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Introduction to the Metaphors of Corporate Law

Daniel J.H. Greenwood¹

I. INTRODUCTION

Corporate law is commonly viewed as merely an aspect of property, contract, or agency law. The corporation, in turn, is variously described as a thing to be owned, a moment in the market consisting of continuously renegotiated arms-length contracts between equals, an agency relationship characterized by the one-sided fiduciary duty of agent to principal, a formal device for distributing risk among investors, or even an individual in its own right. These metaphors contradict each other in many respects. However, each portrays corporations as private, individualized, egalitarian, and market-like, while hiding their organizational, institutional, political, and power distributing aspects. The metaphors drive current interpretations of the law but remain in strong conflict with it, in part because corporate law historically stemmed from explicitly political conceptions.² Although corporations are powerful governance and economic institutions, our corporate law metaphors have taught us to ignore the group and institutional characteristics of corporations and to treat them as powerless and passive players in the markets.

As firms, corporations function as havens from markets; they exist and function best when they offer distinctive advantages over less bureaucratically organized systems.³ Because corporations succeed only by using the advantages of teams, they are also dependent on ordinary human understandings of justice in the context of teams. In contrast, modern economically oriented normative claims that corporations exist solely for private wealth maximization⁴ threaten the viability of successful corporations.⁵ As Burke recognized over two centuries ago, the norms of pure profit maximization undermine the preconditions of profit along with

decency.⁶ Pursuit of wealth, like pursuit of happiness, is best done indirectly; successful corporations use our desires for meaningful work, to create useful products and services, and to participate in just institutions as their sources of strength. By contrast, corporations that emphasize profit as their ultimate and proximate goal are more likely to go the way of Enron and other unsuccessful paragons of self-interest.

II. THE SIGNIFICANCE OF PRIVATIZED CORPORATE LAW

Corporate law is the constitutional law of our great economic institutions—the large bureaucratic structures that create most of our wealth and run much of our lives. Given corporate law’s centrality to our lives and our law, one might imagine that corporate law would be a distinct body of law with its own political or legal theory, internal norms, and unique doctrines. However, this is not the case. Law students study tort, contract, property, and criminal law as the key bodies of common law, and constitutional and administrative law as the key bodies of public law, each with its distinctive conceptual apparatus for understanding legal issues. In contrast, corporate law is not regarded as a distinctive body of law, but instead is treated as a branch of other more fundamental areas of the law. Today, corporate law is most prominently thought to be based on contract law or agency law,⁷ although the law of directors’ fiduciary duties borrows from the law of trusts, and public law norms often treat corporations as a form of property. Even as commentators disagree on which of these basic areas of law is most important to corporate law, they largely that corporate law is derivative of some other area of law that “really” explains it.

All law depends heavily on metaphor. Legal reasoning involves judgments that certain events are (or are not) similar; that norms applicable to one circumstance apply (or do not) to another; that similar verbal formulations describe (or do not) similar segments of reality; that a particular classification is (or is not) the most appropriate way to divide up an infinite normative world that comes with no predetermined boundary

markers. Corporate law, perhaps because of its conscious borrowings from other areas of legal thought, is peculiarly transparent in its dependence on its metaphors. The metaphors of corporate law so dominate our thinking that it is often the metaphors that determine the legal treatment of our largest institutions, rather than social usefulness, underlying reality or even conscious political debate.

Corporate law and political discussion of corporations are dominated by four great privatizing metaphors, each of which puts publicly held business corporations on the private side of the fundamental divide between public and private.⁸ Each contends that corporations, like citizens, need to be protected from the government, rather than being, like cities or administrative agencies, governmental entities from which we need to be protected. Each suggests that corporations are primarily market-like arenas of individual action and contractual agreement, characterized primarily by free agreement rather than coercive power. Thus, corporations are distinguished, on the one hand, from governmental, political fora of collective debate, agreement, coercion and joint action, where the potential for illegitimate public power is well understood. At the same time, they are also distinguished from status-based hierarchies of family, class, or race, where the potential for private coercion is well understood. The consequences are dramatic.

Liberal democratic republics protect citizens from governments that we fear may stray from their intended purpose of serving the population.⁹ Democratic voting should assure that governments remain ultimately answerable to the population that ought to control them, helping to keep governmental institutions tied to the will and the interests of the governed. Simultaneously, liberal rights against the government protect individuals and minorities not only from out of control governments, but also from the majority of the population itself. These fundamental rights create a protected space in which individual conscience or whim trumps both collective norms and the political process.¹⁰

Liberal democracies sharply distinguish between state and society, government and governed, means and end. The state exists to serve the citizenry, not the other way around. The state is a tool; citizens are ends in themselves. The privatizing metaphors of corporate law mean that corporations are classified on the society side of this great liberal divide between state (the means or tool) and society (the end or goal).¹¹ Our law treats corporations as values in themselves, entitled to be given the same consideration as citizens—as beneficiaries of government and not mere tools for a greater end.

Republican democracy can exist only so long as the people control their government, including, most fundamentally, the right to change their mind about the ways in which it governs them.¹² Therefore, municipal and other governmental corporations are, as a fundamental matter of republican politics, answerable to the people.¹³ They are subject to political debate and popular control, with no right to participate in the debate nor to assert rights against collective decision making. If the people (or the legislature) decide to limit, change, muzzle, restrain, or even destroy them, the governmental institutions have no right to complain.¹⁴

We treat business corporations differently. Current First Amendment jurisprudence assumes that corporations, like citizens but unlike state agencies, are entitled to participate in controlling government. Thus, corporations have rights to speak, lobby, contribute money (except directly to candidates out of the corporate treasury), advertise, mobilize, and petition, all of which can trump the people's collective decisions.¹⁵

Similarly, in liberal states, individuals have autonomy rights against the government. The citizens are the ends of government; the government is merely a means to our end. Here too, we treat business corporations as more analogous to citizens than to government. Our business corporations have virtually every constitutional right against governmental control and regulation humans have, except for the right not to testify against themselves.¹⁶ Further, corporations have rights that human citizens lack,

such as free movement across borders and the right to choose their constitutive law.¹⁷ In contrast, citizens do not have constitutional rights—or even much in the way of statutory rights—against corporations.¹⁸ The Fourteenth Amendment protects citizens only against state action. Corporations, though they exist only by the law of the state and with its support, are not the state for constitutional purposes.¹⁹

The consequences are dramatic. If a municipal corporation (city) discriminates, the Constitution protects us against it.²⁰ If a business corporation discriminates, the Constitution protects it against our attempts to stop it.²¹ If a municipality searches our desks or reads our mail, we can invoke the Constitution to create space for autonomous individual decision making.²² If a business corporation does the same thing, it can rely on the Constitution to prevent us from invoking governmental power to protect ourselves.²³ If the population wishes to make its government more answerable—for example, by demanding that government decision makers disclose their records to the public—basic principles of self-government and law alike assume that this is the people's privilege.²⁴ If the same people wishes to make its business corporations more answerable using the same disclosure rules, the business corporation may raise privacy objections as if it were a dissident citizen seeking to maintain an autonomous space against the pressure of the majority, rather than a governing institution illegitimately resisting the will of its masters.²⁵

If corporations were viewed as akin to government entities located on the public side of the public-private divide, liberal, democratic, and republican principles would demand that they serve human interests. Democratic theory would insist that corporate membership be defined in a way that encompasses the maximum number of people affected by corporate decisions, on a basis of equal membership without regard to status, particular roles, or wealth. Republican ideals would demand that the leaders of institutions take the interests and will of the members as their goal, insisting that they treat those whom they rule as citizens rather than

subject, and they set the good of all, not just of particular roles (such as shareholders), as their ultimate end. Liberal principles would require rights against the collective decision making process, as protections for individual privacy, security, and expectations against the overweening power of institutions and to instantiate the belief that our idiosyncrasies are due as much respect as our conformities. But corporations are viewed as private entities. Consequently, they have these rights and privileges against us, instead of the other way around.

