Citizenship and the Corporation

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Abstract

This article investigates the contribution made by the concept of citizenship to contemporary understandings of the widely held business corporation. Because the conventional economic understanding of corporations and corporate law cannot fully explain the nature of the business corporation and the purposes of corporate law, the framework within which teachers and students of corporate law approach the corporation must be enlarged. By looking at the corporation exclusively through the lens of economics we are unable to account for all features of the corporation and corporate law, and we risk mistaking the purpose of these features, or wrongly supposing that they serve no purpose. The article proposes that through resort to a distinct set of conceptual tools—the concept of citizenship, borrowed from political theory—we can attain a fuller comprehension of the meaning of the corporation.

Table of Contents
Introduction................................................................. 3
I. What is “Citizenship”? ....................................................... 6
   Juristic Citizenship.......................................................... 6
   Political Citizenship........................................................ 9
II. What Can Citizenship Contribute to Our Understanding of the Corporation? 12
   Legal Classification, Legal Equality, and the Corporation............... 13
   Power, Authority and the Corporation..................................... 15
      The Corporation as a Vehicle for the Collective Exercise of Power .... 15
      Authority Versus Discretion............................................ 20
III. Possible Objections to the Citizenship Metaphor ....................... 28
      Voluntariness of Entry and Exit...................................... 29
      Shareholder Democracy is Meaningless................................ 31
      Shareholders Vote, Not As Citizens, but to Protect Their Interests ...... 32
IV. The Political Theoretical Approach Compared with Other Critical Approaches ................................................. 33
V. What Difference Does It Make? ......................................... 35
Conclusion........................................................................... 40
INTRODUCTION

The aim of this article is to enlarge the framework within which teachers and students of corporate law understand the nature of the widely held business corporation and the purposes of corporate law. Specifically, I argue that certain features of corporations and corporate law are not adequately explained under the conventional economic understanding. If we look at the corporation only through the lens of economics, we might mistake the purpose of these features, or come to suppose that they serve no purpose. This article considers whether a different set of conceptual tools can shed a different light on the meaning of these features of the corporation. I borrow these other tools—in particular, the concept of citizenship—from political theory.

This article is an interdisciplinary theoretical reflection. In the preface to their now-classic work applying economic thought to the study of politics, *The Calculus of Consent*, James Buchanan and Gordon Tullock (1962) spelled out the dangers associated with unconventional (as theirs was at the time) interdisciplinary projects. Aside from the greater chance of error “along the borders of orthodoxy,” the authors noted that in defying the principle that “good fences make good neighbors,” they ran the risk that “orthodox practitioners of both politics and economics” might object to their disruption of the “currently established order of the social sciences” (v-vi). The present project seeks to apply the concepts and methods of political theory to the task of understanding the corporation, and is exposed to similar risks. In particular, practitioners of economic analysis of corporate law may be perplexed by my nonwelfarist perspective. My objective is not to evaluate the efficiency of our corporate law arrangements or to discuss how “citizenship” may be used to enhance social welfare. Instead, my concern is to show how a noneconomic discourse casts a different light on the corporation and its constituent relationships.1

When I say that I am engaged in trying to “understand,” “think about” or “cast a light on” the corporation, I do not mean that I will develop a model of the

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1 In light of the literature on “corporate citizenship” it might be assumed that this article would be concerned with the relationship between corporations and society-at-large and, more specifically, with the so-called “social responsibilities” of corporations, but this is not my focus. Instead, I am concerned with the much less studied question of how citizenship is relevant to the internal life of the corporation, to the characterization of the relationships that make up the corporation’s “nexus of contracts” and, in particular, to our understanding of the nature and legitimacy of the power exercised within these relationships.
corporation, in the economists’ sense of a simplified representation of reality that
is useful in predicting behavior. Neither am I offering an abstract normative
theory deduced from first principles. Rather, I proceed on the basis that
understanding the corporation is an exercise in interpretation. A corporation
writes Ribstein (2004), a prominent economic analyst of corporate law, is “a piece
of paper in a secretary of state’s office.” That is not true, or at any rate not
illuminating, any more than it is helpful to think of a contract, a statute, or a will
as “a piece of paper.” Accustomed though we are to thinking of a corporation as a
“legal fiction” (Bainbridge 2006, 604), I propose that we think of it instead as a
legal act, a set of legal relationships created under corporate law and the
corporation’s constitutive documents. Understanding the corporation is
interpreting a legal act, much as we interpret a contract, a statute, or a will. We are
involved in ascertaining the objective intention of the corporation’s creators (the
corporate law legislature\(^2\) and the corporation’s founders) as reflected in the
instruments through which they have acted. More specifically, the question with
which this article is concerned is whether the concept of citizenship may be
relevant to an understanding of what corporate law legislatures and the founders
of corporations have purposefully achieved.

In an earlier era, an affirmative answer to the above question would have
seemed self-evident. Blackstone (1979 [1765-69]) described corporations as
“little republics” (456). In the early nineteenth century, per-capita stockholder
voting was commonplace in American corporations (Dunlavy 2006). Influential
political theorists of the late nineteenth century and early twentieth century argued
that corporations and states were but two examples within a larger category of
collectivities (Gierke 1900; Maitland 1911; Hallis 1930; relevant legal historical
works include Cooke (1950) and Fraser (1983)).

However, during the twentieth century, business corporations in the
United States became increasingly characterized by dispersed and passive
shareholders, even as they became larger and more powerful. Corporations came
to seem less like small republics and more like massive oligarchies (see Berle and
Means 1932).

In the last third of the twentieth century, economics and the market
metaphor seemed to offer an avenue of escape from the delegitimating analysis of
Berle and Means and their contemporaries. Specifically, market forces seemed to
reduce the empirical significance of managerial power and to render such power

\(^2\) By “corporate law legislature” I mean the legislature that enacted the relevant
incorporation statute. In the case of Delaware corporations, that would be the
Delaware state legislature. In the case of Canadian federally incorporated business
corporations, the relevant legislature is the Parliament of Canada.
normatively unproblematic to the extent that it existed (Manne 1965; Alchian and Demsetz 1972; Winter 1977; Easterbrook and Fischel 1989). Most corporate theorists today adopt an exclusively economic perspective on the corporation. According to the prevailing understanding, the corporation is not a political entity at all but is rather the nominal hub of a multilateral marketplace interaction—a "nexus of contracts" (Easterbrook and Fischel 1989, 1426).

It is my view that the pendulum has swung too far. This article seeks to reestablish the pertinence of political theory as a framework within which scholars and lawyers may better understand the nature of the corporation and the purposes of corporate law. I shall suggest that it is plausible and useful to think of the corporation as, in some respects, a political entity.³

Although much has been written about the intellectual history of the corporation and the evolution from a political to an economic conception (Cooke 1950; Horwitz 1986; Fraser 1983; Dunlavy 2006), there remains a need for theoretical argument as to how the economic conception is deficient, or at least incomplete. Such arguments can be found in the progressive and feminist literature, but critiques from the perspective of political theory are rare. This is the gap this article seeks to fill.

The primary contribution of this article is theoretical; namely, to enrich our conceptualization of law or legal institutions. However, the stakes are not merely theoretical. I shall argue that scholars interested in the social impact of law ought to care about the conceptualization of the corporation for two reasons, sounding respectively in policy and culture. First, I shall argue that the orthodox conceptualization defines the boundaries of permissible argument in discussions about policy and, accordingly, the adoption of an enriched conceptualization of the corporation can be expected to have an impact on the outcomes of those discussions. Second, the conceptualization has cultural significance, which is to say that the way in which law professors conceptualize managerial power is liable to have an impact on the way in which corporate officials (advised by lawyers) exercise it.

In Part I, I explain what I mean by "citizenship," distinguishing between two familiar conceptions. In Part II, I consider what citizenship can contribute to our understanding of the corporation. I argue that citizenship and, more generally, the political theoretical approach, of which citizenship is an ingredient, casts a useful light on the nature and legitimacy of the power exercised by corporate officials. In particular, I suggest that (1) the corporation’s character as a vehicle

³ Other discussions of the pertinence of political theory to an understanding of modern business corporations include Fraser (1998) and Ciepley (2007). For an argument framed in terms of constitutionalism, see Bottomley (2007).
for the collective exercise of power has been underappreciated by contemporary economic theorists; (2) a political approach invites us to distinguish between two types of power; namely, authority and discretion; and (3) corporate officials’ power is in some respects more aptly characterized as authority rather than discretion, whereas only discretion is available to the conventional economic theorist.

In Part III, I discuss four possible objections to the political-theoretical approach described in Parts I and II. In Part IV, I situate my approach relative to other critical perspectives on corporate law, in particular those embodied in progressive and feminist corporate law scholarship. Finally, as the argument in Parts I through IV is primarily about discourse and conceptualization rather than policy and consequences, in Part V I explain what difference discourse makes and why it matters whether scholars take note of the political elements of corporate governance rather than ignoring them or reconceptualizing them in economic terms.

I. WHAT IS “CITIZENSHIP”?

Citizenship is both a juristic and a political concept. In this Part, I explain and distinguish these two familiar ways of conceptualizing citizenship.

**Jurist Citizenship**

‘I am a Roman citizen’—that appeal has often helped and even saved many a man among barbarians in the remotest lands. (Cicero 1935 [~70 BCE], 629)[4]

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States… No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. (US Const., 14th Amendment, section 1)

Understood as a juristic concept, citizenship is centrally concerned with legal classification and, in particular, the designation of individuals as members and nonmembers of the community, with different bundles of rights and

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responsibilities associated with each status. For the sake of simplicity, we may think of a binary classification (citizen or alien), but in real societies there are usually varying degrees of membership and nonmembership (resident alien, sojourner, diplomat, etc.). The status of citizen, as the highest status, carries with it the most complete bundle of rights and responsibilities. The juristic conception constitutes citizens as holders of a bundle of rights and responsibilities (citizenship rights), and as full members of a community of individuals who are legal equals in the sense of having equal citizenship rights.\(^5\)

We often associate juristic citizenship with classical Rome, where citizenship (\textit{civitas}) was a status conferred by law, entailing a bundle of rights—especially the capacity to enter into enforceable contracts, the franchise, eligibility for offices, and the right to Roman due process—and obligations, especially military service and the payment of taxes (Sherwin-White 1980). Modern constitutions similarly implement citizenship as a legal status entailing a bundle of rights and responsibilities. For instance, the Fourteenth Amendment to the US Constitution declares “[all] persons born or naturalized in the United States and subject to the jurisdiction thereof” to be “citizens of the United States,” and follows up on this definition with a prohibition against the making or enforcement by a State of “any law abridging the privileges or immunities of citizens of the United States,” seemingly inviting members of the national community to declare \textit{civis americanus sum} to ward off infringements by States of the rights attaching to national citizenship.\(^6\) The Treaty on European Union follows a similar pattern.

