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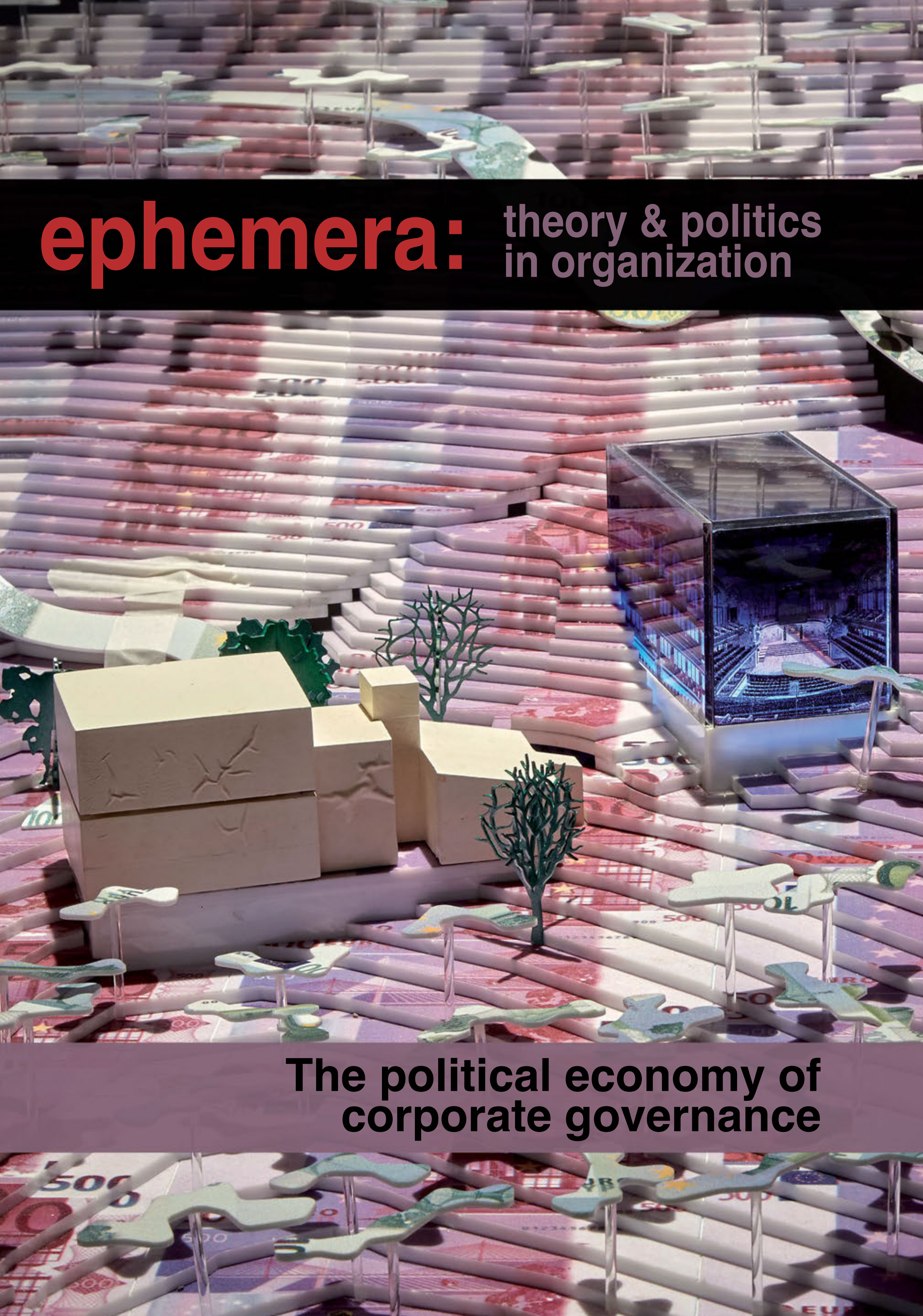

The political economy of corporate governance

What is *ephemera: theory & politics in organization*?

ephemera is an independent journal, founded in 2001. *ephemera* provides its content free of charge, and charges its readers only with free thought.

theory

ephemera encourages contributions that explicitly engage with theoretical and conceptual understandings of organizational issues, organizational processes and organizational life. This does not preclude empirical studies or commentaries on contemporary issues, but such contributions consider how theory and practice intersect in these cases. We especially publish articles that apply or develop theoretical insights that are not part of the established canon of organization studies. e*phemera* counters the current hegemonization of social theory and operates at the borders of organization studies in that it continuously seeks to question what organization studies is and what it can become.

politics

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organization

Articles published in *ephemera* are concerned with theoretical and political aspects of organizations, organization and organizing. We refrain from imposing a narrow definition of organization, which would unnecessarily halt debate. Eager to avoid the charge of 'anything goes' however, we do invite our authors to state how their contributions connect to questions of organization and organizing, both theoretical and practical.

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The political economy of corporate governance

Andreas Jansson, Ulf Larsson-Olaison, Jeroen Veldman and Armin Beverungen

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The political economy of corporate governance

Andreas Jansson, Ulf Larsson-Olaison, Jeroen Veldman and Armin Beverungen

Introduction

Corporate governance reform for promoting efficiency and wealth creation by large corporations has been much in vogue for a few decades now (Lazonick and O'Sullivan, 2000; Filatotchev and Boyd, 2009). The academic field of corporate governance has been equally vibrant with a burgeoning of theory and research (Filatotchev and Boyd, 2009; Ireland, 2009), and influential publications on corporate governance matters, such as Jensen and Meckling (1976) and La Porta et al. (1998), rank among the most cited in the social sciences. Notwithstanding literature on financialization that suggests finance has in some ways sidestepped the corporation as capital's primary vehicle of extracting value (see e.g. *ephemera*, 9(4) on 'the university of finance'), or literature on the common(s) which implies productive activity might today more often than not be organized outside of corporations (see e.g. *ephemera,* 13(3) on 'the communism of capital'), corporate governance asserts the corporate form as a key social technology of our time. This *special issue* engages with this field and the outcomes it entails, suggesting it is a political-ideological project based on a set of questionable conceptual and empirical assumptions, which in turn entail a set of norms and prescriptions – a normativity – with devastating political-economic effects.

Despite the variety of disciplinary backgrounds in theory, and country-specific institutional arrangements in practice, a limited set of related theories focused in a reductive number of research questions – i.e. property rights theory, agency theory, and other contractual approaches – have been strikingly dominant in corporate governance (Blair and Stout, 1999; Zingales, 2000; Aglietta and Reberioux, 2005). Daily et al. (2003) argue that this is likely due to such theories' simplicity and alignment with the well-established tradition of methodological individualism. Corporate governance is reduced to a conflict of interest among a handful of economically rational actors – most frequently shareholders and managers – that must be mitigated (e.g. Jensen and Meckling, 1976), and the only relevant variable to maximize is shareholder value (e.g. Hansmann and Kraakman, 2001). Rhetorically convincing these theories may be, there are many reasons to question their assumptions, such as its underlying conception of the corporation, contracts and markets, which has transformed previous conceptions prevalent e.g. in law (Aglietta and Reberioux, 2005).

Since the 1970s, this dominant variety of corporate governance based mostly on agency theory has succeeded in shaping the accepted standard for 'good governance' in practice and conquered research (e.g. Aguilera and Cuervo-Cazzura, 2004) – notwithstanding critiques articulated for example in critical management and organization or business ethics literature (e.g. Fleming and Spicer, 2007). It has thereby come to influence political, legal, and economic decision-making worldwide through a normativity – a set of norms and prescriptions derived from questionable conceptual assumptions and empirical observations – programmed into law and policy by means such as: strong common law-inspired formal investor protection and limited influence of blockholding shareholders (e.g. La Porta et al., 1998; Lele and Siems, 2007); fair-value accounting and extensive disclosure (e.g. Pesqueux and Damak-Ayadi, 2005); high-powered equity-based executive compensation (e.g. Ezzamel et al., 2008); and elements of corporate board and control structures such as independent or non-executive directors (Gordon, 2007). More recently, this model has inspired governance codes that institutionalize a very limited model of financial accountability of boards to shareholders, e.g. in the UK Corporate Governance Code (Veldman and Willmott, 2016). Both corporate elites and regulators around the world now regularly take this model into account when acting and representing their actions for fear of repercussions by transient international capital (Westphal and Zajac, 1998; Yoshikawa and Phan, 2001; Rose and Meyer, 2003; Bednar, 2012).

The understanding of the purpose of corporations, and its codification, directly influence which interests can or cannot be taken into account in individual corporations. As such, this normativity is directly connected to the distribution of corporate value and, in turn, to broad macro-economic outcomes (Ireland, 2005; 2009). Corporate governance typically supports shareholder primacy, e.g., by adhering to the realisation of shareholder value as the overall goal of corporations (Aglietta and Reberioux, 2005), and ultimately defends this choice with the promise of greater overall social utility. Particularly after the financial crisis of 2008, it has become quite obvious that the promises of micro-economic efficiency enhancement and the creation of overall social utility based on these prescriptions have not been fulfilled (Lazonick and O'Sullivan, 2000; Ireland, 2005; Stout, 2012; Piketty, 2014). Major corporate scandals all over the world during the last decades and the ongoing financial crisis after 2008 have made discussions about corporate governance more open to critique than they had been for long. Nonetheless, there is a lack of work that draws direct links between the normativity of corporate governance theory and its outcomes in terms of political economy.

This *special issue* brings together a number of contributions that undertake this work. We focus on three strands of research. A first strand of research has focused on the *distributive effects of the orientation towards shareholder primacy*, suggesting how this has led to more inequality and poorer working conditions for those outside of top management circles (Demir, 2007; Dore, 2008; Brenner and Wernicke, 2015). The second strand of research suggests a more complex story concerning *the diffusion and dominance of new ideas in corporate governance*, involving issues such as globalization, academic idea production and rhetoric, power, elites, resistance, and local adaptation (e.g. Froud et al., 2000; Fiss and Zajac, 2004; Heilbron et al., 2014). This kind of research questions the usual functionalist story purporting to explain the diffusion of good governance and shareholder value ideas – i.e. that these ideas simply are better and more competitive than the alternatives and therefore come to reign supreme. A third strand of research dissects *the conceptualization of the corporate form* propagated by agency theory, and the departure point of shareholder value as the ultimate goal of corporations. This line of research shows how this conception is plagued with both inconsistencies and false assumptions (e.g. Ireland, 1999; Robé, 2011; Stout, 2012; Veldman, 2013).

In the remainder of this editorial, we will outline the discussion pertaining to these three strands and relate the contributions of the special issue to them. We conclude by identifying a number of interesting research agendas that we believe are opened up by this discussion.

Distributive effects of the orientation towards shareholder value

The political economy of corporate governance comes to the fore most prominently in debates around income distribution. The 1970s and onwards has seen a flatlining of real income growth for low and middle income workers (Van Arnum and Naples, 2013), while incomes for the top 10% skyrocketed. Spearheading this development is corporate remuneration, as the bulk of the so-called 'super-wages' (top 0.1 %) is found among corporate top-executives, a group almost immune to public debate on income inequality (Piketty, 2014; Brenner and Wernicke, 2015). Moreover, the flatlining of employees' income comes in a time when average employee productivity, as well as average earnings per employee, have been rising. Meanwhile, we find that public corporations have been dropping their retained earnings by a large degree, with money spent on dividends and on share buybacks rising extremely fast, with Jacoby (2008) and Lazonick (2014) reporting that total redistribution to shareholders may have reached 90% of corporate profits in US and UK corporations in the last few years. Although these figures have not been broadly confirmed, and the level of profit distribution may vary significantly among countries due to various institutional factors, it is nevertheless safe to say that payouts to shareholders have risen dramatically.

These trends in the distribution of global wealth, in which large corporations are major agents, are consistent with the emergence of the new corporate governance normativity from the 1970s onwards (Ireland, 2005; 2009). Hence, shareholder primacy and supporting theories arguably have a strong connection to broader distributional effects, both at the organizational level and at the macro-economic level. Together with the way the ideas behind this type of corporate governance thinking have spread and the problematic conceptualization of the corporate form central to this thinking, this provides a reason to suggest that the ascendancy of this new regime and normativity for corporate governance was not accidental, but was closely related to the production of a particular type of political economy. In this perspective, the development of contemporary corporate governance theory can be looked at as a political-ideological project (Ireland, 2005, 2010; Davies, 2010; Veldman and Willmott, 2015).

Noticeably, the macro-shift toward an upward wealth distribution (Piketty, 2014) that is effectuated by corporate governance theory coincides quite closely with a shift in the political landscape from leftist and regulationist to neoliberal. Associated with a renewed belief in neoliberal policies all across the OECD countries from the 1970s is the rise of what is now known as globalization; the demise of the state in terms of the ability to regulate; and regulatory and tax arbitrage by corporations. In this way, financialized versions of corporate governance came to play a central role in wealth distribution (Fligstein, 2001; Lazonick and O'Sullivan, 2000). The prioritization of shareholder value thus connects both historically and programmatically to the emergence of neoliberalism (Lazonick and O'Sullivan, 2000; Ireland, 2009; Mirowski and Plehwe, 2009; Peck, 2010; Heilbron et al., 2014).

As Will Davies points out in *The limits of neoliberalism* and elaborates upon in his interview with Stephen Dunne (this issue; see also the book review by Dunne, this issue), neoliberalism has not been opposed to the corporation at least since

Coase made his case for corporations playing a part alongside markets for the efficient allocation of resources. For the last few decades, and continuing after the financial crisis, the normativity of 'good governance' of corporations has gone hand in hand with a neoliberalism that justifies its dominance with reference to claims to efficiency achieved through competition. This competition, often limited by monopolistic tendencies (Birch, this issue), puts vast financial resources under the control of corporate giants, ossifying differences between those inside and those outside of this system.

The diffusion and dominance of new ideas in corporate governance

The contemporary theory of corporate governance has become dominated by a very specific idea of the corporation and of corporate governance. This conception, in which 'shareholder value' is typically identified as the legitimate goal of the corporation, defines problems and prescribes practical corporate governance solutions in terms of a normative blueprint of what constitutes 'good governance' (Fligstein, 1993; Lazonick and O'Sullivan, 2000). The purpose of corporate governance becomes to rectify deviations from this ideal (Jensen and Meckling, 1976). These ideas have also been extremely influential in many adjacent disciplines such as accounting, strategic management and law (Power, 2010).

This 'optimal' view of the corporation and its governance has with equal vigour and instrumentality been used in the development and rapid enforcement of governance standards by individual nations as well as international standards setters like the EU, OECD and IASB, and will continue to influence future regulation, for example through the European Commission's green book on corporate governance regulation (2011). Most jurisdictions around the world have seen at least some tendency for regulatory change in the direction towards the globally present normativity pertaining to corporate governance, be it by adopting a British-style corporate governance code (Larsson-Olaison, 2014; Veldman and Willmott, 2015), the IFRS accounting standard (Pesqueux and Damak-Ayadi, 2005), or various other minority protection devices made fashionable by comparative studies of corporate law (e.g. La Porta et al., 1998).

The dominant approach for explaining the diffusion of new ideas and reforms in corporate governance is functionalist, suggesting that competitive pressures force states and managers to adopt the most efficient corporate governance measures (e.g. Jensen, 1989; Hansmann and Kraakman, 2001). This view is perhaps best illustrated by the well-known statement of Hansmann and Kraakman (2001: 468):

> The triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured [...] the standard model earned its position as the dominant model of the large corporation the hard way, by out-competing during the post-World War II period the three alternative models of corporate governance: the managerialist model, the labor-oriented model, and the state oriented model.

This functionalist understanding has been challanged from at least two angles. First, a number of studies that have explored the ascent of the shareholder value principle, or 'shareholder value ideology' (Lazonick and O'Sullivan, 2000). These studies suggest that the rise of shareholder value can be explained by the interaction of factors such as exogenous shocks, strategic action and academic idea production in the corporate governance field (see also Fligstein, 2001; Davis, 2009). Thus, the emergence of this new set of theoretical assumptions was not a functionalist response to competitive pressures, but rather reflected shifting power relations in the corporate governance field. When previous relative 'outsiders' such as corporate 'raiders' and institutional investors rose to prominence, they endorsed the development of a theory of corporate governance that gave primacy to their interests (Heilbron et al., 2014). Agency theory, developed in the 1970s (e.g. Jensen and Meckling, 1976), lived up to these aspirations and could thus give academic credence and legitimacy to the claims made by propagators of shareholder value (Fligstein, 2001; Veldman, 2013).

Second, the literature on the diffusion of 'good governance' equally supports the argument that the development of contemporary corporate governance was an outcome of a political process. The initiation of changes in corporate governance theory and practice to some extent lead to changes in global and local power relations and social relations. However, the original ideas are also remoulded and sometimes decoupled from practice when meeting local resistance. Such a pattern is replicated in various national corporate governance systems, for example in Germany, Denmark and Japan (e.g. Mills and Weinstein, 2000; Yoshikawa and Phan, 2001; Rose and Meyer, 2003; Goergen et al., 2008). It is also observable in a variety of organizational and regulatory settings (e.g. Ezzamel et al., 2008; Morris et al., 2008; Jansson, 2013; Mehrpouya, 2015; Veldman and Willmott, 2015).

In order to understand and critique the functionalist thesis, one arguably has to understand the ways in which its dominating ideas have come to permeate regulation and behaviour at various levels (global, national, organizational). Two contributions to this special issue explore just this: Yuliya Ponomareva and Jenny Ahlberg engage with the discussion about the diffusion of corporate governance normativity on the organizational level, while Thomas Clarke addresses the question of convergence or divergence of corporate governance by looking at convergent forces emanating from financial forces and contrasting these with the ongoing vitality of institutional differentiation.

Clarke argues that the current push towards shareholder primacy leads to an obsession with shareholder value, manifested in financial performance measures and stock options, increasingly short term business horizons, and a move away from the use of retained earnings to finance raised on the equity market. Clarke argues, however, that the 'optimal' outcome of corporate governance arrangements differs considerably among different perspectives on history and politics, law and regulation, culture, and institutional complementarities. A focus on the strengths of a functional diversity of corporate governance systems would mean that corporate governance as a field would need to embrace the *variety of governance systems* and *multiple equilibria*, rather than strive for the development of one optimal model. This model would maintain the comparative advantages of (competing) systems of corporate governance, and would counter the current 'debilitating ideology' of shareholder value and preserve more positive outcomes for the economy and society.

The idea of shareholder value is also central to the work provided by Ponomareva and Ahlberg (this issue). They analyze how the increasingly dominant normativity of 'good governance' acts on family-controlled corporations and what effects this may have. These family firms are generally recognized as characterized by a higher degree of social embeddedness and a specific type of logic, in which such factors as family control and esteem are prioritized at the expense of financial return. With tight family control through family members at both board and top management positions, a traditional 'agency problem' is simply not as relevant. Given the objectives pursued and the structure of board membership, it is obvious that the tools of 'good governance' that are theoretically grounded in assumptions about atomized, rational actors contracting in the context of widely held corporations and designed to achieve shareholder value, are not well-suited for this category of corporations. They find that in family-controlled corporations, adopting rationalized governance practices such as independent board members becomes a way to counteract an image of family firms as conservative and unprofessional and thus to appear pleasing in the eyes of stakeholders. The advantages of conforming, they argue, lies primarily in the benefits that can be reaped by being held in good esteem by outsiders (e.g. capital markets), while the downside may be decreased strategic adaptability.

Both contributions support the idea that prescriptions for 'good' corporate governance lead to strong institutional pressures. They also suggest that these pressures are not unquestioningly adopted, but run up against competing ideas of what corporate governance should accomplish, both at the organizational and at the national level.

The conceptualization of the corporate form

At the heart of many critiques of contemporary corporate governance theory is an extended notion of the modern public limited liability corporate form. As described by Ciepley (2013), Ireland (1999), and many others, the corporate form has undergone a number of fundamental transformations since its emergence. The earlier versions of the corporate form as we know it today existed essentially as institutions with an intrinsically public purpose, with their corporate privileges such as perpetuity and limited liability premised on the ability to further the interests of the public or state in addition to those of the shareholders. The modern corporate form, characterized by perpetuity, and further attributions of ownership, agency, rights and protections is based on an extremely specific understanding of its legal status that only emerged by the end of the 19th century (Johnson, 2010).

The effects of the commonly recognized lack of proper understanding of the public limited liability corporate form have been amplified by further shifts in how it has come to be understood in various domains – specifically in corporate governance. Although the basic legal idea of what is now understood as the public corporation has remained fairly constant since the end of the 19th century, the content of much of the adjacent regulation affecting corporations (e.g. regulation of accounting and auditing as well as corporate law) has changed significantly. A major factor behind these institutional changes is the contemporary normativity pertaining to corporate governance (Lazonick and O'Sullivan, 2000; Fligstein, 2001; Heilbron et al., 2014; Clarke, this issue), with its very specific conception of the corporate form as a 'nexus of contracts' among economically rational individuals, and of the legal entity as nothing but a 'convenient legal fiction' (e.g. Jensen and Meckling, 1976). This move away from an understanding of the public limited liability corporate form as a highly specific construct with special privileges (Biondi et al., 2007) has been charged with the criticisms of having little traction with its historical development (see Veldman, 2013) and of treating the socially complex phenomenon of corporate law in a conceptually reductive way (Ireland, 2005; Robé, 2011; Blair and Stout, 1999).

Matthew Lampert (this issue) takes such critiques of the status of the corporate form to hand. He suggests that the corporate form is not much more than a technical construct, a 'piece of technology' mandated by law that can be shaped *ex ante* by setting the conditions under which such a construct can come into existence. Because the corporate form is not a (moral) 'person' in any meaningful sense, the attribution of intentionality, agency and responsibility to the corporation as a formal organization is fundamentally distinct from the agency and responsibility exhibited by or attributed to the individuals that constitute that organization. If we accept that it is a simple category mistake to attribute personhood, moral personhood, or (anthropomorphic) ideas to corporations, we find that CSR looks for ethics in the wrong place.

Rather than 'appealing to baseless ethical notions of corporate moral agency' the goals of CSR should explicitly be understood as a political, rather than a normative or ethical goal in which corporate governance 'ought to be determined through democratic process and political struggle, rather than through moral appeals to either business agents or lawmakers' (Lampert, this issue). Directing corporations toward moral agency can only be part of a political project that changes their structure, notably by providing rules that are embodied in law, such as 'industry-wide, externally-enforced codes of conduct' that explicitly set limits to the organization's operations on the basis of 'legally-instituted and -enforced social goals'. From this perspective, Lampert reminds us that the corporation was once the explicit result of a charter that defined the scope of its duties and 'agency' and that the decline of charter revocation has led to a vacuum in terms of demarcating the social and political duties of corporations.

That corporate governance is a question of *politics* rather than *ethics* also becomes apparent in the roundtable discussion on the nature and purpose of the corporation that took place at the Centre for Philosophy and Political Economy in December 2013 between Stephen Dunne, Sam Mansell, Martin Parker and Jeroen Veldman (this issue). While the discussion briefly addresses the question of corporate ethics, it is mostly concerned with the legal status of corporations and swiftly moves to a discussion of political regulation and governance. The format of the discussion itself also highlights the agonistics that mark any political conversation about corporations. Yet opening up a political contestation of the corporate form, as Lampert and the roundtable seek to do, must first of all grapple with the ways the corporate form is always already shaped by political projects.

For Kean Birch (this issue), it is the neoliberal project that has most profoundly shaped the corporate form. Contrary to many suppositions, Birch argues, neoliberalism is not opposed to the monopolistic tendencies coming from the corporate form. He carefully dissects neoliberalism as an analytical category, a political economic project as well as an epistemic community. Birch's starting point is that neoliberalism in a popular understanding often is perceived as a market-based order, which is contradictory considering that neoliberals quietly have accepted the expansion of large monopolistic corporations during the last 50 years. Birch characterizes neoliberalism as a distinct epistemic and social order, different from other forms of liberalism. In this order, the development of 'contractual theory' legitimizes corporate monopoly, as a corporation is understood as contracting individuals rather than an entity in itself. This, in turn, creates an incentives structure for management to pursue shareholder value at all costs, influencing markets and societies negatively.

If contesting the corporate form, then, leads us upon a terrain where the neoliberal project is already present and has already, for many decades, conducted a political program for shaping the corporate form, then what kind of political practices can the 'business politics' proposed by Lampert build upon? One strategy, also suggested by Martin Parker in the roundtable discussion (this issue), is to look elsewhere, for example to social movements, for a political contestation. Certainly, it will also require exploring subjectivities within a wider social field; subjectivities not so closely tied to neoliberalism as entrepreneurial subjectivity and the corporate form are (cf. Beverungen and Case, 2011). At the same time, as Birch insists, it also requires contestation at the level of epistemic order, which implies an extensive research program on the political economy of corporate governance.

Future research agenda

The contributions in this special issue divert from the functionalist thesis that contemporary notions of 'good governance' provide an optimal or necessary point for convergence and develop a number of critical points. The ideology of shareholder value continues to play an important role in shaping most corporate governance systems, establishing a normativity that regulators, standard setters, and corporate elites must take into account in their communication, rule making and organizing. Although there is plenty of divergence and localized resistance to be found in existing corporate governance theory and practice, the normativity embedded in academic theorizing and in regulatory practice continues to provide the means to dominant groups in the domain of corporate governance to align the distribution of wealth with their interests. As such, the theory and practice of corporate governance is a key marker for understanding contemporary political economy. In line with these findings, we suggest three perspectives for further research.

The distributive effects of the orientation towards shareholder primacy

A first aspect future research could take into account is the broad distributive effects of conceptions of the corporation and of corporate governance. The notion of what corporate governance is and who it is for (Veldman and Willmott, 2013) prioritizes particular legal and economic claims over others. In this sense, financialized versions of corporate governance provide micro-level principles for theory and regulation that have strong effects in terms of macro-level wealth distribution (Lazonick and O'Sullivan, 2000; Fligstein, 2001; Piketty, 2014). There is, as of yet, little consideration of how this distribution of wealth might be produced and legitimated by particular ideas of the corporation and its governance or by the contract as a key building block of a capitalist legal architecture (Mitropoulos, 2012). Because corporate governance is of fundamental importance to all constituencies involved in the process and for broad sections of society who are outside this process, we propose to focus specifically on the rules and regulations that currently reinforce a financialized conception of the corporation, a shareholder value-oriented conception of corporate governance, and, ultimately, the reinforcement of a political economy that prioritizes the interests of a very small subsection of the constituencies that have a direct or indirect claim on the modern corporation.

The diffusion and dominance of new ideas of corporate governance

We found that existing varieties of corporate governance, both in terms of national variety (Clarke, this issue) or in terms of organizational-level variety in ownership and governing logic (Ponomareva and Ahlberg, this issue), provide valid and interesting alternatives to the existing normativity. We believe these, and similar, studies provide interesting ways to show how the dominant normativity in the field of corporate governance provides a purportedly functionalistic, but in practice normative, approach to corporate governance that works to 'crowd out' valid alternatives. One further promising approach to study such crowding out would be to look at the diffusion of corporate governance codes and practices. There is evidence to suggest that the terminology of 'good governance', such as policies regarding independent directors or executive compensation packages may be diffused across jurisdictions, but that the content of these ideas is often drastically changed. Although the language of such changes is adopted in external communication for legitimacy purposes, this does not necessarily entail major, substantive changes in how corporations organize or are made to organize by national governments (Westphal and Zajac, 1998; Bednar, 2012; Larsson-Olaison, 2014). Such collective 'window dressing' is a promising area of research to study how the currently dominant normativity is picked up, resisted, or transformed at the national level.

The conceptualization of the corporate form

A third line of further inquiry is the conceptualization of the corporate form. Lampert (this issue) shows how the perspective of agency theory of the corporation as a collection of contracts, agents, or individuals seriously undermines the legitimacy of its legal status and problematizes the claims that can be made about the corporation from a moral and legal perspective. Understanding the corporate form as a recently developed and constantly evolving legal construct, it becomes possible to take a close look at specific design features such as corporate personhood, corporate ownership, and limited liability.

More specifically, it has been argued that the specific way in which legal theory conceives of the separate legal entity means that this entity has been understood as independent of shareholders or other stakeholders (Ireland, 1999; Veldman and Parker, 2012). From this position, claims can be derived that transcend the claims of separate constituencies such as shareholders (Biondi et al., 2007). By extension, shareholders cannot be considered 'owners' of corporations (e.g. Ireland, 1999; Aglietta and Reberioux, 2005; Robé, 2011) and corporate governance is not just the governance of groups of (contracting) individuals. Rather, corporate governance is about understanding and regulating the modern corporation as a very specific kind of institution, which pre-structures the conditions for contracting relations between individuals and the corporation as a legal entity (Parkinson et al., 2000; Biondi et al., 2007; Robé, 2011).

Looking into the historical – and political – legitimation of the corporate form (Ireland, 2010; Marens, 2012) as a specific legal and economic construct would also help to move beyond limited framings of corporate 'subjecthood' and 'ethics' (Dunne, 2008; Lampert, this issue) and direct the gaze at the intersection of theory creation and political economy. Exploring the context, contents, causes and effects, and the forces that uphold corporate governance as a stream of social, economic and legal theory, as well as its associated practices, can support and develop a critical conversation on the relation between corporate governance as a theoretical and practical field and the political economy this field creates and upholds. It is, then, not just the normativity of corporate governance theory that needs to be studied, but also the institutional setting in which the corporate form is conceived and operates (Aglietta and Reberioux, 2005; Ireland, 2005).

Framing the corporation in this broader socio-economic setting will, we hope, provide the basis for new interdisciplinary research in critical management and organization studies. The contributions in this volume provide an excellent introduction to develop this research.

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the editors

Andreas Jansson is an assistant professor of corporate governance and accounting at Linnaeus University, Växjö, Sweden. His research addresses the role of media, reputation, and discursive and conceptual transformations for how corporate governance and accounting practices materialize and develop. His research has been published, for example, in *Corporate Governance: An International Review* and *Culture and Organization*.
Email: andreas.jansson@lnu.se

Ulf Larsson-Olaison is a lecturer in accounting and corporate governance at Linnaeus University, Växjö, Sweden. His research primarily concerns corporate governance regulation and how such regulation change when moved between different settings.
Email: ulf.larsson@lnu.se

Jeroen Veldman is Senior Research Fellow at Cass Business School, City University, London. He has held appointments at Cardiff Business School, the Utrecht School of Governance, Utrecht University and a visiting professorship at UPMF, Grenoble. His research addresses the historical development of the public limited liability corporate form and its current status in and between organization studies, management, company law, economics, finance, accounting, politics, and corporate governance. With Hugh Willmott he is engaged in a research project on corporate governance (see http://themoderncorporation.wordpress.com/). He is also engaged in the organization of a series of International Roundtables on corporate governance. He has published in *Human Relations*, *British Journal of Management*, and *Critical Perspectives on Accounting*.
Email: jeroen.veldman@cass.city.ac.uk

Armin Beverungen is a member of the editorial collective of *ephemera*.
Email: armin.beverungen@leuphana.de

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The continuing diversity of corporate governance: Theories of convergence and variety

Thomas Clarke

abstract

This paper examines the continuing diversity of corporate governance by critically analysing the impelling financial forces for convergence, and the vitality of institutional differentiation. Competing theories of convergence and diversity are examined through the disciplinary perspectives of history and politics, law and regulation, culture, and institutional complementarities. The paper challenges whether a universal corporate governance system is practical, necessary or desirable. The increasingly recognised premium for governance is considered in the context of a globalising economy. The implications of the deregulation of finance and the globalisation of capital markets are examined, with a focus on the growth of equity markets and the dominant position of the Anglo-American stock exchanges. The convergence thesis is debated, examining different theoretical arguments for and against the inevitability of convergence of corporate governance systems and the resilience of cultural and institutional diversity. This institutional diversity serves a productive purpose in contributing innovation and differentiation in products and services. The global financial crisis has shaken the institutional foundations of all advanced economies, and regulatory and market settlements are still occurring. In this context of forces impelling dramatic change yet encountering powerful impulses towards institutional continuity, the future direction of corporate governance trends is questioned, with the likelihood of greater complexity rather than uniformity emerging from current developments. While capital markets have acquired an apparently irresistible force in the world economy, it still appears that institutional complementarities at the national and regional level represent immovable governance objects. The issues are more complex than convergence theorists suggest, and while some degree of market convergence might be occurring, simultaneously there is the creation of greater divergence within national regimes of corporate governance.

Introduction

This paper examines the continuing diversity of corporate governance by critically analysing the impelling financial forces for convergence, and the vitality of institutional differentiation. Convergence implies the increasing adoption by all governance systems throughout the world of a common set of institutions and practices, portrayed as an ideal rational/legal system, but invariably resting upon a belief in the virtue of market based relationships, and the associated paradigms of the prevailing Anglo-American economic and legal orthodoxy, which insists the creation of shareholder value is the ultimate objective of corporate existence. By contrast institutional differentiation approaches recognise the ongoing vitality of differentiation in the institutions, policies and practices of corporate governance, how this reflects differences in culture, values and conceptions of corporate purpose, and why this contributes to quality and variety in regional industries and products.

Competing theories of convergence and diversity are examined through the disciplinary perspectives of history and politics, law and regulation, culture, and institutional complementarities. A central thesis of the analysis is the increasing intensification of the financialisation of the global economy, which translates for corporations into an enveloping regime of maximising shareholder value as the primary objective. These financial pressures may have originated in the Anglo-American world, and are manifest in the vast international scale and penetration of Anglo-American financial institutions, however similar developments are becoming insistent in Europe, the Asia Pacific, and throughout the emerging economies. Yet diversified governance institutions confronted by these continuous pressures for international convergence have proved resilient and viable. The conclusion of the analysis is that this differentiation is valuable since different governance systems are better at doing different things, as revealed in the relative strengths and weaknesses in governance, investment strategy, and product specialization. In practice there may simultaneously be a dual dynamic of convergence and divergence taking place, where corporations learn to live with some of the pressures of international financial markets, yet value the differentiation of their regional cultures and institutions, while they strive to maintain and enhance the distinctiveness of their corporate objectives.

Indeed a fatal flaw of the convergence thesis is the assumption that some uniform, homogenized, corporate governance system would in all circumstances prove superior both functionally and institutionally than the present diversified system. In fact as a result of the differences in corporate governance structure and objectives, the different governance systems demonstrate unique strengths and weaknesses: they are good at doing different things, and they all have different problems to deal with (Clarke and Bostock, 1994; Moerland, 1995; Coombes and Watson, 2000; Dore, 2000; Clarke, 2011; Clarke and Branson, 2012; Clarke, 2016a). Anglo-American governance systems support a dynamic market orientation with fluid capital which can quickly chase market opportunities wherever they occur. This agility, ready availability of capital, intelligence and speed has enabled the US to capitalize on fast moving industries including media, software, professional services and finance in an industrial resurgence that temporarily reasserted US economic ascendancy. The weakness of this system is the corollary of its strength: the inherent volatility, short-termism and inadequate governance procedures that have often led to corporate disasters and have caused periodic financial crises (Clarke, 2013). Adopting a different orientation European enterprise as typified by the German governance system has committed to long term industrial strategies supported by stable capital investment and robust governance procedures that build enduring relationships with key stakeholders (Cernat, 2004; Lane, 2003). This was the foundation of the German economic miracle that carried the country forward as one of the leading exporters in the world of goods renowned for their exceptional quality and reliability including luxury automobiles and precision instruments. Again the weaknesses of this system are the corollary of its strengths: the depth of relationships leading to a lack of flexibility in pursuing new business opportunities in new industries and internationally. It should be noted that the German system of governance is typical of the coordinated market economies (Japan, Sweden, and Germany) of Northern Europe that have concentrated ownership and overall cooperative relations with employees compared to the mixed market Latin economies (France, Italy and Spain) which also have concentrated ownership but more conflictual relations between employers and employees (Goyer and Jung, 2011; Hancké et al., 2007; Hancké, 2009). In Asia corporate governance systems are the most networked of all, with the firm at the centre of long and enduring economic relationships with investors, employees, suppliers and customers (Claessens and Fan, 2002). This insider approach has yielded the longest investment horizons of all, and was for example the key to Japanese success in dominating overseas markets in the US and Europe with advanced electronic consumer goods, as well as in affordable quality automobiles. More recently the capacity for investing in the long term has seen the entrance onto the world stage of impressive Chinese corporations such as the Industrial and Commercial Bank of China as the world's largest bank by assets, and Huawei as one of the world's leading telecommunications manufacturers. However just as the weak and secretive corporate governance practices of Japan ultimately led to the bursting of the Japanese bubble in the early 1990s, and to successive governance problems since, so too the apparently inexorable rise of

Chinese enterprise is threatened by covert governance and lack of transparency and accountability in finance.

A more realistic perspective than the convergence thesis is a more nuanced understanding that despite the financial and other market pressures towards convergence there will continue to be considerable diversity in the forms of corporate governance developing around the world. Different traditions, values and objectives will undoubtedly continue to produce different outcomes in governance, which will relate closely to the choices and preferences people exercise in engaging in business activity. If there is convergence of corporate governance, it could be to a variety of different forms, and it is likely there will be divergence away from the shareholder oriented Anglo-American model, as there will be convergence towards it. There is a growing realisation that shareholder value is a debilitating ideology which is undermining corporations with an over-simplification of complex business reality, weakening managers, corporations and economies, and ignoring the diversity of investment institutions and interests (Clarke, 2014; Clarke, 2015; Lazonick, 2014). Moreover the convergence 'one-size-fits-all' approach studiously denies the essential entrepreneurship and creativity involved in business endeavour that will continuously give rise to innovative and dynamic forms of corporate governance as we are presently seeing in new forms of social enterprise, B-corporations, and other business ventures which in turn create and develop new complementary institutions.

A universal corporate governance system?

In the contest between three resolutely different approaches to corporate governance in the Anglo-American, European and Asia-Pacific models, the question arises: is one system more robust than the others and will this system prevail and become universal? The answer to this question appeared straightforward in the 1990s. The US economy was ascendant, and the American market-based approach appeared the most dynamic and successful. Functional convergence towards the market-based system seemed to be occurring inexorably driven by forces such as:

- Increasingly massive international financial flows which offered deep, liquid capital markets to countries and companies that could meet certain minimum international corporate governance standards.
- Growing influence of the great regional stock exchanges, including the NYSE and NASDAQ, London Stock Exchange, and Euronext – where the largest corporations in the world were listed regardless of their home country.

- Developing activity of ever-expanding Anglo-American based gargantuan institutional investors, advancing policies to balance their portfolios with increasing international investments if risk could be mitigated.
- Expanding revenues and market capitalization of multinational enterprises (often Anglo-American corporations, invariably listed on the New York Stock Exchange even if European-based), combined with a sustained wave of international mergers and acquisitions from which increasingly global companies were emerging.
- Accelerating convergence towards international accounting standards; and a worldwide governance movement towards more independent auditing standards, and rigorous corporate governance practices.

Together these forces have provoked one of the liveliest debates of the last two decades concerning the globalisation and convergence of corporate governance (Roe, 2000; Hansmann and Kraakman, 2001; Branson, 2001; McDonnell, 2002; McCahery et al., 2002; Roe, 2003; Aguilera and Jackson, 2003; Gunter and van der Hoeven, 2004; Lomborg, 2004; Jesovar and Kirkpatrick, 2005; Hamilton and Quinlan, 2005; Jacoby, 2007; Deeg and Jackson, 2007; Williams and Zumbansen, 2011; Aguilera et al., 2012; Jackson and Deeg, 2012; Jackson and Sorge, 2012; Clarke, 2014; Clarke 2016a). As functional convergence proceeds in the way corporate access to finance and governance practices become universal, it is assumed that institutional convergence of legal and regulatory bodies, and governance institutions will become identical. How high the stakes are in this debate is revealed by Gordon and Roe:

> Globalization affects the corporate governance reform agenda in two ways. First, it heightens anxiety over whether particular corporate governance systems confer competitive economic advantage. As trade barriers erode, the locally protected product marketplace disappears. A country's firms' performance is more easily measured against global standards. Poor performance shows up more quickly when a competitor takes away market share, or innovates quickly. National decision makers must consider whether to protect locally favored corporate governance regimes if they regard the local regime as weakening local firms in product markets or capital markets. Concern about comparative economic performance induces concern about corporate governance. Globalization's second effect comes from capital markets' pressure on corporate governance. [...] Despite a continuing bias in favor of home-country investing, the internationalization of capital markets has led to more cross-border investing. New stockholders enter, and they aren't always part of any local corporate governance consensus. They prefer a corporate governance regime they understand and often believe that reform will increase the value of their stock. Similarly, even local investors may make demands that upset a prior local consensus. The internationalization of capital markets means that investment flows may move against firms perceived to have suboptimal governance and thus to the disadvantage of the countries in which those firms are based. (2004: 2)

In the inevitable contest between the insider, relationship-based, stakeholder-oriented corporate governance system and the outsider, market- based, shareholder value-oriented system, it is often implied that the optimal model is the dispersed ownership with shareholder foci for achieving competitiveness and enhancing any economy in a globalised world. The OECD, World Bank, IMF, Asian Development Bank and other international agencies, while they have recognised the existence of different governance systems and suggested they would not wish to adopt a one-size-fits-all approach, have nonetheless consistently associated the *rules-based* outsider mode of corporate governance with greater efficiency and capacity to attract investment capital, and relegated the relationship-based insider mode to second best, often with the implication that these systems may be irreparably flawed. The drive towards functional convergence was supported by the development of increasing numbers of international codes and standards of corporate governance.