III. THE METAPHORS OF CORPORATE LAW

Four key metaphors ground the claim that corporations are private, individualistic, market-based, voluntary, and non-coercive, rather than quasi-governmental, institutional, bureaucratic, collective, authoritarian, and coercive. They are: the corporation as property, contract, agency and individual.

A. Property

The metaphor of a corporation as property treats business corporations as if they were analogous to real property owned by an owner or group of owners (i.e., the shareholders).²⁶ Thus, the property metaphor conceals the degree to which corporations, as powerful governance institutions, resemble the state. Instead, this metaphor implies that protecting corporations is protecting real and personal property rights, and thus a central part of the liberal enterprise. Of course, corporations are not things, but rather collections of human beings operating within a particular institutional framework. We do not allow property in human beings, and indeed, property concepts cannot apply to human beings except by rough analogy. While an owner can control, destroy, or use his pencil or land largely as he pleases, no one can control and no one should be allowed to destroy or use another human being in that way. Since corporations consist of human

beings operating under common direction, the rules of their governance must be based in political rather than property concepts.

The property metaphor is only a metaphor in the simple sense that the law does not in fact treat corporations as property or their shareholders as their owners in any consistent fashion. On the contrary, in publicly traded business corporations as we know them, shareholders own shares (which are property) but not the corporation. They have political—not property—rights in corporations.

Property rights which shareholders of publicly held corporations do not have, as a matter of corporate law, include all of the components of the “bundle of rights” that comprise actual property rights:

- The right to buy, sell, rent, lease, acquire, inherit, divide or consolidate corporate property or the corporation itself
- The right to control the corporation
- The right to exclude other from the corporation or its property
- The right to use corporate assets for the shareholder’s gain, pleasure or edification
- The right to destroy or waste the corporation or its property
- The right to consume corporate assets
- The right to donate or give away the corporation or its property to charities, friends or relatives
- The right to restrict ownership of the corporation to specified persons
- The right to determine or change the purposes for which corporate property will be dedicated or the uses to which it will be put
- The right to demand dissolution of the joint enterprise and separation of or monetization of the joint enterprise in order to allow an individual owner to separate from the collective
- The right to enter into contracts on behalf of the corporation
- The right to pledge or otherwise encumber corporate assets for the benefit of the shareholder or the shareholder’s creditors
- The right to invest corporate assets

- The right to grant easements, encumbrances, trusts or place other restrictions upon the corporation or its property
- The obligation to pay taxes on the property and income of the corporation
- The obligation to make whole persons injured by the corporation or its property
- The obligation to fulfill the corporation's contracts or pay damages for failing to do so
- The obligation to make restitution for, or accept punishment for, crimes or regulatory violations committed by the corporation or using its property

It is the right to control one's property that makes it a fundamental part of the liberal bundle of rights.²⁷ Property creates a sphere of autonomy and privacy in which owners may behave as they please without concern for government, public opinion, or powerful neighbors. But if a man's home is his castle, the corporation in which he owns shares certainly is not. Shareholders lack the most fundamental of all property rights: the right of the owner to decide, without regard to the views of others, how to use the property. Only the board of directors has the right to specify the purpose of the corporation or direct its operations.²⁸ The shareholders have no right to direct the board to exercise its discretion in any particular way,²⁹ and indeed, the directors have a fiduciary obligation to exercise their own judgment, which would be violated if directors followed shareholder instructions.³⁰

In the corporation, some of the basic property rights are held by the board of directors (or their agents) in their fiduciary capacities. Other property rights are held only by the corporation as an entity, and several do not exist at all. One of the most basic rights of full property ownership, for example, is the right to destroy. This right is particularly important because it protects the basic autonomy right of owners to use property as they see fit without regard to the common opinion: if owners have the right to destroy,

no one can complain if they merely use the property unconventionally. Under our corporate law, no one has a right to destroy corporate assets.³¹ Far from being autonomous and unanswerable, corporate decision makers are nearly always fiduciaries, bound to act in the interests (not the will or the whims) of the corporation, regardless of their personal preferences or values.³²

Shareholders do have more or less full property rights in their shares, including the rights to sell, destroy, consume, use, or pledge them without regard for the general opinion, and the obligations to pay taxes on them and be liable for their misuse. Shares, unlike the corporation itself, are thing-like in the sense that they have no will of their own, are inanimate, and so on. Thus, it makes sense to treat shares as property.

Conversely, the basic rights of shareholders with respect to the corporation are not property rights at all. Most importantly, shareholders have a right to vote for the board, typically on the basis of one share one vote, and to vote to ratify or disapprove board initiatives in a limited number of areas thought to be particularly fundamental.³³ Despite the anti-democratic nature of these elections, restricted to only one type of corporate participant and weighted by wealth rather than personhood, the right remains political—an aspect of collective governance, not individual property.

The shareholders do have a property-like right to a pro rata share of any dividend that the corporation has declared, but no right to have the corporation declare a dividend.³⁴ If the corporation winds up, shareholders have a right to a pro rata share of any assets that remain after all other claimants are paid in full, but no right to demand a winding up and no right to determine what other claims the corporation may cause to exist.³⁵ If shareholders are on the losing side of certain elections, they may have a statutory right to sell their shares to the corporation for a price determined by a statutory formula.³⁶ However, these rights are not enough to make shareholders into owners—any more than the right of municipal ratepayers

to pro rata assessments of property taxes makes homeowners into owners of the city.

There is one important exception. A single shareholder that owns all of a corporation's shares obtains control that looks like ownership of the corporation in something close to the normal sense. To be sure, the corporation remains formally independent of its shareholder. Thus, as a matter of law, only the board of directors can make the corporation's decisions, and directors continue to have fiduciary obligations to exercise independent judgment even when the corporation has only a single shareholder.³⁷ However, so long as the corporation pays its debts, only the sole shareholder would have standing to contest undue deference (and presumably the shareholder would have no interest in doing so).³⁸ Furthermore, a single shareholder may, in contrast to the normal rules, remove directors without cause even between normal annual shareholders' meetings.³⁹ In effect, these two deviations from standard corporate law make the directors function almost as if they were the sole shareholder's agents, despite the formal requirements of the statutes. The single shareholder exception, however, emphasizes the importance of the usual situation, in which directors are elected for a term and must maintain their independence from the share majority that elected them.

