doi:10.1017/S0003055412000536

Beyond Public and Private: Toward a Political Theory of the Corporation

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This article challenges the liberal, contractual theory of the corporation and argues for replacing it with a political theory of the corporation. Corporations are government-like in their powers, and government grants them both their external "personhood" and their internal governing authority. They are thus not simply private. Yet they are privately organized and financed and therefore not simply public. Corporations transgress all the basic dichotomies that structure liberal treatments of law, economics, and politics: public/private, government/market, privilege/equality, and status/contract. They are "franchise governments" that cannot be satisfactorily assimilated to liberalism. The liberal effort to assimilate them, treating them as contractually constituted associations of private property owners, endows them with rights they ought not have, exacerbates their irresponsibility, and compromises their principal public benefit of generating long-term growth. Instead, corporations need to be placed in a distinct category—neither public nor private, but "corporate"—to be regulated by distinct rules and norms.

The corporation, it is often noted, has become the world's dominant institution, with the largest ones eclipsing most national governments in revenues, employment, logistical capabilities, and global presence (Rothkopf 2012). Less often noted is that this is not the first time. At its zenith, the British East India Company—the world's first publicly traded, shareholder-governed, limited liability corporation (est. 1600)—ruled fully one-fifth of the world's population, with an army of a quarter-million men and revenues greater than the whole of Britain (Robins 2003, 79). From its inception, the business corporation showed its potential, if not bounded, to metastasize into a world power.

Precisely because of this danger, there was not supposed to be a second corporate era. As mercantilism gave way to liberalism, liberals—long hostile to corporate monopoly and power (Hobbes [1651] 1994, II, chap. 29; Jefferson 1825; Smith [1776] 1976, II, 264, 278)—stripped corporations of their grosser privileges and sovereign powers (Maier 1993, 75–78; McCurdy 1975). These actions were ultimately less adverse to corporations than first thought, however. Seemingly modest privileges remained that would prove unexpectedly advantageous in the coming age of industrial production. And in the meantime, shorn of their grossest privileges, corporations came to be interpreted along liberal lines, as private concerns drawn up through private contract (Horwitz 1992, 70). This left them less well armed, but legally better protected.

Before the nineteenth century, corporations were not viewed as private. It was taken for granted that they owed their existence and rights to the government that chartered them (Blackstone [1753] 1893, 474; Dodd 1954, 14–15). Accordingly, corporations—even business corporations—were chartered only to undertake activities advancing the commonweal, such as building and maintaining a road or canal. Yet neither were corporations considered fully public, because neither their financing, staffing, nor direction came from government. Within the more fluid categories of medieval and early modern Europe, they were, like the king's realm itself, regarded as "bodies politic" (Blackstone [1753] 1893, 476; Kantorowicz 1957, 309–13). They were granted a jurisdiction and government of their own. Yet they existed on sufferance of the Crown (or, in Britain after 1688, Parliament), which reserved the right to revise or rescind their charters and required regular charter renewal (Frug 1980, 1094).

The ascent of liberalism changed this and nowhere earlier or more thoroughly than in the United States (Dodd 1954, 18; Wood 1999). One of the signal projects of nineteenth-century American liberalism was to sharpen the distinction between public and private and divide the social world between them (Balogh 2009, ch. 8; Frug 1980, 1110; McCurdy 1975, 973). Business corporations were placed on the private side of this divide (Wood 1999, 9–10), assimilated to liberalism as private partnerships and, in some contexts, even as private persons (Horwitz 1992, chap. 3). Corporate power that was once unaccountable because of state regulatory weakness now became unaccountable as a point of legal doctrine, as corporations came to be viewed ever more thoroughly through the lens of private contract (*Dartmouth College v. Woodward* 1819). At the terminus of this development stands the neoliberal theory of the corporation, which, as a prophylactic against the possibility that corporate power might invite "totalitarian" intervention in the economy, presented the corporation as nothing more than a "nexus of contracts"

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This work was generously supported by the University of Virginia program on Political Philosophy, Policy, and Law, by a University of Denver PROF grant, and by the Woodrow Wilson International Center for Scholars. The author gratefully acknowledges helpful comments from Richard Bensel, Colin Bird, James E. Block, Yuri Borovsky, Deborah Boucoyannis, Matthew Crawford, Eldon Eisenach, George Klosko, Jeffrey Lustig, Xuefei Ren, Fabio Rugge, Nancy Wadsworth, Julian Wettengel, Stewart Winger, and the anonymous journal referees. Special thanks to Matthew Hull, without whose early collaboration this work might not have been pursued, and to the *APSR* coeditors at UCLA for their faith and advice throughout the revision process.

among private individuals (Jensen and Meckling 1976, 310; Mirowski and Van Horn 2009; Tsuk 2005, 209–15). The corporation became a pure creature of the market rather than a creature of government, exempting it from any duty to the public, or accountability to the public, or even publicity to the public, and rendering it eligible for a raft of constitutional rights, including electioneering rights. The supposed progressive alternative of "shareholder democracy" is really but more of the same, accepting the liberal reduction of the corporation to a private social contract among shareholders and deducing therefrom that shareholders "own" the corporation and are its sole rightful controllers and beneficiaries.

When the privatization of the business corporation commenced, no one anticipated that this fading medieval vestige, the corporate form of business, would draw to itself the most dynamic forces of the industrial age and arise like a phoenix to dominate the landscape (Chandler 1977) or that its privatization would aid and protect this domination. In 1861, Henry Sumner Maine advanced his famous thesis that human history had progressed from relations based on status to those based on contract (Maine [1861] 1873, 165). By the end of the nineteenth century, however, a new chapter had opened throughout the industrializing world, such that since then one has to speak of a movement from status to contract to organization. We do not live in a market society, relating to one another as independent producers and sellers bound together by a web of bilateral contracts. Rather, we live in a corporate, organizational society, relating to one another within and across organizations as job holders, each with a station and duties (American Law Institute 2006, chap. 8). Although these organizations often operate in market contexts, the human actors who bring them to life operate in organizational contexts—a world significantly different in its incentive structures, role obligations, social tensions, and outcomes.

The result is a gross mismatch between the corporate world we inhabit and the liberal individualist frames we use to interpret and address this world. It is commonplace, for example, to describe the United States as modern, liberal, democratic, market oriented, and individualistic. Yet the corporations that are the setting of its workaday world and portions of its leisure world are of premodern provenance and, internally, are neither liberal, democratic, marketized, nor individualistic, but instead are hierarchical, semi-cooperative, and organized through authority relations. Painting the corporation as private and contractual—a voluntary association of shareholders—masks this contradiction. It is potent ideology, because it neatly squares the corporation with our liberal "social imaginary," of society as a prepolitical association of moral equals (Taylor 2004, chap. 1). However, it obfuscates the real underpinnings of the corporate form. In construing shareholders as the corporation's owners and principals, it also fixates corporations on short-term share price, sinking their productivity while upping their irresponsibility. And it brings corporations rights they ought not have, increasing their political influence while reducing their political accountability. Reducing corporations to private contract is theoretically confused, economically deleterious, and normatively askew.

Many nations continue to draw the line between public and private differently or less strictly, especially as applied to corporations (Gourevitch and Shinn 2005, chap. 6). The global impact of the American neoliberal model of the corporation has been substantial, however, carried along by neoliberalism and bringing its dysfunctions with it (Mitchell 2001, 7–8, chap. 11). With the goal of improving our ability to understand and address our corporate world, this article defends a political theory of the corporation as an alternative to the liberal, contractual theory of the corporation—in effect reasserting, in broad outline if not in all details, the preliberal understanding of the corporation and its relationship to government. Corporations, in this view, are not simply private. Unlike private bodies, such as families and voluntary associations, corporations cannot be formed without civil government, depending on it for their contractual individuality, their form of property, and their governing authority. This emphasis on government's constitutive role makes this a *political* theory of the corporation.[1] However, although not simply private, corporations are also not simply public, because unlike armies and government bureaus, neither their financing, staffing, nor direction comes from government. Corporations are what I call "franchise governments"—their form and powers are delegated by the state, yet they are run on private initiative. They thus transgress all the basic divides that structure liberal treatments of law, economics, and politics: government/market, state/society, privilege/equality, status/contract, as well as liberalism's master dichotomy of public/private. Corporations are not of liberalism and cannot be satisfactorily assimilated to its categories. Instead, they need to be placed in a legal and policy category of their own—neither public, nor private, but "corporate"—to be governed by distinct norms and rules, so as to render them more intelligible, more accountable, more responsible, and more productive. Developing this category of the corporate will be the central task of the political theory of the corporation going forward.

The political theory of the corporation so conceived rests on two major premises. The first, defended in the opening section, is that corporations are governmental (meaning "government-like") in operation. Specifically, the business corporation is a form of constitutional republic—a shareholder republic—with a similar governance structure and comparable range of powers. This is not coincidental. Republican governments and corporations fall under a common genus because they share a common history.

[1] There are certainly other ways to be a political theory of the corporation. One outstanding example is Peter Gourevitch's theory of the political determinants of the forms of corporate governance (Gourevitch and Shinn 2005). In addition, theories of workplace politics, interfirm politics, and interest-group politics might be regarded as political theories of the corporation, although they involve noncorporate businesses as well (Dahl 1959).

The second premise, defended across the next three sections, is that corporations are governmental in provenance (meaning "of" government or derived from government).[2] Government is their co-creator and continual prop, supplying them with their contractual individuality, their form of property, and their governing authority. A laissez-faire corporate economy is thus a contradiction in terms: Government interference makes the corporation. This, I argue, is a key point, because it shows that a corporate economy is not merely a parallel universe of private governments, but is a messy public/private offshoot of public government and cannot be separated from it historically, analytically, or normatively. Having argued for placing the corporation in a distinct governmental category—neither public nor private, but corporate—the article's fifth and final section begins the work of fleshing out the rights and responsibilities appropriate to members of this category, as distinct from the rights and responsibilities of public and private entities. It focuses on the ends of the corporation, the rights of corporate workers, and whether corporations deserve constitutional rights.

THE GOVERNMENTAL OPERATION OF THE BUSINESS CORPORATION

What is a Business Corporation?

