The London School of Economics and Political Science

THE CORPORATION, ITS NORMATIVE SIGNIFICANCE, AND THE SOCIAL EGALITARIAN CASE FOR STAKEHOLDER THEORY

David Henry Coombs

A thesis submitted to the Department of Philosophy, Logic and Scientific Method of the London School of Economics and Political Science for the degree of Doctor of Philosophy, London, 29th July 2022

DECLARATION

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work, other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

The copyright of this thesis rests with the author. Quotation from it is permitted, provided that full acknowledgement is made. This thesis may not be reproduced without my prior written consent. I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.

I declare that my thesis consists of 78,659 words.

ABSTRACT

There are two important debates in business ethics that centre on the limited liability business corporation (the *corporation*). The first debate is whether the corporation has a special normative significance because of its legal form, which means that it comes with special moral responsibilities that are different to moral responsibilities in other, non-corporate contexts. The second debate is whether an egalitarian society should normatively regulate the corporation with stakeholder theory or shareholder value maximisation, where stakeholder theory requires that the corporation gives weight to the interests of all the corporation's stakeholders and shareholder value maximisation requires that the corporation maximises profits for shareholders, albeit subject to certain constraints.

In this thesis, I contribute to these debates by defending two over-arching claims. First, I claim that there are strong *pro tanto* reasons for society to regulate the corporation with special moral responsibilities because the corporation has a special governmental provenance and comes with special legal privileges for its shareholders. I defend this claim by developing an argument which I call the Corporate Fair Reciprocity Argument, because it is rooted in a conception of justice as fair reciprocity in which justice requires that citizens fairly benefit from and fairly contribute to society as a system of fair social cooperation.

Second, I claim that a social egalitarian society, which is plausibly a more specific version of justice as fair reciprocity in which the primary concern of justice is that citizens relate to one another as social equals, has good reasons to favour stakeholder theory. I justify this claim by developing a refined version of stakeholder theory that is grounded in specific social egalitarian values and by defending this version of stakeholder theory as being superior to shareholder value maximisation.

ACKNOWLEDGEMENTS

My deepest thanks to everyone who has supported me with this thesis. Thank you Alex Voorhoeve, Susanne Burri, Jonathan Birch, Thomas Ferretti, Mike Otsuka, Jonathan Aldred, Paul Lewis, Bastian Steuwer, and Charles Sherwood. Thank you to my parents, Ffion and Richard, and to my sister, Emma. Thank you Ed, Emily, and Astrida. Thank you Ruth and Caroline. Thank you Norma and Joy, you are deeply missed. Thank you Louis. Thank you Theo. And, most of all, thank you Emma, for your constant love and support.

CONTENTS

INTRODUCTION **9**
I. Two questions about the corporation 9
II. Two claims about the corporation 11

PART 1: THE CORPORATE FAIR RECIPROCITY ARGUMENT **15**

CHAPTER 1: THE CORPORATION, THE NORMATIVE GOVERNMENTAL PROVENANCE ARGUMENT, AND THE CONTRACTUAL VIEW OBJECTION 16
1.1 Introduction 16
1.2 What is a corporation? 19
1.2.1 The legal form analytical lens 19
1.2.2 The corporation as a legal form and its legal features 21
1.2.3 The distinctiveness of the corporation as a legal form 24
1.3 The debate about the corporation's normative significance 26
1.3.1 The NGP argument 26
1.3.2 Objections to the NGP argument 33
1.3.3 The influence of the contractual view 34
1.4 A defence of the standard NGP argument's positive claims 36
1.4.1 The contractual view objection 36
1.4.2 Defending the special governmental provenance claim 38
1.4.3 Why corporate privileges are substantial privileges 42
1.5 Conclusion 45

CHAPTER 2: THE CORPORATE FAIR RECIPROCITY ARGUMENT 46
2.1 Introduction 46
2.2 The normative significance claim and its weaknesses 49
2.2.1 The normative significance claim 49
2.2.2 Weaknesses in the normative significance claim 51
2.2.3 Other versions of the normative significance claim 53
2.3 The need for a political-philosophical framework 54
2.4 Justice as fair reciprocity 57
2.4.1 The general conception of justice as fair reciprocity 57

2.4.2 Three features that are relevant to an NGP-style argument 61
2.5 The corporation in justice as fair reciprocity 65
2.5.1 The justice-based justification for creating the corporation 65
2.5.2 The two pro tanto justificatory reasons for corporate responsibilities 66
2.5.3 The Corporate Fair Reciprocity Argument 71
2.6 Comparing the NGP arguments 72
2.7 Conclusion 74
CHAPTER 3: THREE OBJECTIONS TO THE CORPORATE FAIR RECIPROCITY ARGUMENT 76
3.1 Introduction 76
3.2 The no normative significance objection 78
3.3 Replies to the no normative significance objection 80
3.3.1 First reply: the terms of social cooperation as the institutionalist criterion 80
3.3.2 Second reply: corporate privileges as a different kind of governmental action 89
3.3.3 Third reply: the instrumental effects of the corporation's governmental provenance 90
3.4 The efficiency is sufficient objection 92
3.5 Replies to the efficiency is sufficient objection 93
3.6 The conflicts with freedom objection 95
3.7 Replies to the conflicts with freedom objection 97
3.8 Conclusion 98
PART 2: SOCIAL EGALITARIAN STAKEHOLDER THEORY 99
CHAPTER 4: SOCIAL EGALITARIANISM, STAKEHOLDER THEORY AND SHAREHOLDER VALUE MAXIMISATION 100
4.1 Introduction 100
4.2 A social egalitarian conception of justice 103
4.2.1 Social egalitarianism 103
4.2.2 Some relevant social egalitarian justice-based values 106
4.3 Justifying two candidates for corporate responsibilities 108
4.4 Stakeholder theory 109
4.5 Shareholder value maximisation and the market failures approach 112

4.5.1 Shareholder value maximisation 112
4.5.2 The market failures approach 115
4.6 The state of the egalitarian debate 116
4.7 Conclusion 117
CHAPTER 5: THE INSTITUTIONAL SYSTEM ARGUMENT AND PROTECTING THE VULNERABLE 119
5.1 Introduction 119
5.2 The institutional system argument 120
5.2.1 The argument in a distributive egalitarian conception of justice 120
5.2.2 The argument in a social egalitarian conception of justice 123
5.3 Protecting the vulnerable from domination and exploitation 124
5.3.1 An external challenge to the institutional system argument 124
5.3.2 Substantiating the value of protecting the vulnerable 125
5.4 Rejecting the institutional system argument 127
5.4.1 Why the disapply condition is not satisfied 127
5.4.2 Why the consistency condition is not satisfied 131
5.5 The stakeholder vulnerability obligation 137
5.6 An objection and a clarification 140
5.6.1 Other institutional protections 140
5.6.2 The vulnerability argument for shareholder primacy 142
5.7 Conclusion 142
CHAPTER 6: EFFICIENCY, VAGUENESS, AND MOTIVE COMPATIBILITY 144
6.1 Introduction 144
6.2 The efficiency argument 146
6.2.1 The first fundamental theorem argument 148
6.2.2 The bottom-up strategy 151
6.2.3 The purported inefficiency of stakeholder theory 153
6.3 Evaluating the efficiency argument 154
6.3.1 Flaws in the efficiency argument 154
6.3.2 The stakeholder efficiency obligation 159
6.4 Social egalitarian stakeholder theory 168
6.5 The vagueness argument 169
6.6 Evaluating the vagueness argument 170

6.7 The motive compatibility argument 173
6.8 Evaluating the motive compatibility argument 176
6.9 Social egalitarian stakeholder theory on the front foot 180

CONCLUSION 181
I. Concluding remarks 181
II. The thesis's main claims and contributions 181
III. Other relevant matters not covered in the thesis 189
IV. Directions for further research and implications for corporate governance 196

BIBLIOGRAPHY 199

INTRODUCTION

I. Two questions about the corporation

This thesis addresses two questions about the limited liability business corporation (the *corporation*). First, does the corporation have a special normative status within society that means it should be regulated with special moral responsibilities? Second, presupposing that the corporation is normatively significant, which of the two main approaches to business ethics should a social egalitarian society apply to normatively regulate the corporation – stakeholder theory or shareholder value maximisation?

These questions engage with two important debates within business ethics. The first debate is whether the corporation has a special governmental provenance that justifies regulating it with special *corporate responsibilities*. The corporation is a business that makes use of the corporate legal form; it has a unique governance structure that divides ownership and governance rights amongst shareholders, directors, and managers, and a unique combination of legal features, such as limited liability which protects shareholders from the corporation's liabilities. According to the Normative Governmental Provenance (*NGP*) argument (Ciepley, 2013; McMahon, 2012; O'Neill, 2009a, 2009b), the corporation is normatively significant because its legal form depends on special governmental action that differentiates the corporation from other non-corporate businesses, associations, and institutions, and because the corporation awards special legal privileges to the corporation's shareholders. The corporation must, the NGP argument claims, be assigned corporate responsibilities, which apply primarily to the people who determine corporate behaviour in their governance roles, and that are distinctive to the moral responsibilities that regulate people in other non-corporate businesses, associations, and institutions, or in their general individual conduct.

The notion of singling out the corporation vis-à-vis other businesses, associations, institutions, and individual activity is, however, controversial, and there are several objections to the NGP argument. One prominent objection argues that the corporation is a 'nexus of contracts' and denies that the corporation has a special governmental provenance or comes with corporate privileges (Easterbrook and Fischel, 1991; Hessen, 1979). According to this contractual view of the corporation, the corporation can, in principle, be created by voluntary contractual arrangements without special governmental action. Not only does the contractual view directly challenge the NGP argument but it also informs a range of approaches to business

ethics, spanning libertarianism to liberal egalitarianism, which hold that moral responsibility in business is just the same as personal moral responsibility regardless of the legal form that is used. Another prominent objection grants that the corporation does have a special governmental provenance, but objects that this feature is not normatively significant because the market is characterised by a range of different governmental interventions and that the corporation's dependence on special governmental action is qualitatively similar to other market participants' dependence on other forms of governmental action (Singer, 2019).

The second debate concerns how a social egalitarian society should normatively regulate the corporation, presupposing that the corporation can be assigned distinctive responsibilities. Social egalitarianism, which is also known as relational or democratic egalitarianism, is a conception of justice whose central concern is that citizens relate to one another as social equals (Anderson, 1999, 2007, 2008, 2010; Fourie et al., 2015; O'Neill, 2008a; Rawls, 1996, 1999, 2001; Scheffler, 2003; Schemmel, 2011, 2021). Social equality demands that society upholds some distinctively social egalitarian concerns, such as equality of standing, esteem and authority, and protecting the vulnerable from domination and exploitation, and also registers a concern with other justice-based values that are relevant to a distributive egalitarian conception of justice, including the degree of distributive equality in society. Amongst the different approaches for normatively regulating the corporation, the two main candidates are stakeholder theory and shareholder value maximisation. Stakeholder theory requires that the corporation gives weight to the interests of its stakeholders – being a combination of the corporation's shareholders, employees, customers, suppliers, lenders, its local community and wider society (Anderson, 2015; Asher et al., 2005; Donaldson and Preston, 1995; Evan and Freeman, 1993; Freeman et al., 2010; Jones, 1995; Jones and Felps, 2013a, 2013b; Phillips, 2003, 2011). And shareholder value maximisation requires that the corporation maximises the corporation's profits for shareholders, albeit with some constraints on permissible profit-maximising strategies (Friedman, 1962, 1970; Hansmann and Kraakman, 2000; Heath, 2014; Jensen, 2002; Sundaram and Inkpen, 2004).

There is a long-standing debate about the respective merits of these two approaches to business ethics. When it comes to egalitarian evaluations of these approaches, however, stakeholder theory is on the back foot. One reason for this is that there is, in Heath's (2014) market failures approach, a well-developed and well-defended version of shareholder value maximisation, but no comparable version of stakeholder theory. The market failures approach requires that the corporation should maximise profits for shareholders whilst respecting a set of (at least) ten meaningful constraints and is, Heath (2014: 191) argues, justified on

distributive egalitarian grounds. Whereas, when it comes to stakeholder theory, "we have yet to see a spirited and rigorous defence of the [stakeholder] theory," as Norman (2011: 46) puts it. A second reason is that there are four arguments a social egalitarian has reasons to endorse that appear to favour shareholder value maximisation, and the market failures approach in particular, over stakeholder theory, on the grounds that: (i) shareholder value maximisation is more efficient than stakeholder theory (the *efficiency argument*); (ii) that there is an institutional division of moral labour argument for tasking the corporation with realising efficiency, whilst other institutions, such as society's social welfare system, realise distributive equality (the *institutional system argument*); (iii) that shareholder value maximisation is considerably less vague than stakeholder theory (*the vagueness argument*); and (iv) that shareholder value maximisation is more compatible with generally held motives in business than stakeholder theory because it endorses the profit motive (the *motive compatibility argument*).

II. Two claims about the corporation

I answer these questions by defending two over-arching claims about the corporation in the two parts of this thesis.

Part 1: The Corporate Fair Reciprocity Argument

In answer to the first question, I argue that there are strong *pro tanto* reasons for society to regulate the corporation with special corporate responsibilities, conditional on a political-philosophical framework of justice as fair reciprocity. I defend this claim by developing a modified version of the NGP argument, which I call the Corporate Fair Reciprocity Argument and which I defend over three chapters.

In Chapter 1, I lay out the background to the NGP argument and reject the contractual view objection. I explain what a corporation is and summarise the debate about the corporation's normative status. I then defend two positive (i.e., factual) claims about the corporation that are central to any NGP argument – that the corporation has a special governmental provenance and that it comes with corporate privileges – against the contractual view objection. I argue that the contractual view objection is mistaken because the legal features that jointly constitute the corporation are either impossible or very costly to replicate contractually. Moreover, corporate privileges are a substantial benefit for shareholders, even

in intangible asset-based corporations or where other factors contribute to the corporation's financial success.

In Chapter 2, I develop and defend the Corporate Fair Reciprocity Argument. I argue that an NGP argument cannot succeed as a standalone argument but must be situated in a political-philosophical framework. Accordingly, I situate the corporation in a conception of justice as fair reciprocity, in which justice requires that citizens fairly benefit from and fairly contribute to society as a system of fair social cooperation (Gibbard, 1991; Rawls, 1996, 1999, 2001; White, 2003). I argue that this framework yields two *pro tanto* reasons that justify why a society should regulate corporations with special corporate responsibilities. First, the corporation's special governmental provenance marks it out as a major social institution that structures and substantially affects how citizens cooperate. Second, the corporation should be structured as a 'fair deal' between shareholders and society, in which the corporation's shareholders make a fair contribution to justice-based values as a *quid pro quo* for the corporate privileges they enjoy. The resulting Corporate Fair Reciprocity Argument is a novel version of existing NGP arguments that has, I argue, firm normative foundations and that concludes with the more defensible claim that the justification for corporate responsibilities is, although strong, *pro tanto* and not decisive.

Chapter 3 refutes three objections to the Corporate Fair Reciprocity Argument. These objections argue against assigning corporate responsibilities on the grounds that governmental provenance does not normatively differentiate the corporation from other market participants (Singer, 2019), that the corporation's efficiency properties are sufficient to justify the corporation, or that corporate responsibilities unacceptably conflict with freedom. In refuting these objections, I demonstrate the value of the Corporate Fair Reciprocity Argument, as its modifications to the NGP argument play a role in refuting the objections. Moreover, I indicate that the Corporate Fair Reciprocity Argument has fruitful implications for other longstanding debates in business ethics, such as concerns about whether the existence of special responsibilities in business conflict unacceptably with freedom.

Part 2: Social Egalitarian Stakeholder Theory

In answer to the second question, I argue that a social egalitarian society has strong reasons to favour a new version of stakeholder theory, which I call *social egalitarian stakeholder theory*, over shareholder value maximisation. Stakeholder theory is, I argue, usually on the backfoot from an egalitarian perspective for two main reasons. First, there is not a sufficiently well-

developed version of stakeholder theory that can rival the market failures approach. In developing social egalitarian stakeholder theory, I therefore propose an alternative to the market failures approach that is, I argue, well-developed and firm in its egalitarian foundations. Second, many of the arguments for the market failures approach appear stronger than they in fact are, when scrutinised more closely. As part of the defence of social egalitarian stakeholder theory, I argue that the arguments that purportedly favour the market failures approach have several flaws and are weaker than claimed.

Social egalitarian stakeholder theory comprises two obligations: a *stakeholder vulnerability obligation,* which demands that the corporation protects the vulnerable by refraining from dominating or exploiting its stakeholders; and a *stakeholder efficiency obligation,* which requires the corporation to aim at generating a large surplus by entering into and honouring implicit, as well as explicit, contracts that advance the interests of all of its production stakeholders. Social egalitarian stakeholder theory is not intended as a complete account of corporate responsibilities, but it is sufficiently well-developed, I argue, to contrast with the market failures approach.

I defend the superiority of social egalitarian stakeholder theory over shareholder value maximisation, and the market failures approach in particular, over three chapters. In Chapter 4, I describe social egalitarianism, stakeholder theory and shareholder value maximisation, and pick out the market failures approach as the most coherent version of shareholder value maximisation. I also summarise the state of the egalitarian debate concerning the merits of these two approaches.

In Chapter 5, I develop the case for social egalitarian stakeholder theory by rejecting the institutional system argument for the market failures approach. The institutional system argument for shareholder value maximisation holds that the corporation should be tasked *solely* with realising efficiency and should not take account of other justice-based values. For this argument to succeed in a social egalitarian framework, it must be the case that social equality values permissibly disapply to the corporation, so that the corporation can permissibly disregard them, or that shareholder value maximisation is consistent with social equality values, so that the corporation's focus on efficiency does not conflict with them. When it comes to the important social egalitarian value of protecting the vulnerable from domination and exploitation, however, I argue that neither of these conditions hold, and that the market failures approach is, in this respect, flawed. By contrast, I argue that stakeholder theory can be refined in a social egalitarian direction by developing the stakeholder vulnerability obligation that

directly takes account of protecting the vulnerable and forbids the corporation from dominating or exploiting people.

In Chapter 6, I complete the defence of social egalitarian stakeholder theory by evaluating three further arguments that purportedly favour the market failures approach: the efficiency argument, the vagueness argument and the motive compatibility argument. In respect of the efficiency argument, I argue that the market failures approach is flawed because of an objection based on the general theory of the second best (Lipsey, 2007; Lipsey and Lancaster, 1956). Although Heath (2014: 38-41) identifies the objection, I argue that its implications are more damaging to the market failures approach than he estimates, and demonstrate that the objection also raises serious doubts about the efficiency case for shareholder value maximisation in general. As an alternative, I defend a plausible efficiency argument for the stakeholder efficiency obligation that is based on the team production theory of corporate law (Blair, 2019; Blair and Stout, 1999; Stout, 2002), and which is a novel contribution to business ethics. With respect to the vagueness and motive compatibility arguments, I argue that the case for the market failures approach is weaker than it appears and there is no clear-cut difference between the market failures approach and social egalitarian stakeholder theory when evaluated against these criteria. Moreover, a social egalitarian society is also concerned with sustaining egalitarian attitudes, and on this criterion social egalitarian stakeholder theory has the advantage over the market failures approach.

Concluding remarks

Having defended these two over-arching claims, I close the thesis with some concluding remarks that draw together the thesis's arguments, outline some directions for future research, and identify the practical implications of the thesis's arguments for the regulation and governance of corporations.

PART 1: THE CORPORATE FAIR RECIPROCITY ARGUMENT

CHAPTER 1: THE CORPORATION, THE NORMATIVE GOVERNMENTAL PROVENANCE ARGUMENT, AND THE CONTRACTUAL VIEW OBJECTION

ABSTRACT: According to the Normative Governmental Provenance (*NGP*) argument, the limited liability business corporation (the *corporation*) comes with special moral responsibilities that are different to moral responsibilities in other domains. The purpose of this chapter is to lay the groundwork for a new version of the NGP argument, which I develop in Chapter 2, by undertaking two tasks. The first, expository task is to summarise the debate about the corporation's normative status. I therefore explain what a corporation is, describe the NGP argument's main claims, and situate the NGP argument within the broader debate about the normative significance of the corporation. The second, argumentative task is to defend the NGP argument's two positive claims about the corporation – that the corporation has a *special governmental provenance* and that it comes with special legal privileges (*corporate privileges*) for its shareholders. These claims are crucial to the NGP argument including, importantly, the new version that I develop in subsequent chapters. In particular, I defend the special governmental provenance claim against the *contractual view* objection. This objection views the corporation as a 'nexus of contracts' that does not rely on special governmental action and would, if true, block the NGP argument. The objection is, however, mistaken because the legal features that jointly constitute the corporation are either impossible or very costly to replicate contractually.

1.1 Introduction

The business landscape is, to a large extent, a corporate landscape of limited liability business corporations (*corporations*).[1] These corporations are distinctive to other businesses, and to non-business associations and institutions, because their legal form gives them a unique combination of legal features and a unique governance structure that divides ownership and governance rights amongst shareholders, directors and managers.[2] But is the corporation of any relevance to ethics? Is there any reason to think that the corporation is normatively special and regulated by special normative standards? Putting to one side the possibility that the

[1] The vast majority of large businesses and small jointly owned businesses are corporations (Armour et al., 2017: 3; ONS, 2020).

[2] See section 1.2.2 below for a description of the corporation's legal form.

corporation has a normative status as a group agent,[3] are there grounds to think that the corporation's distinctive legal form means that it comes with special moral responsibilities, privileges or rights that apply to the people who govern the corporation and that are different to the moral responsibilities, privileges or rights that apply in other normative domains?

One argument in favour of the view the corporation *is* normatively significant is what Singer (2019) calls the Normative Governmental Provenance (*NGP*) argument. The NGP argument, versions of which are advanced by Bakan (2004), O'Neill (2009a, 2009b), McMahon (2012) and Ciepley (2013), contends that the corporation is a special entity in the normative landscape and comes with special moral responsibilities (*corporate responsibilities*) for the people who govern it in their roles as directors, managers and voting shareholders (*corporate governors*). The NGP argument comprises four key claims, which all versions of the argument share. The first claim is that the corporation has a *special governmental provenance*, meaning that the corporation is dependent on special governmental action for its existence, and the second claim is that this special governmental action awards special legal privileges (*corporate privileges*) to the corporation's shareholders. The third claim links these two positive claims to the normative claim that the corporation is *normatively significant* and comes with special corporate responsibilities for its corporate governors. And the fourth claim concerns the *content of corporate responsibilities* and stipulates the way the corporation should be governed, its objectives and the constraints that apply to it.

The NGP argument, and the notion of singling out the corporation vis-à-vis other businesses, institutions and associations, is controversial. One of the main objections to the NGP argument is that the corporation is a *'nexus of contracts'* (Jensen and Meckling, 1976: 311) that could, in principle, be created by voluntary contractual arrangements without special governmental action (Easterbrook and Fischel, 1991; Hessen, 1979). This *contractual view* objection rejects the NGP argument's first claim that the corporation has a special governmental provenance, and so blocks the NGP argument's subsequent claims about corporate privileges, the corporation's normative significance and the content of corporate responsibilities. Not only does the contractual view directly challenge the NGP argument, but it also informs a range of approaches to business ethics which hold that moral responsibility in business is just the same as the general moral responsibility that applies to individuals as persons in a general setting. These *'business morality as personal morality'* approaches, which

[3] See sections 1.3.1(v) and 1.4.2(ii) for the reasons why I set aside the issue of the corporation's group agency.

span Friedman's (1962, 1970) property rights argument for profit maximisation, libertarian arguments for minimal responsibilities in business (Hasnas, 1998; Marcoux, 2003; Sollars, 2002) and some institutionalist liberal egalitarian approaches that treat the corporation as a voluntary association (Rawls, 1999: 126, 2001: 164), claim that there is nothing normatively significant about any business, including the corporation, and that moral responsibility in business is entirely determined by the moral permissions and obligations that apply to individuals in their general interpersonal interactions and associative activity. In addition to the contractual view objection, the NGP argument is also disputed on the grounds that the corporation's special governmental provenance has *no normative significance* (Singer, 2019), the contribution of the corporation's legal form to *efficiency is sufficient* and no further corporate responsibilities are needed, and corporate responsibilities unacceptably *conflict with freedom* (Hasnas, 1998; Hussain, 2012).

The purpose of this chapter is to lay the groundwork for a new version of the NGP argument, which I call the *Corporate Fair Reciprocity Argument* and which I develop and defend in this thesis. The groundwork in this chapter consists of two tasks – one expository and the other argumentative. The expository task is to summarise the debate about the normative significance of the corporation. I do this by describing the NGP argument, with a focus on Ciepley's (2013) influential version, and then contrasting the NGP argument with some other approaches to business ethics that deny the normative significance of the corporation. The argumentative task is to justify the NGP argument's two positive claims, concerning the corporation's special governmental provenance and corporate privileges, and to defend the special governmental provenance claim against the contractual view objection. This is a necessary task for developing my Corporate Fair Reciprocity Argument, which depends upon these two claims, just as do other versions of the NGP argument. In justifying these two claims, I draw together work from economic, legal and political theory (Blair, 2003; Ciepley, 2013; Hansmann et al., 2006), and add to this work by defending some additional reasons to reject the contractual view objection. I also focus more closely on the corporation's corporate privileges and argue that they are a substantial benefit for every shareholder, even when they are a shareholder in one of the intangible asset-based corporations that dominate the contemporary economy or in corporations that might otherwise be successful as non-corporate businesses.

The chapter is organised as follows. In section 1.2, I describe what makes the corporation distinctive as a legal form. In section 1.3, I undertake the expository task of summarising the debate about the normative significance of the corporation and discuss its

connection to some other debates in business ethics. In section 1.4, I move to the argumentative task and defend the special governmental provenance claim against the contractual view objection and justify the corporate privileges claim. In section 1.5, I conclude.

1.2 What is a corporation?

1.2.1 The legal form analytical lens

When conducting business activity, there are a number of different legal forms which businesspeople can use, each of which come with certain legal features concerning the business's legal status, legal rights, legal responsibilities, ownership, and governance. A corporation (which can also be called a company, or 'a business using the corporate legal form') is one such legal form and it has a unique combination of legal features that make it distinctive to other legal forms for business, such as the general partnership, the private association and the proprietorship,[4] as well as being distinctive to the legal forms used by non-business institutions and organisations.[5] I describe the corporation's legal features below, but part of what makes the corporation distinctive is that it is a legal entity, separate to its managers and financiers, which can own assets, enter into contracts, and hire employees in its own legal capacity. It is also governed by directors, who make decisions on behalf of the corporation and appoint the corporation's managers, and is financed with a joint stock structure, by shares that grant its shareholders a set of ownership rights over the corporation in return for their capital contributions.

It is important to recognise that this way of viewing the business landscape through the *legal form analytical lens* is different to other ways of viewing the business landscape that are more common to business ethics. As a result, by focusing on corporations, this chapter, and the thesis, is concerned with a slightly different group of entities than the groups of businesses, enterprises, or firms which are the usual focus of business ethics. Or, to put it another way, my focus here is on the corporation as the unit of normative analysis, whereas many other

[4] For a full list of legal forms, in the UK at least, see https://www.gov.uk/set-up-business.

[5] Non-business corporations include the charitable corporation, the co-operative corporation or the statutory corporation (which is typically a public service entity such as a county council or a public broadcasting service provider), and non-business associations include clubs, groups and gatherings of individuals, many of which operate without a special legal form at all.

approaches to business ethics focus on the business, the enterprise or the firm as the unit of normative analysis.

The two most common ways of viewing the business landscape in business ethics are to apply either an *activity-based analytical lens* or a *co-ordination mechanism analytical lens*. The activity-based analytical lens picks out businesses (or enterprises) as those entities that are, roughly speaking, engaged in the activity of production and exchange for the personal financial gain of the people involved. Businesses, being identified based on their activity, can be contrasted with non-businesses that engage in non-business activity, such as charities, state institutions or religious associations,[6] and businesses can adopt a range of different legal forms. The corporation is one of these legal forms and, as such, corporations are a subset of all businesses – albeit, they are a large subset, given the predominance of the corporation as a legal form.