Even in the exceptional situation, the law emphasizes that shareholders do not own corporations. Piercing the corporate veil doctrine lurks in the never-too-distant background waiting to pounce upon shareholders that forget the difference between control and ownership. If the board of directors or the shareholder acts as if the shareholder actually owned the corporation—for example, by using corporate assets for the personal benefit of the shareholder or otherwise failing to distinguish between corporate and personal property, or by neglecting the formalities of board control—the normal response of the courts would be to deny the existence of the corporation, deeming the shareholder to be the owner of a sole proprietorship.⁴⁰ Shareholders usually view this result as a disaster: it

means that the shareholder is responsible for the corporation's torts, contracts, crimes, and taxes, just like any other owner of a business. In short, a shareholder with full property rights in the corporation is a shareholder who no longer has a corporation.⁴¹

The corporation, then, is not property in the ordinary legal sense, nor are its shareholders its owners. However, the property law metaphor claims that the corporation is like property and shareholders are like owners in at least five critical aspects. First, like owners, shareholders should be left alone within a fairly broad sphere of discretion, even though they have no autonomy or privacy interests in that sphere. Second, like property, corporations should have a presumption of inviolability and governmental deference, with the burden of persuasion on those who would interfere, even though corporate decision making processes suffer from every deficiency of ordinary governmental processes without any of the legitimacy of democratic voting or limitations of fundamental rights. Third, under the property analogy, corporations should be seen as private, even though public corporations are at least as large, collective, and powerful as most governmental agencies. Fourth, when treated as property, corporations appear to need to be protected against undue governmental interference; private autonomy does not need to be protected against them. Finally, and perhaps most importantly, the property analogy claims, without argument, that corporations ordinarily should be controlled by market forces with political intervention only at the margins. No one would make such a claim about the city governments, even when they are (as is usual) organized in corporate form.

The property metaphor rhetorically portrays corporations as foundations of human freedom instead of potentially powerful threats to it. Only by escaping the power of the metaphor can we begin to think more intelligently about the ways in which corporate bureaucracies must be directed, restrained, freed, and controlled to work for human interests. Corporations are political creations, making political determinations about collective

enterprises. The property metaphor helps to conceal the obvious democratic deficit in corporate decision making processes.

B. Market and Contract

If “corporation as property” is the leading metaphor of so-called “shareholder rights activists” and of lawyers and lobbyists seeking to protect corporations from regulation by the political process, the “corporation as a market governed by the law of contract” is the favorite metaphor of corporate law academics. Contract is the classic center of the liberal conception of an ideal society of free, equal, and autonomous people joining together on the basis of consent and not coercion.⁴² Of course, the conditions under which contract is free and consent is not coerced are controversial and often the subject of intense debate. Modern contract law is deeply conscious that few actual contracts fit Langdell’s central image of a fully negotiated agreement between equals.⁴³ In reality, most contracts have virtually all their terms determined by social norms. Whether consent is free or not is always a matter of degree, and in any event usually is limited to the choice of entering into a particular status relationship.⁴⁴

Still, the metaphor of the corporation as contract remains powerful, and the contract in the metaphor is Langdell’s, not Gilmore’s,⁴⁵ or an economist’s rather than a sociologist’s or a lawyer’s—that is, the contract law that corporate law is said to be based on is contract in a purely imaginary world of equals freely consenting to all the terms of a mutually beneficial private agreement. These contract metaphors evoke, consciously or unconsciously, Karl Marx’s famous description of the labor market as

a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller . . . are constrained only by their free will. . . . Equality, because . . . they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself. . . . Each looks to himself only . . . and just because they do so, do they all . . . work together to

their mutual advantage, for the common weal and in the interest of all.⁴⁶

The metaphor's assimilation of corporate law is to this thin contract law suggests that corporate law is an arena of private agreement, not public governance. On this view, we need not be concerned that employees experience the corporation as an external, coercive power: they are free even in the absence of a vote because they have consented, contractually, to the limits on their freedom. Just as contract permitted Hobbes to find freedom in autocracy,⁴⁷ it permits us to find democracy in corporate hierarchy. We need not be concerned that our most powerful institutions are free to choose their own constitutive law without regard for democratic processes,⁴⁸ or that they lack mechanisms for determining the collective views of those whose lives they affect as customers, sellers, employers, neighbors, or polluters—corporations, like the Hobbesian state, are simply the result of individual consent. The metaphor of contract suggests that where individuals have agreed, politics is unnecessary.

Contract images have the effect of concealing the organizational, governmental aspects of the firm. Instead, the corporation either disappears entirely or appears to be a private individual. Similarly, metaphors that portray the firm as if it were simply a spot market also make the bureaucracy, and the authority it exercises, disappear. In Alchian and Demsetz's classic contention,⁴⁹ there can be no power inside a corporation because every participant has the market right to quit at any time:

It is common to see the firm characterized by the power to settle issues by fiat, by authority, or by disciplinary action superior to that available in the conventional market. This is delusion. The firm . . . has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people.⁵⁰

Paralleling the claims of Socrates' laws,⁵¹ Alchian and Demsetz see continued participation as consent to all internal law, however seemingly

authoritarian. Arbitrary dicta is transmuted into private agreement. But while the right to emigrate, or quit, clearly limits the power of authority, we have long since abandoned any notion that rights of emigration alone make a society free.⁵² Anyone who thinks, like Alchian and Demsetz, that the firm “has no power of fiat,” clearly has never had a boss.

The metaphors of market and contract portray the corporation as a mere moment in the market—a web of relations that is anything but firm. They hide the reality of the firm as a distinctive enterprise with potentially interesting or problematic cultural norms of its own.

In fact, however, corporate law has relatively little to do with the imaginary purely private contract law of the “nexus of contracts” metaphor. The basic corporate structure is entirely statutory, not contractual: entity continuity, entity liability, centralized governance, and the basic fiduciary duties of both directors and employees. It would be extremely difficult to generate something similar by private contracting, because the corporate structure conflicts with basic contract norms on several levels. Thus, contract assumes at least formal agreement, but corporate shareholders need not individually agree to any corporate decision. Even when shareholders have the right to ratify board decisions, it is only by majority vote. Nor could private contracting parties agree by contract to make someone else liable for their actions; outside corporate law, economic actors cannot decline tort liability simply by announcing their intention to do so.⁵³ Indeed, even where corporate law looks most contractual, it is not: the decidedly non-voluntary norms of agency, not any negotiated agreement, create the basic terms of the employee/employer relationship.