The vast weight of scholarship, led by the financial economists, has reinforced these ideas to the point where they appeared unassailable at the height of the new economy boom in the US in the 1990s (which coincided with a long recession for both the leading exponents of the relationship-based system, Japan and Germany), supporting the view that an inevitable convergence towards the superior Anglo-American model of corporate governance was occurring. This all appeared an integral part of the irresistible rise of globalisation and financialisation that was advancing through the regions of the world in the late 1990s and early 2000s, with apparently unstoppable force. Economies, cultures and peoples increasingly were becoming integrated into global markets, media networks, and foreign ideologies in a way never before experienced. It seemed as if distinctive and valued regional patterns of corporative governance would be absorbed just as completely as other cultural institutions in the integrative and homogenising processes of globalisation. The increasing power of global capital markets, stock exchanges, institutional investors, and international regulation would overwhelm cultural and institutional differences in the approach to corporate governance.

Yet just as there are many countries that continue to value greatly the distinctions of their culture and institutions they would not wish to lose to any globalised world, people also believe there are unique attributes to the different corporate governance systems they have developed over time, and are not convinced these should be sacrificed to some unquestioning acceptance that a universal system will inevitably be better. The field of comparative corporate governance has continued to develop however, and a different and more complex picture of governance systems is now emerging. The objectives of corporate governance are more closely questioned; the qualities of the variety and relationships of different institutional structures are becoming more apparent; the capability and performance of the different systems more closely examined; and different potential outcomes of any convergence of governance systems realised. While capital markets have acquired an apparently irresistible force in the world economy, it still appears that institutional complementarities at the national and regional level represent immovable objects (Jacoby, 2007; Deeg and Jackson, 2007; Williams and Zumbansen, 2011; Jackson and Deeg, 2012; Clarke, 2014; Clarke 2016a). This is not to argue the immutability of institutions which of course are continuously engaged in complex processes of creation, development and reinvention in the economic, social and cultural context in which they exist. However, what is at issue is the causation and direction of these institutional changes. From the convergence perspective they are a logical result of adopting the superior Anglo-American institutions of corporate governance and financial markets. From the perspective of those who respect and understand the reasons for institutional diversity and value the outcomes of this diversity, institutional change is a more autonomous process embedded within economies and societies, which may indeed have to negotiate some settlement with international market forces, but strive to do so while maintaining their own values.

An apparent third possibility to the two polar positions of convergence/institutional diversity is recognised by Coffee (2000; 2001) and Gilson (2000). Coffee (2000: 5) distinguishes ‘functional convergence’ (similarities in activities and objectives) from ‘formal convergence’ (common legal rules and institutions) and contends that functional substitutes may provide alternative means to the same ends (for example, a European company with weak investor protection and securities markets could list on the London or New York exchanges with rules that require greater disclosure of information, providing a framework of protections for minority shareholders not available in civil law countries). Coffee argues that while the law matters, legal reforms follow rather than lead market changes. Gilson (2000: 10) offers a more robust view of the force of functional convergence:

> Path dependency, however, is not the only force influencing the shape of corporate governance institutions. Existing institutions are subject to powerful environmental selection mechanisms. If existing institutions cannot compete with differently organized competitors, ultimately they will not survive. Path dependent formal characteristics of national governance institutions confront the discipline of the operative selection mechanisms that encourage functional convergence to the more efficient structure and, failing that, formal convergence as well.

This view from Columbia University Law School of the ascendancy of functional governance in Europe and elsewhere, might have carried more weight if Coffee had not concluded his 2000 paper with a celebration of Germany’s rapidly growing *Neuer Markt* as the 'clearest example' of self-regulatory alternative functional governance creating a greater constituency for open and transparent markets. In fact, Germany's *Neuer Markt* launched as Europe's answer to the Nasdaq in 1997, collapsed with a precipitous decline in market value and numerous bankruptcies in 2003, leaving the question of how innovative German firms could enter the public equity markets unresolved (Burghof and Hunger, 2003). As von Kalckreuth and Silbermann (2010) state, this represented '[t]he spectacular rise and fall of the first and most important European market for hi-tech stocks. Given investors' frenzy, the Neuer Markt was a special kind of natural experiment'. For some time, financing constraints were virtually non-existent, but as occurred, 'faulty valuation by stock markets may directly induce destructive corporate behaviour: slack, empire building, excessive risk-taking, and fraud' (*ibid.*). While more viable illustrations of functional convergence could readily be found, it could be argued that this approach is largely another route to the convergence thesis rather than an alternative. Indeed, functional convergence, since it is easier to achieve than institutional convergence, could prove a quicker route to shareholder value orientations.

Globalisation of capital markets

The convergence thesis is derived essentially from the globalisation thesis: that irresistible market forces are impelling the integration of economies and societies. Globalisation represents a profound reconfiguration of the world economy compared to earlier periods of internationalization. 'An international economy *links* distinct national markets: a global economy *fuses* national markets into a coherent whole.' (Kubrin, 2002: 7; Clarke and dela Rama, 2006). A major driver of the globalisation phenomenon has proved the massive development of finance markets, and their increasing influence upon every other aspect of the economy:

> Financial globalisation, i.e. the integration of more and more countries into the international financial system and the expansion of international markets for money, capital and foreign exchange, took off in the 1970s. From the 1980s on, the increase in cross-border holdings of assets outpaced the increase in international trade, and financial integration accelerated once more in the 1990s... The past decade has also seen widespread improvements in macroeconomic and structural policies that may to some extent be linked to a disciplining effect of financial integration. Moreover, there is evidence that financial linkages have strengthened the transmission of cyclical impulses and shocks among industrial countries. Financial globalisation is also likely to have helped the build-up of significant global current account imbalances. Finally, a great deal of the public and academic discussion has focussed on the series of financial crises in the 1990s, which has highlighted the potential effects of capital account liberalisation on the volatility of growth and consumption. (European Commission, 2005: 19)

The complex explanation for this massive *financialisation* of the world economy is pieced together by Ronald Dore thus:

- Financial services take up an ever larger share of advertising, economic activity and highly skilled manpower.
- Banks respond to the decline in loan business with a shift to earning fees for financial and investment services and own account trading.
- Shareholder value is preached as the sole legitimate objective and aspiration of corporations and executives.
- Insistent and demanding calls for 'level playing fields' from the World Trade Organisation and Bank of International Settlements (BIS), with pressures for the further liberalisation of financial markets, and greater international competition forcing international financial institutions, and other corporations to work within the same parameters. (Dore, 2000: 4-6)

What is resulting from this insistent impulse of the increasingly dominant financial institutions are economies (and corporations) increasingly dependent upon financial markets:

> Global integration and economic performance has been fostered by a new dynamic in financial markets, which both mirrors and amplifies the effects of foreign direct investment and trade driven integration. The economic performance of countries across the world is increasingly supported by – and dependent on – international capital flows, which have built on a process of progressive liberalisation and advances in technology since the 1980s' (European Commission, 2005: 8).

Financial innovations and financial cycles have periodically impacted substantially on economies and societies, most notably in the recent global financial crisis (Rajan, 2010; Clarke, 2010a). However the new global era of financialisation is qualitatively different from earlier regimes. Global finance is now typified by a more international, integrated and intensive mode of accumulation, a new business imperative of the maximisation of shareholder value, and a remarkable capacity to become an intermediary in every aspect of daily life (van der Zwan, 2013). Hence finance as a phenomenon today is more universal, aggressive and pervasive than ever before (Krippner, 2005; 2012; Epstein, 2005; 2015; Dore, 2008; Davis, 2009; van der Zwan, 2013). These financial pressures are translated into the operations of corporations through the enveloping regime of maximising shareholder value as the primary objective. Agency theory has provided the rationale for this project, prioritizing shareholders above all other participants in the corporation, and focusing corporate managers on the release of shareholder value incentivized by their own stock options. In turn this leads to an obsessive emphasis on financial performance measures, with increasingly short term business horizons (Lazonick, 2012; 2014; Clarke, 2013; Clarke, 2015).

The growth of international equity markets

A vital dimension of the increasing financialisation of the world economy is the growth of capital markets, and especially the vast growth of equity markets, where volatility has been experienced at its furthest extremities. What this demonstrates is the overwhelming predominance of Anglo-American institutions and activity in world equity markets, and how to a great extent these markets reflect largely Anglo-American interests, as the rest of the world depends more on other sources of corporate finance. This pre-eminence of equity markets is a very recent phenomenon. Historically, the primary way most businesses throughout the world (including in the Anglo-American region) have financed the growth of their companies is internally through retained earnings. In most parts of the world until recently, this was a far more dependable source of capital rather then relying on equity markets. Equity finance has proved useful at the time of public listing when entrepreneurs and venture capitalists cash in their original investment, as a means of acquiring other companies, or providing rewards for executives through stock options. Equity finance is used much less frequently during restructuring or to finance new product or project development (Lazonick, 1992: 457). In Europe and the Asia-Pacific however, this capital was in the past provided by majority shareholders, banks, or other related companies (to the extent it was needed by companies committed to organic growth rather than through acquisition, and where executives traditionally were content with more modest personal material rewards than their American counterparts).

The euphoria of the US equity markets did reach across the Atlantic with a flurry of new listings, which formed part of a sustained growth in the market capitalisation of European stock exchanges as a percentage of GDP. A keen attraction of equity markets for ambitious companies is the possibility of using shares in equity swaps as a means of taking over other companies thus fuelling the take-over markets of Europe. This substantial development of the equity markets of France, the Netherlands, Germany, Spain, and Belgium and other countries began to influence the corporate landscape of Europe, and was further propelled by the formation of Euronext, and the subsequent merger with the NYSE. Indeed, as the regulatory implications of Sarbanes Oxley emerged in the United States from 2003 onwards, the market for IPOs moved emphatically towards London, Hong Kong and other exchanges. Concerned about the impact of Sarbanes Oxley on the US economy a group of authorities formed the

Committee on Capital Markets Regulation highlighted the damage being caused to what for many years was recognised as 'the largest, most liquid, and most competitive public equity capital markets in the world' (CCMR, 2006: ix). Though the US total share of global stock market activity remained at 50 per cent in 2005, the IPO activity had collapsed. From attracting 48 per cent of global IPOs in the late 1990s, the US share dropped to 6 per cent in 2005, when 24 of the 25 largest IPOs were in other countries (CCMR, 2006: 2). The more relaxed regulatory environment of the UK and other jurisdictions clearly for a time at least proved attractive in an ongoing process of international regulatory arbitrage.

This greater vibrancy in European markets partly explains the NYSE's interest in merging with Euronext, and the NASDAQ's long but failed courtship with the London Stock Exchange. Any such mergers represent a further US bridgehead into the equity markets of Europe, rather than the converse. Along with the growth in market capitalisation in European exchanges occurred a gradual increase also in trading value. It appears that contemporary equity markets inevitably will be associated with high levels of trading activity, as a growing proportion of trading is algorithmic high frequency computer generated. Following the global financial crisis, regulatory intervention in finance was perceived to be more robust in Europe and the UK, and less so in the United States (with the slow pace of the introduction of the monumental Dodd-Frank Act). In this context the attractions of the New York Stock Exchange and Nasdaq returned, and by 2014 reached once again the levels of IPO financing in the dot-com 1990s era, far exceeding the amounts raised in the London and Hong Kong markets combined (*Financial Times,* 29 September 2014).

The important role of equity markets in fostering further international financial integration was recognised by the European Commission (2005): 'Globally, portfolio investment is the largest asset category held cross-border; global portfolios (equity and debt securities) amounted to 19 trillion US dollar at the end of 2003 (IMF CPIS, preliminary data)'. As equity markets come to play a more powerful role in corporate life in Europe, Japan and other parts of the world, a set of assumptions and practices are also disseminated which may confront long standing values and ideals in the economies and societies concerned. Specifically, the ascendancy of shareholder value as the single legitimate objective of corporations and their executives, usually accompanies increasing dependence upon equity markets. Dore (2000) cites a Goldman Sachs study of manufacturing value added in the United States, Germany and Europe in general, which concluded that:

> The share of gross value added going to wages and salaries has declined on trend in the US since the early 1980s. In fact, for the US, this appears to be an extension

> of a trend that has been in place since the early 1970s... We believe that the pressures of competition for the returns on capital available in the emerging economies have forced US industry to produce higher returns on equity capital and that their response to this has been to reserve an increasingly large share of output for the owners of capital. (Young, 1997)

This insistent pressure to drive increases in capital's returns at the expense of labour inherent in Anglo-American conceptions of the nature of equity finance is roundly condemned by Dore as the negation of essential values previously considered central to economic good in both Europe and Japan:

> Multiple voices are urging Japanese managers to go in the same direction. The transformation on the agenda may be variously described – from employee sovereignty to shareholder sovereignty: from the employee-favouring firm to the shareholder-favouring firm; from pseudo-capitalism to genuine capitalism. They all mean the same thing: the transformation of firms run primarily for the benefits of their employees into firms run primarily, even exclusively, for the benefit of their shareholders... It means an economy centred on the stock market as the measure of corporate success and on the stock market index as a measure of national well-being, as opposed to an economy which has other, better, more pluralistic criteria of human welfare for measuring progress towards the good society. (2000: 9-10)

The euphoric enthusiasm for the power of equity markets was severely dented by the Enron/WorldCom series of corporate collapses in the US. With about seven trillion dollars wiped off the New York stock exchange in 2001/2002, and the executives of many leading corporations facing criminal prosecution, the recovery in equity markets came sooner and more robustly than expected. However part of the price of restoring confidence to the markets was the hasty passage of the Sarbanes Oxley legislation and increased regulation of corporate governance.

Yet Sarbanes Oxley apparently did little to curb the animal spirits of some fringes of the US financial institutions that ultimately impacted on the world economy. The subprime mortgage crisis, and the elaborate financial instruments developed to pass on risk by investment banks, that caused a prolonged implosion of financial institutions in the global financial crisis of 2007/2008 was an indication of the dangers presented by the increasing financialisation of economic activity, and the hazardous context for corporate governance in market oriented economies (Clarke, 2010a). Nonetheless despite the strenuous intervention of the G20, Financial Stability Board internationally and the Dodd-Frank legislation in the US intended to restrain the most dangerous impulses of financial institutions, the strength and vigour of capital markets seems destined to continue to advance globally without adequate regulation or oversight (Clarke and Klettner, 2011; Avgouleas, 2013).

While each of the regional systems of finance and corporate governance remains in the post-financial crisis period weakened and to a degree disoriented, the substance and rhythm of institutional varieties continues: in Germany there remains an incomplete form of market liberalization, and resilient elements of the social market economy (Jackson and Sorge, 2012); in France, while the neo-liberal reforms have undermined social alliances and the pressures for institutional change increase, social commitments continue (Amable et al., 2012); and in Japan the incursions of hedge funds and private equity with a growing proportion of overseas ownership of Japanese corporations has not deflected Japanese executives from maintaining more inclusive conceptions in their definition of corporate purpose (Seki and Clarke, 2014).

Convergence and diversity of corporate governance

Despite the recurrent crises originating in Anglo-American finance and governance in this period, and in the background the continuing reverberations of the global financial crisis, the confidence the market based system was the only way forward has continued almost undaunted in government and business circles, certainly in the Anglo-American world (Clarke, 2010a). Underlying the resurging energy of advancing equity markets and the proliferating corporate governance guidelines and policy documents appearing in such profusion over the last two decades is an implicit but confident sense that an optimal corporate governance model is indeed emerging:

> An optimal model with dispersed ownership and shareholder foci... The OECD and World Bank promote corporate governance reform... Influenced by financial economists and are generally promoting market capitalism with a *law matters* approach, although for political reasons, they do not advocate too strongly market capitalism and allow for other corporate governance systems (i.e. concentrated ownership). (Pinto, 2005: 26-7)

Other authorities are less diplomatic in announcing the superiority of the Anglo-American approach that other systems must inevitably converge towards. Two US eminent law school professors Hansmann and Kraakman in an article prophetically entitled *The end of history for corporate law* led the charge of the convergence determinists:

> Despite very real differences in the corporate systems, the deeper tendency is towards convergence, as it has been since the nineteenth century. The core legal features of the corporate form were already well established in advanced jurisdictions one hundred years ago, at the turn of the twentieth century. Although there remained considerable room for variation in governance practices and in the fine structure of corporate law throughout the twentieth century, the pressures for further convergence are now rapidly growing. Chief among these pressures is the

> recent dominance of a shareholder-centred ideology of corporate law among the business, government and legal entities in key commercial jurisdictions. There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value. This emergent consensus has already profoundly affected corporate governance practices throughout the world. It is only a matter of time before its influence is felt in the reform of corporate law as well. (2001: 1)

The irony of this profoundly ideological claim (the most recent in a long historical lineage of similar appeals), is that it attempts to enforce the consensus it claims exists, by crowding out any possibility of alternatives. This is not an isolated example, but the dominant approach of much legal and financial discussion in the United States, where as McDonnell insists the prevailing view is:

> The American system works better and that the other countries are in the process of converging to the American system. Though there is some dissent from this position, the main debate has been over why countries outside the United States have persisted for so long in their benighted systems and what form their convergence to the American way will take. The scholarly discussion has converged too quickly on the convergence answer. (2002: 2)

It is worth asking by what standards or criteria a system of corporate governance may be defined as 'optimal'? Where a definition is offered in the convergence literature for an optimal corporate governance system it invariably relates to accountability to shareholders, and often to maximising shareholder value which became an increasingly insistent ideology in Anglo-American analyses of corporate purpose. The narrow financial metrics relating to maximising shareholder value often are presented as the only valid measures of an optimal corporate governance system, when there are deeper and wider measures that could be employed in the estimation of business performance.

Business success might be measured in longevity, scale, revenue, sales, employment, product quality, customer satisfaction, or many other measures that might be found relevant in different societies at different times. Certainly the measures of business success employed in Europe and Asia are quite different from the Anglo-Saxon world, and would embrace wider stakeholder interests. Most economic analyses simply substitute 'efficient' for optimal, but McDonnell (2002) offers three relevant values:

a) efficiency
b) equity
c) participation

In considering efficiency there is the question of how well the governance system solves agency problems; how well the system facilitates large scale coordination problems; how well the systems encourage long-term innovation; and how they impose different levels of risk on the participants. Distributional equity is another important value, but again is difficult to measure. For many distributional equity suggests increased prosperity should provide for an increased equality of income and wealth, but others find this less compelling. In some instances, equity may conflict with efficiency: it could be argued the US system is more efficient, but inevitably results in greater inequality. Alternatively equity may be associated with more collaborative creativity. Finally there is the value of participation, both in terms of any contribution this may make to the success of the enterprise, and as an end in itself in enhancing the ability and self-esteem of people. Corporate governance systems affect the level of participation in decision-making very directly, whether encouraging or disallowing active participation in enterprise decision-making (McDonnell, 2002: 4).

Arguably each of these values is of great importance, and the precise balance between them is part of the choice of what kind of corporate governance system is adopted. Yet there appears increasingly less opportunity to exercise this choice:

> The universe of theoretical possibilities is much richer than a dominant strand of the literature suggests, and we are currently far short of the sort of empirical evidence that might help us sort out these possibilities. Most commentators have focused on efficiency to the exclusion of other values. Moreover, even if convergence occurs, there is a possibility that we will not converge on the best system. Even if we converge to the current best system, convergence still may not be desirable. (McDonnell, 2002: 2)

History and politics

In the past these critical political choices on which system of governance provides the most value in terms of efficiency, equity and participation have been made and defended. Mark Roe's (2000; 2003) path dependence thesis rests on how political forces in America, anxious about the influence of concentrated financial or industrial monopolies, resisted any effort at concentration of ownership or ownership through financial institutions, resulting in dispersed ownership. In contrast European social democracy has tended to favour other stakeholder interests, particularly labour, as a system that promotes welfare among all citizens and attempts to prevent wide disparities. In turn this can be viewed as a reaction to the historical rise of fascism and communism (Pinto, 2005: 22). Fligstein and Freeland (1995: 21) adopt a similar historical view that the form of governance is a result of wider political and institutional developments:

i. the timing of entry into industrialisation and the institutionalisation of that process;
ii. the role of states in regulating property rights and the rules of competition between firms; and
iii. the social organisation of national elite.

In this way characteristic institutions of the US economy can be traced back to distinctive political and regulatory intervention, resulting for example in historically distributed banks, diversified companies, and the dominance of the diversified (M-form) corporations. In contrast in Europe and Japan the regulatory environment encouraged a very different approach:

> Regulatory policy in the United States had the unintended consequence of pushing U.S. companies in the direction of unrelated diversification, whereas in Germany and Japan it continued on a pre-war trajectory of discouraging mergers in favour of cartels and of promoting corporate growth through internal expansion rather than acquisitions. In other words, modern regulatory policy in the U.S. produced corporations who relied on markets to acquire ideas and talent, whereas in Germany and Japan it produced corporations whose primary emphasis was on production and on the internal generation of ideas through development of human capital and organizational learning. The implications for corporate governance are straightforward: corporations favour shareholders in the U.S. so as to obtain capital for diversification and acquisitions; they favour managers and employees in the Germany and Japan so as to create internal organizational competencies. (Jacoby, 2001: 8)

A very different reading of these events is offered by Rajan and Zingales (2003), who argue that widely dispersed shareholders is related to the development of liquid securities markets and the openness to outside investments, while it was not social democracy but protectionism that kept European and Japanese markets closed from competition with concentrated ownership. As financial economists they favour the globalisation route to open market based competition, which they see as the way to unsettling local elites, achieving dispersed ownership, raising capital, and improving corporate governance.

Law and regulation

Following a different line of analysis the substantial empirical evidence of La Porta et al. (1998; 1999; 2000; 2002) concerning countries with dispersed and concentrated ownership, which demonstrates differences in the legal protection of shareholders was very influential. Law and regulation may impede or promote convergence or divergence. In many countries without adequate laws guaranteeing dispersed shareholder rights, the only alternative appeared to maintain control through concentrated ownership. This led to the conclusion that the law determined the ownership structure and system of corporate finance and governance. Jurisdictions where the law was more protective encouraged the emergence of more dispersed ownership (Pinto, 2005: 19). Coffee (2001) extends La Porta et al.'s acceptance that in the common law system there was greater flexibility of response to new developments offering better protection to shareholders, to the argument that the critical role of the decentralised character of common law institutions was to facilitate the rise of both private and semi-private self-regulatory bodies in the US and UK. In contrast in civil law systems the state maintained a restrictive monopoly over law-making institutions (for example in the early intrusion of the French government into the affairs of the Paris Bourse involving the Ministry of Finance approving all new listings). Coffee concludes that it was market institutions that demanded legal protection rather than the other way around:

> The cause and effect sequence posited by the La Porta et al. thesis may in effect read history backwards. They argue that strong markets require strong mandatory rules as a precondition. Although there is little evidence that strong legal rules encouraged the development of either the New York or London Stock Exchanges (and there is at least some evidence that strong legal rules hindered the growth of the Paris Bourse), the reverse does seem to be true: strong markets do create a demand for stronger legal rules. Both in the U.S. and the U.K., as liquid securities markets developed and dispersed ownership became prevalent, a new political constituency developed that desired legal rules capable of filling in the inevitable enforcement gaps that self-regulation left. Both the federal securities laws passed in the 1930's in the U.S. and the Company Act amendments adopted in the late 1940's in the U.K. were a response to this demand (and both were passed by essentially "social democratic" administrations seeking to protect public securities markets). Eventually, as markets have matured across Europe, similar forces have led to the similar creation of European parallels to the SEC. In each case, law appears to be responding to changes in the market, not consciously leading it. (Coffee, 2001: 6)

Culture – Deep causation

In the search for explanations some have attempted a philosophical approach including Fukuyama (1996) who conceives of business organisations as the product of trust, and the different governance systems as built of different forms of trust relations. Regarding the social foundations and development of ownership structures and the law, other writers have examined the correlations between law and culture. Licht (2001) examines the relevance of national culture to corporate governance and securities regulation, and explores the relationship between different cultural types and the law:

> A nation's culture can be perceived as the mother of all path dependencies. Figuratively, it means that a nation's culture might be more persistent than other

> factors believed to induce path dependence. Substantively, a nation's unique set of cultural values might indeed affect – in a chain of causality – the development of that nation's laws in general and its corporate governance system in particular. (2001: 149)

In working towards a cross-cultural theory of corporate governance systems, Licht (2001) demonstrates that corporate governance laws exhibit systematic cultural characteristics.

> A comparison between a taxonomy of corporate governance regimes according to legal families ('the legal approach') and a classification of countries according to their shared cultural values demonstrates that the legal approach provides only a partial, if not misleading, depiction of the universe of corporate governance regimes. Dividing shareholder protection regimes according to groups of culturally similar nations is informative. The evidence corroborates the uniqueness of common law origin regimes in better protecting minority shareholders. However, statutes in the English Speaking cultural region offer levels of protection to creditors similar to the laws in the Western European or Latin American regions. Our findings cast doubt on the alleged supremacy of common law regimes in protecting creditors and, therefore, investors in general. Finally, we find that analyses of corporate governance laws in Far Eastern countries, a distinct cultural region, would benefit from combining an approach that draws on cultural value dimensions and one that draws on legal families. (Licht, 2001: 32)

Licht concludes that corporations are embedded within larger socio-cultural settings in which they are incorporated and operate. Cultural values are influential in determining the types of legal regimes perceived and accepted as legitimate in any country, and serve as a guide to legislators. Hence cultural values may impede legal reforms that conflict with them and the naiveté underlying quick-fix suggestions for corporate law reform (2001: 33-4). Culture also influences what are perceived as the maximands of corporate governance – for example in the debate over stockholders' versus stakeholders' interests as the ultimate objective of the corporation: 'The corporate governance problem therefore is not one of maximising over a single factor (the maximand). Rather, it calls for optimizing over several factors simultaneously' (Licht, 2003: 5). Berglof and von Thadden (1999) suggest the economic approach to corporate governance should be generalised to a model of multilateral interactions among a number of different stakeholders. They argue that though protection of shareholder interests may be important, it may not be sufficient for sustainable development, particularly in transitional economies. Licht concludes:

> Every theory of corporate governance is at heart a theory of power. In this view, the corporation is a nexus of power relationships more than a nexus of contracts. The corporate setting is rife with agency relationships in which certain parties have the ability (power) unilaterally to affect the interests of other parties notwithstanding pre-existing contractual arrangements. In the present context, corporate fiduciaries are entrusted with the power to weigh and prefer the interests of certain

> constituencies to the interests of others (beyond their own self-interest). Given the current limitations of economic theory, progress in the analysis of the maximands of corporate governance may be achieved by drawing on additional sources of knowledge. (Licht, 2003: 6)

Institutional complementarities

A further development of the path dependence thesis, is the emphasis on the interdependence of economic and social institutions: 'Corporate governance consists not simply of *elements* but of *systems*... Transplanting some of the formal elements without regard for the institutional complements may lead to serious problems later, and these problems may impede, or reverse, convergence' (Gordon and Roe, 2004: 6). Optimal corporate governance mechanisms are contextual and may vary by industries and activities. Identifying what constitutes good corporate governance practice is complex, and cannot be templated into a single form. One needs to identify the strengths and weaknesses in the system but also the underlying conditions which the system is dependant upon (Pinto, 2005: 31; Maher and Andersson, 2000). The institutions that compose the system of corporate governance and complement each other consist not just of the law, finance, and ownership structure.

Complementarities may extend to such things as labour relations and managerial incentive systems. In Germany and Japan, the corporations' long term relations with banks, customers, and suppliers traditionally facilitates long term commitments to employees. The commitment to permanency promotes extensive firm-specific training, which contributes to flexible specialisation in the production of high quality goods. In contrast in the United States employer training investments are lower than in Japan and Germany, employees are more mobile, and there is less firm-specific skill development. Similarly, in the US fluid managerial labour markets make it easier for ousted managers to find new jobs after a hostile takeover. In contrast, in Japan management talent is carefully evaluated over a long period of time through career employment and managerial promotion systems. Jacoby contends 'It is difficult to disentangle the exogenous initial conditions that established a path from the *ex post* adaptations...What's most likely to be the case is that capital markets, labour markets, legal regulations, and corporate norms co-evolved from a set of initial conditions' (2001: 17). He continues with a warning to those who might wish to randomly transplant particular institutional practices into other countries:

> Given institutional complementarities and path dependence, it's difficult for one country to borrow a particular practice and expect it to perform similarly when transplanted to a different context...Were the Japanese or Germans to adopt a U.S.-style corporate governance approach that relies on takeovers to mitigate agency

> problems, it would prove highly disruptive of managerial incentive and selection systems presently in place. Hostile takeovers also would be disruptive of relations with suppliers and key customers, a substantial portion of which exist on a long term basis. In Germany and, especially, in Japan, there is less vertical integration of industrial companies than in the United States or the United Kingdom. Rather than rely primarily on arms-length contracts to protect suppliers and purchasers from opportunism, there is heavy use of relational contracting based on personal ties, trust, and reputation. Personal ties are supported by lifetime employment; the business relations are buttressed by cross-share holding. In short, imitation across path-dependent systems is inhibited by the cost of having to change a host of complementary practices that make an institution effective in a particular national system. (*ibid*.:18)

Another way of understanding this Jacoby suggests is through the concept of multiple equilibria, which leads to the conclusion there is no best way of designing institutions to support stability and growth in advanced industrial countries:

> Multiple equilibria can arise and persist due to path dependence, institutional complementarities, bounded rationality, and comparative advantage. Sometimes multiple equilibria involve functionally similar but operationally distinctive institutions, such as the use of big firms as incubators in Japan versus the U.S. approach of incubation via start-ups and venture capital. Other times different institutions create qualitatively different outcomes. That is, a set of institutions, including those of corporate governance, may be better at facilitating certain kinds of business strategies and not others. Companies – and the countries in which they are embedded – can then secure international markets by specializing in those advantageous business strategies because foreign competitors will have difficulty imitating them. For example, the emphasis on specific human capital in German and Japan is supportive of production based technological learning, incremental innovation, and high quality production, all areas in which those economies have specialized. By contrast, the U.S. emphasis on resource mobility and on high short-term rewards directs resources to big-bang technological breakthroughs. In short, there are substantial gains to be reaped from sustaining institutional diversity and competing internationally on that basis. (*ibid*.: 25)

The discussion of corporate governance is often framed in static efficiency terms, Jacoby contends, as if it was possible to measure the comparative performance of national governance institutions in a static framework. This is inadequate for understanding the dynamic properties of governance systems, especially concerning innovation and long-term growth.

> When there are multiple equilibria and bounded rationality regarding what constitutes an institutional optimum, we are operating in the world of the second best. In that world, there is no reason to believe that revamping a governance system will necessarily move an economy closer to an economic optimum. The economic case for the superiority of Anglo-American governance – and of the Anglo-American version of "free markets" as we know them, as opposed to a theoretical ideal – is actually rather weak. (*ibid*.: 27)

Integrated together the competing theories of convergence and diversity propounded in the disciplinary perspectives of history and politics, law and regulation, culture, and institutional complementarities offer a more nuanced prognosis of the future trends in corporate governance than crudely deterministic theories of governance convergence suggest. History and politics reminds us of the relation of distinctive institutional developments to the timing of industrialisation, the relative autonomy of states in regulating property and competition, and the significance of the structure and distribution of power and elites. Law and regulation impress upon us the significance of the distinctiveness of common and civil law approaches, and how these respond to maturing markets. Cultural approaches perceive the social foundations and distinctive values that inform different regimes of governance. Finally, the institutional complementarities approach identifies the interdependence of economic and social institutions that create complex systems of governance. These dynamic multiple equilibria of governance systems are unique, and whilst they might exhibit some degree of functional similarity, are based on profoundly distinctive experiences, values and objectives.

Different governance systems are better at doing different things

For Hansmann and Kraakman, convergence of corporate governance systems towards the shareholder-oriented model is not only desirable and inevitable, it has already happened. They boldly confirm:

> The triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured, even if it was problematic as recently as twenty-five years ago. Logic alone did not establish the superiority of this standard model or of the prescriptive rules that it implies, which establish a strong corporate management with duties to serve the interests of shareholders alone, as well as strong minority shareholder protections. Rather, the standard model earned its position as the dominant model of the large corporation the hard way, by out-competing during the post-World War II period the three alternative models of corporate governance: the managerialist model, the labour-oriented model, and the state-oriented model. (2001: 16)

For Hansmann and Kraakman, alternative systems are not viable competitively, only the lack of product market competition has kept them alive, and as global competitive pressures increase any continuing viability of alternative models will be eliminated, encouraging the ideological and political consensus in favour of the shareholder model.

Hansmann and Kraakman dismiss the three rivals they set up for the victorious shareholder model. The managerialist model is associated with the US in the

1950s and 1960s, when it was thought professional managers could serve as disinterested technocratic fiduciaries who would guide the business corporation in the interests of the general public. According to Hansmann and Kraakman, this model of social benevolence collapsed into self-serving managerialism, with significant resource misallocation, imperilling the competitiveness of the model and accounting for its replacement by the shareholder driven model in the US (Gordon and Roe, 2004).

The labour-oriented model exemplified by German co-determination, but manifest in many other countries, possesses governance structures amplifying the representation of labour, which Hansmann and Kraakman claim are inefficient because of the heterogeneity of interests among employees themselves, and between employees and shareholders. Firms with this inherent competition of interests would inevitably lose out in product market competition. Finally, the state-oriented model associated with France or Germany entails a large state role in corporate affairs through ownership or state bureaucratic engagement with firm managers, allowing elite guidance of private enterprise in the public interest. Hansmann and Kraakman argue this corporatist model has been discredited because of the poor performance of socialist economies (Gordon and Roe, 2004).

At the height of the NASDAQ boom when Hansmann and Kraakman wrote their visionary article it might have appeared that the shareholder model in its US manifestation was certainly globally hegemonic in all of its manifestations. However, the post-global financial crisis world is less easily convinced of the inevitable and universal superiority of the US model of governance, and Hansmann and Kraakman may have written off the prospects of Japan and Europe a little too presumptuously, the best that could be salvaged from their over-confident thesis. The Anglo-American system might be better at doing some things which require the ready deployment of large amounts of liquid capital such as in high-tech innovation and global financial services. But the other governance systems have their own dynamism and valuable capabilities such as exhibited in German precision engineering, Japanese consumer electronics, French luxury goods, or Italian design. Essentially it seems that the different corporate governance systems may be better at doing different things, and with different outcomes for the economy and society.

Feature	Anglo-Saxon	Germanic	Latin	Japanese
Orientation	Market oriented (an active external market for corporate control)	Market-oriented (relatively oligarchic, influenced by networks of shareholders, families and banks)	Network-oriented	Network-oriented
Representative countries	USA, UK, Canada, Australia, NZ	Germany, Netherlands, Switzerland, Sweden, Austria, Denmark, Norway, Finland	France, Italy, Spain, Belgium, Brazil, Argentina	Japan
Prevailing concept of the firm	Instrumental (as a means for creative shareholder value)	Institutional (autonomous economic units coming out of a coalition of shareholders, corporate managers, suppliers of goods and debts, and customers)	Institutional	Institutional
The Board system	One-tier (governance with one level of directors, making no distinction but executives and non-executives	Two-tier (executive and supervisory board, the latter monitoring, appointing or dismissing managers; large shareholders on the Board and high pressure from banks)	Optional (France) in general one-tier	Board of directors, offices of representative directors, of auditors, de facto one-tier
Main stakeholders to exert influence on managerial decision-making	Shareholders	Industrial banks (mainly in Germany; in general, oligarchic group inclusive of employees' representatives)	Financial holdings, the government, families, in general oligarchic groups	City banks, other financial institutions, employees in general oligarchic groups
Importance of stock and bond markets	High (requiring continued action and performance)	Moderate or high (legal and regulatory bias against non-bank finance)	Moderate or poor	High (legal and regulatory bias against non-bank finance)
Is there a market for corporate control?	Yes	No	No	No
Ownership concentration	Low	Moderate or high (very high in Germany)	High	Low or moderate

Compensation based on performance	High	Low	Moderate	Low
Time horizon of economic relationships	Short-termism (management and governance myopia)	Long termism	Long termism	Long termism
Strengths	Dynamic market orientation, fluid capital, internationalization extensive	Long-term industrial strategy, very stable capital, robust governance procedures	Creative, aesthetic, flexible, continuity in skill development	Very long-term industrial strategy, stable capital, major overseas investment
Weaknesses	Volatile, short-termism, inadequate	Internationalization more difficult, lack of flexibility, inadequate investment for new industries	Weak governance, majority control, little transparency	Financial speculation, secretive governance procedures, weak accountability.
Products	Financial services, software, High technology, media	Precision engineering, high quality automobiles, high quality manufacturing	Fashion goods, clothes, shoes, interior design goods	Automobiles and motorcycles, consumer electronics

Table 1. The continuing diversity of corporate governance systems. Sources: Adapted from Keenan and Aggestam (2001); Clarke and Bostock (1994).

The continuing diversity in Anglo-American, Germanic, Latin and Japanese corporate governance systems is outlined in Table 1, indicating different orientations, concept of the firm, board structures, main stakeholders, the importance of stock and bond markets, the market for corporate control, ownership concentration, executive compensation, investment horizons, and the resulting corporate strengths and weaknesses that influence the types of products and services that are specialised in. The differences highlighted demonstrate that despite insistent pressures towards institutional and functional convergence, there remains a variety and distinctiveness in the regional approaches to corporate governance and strategy, which relates closely to their respective business strengths and weaknesses. There is a dynamism and vitality to this specialisation which continues to drive the distinctiveness and quality of the industries and products of these regions, despite the international financial, global value chain and functional pressures not only towards convergence but towards bland homogeneity in global industries, products and services.

As Douglas Branson concludes regarding the globalisation and convergence debate, 'seldom will one see scholarship and advocacy that is as culturally and economically insensitive, and condescending, as is the global convergence advocacy scholarship that the elites in United States academy have been throwing over the transom. Those elites have oversold an idea that has little grounding in true global reality' (2004: 276). Bebchuk and Roe's (1999) view still holds that neither shareholder primacy nor dispersed ownership will easily converge. Path dependence has evolved established structures not easily transformed and complimentary institutions make it more difficult to do so. 'Thus keeping existing systems may in fact be an efficient result. This lack of convergence allows for diversity and suggests that globalisation will not easily change the models' (Pinto, 2005: 29).

A more realistic global perspective than the convergence thesis is that there will continue to be considerable diversity both in the forms of corporate governance around the world. Different traditions, values and objectives will undoubtedly continue to produce different outcomes in governance, which will relate closely to the choices and preferences people exercise in engaging in business activity. If there is convergence of corporate governance, it could be to a variety of different forms, and it is likely there will be divergence away from the shareholder oriented Anglo-American model, as there will be convergence towards it. There is a growing realisation that shareholder value is a debilitating ideology which is undermining corporations with an over-simplification of complex business reality, weakening managers, corporations and economies, and ignoring the diversity of investment institutions and interests (Clarke, 2014; Lazonick, 2014).

Certainly boards of directors in the US and UK in recent years have felt a more immediate responsibility to recognise a wider range of relevant constituencies as stakeholder perspectives arguably have once again become a more prominent part of corporate life (David et al., 2007; Deakin and Whittaker, 2007; Clarke, 2010b; Klettner et al., 2014; Clarke, 2015; Clarke, 2016b). In US firms recognition of the growing importance of intellectual capital, and the adoption of high performance work practices, have all reemphasised the importance of human capital in a context where previously labour was marginalised in the interests of a single minded shareholder ethos (Jacoby, 2001: 26). It is ironic that as European and Japanese listed corporations are being forced to recognise the importance of shareholder value; Anglo-American corporations are being sharply reminded of their social responsibilities.