The other common unit of normative analysis in business ethics is the firm. The term 'firm' is used in different ways – sometimes as a synonym for business, sometimes to refer to a type of business partnership that has members (and that often engages in professional services such as accountancy or law), and sometimes to refer to a multi-person business organisation (Coase, 1937; Heath, 2014: 93-115; Singer, 2018). This last usage of firm is, as far as I can tell, the more common in business ethics, and it identifies a firm by applying a *co-ordination mechanism analytical lens* based on concepts from new institutional economics (Coase, 1937; Williamson, 1975). Applying this analytical lens, firms are organisations that co-ordinate their economic activity using *administered mechanisms*, such as managerial instructions and task sharing rules, and they stand in contrast to business relationships in the market which co-ordinate economic activity using the *transactional mechanism* of price-based exchange. One of the insights from new institutional economics is that the prevalence and size of firms within the market is partially explained by the comparative efficiency of these two co-ordination mechanisms. All other things being equal, firms are created and will grow in contexts where the firm's administered mechanisms are more efficient than transactional mechanisms because, for example, the firm reduces transaction costs (Coase, 1937),[7] or the firm motivates people to be productive, by tapping into shared norms that are oriented towards cooperative behaviour

[6] There are some grey areas when using this analytical lens, such as how to classify hybrid entities, such as social enterprises, which combine business activity with beneficiary-based charitable activity and which combine, to various degrees, personal financial motives with pro-social motives.

[7] Transaction cost is a broad term that includes the cost of negotiating individual contracts, the cost of price discovery, the cost of specifying all contractual details over the duration of the contract, and the cost of monitoring and enforcing compliance with the contract (Coase, 1937; Hobbs, 1996).

(Singer, 2018: 835). Given that firms are multi-person business organisations, firms are a subset of all businesses which, although the subset typically overlaps considerably with corporations, is a different subset to corporations. Firms can use a range of different legal forms and, as such, some firms are not corporations. There are also some corporations that are not firms, namely, single-person corporations where one person is both the sole shareholder and sole director. That being said, given the predominance of corporations in the business and firm landscape, there is, considerable overlap between these groupings.

1.2.2 The corporation as a legal form and its legal features

What, then, precisely is the legal form of the corporation? Legal theorists identify five legal features that are uniquely combined in the corporation, when compared with other legal forms, and that are common to corporations across many jurisdictions.[8] These legal features are legal personality, asset partitioning, limited liability, director governance, and a joint stock structure, and their significance is as follows:[9]

(1) *Legal personality*. A corporation is its own legal person. This means that the corporation is treated as a legal person, capable of having legal rights and legal responsibilities, and is, in legal matters, treated separately to the people that govern or participate in the business, such as the shareholders, directors, managers and employees. As a legal person, the corporation has the right to own and transfer property, the right to enter into contracts and the responsibility to honour them, the right to sue and the status to be sued, and the status to be taxed. It is also deemed, in legal matters, to have its own interests and objectives, and its actions are treated as its own.

(2) *Asset partitioning.* The second legal feature is that a corporation's assets are legally partitioned from the assets of its shareholders. Asset partitioning is made possible by the corporation's legal personality, as it permits a corporation to legally own assets, but asset partitioning strengthens the separation between a corporation's assets and its shareholders' assets with the features of *asset lock-in* and *entity shielding*. Asset lock-in means that a corporation's assets are 'locked in' from its shareholders and cannot be withdrawn, sold or used by its shareholders (Armour et al., 2017: 7-8; Blair, 2003; Ciepley, 2013: 143-4). And

---

[8] Armour et al. (2017: 3) identify these legal features in corporations in Brazil, France, Germany, Italy, Japan, the UK, and the US.

[9] In identifying and describing these legal features, I especially draw on the work of Armour et al. (2017: 5-15), and also Blair (2003), Ciepley (2013), Hansmann et al. (2006), and Stout (2012).

entity shielding protects a corporation's assets from any claims that creditors may have on its shareholders' assets (Armour et al., 2017: 7-8; Hansmann et al., 2006: 1336). If a creditor is owed money by a shareholder, then the creditor has a legal claim on that shareholder's assets only, and the corporation, as a separate legal entity, is shielded from any such claims.[10] Entity shielding prevents a shareholder's creditor from 'looking down through' the shareholder to the corporation's assets, and from 'looking across' to other shareholders' assets.

(3) *Limited liability.* The third legal feature limits shareholders' liabilities to their contractual financial commitments with the corporation, which is typically the consideration paid for purchasing the corporation's shares. This means that any liabilities a corporation incurs, be they creditor claims or tort legal claims (i.e., claims arising under civil law for harms to third parties), can only be settled by the corporation's assets, and the corporation's creditors have no recourse to shareholders' assets.[11] If a creditor is owed money by a corporation, the creditor's claim is only on the corporation's assets, and the creditor cannot 'look up through' the corporation to make a claim on shareholders' assets. In effect, limited liability shields shareholders from a corporation's liabilities, and it is sometimes called 'owner shielding' because it protects the corporation's owners from liabilities and mirrors the way that entity shielding protects a corporation from its shareholders' liabilities.

(4) *Director governance*. A corporation is governed by directors, who make decisions on behalf of the corporation. The directors determine the corporation's actions, manage its assets, and hire its employees. Corporations typically have multiple directors who act together as a board, and who delegate some of their powers to executive managers, such as the Chief Executive Officer (*CEO*), although there are corporations that operate with a single director, who may also be the sole manager.

The directors have a legal fiduciary duty towards the corporation, which requires them to act as fiduciaries for the corporation and to govern in the best interests of the corporation. As a legal entity, and not a natural person, the corporation does not, of course, have its own intrinsic interests, and so what counts as the corporation's best interests is typically stipulated by corporate law, although there is considerable room for directors to interpret this. Typically, corporate law stipulates a corporation's interests as being primarily determined by its

[10] The shareholder's assets include the shares in the corporation, as they are an asset owned by the shareholder, but not the assets that the corporation itself holds.
[11] There are, in respect of tort claims, some exceptions to limited liability. Some tort claims, such as those relating to severe harms caused by gross negligence, may 'pierce the corporate veil' and apply to the directors, managers and/or shareholders.

shareholders' interests, although there may be requirements to have regard to or balance other interests and/or considerations.[12] The contemporary corporation is, therefore, typically a *general purpose* corporation that may undertake any business activity that is deemed to be in its shareholders' interests, whereas historically corporations were initially *specific purpose* corporations and their activities were limited to the pursuit of a specific business activity or public purpose.[13]

(5) *Joint stock structure.* The final legal feature is that a corporation has a joint stock structure. Under this structure, a corporation issues shares (also known as stock or equity) with rights over the corporation in return for financial contributions from investors. Importantly, a corporation can issue multiple shares to multiple investors, and each share is fully transferrable.[14]

Shareholders typically have four rights over the corporation – the right to vote on some major issues, the right to residual earnings and assets, the right to transfer their shares, and the right to sue the directors (Armour et al., 2017: 10-15; Stout, 2012: 36-44;).[15] Shareholders have the right to vote on director appointments and on major transactions (such as acquisitions, mergers or the dissolution of the corporation). Shareholders are entitled to the residual earnings and residual assets of the corporation, being the earnings and assets remaining after the corporation has settled all its contractual obligations to its creditors, including its employees, customers and suppliers.[16] Shareholders have the right to sell their shares to other investors,

---

[12] In the UK, Section 172 of the Companies Act 2006 stipulates that directors should "promote the success of the company for the benefit of its members [i.e., shareholders] as a whole," albeit with "regard to" other considerations, which include the long-term impact of decisions, the interests of some other stakeholders, a reputation for high standards of business conduct and the fair treatment of all the company's shareholders.

[13] See Davoudi et al. (2018) for a history of the corporation, and the historical origins of the contemporary general purpose corporation in the specific purpose corporation.

[14] The shares are freely tradable, either on a public stock exchange which comes with additional rules and responsibilities (in which case the corporation is referred to as public or listed) or in the private market (in which case the corporation is referred to as private or unlisted).

[15] I note that a corporation may structure its joint stock with different types and classes of share, such as voting and non-voting shares, or preference and common shares. These types and classes of shares typically divide the four shareholder rights amongst different groups of shareholders, but for my purposes here I will not distinguish between these types and classes of shares.

[16] Importantly, shareholders have only a weak entitlement to these residuals (Stout, 2012: 38-42). Shareholders do not have the right to claim the residuals when they are generated, or to determine what is done with them. Instead, the directors have discretion to retain the residuals in the corporation, to reinvest them by entering into new contracts, or to distribute them as a dividend to the shareholders. Nonetheless, shareholders are entitled to the economic benefit of the residuals because the residuals are either retained by or reinvested in the corporation, or they are distributed to the shareholders, but they cannot be transferred to anyone else.

without approaching the corporation or other shareholders. And shareholders have the right to sue the directors if they fail in their fiduciary duty.

Shareholders are sometimes described as the 'owners' of the corporation (e.g., Armour et al., 2017: 13-15). The accuracy of this description depends on what is meant by 'ownership' and, in order to clarify this, I draw a distinction between *full ownership* and *quasi-ownership*. A *full owner* of an item has a wide set of possession rights, including the right to use, to exclude others from using, to lend, to transfer, or to dispose of that item. For example, I am the full owner of my coffee cup, and I can use it, exclude others from using it, lend it, give it or sell it to someone else, or destroy it, as I wish. Shareholders do not have full ownership rights over the corporation because the four shareholder rights are different to the rights of full ownership.[17] Shareholders cannot use, lend, transfer or dispose of the corporation's assets for their own purposes – indeed, in many cases they cannot even visit the corporation's premises without the consent of the directors. From a legal point of view, the full owner of a corporation is the corporation, just as a natural person legally owns herself (Stout, 2012: 37-8).

Shareholders can, however, be considered *quasi-owners* of the corporation, where quasi-ownership is a weaker form of ownership in which shareholders exert some control over the corporation and benefit economically from the corporation. Shareholders exercise a degree of control over the corporation in their right to appoint the corporation's directors – if a director does not manage the corporation as the shareholders wish, then the shareholders can appoint a new director. And shareholders have a strong economic interest in the corporation by way of their right to the corporation's residual earnings and residual assets. Indeed, although a number of scholars use the term 'ownership' to describe shareholders' interest in the corporation (Armour et al., 2017: 13; Greenfield, 2006: 126; Heath, 2014: 120), a closer inspection of the rights and claims that they attribute to shareholders suggests that they typically refer to quasi-ownership rather than full ownership.

1.2.3 The distinctiveness of the corporation as a legal form

Taken individually, some other legal forms may have some of these legal features, but what makes the corporation distinctive as a legal form is that it uniquely combines all five of these legal features.

[17] Although shareholders are not the full owners of the corporation, I note that they are the full owners of their shares.

Some of the main alternative legal forms for businesses are the (general) partnership,[18] private business association and (sole or joint) proprietorship. Taking a partnership as a case in point (although the following applies also to the private business association and proprietorship), a partnership does not have a separate legal personality and the partners are the legal persons, acting jointly. A partnership does not, as a consequence, have asset partitioning; the partners' assets are pooled and legally treated as being jointly owned by the partners. There is no asset lock-in, and a partner may withdraw their share of a partnership's assets, subject to the notice periods agreed upon by the partnership. And there is no entity shielding to protect a partnership's assets from the partners' creditors – if a partner owes a creditor money, then that creditor has some recourse not only to the partner's assets but also to the partnership's assets, given they are jointly owned, and sometimes to the assets held by other partners. There is no limited liability, and a partnership's creditors may have recourse to the partners' assets, if the partnership does not honour a creditor's claim. A partnership has no directors, and there is no automatic separation of the partnership's governance from its ownership and economic rights; a partnership is governed by its partners who also fully own the partnership's assets and retain their economic interest in it. Finally, a partnership does not have a joint stock structure and ownership rights cannot be freely transferred to others. A partner cannot freely transfer their ownership interest in a partnership to someone else but, as a joint owner of the partnership's assets, must approach the other partners to seek either a buyout by them or their consent for a new partner to take their place. (One corollary is that a partnership has more flexibility in how economic benefits are distributed. In a partnership, a partner's economic interests are not necessarily determined by capital contributions (as they are in a joint stock structure), but can instead be tied to a range of other contributions, including, for example, labour contribution.)

In general, these alternative legal forms have a legal status, and liability, responsibility and governance structure that is much closer to those that individuals have (either acting solely or jointly) in associations. When people act without any particular legal form, either individually or jointly in an association, their legal personhood is the same as their natural personhood, as are their assets, liabilities and responsibilities.

[18] A general, or 'ordinary', partnership is a specific type of partnership that differs to other types of partnership, such as a limited liability partnership (LLP). A general partnership has none of the corporation's legal features (see above), whereas an LLP has some of the same legal features, namely a separate legal personality, entity shielding, and some limited liability for its partners (Hansmann et al., 2006: 1392, 1397). In this thesis, I set aside considering the normative status of other legal forms for business that, like the LLP, share some but not all of the corporation's legal features.

As a legal form, the corporation is much closer to other non-business corporations, such as the charitable corporation, the co-operative corporation or the statutory corporation. These legal forms all share four legal features which make them a type of corporation, being the legal features of legal personality, asset partitioning, limited liability, and director governance. What marks the (business) corporation out as a distinctive legal form is that it combines the general corporate legal form with the joint stock structure (Armour et al., 2017: 14-15; Ciepley, 2013: 143-4).[19] The joint stock structure enables shareholders to benefit financially from the (general) corporate structure, whereas in other non-business corporations any residual financial gains are typically retained and recycled to realise a designated corporate purpose. Moreover, the joint stock structure is only possible because of the (general) corporation's legal features. The free transferability of shares, for example, depends on *bundle assignability* (Armour et al., 2017: 10; Hansmann, 1996: 152-5), whereby shareholders can reassign their bundle of quasi-ownership rights over the corporation to different people, without any disruption to the assets, contracts and operations of the corporation itself. Bundle assignability is only possible because the corporation has its own legal personality, separate to its shareholders, so that all the contracts, assets and liabilities that reside in the corporation can remain with the corporation.

1.3 The debate about the corporation's normative significance

1.3.1 The NGP argument

The NGP argument holds that the corporate legal form entails special moral responsibilities for the corporate governors (i.e., the directors, shareholders and managers who control and run the corporation) that are different, to some extent, to moral responsibilities in other domains, especially the moral responsibilities of individuals in their everyday activity. There are a number of versions of the NGP argument which span business ethics, political theory and legal theory. Within business ethics, these versions of the NGP argument include: Ciepley's (2013) political theory of the corporation which claims the corporation belongs in its own special normative domain and comes with special corporate responsibilities to benefit the public; Bakan's (2004) work on the corporation as a socially destructive legal entity; O'Neill's (2009a,

[19] In addition, many non-business corporations have their own distinctive legal features, one of which is that they must pursue a designated public purpose. In the UK, for example, charities that are non-business corporations are required to have a charitable purpose as their designated purpose.

2009b) argument that the conventionalism of the corporation justifies social justice-based responsibilities, and in particular a robust corporate tax regime; and McMahon's (2012) argument that managers should direct the corporation's activities to public outcomes because the corporation is a publicly-created institution.[20] Within political theory, Ciepley's (2013) argument is one of the most prominent, and is credited with contributing to a recent turn in business ethics towards a political theory of the corporation (Singer, 2019). And within legal theory, the NGP argument is found in *concession theory* (or *artificial entity theory,* as it is sometimes also known), which claims the corporation has a legal obligation to benefit society because it is a privileged and dependent concession of government (Dahl, 1973; Mueller, 1971; Padfield, 2015). In addition, versions of the NGP argument are found in public policy discussions regarding corporate objectives, directors' duties, and corporate governance,[21] and in some legal judgements regarding corporations' legal responsibilities.[22]

The NGP argument, and Ciepley's (2013) version in particular, is part of a recent "political turn" (Smith, 2018a: 131) in business ethics. This political turn has seen a shift away from applying moral normative theories to business,[23] towards applying political philosophical theories and/or drawing on political philosophical values, on the grounds either that a business is (partly or wholly) a political institution or that political philosophical values apply specially to business, or both. The NGP argument is part of this political turn,[24] because it claims that the corporation's special governmental provenance picks the corporation out as a wholly or part political institution.

Here, I focus on Ciepley's (2013) version of the NGP argument, which I call the *standard* NGP argument, for two reasons. First, it contains a promising, albeit underdeveloped,

---

[20] This is not an exhaustive list of all versions of the NGP argument. See, also, Singer (2019) for a good review of and summary of the versions of the NGP argument.

[21] See, for example, the British Academy's Future of the Corporation Project (https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/) or Common Wealth's work on inclusive and democratic ownership of corporations (https://www.common-wealth.co.uk).

[22] For example, an early US Supreme Court judgement in *Hale v. Henkel* (1906) ruled that "the corporation is a creature of the State … presumed to be incorporated for the benefit of the public." And there is Justice Stevens's dissenting opinion in *Citizens United v. Federal Election Commission* (2010) which argued that "state law grants corporations special advantages."

[23] For example: utilitarianism (Jones and Quinn, 1995; Jensen, 2002), Kantianism (Arnold and Harris, 2012; Evan and Freeman, 1993), or virtue ethics (Koehn, 1995; Solomon, 1993).

[24] There are other arguments, beside the NGP argument, which take business ethics on a political turn, including arguments that a business is a political institution because it has pervasive effects on the distribution of socially important goods and services (Millon, 1993; Smith, 2019), and arguments that a business functionally resembles the state, in terms of the structure of its relationships amongst stakeholders, and especially workers (Ferreras and Landemore, 2016). For discussions of these, and other, reasons for political approaches see Heath et al. (2010), Néron (2010), Singer (2018; 2019), and Smith (2018a).

line of argument for the corporation's normative significance. In Chapter 2, I discuss the weaknesses of the standard version argument and develop a modified version in response. Second, it is one of the leading versions of the NGP argument, being described by Néron (2015: 105) and Singer (2018: 831) as "groundbreaking," and is credited with being influential on the business ethics literature (Singer, 2019).

The standard NGP argument comprises four key claims, which I discuss in turn.

(i) First claim: special governmental provenance

The first claim is that the corporation has a special governmental provenance, meaning that the corporation depends on special governmental action for its existence, when compared with other legal forms for business or other types of non-business association or institution. The relevant special governmental action is corporate law, which creates the corporation, by way of the state issuing a corporate charter, and which gives the corporation its legal status, legal rights, and legal responsibilities. The special governmental provenance claim holds that corporate law is essential for creating a corporation, and that people would not be able to recreate a corporation themselves using only non-corporate laws, such as contract law and property law.[25]

Ciepley (2013) argues that corporate law is essential for giving the corporation its legal features, because the corporation's legal features alter the normal legal rules governing property ownership, liability and responsibility. Under non-corporate legal rules, property ownership, liability and responsibility are typically assigned to natural persons, either acting singly or jointly. These non-corporate legal rules mean that people jointly own their assets, jointly share any liabilities, and are jointly responsible for their actions, and these non-corporate legal rules underpin the structure of many of the other legal forms for business, and many other non-business associations. The legal features of the corporation, by contrast, are based on

[25] I note that the standard NGP argument is, at times, ambiguous about whether the corporation has a special governmental provenance or a *unique* governmental provenance (see Singer (2019: 288-291)). Both claims hold that the corporation depends on governmental action, but the difference between the claims is that the special governmental provenance claim holds that other market participants rely on other forms of governmental action to participate in the market (e.g., property law and contract law) so that the corporation has a special kind of governmental provenance, whereas the unique governmental provenance claim holds that other market participants do not depend on any governmental action to participate in the market so that the corporation has a unique governmental provenance. As the unique governmental provenance claim is implausible, see Singer (2019: 288-291), I focus here on the interpretation that the standard NGP argument claims the corporation has a special governmental provenance.

different legal rules. The legal features of legal personality, asset partitioning and limited liability work to assign property ownership, liability and responsibility to the corporation, and not to the shareholders, directors or managers of the corporation, who are treated as separate legal persons to the corporation. Moreover, the joint stock mechanism enables the shareholders to retain an unusual set of quasi-ownership rights over the corporation, including, in particular, some control rights and an economic interest in the corporation. Importantly, the special governmental provenance claim holds that the corporation's legal features are critically dependent on corporate law. In the absence of corporate law, Ciepley (2013) argues that people could not create a separate legal entity themselves, nor could they permanently designate some of their assets for a business purpose, shield their business's assets from their own personal liabilities, or shield themselves from the liabilities of their business.

(ii) Second claim: corporate privileges

The second claim is that the corporation's legal form assigns corporate privileges to the corporation's shareholders, which are of substantial benefit to them. The corporate privileges come from combining the shareholders' quasi-ownership rights with the changes to the normal legal rules that corporate law brings about. These corporate privileges are dependent on the same special governmental action that gives the corporation its special governmental provenance, and so the claim is that the corporation's legal privileges are *special* because they are not found in other legal forms for business.[26]

The corporate privileges are both intrinsically beneficial to shareholders and instrumentally beneficial for shareholders financially. The intrinsic benefit is that shareholders enjoy a unique set of quasi-ownership rights over the corporation, because of the joint stock mechanism. This set of rights, which enables shareholders to control and economically benefit

[26] Sometimes Ciepley (2013) claims that 'the corporation' is privileged, rather than that the shareholders are privileged by the corporation. There is some ambiguity as to whether this should be interpreted as a kind of shorthand for saying that the shareholders are privileged or that the corporation as a legal entity is privileged. On the one hand, the corporation is not legally privileged as a legal person because it is subject to broadly similar legal rules concerning property, liability and responsibility as are other legal persons, such as the individuals who participate in the market. On the other hand, the corporation's legal form arguably gives it some structural financial and productivity advantages (which I discuss below), and so there is a sense in which the corporation could be said to be privileged because it is structurally advantaged by its legal form. Here, I interpret the claim to mean that it is the shareholders that are legally privileged, because they have a unique set of quasi-ownership rights over the corporation, and set aside the interpretation that the corporation is also privileged.

from the corporation's special legal features, is in itself a substantial legal privilege, when compared with the rights of investors in other legal forms (Ciepley, 2013: 142-5).

Moreover, Ciepley (2013: 142-5) argues that shareholders benefit financially from the corporation's legal features, in ways that are both direct and indirect. One direct benefit is that the corporation's legal features reduce investment risk for its shareholders, when compared with investment risk in other business legal forms, by locking in the corporation's assets (by asset lock-in), protecting shareholders from fellow investors' personal creditor claims (by entity shielding) and protecting shareholders from the corporation's liabilities (by limited liability). Two indirect benefits are that shareholders can co-invest with multiple investors and specialise their financial assets more easily than in other business legal forms, which bring consequent productivity advantages. By protecting shareholders from the corporation's liabilities and from their fellow shareholders' liabilities, the corporation facilitates multiple investments from a large and diverse range of investors. In other business legal forms, the absence of liability protections means that investors are typically small in number, they typically trust one another (perhaps by knowing one another), they are closely involved in the running of the business, and they may also be wealthy, so that they can afford the potential losses from liability claims. A corporation, by contrast, can more easily attract multiple and diverse shareholders, who do not know one another, who have no involvement in the management of the business, and who may have few other financial resources. The corporation's joint stock mechanism therefore indirectly benefits investors by enabling them to co-invest with multiple other investors and to invest, in aggregate, at a far larger scale and in larger businesses, that may in turn have scale advantages in the market.[27] The second indirect benefit comes from asset specialisation (Blair and Stout, 1999: 271-87). As a corporation's assets are its own, it does not need to maintain a pool of liquid assets to fund potential asset withdrawals by investors or to fund potential claims from its investors' creditors, unlike in other legal forms for business. This enables the corporation to invest in less liquid capital assets that are specialised to its markets and to its other inputs – for example, to invest in specialised capital machinery, to develop specialised software, or to invest in product research and development. Such asset specialisation can greatly enhance the corporation's productivity,

[27] Indeed, some of the first joint stock corporations were set up to undertake large, capital-intensive projects, such as creating railway networks (Davoudi et al., 2018: 18).

especially when other suppliers and employees also specialise their assets in tandem, and can indirectly lead to financial benefits for the corporation's shareholders.[28]

(iii) Third claim: the corporation's normative significance

The NGP argument's third claim is that the corporation has a normative significance, meaning that it comes with special corporate responsibilities for the people who control and run the corporation. These corporate responsibilities are special in the sense that they are different to the moral responsibilities in other domains – i.e., they are different to the moral responsibilities that individuals have in other business legal forms, in their non-business activity, be it individual or associative, or when participating in public institutions.

The normative significance claim is based on attributing a normative significance to the previous two positive claims about the corporation (i.e., the special governmental provenance and corporate privileges claims) and, as such, the crux of the claim is that there are bridging reasons that link the positive claims to the normative claim about corporate responsibilities. I will discuss and develop these bridging reasons in Chapter 2. Here, I briefly illustrate the claim with Ciepley's (2013) two bridging reasons, which I call the *normative domain reason* and *public benefit reason*. The normative domain reason holds that the special governmental provenance and corporate privileges of the corporation puts the corporation in a special 'corporate' normative domain, which is distinctive to the other normative domains that structure moral responsibilities (which are, in Ciepley's normative schema, the public and private domains), and which comes with its own special normative standards and corporate responsibilities. The public benefit reason holds that because shareholders benefit from corporate privileges in the corporation, there is a debt-like obligation to run the corporation so that it benefits society through its activities and in return for the privileges its shareholders enjoy.

[28] Some other benefits of the corporation, which Ciepley (2013) identifies, include access to lower cost capital (as asset partitioning means that lenders face lower risks when lending to a corporation) and access to longer-term finance (as the corporation's legal personality makes it possible for the corporation to have a longer lifespan than its investors' investment horizon).

(iv) Fourth claim: the content of corporate responsibilities

The fourth claim concerns the content of corporate responsibilities – namely, what it is that corporate responsibilities require of the people who govern the corporation. In the standard NGP argument, Ciepley (2013: 153) argues that corporate responsibilities may require that the corporation benefits its stakeholders, as a way of benefiting society. I will discuss the possible content of corporate responsibilities further in Chapters 4 to 6.

(v) Some clarifications about the standard NGP argument

In addition to these claims, there are three clarifications to make about the standard NGP argument. The first clarification concerns the identity of the responsibility bearer. Ciepley (2013: 153) claims it is 'the corporation' that is the responsibility bearer,[29] but it is unclear precisely what is meant by this. The interpretation I assume here is that corporate responsibilities are said to apply to the corporation because it is a separate legal entity and the corporate responsibilities are mainly concerned with regulating the conduct and objectives of the legal entity, but the responsibility bearers are primarily the corporate governors because it is their role to determine the corporation's conduct and its objectives. On this interpretation, the special moral responsibilities that are corporate responsibilities fall primarily on individual people, in their roles as shareholders, directors and managers who have different governing powers over the corporation, and it is a kind of shorthand to refer to 'the corporation' as the responsibility bearer.[30] This does, of course, raise a further question as to how corporate responsibilities are shared or allocated amongst the various corporate governors, but, as the standard NGP argument does not give any guidance on this point, I set this question aside.

[29] Ciepley (2013: 153) has a section discussing "whom should corporations serve?" in which he claims that "corporations, as privileged entities, bear heightened responsibilities."

[30] A second interpretation is that the corporation counts as a group agent, so that the corporation's actions are not entirely reducible to the actions of the individuals involved (List and Pettit, 2011), and the corporation, as a group agent, is assigned the corporate responsibilities. However, I set aside this interpretation for two reasons. First, the focus of the standard NGP argument is on the special normative status of the corporation as a *legal* entity, and Ciepley (2013) does not at any point argue that the corporation is a group agent. Second, and relatedly, although there is a wider debate in business ethics about whether the corporation is a group agent, this debate is orthogonal to the standard NGP argument, and it is possible to claim that corporate governors are the primary responsibility bearers, per the interpretation above, without taking a position on whether the corporation is also a group agent. On the group agency view, the corporation would also bear corporate responsibilities, alongside corporate governors, and on the non-group agency view, the corporation would not.