Most importantly, the contract metaphor borrows its power from a spot market, in which actors meet momentarily to exchange product for cash. Corporations, however, arise precisely where spot markets are inadequate, as Coase taught us many years ago.⁵⁴ Contrary to Alchian and Demsetz, it is the power of fiat that makes a corporation sufficiently efficient to compete successfully with markets despite the obvious deadweight of

bureaucracy and dividends.⁵⁵ Corporations exist because planning is sometimes more efficient than markets; intelligent design (if it is intelligent enough) sometimes can succeed in the battle for survival against the forces of blind markets. Corporations replace markets with bureaucracy, competition with plans, and evolution with design.

The contract metaphor, thus, drives attention away from the most important fact about corporations—they are not so much moments *in* the market as moments *out of* the market. The politics of liberal states is largely an ongoing debate about the relative roles of democratic politics, professional administration, and markets in our decision making structures.⁵⁶ The contract metaphor places business corporations in the market camp, but they would better be seen as pre-democratic governments—administrative structures staffed by professionals but not answerable to democratic elections.

In practice most aficionados of corporation-as-contract use the metaphor in the tradition of Dr. Pangloss⁵⁷ via Herbert Spencer,⁵⁸ asserting that whatever is must be right, that those who take the most must necessarily have contributed the most, and that those who lose deserve it. Beginning with a presumption of equal bargaining power, they deduce that whatever results from the bargain must also be equal—if CEOs have increased their pay a hundredfold in a generation, and shareholders have doubled their returns, it must be because they are contributing more as well. That there is no evidence of any increased contribution is of no matter—metaphor substituted for reason as a justification for reverse Robin Hood expropriation by the powerful.

The contract metaphor is, however, more useful on a different front: it contradicts the claim of shareholder privilege implicit in the property metaphor. If the corporation is a nexus of contracts among equals, then shareholders are just contracting parties like all others, entitled to no more than what they have contracted for. Given that shareholders clearly have no

contractual right to any returns at all, the contract metaphor might suggest that shareholders should get nothing at all.⁵⁹

C. Agency

Agency, in contrast to contract, is inherently unequal. Agents have fiduciary duties to act on behalf of their principals, not the reverse.⁶⁰ Servants obey and masters order.⁶¹ Agency metaphors are usually used in corporate law to suggest that shareholders should be in charge, even if they seem not to be. If shareholders were principals and directors their agents, it would follow that directors should do what shareholders want, act in the shareholders' interests, and manage the firm for the shareholders. Moreover, the firm itself would seem to be a sort of alter ego of the shareholders, just a tool that shareholders use to act more effectively in the world.

All this is deeply confused as a matter of law. Corporations are no more agents of their shareholders than they are their property. Once again, piercing the veil doctrine makes this clear. Courts consistently state that shareholders that use a corporation as their agent have so violated corporate law principles that the corporation is not entitled to legal recognition.⁶²

In any event, corporate law is quite clear that directors are principals, not agents. As we have seen, they have a fiduciary duty to exercise independent judgment and may not follow shareholder orders. Moreover, they serve according to the terms of the corporate charter and statute, in contradiction to the fundamental agency rule that master and servant alike have an inalienable right to terminate the agency relationship at any time.⁶³ In actual law, directors of public corporations are servants of a sort, but the master to which they answer is not a person but a legal fiction—the hypothetical interests of a corporation and imaginary (undiversified) shareholders isolated from every community and social nexus. No one is entitled to tell the firm that it is time for it to focus on a goal other than survival and profit maximization.⁶⁴

Still, the simple expedient of referring to shareholders as principals and directors as their agents makes the same point as referring to shareholders as owners and the corporation as their property. Both metaphors contend that corporations ought to be operated on behalf of the shareholders, and both metaphors suggest that protecting corporate autonomy can be assimilated to protecting shareholder autonomy.

On a different level, the agency metaphor functions to minimize the political aspects of the corporation. Corporations govern their employees directly and their various investors, suppliers, customers, and other dependants in a looser sense. In a democratic society, this raises an obvious question: why are not the firm's subjects also its citizens? How can a legitimate government determine that the interests of some of its subjects are utterly irrelevant (except insofar as it is useful to pretend they are not), and that the views of all need be given no weight? If we thought of corporations as part of our ordinary government, the democratic deficit would be deeply troubling.

The agency metaphor simply elides the democratic challenge. On this view, employees are servants, not citizens. As agents, they have no independent will, no independent interests, no entitlement to their own views. Servants serve; they do not rule. That is why democracies teach their legislators to view themselves as the people's servants. In the corporate world, we take the opposite approach. We are the servants; the organization is the master.

The agency metaphor deflects the liberal fear that governmental institutions may become autonomous power sources in another way. Our CEOs are officeholders with obvious power over the rest of us, obviously able to appropriate vast amounts of social wealth for personal uses, obviously giving orders to subordinates in less-than-republican equality, obviously making decisions of enormous social importance with neither elections, political debate, nor strong legal limitations. The agency metaphor helps to hide this reality. In the agency metaphor, the actual

Decision makers are mere servants and agents, devoid of a will of their own. The CEOs disappear as potential Caesars. Instead, they are reduced to mere extensions of the needs, desires, and powers of their principal—in this case, the capital markets themselves.

But corporations and their directors are not agents, so the agency metaphor merely conceals these problems rather than solving them. Once we recognize that corporations are sources of power over citizens rather than necessarily servants to them, we must confront the problem straightforwardly. For over two centuries, we have been acutely aware that as much as we need state institutions, we must also take care that they do not oppress instead of free us. Corporate governance raises the same problems but has not received the same attention.

D. Personhood

Corporations are legal persons in the sense that the corporation, not the people who run it or invest in it, is liable for its contracts and torts. The law treats the corporation as the relevant legal actor, much as the classical international law system took cognizance only of sovereign states,⁶⁵ as slave codes made slaves into legal non-persons,⁶⁶ as family law in the days of coverture saw only male heads of households,⁶⁷ and even today ordinarily hides children behind their parents.⁶⁸ The metaphor of personhood, however, often goes far beyond recognition of the corporation's legal standing. Instead, the metaphorical description of a firm as a "person" becomes a rhetorical justification for treating the firm as if it had value independent from its usefulness to its participants. But, firms are not the same as the people who make them up. It is always an open question whether protecting the entity will protect or harm the people it affects: just as protecting the sovereignty of a state may or may not help its subjects, so too protecting the autonomy of a corporation has no necessary connection to the good of those dependent on it.