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\(^5\) In practice, the rights and responsibilities of those labeled as “citizens” within a given society are often not uniform: nonadult citizens cannot vote, for example. There are several alternative ways of accommodating variations of this type within the conceptual framework described here: (1) those from whom rights are withheld are mislabeled as citizens when in reality they are not (that is, second-class citizens are not citizens); (2) citizenship rights are those rights which are enjoyed equally by citizens by virtue of their citizenship (ergo, the right to vote is not a right of US citizenship, but the right to reside in the US is); or (3) the citizenship right in question is circumstantially defined (that is, it is not the right to vote \textit{tout court} but the right to vote in any election that occurs after one has reached a specified age). It is not necessary to settle on one of these alternatives for purposes of this article.

\(^6\) The US Constitution did not at the outset create national citizenship; the original articles merely imposed a requirement of comity. Article IV, Section 2, in providing that “citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States,” limited the ability of the States to impose disabilities of alienage against citizens of other States. Even without national citizenship, it was understood that citizenship was a legal concept.
Through an amendment to the Treaty Establishing the European Community, the EU Treaty introduces the concept of “citizenship of the Union,” declares “[e]very person holding the nationality of a Member State” to be a “citizen of the Union” and, immediately thereafter, announces that citizenship entitles a person to “enjoy[ment] of the rights conferred by this Treaty and…subject[s the person] to the duties imposed thereby” (Treaty Establishing the European Community, Art. 8, added by the Treaty on European Union, Art. G(C)).

Two features of the juristic conception are worth pointing out. First, juristic citizenship is a formal notion, in the sense that the concept does not depend on the content of the bundle of rights to which citizens are entitled or on the manner in which the category of individuals designated as citizens is delimited. There can be citizenships of few or many rights and citizenships of few or many holders. Indeed, the “privileges and immunities” of US citizenship and the rights attached to EU citizenship are strikingly meager--they include most prominently the right to communicate with the federal (or EU) government, the right to vote in federal (or EU) elections, and the right to travel freely across interstate boundaries.7

Second, since juristic citizenship is a formal notion, societies may employ it for varying instrumental purposes, and these purposes determine the content of the rights and the criteria for membership. For instance, as T. H. Marshall (1950) argued, a function of (juristic) citizenship is to fashion a kind of legal equality that can coexist with, and even render legitimate, social and economic inequality among citizens (9). In other words, citizenship might be a “unifying force in a divided world” (Miller 2000, 41), provided that the empty vessel of juristic citizenship is filled with a well-chosen collection of rights. We can observe rights through the use of which each State designated those with full membership in its community. Article IV, Section 2 ensured that whatever rights a State conferred upon its own citizens, it must also extend to the citizens of the other States.7 In the United States, the “blame” for this interpretation goes to the Supreme Court, which in the Slaughter-House Cases (1873) “construed the Privileges and Immunities Clause so narrowly as to pave the way for its virtual elimination from the Constitution” (Tribe 2000, 1303). For an argument that the privileges and immunities clause should be revived as a source of national human rights protection against infringement by the States, see Black (1997). Regarding the EU, Weiler (1999) describes the legal content of citizenship in the EU as “trivial and empty” (324-26). Many of the legal rights most familiar to us today--freedom of expression, freedom from arbitrary detention and so on--are conferred upon people as individuals rather than as citizens, both in the US and European jurisdictions.
being used in this way today: witness the Canadian attachment to universal public health care. Conversely, juristic citizenship can also be used as an instrument of domination by one subgroup within a society over others. Social divisions may be translated into legal classifications, with the exclusion of members of disfavored subgroups from the highest status.

**Political Citizenship**

[The] act of association creates a moral and collective body, composed of as many members as the assembly contains votes, and receiving from this act its unity, its common identity, its life and its will. This public person, so formed by the union of all other persons formerly took the name of city, and now takes that of Republic or body politic; it is called by its members State when passive. Sovereign when active, and Power when compared with others like itself. Those who are associated in it take collectively the name of people, and severally are called citizens, as sharing in the sovereign power, and subjects, as being under the laws of the State. But these terms are often confused and taken one for another: it is enough to know how to distinguish them when they are being used with precision. (Rousseau 2003 [1762], 9-10)

I want to distinguish the juristic conception of citizenship from another conception, which I am calling the political conception. It is with some reluctance that I refer to *a* or *the* political conception of citizenship in the singular, since there is enormous diversity among political theorists as to how they understand the concept of citizenship. I certainly do not pretend to propose a unified theory of citizenship or even to advance, at any rate directly, the philosophical debates that animate the extensive literature on citizenship. However, before we can consider seriously the possibility that citizenship as a political concept may have something to contribute to our understanding of the corporation, we must have an idea of what that concept can mean.

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8 Access to public health care is not, in practice, limited to citizens. Nevertheless, the Romanow Commission observed that “Canadians…strongly support the core values on which our health care system is premised--equity, fairness and solidarity. These values are tied to their understanding of citizenship. Canadians consider equal and timely access to medically necessary health care services on the basis of need as a right of citizenship, not a privilege of status or wealth” (Commission on the Future of Health Care in Canada 2002, xvi).
The following generalization will, I hope, suffice for present purposes. Aside from being a formal, legal concept, citizenship can be conceptualized as membership in a political community: a group in which potentially legitimate decisions are taken collectively, on behalf of the membership as a whole, through a process that typically does not involve unanimous agreement. While constitutional lawyers are often transfixed by the so-called “countermajoritarian difficulty” associated with judicial review (Bickel 1986, 24-28), political theorists know that there can also be a “majoritarian difficulty” since even a majority is a subset of the whole, and we may therefore inquire into the conditions of the legitimacy of the power it exercises over the whole community (Barnett 2006).\footnote{Several theorists have advanced arguments as to why majority rule is preferable to unanimity (see Sen 1970; Beitz 1989; Sadurski 2006; Waldron 2006). In essence, these arguments point out that supermajority rules, of which unanimity is simply an extreme example, attach greater weight to the vote cast by a member of the blocking minority than to the vote cast by a member of the majority. A unanimity rule, for example, attaches greater weight to the vote of a lone hold-out than to the votes of all of the other members of the community put together. The premise of these arguments is that whether a measure is passed or blocked, a subset of the community has decided for all. (Better that it be a majority than a minority.) These arguments need not obviate an inquiry into the legitimacy of the exercise of collective decision-making power, since a majority voting rule might be a necessary condition, without being sufficient, for the legitimacy of an exercise of collective decision-making power.}

The general question concerns the possibility of and conditions for the legitimacy of nonunanimous collective decision making. Does legitimacy depend upon the reasons for which the rulers act, and which they provide to the governed? Are the rulers to be distinguished by their greater civic virtue, or at least by their greater capacity for such virtue? Alternatively, does legitimacy depend on the governed and the rulers being the same people, in the sense that all must have the opportunity and disposition to participate in collective decision making? Or does legitimacy rest on the ruler’s ability to prevent anarchy, and should power therefore be more centralized? Theorists have differed, of course, as to the solution to the problem of legitimate nonunanimous collective decision making, but most have believed that it can be solved, and that it is meaningful to think of ourselves not merely as isolated individuals but as citizens in relation to one another and to our shared political community.

Thus, citizenship as a political concept is a particular kind of relationship among individuals; namely, membership in a community on whose behalf or over which a particular type of legitimate power--political authority--is exercised. In this article, I assume that what characterizes the concept of political authority is
the presence of ongoing conditions of legitimacy. I leave to one side, therefore, other possible understandings of political authority, such as the idea that the establishment of political authority involves the cession of ultimate or absolute power by actual or implied agreement and, thus, that what makes authority political is its ultimacy, and what makes it legitimate is ex ante consent or, at least, ex ante universal self-interest. 10 Where power is exercised without ongoing conditions of legitimacy, I refer to such power as discretion rather than authority. 11 Thus, for purposes of this article, I understand political authority as entailing ongoing, and not only ex ante, conditions of legitimacy, and as referring not necessarily to absolute power but to the exercise of the power within, on behalf of, or over a collectivity, whose members are accordingly understood to be citizens.

I conclude this Part by noting two additional senses of citizenship that are related to this basic sense of membership in a political community. First, citizenship is sometimes conceptualized as a source of identification with the community, and therefore as something that contributes to a political community’s capacity to maintain the allegiance of its members. For instance, an important contemporary debate in political theory concerns whether a form of civic identity, as distinguished from ethnic and other sectional identities, is viable as a source of cohesion (Habermas 1996; Beiner 1995; Kymlicka 1995; Williams 2001; Fossum 2003; and Miller 2000). This is, strictly speaking, an empirical question separate from the normative inquiry into the legitimacy of politics described above, although theorists do not always attend carefully to the distinction.

10 This is a possible reading of Hobbes, but see Dyzenhaus (2004, arguing that Hobbes’s concept of authority embodies ongoing conditions of legitimacy).

