

# THE CORPORATION IN LIBERAL-DEMOCRATIC THOUGHT

Rutger Claassen, Utrecht University

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Abstract: Modern business corporations seem to present a hard case for liberalism. Recent critics have argued that liberal theories are premised on a sharp divide between the public and the private sphere. This private/public distinction does not leave a theoretical space for actors that are neither clearly private nor clearly public, such as corporations. Hence liberalism conceals the true nature of corporations, by misclassifying them as merely private actors. Instead, a new, third category between the private and the public would be needed and liberalism would have to be given up. This paper assesses whether this claim of liberalism's incompatibility with the corporation is warranted. Making use of Thomas Hobbes' theory of personality, I argue that corporations are fictional persons, like the state itself is, whose legitimacy depends, like that of the state, on two conditions: a valid authorization and a valid mandate. Liberalism's legitimacy conditions allow for legitimate private and legitimate public actors in society (but nothing in between). The authorization condition does not help us much in deciding whether the corporation should be treated as a private or a public actor. An analysis of the mandate condition reveals that the question ultimately hinges on the interpretation we give of 'market morality'. I argue that the market should be seen as a sphere commissioned by government to create the wealth necessary for individuals to lead free lives. In the framework of an already existing legitimate state, the only way for corporations to be legitimate is as public actors themselves who are instrumental towards this goal.

## Introduction

Over the last decade a wave of writing has emerged on 'political corporate social responsibility', as an alternative to traditional business ethical ways of looking at the activities of business corporations. Due to their extensive powers in society, and especially pushed by the extensive quasi-regulatory functions corporations fulfil in a globalized context, many have thought it worthwhile to conceptualize corporations as 'political actors' of some sort (Moon, Crane, and Matten 2005; Scherer and Palazzo 2007; Heath, Moriarty, and Norman 2010). However, it is far from clear how the political lens differs precisely from the moral lens (Néron 2010). What seems to be lacking in much of this literature, is a strong embedding of the corporation in the major political theories and themes we already have at our disposal. If the corporation is some sort of political actor, then surely we should want to know how it fits into a liberal, conservative, republican, Marxist etc. theory of politics and society. In this paper, I will be concerned with liberalism only, given its predominant place in political theory as the main defence of the standard constitutional democracies typical of Western societies. Can liberalism 'think' the corporation? More precisely: can liberalism define the conditions of legitimate

existence for corporations, amidst other actors in society (such as states, individuals, non-business associations)?

Strikingly, those few authors who address this question tend to give a negative answer. The corporation, it is thought, is incompatible with liberalism's basic categories. The culprit is liberalism's requirement to divide society into a private and a public sphere. Private individuals are the basic unit of analysis, and are supposed to be left free to act as they wish. Public institutions are justified when they provide for a socially just distribution of resources and opportunities (including basic rights) for private individuals, and are themselves democratically accountable to private individuals. This distinction does not leave a theoretical space for actors that are neither clearly private nor clearly public, such as corporations. Hence liberalism conceals the true nature of corporations, by misclassifying them as merely private actors. While this seems to solve the tension at the surface level, critics argue this fiction comes with a price: it masks the social injustices and lacking democratic accountability which characterize corporate life, by sanctifying them as the outcomes of voluntary activities by freely contracting individuals. As a solution, we would need to recognize a third, separate category in between individuals and states, which is neither private nor public. But this means giving up on liberalism.

My aim in this paper is to investigate whether liberalism can be rescued from this critique; i.e. whether it really cannot provide a convincing theory of the corporation. I will argue that liberalism is first and foremost the theoretical defence of a society of free equals (and the legitimation of public power towards this end, and this end only). Unless we want to give up on this ideal, liberalism had better provide such a theory. Where I will agree with the critics of liberalism is that liberalism indeed has tended to assimilate the corporation to the private sphere (under the influence of market liberals and professional economists and lawyers in the law and economics movement), with all the consequences the critics rightly note. However, I will argue that the liberal straightjacket of the private/public distinction is actually *salutary*: it forces us to think about intermediate associations as either essentially private or essentially public. A proper imposition of the straightjacket, I will suggest, must result in the conclusion that corporations should be seen as essentially public institutions.

I will start by discussing two recent criticisms of liberalism's analysis of the corporation, those by David Ciepley and by Abraham Singer. I will take issue with the identification of liberalism with market liberalism (Ciepley) and political liberalism (Rawls) and propose a definition of liberalism which has at its heart a defence of three normative ideals: freedom, justice and democracy (Section 1). Is the corporation compatible with liberalism, thus conceived? To answer the question, I will first turn to the theory of personality and representation presented by Thomas Hobbes. A social contract between the dissociated members of a multitude creates a

specific ‘fictional personality’, namely that of the state, by authorizing a third person, the sovereign, to represent this state in action. Hobbes’s theory provides two conditions of legitimacy for the exercise of sovereign power, which in different reformulations remain characteristic of liberalism: a valid authorization and a valid mandate (Section 2). On Hobbes’ analysis, corporations can be treated as fictional personalities as well. Liberalism’s legitimacy conditions allow for legitimate private and legitimate public actors in society (but nothing in between). The authorization condition does not help us much in deciding whether the corporation should be treated as a private or a public actor (section 3). An analysis of the mandate condition reveals that the question ultimately hinges on the interpretation we give of ‘market morality’. I argue that the market should be seen as a sphere commissioned by government to create the wealth necessary for individuals to lead free lives. In the framework of an already existing legitimate state, the only way for corporations to be legitimate is as public actors themselves who are instrumental towards this goal (Section 4).

### **1. The Alleged Incompatibility of the Corporation with Liberalism**

In this section I focus on two recent authors who have made a strong case for the incompatibility of liberalism and the corporation: David Ciepley (2013) and Abraham Singer (2015).<sup>1</sup> In speaking of ‘compatibility’, I mean to refer to the idea that the existence of business corporations 1) cannot be assimilated to the *categories* of liberalism, and 2) that this creates a *normative* problem for liberalism. As we will see, Ciepley and Singer have a different diagnosis both on the conceptual and the normative side.

