the identity of the profit-maximizer is clear. Individual entrepreneurs will, if they rationally exercise their property rights, make decisions that maximize expected gain given risk and opportunity costs. With their ends predetermined, the task of these individuals is one that involves instrumental rationality alone. But the question of who is to seek and benefit from profit is far from clear when it comes to the corporation, a collective entity with an open-ended membership roster. Whether profit is, in fact, collectively maximized involves a judgment regarding who counts as a member of the corporate collective entity. Furthermore, both economists and the business law scholars they inspire have made compelling and conflicting cases in favor of maximizing the profit on behalf of shareholders, workers, and other stakeholders. (Urban, 2014, pp. 14-15) If profit is maximized on behalf of any one of these groups, they argue, it will inevitably be maximized on behalf of all because of the nature of residual ownership. Even if true, the question as to who is to be a residual owner involves a political judgment. Finally, putting aside the question of whose profit-maximization will be more likely to yield profit-maximization for the business as a whole, there is the question of fairness. Maximizing collective profit may very well come at the expense of individual well-being. If corporate rights rest on the liberty rights of corporate members, sacrificing the few for the many may not be an attractive option. This is because, as explained in Chapter 3, the corporate right to justify activity which maximizes profit for some at the expense of others would have to account for the equal rights and liberties of those sacrificed.

Counting the Collective

Those who would define the corporation as a privately-owned commodity might demand that profit accrue solely to its owner. As explained in Chapter 1, however, whether a corporation is “property” is a normative conclusion that requires justification and explanation. It is, in other words, a decision that can be subject to political judgment. Nevertheless, since a corporation can be fairly characterized as involving a collection of individuals, and since slavery and indentured servitude have long been outlawed, this simple solution fits uncomfortably within CLD. (Dow, 2003) In any case, many who ascribe to this viewpoint help justify their position not by reference to the deontological requirements of property rights, but by reference to overall social utility. Namely, they argue that those who enjoy the proceeds and bear the risk of the commodity (*i.e.*, the “owners”) will make decisions that yield better market outcomes and thereby increase social wealth. (*Ibid.*; Berle & Means, 1932, p. 8) The issue of “residual ownership” will be addressed in the next section. Even so, precisely because corporations are not commodities but collections of people, there is a risk that its “owners” will not internalize the costs that their decision-making imposes on the corporation’s other members. (*Ibid.*) And so it is by no means certain that they are in the best position to make the most efficient decisions.

Setting aside the notion of corporate ownership, a judgment must be made as to who “counts” in the corporation before profit can be maximized. As Nash pointed out long ago, maximizing utility for a portion of a group may yield sub-optimal results for the group as a whole. To illustrate using a simple one-off prisoner’s dilemma, one set of people (shareholders) can achieve their *ideal* outcome if they (1) successfully convince another set of people (workers) to cooperate with them in their business venture; but (2) renege on their obligation to pay the workers what they promised. At the same time, the workers can achieve their *ideal* outcome if they (1)

successfully convince the shareholders they will undertake work and accordingly receive payment; but (2) renege on their promise to complete the work. This dynamic is illustrated below (shareholder payoff, worker payoff, provided respectively in the shaded boxes):

Shareholder Strategies	Worker strategies	
	Renege	Cooperate
Renege	0, 0	9, -9
Cooperate	-9, 0	6, 6

Figure 1

If the corporation is counted as including shareholders alone, profit maximization requires that shareholders do everything they can to entice work from workers while refusing to pay them. Indeed, nexus-of-contracts theories of the corporation often explicitly presume “a zero-sum game between shareholders and other stakeholders, whereby any regard by management to constituencies other than shareholders is seen as an equivalent to self-dealing.” (Mitchell, O'Donnell, & Ramsay, 2005, p. 429) On the other hand, if the corporation is counted as including workers alone, profit maximization requires that workers do everything they can to entice shareholders to pay them while refusing to perform any labor. But, if the corporation is counted as including *both* shareholders and workers, profit maximization requires that they find a way to commit to both submitting payment and performing labor. As a result, the behavior required to maximize profit on behalf of a collective depends crucially upon who counts as a member of that collective.