11 The concept of discretion that I use here differs from that which one finds in legal theory, where the term “discretion” often refers to the freedom of choice available to a public decision maker either because the law deliberately confers it upon her or because of the indeterminacy of legal rules that are supposed to constrain her (see Kim 2007, 409-13; Dworkin 1977, 31; Hart 1977, 127). Since this is not an article about the nature of legality, I do not use discretion in this sense. Indeed, in my terminology, a public decision maker is exercising “authority” even if he or she is exercising legally conferred or legally bounded freedom of choice (see Sossin 1994). In this article, discretion is defined in contrast to authority; that is, it involves the exercise of power the legitimacy of which does not depend on conditions relating to the manner of its exercise (ongoing conditions).
Second, theorists sometimes understand citizenship as a desirable quality of the members of a political community, one which conduces to the community’s legitimacy or collective welfare (see Kymlicka and Norman 1995). For an illustration I refer again to a contemporary debate, this time concerning deliberative democracy. Inspired by the Aristotelian ideal, contemporary deliberative democrats advance an understanding of a citizen as an individual who is an active participant in public life, and whose political actions are motivated by reasons that transcend the citizen’s particular interest and that all citizens can potentially accept (Miller 2000).

It is important to emphasize that active citizenship is not an essential component of a theory of legitimate collective decision making. Rawls (1999), for example, takes for granted that representatives (legislators and officials) are the main political actors. His account of political legitimacy emphasizes the ends for which power is exercised, especially by representatives. Specifically, representatives must act in accordance with “public reason”; that is, they must “sincerely believe that the reasons…for [their] political actions…are sufficient, and [must] also reasonably think that other citizens might also reasonably accept those reasons” (137). Citizens, too, must act in accordance with public reason when they exercise political power in voting in elections (135), but between elections Rawls accepts that citizens leave politics to professionals.

In summary, then, the concept of citizenship is closely connected with the concept of a political community, a type of community in which potentially legitimate decisions can be made by some on behalf of all. Citizenship signifies membership in such a community, and for some theorists it also stands for conditions contributing to the stability or legitimacy of the community.

II. WHAT CAN CITIZENSHIP CONTRIBUTE TO OUR UNDERSTANDING OF THE CORPORATION?

I now turn to a discussion of what, if anything, citizenship can contribute to our understanding of the corporation. Let me begin, once again, with the juristic conception of citizenship.

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12 Even deliberative democrats (for example, Miller (2000)) recognize that an individual citizen’s opportunities and inclination to participate may be modest.
Legal Classification, Legal Equality, and the Corporation

As a formal concept consisting of classification, equality of rights within each class and differentiated rights as among the classes, juristic citizenship might initially seem to have some relevance to the organization of relationships within the corporation. We observe, for example, different types of relationship (e.g., shareholder, creditor, employee) within each of which a uniform bundle of rights may be identified that differs from the bundle of rights associated with the other types of relationship. Indeed, the creation of classes of investors, with equality of rights within each class and differentiated rights as among the classes, is what corporate finance is all about.

It is, however, a superficial analogy. We are unable to draw any normative conclusions from the parallel uses of citizenship-like legal classification within society and the corporation, since, it will be recalled, juristic citizenship is a formal concept and, as such, has no normative bite. Normative arguments--arguments about what rights should be attached to membership in each class and how individuals should be assigned to each class--must appeal to the ulterior purposes served by the classification (e.g., social unity) or to some other source of normativity (e.g., an antioppression principle militating against the use of citizenship as an instrument of domination).

In this regard, it is significant that legal classification serves a very different function in the organization of corporate relationships as compared with the function served by juristic citizenship in society. Within society, juristic citizenship is an instrument of social organization that serves, for example, to foster a sense of unity and to mitigate inequality among citizens, or else to reinforce social stratification. By contrast, the categories established by corporate finance serve to cater to different appetites for risk and to facilitate risk diversification on the part of providers of capital. The equality of rights associated with each status is not directed at generating unity but is instead a form of standardization aimed at reducing transaction costs in the capital market.

The juristic conception of citizenship is, therefore, a false friend to the corporate lawyer. In particular, one may criticize its deployment in the service of normative arguments about corporate law. Consider, for instance, the debate concerning the principle of one share, one vote. Corporate law in many countries allows corporations to issue more than one class of shares with different rights (for example, different voting rights) attaching to shares of each class. This device is common in situations where a family-held corporation wishes to raise capital without jeopardizing the family’s voting control: the corporation issues a second class of shares carrying a reduced number of votes per share, or even a class of
shares without any voting rights at all, which it sells to nonfamily investors. Opponents of these structures contend that they expose the external investors to excessive risk, but they also argue that it is “unfair” and “discriminatory” that some shareholders should have fewer voting rights than others.\(^\text{13}\) The latter argument is sometimes bolstered by an analogy to citizenship,\(^\text{14}\) the premise of which is that the status of shareholders is akin to that of citizen, and from which it is said to follow that each shareholder is entitled to equality of rights with all other shareholders and, just as citizenship is the highest status, that there should be no status that carries a more complete bundle of rights than the status of shareholder.\(^\text{15}\)

This argument is, in my view, misconceived. Citizenship is the label given to the class of individuals who have the most complete bundle of rights. Since the holders of a class of nonvoting or discounted-voting shares do not meet the latter description, they are by definition not citizens.

An argument that all classes of shareholders should have equal rights cannot appeal to juristic citizenship, since it would be circular. It must instead appeal to the instrumental purposes served by the legal classification in the particular circumstances, or to some external principle of justice. But this analysis leads the critics to a dead end. The existence of different classes of shares having different voting rights serves the joint purposes of corporations and external

\(^\text{13}\) The argument from fairness or democracy is more commonly advanced by regulators and lay commentators than by scholars, reflecting the low regard in which fairness is held within the corporate law academy (see discussion in Seligman 1987, 699, note 76). However, even within the academy one occasionally finds opposition to dual-class shares on the basis of fairness (see Hutchinson 2005, 166-70).

\(^\text{14}\) For example, shareholder-rights advocate Bob Monks argued that “one of the minimal rules is: one share, one vote. It's the same idea as a citizen having a vote” (quoted in Pender 2004). A Canadian shareholder advocacy group has argued that “dual-class structures are by their very nature unfair,” and warned that, in another context, “revolutions have been fought over the notion that all citizens should be treated equally” (Shareholder Association for Research and Education 2004, 18).

\(^\text{15}\) EU Internal Market Commissioner McGreevy used a different analogy to explain why he was considering introducing legislation to recommend to Member States that they require one share, one vote. He stated that the premise of his opposition to differentiated voting rights was that “the shareholder is king or queen” (quoted in Buck 2005, 1). But the argument is the same. McGreevy continued, “The shareholder should be able to exercise his rights, and there should not be any restrictions” (ibid.).
investors: it enables the former to raise equity capital without diluting a controlling shareholder’s voting power, and it enables the latter to invest in companies that might not otherwise issue shares to nonfamily investors. Moreover, since nonvoting or discounted-voting shares are freely purchased, the status of a nonvoting or discounted-voting shareholder is freely entered into and it is difficult to view the status as being, for example, an instrument of oppression of external investors by controlling shareholders.\textsuperscript{16}

Whereas I have concluded that juristic citizenship is of limited usefulness in understanding the corporation, in the next section I shall argue that the other familiar conception of citizenship—citizenship as a political concept—is of greater relevance.

**Power, Authority and the Corporation**

Citizenship as a political concept is more promising as a source of insight into the corporation. In particular, I suggest in this section that the metaphor of citizenship sheds light on the corporation as a vehicle for the collective exercise of power and invites us to consider whether the individuals who exercise power on behalf of the collectivity may be subject to ongoing conditions of legitimacy akin to those that characterize political authority. This way of thinking about corporations differs markedly from the conventional economic understanding, which instead emphasizes the role of individual decision making in markets, conceptualizes any power that subsists within the corporation as residual discretion, and, if it attends to the legitimacy of such power at all, considers the ex ante consent of corporate participants to be a complete justification for the discretion thereby conferred upon corporate officials.

*The Corporation as a Vehicle for the Collective Exercise of Power*

An unprecedented degree of financial concentration…has clothed itself in the corporate form; and…the result of such concentration has been, and must be, to pose a few large organisms, the task of whose administrators is, fundamentally, that of industrial government. (Berle 1932, 1366)

\textsuperscript{16} Some commentators have questioned, however, whether this argument applies to the employees’ relationship with the corporation. See Fannon (2003); and O’Connor (2000).
The firm…has no power of fiat, no authority, no disciplinary action…. I can ‘punish’ you only by withholding future business. This is exactly all that any employer can do. He can fire…. Telling an employee to type this letter rather than to file that document is like my telling a grocer to sell me this brand of tuna rather than that brand of bread. I have no contract to continue to purchase from the grocer and neither the employer nor the employee is bound by any contractual obligations to continue their relationship. (Alchian and Demsetz 1972, 777)

Corporate law vests the board of directors with the power to manage or supervise the management of the business and affairs of the corporation.\textsuperscript{17} Boards are permitted to delegate their powers to corporate officers,\textsuperscript{18} who in turn assign responsibilities to lower managers, and so on. When a human resources manager decides to reassign or terminate an employee, or a drug company executive decides to withdraw a troubled medication from the market, he or she is exercising power that can be traced back to the board, and ultimately to the board’s own plenary powers under corporate law.\textsuperscript{19}

Theorists sometimes write as if political power were fundamentally the power to command people, where commanding is understood as implying an obligation of the addressees of the command to obey it or the power of the person issuing the command to compel obedience.\textsuperscript{20} If this assumption were inevitable, it might be a barrier to a political understanding of the corporation, for although some decisions taken pursuant to corporate powers resemble commands, many others do not, or at least the individuals concerned by the decisions are often not those who are commanded. For example, while a directive to employees prohibiting them from trading in the company’s securities without prior approval is easily recognized as a command, a decision to disclose information to shareholders does not command the shareholders--although it may, of course, take

\textsuperscript{17} See Delaware General Corporation Law (hereafter Del. GCL), 8 Del. Code, section 141(a); Canada Business Corporations Act (hereafter CBCA), R.S.C. 1985, chapter C-44, section 102(1).

\textsuperscript{18} Schoonejongen v. Curtiss Wright Corp. (1998): “unless otherwise provided by the certificate of corporation and subject to the limitations set forth in [Del. GCL section 141(c)], the board may freely delegate the authority to manage the business and affairs of the corporation” (17); see also CBCA.section 121.