Business is conducted under a variety of legal forms, including classically the sole proprietorship and the general partnership, with the corporate form as a relative newcomer. The corporation should thus not be conflated with the business firm or even with the large managerial firm, because managerialism is commonly used by all large organizations, regardless of legal form. Conversely, the corporate form is enjoyed by many nonbusiness entities, including monasteries, universities, towns, and associations, and was granted to them long before it was granted to business entities (Davis 1905). The primary rights of a corporation thus have nothing to do with business per se. They are three in number: (1) the right to own property, make contracts, and sue and be sued, as a unitary entity (a legal "person"); (2) the right to centralized management of this property; and (3) the right to establish and enforce rules within its jurisdiction *beyond* those of the laws of the land—such as the monastic *Regula Benedicti*, town ordinances, bylaws, and work rules.[3]

The first right establishes how a corporation relates to outside parties—it relates to them as an independent contracting individual, with property and liability wholly separate from its members. The second and third rights establish a corporation's governing authority—its right, via a central board, to govern the property and people within its jurisdiction. As Max Weber himself emphasized, managers, no less than government officials, are understood to have a right to rule within their jurisdiction, and their subordinates to have a reciprocal duty to obey (Weber 1978, 213–14, 948). Corporations thus contravene the liberal dichotomy of market freedom vs. government restraint. They make us *more* governed, not less.

In essence, all that the for-profit business corporation adds to these three primary corporate rights—and it is a revolutionary addition—is (4) the right to turn this governing authority and property to the pursuit of private profit. The political theory of the corporation thus starts from the understanding that corporations are governing entities first and foremost, to which business rights and capabilities were added.

For analytical purposes, it is useful to distinguish three dimensions of the corporation as a governing entity. First, there is the *governance* of the corporation—understood in this article as the procedures for collectively *deciding* how to deploy the corporation's labor and capital (Chhotray and Stoker 2009, 3, 145). This can be distinguished (if not always cleanly) from the task of *management*, the actual work of deploying, or *governing*, labor and capital. Finally, there is the legal basis of the corporation's *right* to govern the labor and capital within its jurisdiction.

This article does not explore methods of management, because there is little to distinguish the managerial techniques used in corporations from those used in large partnerships and proprietorships. A common toolkit is available to all and does not mark one as more public or private than another. What sets the corporation apart as a governing entity, and justifies placing it in a different legal category, is found in the other two dimensions—its governance (examined next) and the legal basis of its right to govern (examined in the penultimate section).

Corporation as Constitutional Republic; Constitutional Republic as Corporation

In its governance, as in many other areas, the corporation is distinct from other business entities, but strikingly analogous to constitutional republics. Indeed, its form of governance *is* that of a constitutional republic. This is more than coincidence; it is because corporations and constitutional republics share a common history. As Blackstone once observed, corporations are republics writ small (Blackstone [1753] 1893, 456). Indeed, the further back one goes, the more direct the analogy. The Dutch East India Company, the world's first publicly traded limited liability corporation, was created in the image of the Dutch republic, with a governing board composed of a proportionate balance of representatives from each of the country's provinces, just like the Dutch States-General (Adams 2005, 51). The English East India Company (EIC; est. 1600), which set the mold for future business corporations in

[2] In this article, "governmental" is nothing but the adjectival form of "government," and thus means either government-like or government-derived, depending on context. The business corporation is also ripe for a Foucauldian study of "governmentality," but that would be about strategies of labor management, which is a question here set to the side.

[3] A modern corporation receives additional privileges, such as perpetual existence, which allows it to accumulate property forever, but without the previous three rights, a corporation is not a corporation, but either a partnership or a trust fund.

being a republic of shareholders, was chartered shortly thereafter and soon reorganized along the lines of the House of Commons (Robins 2006, 30). It operated under a constitution (in this case, a written constitution, or charter), which authorized a property-owning electorate (the shareholders) to elect a parliament (the board of directors), which elevated one of its own to the position of prime minister (the chairman of the board). Also striking, its electoral principle was not one-share-one-vote as today, but, as with Parliament, one-shareholder-one-vote, with a substantial property threshold for the franchise (in the early 1700s, the minimum was £500 worth of shares; Robins 2006, 30).[4] The EIC's powers over its members were also analogous to those of Parliament, with directors enjoying the right, by majority vote, to pass bylaws for the corporation and to dismiss, fine, *physically chastise*, or *imprison* those who violated them (Elizabeth [1600] 1887, 7). The EIC could also mint coin, administer justice in its settlements, and wage war (Robins 2006, 28).

Blackstone would have done just as well, however, to say that republics are corporations writ large. The Massachusetts Bay Colony, for example, began as the Massachusetts Bay Company, the charter of which served as the colony's first written constitution. A similar story holds for Virginia and several other American colonies. And the line of development from the corporate charters of Massachusetts and Virginia to their colonial constitutions, to their state constitutions, and to the federal constitution is a direct one (Lutz 1998). Indeed, well into the nineteenth century, "charter" and "constitution" were taken as virtually synonymous. As defined by Francis Lieber in his *Encyclopaedia Americana*, "a corporation is a political or civil institution . . . conducted according to the laws of its constitution." "All the American governments," he added, are "corporations created by charters, viz. their constitutions" (Lieber 1830, 547).

In light of this promiscuous history, it is little surprise that, within its jurisdiction, the business corporation exercises powers analogous to those of government, if more limited, including the right to command, regulate, adjudicate, set rules of cooperation, allocate collective resources, educate, discipline, and punish. In fact, it was long common in debate over the proper distribution of power in one to draw on arguments from analogy with the other. For example, in the early republic, the republican practices of state and federal government were invoked as arguments for "republicanizing" the business corporation—for example, increasing the power of shareholders vis-à-vis management or establishing rotation in office for management (Maier 1993, 79). During the Progressive Era, this same analogy would be used to argue for "democratizing" the corporation—that is, instituting worker self-management, or "industrial democracy" (Croly 1914, 384–85). Conversely, principles of "strict construction" and the doctrine of "implied powers"—mainstays of American constitutional argument—were drawn directly from judicial interpretive practices as applied to corporate charters (Davis 1905, 207). Even the Supreme Court's seemingly unprecedented power of judicial review was likely midwifed by the judicial practice of voiding, as *ultra vires* ("beyond powers"), corporate acts exceeding the powers granted a corporation by its charter (Maier 1993, 79; compare Bilder 2006).

[4] In this respect, the EIC was similar to a modern co-op, which secures equal participation rights by offering only one voting share per member. However, while modern co-ops are generally either "consumer co-ops," with capital contributions and control by customers, or "producer co-ops," with capital contributions and control by workers, the EIC was akin to an "investor co-op" oriented toward profit maximization.

A Problematic Republic

Extensive though the analogy is between citizen and shareholder republics, there are important points of difference as well. Most obviously, shareholder republics are run for profit—the commonweal reduced to dollars and cents. This feature becomes especially noteworthy because of a second difference. Unlike citizens, shareholders—the voting members of a corporation—do not normally fall within its jurisdiction or suffer its government, whereas corporate employees—its nonvoting *metics*—do. There is therefore no reason to expect a shareholder republic to be "for" the governed, because its "ruling class" is neither "of" the governed nor accountable to the governed. I return to this point in what follows when considering the rights of corporate employees.

Finally, although the end of a constitutional republic is the good of its citizen-members, the end of the corporation, at least originally, was not only the good of its shareholder-members but also the good of the chartering government and its general citizenry. As Henry Carter Adams summarized in his President's Address to the 1896 meeting of the American Economics Association, "A corporation . . . may be defined in the light of history as a body created by law for the purpose of attaining public ends through an appeal to private interests" (Adams 1886, 16). How to frame corporate charters, corporate governance, and general laws so as to keep corporate powers oriented toward the public interest or at least consistent with the public interest—that is, how to organize and regulate these shareholder republics so that they serve not only themselves but others—is a problem that no ordinary republican theory has had to address and one that has vexed kings and legislatures throughout the corporation's history. Much of the political theory of the corporation revolves around this question, to which I return when considering the proper end or purpose of the corporation.

THE GOVERNMENTAL PROVENANCE OF CORPORATE "PERSONHOOD"

The preceding section argues only that the corporation is *like* a government. By itself, this might suggest that we think of corporations as "private governments." However, corporations are also governmental in provenance and therefore are not simply private.

This is the second premise of the political theory of the corporation.

The case that corporations are governmental in provenance would seem to be made with the simple observation that a corporation receives its charter from government, and it is this charter—the corporate constitution—that ordains its existence and specifies its rights and obligations. The significance of this fact is regularly discounted, however, by commentators who contend that a corporation can in principle be formed through a series of bilateral contracts among private parties. On this view, application for a charter from the state is just a way to economize on contracting costs, securing the rules one wants "off-the-rack" (Easterbrook and Fischel 1989, 1444). An older line of scholarship, tracing back to Otto von Gierke's magisterial work on the history of German fellowships, similarly discounts the governmental provenance of the corporation, although on grounds of organic growth rather than hypothetical contract; it argues that medieval corporations such as the town grew up without the sanction of the state and only subsequently were required to obtain a charter (Frug 1980, 1087–89).

Be this as it may for towns, it is demonstrably false for business corporations. The corporation depends on government for at least two of its three primary rights. The present section demonstrates that the business corporation depends on government for its contractual individuality, or "personhood"—its right to own property, make contracts, and sue and be sued as an individual. A subsequent section demonstrates that the corporation depends on government for its governing rights: its right to establish and enforce rules within its jursidiction.[5] Both demonstrations establish that the corporation is governmental in provenance.

How Business Corporations Preserve Contractual Individuality despite Investor Plurality

Contractual individuality is important even for nonbusiness corporations. It separates the property and liabilities of the corporation from its members, giving it a separate and stable legal existence—of great importance to Franciscan monasteries, for instance, whose friars could not own property. Additionally, it eliminates many of the coordinating costs and other transaction costs borne by general partnerships and other associations when dealing with external parties.