The distribution of benefits over individual corporate members compounds once the idea of exile is considered. A corporation facing competitive pressure can choose to amputate, saving some at the cost of others. To accomplish this schism, it can fire workers with obsolete skills, stiff

creditors in debt reorganization, or buy out enough shareholders to assume control over the organization. The remaining members might benefit from future profit, but this profit can be balanced against the costs to those sacrificed in layoffs, stock repurchases, debt restructurings, and the like. And, because no market is perfect and bargaining power is often unequal, there is no guarantee that private-market contracting can eliminate these newly minted “negative externalities.” (Bratton, 2005, p. 72) A reasonable question thus arises: whether collective corporate profit has been achieved, given that the collective now has a different composition. An economist might predict that such actions will, in long-term market equilibrium, yield greater social benefit. At least presuming no overweening market imperfections, struggling businesses should downsize. This is how, economists argue, social resources are reallocated to more valuable purposes.

Nevertheless, the question of membership, of who counts, is quintessentially political. The 200-year history of U.S. Constitutional law is peppered with abiding and fractious debates regarding whom, exactly, is to be included in the democratic *polis* and how, exactly, they will be included: freed slaves; women; immigrants; felons; minors; racial minorities; gender. It is a political question that extends beyond explicitly political associations. The Boy Scouts of America, for example, debated whether to include the LGBTQ+ community within their ranks. *Boy Scouts of America et al. v. Dale* (530 U.S. 640 (2000)) It involves judgements about what is important both to the community and to its members, the kinds of differences that the community members can and ought to accept, and the distribution of resources available to meet members’ needs and desires. It is a normative question that must be answered before anyone can undertake to maximize profit. Although economists might answer the normative question using neoclassical market-clearing assumptions and utilitarianism, it is also amenable to democratic decision-making.

Distributing Residual Ownership

Some economic theories hold that profit should be maximized for the shareholders who have bargained for rights to receive a corporation's residual income, (Baums & Scott , 2005) the collective wealth left over after all other expenses have been paid.²⁵⁶ Such theories typically presume that the price of the company's stock on secondary markets reflects the corporation's residual value: its expected future profit stream that can be issued to shareholders in the form of dividends or as a payment after company dissolution.²⁵⁷ (Gupta & Anderson, 2009) As a result, proponents argue that the "profit" to be maximized is that which maximizes the price of the company's shares. (Dinh, 1999, p. 985) This definition has led to, according to some scholars, harmful short-termist and short-sighted management strategies meant to artificially inflate stock prices – the corporate version of the kind of disfiguration caused by an over-reliance on standardized test scores in higher education systems. (Useem, 1993; Lazonick, 2013; Jacoby, 2005, p. 55; Strine, 2007, p. 16)

This definition of corporate profit is vulnerable to at least two attacks. First, even as a measure of shareholder wealth, the use of share price as a proxy for corporate profit is not without its critics. (Fisch, 2006, p. 643) For example, stock prices may reflect not expected corporate income after costs, but instead market bubbles (Keynes' "beauty contest") and the results of manipulative accounting devices designed to artificially inflate trading values. (*Ibid.*, pp. 672-73) Commentators and judges alike blame this concentrated focus on share price for the accounting

²⁵⁶ A residual claim is poorly defined and does not lend itself to easy enforcement via contract law. The claim is to whatever is left over after all prior claims are paid, including lenders' interest, employee wages, supplier invoices and taxes.

²⁵⁷ Generally, stocks are valued using "Tobin's q," a ratio of market and book value of assets, where market value of assets is the sum of the book value of assets and market value of equity, less the book value of equity and deferred taxes.

shenanigans committed by Enron and Arthur Anderson in the late 1990s. (Strine, Jr., 2007; Mitchell, O'Donnell, & Ramsay, 2005) And accounting practices themselves, even if applied in good faith, inevitably involve subjective judgments that, accordingly, are amenable to democratization. (Simon, 1991, p. 37)²⁵⁸ Indeed, Fisch argues that this method of defining profit became popular precisely because measuring firm wealth is inherently difficult. (2006, p. 671) It lends some purportedly objective yardsticks to what is often more art than science. Furthermore, they also compress expected future earnings into a present value that flattens the discount value applied in the price calculation. As explained further below, different people possess different discount values. Some will, because of personal preference or difficult surrounding circumstances, sacrifice long-term earnings for short-term payouts. In addition, the calculation of residual profit presumes a date where there is, as Strine puts it, a “final summing up.” Very rarely does this Armageddon ever come to pass. Corporations do not die nearly so often as they evolve and mutate.