\textsuperscript{19} Under Delaware law, officers also exercise such powers as may be conferred on them directly by the corporation’s bylaws (Del. GCL section 142(a)).

\textsuperscript{20} “It is common to regard authority over persons as centrally involving a right to rule, where that is understood as correlated with an obligation to obey on the part of those subject to the authority”(Raz 1985, 3).
the form of a command to the investor relations staff responsible for making disclosure.

This article takes a broader view, not limited to command and compulsion, of what counts as the collective exercise of power. Corporations and governments alike do more than command people to do or not to do things. Much of what they do can be described as the disposition of property and conclusion of contracts in the pursuit of collective aims. A theory of politics that does not treat public spending as an exercise of political power would be inadequate today, even if the welfare state is smaller than it once was. One might, of course, take the position that public spending requires justification only because it is funded through taxation—and therefore is traceable to an act of compulsion. But consider the situation of a government official in a developing country that has received a foreign aid payment from a donor nation. If the official is to be understood as exercising political power with respect to the disposition of the funds on behalf of the country’s people, it cannot be because he or she is exercising power to command or obligate the latter. Rather, we think of the official as a trustee or agent and the people as the beneficiaries or principal on whose behalf the official acts. In the same way, even when corporate officials do not issue commands, they may nevertheless be understood to be exercising power over and on behalf of the corporation.  

It is unfashionable today to think of the corporation as a vehicle for the exercise of power, but it was not always so. Seven decades ago, Adolph Berle and Gardiner Means’ *The Modern Corporation and Private Property* (1932) deplored the concentration of power within the hands of unaccountable managers. Also, Berle’s famous disagreement with Merrick Dodd—whether managers should be viewed as trustees for the shareholders alone or as also having obligations to society at large—was, in part, a disagreement as to the policy implications of a shared premise; namely, that managers by virtue of their control over corporate resources wield enormous power (see Dodd 1932 and Berle 1932).

Writing a few years after Berle and Means, Ronald Coase (1937) conceptualized the firm as a system of relationships involving the substitution of centralized decision making by an entrepreneur for the allocation of resources through markets. Coase imagined that firms arise when the transaction costs associated with markets are sufficiently high to make centralized decision making preferable, and that transaction costs determine what kinds of productive decisions are centralized within the firm and what decisions are left to the market.

21 In addition, as Hart (1997, 96) argued, the disposition of property and the conclusion of contracts can be viewed as the “exercise of limited legislative powers” because they reassign rights.
Presaging the nexus of contracts conception of the corporation, Coase imagined that the suppliers of certain factors of production entered into contracts “agree[ing] to obey the directions of an entrepreneur within certain limits” (391). This, theorized Coase, is how firms come, for example, to have standing workforces rather than hiring labor on the spot market. The language of obedience is, of course, evocative of the command-and-compulsion conception of power, but Coase’s point extended to the suppliers of factors of production other than labor (391). In relation to these suppliers, Coase’s point was not that the entrepreneur can order them around but that the entrepreneur has acquired the power to dispose of resources committed by them to the firm.

Coase’s conceptualization of the firm in terms of the substitution of centralized decision making for the market mechanism finds echoes today in the work of Margaret Blair and Lynn Stout (1999, 2001). Blair and Stout do not explicitly invoke Coase, but, in their account, the corporation is a scheme whereby “team members” commit resources to discretionary allocation by a “hierarch,” as a solution to the difficulty the participants encounter in structuring their relationships contractually. Since this difficulty is, in essence, a type of transaction cost, Blair and Stout’s account sits very comfortably with Coase’s understanding of the firm. (In a similar vein, see Williamson (1981)).

However, Blair and Stout’s important work aside, a different understanding of the corporation prevails today in the academy. This view emphasizes the importance of market forces in determining the behavior of corporations and corporate officials. The foundation of the now-dominant approach is the work of Alchian and Demsetz (1972) and Jensen and Meckling (1976), who took direct issue with Coase. Alchian and Demsetz asserted that, in reality, entrepreneurs have no more power to direct the work of their employees than consumers have power to direct the actions of greengrocers. Entrepreneurs, in Alchian and Demsetz’s estimation, have only the power to withhold future business (that is, to hire and fire), not the power to require obedience. The entrepreneur’s function within the firm is that of monitoring, hiring, and firing rather than directing members of the productive team. Jensen and Meckling (1976) were of a similar view, downplaying the significance of the corporation as an entity, let alone a locus of power, by emphasizing that the corporation is “simply [a] legal fiction which serves as a nexus for contracting relationships” (311). It is to Jensen and Meckling that the now-dominant theoretical approach to the corporation--the “nexus of contracts” approach--owes its name. The

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22 Coase's model of the firm was (like all models) a simplification. In particular, it took no account of the separation of ownership and control, imagining a unified “entrepreneur-co-ordinator” (1937, 389).
expression signifies that the corporation is a notional common contracting party for shareholders, employees, customers, and so on, who, in reality, have contracts with one other.

Together, Alchian and Demsetz’s and Jensen and Meckling’s arguments sought to erase the distinction that Coase had drawn between the firm and the market and, with it, the idea that entrepreneurs and corporate officials exercise power. The corporation’s actions and, in particular, the coordination of production, are guided not by the visible hand of entrepreneurs and managers but by the invisible hand of the various markets. Thus, for instance, Jensen and Meckling (1976) write that “the ‘behavior’ of the firm is like the behavior of a market, that is, the outcome of a complex equilibrium process” (311).

The empirical claim that, in light of market forces, managerial power is not a significant characteristic of the corporation has been highly influential. For instance, in the debate about whether established firms reincorporate in Delaware because of the promanagement bias of its rules or, rather, because of the rules’ high quality (Cary 1974; Winter 1977; Romano 1985), the current near-consensus in favor of the latter position rests in part on the premise that the stock market would punish managers if they reincorporated in a lax jurisdiction (Winter 1977; Romano 1985).\(^{23}\) The premise of strong market constraints also surfaces in the debate about corporate social responsibility (CSR), with Richard Posner (1998) arguing that firms engaging in unprofitable CSR could be expected to shrink, “quite possibly to nothing” (462), on the theory that in competitive product markets there is no margin for firms to make nonprofit-maximizing expenditures (Manne 1973).

In addition to its widespread acceptance as a description (or at least an approximation), Alchian and Demsetz’s and Jensen and Meckling’s “no-power” model is widely accepted as an idealization of the corporation. To the extent that scholars have understood corporate officials as wielding power, they have typically conceptualized this power as residual slack (Elhauge 2005; Walker 2005; Winter 1977); that is, as a by-product that stands in relation to markets as sawdust stands in relation to the manufacture of lumber. If all markets were free and competitive, corporate officials would have no power. Power is, accordingly, an imperfection, the measure of the degree to which markets in the real world fall short of the ideal. Representative of this understanding is Henry Manne’s (2003) vision of a “free-market model of a large corporation system” (1381). Advocating the deregulation of corporate and securities law, Manne argued that the result would be to leave corporate officials with “only the margin of rents provided by the cost of takeovers to give them any breathing room from powerful market

\(^{23}\) For a well-argued dissenting view, see Bebchuk and Ferrell 1999.
forces that would keep compensation at a purely competitive level, and even these rents will be small if the transaction costs of takeovers are allowed to be minimized by market forces” (1391).

This article takes a different approach to the power wielded by corporate officials. On the empirical question, without disputing that market forces operate significantly upon corporate actors, I proceed on the basis that the power formally conferred by corporate law upon the board of directors is not so constrained in practice by market forces as to be insignificant (Bebchuk 2004; Bebchuk, Fried, and Walker 2002; Bainbridge 2003). Moreover, while it is not my intention here to mount a direct attack against the normative primacy of the market mechanism (I have spoken to this issue elsewhere; see Lee 2006), my concern in this article is with exploring what is to be gained by setting aside the notion that the market mechanism is the “normal” means of coordination and that non-market decision making is an aberration. My hypothesis is that by taking politics seriously, we might be able to produce a more adequate account of the power wielded by corporate decision makers than that transaction costs prevent its eradication.  

**Authority Versus Discretion**

In particular, a political approach invites us to consider whether corporate officials’ power is more adequately interpreted as authority or discretion. Earlier, I explained that “authority” refers to political power that is legitimate by reason of conditions relating to its manner of exercise (ongoing conditions of legitimacy), whereas “discretion” refers to power that is not subject to ongoing conditions of legitimacy.

As noted previously, the conventional (economic) understanding of corporate officials’ power characterizes it as “slack,” which is essentially discretion. In fact, the point can be put more strongly. The distinction between authority and discretion is not part of the economist’s conceptual toolkit—economic analysis conceptualizes all power as discretion. The economist does not distinguish, for example, between the power wielded by a judge over litigants and that wielded by the holder of an option over the grantor of the option. Power in each case is understood as the ability unilaterally to affect the welfare of other people. Economics disregards the question how each type of power ought to be exercised, and models the exercise of power as an occasion, as with any other

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24 Accordingly, my approach also differs from that adopted by Coase, Williamson, and Blair and Stout. These authors account for the existence of firms on the basis of transaction costs.
individual choice, for the maximization of the chooser’s welfare. The political theorist, by contrast, can recognize the judge as possessing authority, whereas the option-holder’s power is discretionary even if it is, by virtue of ex ante consent, legitimate.

Is the power wielded within the corporation subject to ongoing conditions of legitimacy, or is it, as conceived within the framework of economics, merely discretionary? It can, of course, be legitimate power even if it is discretionary. Indeed, a conventional view among corporate lawyers holds that, although in an ideal world (of perfect markets) corporate officials would exercise no power, the “residual slack” that persists in the real world is legitimated by the consent of the participants in the corporation. It may be that consent is not given continuously, as Alchian and Demsetz contended, but is instead given in advance for a substantial duration, as Coase envisaged. Nevertheless, as Easterbrook and Fischel (1989, 1426) emphasize, “the corporation is a voluntary adventure.”