1. Entities

Sometimes the metaphor of personhood is taken quite seriously. For example, the Supreme Court has granted corporations extensive constitutional rights with little explicit consideration of whether granting a right to a bureaucratic organization is the same as granting a right to a human citizen.⁶⁹

Thus, the Court has granted corporations nearly the same First Amendment rights as citizens,⁷⁰ and more than foreign individuals,⁷¹ the only significant difference being that states may bar business corporations from contributing directly to individual political candidates in order to limit corruption.⁷² But there is no reason to think that granting First Amendment rights to corporations furthers political freedom or self-government.⁷³ The issue is precisely analogous to granting the state rights against its people. Granting free speech rights to governmental agencies would increase the power of autonomous bureaucracies to stray from the desires or needs of the electorate. It would be unlikely to improve our abilities to self-govern except in special circumstances.⁷⁴

Liberal political theory is based on the suspicion that governing institutions may prove to have interests and cultures of their own that can head them in directions other than those the people might choose.⁷⁵ In the case of business corporations, the law demands that the institutional decision makers set aside their personal views in order to make decisions based only on a narrow and restricted view of corporate—not social—interests as defined by the law⁷⁶. Thus, while we may worry that democratic institutions will not reflect the views of their constituents, we have designed business corporations to *guarantee* that they will not. Treating business corporations as legitimate participants in a democratic polity should be deeply disturbing.⁷⁷

The person metaphor conceals the corporation's groupness, obfuscating the internal difficulties of aggregate decision making. Instead, it pretends that a firm is a single, unified, pre-Freudian actor.⁷⁸ Thus, it again diverts

attention from the basic liberal suspicion of powerful governance structures able to diverge from the needs and desires of their participants. Externally, it conceals the challenge that corporate lobbying and other participation in the general political process present to maintaining American democracy. Internally, it conceals the difficult corporate law issues of ensuring that corporate managers manage the firm in the interests of all its human participants.

Even more disturbing, the metaphor portrays a tool as a goal, a means as an end. The leap from “entity liability” to “legal personhood” to “person” ends by treating the business corporation as if it were a Kantian ultimate value: a person in the non-legal sense.⁷⁹ Just as liberalism fought the fascist notion that the “state” or the “nation” is an end in itself, a value independent of its usefulness to its subjects, so too should it be horrified at the idolatrous notion that we ought to worship business corporations—which are mere human creations and bureaucracies at that. Drawing aside the veil of personhood rhetoric is a first step towards bringing to the corporate sphere standard liberal suspicion of untamed power and awareness of the conflicts between individual and group.

2. Aggregates

Sometimes, in contrast, the law looks right through the corporation, as if it did not exist. In the tax area, for example, the corporate income tax is often denounced as “double taxation”⁸⁰—as if the taxes paid by corporations were actually paid by their shareholders, which, of course, they are not. Corporate income taxes are paid by the corporate taxpayer. There is no particular reason to think that if publicly traded corporations were relieved of their social obligations they would turn their increased profits over to their shareholders. On the contrary, in a competitive market, prices would adjust to reflect the lower private costs of production, and the reduced taxes would be appropriated by consumers.⁸¹

As another example, some constitutional decision view corporate property or corporate speech as if it were shareholder property or shareholder speech.⁸² As we have seen, this is wrong as a matter of state law. Shareholders do not own corporate property or control corporate speech any more than they own or control the corporation itself. The actions of the entity can never be simply attributed to its participants.⁸³

Like the agency and market metaphors, the aggregate version of the corporate person image tends to make the corporation vanish altogether. Again, this rhetorical move conceals the corporation as a governance institution necessarily raising the standard troubling issues of the use and restraint of power. Just as we know that governments, even democratic governments, will only imperfectly reflect the general will—and that the general will itself is likely to be contradictory, conflicted, and problematic—we should assume that business corporations, which have no pretenses to democracy, will act in ways that the people who compose them never would. Treating the whole as the same as its parts is no more reasonable here than would be treating a human being as the same as the chemicals of which she is made. We need to escape the rhetorical trap of substituting the parts for the whole in order to intelligently discuss how to make the whole work in a way that maximally benefits us all.

IV. CONCLUSION

The time has come to return to an older view.⁸⁴ Corporations need to be reconceptualized in distinctively political terms. Like other parts of our government, corporations are organizations we have created to be tools for our purposes—with a tendency to create their own independent internal norms, culture, and purposes. In short, our tools escape our control. The next step of the great liberal project—creating space for human freedom by restraining illegitimate power—must be understanding the great corporations as centers of power. Simultaneously, we must remember the

most fundamental aspect of corporate law as it exists today: the corporation is a conscious creation of human creativity.

Gertrude Stein famously complained of a city in California that “there is no there there.”⁸⁵ In the world of business, corporate law decides whether and when there is a there there—when there is an entity to act, to be acted upon, to be responsible, to be regulated. It is corporate law that decides, for example, who is in charge of the sweatshops that human rights activists seek to eliminate.⁸⁶ Today, as a general rule, corporate law leaves that decision entirely to the option of the regulated body. That is, the corporation itself decides if it wants to be responsible for the sweatshop or any other given activity or distanced from it. Consequently, we must always think of corporations as entities that, among other things, determines its own existence, boundaries and purpose. This is an aspect of sovereignty that we deny even to our states. If we are concerned about government as a source of power and not merely a restraint on private power, then we should be even more concerned about these self-governing, self-defining, autocratic, unanswerable, private and public power sources.

The issue of who is in charge, and in charge of what, is central to a political conception of the corporation. The privatizing metaphors of corporate law marginalize the problem. If the corporation is no more than a series of private agreements between individuals, or an individual itself, seemingly we need not worry about how it behaves as a government-like autonomous actor. Escaping the privatizing metaphors will help us to confront the true dimensions of our project.

The political metaphors will help us to think about the corporation from the inside. The publicly traded corporation is a powerful actor in our society. Regulatory law seeks to set outer limits on its discretion. Simply urging a corporation to profit maximize within the limits of the law is not enough—if only because part of the law setting those limits is corporate law’s permission for the corporation to seek to modify regulatory law to allow more private profit even at social expense. Milton Friedman’s

simplistic call to allow business to tend to business must be inadequate so long as the law directs business corporations to maximize profits even by subverting the political process or changing the law.⁸⁷

Business corporations combine vast power with vast discretion. Their decision makers have neither authority nor responsibility to consider the full implications of their acts. Furthermore, the external restraint model suffers from a fatal internal flaw: corporate law grants corporations permission, and the market pressures them to take advantage of that permission, to use the very resources the law has granted them as tools to evade or change those very restraints. So long as corporations have power, wealth, and the right to use that power and wealth to influence the political regulatory process, external restraints will never be sufficient. Rather than simply restraining the corporation, we need to point it in the right direction: creating human freedom within the limits of market reality.

¹ Daniel J.H. Greenwood, S.J. Quinney Professor of Law, S.J. Quinney College of Law, University of Utah. See <http://www.law.utah.edu/greenwood>. This essay is a lightly revised version of a talk presented at the New Strategies for Justice Conference: Linking Corporate Law with Progressive Social Movements, sponsored by the Equal Justice Society, the Center on Corporations, Law & Society at Seattle University School of Law and the University of California at Los Angeles School of Law Critical Race Studies Concentration, U.C.L.A., April 7–9, 2005. Special thanks to the organizers of and participants in the conference for useful comments and interesting ideas.

² On the political origins of the corporation, see Daniel J.H. Greenwood, *The Semi-Sovereign Corporation* (Mar. 3, 2005) (unpublished manuscript, <http://www.law.utah.edu/greenwood>) [hereinafter Greenwood, *Semi-Sovereign*].