Second, employees and other stakeholders that have not explicitly bargained for “residual” treatment nevertheless bear residual risk that is not reflected in stock prices. (Mitchell, O'Donnell, & Ramsay, 2005) Blair and Stout (1999), drawing from earlier work on capital lock-in by economist Oliver Hart, argue that many corporate participants make “firm specific investments,” opportunity costs that involve things like specialized training for employees, customized infrastructure investments by governments,²⁵⁹ and made-to-order commitments from business

²⁵⁸ There is a joke that illustrates the point: An engineer, a tax lawyer, and an accountant walk into a bar. The bartender asks: “What’s two plus two equal?” The engineer responds: “Given expected wind speeds, density of the rock below, and the level of moisture in the air, my best estimate is 3.999998674.” The tax lawyer responds: “After all deductions and credits, and applying an alternate minimum tax, 4.50.” The accountant responds: “what do you *want* it to equal?” Norms tend to frame and select on the historical data used to draw conclusions and judgments.

²⁵⁹ A particularly striking example is the investment made by states and municipalities in the infrastructure required to host the Olympic Games. Many lie fallow after draining public budgets

partners. These costs are not recouped entirely through wages and contracts and cannot be transferred without loss to other business relationships. (Blair & Stout, 1999; Dow, 2003) To these stakeholders, there is significant value in the ongoing business that is neither reflected in stock prices nor internalized by shareholders as residual risk-bearers unless “exogenous” state regulation requires them to do so. (Hansmann & Kraakman, 2001, p. 42; Fisch, 2006, p. 644)

As a result, even defining corporate “profit” as the expected income stream due to a corporation’s residual risk-bearers involves normatively and ethically inflected judgments that can be subjected to democratic decision-making.

Sacrificing the Few for the Many

Even once a corporation determines whose behalf profit should be maximized in order to maximize gains for the whole, it confronts the question of who might be sacrificed in the process. Mimicking the notorious tension between deontological and consequentialist moral thinking, organizations like corporations may determine that some profits are not worth the harms they inflict on others. Utilitarianism notoriously recommends riding roughshod over group members if her pain is outweighed by gain to others. When it comes to collective goods of any sort and at any level of analysis, it is difficult to satisfactorily quantify the distribution of benefits and burdens if we value the fate of the individual. Depending on how one discounts collective gains by individual losses, one might decide that profit does not deserve the name if it does not inure to everyone. It is entirely reasonable to argue, for example, that society as a whole is not better off if its largesse comes at the cost of slavery, poverty and exploitation. Rawls attempted to resolve the problem with his difference principle, arguing that unless the least well off are made better off, activities

even as the International Olympic Committee, a Swiss non-profit corporation, remains financially healthy.

leading to gains to other community members would be unjust. Economists and other social scientists, meanwhile, employ the similar notion of pareto efficiency. Thus, it is at least arguable that if a firm that does not bring profit to *all* its members, it is not, in fact, profitable. Other firm members may object, citing utilitarian moral sensibilities. Gains to some may very well justify losses to one – and she can be jettisoned from the group if it no longer serves group purposes. Regardless, a decision must be made as to how collective corporate profit should be understood. This decision is a political one, and thus amenable to democratization.

Judgment 2: The Shadow of the Future

As social scientists have long understood, human beings vary according to whether and how much they value prospective risks and benefits. Hansmann (1996, p. 39) illustrates the point with the following example:

a decision by a worker-owned firm to shift to riskier lines of business, and thereby increase the chance that the firm will fail, is likely to be less attractive to older workers than it is to younger workers who, though doing the same job, are more easily retrainable and have fewer ties to the community.

These differences are not just distributed amongst employees. As pointed out in the last Chapter, they also occur amongst shareholders. “For example,” notes Hansmann, “differences in tax status, risk preference, or liquidity may lead investors to differ about the most appropriate financial policy for the firm.” (1996, p. 62) Ordinary human investors, as perceived by Justice Strine, will seek long-term profits secured by sustainable strategies that maximize the value of their diversified portfolios, but also ensure a strong economy with high employment rates. (2017, p. 1884) On the other hand, some shareholders, like hedge funds, hold positions in a company for one to two

years²⁶⁰ and argue for short-term gains. (*Ibid.*, p. 1882) Cash intended for capital investment and “headcount” thus ought to be paid out to them immediately as dividends or through a stock buy-back program. According to Justice Strine, “[e]ven a giant and massively profitable company like Apple has not been immune from these pressures for short-term increases in returns, as its capitulation to Carl Icahn’s demand for an increased stock buyback program demonstrates.” (*Ibid.*) Managers, for their part, often maintain that re-investing in the company will enhance wealth over the long haul and protect the enterprise through downswings. (Strine, Jr., 2017, p. 1901) Indeed, investor preferences vary so much along the temporal continuum that incorporators create different classes of shares, carrying different franchise and economic rights, in order to accommodate them. (Hansmann, 1996, p. 63)