It might, accordingly, be supposed that in their voluntariness the relationships within the corporation are different in kind from that which exists among the members of society-at-large. Political society is often thought of, as Rawls (1996, 12) put it, as “a structure we enter only by birth and exit only by death.” Since our association within this “structure” is involuntary, the legitimacy of the power exercised over us within the state cannot be taken to be established by our consent in advance to it. One might, accordingly, understand the relevance of ongoing legitimacy conditions attaching to the exercise of power within society-at-large but object to their relevance to the corporation on the ground that the need for such conditions is obviated by the participants’ ex ante consent.

It is, however, a simplification that ignores both immigration and emigration to say that we enter a political community “only by birth and exit [it] only by death.” Moreover, in many political communities other than the nation-state, it is obvious that some or all of the members do not fit the description of involuntary associates. Few would deny, for example, that the mayor of New

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25 The economist’s disregard for the distinction between authority and discretion may be due to what George Stigler (1981) described as the economist’s policy against “preaching” (146) and exclusive concern with predicting behavior. For critical discussion, see Sen (1987).

26 This view holds that although political theorists often use the device of a “social contract,” the contractual label masks the fact that fairness rather than consent is the plausible basis of the legitimacy of any social contract.

27 One may recall Socrates’ argument that his acceptance of the laws of Athens is implied by his choice not to leave (Plato 1892 [360 BCE], 8).
York City or the Senate of Columbia University exercise political authority even though many who live in New York were born elsewhere and no one conscripts students to attend Columbia (regarding cities, see Frug 1980). It is more accurate to say of political communities that regardless of whether entry is by choice, exit is difficult, or as economists say, costly. But the same is true of the corporation, and this is why, with respect to those who cannot terminate their relationship with the corporation without cost, corporate decision makers can be said to exercise power.⁴⁸

Even where the origins of power are consensual, we may nonetheless inquire whether the power granted is of a type that is subject to ongoing conditions of legitimacy. The fact of a bargain begets the question as to what has been bargained for. We have seen that these terms include the exercise of collective power by corporate officials, and the question with which we are now concerned is whether this power is in the nature of discretion (like an option) or authority (like that which characterizes a political community. Consent does not in itself foreclose the latter possibility.

In the remainder of this Part, I consider two features, in particular, of the relationship established by corporate law between corporate officials and the other participants in the corporation that are, in my view, suggestive of authority: the “best interests of the corporation” standard and shareholder voice. These features are difficult to account for as mere residual “slack.”

The “Best Interests of The Corporation” Standard: A Discursive Focal Point for the Justification of Corporate Decisions

To act in good faith, a director must act at all times with an honesty of purpose and in the best interests and welfare of the corporation. (In re The Walt Disney Company Derivative Litigation 2005, 755)

Consider, first, the “best interests of the corporation” standard. Corporate law imposes a “fiduciary duty” upon the board of directors and senior officials to act in the “best interests of the corporation.” The economic analyst of the corporation takes what, after Holmes (1897), we might call the “bad man’s” view of the corporate fiduciary duty. The conventional economic view holds that the

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⁴⁸ Some readers may question whether shareholders fit the description of persons who cannot terminate their relationship with the corporation without cost. However shareholders have no right to redeem their shares. They can exit only by finding a willing buyer, and to this extent they have placed their entire investment at risk.
function of the duty is to control agency costs by attaching a price (in the form of liability risk) to the unilateral taking of opportunities or other property belonging to the firm. For example, Frank Easterbrook and Daniel Fischel (1991) write that “the fiduciary principle…replaces prior supervision with deterrence, much as criminal law uses penalties for bank robbery rather than pat-down searches of everyone entering banks” (92).

Two things are puzzling about this explanation. First, it does not explain why the mandate is formulated in terms of an affirmative duty rather than as a prohibition against misappropriation.

A second, more difficult puzzle is why the duty, even if it must be affirmative, is formulated in terms of the best interests of the corporation. The conventional theory predicts that the participants in the corporation would wish to assign a crisp mandate to management--one that would be easy for managers to follow, should they be so inclined, and easy for a court to determine compliance with (Bainbridge 2003). An example of such a mandate would be an instruction to maximize the stock price. In reality, however, management’s mandate is much more open-ended. Eighty-six years after Dodge v. Ford (1919), it is an open legal question in Delaware whether the best interests of the corporation means only the shareholders’ interests, or whether the interests of other participants in the corporation, such as employees, may also receive independent consideration.29 And even if it were limited to the shareholders’ interests, many possible

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29 The majority academic view is that Delaware law obliges managers to focus on shareholder wealth maximization (Boot and Macey 2004, 363, note 21). A minority view is that Delaware law imposes no such obligation, but rather explicitly authorizes managers to sacrifice profits in the public interest (Elhauge 2005) or even establishes the managers as mediators between the interests of those who have investments sunk in the firm (Blair and Stout 1999). In reality, the Delaware case law is best described as equivocal. Exemplary of the courts’ equivocation is Theodora Holding Co. v. Henderson (1969), in which the Delaware Supreme Court upheld an act of corporate philanthropy for reasons that are ambiguous as to the necessity of a long-run benefit for the shareholders. The Delaware Supreme Court has described the shareholders’ interest as “not a controlling factor” (Unocal v. Mesa Petroleum 1985, 493) so long as the pursuit of nonshareholder interests produces “rationally related benefits for the shareholders” (Revlon v. Macandrews 1986, 506). This case law well merits its characterization by William Allen (1992), who at the time was the Delaware chancellor, as “schizophrenic” (261). See further Lee (2005).
conceptions of their interests would remain possible, including their interest in the corporation’s socially responsible conduct. Only in certain takeover situations does the law impose a narrow mandate on the board.

The effect of the open-texturedness of the standard is to leave the meaning of the standard up for grabs in the corporate decision-making process. In other words, the board is not obliged to attend only to the operational question of how to maximize earnings, but in deciding what would advance the interests of the corporation it may, by implication, include in its deliberations the question how those interests should be understood.

Why would the fiduciary duty be so open-textured, if its sole purpose were to provide corporate officials as homines economici with an incentive to refrain from theft? Why, in a mechanism intended to reduce slack, does the formulation appear calculated to create slack?

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30 Examples include the maximization of share value (Romano 2001); the maximization of the shareholders’ wealth (Bainbridge 2003); benefits to the shareholders “in the long run,” including those resulting from the contribution that corporate philanthropy may make to the legitimization of capitalism as a form of economic organization (Theodora Holding Co. v. Henderson 1969, 405); and the advancement of the shareholders’ social and moral values (Elhauge 2005).

31 See, for example, Medical Committee for Human Rights v. Securities and Exchange Commission (1970). In this case, although admittedly not a state corporate law decision, the D.C. Circuit Court of Appeals recognized the legitimacy of the shareholders’ concerning themselves with the responsible conduct of the corporation’s business, even if profits were thereby not maximized.

32 Paramount Communications, Inc. v. QVC Network Inc (1994) holds that where a change of control or sale of the business has become inevitable, the directors must be guided exclusively by the goal of maximizing the value received by the shareholders. In assessing the implications of this case for the general definition of the board’s mandate, it should be borne in mind that the takeover context is special in that the bidder is offering to the shareholders to buy their shares. The fact that managerial interference in dealings between the shareholders and a third party concerning the shareholders’ sovereign right to sell their shares must be governed by the shareholders’ interests does not imply that the same is true where there is no risk of the managers treading on the shareholders’ exit rights.

33 A standard economic answer is that the application of a stricter mandate would impose more costs than benefits, and that the only alternative is to leave managers with “discretion”—the language leaves managers with “slack.” But if the idea is to give managers discretion (like that of the option-holder), it is difficult to see why the parties would bother with any mandate at all. Why would they not simply...
Perhaps the best interests of the corporation standard, in fact, goes beyond the function ascribed to it under the conventional theory. It is at this juncture that the possibilities of a political theoretical approach become apparent. My suggestion is that from the latter perspective, the best interests of the corporation standard may be understood to be a discursive focal point for the justification of choices by the board and others deliberating about corporate policy: it fulfills the same purpose in this respect that the concept of public reason serves in theories of deliberative governance (Rawls 1999).

The best interests of the corporation is evidently not a formula that can be applied mechanically so as to yield a unique, incontestably correct decisional outcome, any more than the expressions “public reasons” or “the public interest” in the governmental context. Rather, it serves to place some justifications off-limits (such as reasons that invoke a raw preference for the interests of a section of the collectivity), and to indicate that the board and other corporate decision makers are not simply free to pursue whatever ends they wish provided that they do not steal; they exercise authority, not discretion, and must justify their decisions with reasons articulated in terms of the interests of the corporation.

**Shareholder voice**

The second feature of the corporation that may be easier to account for as authority than as discretion is shareholder voice, by which I mean the power of shareholders to act as a body at shareholders’ meetings (that is, to vote on matters submitted for their approval, including especially the election of directors), and the mechanism by which shareholders may propose resolutions for consideration and submission to a vote at such meetings (the “shareholder proposal mechanism”).

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34 See Del. GCL section 211(b); CBCA. section 106(3).
35 In the United States, the shareholders’ rights to put forward resolutions at a meeting is governed by state law, which is generally permissive, although Delaware law contains a mandatory provision authorizing shareholder initiated by-law amendments (see Del. GCL. section 211(b)). United States federal law governs the circulation of shareholder proposals as part of the proxy solicitation process (see Rule 14a-8 under the Securities Exchange Act (17 Code of Federal Regulations (CFR) section 240.14a-8 (2004)). In Canada, shareholder proposals
Shareholder voice is perplexing for economic theorists of the corporation. On the one hand, it is undeniable that shareholder voice is an instance of collective decision making within the corporation. When Easterbrook and Fischel (1991, 67), for example, write that the shareholders’ right to vote reflects the necessity for “someone [to] have the residual power to act (or delegate) when contracts are not complete,” the “someone” to which they refer is a collective body—the body of shareholders. On the other hand, shareholder voice jars with two pillars of the economic model of the corporation: first, that the governance of corporations should ideally be determined by the interplay of markets and not by power, by the invisible hand of the stock market rather than the visible hand of the stockholders’ meeting; and second, that shareholders are uninterested in voice because the point of being a stockholder in a widely held corporation is that one does not have to take an active part in the oversight of management, that one can be a passive investor rather than an active citizen. Moreover, if all power is conceived as discretion, it is not immediately obvious why shareholders in a widely held corporation would confer discretion on a subset of their number to make decisions on their behalf concerning the corporation. For, as Easterbrook and Fischel argue, “no shareholder, no matter how large his stake, has the right incentives unless that stake is 100 percent” (67).