³ This is the fundamental insight of R.H. Coase, see R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (1937), reprinted in R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* 33 (1988), although less clear in some of his followers.

⁴ See, e.g., REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 18 (2004).

⁵ See Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 *COLUM. BUS. L. REV.* 773 (emphasizing conflict between self-interested market norms and reality that a firm's profit maximization normally depends on altruistic team playing) [hereinafter Greenwood, *Enronitis*]; Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 *U. PA. L. REV.* 1735 (2001) (emphasizing the importance of trust in functioning of securities market); Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 *J. CORP. L.* 869 (1999) (emphasizing trust in corporate functioning).

⁶ See generally EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Thomas H.D. Mahoney ed., Liberal Arts Press, Inc. 1955) (1790). Burke discusses states, but the same principles apply to corporations:

On the scheme of this barbarous philosophy, . . . laws are to be supported only by their own terrors and by the concern which each individual may find in them from his own private speculations or can spare to them from his own private interests. In the groves of *their* academy, at the end of every vista, you see nothing but the gallows. Nothing is left which engages the affections on the part of the commonwealth. On the principles of this mechanic philosophy, our institutions can never be embodied, if I may use the expression, in persons, so as to create in us love, veneration, admiration, or attachment. But that sort of reason which banishes the affections is incapable of filling their place . . . There ought to be a system of manners in every nation which a well-informed mind would be disposed to relish. To make us love our country, our country ought to be lovely. . . . But power, of some kind or other, will survive the shock in which manners and opinions perish; and it will find other and worse means for its support.

Id. at 87–88 (footnote omitted).

⁷ See, e.g., KRAAKMAN, *supra* note 4; William W. Bratton, Jr., *Nexus of Contracts Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989); Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). More recently, scholars have reconsidered Coase's point that firms exist precisely because they solve production problems more successfully than the markets with which they compete, see Coase, *supra* note 3, and have begun emphasizing intra-firm competition for the firm surplus. See, e.g., OLIVER E. WILLIAMSON, *ECONOMIC INSTITUTIONS OF CAPITALISM* (1985) (emphasizing transaction costs, bilateral monopolies and sunk costs); Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, J. CORP. L. (forthcoming 2005) (emphasizing team production, bilateral monopolies and sunk costs); Daniel J.H. Greenwood, *Are Shareholders Entitled to the Residual?* (draft, available at <http://www.law.utah.edu/greenwood>) (emphasizing effects of sunk cost of capital in intra-firm competition over firm surplus) [hereinafter Greenwood, *Residual*]. A few scholars have also begun to explore the implications of the conflict between contract's presumption of arms-length equality and agency's mandatory subservience. See, e.g., Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B. C. L. REV. 283 (1998).

⁸ See, e.g., Greenwood, *Enronitis*, *supra* note 5; Daniel J.H. Greenwood, *Markets & Democracy: The Illegitimacy of Corporate Law*, U. MO. KAN. CITY. L. REV. (forthcoming 2005) [hereinafter Greenwood, *Illegitimacy of Corporate Law*].

⁹ By "liberal" principles, I mean the basic notions of limited government: that governments are formed to promote the purposes of individuals and not the other way around, see, e.g., U.S. DECLARATION OF INDEPENDENCE; JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* (Prometheus Books 1986) (1690), and that individuals

retain a sphere of privacy and certain fundamental rights that may not be infringed by even democratically elected governments, *see, e.g.*, U.S. CONST. amends. I-X, XIII, XIV; *Griswold v. Conn.*, 381 U.S. 479 (1965) (fundamental liberties); JOHN STUART MILL, ON LIBERTY (Curran V. Shield ed., Liberal Arts Press 1956) (1859). On these negative rights, *see* Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 MD. L. REV. 220, 223 (2005). By “democratic” I refer to the principle that the government is answerable to the majority of the citizens, in some mediated fashion. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964) (mandating one person one vote within context of single member winner-take-all districts). By “republican” I refer to the idea that “we the people” are the self-governing source of the law; that the government does not derive its legitimacy from an external source such as conquest or heredity; and that the people are not divided into “estates” or classes with fundamentally different rights to political participation. *See, e.g.*, U.S. CONST. pmbl. (“We the people”); U.S. CONST. art. I, § 9, cl. 8 (nobility clause); U.S. CONST. art. IV, § 4 (republican form of government clause); U.S. CONST. amend. XIV (equal citizenship); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (G.D. H. Cole trans., J.M. Dent & Sons, Ltd. 1973) (1762). *But see* U.S. CONST. art. I, § 9 cl. 1 (slave trade clause); U.S. CONST. art. IV, § 2, cl. 3 (fugitive slave clause)

¹⁰ *Shelley v. Kraemer*, 334 U.S. 1 (1948) (discussing limits of state action doctrine and boundary between state and private action).

¹¹ *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (holding that the due process clause does not protect citizens against corporation even in highly regulated industry considered essential to basic conditions of civilized life).

¹² *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹³ Municipal corporations are, in non-legal English, simply cities. Cities were among the earliest corporations: independent, self-governing entities with autonomy rights against the king. *See* Greenwood, *Semi-Sovereign*, *supra* note 2. Modern American cities continue to be organized as corporations, and retain significant autonomy rights as a matter of practice and, often, state constitutional law. *See, e.g.*, UTAH CONST. art. XI, § 5 (setting out procedure for city voters to create a city charter and guaranteeing incorporated cities certain powers and authorities necessary for self-government).

¹⁴ *City of Columbus v. Ours Garage & Wrecker Serv. Inc.*, 536 U.S. 424 (2002) (holding that municipalities are creatures of the state government and subservient to them); *Rust v. Sullivan*, 500 U.S. 173 (1991) (allowing legislature to restrict the political interventions even of non-governmental entities to the extent that they are governmentally funded).

¹⁵ *See First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978). *Bellotti*, despite much criticism, remains the governing law. Under *Bellotti*, corporate speech is protected without consideration of the nature of the speaker or whether it is a legitimate participant in political decision making. *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995 (1998) [hereinafter Greenwood, *Essential Speech*].

¹⁶ *See* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985–86); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L. J. 1593, 1640–49 (1988); Carl J. Mayer,

Personalizing the Impersonal: Corporations and the Bill of Rights, 4 HASTINGS L. J. 577 (1990).

¹⁷ See, e.g., Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Top/Bottom*, 23 YALE L. & POL'Y REV. 381 (2005) (discussing corporate right to choose law) [hereinafter Greenwood, *Mysterious Race*].

¹⁸ Jackson, 419 U.S. at 354.

¹⁹ *United States v. Stanley* (The Civil Rights Cases), 109 U.S. 3 (1883); Aldolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952).

²⁰ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

²¹ See *infra*, note 72 (discussing *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886) (holding corporation to be a “person” protected by Fourteenth Amendment)); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (voiding anti-block busting measure as violation of corporation’s speech rights).

²² U.S. CONST. amends. IV-V.