Ciepley has recently called for a political theory of the corporation that goes beyond the public/private dichotomy. His treatment of liberalism’s stance towards the corporation proceeds through a reconstruction of the historical trajectory of (mainly American) liberalism. Liberalism over time came to be wedded to a strict distinction between the private and the public sphere, with the corporation placed on the private side (Ciepley 2013, 139). For Ciepley, this culminates in the neoliberal (or ‘market-liberal’) view of the corporation as a ‘nexus of contracts’ between private parties. This is fundamentally mistaken, Ciepley, argues, for two complementary reasons, which point to two types of ‘publicness’ of the corporation. First, the corporation depends upon special legal rules (privileges) designed and enforced by the state, the most important of which are asset lock-in, entity shielding and limited liability. Together, these privileges create a pool of ‘socialised property’ under the discretionary power of corporate management. The corporation acquires

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<sup>1</sup> For other statements of this failure of liberalism, see e.g. (Van Eeghen 2005), (Scherer and Palazzo 2011, 917–918)... (add more).

powers normal natural persons do not even approximate (Ciepley 2013, 143–145). Second, managerial authority over employees can only derive from the corporate charter, not from the ownership of the corporation by shareholders. Corporations are created through charters by governments for special purposes, hence this authority derives from government as well (Ciepley 2013, 149–151).

Against the background of this analysis, Ciepley condemns liberalism as a political theory for the corporation:

Corporations are what I call “franchise governments” – their form and powers are delegated by the state, yet they are run on private initiative. They thus transgress all the basic divides that structure liberal treatments of law, economics, and politics: government/market, state/society, privilege/equality, status/contract, as well as liberalism’s master dichotomy of public/private. *Corporations are not of liberalism and cannot be satisfactorily assimilated to its categories.* Instead they need to be placed in a legal and policy category of their own – neither public, nor private, but “corporate” – to be governed by distinct norms and rules, so as to render them more intelligible, more accountable, more responsible, and more productive. (Ciepley 2013, 140)(emphasis added, R.C.)

Liberalism’s error of conceptual miscategorization has had real and devastating consequences. By concealing the true nature of the corporation, Ciepley argues, liberalism has blinded us from seeing how the corporation usurps public power in the service of private need. Within corporations property of multiple shareholders is socialised into a new legal personality, with nobody responsible for the risks taken by the corporation. Market liberals, looking through the corporation with a private frame, have responded to this predicament by making shareholders more strongly responsible for controlling the corporation’s actions, as if shareholders were the owners of the corporation. This however, is a cure worse than the disease, since it incentivises corporations to serve the short-term needs of shareholders only, instead of the long-term productivity of the corporation itself. The result is a history of economic failure: high levels of bankruptcies, corporate law-breaking, and lack of productive re-investment of profits (Ciepley 2013, 145–149).

Singer provides an illuminating in-depth treatment of how John Rawls’s theory of justice is unable to deal with crucial questions surrounding the corporation. At one place, he closely links his treatment of Rawls to the inadequacy of the ‘assumptions of liberalism’ (Singer 2015, 87) in general, so I will interpret his article, not just as a case study of Rawls’s theory, but as representing liberalism through the lens of Rawls.

Rawls’s theory relies on a division of labour between the basic structure (public institutions) and voluntary associational life (private institutions). Singer argues that in Rawls’s theory the corporation cannot be part of the basic structure of society, to which principles of justice apply. There are two fundamental reasons for

this. First, the basic structure only comprises institutions which coerce citizens in a fundamental way, and it is only such coercion which calls for demands for public legitimation. Corporations do not fall under the basic structure because individuals are not coerced by them, given that they can exit from them. They can choose not to work for corporations as employees, stop buying their products as consumers and stop investing their savings in corporations. It is important to note that this distinction relies on a factual assumption, i.e. that a basic structure successfully realizing the principles of justice enables citizens to exit from corporations. Rawlsians do not have to claim that citizens can exit corporations in an unjust society, but they must claim that they can do so in a just society, where institutions of property-owning democracy widely disperse ownership and thus render citizens sufficiently independent from corporate influence (Singer 2015, 78–80). The second reason is that Rawls – at least if one reads the *Theory of Justice* through the lens of *Political Liberalism* – is strongly committed to avoiding adherence to a comprehensive doctrine in the legitimation of liberalism. From this perspective, legitimate political principles must be implicit in a shared public culture, and given the level of controversy over the nature, functions and internal workings of corporations (but also churches, families etc.) these matters should be left to citizens themselves. Politics should not extend into these matters if it wants to keep its legitimacy. Singer argues that this second reason is the fundamental reason for Rawls’s resistance to treat corporations as part of the basic structure (Singer 2015, 78, 86).

The normative consequence which Singer finds problematic is that Rawls’s theory cannot deal with crucial questions about the corporation such as those of corporate purpose, executive compensation, or workplace democracy. It has to stay agnostic on such matters. This does not mean that Rawls’s theory cannot have any impact on corporate governance. It could well be that the principles of justice have consequences for corporate governance. After all, the way corporations act may have profound negative consequences in terms of generating material inequalities with which Rawls’s second principles of justice is concerned. The crux is that the principles of justice in Rawls’s theory will solve these inequalities by constraining the corporation *from the outside*. The *internal workings* of the corporation, by contrast, must be left free to the wishes of individuals themselves who form and operate corporations (Singer 2015, 77). Any negative consequences are to be solved through a ‘society-wide distributive policy as opposed to organizational restructuring’ (Singer 2015, 82).<sup>2</sup> Singer argues that this is inadequate. Rawls’s theory leaves us with no compass in the non-ideal circumstances we are in, where there are widespread unjustified inequalities, caused (inter alia) by corporations, and

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<sup>2</sup> This solution is parallel to Rawls’s remarks on the family and the church, where he admits that law may set boundaries to what happens within these institutions, but leaves members to associate freely within those boundaries.

there is no basic structure which can remedy this. We need to open up the internal governance of corporations to remedy these injustices, but Rawls's theory does not allow us to do so (Singer 2015, 85).<sup>3</sup>

We can now more precisely identify the critique of both authors as variations of the shared template mentioned above: 1) liberal political theories 1a) rest on a distinction between the public and the private sphere and 1b) place corporations in the private sphere; 2) this is normatively problematic, since 2a) corporate actions in reality have public, or quasi-public characteristics and/or effects which remain concealed hence politically unaddressed by treating them as private actors, so that 2b) liberal values or principles of justice tend to get undermined. I now want to argue that while I agree with these diagnoses, we cannot dismiss liberalism in general on the basis of a critique of Rawlsian political liberalism or of neoliberalism (or 'market liberalism'). Both are controversial developments within liberalism which many other liberals do not – and need not – share.

