'Two Fallacies about Corporations' in Subramanian Rangan, ed, Performance and Progress: Essays on Capitalism,

PART V

POWER AND TRUST

CHAPTER □□

TWO FALLACIES ABOUT CORPORATIONS

PHILIP PETTIT

Abstract

One of the most important challenges for political theory is to identify the extent to which corporations should be facilitated and restricted in law. By way of background to that challenge, we need to develop a view about the nature and the potential of corporations and indeed of corporate bodies in general. This chapter discusses two fallacies that we should avoid in this exercise. One, a claim popular among economists, that corporate bodies are not really agents at all. The other, a claim associated with US jurisprudence, that not only are they agents, they are persons whose rights call in the same way as the rights of individual persons for legal recognition and protection.

INTRODUCTION

We are moving towards a world in which more and more people live their working lives as the employees of corporations, and more and more corporations are part of large multinational conglomerates. This development is probably inevitable in a world of global markets, where economies of scale, efficiencies of location, and the attractions of greater market control converge in support of ever more intense incorporation. There are many challenges that we face in looking for ways in which to organize our lives on this planet over the coming decades and centuries but one of the major issues is: how are we to cope with this growing corporatization of our world?

Corporatization is as likely to have economic advantages as it is to generate economic problems and I see the challenge that it raises as one of a more political kind. As things stand in most countries, corporations are not only economically well-resourced, they are also legally privileged, politically powerful, and democratically uncontrolled (Galanter □□□□). Such titans raise a challenge for us as individuals insofar as we coexist

with them in our neighborhoods, seek employment by them in their workplaces, purchase the goods and services they provide, compete with them in open markets, and deal with them as plaintiffs or defendants in the courts. And they raise a challenge for us as communities insofar as they often have a stranglehold over our politicians, whether by virtue of the permanent threat of moving elsewhere or by dint of the capacity to exercise electoral patronage and extract payback.

The political challenge of corporations is hard to underestimate. In the competition for corporate advantage—say, the maximization of shareholder income and wealth—corporations are bound to use their muscle to seek concessions from governments that are likely to make the lives of ordinary people worse off. They will seek to preserve and even enhance the existing infrastructure of their influence: their legal privilege, their political power, and the absence of democratic control over their operations. And putting that infrastructure to work, they will push for more business-friendly arrangements: less unionization, fewer worker rights, weaker consumer organizations, looser environmental constraints, lighter regulatory controls, and, of course, a lower level of corporate taxation.

From my point of view, the prospect of that world is a specter to shrink from. Consider the possible consequences under a worst-case scenario. In the absence of unions or workplace restrictions, we would depend on the whim of a manager for being kept in corporate employment. In the absence of consumer organizations, we would lose important checks on the quality of our food and other purchases. In the absence of environmental constraints, we would be in danger of a serious decline in the quality of public health. In the absence of equality in legal power, we would have little or no chance of using our day in court to call corporations to book. In the absence of independent regulations, we would be in danger of corporate risk-taking and another disaster like the GFC. In the absence of control over corporate boardrooms we would find it hard to know what was going on in the first place. And in the absence of political equality with corporations, we would have almost no hope of getting government to impose our shared, democratic will on larger corporate bodies. We would live in a condition of corporate domination, not a condition of freedom and independence (Pettit □□□□b).

It may be said against the picture I have offered that in the past decade or so corporations have begun to shrink in size, choosing to outsource a large range of their activity, productive and otherwise (Davis □□□□). But while this is a very interesting development, and needs to be carefully tracked, I do not see it as a source of consolation. As a corporation shrinks to a board and a management that operate in the interest of shareholders, outsourcing production, distribution, marketing, and other functions, that threatens to concentrate progressively the power of those at the top, making them less responsive to the ever more replaceable bodies of workers that they employ. There is little or no possibility of unions serving as countervailing forces, for example, if a corporation can switch the production of the goods it sells from one body of workers to another.

I may have painted an excessively lurid description of an excessively pessimistic vision. I put it on the table to try to muster agreement that whatever differences divide

us on matters of detail, we can all agree that this image of a fully corporatized world—this image of Earth Inc—is not attractive, and not even tolerable. And if we agree on that, then the questions we ought to be facing bear on what our different governments ought to be doing, individually and in collaboration, in order to guard against it.

Unfortunately, I cannot begin to deal with those questions here; limitations of space and skill make it impossible. What I propose to do instead is to identify and criticize two fallacies or mistakes that might dull our sense of dismay at the scenario of a fully corporatized world, weakening our commitment to guard against it. They would each would mislead us, although in different ways, about the power of corporations.

