

## What Is a Corporation? Liberal, Confucian, and Socialist Theories of Enterprise Organization (and State, Family, and Personhood)

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[I]t is a serious oversimplification to categorize modern Western legal systems as ideological reflections of capitalism. Much modern law is more feudal in character than capitalist. Much defies any characterization in socioeconomic terms. A more complex system of categorization and characterization is needed, which will draw not only on types of economic and political formation but also on philosophical, religious, and other kinds of criteria.<sup>1</sup>

– Harold J. Berman

Contract, that greediest of legal categories, which once wanted to devour the state, resents being told that it cannot painlessly digest even a joint-stock company.<sup>2</sup>

– Frederick W. Maitland

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\* Professor of Law, Emory University. I thank the organizers of the Adolf A. Berle Jr. Symposium on Capital Markets, the Corporation, and the Asian Century for inviting me to present this essay at the University of New South Wales in May 2013. Many thanks also for the opportunity to present both earlier and subsequent versions of my argument at the Insead-Wharton conference on The Moral Responsibility of Firms at Fontainebleau, France; the Seminar on Implementation of International Labor Standards in the PRC at the University of Helsinki; the Sloan-Georgetown Project on Business Institutions at Georgetown University Law Center; and the Seminar on Comparative Law Method at Duke Law School. I wish to thank all audiences for their questions and comments. I am especially grateful to Margaret Blair, Bill Bratton, Chen Yifeng, Don Clarke, David Eng, Martha Fineman, Doug Howland, Don Langevoort, Ulla Liukkunen, Ralf Michaels, Nico Howson, Chuck O’Kelley, Justin O’Brien, Eric Orts, Jed Rakoff, Craig Smith, and Lynn Stout. Research for this essay has been supported in part by the Academy of Finland’s project on Labor Standards Implementation in China: Legal Architecture and Cultural Logic.

1. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 557 (1983).

2. Frederick W. Maitland, *Introduction* to OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* xxiv–xxv (Frederick W. Maitland trans., Cambridge Univ. Press 1987).

## I. INTRODUCTION

What is a corporation? An easy, but not very informative, answer is that it is a person—a legal person, that is. More substantive answers suggest that it is a moral person, a person/thing, a production team, a nexus of private agreements, a city, a semi-sovereign, a (secular) God, or a penguin (kind of).<sup>3</sup> Surprisingly, despite the economic, political, and social importance of the corporate form, we do not have a generally accepted legal theory of what a corporation is, apart from the law’s questionable assertion that it is a “person.” Insofar as legal scholars theorize corporation law, they draw predominantly on *economic* theories of “the firm”—economists’ umbrella term for business enterprise.<sup>4</sup>

In this speculative essay, I hope to place the idea, and law, of the corporation in a comparative context and to suggest, following the English legal historian Frederic Maitland, that corporation law is a “theme from the borderland where ethical speculation marches with jurisprudence.”<sup>5</sup> I do so not to question the utility of economic theories of the corporation as such but to suggest that by thinking in terms of broader concepts—such as organization of economic enterprise more generally—and by considering those concepts in the context of the larger political

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3. See, e.g., Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 3629 (2002); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 248 (1999); Claire Moore Dickerson, *Corporations As Cities: Targeting the Nodes in Overlapping Networks*, 29 J. CORP. L. 533 (2004); Peter A. French, *The Corporation As a Moral Person*, 16 AM. PHIL. Q. 207 (1979); Katsuhito Iwai, *Persons, Things, and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999); Michael C. Jensen & William H. Meckling, *Theory of the Firm*, 3 J. FIN. ECON. 3056 (1976); Douglas Litowitz, *The Corporation As God*, 30 J. CORP. L. 501 (2005); Daniel Greenwood, *The Semi-Sovereign Corporation* (Utah Legal Studies Paper No. 05-04, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=757315](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=757315).

4. In his recent critique of economic theories of the firm Eric Orts insists that such theories are inadequate insofar as they fail to take account of legal institutions. His own analysis, demonstrating law’s critical role in the organization of corporations, is best regarded as an interdisciplinary account, rather than a solely legal one (which is a strength, not a weakness, of Orts’s method). See ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* (2013). While economic theories of the firm dominate the analysis of corporation law, I do not wish to suggest that they occupy the entire field. See, e.g., Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. SOC. JUSTICE 181 (2005); Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person*, 36 AM. J. COMP. L. 130 (1988); James Boyd White, *How Should We Talk About Corporations? The Languages of Economics and of Citizenship*, 94 YALE L.J. 1416 (1985).

5. 3 FREDERIC MAITLAND, *Moral Personality and Legal Personality*, in THE COLLECTED PAPERS 304, 304 (H.A.L. Fisher ed. 1911).

economy in which economic enterprise is necessarily embedded, we will be able to see better the utility and limits of any particular theory.<sup>6</sup>

Below, I outline theories of enterprise organization in three ideal-typical worlds that I call liberal, Confucian, and socialist. My template for liberalism in this sense is the United States while the main source of my idealized notions of Confucian and socialist polities are late imperial China and the People's Republic of China before the inception of economic reforms in 1978, respectively. Exemplifying distinctive political and moral economies, they help us see more clearly some of the assumptions we make about (U.S.) corporation law. At the outset, I want to state that my aim here is not to advocate or defend any one of the three theories I outline below. To the contrary, I argue that each of them has distinctive conceptual difficulties in justifying the organization of economic enterprise in the form of corporate entities.<sup>7</sup> None of the theories is self-evidently superior to the others. Collectively, they offer a range of different possibilities with distinctive social, political, and moral visions. Rather, what a comparative analysis of different theories of enterprise organization can do is to bring to focus the cultural specificity of each. What economists ordinarily call *the* theory of the firm is in fact best thought as a *liberal* theory of the firm, which assumes in turn a particular division of labor among the institutions of the market, the state, and the family. Stated in the parlance of economics, not only institutions of the material kind but even our theories about them can become path-dependent, losing sight of the historical contingency of the phenomena they seek to analyze.

In Part II, I briefly sketch the broad ideological contours of liberalism, Confucianism, and Chinese state socialism, while Part III examines the theoretical status and place of economic enterprise in each. Part IV analyzes some of the ways in which all three theories of enterprise organization resort to distinctive ideological fictions to maintain their internal coherence: fabrications of corporate personhood, invented kinship, and

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6. I am by no means the only scholar to argue for broader theoretical frameworks. *See, e.g.*, HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996); KATHERINE S. NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL STUDIES* (1983). For a broadly functionalist approach in an expressly comparative frame, see REINER H. KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (Reiner H. Kraakman et al. eds., 2004).

7. I use a minimalist definition of the corporation, borrowing from SHAW LIVERMORE, *EARLY AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT* (Beard Books 2000) (1939). For Livermore, an enterprise takes on "corporate" characteristics insofar as it institutes a division of labor among individuals who participate in it solely as investors, on the one hand, and persons who manage its operation, on the other—that is, a separation between ownership and management, which typically occurs as the size and complexity of an enterprise increase.

aspirational unity in a socialist ideal of “the people,” respectively. Part V considers the practical implications of the preceding analysis in the context of the reform of Chinese state-owned enterprises. Part VI concludes.

## II. IDEOLOGIES AND POLITICAL ECONOMIES

What are some key assumptions about the relationship among the state, the market, and the family that inform U.S.-style liberal capitalism, political theories of Chinese Confucianism, and pre-1978 Chinese state socialism? Needless to say, there are many kinds of liberalism, Confucianism, and socialism. What I try to do below is to set out key terms of one particular type of liberalism (U.S. liberal capitalism), one type of Confucianism (ideology of the late imperial Chinese state), and one type of socialism (state socialism of the PRC before the current era of economic reforms). I have chosen them, not because they are especially worthy examples of the ideologies they represent, but because they represent historically significant instances of each.