Political liberalism's inability to deal with the corporation seems to me *not* to be essential to the possibility of liberalism in general to deal with corporations 'from within'. Rather, it is characteristic of the later Rawls's particular interpretation of liberalism. As noted by Rawls himself, the second principle of justice itself is already too controversial, a politically liberal society could probably only reach an overlapping consensus on something like the first principle which protects basic liberties (Rawls 2005). And even for the first principle one could be doubtful whether the theory of *Political Liberalism* really provides an adequate basis (Waldron 2004). The debate over liberalism should not be held hostage to the later Rawls's controversial and problematic political liberal move (Raz 1990; Estlund 1996). For more comprehensive views of liberalism – which have been dominant throughout history – there is a principled moral reason to make a strong distinction between the public and the private sphere: this is thought to provide the best protection of the moral ideal of equal freedom for all citizens. Citizens' freedom to contract with others in the private sphere is itself worthy of protection (disregarding whether one justifies this position with reference to a natural rights claim, or some contractualist device). The early Rawls could well be interpreted along these lines.<sup>4</sup> The question then becomes whether a more comprehensive liberalism would also be debarred from considering matters of internal corporate governance.

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<sup>3</sup> Greenfield also argues the preference for outside (public law) over inside (corporate law, deemed to be private law) regulation of corporations cannot be a priori established. (Greenfield 2006, 36–39).

<sup>4</sup> Singer suggests as an alternative to Rawlsian liberalism an „eudemonistic approach“ might be promising (p. 87). My suggestion here is not to jump to such a (non-liberal?) approach before testing how far we can get with a comprehensive form of liberalism.

Similarly, it is problematic to identify liberalism with neoliberalism. If we describe liberalism – as I have just done – as in the first instance wedded to the normative ideal of equal freedom for all citizens, it is not clear that neoliberalism qualifies as liberalism. The abstract ideal of equal freedom can be reconstructed as requiring in turn two other ideals: justice and democracy (for the specific liberal theory I would defend, see Claassen 2017a; Claassen 2017b). On the one hand, in a liberal society the state protects citizen’s private freedom through a fair distribution of resources (including basic rights). On the other hand, a liberal state protects citizen’s public freedom through a democratic organization of public authority. On most reconstructions, neoliberalism does not fit this description, since it is first and foremost wedded to a small set of economic rights as basic rights, not to an egalitarian distribution of real freedom, neither to democratic decision-making (REF). Moreover, there is a deeper reason why neoliberalism doesn’t fit the bill of liberalism, thus described; and this has to do with the ‘nexus-of-contracts’ view, which Ciepley rightly identifies with neoliberalism, but which is incompatible with liberalism itself. I will come back to this in section 2.

If liberalism is reconstructed as a *normative* theory first, it is a secondary question what *institutional* set-up best realizes its commitments to freedom, justice and democracy. It remains an open question whether these ideals imply adherence to a strict private/public divide and whether or not this problematic. Both Singer and Ciepley – convinced that liberalism cannot go this route – hint at the replacement of the private/public dichotomy through the creation of a tripartite institutional set-up. Ciepley argues that we could create a corporate category next to the private and public ones (see quote above), Singer proposes a theoretical space for a separate treatment of ‘meso-level institutions’ (p. 86). These suggestions are important; but if we identify liberalism first and foremost with a set of normative aspirations, then it is not a priori clear that liberalism can and/or must accommodate such a tripartite institutional set-up; nor is it clear that this would be the best way to reconcile liberalism with the corporation. The remainder of the paper inquires these questions. Why pursue such a reconciliation within liberalism and not go beyond it? We are not investigating a merely semantic question. Definitions are stipulations; anyone can define liberalism as she wants to. The substantive question should be whether the corporation is reconcilable with ideals of freedom, justice and democracy. If these ideals are – as I think can be reasonably held – characteristic of liberalism, then we need to rethink liberalism itself. Going beyond liberalism either implies abandoning commitments to these ideals or not. If it does, then we are in the area of illiberal theories. If it does not, then we are still on the playing field of liberalism, thus conceived.

In conclusion, I agree with Ciepley and Singer that neoliberalism and political liberalism place corporations in the private sphere. I also agree this is problematic. Singer’s diagnosis of the coerciveness of corporations in non-ideal

circumstances and the problematic consequences in terms of social injustices is convincing. Similarly, Ciepley's diagnosis of the responsibility gap introduced by socialised property and the ensuing failure to generate long-term economic prosperity is convincing. However, I disagree that either political liberalism or neoliberalism is representative for liberalism as a whole, and I want to investigate further whether liberalism properly understood has the intellectual resources to give a more satisfactory evaluation of the corporation.

## **2. The Creation of Fictional Persons (1): The State**

Corporations are collective agents, living within a state (or several states). We first have to consider what a liberal account should say about the legitimacy of collective agency in general, and about one special case of collective agency, i.e. state agency. The first is necessary since corporate agency will be a special case of collective agency, parallel to the special case of state agency. The second is necessary because the existence of a legitimate state can have consequences for the legitimacy of other groups, such as corporations. To explore these questions, I will use Thomas Hobbes' account of personhood and collective personality in chapter sixteen of the *Leviathan*. We need not accept all the details of Hobbes social contract theory, to make use of his particular account of personality, which, I take it, is a fair representative for the liberal tradition as a whole (List and Pettit 2011, 171–174).

Hobbes distinguishes between natural and artificial persons. A natural person is someone 'whose words or actions are considered (...) his own.' (Hobbes 1991, 111). A natural person acts on his own behalf, or represents himself. By contrast, an artificial person is 'representing the words or actions of another man, or of any other things to whom they are attributed, whether Truly or by Fiction.' (Hobbes 1991, 111). If we start with the simple case of two persons, one, a natural person can authorize another one, the artificial person, to represent him. The first person Hobbes also calls the 'author', the second one the 'actor' (Hobbes 1991, 112). The artificiality of the actor relates not to the fact that he himself is no natural person (he is capable of representing himself as well), but to the fact that his words are not really 'his own'. He speaks on behalf of someone else. The relation is one of authorization, and thus Hobbes recognizes that the artificial person now has 'authority', i.e. 'the Right of doing any Action' (Hobbes 1991, 112). While the actor has the right, it is crucial for Hobbes that the responsibility of the action remains with the author. The actions are attributed to him as if they were his own. He has to bear the consequences, positive or negative, of the actions (Pitkin 1967, 19). Attribution and authorization are two sides of the same coin.