The first fallacy is that corporations are dense sites of market-like activity and not entities of the kind that raise concerns of the type illustrated. They are networks of individual-to-individual, relatively enduring arrangements, so the idea goes, and they exist because of serving the contracting parties better than more regular, episodic contracts (Williamson □□□□). The mistake or fallacy here is the assumption, quite common in economics circles, that there is no literal sense in which corporations constitute agents like you and me.

The second fallacy is common within legal rather than economic traditions of thought and involves an error of exactly the opposite kind. It holds that corporations are indeed agents like you and me, not just impersonal contractual arrangements. But it maintains that they are personal agents and that they have a just claim to the rights that our constitutions give to natural persons like you and me. They may not have the capacity to exercise all the rights that we routinely enjoy but where they have appropriate abilities, they should not be denied the corresponding rights.[1]

The two fallacies I describe are not just misleading in relation to commercial bodies. They mislead us with any familiar sort of corporate body, whether that be a voluntary association, a political party, an ecclesiastical organization, or even a social movement. In the discussion that follows, therefore, I shall often speak of corporate bodies in general, focusing only as appropriate on corporations in particular. I do not suggest that all corporate bodies should be granted the same rights, only that the fallacies I consider are misleading in relation to all.

AGAINST THE CLAIM THAT CORPORATE BODIES ARE NOT REAL AGENTS

Corporate Bodies are Representable as Agents

When people incorporate for any purpose or purposes they form a body that acts through its members as if it were an individual agent (List and Pettit □□□□). They

[1] My argument on both fronts is heavily indebted to joint work with Christian List (□□□□).

embrace or at least acquiesce in relevant purposes, and perhaps in a mode of revising or extending those purposes. They endorse a method of forming common judgments that can direct them in the pursuit of those ends; these judgments will identify the opportunities for advancing the ends, the relative costs and benefits of different options, the best overall means for realizing their ends, and so on. And they act as their purposes require, according to their judgments; they may act as a whole in some cases but in most they will authorize one or another member or subgroup to act in their name.

In order to be effective in the manner of an individual agent, such an incorporated group has to organize itself so as to be more or less reliable on two fronts. First, it must be evidentially reliable in the judgments that it forms. That is, it must follow some procedure for generating representations of opportunities, costs, benefits, and means that are supported by the evidence available via its members to the group as a whole. And second, it must be executively reliable in the actions it sponsors. That is, it must generally adopt those actions or initiatives that promise to advance its purposes according to its judgments; it must not stall in its decisions, dither about what to do, or misidentify the right path. Like individuals, corporate bodies may often fall away from these evidential and executive standards but they cannot fall too far or too frequently without losing any claim to mimic individuals.

There are many corporate bodies in this sense: organizations of individuals that operate as evidentially and executively reliable centers of decision and action. Any voluntary association that recruits its members effectively in furthering some cause counts as a corporate agent of that kind. So too does any political party that gets behind a set of policies or ~~individuals~~ and organizes itself for the purposes of achieving democratic power. So does the church that mobilizes its members in confessional unity and recruits them to act in support of ecclesiastical community, evangelization, and social or political action. And so of course does the corporation or business that marshals its management and workforce in pursuit of the means laid down by its board for maximizing the profits accruing to its shareholders.

These corporate bodies all function under the laws of the state or states in whose territories they operate. And each state of that kind is itself a corporate body, albeit one that imposes itself coercively within its territory. It operates or claims to operate on behalf of its membership or citizenry, however they are defined. It is organized via subgroups of elected or unelected officials, legislative, administrative, and judicial, whose activities are coordinated under a written or unwritten constitution. And while its judgments over means and other matters may shift with electoral or other changes in the body of governing officials, it acts or claims to act for the benefit of its members, both in domestic and international contexts.

The striking thing about corporate bodies, as these examples illustrate, is that they come in many different sizes and, more important, assume many different styles. The small-scale voluntary association—say, the small association you and some friends form for the pursuit of environmental goals—may operate in a wholly egalitarian way, with every member exercising a vote in determination of overall general purposes and

judgments and with different members rotating in the exercise of special offices. But most parties and churches and corporations and states are very different from this. They are much larger in scale, they operate under hierarchical rules, and they often distribute purpose-shaping and judgment-making functions across different, coordinated sub-bodies (Hess □□□). All corporate bodies have to establish a corporate internal decision-making structure—a CID, as Peter French (□□□) calls it—but those structures may vary enormously across different organizations.