It is also important to note that insofar as the accounts below pertain to *ideologies*, they must not be confused with descriptions of how any of the societies to which they refer have been organized in fact.<sup>8</sup> Moreover, as ideal-typical constructions, they are not fully accurate historical descriptions even of the ideologies of their respective societies. Rather, they focus on certain salient aspects of each for the purpose of facilitating a comparative analysis.

### A. Liberalism: State, Market, and Family

It is a key premise of the modern liberal state that the appropriate means of regulating a social interaction depends on the nature of the interaction to be regulated.<sup>9</sup> As that state is imagined in the United States, all of social life is divisible into autonomous spheres that operate, or ought to operate, relatively independently of each other with a unique rationality—a governing logic—that is proper to it. At the highest level of generalization, there are three distinct spheres: the political sphere of the state, the economic sphere of the market, and a residual sphere of relations of interpersonal intimacy.<sup>10</sup> Tellingly, this last sphere is the

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8. My definition of ideology is Althusserian, as that which “represents the imaginary relationship of individuals to their real conditions of existence.” LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY, AND OTHER ESSAYS* 162 (1971).

9. See generally MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

10. One major aspect of modern life that seems to be missing altogether in this schema is culture. Insofar as the term refers to artifacts of high culture, we might locate it in the intimate sphere,

least well-defined, and even the political and economic vocabulary for describing it is not as developed as it is for the other two spheres. Although it includes a broad range of associations with intimates, with kith and kin, for present purposes I will call it the sphere of the family for short.<sup>11</sup>

Each of these spheres in turn has a unique governing logic that is proper to it. The political sphere of the state is organized predominantly as a structure of *authority*. Backed by its monopoly on legitimate violence, the state is empowered to extract resources from society and redistribute them on the basis of politically made determinations. It has the power to order an unwilling tax-payer to pay his due, displace a person from her home by the power of eminent domain, and even take a person's freedom or life. In the economic sphere of the market, in contrast, the allocation of resources among private actors takes place on the basis of consensual exchange. The principal governing logic of the market is *contract*. Ideally, the sphere of the family should be regulated only minimally, in order not to disturb the relations of intimacy that undergird it. When economic transfers take place among loved ones (say, unpaid domestic household labor performed by a stay-at-home spouse), such transactions are ideally at least attributed to altruistic motives (labor in return for love). We might thus say that the intimate sphere relies on the logic of sharing and interpersonal *trust*, rather than self-interested exchange.

The three principal logics of *authority*, *contract*, and *trust* ought to operate independently of one another. For instance, the exercise of authority has its necessary and proper place in the political sphere of the

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as the privileged locus for emotional experience and the production of subjective meaning. With respect to commercialized forms of mass culture, we might locate it in the nexus of the market and the intimate sphere, as both a commodity (in the market) and a form of leisure (in the intimate sphere). However, we might also say that it is in fact culture in the broadest sense that determines the boundaries among the different spheres: the logics that operate within each sphere are ultimately *cultural logics*.

Similarly, one might ask where civil society fits in this picture. If we define the term so broadly that it refers to non-state institutions generally, it would exist both in the sphere of the market and the intimate sphere. It is noteworthy, however, that the term "civil society" itself is less well defined than "the state" or "the economy," and the fact that we have some difficulty determining its precise locus in this (admittedly simplistic) liberal schema probably tells us something about the ambiguous status of civil society itself, at least in classical liberalism.

The schema's historicity is even more evident if we consider the changing place of religion. Once upon a time, it would surely have been a major socio-political field in its own right, but today we regard religion as mostly a private matter that belongs in the residual sphere of intimate experience.

11. I provide a slightly longer sketch of this tripartite schema and of the outlines of its historical development in Teemu Ruskola, *Home Economics: What Is the Difference Between a Family and a Corporation?*, in *RETHINKING COMMODIFICATION* 324, 335–37 (Martha M. Ertman & Joan C. Williams eds., 2005).

state, yet direct governmental authority becomes suspect when applied to the market, and even more so when the object of regulation is familial or other intimate relationships, except insofar as regulation is vital for policing the boundaries among the different spheres and for preserving the integrity of the system as a whole. Likewise, the economic logic of the marketplace is inappropriate both in the political and intimate spheres: neither votes nor babies should be sold. Finally, the logic of the intimate sphere, or more precisely the lack of a rational logic, and reliance on love and trust is also best kept where it belongs—in the family and among friends. One trusts a politician at one’s own risk, and in the marketplace too bargains are ordinarily struck at arm’s length.

The above schema can be summarized as follows:

	POLITICAL SPHERE	ECONOMIC SPHERE	INTIMATE SPHERE
INSTITUTIONAL STRUCTURE	State	Market	Family
GOVERNING LOGIC	Authority	Contract	Trust

It is important to reiterate that this chart outlines an *ideological* vision. No state can rely on the basis of brute force alone, markets cannot function in the complete absence of trust, and families too can be battlefields of economic as well as physical domination rather than havens of love and trust. I offer this schema not to describe liberal capitalism as it works in practice in the United States (or anywhere on Earth) but to capture an important set of liberal intuitions that most of us share, at least to some extent.

What is the status of economic enterprise in this picture? Remarkably, although corporate forms of enterprise are the predominant economic actor in liberal capitalist societies as they currently exist, they have an uneasy existence in liberal economic, political, and legal theory. The paradigmatic subject in the political and economic spheres is the individual. Even as the state stands in a relationship of authority over us, we retain certain rights against it as individuals. Likewise, in the marketplace we enter into contracts as individuals. The family, in contrast, is the one place where we are expected to shed our self-interested individual motivations to come together with others. The corporation has no natural resting place in this order. On the one hand, as an economic entity it would seem to be the quintessential actor in the market. On the other hand, the corporation is also evidently a *collective* entity while the marketplace is paradigmatically an arena of interaction among self-interested individuals.

Indeed, the corporation has been a problem for legal theorists in considerable part because we live in a legal system that thinks in terms of “persons.” It has been a jurisprudential conundrum for U.S. law to justify the existence of collective entities such as corporations in terms that accord with liberal individualism. If all legal rights and duties must be held by a person, then every legal actor must be one, no matter the conceptual violence this may entail. It is this logic that gives birth to the legal fiction of the corporation as a person in its own right, as if it were a human being.

This is a solution that only a lawyer (or a poet) could find satisfactory. It is hardly theoretically adequate. Historically, there has been endless metaphysical speculation about whether corporations are “real” persons or not.<sup>12</sup> Today, there are a number of economic theories to explain why, even in the presumptively individualistic sphere of the market, there are in fact collective entities such as corporations. I will consider those analyses and their adequacy in Part III. First, however, let us compare some of the key ideological premises of liberalism with those of Confucianism and socialism.

#### *B. Confucianism: Kinship All the Way down, and Up*

The term “Confucianism” has been used to refer to as wide a range of ideas and institutions as “liberalism.” Here I use it to refer to the general features of the ideology of the late-imperial Chinese state as perpetuated by the civil service examination system.<sup>13</sup> This orthodox form of Confucianism was more rigid than the philosophical forms of Confucianism from which it originated. At the same time, the state’s ideological pronouncements must not be mistaken for the actual policies of Confucian officialdom. What follows is emphatically not a description of Chinese society as it ever existed; rather, it is a sketch of a historically dominant state ideology.

Perhaps the most significant difference between liberal and Confucian worldviews (in the specific senses defined here) is that while the former seeks to divide social life into separate spheres, the aspirational norm of Confucianism is *unity*. All aspects of social life are to be regulated by the fiduciary logic of Confucian kinship relations. That is, all of social life ought to constitute one harmonious whole governed by a system of patriarchal norms where junior kin owe duties of obedience to

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12. See, e.g., Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).

13. See generally ICHISADA MIYAZAKI, *CHINA’S EXAMINATION HELL: THE CIVIL SERVICE EXAMINATIONS OF IMPERIAL CHINA* (Conrad Schirokauer trans., Yale Univ. Press 1981) (1976).

those above while the senior kin in turn owe reciprocal duties of care to those below.