The conventional view, therefore, regards the shareholder proposal mechanism as a pointless anachronism, and it struggles mightily to explain why the shareholders have the right to vote. In relation to the latter, the main strategy is to recharacterize the shareholder’s right to vote not as an instrument of collective decision making but as an instrument of the market: the principal function of voting rights is to make possible the market for corporate control. Managers are kept in line (“slack” is reduced) by the possibility of a hostile

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36 Stephen Bainbridge in “Director Primary and Bylaws” (2008) http://www.businessassociationsblog.com/lawandbusiness/comments/director_primacy_and_bylaws/), for example, describes as a “historical anachronism” the shareholders’ right to initiate by-law amendments by way of shareholder proposal.

37 Coates (1999, 851) argues that although stockholder voice is “radically limited,” voting is nonetheless important because of its role in the market for corporate control. Bainbridge (2003) argues that stockholder voting rights do not provide stockholders with any decision-making power within the corporation or control over the board of directors; they support the takeover market, a mechanism of “market-based accountability” (568-69).
takeover, whereby a third party acquires majority voting control of an underperforming firm and replaces its management (see Manne 1965).

Although I do not discount the importance of the market for corporate control as a disciplinary tool, the economist’s recharacterization leaves much about the shareholders’ voting rights unexplained. For example, why do corporations hold annual meetings and take votes on directorial elections and other matters, even when there has been no change of control? The drafters of corporate laws seem to attach sufficient importance to shareholders’ meetings that they provide mandatory or default rules the purpose of which is to ensure their integrity; for example, a meeting may be held by telephone or other means of remote communication only if the technical arrangements provide shareholders with a reasonable opportunity to participate in the meeting, and shareholders have the right to advance notice of a meeting and to consult, in advance, a list of the other shareholders (Del. GCL sec. 211(a) and 219(a), 222; CBCA subsec. 132(5), 138). They also have the right under federal law to receive all of the information that it is “substantial[ly] like[ly] that a reasonable shareholder would consider…important in deciding how to vote” (TSC Industries Inc. v. Northway Inc. (1976, 449); compare Canada v. Royal Trustco Ltd. (1984)). The purpose of all of these provisions, and of the universal practice in widely held corporations of holding an annual shareholders’ meeting, eludes the economic theorist, for whom voting rights exist only to make possible the market for corporate control.38

What the economic theorist strains to understand, perhaps the political theorist understands more easily. If we are willing to set aside the assumption that the corporation must only be a complex market, and that all power within the corporation must be discretionary, we may instead see shareholder voice as another example of authoritative, collective decision making within the corporation. A shareholder acts consistently with this understanding to the extent that, in the exercise of voting rights, he or she acts with a view to the best interests of the corporation. To be sure, the law does not compel the shareholder to do so (Allied Chemical & Dye Corp. v. Steel & Tube Co. 1923)39 but neither does it attempt to regulate the spirit in which voters cast their ballots in elections for

38 A conventional view regards these features of corporate governance as vestigial (Rodrigues 2006), which is another way of saying that their existence is a descriptive matter accounted for by historical contingency, but that they have no substantive raison d’être.

39 But see British America Nickel Corp. v. M.J. O’Brien Ltd. (1927) at para. 3, where a class of securities other than common shares carries the right to vote, “the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.”
public office. Similarly, shareholder proposals should ideally appeal to reasons potentially acceptable to the general body of shareholders rather than simply trying to persuade the holders of 50 percent +1 of the shares that the proposal is in their sectional interests.\textsuperscript{40} Again, the law does not impose such a requirement by rule, although it does permit management to decline to disseminate proposals that are concerned with redressing personal grievances (Rule 14a-8(i)(4), 17 CFR sec 240.14a-8(i)(4) (2004).\textsuperscript{41}

I am not arguing that the corporation is, or should be, an Athenian-style (shareholder) democracy (contrast Fraser (1998) and Ratner (1970)). Clearly, the shareholder does not play a major political role within the corporation. I do not dispute that a purpose of the corporate form and of limited liability is to make possible the separation of ownership and control, to make it possible for people to supply equity capital despite having limited or no interest in management. Shareholders’ limited political rights within the corporation likely reflect their (for the most part) limited political interest. In this respect, the corporation is not so unlike the modern Western democracy, in which citizens are, to a considerable extent, passive.

The foregoing discussion of directorial authority and shareholder voice is meant to suggest an alternative to the conventional economic interpretation of the arrangements that constitute the corporation. Through an economic filter we look at the corporation and see an ongoing multilateral transaction, in which directorial power, if it exists, is a by-product of imperfect markets and collective shareholder power; if it exists, is an aberration. Through a political filter we see two organs--first, the board of directors and, second, the shareholders as a general body that are vested with the authority to decide or act on behalf of the corporation as a whole.

**III. POSSIBLE OBJECTIONS TO THE CITIZENSHIP METAPHOR**

My article argues for a political understanding of the relationship between corporate officials, including the board of directors and managers, on the one

\textsuperscript{40} The fact that most shareholder resolutions, if adopted, are not binding upon management does not preclude their characterization as instruments of governance. This is an implication of my understanding of political power as going beyond command and compulsion (see note 21). Thus, a shareholder proposal, a plebiscite, a Congressional vote of nonconfidence in a Cabinet member, and a presidential State of the Union address are all acts of governance.

\textsuperscript{41} In addition, the CBCA permits management to refuse to disseminate proposals unrelated to the corporation’s business (CBCA, sec. 137).
hand, and at least some of the individuals who have committed resources to the corporation, for example the shareholders, on the other.

The objections to such an understanding are not difficult to anticipate and, indeed, Usha Rodrigues (2006) offers four arguments against what she calls the “seductive” (1389) comparison between corporate and political democracy: (1) “investing is voluntary, [whereas] living in a civic polity is not” (1398); (2) shareholders are not looking for a “democratic experience” (1398): they vote in order to protect their interests; (3) shareholder democracy is an “empty exercise” (1399) in practice; and (4) shareholders have the “power of exit” (1402). These are familiar objections, and although I have tried to parry them in my exposition of the affirmative case for a political understanding, their considerable influence within the corporate law academy warrants my addressing them directly here.

**Voluntariness of Entry and Exit**

I deal with the first and fourth objections together, as they are related. As to the voluntariness of the act of becoming a shareholder (or otherwise participating in an incorporated business, for example, as an employee), I have already mentioned that membership in a civic polity is also sometimes a matter of choice. We do not deny the existence of a political relationship even in communities where the acquisition of membership is unquestionably voluntary (such as student bodies or self-governing professions), nor in respect of immigrants in traditional polities (such as cities, states, or nations). The voluntariness of the acquisition of membership cannot preclude the existence of a political relationship among the members.

On the other hand, I acknowledge that the nonavailability of free exit is a necessary condition for the existence of a political relationship. If all parties could exit at will and at no cost, there would be no power relationship among them and there would be no point in reflecting upon the conditions for the legitimacy of that power.

There is no question but that public company shareholders’ ability to exit the corporation lessens their vulnerability. Indeed, the prevailing understanding of the market for corporate control is that it is a potent, exit-based mechanism for the protection of the shareholders’ interests. However, it would be wrong to consider shareholder exit as costless, or to think, as Rodrigues (2006) claims, that all that is involved is “a relatively small transaction fee” (1402). At least, the premise of costless shareholder exit is at odds with standard economic understandings of the nature of the shareholder’s investment in the firm.
In particular, it is conventional among economic theorists of the firm to regard the shareholders as the residual risk-bearers. To describe the shareholders in this fashion is to say that increases or decreases in the value of an enterprise as a result of external shocks or the actions of corporate officials and employees translate into corresponding changes in the value of the shareholders’ investment. Others who contribute to the venture, such as employees and creditors, receive fixed remuneration in exchange for factors of production, such as labor and debt capital. By contrast, the nature of equity investment is that the shareholders bear the residual risk, forgoing any right to fixed compensation or even the return of their funds by the corporation, and being the first to go unpaid in the event of the corporation’s insolvency, in the hope that the enterprise will, in fact, be successful, in which case all of the net gains, after compensating the other contributors, will be the shareholders’ reward.

The foregoing description of the shareholders’ function in the venture is not consistent with the proposition that the shareholders are entitled to costlessly terminate the relationship with the corporation at will. One cannot be both the residual risk-bearer and the holder of a free exit pass. In fact, the “right of exit” is more accurately described as the right to transfer one’s shares to a willing purchaser, which is to say that it is the right of a residual risk-bearer to discontinue in this role, provided that the stockholder has found someone to take his or her place. In practice, of course, it is almost always possible to find a purchaser for one’s shares in a publicly traded company--it is simply a question of the price. But what this means is that at any given moment, a portion of the shareholder’s wealth is in the hands of those who control the corporation. Shareholders bear the risk that evolution of the business will be such that they will only be able to dispose of their shares at a reduced price, if at all.

The notion that the shareholder, far from being unattached to the corporation, is locked in, is the premise of a traditional argument for shareholder primacy (Bainbridge 1993), and also lies at the heart of influential recent accounts of the significance of the corporate form as compared with unincorporated forms of business (Blair 2003; see also Hansmann and Kraakman 2000).