At least in a private property economy, a corporation's contractual individuality is a grant of government. A group of friends, for example, having created an informal lending library by pooling their respective book collections, cannot unilaterally decide, no matter the content of the contracts they sign with one another, that the courts will treat the books of the library as library property, allow contracts to be made in the library's name with its books as collateral, or limit liability to the library and its property for harms it might cause (from a tumbling stack of books, say). This alone may be sufficient proof of the dependence of the corporation on government.

However, the business corporation, which is presumed the most private type of corporation, has in actuality a dependence on government much deeper than the nonprofit corporation. What distinguishes the modern business corporation from its nonbusiness cousins is that the business corporation has annexed to it a joint-stock mechanism. This allows it to pool capital from multiple parties, turning the corporation into an investment vehicle with a license to make and disburse a profit. The question is, How does the corporation preserve its contractual individuality even as it acquires investor plurality? In other words, how does it convert investor capital into a single and separate corporate fund? It turns out that this is impossible without violating the standing rules of property, contract, and liability. Government allows the corporation to override them as a legal privilege.

Partnerships pool assets in a simple and straightforward fashion. Partners put in money, which is used to purchase assets for carrying on the business of the partnership. These assets remain bound to the partners, who collectively own them. For this very reason, the partnership falls short of being a separate contracting individual. The partnership does not own its own property; the partners own it. An important consequence is that, if a partner decides to leave the business, she takes her portion of the partnership's equity with her, which normally dissolves the partnership, and at the very least forces a buyout by the other partners, who may need to liquidate firm assets to cover the expense.

In a corporation, in contrast, the normal rules of property are broken. Investments are permanent; the investor cannot directly pull out his contribution. An investor may recoup the monetary value of his investment if he can find another investor to take his place—that is, to buy his "share." However, the assets that the corporation purchases with his initial investment are locked in, becoming corporate property. They form a separate fund (Blair 2003, 392).

The business benefits of this feature are considerable. First, it lowers the corporation's capital costs, because lenders need not fear expropriation by withdrawing investors (Blair 2003, 427). Second, it increases firm productivity. It allows the corporation to specialize its assets to the production process, rather than keep them in more liquid form out of fear that investor withdrawal will force a sell-off. This in turn allows the corporation to specialize its workers to its specialized assets (Blair and Stout 1999, 271–87). In other words, it advances the specialization of both capital and labor, the classic means to increased productivity (Smith [1776] 1976, chap. 1). Being a contracting individual with a separate fund is thus extra-beneficial when a corporation is a business. It lowers the cost of capital by making assets secure and increases productivity by allowing assets to

[5] The corporation's third primary right—to centralized management—arguably also depends on government, but the argument is not attempted here.

be specialized.[6] What I call *asset lock-in* is one of the rules of corporate financing that makes corporate funds separate.

Asset lock-in cannot by itself make the separation complete, however, as can be seen by returning to the example of a general partnership. Imagine that a partner incurs significant credit card debts or debts from some other business. If the partner's personal assets are insufficient to pay off the creditors in question, the creditors may go after partnership assets. Again the firm is put under threat of liquidation. What Henry Hansmann and Reiner Kraakman have dubbed *strong entity shielding* is a legal privilege that protects corporate assets from this threat (Hansmann, Kraakman and Squire 2006, 1336). The personal creditor of a shareholder may take the shareholder's shares, but corporate assets are shielded. It is the conjunction of asset lock-in and entity shielding that provides the protection from liquidation that allows corporations to specialize their assets and that boosts their credit.

One more legal privilege is required, however, to provide for full contractual individuality. This is the privilege of *limited liability* for shareholders, which shields shareholders from the debts of the corporation. Without it, a corporation's credit would not truly rest on its own assets and future prospects, but, like a partnership, would rest in part on the assets and credit of its investors.

Beyond this, limited liability provides economic benefits of its own to the corporation. Most obviously, it makes the corporation much more attractive than a partnership for small and passive investors. Even a small investment in a partnership entangles the partner in potentially large partnership liabilities. A stockholder, however, is liable only up to the value of the stock held. By attracting small investors, as well as diversifying large investors, the corporation can raise great sums at low cost (Easterbrook and Fischel 1985, 94–101).

Less obviously, limited liability combines with entity shielding to make shares *tradable*. Tradability is critical because, without it, the only point at which corporate investors could recoup their investments would be at the dissolution of the firm, because investments are locked in. Few would invest in a long-term enterprise under such a regime, unless dividends were particularly high. Tradability returns liquidity to investors, allowing them to draw out the value of their shares provided they can find buyers for them.

Why are limited liability and entity shielding necessary underpinnings of tradability? Without them, the real value of shares would fluctuate not only with the prospects of the firm but also with the financial condition of all stockholders, because the personal assets of the stockholders would be the ultimate foundation of the firm's credit (as they are in a general partnership). This would make the pricing of shares difficult, to say the least. What is more, it would lead existing shareholders to oppose tradability so as to protect their investments from an influx of financially weak investors, who would have incentive to purchase shares with the object of using firm assets as personal collateral (Hansmann, Kraakman, and Squire 2006, 1350).

In sum, asset lock-in, entity-shielding, and limited liability completely disentangle corporate assets and liabilities from investor assets and liabilities, preserving the corporation as a separate contracting individual. Because of these features, the assets of the corporation alone bond the contracts of the corporation alone. This brings great business benefits. With separate property, the corporation has strong liquidation protection. This increases its productivity (by enabling asset and labor specialization) and lowers its capital costs (by lowering the risk and monitoring costs of its creditors and investors). Limited liability then lowers the cost of capital yet further by lowering investor risk (both directly and by helping make shares tradable).

This gives us the fundamentals of an economic theory of the corporation. Diagrammed, it becomes clear that these privileges are not tangential, but are the legal foundation of the corporation's productive power (see Figure 1).

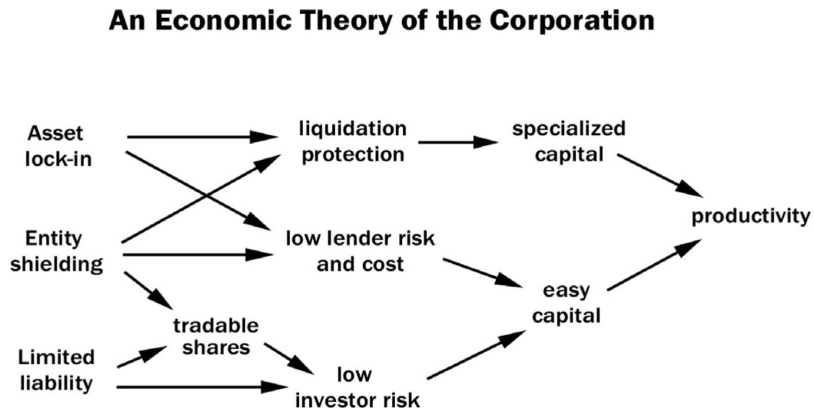
There are circumstances where the sole proprietorship (with its legal simplicity and frequent tax advantages) and the general partnership (with its greater flexibility in assigning control rights) are preferred business forms. But whenever a large quantity of specialized physical capital is called for, the corporate form becomes the legal form of choice. Indeed, this is why the industrial revolution gave the corporate form a new lease on life.

The Dependence of the Corporation's Contractual Individuality on the State

Having identified the key legal attributes of the business corporation, what are their implications for the governmental provenance of the corporation? I have denominated them "privileges," implying that they must be provided by government, and it is indeed the case that they are part of a standard package of corporate attributes that every state now provides by statute. Some, however, could in principle be partially established through private contract. For example, asset lock-in could be established, at least for a fixed term, by having each investor contractually agree not to withdraw his or her assets from the firm for the duration of that term. Indeed, such an arrangement has not been unusual among partnerships (Hansmann, Kraakman, and Squire 2006, 1342). Likewise, limited liability could be established, at least in part, by adding to every corporate contract the proviso that, in case of firm default, the creditor in question will not levy on investor assets. This arrangement, too, can be found historically (Hansmann and Kraakman 2000, 429–30).

[6] By itself, specialization of assets raises the cost of capital from *lenders*, because unredeployable assets make for poor collateral. However, when specialization is desirable, this becomes all the more reason to incorporate, because shareholders will be undeterred, being protected through their influence on the board, not through collateral (Williamson 1987, 307).

FIGURE 1. An Economic Theory of the Corporation



However, these arrangements fall far short of establishing a corporation contractually. There is, for instance, no contractual way to limit the liability of shareholders for tort claims against the corporation, because the harmed third parties will often be outside those with whom the corporation has contracts. Further, courts have been unwilling to uphold contracts among partners to lock in assets beyond a limited term (Hansmann and Kraakman 2000, 412). The biggest shortcoming of the contractual view, however, is that one of the two *indispensable* legal attributes of the corporation—entity shielding—cannot be contracted for at all. Doing so would require every shareholder to contract with every one of his creditors (banks, utility companies, hired help) against their laying claim to firm assets in the case of his personal insolvency. Not only are these transaction costs prohibitive but there is also a problem of moral hazard, because it is in the interest of each shareholder to renege and allow firm assets to back up his personal credit. Because of this, every shareholder would have to monitor every other shareholder to ensure compliance, even as shareholders kept changing (Hansmann, Kraakman and Squire 2006, 1340). Given privacy laws, it is unlikely this monitoring would even be legal, let alone feasible.

The inescapable fact is that corporations rely on government to override the normal market rules of property and liability and reordain which assets bond which creditors. Indeed, asset lock-in, entity shielding, and limited liability together create the very distinction between corporate assets and personal assets. These privileges are thus not mere benefits tacked on to a preexisting, contractually constituted corporate form. Rather, they are what make the business corporation a corporation. Stripped of asset lock-in and entity shielding, a business corporation loses its propertied independence and becomes a general partnership. Government intervention in the market is what begets the corporate "person."