Reflecting this outlook, not only were Chinese county magistrates traditionally referred to as “father-and-mother officials” (*fu-mu guan*)<sup>14</sup> but the entire state was conceptualized as a family writ large with the emperor as a kind of *pater-familias*.<sup>15</sup> It was precisely for this reason that unfilial behavior in the family was subject to punishment by the state: defiance of paternal authority necessarily implied the possibility of defiance of state authority, as the two were ultimately expressions of a single principle. Ideally, even economic production was organized in ways that respected the fiduciary norms of Confucian kinship relations as closely as possible, namely in families.<sup>16</sup>

If we were to superimpose the Confucian normative vision on the chart summarizing liberalism, it would look something like this:

	POLITICAL SPHERE	ECONOMIC SPHERE	INTIMATE SPHERE
INSTITUTIONAL STRUCTURE	Family		
GOVERNING LOGIC	Trust		

In brief, the fiduciary structures of Confucian kinship should inform the operation of the political and economic spheres as well as the intimate one of familial relations in a nested hierarchy of isomorphic institutions. Ideally, it is kinship all the way down, and up.<sup>17</sup>

14. T'UNG-TSU CH'Ü, *LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING* 14 (Harvard Univ. Press 1962).

15. In one classical formulation, “The son of Heaven is the parent of the people, and so becomes the parent of the Empire.” *The Shoo King*, in 3 *THE CHINESE CLASSICS* 333 (J. Legge ed. & trans., reprint ed. 1939) (1865). Although Confucius himself did not make the express parent–ruler analogy, his follower Mencius did, and it was indeed the Mencian interpretation that became the foundation for the Neo-Confucian orthodoxy. See MENCIOUS 1.A.4, 3.A.3 (D.C. Lau trans., Penguin Books 1970).

16. See generally Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *STAN. L. REV.* 1599 (2000); see also DAVID FAURE, *CHINA AND CAPITALISM: A HISTORY OF BUSINESS ENTERPRISE IN MODERN CHINA* 31–42 (2006); MADELINE ZELIN, *THE MERCHANTS OF ZIGONG: INDUSTRIAL ENTREPRENEURSHIP IN EARLY MODERN CHINA* 113–14 (2005).

17. Indeed, as I have observed elsewhere, kinship relations represented the ideal model even for intercourse among states. See TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* 106–07 (2013); Teemu Ruskola, *Raping Like a State*, 57 *UCLA L. REV.* 1477, 1486–87 (2000).



We have already noted liberal theory's difficulties in accounting for the existence of corporate forms of enterprise. Their collective nature is not a problem for Confucianism: it is axiomatic that collectives are morally prior to individuals. The Chinese legal tradition has thus had no need to resort to jurisprudential fictions of personhood to justify the existence of entities that are composed of groups of human beings. To be human *is* to exist in fiduciary communities with others. Rather, to act alone in the selfish pursuit of pecuniary gain—to act like a *homo economicus*—is to make oneself less than human, or at least to become a “small person” (*xiao ren*).<sup>18</sup> In the politico-moral ontology of Confucian thought, it is the kinship group—the family—that is the “natural person,” whereas a self-seeking individual is an unnatural deviation from the norms of kinship.<sup>19</sup>

While Confucianism as the dominant ideology of the Chinese imperial state had no trouble accommodating production in collective kinship units, it created genuine ideological problems for *non*-kinship entities engaged in the operation of economic enterprise, as Part III elaborates.

### C. Socialism: The People's Republic of Everything

If both liberalism and Confucianism have had distinctive ideological problems in conceptualizing economic enterprise because of the nature of the primary legal and moral subjects they assume (and as Part III elaborates), are the general premises of socialist political and legal theory more accommodating? If liberalism's problem is its prioritization of the individual over the collective, both Confucianism *and* socialism regard the collective as ontologically prior to the individual. Of course, the collective subjects of the two ideologies are very different. In the Confucian political order, the sole metaphysically “real” subject is the kinship group, whereas in socialism that place is occupied by “the people.”

If we transpose the ideological vision of socialism on the liberal state–market–family schema, what do the institutions of socialism look

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18. On *xiao ren*, see, e.g., A.C. GRAHAM, *DISPUTERS OF THE TAO: PHILOSOPHICAL ARGUMENT IN ANCIENT CHINA* 19–20 (1989).

19. It is important to emphasize that while I use the single term “family” to characterize kinship institutions under U.S. style liberalism, Chinese late imperial Confucianism, and state socialism in the PRC, I do not mean to suggest that “family” has a transhistorical meaning. Describing the Confucian worldview in terms of a liberal state-market-family schema by definition entails the imposition of a set of foreign categories on it. I use the term “family” simply to refer to a set of institutions in Confucianism that occupy a social space roughly similar to what would be identified as belonging to “family” in liberalism. The very fact that Confucian thought defines family as a universal principle of social organization, rather than one that stands in opposition to the market and the state, necessarily marks the notion as fundamentally different. The same caveat applies *mutatis mutandis* to use my use of the terms “state” and “market” in this essay.

like? In Friedrich Engels's memorable words, once people organize relations of production on the basis of freedom and equality, the state will wither away and end up where it belongs, "in the museum of antiquities, next to the spinning wheel and the bronze ax."<sup>20</sup> Needless to say, the political and economic institutions of the People's Republic of China (PRC) do not represent those of full-blown utopian communism, but rather the apparent perversion of socialism that in the twentieth century came to be known as "state socialism." This hybrid political formation is justified by the theory that until the final and complete realization of communism, the state constitutes a temporary placeholder for the interests of the people.

Nevertheless, "the people" rarely act as a singular subject, beyond revolutionary acts of violence, which by definition cannot take the place of ordinary political action. In the modern centralized state where direct democracy on the Athenian model is simply not possible, popular representation necessarily takes institutionalized forms. In the PRC, as in the former Soviet Union, the primary vehicle for popular representation is not electoral democracy but the leadership of the Communist Party. The Party is in fact the sole legitimate entity below the level of the state—or parallel to it—that is not simply an extension of it. It justifies itself on Leninist grounds by purporting to represent "the vanguard of the people." While the Party is a subset of the people, it is one that professes to understand the people's interests better than the people themselves do. It therefore exercises legitimate authority to advance those interests. This is the justification for the institution of "democratic dictatorship of the people," exemplified by the Party-state.<sup>21</sup>

Although Confucianism and socialism could hardly be further apart in terms of their ideological justifications for the use of authority—enforcing hierarchical kinship norms versus advancing "the people's" interests—as ideal-typical orders both insist on a *single* logic that ought to organize all spheres of social life. For it is not only in the political sphere that the Party-state exercises direct authority in the name of the people. It does so in the economy as well, making allocative decisions on the people's behalf on the basis of a central plan.<sup>22</sup>

Marx was as unenthusiastic about the bourgeois institution of the family as he was about the state. He called for its abolition as a patriar-

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20. FRIEDRICH ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE 232 (Eleanor Burke Leacock ed. & trans., Int'l Press 1972) (1884).

21. See generally MAO TSE-TUNG, *On the People's Democratic Dictatorship*, in 4 SELECTED WORKS 411 (Foreign Language Press 1975) (1960).

22. See generally DOROTHY SOLINGER, CHINESE BUSINESS UNDER SOCIALISM (1984).

chal institution of “latent slavery” and a vehicle for the intergenerational transmission of wealth.<sup>23</sup> From a psychological perspective, it constitutes an arena of particularistic attachments that divert from the promotion of the well-being of *all* the people. Even Mao Zedong was not able to abolish the family, yet during the Cultural Revolution he wished to redistribute his comrades’ affective investments from family to politics, effectively urging them to love the people (or the Chairman himself) more than their kinfolk. Indeed, to this day even family planning is seen as an aspect of *state* planning in the PRC, not something that can or should be left to families themselves.<sup>24</sup>

This ideological vision of all of social life organized in accordance with a single state-based logic, derived from the state’s status as a representative of the people, can thus be summarized as follows:

	POLITICAL SPHERE	ECONOMIC SPHERE	INTIMATE SPHERE
INSTITUTIONAL STRUCTURE	State		
GOVERNING LOGIC	Authority		

Is there a place for a “theory of the firm” in this worldview? As in the case of Confucianism and unlike in liberalism, the fact that economic enterprise is a collective undertaking is not in itself a problem. In fact, from its founding the PRC has devoted enormous amounts of resources to setting up large state-owned enterprises (SOEs) of various kinds. What *is* a problem is determining the boundary between the state and the enterprise, as Part III explains.