²³ Under current doctrine, Congress probably has the power to regulate privacy in the workplace under the interstate commerce clause, providing that the matter affects interstate commerce, see *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995) (holding, counterintuitively, that violence against women and gun violence in schools do not affect interstate commerce), and that the corporation’s First Amendment rights are not implicated, see, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (restricting liquor advertising ban); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1994) (voiding ban on advertising malt liquor alcohol content)).

²⁴ See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (2002).

²⁵ See, e.g., *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (Fourth Amendment warrant required to “invade” corporate offices); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (Fourth Amendment applies to seizure of corporate documents); *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996) (holding that a statute requiring a corporation to make purely factual disclosure of presence of milk from rBST treated cows “contravene[s] core First Amendment values”); Daniel J.H. Greenwood, *First Amendment Imperialism (a response to Michael Walzer’s Leary Lecture)*, 1999 UTAH L. REV. 659.

²⁶ See, e.g., HENRY HANSMAN, *THE OWNERSHIP OF ENTERPRISE* (1996) (assuming that shareholders “own” public corporations). Although the ownership metaphor is widespread, even among authors who also accept the seemingly incompatible “nexus of contracts” metaphor, it has been widely critiqued. See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (arguing that shareholders are not “owners”) [hereinafter Blair, *Team Production*]; Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON 395, 396 (noting that pursuant to nexus of contracts theory, shareholders are not owners); Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021 (1996) (arguing that not only do shareholders not “own” corporations, but the law constructs fictional shareholders with fictional interests

which drive corporations in directions no owner would choose) [hereinafter Greenwood, *Fictional Shareholders*].

²⁷ See, e.g., LOCKE, *supra* note 9 (emphasizing importance to freedom of protecting property rights).

²⁸ DEL. CODE ANN. tit. 8, § 141. (2005); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).

²⁹ SEC Reg. § 14a-8 (2003) (barring shareholder proposals that direct directors to act in a particular way).

³⁰ *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (holding board members personally liable for allowing shareholders to vote on proposal to sell company without first exercising their own judgment to conclude that the proposal was in the company's interest).

³¹ *Brehm v. Eisner*, 746 A.2d 244, 262 (Del. 2000) (discussing corporate waste doctrine).

³² See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 682-85 (Mich. 1919) (holding that directors were barred from following will of shareholder majority); MODEL BUS. CORP. ACT § 8.30(a) (duty of care); Greenwood, *Fictional Shareholders*, *supra* note 26; Blair, *Team Production*, *supra* note 26.

³³ DEL. GEN. CORP. CODE § 211 (2005) (shareholders meeting); *id.* § 212 (share voting); *id.* § 242 (amendment of certificate of incorporation); *id.* § 251 (merger); *id.* § 271 (sale of all assets); *id.* § 275 (dissolution).

³⁴ *Id.* § 172.

³⁵ *Id.* § 278.

³⁶ *Id.* § 262.

³⁷ *Id.* § 141(a).

³⁸ Ordinarily, only a current shareholder may bring a derivative action to enforce the directors' duty. MODEL BUS. CORP. ACT § 7.41.

³⁹ DEL. GEN. CORP. CODE § 141(k) (providing for the removal of directors with or without cause by majority of shares at any election, with exceptions for corporations that have cumulative voting or staggered boards). Staggered boards are quite common, precisely in order to prevent shareholders from removing the incumbent directors at will. However, in a corporation with a single shareholder, these rules become irrelevant. See *id.* at § 211(b) (providing that election of directors is ordinarily at a shareholder meeting, ordinarily held at fixed time or when called by directors, but that shareholders by unanimous consent may elect directors at any time); *id.* at § 228 (providing that shareholders may act by consent without a meeting).

⁴⁰ As David Ellerman has pointed out, ownership of unincorporated businesses is also somewhat fictional. A business consisting of employees is a human enterprise, and it can be no more fully owned than can the human beings of whom it consists. Still, the legal system grants sole proprietors many aspects of property ownership with respect to their enterprises, just as slave owners had many aspects of property ownership with respect to their slaves. See David Ellerman, *Translatio versus Concessio: Retrieving the Debate about Contracts of Alienation with an Application to Today's Employment Contract*, 33 POL. & SOC'Y 449 (2005).

⁴¹ More precisely, the shareholder will lose a piecing the corporate veil case any time that corporate status matters, and thus will be treated as if the shareholder owned the

corporate assets just when the shareholder would prefer not to.

⁴² See, e.g., LOCKE, *supra* note 9; JOHN RAWLS, A THEORY OF JUSTICE (1971).

⁴³ C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880). In modern economically oriented legal academics, the traditional assumption of full autonomous agreement is given a new form, embedded in the definition of efficiency. If money is taken to have a fixed value then, by definition, any trade must be value enhancing, and all contracts are both voluntary and efficient. See, e.g., DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 22 (2000) (noting but then ignoring the significance of the declining marginal utility of money for efficiency arguments). In contrast, if we take seriously the declining marginal utility of money, it becomes obvious that the rich will often outbid the poor (in money terms) not because they value the product or service more, but because they value money less. Thus, seemingly free and "efficient" contracts will unfairly favor the rich. This problem is compounded by the fact that in the modern world most important goods are positional (that is, what matters is not absolute amounts but relative standing), see ROBERT H. FRANK, LUXURY FEVER (2000); THORSTEIN VEBLEN, THEORY OF THE LEISURE CLASS (1934), so that much competition is over status and therefore necessarily zero-sum. If competition is frequently zero-sum and economic (dollar denominated) efficiency is not conducive to happiness or health, see, e.g., RICHARD WILKINSON, MIND THE GAP (2000) (arguing that inequality is bad for health), then the basic argument for routinely enforcing contracts even when they appear facially unfair loses much of its appeal, even without taking into account problems of limited rationality.

⁴⁴ See generally GRANT GILMORE, THE DEATH OF CONTRACT (1974) (arguing that contract law, like tort, largely involves enforcing social norms, not individual agreements).

⁴⁵ *Id.*

⁴⁶ 1 KARL MARX, CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION 172 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Progress Publishers 1971) (1867).

⁴⁷ HOBBS, LEVIATHAN (Oxford Press 1909) (1651).

⁴⁸ Greenwood, *Illegitimacy of Corporate Law*, *supra* note 8 (discussing implications of free corporate choice of law); Greenwood, *Mysterious Race*, *supra* note 17.

⁴⁹ Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

⁵⁰ *Id.* at 777.

⁵¹ Plato, *Apology*, in PLATO: COMPLETE WORKS 17 (John M. Cooper ed., 1997).

⁵² LOCKE, *supra* note 9 (arguing that citizens have effectively consented to the law by accepting their benefits and failing to emigrate). Despite its impressive pedigree and its occasional use in domestic politics (critics of the US policy in Vietnam, for example, were repeatedly told they should move to the Soviet Union, as if their continued acceptance of citizenship were a waiver of the right to dissent), this theory has few serious proponents today. The right to emigrate is an important aspect of human freedom, but even those who decline to abandon their patrimony are entitled to liberty.