The widespread adoption among leading Anglo-American corporations of publishing social and environmental reports alongside their financial reports, and actively demonstrating their corporate social responsibility in other more practical ways, suggests this may be more than simply a rhetorical change (Searcy, 2012; Schembera, 2012). The formal adoption of *enlightened* shareholder value in the UK Companies Act indicates at least a rhetorical move forwards from the more naked pursuit of shareholder value (Keay, 2013). Further unlikely evidence that the United States system could in some important ways be converging towards the European model is unearthed by Thomsen (2001).

The pattern of insider ownership and extensive block holding in the US, does not demarcate the American system as sharply from the European as is often suggested. And the trend may be in this direction as apparently the stock market in Anglo-American systems responds positively to higher ownership by financial institutions, and one reason for this may be the perception of better monitoring (Thomsen, 2001: 310). The increasing importance of institutional investors in the US, and in every other market, means that ownership relations are once again becoming more concentrated (even if the ultimate beneficiaries are highly diffuse). This institutional ownership has begun to create forms of relational investing, which could over time lead to more exercise of voice and less of exit by US shareholders (Jacoby, 2001: 26).

Much attention has been focussed upon the pressures driving large listed German corporations to focus more directly on the creation of shareholder value, and upon the insistent pressures for Japanese corporations to demonstrate more transparency and disclosure (Clarke and Chanlat, 2009; Jackson and Sorge, 2012; Amable et al., 2012; Seki and Clarke, 2014). Less attention has been paid to the developing pressures upon Anglo-American corporations to exercise greater accountability towards institutional investors and more responsibility in relation to their stakeholder communities (Williams and Zumbansen, 2011; Deeg, 2012).

With multiple institutions exerting interdependent effects on firm level outcomes (Aguilera and Jackson, 2003: 448), and with different values informing the objectives for the enterprise in different cultures (Hofstede, 2004), the scenario for convergence and diversity of corporate governance models is more complex and unpredictable than many commentators have suggested. A pioneer of corporate governance possessed a more compelling grasp of the possibilities that convergence and divergence may occur *simultaneously:* that is an insistent increase in diversity within an overall trend towards convergence:

> Looking ahead towards the next decade it is possible to foresee a duality in the developing scenarios. On the one hand, we might expect further diversity – new patterns of ownership, new forms of group structure, new types of strategic alliance, leading to yet more alternative approaches to corporate governance. More flexible and adaptive organisational arrangements, entities created for specific projects, business ventures and task forces are likely to compound the diversity. Sharper differentiation of the various corporate governance types and the different bases for governance power will be necessary to increase the effectiveness of governance and enable the regulatory processes to respond to reality... But on the other hand, we might expect a convergence of governance processes as large corporations operating globally, their shares traded through global financial

> markets, are faced with increasing regulatory convergence in company law, disclosure requirements and international accounting standards, insider trading and securities trading rules, and the exchange of information between the major regulatory bodies around the world. (Tricker, 1994: 520)

In this analysis the strength of diversity rather than uniformity becomes apparent, even to the extent there is some convergence of regulation, and it is increasingly likely this will need to be negotiated among regions and countries rather than disseminated from the Anglo-American heartland. 'There is then value in maintaining international diversity in corporate governance systems, so that we do not foreclose future alternatives and evolutionary possibilities. The argument resembles the argument for biodiversity in species' (McDonnell, 2002: 18). The importance of diversity for the exercise of choice and creativity is paramount, and reveals the dangers involved in national and international policymaking vigorously advocating a one-size-fits-all prescription for corporate governance (McDonnell, 2002: 19). Indeed, this essential dynamism of corporate governance was fully recognised in the OECD Business Advisory Group's report at the time of the formulation of the original OECD principles:

> Entrepreneurs, investors and corporations need the flexibility to craft governance arrangements that are responsive to unique business contexts so that corporations can respond to incessant changes in technologies, competition, optimal firm organization and vertical networking patterns. A market for governance arrangements should be permitted so that these arrangements that can attract investors and other resource contributors – and support competitive corporations – flourish. To obtain governance diversity, economic regulations, stock exchange rules and corporate law should support a range of ownership and governance forms. Over time, availability of 'off the shelf' solutions will offer benefits of market familiarity and learning, judicial enforceability and predictability. (OECD, 1998: 34)

Future trends

Contemplating the future of corporate governance systems is a hazardous business. Each of the systems is facing pressures to change. The long-term stakeholder orientation of the German and Japanese governance systems is under insistent pressure to deliver shareholder value, particularly from overseas investment institutions. However, the market oriented short-termism of the Anglo-American approach is itself being challenged by international, national and community agencies to recognize wider social and environmental responsibilities. The German and Japanese systems are faced with demands for increased transparency and disclosure from both regulators and investors, while Anglo-American corporations are faced with repeated calls for greater accountability from institutional investors and other stakeholder communities.

Bratton and McCahery (2002: 30) recognized four possible outcomes from the present pressures to converge, and the resilient institutional resistance encountered:

i. a *unitary system* as there is strong convergence towards a global system which assembles the best elements of both major governance systems and combines them together (the least likely alternative);
ii. a *universal market based system* as anticipated by the Chicago School of financial economists, representing the triumph of the rules based outsider system;
iii. an *improved variety of governance systems* in which there is weak convergence, but some learning from each other between the different national systems;
iv. a set of *viable distinctive governance systems,* based on distinctive institutional complementarity each having a unique identity and capability.

Contrary to all of the predictions of an early and complete convergence of corporate governance systems, the final two alternatives are the closest to the present state of play, and are likely to be for some time to come, as this differentiated system has a proven robustness and usefulness, reflecting different industrial strengths and strategic directions. The immense capacity of the international finance institutions to continue to drive economic and social change in their own interests should be recognised, and the increasing financialisation of corporations globally disciplined to narrower and narrower financial objectives is a plausible scenario. The continuing threat to the variety and distinctiveness of regional forms of corporate governance and strategy should be recognised. However Anglo-American financial institutions, even if untamed by post-crisis regulation, are under some constraint by the widespread popular demand that they demonstrate greater social responsibility (Clarke, 2010b; Clarke, 2016a). Secondly as presently in China, regional financial systems with different orientations and objectives to the Western banks may exert increasing influence (and indeed Chinese corporations have benefited from this radically different regime in their rapid advance).

Complexity of corporate governance forms

It is likely the campaign to raise standards of corporate governance will continue for some time in all jurisdictions of the world. There will be a strenuous effort to secure commitment to the essential basis of trust identified by the OECD as fairness, transparency, accountability and responsibility. However, this will occur in countries with different cultures, legal systems, and economic priorities and social commitments. This campaign to raise standards of accountability in corporate governance should be distinguished from the intense and numbing assault by international financial interests to impose on the corporations of the world a narrow and self-interested shareholder value ideology which will serve to constrain corporations' purpose and development.

To assume that all countries will adapt to the same corporate governance structures is unrealistic, unfounded and unimaginative. It is likely that fundamental features of the European and Asian approaches to corporate governance will be maintained, even where the apparatus of market-based corporate governance are formally adopted. Often these differences will be perceived as part of the cultural integrity and economic dynamism of the economy in question. To the extent countries adopt universal principles they will do so within a culturally diverse set of corporate values, structures, objectives and practices. This is part of the evolving and dynamic complexity of corporate life, in which both convergence and divergence can occur simultaneously. As pressures to conform to international standards and expectations increase, the resilience of historical and cultural differences will continue. The business case for diversity is, if anything, even more compelling. There will be a continual need to innovate around new technologies, processes and markets. This will stimulate new organisational and corporate forms, the shape and objectives of which will be hard to predetermine.

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the author

Thomas Clarke is Director of the Centre for Corporate Governance at the University of Technology Sydney. He has published *Rethinking the company* (1994, London: Financial Times) in five languages; *Changing paradigms: The transformation of management knowledge for the 21st century* (2000, London: HarperCollins Business) (with Stewart Clegg); *Theories of corporate governance* (2004, London: Routledge); *International corporate governance*, (2016, second edition, London: Routledge); *European corporate governance*, (2009, London: Routledge)(edited with Jean-Francois Chanlat); and the *Handbook of corporate governance*, (2012, London: Sage) (edited with Professor Douglas Branson, Chair in Business Law, University of Pittsburgh). Formerly he was corporate governance and sustainability editor of the *Journal of Business Ethics* (Springer).
Email: thomas.clarke@uts.edu.au

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Bad governance of family firms: The adoption of good governance on the boards of directors in family firms*

Yuliya Ponomareva and Jenny Ahlberg

abstract

The concept of good governance, as the manifestation of a larger ideology of shareholder value maximization, is designed for and promoted by large, manager-controlled listed corporations. The increasing adoption and growing legitimacy of good governance have led to the formation of a dominant institutional logic, which family firms experience pressure to adopt. Particularly strong is the pressure to increase the independence of the board of directors. While the process of change towards more independent boards may not necessarily contribute to increased economic efficiency or be fully able to fulfill the governance needs of family firms, these firms continue to adopt such practices. Drawing on institutional theory, we propose that institutional pressure is the dominant reason for family firms to adopt board independence. We then deduce potential consequences of this change, including positive consequences in terms of creation of both social and economic value, as well as negative consequences in terms of dilution of board meetings, demotivation of managers and decreased collaboration in the boardroom. Our study suggests that the benefits associated with the adoption of good governance can become offset by a decrease in the strategic adaptability of a firm.

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Introduction

Shareholder value maximization has been termed 'a new ideology of corporate governance' and has become the point of convergence for the mainstream literature in corporate governance research (Lazonick and O'Sullivan, 2000). This ideology appeared in the United States during the 1970s, shifting the focus of large, managerially governed corporations from a 'retain and reinvest' to a 'downsize and distribute' philosophy (Fiss and Zajac, 2004; Stout, 2012). One manifestation of this dominant ideology is the concept of good governance, which has attracted the attention of researchers and policymakers as well as practitioners.

The diffusion of shareholder value ideology and good governance has been facilitated by the development of agency theory (Eisenhardt, 1989; Fama, 1980; Fama and Jensen, 1983; Jensen and Meckling, 1976), which remains the primary theoretical perspective on corporate control and the cornerstone of good governance (Aguilera and Cuervo-Cazzura, 2004). Web of Science citation index search results for the term *good governance* across disciplines (retrieved July 10, 2015) have increased nearly ten times in the last 14 years, starting with 116 records of the term in 2000 and reaching 1,137 in 2014. During the same period, the number of citations of works addressing the concept of good governance has increased nearly 30 times, indicating rapid development of this body of research as well as its scientific impact.

The dramatic shift towards the increasing influence of good governance is also depicted in the literature oriented towards practitioners. Articles in the business press encourage managers to improve the governance of their firms through increasing board independence (Argandona, 2014; Bebchuk, 2012; Nadler, 2004; Sonnenfeld, 2002). Recommendations to move towards greater board independence target not only large publicly listed corporations with dispersed ownership structure but also family firms (Bromilow and Morrow, 2014). Furthermore, the media have supported this movement by giving positive coverage to corporations signaling their adherence to good governance (Bednar, 2012). At the same time, insider-dominated boards have been 'punished' by negative coverage (Joe, Louis and Robinson, 2009). Increasing publicity of good governance resonates with large public corporations including Coca-Cola and Telenor, which have published good governance reports and included them in their annual reports of 2014, contributing to the normalization of good governance.

In line with this trend, the principles of good governance have been used extensively among policymakers, sometimes parallel to research discussions, and sometimes ahead of them. Two influential regulatory documents – the Cadbury Committee report (1992; 2000) in the UK and Sarbanes-Oxley Act in the U.S. – both incorporated the rhetoric of shareholder value, conceptualizing it in good governance practice recommendations (Filatotchev and Boyd, 2009). Codes of good governance have subsequently spread to international political and corporate contexts (Jansson, 2013; Jansson and Larsson-Olaison, 2010; Jonnergård and Larsson, 2007; Oxelheim and Randøy, 2005), indicating the existence of a general consensus regarding the direction in which governance standards are assumed to develop in the future.

The increasing adoption and growing legitimacy of good governance reflect the formation of a dominant institutional logic, referring to a set of commonly accepted governance practices serving the interests of the corporate elites, particularly the shareholders (Fligstein, 1985; 1987; Lazonick and O'Sullivan, 2000). This market-oriented logic, which originally appealed to large manager-controlled listed corporations with highly dispersed ownership structure (Lane et al., 2006) came to be adopted by companies with concentrated ownership structure as well as by private corporations (Pieper, 2003).

While shareholder value maximization concerns primarily the economic value, this may not necessarily be the primary objective for all categories of firms. Particularly different in this dimension are family businesses, which are motivated by non-economic goals such as retaining family control over the firm and the preservation of the family wealth (Gomez-Mejia et al., 2011). This incongruence between governance of family business and the dominant institutional logic of good governance has resulted in criticisms of the current governance practices of family firms (Bertrand and Schoar, 2006; Carney, 2005).

Being more responsive to conform to institutional pressure than non-family firms (Berrone et al., 2010), family businesses – both public and private – have increasingly adopted governance codes (Pieper, 2003; Yildirim-Öktem and Üsdiken, 2010). This said, the empirical research has not managed to confirm the claim of positive performance effects of good governance for firms in general (Seidl, 2006); neither has it consistently shown lower performance of family-dominated governance (Gomez-Mejia et al., 2001; Woods et al., 2012).

While the general perspective in corporate governance research is exploring the relationship between governance mechanisms and firm outcomes, little is known about how and why family firms respond to changes in the dominant institutional logic of corporate governance practices or about the consequences these changes bring to the firms. Reflecting on the increased emphasis on board control promoted by good governance, we explore what drives family business to conform to the dominant institutional logic. Drawing on institutional theory (DiMaggio and Powell, 1983; Meyer and Rowan, 1977), we explain ideologically driven institutional change using the example of the increasing adoption of good governance by family firms and illuminating the potential consequences of this change.

Our analysis focuses on one particular aspect of good governance, namely the notion of board independence, which comprises one of the central tenets of good governance (Aguilera and Cuervo-Cazzura, 2004). Over recent decades, with the rise of shareholder activism, a shift of power has occurred from managerial dominance to greater power for corporate boards (Filatotchev and Toms, 2003; Nielsen and Huse, 2010). According to this widely accepted view, boards with a higher proportion of outside directors, independent from management, are able to exercise more vigilant control (Finkelstein et al., 2009). In line with this logic, researchers have documented a trend towards the adoption of more independent board structures among firms in general (Bhagat and Black, 2002; Gordon, 2006; Johanson and Østergren, 2010; Westphal and Zajac, 1997; Clune et al., 2014) and family firms in particular (Pieper, 2003; Yildirim-Öktem and Üsdiken, 2010).

In our study we put forward three main arguments. First, we question the economic efficiency of good governance for family firms; secondly, we illuminate the difference between the governance needs addressed by good governance and the actual governance needs of family firms; thirdly, we argue that family firms adopt good governance in response to institutional pressure. In the final part of the paper we discuss the potential consequences of adoption of good governance by family firms.

Economic efficiency of good governance

The motivation behind recommendations to adopt good governance largely builds on the economic efficiency arguments designed mainly for manager-controlled firms. The inclusion of independent directors on corporate boards, consistent with good governance, is assumed to reduce the risk of managerial opportunism, thereby maximizing the shareholder value (Fama, 1980). Based on this logic, family firms' tradition to have a strong family representation at the board has been criticized for potential internal control problems (cf. Gomez-Mejia et al., 2011). Researchers generally view managers selected within and by the family as less competent, more likely to face problems of self-control and moral hazard (Anderson and Reeb, 2004; Fang et al., 2012). Family boards that are essentially passive organizational bodies, rubber-stamping the decisions of a controlling family, do not contend problems of self-control and moral hazard supporting managers in pursuing their endeavors (e.g., Gomez-Mejia et al., 2011; Lubatkin et al., 2005). The lack of internal control mechanisms is seen as a potential reason for efficiency loss, which in turn compromises the ability of a firm to maximize shareholder value. The good governance recommendations aim at curbing these negative implications by appointing outside board members to exert more vigilant monitoring over managerial decisions (Miller and Le Breton-Miller, 2006) and to manage parental altruism (Lubatkin et al., 2005). According to this view, stronger control over managerial actions is assumed to minimize the agency costs of managerial opportunism and generate profits, ultimately maximizing shareholder value.

A surprising fact in the promotion of good governance is the limited amount of research supporting the normative assumptions behind the codes (Seidl, 2006). Empirical tests of the theories of board structure and board leadership underlying the good governance recommendations have shown little consistency (Bhagat and Black, 2002). In the context of family firms, a comprehensive review by Bammens et al. (2011) reports mixed findings regarding the relationship between board independence and firm performance. Some studies have found negative effects of board independence on firm performance (Klein et al., 2005) in family-controlled public firms. A number of conceptual arguments may contribute to explain the lack of empirical evidence of economic efficiency of good governance in family firms.

The inclusion of independent directors on the board of a family firm might not always lead to increased attention to the monitoring function (Goh et al., 2014). Previous research has distinguished other important tasks of outside directors besides monitoring; the tasks include resource provision, strategic advice and CEO counsel, as well as conflict resolution (Bammens et al., 2011; Collin, 2008; van den Heuvel et al., 2006). Family members, motivated by the desire to preserve their control over firm, can have a strong influence on the process of director selection (Miller and Le Breton-Miller, 2003). In this case, the family will be interested in selecting directors with specific characteristics to serve on the board, such as directors who are able to provide qualified advice for the CEO (Heidrick, 1988) or directors that do not challenge family control (Anderson and Reeb, 2004). In support of this, Cannella et al. (2015) show that family firms are more likely to employ directors with prior experience of serving on family firm boards, as they are more likely to support the goals of the family, thereby assuring the family's control over the firm. This leads to the assumption that board independence emphasized as part of good governance may have less importance than other motivations for inclusion of independent directors on the boards in family firms.

Secondly, once the outside directors are selected, their ability to act as monitors may be significantly constrained by the family control over board decision making. Outside directors selected by the family may feel indebted, implying that they would not engage in vigilant control over managerial decision making, neither would they challenge the actions of family members representing the management or the board. Furthermore, family control over the board may imply assuming control over the information flow, for example through preparing board meeting agenda (Goh et al., 2014). In such situations the independent directors may find it difficult to place issues related to control on the board agenda. In addition, board decisions in family firms can be made outside board meetings through informal conversations between influential insiders (Gersick et al., 1997). Outside directors may not be able to take part in these discussions due to their limited contact with the firm and the lack of inside information and firm-specific knowledge (Baysinger and Hoskisson, 1990). Consequently, the inclusion of independent directors to the board may not necessarily increase control over managerial decision making in family firms, as advocated by good governance principles. This in turn questions the economic efficiency argument of good governance when applied to the context of family firms.

The governance needs of family firms

Several characteristics make family firms distinctively different from manager-controlled firms. Most notable are goal orientation towards both financial and non-financial goals (Chrisman et al., 2012; Gomez-Mejia et al., 2007), dominance of relational contracts, reliance on relational trust, and non-existence (or a different aspect) of the agency problem (Gibson et al., 2014). These characteristics form a set of governance needs for family firms, i.e. overall motivation forces for implementing governance in the firm. These needs, being substantially different from the governance needs in managerially governed firms, influence the functions of the board of directors. In this section we discuss the governance of family firms, focusing on the board of directors and compare it to the good governance principles, designed primarily for manager-controlled firms.

Non-financial goals are described as a characteristic fundamental for family firms (e.g., Zellweger et al., 2013). This is also embraced in the socioemotional wealth (SEW) perspective, where the family's benefits from non-financial aspects of the firm are at the core of the firm's values (e.g., Gomez-Mejia et al., 2011). According to this view, the loss of SEW implies the loss of status, informal ties with the family and the failure to meet family expectations (Gomez-Mejia et al., 2007). The non-financial goals of family firms may include the preservation of control over the firm, the survival of the firm through generations, legitimacy and reputation gains (Berrone et al., 2010; Zellweger et al., 2013). Moreover, the long-term survival of a family firm is valued higher than its short-term profit (cf. Astrachan and Jaskiewicz, 2008). Consequently, because of the different goals of family firms (Chrisman et al., 2004), the maximization of shareholders' economic value, emphasized by good governance (Fama and Jensen, 1983; Lazonick and O'Sullivan, 2000), can be less relevant for family businesses. Instead, the goal orientation of family firm governance can involve both economic and non-economic aspects.

The distinct goals of family firms imply a different nature of contract between the principal, represented by the controlling family, and the agent, represented by the management. In contrast to the formal agency contracts in manager-controlled firms based on the assumption of economic rationality, relational contracts in family firms can be based on mutual expectations that depart from this assumption (Gomez-Mejia et al., 2001). In particular, the relational contract in family firms can be influenced by non-economic motives, such as nepotism, i.e. preferences towards the other members of the kin (Collin and Ahlberg, 2012), family altruism (Corbetta and Salvato, 2004), as well as emotions and feelings such as rivalry and internal family conflicts (Tagiuri and Davis, 1996). These non-economic motives of the management and the board form the contractual relationships within the firm; clearly, they are largely informal in contrast to the more formalized contractual arrangements in manager-controlled firms (Mustakallio et al., 2002).

Furthermore, trust plays an important role in family firm governance (Gomez-Mejia et al., 2001; Pollak, 1985) defining the nature of relational contracts. In the context of family firms, trust derives from personal ties and kinship within the family, which makes it different from control-oriented 'calculative trust' discussed in the context of managerially governed firms (Corbetta and Salvato, 2004). Relational trust is based on emotions and feelings rather than economic rationality. The presence of a high level of trust created by collectivistic family culture makes individual goals subordinate to the goals of the family (*ibid.*). In contrast, managerially governed organizations possess a calculative trust, deriving from more formal agency contracts, forming a managerial philosophy relying largely on controlling rather than enabling.

Due to this different goal orientation, reliance on relational trust and the distinct nature of the relational contracts in family firms, the nature of the agency conflict in family firms is substantially different from the agency conflict addressed by good governance. While the focus of good governance is the effective resolution of agency conflict arising due to the separation of security ownership and control

(Fama, 1980; Jensen and Meckling, 1976), family firms tend to preserve their control over firms through the inclusion of family representatives on the board of directors and the management of the firm (Lane et al., 2006). Hiring family members in these cases may not be considered to cause any agency costs, since it is in line with the goals of the principal (Chrisman et al., 2003; Chrisman et al., 2004). The congruence of goals between agent and principal is further facilitated through intense formal and informal contacts. Previous research has shown that the relationship between management and the controlling family often goes beyond formal exchanges involving strong informal ties (Gomez-Mejia et al., 2001). Since agency costs arise only if the interests pursued stand in contrast to the principals' interests (Fama and Jensen, 1983), what would be considered an agency problem in a firm with dispersed ownership might not be considered an agency problem in a family firm. The family CEOs who have a large firm-specific investment in terms of ownership capital, firm-specific knowledge and SEW are expected to put the welfare of their firm prior to their personal interests, thereby minimizing the agency conflicts (Anderson and Reeb, 2003; Chrisman et al., 2004).

The low relevance of the classical principal-agent conflict for family firms does not imply that this organizational form is conflict-free. In fact, the presence of agency conflicts in family firms has been thoroughly discussed, in terms of the actual presence of diverging interests among family members, that is, a principal-principal problem; preferences towards family members, or nepotism, and related free-riding problems (e.g., Schulze et al., 2002); and conflict between family and minority shareholders (Chrisman et al., 2004), if such are present. While the literature on principal-principal conflict emphasizes potential agency costs arising from conflicts of interest between family and non-family shareholders, the presence of a strong family control may also increase efficiency through reducing opportunistic behaviors. Family managers that have long-lasting ties with the family are less likely to sacrifice the long-term wealth of the family for short-term personal benefits (Pollak, 1985).

The four distinct characteristics of family firm governance presented above form specific governance needs where the central need is the preservation of the socioemotional capital (Gomez-Mejia et al., 2011), rather than resolving the agency problem. According to the arguments presented, the differences between the governance needs of managerially controlled firms and those of family firms would be reflected in the dominating functions of the board of directors. While good governance grounded within the agency perspective emphasizes the control and monitoring functions of the board (Westphal and Zajac, 1994; Westphal, 1999), it is the conflict resolution function with resource and service provision, or strategic involvement, that may be viewed as more important functions of the board of directors in family firms (Bammens et al., 2011; van den Heuvel et al., 2006). For example, the board's engagement in giving advice has been found to contribute to better quality strategic decisions in family firms, as well as higher managerial commitment concerning such decisions (Mustakallio et al., 2002).

The conflict resolution function has been discussed as particularly important for board governance in family firms. Since family firms have a dominant owner, the ability to negotiate the intentions of family and non-family owners becomes imperative (Collin, 2008). The board of directors thus constitutes a suitable arena to discuss diverging views of family owners (Bammens et al., 2011; Siebels and zu Knyphausen-Aufseß, 2012). Conflict resolution in family firms implies that affiliated or inside directors can contribute to the board's decision making to a larger extent than independent directors. Consequently, considering the distinctive characteristics of family firms, the objectives emphasized by good governance and their manifestation in the functions of the board may not be fully applicable to particular governance needs of family firms.

Institutional pressure to adopt good governance practices

If good governance practices are not economically efficient or are misaligned with the governance needs of family firms, why would family firms adopt them by including independent directors on their boards? One reason for doing so is the institutional pressure (cf. Shipilov et al., 2010) stemming from corporate practices, regulatory frameworks and mainstream corporate governance research. Active promotion of good governance in these three areas has led to a formation of an institutional logic comprising a set of social norms and expectations, enforced by regulatory mechanisms that drive the process of adoption (Joseph et al., 2014).

Family firms are responding to institutional pressures more than their non-family counterparts (Berrone et al., 2010; Miller et al., 2013; Yildirim-Öktem and Üsdiken, 2010). The explanation is that by doing so, family firms increase their likelihood of firm survival by creating legitimacy (Cennamo et al., 2012). Deephouse and Jaskiewicz (2013) argue that family members identify more strongly with their firms than non-family members. This strong identification serves as a source of motivation for family members to seek legitimacy of their firms in order to feel good about themselves and the firm they work in. Consequently, in the context of family firms, social legitimacy may constitute an objective which is superior to that of economic gains (Berrone et al., 2010).

Institutional context is claimed to have a substantial effect on the internal organizational environment of a firm and its governance practices (DiMaggio and Powell, 1983; Meyer and Rowan, 1977; Scott, 1995). The dominant institutional logic of good governance designed primarily for large manager-controlled corporations is enforced within normative (best practices), mimicking (successful examples) and coercive (regulatory) pressure for firms to adopt the institutional changes (DiMaggio and Powell, 1983). Family firms respond to this pressure by adopting a larger proportion of independent directors on their boards.

The normative pressure derives primarily from commonly accepted assumptions that define appropriate strategies (DiMaggio and Powell, 1983). In the case of good governance, board independence is a largely taken-for-granted assumption within the dominant perspective of shareholder value maximization (Joseph et al., 2014). According to general view, the independence of corporate boards assures vigilant monitoring of managerial decision making (Finkelstein et al., 2009).

Family firms have been criticized for their conservatism and lack of professionalism, due to the presence of strong family control over management decisions (Bertrand and Schoar, 2006; Carney, 2005). These criticisms derive from the agency perspective, where a strong family involvement implies opportunities for extraction of private benefits at the expense of non-family shareholders (Young et al., 2008). The governance needs of family firms such as the maximization of SEW may contradict the dominant institutional norms of managerially governed firms, concerned with the maximization of economic value (Chrisman et al., 2012; Gomez-Mejia et al., 2003; Shepherd and Haynie, 2009; Stewart and Hitt, 2012). Bearing in mind that reputation constitutes an important asset for family firms (Zellweger et al., 2013), refusal to conform to these institutional norms may have a strong negative impact on firm reputation. Being more sensitive to assessments by outsiders (Berrone, 2010) and adapting to these institutional norms may aid family firms' reputation, thus maximizing the SEW of the family. In response to this normative pressure, researchers have depicted increasing professionalization of family firms: they refer to the change from family-dominated leadership to professional non-family managers (Gedajlovic et al., 2004; Lin and Hu, 2007).

Mimetic pressure constitutes another mechanism facilitating the adoption of good governance by family firms. A series of high profile corporate scandals including Enron, Tyco, and Parmalat have questioned the existing practices of corporate governance (Coffee, 2005), creating a symbolic uncertainty about how to govern a corporation (DiMaggio and Powell, 1983). Mimicking other corporations constitutes one potential strategy of coping with this uncertainty (*ibid*.). Model corporations, from which the other firms 'borrow' practices, diffuse good governance through board social interlocks (Westphal and Zajac, 1997). By mimicking best practices and conforming to the prevailing institutional logic family firms may gain social legitimacy through improved reputation (Bednar, 2012).

Coercive institutional pressure to adopt good governance may come from non-family shareholders who have a stake in the firm's capital. The inclusion of outside directors on family firm boards creates a signal of objectivity and professionalism (Heidrick, 1988; Hutcheson, 1999). The action is often taken and the signal given due to the pressure from non-family stakeholders including investors and banks that use their political power to assure the efficient use of their financial capital (Fiegener et al., 2000; Johannisson and Huse, 2000).

Coercive pressure to conform to the prevailing institutional logic of good governance also stems from the legal environment. Corporate governance codes provide corporations with a legal mandate to adhere to good governance (Joseph et al., 2014). Family firms are no exception from this pressure towards greater independence of the board. The codes of good governance designed for family firms stress the importance of board independence, creating both formal and informal pressure to adhere to good governance (Cadbury, 2000; ecoDa, 2010).

Previous research has argued that firms may respond to social pressure in different ways from active resistance, symbolic compliance or actual adoption of the institutional change (Oliver, 1991). This implies that even if family firms were to adopt good governance practices due to pressure from stakeholders or regulators and include more independent directors on their boards, these changes may still be entirely or partly 'window-dressing'. In support of this observation, Yildirim-Öktem and Üsdiken (2010) find that Turkish family business groups tend to appoint as outside directors informally affiliated persons. The authors attribute this formal adoption of practice as a response to coercive pressure from governance codes. Another study by Selekler-Goksen and Yildirim-Öktem (2009) shows that Turkish family business groups resist governance codes' recommendations in their compliance reports. For example, they may not explain why codes are not followed, or they may shape the definition of an external board member by defining retired employees as such. These findings imply that the adaptation to the dominating logic of good governance can occur de jure, while governance practices remain to be unchanged de facto.

The legitimacy gained through symbolic adoption of good governance can also affect other family firms in the industry forcing them to adhere to the dominant institutional logic. Particularly, the increasing adoption of more independent boards may lead to cycles of reinforcement and readoption of such practices by other firms, since firms tend to mimic the actions of one another (DiMaggio and Powell, 1983). Eventually these sanctioned behaviors can become internalized, transformed into norms and subsequently guide actual governance practices. In support, previous research has documented that the initial adoption of window-dressing to meet the prevailing institutional logic of greater female representation on the board transformed situations where there was merely a 'token' female director to situations where women were influential decision makers on the boards of Norwegian companies (Huse and Solberg, 2006). Similar dynamics can occur on family firm boards, implying that independent directors initially selected as tokens will gain legitimacy and exercise increasing control over strategic decision making.

Overall, good governance constitutes one of the manifestations of the dominant institutional logic. According to institutional theory, the pressure to conform leads to convergence in firms' organizational practices. The pressure to adapt to the norms of good governance derives from normative, mimetic and coercive pressure to conform to the dominant institutional logic. Family firms are expected to follow the norms of good governance and are particularly pressured towards adopting more independent boards. These changes may happen de facto or de jure, when boards are formally but not effectively independent.

Potential consequences of good governance

Based on the foregoing arguments, we now identify and discuss several potential consequences of the adoption of good governance by family firms. First, we present the positive consequences: enhancing the firm's competitive position, including reputation enhancement as well as access to external financial and non-financial resources. We then discuss the negative consequences, namely, the dilution of board meetings, demotivation of managers and decreased social cohesion at the board meetings,[1] which in turn may decrease the strategic adaptability of the family firm.

Positive consequences of good governance

Firstly, the perceived adoption of independent directors as a symbolic gesture (Westphal and Zajac, 1994) through impression management and the fulfillment

1 We thank an anonymous reviewer for this point.

of societal expectations may benefit companies both reputation-wise but also in terms of creating access to investor capital. The notion of 'social worthiness' (Thornton and Ocasio, 1999) referring to legitimacy gained through adaptation to the social norms, can bring important non-economic gains to family firms. Particularly, the inclusion of independent directors on family boards signals justice and equality of family firm governance (Craig and Moores, 2004), enhancing their reputation and the social status of the family members. These non-financial outcomes, derived from created legitimacy, contribute to the maximization of the socioemotional wealth of the firm (Berrone et al., 2010).

Besides the SEW gains associated with social legitimacy, adapting to the dominating institutional logic may provide family firms with access to external resources, both financial and non-financial. Increasing the independence of a board signals credibility of a firm and security of investors' capital (Pfeffer and Salancik, 1978). In support of this argument, research shows that investors are willing to pay a premium for the corporate stock of firms that practice good governance (Certo et al., 2001; IRB, 2000). Thus, adhering to good governance may help family firms raise financial capital for development.

In addition to the financial advantages associated with conformity to institutional norms, the inclusion of independent directors can bring additional resources to the board, including valuable networks, information, strategic advice and counsel (Bammens et al., 2008). Van den Heuvel et al. (2006) show that CEOs of small and medium-sized family firms value the resource provision role of the board as more important than the control factor. Such tasks as the mediation of a succession process can be fulfilled by independent directors that can assume the role of mediators between the family and non-family shareholders. Furthermore, outside directors on family firm boards can also contribute to the increase of internal efficiency of their firm through disseminating the processes and routines of market-oriented governance stemming from the experience of other boards' practices. This can particularly benefit a family business whose goal is to scale up its business and need an increased degree of formalization (Miller and Le Breton-Miller, 2006; van den Heuvel et al., 2006).

Negative consequences of good governance

While the benefits associated with increased independence of family business boards have been widely discussed in previous research, the potential negative effects have received considerably less attention. As it was argued above, the institutional conformity may increase social acceptance and enhance firm reputation (Bednar, 2012; Westphal and Zajac, 1994); however, it may also cause incongruence between good governance objectives and the specific governance needs of family firms. This incongruence may lead to three main consequences, namely, the dilution of the board meetings, demotivation of managers and decreased social cohesion at the board meetings. These consequences may in turn lower the quality of strategic decisions undertaken by the board, resulting in the decreased strategic adaptability of a given firm.

The increased independence of the board may result in some board work remaining outside of board meetings, whether or not it had been conducted there before (cf. Nordqvist, 2012); or even in board work being intentionally moved outside of board meetings. Due to the existence of close ties between the board and the management in family firms, family members can make decisions outside the board meetings, and then get the decisions accepted at a formal board meeting afterwards (Khan et al., 2013). For example, this can occur if the independent director stresses financial goals and monitoring by the board, while the family wants to stress non-financial and family-related goals. Furthermore, due to the externalization of the board meetings, the decisions informally made by incumbent directors will not be properly evaluated, and may possibly be of a poor quality. By the same process, the competence of independent directors will remain unused despite its potential value for the strategic decision-making process.

Secondly, increased control and monitoring over managers in family firms will lead to the demotivation of managers. In family firms, where family members generally favor autonomy (e.g., Zellweger et al., 2013), increased control and monitoring will reduce managerial discretion, resulting in the impaired ability of a family member CEO to exercise his or her professional judgment. Managers, generally assumed to be highly motivated due to the complexity of job demands and to the presence of strong competition along the executive career path (Jensen and Meckling, 1976), may interpret as distrust signals the increased control by the board. The decline of trust and aversion to risk can in turn compromise the central function of firm executives as professional decision makers in a corporation. Demotivated executives, whose authority is questioned, will feel alienated and become less committed to their work (Mustakallio et al., 2002). Consequently, imposing additional control over managerial behavior will decrease managers' intrinsic motivation to act in the interest of their firm (Ghoshal and Moran, 1996; Perrow, 1986).

Furthermore, the salience of control over strategic decision making will undermine the collaboration in the boardroom. Family firms have been referred to as 'high-trust' organizations (Corbetta and Salvato, 2004). The weakened trust will, in turn, bring out an 'us versus them' categorization between the family and independent directors, inhibiting collaboration at the board (Knapp et al., 2011).

As a result, the social cohesion at the board will become inhibited and in turn decrease productive interaction and information exchange among family and non-family members at leadership positions in the firm (Dawes, 1992; Shachter et al., 1951). Due to the lack of social cohesion and the salience of family and non-family categories, family executives may become more reluctant to seek strategic advice from the board (cf. Gulati and Westphal, 1999). Since family firm CEOs consider the advice function to be the most important board function (van den Heuvel et al., 2006), the decreased collaboration in the board room can lead to decrease in the strategic adaptability of family firms. The increased control may also be interpreted as a signal of distrust in the managers, leading them to engage in opportunistic behaviors due to social expectations (Knapp et al., 2011), decreasing collaboration even further. This in turn may result in the inability of the firm to adapt in a timely fashion to the changing forces of its external environment.

To summarize, while positive consequences for family firms adhering to good governance may exist in the form of both economic and non-economic benefits, the adoption of good governance may also have a negative effect on a family firm in terms of dilution of board meetings, demotivation of managers and decrease in collaboration in the boardroom. These consequences may in turn undermine the ability of a firm to generate timely, strategic decisions.

Discussion and conclusions

In this conceptual work we addressed the process of adoption of good governance by family firms through increasing emphasis on independence in the board of directors. We discussed the economic efficiency of good governance and then compared the needs addressed by its objectives with the governance needs of family firms. While the process of change towards more independent boards may not necessarily contribute to increased economic efficiency, or be fully able to fulfill the governance needs of family firms, these firms continue to adopt such practices, de jure, and possibly also de facto. Drawing on institutional theory (DiMaggio and Powell, 1983; Meyer and Rowan, 1977; Scott, 1995), we propose institutional pressure to be the dominant reason of adoption of board independence by family firms. We then deduce potential consequences of this change, proposing that the price for benefits associated with gained social legitimacy can be impeded strategic decision making and consequently a decrease in the strategic adaptability of a firm.

More broadly, from a corporate governance viewpoint, we analyzed the diffusion of the ideology of shareholder value maximization (Deakin, 2005), using the example of family firms applying good governance principles. Good governance, being the manifestation of a larger ideology of shareholder value maximization grounded within the agency theory assumptions, is designed for and promoted by large managerially controlled diversified corporations and serves the interests of corporate elites (Gordon, 2006; Jensen, 2001; Lazonick and O'Sullivan, 2000). Family firms represent a contrast to the large publicly listed corporations with dispersed ownership structures in many aspects; particularly different are their governance needs concerning the maximization of the socioemotional wealth of the family (Gomez-Mejia et al., 2011). Despite their distinctive governance needs, family firms experience a strong institutional pressure to conform to the created institutional logic, either effectively or symbolically. The process of adoption of good governance facilitates the diffusion of shareholder value ideology.

This ideology is subsequently reshaped in accordance with the governance needs of family firms. Particularly in the case of a symbolic adoption of good governance, the latter can lead to different outcomes, such as improving reputation and exploiting resources brought by outside directors. One can speculate that the process of adoption may nevertheless lead to changes in family firm governance. For example, adhering to good governance may increase formalization and professionalization of family firm governance. Consequently, the diffusion of shareholder value ideology, through the adoption of good governance, may facilitate a change in the governance objectives of family firms, redefining the family firm's governance.

In line with previous research, our arguments suggest that ideology constitutes an important factor shaping norms and practices of corporate governance (Embrick, 2011; Fiss and Zajac, 2004). The influence of ideology may even exceed that of economic rationality, which is evident in the case of good governance. Yet ideology is formed and induced by a set of corporate elite members, who preserve and reinforce it (Lazonick and O'Sullivan, 2000). While framed as benefiting shareholders, the goodness of good governance for the firm itself appears questionable (Stout, 2012). By contrasting the needs addressed by good governance principles and the actual governance needs of family firms, we show the existing discrepancy between the means (good governance) and the ends (governance of family firms). These discrepancies suggest that the application of good governance may not necessarily serve its original purpose, but instead contribute to the fulfillment of the interests of powerful elites (Joseph et al., 2014).