A complication arises in cases of what Hobbes called 'inanimate things.' In this category he includes first 'a Church, an Hospital, a Bridge' and secondly, 'Children, Fooles and mad-Men' (Hobbes 1991, 113). In contemporary terms,

Hobbes lumps together marginal agents (like children), collective agents (like churches and hospitals) and material things (bridges). What all of these have in common is that they cannot authorize others to act on their behalf, since they lack reason. However, Hobbes argues that third parties can authorize representatives. Who are these third parties? Hobbes calls them the ‘Owners, or Governours of those things’, such as guardians or curators (Hobbes 1991, 113). Now we have a three-place relation, between an author, an ‘inanimate thing’, and a representative. The difference between the two-place relation and the three-place relation explains the use of the phrase ‘Truly or by Fiction’ in Hobbes definition of the artificial person. When an artificial person is representing a natural person who can authorize him and take responsibility, the representation is done ‘truly’, when he is representing an inanimate thing he is representing by fiction. One commentator therefore suggests referring to the inanimate category as to ‘persons by fiction’. (Runciman 2000, 271); I will refer to them henceforth as *fictional persons*. Some of these fictional persons existed before they were represented (like bridges or mad men), some others only come into existence through actions of their governours or owners (like parents getting a child). For all of them it is true, however, that they become *persons* (i.e. bearers of status in the moral and/or legal community) by virtue of the act of being represented only.

The account of collective agents for Hobbes follows this three-place schema, as is already clear from his mentioning of hospitals and churches. Hobbes main interest of course is in the fictional agent that is the state. The state is created by an act of a multitude of men who make a covenant with each other. The covenant has two consequences: one is that it unites an otherwise dissociated group into a unity, a new person which Hobbes refers to as the ‘commonwealth’ or ‘state’. This is the creation of a fictional person analogous to the hospital. Second, the covenant appoints a sovereign as the representative of the state. The sovereign is the artificial person, who makes it possible for the state to act (it can be a single person or an assembly, but this is not of any direct relevance here). The two new persons are closely related: only by appointing a representative can there be the person of the state. This is not specific to the state, but it is true of collective agents more generally: they need a structure in which decision-makers are appointed to come to life in social practice.

The three persons in the play need to be kept strictly distinct. This becomes clear once one considers that while the identity of members of the multitude as well as the identity of the sovereign may change over time (new natural persons are born into the multitude and take the place of older ones who die), the identity of the state remains intact. It has existence in perpetuity. Moreover, it is the state which bears responsibility for the acts done on its behalf. For example, the debts concluded by sovereigns are owned by the state, even if only real persons can take the actions necessary to discharge the debt. Within the same state a new generation of citizens

and their sovereign can be confronted with debts from older generations (Skinner 2009, 363). Authorization and attribution therefore now come apart. While the multitude authorizes, it is the state to which the acts of the sovereign are attributed.

The relevance of Hobbes' account of personhood for liberal theory is that it gives us the criteria to judge whether sovereigns are acting *legitimately*. There are two such criteria, a formal and a substantive one.

The formal criterion is a valid *act of authorization*. Any act of representation needs a valid authorization of the actor by the author, and the state is no exception. The covenant between the members of the multitude fulfils this function. Here we find Hobbes' formulation of the liberal idea that the legitimacy of government derives from the consent of the people. However, Hobbes gives a particular twist to this idea, because he argues that authors have transferred their right to take actions to the actor which acts on their behalf. This comes with two duties: to accept the responsibilities which follow from the actors' deeds, and not to interfere with whatever the actor does (Skinner 1999, 26–27). This right to act, since it is transferred to the sovereign, cannot be taken back unilaterally. Every citizen has authorized the sovereign to undertake actions on his behalf, i.e. 'in the same manner, as if they were his own' (Hobbes 1991, 121), and must now live up to the fact that they are attributed to himself. From this strong form of authorization follow some of the more controversial aspects of Hobbes' theory, such as that the sovereign cannot commit an injustice to his subjects (p. 124) or that a criminal who is punished by a sovereign in some sense punishes himself (p. 122).

The substantive criterion I call the *mandate condition*. It refers to the mandate for which the actor is authorized. An act of the sovereign is legitimate in case it doesn't violate the mandate which is expressed in the social contract. Hobbes argues the commonwealth is created 'to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence' (Hobbes 1991, 121). The reference to peace and common defence should be understood in the context of Hobbes' particular interpretation of the public interest, which is given with his overriding concern with the absence of physical security in the state of nature. This is a particularly wide, almost unlimited mandate, given Hobbes' description of the individual's right in the state of nature as a 'right to every thing' (Hobbes 1991, 91). However, we can imagine other formulations – for example a more Lockean one where the protection of natural property rights is made a central part of the social contract. Whatever the substance, it is crucial that the reason for which the contract was concluded is at the same time the criterion to judge whether the sovereign acts legitimately. Only where his actions promote the public interest is he acting within the bounds of the established authorization relation.

These two legitimacy conditions are characteristic for liberalism more generally. Their juxtaposition leads to a tension, that is therefore also characteristic

of liberalism more generally. For the two conditions can come into conflict with one another in cases where a sovereign oversteps his mandate. In such a case the multitude could claim that it hasn't authorized the sovereign to undertake the acts in question.<sup>5</sup> Such a conflict allows of two solutions. The judgment whether a sovereign has breached the mandate can be either relegated to the sovereign himself or to the original multitude of men who signed the covenant. The social contract tradition is split on the issue. Hobbes chose the former one, and this is characteristic of his absolutism. Locke chose the other solution, which led to the type of constitutional democracy we associate with his brand of social contract theory, which has come dominant in liberalism. Both argued for their choice in emphasizing that only this choice would truly annul the state of nature. Hobbes emphasizes several times that where subjects can dispute the judgments of their sovereign, we threaten to fall back into the state of nature (Hobbes 1991, 123, 127–128, 144–145), while Locke explicitly targets Hobbes for the consequence that the people remain in a state of nature vis-à-vis the sovereign when the latter has absolute powers (Locke 2003, par 13 & 90).