Second, I note that Singer (2019: 288) identifies an additional claim in most versions of the NGP argument, which is that the government has a special power to stipulate and legally enforce corporate responsibilities.[31] I have omitted this claim, however, because I do not think it is clear that this power is *special* to corporate responsibilities when compared to other moral responsibilities. Moral responsibilities could be enforced with legal or extra-legal measures, and Ciepley (2013) does not claim that government's power to enforce corporate responsibilities is a special power that does not normally exist.

Third, the standard NGP argument applies exclusively to the corporation, and it sets aside other business legal forms. As I noted earlier, there are some business legal forms that share some (but not all) of the corporation's legal features.[32] To the extent that some of these legal forms also depend on special governmental action, it may, therefore, be possible to construct an argument, which has parallels with the standard NGP argument, about the normative significance of these other business legal forms. The standard NGP argument does not, however, consider the normative significance of other legal forms, but focuses only on the corporation and what makes it distinctive as a legal form.

1.3.2 Objections to the NGP argument

The NGP argument is controversial and faces a number of objections, which I briefly outline here but discuss in more depth later in the thesis.[33] One of the main objections is the contractual view objection, which holds that the corporation does not have a special governmental provenance and is instead a 'nexus of contracts' that could, in principle, be created by voluntary contractual arrangements (Easterbrook and Fischel, 1991; Hessen, 1979). A second objection, raised recently by Singer (2019), grants the special governmental provenance of the corporation but objects that this has no normative significance because all participants in the market rely on different types of government action. A third objection is that corporate responsibilities are not necessary because the corporation's efficiency properties mean that it automatically generates wider benefits for others in society. And a fourth objection claims that corporate

[31] Singer (2019: 286-288) argues that all NGP arguments have three claims in common, of which the first two claims are similar to the first and third claims I identify in the standard NGP argument. I have departed from Singer's distillation of the claims in NGP arguments partly because I have chosen to focus on the standard NGP argument (rather than review all NGP arguments) and partly because the standard NGP argument contains different claims to the three Singer identifies.
[32] See fn18.
[33] I discuss the first objection in depth in section 1.4 below, and the remaining objections in Chapter 3.

responsibilities conflict with freedom in an unacceptable way (Hasnas, 1998; Hussain, 2012), which is an objection that is also raised more widely against any special moral responsibilities in business.

1.3.3 The influence of the contractual view

The contractual view of the corporation is influential and informs a range of other approaches to business ethics. In particular, the contractual view of the corporation is held, sometimes explicitly and sometimes implicitly, by approaches to business ethics that regard the corporation as a type of association, and which hold that the corporation, along with all other businesses, is regulated by the same moral responsibilities that apply to individuals in their everyday personal and associative activity. These 'business morality as personal morality' approaches to business ethics span a range of conceptions of personal moral responsibility and a range of normative commitments, which indicates the influence of the contractual view, and I pick out three of these approaches here.

One prominent 'business morality as personal morality' approach is Friedman's (1962; 1970) property rights argument for profit maximisation, which is closely associated with the Chicago School 'law-and-economics' approach to corporate governance. Friedman argues that a corporation's manager's moral responsibility is to maximise profits for shareholders, on the grounds that a manager has entered into a contractual agreement to follow the instructions of the corporation's shareholders, who are the owners of the corporation. As Friedman (1962: 135) puts it, the corporation is "an instrument of the stockholders who own it." The argument treats the corporation as an association owned by the shareholders and reduces the manager's moral responsibilities to general personal moral responsibilities that are grounded in property rights and promises.[34] Another example within the Chicago School 'law and economics' approach is Easterbrook and Fischel's (1991: 36) argument that people in a corporation are subject only to the moral obligations that accompany promises and contracts.

A second 'business morality as personal morality' approach is the libertarian view of business ethics (Hasnas, 1998; Marcoux, 2003; Sollars, 2002). On this view, the corporation is similar to other voluntary associations, and corporate responsibilities are broadly the same as

[34] There is some ambiguity about whether Friedman's (1970) argument is based on property rights or efficiency, see fn123. It is also plausible that Friedman's version of the property rights argument is principally consequentialist, rather than deontological, and is based on the beneficial consequences for welfare maximisation of shareholders using their property rights in the corporation to maximise profits.

the limited set of libertarian responsibilities that apply to individuals, and which are based on property rights and deontological constraints (e.g., Nozick, 1974).

A third 'business morality as personal morality' approach is a branch of *institutionalist liberal egalitarianism* that exempts the corporation (and all other businesses) from many of the demands of justice. A *liberal egalitarian* conception of justice is more demanding than the Chicago School or libertarian approach and requires, for example, that people have effective freedoms, fair equality of opportunity, and that the benefits and burdens of social cooperation are fairly distributed.[35] An *institutionalist* liberal egalitarian holds, moreover, that the principles of justice apply primarily to the structure of the main political, legal, economic and social institutions, and do not directly regulate individuals' behaviour. Some institutionalist liberal egalitarians adopt a contractual view of the corporation that regards the corporation as being similar to voluntary associations and individual activity, and, therefore, exempt the corporation from the primary demands of justice, just as individuals and their voluntary associations are exempt.[36] One prominent example of this approach is a version of Rawlsian institutionalism[37] which treats the corporation as being outside of the "basic structure" (Rawls, 1996: 11, 1999: 6-10), being the main institutions of society that are structured to realise and directly regulated by Rawlsian principles of justice.[38] Support for this version can be found in various passages in Rawls's writing,[39] albeit there is some ambiguity about Rawls's own position (Singer, 2015). This interpretation has also arguably influenced other institutionalist liberal egalitarians to adopt a similar approach – or, at the very least, this may be a reason for what Néron (2015: 95) calls liberal egalitarian philosophy's "pervasive neglect" of how principles of justice should be applied to the corporation, and other businesses.[40]

---

[35] See Hsieh (2008: 73) and Néron (2015: 95) for good discussions of the relationship between liberal egalitarian theory and business ethics.

[36] As I discuss in Chapter 2, this does not imply that individuals have no moral responsibilities, just that their moral responsibilities are comparatively fewer and less demanding than those which apply to officials in institutions.

[37] See Heath et al. (2010: 431-3) and (Singer, 2015) for good discussions of this version of Rawlsian institutionalism and business ethics.

[38] I define the basic structure and discuss this approach further in Chapter 2.

[39] For example, Rawls distinguishes the "rules of corporate associations" from the basic structure (Rawls, 1999: 126), and elsewhere he includes "business firms" with other "associations" that are exempt from the principles of justice (Rawls, 2001: 164).

[40] I note that some institutionalist liberal egalitarians exempt the corporation from the principles of justice on other grounds (see Néron, 2015: 97-101) and that there are also other versions of institutionalist liberal egalitarianism that take the opposite approach and apply principles of justice directly to the corporation, either on the grounds that the corporation is in fact part of the basic structure (O'Neill, 2009a) or that the dividing line between principles for institutions and principles for individuals is not a sharp one (Berkey, 2020).

1.4 A defence of the standard NGP argument's positive claims

With this description of the debate about the corporation's normative significance complete, I now turn to the argumentative part of this chapter. In this thesis I argue that the corporation *is* normatively significant because of its special governmental provenance and corporate privileges, but that the reasons for its normative significance are slightly different to those in the standard NGP argument. I defend these reasons in depth in Chapter 2, but first it is necessary to justify and defend the two positive claims about the corporation's special governmental provenance and its corporate privileges. In particular, it is especially important to rebut the contractual view objection that denies the corporation's special legal provenance because the objection blocks all of the NGP argument's subsequent claims; if the corporation does not have a special governmental provenance, then it cannot come with corporate privileges, it cannot be normatively significant and there cannot be any special corporate responsibilities (at least, for the kinds of reasons in the standard NGP argument and in the modified version I develop).

1.4.1 The contractual view objection

Easterbrook and Fischel (1991) develop one of the most comprehensive accounts of the contractual view objection, but the objection is also found in earlier work in legal theory (e.g., Hessen, 1979). I refer to these objectors as the *contractual theorists* and focus my discussion on their account, although I note that their view of the corporation has its roots in a contractual approach to understanding the firm from economic theory (Alchian and Demsetz, 1972; Coase, 1937; Jensen and Meckling, 1976).[41]

The contractual view objection agrees with the standard NGP argument that the corporation is a legal form for business. But the objection disputes that the corporation relies on corporate law for its existence, and holds that the corporation could, in principle, be created with non-corporate law.[42] The objection develops this contractual view of the corporation with

[41] Easterbrook and Fischel (1989: 1419n2) acknowledge the influence of these, and other, economic theories on their contractual view of the corporation.

[42] Accordingly, the objection denies that the corporation depends on the *extra* governmental action of corporate law, but it does not deny that governmental action plays a role in creating the corporation. Indeed, Easterbrook and Fischel (1991: 12) maintain that governmental action in setting and enforcing property law and contract law is vital for the existence of the corporation.

three claims. First, the corporation's legal personality is not a real legal property but is a convenient legal shorthand for referring to the legal personalities of all the people involved in the corporation. Second, the legal features of the corporation can be created by contract, and do not critically depend on corporate law. Third, the role of corporate law is to save on contracting costs and furnish businesspeople with an efficient set of default contractual terms.

As regards the first claim, the contractual theorists agree that the legal form of the corporation is characterised by the five legal features of legal personality, asset partitioning, limited liability, director governance, and a joint stock structure, but they disagree about the meaning of the corporation's legal personality. The contractual theorists argue that although the corporation appears to have a separate legal personality, in reality the legal status of the corporation is reducible to the legal status of the individuals who are jointly involved in the corporation. The corporation's legal personality is therefore not real but a convenient legal shorthand that saves people from the onerous task of referring to all the individual legal persons who are involved in a business. Legal personality is a "matter of convenience" (Easterbrook and Fischel, 1991: 11), and a significant convenience, given the thousands of people that can be involved in a business as shareholders, directors, managers, employees, and so forth. One argument for this claim is that the legal personality of the corporation can be redescribed using only the legal personalities of its individuals; for example, instead of saying 'the corporation is being sued,' one could instead say that 'the individual shareholders are being sued' without any change in meaning (Hessen, 1979: 1331, 1336; Easterbrook and Fischel, 1991: 11-12). Another argument is that the corporation cannot be a separate legal entity because it is not a group agent. Hessen (1979: 1335-6) denies that group agents exist and argues that any group's actions are reducible to the actions of its individual members. Hessen argues that the corporation cannot, therefore, be a group agent either, and the corporation's legal personality must be reducible to the legal personality of the individuals involved.

The contractual theorists defend the second claim, that the corporation can be replicated contractually without corporate law, with a theoretical argument and some empirical evidence. The theoretical argument is that it is in principle possible for people to replicate the corporation by designing special contracts amongst themselves. This "corporation as a set of contracts" (Easterbrook and Fischel, 1991: 14) holds that investors could designate some of their assets for a 'corporate' purpose and then enter into special contracts regarding how these 'corporate' assets are treated (mainly by creditors) and managed. Asset partitioning can be achieved with asset lock-in contracts that permanently lock in the investors' 'corporate' assets, and with entity shielding contracts that prevent personal creditors from having recourse to 'corporate' assets.

Limited liability can be achieved with contracts that limit 'corporate' creditors' claims to the 'corporate' assets, and prevent creditors from making claims on investors' personal assets. The director governance and joint stock mechanism can be achieved with special employment contracts that grant directors an equivalent set of 'corporate' powers and responsibilities over the 'corporate' assets, and give shareholders quasi-ownership rights over the 'corporate' assets. And the legal personality of the 'corporation' is realised because the contractual theorists hold that the legal personality is a shorthand anyway.

In addition to the theoretical argument, some contractual theorists also claim there are empirical examples of contractual corporations that do not rely on corporate law. Hessen (1979: 1340) argues that there are examples of business entities in England that are corporation-like, insofar as they have a joint stock structure and use sophisticated contractual arrangements to limit investor liability, but that predate the Joint Stock Companies Act 1844, which permitted general purpose corporations.

In denying that corporate law is essential for creating the corporation, contractual theorists need to offer an alternative explanation for the role of corporate law. Their alternative explanation is that corporate law has an enabling function that saves businesspeople the time and cost involved in agreeing contracts amongst themselves. And by providing the corporate legal form as a "set of terms available off-the-rack" (Easterbrook and Fischel, 1991: 34), the state also provides people with an optimal default coordination point for contractual arrangements, which has emerged as an optimal coordination point for many businesspeople through a process of learning over time. Although this enabling function is a benefit to businesspeople, it is only a weak benefit and does not, according to the objection, count as giving the corporation a special governmental provenance, presumably because there would still be a universe of contractual corporations without corporate law.

1.4.2 Defending the special governmental provenance claim

I now turn to defend the special governmental provenance claim against the contractual view objection by rejecting the objection's three claims in turn.

(i) The legal realism of the corporation's legal personality

The contractual theorists are incorrect to claim that the legal personality of the corporation is a fiction. One way to demonstrate this is to look closely at the two main steps for establishing a corporation, being incorporation and the issuance of shares. In the incorporation step, the corporation is created by a charter from the state, which establishes the corporation as a separate legal entity, its legal responsibilities and its legal powers, and in the share issuance step, the corporation issues shares to subscribing shareholders. The two steps often take place simultaneously, but the incorporation step is separable from the share issuance step, and the corporation must be incorporated before, or at the same time as, it issues shares. Importantly, the separability of these steps indicates that the corporation has a real legal personality, since if it is possible to establish the corporation separately to the issuance of shares, then the corporation cannot be legally reducible to its shareholders.[43]

A second problem with the contractual theorists' claim is that it cannot be made consistent with the legal personality of a non-business corporation, such as a charity or statutory body, which is also established by a charter but does not issue shares. On the one hand, it seems that the contractual theorists should also deny the realism of a non-business corporation's legal personality, to be consistent with their treatment of the corporation. But which legal persons, then, is the non-business corporation's legal personality reducible to, given that it does not have any shareholders? The kinds of answers that the contractual theorist would have to give are implausible. For example, it is implausible to claim that a local authority's legal personality reduces to its councillors and staff, as it would imply that if a citizen were to sue a local authority, she would be suing the individual councillors and staff. On the other hand, the contractual theorists could maintain that the non-business corporation's legal personality is real, but they would then be treating a non-business corporation differently to a corporation. This position would, therefore, require further argument to justify why a non-business corporation's legal personality is real but a corporation's legal personality is not, and it is far from clear what features a non-business corporation has that could justify such a difference. The legal status of a non-business corporation poses, in effect, a dilemma for the contractual theorist, in which both horns lead to an implausible position. Whereas the most consistent and plausible position is that both the corporation's and the non-business corporation's legal personalities are real.

[43] In the UK, the two steps typically take place simultaneously in a Memorandum of Association that creates the corporation and issues shares to one (or more) shareholders. The separability of the two steps is, however, apparent in the way that the Companies Act 2006 permits a company to be formed either with or without shareholders, i.e., as a limited liability company or as a company limited by guarantee respectively.

A third problem is presented by single-person corporations, where one person is both the sole director and sole shareholder. For a single-person corporation, there is no reason based on convenience to refer to the corporation instead of the sole shareholder/director in matters of law. And yet there is a legal distinction between the corporation and the sole shareholder/director – if someone sues the corporation then this attributes responsibility and liability only to the corporate entity and not also to the shareholder. Moreover, the contractual theorists' denial of group agency does not have any relevance to the legal personality of a single-person corporation. As it is not a group, a single-person corporation could not be a group agent anyway, and so the contractual theorists' denial of group agency has no bearing on the realism of the legal personality of a single-person corporation. Indeed, this speaks to a broader point about the contractual theorists' group agency argument, which is that claims about group agency are irrelevant to claims about the realism of legal personality. One could grant that a corporation is not group agent,[44] so that when we say, for example, 'Ford makes cars', we do not mean that Ford is a group agent but use 'Ford' as a useful shorthand for referring to the various employees, managers, and investors, whose individual actions make cars. But, separately, one can hold that the legal entity that is Ford Motor Company LLC has a real legal personality and concerns how Ford is treated by the law.

(ii) The barriers to creating a contractual corporation

Turning to the contractual theorists' next claim, the corporation cannot be replicated without corporate law because some legal features are impossible to replicate and other legal features are very costly to replicate using contracts alone.

It is impossible to contractually replicate the legal features of legal personality, asset lock-in and limited liability. The corporation's legal personality – being, as I argued above, real – is impossible to recreate because it concerns how the legal system recognises and treats a corporation. Legal personality can only be established by the state, not by private contracts amongst people, as legal personality requires a special status that can only be awarded by the state. Asset lock-in is impossible as property law prevents someone from permanently alienating themselves from their own property. In court cases that test asset lock-in contracts, the courts do not uphold permanent asset lock-ins on the grounds that this alienates people, and

[44] I note that, in any case, there are good reasons to regard some corporations as group agents (see, e.g., List and Pettit, 2011).

their heirs, from their property (Hansmann et al., 2006: 1342; Singer, 2019: 286). (The courts will enforce 'temporary' asset lock-ins, which may last many years, but temporary asset lock-in is not the legal feature of the corporation). Limited liability for tort claims is impossible to replicate for a similar reason, as civil law prevents people from contractually limiting their exposure to tort claims. As with asset lock-in, the courts do not typically uphold the validity of contracts that attempt to limit tort liabilities, and instead the courts determine a tort claim based on whether a third party is harmed and owed compensation (Randles, 2017).

Accordingly, all three of these legal features are only possible because of corporate law and the way that it creates the corporate entity by altering the standard ascription of legal personality to natural persons, and alters the legal principles in property law and civil law concerning ownership and liability. Indeed, it is because these legal features depend on variations in standard legal principles that they cannot be recreated contractually. Only the state can vary legal principles, and people cannot vary legal principles amongst themselves by contract or by agreement.

Moreover, the legal features of entity shielding and limited liability by contract are very costly to recreate contractually. Complete entity shielding requires that every investor contracts with every single one of their personal creditors (now, and whenever they have a new personal creditor) to ensure that their personal creditors have recourse to their personal assets only, and not to the designated 'corporate' assets. This is costly to implement, given the scale and number of contracts required, and also creates a moral hazard problem, which is costly to mitigate. The moral hazard problem is that each investor has a personal incentive to avoid entity shielding contracts because personal borrowing costs are lower if personal creditors also have recourse to the 'corporate' assets (Ciepley, 2013; Hansmann et al., 2006). Given this incentive, investors cannot be certain that a 'contractual' entity shielding mechanism completely protects them from the liabilities of their fellow investors, and will look to other monitoring and enforcement mechanisms, all of which are costly. In addition, any attempts to place limitations on liabilities through bespoke contractual arrangements are also costly, as this too involves individual negotiations with all the 'corporation's' creditors.

The point is that as these costs are substantial, they act as a significant barrier to creating contractual corporations. The costs involved in making all the various contracts are substantial, even for a small corporation, as they include the search costs of finding all the relevant creditors, the transaction costs of agreeing and making the contracts, and the costs of monitoring and enforcing the contracts. And this is before taking into account the moral hazard problem

connected to entity shielding and the costs of mitigating this problem. By contrast, when these legal features have a governmental provenance, these costs are eliminated.

What, though, about the empirical evidence of corporation-like businesses in early nineteenth century England? The answer is that the businesses Hessen (1979) points to are not, in fact, corporations as they do not have the corporation's legal features of legal personality, complete entity shielding, asset lock-in or complete limited liability. They are instead partnerships with some limited liability features (Harris, 2000: 137-167). Moreover, there is other empirical evidence that is indicatively supportive that the corporation has a special governmental provenance. Once the Joint Stock Companies Act of 1844 was passed, and general purpose incorporation became possible, there was a marked rise in incorporations (Harris, 2000: 288), suggesting that it was previously either impossible, and/or extremely costly to replicate the corporate legal form using contract alone.

(iii) The function of corporate law: creating and privileging, not merely enabling

These barriers to creating a contractual corporation mean that the corporation does have a special governmental provenance. Corporate law does not play a merely enabling function, as the contractual theorists claim, but creates the corporation. As such, the corporation is a special legal form that investors and entrepreneurs can use to conduct their business activity, and which depends on extra governmental action.

Moreover, by refuting the contractual view objection, and defending the NGP argument's special governmental provenance claim, I open the door to the corporate privileges claim. If the corporation could be replicated contractually, then shareholders could not be legally privileged, because their shareholder rights and benefits would be accessible to anyone else just by making the same contractual arrangements. Whereas, if the corporation has a special governmental provenance, then the benefits that shareholders enjoy in the corporation (see section 1.3.1(ii) above) count as a *special* legal privilege because they come from *special* governmental action.

1.4.3 Why corporate privileges are substantial privileges

Although I have established that the corporation has a special governmental provenance and comes with corporate privileges, it could be objected that incorporation is not a substantial

benefit and that the corporate privileges for shareholders are negligible. It might be argued, for example, that a corporation's success as a business is attributable to many other factors – such as product quality, customer service, innovation, leadership, talent, entrepreneurial risk-taking, trust-building and so forth – and that the role of corporate privileges are minor when compared to all these other factors. Moreover, it might be argued that this is especially the case for corporations whose value is predominantly based on their intangible assets and that are less reliant on the capital contributions of shareholders to invest in tangible assets, such as technology corporations.[45] A technology entrepreneur might, for example, challenge the standard NGP argument by objecting that the corporate privileges are negligible, and the success of their corporation is down to their ideas and hard work, as evidenced by the value of the intangible assets in their corporation.

This objection would be a challenge to the standard NGP argument. The standard NGP argument holds that incorporation is such a substantial advantage for businesses and such a substantial privilege that it justifies corporate responsibilities that are very different to personal moral responsibilities and that make significant demands of how the corporation should be run and what its objectives should be. If, however, the benefits and privileges of incorporation were small to negligible, then it would be difficult to justify such different and demanding corporate responsibilities, and the standard NGP argument would lose its force. (It may still be possible to justify making some demands of the corporation, but these would be far weaker than the kinds of corporate responsibilities the standard NGP argument defends.)

My response to this objection is to emphasise that the benefits of the corporation's legal features are substantial, whilst also granting that there may be many other factors that also significantly contribute to a corporation's success. The financial benefits of the corporate privileges can, sometimes, be taken for granted given the predominance of the corporate legal form, but they are substantial. As I discussed in section 1.3.1(ii) the benefits of the corporation are numerous and include: the elimination of the transaction cost barriers of making bespoke contractual arrangements; the dissolution of a moral hazard problem with entity shielding; the facilitation of greater access to equity capital; the facilitation of asset specialisation; the reduction in financing costs; and the encouragement of risk-taking by entrepreneurs whose personal assets are protected. The scale of these benefits is difficult to quantify, except that it

[45] In 2015, over 80% of the market value of US corporations was attributable to intangible assets (e.g., licences, patents and research developments), whereas in 1975 over 80% of market value was attributable to tangible assets (e.g., plant, machinery and buildings) (Mayer, 2016: 54).

is clear that they are significant, even when compared to other business success factors.[46] Moreover, it is possible that some of the benefits of the corporation create the conditions that either enable or enhance the influence of other factors on the business's success. For example, entrepreneurial risk-taking involves entrepreneurs putting their own capital at risk as well as specialising their own human capital to their new business idea. The financial risks and human capital risks that are part of entrepreneurial risk-taking are, to a certain extent, enabled and enhanced in the corporation, as entrepreneurs are able to commit their own capital without the risk of further liabilities, and are facilitated in raising the investor funds that enables them, as entrepreneurs, to specialise their human capital. The point is that many of the other factors for business success are not entirely independent of the corporation's legal form, but instead they rely on a backdrop of corporate law that enables and enhances their influence.

Here is an example to illustrate the point. Facebook is a technology corporation whose value resides in its intangible assets, and whose business success is clearly attributable to other factors such as its highly innovative product, its technological capabilities, the capability of its founders, and its talented employees. Nonetheless, here is one reason to think that part of Facebook's success is attributable to, and its shareholders substantially benefit from, the corporate form. Facebook was cash flow negative for its first five years (CBC, 2009) and during that period raised $970 million of early-stage venture financing from multiple equity investors for its development and growth (Fortune, 2011). Without the corporate legal form, the availability of venture financing would have been greatly reduced, so that either the cost of raising capital would have been far higher and/or it would have taken far longer to secure financing. Early-stage investors would have required greater direct control, they would have restricted the number of co-investors, and they would have required higher returns to compensate for the risks associated with the potential liabilities from investing in Facebook. And the early-stage investors may also have restricted the asset specialisation that is part of developing Facebook's software, in order to de-risk their investment. This reason alone – the impact of the corporate form on the availability, flexibility and cost of finance, and its impact on asset specialisation – suggests that, even for an otherwise successful technology corporation, the corporate privileges are substantial.

[46] There is also some empirical evidence that the corporation played a significant role in the second industrial revolution (Deakin et al., 2018: 233) for reasons that are linked to its corporate privileges, such as the corporation's ability to specialise its assets.

1.5 Conclusion

In conclusion, I have defended the standard NGP argument's first two positive claims – that the corporation has a special governmental provenance and comes with corporate privileges for its shareholders, which set the corporation apart from other business legal forms or non-business institutions and associations. The contractual view objection is mistaken, despite its widespread influence on 'business morality as personal morality' approaches to business ethics, and the corporation does critically depend on extra governmental action for its existence. Moreover, the corporate privileges that come with the corporation are substantial, even for the shareholders of the intangible corporations that predominate today. With these two positive claims defended, I now turn to consider their normative implications in the next chapter.

CHAPTER 2: THE CORPORATE FAIR RECIPROCITY ARGUMENT

ABSTRACT: In the standard NGP argument, the reasons given for the corporation's normative significance are underdeveloped and have several weaknesses. In this chapter, I develop a modified version of the NGP argument that is free from these weaknesses. I call the modified version the Corporate Fair Reciprocity Argument because it is rooted in a conception of justice as fair reciprocity, in which justice requires that citizens fairly benefit from and fairly contribute to society as a system of fair social cooperation. I argue that this framework yields two *pro tanto* reasons that justify why a society should regulate corporations with special corporate responsibilities. First, the corporation's special governmental provenance marks it out as a *major social institution* that structures and substantially affects how citizens cooperate. And as a major social institution, there is both a special permission and a strong presumption that society should regulate it with corporate responsibilities that will better realise justice-based values. Second, there is a presumption that the corporation should be assigned corporate responsibilities so that the corporation is structured as a 'fair deal' between shareholders and society, in which the corporation's shareholders make a fair contribution to justice-based values as a *quid pro quo* for the corporate privileges they enjoy.

2.1 Introduction

According to the standard NGP argument (Ciepley, 2013), corporations have a normative significance that "changes the normative landscape" (Ciepley, 2013: 152) of moral obligations and permissions. Corporations are distinctive in a positive (i.e., factual) sense to other businesses, associations and institutions because of their special governmental provenance and corporate privileges. Corporations are also distinctive in the normative sense that they come with corporate responsibilities for the people who govern them,[47] which is to say that they come with special moral responsibilities that are distinctive to the moral responsibilities people have

[47] As discussed in Chapter 1.3.1(v), I presume that corporate responsibilities primarily apply to corporate governors, i.e., directors, shareholders, and managers, rather than to corporations as group agents.

in other settings, such as in other businesses, other types of associative or individual activity, or other institutions.

The standard NGP argument's claim that the corporation comes with corporate responsibilities (which I refer to as the normative significance claim) is based on justificatory reasons that attribute a normative significance to the corporation's special governmental provenance and its corporate privileges, and which thereby bridge the standard NGP argument's two positive claims about the corporation to a normative claim about corporate responsibilities. In the standard NGP argument, Ciepley (2013) offers two reasons for the corporation's normative significance. First, the corporation's positive features place it in a distinctive 'corporate' normative domain, separate to the public and private domains that are standard to liberal institutionalist political theory. Second, the corporation owes society a public benefit in return for its corporate privileges.