This argument, it is worth noting, is not a mere recapitulation of "legal realist" arguments about the pervasiveness of state action in the economy. In defense of factory legislation and labor laws, legal realists of the early twentieth century argued that the common law rules of property, contract, and liability under which business is conducted are not the natural, neutral principles of justice and reason, but are in the final analysis determined by government authority, and thus should be subject to legislative revision (Horwitz 1992, 193). Kent Greenfield has argued for viewing corporate law in the same light, for similarly reformist reasons (Greenfield 2006, chap. 2). That government sets the rules of the market does not mean that all business entities depend on government for their bare existence, however. Proprietorships and partnerships, for example, are legally identified with their owners; and these proprietors and partners do not depend on government for their existence. But corporate entities do—and this will be true whatever the reigning rules of property and liability, because these rules will have to be broken to separate the property and liabilities of the corporation from its members.

Legal realism gives us no reason to place corporations in a category separate from proprietorships and partnerships (which we may fairly denominate "private," while remaining mindful that their flourishing depends on a variety of state services). In contrast, the argument developed so far provides a double reason to place corporations in a separate category. First, the ontology of corporations is different, being grounded in government fiat rather than natural persons. That is to say, corporations are governmental in provenance. Second, the rules by which they operate are different. Although corporations do buy and sell under the same rules as proprietorships and partnerships, they are constituted and financed under different rules created especially for them. And it is their mode of financing that gives corporations their main advantage, securing for them large amounts of specialized capital.

CORPORATE DYSFUNCTION UNDER MARKET LIBERALISM

If the corporation were a private, contractually established business entity—a kind of glorified partnership—it would respond to market forces like one. But in key respects it does not, for reasons directly related to its governmental provenance. Specifically, because government places corporations under different rules of property and liability, they malfunction when the logic of market liberalism is indiscriminately applied to them, even turning toxic —displaying elevated irresponsibility and depressed productivity. This indirectly confirms that corporations are governmental in provenance, and not simply private, contractual entities. It also means that treating the corporation as private, as liberals do, is more than a "merely theoretical" error, safely ignored for the sake of "what works." It is a misclassification that *undermines* corporate performance.

The fundamental mistake that liberals make about the corporation, both in theory and practice, is to treat shareholders as if they were the owners of corporate property—like partners in a partnership. Not only does this suggest that corporations are private but it also suggests that the way to improve corporate performance is to hitch the corporation more closely to the interests of shareholders, the responsible owners. Shareholders, however, are not the corporation's owners and face different incentives than true owners. Using the market to tie the corporation more closely to shareholder interests thus pulls it in irresponsible and unproductive directions. The explanation of why corporations malfunction under market liberalism thus begins with an examination of corporate ownership and then turns to the question of shareholder incentives.

Corporate Property as Socialized Property

No one ever thinks to ask who owns the lecterns of a college, or the benches in a city park, or the desks in a philanthropic organization. It is understood that they are owned by the nonprofit corporation in question—the college, town, or NGO. Yet, as soon as a firm incorporates and sells shares to generate extra financing, however little, it is asserted—in law schools, business schools, and the popular press—that its shareholders "own" the company. This assertion implies that corporate property is reducible to the private property of individuals, which in turn becomes a powerful argument for assimilating corporations to liberal market economics and the category of the private. But the assertion is plainly false.

The relevant contrast is with the partners in a partnership. A partner really does own a percentage of the partnership, and if she leaves, she removes her portion from the assets of the firm. In contrast, corporate assets are locked in. What a shareholder owns instead is a piece of stock, representing her financial interest in the corporation. If the corporation does well, she may receive dividends, at the discretion of management. She may also sell her share to others, it is hoped at a profit. Owning a share, however, is entirely different from owning corporate assets. If I own something, I can (a) use it, (b) exclude others from it, (c) lend it to others on my terms, (d) borrow on it, (e) alienate it, and (f) profit from it in use or sale. Shareholders have none of these rights over corporate assets, either individually or jointly. Nor are they legally liable for them.

It is true that shareholders collectively have the formal right of electing the board of directors, and in theory they could use this right to elect board members precommitted to a specific policy for the use of corporate property. Still, even on the odd occasion when this right is not completely undermined by managerial control of board member nominations and proxy voting, it is a political right, or voting right, intended to allow shareholders to protect their financial interest, and not a property right. It allows shareholders to influence the policy of management, but it implies no more legal title on the part of shareholders to corporate assets than voting rights imply a legal title of citizens to a country's fighter jets, the property of the state.

Also incorrect is the oft-cited argument that shareholders should be regarded as owners because they are the "residual claimants" of corporate revenue (Easterbrook and Fischel 1989, 1425). In actuality, all profits go to the corporation, the true residual claimant, and are then allocated at the discretion of management, which rarely directs more than a fraction to dividends (Stout 2012, 40–41). Even in bankruptcy, shareholders are not treated as owners. If they were, all assets would come into their legal possession at bankruptcy, and it would then fall to them to pay off corporate creditors. Instead, the opposite happens, at least in the United States. Corporate creditors have first claim, and only what remains goes to shareholders (*Wood v. Dummer* 1824). So even at this rare moment, shareholders are not in the position of owners, but heirs.

So whose assets are they? As we have seen, asset lock-in, entity shielding, and limited liability partition the assets and liabilities of the corporation from those of its investors (and creditors and managers). This partitioning provides the corporation with a stability and potential scale that cannot be matched by the aggregated personal property of partnerships, which are subject to disruption by partner death, withdrawal, or bankruptcy. It also means, however, that *no* natural person or group of persons owns the assets of the corporation. The corporation owns corporate assets—uses them to bond its contracts, for example, and is liable for the damages they cause—just as the state owns state assets and the church owns church assets. It is *corporate* property. The rights that natural persons have over corporate property are *control rights*, which fall, variously, to office holders in the corporation, just as control rights over government property fall to office holders within government. Such corporate property is "private" only in the sense that it is not public. What it really needs is a category of its own, distinct from both public and private (proprietary) property.

Marx was thus not wrong to see bourgeois (individually owned) property as a fetter on the productive powers of capital that would be burst asunder, to be replaced with socialized property (Marx and Engels [1848] 1933, 13). The Marxist mistake was to assume that the socialization of property would occur at the level of the state. Instead it has occurred at the level of the corporation. The underlying reason is the superior scale and stability of socialized property to the merely aggregated property of restless individuals in partnership.

Ours is neither a public property economy nor a private (bourgeois) property economy, but a government-fostered corporate property economy, with the means of production socialized at the level of the firm. No less than a socialist economy, but through devices more opaque, our economy is dominated by property unowned by natural individuals.

Corporate Irresponsibility and a Liberal Cure Worse than the Disease

That corporate property is socialized property has important implications for how the corporate economy works. A central rationale for private property, going back even to Aristotle, is that the owners of private property bear the consequences of their use of that property and thus have every incentive to mind it well (Aristotle 1988, 1263a). A private property economy is, externalities aside, a system of individual economic responsibility.[7] In contrast, socialized property severs this responsibility: Those who control it do not own it and thus do not bear the direct economic or legal consequences of their control. This is familiar as a critique of socialism (Von Mises 1944, 62), but the same holds for corporate capitalism. The corporate form separates ownership and control; thus, corporate managers, like socialist managers, do not own the assets they control and do not bear the direct consequences of their control. Without supplemental devices to align incentives, a corporate economy is, literally, an institutionalization of individual economic *ir*responsibility. Corporate property thus creates the conditions both for greater productivity and greater irresponsibility: The former may only be a boon if the latter can be curtailed. Market liberals have actually been quite sensitive of this responsibility gap. Their strategies for closing it, however, have been counterproductive.

Fallacies Regarding the Separation of Ownership and Control. As noted, the central liberal fallacy regarding the corporation is to treat share ownership as equivalent to asset ownership. This fallacy was institutionalized in the American discussion by Berle and Means' 1932 classic, *The Modern Corporation and Private Property*, which, in its most famous phrase, spoke of a "separation of ownership and control" within the modern American corporation. The phrase is entirely accurate. The problem is that Berle and Means seem not to have grasped its real meaning, but instead confused it with something very different. This separation is not, as they understood it, the result of a historical development over the course of which the putative "owners" (the shareholders) multiplied, became dispersed, and thus effectively ceded the control portion of their ownership rights to management (Berle and Means 1932, chap. 4). Rather, because of asset lock-in and entity shielding, ownership has been separated from control from the very beginning, because the assets of the corporation have been legally separated from managers *and* shareholders from the very beginning. The development Berle and Means actually describe, which achieved its extreme point in the United States (Gourevitch and Shinn 2005, 18, 241–46), is not a separation of *ownership* and control, but a separation of *shareholder* and control.

Neither of these separations is necessarily a bad thing if one conceives of the corporation as having responsibilities to a range of constituents—to shareholders, but also to employees, customers, creditors, and the general public. American progressives, for example, expressed optimism that corporate managers—freed from control by the narrowly self-interested "robber baron" owner, on the one hand, and the dividend-demanding stockholder, on the other, and trained in professional methods and professional ethics—would pursue the enlightened self-interest of a public reputation and usher in an era of corporate social responsibility (Eisenach 1994, 161–63). Progressive hopes proved inflated. Nonetheless, scholars of the American corporation now look back on the postwar "managerial era"—when managers enjoyed great autonomy, when the Business Roundtable subscribed to the notion of corporate social responsibility, and when corporate executives were compensated not with stock, but with relatively modest salaries—as the golden age of corporate productivity and social responsibility (Jacobs 2011, 1646).

In contrast, if one views the corporation through a liberal or neoliberal lens, construing it as the private property of its shareholders and construing all institutional actors as narrowly self-interested, then the separation of shareholder and control raises a problem—an "agency" problem. Namely, it foregrounds the real possibility that management, the "agent," will pursue its own interests over those of the shareholders, the "principals" and presumed sole rightful corporate beneficiaries. This conception gives rise to a standard liberal criticism of corporations, classically expressed by Adam Smith:

> The directors of such companies ... being the managers rather of other people's money ... it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own.... Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company. (Smith [1776] 1976, II, 264–65)

A classical liberal such as Smith simply wanted to do away with corporations in anything other than a few necessary, easily routinized industries (Smith [1776] 1976, II, 279–82). In contrast, a neoliberal accepts the corporation as a natural and desirable feature of a market economy and therefore seeks ways to overcome

[7] This does not necessarily make it a just economy. Initial distributions of endowments and opportunities may be unequal (the problem of inheritance), and success may come from luck as much as from effort (Knight 1923, 598–99).

this agency problem, tying management more closely to shareholder interests. This means either returning greater control to shareholders in the boardroom or incentivizing the CEO to exercise control in the interests of shareholders.