Nothing in the general theory of authorization that Hobbes presents necessitates a choice either way. The resolution of the conflict, one way or the other, depends on specific interpretation of both legitimacy conditions. In Hobbes, the authorization condition is interpreted as an unconditional transfer of right and the mandate condition is interpreted as virtually unlimited (Pitkin 1967, 30). In Locke, the authorization become conditional on the mandate being respected, the mandate condition itself is more limited, and the people is being made the judge of whether the mandate is respected. Where we identify Locke's choices as the liberal solution to the problem, the underlying scheme is nonetheless essentially the same as Hobbes's. Its core is that the state is a fictional person that should not be conflated with another person, its representative (the sovereign who acts on behalf of the state), nor with the natural persons (multitude) who have created the state and authorized the representative. This is a scheme which is moreover also applicable to other fictional persons, such as corporations.

The specific figure of the *social* contract at the heart of liberalism creates a state whose representative is to rule for the common good of the citizens. This creates a genuinely public authority, which is fiduciary in nature and should be exercised impartially to the benefit of all. In a convincing analysis, Samuel Freeman argues that this should not be confused with the libertarian figure of political power as based upon a set of *economic* contracts which are concluded between private parties and a sovereign (Nozick's dominant mutual protection agency), where each

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<sup>5</sup> Copp argues Hobbes makes a mistake by attributing the actions of the sovereign to the members of the multitude, since the original covenant instates a form of 'commission authority' (which involves giving specific instructions, i.e. a mandate), and the multitude has not authorized a sovereign to overstep the instructions. (Copp 1980, 601–602).

of the parties contracts directly and separately with the sovereign, on the basis of a process of bargaining. The political power that is thus created remains private in character, a contract to deliver a level of protection against a price (level and price may be different for different parties, depending on their bargaining power). It cannot be taken to represent an authority ruling for the common good and treating everyone impartially. It rather is akin to feudalism, as ‘a system of personal political dependencies that is based in a network of private contractual agreements.’ (Freeman 2001, 147–148). Libertarianism is not a liberal theory, as is betrayed by its nexus-of-contracts view of political power. It denies the distinction between office and person central to liberalism, marked by Hobbes’s innovative theory of collective personality. If the corporation (along Hobbesian lines) is marked by a similar representation-relation as the state, then we may equally doubt whether a nexus-of-contract analysis of the corporation will be adequate; but at the same time also whether such an analysis will be a liberal analysis at all.

### **3. The Creation of Fictional Persons (2): Corporations**

The liberal theory of legitimate public authority seems to necessarily imply the division of society into a public and a private sphere. On the one hand, there is a public power (the state, represented by the sovereign), while on the other hand there is a multitude of individuals. This in turn is associated with the familiar distinction between private and public interests. The public interest defines what is in the interest of all in a given society, while the private interest refers to whatever is in the interest of a given individual. *Tertium non datur*. However, one may think this conclusion is too quick. A common typology of forms of government distinguishes them by the number of those who govern: either one (monarchy), several-but-not-all (aristocracy) or all (democracy). Similarly, we can divide persons into individual agents (natural persons) and two types of collective agents: those representing all (the state) and those representing several-but-not-all, i.e. other collective persons, which I will henceforth refer to as ‘intermediate’ collectives.<sup>6</sup> Before concluding that liberalism is wedded to the dichotomy, we therefore need to consider how liberalism judges the legitimacy of these third types of actor, intermediate collectives. It is worthwhile once more to return to Hobbes, since he explicitly dealt with this question as well.

Hobbes distinguishes two types of collective agents (which he called ‘regular systems’): absolute and independent ones and dependent or subordinated ones. The first type only refers to the state (commonwealth). All the other collective agents in society are ‘Subordinate to some Sovereign Power’ (155). These subordinate systems Hobbes divides into political ones, which he also calls ‘Bodies

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<sup>6</sup> Similarly, in economic theory, in between private goods and public goods, there is an intermediate category of club goods (REF).

Politique' and private ones, which he also calls 'Persons in Law' (155). The power of political bodies is always limited, Hobbes says, by the power of the Sovereign. These limits are given by two sources: 'their Writt, or Letters from the Sovereign' and the 'Law of the Common-Wealth' (156). Finally, Hobbes emphasizes that all acts of such political bodies are 'the act of everyone', i.e. every citizen in society (156). This he explicitly justifies through a two-step process of authorization: all citizens have authorized the sovereign, and the sovereign has authorized (through the Letters and/or the Law) the specific political body. As examples of political bodies he mentions provinces, colonies, towns, universities, colleges, and churches but also companies of merchants (I come back to this below). On private bodies, Hobbes is relatively short. Their essential characteristic is that they are 'constituted by Subjects amongst themselves' (155), or again 'constituted without Letters, or other written Authority' (162). As other collective persons they must be represented. In this context Hobbes briefly discusses only the family, represented by the Father.

What is characteristic of Hobbes's treatment of other collective persons, then, is that they are assimilated either to the private or to the public side of the divide. While they do form a third kind of person, distinct from both natural persons and the collective person of the state, this third category is immediately split up into the two established subclasses: private and public bodies. The former serve merely private purposes, while the latter are a part of the delegated structure of government which in the end is traced back to the same source of authorization as that of the sovereign representative of the state: the citizenry. We can also express this as follows. Every intermediate collective in the end derives its authority from private individuals (this is liberalism's ethical individualism). However, some derive it *indirectly* from all private individuals, via the actions of a sovereign who creates such a collective. Other collectives derive their authority from a subgroup of private individuals who create this collective *directly*.<sup>7</sup> The private/public distinction is itself irreducible while every other category of persons is reducible to it. Collectives either serve the public interest or they serve a (collective) private interest. Their legitimacy depends on their authorization being traceable to either a private or a public source. Indeed, what third option could there be?

The big question is how to categorize corporations, given this liberal divide. Hobbes discusses this question briefly, in his chapter on political bodies. For him, there is no misunderstanding that the companies of merchants or corporations (he uses the word explicitly) are political bodies. This classification conforms to the status of the rising trade companies in his own time, which were chartered by governments to exploit trade overseas with the colonies. However, Hobbes at the same time notes that there is a tension. On the one hand, he states: 'The End of Incorporating, is to make their gaine [i.e. that of the merchants, R.C.] greater' (160).