There are, however, some weaknesses with the standard NGP argument's two justificatory reasons. One weakness is that the overarching political-philosophical framework is underspecified, and another weakness is that the argument underpinning the bridging reasons is underdeveloped. These weaknesses give rise to a third weakness, which is that there are ambiguities in the normative significance claim and in the justificatory reasons that purport to justify it. In particular, the conditions for determining normative domains are ambiguous, it is unclear whether or not the justificatory reasons generalise to other non-corporate entities, and it is unclear what the content of corporate responsibilities should be. In addition to these weaknesses, the normative significance claim faces a number of objections, including a recent objection from Singer (2019) that the corporation's special governmental provenance has no normative significance.

The purpose of this chapter is to develop a modified version of the NGP argument that remedies the weaknesses in the standard NGP argument's normative significance claim and that is also able to overcome the objections it faces. I argue that the corporation *is* normatively significant, but that its normative significance is conditional on other, political-philosophical normative commitments and, in particular, on there being an institutionalist division between responsibilities for institutions and for individuals. I therefore situate the corporation in a framework of justice as fair reciprocity, in which justice requires that a political society is organised as a fair system of social cooperation with major social institutions that work to each citizen's fair advantage (Gibbard, 1991; Rawls, 1996, 1999, 2001; White, 2003). Within this framework, I develop a coherent argument for the corporation's normative significance which I call the Corporate Fair Reciprocity Argument. The central idea is that the corporation's

positive features mark it out as a major social institution because it relies on distinctive terms of social cooperation. As a major social institution, society is both permitted to, and has strong *pro tanto* reasons to, regulate the corporation with corporate responsibilities. Moreover, corporate privileges ground a further *pro tanto* reason for society to assign corporate responsibilities to the corporation as a *quid pro quo* for the corporate privileges that shareholders enjoy.

The Corporate Fair Reciprocity Argument develops and deepens Ciepley's (2013) standard NGP argument, but it also departs from the standard NGP argument in several ways. One especially important difference is that corporate responsibilities in the Corporate Fair Reciprocity Argument are *pro tanto* justified, whereas the standard NGP argument holds that the justificatory reasons for corporate responsibilities are decisive.[48] Nonetheless, the *pro tanto* justificatory reasons for corporate responsibilities are, I argue, strong reasons, particularly given that the corporation has substantial effects on justice-based values. The Corporate Fair Reciprocity Argument is, therefore, strong grounds to reject applying 'business morality as personal morality' approaches to the corporation, and opens the door to applying a range of *'business morality as special morality'* approaches, such as stakeholder theory (Evan and Freeman, 1993; Freeman et al., 2010; Donaldson and Preston, 1995), shareholder value maximisation (Friedman, 1962, 1970; Heath, 2014; Jensen, 2002), shared value theory (Porter and Kramer, 2011) or approaches that require that the corporation has a social or environmental purpose (Hsieh et al., 2018; Smith, 2014).

The rest of this chapter is organised as follows. In section 2.2, I describe the standard NGP argument's normative significance claim in greater depth and discuss its weaknesses. In sections 2.3, 2.4 and 2.5, I develop the Corporate Fair Reciprocity Argument. In section 2.3, I discuss the need to situate the corporation in a political-philosophical framework and identify the normative commitments that are necessary to develop an NGP argument. In section 2.4, I introduce the conception of justice as fair reciprocity, picking out those of its normative commitments that are particularly relevant to understanding the corporation's normative significance. In section 2.5, I develop the Corporate Fair Reciprocity Argument by explaining why, in justice as fair reciprocity, the corporation's positive features give it a normative

[48] A *pro tanto* reason for corporate responsibilities is a genuine reason in favour of assigning corporate responsibilities, but it is not an *all things considered* reason to assign them as it could be counter-balanced or outweighed by other reasons that count against assigning corporate responsibilities. Whereas a decisive reason for corporate responsibilities is one that counts absolutely in favour of assigning them and overrides any countervailing reasons against assigning them.

significance. Then, in section 2.6, I contrast the Corporate Fair Reciprocity Argument with the standard NGP argument, explaining how it remedies the weaknesses in the standard NGP argument, and how it can serve as a framework for formulating the content of corporate responsibilities. Finally, in section 2.7, I conclude.

2.2 The normative significance claim and its weaknesses

2.2.1 The normative significance claim

The normative significance claim holds that the corporation should be assigned special corporate responsibilities (which apply primarily to the people who govern the corporation), which are different to the moral responsibilities that apply to people in non-corporate businesses, or to people in their non-business activity, be it individual or associative. The normative significance claim depends on attributing a normative significance to the NGP argument's two positive claims about the corporation's special governmental provenance and its corporate privileges. The two positive claims, being descriptive, factual claims about the corporation's special reliance on governmental action and its corporate privileges for shareholders, identify positive features about the corporation that do not, by themselves, have an intrinsic normative significance. As such, the argument for the normative significance claim depends upon defending some *justificatory reasons* that bridge the positive claims about the corporation to the normative claim that it comes with special corporate responsibilities.

Ciepley's (2013) standard NGP argument contains two justificatory reasons. For the first justificatory reason, which I call the normative domain reason, Ciepley considers the corporation's normative status within a normative landscape that is divided into a public domain and private domain, which Ciepley (2013: 140) argues is standard to many liberal political theories. The public domain contains the main institutions of the state, and it is normatively required to realise wholly public aims, meaning that these institutions, and people in their roles within these institutions, are normatively required to realise public goals and values. In contrast, the private domain comprises individuals and their associations, and is normatively regulated by more permissive standards that license individuals to set aside public considerations and pursue their own, personal aims. There are, Ciepley argues, some standard features that characterise the public and private domains, but the corporation has features that

straddle these domains.[49] In particular, the corporation's governmental provenance means that the corporation is jointly dependent for its existence on both special governmental action and the initiative of private individuals, and governmental provenance marks the corporation out as being unlike institutions in the public domain, which are wholly dependent on governmental action, and unlike associations in the private domain, which are considerably less reliant on governmental action. The implication is, Ciepley argues, that the corporation does not belong in either the public or private domain but should be placed in its own 'corporate' normative domain (Ciepley, 2013: 140), which should have its own distinctive normative standards and corporate responsibilities.[50]

Whilst the normative domain reason is the main justificatory reason in the standard NGP argument, Ciepley (2013: 153) also briefly defends the normative significance claim with a second justificatory reason, which I call the public benefit reason. Ciepley claims that variations in the default legal rules, like the corporation's corporate privileges, are only justified on the grounds that they realise a public benefit. Ciepley argues that this requirement for a public benefit justification places a debt-like obligation on the corporation to benefit society through its activities in return for its corporate privileges. Indeed, Ciepley claims that a public benefit obligation was historically central to the regulation of the corporation and formed the justification for mandating specific public benefits in the corporate charter. Although contemporary corporate charters no longer mandate a specific public benefit and permit the corporation to pursue a general purpose, Ciepley argues that the public benefit obligation still exists and places an extra-legal obligation on the corporation to benefit society.

Importantly, Ciepley claims that the normative domain reason is a decisive reason for regulating the corporation with corporate responsibilities. The corporation is so distinctive to the institutions and associations in the public and private domains, respectively, that, Ciepley claims, the corporation *must* be regulated with distinctive responsibilities. Once it is recognised that the corporation belongs in its own corporate normative domain – and is not mis-categorised in the private domain as, Ciepley (2013: 146) argues, too often happens because of the mistaken contractual view of the corporation – it should be immediately apparent that the corporation should be regulated with its own distinctive responsibilities. Indeed, in places, Ciepley's claim

[49] As Ciepley (2013: 140) puts it, corporations "transgress all the basic divides that structure liberal treatments of law, economics and politics: government/market, state/society, privilege/equality, status/contract, as well as liberalism's master dichotomy of public/private."
[50] Since corporations are "constituted across this [public/private] divide and straddle it throughout their existence … it justifies placing them in a distinct category" (Ciepley, 2013: 152).

appears to be that corporate responsibilities are necessitated by – meaning that they are automatically entailed by – the corporation being in a different normative domain, or at least that is how some (e.g., Singer, 2019: 292) have interpreted Ciepley's claim.[51] The public benefit reason, by contrast, is not a decisive reason, but it is a "strong argument" (Ciepley, 2013: 153) for corporate responsibilities, and one that complements the normative domain reason.

2.2.2 Weaknesses in the normative significance claim

There are some weaknesses in the normative significance claim, and its two justificatory reasons. I call these 'weaknesses' rather than flaws, or even outright objections to the claim, because I think that Ciepley puts a finger on the right sorts of justificatory reasons for the normative significance claim, but the justificatory reasons are underdeveloped and require refining. Indeed, Ciepley (2013: 156) appears to anticipate that some refinements may be required when he argues that "the central task of a political theory of the corporation at present is to develop … the category of the corporate."

One weakness is that the overarching political-philosophical framework is vague, and it is unclear what are the normative commitments in the liberal framework that Ciepley presupposes.

A second weakness is that the argument that underpins the normative significance claim is underdeveloped. To a certain extent, the normative significance claim is taken to be an obvious implication of the way the corporation differs to institutions and associations in the public and private domains, and the justificatory reasons are defended only briefly, especially in comparison to Ciepley's extensive argument about the origins of and distinctive positive features of the corporation.

A third weakness is that there are some ambiguities about the normative significance claim and its justificatory reasons. This weakness is partly connected to the vagueness of the framework and the underdevelopment of the argument, and it is problematic because it leaves the normative significance claim vulnerable to a number of challenges. I will pick out three areas of ambiguity here. The first ambiguity is that it is unclear what the precise conditions are that determine the normative domains. In particular, it is unclear why the corporation belongs

[51] Ciepley claims, for example, that corporations "need to be placed in a legal and policy category of their own – neither public, nor private, but "corporate" – to be governed by distinct norms and rules" (Ciepley, 2013: 140).

in a distinctive corporate domain, rather than in the public or private domain. Another way of putting Ciepley's (2013: 140) claim that the corporation "transgresses" the public/private domain divide is to say that the corporation has some features it shares with the public domain and some that it shares with the private domain. Given that the corporation shares some features with each of the public and private domains, why not determine the corporation's normative domain by what it has in common with one of the public or private domains, rather than its differences? Why not, for example, treat the corporation's governmental provenance as a necessary and sufficient condition for belonging in the public domain? Indeed, some other NGP arguments do precisely this. McMahon (2012: 14-20), for example, proposes a view of the corporation and of the public and private domains that is similar to the standard NGP argument, and yet McMahon places the corporation in the public domain and argues that the corporation should act wholly in the public interest.

The second ambiguity concerns whether the normative significance claim generalises beyond the corporation. If governmental provenance and corporate privileges are normatively significant for the corporation, then this raises the question as to whether other kinds of governmental provenance and other kinds of legal privilege are normatively significant in other contexts. For example, driving licences legally privilege some people with the right to drive on public roads that are built and funded by special governmental action. Are licensed drivers, then, also in a special normative domain and/or obligated to provide public benefits? This example, and others like them, raise a dilemma for the normative significance claim. If the normative significance claim generalises, then the consequence is multiple special normative domains and special responsibilities. This appears to be an unintuitive and overly complex implication that raises doubts about the normative significance claim itself. Alternatively, if the normative significance claim does not generalise beyond the corporation in this way, then the reasons for singling out only the corporation for special responsibilities must be refined, or otherwise this also raises doubts about the normative significance claim.

A third ambiguity is that the reasons for the corporation's normative significance do not provide much guidance about the content of the corporate responsibilities that they imply. Ideally, there should be a connection between the reasons for corporate responsibilities and the formulation of their content, since what is normatively required of the corporation is connected to why it is normatively required. However, neither the normative domain reason nor the public benefit reason give much guidance about the content of the corporate responsibilities. The corporate domain reason entails that corporate responsibilities are different to and, in their demandingness, probably lie somewhere in between public and private responsibilities. But are

corporate responsibilities a hybrid of public and private responsibilities, or are they entirely unique? If they are a hybrid, when are they based on public responsibilities and when are they based on private responsibilities? If they are unique, what are their normative grounds? The public benefit reason is a little more prescriptive in requiring a public benefit obligation, but it also lacks guidance as to what form the public benefit should take and how demanding it is. Should the corporation benefit the public with a financial contribution (e.g., with corporation tax rates that are higher than income tax rates), a social contribution (e.g., by providing goods that are valued for their wider public benefits), or something else? Ciepley proposes some more specific corporate responsibilities, including a suggestion that the public benefit obligation should be formulated as an obligation "to attend to broader stakeholder interests" (Ciepley, 2013: 153). The problem is, however, that there are many other potential public benefits the corporation could provide, so why should the corporation attend to stakeholder interests rather than something else? The problem is that the justificatory reasons are, by themselves, too vague and too unconnected to other normative commitments to give much guidance on what the corporate responsibilities are.

A final weakness is that it is unclear how the normative significance claim can respond to some of the objections that are raised against the standard NGP argument (see Chapter 1.3.2). In the no normative significance objection, for example, Singer (2019: 292) argues that there is a particular way of characterising the political-philosophical normative framework so that corporate responsibilities are unjustified, even though the objection grants that the corporation has a governmental provenance. Without going into the details of the objection, which I discuss and respond to in Chapter 3, the relevant point here is that the vagueness of the standard NGP argument's normative framework leaves it vulnerable to an objection of this kind and that is based on specifying the normative framework in a particular way.

2.2.3 Other versions of the normative significance claim

There are, as I noted in Chapter 1.3.1, other versions of the NGP argument, which span business ethics, political theory and legal theory. Moreover, some of these versions justify the normative significance claim with similar justificatory reasons to Ciepley's standard NGP argument (e.g., O'Neill, 2009a; McMahon 2012). Given this, one might wonder why not defer to these other versions of the NGP argument, instead of developing a modified version?

I have four reasons for not doing this. One reason is that some of these versions are also a little underdeveloped and, to a certain extent, take the normative significance claim to be a straightforward implication of the corporation's positive features. In this respect, I agree with Singer (2019: 284) that although the NGP argument has "rhetorical force … there has been less rigorous attention paid to explaining precisely why we should think that the corporation's governmental provenance has such normative ramifications." Accordingly, there is considerable value in developing a version that is more transparent about the reasoning that underpins the normative significance claim, even if it makes similar claims to an existing version.[52] The second reason is that some of these versions face similar weaknesses to those that the standard NGP argument faces, partly because they are underdeveloped, and articulating a more developed version of the NGP argument is one way to address these weaknesses and clear up some of the ambiguities. The third reason is that there is some variation across NGP arguments in the formulation of the justificatory reasons and in their implications for the content of corporate responsibilities. As I noted above, McMahon (2012), for example, defends a normative domain reason that is very similar to the one in the standard NGP argument, but ends up with different corporate responsibilities. Given this variation, there is considerable value in developing a version that can discriminate between different versions of the NGP argument, and that can also justify *why* a particular version or implication is more defensible than another. Finally, the fourth reason is that I think there are some refinements to be made to the normative significance claim when compared to these extant versions, the most notable one being that the justificatory reasons for corporate responsibilities are *pro tanto* rather than decisive.

2.3 The need for a political-philosophical framework

Before I develop a modified version of the NGP argument, I begin by pointing out that the normative significance claim depends on broader political-philosophical normative commitments. The normative significance claim is, after all, a claim concerning the

[52] I note that the version of the NGP argument that I develop is most comparable to O'Neill's (2009a) version, which is rooted in a broadly Rawlsian institutionalist political-philosophical framework and which justifies corporate responsibilities on the grounds of a "straightforward conception of reciprocity" (O'Neill, 2009a: 12). However, rather than taking this conception of reciprocity to be "straightforward," I substantiate a conception of justice as fair reciprocity in depth and defend the justificatory reasons for corporate responsibilities. And in this sense, the version of the NGP argument that I develop complements, rather than competes with, O'Neill's version.

justification for using governmental power to create the corporation and the sorts of normative implications that follow from this. And claims of this kind are the territory of political-philosophical theories, as opposed to moral theory,[53] and so the normative significance claim depends on presupposing a political-philosophical framework with certain political-philosophical normative commitments.

Although this point is acknowledged within the debate about the NGP argument, the political-philosophical framework is, as I argued in section 2.2.2, sometimes vague. Ciepley (2013: 139) conceives of the NGP argument as a "political theory of the corporation," but the broader political-philosophical framework for this political theory is unclear. Moreover, it is important to recognise that only some political-philosophical frameworks are compatible with the NGP argument, and those frameworks that *are* compatible must contain at least three normative commitments. First, the framework must be capable of justifying the use of governmental power to create the corporation. Second, the framework must have some way of differentiating between the normative standards that apply to institutions and to individuals in order to be capable of differentiating corporate responsibilities from people's general, individual responsibilities. And third, the framework must be capable of attributing a normative significance to the corporation on the grounds of its special governmental provenance and corporate privileges.

Although these normative commitments may appear to be quite minimal, they rule out certain political-philosophical frameworks. For example, the first normative commitment rules out a libertarian political-philosophical framework because there is no libertarian justification for using governmental power to create the corporation. A libertarian society is organised around a minimal state which secures people's rights of self-ownership and justice in holdings with rules against using force, fraud, and theft (Nozick, 1974). In a libertarian framework, it is difficult to see how the corporation as a legal entity is normatively justified (O'Neill, 2009a: 5-7; Singer, 2019: 297). Given that the corporation is not a nexus of contracts, but depends on special governmental action, the only possible libertarian justifications for corporate law are either that corporate law aligns with libertarian pre-institutional, natural rights or that corporate law has the unanimous consent of all citizens who are using their pre-institutional natural rights

[53] The basis for the political/moral distinction can be drawn in different ways, and on some views the political is co-extensive with the moral or the political is a special case of the moral (Larmore, 2012). The political/moral distinction I have in mind here is a rudimentary one in which political-philosophical theories are concerned with normative reasoning about a political society, political institutions and the political citizenry, and moral theories are concerned with normative reasoning about individual and interpersonal rights and obligations, independent of their political relationship.

to create the corporate legal form. To illustrate the implausibility of these possibilities, consider that corporate law does not align with pre-institutional natural rights concerning property ownership, insofar as it assigns property ownership rights to the corporation as a separate legal person rather than to natural persons. And it is difficult to see how there could be unanimous consent to the corporate arrangement, and particularly how innocent third parties who might be harmed by the corporation could consent to the corporation's legal feature of limited liability for tort, given that this legal feature limits people's ability to seek rectifications to injustices that infringe on their libertarian self-ownership rights. Indeed, when a libertarian argument claims that the corporation is not subject to any special responsibilities, whilst also presupposing that it is legitimate for the corporation to exist, the argument typically presupposes an incorrect contractual view of the corporation and presupposes that people are permissibly using their pre-institutional natural rights to enter into voluntary contractual arrangements to create the corporation without acquiring any special moral responsibilities (e.g., Hasnas, 1998).

To be clear, I do not mean that we should reject a political-philosophical framework, such as libertarianism, because it is incapable of justifying the corporation and is incompatible with the NGP argument. Clearly, the plausibility of a political-philosophical framework depends on the plausibility of its fundamental normative commitments, its robustness to various objections that are raised against it, and the plausibility of its many implications, only one of which is its implications for the justifiability of and normative significance of the corporation.[54] My point is simply that the NGP argument depends on certain normative commitments and can only succeed if it is conditional on some (but not all) political-philosophical frameworks. It is, therefore, important to make the political-philosophical framework explicit because this helps to make it clearer what the grounds are for making the normative significance claim. (Symmetrically, if an argument denies, or objects to, the NGP argument, it also helps if that argument is situated within an explicit political-philosophical framework).

[54] If, however, a libertarian does have a reasonably firm, initial moral judgement that the corporation is justified as an entity but it is not compatible with a libertarian framework, then, using the method of reflective equilibrium for moral reasoning (Rawls, 1999: 42-5), this counts against a libertarian framework to the extent that it requires some revisions to the libertarian framework until there is an equilibrium between moral judgements about the justifiability of the corporation and the libertarian framework. (Of course, the method of reflective equilibrium may also require revisions to the initial moral judgement, so that an equilibrium is reached by rejecting the justifiability of the corporation.)

2.4 Justice as fair reciprocity

I now take a step towards developing a modified version of the NGP argument by outlining the core normative commitments of a substantive political-philosophical framework that is, I will argue, compatible with the normative significance claim. The framework is a *general* conception of justice as fair reciprocity that is based on Gibbard's (1991) interpretation of Rawls's (1971) theory of 'justice as fairness' and that draws upon some of the concepts in specific conceptions of justice as fair reciprocity, such as Rawls's (1996, 1999, 2001) 'justice as fairness' and White's (2003) 'fair-dues conception of reciprocity.'

The main rationale for using a general, rather than a specific, conception of justice as fair reciprocity is that a general conception contains the essential resources for refining the normative significance claim, and it is not necessary to include some of the additional normative commitments that are part of the more specific conceptions. Indeed, although there is a collection of recent work that looks at the normative significance of the corporation within a Rawlsian institutionalist framework (Berkey, 2020; Blanc and Al-Amoudi, 2013; Singer, 2015), the corporation plausibly has a normative significance in other political-philosophical frameworks that are not Rawlsian, and I presuppose a general conception of justice as fair reciprocity to demonstrate the broader normative significance of the corporation. Moreover, in later chapters where I determine the content of corporate responsibilities (chapters 4 to 6), I presuppose a more specific conception of justice as fair reciprocity that is social egalitarian and that does not precisely align with either of Rawls's 'justice as fairness' or White's 'fair-dues conception of reciprocity,' although it does draw upon Rawlsian ideas.

2.4.1 The general conception of justice as fair reciprocity

In justice as fair reciprocity, a political society is a system of social cooperation that depends on people abiding by rules that regulate their fundamental terms of association as citizens, such as their rights, duties and claims, and which also construct their main institutions (Gibbard, 1991; Rawls, 1999: 74). This system of rules and institutions brings significant advantages for its citizens, particularly when compared to a non-cooperative benchmark in which there are no terms of social cooperation,[55] such as giving people a considerable degree of certainty and

[55] The non-cooperative baseline for comparison, also called the disagreement point, should be one of equality (Rawls, 1996: 17), given a commitment to considerations of fairness. But the baseline for comparison could also be taken to be one of non-cooperative inequality without meaningfully changing

security, securing the enabling conditions for sub-societal schemes of cooperation (e.g., cooperative schemes of production, or associations based on personal interests or personal convictions), and establishing valued social and political institutions. However, the system of social cooperation depends on citizens restraining themselves according to society's rules and institutions, and the system is unrealisable if (too many) citizens do not restrain themselves in this way. Accordingly, as well as advantaging its citizens, this system also brings with it considerable restrictions and burdens for citizens, who must restrain themselves in observing the rules, forgo opportunities to advance their own interests where this is contrary to the rules, and accept the burdens or sacrifices that the rules and institutions may require of them.

This conception of a political society – as a system of social cooperation that depends on rules and institutions which benefit and burden its citizens – is not unique to justice as fair reciprocity. Justice as fair reciprocity is, however, distinctive as a conception of justice because it adds three fundamental normative commitments to this understanding of political society, which are each grounded in a conception of 'fair reciprocity.' First, justice is fair reciprocity in the terms of social cooperation, so that justice as fair reciprocity is a kind of political society that realises a *system of fair social cooperation.* Second, justice as fair reciprocity presupposes that people have a motive of fair reciprocity, being a *motive that is intrinsically reciprocal,* and claims that this motive is compatible with sustaining fair reciprocity in the terms of social cooperation. And third, fair reciprocity is the grounds for an *obligation to play one's part* in abiding by the terms of social cooperation. Moreover, not only are these three normative commitments a coalescence of different aspects of fair reciprocity, but they are also unified by a commitment to mutual respect and the equal worth of people.

Taking each of these normative commitments in turn, justice as fair reciprocity requires that the terms which regulate political society, as a system of social cooperation, should be based on fair reciprocity. What this means is that they should be terms that represent a fair exchange for each citizen, so that everyone benefits fairly from the advantages of social cooperation and also contributes fairly by sharing the burdens of social cooperation. In this way, justice as fair reciprocity picks out a particular kind of political society in which the terms of social cooperation represent a 'fair deal' for its citizens that both advances their interests and is responsive to fairness considerations, and which is different to two of the main alternative political-philosophical frameworks, justice as mutual advantage and justice as impartiality

---

the comparator because, as Gibbard (1991: 270) points out, in a truly non-cooperative baseline everyone's prospects are equally meagre, given the conditions of conflict and instability.

(Gibbard, 1991). In justice as mutual advantage, justice secures a system of social cooperation based on rules and institutions that regulate citizens' behaviour, but the system is grounded solely in citizens' narrowly conceived personal interests and any apparent norms of fairness are, in fact, formulated and abided by because they serve these interests (Hobbes, 1994; Gauthier, 1986). In justice as impartiality, justice depends on adopting an impartial perspective that aims towards the general good or reflects an altruistic concern for each person's good. The utilitarian aim of maximising aggregate utility may require, depending on the empirical circumstances, a system of slavery as a just social arrangement (if doing so would generate so much utility for the slave owners that it maximises aggregate utility overall), even though this goes against the interests of those citizens who, as slaves, are worse off than they would be in a non-cooperative social arrangement (Rawls, 1999: 137-9).

In this general conception of justice as fair reciprocity, I will not specify what counts as a fair exchange except to say that the terms of social cooperation should be *both* mutually advantageous and fair, i.e., justice is concerned with realising two broad *justice-based values*, which are 'advancing citizens' interests' and 'fairness.' In Chapters 4 to 6, I specify some of these justice-based values in greater depth, but I note here that some of the main ways of substantiating the justice-based values include measuring citizen's interests in terms of their possession of primary social goods, such as income and wealth and the social bases for self-respect (Rawls, 2001: 57-59), and conceiving of fairness as a degree of relational and/or distributive equality (e.g., an allocation of primary social goods that works to the greatest benefit of the least advantaged in society (Rawls, 2001: 42-43)).

One justification for basing the terms of social cooperation on fair reciprocity is that it secures the commitment of each citizen to abide by the terms of social cooperation. Since the terms are both advantageous and fair, each citizen is assured that the terms work fairly for them and for their fellow citizens. This gives each citizen a reason to abide by the rules of social cooperation on the assurance that their fellow citizens will also do so, and thereby secures the system of social cooperation on which these advantages depend. One way to illustrate this is by considering the reasons that can be given to two groups of citizens – those who fare comparatively less well and those who fare comparatively better than others – for supporting and abiding by the rules. Each of these groups of citizens has reasons to support and abide by the rules because they are all better off than they would be in a non-cooperative society, they are all guaranteed that the social arrangement treats them fairly, and they are all aware that their situation depends on the willing cooperation of their fellow citizens. As Gibbard (1991: 269) puts it "you have what you have only because others constrain themselves, in ways that

make for a fair cooperative venture for mutual advantage. Constrain yourself by those rules in return, and give them fair return for what they give you."[56]

The second normative commitment in justice as fair reciprocity is that fair terms of social cooperation are further justified because they align with citizens' fundamental motivations which are based on fair reciprocity. A fundamental premise of justice as fair reciprocity is that citizens are motivated both by their own interests and are intrinsically reciprocal,[57] meaning that they are moved by fairness and will sometimes forgo the maximal pursuit of their personal interests, but only on the assurance that others are similarly motivated.[58] One way of understanding the motive of intrinsic reciprocity is as a deep commitment to mutual respect based on the equal worth of people,[59] as a deep commitment of this kind can justify why someone would forgo their own interests for the sake of someone else (i.e., out of respect for, and regard for the equal worth of, the other person) but only on the condition that this motive is reciprocated (i.e., when such respect is mutual and the other person is also committed to the equal worth of the person who forgoes their own interests).[60] This motivational psychology grounds both an intrinsic and an instrumental justification for justice for reciprocity. The intrinsic justification is that terms of social cooperation based on fair reciprocity are an embodiment of people's fundamental commitment to their own interests and

---

[56] See also Rawls (1996: 16) who argues that the "fair terms of cooperation specify an idea of reciprocity: all who are engaged in cooperation and who do their part as the rules and procedures require, are to benefit in an appropriate way as assessed by a suitable benchmark of comparison."