### III. THREE THEORIES OF ENTERPRISE ORGANIZATION

Having sketched the general contours of U.S.-style liberalism, Chinese Confucianism, and Chinese state socialism in their ideal-typical forms, it is time to examine more closely how each of them justifies their preferred forms of enterprise organization. A lion’s share of the analysis that follows is taken up by liberalism (section A), while socialism occupies the least space (section C). The very idea of a theory of enterprise organization is one that grows out of the context of liberal capitalism. Consequently there exists a large literature on the topic, which I canvass

23. KARL MARX, *THE GERMAN IDEOLOGY* 52 (Prometheus Books 1998); *see also* ENGELS, *supra* note 20.

24. *See* Population and Family Planning Law (promulgated by Standing Comm. Nat’l People’s Cong., Dec. 29, 2001, effective Sept. 1, 2002) (China).

at some length below. State socialism too has its own analysis of enterprise organization: it simply does not recognize the political legitimacy of business enterprises independent of the state. This theoretical position is easy to set out without much elaboration. As to late imperial Confucianism (section B), it never had a cadre of economists devoted to analyzing business enterprise in theoretical terms. However, drawing on an analysis that I have developed at greater length elsewhere, I argue that Confucianism did in fact have what we might call a “functional” theory of the firm, with the kinship group providing the paradigm for the organization of enterprise.

*A. Liberalism: Economic Theories of the Firm*

That law calls corporations “persons” does not make it so. The state and the individual are the unchallenged protagonists of the modern legal universe—we take their existence as givens. Economic entities such as corporations, in contrast, occupy the murky intermediate space between the state and the individual. As Hobbes starkly put it, the existence of corporations within the state is like having “wormes in the entrayles of a naturall man.”<sup>25</sup> The two “easy” ways to accommodate their existence is to assimilate them to the state, the solution preferred by socialism, or to reduce them to groupings of individuals, which affirms the premise of liberal individualism. (The distinctive Confucian solution is analyzed in section B below.)

Let us turn to the liberal solution first. As we already noted, it is significant that we do not have a “legal” theory of the corporation as such—apart from the profound but ultimately uninformative assertion that corporations are persons at law. Theories that dominate legal scholarship are pre-eminently economic theories rather than legal ones. I will briefly consider two of them: neoclassical and institutionalist theories.

The neoclassical theory of the corporation takes the premise of methodological individualism to its logical conclusion, insisting that the term “corporation” is only shorthand for a “nexus of contracts” among numerous individual participants in a joint venture.<sup>26</sup> There is effectively no “there” there. Corporation law is only a set of gap fillers: default contract terms that govern when individuals fail to negotiate complete agreements as they undertake collective economic undertakings. This is a parsimonious, perhaps even elegant, solution. Significantly, however, it

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25. THOMAS HOBBS, *LEVIATHAN* 375 (Penguin 1968) (1651) (original spelling).

26. The *locus classicus* of the modern neoclassical theory of the firm is Jensen & Meckling, *supra* note 3.

has difficulty accounting for various aspects of corporation law that are in fact mandatory and *not* subject to individual contracting in the first place. The theory rationalizes such mandatory rules of corporation law as representing the “hypothetical contracts” that the parties would enter into, if only they had the opportunity and all the requisite information to do so.<sup>27</sup>

In contrast, institutional economists seek to analyze firms as they exist in fact—as institutions for coordinating collective economic activity—rather than networks of discrete contracts. Institutionalists resort neither to legal fictions nor to hypothetical contracts in considering circumstances where asymmetries of information or otherwise high transaction costs make *ex ante* agreements costly or impossible. In the institutionalist view, there are two primary solutions to this problem: organizing relations of production in terms of trust or authority, rather than contract.<sup>28</sup>

Trust is the simpler and least costly solution. People who trust each other need not expend time and energy negotiating complex contracts and monitoring each other’s performance. Alas, while trust is the most efficient solution to the existence of high transaction costs of contracting, it is also the most fragile and elusive. Finding people whom one in fact can trust is not easy, and those people tend to be limited to family and close friends. Although institutionalists recognize the existence, and importance, of trust, they often have difficulty in accounting for it when it does exist. Oliver Williamson argues that people trust each other because it “pays off.”<sup>29</sup> Nevertheless, the kind of “calculative trust” that Williamson posits is rather counterintuitive and even the opposite of trust in the ordinary sense of the term.

Employing paid workers represents a solution that is based on authority. When an entrepreneur cannot predict beforehand precisely what she will need and when, she is not in a position to enter into multiple contracts with outside providers for all the inputs she needs. Just as not everyone can be trusted, nor can everything be outsourced. In those situations an entrepreneur will hire employees to work directly under managerial supervision, with the understanding that during that time she has the power—within limits set by employment law—to control her em-

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27. The formulation here follows generally what is the most extensive use of neoclassical economic theory in the analysis of corporation law by FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *ECONOMIC STRUCTURE OF CORPORATE LAW* (1996).

28. There are many strands of institutionalist analyses of the firm. In general terms, they all draw on Ronald Coase’s seminal *The Nature of the Firm*, reprinted in R. H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 33 (1988).

29. Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 *J.L. & ECON.* 453, 466 (1993).

ployees directly. Kenneth Arrow describes the employment contract as an employee's sale of her "willingness to obey *authority*" so that "what is being bought and sold is not a definite objective thing but rather a personal relation."<sup>30</sup> In this regard, the employment contract is evidently not just another market transaction among others, but a qualitatively distinct one: a structure of authority. To institutional economists, corporations and other similar business organizations are thus emphatically not mere nexuses of contracts in the even wider web of contracts that is the marketplace as a whole. Instead, they are islands of vertically structured hierarchy in an otherwise horizontally organized marketplace. Rather than extensions of markets, they are, in an important sense, their very antithesis.<sup>31</sup>

In light of the above analysis of the political economy of the liberal state, it is noteworthy that using *trust* and *authority* to explain the organization of production amounts in effect to borrowing the logic of the two primary non-economic social fields: that of the family, in the case of trust, and of the state, in the case of authority. To be sure (and putting trust aside for a moment), when institutional economists distinguish between horizontally structured markets and vertically organized hierarchies, what they have in mind are *economic* hierarchies, not political ones. Nevertheless, as a structure of authority a firm does rely on what is paradigmatically the logic of the state—the power to command—to explain the organization of production. As a kind of mini-state, a corporation is effectively a small-scale command economy where factors of production are allocated by decree.<sup>32</sup>

It bears noting that the institutional structures themselves by which modern business corporations exercise their authority are also state-like. One of the key attributes of the modern centralized state is not only its monopoly on the exercise of legitimate violence but also the formal rationalization of its structures of authority.<sup>33</sup> The simultaneous centralization and rationalization of authority is similarly a distinguishing feature of the modern managerial corporation, also administered through a bureaucracy, albeit a private one. Again, while neoclassical theory effectively reduces a corporation to a set of contracts, institutional economists borrow the political logic of the state to explain—rather than simply ex-

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30. KENNETH ARROW, *THE LIMITS OF ORGANIZATION* 25, 64 (1974) (emphasis added).

31. See generally OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1983).

32. See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

33. See 2 MAX WEBER, *ECONOMY AND SOCIETY* ch. XI (Guenther Roth & Claus Wittich eds., 1968).

plain away—the modern corporation as an institutionalized structure of authority.