I realize that some critics of shareholder primacy have disputed the proposition that shareholders are the sole residual claimants, or that they are locked into the firm, and my aim here is not to argue against them. My point is that the critics’ strategy is not available to those with whom this article principally takes issue, namely the defenders of the orthodox conception of the corporation.
Shareholder Democracy is Meaningless

Rodrigues (2006) also argues that, in practice, shareholder democracy is meaningless because there is virtually always only one slate of candidates for the board (and they are nominated by the incumbent board), and because candidates can be elected without receiving the majority of the votes cast. This objection raises the issue of what conclusions we should draw from discrepancies between the functioning of the political organs of the corporation and what one would expect of a democratic system.

I have already emphasized that I make no claim that the corporation is (or should be) a democracy. My claim is that the corporation is in some respects a political community. This claim consists of two subsidiary propositions, namely, that nonmarket decision making (power) is an important feature of corporate governance, and that this power has the character of authority rather than discretion, meaning that it is subject to ongoing conditions of legitimacy. I suggest, further, that the shareholders as a general body are a locus of such authority within the corporation, albeit a less important one, in practice, than the board of directors.

I do not wish to overstate the importance of the shareholders as a decision-making body. The rational passivity of shareholders presents a formidable obstacle to their effective exercise of their formal powers. In particular, it is one reason why in practice there is usually only one slate of candidates for the board. However, rational passivity is a problem for any political participatory mechanism. More generally, as I have observed, active participation is not an essential component of a conception of political citizenship.

My point is that when the shareholders do get their act together, we should not misinterpret what they are doing. Consider, for example, Rodrigues’s (2006) discussion of the 2004 directorial elections of the Walt Disney Company. In describing the episode, Rodrigues chooses to emphasize the fact that the decision of 45 percent of Disney shareholders to withhold their votes from the incumbent chairman “had no legal significance” (1400). I am prepared to grant that the withheld votes produced no formal legal consequence, since the incumbent still received more affirmative votes than any other candidate and was formally

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42 Similarly, Bainbridge (2006) claims that the shareholders’ voting rights “in fact are so weak that they scarcely qualify as part of corporate governance” (616).
43 Democratic discrepancies abound in contexts that are uncontroversially political. An American president can be elected without receiving a majority of the popular vote.
elected. However, it does not follow that their withholding of their votes was a political nonact. Officials exercise political authority even when their act does not produce formal legal effects. When a legislator votes in favor of a measure, knowing that it will be defeated or will be vetoed by the chief executive, the legislator’s vote is, in a sense, inconsequential, but it is nevertheless an act of participation in the collective self-governance of the community, an exercise of authority. (If it were otherwise, no one could criticize a legislator for his or her voting record as long as it was not pivotal.) Similarly, when shareholders of Disney withheld their votes from the incumbent, they were exercising their powers under corporate law, not engaging in a meaningless protest, despite the absence of formal legal consequences. Their act was, in substance, a vote of nonconfidence, not a tantrum en masse.

Shareholders Vote, Not As Citizens, but to Protect Their Interests

This objection holds that shareholders do not in practice perceive themselves as citizens, or act as such. They perceive themselves and conduct themselves like investors.

The underlying assumption is that when individuals participate in democratic processes, they expect one another to act, and do act, in a public-spirited manner, whereas when they act in the private sphere (for example, as investors) they expect one another to act, and do act, selfishly. As an empirical proposition this claim, if it contains a grain of truth, is at best a generalization. Few now doubt that participants in democratic processes sometimes (some would say often) act selfishly, and that some participants have internalized the economist’s conception of politics as an occasion to seek rents. By the same token, investors sometimes do not act as self-interested automatons. They sometimes act in a collectively rational rather than individually rational manner. Even returning a proxy form (casting a vote) is more easily understood as an act of participation in collective self-governance than an action to protect one’s own interests: rational and purely self-interested investors would not vote because of nonpivotality.44 Similarly, when shareholders put forward proposals on matters of

44 Because any individual’s vote is extremely unlikely to make a difference to the outcome of an election (it is nonpivotal), voting is difficult to explain as an act whereby a rational individual attempts to procure an election outcome that advances the shareholder’s self-interest. The fact that some people do vote is an enduring puzzle for economists. “People do vote, of course, despite the lack of instrumental value to voting; they evidently derive some consumption value from
social responsibility, they act in a way that reveals the dichotomy between citizen and investor as simplistic.

Our conception of the corporation should be capable of accommodating to a greater extent than it currently does the complexity of the phenomenon. My contribution is to suggest that the participatory mechanisms in corporate governance, like those in the governmental context, can be understood as providing an opportunity for individuals to act collectively--to act in a collectively rational manner--as opposed to in the self-regarding manner expected of them in their marketplace interactions. I suggest that a shareholder who exercises his or her voting rights in the collective interest of the shareholders is not making what amounts to a charitable gift to the other shareholders but is acting in accordance with collective rationality in a collective decision-making process. One can similarly imagine a statement in a management or dissidents’ proxy circular that appeals to the collective interest of the shareholders rather than the sectional interest of 50 percent+1 of the shareholders. There is no guarantee that shareholders will, in fact, act in accordance with the collective interest, but that is not fatal to my argument--we have no such guarantees in ordinary elections, either.

Once again, I do not dispute that shareholders cannot realistically be expected to be active participants in their collective self-governance. This observation is as old as the widely held corporation itself (cf. Berle and Means 1932). But it is also true of large political communities in general, and my point is simply that it does not follow from shareholders’ relative passivity and disempowerment or from the fact that they have financial objectives in investing, that they are not members, qua shareholders, of a political community.

IV. THE POLITICAL THEORETICAL APPROACH COMPARED WITH OTHER CRITICAL APPROACHES

Since my aim is to enlarge the framework within which corporate law scholars and teachers understand the nature of the corporation and the purposes of corporate law, my focus in this article has been on showing what is missing from the dominant approach and, specifically, how viewing the corporation through a political-theoretical lens renders visible certain features that are invisible or incomprehensible when the corporation is viewed through an economic lens.

it (which is to say, economists don't understand why people vote)” (Posner 1986, 23). Compare Jacobson and McCormik (2005), who suggest that individuals vote, even though “rational calculation counsels against it,” because not voting “contradicts the premise of [their] life in a democracy” (720).
Mine is hardly the first exercise in criticism of the economic understanding of the corporation, and in this Part I consider the relationship between the approach defended here and two strains of criticism that have emerged over the last decade or two, specifically progressive and feminist corporate law scholarship.

In describing progressive corporate law scholarship, generalization is perilous. Testy (2004), sympathetic to the movement, has described it as “emergent” and, therefore, “not amenable to easy definition” (91). Yet, it seems a fair approximation to say that progressive scholarship is troubled by the prevalence of illegal, immoral, and irresponsible corporate behavior—frequently mentioned examples include behavior relating to dangerous products, the treatment of workers at home and in the Third World, and environmental irresponsibility (Mitchell 2001; Branson 2002). Progressives regard the persistence of such behavior as symptomatic of fundamental defects in the structure and content of corporate law. There is not a consensus among progressives as to what these defects are (and therefore what their remedy would be), although criticisms of the shareholder wealth maximization norm and of stakeholder disempowerment figure prominently in many accounts (Testy 2004; Dallas 2002). Many progressive scholars are also critical of the economic approach to the evaluation of corporate law and, in particular, of economics’ capacity for justifying situations that to the progressive scholar seem manifestly unfair or dysfunctional (Greenfield 2002).

There is also an emerging literature about the application of feminist theory to corporate law. With the same caveat about generalizations, this literature seems to contribute at least two intellectual moves. The first is an argument that the conventional economic emphasis on autonomy and self-interested marketplace interactions should be enriched with the concepts of care and connection (Testy 2004; Cohen 1994; Gabaldon 1992). The second is an argument that the conventional evaluation of corporate law pays insufficient heed to certain contextual elements and consequences, including the gendered distributional consequences of superficially gender-neutral concepts such as efficiency (Sarra 2002).

The political theoretical argument I have defended in this article has several points in common with the progressive and feminist critiques of corporate law, especially its recognition that intracorporate relationships are characterized by the exercise of power, and its concern about the justification (or lack thereof) of the exercise of that power. In addition, this article shares feminism’s concern about the standard model’s impoverished conceptualization of human interaction.

Nevertheless, there are important differences between my project and other critical literatures. The first and most important difference is that I am not articulating a critique of corporate law or a reform agenda for corporate law but
rather an interpretation of corporate law as it exists. Mine is nevertheless a critical project, in that it questions the dominant interpretation and, more broadly, the completeness of the dominant theoretical framework in corporate law. More precisely, I have argued that the conventional articulation of corporate law’s internal normative structure is insufficient without reference to the concept of political community.

Second, my argument is essentially theoretical, whereas a concern for the concrete effects of institutional structures is prevalent in progressive and feminist scholarship (Gabaldon 2002; Condon 2000). My focus on theory does not, however, flow from any belief on my part that consequences are unimportant. It simply reflects the aim of the project, which is to illuminate the internal normative structure of corporate law. One can study the normative structure of a legal act or a legal concept at a theoretical level (Fuller 1964; Hart 1997), even if one would hesitate to advocate law reform or articulate a normative defense of the status quo without regard to consequences in fact.45

Finally, whereas some feminist scholarship “begin[s] with the rejection of liberal theory” (Cohen 1994, 22), and views the advancement of its agenda as a matter of accumulating sufficient “political might” to prevail against conservative forces (Testy 2004, 89), my approach is intended to complement the economic perspective, which I view as partial and incomplete rather than fundamentally misguided. My quarrel is with economics’ hegemony in academic corporate law, not with the pertinence of its values or methodology.