[57] This motive, which Gibbard (1991: 266) labels as being intrinsically reciprocal, is also sometimes called the "motive of fair reciprocity" (Gibbard, 1991: 266) or an assumption that people are "reasonable" (Gibbard, 1991: 265). "Reasonable" people in the Rawlsian conception (Rawls, 2001: 6-7) have the capacity to propose, acknowledge and abide by principles of justice that are fair and which other people observe, and are to be contrasted with merely rational people who act only in their own interests and in ways that might opportunistically take advantage of rules based on fairness.

[58] I note that there is some evidence from experimental settings and survey data that people are committed to norms of fair reciprocity (Bowles and Gintis, 1998; Cappelen et al., 2007; León, 2012).

[59] This idea of a commitment to mutual respect and equal worth is found in both White's and Rawls's specific conceptions of justice as fair reciprocity. White (2003: 63) argues that justice as fair reciprocity expresses an "ethos of mutual respect between equals." Rawls (1999: 303) argues that the motive of fair reciprocity gains support from citizens' desire "to cooperate on a basis of mutual respect" because people have a common interest in living with one another on terms of mutual respect and in living in a society of "free and equal persons" (Rawls, 2001: 132). It is also evident in the selection of a non-cooperative baseline for comparison that presumes equality, see fn55.

[60] Some of the other ways of understanding or grounding the motive of intrinsic reciprocity include presuming that it is a basic disposition (Cohen, 1989: 745), that it expresses a desire for a sense of community with others (Rawls, 1999: 460-464), or that it expresses a commitment to pluralism and the development of human capacities, which people take delight in (Cohen, 1989: 748; Rawls, 1999: 456-459).

to the value of mutual respect and the equal worth of all people.[61] The instrumental justification is that such terms also align with and, thereby, realise as best as possible people's interests in themselves and in fairness.

Finally, the third normative commitment is that citizens are subject to a reciprocal obligation to abide by terms of social cooperation based on fair reciprocity.[62] This reciprocal obligation requires that all those who benefit from the system of social cooperation have an obligation to fairly share the burdens placed on others. It is based on the principle of fair play (Hart, 1955; Rawls, 1999: 96-98, 301-308), which holds that each person should 'play their part' in sharing the sacrifices that others make in any mutually beneficial cooperative scheme. This principle can be grounded in the motive of intrinsic reciprocity by linking it to people's commitment to mutual respect and equal worth. Someone who fails to abide by the terms of social cooperation demonstrates a lack of appropriate respect towards others and for the sacrifices others are making in abiding by the terms of social cooperation, and is suggestive of an attitude that denies the equal worth of others. Accordingly, a political society may insist that everyone abides by the rules, as a matter of obligation, not only to secure the terms of social cooperation but also to affirm a commitment to mutual respect and people's equal worth.

2.4.2 Three features that are relevant to an NGP-style argument

Having outlined the fundamental normative commitments that make justice as fair reciprocity distinctive as a conception of justice, I now turn to pick out three features of justice as fair reciprocity that, by aligning with the three necessary features for an NGP argument that I identified in section 2.3 above, make it amenable to an NGP-style argument. These features concern: (i) the justification for governmental action; (ii) an institutionalism that divides the

[61] Rawls (1996: 17) points to this intrinsic justification when he claims that "reciprocity is a relation between citizens in a well-ordered society expressed by its public political conception of justice." Hartley (2014) also makes a complementary argument for justice as reciprocity based on mutual respect and argues that the "central good of the social product must be understood as a kind of relationship among members of society … as having a certain status or standing as equals" (Hartley, 2014: 427).

[62] One argument for justice as fair reciprocity is that it resolves, to a certain extent, some of the tensions between citizens' own interests and considerations of fairness because (i) it is rational for citizens to forgo their own interests for the sake of fairness, if others do so too, in order to realise the benefits of social cooperation and (ii) citizens are presumed to be intrinsically motivated by fairness and, to a certain extent, are willing to forgo their own narrow interests if others will also do so. Nonetheless, certain tensions will arise between people's interests and fairness, particularly when the benefits from disregarding the rules of social cooperation are very great, in which case this obligation becomes especially important.

normative landscape into a political domain and a non-political domain; and (iii) the concept of special responsibilities.

Governmental action is one of the main ways that a political society structures its terms of social cooperation.[63] By enacting laws and specifying regulations, governmental action establishes commonly understood ways of cooperating and of resolving competing claims, and, by making use of its monopoly on coercive power, the government has a unique power to enforce the terms of social cooperation with legal sanctions. Moreover, governmental action is capable of establishing agencies that the government can task with specific objectives or to which government can delegate some of its powers.

In justice as fair reciprocity, governmental action is justified if it improves the terms of fair social cooperation, by better realising the justice-based values.[64] This justification for governmental action opens the door to an NGP-style argument because the implication is that the use of governmental action to create the corporation could be justified, in a framework of justice as fair reciprocity, if it can be shown that the corporation better realises one or more justice-based values, i.e., if corporate law advances citizens' interests or better realises some fairness considerations or both.

The second relevant feature is that justice as fair reciprocity is typically an institutionalist conception of justice in which the normative landscape is divided into a political domain, which is regulated by principles for institutions, and a non-political domain, which is regulated by principles for individuals. The institutions in the political domain should be structured and regulated so that they directly and wholly realise justice-based values, whereas individuals in the non-political domain have far greater freedom to pursue their own ends and are, by contrast, merely constrained in their actions by some justice-based duties and obligations.

One way of sharpening this distinction is to draw upon the Rawlsian division between the political and non-political domains. In a Rawlsian framework, the political domain comprises society's "major social institutions" (Rawls, 1999: 47), which are the main social and political institutions that structure the fundamental terms of social cooperation between

[63] Governmental action is not the only way to structure terms of social cooperation (see Chapter 3.3.1).
[64] A further reason for this justification is that citizens have a distinctly "political relationship" to government's coercive power both because its use is imposed on them and because its power comes from them – it is a power that is delegated to the state by its citizens, if they are free and equal (Rawls, 2001: 182).

members of society,[65] and the way that these major social institutions fit together into a complete system is the "basic structure".[66] Major social institutions include all socially significant social practices of citizens following legal or extra-legal rules, where they are both publicly understood and determine social cooperation between citizens (Melenovsky, 2013; Rawls, 1999: 47-48). And the kinds of major social institutions that constitute the political domain include the constitution, the judiciary, the legal rules governing property, and the structure of the economy. The political domain also includes all those laws and institutions that are formed by major social institutions in the basic structure, using governmental action, albeit Rawls (1999: 171-176) argues the justifiability of these laws is subject to a four-stage procedure that varies the availability of knowledge. Importantly, the political domain is to be structured and regulated so that it directly realises justice-based values.

The non-political domain, by contrast, is a diverse domain that includes the personal, the associational and (parts of) the familial (Rawls, 2001: 183). In the non-political domain, individuals have a far greater freedom to pursue their own ends and are regulated by much less demanding responsibilities than in the political domain. It is important that people have a "free and flourishing internal life" (Rawls, 2001: 165) – indeed, this is a justice-based value given that justice is partly grounded in people advancing their own interests and pursuing their own ends. But individuals are also subject to individual responsibilities that constrain their behaviour in some respects, such as duties of mutual aid, respect, and civility (Rawls, 1999; Voorhoeve, 2005).[67] And individuals are also subject to "individual rules" (Scheffler, 2015a: 221) that they are required to follow as part of the demands of specific major social institutions. For example, tax law is a major social institution in the political domain, but it places responsibilities on individuals in the non-political domain to complete tax returns.

Importantly, the two domains are not pre-determined, but are constructed by citizens as a way of realising justice. The distinction between the political and non-political domains, as

---

[65] There is, as I discuss in Chapter 3.3.1, some disagreement about the conditions that determine the major social institutions that are in the political domain.

[66] As Rawls (2001: 10) puts it "the basic structure of society is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time."

[67] The duty of mutual aid requires citizens to help those in need when doing so is not too onerous (Rawls, 1999: 100, 297-8), the duty of respect requires citizens to treat one another as beings with their own interests and a sense of fairness, and to consider their perspective in disagreements (Rawls, 1999: 155-6, 297), and the duty of civility requires that all citizens explain their political decisions (e.g., votes, legislation) in political terms that other citizens can reasonably be expected to endorse (Rawls, 1997: 769).

well as the identity of the major social institutions and individual rules within them, is an outcome of applying the demands of justice to the way that a society is organised.[68] And both domains are subject to the demands of justice. It is simply that justice demands *more* of, and should directly structure, the political domain, and demands *less* of individuals in the non-political domain. Indeed, one justification for the division between the political and non-political domains is that they realise a division of moral labour between institutions and individuals (Rawls, 1996: 268-69). If the political domain forms a "background justice" (Rawls, 1996: 268) that aims at realising justice, then individuals can pursue their own ends (constrained only by their individual responsibilities), so that the system of social cooperation is, on the whole, a more just system of social cooperation than if individuals were also to aim directly at realising justice.

This distinction between the political and non-political domains is particularly relevant to an NGP-style argument for two reasons. First, it draws a distinction between normative domains in a way that has some resemblance to the standard NGP argument's division of the normative landscape into public and private domains. Second, the distinction is more precise than in the standard NGP argument. Ciepley (2013: 140) draws the division in terms of multiple criteria of "government/market, state/society, privilege/equality, status/contract, as well as liberalism's master dichotomy of public/private." Whereas, in the Rawlsian framework, the political domain comprises those major social institutions that structure the terms of social cooperation, and which should, therefore, be structured to wholly realise justice-based values.

The third relevant feature is that justice as fair reciprocity allows for assigning special responsibilities as a way of improving the terms of fair social cooperation. Since what matters in justice as fair reciprocity is that the system as a whole advances justice, different major social institutions can be structured with different justice-based aims, and different people can be assigned special responsibilities, according to the roles they hold, so that they each play their part in realising a just system of social cooperation.[69] And although these special responsibilities place distinctive requirements on different major social institutions and people, they are derivative of the same justice-based values, rather than being independently justified based on unique values. Moreover, the special responsibilities can also take either a legal form,

[68] As Rawls (2001: 166) puts it, justice "does not regard the political and the nonpolitical domains as two separate, disconnected spaces, as it were, each governed by its own distinct principles… a domain is not a kind of space, or place, but rather is simply the result, or upshot, of how the principles of political justice are applied, directly to the basic structure and indirectly to the associations within it."

[69] As Rawls puts it, what matters is how the system fits "together into one unified system of social cooperation" (Rawls, 1996: 11).

in which case they can be enforced using coercive legal measures, or an extra-legal form, in which case compliance is encouraged through social norms and expectations. As an example of an extra-legal special responsibility, in a Rawlsian framework carers with parental responsibility have a special responsibility to raise the children they care for with the motives necessary for justice, given that a person's moral psychology and sense of justice are formed by their family upbringing (Rawls, 1997: 788, 1999: 429).

2.5 The corporation in justice as fair reciprocity

2.5.1 The justice-based justification for creating the corporation

Drawing on these three features of justice as fair reciprocity, I now develop a version of the NGP argument, which I call the Corporate Fair Reciprocity Argument.

I begin by articulating the justification for the corporation's special governmental provenance. In a framework of justice as fair reciprocity, the principal justification for the use of governmental action to create the corporation is that it advances citizens' interests. The corporate legal form has a number of advantages over other business legal forms that enable the corporation to substantially improve the satisfaction of citizens' interests – be it as, amongst other things, consumers who have an interest in a range of goods and services, as workers who have an interest in well-remunerated and/or personally satisfying work, as entrepreneurs who have an interest in developing new ideas and/or developing thriving businesses, or as investors who have an interest in financial returns. There are several mechanisms by which the corporation advances citizens' interests (Armour et al., 2017; Blair and Stout, 1999; Ciepley, 2013; O'Neill, 2009a: 8; Williamson, 1998), five of which I briefly identify here. One, the corporation enables investors as shareholders to pool their capital, by solving the moral hazard problem investors face in non-corporate businesses. This enables investors to establish and grow businesses that are larger and more capital-intensive than non-corporate businesses. Two, the corporation enables shareholders to diversify their risk across different corporations using the joint stock mechanism, which enables them to invest in riskier business ventures and lowers the cost of capital compared to non-corporate businesses. Three, the corporation facilitates entrepreneurial risk-taking, as entrepreneurs can establish new business ventures without necessarily risking all of their own capital. Four, as it is a separate legal person with director governance, the corporation facilitates the development of firm-specific assets and facilitates

firm-specific commitments and investments from the people who are involved in the corporation's production, with significant productivity benefits compared to non-corporate businesses. Five, as a separate legal person with asset lock-in, the corporation facilitates businesses that have a longer-term horizon than non-corporate businesses.[70]

This *advances interests* justification for the corporation must be the principal justification for creating the corporation. The corporation's five legal features are not structured to realise those other justice-based values that are concerned with fairness, but to facilitate large, productive, and innovative businesses that work to the advantage of citizens. This contrasts with some other kinds of governmental action where the principal justification is that they realise fairness, such as, for example, how a redistributive taxation system aims at distributive fairness.

2.5.2 The two *pro tanto* justificatory reasons for corporate responsibilities

(a) The corporation as a distinctive major social institution

The corporation's special governmental provenance also grounds a *pro tanto* justificatory reason to regulate the corporation with corporate responsibilities. This *pro tanto* justificatory reason consists of a permission to single out the corporation for special corporate responsibilities, and a strong presumption that society should assign corporate responsibilities as a way of improving the overall terms of social cooperation.

The special governmental provenance of the corporation marks it out as a distinctive part of the terms of fair social cooperation. When a society uses its governmental power to add the option of conducting business using the corporate legal form, a society is using its governmental power to expand and extend the system of rules and institutions that regulates social cooperation from being a *non-corporate system* of terms of social cooperation – which typically comprises property law, contract law, criminal law, taxation laws, and also a number of governmental agencies, amongst other things – to a *post-corporate system* which includes the corporation. With its five legal features of legal personality, asset partitioning, limited liability, director governance and the joint stock mechanism, the corporation extends the non-corporate system by adding a way of socially cooperating that is distinctive to those other ways of socially cooperating that make use of the non-corporate system. Indeed, the corporation is

[70] For further discussion of these mechanisms, see Chapter 1.3.1, Chapter 3.5 and Chapter 6.3.2.

unlike *non-corporate organisations* – which include non-corporate businesses, such as partnerships and private associations, and a range of associations – that rely on the non-corporate system's terms of social cooperation, and on contract law and property law in particular. These non-corporate organisations are formed by making use of the non-corporate system in different combinations, but do not rely on a unique part of the terms of social cooperation. Associations do not, for example, rely on association law, whereas the corporation relies uniquely on corporate law and on the corporate charter that it includes.

As a distinctive part of the terms of social cooperation, the corporation counts as a major social institution and as part of the political domain, with two notable normative implications. First, society is permitted to single out the corporation for special corporate responsibilities, where doing so will better realise justice-based values. The corporate legal form is not the only way that society can structure the corporation as a way of socially cooperating (and the resultant post-corporate system) and society can also assign corporate responsibilities to the corporation concerning society's demands and expectations about how the corporate legal form should be used. These corporate responsibilities can take a legal form and can be embedded into the corporation's structure in terms of defining the corporation's purpose and responsibilities or the corporation's directors' legal obligations, or they can take an extra-legal form by stipulating social norms that apply to the corporation's actions or the conduct of the corporate governors. Second, if assigning corporate responsibilities will better realise justice-based values, then society should assign such corporate responsibilities. As the political domain is structured to directly realise justice, if society can improve how the corporation realises justice and improve the post-corporate system as a whole, then it should do so.

This special permission to assign corporate responsibilities depends on rejecting the contractual view of the corporation and recognising that the corporation has a special governmental provenance. If the contractual view of the corporation were correct, then corporate law would not in fact extend the non-corporate system because corporate law is, on this view, just an application of contract law to provide an off-the-shelf set of contractual terms. Accordingly, the corporation could not be singled out for special corporate responsibilities because it would not rely on unique terms of social cooperation. The corporation would, instead, be another type of non-corporate organisation that makes use of the non-corporate system, and it would be part of the non-political domain. Accordingly, the corporation could only be assigned the same responsibilities that apply to all other non-corporate organisations, and which are typically less demanding and are the same as those that apply to individuals in their general, everyday associative activity.

This special permission permits society to assign corporate responsibilities to the corporation if doing so will better realise justice-based values. The justificatory reason for corporate responsibilities is, however, stronger than a bare permission, and there is a strong presumption that society should assign corporate responsibilities to the corporation. The reason for this presumption starts from the fact that corporate law is a substantial variation in the terms of social cooperation. The corporation's legal features substantially alter the legal rules governing legal personality, property ownership, liability, and legal responsibility when compared to non-corporate terms of fair social cooperation (see Chapter 1). As a consequence of being such a different way for citizens to socially cooperate, the corporation can be presumed to have substantial effects on justice-based values, including substantial effects on some of the main ways that fairness considerations could be substantiated, such as distributive or relational fairness. Indeed, there is evidence that the corporation profoundly shapes economic and social conditions, particularly given the predominance of corporations in the economy (ONS, 2020), with effects on working conditions and opportunities, pay levels and pay inequality, innovation for social goals, the environment, social and political power, and individual attitudes (e.g., Clarke et al., 2019; Crane et al., 2008; Deakin et al., 2018; Serafeim et al., 2019).[71,72] And given that the corporation substantially affects justice-based values, there is a strong presumption that society could regulate the corporation with at least some corporate responsibilities that would better realise justice-based values.

Whilst there is a strong presumption in favour of corporate responsibilities, the actual case for them is contingent on a number of factors that include the feasibility of specifying clear corporate responsibilities, their compatibility with peoples' motives and/or the feasibility of enforcing them, or the possibility of protecting those justice-based values that are adversely affected by the corporation with other institutions.[73] As such, whilst the presumption in favour of corporate responsibilities is a strong one, it is not a decisive reason for corporate responsibilities as in the standard NGP argument. Instead, the combination of a special permission and a strong presumption for corporate responsibilities grounds a *pro tanto* justificatory reason for corporate responsibilities.

---

[71] In addition to empirical evidence of these effects, a further argument for the corporation's substantial effects is that citizens have a range of concerns about the corporation's impacts and effects on society, as documented in various surveys (Deloitte, 2018: 6; Edelman, 2019: 30; Hsieh et al., 2018: 50) and as reflected in the some of the criteria that are included in corporate governance codes and ESG or responsible business frameworks.

[72] I discuss some of these, and other, effects in greater depth in Chapter 3.3.3, Chapter 5 and Chapter 6.

[73] I discuss these factors in Chapters 5 and 6.

(b) Corporate responsibilities as a *quid pro quo* for corporate privileges

Not only is corporate law a distinctive part of the terms of social cooperation, but it is also notable for privileging shareholders as the quasi-owners of the corporation.[74] Corporate privileges are both an intrinsic benefit and a substantial financial benefit for shareholders, as I argued in Chapter 1.4.3. And the corporation also directly imposes several burdens on the rest of society. One of these burdens is the cost associated with establishing, enforcing, contesting and revising corporate law, through the judicial system and with regulatory agencies. A second burden is that the costs of corporate bankruptcy are partially socialised amongst citizens, as the corporation's limited liability feature protects shareholders from bearing any of the corporation's financial liabilities themselves.[75] And a third burden is that the corporation places additional restrictions on citizens' freedoms, by requiring that citizens respect corporate law in addition to other laws and exercise additional restraint in respecting the corporation's legal features.

In justice as fair reciprocity, this asymmetry in the benefits and burdens of the corporation has a normative significance and grounds a second, *pro tanto* justificatory reason for corporate responsibilities. Justice as fair reciprocity requires terms of fair social cooperation in which everyone benefits fairly from the advantages of social cooperation and also contributes fairly in sharing the burdens of social cooperation. In this context, a privileging term,[76] like corporate privileges, which benefits some citizens whilst burdening other citizens,

[74] See Chapter 1.2.2 for an explanation of quasi-ownership.
[75] The corporation's limited liability only *partially* socialises bankruptcy costs, when compared to non-corporate businesses, for two reasons. First, most corporate creditors are subgroups of citizens (e.g., the particular corporation's employees, suppliers, customers, financial creditors), so that most corporate bankruptcy costs are socialised amongst a subgroup of citizens rather than amongst all citizens. The one exception where a creditor's costs are fully socialised is where government is an unpaid creditor, e.g., in respect of unpaid tax payments. Second, some non-corporate businesses also socialise bankruptcy costs, such as when the business owners declare themselves personally bankrupt and do not meet the outstanding liabilities themselves. In this respect, the corporation's limited liability feature should be understood as a way of guaranteeing that bankruptcy costs will be socialised amongst a large group of citizens and of protecting shareholders. To give an example, when BHS Ltd, a UK corporation that operated department stores, went bankrupt in 2016 it had debts of £1.3 billion including a pension deficit of £571m covering 19,000 employees (Guardian, 2017). Because of limited liability, none of these creditors had financial recourse to BHS's shareholders, and the outstanding liabilities were socialised amongst BHS's creditors.
[76] In this respect, the corporation is unlike other, non-privileging terms of social cooperation that simultaneously benefit and burden each citizen, and thereby affect citizens in a roughly symmetrical way. For example, criminal laws against harmful and aggressive acts are non-privileging terms of social

is presumed to be unfair. There is a presumption that society should require the privileged citizens to make a fair contribution to society in return for their privileges, in order to maintain a fair deal for all citizens in the overall terms of social cooperation. The concept is essentially that of a *quid pro quo*, or fair return, in the sense that privileged citizens should make a fair contribution to society as a *quid pro quo* for the privileges they receive from, and burdens they impose on, other citizens.

Applying this principle to the corporation, corporate privileges count as a privileging term because they benefit one group of citizens, as shareholders, whilst also burdening the rest of society. As such, there is a strong presumption that society should require a fair contribution from shareholders as a *quid pro quo* for the corporate privileges, and as a way to maintain fair terms of social cooperation. And society can assign corporate responsibilities that require the corporation to contribute to society's justice-based values as a way of formulating the fair contribution. Importantly, the *quid pro quo* contribution does not need to be a narrow contribution, such as requiring a financial contribution that directly compensates society for those financial costs it imposes on society. Instead, the fair contribution should be determined by the terms of fair reciprocity, where the requirement is that the corporation on the whole works either in citizens' mutual interests or advances fairness or both. In this respect, corporate responsibilities should be assigned so that the corporation is a fair deal between shareholders, who benefit from corporate privileges, and society, which benefits by realising its justice-based values. And in this way, the *quid pro quo* justificatory reason aligns with the major social institution justificatory reason, as both justificatory reasons require that the corporation works to advance justice-based values.

As with the major social institution justificatory reason, the *quid pro quo* justificatory reason also applies specially to the corporation. The *quid pro quo* justificatory reason depends on a permission to pick out the corporation for corporate responsibilities, compared to non-corporate organisations, not only because the corporation is a distinctive part of the terms of fair social cooperation but also because it is a privileging term. And as with the major social institution justificatory reason, the *quid pro quo* justificatory reason is a *pro tanto* reason for corporate responsibilities and not a decisive reason. Assigning corporate responsibilities is contingent on other factors, including that only a subset of shareholding citizens benefit from the corporation and the *quid pro quo* justificatory reason would not apply if all citizens were

---

cooperation because they simultaneously protect people whilst also requiring people to restrain themselves.

shareholders and benefited from corporate privileges to a fairly equal extent.[77] Despite these similarities with the major social institution justificatory reason, the *quid pro quo* justificatory reason is a different justificatory reason, as it depends on corporate privileges and not merely the corporation's special governmental provenance. And in this respect, it strengthens the case for corporate responsibilities by adding an additional *pro tanto* justificatory reason for them.

2.5.3 The Corporate Fair Reciprocity Argument

I call this argument that links the corporation's positive features to corporate responsibilities the Corporate Fair Reciprocity Argument because it is grounded in the political-philosophical framework of justice as fair reciprocity. Fair reciprocity plays a role in both the justificatory reasons for assigning corporate responsibilities. As a major social institution, the corporation is part of the system of fair reciprocity's political domain and the corporation should, therefore, advance justice-based values of fair reciprocity in order to justify to citizens why they should abide by the distinctive legal rules that constitute the corporation. And as the corporation privileges shareholders, the corporation should make a fair contribution to society in fair reciprocation for these benefits.

A core idea is that the corporation should be structured as a fair deal for all citizens. Importantly, this notion of a fair deal can be used to formulate the sorts of public justifications that citizens could give to one another when constructing and regulating the corporation. Before the corporate legal form is created, citizens can reason that the corporation will extend the non-corporate system of rules and institutions, that it has some features that will potentially advance some citizens' interests, and that it will benefit some of them, namely those who have more financial resources and want to invest as shareholders, whilst also placing some burdens on the rest of them. They can therefore reason that the corporation should be assigned corporate responsibilities so that it makes a fair contribution to society. And after the corporate legal form is created, society has a continued reason to assign corporate responsibilities on this basis, and perhaps to refine the form that they take when the substantial effects of the corporation become more apparent.

[77] As it stands, in the UK and USA at least, not all citizens are shareholders, even taking account of indirect holdings through pension schemes, and, amongst those that are, shareholdings are very unequal (Financial Times, 2020). According to research by the Federal Reserve Board and Goldman Sachs, in 2019 the richest 1% of American households held more than half of all household equity wealth, whilst the poorest 50% of American households owned under 1% of all household equity wealth (Financial Times, 2020).

Moreover, shareholders can be given public justifications as to why the corporation should be regulated by corporate responsibilities, even though these may make greater demands of them than in their other associative activity or even though they may believe that the corporation's success is attributable to them, the managers they appoint, or other factors. Incorporation is a substantial benefit which is given to shareholders by the rest of society (see Chapter 1), and society can demand a fair contribution to justice-based values in return.

2.6 Comparing the NGP arguments

The Corporate Fair Reciprocity Argument develops and deepens Ciepley's (2013) standard NGP argument. Like the standard NGP argument, it also ascribes a normative significance to the corporation within a liberal institutionalist political-philosophical framework, and the justificatory reasons that bridge the positive claims to the normative claim also have considerable similarities with the standard justificatory reasons – identifying the corporation as a major social institution has a similarity to the standard NGP argument's normative domain reason, and the quid pro quo reason is similar to the public benefit reason.

There are, however, some important differences. One difference is the justification for corporate responsibilities is *pro tanto,* rather than decisive. Whilst there are strong presumptive reasons for corporate responsibilities in the Corporate Fair Reciprocity Argument, these reasons are not decisive, and an *all things considered* case for corporate responsibilities depends on a number of factors, including empirical circumstances, motive compatibility, the feasibility of enforcement, and the structure of other major social institutions. A second difference is that the corporation does not challenge the standard institutionalist landscape of political and non-political domains by adding a corporate normative domain. The corporation does not, in a fundamental sense, require a new normative domain, and it can be regarded as part of the political domain because it depends on special government action and structures the terms of social cooperation. However, since the political domain is a large system and contains a range of major social institutions that are structured to realise different aspects of justice and come with distinctive responsibilities, it may be pragmatically useful to treat the corporation, from a normative perspective, as being in its own 'corporate' normative category. But a 'corporate' category of this kind would be an analytical simplification purely to distinguish the corporation from other parts of the political domain, and it would not fundamentally reassign

the corporation from the political domain nor would it represent an expansion of the relevant normative domains from two to three.

The Corporate Fair Reciprocity Argument also remedies the weaknesses in the standard NGP argument. It is grounded in a clear political-philosophical framework of justice as fair reciprocity that has firm normative foundations, and its justificatory reasons are well-developed and, as discussed above, more nuanced than in the standard NGP argument. The Corporate Fair Reciprocity Argument also clears up, to an extent, the other ambiguities in the standard NGP argument. Not only are the domain conditions clearer, but the Corporate Fair Reciprocity Argument also plausibly generalises to other rules and social institutions that also depend on special government action or are privileged. The political domain comprises many other major social institutions, all of which should be tasked with realising justice-based values and all of which can be regulated with their own distinctive responsibilities. As particular examples, consider the range of other, non-business corporations that society justifiably creates using governmental power and plausibly tasks with different, justice-based responsibilities. Government departments, local authorities, central banks, public broadcasters, and charities are kinds of corporation that society creates using its governmental power, and structures and regulates with different responsibilities. The idea that generalisation is a problem is at odds with the actual normative landscape of many societies.