Our study contributes to the literature on family firms, focusing on how these firms adapt to institutional changes. The ongoing change in the institutional frame is very important for family firms as they are claimed to be more responsive to institutional pressures (Berrone et al., 2010). Yet possessing their distinct characteristics, they seem to strive for social legitimacy through adopting the prevailing governance norms. The adoption to the prevailing institutional logic may be symbolic, without actual implementation of practices. But even symbolic adoption may lead to the dilution of board meetings and potentially inhibit the strategic decision-making process. Family firms may also strive for actual adoption of practices, increasing control and formalization of decision making. The latter may also come at the expense of inhibited strategic decision making due to demotivation of managers and decrease of collaboration at the board meetings. In addition, the symbolic adoption of good governance may contribute to the overall diffusion of shareholder value maximization ideology, as firms tend to mimic each other (Bednar, 2012; Westphal and Zajac, 1994), thus leading to further discrepancies between governance objectives and firm outcomes.

Based on the arguments presented in our study, we propose several recommendations for practitioners and policy makers. The practical recommendations are particularly designed for boards of directors in family firms as they constitute the focus of good governance norms. Our study highlights the question of applicability of the current notion of the board's best practices grounded within agency theory. We suggest that recommendations of good governance have to be followed with caution. Particularly boards of directors in family firms may need to evaluate both the non-economic benefits of inclusion of independent directors against the negative implications of these changes for the strategic decision making process. In case of the adoption of good governance, boards may need to allocate more attention to assure effective collaboration and information flow at the board as well as to emphasize managerial motivation.

Our study also has implications for policy makers. In particular, the current recommendation to include independent directors based solely on agency theory may not achieve anticipated results in the case of adoption by family firms. The recommendation for best governance practices should be revisited to consider distinct characteristics and governance needs of this category of firms. The notion of good governance needs to be broadened to account for non-economic goals that create value for family firms. Furthermore, the symbolic adoption of good governance by family firms can lead to effects opposite to the original objectives in the form of dilution of board meetings. For example, decisions informally made by family directors will not be properly evaluated at the formal board meeting, and therefore directors will be held less accountable for these decisions. Instead of increasing accountability and transparency as the ultimate goal of good governance, the adoption of more independent board structures may lead to situations where board decisions will be undertaken informally outside the board.

Our study outlines several directions for future research. One proposition for corporate governance scholars is to focus more on governance of family firms within the changing institutional context. Further elaboration and empirical examination of the process of adaptation of family firm governance to the prevailing institutional norms can generate important insights about governance in family firms. Furthermore, future studies may focus on empirical testing of the negative and positive consequences associated with the adoption of good governance by family firms. Other interesting avenues of future research include addressing the tradeoffs between non-economic benefits and negative strategic impact of adopting good governance principles by family firms. It is important to note that our study has treated the concept of family firms as a homogeneous entity; however, important variations in goals, values and business practices among family firms may emerge from research. Future research could focus on how the governance needs of family firms may determine the balance between positive and negative influence of good governance. It would also be interesting to investigate the performance results of family firms who adhere to good governance and those that do not.

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the authors

Yuliya Ponomareva is a PhD candidate at the School of Business and Economics, Linnaeus University, Sweden. Her research interests include top management teams and boards of directors with focus on decision-making and corporate governance.
Email: yuliya.ponomareva@lnu.se

Jenny Ahlberg is a PhD candidate at the School of Business and Economics, Linnaeus University, Sweden. Her research concerns corporate governance in family firms, with a focus on the board of directors.
Email: jenny.ahlberg@lnu.se

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Corporate social responsibility and the supposed moral agency of corporations

Matthew Lampert

abstract

Corporate Social Responsibility (CSR) has been traditionally framed within business ethics as a discourse attempting to identify certain moral responsibilities of corporations (as well as get these corporations to fulfill their responsibilities). This theory has often been normatively grounded in the idea that a corporation is (or ought to be treated as) a moral agent. I argue that it is a mistake to think of (or treat) corporations as moral agents, and that CSR's impotency is a direct result of this mistake. I then outline a distinction between business ethics and business politics, arguing that CSR might be better framed as a political goal – one which might be able to take better advantage of the resources of corporate governance and a renewed (albeit shifted) focus on agency theory.

1.

The classic – and still largely dominant[1] – account of corporate governance has it that governance ought to operate in the interests of the stockholders, and that, in

1 There is by now a wealth of diverse literature criticizing this dominant approach; but the standard introduction is to acknowledge stockholder theory and the principal-agent problem as the dominant approach before moving to criticize it. See, for example, Daily, Dalton, and Cannella (2003: 371), who begin by noting that agency theory is the 'overwhelmingly dominant theoretical perspective applied in corporate governance studies'. Likewise, Rajan and Zingales (2000: 1) explicitly lay out their understanding of 'the new enterprise' by showing how things have changed since Berle and Means 'set the terms of the modern debate on corporate governance' with their work on the principal-agent problem. So too do Blair and Stout (1999: 248) begin their account of the 'team production theory' of the corporation by noting that 'discussions of corporate governance have come to be dominated by the view that

Milton Friedman's (1970) words, 'the social responsibility of business is to increase its profits'. This *ought* is grounded primarily legally: the executive has a contractual fiduciary responsibility to the shareholders as their 'agent'. David Ciepley, in an article thoroughly critical of agency theory, still rightly recognizes that this is not simply a theoretical issue, but also a matter of *de facto* law: Ciepley (2013: 154) traces a history of US legal precedents across 'the long nineteenth century, and with renewed energy since the 1960s', treating corporations as the private property of their stockholders, and treating executives as agents with fiduciary responsibilities to pursue the desires of those stockholders.

Critics of this dominant approach who want to offer competing theories of corporate governance – especially in light of the legal entrenchment of agency theory – typically do so on the basis of pragmatic and strategic claims. Blair and Stout (1999), for example, argue that the dominant principal-agent theory is wrong on two major counts. First, they argue that corporate management – and even corporate law – *doesn't really* work the way agency theory says it does. And second, Blair and Stout claim that management ought to operate for the benefit of the corporate entity itself, rather than for the benefit of shareholder wealth maximization, because it is in the financial long-term interests of the corporation. In other words, agency theory is both factually wrong and less strategically beneficial. Likewise, Rajan and Zingales (2000) also make the claim that the corporation ought to be governed in the interest of the corporate entity itself ('the firm'), rather than in the interests of the shareholders. They ground this claim by an appeal to 'the facts': the nature of modern corporations has changed, claim Rajan and Zingales (their chief example is the modern investment firm, a very different kind of enterprise than mid-20th century General Motors was), and to govern in the old way will simply result in failure (bankruptcy, dissolution of the firm, etc.).

As competing theories of corporate governance, theories of Corporate Social Responsibility (CSR) can also object to the dominant approach on both pragmatic, factual and strategic grounds. The latter (the 'morality pays' approach) offers a competing goal of corporate governance (a corporation ought to be governed, say, in the interests of all of its *stakeholders*), and justifies this claim on grounds similar to those used by Blair and Stout or Rajan and Zingales: either that this kind of governance *will make the firm more successful*, or that failure to govern in this way *will cause the firm to fail*. We shall return to this approach in a moment. The other major strategy in CSR arguments, meanwhile, will be to

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public corporations are little more than bundles of assets collectively owned by shareholders (principals) who hire directors and officers (agents) to manage those assets on their behalf'.

claim that (as a matter of fact) the corporation carries with it some sort of social obligations, usually in the form of moral obligations. It is not uncommon to see both strategies employed side by side.[2]

There are two major problems with the 'morality pays' justification for CSR. First, as John Corvino (2006: 4ff.) has argued, the 'morality pays' version of business ethics fails in precisely those situations in which it is most needed. (In other words, it is just those situations in which doing the right thing *does not* pay – or, worse, that doing the wrong thing *is* better for the business – that business ethics is most needed.) Of course, one might simply respond that such 'hard cases' don't exist; doing what is right and doing what is profitable may be separate in theory, one might say, but at least they are the same thing in practice. This, however, is the second major problem with the 'morality pays' argument: it simply isn't true. Henry Mintzberg (2007: 38-41), for example, cites some rather compelling empirical evidence which suggests that the most profitable corporations are the ones which place the *least* emphasis on 'social responsibility' – and (more damningly) vice versa.

Without strategic justification for CSR policies, theorists must ultimately resort to arguing that corporations (or executives) *have* social obligations, *even* if these obligations sometimes stand in the way of profits. There seem to be two major ways to make this claim. One can, starting with the moral responsibilities of human beings in general, attempt to show how these duties make certain moral claims on the practice of business executives (ones which trump their other role responsibilities). Or, one can attempt to ground CSR and calls for corporate 'citizenship' on an idea that the 'business organization' itself ought to be thought of as an acting, *ethical* subject. The idea here seems to be that if a corporation is a moral agent, then we can make certain non-(or extra-)economic demands on it to fulfill certain social (i.e. *moral*) responsibilities.

Because the field of CSR is wide, my goal in this article will not be to pay special attention to any *particular* theorist's work – rather, I shall try and focus on the general principles that must be at stake in putting forward CSR as a goal of corporate governance. In the pages that follow I will argue that grounding CSR in ethics is ultimately a mistake (or, rather, that it invariably masks a confusion). After I have laid out my objections, I will return to corporate governance and agency theory to think about some of the resources still left to those of us who are

2 See, for example, Carroll (2008), the famous 'pyramid of CSR'; see also Freeman and Reed (1983). R. Edward Freeman has of course made a number of principled arguments for stakeholder theory (e.g., Freeman and Phillips, 2002), but he is not above occasionally arguing that corporations *will be more successful* (read: *profitable*) if they treat their stakeholders well.

interested in CSR. I will argue that, while CSR does not ultimately make sense as an *ethical* claim, it can (and should) be thought of as a *political* goal. Furthermore, I will outline a form of Corporate Social Responsibility that does not compete with agency theory, but instead harnesses it. My ultimate goal will be to suggest a shift away from 'business ethics', toward 'business politics'. In the final section of this essay, I will both explain what I mean by this and attempt to address some preliminary objections to my position.

2.

Theorists who want to underpin CSR with ethics attempt to show that corporations have certain *moral responsibilities* to strive for some social ends over and above the pursuit of profit. However, the attempt to show that such moral responsibilities exist can be done in either (or both) of two major ways. The first approach – seen, for example, in Kenneth Goodpaster's 'principle of moral projection' – is to treat a formal organization as an entity capable of deliberation, making decisions, and holding moral values. The second approach is to try and establish ethical constraints that apply specifically to executives, managers, and/or other official representatives of a company *qua* their roles as official representatives. (This might be a matter of showing that executives have special, extra duties – duties that they have over and above their duties as human beings – or it may simply be to show that moral duties in some way 'trump' any occupational duties.) These two approaches to establishing moral obligations for corporations are not mutually exclusive – Goodpaster (2007), for example, attempts to pursue both lines of argument[3] – but nor does one necessarily entail the other. Therefore, we will (briefly) treat each one separately; in sections two through five, I will consider the various ways in which one might try to treat businesses (primarily corporations) as moral entities. After a brief detour (in section five) in which I consider the roots of this mistake, I will turn – in section six – to the idea that business executives have special moral responsibilities, and set this idea back into its context within agency theory.

The attribution of agency to business organizations – especially corporations – is certainly commonplace in everyday speech. To say that 'General Motors is reopening a plant in Texas' or that 'Lehman Brothers misled its investors' is, grammatically speaking, unlikely to cause confusion. But neither, it should be noted, are such sentences as 'My car is burning fuel' or 'Germany invaded

3 E.g., 'Both the individual decision-maker within the organization and the organization itself as a decision-making entity will need our attention' (Goodpaster, 2007: 15).

Poland'. The simple fact that we can attribute agency without causing grammatical confusion, in other words, is not enough to show that we can attribute *personhood* to a subject, let alone *moral personhood*. A car can certainly take the subject-position in a sentence, but it cannot be the subject of even legal rights, let alone moral responsibilities.

The argument that a corporation has *moral* agency can, it seems to me, proceed along any (or all) of three major lines. First, one can argue that a corporation is capable of taking *intentional* action, and is therefore an agent subject to moral address and sanction. Second, one can argue that, even if corporations are not (and cannot be treated as) moral agents in the primary sense, that they might still be considered 'secondary moral agents'. Finally, one can argue that, even if corporations do not meet the metaphysical standards of personhood, it might still be useful to *treat them* as moral persons. Each of these arguments attempts to establish a normative basis for Corporate Social Responsibility on the claim that a corporation is (or should be treated as) a moral person. As none of these arguments are logically reliant upon any of the others, allow me to address them individually, in turn: In section three I shall argue that a corporation is not a moral person; in section four I shall argue that the notion of corporations as 'secondary moral agents' is both wrong and unhelpful; and in section five I shall argue that it is not useful to treat corporations *as if* they were moral agents.

3.

The claim that a corporation – or, indeed, any formal organization – is a moral agent always seems to build from the argument that corporations are intentional agents. As French (1979: 211) understands the issue, for a corporation to be a moral agent 'it must be the case that some things that happen, some events, are describable in a way that makes certain sentences true, sentences that say that some of the things a corporation does were intended by the corporation itself'. The key distinction for French, then, is whether or not 'attributing intentions to a corporation is only a shorthand way of attributing intentions to the biological persons who comprise, e.g., its board of directors' (*ibid.*). To this end, French devotes considerable effort into developing the concept of a 'CID Structure' (Corporation's Internal Decision-making Structure) in order to show that decisions made by a corporation often cannot be reduced to (or redescribed as) decisions made by specific biological persons employed by that corporation.

There are some very important debates about how corporate intentionality actually works.[4] Note, however, that such debates miss a more important point; for even if we fully accept some account of group constitution such that it would count as a theory of how 'corporate decisions' get made, and even if we accept fully that this account establishes the point that corporations are *intentional agents*, a more fundamental problem still stands. The jump from arguing that a corporation is an intentional agent to the claim that a corporation is a *moral* agent rests on the premise that *all intentional agents are moral agents*. And this claim is certainly false.

First and foremost, it should be apparent that intentional agency is far too broad a criterion to identify only those subjects that are moral persons; John Danley (1980: 144), for example, draws our attention to the case of chess-playing computers. While it is certainly intelligible to say that 'the computer intends to respond P-K4 to my king pawn opening', it would by no means be correct to conclude from this that the computer is a moral person. More clearly still, Daniel Dennett uses the example of an apple tree. 'You can trick an apple tree into "thinking it's spring"', he writes, 'by building a small fire under its branches in the late fall: it will blossom' (1988: 149). It is important to note that this is not simply a metaphorical extension of the notion of intentionality, nor a *reductio ad absurdam*; 'intentional agency' is a stance whereby we *attribute* certain beliefs, desires, and intentions *to* an entity in a way that allows us to both ascribe certain actions (blooming; moving a chess piece) to that entity and explain those actions by reference to intentional states (thinking it's spring; responding to my king pawn opening). Furthermore, as Dennett (*ibid.*) notes, we either treat intentions as something we *ascribe to* an entity (Dennett calls them 'Intentional Systems') –

4 French's assertion that corporate decision-making structures can be formally identified (and, hence, that a hard-and-fast distinction can be made between corporations and crowds or mobs) has been widely criticized (see, e.g., Danley, 1980) – as an 'ideal' process, it is very likely that the sort of decisions French thinks we can attribute to corporations rarely (if ever) happen, while the sorts of 'corporate actions' that we most want to morally censure are actions that do not (indeed, cannot) be said to follow such a path. (Indeed, some researchers even speak of 'the "black box" of boardroom deliberations': Daily et al., 2008: 379) Furthermore, as Christian List and Philip Pettit (2006) have shown, even at the level of formal constitution, not all 'CID structures' are created equal. A wide range of CID structures (List and Pettit simply refer to 'constitutions', a category which would seem to include – but not be limited to – the two-part CID structures French discusses), including 'proposition-wise' democracies, will result in *irrational* group agents, even if these groups are composed of fully rational individuals. In other words, 'rationality' will *only* supervene at the group level if it is specifically built into the constitution from the beginning. Even if CID structures were fully followed in the real world, then, this still would not be enough to always and automatically guarantee rational agency at the level of the corporation.

that is, a certain stance we adopt towards them – or we get bogged down in potentially intractable metaphysical debates about 'real' versus 'false' intentions. In this sense, intentionality is a useful concept inasmuch as it allows us to predict and describe behavior in the aforementioned ways.

> There may be *in every case* other ways of predicting and explaining the behavior of an Intentional system – for instance, mechanistic or physical ways – but the Intentional stance may be the handiest or most effective or in any case a successful stance to adopt, which suffices for the object to be an intentional system. (Dennett: *ibid.*)

We might go on to note that, while 'the Intentional stance' seems to apply just as well to persons, corporations, and apple trees, the sort of metaphysical claims that might be made to make 'intentionality' *only* apply to moral agents (e.g., intentions as reflective states of consciousness) will, even if successful, rule out corporations just as much as they will rule out computers and plants. The mistake of those who equate intentional systemhood with moral personhood is understandable, as intentionality is a *necessary* condition for moral personhood. The mistake, however, is in assuming that intentional systemhood is also a *sufficient* condition for moral personhood.[5]

It might be thought that a better case might be made for corporate moral agency by appealing to *rational agency* instead of strictly to intentional systemhood. Following List and Pettit (2006), we could show that only *certain* constitutions (CID structures) will result in rational agency at the level of the group, and we could argue that *only* these groups are moral agents. Restricting ourselves to rational agents would seem to allow us to treat only *some* intentional agents as moral agents, while excluding cases like those mentioned by Dennett: dogs, ivy plants, and apple trees. However, it should again be clear that any definition of 'rational agency' sufficiently flexible to include corporations would also have to

5 Peter French is quite right when he claims, early on in his argument, that 'to be a moral person, the subject must be *at minimum* what I shall call a Davidsonian agent' (1979: 211, emphasis added), where 'Davidsonian agent' is here equivalent to what we have been calling, in Dennett's language, an 'Intentional System'. But by the end of his article, French simply pretends that this minimal condition is enough: 'I have maintained that Davidsonian agency is a necessary and sufficient condition of moral personhood' (1979: 215). He repeats this trick in his later article 'Kinds and persons' (1988), *again* without any argument to support it; early on in the article he writes that 'to be a person is, *at least*, to be an intentional agent' (302; emphasis added), before simply declaring several pages later that intentional agency is both a necessary *and sufficient* condition of personhood (306). Nor, as some might claim, does French's later (1984) elaboration of the principle of responsive adjustment ('PRA') do anything to alleviate the problem. Here he simply assumes that corporations are persons, and his question is rather about whether and to what extent persons can be held morally responsible for the harmful effects of non-intentional behavior (1984: 101).

include chess-playing computers and the like. In other words, either our understanding of what it means to be a rational agent is sufficiently restricted that it applies *only* to moral agents (and, through this restriction, excludes corporations); or our understanding is broadened to include corporations, but in the process becomes too broad to apply only to 'persons'. It is for this reason that Amelie Rorty (1973) has argued that those who equate rational agency with personhood 'must include many other intellectual capacities – memory, imagination, perception, perhaps even the formation of desires – within the analysis of rationality' (*ibid.*: 71). Rorty's argument makes another crucial objection, though. She in fact argues that, even when we apply it only to bodily agents, the theory that persons are rational agents ends up being too narrow to properly define personhood (*ibid.*: 79). In other words, even if we were to broaden our understanding of rational agency such that it might include corporations (and chess-playing computers), it is likely that we would yet *fail* to include less contentious candidates for moral personhood! For example, what human being can be said, in *practice*, to ever be *fully rational*? We might instead treat 'rationality' as a normative ideal – 'a person is identified as someone for whom the ideal of rationality *can* be dominant' – but only at the cost of making rationality, as Rorty shows, 'at best a necessary but not a sufficient condition for being a person' (*ibid.*: 69).

But if intentional systemhood and rational agency are *not* sufficient conditions for personhood, then what is missing? Dennett (1988: 147-148) offers what I believe to be three very reasonable criteria. Not only must a person be an entity toward which we can take an intentional stance (that is, attribute intentions to), but a person must 1) be capable of *reciprocating* this stance (that is, must be a 'second-order Intentional system'; *ibid.*: 151); 2) be capable of *verbal* communication; and 3) be self-conscious. Dennett himself goes on to make the point that these conditions for personhood (Intentional systemhood, plus the three additional requirements) are necessary, yet *still not sufficient* conditions of personhood. And why? Because these criteria are *normative* – and we are always (especially in the most important cases) unsure about what counts as a 'passing grade' (*ibid.*: 163). All the same, it should be clear that these criteria easily apply to our least contentious cases of moral persons – 'normal', adult human beings – while easily excluding goldfish, ficus plants, chess playing computers – and corporations.

Two objections still seem to be available to those trying to insist that a corporation can be a moral agent. First, one might ask: but why can't moral agency supervene at the group level the same way that rational agency can? And second, one might object that I have been laying out the conditions of moral *personhood*, and ask if it isn't possible for a corporation to be a moral *agent* without being a moral *person*. And so, before I move on to consider the idea that corporations might be *secondary* moral agents, let me first briefly address these objections to my dismissal of the idea that corporations are *primary* moral agents.

The account of the supervenience of rationality at the group level depends, essentially, on building rationality into the decision-making structure up front. List and Pettit (2006: 96) give an example they call the 'premise-based procedure' for making group decisions, in which logical constraints are built into the procedure itself (and accepted by all group members), asking group members simply to decide individually on *premises*, and then allowing logical conclusions to be derived from these premises. The group constitution contains a kind of logical computer: given inputs, it's 'programmed' to calculate the logically-necessary results. It's certainly not *simple* to make rationality supervene at the group level – this, after all, is List and Pettit's main point – but rationality can supervene by simply building rationality into the decision-making rules; 'rationality', after all, is simply (in this sense, at least) a matter of logical self-consistency. It accepts any input at the level of premises, any input at the level of goals; a conclusion is rational simply to the extent that it efficiently and self-consistently identifies conclusions and means to the given ends.

It may seem that we could simply build morality into the decision-making structure in the same way – say, by disallowing in advance certain kinds of means, and even certain ends. We might build a requirement for morality into the decision-making structure by fiat – but would this be enough for moral *agency* to supervene at the group level? There are good reasons, I think, to answer in the negative. Again, the example of a computer program is helpful: we could program a robot to follow certain rules (moral rules, cultural norms, etc.), 'building morality in' in advance. But would we really say that this robot had *moral agency*? The robot would in no way be regulating its own conduct; it would not have any self-awareness, and it would not have free will. (In Kant's terms: for such a robot, moral laws would be *descriptive* laws, merely telling us how the robot *will* act, rather than *normative* laws, telling us how the robot *ought* to act.) We would have good reasons to prefer spending time with morally perfect robots and corporations, I think – but these would still not be fellow moral agents. Morality simply cannot supervene at the group level in the same way that rationality does.

But the objection will still seem to be open that I am setting the bar too high, demanding that we only count moral *persons* as moral *agents*. A number of 'improvements' on French's account have recently been offered (see Manning, 1984; Arnold, 2006; or Hess, 2013), arguing that even if a properly-constituted CID structure wouldn't make a corporation a moral *person*, it still might make a corporation a moral *agent*. Manning (1984) and Hess (2013), for example, both seem to reason that intentional, rational agency is enough for moral agency, even if it is not enough for moral personhood. Hess (2013: 335) writes that 'personhood… does not follow from moral agency', per se, but seems therefore to think that moral agency is a necessary-but-not-sufficient requirement for moral personhood. But if there is any difference at all between *rational* agency and *moral* agency (and, looking again to our robots, we have good reason to think that there is), it would seem that arguments like Hess's and Manning's have things exactly the wrong way around: moral personhood does not follow from moral agency, *because* moral agency follows from moral personhood! In other words, the difference between a rational agent who can be morally responsible and a rational agent who cannot is going to rest on precisely those features (self-awareness; ability to take up second-order intentional stances; etc.) that mark out moral *personhood*. Moral agency – the ability not only to take intentional action, but also to be morally responsible for one's own actions – is a special feature of moral persons, and not the other way around. If a corporation is not a moral person, then it is also not a moral agent.

4.

But granting that corporations are not true ('primary') moral persons, those looking to ground business ethics in the moral agency of businesses might yet try to argue that corporations are 'secondary moral agents'. This is the claim that has been put forward by Patricia Werhane (1985), drawing on a theory of secondary actions developed by David Copp (1979).[6] Allow me to lay out this argument briefly and clearly as I understand it.

A corporation, as we have said above, is an intentional system, but not a person. As such, it is capable of 'acting', but not directly; rather, the corporation's 'actions' must be the actions of agents of that corporation on the corporation's behalf. Through whatever process is required to 'incorporate' certain actions of employees of a corporation as the 'corporation's actions' – and here Werhane (1985: 54-55) essentially appeals to a version of the 'CID Structure' or 'constituion' – corporations become at least indirectly *responsible* for these actions. In Copp's (1979) language, the actions of the agents are 'primary actions', and these primary actions are – under certain conditions (the CID Structure, etc.) – said to *constitute* the 'secondary actions' of the corporation. Both

6 My intention in this section is still to criticize a position, rather than simply to criticize specific theorists. However, I believe that Werhane and Copp, between them, have laid out this position about as clearly as one could hope for – and so I will tend to stick fairly closely to their texts as I discuss this position.

Copp (1979: 177) and Werhane (1985: 52-53) compare the situation to a person using a real estate agent to rent or purchase property; the agent takes a primary action, but does so *on behalf of* the client, who in this way takes 'secondary action'. I am therefore not wrong when I say, 'I bought a house', for the agent was merely acting as my representative. However, both Copp and Werhane also note a crucial distinction: whereas in the case of a person acting through an agent to buy property, both parties are persons (and, hence, moral agents), in the case of a corporation 'acting' through its representatives, *only* the representatives are self-sufficient agents. Because a corporation is not a self-sufficient agent, Copp (1979: 185) points out, it cannot be a self-sufficient *moral* agent. However, it is at this point that Copp lets the crucial issue slip past him:

> That is, simply, the actions of a collective cannot accord, or fail to accord, with the requirements of morality unless some person performs an action which constitutes the collective's doing so. (*ibid.*)

Because a person is a moral agent, his or her actions can accord – or fail to accord – with the requirements of morality. But if a corporation is not a moral agent, then how can there *be* requirements of morality for its actions to meet or fail to meet? Copp immediately goes on to say, 'It should not be assumed, however, that "moral attributes" simply transfer across the constitution relation' (*ibid.*). But while this is absolutely correct, he gets the inference exactly wrong: 'It should not be assumed, for example, that if a collective is blameworthy for something it has done... then that individual is blameworthy for this given action' (*ibid.*). In other words, after noting that a collective is not a moral agent, and that moral attributes do not automatically transfer across the constitution relation, Copp goes on to assume (simply and without argument) that the actions of a collective can still be morally obligated.

Though she does not criticize him on these grounds, I believe that Werhane notices the missing step in Copp's argument. She therefore attempts to explain how moral praise and blame can transfer across the constitution relation. However, her explanation falls short of exactly being an argument: 'because secondary actions are, in a derivative way, actions of persons', she writes, 'they can be moral or immoral actions, and one may evaluate them accordingly' (1985: 57). Where Copp was right to note that morality does not simply transfer across the constitution relation, Werhane attempts to circumvent this clause by saying, in effect, 'but morality transfers anyway'. It is hard to see this as anything but a fallacy of composition: the actions of corporations are composed of the actions of moral persons, so therefore the actions of corporations are moral (or immoral) actions. Rather than further argument, Werhane attempts to appeal to examples; but these examples should only serve to bring us back to the points we have been making all along. The example of Nestlé marketing formula in the third world is used to show that corporate misdeeds provoke moral outrage (*ibid.*), while the example of Johnson & Johnson retracting Tylenol during the 1982 scare is used to show that corporations (sometimes) respond to moral demands (*ibid.*: 58). But neither public outrage at corporate misdeeds nor the fact that corporations are capable of responding to consumer pressures are enough to make intelligible the claim that a corporation is *any kind* of moral agent, primary or otherwise. In the end, it is unclear how Copp and Werhane are doing anything other than simply redescribing intentional systems as moral agents.

5.

A corporation, then, is not in any sense a moral person. One might still claim, however, that it is useful to *treat* corporations *as if* they were moral persons. Kenneth Goodpaster, for example, in relying upon the 'principle of moral projection', tends to treat this principle as an axiom rather than a thesis to be defended. In *Conscience and corporate culture* the principle is asserted as a sort of heuristic – Goodpaster cites the model of Socrates using the city as an image of the soul writ large in Plato's *Republic* as one of his precedents (2007: 19) – and it would seem that, in the end, Goodpaster's argument in that book depends upon whether or not his analogy proves helpful as a way of understanding business ethics. Inasmuch as it tends to contribute to a fundamental confusion of normative grounding, I argue that it is not helpful; this, however, is to beg the question for a moment. In an earlier paper, co-written with John B. Matthews, Jr., Goodpaster reframes the question of 'usefulness' in the following way: 'As for holding corporations responsible, recent criminal prosecutions such as the case of Ford Motor Company and its Pinto gas tanks suggest that society finds the idea both intelligible and useful' (1982: 139).

The passage from Goodpaster and Matthews, Jr. is helpful, inasmuch as it calls our attention to the major reason some find it useful to treat the corporation *as if* it were a moral person: the issue of assigning blame. One last way to assert that it still might be useful to treat corporations 'as if' they were moral persons might be to say that, even recognizing that a corporation *is not* a moral person, we still might treat them as if they had moral *responsibilities*. Rita Manning (1984: 82) seems to argue in much this way when she argues that if the 'decision-making procedures and information gathering networks' of the corporation are (even in part) responsible for bad things happening in the world, that we are correct to *morally blame* not just the individuals within the corporation, but the corporate institution itself. Manning's argument, bizarrely, seems to run roughly thus: because corporations are not moral persons, we need not worry about whether or not we respect their moral rights (the right, say, to not be unfairly accused of moral wrongdoing). Therefore, 'we do not need to show that our corporation is a person before we can show that it is morally at fault', because it can never be 'unfair' to blame it anyway! This argument, of course, would seem to apply in much the same way to hurricanes; we need not worry about stepping on a hurricane's moral rights, and so we are not being unfair to morally blame them for the damage they cause. But of course Manning isn't interested in whether or not it makes *sense* to morally blame corporations – her concern is rather with the possible effects of assigning moral blame in this way. Manning writes that we assign moral blame 'when we object to certain kinds of behavior which we want to discourage' (*ibid.*). 'We want to modify their behavior if we think it is inappropriate', Manning continues. 'In deciding how to do this, the considerations are utilitarian; we want to gauge the effectiveness of alternative courses of action' (*ibid.*: 83). To say that it is useful to treat a corporation 'as if' it were a moral agent really comes down to saying that, even if a corporation *is not* a moral agent, it may still be useful to *morally blame* them.

But if a corporation is not a moral entity, then why should anybody think it useful to attempt to assign moral blame to one? To answer this question, allow me to briefly sketch out a little history. As many business ethicists have noted (e.g., Rowland, 2006; Banerjee, 2007; Painter-Morland, 2011), the granting of corporate charters used to be strictly tied to service of the public good. If and when a corporation's actions violated this public good, it was once standard practice to revoke the corporate charter. However, over the course of the first half of the nineteenth century, this practice greatly dwindled, and by the twentieth century the restriction of corporate charters to service of the public good had disappeared. Today, as Mollie Painter-Morland has noted, '[c]orporations are no longer officially required to serve the public interest, and even though some laws govern their relationships with stakeholders, the law also grants them many rights and freedoms' (2011: 18). As legal accountability has dwindled, calls for 'business ethics' have been on the rise. To venture a hypothesis (which it exceeds the scope of this paper to fully substantiate), I would suggest that the idea that it is useful to appeal to the corporation as a moral entity has arisen (at least partially) on the basis of our *loss* of the ability to restrict it legally. Those who think it is useful to treat the corporation as a moral entity (even though, as we have shown, it is not) seem to be appealing to a sort of exasperated *modus tollens*: 'Well, if not this – then what?'

If my hypothesis seems overly speculative (or cynical), note how often the converse claim is made. 'Only when they [corporations] acknowledge their responsibilities as secondary moral agents will corporations be able to carry out their obligations independent of coercive regulation', writes Patricia Werhane (1985: 76). Likewise, Freeman and Reed explicitly frame their pitch for the stakeholder approach to CSR by suggesting that 'a volunteeristic approach to questions of corporate governance which focuses on effective director behavior is preferable to structural change via legislation' (1983: 88). Norman Bowie and Ronald Duska, meanwhile, warn that 'business needs to police itself or be policed, so that limitations on self-interested profit are carried out where appropriate' (1990: 95-96), and to this end explicitly recommend industry-wide codes of ethics as a way to help stave off government regulation. We have likewise seen business managers move quickly to adopt statements of corporate responsibility and business ethics training seminars as a PR response to corporate scandals. Is it such a stretch to imagine that the persistent myth that it might be *useful* to treat corporations *as if* they were moral agents emerges from precisely the failure to control them in more logically coherent ways (i.e. at the legal and economic levels)?

The objection here – alluded to, once again, by the reference Goodpaster and Matthews, Jr. make to the Ford Pinto case – will surely be that the by now thoroughly-entrenched idea of corporate legal personhood ought to be taken to mean precisely the opposite of what I am claiming. That is, corporate legal personhood means that we *can* place legal blame on corporations – so why should moral blame be thought of as some sort of supplementary substitute? In the Ford Pinto case, of course, Ford Motor Company was acquitted of charges of manslaughter; this actually makes it easier to gloss over some of the difficulties involved in trying a corporation for a crime. If we turn to a different case, however – for example, *Granite Construction Co. v. Superior Court (People)*, a case in which the corporation charged was also found guilty – we might see the issues that arise when the court is forced to address the issues head-on.[7] In his ruling, Judge Harry Woolpert writes that the court has been 'asked to exempt corporations from prosecution for manslaughter. We refuse, holding that corporations may be prosecuted for manslaughter under existing California law' (*Granite Construction Co. v Superior Court (People)*, 1983: 465). The interesting part of Woolpert's ruling, for our purposes, is where it directly addresses the extent to which we can hold corporations responsible. When a human person is found guilty of a crime in the United States, there are a variety of punishments that can be doled out – ranging from community service, court-mandated therapy or classes, and fines, all the way up to incarceration and even (in some states) death. Judge Woolpert notes that, when it comes to 'punishing' a corporation, the only penalty that can actually be administered is a fine. The court must therefore impose 'fines on corporations where both fines and

7 This ruling is available online at http://law.justia.com/cases/california/calapp3d/149/465.html (accessed 1 October 2011).

imprisonment would be imposed on natural persons' (*ibid.*: 471 n. 2). John Danley puts the issue a little more forcefully when he writes:

> The corporation cannot be kicked, whipped, imprisoned, or hanged by the neck until dead. Only individuals of the corporation can be punished. What of punishment through the pocketbook, or extracting compensation for a corporate act? Here too, the corporation is not punished, and does not pay the compensation. Usually one punishes the stockholders who in the present corporate climate have virtually no control over corporate actions. Or, if the corporation can pass on the cost of fiscal punishment or compensation, it is in the end the consumer who pays for the punishment or compensation. If severe enough, hitting the pocketbook may result in the reduction of workforce, again resting the burden on those least deserving, more precisely, on those not responsible at all. (1980: 146)

Woolpert freely acknowledges the 'inadequacy of the penalty provided by' the law – but maintains that this 'is a legislative problem irrelevant to this case' (*Granite Construction Co. v Superior Court (People)*, 1983: 471 n. 2). He offers that 'the corporation [still] has reason to defend itself against the charge, because of the damage to its reputation, the standing of management in the eyes of its stockholders, and the like'. But when the stakes are corporate reputation and financial penalties (which are easily passed along to more innocent parties), then 'holding corporations responsible for wrongdoing' too often ends up simply becoming a challenge to PR firms and cost-cutting business consultants.

All of this is of course to say that it *could be* possible to hold corporations legally responsible for wrongdoings. Again, there was a time when such practice was quite standard, and when the granting of corporate charters was strictly tied to upholding the public interest. The current absence of such practices makes the turn to a certain kind of 'business ethics' – attempting to appeal to corporations *as if* they were moral agents – understandable, but no less unintelligible. I shall return to this point below, and I shall argue that notions of 'corporate social responsibility' *only* make sense as *political* goals. In other words, rather than attempting in vain to hold corporations *morally* responsible for their wrongdoings, we should instead refocus our efforts on broadening our ability to hold them *legally* responsible. For now, though, let us simply return to the point at hand and say: we can see *why* some might think it is useful to treat a corporation *as if* it were a moral agent. But the fact that the corporation *is not* a moral person ultimately undercuts any and all such usefulness.

6.

It is at this point that we should return to corporate management and agency theory. For the valuable insight at the root of agency theory is that 'business' is a set of institutions that create certain kinds of agency – and these types of agency, while not bringing with them any specific *moral* responsibilities, do yet bring certain obligations, and provide a framework within which certain kinds of action can (and must) be taken. The exclusive focus within 'agency theory' seems to have heretofore been on the relationship between agents and principals – but the important thing to note here is that an agent is not simply one who acts 'on behalf of' another, but is also an individual granted a certain kind of *agency*. This agency brings with it certain *abilities* and also certain *obligations*. What obligations, then, does business agency carry with it? To answer this question we must place the business roles in question back within their context inside certain kinds of business institutions. Peter French (1977: 576) draws on the work of John Searle for this purpose:

> An institution's set of rules... is not merely a collection of devices that regulate antecedently existing behavior patterns. Rather the rules define, or, in Searle's terms, are constitutive of, new kinds of activity; that is, they identify the performance of certain actions as 'counting as' the performance of an institutional act (e.g., from Searle, 'A touchdown is scored when a player crosses the opponent's goal line in possession of the ball while play is in progress').

Taking on a role within a business thus grants a certain kind of agency, through the definition of that role within the larger institutional structure. A corporation, as an institution (composed of certain rules and roles, and granted a certain kind of legal status), will be designed to perform a certain function; this will most often be the function of generating profit, though Milton Friedman also cites the example of businesses designed with 'an eleemosynary purpose – for example, a hospital or a school' (1970: 33). A business agent thus gains certain abilities (to have his or her actions 'count as' certain kinds of legitimate business activities) to use in the fulfillment of certain responsibilities. Elaborating upon our earlier discussion of agents acting on behalf of corporations, Friedman tells us that the business agent takes on a 'direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society' (*ibid.*). The point is not that a business agent must focus on profit, however (again, exceptions like schools and hospitals might be cited); rather it is that, outside of this institutionalized responsibility, it is essentially meaningless to talk about the 'responsibilities' of a business agent. This means, furthermore, that the 'responsibilities' that a business agent has *qua* business agent will only be the things she is *required* by her job to do, as French (1977: 577) explains:

> Hence, the sentence... '*X* has an obligation to do something', is a description of *X*'s institutional situation. It should be understood as equivalent to... '*X* is required by the rules of some institution to do something'.

It thus makes every kind of difference in the world just what *kind* of institution the practical role in question is embedded within, and how these institutions are designed.

It is tempting to try and use agency theory to bring business ethics back into the picture; the all-too-common approach here is to attempt to derive corporate *moral* responsibilities from an 'implicit contract' between a business and the society in which it is run, casting the society as another kind of 'principal'. If one can show that 'business' as such has certain moral responsibilities to the community or society, then the agents who take on the responsibility of acting for and through businesses would thus inherit these special moral responsibilities. The advantage of framing the issue in this way is that, unlike the attempt to turn a corporation into a moral agent itself, it is entirely conceivable that an institution of any sort could be set up on certain conditions, and that these conditions might include the taking on of certain additional moral duties by the members of that institution. A fraternity or sorority, for example, might require its members to perform a certain number of hours of community service, and this requirement might be tied to the organization's official recognition by either the school or the organization's own central branch.

If you will recall the history I sketched out in section four, you will note that the social responsibility of business has during much of the history of corporations rested upon an *explicit* contract – and so the 'role-specific' responsibilities carried by agents of these corporations were not special *moral* responsibilities, but were *legal* responsibilities. And we should see once again that the appeal to 'corporate social responsibility' – the 'implicit contract' – is an attempted *ad hoc* solution to an age in which the legal responsibilities of corporations have all but disappeared. Unfortunately, with few legal, formal, explicit responsibilities built into business institutions, business ethicists have to appeal to an 'implicit contract' (see, for example, Carroll, 2008: 93; Bowie and Duska, 1990: 77). But what kind of a 'contract' is this – and, more importantly, what is its normative foundation? The idea of an 'implicit contract' seems to be consistently built upon references to 'what society expects' from business. How such expectations gain any *normative* traction, however, is unclear; it is certainly the case that I can *expect* things from you without you being in any way *obligated* to fulfill those expectations. Without any kind of *explicit* contract laying out 'social demands' on corporations, it's unclear what kind of normative basis appeals to 'implicit contracts' carry – that is, without simply recurring to some theory of the corporation as a moral agent. This is why Patricia Werhane, though largely sympathetic to social contract theory, is yet led to caution us, 'The theory assumes that corporations are moral agents, but it is less clear as to what this agency entails' (1985: 46).