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<sup>7</sup> See also Copp's distinction between 'inside' and 'outside' authorization in Hobbes. See (Copp 1980, 597).

Here Hobbes seems to believe that corporations have a private purpose. This judgment, taken on its own, might seem to disqualify corporations from being classified as political bodies, against Hobbes's own explicit statement. Immediately afterwards, he goes on to argue that these companies possess a double monopoly in selling and buying, both at home and abroad, which serves for the merchants to 'make their gaine greater' (160). He criticizes this monopoly for not being maximally profitable for the Common-wealth: 'Such Corporations therefore are no other than Monopolies; though they would be very profitable for a Common-wealth, if being bound up into one body in forraigne Markets they were at liberty at home, every man to buy, and sell at what price he could.' (161).

The implication of this passage, as I see it, is that Hobbes acknowledges that corporations in the form they took in his days were problematic, but thereby at the same time accepts there can in principle exist an economic form of the Corporation which would be in the legitimate interest of the common-wealth as a whole (where the corporation would act as one person in foreign markets, but allow competition between merchants at home). The orientation to private gain can be compatible with the status of a political body, under the right (non-monopolistic) *economic conditions*. To this, Hobbes in a later chapter adds a *political condition*. In the chapter on things which may weaken a commonwealth, he explicitly lists 'the great number of corporations' as a danger, referring to them as 'many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a natural man.' (230). Corporate power may challenge and threaten the absolute power of the sovereign, thus violating the social contract. This subversion needs to be prevented from happening.

If we now move beyond Hobbes and return to our own days, the question we face is whether contemporary corporations can be described as legitimate political bodies in Hobbes's sense. The corporation is legitimate if it is either a legitimate private body or a legitimate public body. Using Hobbes' theory of collective agency, this question can be broken down in two specific subquestions, representing the two conditions of legitimacy: i) who is the author (natural person) creating the corporate agent (fictional person); and is he/she public or private? (ii) what is the mandate given to the corporation by its author(s); and is it public or private? This will be our program. I will discuss the first question in the remainder of this section and the second one in the next section.

The question as to the authorization of the corporation is not so simple today as it was for Hobbes. On the one hand, corporations are still officially created through a corporate charter (or act of incorporation), which is public and facilitated by corporate law. On the other hand, private persons instead of governments now usually take the initiative of creating new corporations. Law has come to facilitate this private initiative for incorporation from the nineteenth-century onwards, up to the point where starting a corporation is now a quite 'uneventful' formality (Robé

2011, 12). So should we continue to conceive of the authors as the sovereign or as some group of private persons? If we consider the authors to be private, then we face a second difficulty, for who are these? Dominant legal and economic thought nowadays points to the shareholders (Hansmann and Kraakman 2001) while others reconstruct the corporation as resting on a broader group of stakeholders (Blair and Stout 1999; Greenfield 2006; Robé 2011). The debate between these two camps can be reconstructed as a debate over different questions, each of which has sometimes been taken to be decisive (such as: who owns the firm? Who is the residual claimant of the firm? Running the firm in whose interest would maximize economic performance of the firm, and/or the economy as a whole?). None of these key questions however is the one Hobbes asked: who is the author of the corporation, authorizing its representatives?

A first answer that comes to mind might be: that the official *founders* of the corporation, whoever they are, should count as the corporation's authors. However, once we realize that the founders might be dead, while the corporation is still alive, it is obvious that this answer cannot be right. The authorization relation is not a one-off moment in time, but it is a continuing relation. It is true that the members of the multitude may change (due to births and deaths) while the commonwealth remains identical. At every moment in time, however, there must be a set of persons who are to be identified as the members of the commonwealth, for whom the commonwealth exists and from whom its authority emerges. Otherwise the commonwealth would be an empty body, a zombie collective. Without an underlying membership, there would be no authors, who must consider what the sovereign does to be done in its name. Similarly, the business corporation must rely on an underlying membership or constituency which itself continues to animate the corporation as long as it exists.

A second possible answer could be that the *sovereign* is the author of all corporations. This answer might be correct, at least for some corporations. For if the sovereign creates a corporation for a public purpose, out of public funds (say, old-style public railroad or telecom companies), then the perpetual life of its founder, the state, solves the problem. The state functions as the underlying member who continues to authorize the corporation. However, the sovereign cannot be the author of all collective bodies by definition, for this would void the category of private bodies of all content. This would mean that private individuals cannot authorize the actions of a collective for their private purposes (say, churches or universities). All private action would then have to be individual action. Whether or not one thinks this is a normatively attractive conclusion, it is certainly not the conclusion a liberal theory can draw. As we saw above, Hobbes allows for the legitimate existence of two types of intermediary bodies, public and private ones. The fact that law recognizes private organizations as separate legal persons, doesn't mean their author is the state.

So what makes the public-purpose corporation a public body in a Hobbesian sense, in contrast to a private association? The third answer might be: the difference lies in the *ownership* of the corporation. In a public-purpose corporation, the state is the majority shareholder. This then decides the question for all other corporations, in which the shareholders are private persons; these corporations are private bodies. For one thing, it is dubious to describe shareholders as owners of the corporation. The shareholders only hold shares, but this gives them no direct control rights over the corporations' assets. The corporation owns assets in its own name and is a legal person which is not itself owned by anyone (REF). Moreover, if the shareholders would be the authors of corporations, then it becomes a mystery who authorizes a non-profit corporation (foundation or association) – collective bodies which have no owners/shareholders. Finally, other contributors, such as employees, may claim that there is nothing special about the inputs that shareholders contribute to the corporation. Employees (and possibly others as well, such as suppliers) also make specialized investments in the corporation (Blair and Stout 1999).

This suggests that a fourth and final answer must be the correct one: the authors of a collective body are those who join together to provide the inputs to achieve a common goal. These *contributors*, as long as they contribute, constitute the enduring 'membership' in a Hobbesian sense that underlies the corporation. This answer, while better than the previous ones, is still not completely satisfactory. For consider: a public-purpose corporation also has private contributors (employees, suppliers etc.). What makes it a public body, it seems, is that its *purpose* is to further some part of the public interest. The contributors are enlisted for this public purpose (e.g. capital is made to work for the public purpose by having majority state ownership, employees are contracted on certain conditions which make their work oriented towards this public purpose etc.). The factual contributors are here mere 'cogs in the wheel' of the real author of the corporation, the sovereign. This suggests that the *mandate* is decisive. If the mandate states that the corporation exists for the sake of some public good, then the sovereign is the author (and since the citizenry at large is the author of whatever the sovereign does in name of the state, in the end the citizenry are the authors of every public-purpose corporation). However, if the mandate refers to a private purpose, then authors of this corporation are whoever keep on contributing to the realization of this purpose. The mandate determines authorship, hence the publicness or privateness of collective bodies. This position gives the right answer in the case of public-purpose corporations and in the case of non-profit associations. In the next section I will enquire what it implies for business corporations.