Lastly, the Corporate Fair Reciprocity Argument contains a clearer framework for determining the content of corporate responsibilities than in the standard NGP argument. Whereas in the standard NGP argument, it is not clear what are the relevant values for the corporation or whether they are unique, in the Corporate Fair Reciprocity Argument the values are based on the justice-based values of justice as fair reciprocity. Corporate responsibilities are derivate of society's fundamental justice-based values, rather than being based on unique values, and society should determine corporate responsibilities by taking account of the particular justice-based values, the corporation's role in society (when set against other non-corporate rules and institutions) and the empirical connections between the corporation's actions and these justice-based values. Although this is a very general framework for determining corporate responsibilities, each of the factors for determining corporate responsibilities can be given greater specificity by articulating more definite justice-based values, presupposing which institutions exist alongside the corporation, and identifying some of the empirical connections.

Two points can, however, be made at this level of generality. The first point is that the Corporate Fair Reciprocity Argument is a reason to reject 'business morality as personal

morality' approaches to business ethics, in the case of the corporation, and opens the door to a range of other business ethics approaches that make special normative demands of businesses. These other approaches, which I call 'business morality as special morality' approaches, include stakeholder theory (Donaldson and Preston, 1995; Freeman et al., 2010), shareholder value maximisation (Friedman, 1962, 1970; Heath, 2014; Jensen, 2002), shared value theory (Porter and Kramer, 2011) or social and environmental purpose theories (Hsieh et al., 2018; Smith, 2014). These approaches all prescribe distinctive moral obligations that are different to those for individuals and associations. Individuals are not, for example, typically morally obliged to account for stakeholder interests, maximise profits, pursue profitable strategies that create broader value for society, or pursue a social or environmental purpose. The Corporate Fair Reciprocity Argument has the potential, therefore, to act as the justification for one of these approaches, so long as the approach is applied more narrowly to the corporation only (and not to all businesses) and is grounded in the justice-based values of a conception of justice as fair reciprocity.

The second point is that the Corporate Fair Reciprocity Argument also contains the tools to appraise and scrutinise between these 'business morality as special morality' approaches. With a determinate set of justice-based values, a defined set of other institutions, and information on empirical relationships, the Corporate Fair Reciprocity Argument can be used to ask which of these (or, potentially other) 'business morality as special morality' approaches best justifies the corporation as a major social institution and as making a fair contribution in return for corporate privileges? And the Corporate Fair Reciprocity Argument can be applied to refine one of these approaches, if an approach can be improved upon and its corporate responsibilities amended so that they better realise the relevant justice-based values.

2.7 Conclusion

The Corporate Fair Reciprocity Argument develops and deepens Ciepley's (2013) standard NGP argument. Conditional on a political-philosophical framework of justice as fair reciprocity, in which justice is about realising a system of fair social cooperation, society is *pro tanto* justified in regulating the corporation with special corporate responsibilities so that it realises a fair deal for all citizens, and in particular between shareholders and the rest of society. The Corporate Fair Reciprocity Argument justifies picking out the corporation as a special entity within the normative landscape and moving away from 'business morality as personal

morality' approaches to business ethics and towards a 'business morality as special morality' approach, in the special case of the corporation. It also provides an outline framework for evaluating the content of corporate responsibilities, and in Part 2 of this thesis I undertake an evaluative exercise of this kind to compare the merits of shareholder value maximisation and stakeholder theory, and to develop a refined version of stakeholder theory.

CHAPTER 3: THREE OBJECTIONS TO THE CORPORATE FAIR RECIPROCITY ARGUMENT

ABSTRACT: I consider and reject three objections to the Corporate Fair Reciprocity Argument. The first objection is that the corporation has *no normative significance* because its special governmental provenance does not normatively differentiate it from other market participants who also depend on governmental action. The objection continues that it is the *firm* (rather than the corporation) that is normatively significant because of its reliance on power, hierarchy and authority norms. The second objection is that the corporation's contribution to *efficiency is sufficient* to justify the corporation and no further responsibilities are needed. The third objection is that corporate responsibilities unacceptably *conflict with freedom*. I refute the first objection by arguing that institutionalism should identify major social institutions because they instantiate the terms of social cooperation, not purely because they affect justice-based values, in which case the corporation is normatively significant and not the firm. I refute the second objection by defending the role that corporate responsibilities can play in improving the realisation of justice-based values. And I refute the third objection by arguing that the corporation's special governmental provenance means that corporate responsibilities are voluntarily assumed.

3.1 Introduction

According to the Corporate Fair Reciprocity Argument, there are *pro tanto* reasons for regulating the corporation with special *corporate responsibilities* that are different to the responsibilities that regulate other businesses, associations, and individuals. The implication of the argument is that the corporation should be regulated with corporate responsibilities, potentially of the kind that are articulated in 'business morality as special morality' approaches to business ethics, unless there are sufficiently strong countervailing reasons.

There are, however, a number of objections to regulating the corporation with corporate responsibilities, irrespective of what the corporate responsibilities might be. In this chapter, I consider three such objections. The first is a recent objection by Singer (2019) that the corporation's special governmental provenance does not normatively distinguish it from other market participants who also depend on governmental action, and that special justice-based responsibilities should instead be assigned according to an instrumentalist logic that singles out the norms-based *firm*, rather than the legal *corporation*, because of special normative problems

arising from the firm's dependence on power, hierarchy and authority norms. Accordingly, the *no normative significance* objection rejects the Corporate Fair Reciprocity Argument's claim that there are *pro tanto* reasons for specifically *corporate* responsibilities.

The second objection argues that the corporation's *efficiency is sufficient* to count as a fair contribution to society. The corporation has efficiency properties which mean that it indirectly benefits many other people in society beyond the corporation's shareholders, such as customers who benefit from the corporation's goods and services or workers who benefit from employment opportunities. The objection is that these efficiency benefits are, on the whole, automatically realised because of the way the corporation is structured and society does not need to regulate the corporation with special corporate responsibilities.

The third objection is that corporate responsibilities unjustifiably *conflict with freedom* to pursue one's own aims without interference and to associate freely with others. The objection is a prominent and important one within business ethics that is often directed against arguments for special responsibilities in any business (Hasnas, 1998). Sometimes, however, the objection is directed exclusively against corporate responsibilities (Hussain, 2012).

In this chapter, I refute each of these objections. In doing so, I make three distinctive contributions to business ethics. The first contribution is that I develop responses to the objections that are, as far as I am aware, novel. Importantly, the refinement of the standard NGP argument into the Corporate Fair Reciprocity Argument plays a role in securing the corporation's normative significance against these objections. The second contribution is a deeper and more developed defence of the normative status of the corporation. In the process of refuting the objections, I give the Corporate Fair Reciprocity Argument firmer foundations and also strengthen the normative case for regulating the corporation with special legal and extra-legal responsibilities. The final contribution is a demonstration that the Corporate Fair Reciprocity Argument has fruitful implications for longstanding debates in business ethics. The conflict with freedom objection is a prominent objection to the existence of any special responsibilities in business, and the refutation that I defend is only made possible by focusing on the justifiability of special responsibilities for the corporation and the normative implications of the corporation's special governmental provenance.

The rest of the chapter addresses each objection in turn. In sections 3.2 and 3.3, I reject the no normative significance objection. In sections 3.4 and 3.5, I reject the efficiency is sufficient objection. And in sections 3.6 and 3.7, I reject the conflict with freedom objection, before concluding in section 3.8.

3.2 The no normative significance objection

In a recent article, Singer (2019) raises a sophisticated objection against NGP arguments. The objection is directed at extant NGP arguments, including Ciepley's (2013) standard NGP argument, but it clearly applies to the Corporate Fair Reciprocity Argument because the objection is that the corporation's special governmental provenance has no normative significance.[78]

The objection is based on four claims. The first claim is that government intervenes in both the market and the corporation in qualitatively similar ways. Singer endorses the NGP argument's rejection of the contractual view of the corporation and the claim that the corporation depends on extra governmental action for its existence. However, Singer points out that the government intervenes extensively in the rest of the market, by arbitrating and enforcing contracts, stipulating common meanings and values for contracts (Durkheim, 1984), recognising private property and associated rights (Graeber, 2011; Scott, 1998), and regulating competitive markets (Polanyi, 2001). Importantly, Singer argues that government action in the corporation is qualitatively similar to government action in other parts of the market, as in both cases government uses its coercive, regulatory and coordinating powers, and any difference between the corporation and other market participants in terms of their reliance on the government is at most a matter of degree rather than a matter of kind.

The second claim is that, because of this qualitative similarity, there is no normatively relevant difference between government action in the corporation and in the market. Singer (2019: 292) argues that the corporation's special governmental provenance is not, therefore, a justification for applying different normative standards to the corporation, when compared to non-corporate market participants. In addition, he argues that applying a different normative standard to the corporation on the grounds of its special governmental provenance threatens to dilute or eliminate the ability to apply normative standards to the rest of the market. One problem with the standard NGP argument, Singer (2019: 284) argues, is that if the corporation is regulated by a special set of normative standards, then society cannot also apply this special set of normative standards to the rest of the market. And yet government intervenes in the market as well as in the corporation, presumably sometimes for similar reasons, and society

[78] As Singer (2019: 285) puts it, "the fact of government provenance cannot account for the distinctive normative problem of the corporation, nor the specific sorts of standards we should apply to it… The normative implications of the corporation's governmental provenance are practical and pragmatic, not principled or ontological."

also regulates market participants according to similar normative standards to those which sometimes regulate the corporation.[79]

The third claim is that government intervention in both the market and the corporation is justified by a common instrumental logic that aims to realise a common set of justice-based values. Singer (2019: 292) posits a "toy theory of normative political economy" that he calls Social Paretianism because it combines the value of Pareto efficiency, here meaning mutual benefits that move society closer to, but not necessarily on, the Pareto frontier (2019: 293), with a collection of justice-based values that include values rooted in justice, equality, democracy, non-domination and anti-exploitation (2019: 294-5). Singer argues that this Social Paretian framework simultaneously explains and justifies government intervention in both the market and the corporation. In the market, the government justifiably intervenes to facilitate Pareto improvements by correcting information asymmetries or externalities, and the government also intervenes to protect important social values, such as prohibiting contracts involving child labour or involving work in dangerous environments. And in the case of the corporation, governmental intervention enables Pareto improvements by facilitating capital pooling, asset specialisation and greater productivity (Ciepley, 2013; Williamson, 1988: 581), but also, Singer (2019: 295) argues, protects social values by requiring the corporation to abide by standard labour laws.

The final claim is that the corporation's special governmental provenance is of no relevance for special responsibilities. Special responsibilities can be assigned to any market participant, but they should be assigned purely using an instrumental logic that aims to realise the Social Paretian values, and not on the basis of their degree of reliance on governmental action. Accordingly, society can assign special responsibilities to any market participant – be it a corporation or non-corporate organisation – whenever doing so will better realise the Social Paretian values (2019: 285). Indeed, to push the point home, Singer (2019: 296) argues that even if the contractual view of the corporation were correct then society could still assign special responsibilities to the corporation on instrumentalist grounds, since the corporation's governmental provenance is itself irrelevant for special responsibilities.

Applying this instrumentalist logic, Singer argues (2019: 298-300) that it is the firm, not the corporation, that should be regulated with special responsibilities because of its governance structure. The way that a firm coordinates economic activity, using administered

[79] In Singer's (2019: 284) words, "the NGP risks purchasing a normative theory of the corporation at the cost of conceding the public and moral nature of contracts, markets and property rights in the first place."

mechanisms based on power, hierarchy and authority, can sometimes cause special normative problems such as the unfair exploitation of workers, unfair constraints on the freedoms of workers and unfair power imbalances (Anderson, 2017; Ferreras, 2017; Singer, 2019: 298-300). These effects on the social values of the Social Paretian framework are, Singer argues, a reason for society to regulate the firm with special moral responsibilities. Not only is this a more defensible argumentative position, Singer argues, but it is also more plausible as it assigns the same responsibilities to a large corporation and a large partnership, whereas NGP arguments differentiate between the corporation and the partnership.

3.3 Replies to the no normative significance objection

I offer three replies to the objection.

3.3.1 First reply: the terms of social cooperation as the institutionalist criterion

(a) A dispute over the institutionalist criterion

Although there is a clear disagreement between the Corporate Fair Reciprocity Argument and the objection as regards the justifiability of specifically corporate responsibilities, there are also a number of similarities between the framework in the Corporate Fair Reciprocity Argument and the Social Paretian framework. First, justice as fair reciprocity's justice-based values of advancing people's interests and fairness are similar in their broad outline to the Social Paretian values of efficiency and social value, albeit they could be different when given a precise definition and they may also presume a different ordering and/or weighting for the values. Second, both frameworks hold that instrumentalism plays a role in assigning special responsibilities; the Corporate Fair Reciprocity argument holds that special responsibilities should be assigned to the corporation whenever they will better realise justice-based values, and Social Paretianism holds that special responsibilities should be assigned to the firm because of its effects on justice-based values. Third, they both reject the contractual view of the corporation and recognise the corporation's special governmental provenance, even if they disagree about its normative significance.

One similarity that is of particular relevance is that they both endorse an institutionalist conception of justice. To see this, consider that the distinctive feature of institutionalism is that

it divides society into a political domain of major social institutions, which should be structured and regulated to directly realise justice, and a non-political domain comprising other associations and general individual conduct, which are not required to directly realise justice-based values and have substantially more freedom. The Corporate Fair Reciprocity Argument's institutionalist foundations are explicit (see Chapter 2.4.2), particularly as the corporation's status as a major social institution is one of the reasons for its normative significance. In the objection's Social Paretian framework, by contrast, the institutionalist commitment is implicit and is also masked by the objection's claim that responsibilities should be assigned according to an instrumentalist logic. Even though it is implicit, a commitment to institutionalism is apparent in the way that Singer (2019: 92-4) formulates Social Paretianism as a theory to justify, structure and regulate *institutions* in the market so that they realise justice-based values, and in the way that Social Paretianism singles out the institution of the firm for special responsibilities – Social Paretianism does not, for example, assign a responsibility to individuals to regulate their conduct whenever the normative problems concerning power, hierarchy or authority-based relationships arise, but instead assigns a special responsibility to the firm.

The reason for emphasising this shared institutionalist commitment is that it draws attention to the main point of disagreement that the objection has with the Corporate Fair Reciprocity Argument – namely, the objection disputes the *institutionalist criterion* that should be used to differentiate major social institutions in the political domain from the associations and individual conduct in the non-political domain. In the Corporate Fair Reciprocity Argument, special governmental provenance is an institutionalist criterion that marks out the corporation as a major social institution that is distinctive to non-corporate organisations in the non-political domain, and it also marks out the corporation as distinctive to other major social institutions. By contrast, the objection rejects special governmental provenance as an institutionalist criterion on the grounds that it does not in fact differentiate the corporation from other market participants who also rely on a form of governmental action, and the Social Paretian framework offers an alternative institutionalist criterion that appears to identify a major social institution as any institution that has significant effects on justice-based values – after all, Social Paretianism singles out the firm as a major social institution for special responsibilities because of its 'significant effects' on social values. And it is this significant effects institutionalist criterion that Singer (2019: 296-7) implicitly appeals to when arguing that the corporation's special governmental provenance makes no normative difference

because special responsibilities could also, in principle, be assigned to a 'nexus of contracts' corporation so long as the corporation has significant effects on social values.[80]

The debate about the appropriate institutionalist criterion is not confined to Singer's objection, and there is a vigorous debate about what the institutionalist criterion should be, which institutions are major social institutions, and, also, whether institutionalism is defensible (Berkey, 2016, 2020; Cohen, 1997, 2008; Melenovsky, 2013; Porter, 2009; Rawls, 1996, 1999, 2001). Within Rawlsian institutionalism, there are three main accounts of the institutionalist criterion which, as I will demonstrate, inform the dispute between the Corporate Fair Reciprocity Argument and the objection.[81] The first is a *Coercive Account* which identifies major social institutions based on whether they use society's coercive legal structure (Cohen, 2008: 133; Tan, 2004: 346). The second is a *Profound Effects Account* which picks out major social institutions as those institutions that have profound and pervasive effects on justice-based values (Berkey, 2016: 721; Cohen, 2008: 136-8). The Profound Effects Account overlaps with the Coercive Account to the extent that some of the coercive institutions also have profound effects, but the Profound Effects Account differs by including as major social institutions those non-coercive institutions that have profound effects, such as informal norms and practices that arise in the market or in the family, and excluding those legally coercive institutions that have negligible effects.

These two accounts are sometimes regarded as the only two options,[82] but there is a third account that I call the *Terms Account,* which identifies a major social institution as those

[80] Another way of putting this is that the procedure for determining special responsibilities in an institutionalist conception of justice can be roughly approximated with the following two step method. In the first step, major social institutions are identified according to the institutionalist criterion, and are differentiated from the non-political domain. This step merely identifies which of society's social and political institutions may permissibly be treated differently, from the perspective of justice, to individuals and their private associations, but stops short of assigning special responsibilities. In the second step, major social institutions are then assigned special responsibilities based on relevant factors which include the content of the relevant justice-based values, the major social institution's effects on those values and the structure and responsibilities of other major social institutions. The primary dispute the objection raises concerns the first step, as the objection disputes that the special governmental provenance of the corporation is, in principle, a reason to single out the corporation as a major social institution, but the objection agrees with many of the relevant factors in the second step (albeit, not all of the factors, as I discuss in the second reply). See Berkey (2020: 188) for a somewhat similar institutionalist procedure that identifies major social institutions as "slots" into which different policies may permissibly be placed.

[81] I adopt the same labels as Berkey (2020) for the first two accounts. I note that people who endorse each of these accounts also argue there is some support in Rawls's writings for their account, but I do not pick out the particular Rawlsian passages here.

[82] Cohen (1997, 2008) argues there are two options for the institutionalist criterion, and Berkey (2020: 186-7) also frames these as the two main accounts.

rules and institutions that structure the terms of social cooperation between members of society (Freeman, 2007: 101-2; Melenovsky, 2013). Melenovsky (2013), for example, argues that the major social institutions that together comprise the Rawlsian basic structure are those social institutions that structure how citizens cooperate with one another in a political society and through which social cooperation between citizens proceeds.[83] Although the Terms Account will count many of society's legally coercive institutions as major social institutions, it differs to the Coercive Account because its reason for picking them out is that they structure the terms of social cooperation between citizens, rather than that they depend on state enforcement.[84] Moreover, the Terms Account differs to the Coercive Account by also counting extra-legal institutions as major social institutions, to the extent they structure social cooperation.

Comparing the Terms Account to the Profound Effects, the two accounts are similar because they both include legal and extra-legal rules and institutions that affect justice-based values as major social institutions. An important difference between the accounts is, however, that the Terms Account only includes as major social institutions those social institutions that structure cooperation between members of society and it excludes all other social institutions that structure cooperation between people as individuals in smaller, sub-societal settings. As Melenovsky (2013: 602-613) usefully clarifies, a social institution structures how people cooperate, as individuals, according to certain terms,[85] and social institutions encompass a wide range of sub-societal schemes of cooperation, such as associations, groups, and certain kinds of relationship. A religious association, for example, is a kind of social institution in which a sub-group of citizens, being the followers of that religion, cooperate in their religious observances according to certain social rules and social practices. Whereas a major social institution is a unique kind of social institution which structures social cooperation between *all members of society*, i.e., according to terms of social cooperation that apply to all citizens. The Terms Account differs, therefore, to the Profound Effects Account in that it only includes

[83] As Melenovsky (2013: 615) puts it, "the basic structure is understood as the system of major social institutions through which social cooperation proceeds. The structure of social cooperation in a particular society is then specified by the rules of the major social institutions."

[84] Melenovsky (2013: 618) argues legally coercive action is not conceptually necessary to something being a major social institution as people could, in principle, follow a set of rules for social cooperation in the absence of coercion.

[85] Melenovsky (2013: 602-613) explains how terms of cooperation are built up from social rules (being the ways that individuals ought to act purely according to the terms of the social rules) to social practices (as patterns of behaviour that consist of individuals following social rules) to social institutions (as types of social practices that are clearly understood and less open to interpretation, complex and structured, and important or socially significant). Here, however, I set aside these distinctions and the focus on the way that terms of cooperation set out how people cooperate either as members of society, in the case of a major social institution, or as individuals in a sub-societal setting, in the case of a social institution.

societal terms of cooperation between members of society as major social institutions, whereas a Profound Effects Account includes as major social institutions all social institutions that have profound effects on justice-based values and might include sub-societal organisations or associations.

(b) Reasons to favour a Terms Account of the institutionalist criterion

With this context in mind, I now respond to the objection in two stages. In the first stage, I argue that part of the objection can be refuted by clarifying that the Corporate Fair Reciprocity Argument is based on a Terms Account institutionalist criterion, and not a Coercive Account one as the objection presupposes. In the second stage, I argue that the remaining disagreement between the objection and the Corporate Fair Reciprocity Argument comes down to the respective merits of a Profound Effects Account versus a Terms Account for the institutionalist criterion, and I argue that there are good reasons to favour a Terms Account of the institutionalist criterion.

The objection argues that the corporation's special governmental provenance cannot be an institutionalist criterion because other market participants, including non-corporate organisations, also rely on governmental action.[86] A common reliance on governmental action is not, however, a problem if major social institutions are identified using a Terms Account, as is the case in the Corporate Fair Reciprocity Argument (See Chapter 2.5.2). In a Terms Account, the corporation is a distinctive major social institution because it alters the way that members of society can cooperate by providing a distinctive legal form for conducting business with a distinctive combination of legal features (see Chapter 1). The fact that the corporation and other market participants are both reliant on governmental action is not grounds for an objection because they rely on governmental action that defines different ways of socially cooperating. It is the use of governmental action to establish a distinctive set of corporate terms of cooperation, and which varies the non-corporate terms of cooperation, that marks the corporation out as a distinctive part of the terms of social cooperation and as being normatively distinctive to non-corporate organisations (see Chapter 2.5.2). Moreover, it is the reason that a contractual view of the corporation would rule out treating the corporation as a distinctive major social institution – a 'nexus of contracts' corporation would not be based on or make use

[86] See the objection's first and second claims (section 3.2).

of distinctive terms of social cooperation, so it could not be singled out as a distinctive major social institution.

To a certain extent, the objection's claim that common reliance on governmental action rules out corporate responsibilities is a reasonable response to ambiguity in the standard NGP argument. Because the standard NGP argument sometimes appears to claim that the corporation has a unique and sometimes a special governmental provenance (see Chapter 1: 28 fn25), Singer appears to attribute something like a Coercive Account of the institutionalist criterion to the NGP argument, which he rejects because the corporation does not specially rely on coercive action. The Corporate Fair Reciprocity Argument removes this ambiguity by clarifying that a main reason for the corporation's normative significance is not based on a Coercive Account but on a Terms Account. On a Terms Account, the corporation's special governmental provenance is normatively significant not because it relies on either special or more coercive action, but instead because it uses governmental action to alter the terms of social cooperation. In the case of the corporation, moreover, the way the terms of social cooperation are altered *must* proceed through legally coercive governmental action because the terms that are being varied are themselves legally coercive terms concerning contract law, property law and legal personality.

With this part of the objection refuted, I now turn to the second stage of my response. In arguing that special responsibilities should be assigned to the firm because of its significant effects on justice-based values, the objection presupposes a Profound Effects Account of the institutionalist criterion. Whereas, as I argued above, the Corporate Fair Reciprocity Argument is based on a Terms Account. There are, however, two good reasons to favour a Terms Account over a Profound Effects Account, and, as a consequence, good reasons to favour specially regulating the corporation rather than the firm.

The first reason is that the Terms Account is justified in singling out the terms of social cooperation as the institutionalist criterion because they are centrally important to a political society. A political society depends on fundamental rules and institutions that structure how people live together as a society, and that are constructed, structured and shaped by citizens – governmental action, laws, and society-wide social norms comprise the structural framework that determines how citizens live together and constitute a political society. The terms of social cooperation have, therefore, a weighty normative significance[87] precisely because they are the terms that people have collectively created with one another to regulate their interactions, and,

[87] They are, as Rawls (1999: 7) puts it, "the primary subject of justice."

as such, society has a special responsibility for ensuring that the terms of social cooperation work to advance justice-based values.

By their nature, the terms of social cooperation will also have profound effects on justice-based values, since different ways of socially cooperating will affect how people realise their own interests and the fairness of distributions and relationships, and these effects are of paramount importance in justifying rules and institutions.[88] But on the Terms Account, major social institutions are not identified purely because of their profound effects, but rather they are identified because they are terms of social cooperation that then have profound effects. Or, to put it another way, justice on the Terms Account includes consequentialist considerations, but it is not *wholly* consequentialist as justice is only concerned with the consequences of the terms of social cooperation.[89] Whereas justice in the Profound Effects Account is wholly consequentialist and is concerned with the effect, so long as it is large enough, of any social institution on justice-based values.

On this line of reasoning, society has a special responsibility for the profound effects of the corporation precisely because the corporation is dependent on a special set of rules that are established by society. Whereas society does not have a special responsibility for the profound effects of the firm because the firm does not rely on special rules. Indeed, drawing on Melenovsky's distinction between major social institutions and social institutions, the firm can be categorised as a social institution because it is a sub-societal scheme of cooperation that is formed using norms between individual members of society. As I discussed in Chapter 1.2.1, the firm uses administered mechanisms to coordinate transactions within the market, but the administered mechanisms of managerial instructions or task-sharing rules can be understood as different kinds of norms. These norms are, however, formed between individuals as a sub-group of society, and only regulate their behaviour between one another. As such, society does not have the same special responsibility for the justice-based effects of these firm-based norms as it has for the corporation.

The second reason is that the Terms Account is more consistent with the justifications for implementing an institutionalist division between responsibilities for institutions and

[88] Rawls argues that the basic structure, comprising the major social institutions in one system, is the primary subject of justice (see fn87 above) "because its effects are so profound and present from the start," which can be interpreted to mean that the major social institutions also have profound effects, and not that they are the primary subject of justice solely *because* they have profound effects (Melenovsky, 2013: 622-3).

[89] Strictly speaking, justice is not limited to terms of social cooperation only, and in a Rawlsian framework the basic structure is described as the "primary" (Rawls, 1999: 7) but not the 'sole' subject of justice. But for my purposes here, the focus is on the primary subject of justice.

responsibilities for individuals. Institutionalism realises a division of moral labour in which the political domain aims at realising justice and individuals in the non-political domain are free to pursue their own ends (constrained only by their individual responsibilities) (Rawls, 1996: 268-9; Scheffler, 2005a). This division of moral labour can be justified on the grounds that it is better to rely on institutions to realise justice than relying on individual conduct. Institutions can coordinate and direct individual actions towards justice-based values in ways that individuals cannot, both because the individuals do not have the requisite information (Scheffler, 2005a: 244) and because any requirement to do so is excessively demanding insofar as it requires individuals to consciously and continuously consider how their actions can realise justice-based values. It is, therefore, better to realise justice-based values with a "background justice" (Rawls, 1996: 265-69) of institutional structures, rather than through individual conduct. A second justification for institutionalism is that it resolves a tension between justice-based values and personal values (Scheffler, 2005a). It is a "fact of reasonable pluralism" (Rawls, 2001: 197) that people reasonably have different personal values, concerning their personal conceptions of the good, or their moral and religious beliefs. And yet, these personal values can, at times, come into conflict with the demands of justice-based values. Scheffler (2005a) argues that institutionalism offers a way of resolving this tension – by assigning responsibility for justice to society's institutions, individuals are able to pursue and act on their personal values in their individual conduct, with the surety that the major social institutions will realise justice.