The obvious move, of course, is to say that the social and moral responsibilities of business are derived from the social and moral responsibilities of the people who own or run the business. In this sense, one looks not so much to derive moral responsibilities *from* agency theory, but rather to show how moral responsibilities direct, shape, or constrain that agency. Samuel Mansell (2013), for example, attempts to show that CSR is compatible with 'orthodox shareholder theory' by attempting to show that the desires (and supererogatory moral motives) of shareholders can obligate executives to pursue socially responsible ends. Freeman and Phillips (2002: 338) likewise argue that a business 'is a nexus of contracts or the centerpiece of an ongoing multilateral agreement, based on voluntary consent.... If there is a weak presumption that the agreement is ongoing, managers must take the interests of all parties to the contract, or the nexus, into account'. In arguments of this type, the logic would seem to be something like this: a corporation is just a series of contracts – or promises – between people, and therefore the usual moral rules regulating voluntary agreement and promises between people apply to actions within the corporation. As Werhane puts it, this approach seems appealing 'because it identifies any so-called "corporate moral agency" with the sum of the individual moral views of its constituents and thereby avoids some of the philosophical difficulties inherent in describing a corporation as a unit like a moral person' (1985: 41). However, the problem – as Werhane (1985), Ciepley (2013), and Blair and Stout (1999) have all convincingly argued – is that the corporation is *not* simply a 'nexus of contracts', and the shareholders are *not* simply owners of property who can dispose of their property as they wish. Rooting agency theory in either a principal-agent relationship between the shareholder(s) and the executive(s), or a contractual relationship between various 'stakeholders' involved in the corporation, is to overlook the distinctiveness of the corporate form. And that distinct form, as it turns out, specifically foils the attempt to root business moral agency in the moral agency of the humans who own or operate a corporation.

A corporation, as John Ladd (1970: 488) reminds us, is a *formal organization*. Formal organizations 'make a clear-cut distinction between the acts and relationships of individuals in their official capacity within the organization and in their private capacity'. The bureaucratic structures of formal organizations provide formal roles with prescribed duties, and individuals 'take up' these roles while remaining distinct from them. As a 'decision-making structure' (Ladd, 1970: 492), a formal organization is a *rational* structure for the pursuit of some pre-given end (in most cases, the pursuit of profit). Decisions of the organization – made through a constitution or 'CID structure' – are held up to the efficiency standard of rationality, and a 'good' or 'bad' decision is made within the distinct 'language game' of the organization:

> The game not only determines what should and should not be done, but also sets forth the goals and the moves by which they are to be attained. More important even than these, a particular language-game determines how the activities within it are to be conceptualized, prescribed, justified and evaluated. (Ladd, 1970: 491)

The function of the bureaucracy is thus to split off the moral, private individual from the rational official. Decisions are 'depersonalized', decisions are made *on behalf of* the organization, and values and goals external or foreign to the goals of the organization are screened out, 'automatically excluded as irrelevant to the organizational decision-making process' (Ladd, 1970: 496). Patricia Werhane (1985: 43) captures the logic of the process quite nicely when she summarizes: 'Therefore, while corporate activities are rule-governed, these rules, as impersonal operating procedures, preclude rather than imply moral agency'.

Of course, Werhane objects that this account of a corporation as a formal, decision-making structure – both Ladd (1970) and Danley (1980) describe it as a 'machine' – cannot account for the ways in which corporations respond to moral social pressures, or the ways in which people inside the corporation can sometimes make morally-motivated decisions. But on the contrary, Ladd's account is quite clear. Regarding the ways in which individuals inside a corporation can sometimes make morally-motivated decisions, Ladd (1970: 490-1) points out that rationality functions within a formal organization as a normative standard – it is, he says, quoting Herbert Simon, 'not a description of how administrators decide so much as a description of how *good* administrators decide'. Ladd studies the structure of formal organizations as a way of coming to understand a kind of wide-spread alienation and 'moral schizophrenia' he sees within modern societies; and this is because the standards for 'morally good people' do not *shape* or *limit* the standards for 'good executives', but often rather exist at loggerheads with them. The actions and decisions of a corporate executive are 'subject to the standard of rational efficiency (utility)', whereas the decisions and actions of 'the individual as such are subject to the ordinary standards of morality', and these two are, 'at times, incompatible standards' (Ladd, 1970: 501). Because corporate executives must *also* be individuals (that is, humans, moral beings), but cannot do both *well* or *correctly* at the same time, an inevitable moral schizophrenia results: the same person, trying to be live by two competing value systems at the same time.

Regarding the fact that corporations can and do react to moral *social* pressures, however, Ladd's remarks are even more interesting. For while Werhane seems to believe that this is a sign that corporations can have a conscience, Ladd is right (I think) in pointing out that it is not the fact that they are *moral* pressures, but the fact that they are *social* pressures that makes corporations respond. Moral considerations, writes Ladd, can only 'be relevant to the operations of a formal organization… by becoming limiting operating conditions', that is, 'conditions that set the upper limits to an organization's operations' (1970: 498).

> It follows that the only way to make the rights and interests of individuals or the people logically relevant to organizational decision-making is to convert them into pressures of one sort or another, e.g. to bring the pressure of law or of public opinion to bear on organizations. (*ibid.*: 508)

It is simply a category mistake to appeal to corporations on the basis of ethical principles; but corporations can and will respond to *coercion* through law (and, under certain circumstances, organized social pressure). And where external, limiting conditions set the rules for a corporation's actions, these rules will also govern the way managers and executives function – not just the 'bad' executives, who do their job 'irrationally' by making moral decisions, but also and especially the 'good' executives, who decide rationally and efficiently.

While the attempt to use agency theory as a way of normatively grounding business ethics is thus in error, this very failure provides us with an important insight. The creation of business agency *does* bring with it certain obligations, but these obligations can only be tied to *explicit* contracts – this is why agency theory has focused almost exclusively on the relationship between agents and principals. Business agency is shaped by the business structures – formal institutions – in which they are embedded, however; change the institutional structure, and you change the form of agency, as well as its attendant responsibilities. If we want to establish extra-economic responsibilities for business agents, then, we need to change *the institutions* rather than attempting to appeal to the moral nature of these agents. And such changes will not take the form of *appealing to the consciences* of corporations, but of *changing their structure*. The failure to ground business ethics in agency theory, then, should not be taken as a problem with agency theory – but as a sign that we are mistaken to ground CSR in business ethics.

7.

I have now argued that business is not – and should not be seen as – a moral entity, bringing with it any specific moral obligations (or exemptions); and that corporations are not moral subjects, and hence cannot – and should not – be beholden to moral obligations. Furthermore, I have argued that much of the intuitive appeal of seeking to morally praise or blame the actions of corporations comes from the lack of legal and political recourse. If CSR theorists are increasingly turning to ethics as an *ad hoc* solution for the loss of any kind of *legal* mechanisms of business accountability, Bowie and Duska are quite right to warn us that such an approach is insufficient for the task:

> [A] single individual or a single firm alone will find it next to impossible, unless they are heroic, to overcome or counteract the generally accepted practices of business, even where those are unethical. Thus, business needs to police itself or be policed, so that limitations on self-interested profit are carried out where appropriate. (1990: 95)

Furthermore, they add, even *when* businesses or individuals are 'heroic', morally heroic decisions – under unregulated market conditions – are liable simply to put one out of business (*ibid.*: 96). Picking up on the refrain that is so common in business ethics literature, Bowie and Duska recommend industry-wide adoptions of moral codes as a way to stave off government regulation; but by the end of the book, the authors have made it clear that *some* kind of government regulation is probably necessary to counteract the built-in profit-seeking function of businesses (*ibid.*: 102).

At the heart of business ethics approaches to CSR, then, we have a failure married to a confusion. The failure comes from attempting to address *morally* problems which are better addressed *politically*. And the confusion is one of normative scope; when either 'business' or corporations are taken as the moral subject, then business ethics commits itself to this failure by attempting to derive specific moral guidelines and obligations where no such guidelines and obligations can exist. Given the limitations and failures of this sort, it seems to me that many of these problems would be better addressed by turning to something like *business politics*. If there is currently no such thing as 'Corporate Social Responsibility', it is only because social responsibilities are no longer required as a legal condition of incorporation. If there are no moral limits placed upon business agents *qua* business agents, it is only because industry-wide, externally-enforced codes of conduct have not been adopted. 'Corporate Social Responsibility' *only* makes sense, in fact, as a *political* goal. The practice of business and the granting of corporate charters have both in the past been limited by legally-instituted and -enforced social goals. Those who desire to see more 'Corporate Social Responsibility', then, would do better to focus their efforts on legal and political approaches to solving the problem, rather than appealing to baseless ethical notions of corporate moral agency.

Note, furthermore, that the distinction between 'business ethics' and 'business politics' completely dissolves the major objection to talk of 'Corporate Social Responsibility'. As Milton Friedman (1970) has framed it, this objection roughly runs, 'The only social responsibility of business is to increase profits'. As I have already argued above, I believe Friedman to be entirely correct when he argues that, *qua* business agent, a business agent's responsibilities are derived from the specific kind of agency granted to him or her by participation in a business institution. Friedman writes:

> In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible *while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.* (1970: 33, emphasis added)

While much time and effort has been spent quibbling over Friedman's latter phrase, 'embodied in ethical custom', it should be clear that any rules regulating business 'embodied in law' are simply accepted by Friedman (and business) as legitimate constraints. When we transform 'Corporate Social Responsibility' from an ethical demand into a political goal, we sidestep almost completely the neoliberal objection that such talk provokes.[8]

Especially among those who desire to see more Corporate Social Responsibility, however, there is likely to be one more major objection to the position I am putting forward. The objection, I take it, would be something like this: I am drawing a distinction between 'business ethics' and 'business politics', where in fact no such distinction exists. All struggles for corporate social responsibility must be rooted in ethical principles – and therefore I am merely suggesting a better (and perhaps more political) *strategy*, while any normative claims (about what the role of business *ought* to be) must continue to take the form of 'business ethics'. Without business ethics, in other words, there can be no business politics. My response to this objection is twofold. First, pragmatically speaking, it is simply not true that any idea of Corporate Social Responsibility must be rooted in ethics; indeed, if what I have been saying is correct, any such rooting is at best highly misleading. And second, even if we were to admit that *discussions* of 'social responsibility' are in some sense discussions of 'moral principles', it is yet the case that the attainment of these principles themselves are a political goal, rather than the kinds of things that can be derived from ethical theory; in other words,

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8 *Almost* completely. Certainly, the neoliberal objection is bound to now run something like this: 'Increased governmental regulation of business – including the conditions of incorporation – can only have the effect of making businesses less competitive, and therefore drive business away'. Objections like this have been addressed many times in the past – but the important point here is that such a debate at least properly reframes arguments about 'Corporate Social Responsibility'. As those debates now stand, neoliberals can rightly accuse business ethicists of pernicious metaphysical nonsense; a charge business ethicists are left attempting to refute by arguing, as Goodpaster does, that such nonsense might yet be 'useful' – even as realists like Bowie and Duska recognize the inherent futility in such approaches.

'business ethics' as a discourse in itself must arise from, rather than ground, politics. In this final section of my essay, allow me to briefly explain my responses.

Thanks to the discourse of business ethics, it has come to be assumed that all 'Corporate Social Responsibilities' are *moral* responsibilities. But this needn't at all be the case. Might we want to regulate corporations in order to demand more honesty, more respect of human beings, and more environmental responsibility from them? Certainly, we probably do. But could we also collectively – and through the force of law – demand other, far more pedestrian responsibilities of them? Could we demand that corporations aid the building and repair of infrastructure, support education, or even devote resources to litter removal or other community service? Yes, we could. My point is not that any of these goals might be *immoral* – only that these goals need not in any sense reflect the kind of moral *responsibilities* that normal moral agents are said to have. These responsibilities at the very least could be the kinds of things that would be supererogatory for normal moral agents – and could even take the form of desired community improvements that would go far beyond ideas of 'charity'. (Furthermore, such activity would not be 'philanthropic', as it would be done from necessity rather than generosity.) If we were to grant corporate charters on the condition that the existence of a corporation also serves social goals, these 'social goals' could be *anything*, rather than merely the demand for 'minimally-decent Samaritans'.

Furthermore, if what I have been saying is true, then the demands we place upon corporations *could not* take the form of demands for 'morally responsible behavior'. Morally responsible behavior is the behavior of a moral agent who lives up to his or her moral responsibilities; as corporations are not moral agents, they do not have moral responsibilities for us to demand that they fulfill. Rather, as a piece of technology, a corporation exists to serve ends we have decided upon ahead of time. Rather than merely serving financial ends, I am arguing that we could return to the days of demanding that corporations serve other, socially desirable ends as well.

One might still object, however, that *any* discussion of which ends are 'socially desirable' must be a discussion of ethics, inasmuch as we are addressing issues of the Good. And so, even if it has the aim of being codified in law and governmental regulation, one might object that these discussions of 'the social ends which business ought to serve' would still be a form of 'business ethics', and that furthermore this business ethics would therefore still have to underwrite any 'business politics'. While I accept the principle that moral judgment will inevitably be involved in each individual's judgment of 'the ends a corporation ought to serve', I must yet reply that this objection seems to confuse the *goal* of such a discussion for its *form*. As Scherer and Palazzo (2007: 1104) have also argued, we *do* 'need a normative discussion on how the legitimate role of business in society should be defined and how the business firm should act in a responsible way', but such a discussion is the *goal* of business politics, not its *precondition*. In other words, the guiding principles of CSR are not conditions to be derived in advance from a theory of ethics, and *then* put into place through legal codification. Rather, such principles ought to be the result of democratic discussion; the arrived-at principles will be legitimate, not to the extent that they are certified by one theory of ethics or another, but by their having resulted from as widespread a democratic consensus as possible.[9] Another way of framing my demand for Corporate Social Responsibility is to say that I am looking to restore *the democratic control* of corporations – or at least of some of their necessary ends. Corporate governance ought to be determined through democratic process and political struggle, rather than through moral appeals to either business agents or lawmakers. It is not 'business ethics' underlying 'business politics', in other words, but exactly the opposite: business politics and the restructuring of corporate law will allow *us* to *discuss* 'business ethics' (among other socially-desirable goals!).

In summary, then, we will certainly want to continue to have normative discussions about the role corporations can play in society. But these prescribed ends need not be strictly moral, the normative content of the conversation need not restrict itself to strictly moral considerations, and the content of these judgments is to be arrived at democratically rather than derived from ethical theory. And so my critics and I may disagree about the extent to which 'business ethics' as a discourse might continue to have any meaning at all; but I must at least insist that my call for 'business politics' is not simply a pragmatic strategy for business-ethics-as-usual!

Richard Marens (2013) has argued (rather persuasively) that CSR as a discourse about corporate management has arisen and taken hold in the wake of the loss of explicit, legal forms of business regulation. In this sense, CSR has developed as a

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9 To this extent, I agree with Scherer and Palazzo, and find myself sympathetic to their 'Habermasian' approach. However, as their 2011 article, 'The new political role of business in a globalized world' shows, Scherer and Palazzo have come to take up a position that is not at all what I mean by 'business politics'. In their recent work, Scherer and Palazzo seem to want to integrate corporate institutions (albeit democratically controlled corporations) with the democratic institutions of the state. Rather than regulating corporations through state power, Scherer and Palazzo seem to want corporations to co-govern! A criticism of their position is of course far beyond the scope of this essay – but suffice it to say, I am not convinced.

discourse of justification, a moral smoke screen to fend off either renewed regulations or public backlash at their repeal. If my argument thus far has been correct, then we can more or less agree with Marens: CSR as a *moral* discourse has arisen in response to an inability to control corporate behavior. But we needn't throw the baby out with the bathwater. As Henry Mintzberg puts it, 'Social responsibility – that most naïve of concepts – represents our best hope, perhaps our only real hope' (2007: 50). Despite having spent his article showing why CSR is impossible (Mintzberg's approach to CSR is rooted in the standard, business ethics approach), Minztberg yet argues that it is *necessary*. I have tried to argue that this failure of CSR (the *tragedy*, if you will, of an idea that is both necessary and impossible) derives from our tendency to approach it as a *moral* goal. If we instead approach CSR as a *political* goal, restructuring both business institutions and the legal frameworks in which they are situated, then 'corporate governance' will cease to be a competing paradigm, and become instead a set of tools for CSR's implementation. There is obviously much difficult work to be done, here, and I do not begin to claim that my article has even scratched the surface of such difficulties. Rather, it is my hope that this essay might serve as a 'ground-clearing operation': by showing why business ethics approaches to CSR are fundamentally *mistaken*, it is my hope that we might begin, together, the difficult work of mapping out a business *politics* approach.

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the author

Matthew Lampert completed his PhD in philosophy at the New School and is currently an adjunct professor of philosophy at several colleges in the New York City area. His recent and forthcoming publications include essays on critical pedagogy, Louis Althusser's theory of ideological apparatuses, and the work of Jacques Rancière.
Email: lampm414@newschool.edu

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Market vs. contract? The implications of contractual theories of corporate governance to the analysis of neoliberalism

Kean Birch

abstract

Defining neoliberalism is a tricky thing to do. Whereas most critics of neoliberalism characterize it as an analytical category denoting an epistemology and set of practices based on a market ethic, market mechanism, or market principles, my aim in this paper is to theorize neoliberalism as a contract-based concept and social order. To do this I examine the co-production of neoliberalism's epistemic order and social order as they relate to corporate governance and corporate form. Neoliberal theories of the firm, characterizing it as a *nexus of contracts*, provide a useful insight into the importance of law, especially contract law, to our understandings of neoliberalism.

Introduction

How is it that neoliberalism – as an analytical category, political-economic project, or epistemic community – sits very comfortably with the expansion and dominance of large, monopolistic corporations? One would expect, considering the emphasis of neoliberals and their critics that neoliberalism entails the expansion and dominance of the market and market principles, that corporate monopoly would be anathema to neoliberalism. It certainly was anathema at one point in time, although this changed during the 1950s and 1960s – primarily in the United States – as the result of a concerted intellectual effort to reconcile markets and monopoly (see van Horn, 2009; 2011; van Horn and Mirowski, 2009). Nowadays, it is worth noting that most economic activity is undertaken *within* private economic organizations, especially large, multinational enterprises

(Hodgson, 2005). There are sectoral and national differences of course, but in countries like the UK, USA and Canada large business enterprises (i.e. over 500 employees) represent a significant proportion (i.e. 40-50%) of employment and value-added (Deakins and Freel, 2012: 36-7).

This contradiction provides the starting point, but not finishing line, for this paper. My aims are twofold. First, and primarily, my aim is to contribute a new angle to critical understandings of neoliberalism as an analytical category, especially by questioning the notion that neoliberalism is best thought of as a market-based order. This aim is really about questioning neoliberals and the tenets that underlie their epistemic and moral claims about the world (e.g. the market is efficient, the market is good, etc.) and, in so doing, questioning the analytical term 'neoliberalism' as it is currently deployed. Second, to undertake this first analytical goal, I address what I see as the central contradiction in understanding neoliberalism as a market-based social order, which I briefly highlighted above (re. monopoly). Neoliberal epistemic claims are underpinned by paeans to the market and its wondrous capacity to resolve *all* social problems, yet neoliberalism as a social order has entailed the legitimation of corporate monopoly and concentrations of market power, whether or not this produces significant distortion in the market.

In this paper, the first aim builds on the second. To do this I adopt a theoretical approach from science and technology studies (STS) called 'co-production' to examine the evolution of corporate governance and corporate form during the so-called neoliberal era (i.e. from 1980 onwards). Co-production is particularly useful for this task because it emphasizes the need to understand the relationship between the epistemic order – how we understand and represent the world – and the social order – how those claims are realized and enacted (or not). It is my contention that the co-production of neoliberal corporate governance and form provides a way to then unpack and rethink neoliberalism as an analytical category, which will hopefully provide a new way to critique the epistemic *and* moral claims of neoliberals (and other free market advocates).

I first outline the theoretical framework of co-production in more depth and explain how it can be usefully extended to political economic analyzes. I then discuss neoliberalism as an analytical category in the critical literature. I then focus on the evolution of corporate governance and corporate form in order to illustrate the usefulness of the co-production framework and to show how current understandings of neoliberalism are too focused on conceptualizing neoliberalism as a market-based order. In this section I provide a short historical overview before focusing more explicitly on the neoliberal era. In the final section I return to neoliberalism as an analytical category in order to illustrate how neoliberalism can be considered as a contractual-based concept. I then conclude with some implications of this argument.

Co-production as a theoretical framework

Co-production is a conceptual perspective in science and technology studies (STS) and is associated with the work of Sheila Jasanoff and her collaborators. It is based on the idea that 'natural and social orders are produced together' based on the claim 'that the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we live in it' (Jasanoff, 2004a: 2). Consequently, it is focused on understanding the articulation of scientific knowledge and socio-political order; especially how science and the nation-state evolve together. In this way co-production highlights how scientific knowledge entails certain 'social dimensions' and, on the other hand, that these social dimensions are informed by scientific knowledge. According to Jasanoff (2004b: 38), it is the 'constant interplay of the cognitive, the material, the social and the normative' that generates and maintains socio-political order. In this sense, culture, social meaning, political discourse, and so on are embedded in our scientific knowledge as much as scientific knowledge is embedded in our culture, politics, etc.

What this means, theoretically and methodologically, is that to explain something like scientific knowledge necessitates an examination of social and political institutions – both formal (e.g. the state, law) and informal (e.g. ethics, discourses, narratives) – since these institutions are implicated in the formation and stabilization of scientific knowledge (and vice versa) (*ibid.*). In their work on science and technology, for example, Jasanoff and Kim (2009: 120) argue that co-production allows them to analyze how different national states 'describe attainable futures and prescribe futures that states believe ought to be attained'. They contrast nuclear policies in the USA and South Korea to show how particular national narratives have driven specific scientific pathways: one aggressive (nuclear weapons) and the other passive (nuclear power).

More generally, this perspective can be applied to other forms of epistemic order and social order. Any specific social order necessarily entails the co-production of an epistemic order; that is, the world and our claims about it are entangled with one another, making it difficult to identify how either ideas or institutions cause one another. The explanatory strength of co-production rests on this approach. First, it has the capacity to explain how new epistemic claims (and artefacts) are created, understood and integrated in prevailing institutions and infrastructures at the same time that it can explain how those same institutions and infrastructures are challenged, changed and legitimated by new epistemic claims (and artefacts). Second, perhaps its greatest explanatory power rests in the fact that co-production does not lead to either techno-scientific or social deterministic claims.

While co-production has explanatory power in some areas, there is a significant gap in its analytical arsenal: it focuses on certain epistemic claims (e.g. scientific) and certain social formations (e.g. the state) meaning that it ignores a swathe of societal agents and formations (e.g. business) and epistemic claims (e.g. political economy) (Tyfield, 2012). This gap is made clear in Jasanoff's (2004a: 3) comment that 'States, we may say, are made of knowledge, just as knowledge is constituted by states'. In order to extend co-production as a theoretical perspective it is important to think about how it might be used to analyze the development of political economy as both epistemic and social orders. Doing so necessitates an examination of epistemic understandings of political economy (e.g. economics, law, corporate governance) and of social formations and forms of political economy (e.g. business enterprise, corporation, etc.). Incorporating such an analysis will complement the state-centric focus of Jasanoff (2004a, 2004b), Jasanoff and Kim (2009) and others, with a more economic- or market-focus of people like Jessop (2005; see also Ponte and Birch, 2014).

My intent in this paper is to apply co-production as a theoretical approach to the evolution of corporate governance (i.e. epistemic order) and corporate form (i.e. social order) in order to tease apart the contradiction between market-based claims underpinning neoliberalism and monopoly-based forms underpinning modern business. Before doing this, however, it is necessary to first highlight how neoliberalism and monopoly are contradictory.

Neoliberalism as a market-based concept and the contradiction of corporate monopoly

For a topic much discussed, neoliberalism is still a fuzzy term and concept. It has been used to mean anything from corporate power and malfeasance through to the systemic instability and collapse of the financial markets in 2007-8 – and much in between. It is a term that is difficult to pin down or come to agreement about. This is despite the fact (or perhaps because of it) that the term is largely used in a pejorative sense by critics of (free) market systems and institutions rather than by proponents of a market-based order itself. Few people identifiable as 'neoliberals' – e.g. Friedrich Hayek, Milton Friedman, etc. – actually ever used (or use) the term to describe themselves, and when they did (like Friedman) they subsequently recanted (Peck, 2010). Moreover, and to add to the confusion, it was a term originally used to characterize only one strand of 'new' liberalism – that of the Freiburg School or *ordoliberalism* (Friedrich, 1955) – rather than all schools (e.g. Austrian, British, Chicago, etc.) (Birch, 2015).

There are at least two reasons why it is difficult to either identify or agree on one version of neoliberalism. First, neoliberalism has a complex, shifting and often contradictory intellectual history stretching back to the 1930s (if not before). Neoliberalism emerges from a range of disparate strands of (new) liberalism – most of which had rejected the discredited *laissez-faire* version dominant in nineteenth-century Britain. Early work on neoliberalism by Michel Foucault (2008), for example, identified two schools of neoliberalism: the Freiburg (or ordoliberal) School and the Chicago School. The key difference between the two is their position on the role of the state in ordering (Freiburg) or interfering (Chicago) with markets (Siems and Schnyder, 2014). There is a long history to these differences that belies this simple characterization – those interested in these details should read Friedrich (1955), Foucault (2008), Gerber (1994), and Siems and Schnyder (2014), amongst others. The evolution of these distinct schools of neoliberalism could not be more different; on the one hand, the Freiburg School was pivotal in the founding of the German *social market economy* – the epitome of coordinated capitalism – while, on the other hand, the Chicago School is implicated in the emergence of Anglo-Saxon *free market capitalism* (Gerber, 1994; Siems and Schnyder, 2014). It is possible to argue that while both schools emerged from a similar critique of *laissez-faire*, they eventually diverged as their epistemic arguments evolved. For example, the Freiburg school maintained its conception of markets as social constructs, while later Chicago School thinkers shifted more towards the view that markets are *natural*, emerging from a liberal notion of the freedom to contract rather than from government fiat (see Bowman, 1996).

Second, critics do not adopt the same analytical meaning or concept when writing about neoliberalism. The main critical perspectives include the following:

- Foucault (2008) and later Foucauldian analyzes emphasize that neoliberalism is a form of *governmentality* – or art of governing – in which a specific market-based rationality and set of technologies of power help to mould people into suitable members of society.
- Neoliberalism has been defined as a *political project to restore class power* by Marxists like David Harvey (2005) and others (e.g. Dumenil and Lévy, 2004); this project entails the installation of a 'market ethic' across society.
- Economic sociologists have argued that neoliberalism is a form of *institutional restructuring* involving the introduction of markets and

market values into formal institutions, normative assumptions and cognitive principles (e.g. Campbell and Pedersen, 2001; Prasad, 2006; Mudge, 2008).

- Political scientists have argued that neoliberalism is a set of *powerful ideas* involving new forms of problem definition and solution based on neoclassical theories of the market (e.g. Blyth, 2013; Swarts, 2013).
- A number of human geographers have characterized neoliberalism as a process – or *neoliberalization* – in which 'market-like rule' is layered on existing spatialities, places and scales (e.g. Tickell and Peck, 2003; Brenner et al., 2010).
- Several philosophers and historians of economics argue that neoliberalism is an all-pervasive and constantly evolving epistemology and epistemic community, or *thought collective*, centred on promoting and constructing markets (e.g. Mirowski and Plehwe, 2009; van Horn, 2009; Davies, 2010; Mirowski, 2013).

Despite these different schools of neoliberal thought and different critical analyzes of neoliberalism, it is still possible to identify certain common characteristics across these definitions. The most obvious is the emphasis placed on markets – or, one kind of market (i.e. 'the market'). Within neoliberal thought the (competitive) market is positioned as economically efficient and politically liberating, and therefore the best and most ethical means to ensure social order (e.g. Hayek, 1944/2001; Friedman, 1962). Critics of neoliberalism also highlight the notion of a market-based order as the central premise of neoliberalism. For example, Bourdieu (1998) argued that neoliberalism is a political project to eradicate social collectives (e.g. state) and replace them with a (utopian) market. Similarly, Harvey (2005: 3) argues that neoliberalism 'holds that the social good will be maximized by maximizing the reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market'.

Seemingly, there is now a general agreement amongst (academic) critics that neoliberalism does not entail the erosion or hollowing out of the state, primarily because the state is necessary to institute, maintain and enforce the market. Consequently, neoliberalism is distinct from *laissez-faire* in that it is based on an acknowledgement of the social construction of markets rather than their natural emergence (Mirowski, 2013). What neoliberalism naturalizes, however, are the origin of markets in liberal notions of freedom to contract (cf. government enactment) and the role of the market in the construction of social order. It is not simply a positive epistemic programme in this sense, it also seeks to legitimate the introduction or extension of the market as an efficient mechanism for organizing society; thus it is both a positive (i.e. descriptive) and normative (i.e. prescriptive) programme.

There are two contradictions to this notion of neoliberalism as a market-based concept pertinent to the rest of the paper. First, the concept of a market-based order, as imagined by neoliberals, entails the extension of the market and market thinking into all areas of life. The reason for this is outlined by Colin Crouch (2011: 31), who argues that the (neoliberal) market necessitates that everything be priced so that we can calculate the best allocation and distribution of resources across society, especially in our individual choices; however, without a 'common unit of measurement' it is impossible to coordinate information through market prices. Consequently, the (neoliberal) market provides no room *to not* participate in the market; everyone and everything must be priced – which has obvious implications for individual freedom. Second, with a market-based conception of order everyone must be a price taker and not price maker since market power distorts the workings of the market, meaning that monopoly is deeply problematic because it distorts market signals (i.e. prices) and, therefore, the efficiency of the market (*ibid.*: 29). While the former contradiction is important for understanding neoliberalism analytically, the latter raises questions about conceptualizing neoliberalism as *only* – or *primarily* – a market-based order and concept.

Neoliberalism has an interesting history when it comes to perceptions of business monopoly. Almost all neoliberals, from whatever school of thought, were opposed to any form of monopoly – private or public – up until the 1950s and 1960s. This is evident across the board in the writings of ordoliberals like Alexander Rustow and Wilhelm Ropke (Burgin, 2012); early Chicagoans like Jacob Viner and Henry Simons (*ibid.*); later Chicagoans like Friedman (1962; see Peck, 2010); and Austrians like Hayek (1944/2001; 1960/2011). These early neoliberals had a negative view of private monopoly as distorting market competition, on which their epistemology and normative claims rested. However, the attitude of later Chicago School neoliberals changed quite dramatically from the 1950s. According to van Horn (2009; 2011) and van Horn and Mirowski (2009) this change in attitude resulted from two major projects undertaken at the University of Chicago in this period: the *Free Market Study* (1946-1952) and the *Anti-Trust Project* (1953-1957). These projects went beyond the economics department, and were led by or involved academics from the law (e.g. Aaron Director) and business (e.g. George Stigler) schools. They de-problematized private monopoly in the eyes of Chicago School neoliberals, although not those of other neoliberals; for example, ordoliberals never reversed their position on monopoly (Gerber, 1994). According to Siems and Schnyder (2014: 383), private monopoly was 'accepted as a legitimate form of economic organization' because

Chicago thinkers argued that monopoly was, by definition, always 'a transitory phenomenon, which will ultimately be eroded by market forces'. Evidence for this expectation, however, is not supported by subsequent events, as outlined below.

What this change in attitude illustrates is a broader shift in representations of the market during the later twentieth century, especially in terms of what the market is, how it functions, and how we should understand it. Put simply, it distinguishes neoliberalism from both *laissez-faire* notions of the market as a creator of prices and price competition (Means, 1983) *and* from embedded liberal notions of the market as an outcome of cost-based transactions and cost accounting (Miller, 1998). It is broader than this, however, since it involved a complex evolution of epistemic claims about markets, business and society and the social order bound up with those claims.

The co-production of corporate governance and corporate form

In order to understand the contradiction inherent in neoliberalism highlighted above – that is, between the market and monopoly – it is necessary to examine the co-production of neoliberal epistemic claims and neoliberal social order. This section focuses on the co-production of corporate governance and corporate form as proxies for epistemic order and social order respectively. My starting point is that both corporate governance and corporate form have changed over time, but not necessarily towards greater efficiency. What I mean by corporate governance and form are the organizational and legal characteristics and abstract understandings of the dominant form of business enterprise (e.g. partnership, limited company, corporation, etc.) at a particular point in time. This means examining how certain social formations are represented as viable and/or achievable, while others are not. All of this will then allow me to unpack neoliberalism as an analytical category in the final section.

Corporate governance and form in historical perspective

The starting point for this brief historical sketch is the argument that global capitalism is dominated by one hegemonic power during each epoch; in the nineteenth century it was Britain and in the twentieth century it was – and still is? – the USA (Arrighi, 1994/2010). Each period was dominated by the co-production of a specific epistemic order and social order; that is, specific economic, legal and management claims about the role of business in society (epistemic order) and the emergence and dominance of specific business formations (social order).

Karl Polanyi (1944/2001) claimed that nineteenth-century British *laissez-faire* was underpinned by the concept of a 'self-regulating market' – although this was more fiction than reality. *Laissez-faire* emerged as a social order from new understandings of the market and economy, and new forms of economic organization. Going back to Adam Smith, it was centred on epistemic claims that individual, self-interested action would create social benefits through market interaction (Barkan, 2013: 44, 58); these new ideas promoted the view that large-scale economic organizations – whether the state or quasi-state entities like joint-stock companies – disrupt markets through collusion and monopoly (see Arrighi, 1994/2010: 21, 252; Hessen, 1983). Market competition and prices were naturalized as objective forces, according to Bratton (1989: 1471), while large-scale organizations were characterized as disrupting this *natural* order. Certain forms of business enterprise dominated the British economy during this period, namely small- and medium-sized owner-managed firms and partnerships or unincorporated joint stock trusts which acted like partnerships (Gillman and Eade, 1995; Guinnane et al., 2007; Cheffins, 2008; Schrauwers, 2008). These business enterprises did not entail a separation of ownership and control, and were part of a highly competitive, mainly familial business tradition; for example, they formed what Arrighi and Silver (1999: 127) call 'an ensemble of highly specialized medium-sized firms held together by a complex web of commercial transactions'. Their success and failure depended on price competition since success was supposedly rewarded and failure punished on the basis of market decisions (Ireland, 2010).

At the end of the nineteenth century, British hegemony was gradually eclipsed as a result of the so-called *corporate revolution* in American (e.g. Chandler, 1977; Fligstein, 1990; Roy, 1997). This involved the rise and expansion of large, corporate enterprises and a gradual rapprochement between organized labour and business after World War II, ultimately leading to an 'embedded liberal order' (Ruggie, 1982). New understandings of markets and corporate governance were entangled with the emergence of these new corporate enterprises. These ideas promoted responsible corporate management and the societal benefits of large corporations (Konzelmann et al., 2010) as a way to reconcile the concentration of corporate power with the demands of liberal democracy (Bowman, 1996). There was an emphasis on understanding and promoting the positive role of large corporate entities in the wider US economy, especially in terms of promoting rising standards of living through mass production (Locke and Spender, 2011), as opposed to promoting (*laissez-faire*) markets. Examples of this new understanding was most evident in the work of people like Berle and Means (1932) when it came to corporate governance, but was also evident in the emergence of things like dedicated business schools (Khurana, 2007) and cost accounting (Miller, 1998). Corporations were classified as 'real entities', in contrast to the aggregate / contract view at the end of the nineteenth-century (Bratton, 1989; Harris, 2006; Gindis, 2009),[1] while corporate governance was shifted from corporate law to securities law as stock markets were turned into a mechanism for interaction between shareholders (*owners*) and managers (Hessen, 1983). These changes accompanied the rise of large, oligopolistic corporations, legitimating the activities of corporate *entities* as opposed to individual business owners; in turn, these entities became the centre of cost-based planning and production according to Bratton (1989: 1471), in contrast to previous focus on price-based market interactions between individuals.

Corporate governance and form in the neoliberal era

Neoliberalism is characterized by a distinct epistemic and social order when it comes to corporate governance and corporate form. This is most evident in the development of a 'contractual theory' of the firm alongside the dominance of corporations – and big business generally – over the state and society (Weinstein, 2012). In contrast to nineteenth-century laissez-faire, neoliberalism is not based on the assumption that the market emerges naturally, but rather on the idea that the market is based on the 'presumption of freedom to contract' (Bowman, 1996: 171), which must then be protected by the law and/or state regulation. However, what really distinguishes neoliberalism from laissez-faire is the emphasis on contract and contractual relations over and above (fictive) natural market ones; that is, the market is conceived as a series of contracts and not price interactions or cost calculations. This enables anything to be remade as part of the market in neoliberalism since everything can be turned into a contract (e.g. municipal rubbish collection, saving the planet from climate change, etc.).

When it comes to corporate governance, neoliberalism is based on the re-conceptualization of the market as a series of contracts, exemplified by the firm as a 'nexus of contracts' (Butler, 1989; Eisenberg, 1999; Olssen and Peters, 2005; O'Kelley, 2012; Weinstein, 2012). This is evident in the importance placed on the work of Coase (1937) on the theory of the firm and concept of transaction costs

1 This evolution is too complex to really discuss here, so I can only point out a few aspects of this process as outlined by Harris (2006). First, the aggregate/contract view was specific to the US because of the emphasis on *contractual* relations (*ibid*.: 1468); this is something I discuss later in relation to neoliberalism. Second, the aggregate/contract view 'could not be squared with the limited liability attribute of business corporations' because if corporations are mere aggregates of their shareholders then there is no reason why those same shareholders should receive liability protection (*ibid*.: 1470). This meant it did not survive very long before being replaced by real entity theory. Finally, real entity theory, which was partially derived from German legal concepts, enabled managers to claim control over corporate activities to the exclusion of shareholders (*ibid*.: 1474).

(O'Kelley, 2012). Transaction costs are described as the costs of contracting (e.g. negotiating, writing, enforcing, etc.) and are used to explain the decision to internalize certain market activities (e.g. hiring employees over temporary contractors) in an economic organization (e.g. corporation) (Eisenberg, 1999). Neoliberal scholars developed this contractual perspective through their direct engagement with the theory of the firm; for example, the likes of Jensen and Meckling (1976) and Fama (1980) have very explicitly identified corporations as a nexus of contracts between contracting parties (e.g. investors, managers, workers, etc.). In so doing, they assume a number of things:

- 'Contractual relations are the essence of firms' (Jensen and Meckling, 1976: 310).
- The separation of ownership and control entails an 'agency problem' in that managers need incentives (i.e. well-designed contracts) to run firms for the benefit of shareholders (or investors), who are characterized as both contractual owners and allocators of 'residual control rights' to managers (Shleifer and Vishny, 1997: 741).
- Markets are efficient (Fama, 1980).
- Stock markets are a suitable 'market for control' in that they enable shareholders to punish management (Jensen and Meckling, 1976).

This contractual perspective seeks to reframe *internal* transaction costs (e.g. employment contracts) as *external* and, therefore, market-based contracts (Hodgson, 2005). There are significant problems with this reframing, notably the difference between economics and law in definition of contract; that is, 'reciprocal arrangement' in economics and 'legally enforceable promise' in law (Eisenberg, 1999: 822-3).

What this contractual perspective helps explain is the contradiction in neoliberalism highlighted above – that is, between an emphasis on the market and the legitimation of monopoly. Here I outline three ways that the co-production of corporate governance and corporate form in the neoliberal era has come to legitimate corporate monopoly:

It has involved a new view of corporate identity and personality. There has been a resurgence of the aggregate or contractual view of the corporation, which had briefly flared up at the end of the nineteenth-century (Harris, 2006; Gindis, 2009; Veldman, 2013). This resurgent conception of the corporation is based on the idea of the firm as a nexus of contracts, outlined above, as well as a legal fiction (Bratton, 1989). Unlike the nineteenth-century version, however, it treats contract as the basis of market interactions (cf. price). The aggregate/contract view legitimates specific forms of ownership, notably those based on shareholding since corporations are represented as the aggregate interest of shareholders who are represented as residual claimants (Butler, 1989). It thereby legitimates the market-distorting power of corporations by imagining the corporation as a collection of disparate and different market actors who are contracting with one another. From this perspective, a large, monopolistic corporation is no longer a problem for the functioning of the market because it is *actually* and *merely* a group of individuals contracting with one another, not a massive and powerful entity in its own right. Thus the corporation or firm is theorized away, according to Bratton (1989).