To the extent that corporate bodies pursue certain purposes in an executively reliable way according to evidentially reliable judgments, they are representable as agents in a straightforward manner. Their behavior allows us to identify independently plausible purposes and judgments such that in general it can be seen as oriented toward the promotion of those purposes under the guidance of those judgments. We can sensibly adopt the intentional stance, as Daniel Dennett (□□□) has long called it, in seeking to make sense of the steps a corporate body takes in the actual situation and to predict what it is likely to do under different scenarios (Tollefsen □□□). We can treat it as we treat other animals, or at least other more or less complex animals, when we look on them as centers of purpose, judgment, and agency.

Corporate Bodies Represent themselves as Agents

But in one important respect corporate bodies are different from animals like these and more akin to human agents. Not only are they representable as acting reliably, in accordance with more or less reliable judgments, for the promotion of certain purposes. They actively represent themselves in that light too. They speak for themselves, whether through an authorized spokesperson or, more typically, a coordinated network of authorized spokespersons, each operating in a different domain. Those spokespersons announce the purposes adopted by the corporate body and the judgments it makes about relevant opportunities, means, and the like, inviting their own members, other individuals, and indeed other bodies to judge them for how far they act for those purposes, in fidelity to those judgments: inviting them, in effect, to take an intentional stance and view them from that perspective.

In representing themselves in this way, corporate bodies operate in a fashion like that in which human beings, you and I, conduct ourselves. For not only do we constitute agents who pursue our purposes, according to our judgments, as many animals do. We also speak for ourselves in a distinctive manner. We declare that this or that is the case, or that we will do such and such, avowing the corresponding belief or intention. And in doing this we foreclose the possibility of excusing a failure to live up to those attitudes by claiming that we misread the evidence on our own minds. Moreover, we promise that we will take this or that action, foreclosing the possibility of excusing a failure to live up to those words, not just by claiming that we misread our minds, but also by claiming that we changed our minds since uttering those words.

With both avowals of attitude and promises of action, we do not just report on how we think or what we will do, since reports allow of mind-misreading and mind-changing excuses. We put ourselves on the line, making it reputationally costly to fail to live up to our words; we commit ourselves to thinking and acting as the words indicate.

What we do in these respects, every corporate body can do also. Each body will have an incentive, shared by its members, to endorse only purposes and judgments—for short, only attitudes—that it can live up to and, given the attitudes it endorses, to take all the actions that its attitudes require. If it fails to perform in that way, then it will not act effectively for the purposes shared among the membership. And if it fails to perform in that way—if it fails to live up to its word—then it cannot hope to attract others to cooperate with it: say, to take it at its word and establish contractual relations in one or another domain.

The members of any corporate body can be expected, in view of this incentive, to fall in line with the purposes or judgments announced by an authorized spokesperson. And of course the spokesperson can be expected to endorse only such purposes and judgments as the members authorize them to endorse in the name of the organization. Since this is going to be manifest to all, that means that the announcement of such an attitude commits the corporate body so that the group cannot excuse a failure to live up to the words uttered on the grounds that the spokesperson misread the mind of the group. A similar lesson applies when a spokesperson makes a promise on behalf of the group, committing the group to an action rather than just an attitude. In this case the spokesperson commits it in such a way that the group cannot excuse a failure to act appropriately either by claiming that the spokesperson misread the group mind or by claiming that it changed its mind since the promise was given.

There is a salient and important distinction between agents like mute animals that cannot speak for themselves and agents like us, who can. A traditional way of marking that distinction is to describe the latter sorts of agents as persons: agents that can speak for themselves, give their word in explicit or implicit commitment to others, and be held responsible for whether or not they keep their word. Persons in this sense are distinguished by how they can function, not by how they are composed. And in that functional sense, we can now see that not only do we individual human beings count as persons, so do the group agents that we constitute.[2]

The idea that corporate bodies can represent themselves appropriately, and therefore count as persons, appears in the high Middle Ages. In a papal bull of □□□□, Pope Innocent IV agreed that a corporate body is a persona or person in arguing, more specifically, that because it is a persona ficta—a fabricated person—it cannot be excommunicated. While theologians often took this qualification to mean that it was a fictional rather than a real person, the lawyers took it to imply that it was an artificial person: a real person, to be sure, but not a natural person like you and me (Eschmann

[2] While this conception of a person has its roots in medieval, legal usage (Duff □□□□), it is developed in different forms by Hobbes (□□□□), as I note in the text, and also by Locke (□□□□); see Rovane (□□□□) and List and Pettit (□□□□).

; Canning ; Kantorowicz). And with this development the recognition of corporate bodies as full-scale persons became a centerpiece of Western thought.

The theme reappears in the writings of Thomas Hobbes in the seventeenth century, for example, although modified to suit the purposes of his political philosophy (Pettit). He makes representation or "personation," as he also calls it, central to the possibility of a group's creating and enacting a single mind. "A multitude of men are made one person, when they are by one man, or one person, represented." Where does the unity come from? From the fact that the representing individual—or body—will speak with one voice, thereby testifying to one mind in the group: "it is the unity of the representer, not the unity of the represented, that maketh the person one" (Hobbes : ,).