⁵³ Ordinary tort law says that actors are liable for their torts, but corporate law says that shareholders are not liable for corporate torts. So I can avoid liability for my business's torts by incorporating.

⁵⁴ Coase, *supra* note 3.

⁵⁵ Greenwood, *Residual*, *supra* note 7.

⁵⁶ Daniel J.H. Greenwood, *Akhnai: Legal Responsibility in the World of the Silent God*, 1997 UTAH L. REV. 309 (discussing democratic decision making); Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781 (2001).

⁵⁷ VOLTAIRE, *CANDIDE OR OPTIMISM* 114 (Norman L. Torrey ed., Appleton-Century-Crofts 1946) ("All is for the best in this best of all possible worlds").

⁵⁸ HERBERT SPENCER, *SOCIAL STATICS* (1969) (postulating, in so-called "social Darwinism" theory, that the poor deserve to be poor because they are poor).

⁵⁹ As I argue in *Residual*, *supra* note 7.

⁶⁰ RESTATEMENT (SECOND) OF AGENCY §§ 1, 13.

⁶¹ *Id.* § 2 ("a master ... controls or has the right to control the physical conduct of [the servant]."); *id.* § 14 ("a principal has the right to control the conduct of the agent...").

⁶² *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58 (N.Y. 1926) (Cardozo, J.) (using "general rules of agency" to determine that corporate form should be disregarded when corporation is agent of shareholder).

⁶³ RESTATEMENT (SECOND) OF AGENCY § 118 (either principal or agent may terminate relationship at any time); *cf.* UNIF. P'SHIP ACT § 31 (similar rule with respect to partners). *See also* *Guz v. Bechtel Nat'l Inc.*, 8 P.3d 1089, 1100 (Cal. 2000) (an "at-will employment may be ended by either party at any time without cause, for any or no reason") (internal quotations omitted); Greenfield, *Residual*, *supra* note 7.

⁶⁴ *See generally* Greenwood, *Fictional Shareholders*, *supra* note 26.

⁶⁵ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 57 (2004).

⁶⁶ *See generally* ROBERT COVER, *JUSTICE ACCUSED* (1975).

⁶⁷ 1 SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *430 (William Carey Jones ed., 1916), *discussed in* Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1140; *cf.* *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953), *discussed in* Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 541-42.

⁶⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972).

⁶⁹ In the seminal case of *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886), the United States Supreme Court declared that business corporations were "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment (although no one has ever contended that they are "persons" for purposes of the apportionment clause of the next section of the same amendment). *Id.* at 396. The *Santa Clara* Court offered no justification whatsoever for its reading of the Amendment, which defies both ordinary English grammar and the specific history of the Civil War. (The entire discussion of the issue appears in the Reporter's Note: "Before argument Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a

State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.” *Id.*) Nor has it remedied that omission in the 119 years since. The closest the Court has come to a reasoned discussion of the issue is Justice Jackson’s explanation of why he did not address the issue in his main opinion in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 574 (1949) (separate opinion of Jackson, J.).

⁷⁰ *Bellotti*, 435 U.S. at 790-92.

⁷¹ *See* *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972) (holding that distinguished foreign scholar has no First Amendment right to speak in U.S. and potential audience’s rights are highly limited).

⁷² *Tillman Act*, Pub. L. No. 36, 34 Stat. 864 (1907), codified at 18 U.S.C. § 610. *See also* *United States v. Int’l Union*, 352 U.S. 567 (1957). However, the firm may finance a PAC and “invite” its employees to contribute money to the PAC which will then be distributed to candidates. *Federal Election Campaign Act*, 2 U.S.C. § 441b (2005); *McConnell v. Federal Election Com’n*, 540 U.S. 93, 118 & n.3 (2003).

⁷³ Greenwood, *Essential Speech*, *supra* note 15.

⁷⁴ Granting free speech rights to governmental bureaucracies or their employees would, in effect, grant those institutions autonomy from the political process and thus be in direct contradiction to the basic principle of electoral accountability. We do grant free speech rights, in effect, to judges, state university professors, and to a much lesser extent, civil servants below the policy level. But judges and civil servants are expected to set aside their own views in favor of policies and rules promulgated by elected officials and their political delegates, and professors, of course, have political power only insofar as they can persuade.

⁷⁵ *See, e.g.*, ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACIES* (Eden & Cedar Paul trans., 1962).

⁷⁶ Greenwood, *Fictional Shareholders*, *supra* note 26.

⁷⁷ For further discussion, see Greenwood, *Essential Speech*, *supra* note 15.

⁷⁸ Theories of the corporation as a person never seem to have in mind real people, who are usually neurotic and conflicted, with multiple, internally inconsistent values, multiple loyalties, and roles each with its own ethical and aesthetic demands, imperfect information, cognitive errors, and so on. The “person” the metaphor invokes, instead, is fully rational and interested only in maximizing profit: homo economicus, not homo sapiens.

⁷⁹ *See, e.g.*, RAWLS, *supra* note 44.

⁸⁰ *See, e.g.*, R. Glenn Hubbard, *How to Deflate Overblown Fears of Deflation*, WALL ST. J., June 9, 2003, at A19.

⁸¹ In less competitive markets, where the firm might be able to retain the funds formerly paid in taxes, there is still little reason to think that shareholders would get the benefit. *See* Greenwood, *Residual*, *supra* note 7.

⁸² *San Mateo v. Southern Pac. R.R. Co. (The Railroad Tax Cases)*, 116 U.S. 138 (1885) (justifying granting rights to corporation on assumption that corporate rights are the same as rights for the members of the corporation; a citizen should not lose constitutional rights

the “moment the person becomes a member of a corporation”); *cf.* Greenwood, *Illegitimacy of Corporate Law*, *supra* note 8.

⁸³ Even Jean-Jacques Rousseau, whose theory of the ‘general will’, *see* ROSSEAU, *supra* note 9, is generally seen as a locus classicus of the identification of the individual with the whole, recognized that the conditions under which this identification might happen are extraordinarily rare (and in the view of most modern readers, not particularly attractive). The Rousseauian “legislator” must fundamentally, and apparently forcibly, change his human material to mold them into potentially “free” citizens. (See his description of Sparta in JEAN-JAQUES ROSSEAU, *CONSIDERATIONS ON THE GOVERNMENT OF POLAND* (1772)). For those of us who prefer not to be remolded, conflicts between individuals and the group are central issues of any decent politics.

⁸⁴ *See* Greenwood, *Semi-Sovereign*, *supra* note 2 (discussing the political origins of the business corporation in the great imperialist trading companies; in the beginning, Burke understood that corporations were inherently political.).

⁸⁵ GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 298 (Exact Change 1993) (1937). She was referring to Oakland, but the aphorism is more often reused in connection with other, less determinate conurbations.

⁸⁶ *See generally* *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002) (describing allegations of sweatshop production), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003).

⁸⁷ “There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.” Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, in *ETHICAL ISSUES IN BUSINESS* 159 (Thomas Donaldson & Patricia H. Werhane eds., 1999).