Moreover, the business corporation is a hybrid institution embodying not only the economic logic of contract and the political one of authority but also elements of the fiduciary logic of the family. Consider the so-called “agency problem” of corporation law. In principle, shareholders occupy the position of principals in a corporation while managers are their agents, charged with the obligation to manage the corporation in the principals’ interest, rather than their own. The agency problem is the following: given the separation of ownership and management in the modern business corporation, how can shareholders monitor managers effectively?<sup>34</sup>

In fact, the very term “agency problem” is a legal misnomer, appropriated from economic discourse. In a *legal* sense, shareholders are not managers’ principals, for they fail to meet the core part of the definition of legal agency: principal’s control over agent. Indeed, the agency problem arises precisely because of shareholders’ *lack* of control over managers.<sup>35</sup> In contrast, the manager–employee relationship *is* a principal–agent one (since managers have direct authority over employees), whereas shareholders cannot simply command managers to manage as they wish. Rather, their recourse is to vote the managers out, while the right to operate the corporation on a day-to-day basis lies with the managers themselves.

Nevertheless, it would be utterly naïve to ask shareholders to simply trust managers. In other words, as far as the shareholder–manager relationship is concerned, none of the three main operational logics of the liberal state seem adequate: contract (the market logic) fails, as do authority (the political logic) and trust (the logic of the intimate sphere). Corporation law has stepped into this vacuum by establishing a fiduciary duty for managers to seek to realize the interests of the corporation as a whole. This legal duty can be viewed as an attempt to institute, or at least legally mimic, a relationship of trust where none exists in sociological or psychological terms. It is, in an important sense, an effort to transplant the operational logic of the intimate sphere into the corporation.

Viewed from a macro perspective, what we witness in the corporation is thus a confluence of all *three* main types of logics of liberalism,

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34. The classic statement of the agency problem is ADOLF A. BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

35. This often-overlooked point is emphatically noted in LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012); *see also* ORTS, *supra* note 4, at 60.

meeting in various guises in a single locus, rather than remaining in separate spheres.

*B. Confucianism: Kinship Theories of the Firm*

Having analyzed some of the problems of liberal political theory and American corporate jurisprudence, let us turn to the status of business enterprise in Confucian political theory. In contrast to liberal theory, the collective nature of corporate entities is not a problem, as I have already noted: it is a Confucian axiom that the collective is morally prior to the individual. Instead, historically the main ideological problem for Chinese business enterprise has been the officially anti-mercantile attitude of Confucianism and its theoretical (although typically not actual) hostility to profit seeking. Starting from the moral premise that the only legitimate collective is the kinship group and that one is not supposed to take advantage of one's kin, historically Chinese corporate entities have spent much of their energy justifying to the state (and themselves) a type of entity that is in fact engaged in profit-seeking at others' expense.

Because of this ideological kinship-orientation, there is a long-standing scholarly tradition going back at least to Max Weber that maintains that an important reason why capitalism did not develop indigenously in China was the absence of the corporation in the sense of the Western legal tradition.<sup>36</sup> That is, in the absence of the legal fiction of the corporation as a person in its own right, by default most Chinese businesses were merely family businesses, necessarily limited in scope and rarely surviving for more than a few generations. As I have elaborated at greater length elsewhere, in numerous Chinese "family" businesses the notion of kinship was in fact little more than a fiction serving to justify the existence of what I have called "clan corporations"—much as the personhood of the U.S. business corporation is a legal fiction. In a Confucian polity, an entity that was regarded as a kinship group enjoyed recognition by the state, which provided an incentive even for non-kin entities to present themselves as if they were founded on relations of kinship.<sup>37</sup>

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36. For a longer discussion of these characterizations, see Ruskola, *supra* note 16, at 1613–16.

37. The account in the remainder of this section draws on a more extended argument in *id.* at 1619–59, and RUSKOLA, *supra* note 17, at 60–107. It bears noting that by no means am I suggesting that *all* Chinese enterprises were organized as "clan corporations"—only that they constituted an ideologically privileged form with maximal legitimacy and legal recognition. Other corporate forms of enterprise that engaged in various types of business and productive activities included guilds, monasteries, and merchant networks of many kinds. See Ruskola, *supra* note 16, at 1633–34 n.116.



Briefly, in what sense was kinship in clan corporations fictive? Chinese kinship idioms are encompassing and often used metaphorically in everyday discourse to refer to non-kin so as to recognize and foster relations of intimacy and trust. Yet many late imperial clan corporations stretched kinship terms far beyond ordinary usage. The pre-eminent example of fictions of corporate kinship was the legal “merger” of two or more clans. As there are only about four hundred Chinese family names, it was not uncommon for unrelated families in the same locale to have the same name. If such families wished to pool their capital to set up a new business, they would combine their genealogies by fabricating a long-dead ancestor to whom they would begin offering sacrifices. Subsequently, the “new” clan would draw up a detailed contract to establish how to operate the joint enterprise. In addition to instructions for carrying out sacrificial duties in the name of the clan’s ancestors, these contracts often contained specifications on how to manage the assets of the ancestral trust, provisions on how to select full-time managers and what their duties were, how to keep books and select auditors, and so forth. Essentially, the contracts functioned as corporate bylaws in the form of trust instructions. In fact, often the parties would take the contract to the local magistrate who would in turn stamp and agree to enforce its provisions, thus giving the rules the express force of law.

Adoption was another way of adjusting kinship relations contractually. There are cases of a single clan adopting as many as three hundred members. In effect poor families that could not afford to hold on to their human capital ended up selling it to wealthy clan corporations. The economic aspect of these transactions is evident. Adoption contracts specified the price paid, while the sellers guaranteed title (by representing that the adoptee had not been kidnapped or obtained in some other illegal manner) and assured that if something should “happen” to the adoptee subsequently it would be no longer of concern to the sellers. Likewise, wives and concubines were in many ways bought and sold in the market for productive as well as reproductive labor, as marriage too entailed a written contract specifying the economic terms of the transaction, including bride price.

The utility of organizing economic entities in the form of Confucian kinship was not limited to securing recognition from the state. As a consequence of being legally clothed in the “natural personality” of the family, clan corporations were governed in effect by family law, which in turn supplied a model of enterprise governance in which ownership was separated from management. That is, under the norms of Confucian kinship, while all the property of a family business is owned by the kinship group as a whole, its management is the province of its senior mem-

bers. At the same time—again, at least in Confucian theory—in their roles as managers the senior kin owe duties of loyalty and care to those below them. Conceptually, Confucian family law thus mirrors the structure of modern American corporation law: managers have the authority to run the corporation, subject to a fiduciary obligation to do so in the interests of the corporation as a whole.

In short, insofar as the family was the preferred Confucian theory of the firm—and indeed the theory of everything—even non-kin entities engaged in the pursuit of profit routinely resorted to fictions of kinship in order to make themselves legally cognizable and politically legitimate.

### *C. Socialism: Political Theories of the Firm*

The orthodox socialist view has no less difficulty than the American liberal one in coming up with a coherent theory of the firm, but for the opposite reason. The conceptual quandary of the theory of a socialist firm does not arise from extreme individualism but rather from its opposite, extreme collectivism. In the end, neither assumption leaves room for a firm with an integrity of its own. The assumption of collectivism seems at first glance more hospitable to corporations, which are after all collective entities. Yet the problem arises from the fact that in the socialist vision there is ultimately only *one* legitimate collective entity: “the people.” Upholding the interests of the people is the highest and ultimately sole arbiter of legitimacy. Hence, there is little room for political entities mediating the relationship between the people and the Party-state.