Against the First Fallacy

The claims I have just defended run directly counter to the tradition in economic circles of claiming that group agents are expressive fictions and that in the words of John Austin (:), the nineteenth-century jurist, they can be cast as subjects or agents "only by figment, and for the sake of brevity of discussion." Anthony Quinton (:) sums up the view in the following passage: "We do, of course, speak freely of the mental properties and acts of a group in the way we do of individual people. Groups are said to have beliefs, emotions, and attitudes and to take decisions and make promises. But these ways of speaking are plainly metaphorical. To ascribe mental predicates to a group is always an indirect way of ascribing such predicates to its members."

I hope that my remarks about corporate bodies already makes clear that this view is utterly at odds with how we ordinarily think. It is certainly true that we sometimes speak in a figurative way of the things that certain groups think and do, not giving it any literal significance. We may say in this key that the electorate has opted for dividing power among different parties, or that the markets have made a harsh judgment on the government's policies, or indeed that the working class are resistant to anti-trade union laws. But this sort of talk is clearly intended to be figurative, since the groups in question lack the organization that would enable them to form attitudes and abide by them in action. With the groups envisaged in our examples, however, there is more than enough organization to allow us speak in quite a literal way of what they seek and think and do.

The reductionist line espoused by Austin and Quinton often makes an appearance in the economic literature in the observation any would-be group agent is constituted by a framework of relations among its members—"a nexus of contracts," in the favored phrase—and that this means it cannot be an agent in any literal sense. On this approach, as one commentator puts it (Grantham :), it is taken as obvious that a corporation or group agent is just "a collective noun for the web of contracts that link the various participants."

The suggestion behind this reductionism makes little sense. It is true that the existence of contractual arrangements between individuals does not ensure in itself that the group they constitute is an agent; otherwise every market, for example, would be an agent. But that does not mean that that no sorts of contractual arrangements are capable of making a group into an agent. Consider the argument envisaged in the nexus-of-contracts line of thought: "Markets and corporations are both built out of contracts; but markets are not agents; and so neither can corporations be agents." That the argument is invalid should be obvious from the clear invalidity of the parallel argument: "Trees and human beings are both built out of cells; but trees are not agents; and so neither can human beings be agents."

As the cellular structure of human beings enables them to be agents, unlike the cellular structure of trees, so the contractual structure of corporate bodies enables them to be agents, unlike the contractual structure of markets. It makes it possible for them to be representable as agents and indeed to self-represent as agents. Contractual or quasi-contractual arrangements among members will give rise to a corporate agent if they are designed to ensure that overall the group meets the conditions for being representable in that way.

There is more to say in support of the agential status of corporate bodies, since the fact that they are not fictions of the kind that Quinton has in mind does not mean that they are not fictions in a distinct sense: for example, in a sense that someone like Hobbes might have endorsed (Skinner). But that possibility need not detain us; the considerations rehearsed ought to be sufficient for current purposes (Pettit a).

Against the Claim that Corporate Agents Have Autonomous Rights

Some Legal History

The medieval tradition that began with Innocent IV was continuous with a long line of legal thought, already found in the compendium of Roman law, compiled under the Emperor Justinian in Constantinople in the th century CE. The Digest, which is a central part of that compendium, quotes the eminent second-century jurist, Ulpian, with approval on the crucial idea: "if anything is owed to a group agent (universitas), it is not owed to the individual members (singuli); nor do the individual members owe that which the group agent owes" (Duff :). This idea meant that the group, acting as such, has to be treated as enjoying an important autonomy relative to the individuals who make it up. It can enjoy rights and duties in its own name and these are distinct from the rights and duties of any individual in its ranks.

The medieval tradition built on the Roman in dignifying any such corporate body with the name of a persona or person, as we saw. The legal tradition in particular took it

to signify just that the corporate body is an artificial person. It is a person as real as you and I, albeit one constructed by institutional rather than biological means: that is, as they would have thought, by human rather than divine hands.

The legal tradition of the fourteenth century already made much of the idea of the corporate person. Thus Bartolus of Sassoferrato, who was a Professor of Law at the University of Perugia, used it to great effect in maintaining that a city republic like Perugia was a self-governing entity (Woolf ; Canning ; Ryan). At the time the Holy Roman Emperor was treated in the common law, so called—the Roman law, rediscovered at the end of the eleventh century, that formed the basis of civil and canon law—as dominus mundi, lord of the world. This gave him great legal powers of interference in the states that belonged within the Holy Roman Empire—in effect, Germany and Italy—at least insofar as they did not have rulers of their own. It was accepted that, if a city or state had a king or prince of its own, then that person represented the Emperor within local boundaries and the Emperor could not interfere within those boundaries. The principle was that the king in his own realm is the Emperor of that realm: rex in suo regno est imperator sui regni.