It has involved new forms of governance and control. Aggregate/contract theory became popular alongside emerging social trends in corporate governance, especially the demands of new types of shareholders like institutional investors (e.g. pensions, mutual and insurance funds). According to Lazonick and O'Sullivan (2000), the rise of institutional investors and changing financial climate during the 1970s led to greater demands for shareholder control. These trends were accompanied by the growth in the economic *and* market power of institutional investors themselves (see Deakin, 2005; Davis, 2008; Dobbin and Jung, 2010; Soederberg, 2010). This eventually fed into the adoption of specific governance mechanisms. Some were *internal* (e.g. executive share options), creating incentives for management to pursue shareholder value at all costs; others were *external* (e.g. stock analysis), creating information for investors to pursue portfolio diversification and liquidity through ease of exit (Dobbin and Jung, 2010). Aligning these two interests mirrored and incorporated some of the assumptions of efficient markets (*à la* Fama) and agency problems (*à la* Jensen and Meckling) (*ibid.*). This transformation reflected a broader shift from managerial capitalism – associated with the embedded liberalism – to shareholder capitalism and was tied into wider trends in the reconfiguration of (predominantly) American business schools; this involved a reorientation around fields like finance and objectives like shareholder value as curricula increasingly incorporated principles from financial economics (Khurana, 2007; Fourcade and Khurana, 2011; Locke and Spender, 2011).

It has involved a new view and implementation of antitrust regulation. Aggregate/contractual theory also fed into and reflected changes in competition law, helping to legitimate corporate monopoly by reframing notions of competition itself. This has been detailed by Will Davies (2010) in a discussion of the 'antitrust revolution' during the 1970s and 1980s, and can been seen in other issues in competition law (Christophers, 2015). What Davies (2010) highlights is the way that economic theory – especially notions of transaction costs derived from Coase (see above) – informed a shift in antitrust laws in the USA that contrasted with earlier critiques of corporate monopoly (see Barkan, 2013: 41-64;

also Bowman, 1996; van Horn, 2011). The focus on (nexus of) contracts meant that business organization – and hence corporate monopoly – could be cast as more efficient than the market where economies of scale led to reduced consumer prices (Davies, 2010: 75).[2] Ultimately, competition could be framed as a concern with 'consumer welfare', defined in a limited fashion as lower consumer prices, since prices were no longer seen as subject to arbitrary market power and were replaced by contract as the underpinning of corporate governance. Whether this transformation of antitrust was driven by epistemic claims or corporate power is difficult to untangle.

	Laissez-faire	**Embedded liberalism**	**Neoliberalism**
CORPORATE GOVERNANCE (epistemic order)	Economics: self-regulating market	Economics: transaction costs	Economics: nexus of contracts
	Theory: fiction, concession	Theory: real entity	Theory: aggregation
	Transactions: market price	Transactions: historic cost accounting	Transactions: contractual
CORPORATE FORM (social order)	Form: small, family	Form: large, oligopolies	Form: large, monopolies
	Law: private property	Law: securities	Law: contract
	Governance: ownership	Governance: separate ownership and control	Governance: shareholder primacy

Table 1: The evolution of corporate governance and form.

This discussion implies that the co-production of neoliberal epistemic and social orders is based, in part if not whole, on the conceptualization of contractual relations as equivalent to market price interactions, such that neoliberalism – as a supposedly market-based order – is made compatible with monopolistic business formations, which are treated as markets in themselves. As Hessen (1983: 283) puts it, from this perspective any 'organizational form is a contract with a particular mix of features... but the underlying core in *every* form [of organization] is contract'. The key point to emphasize is that contract actually trumps price or cost as the epistemic basis for thinking about the market within neoliberalism, at least when it comes to corporate governance. Moreover, Letza et al. (2004: 248) argue that 'The concept of contract is the most favoured metaphor used in agency theory. It believes that all social relations in economic interaction are reducible to a set of contracts between principals and agents'. Now, my point is that the implications of this contractual-based epistemic and social order are important, not only when it comes to analyzing the evolution of

2 Another interesting point Davies (2010: 68) makes is that neoliberals – of the second Chicago school – 'ceased to privilege markets' because they sought to erase any difference between economy and society.

corporate governance and corporate form (see Table 1), but also when it comes to understanding neoliberalism as an analytical category used to criticize certain forms of political-economic decision-making. It is to these analytical issues that I turn to next.

Neoliberalism as a contract-based analytical concept and category

Neoliberalism, contract and contract law

As Crouch (2011) outlines, competitive and free markets are theoretically incompatible with the organization of any economic activity, in whatever form. On the one hand, a strong version of this claim would problematize any form of contractual regulation and management of economic activity within an organization since this entails forms of hierarchical rather than market coordination – that is, according to the work of people like Coase (1937) and others on transaction costs. Obviously this strong version is incompatible with twentieth and twenty-first century capitalism in which over half of all economic activity takes place within organizations and not markets (Hodgson, 2005). On the other hand, a weak version would stress the market distorting power of large, monopolistic organizations (e.g. multinational corporations), which is what early neoliberal thinkers (e.g. Hayek, Friedman, Ropke, etc.) argued at one point or another (see above). This would imply that a neoliberal, market-based order would be incompatible with business monopoly; yet this is far from the case, both empirically and conceptually. While this paper has not addressed the former, it is not due to a lack of evidence to support the idea that economic and market power has become increasingly concentrated.[3] As noted above, however, the objective of this section is not to present the evidence of economic and market concentration, but rather to develop a new analytical understanding of neoliberalism as a contract-based concept and order.

To start, it is important to note that contract and contractual relations are central planks of neoliberal thought – many early neoliberals, for example, were lawyers

3 Empirical work on business monopoly can be hard to dig up, and has seemingly been sidelined since the 1960s. However, it is still possible to illustrate, empirically, the concentration of economic power in the hands of large business organizations, especially corporations. For example, recent work by several physicists shows that 737 multinational corporations (MNCs) control 80% of the value of all MNCs and only 147 control 40% (Vitali et al., 2011); the journalist Barry C. Lynn (2010) outlines how a range of product and sectoral markets are dominated by a small number of firms as well as the concentration of supply chains behind these markets; and finally, Bellamy Foster et al. (2011) provide evidence of the increasing concentration of revenues, profits and sectors in the USA since the 1950s.

or interested in law – and, hence, it underpins their conceptions of social order. One example of the discussion of contract in neoliberal thought is Hayek (1960/2011) in his major treatment of law, *The Constitution of Liberty*. He claimed that the reason 'other people's property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts' meaning that 'the whole network of rights created by contracts is as important a part of our own protected sphere, as much the basis of our plans, as any property of our own' (1960/2011: 208). What he means is that *free* social interaction (i.e. market exchange) is only feasible where there is both property rights and, as important if not more so, rules of contract to enable exchange between property holders. In his words, 'competition [is] made possible by the dispersion of property' and this dispersion is dependent on contract.

What contract enables is individual decision-making in the arrangement of (contractual) relations with one another, although it is necessary that this only occurs within 'the reign of general and equal laws' (1960/2011: 222). Hayek had a preference for common law in this regard (1960/2011: 329) since it does not entail the *arbitrary* interference of government. However, according to Hayek certain minimum legal requirements are needed for a market order and have to be enforced by the state, including 'the protection of property and the enforcement of contract' (1960/2011: 338). To summarize Hayek's position: he argued that markets and market competition are underpinned by contract and individual contracting (e.g. buying and selling products and services); and, in turn, contract is underpinned by a general set of laws enforced by a state.[4]

Neoliberalism as a contract-based order

By mentioning Hayek's arguments, I want to highlight the importance of contract and law in theorizing neoliberalism. Not many critical scholars have engaged rigorously with this 'legal side' of neoliberalism – with a few exceptions. For example, several critics of neoliberalism have sought to show how neoclassical economic ideas have infiltrated legal scholarship, with the clear example being the law and economics movement developed at the University of Chicago (e.g. Davies, 2010; Nik-Khah and van Horn, 2012; Aksikas and Andrews, 2014). These critics show how economic analysis has come to influence concepts and principles in the law itself. While this is important work, it is not my focus

4 Neoliberals of one school or another have been interested in the law since the early days of the movement. A clear example of this is the emphasis placed by ordoliberals on the notion of an 'economic constitution' to underpin society and ensure the proper functioning of markets. This vision was enacted in West Germany after WW2 and, to a lesser extent, it has been embedded in the European Union (Gerber, 1994).

here. Rather I want to consider neoliberalism as a contractual theory – not simply a market-based one – by examining the relation between neoliberalism and contract law (Zamir, 2014).

First, it is possible to conceive of neoliberalism as a contract-based order in light of the contractual theories of the firm, corporation and corporate governance outlined in the previous section (e.g. Butler, 1989; Eisenberg, 1999; O'Kelley, 2012). In particular, Weinstein (2012) argues that the new contractual theory of market relations developed by the likes of Jensen and Meckling was meant to frame the firm as the market; this is evident in subsequent positive and normative claims about (proper) corporate governance and corporate forms. In Weinstein's (2012: 28 fn. 69) words:

> Let us say that there was a shift from a representation of the market order as a multilateral system of simultaneous, anonymous relations to a representation in terms of bilateral relations that are necessarily personal, and from coordination through prices (and equilibrium) to coordination through negotiation and contracts. This made it possible to reduce the opposition between market and firm, or even reduce the firm to a particular market.

Famously, Jensen and Meckling (1976: 310, emphasis in original) claim that firms are '*legal fictions which serve as a nexus for a set of contracting relationships among individuals*' and that 'Contractual relations are the essence of the firm, not only with employees but with suppliers, customers, creditors, etc.'. According to Weinstein (2012), this view enabled Jensen and Meckling to align their contractual theory with an organizational structure, namely the firm (or corporation – sometimes the distinction is not well made in this corporate governance literature); however, they did not argue – merely assume – that the contracts constituting the firm represent a market structure.

Second, the idea that all business transactions are only or mainly discrete, one-time interactions seems incongruous. Ongoing, relational contracts – highlighted in the literature on trust in business – are (more) common in business; however, this is ignored in most neoliberal conceptions or deployment of contract and contract language (Trakman, 2010). Importantly, when the market is conceived as one-time contractual relations, any extension of the market necessarily increases transaction costs – because it increases contracting – and thereby reduces the efficiency of the market.[5] This creates a major paradox in neoliberalism and our analytical understandings of it.

5 As Thorsten Veblen argues: 'The greater the parcelment in point of ownership, the greater the amount of business work that has to be done in connection with a given

Third, according to Paul Treanor (2005: n.p.) neoliberalism is characterized by the 'desire to intensify and expand the market, by increasing the number, frequency, repeatability, and formalisation of transaction'. In this sense, neoliberals conceptualize the market as a contractual structure, as opposed to property- or price-based one – both of which are naturalized as givens. Treanor (2005) goes on to argue that neoliberalism promotes an extension of (market) contracts to everything, an increase in the frequency of (market) contract negotiation, a decrease in their duration, and intensified forms of contractual audit; in this sense, neoliberalism is conceptually based on the number, frequency, duration and intensity of *contractual* transactions. With neoliberalism, everything should be turned into a (market) contract, and these contracts should be (re-)negotiated constantly, reduced to the shortest possible timeframe to enable constant (re-)negotiation, and watched constantly – a starker utopia than the market-based order critical scholars generally present. This implies that as more activity – economic, social, political, etc. – (supposedly) becomes more market-based, it will significantly increase the aggregate cost of (market) transacting as every social action – now covered by the market – will necessitate contractual negotiation, coordination, monitoring and enforcement. The increase in contracts (or transaction costs) would be phenomenal if everything was swept up into the market, and it would likely lead to the market grinding to a halt. In fact, it would seem that the only way to resolve this dilemma is to standardize contractual arrangements; that is, to construct a range of *standard form contracts* to cover different social activities.

Finally, understanding neoliberalism as an analytical category requires an examination of the conceptual and practical importance of these standard form contracts (from now on 'standard contract'). Although Hayek (1960/2011: 339) noted that each individual should be able to construct their own contractual relations with each other, he also noted that the standard contract 'often greatly facilitates [such] private dealings' (1960/2011: 339). Standard contracts, however, raise yet more contradictory issues for neoliberalism in concept and practice. Recently, Aksikas and Andrews (2014: 745) argued that 'This artifice – the contract between equals – is central to the neoliberal ideology of our present age'. Their point is that even though neoliberalism may be a contract-based order, this does not mean that it is based on *free* and *voluntary* contract. More apt, perhaps, is the notion that neoliberalism is underpinned by standard contracts with all the inherent problems this entails.

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output of goods or services, and the slower, less facile, and less accurate, on the whole, is the work' (quoted in O'Kelley, 2012: 1256 fn. 44).

Standard form contracts and neoliberalism

A standard contract – or boilerplate contract – is a contractual arrangement in which one party – usually buyer or consumer – has no input in determining the terms of the contractual agreement (e.g. Slawson, 1971; Bebchuk and Posner, 2006; Gilo and Porat, 2006; Trakman, 2010; Zamir, 2014). An everyday example would be an end user license agreement (EULA) between software provider (or similar) and customer – this is a generic contract we enter into on an almost daily basis. Standard contracts are, in this sense, no longer negotiated or even negotiable. It is hard, therefore, to consider them to be free and voluntary arrangements since one party has no power to enact their demands; yet, as Hayek claimed, they are necessary for modern capitalism since without them every transaction would need to be individually negotiated, monitored and enforced – an enormous cost for any society to bear. Consequently, it is hardly surprising that standard contracts now represent 'more than 99% of the contracts currently entered, whether consumer or commercial' (Zamir, 2014: 15). They are everywhere, and they are not limited to individual consumers – business, the state and consumers use them on a daily basis. According to Zamir (*ibid.*) it is not 'coincidental' that US law has failed to address problems with standard contracts (e.g. asymmetric power) since such contracts reflect:

> ...the fundamentally individualistic ethos of American society, the entrenched suspiciousness of – and even hostility to – government regulation, and the great influence of right-wing, Chicago-style economic analysis of private and commercial law in the past decades.

Standard contracts highlight at least three significant contradictions here with current analytical conceptions of neoliberalism:

Anti-competitive practices: according to Gilo and Porat (2006: 1006-1007), standard contracts are problematic because they enable and legitimate various forms of anticompetitive practice as a result of their complexity; for example, cellphone operators can tacitly collude through complex and incommensurate cellphone contracts. As standard contracts become increasingly complex and differentiated from one another it becomes almost impossible to compare suppliers and prices. This has meant that it is the 'transaction costs [i.e. negotiating, monitoring, enforcing] imposed upon consumers, from which the supplier expects to gain' (*ibid.*: 986). It becomes difficult to see how market price competition is promoted, enabled or facilitated as a result, suggesting that characterizing neoliberalism, in analytical terms, as only or mainly a market-based order misses a key issue; most markets are 'administered' in one way or another (see Means, 1983).[6]

Markets vs. contract: Butler (1989: 119) notes that the standard form contract 'reduces the transaction and negotiating costs of reaching and adhering to optimal contracts'. Contract law is, in this sense, central to neoliberalism because it enables the extension of *market-like* relations – or, more accurately, contractual ones – to all areas of society; without standard contracts, transaction costs would militate against the extension of market-like arrangements. This conflicts, however, with the idea that the market is the best or should be the central mechanism for coordinating either society or the firm. If the market was the best or only mechanism needed, then there would be no need for contract law. However, the latter is crucial for ensuring transactions can and do happen without too high a cost. More critically, the more that our social relations are converted into *market-like* interactions, the less efficient the market will be unless those interactions are reduced to standard and non-negotiable contracts; this is hardly the basis for liberty or choice.

Privately-made law vs. private law: following on from the last point, a standard contract is a way for private organizations to establish their own private system of law and governance, which explains why neoliberalism can sit comfortably with the rise and dominance of large, monopolistic businesses (Braithewaite, 2005). This point goes back to the 1970s when Slawson (1971: 530) argued that standard contracts, which he argued had 'engulfed the law of contract' and 'become a considerable portion of all the law to which we are subject', are a form of 'privately made law'.[7] The lack of negotiations – or even capacity to negotiate on the part of some parties – in standard contracts reflect the *delegation* (or arrogation) of law to private business, especially in the areas of incorporation, employment and association (*ibid*.: 536). What this implies, and as Miller (1972: 63) pointed out long ago, is that government and the law are 'used to permit economic power (the corporations) to prescribe the terms and conditions of most of those transactions called contracts'. The stipulation of non-negotiable terms

6 There is a neoliberal response to these criticisms of standard, one-sided contracts: to paraphrase, perhaps crudely, Bebchuk and Posner (2006), these contracts are clearer and therefore more efficient (i.e. low transaction costs) because courts will rarely need to get involved to adjudicate cases. Moreover, sellers with one-sided contracts simply have discretion as to how they treat their customers and will be lenient because they want to maintain their reputations, while customers with more equal contracts simply seek to exploit sellers.

7 This 'privately created law' goes along with the private law *within* the corporation between management and employees (see Ciepley, 2013).

and conditions in standard contracts, based on asymmetries in power between business and customer, severely limits any sense of freedom of contract.[8]

Conclusion

The rationale behind this paper is my desire to understand neoliberalism better, especially the tensions and ambiguities in our current conceptualization of it. The main issue that concerns me is the contradiction between the conceptualization of neoliberalism as a market-based epistemology and social order and the neoliberal accommodation with the rise and dominance of large, monopolistic corporations. This central problematic, as I call it here, is based on the view that corporate monopoly should be anathema to neoliberalism (Crouch, 2011); however, neoliberals have become very comfortable with corporate monopoly and market power (see van Horn, 2009; 2011; van Horn and Mirowski, 2009; Nik-Khah, 2011). My solution to this contradiction is to attempt to find some way analytically to reconcile neoliberalism as a concept and a social order. My suggestion it that we need to go beyond thinking of neoliberalism as market-based and, instead, consider how it is also a contract-based epistemology and order in which market price, competition and interaction are complicated by neoliberalism's dependence on the capacity to create, monitor and enforce contracts, most of which are by necessity standard form contracts.

Overall then, and despite the rhetoric about the market as the arbiter of value, my analysis in this paper is meant to illustrate – in some small way – that neoliberalism is not only or mainly underpinned by a market-based epistemic and social order, at least when it comes to corporate governance. Here there is less concern with market price or cost interactions, as opposed to the framing of markets interactions as (voluntary) contractual relations between private individuals, in an attempt to obscure the role of the state as creator, facilitator and/or enforcer of those relations (Butler, 1989; Bowman, 1996). What this reframing hides, however, is the difference between market interactions and contractual relations. These can be summarized as follows:

- Contracts are different from market price interactions in that they have to be instituted, by which I mean they need laws, regulation and enforcement to ensure that they are honoured.

8 In a discussion of the usefulness of neoliberalism as an analytical category, Carolyn Hardin (2014: 203) highlights an interesting point: 'Foucault (2003) suggests that the liberal thinkers in the eighteenth century conceived of power as a commodity, a right, which could be transferred or surrendered through contract'.

- Contracts are different because market prices need not be reflected in the agreed price in a contract at its signing, nor is the contractual price necessarily the same as the market price on the date the contract is realized; hence, the (current) market price is never necessarily realized in the contract price.
- Third, the future price (or goods) realized from a contract will be more or less than the market equivalent at the time the contract is realized (in the future), while one party is likely better off than the other as a consequence; there is not necessary reason that both parties will benefit from their exchange.[9]

All of this has several implications for how we understand neoliberalism, how we criticize it and how we engage politically with it. First, it is important to stress that what neoliberals write about their faith in freedom and liberty does not always tally with the implications of the implementation of market-based policies. What is clear is that neoliberal ideals are not reflected in neoliberal practice; the main example here is the contradiction between the market as the best mechanism for coordinating society and the resurgence of corporate power in the last three to four decades. Most economic activity, social relations, political decision-making, ecological conservation, and so on is now managed – in some way or another – by and on behalf of private economic organizations, especially multinational corporations. It is difficult, to say the least, to reconcile this state of affairs with neoliberal claims about individual liberty, freedom and choice.

Second, the increasing reliance on contract, especially standard contracts, necessitates an increase in both quasi-state and state oversight, enforcement and regulation of individual decisions, which are themselves increasingly dominated by contractual forms of social interaction. Individuals, social groups, communities, etc. are increasingly constrained by these contractual relations; this is not just a result of business activities either, it also involves the state as it has supported the neoliberal order. This is why a number of scholars argue that neoliberalism is not an analytically useful term because it ignores the expansion of regulation and governance in both private and public forms and at many national and global scales. Braithewaite (2005) – a key proponent of this perspective – argues that this form of 'regulatory capitalism' actually supports and reinforces the expansion of large, powerful businesses because they can afford to adhere to regulatory demands, while smaller businesses end up in the orbit of these powerful enterprises. None of this involves the market *per se*; all of it is about power and the constraints on politics and political decision-making.

9 Contracts are far more concerned with assets (i.e. resources that produce an income over time) than commodities (i.e. goods that are sold in the market) (Birch, 2015).

Third, analytically it is important to rethink the idea that neoliberalism – in theory or practice – is only about the market. Critics of neoliberalism can fall into the trap of accepting neoliberals at their own words by representing neoliberalism as a market-based theory and order. Consequently, neoliberals have had a free pass for decades because they are able to draw rhetorically on notions of free markets, free exchange, individual choice, individual responsibility, and so on. In reality, freedom, individualism, liberty and all those good things neither underpin neoliberalism conceptually nor in reality; neoliberalism is a wholly regressive philosophy and order based on the limiting capacity of contractual relations, especially asymmetrical, standard form contracts. Politically, critics of neoliberalism can turn the rhetorical tables on neoliberals by re-appropriating the language of freedom and democracy.

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the author

Kean Birch is an associate professor in the Business and Society programme at York University, Canada. His current research focuses on rethinking neoliberalism as a concept and on the implications of finance to life science innovation. His book *We have never been neoliberal* was published by Zero Books in 2015.
Email: kean@yorku.ca

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The nature and purpose of the corporation: A roundtable discussion

Stephen Dunne, Samuel Mansell, Martin Parker and Jeroen Veldman

abstract

Towards the end of 2013, the University of Leicester's Centre for Philosophy and Political Economy (CPPE) marked its 10 Year Anniversary by organising a 3-day event on the theme of exhaustion. During this event, a roundtable discussion was devoted to the modern corporation. The participants were Samuel Mansell, author of *Capitalism, corporations and the social contract,* Martin Parker, co-author of *The dictionary of alternatives,* and Jeroen Veldman, co-founder of *The modern corporation* project. The discussion was chaired by *ephemera*'s Stephen Dunne.

Stephen Dunne (henceforth SD): What has been really interesting throughout the event – for me at least – has been the discussion of philosophy and political economy with respect to differing sites of agency. We've heard many very different accounts: some which focus upon individuals, others on classes, others on parties, others still on social movements. We've also heard a few smart-arses using the term agency ironically, between parentheses, under-erasure, and so on. What I haven't yet witnessed, however, is a serious attempt to theorise the agency of the corporation. That's what I'm shortly going to ask the panel to start doing.

So, audience, from your left to your right – geometrically but perhaps also politically speaking, let me briefly introduce our three speakers. Here we've got Martin Parker who is probably going to tell us something about radical and alternative forms of organising. There we find Jeroen Veldman who will likely speak about the legalities and metaphysics of the corporate form. Further along we observe Samuel Mansell, with what is perhaps the toughest job of this panel, given this crowd: describing the corporation as something *other* than a source of evil.

I've asked each speaker to outline their position on the nature and purpose of the corporation, from the perspective of their research, for no more than 10 minutes. They're then going to cross-examine one another for about 30 minutes. Finally, we will open up to the floor for questions.

Samuel, let's kick off with you: what's the nature and purpose of the corporation?

Samuel Mansell (henceforth SM): Evening everyone. It's not difficult to appreciate the importance of this question if we look at the range of examples of corporate irresponsibility from recent months and years: tax avoidance and evasion,[1] the horsemeat scandal,[2] environmental degradation,[3] the Deepwater Horizon tragedy in the Gulf of Mexico in 2010 and the ongoing repercussions of that incident.[4] We also have the exploitation of sweatshop labour in the developing world[5] and, closer to home, recent reports of working conditions in Amazon warehouses.[6] Excessive levels of executive pay[7] and numerous scandals in the banking sector[8] are also never far from the headlines. The list goes on and it leads me into a question: if these events are unacceptable then what, if anything, is acceptable? What objectives can we expect corporations to have? What ethical values might constrain their behaviour? These questions underpin an exploration of the nature and purpose of the corporation.

Let's start with the corporation. Do corporations have a nature? My position is that they are inaccurately described as natural entities. They are artificial, fictive entities, the product of human design with the status of legal persons. The very

1 See, for example, http://www.theguardian.com/politics/2015/feb/23/hsbc-scandal-george-osborne-tax-measures.

2 See http://www.telegraph.co.uk/foodanddrink/10572470/Horsemeat-scandal-a-year-on-nothing-has-changed.html.

3 Professor Rob Gray at the University of St Andrews provides this overview of the problem: https://www.youtube.com/watch?v=-uCSapy9gzY.

4 See BP's response to the issues: http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/deepwater-horizon-accident-and-response.html.

5 See this report from War on Want: http://www.waronwant.org/campaigns/supermarkets/fashion-victims/inform/16360-fashion-victims-ii.

6 See this report: http://www.dailymail.co.uk/news/article-2512959/Walk-11-miles-shift-pick-order-33-seconds--Amazon-works-staff-bone.html.

7 See, for example, http://www.bbc.co.uk/news/business-27155622.

8 See, for example, this list: http://www.channel4.com/news/five-other-banking-scandals-since-2008.

concept of the corporation implies the making of a unity where one did not exist before. Elements that were previously separate are incorporated into an artificial body or body corporate, something which comes into being as a product of human artifice. This body, this corporate body, cannot be found in nature. It arises through a conscious act of human will: it is an agreement, a contract. This also distinguishes it from a metaphor for a group of individuals or a synonym for the participants of a common enterprise.

A corporation necessarily exists, I would say, as a result of an explicit agreement or contract. We should see it as a distinct person before the law, which contracts with other entities as if it had a single will distinct from the different wills and interests of members. An aggregate of separate legal persons, each with independent rights before the law, cannot have their separate interests represented by the one single will, except through common agreement: the corporation is the outcome. For example, a majority decision reached by corporate shareholders, say to elect or fire a director, is binding for all the shareholders of that corporation, not merely those that voted in favour of it.

As to the corporation's purpose, it surely follows from the interests of those persons who agree to let the corporate will stand in place of their individual wills, where the affairs of the corporation are at stake. Now, who has the right to participate in determining what the corporate purpose should be? Who, in other words, are the corporate members? UK and US Company law tends to make shareholders the answer to this question. Fine, but are there any other stakeholder groups, for example customers, suppliers, employees and so on, that ought to be recognised legally or morally as corporate members? That's the question I tried to answer in my book (Mansell, 2013).

There I engage, specifically, with social contract models of the corporation which try to derive the corporate purpose from an analogy between corporate stakeholders and the citizens of a state. The problem with this approach is that a ground for common agreement, across stakeholder groups with diverse sets of interests, is extremely difficult to find. Take, for example, the interests of customers as opposed to those interests of employees – a tension which goes to the heart of sweatshop labour controversies. Here, the corporation cannot be understood, as stakeholder theory would have it, as a mutually beneficial compromise between different groups of interest. My book concluded with the suggestion that no defensible arguments have yet been given for the extension of corporate membership beyond shareholders. I argue at the same time, however, that the corporation should not be identified with the shareholders, simply as an aggregate of individual investors, but only insofar as they have a single artificial will as members of the body corporate. In other words, insofar as they have a *corporate* will. What this means in practice is that individual shareholders can participate in the determination of the corporate will by voting on decisions taken in general meetings. If you own 10% of the shares in a company, you don't own 10% of the corporate assets but 10% of the voting rights.

We can certainly debate the ethical standards of shareholders and we should certainly hold boards of directors accountable to these. UN initiatives such as the Global Compact[9] and the Principles for Responsible Investment,[10] or the Global Reporting Initiative,[11] come to mind in this connection. Ethical arguments can help us establish the broad purposes that ought to be pursued through the corporate form beyond, or perhaps to some extent instead of, traditional financial performance objectives. This approach is preferable to the stakeholder approach precisely because it has an answer to the question of whose interests the corporation exists to serve. I'm happy to elaborate on this later but for now I'll hand over.

SD: Thanks Samuel. Jeroen, where do you differ – and not – with what Samuel has just outlined?

Jeroen Veldman (henceforth JV): OK, thank you Samuel and hello everybody. Where I'm going to make a distinction is on this question of corporate nature. I've regularly asserted that, historically speaking, the corporation has only recently come to be spoken of as a private entity (Beverungen et al., 2014). From around the 13th century until the beginning of the 19th century, it was understood as a solely public entity. At the end of the 18th century, after the French revolution, the corporate form is radically revised: when you no longer have kings, you can't have a concession (see Maitland, 2003). Because people now pay to get a concession from a state consisting of individuals who get to determine who gets a license and who does not, the accusation of corruption is never far away (see Bowman, 1996). This was one of the main arguments to open up the concept of incorporation to all individuals and for all purposes, allowing the use of this special legal concept for private purposes. Subsequent innovations are the attribution of ownership to a separate legal entity, the automatic attribution of limited liability from the middle of the 19th century, and the idea that one separate legal entity can 'own' and buy or sell another one by the end of the 19th century.

9 See https://www.unglobalcompact.org/.

10 See http://www.unpri.org/.

11 See https://www.globalreporting.org/Pages/default.aspx.

As a result, by the start of the 20th century, the corporation as a private entity relates to at least three different legal theories about its status (see Dewey, 1926). Firstly, following from the idea that the state gives the concession that is needed for perpetuity and limited liability the corporation is seen as an artificial entity. Secondly, arguing that the corporation is a specific type of group representation, which creates a legal representation as a 'body' apart from the state, the corporation is seen as a natural entity (see von Gierke, 1968; Maitland, 2003). Finally, the third position says, well, if you're talking about a corporation you're essentially talking about a partnership, an aggregation of individuals. This is obviously problematic, as a corporation is a different thing from a partnership in the legal perception and its functioning (see Ireland, 1999).

On the basis of this history, my position is that the contemporary corporate form is intrinsically incoherent, usually understood today through two very different philosophies. On the one hand we are dealing with a reduced construct which theoretically appears like it can be understood through methodological individualism: the corporation is a voluntary private contractual aggregation, more or less in line with what we just heard from Samuel. At the same time legal theory has also produced a single reified economic construct which can be attributed with agency, ownership and rights in its own right (see Mayer, 1989). That single reified agent is not just accepted in the legal sphere, it is also accepted in the economic sphere: it becomes conflated with the idea of how you can have economic agents in markets (see Zey, 1998), which are nominally equal to any other agent in the market (see Bratton, 1989). Therefore, the concept of the 'person' becomes more or less equal to corporations in terms of their legal representation.

This, in turn, feeds back into that classical discussion of what a person, what a subject, what a citizen is, this time posed with respect to the corporation (see Naffine, 2003). We do not know what that construct is, where it comes from, or how it's constituted because all these legal theories work in all three ways at the same time, even though they are mutually exclusive. So what I'm saying, in terms of an ontological perspective on the corporation, is that there are multiple ontological positions in play at the same time. You have the assumption that the corporation constitutes a reified agent in the political and legal domains, while at the same time you have an assumption that the corporation essentially is constituted as nothing more than a nexus of contracts, an aggregation of individuals. The two exclude each other and yet they are in play at one and the same time.

The question of what the corporate form *is* must be separated from the question of what it is *for*. If you're going to say that a company has to be run in the legal interests of its owners it's not at all clear what that corporation actually is. Nevertheless, from the 1970s onwards, we have the law and economics movement (Davis, 2009) which tells us that what we can assume from the economic perspective is that the corporation's interests are the interests of its shareholders, its primary constituency. From here we get the axiom that the purpose of the corporation is to maximise shareholder value and there is no longer an acknowledgment about who grants a concession to the corporation and who can take it away. Therefore, we have calls for different forms of monitoring. Economists in the 1950s wrote a lot about how, even though corporations are actually taking a large part of the economy, we must nevertheless assume perfect competition. In this perception, anti-trust regulation can be done away with and self-regulation becomes a viable option, because corporations are not qualitatively different from other types of business representation, like partnerships (see Ireland, 2002).

The norm has become that of maximising shareholder value and in this light the pursuit of tax avoidance, excessive executive remuneration, and market efficiency comes to gain moral – and legal – legitimacy. The shareholder wealth maximisation axiom has shaped all of our thinking about what a corporation's purpose should be (see Bratton, 1989; Ireland, 2005; 2009; 2010). Politically, this should lead us to the realisation that this quite simple legal construct violates the very precepts of a liberal framework. Not only do we have the interests of citizens marked off against the interests of the state – we also have corporations, with interests of their own, taking on the privileges previously experienced within feudal systems, on both a national and an international level (see Bowman, 1996).

SD: Thanks Jeroen. Martin, why don't you set your stall out, before you each start having a go at one another?

Martin Parker (henceforth MP): I asked to go last in this because I want us to talk about what we might do, rather than simply bleat. It seems to me there are plenty of people who are critical of corporations from a whole bunch of different places. Some of them are relatively anodyne: Business Ethics, CSR and, dare I say it, stakeholder theory too. Others are noisier: the Million Mask march, or Occupy, or Russell Brand.[12] Indeed, it seems to me that criticism of corporations is very much embedded into popular culture itself (see Rhodes and Parker, 2008). So the question for me is not so much whether there is a problem with corporations, because I think that's obvious and widely agreed. I think the issue is what we in Critical Management Studies (CMS) might do about it.

12 See, for example, www.millionmaskmarch.com/, Chomsky (2012), Brand (2014).

Over the past 30 years or so in the UK, business schools have expanded hugely, filling in the gaps in state funding through the academic equivalent of flogging dodgy gear to whoever will buy it. They tend to teach that markets and corporations are the best way to solve problems and that whatever the problem might be, market discipline can solve it. Management is sold as the solution to every problem, including the problems caused by management. All of this is obvious but it bears repeating: it shapes what we, as business and management academics, might actually be capable of doing in terms of contesting corporate power. In that sense, it's important to be clear about what we are, where we are and what we can do. Most of the time people in the UK who articulate some version of being critical of management are employed by business schools to teach aspirant managers. The brutal reality for such people – well for me at least, and for most of you – is that my salary is paid by selling ideas about management to the children of the Chinese bourgeoisie. So it would be foolish for me to pretend I'm some kind of vanguard revolutionary, taking risks by shouting at those in power. I might do all sorts of other things in my non-work life, but that's not my concern here. The CPPE is hosted by a Business School, so let's take that as our most immediate context.

So what can we do? My proposal is that business schools should teach about organising, not just about management. The corporation, as a historically specific organizational form, shouldn't be allowed to stand in for the widespread and general activity of organising. This is an act of political metonymy, in which part of a thing becomes the whole of that thing, a restriction of imagination and understanding. 'Schools for Organising' (Parker, 2008) would teach a much broader range of topics than business schools do at present. An example might be useful here. What would you think of a medical school that taught about heads and arms but didn't teach about legs and hearts? Or of a school of architecture that was only interested in teaching about office blocks and garages, ignoring hospitals and car parks? That's what the business school is doing at the moment: passing a part of its subject off as the whole. We need to ask what gets taught and we need to consider whose interests are being served in such an unjustifiably delimited pedagogy.

Organising. It's a word which points to a whole variety of different ways in which human beings and things can be arranged in order to do things. I've just finished co-editing a book which contains a series of chapters, some written by people in this very room, outlining different ideas of organisation (see Parker et al., 2014). There aren't any chapters on corporations or management because more than enough ink has been wasted on them already. When people ask us whether there are alternatives to corporations we can say yes, there's lots of other stuff we can do, lots of other ways in which we can organise. So let's teach about cooperatives, community interest companies, worker self-management, localism, partnerships, complementary currencies, intentional communities and so on. That, it seems to me, is the best way in which we, as critical people located in business schools, can respond to the corporation. Teach about the alternatives. Unfortunately, the book costs £125 which is ridiculous. So if you want the pdf just email me, because otherwise another big corporation gets the profits!

SD: Thanks Martin. I'll remind the audience to hold onto their questions for now, allowing the panel members to interrogate one another. Who'd like to go first?

SM: I've got one for Jeroen to begin with. In your presentation you set out a number of different positions from which the concept of the corporation has been explained. You argued, if I understood correctly, that an explanation of the corporation as an entity that arises out of a network of contracts between private voluntary individuals, using all the assumptions of methodological individualism, is incompatible with the notion of the corporation as a singular legal entity. Why are those two explanations opposed to one another? Does it contradict methodological individualism to say a group of individuals can get together and agree to let the outcome of a decision making procedure stand for their collective interests on matters pertaining to the corporate form?

JV: I do not think that the legal entity arises out of a common volition, I don't think that it actually represents a common volition (see Freund, 1897). I think it only represents a legal representation (see Dewey, 1926). As such it clearly stands completely apart from the individuals within the aggregation. So if it is a thing in and of itself – a legal construct – it does not need to have any connections to anything in-between. In that sense it is some sort of entity 'out there' which has been attributed with limited liability, agency and ownership rights. So what is that entity? What does it stand for? Why is it there? How did it develop? In whose interest is it working? If there is no direct connection to a common volition, obviously there will be all sorts of ideologies telling us how we can interpret some other sort of common volition.

SM: So you say that there's no direct connection between the corporate entity and the common volition, but it is still true that individuals can get together and form corporations, which is precisely what happens. So at what point does that separation occur between the entity of the corporation and any group who had a hand in setting everything up?

JV: Well, there are two different movements. One is a formal separation between ownership and control which takes place in the middle of 19^{th} century. The second event is that the resulting separate legal entity becomes reified ever more and more, personified ever more and more. If you look at discussions at the end of the 19th century you will hear that the corporation is actually just a tool. That it's not something we can treat as a person. The recent US presidency candidate Mitt Romney, on the other hand, said 'of course they are persons'.[13] That has become such a common mind-set, both within political discourse and legal scholarship (see Mayer, 1989; Naffine, 2003), but it has taken more than 100 years for that split to become discursively naturalised (see Bowman, 1996).

I have a pretty simple question for Martin that follows from what I've just said. About 90% of all private enterprises adopt the corporate form whereas in the past the partnership form used to dominate. So why are you going on about management instead of looking at the growing dominance of the corporate form itself? Why, in other words, are you hedging your bets on a quickly disappearing outside?

MP: This is a question about the politics of the possible. Your ground clearing work is really helpful because it shows us how contingent the idea of the corporation is. If the state can give corporate licences they can also take them away. This does suggest that state regulation is going to be useful because it might prevent corporations from doing dreadful things. My sense, nevertheless, is that regulation isn't going to be enough. What I think is required is a much greater level of organisational audacity and imagination. We need to be thinking, writing and teaching about other organisational forms, forms which instantiate a different sort of relationship between the state, the organisation and the economy. I like your analysis but my worry is that it ends up becoming a repeated call for regulation by the state, something which, historically speaking, corporations have been extraordinarily good at side-stepping. So, rather than asking the Big Other to do our work for us, let's look for the alternatives, teach about those, and help to produce a new future.

Samuel, I might well be wrong here but I think you believe that the corporate form is in some sense inevitable because it is underpinned by a collective will of some description. Yet you also think that it could be ameliorated, that non-members can make it serve a more general good. Is that a fair characterisation?

SM: A lot of the work that Jeroen has done (e.g. Veldman, 2011) has shown there are many different forms in which the corporation has appeared through time: one form of the corporation is not necessarily best suited to all times or places. As to whether incorporation is inevitable, there are examples of people

13 See https://www.youtube.com/watch?v=E2h8ujX6ToA.

organising themselves around a common legal purpose dating back to Roman law, possibly even to the Ancient Greeks. Corporations can serve all manner of ends, for good or evil, it's an ongoing debate, as with any other dominant form of practice or organising, around what ends are being served, whose rights are being upheld and whose rights are being violated. Incorporations of some form or other, not necessarily just business corporations but also not for profit corporations, charities and NGOs, are pretty much inevitable. Beliefs people hold about the ethics of exchange, profit and management feed into the regulations that are implemented and upon the sort of pressure shareholders will exert upon directors.

MP: So you think that state regulation responds to some kind of expression of popular will? That the state represents the population?