Beginning in the 1980s, the United States has done both. Shareholder control over the board has been increased, for example, through rules that make it easier for shareholders to field and finance a rival slate of candidates for director, as well as through rules that shareholders can use to disable a management's takeover defenses (Jacobs 2011, 1654–57). Meanwhile, CEOs have been reoriented from company-building to share-price maximization by changing how they are compensated. Pushed by executive compensation theory and by a change in the tax code that promotes it, stock and stock option compensation as a percentage of CEO pay has skyrocketed from 0% in 1984 to 66% in 2001 (Stout 2012, 25). This is neoliberal corporate governance, using the discipline of the market—in this case, the stock market—to incentivize managerial behavior.

By the logic of private property, this compensation approach is exactly what one would want. Tying management more closely to ownership interests should make management more responsible, because it will bear more of the consequences of its control. The interests of share ownership, however, are not the interests of asset ownership, as I now show. It is on this point that the nomenclature of Berle and Means misleads, as if bridging the gap between shareholder and control were the same thing as, and would have the same effect as, bridging the gap between ownership and control. Instead, the actual consequence of "shareholder primacy" has been, not responsibility, but the incentivizing of risk taking, law breaking, and the sacrifice of long-term growth for immediate share price increases.

The Risk-seeking Stockholder and Stock-optioned Manager. A corporation's incentive toward risk taking stems in the first place from the shareholder's limited liability. For shareholders, the greater a company's risk (assuming constant average returns), the greater their expected profit, because limited liability places a floor on their losses, but no ceiling on their gains. Put another way, shareholders reap more upside than downside of business risk; therefore, both high volatility and high leverage (high debt) increase average returns across a stock portfolio (Moyo 2011, 23–31). Unfortunately, they also increase the number of corporate bankruptcies, because increased volatility and leverage bring more corporations below the break-even point. This is of serious concern for employees and creditors, and perhaps customers, but not for the broad portfolio investor.

The risk incentive associated with stock *ownership* is only amplified by stock *options*, which provide managers the option of purchasing stock at a fixed price in the future. This is an economic boon if the stock goes up, but *no loss at all* if it goes down, because in such a case the option is simply not exercised. Again, volatility and leverage are incentivized.

Less often noted, limited liability also incentivizes *legal* risk taking—that is, law breaking (Hansmann and Kraakman 1991). If management directs the corporation to commit an infraction, it is the corporation that pays the fine, not management or shareholders. Of course, both management and shareholders are losers if share price drops as a result. But again, because of limited liability, there is a floor on their losses, but no ceiling on their gains if the violation goes undetected or is under-penalized. The reorientation of managers toward stock price thus creates an incentive for law breaking that did not exist when managers were merely salaried.

Incentivizing risk taking can be a good thing in certain areas and up to a point. The original purpose of limited liability, as pioneered for the great trading companies, was to encourage private investment in high-risk endeavors that the state did not have the desire or wherewithal to undertake on its own dime, but that promised public benefits (Robins 2006, 24). However, the universalization of limited liability means that shareholders have incentive to invest in volatile businesses over stable ones, even when the former produce no special public benefits. Worse, they have an incentive to push lower risk ventures into high-risk strategies. It is hard to see the social benefit of transforming stable businesses into volatile ones. It is even harder to see the social benefit of incentivizing *legal* risk taking. Limited liability plays an important role in corporate finance. But it also generates incentives toward economic and legal irresponsibility, and these are brought to the fore when the corporation is placed within a liberal frame, treated like shareholder property, and oriented toward maximizing "shareholder value."

Shareholder Primacy and the Crisis of Corporate Productivity. These same developments are also undermining corporate growth and the prosperity that comes from growth. This is because shareholder empowerment is occurring at a time when the nature of the typical American shareholder has changed dramatically.

The received image of the shareholder is of an independent investor who researches a company's growth prospects and then buys and holds its stock. That day has passed; today's dominant shareholders, owning almost 70% of U.S. corporate stock, are institutional investors—pension funds, mutual funds, and hedge funds. These are active traders, with portfolio managers compensated on the basis of their quarterly portfolio returns and thus operating on a short investment horizon (Jacobs 2011, 1650). In 1960, stock was held an average of eight years. In 2010 it was four months (Stout 2012, 72). In other words, if one's corporate asset were a cherry orchard, an institutional investor would likely have one cut it down and sell the wood for profit today rather than wait for the next crop.

This loss of "patient capital" is increasingly regarded as the major crisis of American capitalism (Mitchell 2001, 3–7). It is directly tied to another sobering statistic. In the 1950s, 60% of U.S. corporate profits were retained for research and development (R&D) and for expansion. In 2003, this was down to 3% and remains under 10% (Jacobs 2012). In contrast, in China today, nearly 50% of the gross domestic product is reinvested (Borst 2011). With such competition, a country whose major economic institutions cannot muster 10% reinvestment does not have a very rosy future.

The irony is that, in subjecting the corporation to "market discipline" and "owner control," the very sources of its superior productivity are undermined. The stability of corporate property creates the possibility of long-term investments, in the form of capital accumulation, asset specialization (improved technology), and labor specialization (improved skill). However, under the rule of impatient capital, capital accumulation, R&D, and worker training decline. This denies the corporation the very advantages offered by the corporate form, compromising future growth.[8] The standard recipe for responsibility and growth in a genuine private property economy becomes a recipe for recklessness and decline in a corporate property economy.

The overall result of treating the corporation like shareholder private property is aggressive risk taking for short-term gain, with corporate assets cannibalized for the sake of short-term investors to the detriment of long-term investors and other stakeholders. This is yet one more knock against viewing the corporate economy through a liberal lens. Market liberal theory obscures the governmental provenance of the corporation; it misconstrues corporate assets as shareholder property; and, what is most important deforms the customary incentive structure of the corporation, increasing its recklessness and undermining its productivity. This adds a strong policy reason to place corporations in a separate category from other market entities, to be governed by distinct rules and norms.[9]

THE GOVERNMENTAL PROVENANCE OF CORPORATE AUTHORITY

The previous two sections have highlighted what sets the corporation apart from other business entities as a market actor: its governmental provenance, its socialized property, and its dysfunction under certain kinds of market discipline. The present section turns to the question of what sets the corporation apart from other business entities in its internal government. Because my concern is with the legal classification of corporations, my focus is not on the diverse techniques that corporate managers use to govern their workforces, but on the legal basis of this government.

Corporate management (the board and the executive officers it hires) is today widely assumed to derive its authority from the shareholders, who, as owners, authorize it. The argument so far shows this cannot be correct, because shareholders do not own the corporation. Shareholders do have a nominal right to select who occupies the seats on the board of directors; however, as I now argue, neither the office of director nor its authority derives from them, but from the state, via the corporate charter. Furthermore, the shareholders' right of election itself comes from the charter, and not from ownership. The authority of corporate management is thus "of government." Again, this shows the distinctiveness of the corporation. Unlike subordinate public bodies, it enjoys autarky, the ability to select its own leaders; yet unlike private bodies, it has its offices and their authority from government.

The Foundations of Managerial Authority

Management in a business firm (whether proprietorship, partnership, or corporation) has a dual authority: It has authority over the firm's employees (Ciepley 2004), and it has authority over the firm's assets (Zingales and Rajan 2001).

Management's authority over its employees rests on two foundations. Its proximate foundation is the labor contract, which includes, as a nonnegotiable "implied term," a duty of obedience on the part of the employee to the employer (Muthuchidambaram 1979, 105–6). Unless a boss's directive is illegal, unreasonable, or unethical, one has an obligation to carry it out, however unwise or contrary to one's own interests it may be. Together with accompanying duties of loyalty, care, and confidentiality, the duty of obedience shows that today's labor contract, like the feudal contract between master and servant from which it descends, is a contract that is more than a contract.[10] It ushers one into a status category, with non-negotiable asymmetrical obligations of deference that last for the duration of the relationship, although limited to the organizational setting. In an organizational age, status relations recrudesce.

As this shows, even the authority of management in a proprietorship or partnership is governmental in the weak, legal realist sense, being exercised under government-sanctioned, non-neutral background rules of labor control. Nonetheless, the authority of management in the corporation is "of government" in a much more direct sense, as seen momentarily.

Why in a liberal age would anyone subject themselves to the status relations of the labor contract? Why take a job? The answer, of course, is because it may be

[8] Scholars have bruited a number of proposals for increasing the patience of capital—taxing stock transactions; graduating the tax on capital gains (say, 90% on stock held one day, to 9% for stock held at least five years); eliminating stock options from CEO compensation, and so forth (Aspen Institute 2009). All implicitly acknowledge that corporate property functions differently than does private property and needs to be placed within a different framework of rules to work well.

[9] A body of law especially directed at corporations already exists. However, it consists almost entirely of rules for protecting shareholder interests. Thus, rather than being evidence that the corporation already occupies a separate category, it underscores that the corporation is seen as the private property of its shareholders.

[10] On the feudal roots of nineteenth-century U.S. labor law, see Orren (1991, chaps. 3–4). Orren emphasizes the rupture in this feudal regime that occurred in 1937, when labor relations were removed from the exclusive jurisdiction of the common law courts to the legislature. Nonetheless, elements of the feudal regime remain at the heart of agency law (American Law Institute 2006, chap. 8).

one's best or only means of access to scarce productive assets, the "means of production." This brings us to the other, mediate foundation of management's authority over the firm's employees—management's authority over firm assets.

The prototypical ground of authority over assets is ownership. An owner has the right to exclude others from the property or, alternatively, to set the conditions of access to it; for example, conditioning it on the signing of a labor contract (Cohen 1927, 12). In the case of proprietorships and partnerships, ownership is indeed the ground of management's asset control. But what is the ground of management's asset control in a corporation? And for that matter, what is the ground of management's authority over employees, because the labor contract is not between the worker and manager, but between the worker and the corporation?