V. WHAT DIFFERENCE DOES IT MAKE?

I have suggested that a political perspective on the corporation calls attention to the power vested in corporate officials, and invites the question whether this power is better characterized as authority or as discretion. By contrast, the dominant economic understanding of the corporation either denies

45 Just as a classic endeavor of legal theory is to identify the inner normative structure of the institution of law (Fuller 1964; Dworkin 1986), corporate law theorists engage in a similar exercise with respect to corporate law. This is in large part what Easterbrook and Fischel’s classic essay, “The Corporate Contract” (1989) is about. The present article is a critique of the conventional economic understanding of corporate law’s normative structure, as articulated by theorists such as Easterbrook and Fischel.
the phenomenon of power as an empirical matter, or else conceptualizes it as residual slack. Market interactions are viewed as primary.\footnote{As Guido Calabresi (1991) approvingly observed, Coase’s 1937 insight was that “neither market nor non-market forms of organization are primary” (1214).}

Put another way, the question with which I have been concerned is whether the nonmarket elements of corporate governance must necessarily be thought of as interstitial; that is, as a “second-best” response to the reality of transaction costs in a system that, in an ideal world, we would prefer to see organized around markets. The economic theorist, whether he or she is Henry Manne (2003) or Margaret Blair and Lynn Stout (1999, 2001), typically answers yes.\footnote{I use Manne and Blair and Stout as examples because they represent opposite ends of the spectrum of opinion on the debate about shareholder primacy, a fundamental philosophical debate in corporate law. The writings of both, however, reflect a characterization of nonmarket decision making as inferior in principle to marketplace interactions.} I have tried to develop an alternative understanding of the nonmarket aspect of corporate governance as a form of governance with its own logic and justificatory theory. For this purpose, I have argued for the relevance of a discourse grounded in political theory rather than economics.

What difference does it make whether we conceptualize in political terms the nonmarket component of corporate governance? What difference, in other words, does discourse make? Discourse matters for at least two reasons, having to do with policy and culture. First, discourse determines the types of argument that are viewed as fair game in discussions about policy. Therefore, it can plausibly affect the outcomes of those discussions. We might, for example, too readily seek to abolish nonmarket corporate governance mechanisms on the grounds that they “don’t belong” or because we see only the potential for rent-seeking and attach no normative significance to collective self-governance. Consider, by way of illustration, the debate in the academic literature about the shareholder proposal mechanism. Opponents of the proposal mechanism often assume that the mechanism serves no purpose (Bainbridge 2008) and that shareholder voice must be understood as rent-seeking rather than as participation in the collective exercise of authority (see Liebeler 1984; Fischel 1982). Such objections are, on my analysis, misconceived.

Even if our incomprehension of authority does not lead us to advocate the outright abolition of nonmarket corporate governance mechanisms, we might commit the related error of focusing all of our energies on greasing the wheels of the market for corporate control and unduly neglect the health of the corporation’s political organs. For example, we might give short shrift to such questions as
whether regulatory obstacles to informal shareholder communication should be removed, whether shareholders should be able to nominate directors (Bebchuk 2003), whether longer earnings reporting cycles and longer directorial mandates might improve the quality of managerial deliberations (Mitchell 2001, Lipton and Rosenblum 1991), and whether transfer restrictions on shares might encourage shareholders to take a longer term perspective on their relationship with the corporation (Mitchell 2001). It is also, of course, possible to construct an economic defense of these reforms, but my point is that the debate is not purely economic since the mechanisms in question also have a deliberative aspect, the rationale for which is also political.

Second, discourse has cultural significance. By this I mean that it informs people’s understanding of their own role and appropriate behavior. In concrete terms, the way in which scholars conceptualize the corporation can be expected to affect the behavior of those of our students who become corporate officials or legal advisers to them.

It is significant, in this connection, that the conventional economic approach has little to say about how those who wield power within the corporation should act. The standard narrative is that the welfare of all participants in the corporation is maximized by leaving corporate officials a zone of discretion, bounded by market forces and legal sanctions (Elhauge 2005). Within this zone of discretion corporate officials are free to act as they wish. The political approach, by contrast, makes it possible to understand corporate officials’ powers as authoritative, which is to say that their exercise is subject to

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48 Regulatory reforms in the United States in 1992 (Regulation of Communications Among Shareholders) and in Canada in 2001 (An Act to amend the Canada Business Corporations Act and the Canada Cooperatives Act and to amend other Acts in consequence) have accomplished this.

49 I am not arguing for or against particular institutional reforms within the corporation. One can, for example, debate the respective roles of the shareholder, director, and manager in corporate governance, just as one debates the appropriate political role of the citizen, elected representatives, and bureaucracy in the governance of society-at-large. My suggestion is simply that we would be wrong to assume that unfettered markets are the only route to better corporate governance.

50 As Lyman Johnson (2002) wrote: “[as] future lawyers counseling corporate decision makers, [our students] will draw from us [their teachers] a good measure of what they believe to be the proper role, professional responsibility and ambit of concern of corporate lawyers” (1484).
ongoing conditions of legitimacy. A political theoretical approach does not view corporate officials as free agents.\footnote{Admittedly, economic analysts do sometime take a different tack, arguing that managers ought to seek to maximize some conception of the shareholders' interests. Thus, for example, Milton Friedman (1970) instructed managers that their “social responsibility” is to “maximize profits” (32). Such arguments appear to violate the economist’s policy against “preaching” (Stigler 1981, 146). Nevertheless, to the extent that they view corporate officials as normatively obligated to advance some conception of the interests of the corporation, and not as free agents, they appear to be more compatible with a political conception of the corporation as an entity characterized by a relationship in which power is exercised on behalf of the collectivity subject to ongoing legitimacy conditions. That is not to say that I have no issue with Friedman’s exclusively profit-focused conception of the best interests of the corporation, as will become apparent shortly.}

The conventional economic approach is illuminating enough for the “bad man,” but it sends the wrong message to the “puzzled” or “ignorant man,” to whom H. L. A. Hart (1997, 40) reminded us that the law must also speak. The point, of course, is not that there are no “bad men.” Not in the least do I suggest that politics are perfect while markets are defective. However, if as scholars we fail to recognize that the exercise of authority by corporate officials is subject to ongoing conditions of legitimacy--and instead continue to articulate a conception of the corporation according to which officials possess discretion that, within the bounds established by market forces and (weak) legal sanctions, is absolute--corporate actors might come to believe the same and conduct themselves accordingly. As Arendt (1958) observed, “the trouble with modern theories of behaviorism is not that they are wrong but that they could become true” (322).

The analysis of ethical issues arising in the course of business provides another illustration of the significance of discourse for policy and culture. The conventional approach conceptualizes corporate officials’ ethical behavior, to the extent not motivated by profit, as an exercise of their discretion (Elhauge 2005, Butler and McChesney 1999, Ribstein 2005) or even as wrongful expropriation of the shareholders (Fischel 1982). If, for example, a corporate official makes use of “residual slack” to discontinue a profitable line of business supplying equipment to a genocidal regime, on the basis that continuing to deal with the regime would be immoral, the conventional understanding does not distinguish this decision from any other exercise of discretion that fails to maximize the shareholders’ wealth--for example, a decision to provide executives with excessively lavish office furnishings (Butler and McChesney 1999).
A political approach, on the other hand, makes it possible to think of corporate officials as exercising authority on behalf of the participants in the corporation when they engage in ethical behavior, depending on whether the decision satisfies the criteria for its legitimacy. Such criteria might include conditions relating to the manner in which the decision is made and, perhaps, a requirement that the reasons upon which they act are ones that all of the participants would reasonably understand and accept. To articulate such criteria is not, of course, to say that it is easy to apply them. However, at the level of concepts it is useful to be able to distinguish discretion and misappropriation from ethical representation.

Why does this conceptual distinction matter? It matters, once again, for reasons of policy and culture. From the standpoint of policy, a standard normative argument against ethically motivated departures from profit maximization takes for granted that the appropriate conceptualization of the managers’ actions is that they are indulging their own personal preferences. I have questioned this conceptualization.

From the standpoint of culture, the conceptual confounding of loyal representation and bounded free agency may have an impact on the behavior of corporate officials to the extent that it becomes internalized by them. Specifically, the dominant discourse may lead managers, when confronted with a business decision raising an ethical issue involving the rights of a third party, not to approach the issue from the standpoint of ethics but rather to adopt one of two rather different frameworks of analysis. On the one hand, they may approach the issue amorally, based solely on an appreciation of the public relations fall-out, liability risk, and other like consequences attached to various courses of action. On the other hand, they may view themselves as at liberty to do whatever they want, to allocate welfare as they wish among the shareholders (by pursuing profit), the third party (by protecting the third party), and themselves (by doing that which attracts praise and enhances their social standing). Both of the latter approaches are, in my view, inappropriate to the resolution of ethical dilemmas in business.

Adherents of the conventional view believe that corporate managers should leave ethical questions to governments. For example, Easterbrook and Fischel (1991) write that “to view pollution, or investment in South Africa, or other difficult moral and social questions as [corporate] governance matters is to miss the point” (39). To this it might be responded that one cannot always successfully avoid an ethical dilemma associated with a course of action by looking to whether the course of action is legal.
CONCLUSION

Some readers may be struck by the fact that in an article on citizenship and corporate governance, I have not said who the “citizens” of the corporation are. This omission is intentional. The portrayal of the corporation I have drawn is compatible with either a shareholder-centered or a broader understanding of the corporate political community. It is, I assume, uncontroversial that the community includes at least the shareholders. Whether it includes any other “stakeholders” who, by virtue of having committed resources to the corporation, have become associated with the corporation, is a matter of whether the power exercised over them by corporate officials is in the nature of authority or discretion, a question on which I do not take a position in this article.\textsuperscript{53}

Instead, I have used the metaphor of citizenship as a point of entry into an exploration of the possibilities offered by political theory for enriching the prevailing conceptualization of the corporation. Legal scholars should care about the conceptualization of the corporation and about corporate law discourse more generally. Discourse determines the intellectual boundaries of debate on policy questions, and it affects the self-understanding and the conduct of corporate officials. For this reason it makes a difference whether corporate law academics and students are aware of both the political and economic parts of the corporate “elephant” rather than mistaking the economic part for the whole elephant.

\textsuperscript{53} A few authors, for example Allan Hutchinson (2005), have criticized, on democratic grounds, the nonparticipation of employees in governance. This article supplies a necessary theoretical foundation for arguments such as Hutchinson’s. The dominance of the economic approach means that it cannot be taken for granted that considerations having to do with the legitimacy of power, other than ex ante consent (i.e., contract), have any place in debates about corporate governance. The argument has to be made, and making the argument is the goal of this article.
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