Depending on how the corporation determines how to discount to present value, different efficiency-maximizing requirements will obtain. In other words, maximizing profit first involves a judgment about what the future is worth. Citing Schumpeter’s *Capitalism, Socialism and Democracy*, Elster and Moene (1989) point out that the optimal use and allocation of existing resources “does not in general maximize dynamic efficiency – the optimal creation of new resources.” (Elster & Moene, 1989) Maximizing short-term gains may allocate investment away from innovation and therefore future profit.

The choice, further, involves a political judgment that balances competing values. As Elster and Moene observe,

²⁶⁰ Strine’s explanation as to why this is the case illustrates how law and legal institutions come to shape human preferences: “One major reason that most hedge funds have relatively short holding periods is that hedge funds have contracts with their investors that allow investors to get their money back after lock-up periods of typically six months to two years...Another reason is 2 and 20 ... The phrase “2 and 20” refers to the traditional hedge fund compensation structure in which fund managers earned 2% of assets under management as well as 20% of profits.”

In principle, and speaking very crudely, one would expect that in the long run a dynamically superior system will outperform one that is statically more efficient. At the same time, if gains in static efficiency can be realized quickly, they may have greater political efficacy than long-term prospects.

(*Ibid.*, p. 5) Indeed, the conflict between participants' temporal horizons form the basis of the most trenchant and divisive intra-corporate conflicts to show up in court. (Paine L. S., 2014, p. 38) It drives the most notorious cases in U.S. corporate jurisprudence: *Dodge v. Ford Motor Co.*, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), *Unocal*, and *Unitrin*, to name but a few. It also forms a fault line between the management class. Paine (2014), in an empirical study of management styles, distinguishes between those who adopt an "enterprise model," where entrepreneurs are in it for the long haul, and "serial entrepreneurship," where the interest of entrepreneurs is in selling the new company as soon as possible, getting out quickly and with a profit." (*Ibid.*, p. 40)

Judgment 3: The Definition of "Profit": Well-being versus Pecuniary Returns

The art and science of accounting, as briefly noted above, inevitably involves subjective judgments about what, exactly, is a liability and what, exactly, is an asset. For some, counting the exchange (or market) value of the items that make it onto corporate balance sheets provides an incomplete picture of "profit." According to economists both classical and neoclassical, and barring a Weberian reversal of means and ends, people seek profit through productive activity because they can transform it into cash that can be used to purchase goods that they value. If money cannot buy happiness, it can certainly buy the luxury of free time, flexibility, material comforts, opportunities for entertainment and intellectual engagement, and the simple capacity to choose how one wants to spend one's time. Of course, this line of thinking only works if (1) the good is

amenable to commodification; and (2) it is provided on the market. These assumptions do not always hold. It thus reasonable to expect corporate participants might bypass some of the market-related intermediate steps between means and ends and produce these goods directly.

Such commitments are neither economic heresy nor uncommon. According to anthropologist Greg Urban, a specialist in the ethnography of business corporations, CEOs sometimes prioritize an understanding of human flourishing beyond cash value.²⁶¹ (Urban, 2014) Perhaps channeling the sentiments of Henry Ford, who sought to transform an automobile manufacturer into a “semi-eleemosynary institution,” (*Dodge v. Ford Motor Company*) corporate leaders at least occasionally focus on providing non-cash benefits to the lives of employees, customers, business partners and even those stakeholders in the surrounding community. (Urban, 2014, pp. 33-34) Corporations’ ends are capacious and diverse enough that even classical economists have a hard time deciding on what it is that managers are trying to maximize: cash profits or, for example, market share, growth, community goodwill “or some composite functions of such objectives.” (Hirschman, 1970, p. 10; *see also* Johnson, 2010, p. 96) Amartya Sen, first intervening in welfare economics in the late 1970s, argued that measuring economic development in quantitative, income-based terms was an inadequate gauge of human flourishing. (Sen, 1987) Instead, Sen challenged social scientists to consider whether their resources actually enabled them to pursue those activities that brought meaningful value to their lives. Meanwhile, empirical research suggests that such choices may, in the long run, lead to more profitability regardless.