A city republic like Perugia was in obvious difficulty insofar as it did not have a king or prince—a rex or princeps—of its own. But Bartolus used the new doctrine of the corporate person to great effect in arguing that this difficulty was only apparent. He pointed out that a city republic organized its business like any familiar corporate body such as a guild or monastic order: it was ruled by a council that citizens elected and on which they took turns in serving. Thus he argued on this basis that the civitas—the state or citizenry—was itself a corporate body or universitas. But if it was a corporate body, it was a persona or person, albeit a persona ficta, an artificial person. And if it was a person, then in virtue of its role in governing its members, it counted as a princeps or prince. In words long quoted after Bartolus's death, it was a sui princeps, a prince unto itself.

The political use of the idea of the corporate person went hand in hand over the following centuries with its use in characterizing other corporate bodies, in particular corporations. Thus in the s Hobbes (: ,) could claim that just as a company of merchants counts as a corporate person, so too does any commonwealth count as a civil person. While the use of the image of the corporate person in describing states declined in the eighteenth century—a great exception, however, is Rousseau's ( ) Social Contract—its use in relation to corporate bodies, in particular corporations, greatly increased. Thus in his classic Commentaries on the Laws of England, published in the s, William Blackstone (: bk , ch. , §) could write: "Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic."

This traditional way of thinking about corporations was given a firm place in American law in a famous case decided by the Supreme Court in , Dartmouth College v Woodward. The court decided that the Constitution protected the

contractually based constitution of Dartmouth College from interference by the legislature. And in the course of the hearing Chief Justice Marshall summed up the court's position in asserting that by means of incorporation "a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

What rights did corporate bodies enjoy under the law? Blackstone (bk □, ch. □, §§□□□–□) held that when they incorporate with the permission of the King, "a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their politic capacity, which they were utterly incapable of in their natural." More specifically, so he argued (bk □, ch. □□, §§□□□–□), the bodies thereby formed enjoy five rights: first, to continue indefinitely in existence, enjoying "perpetual succession"; second, "to sue or be sued, implead or be impleaded, grant or receive, by its corporate name"; third, "to purchase lands, and hold them"; fourth, to "manifest its intentions," as when it "acts and speaks **...**by its common seal": i.e. via an authorized spokesperson; and fifth, to "make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land."

Blackstone was writing at a time when the rights of corporations proper were limited under the South Sea Bubble Act of □□□□, which had prohibited the formation of commercial corporations not authorized by royal charter or Act of Parliament. And so it is unsurprising that he puts the following qualification on the fifth right: "But no trading company is with us allowed to make by-laws which may affect the king's prerogative, or the common profit of the people **...**unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits; and, even though they be so approved, still, if contrary to law, they are void."

The South Sea Bubble Act was repealed in □□□□ and over the following few decades, corporations gained enormously in the rights they were given both in Britain, in Europe more generally, and in the United States. They could be formed by recourse to a notary or lawyer; they could operate across the land, not just in a specific territory; they could change their sphere of activity at will; they could own and be owned by other corporations; and their shareholders could enjoy the right of limited liability, which had been implicit at best up to the mid-nineteenth century (Horwitz □□□□). This growth in the rights of corporations went along with the ever more important economic role that they played in industrial development, particularly in the construction of canals and railroads.

At the height of this development, the question arose in the United States as to the constitutional standing of corporations and of corporate bodies more generally. With a written constitution in place, and with lots of issues to settle about the status of corporations, it was inevitable that sooner or later the Supreme Court would have to decide what rights accrue to corporations. And, given the focus of the Constitution on individuals, it was inevitable in particular that it would have to make a judgment on whether the articles and amendments of the document that articulated the rights for individuals established the same rights for corporate persons.

The issue finally came to a head in a case heard in □□□□, Santa Clara County v Southern Pacific Railroad. The Court had to decide in that case whether the Railroad was required to pay taxes on the wooden fences that bordered the track it used in Santa Clara County. In its defense the Railroad made a number of points: at the more mundane end, that it did not actually own the fence; at the more elevated, that it was protected against the allegedly unfair treatment by the County under the Fourteenth Amendment to the Constitution, which had been passed in □□□□. The relevant part of the first section of that amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The claim made by the Railroad was that the County proposed to breach its claims as a person under the last equal protection clause.