#### **4. The Business Mandate and the Morality of the Market**

In this section I will argue that from liberalism's intellectual resources one can offer not one but two views on the corporation, both of which would make the corporation a legitimate collective body in a liberal society. Both views are mutually contradictory, however, one defining the corporation as private, the other as public – and both imply opposing directions for reform of the corporation as we know it. Each of them relies on a different view of the mandate.

The first view is that the private contributors to the corporation are its authors, and hence that the mandate for which they have created the corporation is to do anything they consider in their interest. This view may derive some support from the factual way corporate charters are drafted. Legal scholar Lynn Stout, while debunking the idea that corporate law requires corporations to maximize shareholder value, notes: 'The overwhelming majority of corporate charters simply state that the corporation's purpose is to do anything "lawful".' (Stout 2012, 28). The absence of an explicitly stated substantive purpose gives maximum freedom to private contributors to use the corporations for the specific purposes they see fit. These purposes may change over time, they may include self-interested as well as altruistic purposes, single or multiple, all of this remains open to be adapted to the evolving wishes of the private contributors. In this first view, the business corporation is a private collective body analogous to non-profit associations

The second view is that the business corporation is a public organization (a Hobbesian political body), authorized by government, because its mandate includes a public purpose. This may perhaps seem surprising as an interpretation of all those corporations, which are not explicitly created by government for a specific public purpose (such as maintaining parts of public infrastructure) but operate on a commercial basis. There is nonetheless a public purpose they contribute to: the maximization of social wealth. The underlying view is that the whole market sphere should be seen as an organized competition that is commissioned by government to procure consumer goods at maximally competitive prices. Private parties are being hired and contracted to do so (just as in the case of a public purpose company) but this doesn't make the market less of a public space. Just as Roman authorities organized a competition between gladiators because they considered the games a public good (just as much as the deliverance of bread) for the Roman people, so market competition is created to maximize the public good of social wealth.

Both views of the corporation can be reconstructed as defensible within liberalism, but by appealing to a different part of liberal theory, which in turn is connected to a different way of defending a market realm in liberal society.

The private view rests on what is normally called the *freedom-defence of the market*. Recall liberalism's starting point: citizens should be treated as free equals and public power arranged so as to realize this equal freedom. The first step in operationalizing this abstract notion is to formulate a set of concrete freedoms which realize equal freedom: the freedom to worship, express oneself in public, assembly

etc. The freedoms of property and contract, which together define the market, are in this view basic freedoms which form part of this set (Tomasi 2012). As Waheed Hussain has argued, the market should be seen as part of the personal sphere of life, 'in which we are allowed to pursue any goals, plans and projects we choose, even if these are not optimal from an impartial point of view' (Hussain 2012, 323).

The second, public view of corporations relies on the *wealth-defence of the market*. By contrast to the freedom-defense, it explicitly sees the market as being justified through an impartial point of view. The invisible hand justification belongs here. The pursuit of private self-interest from this perspective is just a systemic instrumental imperative to make sure the market as a whole maximizes wealth for everyone (McMahon 2012, 111–134). Some may question whether this is a liberal view at all, instead of a utilitarian one. My position would be that it is, for (a certain level of) wealth is itself instrumentally necessary to lead a free life. The ability to acquire food, housing, clothes and other basic products is a prerequisite of any credible notion of what it is to live in freedom; independence from the imperatives of nature (the struggle for survival) is just as much a necessity as independence from the imperatives of others in social systems.

While both defences of the market are often run together by market proponents, they are in deep tension; the problem of the corporation brings this out. From both perspectives, one can question the extraordinary powers that corporations have nowadays acquired. From the perspective of corporations as private actors, however, the solution would be to make corporations more like other private actors by diminishing or even abolishing completely their special powers and privileges (asset partitioning, limited liability). From the perspective of corporations as public actors, by contrast, the solution would be to increase the responsibilities of corporations. From both perspectives rights and duties need to be in equilibrium, but this still leaves open whether the corporation should have fewer rights or rather more duties. Which route one takes, depends on which view of the two views of the morality of the market one adopts. Both however, are consistent and liberal, in assimilating the corporation more clearly either to the public or to the private sphere.

Leading to policy conclusions that go in opposite directions, one may wonder if either of them is 'more liberal' than the other. In the remainder of the section I offer my own answer to this question. This answer is tentative, for it needs more study than I can provide here. Also, it is offered with the qualification that whichever direction one ultimately defends for public policy purposes, this will not annul the conclusion reached so far, that liberalism can reasonably be reconstructed as leading to either a private or a public interpretation of corporations.

The strongest case for the public interpretation of corporations is instrumental. Corporations – and especially the legal protections of investors made possible through the corporate form – are necessary for creating substantial wealth

and productivity increases. This is what economic theory suggests (economies of scale in production made possible by pooling wealth in corporations) and this is what comparative history seems to suggest.<sup>8</sup> Wealth and productivity increases are themselves a necessary means for lifting populations out of poverty, and poverty is a violation of one of the basic conditions of living a free and autonomous life. Liberalism needs the economic engine of the corporation. This suggests that it might be best to work from the public end, see how the corporation can be understood as a public institution, and which violations of legitimacy on the public model the corporation might need to take into account.