A Terms Account realises a kind of institutionalism that is more consistent with these justifications for institutionalism than a Profound Effects Account. This is because a Terms Account is able to clearly pick out major social institutions, based on whether they instantiate terms of social cooperation between members of society, whereas a Profound Effects Account cannot clearly differentiate major social institutions in the political domain from other social institutions or from individual conduct in the non-political domain (Cohen, 1997; 2008). The boundary condition for a major social institution in a Profound Effects Account is whether an institution has profound effects; but what counts as a profound effect, rather than an almost-profound effect? And does an individual, or very small group of individuals, count as a major social institution if they happen to have a profound effect? The problem here is not simply that it is difficult to identify a major social institution on a Profound Effects Account, but that this difficulty undermines the two justifications for institutionalism. If people need to work out whether their individual or associative activity counts as a major social institution, because of the possibility of profound effects, then the political domain does not function entirely as a

"background justice" (Rawls, 1996: 265-69), but justice is brought into the foreground of individuals' considerations and places informational and cognitive burdens on them. Individuals are also less free to pursue their personal values and associate in accordance with their personal values, as they are required to consider if their personal values and the norms they use to structure their associations have a special relevance to justice. By contrast, by clearly differentiating the political domain from the non-political domain, the Terms Account realises a clear division of moral labour and also gives considerable space and freedom to individuals in the non-political domain to pursue their own personal values.

These problems with the Profound Effects Account are pertinent to the Social Paretian argument for picking out the firm as a major social institution. Singer identifies firms as those businesses that use power, hierarchy and authority to coordinate their activity and that have significant effects on justice-based values of justice, equality, democracy, non-domination and anti-exploitation. But two people who cooperate together might do so using power, hierarchy and authority, with some effects on justice-based values. And there are many non-business organisations that also use power, hierarchy and authority and which affect justice-based values, such as religious groups and clubs, charities and governmental agencies.[90] On Singer's definition of a firm, these should plausibly also count as being normatively significant, as there is no apparent reason why justice should only be concerned with the effects of *business* organisations. But if non-business organisations count as being in the political domain, the reason for singling out the firm versus individuals is also weakened – why not, for example, simply regulate individuals in their use of power, hierarchy and authority, regardless of their institutional setting? And this lack of a clear boundary regarding what counts as a firm in the political domain is a problem for Social Paretianism because it undermines the division of moral labour and pluralism justifications for institutionalism. By contrast, the Terms Account has a clear way of identifying the corporation, based on its incorporated status.

There are, therefore, good reasons to reject the objection's Social Paretian framework for being incompatible with its institutionalism, and to favour the Corporate Fair Reciprocity Argument. As a final comment, I note that Singer argues that an advantage of Social Paretianism's focus on the firm is that it justifies society regulating large and powerful firms even if they are not corporations. There are, however, other advantages that come with regulating the corporation, instead of the firm. One advantage is that a focus on the corporation

[90] For example, the NHS is the UK's largest employer (NHS, 2021) with authority-based normative problems such as bullying (BBC, 2021).

enables society to assign corporate responsibilities to small corporations, including single-person corporations, which are a significant part of the business landscape.[91] A second advantage is that a wider range of normative concerns can be addressed by focusing on the corporation. Firm-based responsibilities apply principally to the internal relations within the firm, since they regulate the authority and power relationships between employers and workers, but cannot extend to the normative problems that concern relations and effects that are external to the firm, e.g., the firm's relationship with its customers and suppliers, or its effects on the local community and other citizens.[92] By focusing on the corporation, the Corporate Fair Reciprocity Argument is a framework for regulating normative problems that arise *both* with internal relations and with external effects, so long as they are connected to justice-based values. Singer (2019: 299-300) argues that "a normative account of the corporation that centres on its governance, as opposed to its government provenance, is therefore better able to track what distinguishes it morally from the market." On the contrary, firm-based responsibilities leave too much out and corporate responsibilities are better able to track the full range of justice-based concerns that arise with the corporation.

3.3.2 Second reply: corporate privileges as a different kind of governmental action

The objection claims that governmental action in the corporation and in the market is qualitatively of the same kind. On the contrary, governmental action in the corporation assigns corporate privileges to shareholders, whereas governmental action in the market is typically non-privileging. This is an important qualitative difference that figures in many NGP arguments but which the objection does not discuss. It is possible the objection denies the privileging effects of the corporation, but if this is the case it is an indefensible position (see Chapter 1). The more plausible possibility is that the objection regards all governmental action as being qualitatively the same simply because it is governmental and, as a consequence, the corporation's corporate privileges do not count as a qualitative difference.

[91] In the UK, approximately three quarters of all corporations have between one to four employees (ONS, 2020).

[92] This broad range of normative concerns is reflected in surveys of public expectations of business (Hsieh et al., 2018: 50; Edelman, 2019: 30; Deloitte, 2018). Indeed, the Deloitte Millennial Survey (Deloitte, 2018: 6) identifies normative concerns that map onto both internal relations (e.g., businesses should "enhance [the] livelihoods (of its employees)") and external effects (e.g., businesses should "improve society, e.g., educate, inform, promote health and well-being").

Corporate privileges have a normative significance in the Corporate Fair Reciprocity Argument. This is because the way that the corporation alters the terms of social cooperation with a kind of privileging rule underpins a *pro tanto* reason for corporate responsibilities on the grounds that the corporation should make a fair contribution to society in return for the corporate privileges its shareholders enjoy (see Chapter 2.5.2).

Although the objection is based on a conception of justice as Social Paretianism, in which it is unclear whether corporate privileges register as being normatively significant, there are good reasons to favour a conception of justice as fair reciprocity over Social Paretianism. The strongest of these is that the Terms Account is preferable to the Profound Effects Account of the institutionalist criterion, as I argued in the previous reply. A second reason is that justice as fair reciprocity has strong normative foundations, whereas Social Paretianism is, to quote its author, a "toy framework" (Singer, 2019: 292). Singer defends Social Paretianism because it is coherent with the sorts of justifications for governmental action in the market (i.e., social or Paretian justifications), but this coherence is equally strong in a conception of justice as fair reciprocity which justifies governmental action on similar grounds (i.e., by advancing people's interests or on fairness grounds). But, looking beyond this coherence, justice as fair reciprocity has comparatively stronger normative foundations, as I outlined in Chapter 2.4.

3.3.3 Third reply: the instrumental effects of the corporation's governmental provenance

A final point is that even within the objection's Social Paretian framework, there are good reasons to pick out the corporation because it has profound effects on justice-based values. Importantly for this reply, these profound effects are directly caused by the corporation's special governmental provenance and the way that the corporation substantially varies the non-corporate system of rules and institutions. Therefore, purely on the basis of profound effects, the corporation's special governmental provenance is normatively significant because it affects a range of justice-based values. Or, to put it another way, even if the corporation's special governmental provenance does not directly meet the Profound Effects Account institutionalist criterion, it meets it indirectly because of how it causes the corporation to affect various justice-based values.

In particular, there are three effects that the corporation has on the social values that Singer includes in the Social Paretian framework – anti-exploitation, non-domination and

equality (Singer, 2019: 294-5) – where the corporation's special governmental provenance plays a crucial causal role.[93] First, the corporation's structure distorts the balance of power between people in society, so that citizens are more vulnerable to being exploited and harmed by the corporation. The corporation's legal personality and limited liability structure protects the people who control the corporation from being held accountable for harms, as citizens can only sue and seek financial recompense from the corporation and not the individuals involved,[94] making citizens more vulnerable to being exploited by harmful corporate activity.[95] Second, the corporation's structure distorts the balance of power between senior managers and workers, so that workers are more vulnerable to domination by senior managers. As senior managers are authorised to act on behalf of the corporation and control the corporation's assets, senior managers have greater negotiating power regarding employment terms and tasks than workers. Third, the corporation's structure affects the equality of distribution in wealth by advantaging capital over income. By privileging shareholders, the corporation's joint stock structure advantages capital owners and, absent any compensating tax policies, exacerbates inequalities in wealth and income, as people with capital to invest in corporations are typically already amongst the most wealthy in society, as are people who receive capital-based income (e.g., dividends).[96] In addition, the corporation's special governmental provenance also amplifies the strength of these effects by enabling the existence of large corporations, given the corporation's capital pooling and productivity advantages (see Chapter 1.3.1). For example, citizens' vulnerability to corporate harms is compounded when the corporation is large, as the corporation then has access to greater legal resources to resist lawsuits.

These effects are as important as those Singer attributes to the firm and are presumably sufficient reasons to count the corporation as a major social institution, even in the Social

---

[93] I discuss the corporation's substantial effects on the justice-based values of non-domination and non-exploitation in greater depth in Chapter 5.

[94] For example, if a citizen sues a private association, then she sues all the individual associates, who are liable for any financial compensation due. Whereas if a citizen sues a corporation, she sues the corporate legal entity and no individuals are liable, unless there are exceptional circumstances that permit the corporate veil to be pierced so that she can sue the shareholders, directors and/or managers. As such, the corporation may be unable to pay the full financial compensation and file for bankruptcy, in which case citizens' financial claims are only partially met.

[95] Some examples of the sorts of exploitation and harms that corporations are particularly prone to are contained in RepRisk's annual report of the 'Most Controversial Companies' and include occupational health and safety incidents, fraud, corruption, product violations, product recalls, industrial accidents, and environmental harms (RepRisk, 2020).

[96] As an illustration of the relevance of these inequalities, in the US the Gini coefficient for net wealth in 2010 was 0.87 (Carroll et al., 2014: 3) whereas the Gini coefficient for net income in 2017 was 0.39 (OECD, 2021). Moreover, the proportion of wealth directly held in shares increases substantially as net worth rises (Federal Reserve, 2016).

Paretian framework. Moreover, these instrumental effects are caused by the corporation's special governmental provenance. In this respect, the objection's claim that it does not matter for corporate responsibilities, from an instrumentalist perspective, whether the corporation has a special governmental provenance or is a 'nexus of contracts' is false. On the contrary, it matters a great deal, as the corporation's special governmental provenance causes many effects that are a *pro tanto* justificatory reason for society to pick out the corporation and regulate it with special responsibilities. Whereas, if the corporation were a mere 'nexus of contracts,' these effects would be absent and there would be no instrumentalist reason to assign it special responsibilities.

3.4 The efficiency is sufficient objection

A second objection is that the efficiency benefits of the corporation count as a sufficient fair contribution to society so that society does not have a reason to regulate the corporation with corporate responsibilities. I have not come across this objection in the literature, but I think it is an important objection that could be raised against the Corporate Fair Reciprocity Argument, particularly as the argument holds that corporate responsibilities are only *pro tanto*, and not *all things considered*, justified.

The objection has three parts. The first part endorses the advances interests justification for the governmental action that creates the corporation, based on the capital pooling, asset specialisation, and productivity advantages of the corporate legal form (see Chapter 2.5.1). The second part claims that the corporation's efficiency benefits are so very large and widespread that the corporation automatically makes a fair contribution to society and there is no need for special corporate responsibilities. The general idea is that the efficiency benefits mean that the corporation benefits many people by contributing to the wealth and prosperity of society as a whole, providing valued goods and services, innovating, and/or providing jobs. For example, it could be argued that, by incentivising investment in capital-intensive business sectors, the corporation creates new consumption and job opportunities, and this counts as a sufficient fair contribution. The third part claims that there is no further case for corporate responsibilities, either because the corporation does not affect other justice-based values, so that the corporation automatically advances citizens' interests without affecting fairness, or because the justice-based effects of the corporation cannot be improved upon by assigning it corporate responsibilities.

3.5 Replies to the efficiency is sufficient objection

There are, I argue, three good reasons to think that there are at least some corporate responsibilities that will better realise justice-based values. And since justice, in a conception of justice as fair reciprocity, is about structuring terms of social cooperation that advance people's interests and realise fairness, society should seek to modify the terms of social cooperation whenever there is a reasonable expectation that doing so will further advance people's interests or better realise fairness.

The first reason to think corporate responsibilities can better realise justice-based values is that the corporation has significant effects on fairness values. Just because the corporation's efficiency benefits are large and widespread, this does not establish that the benefits of the corporation are fairly distributed or are fully compatible with egalitarian social relations; nor does it establish that these benefits, their distribution, and the corporation's effects on justice-relevant social relations may not be further improved. And as I discussed in section 3.3.3 above, the corporation affects the balance of power between people and the potential for exploitation, it increases some people's vulnerability to domination, and affects the distribution of wealth. There is, accordingly, a *pro tanto* justification for placing constraints or obligations on the corporation to mitigate the corporation's negative effects on a range of fairness values, although an *all things considered* justification will depend on looking more closely at the possibilities for improving how specific fairness values are upheld (see Chapter 5).

The second reason is that there are also efficiency-based reasons for assigning corporate responsibilities. The objection presumes that the corporation is automatically efficient, and automatically brings wider benefits for people in society. However, this presumption is not warranted for two reasons. First, the particular efficiency arguments for the corporation (i.e., its capital pooling, capital specialising and productivity advantages) cannot be guaranteed. It may be the case that shareholders use the corporation in ways that do not take advantage of its capital pooling or asset specialising advantages, but instead take excessive risks because they are protected from financial liabilities or use the corporation purely as a mechanism to minimise tax liabilities. Second, although the corporation has a number of efficiency benefits, it also comes with a number of inefficiency problems. For example, one inefficiency problem is that the corporation creates a structural incentive to generate negative externalities (i.e., harmful effects on third parties), as the separate legal personality and limited liability structure

mean that there are fewer structural safeguards, compared with non-corporate legal forms, to discourage negative externalities (Bakan, 2004). And a second inefficiency problem is that the corporation can create a structural incentive to pursue short-term returns over longer-term investment and research and development. If shareholders require short-term returns this can potentially divert corporate activity towards short-term investment projects or shareholder returns (e.g., dividends, shareholder buybacks) and away from longer-term investment or research and development activity, with an overall effect that sees corporate productivity stagnate or decline (Ciepley, 2013: 147-9; Haldane, 2015: 11-15).[97] The point of these examples is that although the corporation's structure may automatically bring about some efficiency gains, such as enabling multiple, diverse investors to pool their capital in ways that they are unable to do in the absence of the corporation, it may also bring about efficiency losses. Moreover, these efficiency losses may be substantial; a Trucost (2013) report found that many of the top industries are not profitable once environmental externalities are taken into account.

There is, therefore, no guarantee that the corporation automatically realises efficiency gains overall or, indeed, that it realises the maximum efficiency gains that are possible. Absent corporate responsibilities, the corporation may be run in such a way that it does not fully realise the efficiency benefits of the corporate form and/or it generates many other inefficiency problems. And, if this is the case, then the wider benefits of the corporation – in terms of prosperity, jobs, and so forth – will be less widespread and less beneficial than they could be or, in the worst case, non-existent. Given this, there is a *pro tanto* justification for assigning corporate responsibilities to the corporation that will better realise efficiency. Indeed, as I discuss in Chapters 4 and 6, efficiency is one of the main justice-based values for appraising the respective merits of shareholder value maximisation and stakeholder theory as options for corporate responsibilities.

There is, in addition, a third, conceptual reason for the plausibility of special corporate responsibilities.[98] By creating the corporation, society enables at least two different ways of conducting business – either using a non-corporate legal form, such as a partnership or association, or using the corporate legal form – which differ substantially in their legal features concerning legal personhood, responsibility for liabilities, and governance arrangements. The conceptual argument is that, given the extent to which these two types of legal form differ, it is highly plausible that these two legal forms will have differential effects on justice-based

[97] See Haldane (2015) for a good summary of some of these, and other, efficiency problems that arise in the corporation.
[98] This conceptual argument develops the Corporate Fair Reciprocity argument in Chapter 2.5.2.

values. And, therefore, it is highly plausible that there will be some corporate responsibilities that can improve the realisation of justice-based values. An analogy can be drawn, here, between the responsibilities society applies to regulate different modes of transport. Society barely regulates travelling by foot, and people have considerable freedoms on public paths and pavements, whereas society regulates car travel extensively, with regulations concerning road position, speed, emissions, and so forth. As with the corporation, there is an efficiency argument for car travel and public highways, given the speed and convenience of the car; the efficiency benefits of car travel are distributed widely and non-car users also benefit indirectly from, for example, goods deliveries. But this efficiency argument is not sufficient to rule out special responsibilities for car travel and it would be inappropriate to apply the minimal responsibilities that regulate pedestrians to car users. Rather, the two modes of transport are regulated (both in law and through extra-legal social norms) in different ways because of the substantial differences between them and their substantial, differential effects. Indeed, car travel's regulations appear to be justified on both efficiency grounds (e.g., regulations concerning which side of the road to drive on enable faster speeds) and fairness grounds (e.g., speed limits are lower in residential zones). The corporation is, I suggest, in some respects similar to the car, whereas the non-corporate business is similar to the pedestrian, and their differences ground a *pro tanto* reason for differential responsibilities.

3.6 The conflicts with freedom objection

A third objection to corporate responsibilities is that they unjustifiably conflict with the freedom to pursue personal aims without interference.[99] The objection is a prominent and important one in business ethics. It is most commonly raised as an objection to any special responsibilities in business regardless of whether that business is a corporation or not, but it is sometimes also raised as an objection to specifically corporate responsibilities. Either way, the objection has a similar shape – it defends a particular conception of freedom from interference, defends a contractual view of the corporation and then argues that this conception of freedom blocks corporate responsibilities.

An example of the objection that applies to all businesses, including the corporation, is Hasnas's (1998) argument. Hasnas (1998: 34) defends a conception of freedom which requires

[99] The objection does not hold that this freedom is unlimited – it is compatible with some restrictions on the pursuit of personal aims, e.g., a restriction against harming others.

that any special moral responsibility in business must be based on voluntary consent. Next, he defends a view of businesses as networks of voluntary contracts. He argues that this view also applies to the corporation, rejecting arguments that the corporation has a special governmental provenance and endorsing a contractual view of the corporation (Hasnas, 1998: 41-2). Finally, he argues that the requirement for voluntary consent blocks all special responsibilities in business, including those defended by stakeholder theory (Donaldson and Preston, 1995; Evan and Freeman, 1993) and social contract theory (Donaldson, 1982), because they are non-voluntary and there is no mechanism for businesspeople to give the requisite consent.

Hussain's (2012) argument against profit maximisation obligations is an example of the objection being applied specifically to corporate responsibilities. Hussain defends a conception of freedom in which people have a protected "personal sphere" in which they can pursue their own aims without regard to the impersonal good of society. Hussain (2012: 323) claims the personal sphere is part of "commonsense morality." Its boundary can be drawn in at least three ways, all of which, Hussain (2012: 324-5) argues, are consistent with the objection: by tracing an individual's agent relative prerogative (Scheffler, 1982); by applying a liberal welfare consequentialist view (Mill, 1906) that protects personal freedom in order to maximise aggregate welfare; or by respecting a deontological view that individuals possess negative rights to non-interference (Kamm, 2007: 11-40; Nozick, 1974). Hussain also defends what he calls a "commonsense view" (Hussain, 2012: 326) of the corporation as a private association and rejects its special governmental provenance. Hussain (2012: 326) grants that, historically, the special purpose corporation may have had a special governmental provenance but denies that the contemporary general purpose corporation does. In a subsequent article, Hussain (2013: 91) reiterates his view of the corporation, arguing that people have the power to form it amongst themselves, but adds some nuance with the claim that the corporation is also a legal institution, and that corporate law should be "sensitive to various social and political considerations."

Hussain then proceeds to reject Jensen's (2002) argument that there is a corporate responsibility to maximise profits in order to realise efficiency. A responsibility to maximise profits requires that people suspend their personal aims, whatever they might be, in order to run the corporation so that it maximises profits. And this conflicts unacceptably with the personal sphere and people's prerogative to pursue their own aims in their private associations. As such, Hussain argues that the profit maximisation obligation is unjustified, but the argument applies *mutatis mutandis* to other forms of corporate responsibility.

3.7 Replies to the conflicts with freedom objection

The objection is mistaken because it assumes a contractual view of the corporation. By shifting to a correct view of the corporation that recognises its special governmental provenance, the objection can be defeated. As the corporation is a distinctive major social institution, society can assign corporate responsibilities that are publicly known to accompany the corporation. Society can assign these corporate responsibilities as legal rules, or as extra-legal rules, based on societal norms and widely known expectations about corporate behaviour. As such, corporate responsibilities are freely and voluntarily assumed as part of being able to conduct business as a corporation, and there is no conflict with freedom. Corporate responsibilities do not interfere with people's aims as people can choose to use the corporation, with its accompanying corporate responsibilities, or to use another business legal form, which does not come with special responsibilities.

Applying this response to Hasnas's objection, the corporate governors in the corporation give the requisite consent to the corporate responsibilities. Shareholders who set up a new corporation consent to the responsibilities through the act of incorporation, and shareholders who purchase shares subsequently accept that the shares come with the strings of obligations that arise from corporate responsibilities. Directors also consent to directors' duties and managers consent to the responsibilities that come with their roles. Taking Hussain's objection, corporate responsibilities do not conflict with the personal sphere because people consent to corporate responsibilities and should recognise that they accompany the use of the corporation.[100] Corporate responsibilities are not unjustifiably thrust upon private associations, as Hussain argues, but are instead part of the fair deal that people voluntarily enter into when they make use of the corporate form.

Not only are corporate responsibilities compatible with freedom from interference, but the corporation in fact expands freedom. There are other conceptions of freedom in addition to "negative" freedom from interference (Berlin, 1969). One of these is positive freedom, which can be measured by the range of opportunities to do certain things or realise certain values or aims and ambitions, and which expands when a person has a wider range of available options

[100] I note that Singer (2013: 80-81) makes a similar point that Hussain's objection can be blocked by recognising the corporation's special governmental provenance, but does not root it in an account of the corporation's normative status like my Corporate Fair Reciprocity Argument.

and opportunities (Anderson, 2017: 45).[101] Rather than holding that one type of freedom takes precedence over the other, or is more valuable than the other, we can hold that different types of freedom are distinct and valuable (Anderson, 2017: 45-47). To borrow an example from Anderson (2017: 45-47), a person alone on a desert island has complete negative freedom, but their positive freedom is limited because they have very few options as to what they can do on the desert island. By contrast, a person in modern society has less negative freedom (as their freedom to take what they want or do whatever they want is reduced by legal constraints),[102] but their positive freedom is enhanced by the greater opportunities that come with living in a society where people co-operate with one another.

When evaluated against the value of positive freedom, the corporation is freedom-enhancing because the option to form a corporation expands people's opportunities. It enables investors to make use of the corporate form, in their role as shareholders, and to invest in new and larger business ventures. And, moreover, provided the corporation is regulated in such a way that it fairly benefits other citizens, it has the potential to enhance other people's positive freedom by also creating new opportunities for consumers and employees.

3.8 Conclusion

In conclusion, none of the three objections defeat the Corporate Fair Reciprocity Argument. There is a strong case for corporate responsibilities in a conception of justice as fair reciprocity.

[101] There are other ways to draw the distinction. Berlin (1969), for example, argues that negative liberty is the absence of barriers and constraints, whereas positive liberty is the presence of control and self-determination over one's life.

[102] Arguably, some extra-legal, moral constraints may also interfere with people's negative freedom, if the use of social pressure is so great that it effectively becomes a form of coercion that is on a par with the use of physical force.

PART 2: SOCIAL EGALITARIAN STAKEHOLDER THEORY

CHAPTER 4: SOCIAL EGALITARIANISM, STAKEHOLDER THEORY AND SHAREHOLDER VALUE MAXIMISATION

ABSTRACT: The two main approaches to business ethics are stakeholder theory (which requires giving weight to the interests of all the corporation's stakeholders) and shareholder value maximisation (which requires maximising the corporation's profits subject to some constraints). In this chapter, I lay out the argumentative background for developing a refined version of stakeholder theory (*social egalitarian stakeholder theory*) that is, I will argue, superior to shareholder value maximisation when appraised from a social egalitarian perspective in which the central concern of justice is that people relate to one another as social equals. I describe social egalitarianism, stakeholder theory and shareholder value maximisation, as well as the state of the egalitarian debate concerning the merits of these two approaches. As I explain, there are four arguments that a social egalitarian could endorse and that appear to favour shareholder value maximisation over stakeholder theory on the grounds that it is more efficient, justified by an institutional division of moral labour, less vague and more compatible with motives in business. To defend the superiority of social egalitarian stakeholder theory over shareholder value maximisation, it is important, therefore, to address each of these egalitarian arguments, which is a task I commence in the next chapter.

4.1 Introduction

Given that there are strong *pro tanto* reasons for special corporate responsibilities, per the Corporate Fair Reciprocity Argument, what should these corporate responsibilities be? In these three chapters, I address this question by evaluating two alternative candidates for corporate responsibilities, stakeholder theory and shareholder value maximisation, from a social egalitarian perspective.

Social egalitarianism, which is also known as relational or democratic egalitarianism, is an attractive conception of justice whose central concern is that citizens relate to one another as social equals (Anderson, 1999, 2007, 2008, 2010; Fourie et al., 2015; O'Neill, 2008a; Rawls, 1996, 1999, 2001; Scheffler, 2003; Schemmel, 2011, 2021).[103] It is also plausibly a specific version of justice as fair reciprocity that contains some definite justice-based values for

[103] Social egalitarianism is sometimes also called relational egalitarianism because of its concern with a certain type of egalitarian relationship, or democratic egalitarianism because it requires securing people's status as free and equal citizens.

evaluating alternative corporate responsibilities, in a way that extends the framework of the Corporate Fair Reciprocity Argument. These justice-based values include considerations that aim directly at social equality, such as protecting the vulnerable and sustaining equality of standing, as well as considerations about distributive equality and egalitarian attitudes.

As two of the main 'business morality as special morality' approaches to business ethics, stakeholder theory and shareholder value maximisation are the two most prominent candidates for corporate responsibilities. Stakeholder theory requires that the corporation[104] gives weight to the interests of its stakeholders – being a combination of the corporation's shareholders, employees, customers, suppliers, lenders, its local community and wider society (Anderson, 2015; Asher et al., 2005; Donaldson and Preston, 1995; Evan and Freeman, 1993; Freeman et al., 2010; Jones, 1995; Jones and Felps, 2013a, 2013b; Phillips, 2003, 2011). Shareholder value maximisation requires that the corporation maximises the corporation's profits for shareholders, albeit with some constraints on permissible profit-maximising strategies (Armour et al., 2017: 22-24; Friedman, 1962, 1970; Hansmann and Kraakman, 2000; Heath, 2014; Jensen, 2002; Sundaram and Inkpen, 2004). As such, one of the key differences between the two approaches is that stakeholder theory requires that the corporation sometimes (perhaps frequently) sacrifices shareholder value for the sake of the interests of other stakeholders.

There is a long-standing debate about the respective merits of these two approaches to business ethics. When it comes to egalitarian evaluations of these approaches, stakeholder theory is on the back foot. One reason for this is that there is, in Heath's (2014) market failures approach, a well-developed and well-defended egalitarian version of shareholder value maximisation, but no comparable egalitarian version of stakeholder theory. The market failures approach requires that the corporation should maximise profits for shareholders whilst respecting a set of (at least) ten meaningful constraints and is, Heath (2014: 191) argues, justified on distributive egalitarian grounds. Whereas, when it comes to stakeholder theory, "we have yet to see a spirited and rigorous defence of the [stakeholder] theory," as Norman (2011: 46) puts it in his qualified endorsement of the market failures approach.

A second reason is that there are four arguments an egalitarian has reason to endorse that appear to favour shareholder value maximisation, and the market failures approach in particular, over stakeholder theory. In brief, these *egalitarian arguments* are: (i) that

[104] As I explained in Chapter 1, corporate responsibilities are assigned to the people who govern the corporation in their roles as directors, shareholders or managers (the corporate governors), but I sometimes use the shorthand of describing corporate responsibilities as being assigned to 'the corporation.'

shareholder value maximisation is more efficient than stakeholder theory (Heath, 2014: 25-92); (ii) that there is an institutional division of moral labour argument for tasking the corporation with realising efficiency, whilst other institutions, such as society's social welfare system, realise distributive equality (Heath, 2014: 10, 84, 191-203); (iii) that shareholder value maximisation is considerably less vague than stakeholder theory (Heath, 2014: 42-92); and (iv) that shareholder value maximisation is more compatible with generally held motives in business than stakeholder theory because it endorses the profit motive (Heath, 2014: 145-204).[105] On the strength of some of these arguments, Norman (2015) claims that egalitarians should accept the market failures approach as the best way for the corporation to realise egalitarian values, even though this may be a "bitter pill" (Norman, 2015: 34) for egalitarians to swallow because it requires that the corporation sets aside egalitarian norms – indeed, the market failures approach requires that the corporation takes anti-egalitarian actions, such as increasing pay inequality between the CEO and the lowest paid employees, if doing so is expected to maximise shareholder value.