²⁶¹ Hansmann (1996) argues, however, that these benefits do show up in balance sheets: employees will exchange, for example, more leisure time for lower wages. The argument, however, relies on certain assumptions regarding the equality of bargaining power and, if the good sought is public, the ability of workers to overcome collective action problems. It is too tempting, put in plain language, for stakeholders to take what is offered in terms of cash payment than to bargain for non-cash benefits. To cite one alarming example, Hersch (2011) argues that employees receive a bump in wages to compensate them for being subject to the risk of sex harassment.

(Strine, 2017) Perhaps picking up on these insights, corporations likewise pursue human well-being at the expense of maximizing EBIDTA.²⁶² As one last supporting example, many states authorize the creation of “B” (Benefit) Corporations that, amongst other things, recognize that corporations can and do pursue goods beyond the maximization of cash profits.

Cynics point out that acts of corporate philanthropy may be part and parcel of sophisticated consumer relations campaigns aimed to build political and social capital while distracting from corporate misbehavior. Regardless, it is hard to argue that flexible working hours, office amenities, vacations, and opportunities to engage in charitable works and recreation do not provide value for corporate stakeholders, even if they are difficult to measure in terms of cash, and even as they may camouflage corporate misdeeds.

Judgment 4. The Means of Achieving Ends

Another judgment that corporations face involves selecting the means by which they are to pursue their given ends. As Hansmann (1996, p. 39) notes, within firms, as within political associations, “there are likely to be differences of opinion concerning the firm’s policies and programs. Sometimes those differences will merely reflect different judgments about the most effective means for achieving a shared goal.” There are decisions to be made about, for example, technology, organization of the workforce, plant location, and executive prerogatives. (Parkinson, 1993, p. 15) Corporations “will usually have *options* about how to manage the impact of changed market conditions or technology: the company is not merely a passive instrument of the market.” (*Ibid.*, p. 17) Diversified shareholders may prefer risky strategies with big payoffs; long-term

²⁶² Earnings before interest, taxes, depreciation and amortization

investors will seek safer bets. (Dow, 2003; Bowles & Gintis, 1993, p. 78) Choosing requires the exercise of the Aristotelian notion of *phronesis*, or prudence.

The lack of any clear answer as to how to go about best achieving a desired outcome is, in fact, why, as John Dunn (1990, pp. 36-37) argues, neither purely market nor purely planned economies can depoliticize modern economic management. To give one example, when an enterprise undertakes to assess the costs and benefits of installing a new assembly line, the “notion of efficiency can be taken in a narrow sense, in which labour is considered solely as an input to the production process with a constant disutility to the worker.” (Elster & Moene, 1989) Or, the assessment can accommodate “producers’ preferences” over different ways of organizing the production process. (*Ibid.*) Other “empirically informed” political judgments may include weighing the partial and net effects of strategies that implicate various intermediate, interacting variables. Elster & Moene (1989, p. 18) illustrate by discussing a hypothetical choice between production processes involving hierarchical versus democratic governance when the end goal is overall profitability. Democracy may incentivize more robust monitoring of workers but disincentivize risk-taking. Schumpeter (2003[1941], p. 98) gives another example:

Frequently, if not in most cases, a going concern does not simply face the question whether or not to adopt a definite new method of production that is the best thing out and, in the form immediately available, can be expected to retain that position for some length of time. A new type of machine is in general but a link in a chain of improvements and may presently become obsolete. In a case like this it would obviously not be rational to follow the chain link by link regardless of the capital loss to be suffered each time. The real question then is at which link the concern should take action. The answer must be in the nature of a compromise between considerations that rest largely on guesses.

Given uncertainty, such choices are ones that require the kind of judgment that democratic citizens might be trusted to make, or about which they can be at least be trusted to develop informed opinions. (Moore A. , 2017) They involve no epistemic certainty; they do not entail merely plugging datum into an equation that yields an unassailable answer.

Indeed, the very uncertainty inherent in truth claims, like the kinds of claims made when justifying a particular means of achieving a set goal, opens space for judgment and, accordingly, the democratization of decision-making. To illustrate, historian Adam Tooze (2008) observes that Weimar Germany found itself facing a fundamental decision on economic and financial policy: whether they would try to cajole from the Entente reduced reparation obligations or whether they would force a political and economic confrontation. Whatever decision it made, it would justify itself using its current account figures, namely, whether and to what extent its recent currency devaluation had yielded a trade surplus. It would mobilize its financial figures to garner political support. Facts, in other words, were constructed; their statistics were a “system of power and knowledge” used for justificatory purposes. One observes similar kinds of arguments in contemporary U.S. politics as policy experts and partisans proffer contradictory empirical support for contradictory economic policies intended towards the same goal of stimulating growth: tax cuts versus fiscal spending; interest rate hikes versus quantitative easing, *etc.* This is what Bruno Latour refers to as the Janus-faced nature of modern knowledge. (Latour, 1988) It is obviously constructed by human beings for specific and partial reasons. But once created, we cannot help but treat it as objective truth. “There is,” as Arendt (1967) argues, “no other ground on which to stand.” The trouble with numbers, concludes Tooze, is that they become “political pinball.”