Two qualifications of the instrumental link between freedom and wealth might prove an entry into this project of reforming corporations on public lines. First, the link only holds up to a certain level. While some wealth is necessary to lead a free life, it is not the case that endless wealth increases will lead to endless increases in freedom. A threshold might be sufficient, analogous to the threshold much empirical research on subjective wellbeing, or happiness, finds between increases in wealth and increases in well-being. One key explanation for such a threshold is that at higher levels of wealth, additional wealth does not have a material function but rather acquires more of a signal (status) function. Competition between individuals in a group (such as a nation state) for wealth acquires a positional character (Hirsch 1999; Frank 1999). Increases in well-being due to wealth increases are cancelled out by the wealth increases of others. A second qualification is that wealth is not the only condition for leading a free and autonomous life. Other conditions (such as a clean environment, or meaningful work, but also a sufficiently equal distribution of wealth) are also important. And the actions of corporations do not only affect social wealth, but also these other conditions. To the extent that corporate actions affect the production of wealth positively, but these other conditions negatively, trade-offs need to be made. Combining both points then suggests that we should not privilege wealth maximization unequivocally. Doing so is even deeply illiberal.

This line of thought shows why shareholder value maximization as an end in itself (the ‘market liberal’ view) is illiberal. The aim of the corporation – and of corporate law as facilitating the corporation – should be seen as the increase of social wealth in a broad sense (Kraakman and et al 2009, 28–29). This puts all the pressure on the empirical link between shareholder value maximization and the maximization of social wealth in this broad sense. Alternative stakeholder theories see this as the balancing of claims of different stakeholders, but this is misleading to the extent that these stakeholders are still considered as private parties with private interests (Robé 2011). A meaningful connection to the public would have to include

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<sup>8</sup> Add some historical evidence. Robe 2011, p. 43 refers to paper by Timur Kuran on islamic law, which kept businesses small, and led to comparative disadvantage of Islamic business world compared to the West.

accountability mechanisms which go beyond a role for the direct stakeholders of corporations. This point may perhaps best be illustrated by returning to Hobbes one last time.

In a perceptive article, Daniel Greenwood has analysed the doctrine of shareholder supremacy in light of Hobbesian social contract theory, and by comparing the corporation in light of what is said about the state. He emphasizes that social contract theory does not need real flesh-and-blood individuals. Instead, it paints a simplified theoretical picture of the interests of individuals in the state of nature (such as Hobbes's individual whose sole interest is in security), and then argues towards the justification of the social contract on this basis. Such a theoretical endeavour does away with the need for real politics, by working with stylized facts about 'imaginary people with unified goals' (Greenwood 1996, 1045). Similarly, economic principal-agency theories of the corporation take a unified shareholder as a given whose sole interest is taken to be profit maximization. No corporate politics then is necessary. Directors and managers can act as technocrats which optimize corporate performance, with the sole purpose of the 'fictitious shareholder' in mind. Both constitutional law and corporate law rest on a fiction of a hypothetical agreement in which politics is reduced to administration (Greenwood 1996, 1049–1054). Similar criticisms of the assumption of shareholder homogeneity have also been made by others (Stout 2012).

Interestingly, Greenwood argues that the only reason that the tradition shed off Hobbes's authoritarianism was that it realized that power corrupts. Hence, the power to interpret the mandate should be given to parliamentary majorities, not to absolute sovereigns (Greenwood 1996, 1054). This seems to me a one-sided interpretation of the tradition. The requirement of democracy did not only develop to ward off corruption in the execution of the mandate as promulgated in the social contract. It also developed because the mandate cannot be fixed in advance in all the details required for running a polis (it is an 'incomplete contract' in the economist's sense). The public good consists of multiple goals which must be balanced, and the balancing act may take different forms in different communities, depending on the views of the constituents (this is in line with what I said earlier about the continuous nature of the authorization relation). A real multitude therefore must run the political community, re-authorizing and reassessing both the appointment of sovereigns, the interpretation of the mandate itself.

On such a view, there can be no legitimate technocratic management of the state, and the same is true of corporations, conceived as public actors. Authors who reject shareholder primacy sometimes advocate the independent judgment of directors and managers as an antidote (as formalized in law by the 'business judgment rule'). Only by being independent, can they have the space to balance the interests of all stakeholders (REF). This seems to me – in light of the liberal theory developed here – to provide a cure which may prove worse than the disease. Just as

this is not desirable for the state, it is not desirable for corporations. Instead, the challenge is to find mechanisms of accountability to the public as a whole and to democratize the governance of the corporation as has been done for the state (Greenwood 2013). What this would entail in practice, will have to be left for another day.

[something needs to be added here on the status of non-corporate participants in the market – which obviously pose a problem for this argument and seem to instantiate what is true about the freedom-defense of the market]

## **Conclusion**

The paper has argued that the public/private distinction is irreducible. Hence intermediate organizations must be assimilated to either side of the divide. The irreducibility of the private/public distinction, as it has emerged from the discussion so far, should not be taken as implying that all cases are clear-cut in social reality. Indeed, the search for the correct reconstruction of authorization relations for all types of intermediate organizations shows, if anything, that grey zones may exist. The private and the public function as two competing zones of gravitation, poles which attract objects in their vicinity. In the end every object may be best classified as either public or private – even though some are initially more of a mixed bag. The zones of gravitation do structure the field, however. This is especially so from a normative perspective; norms and expectations with respect to the legitimacy of collective bodies will remain strikingly different depending on whether the authorization derives from a public or a private source. Unless a third source of legitimacy can be convincingly argued for, liberals have a strong case in defending this structuring of the field. Activities are either legitimate because they are done by private citizens (alone or together) as an expression of their freedom to act, or by public bodies in the execution of an interest common to all citizens and necessary to defend everyone's equal right to freedom.

The arguments of those who argue for going beyond liberalism seem to me to dispute the divide on a descriptive level, without pointing to a truly third source of legitimacy for intermediate collectives. The descriptive disputation may be correct. Law in western societies seems to have created an ambiguous legal entity. There is a formal governmental mandate (the requirement of a corporate charter) and a specific set of publicly granted privileges, but at the same time large space for private initiative in spelling out the mandate and in using the corporation for private gain. However, such a descriptive hybrid may still be criticized normatively by liberalism as being problematic. This may lead to either of two prescriptions: either to abolish the corporation as we know it, or to bring it into line with a Hobbesian political body, reinterpreted on democratic lines. Most of the critics, where they

become normative, seem to actually pursue the second project, and argue for a (return to a) more publicly legitimated corporation. Any private elements of corporate action then can be reinterpreted as margins of discretion that the sovereign has left to the contributors of the collective to decide for themselves.

This paper has tried to make explicit that there are good reasons for going this public route in the interpretation of the corporation. If the argument is correct, this route does require accepting the framework of liberalism as a normative theory and as a theory that divides society into a private and a public sphere.

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