SM: The nature of state regulation is an inevitable consideration for anybody not committed to an anarchist political philosophy. Take the scandals I opened with: in all these cases regulations were already in place. Discussing how the activities of organisations can be governed better within the law is just as important as asking which statutes are already in place. It isn't my position that state regulation solves all these problems, only that it always plays an important role within them. In the case of shareholder activism, for example, if one group is going to have a role to play in controlling directors, they need to have particular standards and expectations in mind. Jeroen might well doubt the value of focusing on such issues and I have the sense that we've distinguished ourselves from one another well enough to open up for audience questions.

Audience Q: Martin, I like your idea of schools for organising but there's a real danger there. Organisation doesn't cover political goods. An example I have in mind is where the Israeli defence force read some quite anarchistic philosophy – Deleuze in particular – then sent its commanders off into Palestinian territory for the purpose of practicing an anarchist war (see Weizman, 2006). There's a clear example of a good form of organisation which is put towards questionable ends. The danger of focusing on practices of organising, I suggest, might be to look away from the purpose of particular organisations.

MP: Much of my project is shaped by my being situated within a business school. Following and twisting Latour (1991), I understand organising as politics made durable. We need to start by understanding that there are lots of ways of organising and lots of ways of doing politics. In the context of the business school, how we organize ourselves needs to become a political question, rather than a matter which can be solved by recourse to ideas about 'efficiency', or 'shareholder value', or whatever. Much of the logic of the Business School adds up to the idea that there is no alternative. A School for Organising would open up the possibility of enquiring about lots of different organisational forms and lots of different political implications of those arrangements. In terms of a means and ends thing, yes of course: there is no one 'good' or 'bad' organization form, because we must always be discussing ends as well as means. They should never be separated, as if we can have good organizations doing bad things, or bad organizations doing good things. That would be lesson one of the 'Organizing 101' module at my new School.

Audience Q: Samuel, can you go a little bit more into detail concerning the corporate social contract? In state building the social contract is always premised on the existence of an Other. For Hobbes, for example, this Other is the state of nature, the fear of the state of nature. What is the kind of social contract applied to the corporation buffered against?

SM: That hasn't been adequately theorised. How the argument tends to work is through a reading of John Rawls (1999). Just as Rawls established an argument for the social contract in society as a whole, we can imagine the stakeholders of the corporation in much the same way (see Freeman, 1994; Sacconi, 2006). So let's imagine you're a stakeholder of a company but you don't know whether you're an employee, a supplier, a customer, a shareholder, a lender, a member of the local community, etc. You don't know what stake you're going to have so what rules would you agree on with respect to the just distribution of corporate wealth? One of the main problems with this juxtaposition is precisely what you've put your finger on: there isn't really a state of nature outside a single organisation within which all stakeholders might be considered formally equal. In social contract theory, citizens have a formally equal status which usually compels them to unite in the form of a state. I don't think such an original equality can be theorised with respect to corporate stakeholders.

Audience Q: Martin, I don't think your account is representative of what you claim to be talking about. It is talk of entrepreneurship, not organisation, which predominates within contemporary business schools. Alternative forms of organising are a part of that discussion but this outsider discipline that your book is introducing to the business school is basically naïve. So what is the value of these alternatives, other than their being alternative? So what if alternatives exist? We have the top 40 charts but there's lots of alternative music. Most of it is shit though! I've also not heard from anybody on this panel an honest account of what corporations actually enable.

MP: Entrepreneurship celebrates an edgy figure who takes on the establishment. But what does this image produce? Virgin, Apple and a whole bunch of other tax avoiding multinational corporations. Most entrepreneurship is far from oppositional, despite what its supposedly piratical advocates say. To my mind, it's naïve to think otherwise! So yes, I do think alternatives to the corporation are worth thinking about. There are plenty of reasons why we should be suspicious of them too of course because such suspicion is the ground in which the seeds of alternative utopias can take root, germinate and perhaps even blossom. We need to imagine modes of organisation which are less damaging to ourselves and the world and, as far as I'm concerned, corporations are not such modes. Alternatives are predicated on radically different assumptions about what a lovelier world might entail, in terms of their scale, their means, and their ends.

JV: Corporations enable people to do lots of things: to avoid paying tax, to avoid taking personal responsibility for actions undertaken in the name of work, to redistribute wealth from the many to the few, etc. They are the main reference point for contemporary capitalism and the main agent underpinning international wealth's radically unequal distribution (see Ireland, 2005; 2010; Lazonick and O'Sullivan, 2000).

SM: I think limiting the liabilities of a corporation's members is a good thing: it allows the corporate person to trade on its own account, separating its rights from those of individuals. It also makes the pooling of resources from individuals with a common endeavour possible. Hegel (1820/1996) advocated corporations because they encouraged individuals to engage in common, public life. This helped foster a notion of the common good and so with it the recognition of the ethical status of other individuals, beyond the individual and family sphere. The corporation, in turn, was an intermediate between the state and the household. Interesting how today the corporation is regularly understood to be in tension with the state.

Audience Q: Another question for Martin. What is the relation between your school of organising and organisations that are not necessarily directly within the sphere of economics yet pursue different notions of value: the value of social justice, for example?

MP: Insofar as this is a polemic for a different educational institution, for a different curriculum, it's aimed at exposing the narrowness of what the business school currently teaches. The deal is that you have to talk about the politics of organising and recognise that organising is multiple and varies in all sorts of ways. I don't think profit is necessarily a bad motive for people to get together, but it doesn't somehow trump social justice. It depends on what you're doing. As I suggested before, the point of this is to insist that all organizing is politics made durable, so let's look to the politics and not hide it behind some sort of assumption that things just have to be like this.

Audience Q: My background isn't in the business school but in politics so apologies if this sounds naïve. How do you think the nature of a corporation overlaps with different ideas of ownership? From Samuel and Jeroen I get the impression that you are starting from the perspective of today's corporations and looking backwards, thereby taking it as given that corporations now own things. But where does ownership come from?

JV: Ownership initially resided with the king or queen: it is from those in charge that the corporation was granted a public purpose (see Maitland, 2003). In the 19th century that very idea of ownership started to shift...

Audience Q: That assumes land and property can be owned. The very idea that a human being can own land, rather than land being understood as a common resource, itself has a history.

JV: That may well be. From the perspective of my work all I can answer is that historically, the legal debate about what the corporation could be, long before the 19th century, was always rooted in concepts of ownership. Who actually owns it? Can the right to ownership be overruled by the sovereign? Is the entity distinct from the persons? Can ownership rights be transferred and if so on what conditions? All of these questions presuppose the existence of ownership, in one way or another (see Maitland, 2003).

SM: Friedman's (1970) infamous *New York Times* article equates the shareholders with owners in a way which conveniently side-steps your difficult question. But what does corporate ownership really mean? What does it mean for the corporation to own itself? I'm quite attracted to Immanuel Kant's theory of property (1797/1996), in which a property right is a right to exclude others from the use of particular objects. Individuals in a state of nature have a right to just about anything. When you enter a state, the right to exclude others needs to be a matter of common agreement. If a corporation is the collective representation of a series of individual wills, that single will excludes all others, including those of individual shareholders.

Audience Q: Since the 2007-8 crisis a lot of management scholars have been re-educating themselves in finance theory. Have you any thoughts on the nature and the purpose of the corporation in light of, for example, opportunistic shareholders, private equity firms, complex financial instruments and high frequency trading?

SM: There is a risk in over simplifying a highly complicated chain of events but I think the financial crisis very clearly illustrates the problem of who, ultimately, should have been taking responsibility. Many blame short-term profiteering, rightly, in my view. As individuals we do tend to look at the long term consequences of our behaviour on the wellbeing of others so why can't something similar happen when it comes to investment? A socially responsible idea of investment would take its bearings from the longer term perspective: I'd be reluctant to say anything more than that, off the cuff.

JV: Samuel, your approach seems to assume that shareholders are a sort of collective which comes to a shared decision concerning the direction of the company. I don't think that is how it works in practice. Ownership in corporations generally tends to become functional once it reaches, say, 10 or 20 percent (see Zeitlin, 1989). That means you have to have an enormous amount of capital before you can have any real say in the corporation's affairs. The people who are actually involved in corporate decision making tend also to be involved in hedge funds: a very small minority. This is worth thinking about.

Audience Q: I don't believe that corporations are as important as you have been telling us. People don't live in corporations. They have to deal with them, of course, but most of the time they're devising ways of keeping them at bay. The alternatives Martin is looking for are in front of our nose every day. Daily life isn't a matter of being a shareholder in a corporation. By being fascinated by corporations you are fascinated only by their power, which isn't that significant.

MP: I agree very much. That's precisely why Gibson-Graham's (1996; 2006; 2013) work has been so important to me, because it puts capitalism in its place. When we look at what people actually do in their everyday lives, they argue, we find that the concepts of commodification make very little sense, and that corporations are not as dominant as some seem to imagine. They use the metaphor of an iceberg, and suggest that we mostly just look at the tip, and ignore all the mutualism and co-operation that takes place beneath the water. Colin Williams (2005) has made very similar arguments. Sometimes it might be enough to draw attention to what is already going on rather than looking for yet to be thought of, let alone practiced, alternatives. If we only look for corporate power, that's all we will see.

SM: For as long as we have corporations I think *not* talking about their purpose or nature might mean to let them off the hook. Alternatives are always worthy of discussion but we should also surely engage with what we have in front of us.

JV: Corporations protect specific interests. If we do not ask who, and how, we are effectively ignoring a crucial component of how our world is constructed. We also need to question corporations so that we might better understand other forms of organisation.

Audience Q: But the vast majority of people in this world still have nothing to do with management. Business schools tend to forget that. Most people just work for themselves and try to make ends meet: you don't need management and strategy and all the rest of that nonsense to live your life. Nobody cares about managers, except in business schools. Like Martin, these institutions pay my salary but beyond that they're not that important. There is an ideology of management, distinct from the reality of management, and discussions like this end up making it seem much more important than it actually is.

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the discussants

Stephen Dunne is a member of the editorial collective of *ephemera*.
Email: s.dunne@le.ac.uk

Samuel Mansell is Lecturer in Business Ethics at the University of St Andrews, and is best known as a critic of stakeholder theory. His research interests are in business ethics

and the history of political thought, particularly in theories of the state, the corporation and natural law from the medieval scholastics to Thomas Hobbes.
Email: sfm5@st-andrews.ac.uk

Martin Parker is Professor of Culture and Organization at the University of Leicester School of Management. His latest book is Daniel Defoe and the Bank of England: The dark arts of projectors (2016, ZerO Books, with Valerie Hamilton). He is currently writing about James Bond too.
Email: mp431@leicester.ac.uk

Jeroen Veldman is Senior Research Fellow at Cass Business School, City University, London. He has held appointments at Cardiff Business School, the Utrecht School of Governance, Utrecht University and a visiting professorship at UPMF, Grenoble. His research addresses the historical development of the public limited liability corporate form and its current status in and between organization studies, management, company law, economics, finance, accounting, politics, and corporate governance. With Hugh Willmott he is engaged in a research project on corporate governance (see http://themoderncorporation.wordpress.com/). He is also engaged in the organization of a series of International Roundtables on corporate governance. He has published in *Human Relations*, *British Journal of Management*, and *Critical Perspectives on Accounting*.
Email: jeroen.veldman@cass.city.ac.uk

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The limits of neoliberalism: An interview with Will Davies

Will Davies and Stephen Dunne

This is an edited transcript of a face-to-face interview that took place in London on 21st of January 2015.

Stephen Dunne (hereafter SD): Can I ask you to recount, when you set out on the book, what you were trying to do and in relation to what body of work?

Will Davies (hereafter WD): The main question I had, following on from my PhD, concerned competition and competitiveness as forms of justification, or as sources of political authority. It appeared to me that appealing to competitive processes, or claiming that certain actions were going to be good for competitiveness or improve competition, was a basis on which to win consent to certain things. It seemed to be a form of justification or a way of legitimating certain types of action. I was interested in the fact that it was almost not tenable in today's society and particularly in today's policy establishment to be against competition or against competitiveness in some way. It was almost that to be against those ideas was to put yourself in some sort of irrational or futile position. And that immediately concerned me because it made me think about where these ideas came from.

In that respect, discovering the work of Luc Boltanski and his co-authors, Eve Chiapello and Laurent Thévenot, was a massive moment for me because they are precisely interested in that question of the modes of authority, the modes of legitimisation and justification that are at work within economic processes, in how certain types of economic rhetoric and economic valuation systems are used in a pragmatic way to win political and moral arguments. Boltanski's work connected with the instinct I had of interrogating how competition and competitiveness seemed to succeed as rhetorical and evaluative devices or discourses in the economy. Which of course links back, as you say in the review, to the work of Max Weber as well, because Max Weber's work on the spirit of capitalism, which Boltanski picks up in his book The new spirit of capitalism, is also about that question of how do certain types of moral and rhetorical and psychological forms of justification operate within capitalism. Also like Albert Hirschman, for Weber it's not self-evident that people will just behave in a calculative self-interested utilitarian fashion: they need to also have accompanying forms of justification and moral bases.

It was only later that I started to become interested in the notion of neoliberalism. In the space of about three years, there were a series of very good critical historical books on neoliberalism as a distinct tradition of thought. In 2008 Foucault's The birth of biopolitics was translated into English, then in the summer of 2009 Mirowski and Dieter Plehwe's The road from Mont Pèlerin, a series of articles on different aspects of what they call the neoliberal thought collective was also published. I think it was 2010 when Jamie Peck's Constructions of neoliberal reason came out and much more recently there was Angus Burgin's The great persuasion, the most historical and detailed history of the neoliberal intellectual movement, although probably also the least critical or theoretical.

Foucault points out that the key trait of markets from a neoliberal perspective is not that they facilitate exchange but that they facilitate competition. For liberals, the market is a space of equivalence in that two people come together and perform an act of exchange. Money is equivalent to a good or a service or a unit of labour. For neoliberals, the market is something which produces inequality between people. One person wins and another person loses and that is the key moral trait of markets for them. Suddenly I realised the reason I was interested in competitiveness was precisely this issue: competition as a mode of justification. This effectively means generating more inequality and preventing the push towards equality that was a trait of the socialists, Keynesians and social democrats: projects that initially prompted the creation of the neoliberal thought collectives as a critical response.

SD: So is it fair to say that Boltanski provided you with a conceptual or methodological framework which allowed you to intervene in these discussions?

WD: Boltanski provided me with a critical and empirical orientation which recognises that all actors interpret the world around them. That's obviously not specific to Boltanski but what I found particularly useful is the epistemological and methodological underpinnings of his work. There hasn't been much use of the Boltanskian approach to investigate state regulation and public policy. Applications of his work have tended to be more interested in micro-political, organisational and managerial forms of power and authority. If you take the Boltanskian approach and you apply it to state regulation you end up doing something quite similar to what the Regulation School has done since the 1970s: Robert Boyer, Michel Aglietta and others. The Regulation School tended to be quite macro, quite top down, however, always searching for the next version of the Keynesian welfare state or of the Schumpeterian workfare state. Boltanski encourages more attention to the detail and nuances of political and economic rhetoric.

SD: If we're going to write about economics though not necessarily within economics, how much are we required to be technically proficient in the language of economics? This book isn't primarily aimed at economists, or practising economists. Yet you really get under the bonnet of economics and become conversant within the technical language of economics, though only up to a certain point. What is going on there?

WD: Although it doesn't really end up appearing in the book, Michel Callon's work has also had a huge influence on me. He starts from the premise that economics is performative in the economy. When he initially started developing that argument, sociologists became more interested in what economists were saying: not guessing but actually listening. Twenty years ago, I probably would never have thought to go and read Chicago School economics: Marxist theories of neoliberalism or something like that would have provided me with all I needed. Callon's notion that economics actually does something in the world changed all that. That in turn takes you into the history of economics and the work of Philip Mirowski, which has been effectively peerless.

What also prompted me to dig around in economics as much as I did was that I was doing interviews with economic policy makers and experts in Brussels and Washington DC. I found that if I didn't understand what the hell was going on then I wasn't going to be taken very seriously. They kept making distinctions between the Chicago School and the ordoliberal approach. I had to read a lot about the history of competition economics and business strategy just to be able to undertake my empirical work.

SD: You say early in the introduction that this is primarily an historical study. The earlier sections of the book chart epochal developments, different ways of thinking about the economy and the role competition is said to play within it. Is the structure you adopted important for the argument you wanted to make?

WD: I didn't want to have to choose between writing a piece of sociology of the present day and writing a history of ideas. I wanted to be able to do both at once and in this I'm inspired by Foucault's famous line about the history of the present. So the first chapter lays out quite a lot of ground work in terms of how I understand neoliberalism and what approach I'm taking. Then there's a chapter which is very influenced by Boltanski's work which seeks to demonstrate how competitiveness became an ethical ideal. Then there are three partly historical chapters which delineate different sources of political authority made available within the logic of neoliberalism. First – the liberal spirit of economics – holds that economics allows human beings to be governed with some kind of spirit of fairness, as if they are all capable of a similar mode of rationality. Second – the violent threat of management – locates the principal authority in the moment of decision in a manner reminiscent of Carl Schmitt. Finally, something which emerges after 2008 – contingent neoliberalism – a form of neoliberal government which lacks higher order principles of adjudication and collapses into contingent acts of rescue.

SD: What seems to happen as we move forward historically is that the basis for fairness starts to become less universal. We may not like competitiveness, but we can all imagine it as a demand on us. We may not like efficiency, but we can all imagine it as demand on us. When we come to the discussion of violence, however, it seems to require some actors to embrace a position of subservience and other actors to quite happily embrace a position of power. Is neoliberalism shedding the possibility of its legitimacy, is that what you're trying to get at?

WD: This has been something which has had a very long history. There's a period between the early 1920s and, say, the 1950s, where neoliberals were quite idealistic types. People like Henry Simons were utopians, they thought that the classical socialist zeal had to be re-channelled into the creation of a beautiful competitive society governed by the rule of law, strong antitrust and monopoly decomposition. The price system would end up being the arbiter of all disputes. This was not liberal in the classical economic sense of laissez faire but very much liberal in a normative and philosophical sense, driven by some ideal of what freedom should look like. What makes this utopianism sociologically naïve was that there was no legitimate space for corporations or hierarchies within it. In the 1950s the Chicago School became increasingly sceptical of the notion that law or regulation could actually achieve this kind of outcome. Large corporations, in their pursuit of profits and efficiency, oust their competitors: maybe that's part of competition. The fact that the small guy's getting trampled on is also maybe what competition requires. This can be understood in the terms of Braudel's distinction between 'markets' and 'capitalism': the transition that happens in the course of twentieth century neoliberal thought is the shift from the justification of markets to a justification of capitalism. If we understand capitalism as politically mandated exploitation then – according to Chicago neoliberalism – someone who is very good at exploiting people, nature, technology, and so on, deserves to get rich and deserves to be celebrated. That is what we call competition or competitiveness and it is opposed to the notion that everyone has to have an equal stake in the game.

The other strand to my account of legitimacy comes from Schumpeter. He was an Austrian economist yet always rather snotty about neoliberalism. Schumpeter had quite a different vision of humanity from that held by the more idealistic neoliberals in that he believed some people were born to lead and most people were born to follow. The problem with capitalism was that the follower mentality was beginning to usurp that of the leaders. It was becoming bureaucratised and leaders, entrepreneurs and heroes were being submerged. Schumpeter provides justifications for the freedom of the leaders to lead, to dominate. This mentality feeds into discussions of business strategy and the work of people like Michael Porter. The 1980s heralded Schumpeter's valorisation of innovation, high tech and value start up being the basis for wealth creation and it is here that Bob Jessop identifies the birth of the Schumpeterian workfare state.

SD: What happens to those who are not born leaders or who are not winners of the market game? How does the game become justified to its losers within this Schumpeterian framework?

WD: I don't think that my book really addresses this question but there are things we could say about it anyway. One thing I would say, following Dardot and Laval's The new way of the world, is that the former socialist parties such as New Labour, the SPD in Germany and the Socialist Party in France have ended up being better neoliberals than the Conservative right. The reason for this is they recognised society as something which needs to be constantly acted upon. The sense of a level playing field needs to be constantly created. The French neoliberal Louis Rougier and a later tradition of neoliberalism in France were all about trying to help people back into the labour market. That was also the New Labour vision: through things like tax credits, free childcare and workfare policies, as well as an active labour market policy, whenever anyone looked like they were falling out of the game, you'd sort of dust them down send them back into again. There was a logic of 'social exclusion' accompanying this vision of the 'level playing field'. The crisis of 2008 onwards has destroyed the coherence or the credibility of those earlier projects. Now in Britain when people say we're all in it together and Ian Duncan Smith says everyone has a chance, people just laugh. If you'd said that in 2004 you could have done so with some credibility.

There is also the account of the creation of a form of neoliberal subjectivity that we get in Foucault, as well as Dardot and Laval, which is instructive here. Foucault's famous phrase about people becoming 'entrepreneurs of the self' bears out when so many 16-year-old British children think that they're waiting to be discovered by talent-spotters. Beyond the X Factor there's pop-up business culture, competitive cookery programmes, Dragon's Den, and so on. We live in a culture where we are either trying to be the winner or we're suffering a personal collapse which we blame on ourselves, suffering mental illness or depression – manifestly neoliberal phenomena. That sense that you're either trying to be the winner or accepting you're a loser is the symptom of this obsession with competition and competitiveness. It's not a situation where there are lots of rivals all having a go at the same time, it's a situation where, through a competitive process, one person is discovered to be the best and they are then entitled to all of the riches or glory while everybody else has to accept their inferiority or maybe have another go tomorrow. It is a very harsh, very brutal vision of competition rather than one which might be called a pluralist vision of competition in which you have to constantly have lots of choice and lots of actors in the game all at once. This is what Hayek meant when he described competition as a discovery process. The reason it's a discovery process is that, through the act of competing, rather like how scientists are involved in a discovery process, eventually you'll hit on the truth and then it is settled, at least until a new challenger appears. The Chicago School could not understand why, if a particular firm were dominating a market, anyone would have a problem with that: surely they were dominating it because they were the best.

SD: Concerning the internalisation of this entrepreneurial view of the self: has it survived the economic crisis, has it prospered since it?

WD: Certainly policy makers and elites are rather trapped by the neoliberal view of the world. I don't think this is simply their dogma, I think they genuinely do not have an alternative in the way that Milton Friedman was offering an alternative in the mid-seventies. Take something like the NHS for example: I'm not sure that you could simply kick the private sector out of the NHS right now and not do huge damage both to it and the patients it treats. Politics is a web of very complex technologies, techniques and instruments, as they evolve in a certain direction they can't simply be reversed at a drop of a hat in the way that I think a lot of the left would like.

As to the internalisation of subjectivity, the notion that we each should be the best, to push ourselves further, to make our bodies more beautiful and to be rich has gone a long way. Still, for those who are suffering at the moment, I don't think that those normative forms of justification are working very successfully: it's just that there are no alternatives in their place. There isn't a socialist movement to harness some of that unhappiness and anger. If you're someone who's having to spend every day at a Job Centre and has applied for hundreds and hundreds and hundreds of jobs and done exactly what the Job Centre has told you to do and still things aren't working out for you, you're not able to take all of that responsibility upon yourself. Mental illness seems much more likely.

SD: You announce that your take on critique is likely to annoy some people. Why did you think that?

WD: I suppose what I wondered is whether by trying to excavate the appeals to justice and the appeals to political authority that I argue lie dormant within certain sort of technocratic discourses, it might look like I was trying to explain why neoliberalism might be a good thing in some way. That would be quite a crude reading of it, but there are people that have read Boltanski like that. I know sociologists who think that, after Bruno Latour, Boltanski is the worst thing that's happened to sociology in recent decades. Some believed that The new spirit of capitalism sought to render contemporary power acceptable. I wondered if there might be some people who would make me guilty by association with such a misreading, as if I was letting neoliberalism off the hook. There's also an absence of hard realism in the book, what could be perceived as a slightly idealistic concern with ideas, discourses and ideal types in a Weberian sense. Thankfully, the people on the left and Marxists who I have had responses from haven't reacted that way. Renewal, for example, did a round table symposium on the book which invited three pieces and a response from me. Bob Jessop was one of the three, and seemed to really like the book, recognising it was also making a contribution to state theory.

SD: You point out that Boltanski has a critical project which tends to be overlooked by people committed to a peculiar reading of The new spirit of capitalism. Somewhere in On critique there's a phrase which goes something like 'critique renders reality unacceptable' which has stayed with me.[1] Do you think that with Boltanski it is possible to do descriptive historical work for the purpose of making a critical intervention?

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1 This sentiment runs throughout Boltanski's (2011) *On critique: A sociology of emancipation* (London: Blackwell). See my review of the book in *Organization*, 19(4): 525-527.

WD: There's another reason why Boltanski annoys people and it is his very high profile departure from Bourdieu in the early 1980s. It wasn't until Bourdieu's death that he wrote On critique which came on the back of an invitation from Axel Honneth. One of the reasons Bourdieusians and Marxists dislike Boltanski is that a lot of his work is interested in consensus formation, as if what goes on in a workplace involves a nice kind of pragmatic agreement formation process. There are other works of Boltanski's that haven't been as influential, however, within which he considers forms of action which don't involve justice, critique or consensus. I'm thinking especially of Love and justice as competences, where he talks about love and violence as forms of action which are non-critical in the sense they don't involve the attempt to stand outside a situation in pursuit of consensus, in the way of critique and justice. What I took from that was an interest in forms of political authority which are non-judicial, non-critical and in some sense violent: in Boltanski's work violence is the ability to act as you please without having to explain anything at any point. So if a manager says 'you failed this audit and therefore I'm afraid I have to let you go', that is a juridical type of action. If a manager just says 'get out of here', on the other hand, that is a violent action because there's an absence of any discernible grounds for debate.

Pointing out the moments within neoliberalism where things are going on in an unjustified way is to highlight their violence. That's one of the things I try to do with the book: not defend neoliberal justification but to delineate what it can't achieve, without violence. Boltanski was a bit unfairly maligned by the notion that he's only interested in consensus formation because he has studied violence as well. I don't use On critique: it's an important moment in his trajectory but it isn't so important within my book.

SD: Do you think Foucault was engaged in a critique of neoliberalism or a description of neoliberalism? Or do you find the critique/description distinction unhelpful? I'm partially referring here to a recent controversy over an interview published in the Jacobin magazine which makes the argument that Foucault was neither criticising nor describing neoliberalism but affirming it. In the aftermath of this debate your work – though not this book – was positively referred to by Colin Gordon. Have you any thoughts on the matter?

WD: First of all, I have never read Foucault as someone who's promoting neoliberalism. The controversy strikes me as a fairly tribal attack on somebody who has always annoyed the socialist left. What is more, to read something non-critical or non-evaluative as therefore affirmative is just not very intelligent. To give a non-critical description of things is partly what good social science has always aspired to do. All narratives have a politics of a sort and you could claim the fact that Foucault doesn't talk about neoliberalism as a system of domination, exploitation or dehumanisation, for example, means he's not sufficiently political for your taste. That's one thing but it is another thing altogether to mistake this lack of a stated politics as an implicit endorsement of what he is analysing. He's trying to do history in a way that takes how ideas are productive of embodied technical material and contemporary lived existence seriously. That is at the heart of most of Foucault's work, certainly his genealogical work.

So what can we say about Foucault and neoliberalism? Clearly Foucault was not a socialist: in his lectures on neoliberalism he makes the remark that socialism lacks a governmentality of its own, whereas neoliberalism does have a governmental rationality. That doesn't make him a critic of socialism or a fan of neo-liberalism. It's just his assessment of socialism, that it lacks a paradigm for political rationalisation and so becomes too dependent on centralised plans. There may be reasons to suspect that the neoliberal emphasis on entrepreneurship and the neoliberal critique of centralised social science, which are absolutely central in the work of Hayek and others, has certain resonances with Foucault's own historical critique of the social sciences and his ethical support for acts of self-authorship and self-creation, an ethics which he calls the care of the self or what Nikolas Rose has called the living of a responsible life. Maybe there are resonances between some of those claims and the critical arguments made by people like Hayek. Even that doesn't make Foucault neoliberal. Post structuralism and neoliberalism have a shared historical trajectory that has come to be called post-modernism. If you want to say what is post-modernism, well, it's a kind of neoliberal celebration of money combined with a post-structuralist suspicion of objective knowledge. It's not Foucault's fault that there are historical entanglements between epistemology and political economy.

SD: Foucault's account of the human sciences in The order of things is predated by Hayek's epistemological account of the social sciences by quite a bit. I don't know of any studies of this, because I suspect Foucault wasn't yet reading Hayek at that stage, but there does seem to be an interesting set of parallels coming out of very different contexts and responding to very different questions which might be worth considering.

WD: Absolutely. Hayek was developing his critique of what he called scientism in the late 1930s and on into his most famous work in the mid-1940s. There were other members of the neoliberal thought collective – as Mirowski calls it – such as Michael Polanyi and Karl Popper, who were also very fearful of what they saw as the Platonist pretensions of social theory. The notion that history had a purpose and a system could be put to all sorts of tyrannical ends and that is what they sought to avoid. A common ancestor of all of those people would be

Nietzsche. I don't know to what extent Popper engaged with Nietzsche's work but there's some sort of a deconstructive ethos which flows from Nietzsche and then goes into neoliberal epistemology where liberalism must be reinvented as a form of relativism.

What that relativist position hopes to identify is certain ground rules for an open society or for a market which must be held beyond the limits of dispute or debate. You have to have certain things outside the realm of deliberation, in other words, which is partly why neoliberalism believes so much in things like centralised independent central banking or competitiveness commissions composed of appointed experts. Foucault, on the other hand, was not trying to come up with anything like a new technocratic framework for a relativist self-authoring society. The politics of the two projects, despite the formal resonances, could scarcely be more different.

SD: What you're doing here is what many people would be quite happy to label as critical management studies in that you demonstrate how business and management can be described without necessarily being endorsed. So still with this notion of critique as description versus critique as intervention or delimitation, I want to talk about the role you grant to Michael Porter. The tone seems notably less appreciative, for one thing. Indeed, when we get to Porter there almost seems to be this gesture being made to the reader that this is someone who we should be more wary or even disdainful of. Is that the case? Is Porter of a different nature to, for example, Hayek?

WD: He's a different type of intellectual, that much is clear. It's difficult to look at some of the ideas circulated by business gurus, the content of the reports they produce and the fees that they charge for their insights, without becoming a little bit scornful. Some of it's just so vacuous and therefore extremely difficult to take entirely seriously...

SD: Which couldn't be said of Hayek...

WD: No, of course. So this wasn't really a sort of conscious choice. In addition to Porter I also looked at gurus of regional and urban competitiveness such as Richard Florida. Just to be clear about what I'm arguing in relation to such management gurus, the facts of what is going on in a competitive situation depend on what your stance is in relation to it. So if you're watching a game of tennis, your view would be different if you're the umpire, one of the players, a coach, etc. There are different perspectives on a dynamic competitive situation, each of which requires certain facts. CEOs, senior policy makers or people in an executive branch of government, suffer from problems of existential anxiety where they wonder what's going on in the world and what they should do. Schumpeter thought this a good thing: some people thrive in this rare position of being thrown into a situation and having to decide in a way that will be obeyed. Nevertheless, they require certain types of knowledge, certain types of facts about the world. To try to understand why Michael Porter has the influence that he has, you need to understand the contexts within which his intended audience operates.

When you read what's in the World Economic Forum Competitiveness Yearbooks, you think this is just sort simplistic, arbitrary and vague. Nevertheless, these are also comfort blankets for high-level executives, it gives them what they need, hence commanding such fees. So if I am a bit scornful it is only because people like Michael Porter are manifestly and deliberately in the business of over-simplification. He did it for Ronald Regan in the mid-1980s, he's been doing it for corporations since the 1970s, and he's been doing it ever since. He produces methodological tools through which the world gets governed. There are thinkers, theorists and philosophers who have been important to the development of neoliberalism. There are also people, like Porter, who facilitate in what I call, borrowing from Boltanski, making the shift from political metaphysics to political physics. Considerations regarding what would be 'good' or 'just' in a situation becomes a technocratic matter of GDP enhancement, competitiveness facilitation, or efficiency maximisation. Gurus facilitate the shift of political discourse away from the realm of philosophy and politics and into the realm of economic, technique and managerialism. Whereas Hayek sought to remind us that the world cannot be easily reduced to a set of simple facts, Porter has built his career on seeking to demonstrate precisely the opposite.

SD: So with Porter and with this more general guru period, the base for legitimate authority is largely down to a matter of opportunism, that is, of the ability to reduce the world into simplistic frameworks?

WD: We could, following Weber, call it charismatic authority rather than bureaucratic authority. The guru doesn't aspire to empirical validity or epistemological objectivity. This is where Boltanski is again useful because he invites us to recognise that knowledge has to do certain things. The job of the knowledge of the guru is to achieve certain types of emotional impact as much as anything else. On the one hand, it has to frighten its audience about what lies just around the corner: Frank Knight's unknown unknowns. It also has to provide some existential security concerning how that corner might successfully be taken. This quest for a shared narrative formation is a big part of why the guru has succeeded. The notion of national competitiveness, while epistemologically and methodologically banal, by the end of the 1980s had nevertheless become a tool which organised the anxieties of the elite. The fact that it's not actually a very sophisticated way of analysing capitalism is entirely beside the point.

SD: It makes the role of the scholar – critical, or otherwise, management, or otherwise – particularly difficult because if we have an acceptance of, let's say, a Popperian framework, it's possible to demystify practices with recourse to evidence or with recourse to some sort of demonstration. What we have now seems to be a situation where guru promises can be made effectively without any pretence towards objectivity, yet also without any repercussions upon authority. The classical weapon of demystification, in other words, doesn't seem particularly powerful any more.

WD: Yes – but this sort of thing has been around for quite a while now. Management has for quite a long time needed affective, normative and political resources as a means of survival. It has always suffered from the fact that it's not able to fully account for itself. This, I guess, is an insight which a lot of critical management studies is effectively predicated on. Porter represents a key moment where management discourse turned into political theory. At the same time that he was encouraging prime ministers and presidents to view themselves like CEOs and their nations as brands, new public management was also rising to prominence. It might be very attractive to have someone come in and hold your hand along the five steps which will bring you from nineteenth most competitive country in the world to fifteenth. That is surely more seductive than having an economist coming in and doing a regression analysis while talking about the labour market and commodity price fluctuations.

SD: If we can no longer rely on a strict demarcation between the evidence and the ideology, the contemporary critique of neoliberalism cannot rely on naïve appeals to facts alone. Yet Thomas Piketty's work seems to suggest otherwise. He almost takes a few steps backwards for the sake of leaving the evidence to describe the situation as if, on the strength of objective research alone, the policy will catch up. His concern isn't with neoliberalism as such, but with contemporary capitalism's tendency to exacerbate inequality. Can facts really no longer cut it?

WD: I don't want to sort of inflate my own significance in all this, but it's interesting how Piketty said in one of his interviews that we have come to accept this rising inequality over the last thirty years and that this is a crucial matter for sociologists to investigate. And that's partly what my book tried to do, to show how people have tried to justify inequality because it fostered competitiveness. You don't play football in order to have a draw: you might have a draw but that's not why you do it. Sympathetic readings of Piketty by sociologists such as Mike

Savage argue that we should relish his lack of theory because it opens up territory for us to explain the economic data which he has provided.

I think that in some ways Piketty is also a symptom of financialisation because he has no theory of where money comes from or where capital comes from. This is what really annoys Marxists and others who have attacked him for having no theory of capital, but simply tracking its flows. This notion that wealth has now become autonomous from the productive economy, or separate from politics and culture is very problematic for sociology. The notion that you should study flows and movements of capital as if it were all of capitalism excludes human capital. Deirdre McCloskey, for example, attacks him by saying that if he included human capital in his analysis the picture he painted wouldn't have been nearly as dreary.

Piketty tells us something about both how capitalism is, but also about how critique is. His book is probably the most significant contribution to social science while I've been studying it and yet it involved no attempt to explain. It's so utterly descriptive that it doesn't mobilise political action in any discernible way, wealth and inheritance tax policy apart. This has excited some people while leaving particular institutions more or less intact. It is both inspiring and disappointing.

SD: Last question. One definition of neoliberalism you put forward in the book is that it is the disenchantment of politics by economics. Has that disenchantment persevered beyond the crisis, or is there a re-emergence of the idea that the economy, or economics, can be politicised or is becoming politicised?

WD: We have witnessed democratic counter-movements against neoliberalism in certain respects and people like Paul Mason have written very well about how the Scottish Referendum, Podemos or the uncertainty concerning the forthcoming general election gives cause for optimism. It's exactly the sort of thing that people like Milton Friedman would have been pretty terrified of. Markets are uncertain in a way that is amenable to a sort of calculation, risk modelling and entrepreneurial behaviour. But political uncertainty can, he thought, get very nasty. The neoliberals have quite a pessimistic view of politics which owes more to Schmitt than to, say, Arendt. If we are to follow Arendt then some of these movements might signify the birth pangs of creation, a new politics which needs to be safeguarded from economic rationalisation.

The best book I've read on this matter is Wolfgang Streeck's Buying time. He has a very pessimistic take about the split between processes of instantiating the market as the constitutional framework of Europe and a democratic alternative.

He stops just short of suggesting that almost any violent response to the technocratic constraints of democracy built into central bank led projects of austerity and market governance is now justified. Some people might say that the London riots of 2011 were a manifestation of this being played out on the ground. One of the points that I make in the book is that when economics becomes a procedure through which politics gets done, it ceases to understand itself, breeding crisis. Donald MacKenzie has argued similarly in relation to the performativity of calculative devices in banks. Economics itself becomes a political language and then attempts to disenchant politics. This fails precisely because you cannot achieve the required level of technocratic positivist disenchantment. I don't see politics in any sort of hopeful sense, certainly not with respect to the higher reaches of power, partly because the majority of elites have been excused from the realm of public deliberation.

the discussants

William Davies is a Senior Lecturer at Goldsmiths, University of London and Co-Director of the Political Economy Research Centre. He is author of *The happiness industry: How the government & big business sold us wellbeing* (Verso, 2015) and *The limits of neoliberalism: Authority, sovereignty and the logic of competition* (Sage, 2014).
Email: w.davies@gold.ac.uk

Stephen Dunne is a member of the editorial collective of *ephemera*.
Email: s.dunne@le.ac.uk

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Neo-liberalism is dead! Long live neo-liberalism!

Stephen Dunne

review of

Davies, W. (2014) *The limits of neoliberalism: Authority, sovereignty and the logic of competition*. London: Sage. (HB, pp.296, £85.00, ISBN 978-1-446270-68-4).

It was November 2008 and it happened at the London School of Economics' School of Management. The city was trembling above the shockwaves of a devastating financial crisis yet Professor Luis Garicano had good reason to be cheerful, at least on the beginning of the particular day we've got scene-setting cause to look back on him. As the Departmental Head he was leading The New Academic Building's[1] opening ceremony and the event had attracted a large and illustrious crowd. Media, politicians, dignitaries – even the *easyJet* guy – was going to be there. The crisis isn't going to bother me, at least not today, the Professor must have thought to himself.

Dutifully welcomed by Professor Garicano was the occasion's guest of honour – a state-supported lady of pensionable age, idiosyncratically dressed all in white. She had done this sort of thing countless times before and when the appropriate moment came she intuitively faced the cameras, her curtain opening gloves familiarly poised to stage what should have been the gathering's defining image. There was to be a headline grabbing departure from the script, however. With the twin demands of commemorative plaque revelation and universal economic devastation likely weighing heavily upon her, the rarely outspoken swan

1 Architecture, it would seem, has also gone meta.

enthusiast turned to her host and posed *the big question* which many of us were already asking ourselves – and each other – at the time: 'The Banks! WTF?'[2]. One can only imagine the sheer audibility of just so many dropped pins.

Whenever I hear this story I'm minded to spare a thought for poor old Luis. He woke one morning ready to take his share in a significant professional achievement and went to bed that same evening the victim of a widely discussed sovereign tongue-lashing. This was certainly not an inquisition in keeping with such events' established etiquette. Nor, as we were to find out[3], was it the sort of question which could be adequately addressed in the form of a sound-bite. Garicano's by now infamous response: '[a]t every stage, someone was relying on somebody else and everyone thought they were doing the right thing', while almost certainly not a lie, is true only in a question beggingly obvious way. 'It was a regulatory issue ma'am. I should also reveal that I am a person. And that noise, or what I like to call speech, has recently left my mouth.' It was the sort of explanation which told us something abstract without telling us anything concrete, in other words.