As already noted, the orthodox socialist vision wishes to abolish even the family, although that goal has turned out difficult to achieve in practice. The economic sphere can hardly be abolished, but it too must be organized so as to promote the interests of the people as a whole. Therefore, the only completely unimpeachable form of socialist enterprise is the state-owned enterprise (SOE)—or more precisely, the “industrial enterprise owned by the whole people,” as the ownership form of state enterprises is defined legally in the PRC, in a careful attempt to elide the troublesome distinction between “the people” and the “state.”<sup>38</sup>

Importantly, however, in a planned economy even an SOE has little organizational integrity, or what a corporate lawyer would call legal personality. Ultimately, an SOE is simply one administrative unit in the larger national economy—a glorified accounting convention in the calculus of the larger collective benefit. Even the biggest SOE is only a small

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38. Industrial Enterprises Owned by the Whole People Law (promulgated by Standing Comm. Nat'l People's Cong., Apr. 13, 1988, effective Aug. 1, 1988) (China).

piece of the mother company, as the socialist theory of enterprise organization ultimately has room for only one enterprise—"People, Inc.," as it were, stated in the parlance of capitalism.

#### IV. ECONOMIC THEORIES, LEGAL FICTIONS

What should we make of our comparative examination of divergent ways of conceptualizing economic enterprise, and of the different kinds of problems they pose to the internal coherence of the larger normative systems of which they form a part? For one thing it seems evident that in order to attain ideological purity, the liberal, Confucian, and socialist theories we have considered *all* resort to fictions—whether ideological fictions of corporate personhood, fabricated kinship, or aspirational unity in a socialist ideal of "the people."

The liberal aspiration to maintain the integrity of political, economic, and intimate spheres is difficult, if not impossible, to enact, as life does not yield to ideology. Instead of attempting to explain the existence of relations of authority and trust in corporations in economic terms, it might better to analyze them simply in the alternative modalities of politics and psychology.<sup>39</sup> The state is in fact necessarily and intimately involved in creating and maintaining the market.<sup>40</sup> At the same time, even if authority—in the form of a monopoly on organized violence—is what distinguishes the state from other social institutions, it is of great ideological significance that we nevertheless justify even the state's existence on the basis of a reciprocity founded on contract, through the metaphoric projection of a "social contract." Yet no social contract is sustainable if supported by nothing other than individuals' self-interest in avoiding a short, nasty, and brutish life. At least a modicum of trust is required as well. Historically, the sphere of the family is no less plural in its constitution. As even—or especially—a child knows, the family is not simply a haven of unmodified trust but also a structure of authority, with parents exercising control over minor children (what John Locke characterized

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39. In fact, many scholars are doing just this. For a political analysis, see, e.g., MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* (Princeton Univ. Press 1994); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 *AM. POL. SCI. REV.* 139 (2013); John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 *N.Y.U. L. REV.* 1003 (1993). The entire field of behavioral economics similarly seeks to incorporate insights of psychology into economic analysis.

40. This insight is at least as old as Legal Realism. See BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (Harvard Univ. Press 1998).

as “paternal jurisdiction”).<sup>41</sup> Equally significantly, feminist theorists have challenged the very distinction between the political and the personal. The state is no less involved in regulating the family than it is in maintaining the market.<sup>42</sup> Finally, the intimate sphere is always also an endless ground of negotiation—a place where bargains are struck and deals are entered into.<sup>43</sup>

If the liberal state’s difficulty is in maintaining a *separation* among the logics of authority, contract, and trust, a Confucian commonwealth’s problem is the impossibility of making life conform to a *single* one of trust. It will not come as a surprise that the Chinese imperial state and the Confucian family unit relied as much on authority as on the (theoretically) self-enforcing fiduciary logic of trust. At the same time, as we have seen, even a seemingly upright clan corporation was as likely to be a “nexus of contracts”—a voluntary contractual undertaking—as a “natural” unit integrated by fiduciary norms of kinship.

Life is no less hospitable for socialist theory. The work unit of a large Chinese SOE is possibly the closest thing to the actual realization of state socialism. More than merely a place to work, historically it has been an extraordinary cradle-to-grave system of welfare, with lifetime job security, housing, childcare, schools, hospitals, and retirement benefits. In other words, it has been simultaneously an arm of the state, an economic unit, *and* a family writ large. Even under socialism it is not possible for a single-state based logic simply to displace competing economic and familial ones.<sup>44</sup>

One important conclusion is that what we typically refer to as *the* theory of the firm in our economic and legal analyses would be better called a *liberal* theory—not a universal one. This is not to discredit the theory, but only to take note of the assumptions it makes. Our economic theories of enterprise surely have considerable explanatory power with

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41. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 7, 38–39 (1986). To be sure, while Locke used political analogies to analyze familial relations, by no means did he mean to suggest that patriarchal and political authority were identical. GORDON J. SCHOCHET, PATRIARCHALISM IN POLITICAL THOUGHT: THE AUTHORITARIAN FAMILY AND POLITICAL ATTITUDES ESPECIALLY IN SEVENTEENTH-CENTURY ENGLAND 245 (1988).

42. *See generally* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

43. *See generally* GARY S. BECKER, A TREATISE ON THE FAMILY (Harvard Univ. Press 1981). For an application of transaction cost economics to the household—a central institution of the intimate sphere that is not necessarily limited to family—see ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH (2008). For an analysis of the corporatization of residential communities, see NANCY L. ROSENBLUM, *Corporate Culture and Community at Home*, in MEMBERSHIP AND MORALS: THE USES OF PLURALISM IN AMERICA 112 (1998).

44. *See generally* ANDREW WALDER, COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY (1988).

regard to U.S. corporations and the U.S. legal and political systems. However, when we turn to analyzing other legal systems embedded in different political and moral economies, it is vital to be aware of those assumptions, for they are as likely to obstruct our analysis as to aid it.

As an heir to Legal Realism, Law and Economics has helped us denaturalize the corporation as a legal entity. This view stands in contrast to the views of late nineteenth-century “real entity” theorists for whom the corporation was effectively a kind of super-person, a metaphysically real entity in its own right, the existence of which preceded law whose main task was merely to declare its social existence.<sup>45</sup> Economists have helped to demystify the debate by bringing it down to the level of ordinary mortals. For all our sophistication in regarding corporate personality as a legal fiction, all too often even corporate lawyers reify corporations, speaking of them as if they were indeed individual actors with subjective purposes. Whatever its conceptual difficulties, even a nexus-of-contracts analysis denaturalizes the corporation as an entity and reminds us that a corporation *itself* can do nothing: it can only act through its agents. Ultimately only people can sign contracts, commit crimes, or fire other people.

It is thus a signal virtue of economic analysis that it breaks down the corporation—and other forms of economic enterprise—as a singular entity. However, in this breakdown individual persons become the legal equivalents of the smallest subatomic particle in physics: they are the legal fundamentals of the system, basic units that cannot be broken down any further. Although the Romantic attachment to metaphysically real corporations has passed into history, our analyses remain dedicated to the category of “person,” an ideological premise of liberal individualism. That is, we continue maintain a commitment to the Enlightenment idea of the individual as a coherent, self-identical subject of free will, even as that subject has been taken to task philosophically, psychologically, and politically over the course of the twentieth century.<sup>46</sup>

While this may still be a relatively unproblematic assumption for liberal capitalism, it is emphatically not one shared either by Confucian or socialist worldviews for which the “real” subjects are the kinship group and “the people,” respectively. Just as economists’ rigorous indi-

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45. See Mark M. Hager, *Bodies Politic: The Progressive History of Organizational ‘Real Entity’ Theory*, 50 U. PITT. L. REV. 575, 576 (1989).