The prevailing view suggests there is nothing special about the corporation in this regard. Shareholders are taken to own the corporation. As a corollary, it is supposed that the right of management to govern the corporation—to control its assets and manage its employees—derives from these owner-shareholders, who authorize the management as their agent. Milton Friedman, in his famous polemical essay, "The Social Responsibility of Business is to Increase its Profits," provides a classic statement of this view: "In a free-enterprise, private-property system a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible" (Friedman 1970, 17). The corporation, on this neoliberal rendering, is but a partnership. It is the private property of its shareholders, who authorize management to run it on their behalf.

Within political science, Robert Dahl is a well-known critic of the shareholder-oriented corporation, especially on account of its antidemocratic implications. As he emphasizes, "By making ownership the only, or at least primary, source of legitimate control over corporate decisions, the new [corporate] order not only excluded democratic controls in the internal government of the enterprise but placed powerful ideological barriers against the imposition of external controls by a government which, for all its deficiencies, was much more democratic than were the governments of business firms" (Dahl 1977, 8). Clearly implied here is the possibility that there might be sources of legitimate corporate control other than ownership. Dahl then takes another step forward, questioning whether it was justifiable to give shareholders the control rights of owners in the first place. Doing so was, in his words, an "extraordinary ideological sleight of hand," based on extending the "Lockean" rights of private property from the agrarian farm, where they belong, to corporate stock (Dahl 1977, 8).

Unfortunately, Dahl does not fully develop these intuitions, and he even obscures them. Accepting the conventional view that shareholders "own" the corporation (Dahl 1985, 79), yet persuaded that the modern business firm is an association that ought to be organized along democratic lines, Dahl looks to alternative ownership arrangements that he believes are more compatible with worker self-government—employee ownership through single shares, collective employee ownership, state ownership, and ownership by "society" (Dahl 1985, 140–48). As Dahl puts it, "What is a desirable form of ownership ought to be viewed, at least in part, as subordinate to and dependent on a judgment as to what is a desirable form of control" (Dahl 1977, 16). Addressing the problem this way, however, only reinforces the identification of control rights with ownership rights, even if reversing their usual priority.

The analysis of corporate property developed here vindicates Dahl's initial intuitions and allows them to be pushed further. Because no natural persons own corporate assets, legitimate control of these assets not only might, but must, derive from something other than ownership of them. Furthermore, the reason that it is a sleight of hand to attribute a Lockean right of asset control to owners of stock is that stock ownership is not the same thing as asset ownership. Both points follow from the one ownership arrangement that Dahl does not consider, which is the arrangement that actually obtains within the corporation, in which the firm owns itself. Contrary to Dahl's impression, this arrangement makes the corporation a perfectly suitable vehicle for worker self-government, because it completely removes the issue of ownership from the question of who controls. A corporate charter could make the employees the electors of the board—or place employee representatives on the board, as in Germany (Beal 1955)—without violating any of the property rights of shareholders. Indeed, nonvoting stock has long been commonplace in the United States (Mitchell 2007, 4), with no protest about loss of property rights.

Board composition can be customized in this way because the true basis of management's authority—its authority over both corporate employees and corporate property—is not shareholder ownership, but the corporate charter, along with any enabling corporation law that specifies the rights that charters convey. In other words, it is government that authorizes management's rule within the corporation's jurisdiction. This is not just a theoretical extrapolation from the fact of corporate self-ownership. It is fully supported by the specifics of corporate law. First, the mechanics of incorporation support it. A charter formally ordains a corporation and, as part of this, expressly ordains and authorizes a board of directors, usually with members listed by name, to manage corporate assets, hire employees, define their duties, and generally conduct the corporation's affairs (Corporate Laws Committee 2005, §8.01, §3.02). It also expressly authorizes the board to issue stock up to a specified amount (Corporate Laws Committee 2005, §6.01). All this happens before there are any shares or shareholders. Given this sequence of events, it is clear that the government charter, and not the shareholder, creates and authorizes the board. With the boards of nonprofit corporations, this is even more clear, because they never solicit shareholders. In the case of business corporations, purchasers of common stock do receive a nominal right to elect succeeding directors. This right does not derive from ownership, however; it is authorized by the government charter (Corporate Laws Committee 2005, §7.21). Nor does this nominal right of shareholders to choose the *occupant* of the office of director alter the fact that the office itself and its authority are established by government via the charter, and not by the shareholders. It is telling that this is formally no different from the arrangement that obtains in that other important corporation, the American town, the members of which choose its officers, but which has its offices and their authority by state charter (Frug 1980, 1062–63). If shareholders were truly owner-principals and authorized management, they would have the freedom of establishing whatever offices they saw fit, as do partners in a partnership. Instead, the corporate form includes certain non-negotiable constitutional fundamentals, the centerpiece of which is an elected board with specific powers and duties (Corporate Laws Committee 2005, §8.01, §6.01).

That government, rather than the shareholder, authorizes management's rule is also borne out by consideration of management's legal obligations. If shareholders were authorizing principals and directors their agents, directors would have an agent's duties toward them and accountability to them. Instead, the duties of directors—of loyalty, care, and confidentiality—are duties to the corporate entity, and not to shareholders (Corporate Laws Committee 2005, §8.30). Although holders of common stock nominally elect directors, they cannot fire them nor directly sue them for breach of duty,[11] any more than town residents can fire or sue their elected mayor for breach of duty. Again, the similarity is not coincidental.

In sum, the shareholders are not management's authorizing principal. In the eyes of corporate law, the principal is the corporation itself, and management is its agent. Management has a duty to act on behalf of the corporation (and not simply on behalf of its shareholders), and, in discharging this duty, is authorized to rule over corporate personnel and property. Both this duty and this authorization come from the state, via a corporate charter. The state is the foundation of managerial authority.

Corporations as Franchises of Government

The surprising picture that emerges from analysis of the foundations of managerial authority is of a formal constitutional structure of government in the United States composed of, not two, but three tiers—a triple layer of constitutional republics: (1) the federal government, authorized by the formally sovereign people; (2) the state and territorial governments, authorized by the federal government—if not one of the original 13, authorized by the Crown; (Biber 2004); and (3) the towns and other corporations, including business corporations, authorized by the state governments. At each level, authorization takes the form of a charter, or constitution, approved on authority of the legislature at the level above (or, at the top level, by the people). Also, each level of government is republican in form, enjoying autarky (the ability to select its own leaders) and broad, but not limitless, autonomy (the ability to frame laws within its jurisdiction), the limits to its autonomy being drawn at the level above, in a system of ascending legal supremacy.[12]

This way of viewing matters is not novel, merely long submerged. The history of corporations is a history of "sovereign" institutions (such as church or state) authorizing inferior institutions (corporations) to do things that the sovereign institution wants done but is unable or unwilling to do itself (Wood 1999, 9). Corporations are institutions of delegated government. Their authorization is accompanied by a grant, sufficient to the work to be undertaken, of powers and privileges that governments normally deny natural persons and reserve to themselves. At the extreme, this has meant granting corporations nearly plenipotentiary powers, as with the British East India Company. More modestly, it might mean granting a canal or railroad company the power of eminent domain, as was often done in the early American republic, when corporations were chartered to build the nation's infrastructure (Maier 1993, 68). Or it might mean granting the privileges of contractual individuality and centralized management alone, as with banks and insurance companies. A history of state power without a history of corporations is thus radically incomplete. Indeed, the practice of chartering corporations can be thought of historically as state-building at one remove—the building of a "franchise state."

Whether corporations should still be thought of as constituting a franchise state is difficult to say. Even today, *all* business corporations depend on state-granted privileges and authorizations and thus remain legally closer to the Tennessee Valley Authority than to proprietorships and partnerships. The difficulty is not that corporations have become genuinely "private," but that their activities have become almost wholly commercial, which liberals do not associate with the state. Put another way, they are difficult to interpret because they have participated in—indeed, have been a principal conduit for—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, 38–49). The chartering of the great trading companies in the early modern period stands at the trailhead of the social—a tapping of public power for traditionally private, money-making pursuits

[11] What the law does allow, in the face of a wayward director, is for a shareholder to file a "derivative suit" against the corporate entity itself for its failure to uphold its own rights against a director in breach. Tellingly, if successful, it is the corporate entity that recovers damages from the director, not the shareholder (Corporate Laws Committee 2008, §8.31). Shareholders may also file class action suits, but these address director fraud, which falls outside of agency law.

[12] For example, the U.S. Constitution limits states in Article I, Section 10. In turn, state corporation laws impose limits on business corporations (Corporate Laws Committee 2005, §3.02).

and a liquidation of private property for the sake of social wealth. The stepwise unleashing of corporations into all branches of commercial activity is a marker of the progress of the social. Corporations, which begin as indirect arms of the state, are chartered for the sake of increasingly commercial "public benefits" and end as institutions of delegated government for the pursuit of private profit and private consumption alone. This coopting of public power by private need is only rendered more complete by the fact that public power's role in constituting the corporation has been concealed within liberalism and thus placed beyond challenge. Thus, it remains legally correct to describe corporations as a franchise state, but it is only phenomenologically plausible if one bears in mind liberalism's subordination of the state to the needs of society, the political-economic culmination of the rise of the social.

NEITHER PUBLIC NOR PRIVATE, BUT CORPORATE

It is clear from the above sections that corporations trouble the public/private distinction that organizes so much of liberal thought and practice. Are corporations private because they are organized and financed by private parties, or are they public because government provides their contractual individuality, the separateness of their property, and their exemptions from liability? Are they private because members choose their leadership? Or are they public because the leadership occupies offices and exercises authority derived from government? Are they private because not under government command? Or are they public because constituted by government? Neither answer will suffice. They are neither public nor private, but should be placed in a separate theoretical, legal, and policy category—the category of the corporate.

Ontological versus Consequentialist Transgressions of the Public/Private Divide

It has been pointed out many times before that corporations transgress the public/private divide, perhaps most famously by Theodore Lowi in *The End of Liberalism*, where he highlights the institutionalized inclusion of business actors (often corporate) in the formulation of public policy (Lowi 1969, chaps. 3–5). The point I am making, however, is not just that the *activities* of corporations transgress this divide, but that their very *being* transgresses this divide.