The evident banality of the Professor's pseudo-explanation notwithstanding, I honestly struggle to see what else we should realistically have expected from him, within a situation like that, with the entire world potentially watching on. What would you have said, even with the benefit of hindsight, if you were called upon to respond to that? This was absolutely not the time for Cheshire Cat impersonation[4] – answers were demanded by the interrogator and expected by the millions of non-economists on whose behalf she then seemed to be speaking. Garicano, perhaps despite his better judgment, dutifully obliged, all the while knowing that no answer would ever really have been good enough. Liberally democratic times or not, it remains unwise to outwit sovereignty with expertise.

Fast forward over half a decade and the Queen is still on her throne, the LSE's New Academic Building is still frequented by the great and the good[5] and *the big*

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2 Or something to that effect, the reported details don't allow for clarity. The *Daily Mail*, for example, quotes: 'Why did nobody see it coming?' *and* 'Why did nobody notice it?' *The Telegraph* suggests only: 'Why did nobody notice it?' while the *FT* coins: 'Why did no one see it coming?' [http://www.dailymail.co.uk/news/article-1083290/Its-awful--Why-did-coming--The-Queen-gives-verdict-global-credit-crunch.html; http://www.telegraph.co.uk/news/uknews/theroyalfamily/3386353/The-Queen-asks-why-no-one-saw-the-credit-crunch-coming.html; http://www.ft.com/cms/s/0/50007754 -ca35-11dd-93e5-000077b07658.html#axzz3GleX8F7d].

3 See http://www.britac.ac.uk/news/newsrelease-economy.cfm.

4 She is rumored to be more of a dog person anyway.

5 See: http://www.lse.ac.uk/intranet/LSEServices/estatesDivision/lseEstate/campusBuildings/newAcademicBuilding/Home.aspx.

question still gets asked of those deemed capable of answering it. Financial and economic influence, for its part, seems only to have heightened in the interim: think of the imperatives of public debt-reduction, of student debt-inflation, of public provision cuts, and of non-elected troikas. The irony of just so many financial and economic Pied Pipers leading the way *out of* the crisis, for its part, has far from gone unnoticed. The common people's poet prophesized how unmentionable c-words would still be running the world[6], the blogosphere chastised the metaphorical lunatics still running the asylum[7] and click-bait presented the spectacle of, for example, the kids who are now quite literally running the sweet-shops[8]. In the UK, though surely not just there, a widely held sense of economic disenfranchisement was accompanied by historically unprecedented levels of political cynicism[9]. It seems almost churlish to point out that none of this seemed very fair.

What also seems to have happened in this brief interim is that *the big question* has given way to an *even bigger one*. So now it's not so much: 'The Banks! WTF?' as it is: 'The Banks! *Still!* WTF?' Different formulations of this question suggest the promising beginnings of an emergent intellectual tradition, one to which William Davies's book has made a very important contribution. For Davies and his predecessors – let's just call them TBSWTF scholars – post-crisis political economy is much too important to be left to the economists. This is not to say that the emergent tradition is necessarily hostile towards economics, it is only to say that it situates economics – and often economists – within a socio-political configuration. Economic and financial propositions gain legitimacy, TBSWTF studies demonstrates, not only through disciplinarily sanctioned epistemological procedures but also through the establishment of exoterically exclusionary linguistic and interpersonal communities. The inability of Professor Garicano to respond directly to the Queen's question, to offer a practical example, isn't a glaring weakness of contemporary economics but one of its major strengths. It is precisely because the Queen (and you? certainly I) are presently incapable of understanding complex economic phenomena that we defer judgment to would-be experts. Worryingly, as TBSWTF scholars often reveal, these apparent experts don't really know what's going on either. Their explanations, demonstrably more

6 See https://www.youtube.com/watch?v=monyiOsoKxg.

7 See http://www.theduckshoot.com/tory-bedroom-tax-flawed-the-lunatics-are-running-the-asylum/.

8 See http://www.mirror.co.uk/news/uk-news/britains-youngest-tycoon-opens-up-4330641.

9 'In 2013, a third (32 per cent) say that they "almost never" trust "British governments of any party to place the needs of the nation above the interests of their own political party", three times as many as took this view in 1986 (11 per cent)' [http://www.bsa-31.natcen.ac.uk/read-the-report/key-findings/britain-2014.aspx].

sophisticated than ours, are nevertheless often just as wrong as ours. How on earth, it is clearly worth asking, has this utterly perverse situation managed to persist? 'The Banks! *Still!* WTF?'

Colin Crouch's *The strange non-death of neo-liberalism,* probably the best known example of this emergent tradition to date, offers one possible explanatory response. His book doesn't so much lament the contradictions defining the period of neo-liberal policy dominance as it diagnoses the status-quo reverting consequences deriving out of an apparent lack of legitimate alternatives. Philip Mirowski's *Never let a serious crisis go to waste,* probably the best example of the tradition to date, offers another possible explanation by bringing a concern with networks of influences to the forefront of his analysis. The very sources from which post-crisis alternatives to neo-liberalism might have been generated – heterodox economics, everyday experience, even popular protest – Mirowski suggests, are significantly if not irretrievably tied to its continuation. Just as these scholars aren't axiomatically opposed to contemporary economics in general or to neo-liberalism in particular, they aren't apologetically tied to it either. TBSWTF studies rather teaches neoliberalism's bitterest opponents and its keenest advocates alike why it is going to take a lot more than the evidence of a global financial crisis to right so many perceived wrongs/wrong so many perceived rights.

The limits of neoliberalism adds to this tradition in the making by highlighting the role of financial experts, management gurus and other economic and political elites within neo-liberalism's post-crisis re-legitimation project. By interviewing US, UK and EC government officials and advisors, and by studying a series of relevant policy reports, Davies provides an evidence based, conceptually rich and experientially grounded[10] account of how, as he puts it, 'the economic critique of the state can be employed precisely so as to legitimate, empower and expand the state' [x]. There are no grand clandestine conspiracies unveiled here. Rather, following the concerns of Luc Boltanski and therefore Max Weber, Davies sets out to delineate the complex basis of contemporary political legitimacy, however spurious this might initially seem. In an achievement which seems all too rare, such name checking serves to clarify, rather than obscure, the author's project. Weber explained why most large bureaucracies would serve charismatic leaders with their P-45s. Boltanski (and Thévenot) explained why most of the inhabitants of Augustine's *The city of God* would starve to death within the financialized City

10 During the early 2000s, the author worked in a variety of think tanks 'loosely supportive of the "New Labour" government' [ix]. This confession is to be understood less as a statement of political allegiance and more as a claim towards reliable narrator status.

of London. Davies wants to show us how anti-neo-liberalism very often has the paradoxical effect of reinforcing, rather than undermining, the position and therefore the power of policy elites.

In as much as Davies isn't really in the business of counsel of despair provision, he isn't really in the business of critical intervention either. He knows all too well that a methodologically derived refusal to take sides will have its detractors. The majority of the book's first chapter provides a rationalisation for this tone-setting decision: one of which he informs us early and reminds us often. The clearest formulation of the gamble Davies is asking his reader to take – that his book on neo-liberalism is worth reading because it has no grand plan to offer – comes in the preface:

> Much of this book is descriptive and historical, and not explicitly critical. Given the historical moment, this will disappoint some readers. But I would suggest that we need to understand how power works, how it achieves authority, and the role of economics (and business strategy) in facilitating this. It is no good simply criticizing without understanding the role of critique within capitalist society and its capacity to be adopted by dominant powers. [xiii]

Neo-liberalism has not collapsed under the weight of whatever contradictions the global financial crisis might have exposed us to so we would do well to understand why. Davies's descriptive and historical argument is written out of the recognition that neo-liberal advocacy, while clearly beset by vested interests, cannot be understood on the basis of vested interests alone. Ever since Ludwig von Mises' and Friedrich Hayek's responses to the socialist calculation debate of the 1920s and 1930s, neo-liberalism has always sought justification within 'conflicting philosophies of the common good' [32]. The majority of Davies's book accounts for three of these, beginning with neo-liberalism's liberal-juridical justificatory regime. This regime derives out of Mises and Hayek's insistence that the inability of centrally-planned economies to provide meaningful market signals wasn't just a technical economic problem but also, indeed much more so, a profoundly political one. The situation should be opposed, the early neo-liberals argued, not for the sake of a new aristocracy or plutocracy but for the sake of liberal democracy itself. The arbitrary yet substantial power which incompetent political actors held in the influence of prices should be replaced, the early neo-liberals believed, with a common interests serving market-based alternative.

This observation leads Davies to define neoliberalism as the '*pursuit of the disenchantment of politics by economics*' [4, italics in original]. The success of the early neo-liberals was to have moved judgments concerning the common good away from moral-juridical pronouncement and/or casuistry onto economically-demonstrable modes of quantification. Neoliberalism opposed the enigmatic authority of politics, Davies demonstrates, proposing the world as depicted by the Austrian School of economics as the less mysterious, more legitimate alternative. That neo-liberal economics was successful in its disenchantment of politics, the book demonstrates, only had the effect of making human existence all the more uncertain. We are freed from the disingenuous authority of paternalistic state actors only to embrace a condition defined by epistemological fallibility, generalised competition and existential risk. We might not have more, we might not share more and we will not know more. Nevertheless, liberty flourishes within such a situation because the rights of market actors are democratically dispersed: held by all and in common. Or at least that was the idea.

Just as it was in relation to an idea of the common good that Hayek sought to liberate economic action from tyrannical privilege, so too the work of his successors – Ronald Coase in particular – sought to further prioritise economic description above political prescription. Within Coase's work, according to the book's second and third chapters, Hayek's idealised account of economic actors competing with one another on an equal footing is replaced by a situation where the actions of large actors are frequently – though not necessarily – prioritised. Neoliberalism's account of the common good thereby transforms from an ideology which sought to generalise competitive relationships to one which prioritises institutional efficiency. The Coasian paradigm, in other words, is also grounded in an account of the common good. The preference for institutions and firms (i.e. corporations) is not a return to the allegedly arbitrary despotism of the centrally planned economies previously derided by Hayek and Mises. It is rather an attempt to replace the politically-idealist belief that horizontal competition is good in itself with the legally-realistic notion that economics provides a neutral/objective foundation for anti-trust adjudication. 'Efficiency', in other words 'became a proxy for "justice"' [83]. And it is in telling the story of how neoliberalism infiltrated the courts, especially with respect to his concept of 'actually existing neoliberalism', that Davies's book already pays out on the wager it had earlier asked us to make:

> These events and processes were crucial factors in shaping the character of 'actually existing neoliberalism' (in contrast to the proposed, more normative neoliberalism of the early neoliberals) that swept across the USA and Europe from the 1970s onwards. [89]

Within Davies's Boltanskian framework, the heavily interventionist economic role played by the state in the aftermath of the 2007-2008 global financial crisis *tests* neoliberalism's liberal-juridical logic of justification right down to its very foundations. One would do very well to read an argument for the state imposed public funding of private firms into the work of Mises and Hayek. On the contrary, indeed, the very idea that the many should pay for the mistakes of the few is precisely what they sought to overcome. Similarly, what might seem like Coase's legalistic bias towards large firms isn't derived out of idealization but observation: corporations just so happen to be more efficient managers of risk. This neo-classical hypothesis was always open to falsification, a falsification which Professor Garicano, The British Queen and we have all subsequently witnessed. So if the liberal-juridical logic of justification can no longer do the job of legitimating neoliberalism after the crisis, what might? What *can*? What *has*? Here's Davies's iteration of the TBSWTF question, a formulation which is worth citing at length:

> The economically rationalized state had prided itself on trimming budgets, balancing the books and optimizing its management, but the state was suddenly revealed as a more fearful, all-powerful force, bereft of any quantitative logic, other than to prop up finance at all costs. The economically rationalized state had focused on savings and improvements that were measured in the hundreds of millions of pounds; the emergency state was capable of injecting hundreds of billions of additional finance and guarantees, simply by force of decision... Not long after, something equally shocking occurred. This emergency state stepped back into the sidelines again, perhaps only a little more visible than before, but effectively suggesting that the rescue was over, and now we could return to our pre-2008 world. The economic language of 'competitiveness' and 'enterprise' is now back, as if nothing has changed. [xi]

The immediate aftermath of the 2007-2008 financial crisis is understood by Davies as a brief but undeniable period within which demonstrably anti-liberal, anti-juridical political exceptionalism made its entirely arbitrary presence very clearly felt: 'The very aspect of sovereignty that had long bothered neoliberals, namely its incalculable and "metaphysical" quality, is what rescued neoliberalism from collapse in 2008' [156]. With Hayek, neoliberalism was, in Davies's terms, 'metaphysically' supported with reference to a notion of liberal equivalence between all actors, and, with Coase, with reference to the demonstrable efficiency attributable to some actors. Post-crisis neoliberalism makes no such 'metaphysical' promises, providing instead a far from heady mixture of what effectively amounts to arbitrary violence (chapter four), on the one hand, and 'a cultural anthropology of different habits and rationalities' [161] (chapter five), on the other. How did these two alternative philosophies of the common good nevertheless go some way towards providing neoliberalism with a renewed source of legitimacy/authority?

After brilliantly highlighting the mode of argumentation and the mechanics of infiltration in the case of neoliberalism's legal-juridical philosophy of the common good, the two alternatives to it, while just as impeccably analyzed, aren't nearly as impeccably contextualized. Davies convincingly demonstrated *how* Coase's arguments *became* justified yet only offers a plausible account of *how* the post-crisis alternatives to the liberal-juridical notion took root. These sections instead capitulate to the dubiously abstract explanatory resources of 'convenient amnesias' and their occasional 'disturbance' [156-7]. These two chapters certainly aren't without their merits and, were it not for how high Davies had set the bar earlier on, I wouldn't have had reluctant cause to wave a small red flag now.

After the financial crisis, the underwhelming but nevertheless plausible account goes, contemporary political governance is no longer justified with respect to competitive dispersal or economic efficiency but in explicitly contingent terms. Ours now is the world governed by expert-forums and think-tanks, by audited score cards and business schools: it is a world theorized by Carl Schmitt and Giorgio Agamben then largely presided over by Michael Porter and his consultative acolytes. The neoliberal economy has demonstrably failed us, so post-crisis neoliberalism's second philosophy of the common good goes, and this is precisely why we need the guidance of the management and political strategist, however anti-democratically or even violently imposed this guidance might be. The sanctity granted by the early neo-liberals to the necessity of the rule of law has been replaced today by the widely acknowledged arbitrariness of executive decision [152]. The law no longer serves as the foundation for political-economic decisions, rather, the executive decision, governed by the logic of the friend-enemy distinction, is now revealed to all as the fundamental basis of law, politics and economics[11].

The widely acknowledged arbitrariness of contemporary executive rule, Davies's account of the final, neo-communitarian mode of neoliberalism's justification continues, is accompanied by a period in which neo-liberal economics readily acknowledges its own fallibility. Homo economicus, as Davies puts it, 'is no longer assumed, but *taught, nudged, mimicked and nurtured into existence*' [152]. How else are we to explain the recent thriving of behavioural economics, social-network analysis, algorithmic trading and psycho-neuro-economic anthropology, Davies asks, if not with recourse to the idea that the classical assumptions of neoliberalism are no longer believed to hold true, if ever they did? Neoliberal economists no longer claim their propositions are the case, they only tell us that 'the methodological presuppositions of neoliberalism *ought* to be true' [159]. The post-crisis successes of these various fields of intellectual enquiry merely help neoliberalism's advocates understand why their classical assumptions about the human being are not true; or at least not yet.

11 Davies uses the example of EU Law concerning the provision of financial aid to ailing national economies to illustrate his example. We might consider debates surrounding British EU exceptionalism within the EU Framework as a more recent example.

Political and managerial executives no longer have any pretences towards universal justifiability, nor do they even seem to need any. Similarly, economists and financial specialists no longer have any pretences towards epistemological verifiability, nor, again, do they even seem to need any. It is extremely difficult to criticize the self-consciously contingent post-crisis advocacy of neoliberalism precisely because it has internalized so many criticisms made against it, to its own advantage:

> The contingent neoliberalism that we currently live with is in a literal sense *unjustified*. It is propagated without the forms of justification (be they moral or empirical) that either the early neoliberals or the technical practitioners of neoliberal policy had employed, in order to produce a reality that 'holds together', as pragmatist sociologists like to say. The economized social and political reality now only just about 'holds together', because it is constantly propped up, bailed out, nudged, monitored, adjusted, data-mined, and altered by those responsible for rescuing it. It does not survive as a consensual reality: economic judgments regarding 'what is going on' are no longer 'objective' or 'neutral', to the extent that they once were. The justice of inequality can no longer be explained with reference to a competition or to competitiveness, let alone to a market. [186-7]

A quip usually attributed to Fredric Jameson about how imagining the end of the world is easier to imagine than the end of capitalism has fuelled much recent indignation about how *they* are still pulling the post-crisis financial strings. Very much like Professor Garicano's response to the Queen with which we opened and somewhat like Davies's contribution to TBSWTF studies with which we have closed, the quip provides a plausible narration though not a contextualized demonstration. It is surely a measure of how successful *they* have been that a non-critical book about the global financial crisis has the effect of leaving us pining for Hayek, identifying with a monarch and, in my case at least, pitying successful economists.

the author

Stephen Dunne is a member of the editorial collective of *ephemera*.
Email: s.dunne@le.ac.uk

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Total bureaucratisation, neo-liberalism, and Weberian oligarchy

Gerard Hanlon

review of

Graeber, D. (2015) *The utopia of rules: On technology, stupidity, and the secret joys of bureaucracy*. London: Melville House Publishing (HB, pp. 272, $21.55, ISBN 978-1-612193-74-8).

David Graeber's book on rules and bureaucracy examines the topic from a refreshing standpoint. Much management literature, since at least Bennis (1965), has made the claim that bureaucracy and competitive markets and/or change are somehow incompatible. The world needs to be post-bureaucratic – 'bureaucracy must die' (Hamel, 2014), organizations must be more entrepreneurial (Drucker, 1984). These are the refrains we hear – if we are to survive and grow, creativity must be unleashed from the shackles of bureaucracy. A dominant neo-liberal motif has been to burn red tape – most recently one thinks of David Cameron's demands of the EU wherein if British membership is to continue, red tape (and perhaps reds) is to be burned – those dynamic commercial Brits taking on the sclerosis of bureaucratic Europe on our behalf. In reply, management scholars opposing such a position argue that bureaucracy and its rules protect us from unethical behaviour, arbitrary power, anti-democratic forces, and so on. Bureaucracy here equates with rational-legal authority and the rule of law. It may not be perfect but it at least defends the weak and the infirm, e.g. Du Gay's (2013) defence of bureaucracy as more ethical than post-bureaucracy. Building on Hennis (1988), Du Gay argues that the father of bureaucracy, Max Weber, sought to find a way through which personality would allow an individual to live ethically. The entrepreneurial or post-bureaucratic firm undermines such an ethic by encouraging an arbitrariness more closely associated with charismatic or traditional rule. Indeed, neo-liberalism itself is in the dock because it undermines ethics and subsumes life to something like Weber's instrumental rationality (see Gane, 2014 – although importantly Weber [1975: 33] argued that the heuristic device of the ideal type known as rational economic man was an 'approximation' that was becoming more and more a reality as institutions altered to act as though it were true). Here, in my crude summary, bureaucracy, ethics, and Weber line up against post-bureaucracy, ethically neutral instrumental rationality, and neo-liberalism.

Graeber takes a different and more interesting tack. For him, bureaucracy increases under neo-liberal market conditions. It is 'an iron law of liberalism' that increasing *laissez-faire* increases bureaucracy [9] and that our so called era of post-bureaucratic organization is actually a period of 'total bureaucratisation' [18]. He usefully highlights the links between bureaucracy and the rise of the state, the contemporary market, and the modern corporation – pointing out along the way, that the two most bureaucratic countries are also perhaps historically the sites of the corporation – Germany and the USA. Bureaucracy is about putting shape on 'reality'; it is the enforcing of particular forms of order. In chapter three, he uses many examples from anthropology, fantasy, and history to argue bureaucracy is engaged in a struggle against play, heroic storytelling, narrative, and charisma. In the name of democratic rules, transparency, indifference and neutrality [183-86], bureaucratic societies seek to 'civilise' non-bureaucratic ones because seemingly impartial rules provide a neutral order. Something like this argument was made recently in the BBC documentary series *The Celts* which compared and contrasted Rome's rule bound order and the charismatic and traditional Celtic world. Bureaucracies are a structured game [190] and not much fun, unlike their less structured nemesis, unruly play. But the game of bureaucracy has been winning as ever more areas of life become rule bound. Ours is a world which increasingly sees play as threatening – as needing evermore structure. As the distinction between work and play collapses (Graw, 2010), unruly play is structured to resemble a game – is this not what the neo-liberal Schultz's (1962) call for human capital as a never-ending investment in man implies – structure your activities to make them profitable? For Graeber [204], games and play also take us to one of the major schisms within the left – between those who see rules as freedom, because it reduces power to a transparent set of regulations, and those anti-authoritarians who see freedom largely in terms of improvisation and play. The problem for the former – as the proto-fascist Robert Michels (1915) understood – is that bureaucracy enables the holders of power to make up the rules. The problem of the latter is that like language play needs flexibility and some rules if it is to be progressive – but this too returns us to how many and who constructs them.

Graeber, from a management studies viewpoint, is a welcome challenge. Bureaucracy versus post-bureaucracy, or markets, or competition, or innovation, or entrepreneurship, etc. has recently been the field's dominant way of viewing organizational life. Here, to paraphrase, Graeber is saying these are largely the same thing. Furthermore, he is arguing that bureaucracy is an anti-democratic rule maintenance machine for a neo-liberal elite. At this juncture, his work takes on an interesting hue. It links to the growing scholarship on neo-liberalism and democracy put forward by Brown (2003, 2006), Streeck (2014), Biebricher (2015) and others. But it is also interesting for reasons concerned with the latent neo-liberalism of management's (indirect) founding father, Max Weber.

That neo-liberalism is rule bound seems beyond dispute. Biebricher (2015) has strongly argued different variants of neo-liberalism make use of rules and expertise to stifle democracy. For example, he suggests ordo-liberals use expert rules as a mechanism to restrict democracy because they believe the masses do not know what is in their own interests. As Megay (1970: 404-424) highlights, rules were to be used as a tool in a 'revolt of the elite' who were a 'natural aristocracy'. Indeed, one can see elements of this in the contemporary 'Greek' crisis wherein Jens Weidmann, the head of the Bundesbank (quoted in Streeck, 2014: 109), commented:

> In the event that a country does not keep to the budgetary rules national sovereignty would automatically pass to the EU level to the extent for the targets to be reached… one example might be the right to implement – and not simply demand – tax increases or proportionate spending cuts… Within such a framework, the EU level could secure the path to consolidation, even if no majority could be found in the national parliament concerned.

Or one can also think of the UK government's push to ensure legislation stopping future governments from running deficits. In these renditions democracy has to be curtailed by rules created via an elite 'expertocracy' (Müller, 2015: 6).

Hayek also develops such rule inflected structures. Following Carl Schmitt's repost to the attempts by the German left to commandeer the private property of the former Kaiser (Scheuerman, 1997), Hayek (1960: 54-71) argues general and self-binding rules need to be developed to stop a state acting on the whim of an electorate (or of experts – both of whom he distrusted). General rules would keep democracy at bay. Rules should be used to enable the free flow of capital, goods, labour etc. and thereby limit the capacity of democratically elected governments to initiate changes which damaged returns on property. If the electorate 'freely' undermined these returns, then property (and skilled labour) could move to where it could get a better return –hopefully the burden of such responsibility would chasten democrats. This 'interstate federalism' (Hayek, 1948: 255-272; Streeck, 2014: 97-102) shares many features with the current neo-liberal turn of the EU. Thus neo-liberals are not necessarily hostile to rules or to bureaucratic forms, even if Mises (1944:10 fn1) claimed they were un-American. Indeed, rules are used to instil authority and circumvent democracy with softer or harder forms of authoritarianism. Echoing Graeber, less play and more expert games lies at the heart of the supposedly dynamic, creative, free-flowing, bottom-up neo-liberal economy.

But how does this link to the rules outlined in Weber's analysis of bureaucracy? Weber (1948: 197) clearly outlines how bureaucratic rules can be used by those lower in the hierarchy to appeal to a higher authority against decisions made by their immediate superiors. He (1948: 216-217) clearly links bureaucracy to rational justice rather than the 'Kadi-justice' of charismatic or traditional systems. And finally, he (1948: 224-225) clearly links it to a 'levelling of social differences' because it undermines ascribed power. Here, bureaucracy appears as an enabling force. But as is well known Weber does not stop there. Bureaucracy is not simply 'good' because it is '"Without regard for persons" (which) is also the watchword for the market' (Weber, 1948: 215). Like the law or the market, as a rational impersonal system bureaucracy is ethically neutral (Hennis, 1988: 90-103). Thus it can be beneficial to larger or smaller groups, to all or to the few. Graeber [14-21], for example, suggests during the post-war boom the bureaucratic corporate structure was built on an inter-class alliance between workers and managers which broke down when 'management' abandoned workers to side with an investor class. In this transition, to what we call neo-liberalism, the many were disempowered and the few were dramatically enriched as the organizational (and other) rules changed. Thus bureaucracy and rules are always the result of social re-composition – of the relations rather than the forces of production.

One can see this clearly in the twentieth century emergence of the American corporation. The shift from the 'Inside Contract' wherein hierarchical and unequal craft workers self-organized production according to forms of authority built on expertise, collegiality, community, age, gender, etc. to what became the bureaucratic corporate form (Buttrick, 1951; Williamson, 1952; Clawson, 1980; Englander, 1987). Here, one can surmise that these craft 'honorific arrangements' meant that the 'administration, therefore, runs less precisely and is more independent of superiors; hence, it is less unified and slower' (Weber, 1948: 214). The creation of bureaucracy was used to counter this 'independence' and to make administration quicker, more certain, dependent on superiors, and more anti-democratic. This is precisely the point made by Clawson (1980) and Stone (1973). Stone's examination of the steel industry is important in this regard. In fine detail, she lays out Graeber's claim that bureaucracy is not neutral and demonstrates how the emergence of the modern bureaucratic corporation, dominated by rules and procedures, was the outcome of social struggle into which were built class, ethnicity, gender, and age related forms of power.

For management research, Graeber's essential point is that the bureaucracy versus the post-bureaucracy-entrepreneurial firm is a misplaced argument. Today both are essential elements of neo-liberal social re-composition. Central here he argues is the blurring of the public and the private. Government bureaucratic re-regulation has enabled corporate bureaucracies access public funding on a monumental scale; so, too, have the trade bureaucracies, the WTO, IMF, World Bank, G8, EU, NAFTA. They have opened up large elements of the Global South to bureaucracies such as Goldman Sachs, American Insurance Group, etc. Furthermore, he argues, we are complicit in this because through these bureaucracies we act as though we believe trade is free, the market is free, and corporations fair and transparent. He goes on to add that the expansion of the market is really an expansion of more 'people in offices to administer things' [32]. Thus in reality it is the opposite of everything the free market is supposed to be. He also claims the same is true for the demise of the labour theory of value (a view of value adhered to by those working under the Inside Contract). Bureaucracies managed by leaders such as Andrew Carnegie forcefully espoused the notion that efficient bureaucracies headed by men of leadership created wealth, not labour. As such, these leaders should justly take the rewards. Adding this to Michels' (1915: 13) famous suggestion that the organization implies 'a tendency to oligarchy' and the way to deliver elitism was through control of the bureaucracy – we thus have oligarchy. Neo-liberalism necessarily creates a world of ruled and rulers because of 'the technical indispensability of leadership' (Michels, 1915: 400). Thus Mount misses the point when he claims the new oligarchs have emerged because the neo-liberal reforms 'have not been neo-liberal enough' (2013: 11). Quite simply, at the heart of neo-liberalism is a bureaucratic oligarchy. Herein lies the rub for Graeber. More markets mean more bureaucracy and more oligarchy. Not an outrageous position – indeed it is increasingly espoused by theorists such as Wolfgang Streeck and Wendy Brown. The anti-democratic bureaucracy and the anti-democratic modern market reinforce one another to create our contemporary elite societies.

Of course this returns us to that other elite theorist, Max Weber (Titunik, 1997). The indirect father of much of management – leadership, bureaucracy, innovation, and entrepreneurship all bear his imprint – shared many similarities with neo-liberal thinkers. This is why he influenced them so much (Mommsen, 1974: 64; Gane, 2013; 2014). For example, Mises takes Weber's concept of instrumental rationality to apply it to all human action and to imbue it with values (Gane, 2013: 8-9). Schumpeter – not a neo-liberal – and the neo-liberals use Weber's concept of the static, planned, bureaucracy to posit the need for an innovator/entrepreneur. Leadership studies is, to a significant extent, based on Weber's concept of the leader as a charismatic figure (Beyer, 1999). And finally, organization studies examines or critiques Weber's bureaucracy more than perhaps any other single form. Weber is at the heart of the study of management, yet we misinterpret him.

Weber thinks in neo-liberal ways in two senses. Firstly, his concept of economic behaviour is heavily neo-liberal (Parson, 2003). Neo-liberalism critiques orthodox economics because it is static, it does not allow for error, and it does not have a temporal dimension. As I have already argued in this journal (Hanlon, 2014), time and uncertainty are central to neo-liberalism. The market is never static, the future always unknown, people make mistakes, and the market acts as an institution which teaches us over time. Those who learn best do well, those who cannot (or will not) suffer, and the market never achieves equilibrium (Hayek, 1948: 100). Thus, central to neo-liberal economics is a view of the market as an institution that teaches us that the future is important because we base future actions on learned experiences, and that uncertainty is a fundamental part of economic life (Hanlon, 2014). This view makes the entrepreneur/innovator the key subject because more than any other figure, she delivers the market's most urgent needs. This subject learns from the market what is in demand and provides it – it is not the scientist, the inventor, or the worker who shapes the economy but the entrepreneur. In his analysis of utility theory, wherein he favourably comments on the Austrian economist Carl Menger, Weber too stressed the future, uncertainty, and the role of the market as a learning mechanism (1975: 33). Indeed, he highlights the importance of uncertainty with a footnote mentioning Frank Knights' famous work *Risk uncertainty and profit* in this quote:

The calculations underlying trading activity will be called "speculative" to the extent to which they are oriented to possibilities, the realization of which is regarded as fortuitous and is in this sense uncalculable. In this sense the merchant assumes the burden of "uncertainty" (51). The transition from rational calculation to what is in this sense speculative calculation is entirely continuous, since no calculation which attempts to forecast future situations can be completely secured against "accidental" factors. The distinction thus has reference only to a difference in the *degree* of rationality. (1978: 159 fn 51, emphasis in original)

In light of this people learn in the marketplace (Weber, 1975: 29). The market and our behaviour within it are shaped by three forces. One, our needs and their satisfaction in light of limited supply; two, in contrast to orthodox economics, subjectively felt urgent needs are (or are not) satisfied and replaced or supplanted with other more urgent needs; and three, prior experience of subjective needs and efforts to attain them shape our future calculation of effort, spend, investment, and so on. Here need, temporal matters, learning, error, matter in a way that Menger would approve of. Thus Weber's sociological analysis of economic action shares very substantial overlaps with Menger's Austrian economics (Parson, 2003: 19). Furthermore, unlike orthodox economics, both Weber (1975: 28) and Menger (Parsons, 2003: 10) stress the importance of interaction and anticipation as central to the formation of price. Price is generated in uncertainty and time rather than as a given outcome of supply and demand. As is well known, the entrepreneur is a key figure in neo-liberalism, but Weber (1978: 92) too stresses their importance because future and uncertain needs need to be 'awakened' and 'directed' by entrepreneurs. In light of this, it is the entrepreneur, not the 'marginal consumer' of orthodox utility theory, who drives production. Here, one sees the outline of a tension between the bureaucracy and the entrepreneur/innovator. The bureaucracy sees planning as the solution to the fixed preferences of marginal utility and the entrepreneur/innovator (or leader) sees the shaping and anticipating of fluid preferences as central to the pursuit of profit – crudely the bureaucracy versus the post-bureaucracy.

These tensions return us to Graeber's merging of bureaucracy and neo-liberalism because Weber is important to both concepts. The bureaucracy and its rules are necessary to deliver neo-liberalism through institutions such as the state, the corporation, the market, etc. But it is also the case that the bureaucracy allows an elite to dominate and, in many respects, force competition onto the rest of us whilst legitimating such actions through the discourses of leadership, entrepreneurship, or innovation – all important neo-liberal and Weberian concepts.

As is well known, Weber was interested in institutions and how they shape behaviour. Often the routines of life created discipline and, as suggested, whilst he (1975) accepted that the ideal type of economic man was an approximation to reality, it was one which was getting closer and closer to reality as institutions altered to accommodate this ideal type. Thus central to institutions like the state, the market, or the bureaucracy are rules which create routines. In his examination of the bureaucracy this worried Weber – he was concerned with oppressive stagnation and the emergence of the bureaucratic personality (Merton, 1940). This bureaucrat is characterised by obedience developed through '*habitual* activity learned in public as well as in private organizations' (Weber, 1948: 229, emphasis in original). Obedient habits make bureaucrats susceptible to corporatism and the formation of unethical bureaucratic economies – a 'robber capitalism' (Weber, 1994: 89) – because they learn the wrong routines. Charismatic leadership is pivotal to undermining this form of bureaucracy and un-freedom in a democratic state (Burawoy, 2013: 752-753; Mommsen, 1974: 72-94). Yet this leadership also demonstrates Weber's neo-liberal democratic scepticism. On the issue of democracy and leadership, he supposedly expressed the following to General Ludendorff:

> In a democracy people choose a leader in whom they trust. Then the chosen leader says "Now shut up and obey me". People and party are now no longer free to interfere in his business. (Gerth and Mills in Weber, 1948: 42)

Weber affirms leadership in the face of bureaucratic capitalist societies but his affirmation allows a few to maintain their freedom and creativity. For the majority, they face a life of being subject to the rules and regulations of the bureaucratic organization (Mommsen, 1974: 93-94). In this manner, competitive-based leaders set the rules and regulations for organizations and societies. But this occurs alongside a world where the masses are dominated by bureaucratic un-freedom.

Furthermore, Weber sees that these twin features of bureaucracy and charismatic leadership – the 'double nature of what may be called the capitalist spirit' (Weber, 1978: 1118) – alter people in two neo-liberal ways. Bureaucracy externally regulates them through rules, rewards and punishments and charismatic leadership internally alters them by giving people new ambitions, desires and beliefs (Weber, 1978: 1115-1117). Thus the charismatic leader acts in ways Weber (and neo-liberals) also associated with the entrepreneur. His work suggests that, if managed by the right elite, bureaucracy and charismatic leadership can shape society, buttress markets, create competitive organizations, mould subjectivity, and protect individual freedom (for some). However, whilst bureaucracy is often presented as the opposite of competitive freedom (Mises, 1944), in actual fact what has occurred is a Weberian combination of neo-liberal management joined to bureaucracy to regulate and de-democratise and create increasing un-freedom for the many and freedom for the elite (Briebricher, 2015; Müller, 2015; Streeck, 2014).

This is clearly obvious in contemporary organizations with their unforgiving bureaucratic use of data to make labour compete and their infatuation with a culture that rewards the successful charismatic leaders and entrepreneurs – just think of the current obsession with Steve Jobs. Here Weber's competitive charismatic leadership and bureaucracy dominate the individual, the organization and the society. This takes place in a market society controlled by large organizations with competiveness, individualism, and private property at its base. In this vision, charismatic leaders alter the bureaucratic rules to change society, anchor competition, and reserve freedom.

Such a world is extremely close to neo-liberalism's entrepreneur. Mises (1996: 252) argues that uncertainty makes us all entrepreneurs. He enshrines (entrepreneurial) knowledge at the heart of social relations so that it creates development in the marketplace and the organization. Because of these attributes the entrepreneurial function is different to simple management. Management deals with 'subordinated entrepreneurial duties' (Mises, 1996: 304). However, in the actual functioning economy you cannot disentangle the two roles (Mises, 1996: 306; Metcalfe, 2006: 83-86). This inability to separate the roles increases in corporate bureaucratic capitalism. This has led some neo-liberals to argue that senior management takes on the entrepreneurial role of driving the economy. Elite management's subjective view and tacit knowledge grow in importance in an 'experimentally organized economy' (Eliasson and Eliasson, 2003). Senior management should act and be rewarded as entrepreneurs. It is they who have the subjective, intuitive, and tacit knowledge central to a bureaucratically filled economy (Eliasson, 1990; 2005; Eliasson and Eliasson, 2003). Here, following Hayek (1945), senior management need to act entrepreneurially because they can also only ever know a small part of the market – their knowledge, like that of everyone else, is incomplete hence they have to imagine the future and not rely on routine – they have to act as 'proxy entrepreneurs' (Foss et al., 2007; 1894). Furthermore, the entrepreneurial function entails the search for profit thereby allocating resources through anticipating the future needs of consumers. From this anticipation, profits or losses ensue which 'thereby shifts the ownership of the means of production from the hands of the less efficient into those of the more efficient' (Mises, 1996: 299).

As such, senior management becomes entrepreneurial through anticipation and the ability to match existing or new routines to this anticipation (Metcalfe, 2006; Foss et al., 2007). Thus the economy can continuously transform or develop itself through what we might call the 'entrepreneurial function of senior management'. Schumpeter's belief in equilibrium meant that knowledge could be concentrated which led him to forecast the demise of the entrepreneur and the rise of the behemoth corporation. However, in the neo-liberal vision, Schumpeter's 'invincible corporation' (Eliasson and Eliasson, 2003: 432) can no longer survive on routine innovation or 'subordinated entrepreneurial duties' and hence the necessary shift of major corporations to an entrepreneurial senior management found in areas of value capture, open innovation, or strategic acquisition. Thus the subjective imagination of the entrepreneur, who stands or falls by the actually realised value from their anticipated future, is transferred to the behemoth corporation (Eliasson, 1990; 2005). This is Graeber's 'total bureaucratisation'.

Central to this is the fact that here entrepreneurship is not creative. Rather it is about value capture (Burczak, 2002; Alvarez and Barney, 2006). Indeed, Kirzner explicitly comments:

> I view the entrepreneur not as a source of innovative ideas ex nihilo but as being *alert* to the opportunities that exist *already* and are waiting to be noticed. In economic development, too, the entrepreneur is to be seen as *responding* to opportunities rather than *creating* them; as *capturing* profit opportunities *rather than* generating them. (1973: 74, emphasis added)

Following Mises (1996), he sees entrepreneurial activity as the ethical inheritor of all wealth (Burczak, 2002). This wealth is then used to pay (or increasingly not pay) others their market price via transaction co-ordination e.g. capitalists, landowners, or workers. Building on Locke and Mises, Kirzner (1973) argues entrepreneurs display initiative and it is this human will – this imagining of profit to be captured and realised – that creates the product and not what flows through labour or capitalist risk – entrepreneurial activity is the key to wealth generation (Burczak, 2002).

Today, corporate bureaucracies supposedly house such entrepreneurial leadership and have used this vision and their economic power to legitimate a world wherein neo-liberal bureaucracy has created levels of inequality that even the Chief Economist of the Bank of England is concerned about and has referred to as corporations 'almost eating themselves'[1] as they snaffle labour's 'share'. This is what David Graeber entreats us to consider.

Graeber's book – whilst by no means perfect – usefully switches our attention to a different bureaucratic battle. Rather than analysing the bureaucratic firm versus the post-bureaucratic firm or the entrepreneurial economy versus corporatism, management scholarship would do well to heed his call and examine the bureaucratic firm as the Trojan horse of neoliberal (post-bureaucratic) oligarchy. As the most productive and efficient organizational form to date (Mills, 1951), it would be a surprise if elites relinquished bureaucratic power without a fight. Far more likely, they would harness such power to further entrench the elite societies neo-liberals have long since sought – Weber's

1 See this interview with Andy Haldane, chief economist at The Bank of England: https://www.youtube.com/watch?v=ZmUlTuyRPd8 [accessed 18 November 2015].

bureaucracy and his elitism combine in neo-liberalism's oligarchic 'total bureaucratisation' (Hanlon, 2016).

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the author

Gerard Hanlon is located at the School of Business and Management, Queen Mary University of London. His recent work has concentrated on Neo-liberalism, Post-Workerism and the changing nature of work and subjectivity, the shift from a real to a total subsumption of labour to capital, innovation and entrepreneurship. His most recent book (2016) is entitled *The dark side of management – A secret history of management knowledge* (London, Routledge).
Email: g.hanlon@qmul.ac.uk