46. The challengers range from psychoanalysis to post-structuralism to analytic philosophy. See, e.g., SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS (Joan Riviere trans., Wash. Square Press 1968) (1924); MICHEL FOUCAULT, THE ORDER OF THINGS: THE ARCHAEOLOGY OF THE HUMAN SCIENCES (1970); DEREK PARFIT, REASONS AND PERSONS (1984).

vidualism tends to naturalize the individual actor as an ontological category—rather than a mere methodological postulate—so lawyers too inhabit a world where (in civil law terminology) there exist only “persons,” “things,” and “actions.” The lawyer’s “persons” in turn are divisible into “legal persons” and “natural persons,” the latter being seemingly a natural category equivalent to the economist’s “individuals.” Yet law can never simply describe a pre-legal or pre-political reality. It cannot look beyond itself to nature, as there are no more “natural” persons than there are “unnatural” ones. Although legal theorists assert that the “only natural persons are human beings,” even the lawyer’s “natural” person is ultimately a legal classification.<sup>47</sup> As Hans Kelsen noted, “even the so-called physical person is an artificial construction of jurisprudence” and hence “actually only a ‘juristic’ person.”<sup>48</sup>

This is not to deny that we are born with bodies that can be demarcated physically from the environment in which we find ourselves. Yet while it seems evident that our bodies mark the boundaries of our “natural” selves, it is far from clear what the existential or political significance of this fact is. From the point of view of liberalism—growing out of a Cartesian opposition of self to world, and subject to object—our bodies are indeed what *separate* us from the world and from other human beings. Yet in a Confucian view our bodies are what *connect* us to others, and to the world around us. Rather than the one thing that we “possess” without qualification, our bodies are not even ours, but belong to those who preceded us and gave birth to us (given that to date no human being has given birth to himself). We are all part of a larger body, connecting the dead, the living, and the unborn in a single intergenerational entity.<sup>49</sup> In a socialist understanding in turn the foundational category of analysis is the political collective, workers united by bonds of class. Considered from this broader angle, we might say that economic analyses typically replace one large fiction with a smaller one—corporate legal personality with that of liberal individualism. Whether our “true” nature as human beings is our individuality or our connectedness to other human beings is a vital existential question that is contested even in the North Atlantic world, let alone across wider cultural divides, and it seems unlikely to admit of a final answer.

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47. David P. Derham, *Theories of Legal Personality*, in LEGAL PERSONALITY AND POLITICAL PLURALISM 1, 9 (Leicester C. Webb ed., Melbourne Univ. Press 1958) (Austl.).

48. HANS KELSEN, THE PURE THEORY OF LAW 172 (Max Knight trans., Univ. Cal. Press 1970) (1967).

49. For a comparison of liberal and Confucian views of the embodied human subject, see David L. Eng, Teemu Ruskola & Shuang Shen, *Introduction: China and the Human*, 29 SOCIAL TEXT, Winter 2012, at 1.

When Bayless Manning surveyed the field of corporation law some forty years ago he observed ruefully that the “rules, the vocabulary, the inherited symbols are all awry.” In response, he urged us to get beyond “poetic” metaphors.<sup>50</sup> Alas, we have no choice but to think in terms of metaphors. Some may be more apposite than others, but none are simply right or wrong, true or false. The idea of “corporation” has no trans-historical meaning, nor is there a single correct way to analyze economic enterprise. Indeed, so elastic are our concepts that Adolf Berle and Gardiner Means regarded the public ownership of modern corporations as a way of *socializing* property and thus a move toward a more communist form of ownership in the United States.<sup>51</sup> In his ethnography of Trobriand Islanders in Melanesia, the legal anthropologist Bronislaw Malinowski likens even a group of fishermen operating a canoe to a “joint-stock company”—a poetic metaphor indeed.<sup>52</sup>

Whether economic enterprises are best thought of as voluntary associations of private individuals, as akin to the family, or as amenable to the logic of the state are immensely important questions. And so are the corollary questions of the extent to which the family is a public institution and thus properly subject to state authority, and the degree to which the state itself is best thought of in terms of elective kinship and affective belonging—or alternatively as only a giant calculator that aggregates our individual preferences through electoral democracy.<sup>53</sup>

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50. Bayless Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U. L. REV. 38, 51 (1960).

51. BERLE & MEANS, *supra* note 34. This view of the role of corporations was anticipated by Karl Marx himself. III KARL MARX, *CAPITAL* (1984); *see also* WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* (1997).

52. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 19–20 (Harcourt, Brace & Co. 1926) (1984). Similarly, when examined by an economist or economic historian, a host of institutions can be analyzed as “firms.” *See, e.g.*, ROBERT B. EKELUND, JR. ET AL., *SACRED TRUST: THE MEDIEVAL CHURCH AS AN ECONOMIC FIRM* (1996).

53. Indeed, the boundaries between the market and the state, on the one hand, and the market and the family, on the other, seem to be becoming more and more porous in the United States. Suggesting a transition from liberalism to neo-liberalism, political power is increasingly commodified under legalized bribery known as “campaign finance,” while numerous traditionally domestic functions are being outsourced to the market, from childcare, to cooking, to cleaning, and much else. There is, it seems, an increasingly singular logic of contract that is beginning to challenge those of authority and trust. If so, our future may look something like this:

	POLITICAL SPHERE	ECONOMIC SPHERE	INTIMATE SPHERE
INSTITUTIONAL STRUCTURE	Market		
GOVERNING LOGIC	Contract		

At a minimum, though, the answers to these questions are not deducible from legal forms. The U.S. legal system tends to privilege bargains among autonomous individuals (legitimated in the idiom of contract) while both Confucianism and Chinese socialism prefer to rely on trust among members of communities (legitimated in the idiom of the family or the people). If we begin with the individual as the foundational unit, private economic activity appears as natural while political institutions need to be explained and justified (say, in terms of “social contract”). In contrast, if one begins with the opposite assumption, treating the collective as the basic unit, the question becomes why and when should individual actors be allowed to control large concentrations of economic resources without moral supervision and political checks—a question of considerable concern both to the late imperial Chinese state and the PRC.

Whether we use the template of the individual in social, economic, and political organization or prefer the model of the family, or the state, it is vital to recognize that our choices reflect ultimately our ideological predilections. Whichever model we choose, we must not confuse that choice with an ontological discovery.

#### V. WHAT IS “ENTERPRISE AUTONOMY”?

The need to recognize enterprise organization as part of a larger political economy is not of purely theoretical importance but has considerable implications for our analysis of, and prescriptions for, the organization of business enterprise in China today. As the PRC first embarked on enterprise reforms in the 1980s, among its primary goals was to create “enterprise autonomy.” While providing for non-state ownership was out of the question, the state wished to establish a space of significant autonomy for SOE managers. Remarkably, what was being prescribed as the *solution* to the problems of Chinese SOEs was precisely what constitutes the chief *problem* of U.S. corporation law—a division of labor between owners and managers, with the resultant agency problem that corporation law seeks to overcome.<sup>54</sup>

One might view this as a manifestation of a precisely backward understanding of (Western) corporation law. More innocently but no less damningly, it could also be regarded as a case of mindless imitation of, and fascination with, things Western (“if American corporations have

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54. See Donald C. Clarke, *GATT Membership for China?*, 17 PUGET SOUND L. REV. 517, 545 (1994); William H. Simon, *The Legal Structure of the Chinese “Socialist Market” Enterprise*, 21 J. CORP. L. 267, 287 (1996).



this problem, we should too”). However, viewed from the broader perspective suggested above, it is evident that separating ownership from management is a genuine answer, or at least an attempt at one, to real problems that are distinctive to Chinese enterprises.<sup>55</sup>

Let us consider in some detail the agency problems of a classic Chinese SOE and its relationship to the state.<sup>56</sup> If we begin with the latter, we should note that the Chinese Party-state itself bears a striking resemblance to a corporation, at least if we regard the separation between ownership and management as a key criterion. In principle, SOEs are only administrative sub-units of the state, as we have seen. Ultimately it is the people who own all the public assets, including those of SOEs, while the state has an obligation to manage those assets in the people’s collective interest. The main structural problem of this arrangement is the lack of an institutional mechanism to enforce the state’s fiduciary obligation.