I believe this changes the normative landscape. In a conventional critique, corporations would be categorized as private, and one would raise concerns of the sort raised by Lowi or by Jürgen Habermas in *Theory of Communicative Action* and Michael Walzer in *Spheres of Justice*— that corporate power in the private market is spilling over into other spheres of life, colonizing them and perverting their principles and goods (Habermas 1984, chap. 6; Walzer 1983, chap. 4). This is surely true and of concern. The deeper point, however, is that corporations themselves are not creatures of the private market, but governmental colonizers of it. Therefore, a strategy of "returning" them to the private market, with license to operate by the same rules as regular market actors, is both theoretically mistaken and pragmatically inadequate, as argued earlier. A distinct analytical category and corresponding set of legal rules must be developed for them.

Closer to the position developed in this article is that of Adolfe Berle, who also emphasized corporate transgression of the public/private divide and rightly concluded from this the need for something like a political theory of the corporation. In Berle's view, it is not just the corporation's political heft but also its provision of essential goods and services that give it a "political aspect" and turn it into a "quasi-governing agency" (Berle 1954, 104–5). In other words, corporations become quasi-public when they have significant public consequences.

Unfortunately, this argument suffers from being overly broad, in that it would turn any powerful entity or individual into a quasi-public body by virtue of its public impact; and it suffers from being vague, because almost any act by any actor may have eventual public consequences, forcing one into ad hoc line drawing and endless, destabilizing reclassifications of particular entities as their public impact varies over time.

In something of an afterthought, Berle adds that corporations can become quasi-public by virtue of receiving public benefits. As an example, Berle mentions corporate use of publicly funded scientific research (111), though benefits can also take the form of tax breaks, or subsidies, or even use of public infrastructure. This argument is also overbroad, however, because it threatens to turn even a private citizen who receives, say, Social Security payments into a quasi-public entity; and it is vague, again involving endless controversial line drawing, because, as legal realists forcefully argued, in modern society, almost any activity can be seen as in some way underwritten by state authority and thus in receipt of a public benefit (Sunstein 2002). The argument thus threatens to erase the very category of the private, which is something the legal realists rightly avoided. Classifying corporations by virtue of their public impact or receipt of public aid, although intuitively appealing, is in practice a conceptual, legal, and policy morass.

Rather than resting the case for the reclassification of corporations on their sending *consequences* across the public/private divide or their receiving *benefits* across this divide, I stress that they are *constituted* across this divide and straddle it throughout their existence, with private parties providing financing, organization, and initiative, and government providing contractual individuality, a socialized mode of property, and governing rights. This conception clearly identifies all corporations, regardless of size and impact, as governmental, even if not fully public. It makes them proper objects of political theory, and it justifies placing them in a distinct category, subject to rules and norms beyond those applied to properly private business entities. The remainder of this section begins fleshing out the category of the corporate with some of the distinct rules and norms that I believe follow from arguments in previous sections.

Whom Should Corporations Serve? The Shareholder/Stakeholder Debate

That the corporation is co-constituted by government has implications for the corporation's proper ends. It has been strongly asserted in recent decades that the purpose of the corporation is to "maximize shareholder value," or share price. This doctrine of "shareholder primacy" has two main rationales: that shareholders are the legal owners of the corporation, and that treating them as such is economically efficient. Neither rationale is tenable, however. Shareholders are not the owners; and running a corporation as if they were, by maximizing short-term share price, is not economically efficient—at least not in allocating resources to produce sustained growth (Stout 2012, chap. 4).

The alternative to shareholder primacy is corporate social responsibility—a responsibility not just to shareholders but also to other stakeholders and society. Justifications for it vary, from long-term self-interest to the ethical principle that one should act in consideration of the consequences of one's actions for all, avoiding harm and perhaps even providing help (Garriga and Mele 2004). However, all the standard justifications, such as these, apply to all business actors and not to corporations specifically.

My argument revives an older view—that corporations, as privileged entities, bear heightened responsibilities toward the public. Intervention in the default rules of property and contract is justified only on grounds of public benefit. At least that is the usual understanding—the legal basis for the exercise of state "police powers," for example—and for more than 250 years, it was the understanding of those who chartered business corporations. Corporations were chartered only if they promised a clear public benefit, and their charters regulated their activities, often heavily, to ensure this promise was fulfilled (Maier 1993, 75–78). Corporations were to be instances of "private vices" creating "public benefits," but with benefits to be secured not through the invisible hand of the market, but through the wise hand of the author of the charter.

So long as corporations were well regulated by charter and restricted to activities with a clear public benefit, it was considered justifiable to grant them legal privileges and to give their shareholders the profits. Profit was their incentive to move the public good forward. Once corporations became general business forms, however, with no limits on their activity but those of general legality, one could well ask, What is the public benefit to justify the special privilege? Why do they get to enjoy rights without corresponding duties? Corporations may offer heightened productivity. This is a public benefit, however, only if the fruits of increased productivity are widely spread. Without charter restrictions assuring public benefits, the practice of catering solely to the interests of shareholders (or managers) loses legitimacy.

How exactly corporations are to be brought to attend to broader stakeholder interests has always been a difficult question.[13] Nevertheless, corporations' debt to public authority is a strong argument that they ought to, beyond what is expected of genuinely private actors.

The Rights of Corporate Workers

The authorization of corporate management by the state also has implications for worker rights. Without safeguards, the potential for worker exploitation by corporations is quite real. Although business corporations have the external form of constitutional republics, their internal governance is, generally speaking, neither liberal nor democratic. Internally, corporations are for-profit governments whose rulers are, with few exceptions, not accountable to the governed.

One ameliorative arrangement is to make management more accountable to workers, and there is no rights-based reason this cannot be done. As argued before, corporations could be organized as worker republics with no harm to shareholder property rights. That said, I know of no rights-based reason *requiring* business corporations to be organized as worker republics as opposed to shareholder republics.[14] The question comes down to one of efficacy, policy, and preference.[15]

On the other hand, I do believe that the state's authorization of corporate management argues for more extensive civil liberties in the corporate workplace, whether organized as a republic or an autocracy. At mid-twentieth century, the Supreme Court began requiring state and local government to observe the core provisions of the Bill of Rights, which originally had only applied to the federal government (Ciepley 2006, 231–51). Because the governing authority of the business corporation is derived from the state, parallel to the way in which municipal corporations derive their governing authority from the state, it would seem that corporate management ought to be required to observe the Bill of Rights as well. Yet the Court exempts corporations, as "private" business concerns. Workers do enjoy the protection of labor laws; the Bill of Rights, however, runs out at the company gate. Thus is created a paradoxical situation in which corporations are extended ever more rights from the Bill of Rights

[13] For suggestions, see Bovens (1998), Crane and Matten (2010), and Greenfield (2006, Part II).

[14] Dahl argues that, when there is a need for binding collective decisions but no member is preeminently qualified to arrive at the correct decision, procedural democracy should be implemented (Dahl 1977, 11). Unfortunately, the argument fails, falsely supposing that political authority derives from epistemic authority (Darwall 2010, 267–68).

[15] That said, worker participation in management is far more economically viable than generally recognized, and there would likely be far more worker republics if the initial capital and organization costs were lower (McDonnell 2008, 375–76). For one thing, empowering workers, who have a much sharper interest than shareholders in a company's long-term solvency, counters the problems of risk seeking and short-termism that plague the present-day shareholder corporation (Greenfield 2006, 57). Worker participation also likely brings broader political and societal benefits (Dahl 1985, 93–110; McDonnell 2008, 357–73; Pateman 1975, chap. 3).

(see the following), whereas their employees, though proper citizens, are denied them.

There are legitimate reasons why civil liberties might be selectively narrowed in the workplace. For example, trade secrets probably justify the curtailing of speech rights for corporate employees just as state secrets do for government employees. It seems doubtful, however, that an employee's duty of loyalty can justify an across-the-board gutting of First Amendment rights in the corporation. If it is accepted that corporations, as publicly privileged entities, should be held to a higher standard of public benefit, then speech protection should be elevated where matters of public interest are at stake. For example, the currently piecemeal protection of corporate whistle-blowers might be expanded into a general protection against adverse action for publicizing corporate actions harmful to public or consumer interests (Blumberg 1971). This would both expand worker rights and help trim corporations to the public good.

The corporation is a major anomaly in America's civil liberties revolution—an anomaly that political theorists are well placed to address. Political theorists have thought long and hard about institutional bulwarks against state tyranny and about issues of efficiency and fairness in government. At least some of their conclusions should apply to corporate government.[16]

Reconsidering the Constitutional Rights of Corporations

The argument of this article is that corporations are neither public nor private, but belong in a separate category, with different rights and responsibilities. However, American courts have not agreed. Over the long nineteenth century, and with renewed energy since the 1960s, they have escorted corporations down liberal lanes and into the category of the private, granting them license to act with minimal regard for, or accountability to, the public, and outfitting them with a layer of protection from public scrutiny and public regulation (Horwitz 1992, 74). A political theory of the corporation should be able to controvert every step down this path, from *Dartmouth College v. Woodward* (1819) (institutionalizing the distinction between public and private corporations and also redefining corporate charters as contracts immune to legislative revision) to *Citizens United* (2010). As promissory that it can, the remainder of this section challenges one of the most consequential steps in this assimilation to liberalism—the Court's practice of extending to corporations the constitutional rights of private citizens.

Three Legal Theories of the Corporation. Throughout this article, I have scrupulously avoided the term "legal person" to describe corporations because of its troublesome ambiguity. Corporations have *always* been persons in the sense of "contracting individuals" (my term), with the right to own property, make contracts, and sue and be sued as individuals. Without this right, they simply would not be corporations, but partnerships. The question is, Are corporations also persons in the sense of *constitutional* individuals, with the additional rights of citizens? Within the law, three theories of the corporation have vied for preminence, each offering different answers to this question.

The corporation as artifice: On the original understanding of corporations, here reaffirmed, corporations are creations of government via the grant of a corporate charter and receive all of their rights therefrom. As Chief Justice Marshall put it in *Dartmouth*, "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" (*Dartmouth College v. Woodward* 1819, 636). These charters certainly did not—and could not—grant corporations constitutional rights. Nor does the Constitution make any mention of corporations or corporate rights. Nor can corporations claim to preexist government and have reserved rights against it. Constitutional rights, it would seem, are reserved to people.