The Court found for the Railroad on the grounds of its not actually owning the fence on which the County wished to tax it. But the court report cited the Chief Justice at the time—he died before the report actually appeared—as offering an important remark, or obiter dictum, on the constitutional defense. "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does" (Horwitz □□□□: □□).

This remark had important ramifications. Supported in a long line of judgments, the Court was able to maintain in □□□□, in its judgment on Southern Railway Co. v Greene: "That the corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion" (Schane □□□□). This judgment has always been contentious in US jurisprudence, since the Fourteenth Amendment was one of the Reconstruction Amendments designed to establish the civic status of emancipated slaves in the wake of the Civil War. But time and again it has played a role in judgments that invoked the Constitution to argue for corporate rights. These included the right to search and seizure protection under the Fourth Amendment (□□□□); the right to jury trial in criminal cases under the Sixth Amendment; the right to jury trial in civil cases under the Seventh Amendment; and, on the grounds that money is speech, the same right as individuals to independent political expenditures under the First Amendment (□□□□).

This jurisprudential tradition, particularly the finding in □□□□ in the case Citizens United v Federal Election Commission, has given life to the second of our two fallacies. This is the claim that corporate bodies have the same claim as individuals to be given certain rights under law. We naturally think that individuals have a claim to be given rights under law on the basis of their having natural, pre-legal rights of a certain kind or on the basis of their having certain needs or preferences. In either case we hold that they have a claim to autonomous rights in law: a claim that is based on their own interests, whether they are construed as pre-existing rights or needs or preferences, and not on the interests of other entities. According to second of our fallacies, corporate

persons have a claim of a parallel kind to autonomous legal rights: a claim that is based on their own interests as corporate persons. I think that this claim is just as mistaken as the earlier claim we considered.

Against the Second Fallacy

When a number of people form to create a corporate person, they exercise the right of association that they are likely to enjoy under any reasonable dispensation and they do so, presumably, because that answers to certain shared interests, commercial or otherwise. But our shared interests as members of a presumptively equal community lead us to impose legal limits on how people should associate in any of a range of areas: for example, in conspiring to commit crime, or in forming a cartel to fix prices. And there is every reason, by analogy with such interventions, why our shared, communal interests might lead us to put legal limits on how people may associate in forming corporate bodies. There is every reason, in other words, why those interests should lead us to restrict the range of rights that the artificial persons created by incorporation should be able to enjoy. After all, corporate or artificial persons, as Blackstone says, "are created and devised by human laws for the purposes of society and government."

This argument, spelled out a little more carefully, runs as follows:

- To give any rights to corporate agents is to give corresponding rights of association to their members; thus to give a right of changing its sphere of activity to a corporate body is to give its members the right to associate in a way that enables them to alter the sphere in which they act together.
- The rights of association that ought to be given to individual agents should be fixed by a consideration of the interests of individuals in the community: the interests of those associating and, in an egalitarian spirit, the interests of others too.
- Hence the rights that ought to be given to corporate agents should be fixed by the egalitarian consideration of the interests of the individuals associating and the individuals affected; they ought not to be determined by reference to the interests of the corporate entities themselves.

The first proposition asserts that the rights of corporate persons are determined by the rights of individuals, in particular their rights of association; the second holds that the rights of individuals to associate with one another ought to be restricted to fit with the interests of all individuals in the community; and the third draws the conclusion that the corresponding corporate rights ought therefore to be restricted in the same way.

This argument presupposes, plausibly, that the interests of all individuals in the community, more or less equally balanced, ought to determine the rights accorded to any individuals, in particular the rights of association that we establish. It shows that if we are to stick with this principle—a principle of equal individual interests, as we may call

it—then we must be prepared to limit the rights that we establish for the corporate bodies that individuals form, taking account of their effect on the interests of individuals.

If we grant rights to corporate bodies on the basis of the interests of those bodies themselves—if we grant them rights on a parallel basis to that on which we grant rights to individuals—then we are very likely to breach that principle. And insofar as that is possible, the principle of equal individual interests requires us to deny that corporate bodies should have autonomous rights in law; they should only have such rights as answer equally to the interests of individuals. The cost of granting corporate agents rights on an independent basis—that is, other than by reference to the principle of equal individual interests—is that the law might no longer treat individuals as equals; it might give some of those who associate in various corporate forms insider benefits that would impose intuitively unfair costs on those outside such groups or perhaps on other members.

It may be said that these costs ought not to matter if all individuals are given the same legal right to associate in a self-serving way. But that is scarcely a consoling thought. It suggests that giving corporate bodies rights on an independent basis would provide an incentive for individuals to compete in a free-for-all attempt to gain advantages in relation to one another. And since there is no prospect of equal gains in such a zero-sum game, it would mean that some individuals are bound to end up in a position of serious disadvantage in relation to others: that is, in a position where their interests do not count for as much as the interests of others.