This political pinball already occurs within business corporations. It is played by upper level managers with conflicting interests and loyalties bent on defending their departments and divisions. (Cyert & March, 1963) And it is a game that can be opened up to a broader audience.

Judgment 5. Distributive Conflict

Corporations face at least one more essentially – and quintessentially – political judgment: one of distributive politics. If corporations agree to maximize profit, and further agree about what “profit” means and how best to achieve it, they still must decide what to do with it. It is possible to arrange many different distributional rules whereby the same surplus is generated yet nevertheless divided differently. (Team, ch. 5) As even Hansmann (1996, p. 16) admits, there is no reason in principle that residual claim status must redound to shareholders alone. As a result, a divisive conflict amongst stakeholders can ensue “about how to distribute the profits from the firm’s success amongst themselves (wages, managerial salaries, and owners’ profits).” (Team, ch. 6.1) One recent example stands out. The recent Trump tax cuts could have been passed along to workers as bonuses in funding new hiring. Or it could have been passed along as surplus to shareholders.

Reflecting contemporary distributive politics, intra-corporate distributive politics once supported more material equality as stockholders, workers and the community enjoyed stable profits and benefits secured by intra-corporate powers like unions and skilled labor. (Cioffi, 2011, p. 1112) Now, corporations are marked by extreme inequality: outsized CEO pay, flat wage growth, and hefty financial returns. (Strine, Jr., 2017) At least some of the new imbalance of power is not due to inescapable market dynamics, but to intentional state influence. Namely, finance has been empowered by regulatory change. For example, the Sarbanes-Oxley Act, passed in the wake of various accounting scandals, commanded boards to fund stockholder proxy campaigns (Rule

14a-8 of the '34 Act). The New York Stock Exchange now requires that the boards of listed companies comprise of a majority of “independent,” shareholder-friendly directors who must have regular and separate meetings. (NYSE Rule 452 (2010)) The Dodd-Frank legislation, passed after the financial crisis of 2008, further eases stockholder access to company-funded proxy statements (the “campaign” materials used by companies during stockholder votes for directors and substantive reforms). (Pub. L. No. 111-203 §§ 951, 971) Dodd-Frank also directs institutional investors to disclose more information to their beneficiaries. As a result, those investors are under pressure to show ever-increasing returns and, therefore, to exercise their voice more frequently. In any case, shareholders now have so much power in the distributive game that they may even, in a “Kaleckian reaction,” punish corporate decisions that distribute profits towards anyone other than themselves. (Streeck, 2011) They withdraw, leading to a drop in stock price and leaving the company ripe for takeover. The intra-corporate political reaction, like the political reaction in the economy more broadly, is one of labor mobilization in an effort to equalize bargaining (and thus political) power.

Conclusion

This Chapter addresses one important critique to corporate democratization: it’s just not good for business. If it’s not good for business, then it undermines both the business itself and the purpose that many business participants ascribe to it. Accordingly, there would be no point in protecting business corporations with legal rights that are, *au fond*, intended to vindicate the rights and liberties of individual business participants.

This critique was attacked along two major fronts. First, it argued that democratic decision-making is not inherently inefficient. Representation and other forms of democratic power delegation can save on the costs implicated in participatory decision-making while maintaining

opportunities for citizen input. Moreover, workers and other non-shareholder stakeholders have reason to make efficient decisions democratically. Relatedly, efficiency requirements and other constraints are not necessarily inconsistent with democratic autonomy. Second, the Chapter showed that business corporations are not as “constrained” by market forces as one might be led to believe. Many enjoy sufficient market power to make decisions that do not obviously maximize profits and minimize costs or, indeed, relate to economic activity at all. Furthermore, the ostensibly instrumental reasoning required to maximize profits actually involves the kinds of judgments that are inherently political. They implicate, for example, questions of value, time, risk, membership, and distribution. Often depoliticized through claims invoking efficiency, necessity, and the need for expertise, they are questions whose answers can work to the benefit of some while harming others. One would be wise, then, to see whether they are offered by those in a place of power.