Faced with this, corporate lawyers seeking constitutional rights for their clients had to find a way to assimilate corporations to natural persons, the rights-bearers within liberal constitutionalism. There are really only two possibilities: Either construe the corporation as nothing more than an association of natural persons whose rights pass through to the corporation, or construe the corporation as itself a natural person, meriting the rights of persons.

The corporation as partnership: For lawyers and judges embracing the first approach, the corporation is not constituted by state charter; rather, it is "formed by the voluntary association of their members" (Morawetz 1882, 2). This was the legal precursor to the neoliberal theory of the corporation propounded by Friedman. In the context of constitutional interpretation, the point was to deny that the corporation was an artificial legal entity by re-grounding it in natural, contracting individuals. From this it could be inferred that corporate property was really the individual property of the shareholders, whose property rights extend to it. As put by John Norton Pomeroy, lawyer for the Southern Pacific Railroad, in his brief in the famous case of *Santa Clara County v. Southern Pacific Railroad* (1886), "The truth cannot be evaded that, *for the purpose of protecting rights, the property of all business and trading corporations* IS *the property of the individual corporators*" (Horwitz 1992, 70). In other words, judges were being asked to strip away the "metaphysics" of the corporation and find a partnership underneath. And this is just what many began to do. Conflating corporate property with the private property of individuals, federal judges began striking down many of the corporate regulations that states erected, as violating the equal protection and due process clauses of the Fourteenth Amendment (Horwitz 1992, 69–70). An amendment

[16] A logical point of intervention would be in the management literature that conceptualizes employees as corporate citizens; see Podsakoff et al. (2000).

aimed at protecting emancipated slaves from discim-inatory legislation was thus extended to corporations at the very historical moment that the Court was limiting its application to its intended charges (*Plessy v. Ferguson* 1896).

The corporation as real person: The analogy of corporations to partnerships did have one downside for corporate advocates. Arguing that the rights of corporations are the rights of their members puts in jeopardy corporate privileges such as limited liability, which no private person enjoys (Horwitz 1992, 91). Accordingly, other corporate lawyers, and many progressive intellectuals as well, argued that the corporation was a constitutional individual in its own right—a "real person," even if not a natural, biological person (Dewey 1926). Though strange on its face, the position found support in the work of eminent historians such as Otto von Gierke and Frederic Maitland, who argued that medieval corporations such as towns were independent bodies between individual and state that the state only subsequently claimed to have chartered (Horwitz 1992, 71). "Our German Fellowship," Gierke wrote, "is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand" (Maitland 1900, xxvi). Being a "real person" independent of government, a corporation might claim the constitutional rights of real persons.

Both the partnership theory and the real entity theory have fatal flaws, however. The partnership theory imagines that a corporation can be contractually established, when it cannot; it implies a principal-agent relation between shareholders and management that does not obtain; and it ignores the very feature that makes a business corporation a corporation, which is that its property is entirely separate from the property of its shareholders. Shareholders hold none of the rights of property over corporate property, so the corporation is hardly entitled to borrow the shareholders' property protections. The flaw in the real entity theory, in contrast, is that it conflates medieval corporations with the business corporation. As an investment vehicle, the business corporation is predicated on asset lock-in and entity shielding, which only government can fully provide. Business corporations thus really are artifices of government. In effect, both theories fail to appreciate the wholly abstract character of the corporation as a rights-bearing entity. If the corporation were an association of persons or an emergent group personality, then it would cease to exist if its members disbanded. In actuality, however, if a corporation buys back all of its stock, eliminating its shareholders, and if its employees all resign, the corporation still exists (though these events would put it in receivership), because it still owns property and is still party to contracts. Only the theory of the corporation as an artifice of government is consistent with this situation. And artifices of government do not properly hold the constitutional rights of real, independent persons.

Nonetheless, on the back of the partnership and real entity theories, a broad range of constitutional rights have been extended to corporations. The central legal fights of the Gilded Age and Progressive Era were over the rights of private property, and corporations clothed themselves in natural personhood to acquire these rights for corporate property. These include Fourteenth Amendment rights of due process and equal protection against state law (*Minneapolis & St. Louis Roads v. Beckwith* 1889) and federal law (*Noble v. Union River Logging R. Co.* 1893), as well as rights against unreasonable search and seizure (*Hale v. Henkel* 1906) and against uncompensated regulatory "takings" (*Pennsylvania Coal Co. v. Mahon* 1922). Subsequent to the New Deal, which undid some of these property rights, the central legal fights have been over civil and political rights, and corporations have used their ideological personhood to acquire as many of these as possible as well. This includes the right to trial by jury in criminal cases (*Armour Packing Co. v. U.S.* 1908) and in civil cases (*Ross v. Bernhard* 1970), the right against double jeopardy (*U.S. v. Martin Linen Supply Co.* 1977), and the right of commercial speech (*Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* 1976). Most infamously, it also includes a right of corporate *political* speech, as developed over a line of cases from *First National Bank of Boston v. Bellotti* (1978) to *Citizens United* (2010), which gives corporations the full political speech rights of citizens, allowing them to spend unlimited sums in elections.

Citizens United. The case of *Citizens United* is a good example of how corporations continue to benefit from both the partnership and real entity theories, because each is invoked by the majority to build a separate argument for protecting corporate speech. On the one hand, the majority invokes the partnership theory, insisting repeatedly that the corporation is but an association of persons—or, as Justice Kennedy prefers to put it, an "association of citizens"—and therefore entitled to the speech rights of its citizen members (*Citizens*, 876, 904, 906–7, 925, 928). On the other hand, it invokes the real person theory, arguing that the corporation is a "speaker" with a distinct and important "viewpoint," the restriction of which interferes with the "open marketplace of ideas" protected by the First Amendment (906–7). The one suggests corporate speech deserves protection because it is really the speech of its associating (citizen) members; the other suggests it deserves protection because it is *distinct from* and *different than* the speech of its associating members and can make an independent contribution to democratic debate.

Obviously these theories are contradictory. If the corporation is reducible to its members, then it has no opinion separate from them to contribute to democratic debate. If the corporation is distinct from its members, then it cannot claim their rights of citizenship. What is more, the analysis provided earlier shows that neither position is coherent in its own right. Corporations are not real, independent persons, because they are not constituted independent of government (and even if they were, they still would not be

American citizens with a right to spend money in American elections).[17] Nor are corporations associations of individuals, because there is no way for them to be formed simply through bilateral contracting. The corporation is an abstract government-constituted legal entity possessing unique privileges and separate property. It may bring individuals into association, but it is wholly separate from them. Managers, employees, board members, and shareholders are all free to electioneer with personal funds, including funds from the sale of investments, whether stock or artwork. This fully vindicates their speech rights. The idea that, in addition, corporate management is constitutionally entitled to use *corporate* funds to amplify its views is against legal logic.[18] In fact, it may be questioned whether corporations even have a constitutional right to petition government—that is, have their funds used for lobbying—given their governmental constitution. However far one takes this, corporations should not have the constitutional rights of political participation that private persons, proprietorships, and partnerships enjoy. Although these or any of the above rights might be extended to corporations by statute, they should not be found in the Constitution.

CONCLUSION

The ascent of corporations is one of the great, if unheralded, paradoxes of the modern West. Corporations are regarded as the apogee of modern capitalism and have found their most fertile soil within liberal, democratic, capitalist polities, where their legal protections are most numerous. Yet they are of premodern provenance and themselves violate all the basic principles of liberalism, democracy, and free-market capitalism. More than any other phenomenon, the rise of corporations challenges the adequacy of our liberal individualist frames and underscores the urgency of complicating them. Indeed, it can be asked whether we even still live in a liberal economy, as opposed to a new form of socialized economy—an economy of socialized property under the control of state-authorized, for-profit governments. The liberal individualist ideal retains great potency. Overlaid on the corporate economy, however, liberal individualism becomes a mere ideology that at once misdirects corporate power, conceals it, and protects it.

The political theory of the corporation challenges this assimilation to liberalism. It rests on two premises: (1) that business corporations are governing entities first and foremost, with a subsidiary right to turn their right of government toward the pursuit of private profit; and (2) that corporations are not constituted through private contract, but are government fostered. Neither their operational logic nor their founding logic is liberal, but governmental. The correct response, however, is not to turn our received categories on their head and assert that corporations are public, with all that follows from that. Rather, corporations are neither wholly private nor wholly public, but amphibian, incorporating properties of each and exhibiting additional properties unique to themselves. The central task of a political theory of the corporation at present is to develop this distinct governmental category, the category of the corporate.

This article begins this task. Theoretically, it differentiates the corporation from both public bodies and private bodies, emphasizing its unique form of property and its unique combination of dependence on, and independence from, government. Practically, it shows why treating the corporation as just another private market actor and applying the logic of market liberalism to it heighten its irresponsibility and undermine its productivity. Normatively, it addresses the purpose of the corporation and challenges the historical trajectory of constitutional law as applied to corporations; it raises questions about the absence of liberalism and democracy in the corporate workplace and about the presence of corporations in electoral politics and even in ordinary interest-group politics.

These are but initial steps in developing the category of the corporate, distinguishing corporations from public and private bodies in their ontology, their rights, and their regulative ideals. Although I have spoken of this as a task for political theory, it is really a task to be shared among many fields. The need is acute for fundamentally rethinking the place of corporations in society, and at this level, "theory" is but an honorific attached to the rethinking done by all.

[17] Despite some language in the decision suggesting a blanket protection of political speech regardless of source, based on the rights of listeners, the Court continues to uphold the portion of the Federal Campaign Election Act of 1971 that bars noncitizens from spending in U.S. elections, as confirmed by the Court's summary affirmation in *Bluman v. FEC* (2012).

[18] The majority opinion makes much of the apparent anomaly that Congress exempted media corporations from its ban on corporate electioneering in proximity to elections, but as Justice Stevens points out in dissent (*Citizens United*, 976), this is an exception, not a doctrinal inconsistency, because the Constitution explicitly grants freedom of the press.

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