We might analyze this system also in terms of historical continuities in the organization of state power in China. The Party-state’s relationship to “the people” is not unlike that between the emperor and his subjects. Both regimes owe a fiduciary-like obligation to those they govern, and both regimes resolve the resulting agency problem in a similar fashion: by insisting on the psychological and political unity of the ruler and the ruled so that the interests of the two are no longer separate. In a Confucian state, the family metaphor turns the agency problem into no problem at all, as the emperor is to be trusted like a father. In socialist ideology, it is the Party-state’s Leninist claim to stand in for the people that denies the existence of a potential cleavage between the interests of the state as an agent and the people as its principals. Yet the Party-state’s fiduciary duty is as difficult to enforce as fiduciary relationships in the family. When the state fails to promote the interests of the people, there is indeed no mechanism of control, such as voting the power holders out of office, as in the case of electoral (and corporate) democracy.

Nevertheless, while it may be politically correct to view the people themselves as the owners of SOEs, it is economically more realistic to

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55. In fact, several participants in the reorganization of SOEs have been well versed in Western theoretical analyses of enterprise organization. *See, e.g.*, QIN XIAO, *THE THEORY OF THE FIRM AND CHINESE ENTERPRISE REFORM: THE CASE OF CHINA INTERNATIONAL TRUST AND INVESTMENT CORPORATION* (2004).

56. That is, the following discussion pertains to “true” pre-reform SOEs, in contrast to their “corporatized” contemporary counterparts, or SOEs that have been formally converted to the legal form of the corporation under the PRC Company Law. Colloquially, such enterprises are still often called SOEs, even though they are no longer “state-owned” but rather “state-controlled,” with the state as the controlling shareholder.

view the state as the true owner, as it is the residual claimant in SOEs. Insofar as SOEs are thus owned *and* managed by the state, they would seem to suffer from no agency problem—surely the state is capable of monitoring and controlling its own behavior. It would thus seem more appropriate to liken SOEs not to corporations but to sole proprietorships, with the state exercising full ownership over each one.

Yet the sole proprietorship analogy too is imperfect. The Chinese state is not a singular entity in a meaningful sense but consists of numerous overlapping bureaucracies and supervisory agencies competing for control over public enterprises. Historically, managers of Chinese SOEs have therefore been subject to the direct or indirect control of multiple principals, each seeking to use the enterprises under its supervision to the advantage of its own political and administrative constituencies. The resulting problem has hardly been lack of control by principals, but an excess of inconsistent and contradictory attempts at control by numerous supervisory organs of the state. The historic dilemma of Chinese SOEs is thus not that the principals cannot control the managers, but that they have *too much* control. The solution to *this* particular dilemma has been to create a greater degree of separation of ownership and control, so as to provide for managerial autonomy.

At the same time, distancing the state from SOEs is not simply a managerial imperative. In addition to being the residual claimant in SOEs, the state is also the residual deep-pocket. Historically, before the relatively recent transformation of socialist SOEs into corporations under the PRC Company Law (enacted in 1993 and revised in 2005), when SOEs' operational expenses exceeded their receipts, the state was responsible for making up the difference.<sup>57</sup> Thus, when the Chinese government as well as Chinese commentators first began to emphasize the importance of “enterprise autonomy” in the 1980s, the term was shorthand for the need to create enterprises with independent legal personality—that is, corporate entities with limited liability, thereby releasing the state from its obligations to cover the losses of the state sector. In the absence of a legitimate (socialist) theory of the firm, the notion of “enterprise autonomy” came in effect to stand in for the main structural and operational characteristics of Western-style business corporation, includ-

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57. See Company Law (promulgated by Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994; revised by Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 2006) (China).

ing both centralized management (desired by SOE managers) and limited liability (desired by the state).<sup>58</sup>

When we are analyzing phenomena in different political economies operating under different political and ideological constraints, it is indeed possible that the “problem” of one system may be a “solution” in the other.

## VI. CONCLUSION

Putting aside both state socialism and Confucianism, it is a striking fact that even in the United States “no consensus exist[s] in the legal community as to *why* corporate law imposes fiduciary duties or what the operative ‘principles’ of corporate fiduciary law ought to be.”<sup>59</sup> If nothing else, this dissensus reflects the ultimate indeterminacy of the legal form of the corporation. It is just that—a legal form. To give it substantive content we must have a *theory* of what a corporation is, or ought to be. The multiplicity of our theories of how best to understand, and organize, business enterprises is in the end a symptom of larger differences about the social and political purposes corporations ought to serve. Legal analysis alone cannot tell us what those purposes ought to be—despite Manning’s heartfelt desire to get our conceptual vocabulary of corporation law “right.”

By no means is the desire for definitive analytic categories limited to economic theorists. No lesser an authority than the legal anthropologist Paul Bohannan predicted in 1969 that “within a decade or two” comparative lawyers would come up with a methodology that would allow us to describe legal systems—foreign and domestic—in “a whole new independent language without national home,” something akin to “Fortran or some other computer language.”<sup>60</sup> That prediction has evidently not come to pass. To the extent that our theories of the firm are ultimately *liberal* theories of the firm, they run the risk being limited to “the wisdom of the native bourgeois categories” of the West, effectively “flourishing as ideology at home and ethnocentrism abroad,” in the cautionary words of another anthropologist, Marshall Sahlins.<sup>61</sup>

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58. See Industrial Enterprises Owned by the Whole People Law, *supra* note 38, at art. 2 (providing that SOEs shall be responsible for their own losses as well as their profits, have independent legal personality, and be managed in accordance with the “principle of the separation of ownership and managerial authority”).

59. William W. Bratton, *Self-Regulation, Normative Choice, and the Structure of Corporate Fiduciary Law*, 61 GEO. WASH. L. REV. 1084, 1084 (1993) (emphasis added).

60. Paul Bohannan, *Ethnography and Comparison in Legal Anthropology*, in LAURA NADER, LAW IN CULTURE AND SOCIETY 401, 415 (1969).

61. MARSHALL SAHLINS, *STONE AGE ECONOMICS* xii–xiv (Aldine Publ’g Co. 1972).

To apply liberal economic analysis without modification to non-liberal legal and political orders risks assuming precisely what we *cannot* know in advance. If we take for granted which phenomena are best analyzed as economic rather than political ones, for example, we will fail to attend to what should be one of the main objects of our analysis—ascertaining precisely where the boundary between the economic and political lies in the system under examination. A fusion of political and economic power may be just that: a deliberate fusion, not a confusion.<sup>62</sup> The state–market–family distinction represents nothing more (or less) than the ideological premises of liberal capitalism, not a transcendental truth. As institutional economists know all too well, even less than optimal institutions can persist over time for reasons of inertia—a phenomenon they characterize as path-dependency.<sup>63</sup> Importantly, it is not only institutions of the material kind that can become path-dependent. Theory too can become invested in certain categories, even after they have been depleted of their explanatory power.

The ultimate “agency problem,” in economic enterprise as in life, is *who gets what? Who counts as a principal?* To understand fully the ways in which our economic, social, and political relations are organized in the modern business corporation, at a minimum we need the insights of psychology and political theory as well as those of economics. At the same time, we must keep in mind that the questions posed by corporation law have no final answers. There is no end of history for corporation law, any more than for history itself.<sup>64</sup> Where *should* we draw the boundary between the inside and the outside of a corporation? Today, the insiders include shareholders and managers, which is why the law of corporate governance focuses on the dilemmas of ownership and control. But in a model of the corporation based as much on membership as ownership, might we not include workers too as insiders? Or even the public at-large? Perhaps even the environment?

In defining these limits, corporation law is part of a larger narrative about personhood—telling us who we are and what we owe one another, and indeed who “we” are, or would wish to be.

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62. See, e.g., SONJA OPPER, *ZWISCHEN POLITICAL GOVERNANCE UND CORPORATE GOVERNANCE: EINE INSTITUTIONELLE ANALYSE CHINESISCHER AKTIENGESELLSCHAFTEN* (Baden Baden: Nomos Verlagsgesellschaft 2004) (Ger.).

63. See, e.g., DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

64. But see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).