Conclusion: Beyond Corporate Autonomy

Raison de la Marché is, therefore, no excuse against democratizing the business corporation. As a result, if I am right that a corporation's legal autonomy rights are conditioned on it carrying internal democratic institutions, then those who argue against such reforms may be sneaking into their argument normative arguments or biased, partial interests that are inconsistent with constitutional liberal democracy's commitment to equal human worth.

Summary of the Argument

To justify the conclusion that democratic corporations are more likely to merit legal autonomy rights, I first argued in Chapter 1, "Excavating the Corporate Person," that the legal theories of corporate personhood often fumble their ontologies. Not only inflexibly eliding facts that CLDs will find to be morally salient, they rely on theories of political legitimacy that are too communitarian, too libertarian, or too pluralist. Chapter 2, "Corporate Personhood's Three False Choices," explained why the political theory underlying corporate personhood is inconsistent with constitutional liberal democracy. Namely, they rely on a rigid separation between public and private, draw a too-hard distinction between positive law and normativity, and reject the co-originality of democracy and rights.

Nevertheless, if the theories of corporate personhood are understood as critical theories that help articulate rights claims, they, considered together, suggest an associationalist conception of corporate rights limited by the equal liberties of corporate outsiders and insiders. Chapter 3, "The Democratic Autonomy of Corporate Rights," formalizes these intuitions. Drawing from theories of multicultural rights and group agency, it concluded that corporations are more likely to merit associational rights if their internal governance carries democratic credentials. Nevertheless, because corporate rights threaten not only the equal rights and liberties of their members, but also

outsiders, those associational rights must be constrained. To avoid this constraint, corporations might adopt internal governance mechanisms that can prevent it from overstepping: contractarian decision-making procedures; internal rights; democratic accountability mechanisms, *etc.* These solutions likewise resemble the democratic institutions usually found within states. Though the similarities are strong, the democratic institutions of the corporation and the state carry at least one crucial difference: only the CLD state can claim sovereignty. Only the state can claim legitimacy based upon lawmaking committed to popular sovereignty using procedures that ensure that each and every citizen can consider herself a co-equal author of the laws that bind her.

To elaborate on the democratic institutions that corporations seeking autonomy rights would be wise to adopt, Chapter 4, “Workplace Democracy and Corporate Autonomy,” rejected the perfectionist, utopian, and communitarian implications of syndicalist and participatory-democratic theories. It also embraced the protective instincts of republican theories while adopting the representative, procedural democracy of theories that sought only to dilute the harms inflicted by Wall Street. Chapter 5, of course, responded to perhaps the strongest and most common critique lodged against corporate democracy: it is just too inefficient and therefore risks “utopianism or pure science fiction.” (Singer, 2018, p. 11)

Further Research

This argument begs several significant questions. First, while the solution it offers to the question of corporate autonomy rights is determinate, it is deeply context-sensitive. Only a strong, democratically accountable state could undertake the investigation and judgment necessary to respond appropriately to such context-sensitivity. Further research is required, therefore, to identify what kinds of state institutions might undertake this herculean task. Courts can provide post-hoc oversight, but it is more likely that expert administrative agencies will be best positioned

to undertake the investigation and surveillance required to ensure that corporate rights, as and when they are exercised, respect the principle of equal human worth. Corporate behavior and formations change quickly; only specialists dedicated full-time to studying them could possibly hope to keep up. (*See* Vermuele, 2016) Although caselaw can inspire helpful self-ordering,²⁶³ judges are ill-equipped to staff, generate, and critically assess the kinds of social science research that will have to be brought to bear. Yet bureaucracy carries anti-democratic implications. In addition to the extant political theory addressing executive administration, epistocracy and technocracy, scholars might address the problem by exploring the rich legal realist literature that helped frame New Deal institutions.²⁶⁴

Political theorists might also turn their attention to the design of corporate governance institutions. While this dissertation suggested that corporate autonomy rights ought to track member interests, and while it gestured at a few ways this requirement might be operationalized, much more work needs to be done. States could, for example, change their corporate codes in order to require pre-set forms of democratization. Here, scholarship on constitutions and constitution-making will undoubtedly prove useful. Alternatively, states could demand that corporations adopt their own by-laws, affording them some choice and flexibility about how they will implement their democratic credentials. Or they could leave it to judges or administrative agencies to check particular exercises of corporate rights for their alignment with members' interests by, *e.g.*, insisting that lawsuits include pleading requirements that solicit members' views or amending directors' and investment managers' fiduciary duties to include responsiveness and accountability

²⁶³ As evidenced by the healthy, thriving Delaware bar, which already spends much of its time advising boards and executives on how they can abide the normative requirements of the law as they undertake corporate decision-making.