Suppose, as is currently the case in the United States, that corporate bodies are given the same legal rights to make independent political expenditures as individuals. That means that those incorporated for collateral reasons—say, as a business or union—can exercise their clout under the corporate form in a way that may swamp the enterprise and the confidence of the unincorporated. Indeed it means in many of these cases that those at the helm of such organizations, who will often be subject to little discipline in the exercise of patronage—think of the CEOs of corporations—will be super-empowered individuals in the political sphere. They will be in a position to disburse corporate funds more or less at will to the causes, and in effect the candidates, of their choosing. The principle of equal individual interests argues against giving any corporate bodies rights that would have such an adverse effect on the interests of some individuals.

Is the principle of equal individual interests sufficiently compelling to support the rejection of our second fallacy? It may not seem so to those who think of the corporate bodies we individuals construct on an analogy with the children we procreate as parents. Just as we do not think that the interests of parents ought to determine the rights that we establish for children so, it may be suggested, we ought not to think that the interests of individuals ought to determine the rights that we establish for corporate bodies. Children have interests of their own, distinct from those of their parents, and the idea here is that corporate bodies also have interests of their own, distinct from those of their creators.

This idea is not persuasive for the simple reason that, while parents produce children that grow up to function without parental support and to have interests that are distinct

from their parents, corporate bodies are quite different. They remain completely dependent on their members for being sustained in existence and activity, and their interests remain firmly tied, therefore, to the interests of those members. Whatever interests are ascribed to corporate bodies, they are not just interests of their own, unlike the interests of children; they inevitably reflect the interests of some or all of the members who sustain them. To give independent attention and concern to those interests, then, would be to discriminate in favor of the interests of such individuals.

It is certainly true that, if we establish corporate bodies, then we must give some rights to them; otherwise they would not have a defined space within which to act and would not be able to play their role as agents among agents. It may even be true that if those corporate bodies are to have any useful function, then the rights we give them must include rights like those listed by Blackstone. But that just means that it would make no sense for the law to deny corporate bodies access to such rights—this would be to outlaw corporate bodies, period—and that it would make no sense, the law permitting, for individuals to refuse to allow their corporate creations the enjoyment of such rights. It does not mean that, once created, corporate persons have interests that call for the protection of legal rights in the way that children have such interests. And it does not mean that the law ought to take account of such interests in determining the rights that should accrue to those bodies.

The upshot of these considerations is that we can allow corporate bodies to have autonomous rights only if we are prepared to reject the idea that the law should treat people as equals in determining what rights—in particular, what rights of association—they are to enjoy. The principle of equal individual interests seems unquestionable, however, and is respected in almost every contemporary philosophy of the state. Thus the cost of allowing corporate bodies to have autonomous rights is just too heavy for the proposal to have any appeal.

There are four different areas in which an assignment of corporate rights might offend against the principle. It might favor some members disproportionately over others in the private or the political benefits of membership: in the rate of recompense for effort and talent, for example, or in the degree of power that some enjoy over others. And it might favor at least some members over outsiders in the private or political benefits ensured: in the greater chances it gives them of winning in legal cases, for example, or in their greater capacities to exercise influence over government. The principle of equal interests calls for a normative inquiry into the rights that ought to be given to different corporate entities: say, to churches or NGOs or corporations. But such an inquiry would carry us well beyond the brief of this chapter.

CONCLUSION

We have looked at two sharply opposed views of corporate bodies, each with a firm place in contemporary thinking, and argued that they are both mistaken. One

maintains that such bodies have no more claim to the status of agents than markets, the other that they have a claim, not just to the status of agents, but to the status and rights of persons like you and me.

As against the first position, we have argued that corporate bodies are agents—agents indeed that have capacities characteristic of natural persons—and that they do raise a challenge for us as citizens who have to make our lives in their company. And as against the second, we have argued that, on pain of betraying the ideal of individual equality, we should only give corporate bodies the rights that it is in the interest of the community of natural persons to bestow; they do not have any independent claims in their own name.

That two such opposed views each have a place in our thinking reflects a failure on the part of our academic and public culture to bring economic and legal traditions of analysis together in charting corporate reality. And that they are each subject to ready criticism, as I hope the foregoing may suggest, reflects a failure to take that thinking to any depth. We face the prospect in this century of having to come to political terms with an ever more corporatized world, as I suggested in the Introduction. The first prerequisite of doing so is that we put behind us the shoddy thinking that these rival positions exemplify.