²⁶⁴ Happily, such a project is already underway at Yale University's Law & Political Economy project. *See* <https://lpeblog.org/>.

to corporate constituents. The state might also experiment with works councils and mandatory union representation. Institutional political theory might, in addition, provide useful insight into the governance of institutional investors.

Relatedly, an open question is whether corporate associational freedom can accommodate a membership roster that includes both workers and shareholders. Recall from Chapter 3 that associational membership was left open; it is up to people themselves to first associate and then claim an associational right. The role of CLD was not to form the group, but to test whether its rights are consistent with equal human worth. Extant institutions seem to encourage class conflict by supporting certain kinds of association at the expense of others. As suggested in Chapter 5, for example, institutions encourage the formation of capital-led corporations and force cooperation amongst diverse shareholder constituencies by repressing or channeling their preferences into a homogeneous desire to see short-term swings in stock prices. Further work might explore whether institutions can mitigate this kind of crystallization of class interest— rather than exacerbate it.

But before institutions can work a more wholesome transformation on the availability of association, it is also necessary to determine whether capital and labor can surmount their historical opposition. Integrationist sociology suggests that labor and capital can overcome their differences (Drucker, 1946; Follett, 2012); Marxists are not so sanguine. (Clegg, 1951; Dahrendorf, 1959) Meanwhile, the institutional design of corporations can either help or hinder cooperation between them. Political theory can thus be brought to bear in order to help more people enjoy corporate autonomy rights. Here, drawing from the rich management literature arising from business schools will likely prove profitable. Also particularly fruitful might be an examination of the population of human, *laboring* investors who comprise a significant portion of corporate equity ownership. It is an open question whether the public ownership of public companies might become more

publicly-minded and cooperative if we were to neutralize the unique incentives of institutional investors. Political theory might also give an answer to whether worker-investors can overcome their seemingly irrevocable conflict-of-interest: to demand higher wages in their own place of work while demanding lower wages in the workplaces where they merely invest. Some scholarship resolves the tension with a hypothesis about their long-term self-interests; political theory can test and refine it.

Another topic ripe for research is how this theory of corporate autonomy rights might apply to platform-based technology companies that often make use of a hyper-contingent workforce governed not by human bosses, but by algorithms. It is not apparent, for example, that a corporation staffed mostly by “independent contractors” and artificial intelligence merit associational rights at all. To answer this question, theorists might draw on recent economic scholarship addressing our new platform economy as well as legal scholarship probing the legality and morality of our growing I-9 workforce.

Finally, the theory of corporate autonomy offered by this dissertation does not confront the multinational. Its account of corporate autonomy rights relies on the bridge that constitutional liberal democratic lawmaking builds between ontology and morality. But many corporations operate under multiple legal regimes through complex chains of subsidiarity. A truly comprehensive theory of corporate autonomy rights, therefore, should attend to this legal pluralism. It must address, for example, the responsibility a state has to ensure corporations do not trample the rights and liberties of foreign corporate members. It must also tackle the problem of jurisdictional choice. As Pistor (2019) shows, corporations can usually pick and choose the legal systems that will govern them. Future work should give answer to questions regarding whether CLDs could or should regulate corporations electing to subject themselves to regimes less attentive

to equal human. It might, for example, explore the possibility of international governance and all its universalizing, cosmopolitan risks.

Expanding the Scope

The dissertation sets forth a theory of corporate legal autonomy rights, intervening in the new by growing literature inspired by several controversial U.S. Supreme Court decisions that award liberty rights to corporations. My hope, though, is that it might do more. It should provide a useful framework for scholars exploring the normative credentials of other economic phenomena in CLDs. By invoking a legal regime grounded in the notion of equal human worth, it builds an ontological and normative bridge between states and markets. It therefore offers a systematic strategy that will allow political theorists to fruitfully and realistically examine additional contemporary economic phenomena – from global industry concentration to international finance – that implicate not only distributive justice and welfare but also human autonomy. By taking our norms and then applying them to facts, as Dewey teaches, normative theorists can make much headway into, perhaps, every kind of market behavior.

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