ACKNOWLEDGMENTS

I benefitted enormously from the discussion of this and other papers at a meeting in the Royal Society, London, in Apr. □□□□, organized by Professor Subramanian Rangan. And equally I benefitted from a thorough discussion of the paper at an event in Paris, Sept. □□□□, which was organized jointly by Gloria Origgi of the Institut Jean Nicod in Paris and Astrid Von Busekist of the Institut d'Etudes Politiques de Paris (Sciences Po).

REFERENCES

Austin, J. (□□□□). Lectures on Jurisprudence, or the Philosophy of Positive Law. London.

Blackstone, W. (□□□□). Commentaries on the Laws of England. New York: Garland.

Canning, J. P. (□□□□). The Corporation in the Political Thought of the Italians Jurists of the Thirteenth and Fourteenth Century. History of Political Thought, □: □–□□.

Canning, J. P. (□□□□). Ideas of the State in Thirteenth and Fourteenth Century Commentators on the Roman Law. Transactions of the Royal Historical Society, □□: □–□□.

Davis, G. F. (□□□□). After the Corporation. Politics and Society, □□: □□□–□□□.

Dennett, D. (□□□□). The Intentional Stance. Cambridge, MA: MIT Press.

Duff, P. W. (□□□□). Personality in Roman Private Law. Cambridge: Cambridge University Press.

Eschmann, T. (□□□□). Studies on the Notion of Society in St Thomas Aquinas, □. St Thomas and the Decretal of Innocent IV Romana Ecclesia: Ceterum. Medieval Studies, □: □–□□.

French, P. A. (□□□□). Collective and Corporate Responsibility. New York: Columbia University Press.

Galanter, M. (□□□□). Planet of the APs: Reflections on the Scale of Law and its Users. Buffalo Law Review, □□: □□□□–□□□□.
Grantham, R. (□□□□). The Doctrinal Basis of the Rights of Company Shareholders. Cambridge Law Journal, □□: □□□–□□.
Hess, K. M. (□□□□). The Free Will of Corporations (and Other Collectives). Philosophical Studies, □□□: □□□–□□.
Hobbes, T. (□□□□). Leviathan, ed. E. Curley. Indianapolis: Hackett.
Hobbes, T. (□□□□). On the Citizen, ed and tr. R. Tuck and M. Silverthorne. Cambridge: Cambridge University Press.
Horwitz, M. J. (□□□□). The Transformation of American Law □□□□–□□□□. Cambridge, MA: Harvard University Press.
Horwitz, M. J. (□□□□). Santa Clara Revisited: The Development of Corporate Theory. In W. J. Samuels and A. S. Miller (eds), Corporations and Society. New York: Greenwood Press, □□–□□.
Kantorowicz, E. H. (□□□□). The King's Two Bodies: A Study in Mediaeval Political Theology. Princeton: Princeton University Press.
List, C., and P. Pettit (□□□□). Group Agency: The Possibility, Design and Status of Corporate Agents. Oxford: Oxford University Press.
Locke, J. (□□□□). An Essay Concerning Human Understanding. Oxford: Oxford University Press.
Pettit, P. (□□□□). Made with Words: Hobbes on Language, Mind and Politics. Princeton: Princeton University Press.
Pettit, P. (□□□□a). Group Agents are Not Expressive, Pragmatic or Theoretical Fictions. Erkenntnis, □□: □□□□–□□.
Pettit, P. (□□□□b). Just Freedom: A Moral Compass for a Complex World. New York: W. W. Norton & Co.
Quinton, A. (□□□□). Social Objects. Proceedings of the Aristotelian Society, □□: □–□□.
Rousseau, J.-J. (□□□□). The Social Contract and Discourses. London: J. M. Dent & Sons.
Rovane, C. (□□□□). The Bounds of Agency: An Essay in Revisionary Metaphysics. Princeton: Princeton University Press.
Ryan, M. (□□□□). Bartolus of Sassoferrato and Free Cities. Transactions of the Royal Historical Society, □: □□–□□.
Schane, S. A. (□□□□). The Corporation is a Person: The Language of a Legal Fiction. Tulane Law Review, □□: □□□–□□□.
Skinner, Q. (□□□□). A Genealogy of the Modern State. London: British Academy.
Tollefsen, D. (□□□□). Organizations as True Believers. Journal of Social Philosophy, □□: □□□–□□□.
Williamson, O. E. (□□□□). Transaction Cost Economics. In R. Schmalensee and R. Willig (eds), Handbook of Industrial Organisation, i. Amsterdam: North Holland: □□□–□□.
Woolf, C. N. S. (□□□□). Bartolus of Sassoferrato. Cambridge: Cambridge University Press.