My purpose in these three chapters is to develop a social egalitarian defence of stakeholder theory that shifts the debate so that stakeholder theory is on the front foot and gives social egalitarians good reasons to resist the "bitter pill" of shareholder value maximisation. I develop this defence by making three contributions to the debate. The first contribution is a refined version of stakeholder theory that is grounded in social egalitarian values. This *social egalitarian stakeholder theory* is not intended as a complete account of corporate responsibilities, and it only takes account of a subset of all social egalitarian values, but it is intended to be sufficiently well-developed and firm in its egalitarian foundations that it rivals the market failures approach. The second contribution is a defence of social egalitarian stakeholder theory as being superior to shareholder value maximisation. I do this by reappraising the four egalitarian arguments and demonstrating that these arguments either favour social egalitarian stakeholder theory or cannot reasonably distinguish between the two candidates. The third contribution is that I develop distributive egalitarian arguments for stakeholder theory. Although social egalitarian stakeholder theory is grounded in some distinctively social egalitarian values, it is also based on some justice-based values that are

[105] I note that some of these egalitarian arguments are also relevant to non-egalitarian conceptions of justice. Indeed, even from a non-egalitarian perspective, stakeholder theory is arguably on the backfoot as an approach to corporate responsibilities (see, e.g., Norman (2011), Norman (2013) and Orts and Strudler (2010)).

important to both social and distributive egalitarians, and, to that extent, the theory and some of the arguments for it are also relevant to distributive egalitarians.

In this chapter, I lay out the background context for developing the case for social egalitarian stakeholder theory. In section 4.2, I describe social egalitarianism and pick out those social egalitarian values that are relevant to my argument. In section 4.3 I justify selecting two candidates for corporate responsibilities. In sections 4.4 and 4.5, I describe the two candidates for corporate responsibilities, stakeholder theory and shareholder value maximisation, and identify the market failures approach as a well-developed version of shareholder value maximisation. In section 4.6, I summarise the state of the current debate between these two approaches by outlining the four egalitarian arguments that purportedly favour shareholder value maximisation, and outline how I will challenge this view in the next two chapters. In Section 4.7, I conclude.

4.2 A social egalitarian conception of justice

4.2.1 Social egalitarianism

In order to determine what the Corporate Fair Reciprocity Argument implies for the content of corporate responsibilities, it is necessary to move from a general version of justice as fair reciprocity to a more specific version that contains a more specific characterisation of what constitutes 'fairness.' In this chapter and the following two chapters, I presuppose a social egalitarian conception of justice in which fairness is fundamentally about realising social equality, meaning that people relate to one another as social equals and are secure within society in their status as social equals (Anderson, 1999, 2007, 2008, 2010; Fourie et al., 2015; O'Neill, 2008a; Rawls, 1996, 1999, 2001; Scheffler, 2003; Schemmel, 2011, 2021). Social equality is a multi-dimensional value and social egalitarianism is therefore concerned with realising and respecting a range of justice-based values that each aim at different aspects of social equality. In addition, social egalitarianism registers a concern with other justice-based values that are relevant to a distributive egalitarian conception of justice, including a concern with the degree of distributive equality (either as an important determinant of social equality and/or as an outcome of a social egalitarian system of cooperation), and sustaining the conditions for fair social cooperation, including sustaining egalitarian attitudes. In what follows, I draw out the distinguishing features of social egalitarianism and contrast it with distributive

egalitarianism, and then identify some social egalitarian values that are particularly relevant to corporate responsibilities.

The meaning and normative appeal of social equality can be substantiated in three complementary ways. The first way is to describe what social equality looks like, in a positive sense. Anderson (2007; 2008; 2017: 3-5) argues that there are at least three dimensions to equal social relations – equality of standing, equality of esteem and equality of authority. Equality of standing means that everyone counts for the same, and their legitimate interests are given the same attention and regard. Equality of esteem means that people respect one another equally and recognise their equal worth. And equality of authority means that relationships are negotiated from an initial position of equal power and accountability.[106] If these dimensions of equality are realised, people are secure and equal in their status, and their social relationships "are – in certain crucial respects at least – unstructured by differences of rank, power, or status" (Scheffler, 2005b: 17).

The second way is to substantiate social equality in terms of what it is not, by contrasting it with objectionable forms of social inequality (Anderson, 1999; O'Neill, 2008a; Scanlon, 2018; Wolff, 2015; Young, 2011).[107] On this approach, social egalitarianism stands against social relationships of domination, exploitation, oppression, marginalisation, stigmatization, or disregard, and it stands against taking unfair advantage of people's vulnerabilities. This way of substantiating social equality in terms of what it stands against reflects an important justification for social egalitarianism, which is that it is better able to characterise what is objectionable about inequality than alternative forms of egalitarianism (Anderson, 1999; O'Neill, 2008a; Scanlon, 2018). For example, by inverting Anderson's three dimensions of equal social relations, social egalitarianism can be described as being opposed to unjust hierarchies of standing, esteem or authority. In an unjust hierarchy of standing, those with a higher rank count for more than those with a lower rank, so that the interests of those with a higher rank are given greater attention by society, whilst the interests of those with a lower rank are neglected. In an unjust hierarchy of esteem, those with a higher rank relate with superiority or disregard to those with a lower rank, who in turn relate with either inferiority or

[106] People may agree to structure a particular relationship with unequal authority (e.g., when a group of people agree to appoint someone as their leader), but to be consistent with social equality this must be done from an initial position of equal authority.
[107] See, especially, Anderson (1999: 313) for the claim that there are both positive and negative arguments for social egalitarianism.

deference. And in an unjust hierarchy of authority, people with a higher rank have arbitrary and unaccountable power over those with a lower rank and can order them about.

The third way of substantiating social equality is to describe what a society of social equals looks like, by focusing on the practical implications for how a social egalitarian society should be structured (Scheffler, 2015b). Taking this approach, a social egalitarian society will arrange its major social institutions so that its citizens are secure in their status and so that its major social institutions work to the advantage of everyone (Anderson, 2010: 2, 6-12; Rawls, 1999: 53; Scheffler, 2015b).

Social egalitarianism contrasts with distributive egalitarianism by making social equality, rather than distributive equality, its fundamental concern. Distributive egalitarianism requires that some goods (or distribuenda) – which may include welfare, resources, opportunities, and/or liberties – are distributed amongst members of society according to an egalitarian pattern or procedure (Sen, 1980). This distributive egalitarian view is "recipient-oriented" (Pogge, 2003: 143; Schemmel, 2011: 126) and is concerned with what members of a society are entitled to receive. Luck egalitarianism, for example, is a prominent version of distributive egalitarianism that requires that people's holdings of a distribuendum should not be influenced by factors which are outside of their control or for which they cannot be held responsible, such as their (unchosen) socio-economic position or natural capacities. By contrast, social egalitarianism is relationship-oriented and centres on the character of relations between members of society. As Anderson (1999: 288-289) puts it, social egalitarianism's "proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others." That is not to say, however, that social egalitarianism is unconcerned with distributions or that it is entirely separate from distributive egalitarianism. There are at least two reasons for social egalitarianism to register a concern with distributive equality. First, distributive equality matters to the extent that distributions affect social equality, and there are good reasons to think that distributive inequalities create or compound objectionable forms of social inequality (O'Neill, 2008a). Second, a social egalitarian society will exhibit a "general pressure toward egalitarian distributions" (Scheffler, 2015b: 34) and it is plausible to think that egalitarian principles for the distribution of the main advantages and burdens of life are a way of adding specificity to the social egalitarian ideal of treating everyone with equal concern (Voorhoeve, 2020: 155).[108]

[108] There is also a plausible converse argument for why distributive egalitarianism should register concerns with social equality, e.g., on the grounds that social equality is an important determinant of and condition for sustaining people's commitment to distributive equality. Indeed, there are many

Amongst the different versions of social egalitarianism (see, e.g., Fourie et al., 2015), my focus here is on those versions that are consistent with a conception of justice as fair reciprocity (e.g., Anderson, 2010; Rawls, 1996, 1999, 2001; Scheffler, 2005b, 2015b) and which Schemmel (2011: 137) describes as "liberal" social egalitarian theories, as opposed to non-institutionalist or "radical" social egalitarian theories. These liberal social egalitarian theories share the normative commitments that underpin justice as fair reciprocity (see Chapter 2.4), such as a commitment to developing a system of rules for fair social cooperation (Anderson, 2010: 3) and a motive that is intrinsically reciprocal (Scheffler, 2015b). Indeed, although the Rawlsian conception of justice as fair reciprocity (Rawls, 1999: 16-17) is sometimes interpreted as a distributive egalitarian conception of justice, it can also be interpreted as containing commitments to social egalitarianism (Anderson, 1999, 2010; Voorhoeve, 2020: 152-3).[109] An ideal of people as free and equal citizens is central to the Rawlsian approach (Rawls, 1996: 3-4, 14, 18-20, 29-35; 1999; 2001: 130-132), as is the presumption that people have an interest in possessing and developing the "two moral powers" (Rawls, 1996: 19; 1999: 441-449; 2001: 18-19) of having a capacity for a conception of the good and a sense of justice.[110] On the social egalitarian interpretation of Rawlsian theory, in order to secure and promote the use of these two moral powers, people must be equal in their status and in their social relations, and this, in turn, justifies a range of social egalitarian aims such as securing people's status as equals in public deliberation about social arrangements (Rawls, 1999: 194-200), securing the social bases for attitudes of self-worth (Rawls, 1999: 386-391), and organising social arrangements so that they work for the benefit of everyone (Rawls, 1999: 53) and have egalitarian distributive tendencies (Rawls, 1999: 65-72).

4.2.2 Some relevant social egalitarian values

complementarities between the two types of egalitarianism (Voorhoeve, 2020: 154-155), although this is not to say that social egalitarianism and distributive egalitarianism ultimately end up in the same place and there are also differences between them. For example, social egalitarians arguably give greater weight than distributive egalitarians to distributive equality within a given political community versus distributive equality within the global community (Voorhoeve, 2020: 156-9).

[109] I set aside debating what is the proper way to interpret Rawlsian theory, and simply claim that there is a plausible social egalitarian interpretation of Rawlsian theory given that parts of Rawlsian theory are consistent with some social egalitarian commitments and concerns.

[110] The first moral power, the capacity for a conception of the good, is a person's capacity to form, revise and pursue their own conception of the good. And the second moral power, the sense of justice, is a person's capacity to formulate and act in support of fair terms of social cooperation, on the assurance that others will do the same.

Drawing on liberal social egalitarian theories, I will now pick out three social egalitarian values that underpin my subsequent arguments about corporate responsibilities. I have selected these three values on the basis that they are particularly relevant to the four egalitarian arguments that purportedly justify shareholder value maximisation. Rather than explaining the values in detail here, I simply list them with a brief description; I substantiate the values more fully in subsequent sections, where I also draw out their implications for corporate responsibilities.

The relevant social egalitarian values are:

1. *Protecting people who are vulnerable to domination or exploitation (or, simply, protecting the vulnerable).* Social egalitarianism condemns relationships in which people are dominated, because people have unacceptable forms of power and control over others, or are exploited, because people are taken unfair advantage of (Anderson, 1999). Such relationships are incompatible with people relating to one another as social equals and undermine people's security in society as social equals. As such, social egalitarianism requires protecting people who are vulnerable to domination and exploitation.
2. *Efficiency.* Citizens in a social egalitarian society are prepared to develop mutually beneficial major social institutions that are, at a minimum, (Pareto) efficient. Efficiency contributes to aims of realising a degree of distributive equality because the more efficient major social institutions are, the greater their potential to benefit all citizens with egalitarian distributions. Moreover, efficiency is of value even if there is no possibility of egalitarian redistributions: it would be unjust to deny Pareto improvements that are inequality-generating and which cannot be redistributed, purely on the grounds that some have more than others, and this would reflect attitudes of "envy, spite and malice" (Anderson, 2010: 20).[111]
3. *Sustaining egalitarian attitudes.* It is important that individual attitudes are sufficiently supportive of the main aims of a social egalitarian society. Social egalitarianism relies on a sense of social solidarity and a willingness amongst citizens to develop and abide by fair terms of social cooperation, and so institutional arrangements should be such that they maintain the requisite social egalitarian attitudes.

[111] I note that all leading distributive egalitarian theories are pluralist in the sense that they are concerned both with increasing the amount of the distribuendum that people have and the dispersion of a distribuendum. Rawls's difference principle, for example, is a distributive egalitarian principle that requires that the worst off are as well off as they can be, rather than that everyone is equal.

I call the first value a *social equality value* because it is directly concerned with a dimension of social equality and is, therefore, a distinctly social egalitarian value. There are other social equality values – such as ensuring that people have equality of standing, esteem and status, or equality of status in the public sphere – but I do not inspect these closely in this thesis. I note also that the second and third values are relevant to distributive egalitarianism, and so the implications of these values for corporate responsibilities are also relevant to distributive egalitarianism.

4.3 Justifying two candidates for corporate responsibilities

Rather than consider and evaluate all possible corporate responsibilities, which would require a survey of all 'business morality as special morality' approaches to business ethics, I compare stakeholder theory and shareholder value maximisation.[112]

One reason for restricting the range of corporate responsibilities in this way is that these are two of the main alternative approaches to business ethics and there is a long-standing debate about their respective merits that ranges across moral and political philosophy, legal theory, public policy and business practice. In his 2016 Society for Business Ethics Presidential address, Hsieh (2016: 293) describes the two approaches as the "most prominent" positions in business ethics, and there are many papers within business ethics that compare the respective merits of the two positions (e.g., Heath and Norman, 2004; Heath, 2014; Smith, 2003). These two approaches have the same prominence in legal theory; in their survey of corporate law and corporate governance arrangements, Hansmann and Kraakman (2000) describe shareholder value maximisation as the dominant organising framework and stakeholder theory as the main alternative. In public policy, these approaches were the two alternatives considered by the Steering Group on the reform of the UK Companies Act 2006 (Collison et al., 2011). And voluntary codes concerning business practice often articulate their framework in terms of one or the other approaches; for example, the Business Roundtable's voluntary statement on the purpose of a corporation endorsed shareholder value maximisation from 1997 and stakeholder

[112] These two options are a kind of 'business morality as special morality' approach to business ethics as they hold that business activity comes with special moral obligations that are different to the moral obligations that people have in other personal or private settings – in their personal lives or associative activity people are not normally obliged either to weigh up the interests of groups of people who they categorise as stakeholders or to maximise profits.

theory from 2019 (Business Roundtable 2019). Given their prominence, then, it is valuable to compare these two approaches directly and to determine which approach is preferable, even though this does not mean that it is necessarily the best approach amongst all possible formulations of corporate responsibilities.

A second reason for this restriction is that it forms part of my argumentative strategy for defending stakeholder theory. As stated earlier, I think that a refined version of stakeholder theory is a good option for corporate responsibilities, but stakeholder theory is argumentatively on the backfoot and faces a number of egalitarian arguments that favour shareholder value maximisation instead. Given the apparent strength of these egalitarian arguments, I have chosen to defend stakeholder theory on a comparative basis as a better option than shareholder value maximisation, rather than defending it on an absolute basis as the best option for corporate responsibilities.

By way of clarification, one corollary of focusing only on these two approaches to business ethics is that I also set aside considering more radical approaches that require either reforming, or possibly abolishing, the corporate legal form. For example, Néron (2015: 116) argues that there is an obvious social egalitarian case for reforming the corporation so that it is not quasi-owned by shareholders but is instead a worker-run, "democratic" business,[113] and it could be argued that there is an egalitarian case for greater multi-stakeholder participation in the corporation. Here, however, I set aside considering reforms to the legal structure of the corporation and consider, instead, what are the most defensible responsibilities that can be assigned to the corporation whilst keeping its legal features fixed. From a social egalitarian point of view, it is valuable to establish how corporate responsibilities can best regulate the corporation, keeping these legal features fixed, even if there may be better ways to realise social egalitarian values by re-structuring the corporation's legal features as well. Moreover, examining corporate responsibilities in this way can be considered as part of an iterative process that contributes, in steps, towards the best way of structuring and regulating the corporation as a major social institution.

4.4 Stakeholder theory

At least initially, the version of stakeholder theory I consider is a broad one that obligates corporate governors to give some weight to the interests of the corporation's stakeholders, who

[113] See also Hsieh (2008: 81-93) for a survey of the literature on workplace democracy, and Hsieh (2005) and O'Neill (2008b) for arguments that defend workplace or economic democracy.

include some combination of the corporation's shareholders, employees, customers, suppliers, lenders, its local community, and wider society. In this section, I call this version *normative stakeholder theory* to differentiate it from other versions of stakeholder theory, but in the remainder of the thesis I refer to it simply as stakeholder theory. This version is one of the main approaches to corporate responsibilities (Heath and Norman, 2004: 249-51; Smith, 2003)[114] and it is consistent with some of the main versions of stakeholder theory defended by, amongst others, Anderson (2015), Asher et al., (2005), Donaldson and Preston (1995), Evan and Freeman (1993), Freeman et al. (2010), Jones (1995), Jones and Felps (2013a, 2013b) and Phillips (2003, 2011). Moreover, it has three features that differentiate it from other options for corporate responsibilities and that set it apart from some other versions of stakeholder theory.

First, it is necessary to make its normative feature explicit because stakeholder theory is a very broad category in business ethics that is sometimes used to refer to theories that are not normative; some versions of stakeholder theory are instead explanatory, in the sense that they claim that managerial behaviour is best described as responding to stakeholder interests (Boatright, 2000: 391), or managerial, in the sense that stakeholder theory is a successful managerial strategy to achieve various managerial goals and targets (Donaldson and Preston, 1995: 67).[115] Here, I am concerned only with versions of stakeholder theory that specify what corporate governors *ought to do*, and I set aside the non-normative versions.

Second, normative stakeholder theory requires that the corporation sometimes (and, perhaps, often) sacrifices shareholder profits for the sake of the interests of other stakeholder groups. For example, there may be situations where it requires managers to sacrifice profit for the sake of improving employees' pay and working conditions, or for the sake of reducing pollution and protecting the local community's environment. This feature does not mean that normative stakeholder theory is unconcerned with profit – profit is important because of the importance of shareholders *qua* stakeholders and as a condition for advancing the interests of other stakeholders over the long-term, to the extent that the long-term survival of the corporation depends on profitability. But this feature does differentiate normative stakeholder theory from shareholder value maximisation by requiring that profits are not given overriding

[114] Heath and Norman (2004: 250) call normative stakeholder theory a "deontic stakeholder program."
[115] In its very broadest sense, stakeholder theory is not only a normative theory but is instead a research programme, across multiple disciplines, in which stakeholders play a crucial role (Heath and Norman, 2004: 250; Freeman et al., 2002: 19). For a good taxonomy of types of stakeholder theory, see Heath and Norman (2004: 249-50) and Donaldson and Preston (1995).

priority.[116] This feature also marks normative stakeholder theory out from strategic stakeholder theory (Freeman, 1984), which requires that corporate governors balance stakeholder interests as a way of indirectly maximising shareholder value. Strategic stakeholder theory is based on the empirical claim that advancing stakeholder interests is the best way to maximise shareholder profits and is reducible at the normative level to shareholder value maximisation. As such, strategic stakeholder theory treats stakeholder interests purely instrumentally as a means to achieve shareholder value maximisation, and will, in conflict cases where stakeholder interests and profits diverge, necessarily require managers to maximise profits and to disregard stakeholder interests.[117]

The third feature is that normative stakeholder theory requires that corporate governors sacrifice profits when this is necessary to further other, more important and normatively relevant stakeholder interests. This feature distinguishes normative stakeholder theory from other approaches to business ethics that are also profit-diminishing but for other reasons, such as ‘corporate social responsibility’ which requires that corporate governors sacrifice profits in order to protect moral values (such as human rights), advance specific public goals (such as environmental protection) or make philanthropic contributions to charitable or educational causes. Amongst the different versions of normative stakeholder theory, there is a range of ways of justifying stakeholders’ normatively relevant interest in the corporation, which include: appealing to the intrinsic worth of the stakeholder as a person who interacts with the corporation (Evan and Freeman, 1993); the idea that a stakeholder’s relationship with the corporation gives the stakeholder a quasi-property right in the corporation (Asher et al., 2005; Donaldson and Preston, 1995); and a contribution-based right based on a stakeholder’s contribution to the productive activity of the corporation (Anderson, 2015; Post, Preston and Sachs, 2002). These different ways of justifying stakeholders’ normatively relevant interest also have somewhat different implications for the identity of stakeholders; if stakeholders’ interests are based on people’s interactions with the corporation, this will identify a larger set of stakeholders than if stakeholders’ interests are based on more tangible contributions to productive activity.

[116] As I discuss in section 4.5 below, shareholder value maximisation does not require profit maximisation simpliciter and also imposes some profit-diminishing constraints on the corporation for the sake of efficiency. However, the difference between the two approaches that this feature picks out is that shareholder value maximisation’s profit-diminishing constraints are unconnected to stakeholder interests (and are, instead, based on realising efficiency), whereas stakeholder theory is profit-diminishing for the sake of stakeholder interests.

[117] Albeit a tenacious defender of strategic stakeholder theory might deny that any such conflict cases exist and claim that the best way to maximise profits is always to advance stakeholder interests.

In addition to these three features, another characteristic of normative stakeholder theory is that it typically holds that many of the obligations to stakeholders take an extra-legal form.[118] This characteristic is not distinctive to normative stakeholder theory, as other approaches to business ethics also place extra-legal requirements on corporate governors (including, as I discuss below, shareholder value maximisation), and the characteristic does not mean that stakeholder obligations can only take an extra-legal form, as some stakeholder responsibilities could be, and sometimes are, enforced legally (Hansmann and Kraakman, 2000). But it is certainly the case that normative stakeholder theory typically holds that many of the stakeholder obligations take an extra-legal form, and an important part of the debate about stakeholder theory is whether and how extra-legal stakeholder responsibilities can be enforced (Norman, 2011).

Beyond these features, normative stakeholder theory is, admittedly, vague on a number of points, including exactly how to identify a stakeholder, how to identify which of a stakeholder's interests are relevant, and what it means to 'give some weight' to a stakeholder's interests. I will not, however, clarify these points at this stage. The reason for this is that I am not aware of a version of stakeholder theory that is explicitly grounded in social egalitarianism. Although some versions of normative stakeholder theory could, plausibly, be interpreted as containing some egalitarian commitments (e.g., the requirement to 'balance' stakeholder interests is sometimes interpreted as an egalitarian requirement (Norman, 2013: 6-7)), these versions are not grounded in social egalitarianism. Accordingly, rather than picking out an existing version of normative stakeholder theory, instead I develop a new and more specific, social egalitarian version of normative stakeholder theory.

4.5 Shareholder value maximisation and the market failures approach

4.5.1 Shareholder value maximisation

The second candidate, shareholder value maximisation, places an obligation on corporate governors to maximise shareholders' financial value by maximising the corporation's profits, subject to certain constraints. There are a number of versions of and defences of shareholder

[118] As Heath and Norman (2004: 250) put it, normative stakeholder theory requires that a manager "has assumed extensive extra-legal, profit-diminishing obligations to some of its [the corporation's] stakeholder groups."

value maximisation that span business ethics and legal theory (Armour et al., 2017: 22-24; Friedman, 1962, 1970; Hansmann and Kraakman, 2000; Heath, 2014; Jensen, 2002; Sundaram and Inkpen, 2004). Although these versions differ in sometimes subtle ways, they all have in common that they justify shareholder value maximisation on the grounds that it will realise efficiency, and, as such, share the following three features.

First, shareholder value maximisation holds that efficiency is the primary consideration in determining corporate responsibilities. Versions of shareholder value maximisation vary in their definition of efficiency[119] and in their justification for singling out efficiency as the primary consideration,[120] but they all hold that the corporation's role in society is to realise efficiency, and that other justice-based considerations – to the extent they exist – should primarily be set aside. (This is not to say that other justice-based considerations are entirely irrelevant to the corporation, but they are secondary to the main goal of realising efficiency and are rarely considered in any great depth. Moreover, when other justice-based values are considered, they typically either place minimal requirements on the corporation and/or they do not place any special requirements on the corporation, but are the sorts of requirements that also apply to all private associative and individual activity.[121])

Second, shareholder value maximisation holds that there is a strong causal connection between profit maximisation and efficiency, typically by appealing to standard economic

[119] The definitions of efficiency include: (i) Pareto efficiency according to which it is not possible to make some person(s) better off without making some person(s) worse off (e.g., Heath, 2014: 29); (ii) Kaldor-Hicks efficiency according to which although some person(s) is made worse off in the process of making some other person(s) better off, it is possible in principle for those who are made better off to compensate those who are made worse off, so that there is a potential Pareto improvement (e.g., Armour at al., 2017: 23); (iii) allocative efficiency, according to which resources, goods and services are optimally produced and allocated so that the marginal costs of the supply of a resource is equal to the marginal benefits of the demand for that resource (e.g., Heath, 2014: 40-41, 187-190); and (iv) social efficiency, which refers to the maximisation of a social welfare function that in some way aggregates individual welfare (e.g., Heath et al., 2010: 442-445; Jensen, 2002: 239).

[120] Some versions adopt a consequentialist conception of justice, according to which efficiency directly realises the justice-based goal of maximising aggregate social welfare (e.g., Armour et al., 2017: 23; Jensen, 2002: 239; and see Hussain (2012: 311) for a discussion of these approaches). Other versions hold that efficiency is important as one, amongst many, justice-based values, or because it enables the state to better realise distributive justice through an institutional division of moral labour (Heath, 2014: 10, 203).

[121] For example, when arguing that the corporation has a social responsibility to maximise profits, Friedman (1970) also claims that the corporation should adhere to "law and ethical custom." This is an ambiguous caveat, but it can be interpreted as holding that the corporation is constrained in its profit-maximising behaviour by the same laws and moral responsibilities that apply to individuals. (It also distances Friedman's version of shareholder value maximisation from those versions that hold that the corporation should break the law if doing so will maximise profits, after taking account of the financial costs of legal penalties (e.g., Easterbrook and Fischel, 1982: 1168).)

theory regarding the efficiency properties of profit-maximising behaviour in well-functioning competitive markets. As Jensen (2002: 239) puts it, the purported justification for shareholder value maximisation is that, in his view, "200 years' worth of work in economics and finance indicate that social welfare is maximized when all firms in an economy maximize total firm value."

Third, shareholder value maximisation holds that profit maximisation should be constrained in certain ways in order to realise the corporation's primary purpose of efficiency. Not all profit maximising strategies are efficient, and standard economic theory recognises that certain conditions must hold in order for profit maximisation to be guaranteed to be efficient. Accordingly, shareholder value maximisation rules out inefficient profit maximising strategies and imposes a set of constraints, such as forbidding making profits through deception or fraud (Friedman, 1970; Heath, 2014: 35-37). Importantly, although some of these constraints could, in principle, be justified on other grounds,[122] this is incidental, and they are justified solely by their contribution to efficiency.

Importantly, shareholder value maximisation is distinct to other approaches that also grant priority to shareholder interests and are sometimes grouped together with shareholder value maximisation under the umbrella term of 'shareholder primacy.' One of these other approaches is the shareholder property rights approach, according to which shareholders have an overriding ownership right over the corporation based on a contractual view of the corporation (Easterbook and Fischel, 1989, 1991; Friedman, 1970) that is, as I argued in Chapter 1, mistaken.[123] On this approach, shareholders own the corporation and delegate control to managers who, as agents of the shareholders, are obligated to act on the shareholders' instructions (subject to the normal boundaries of morality). The shareholder property rights approach can be justified on an understanding of property rights that is either consequentialist (Hansmann, 1996), and points to their beneficial effects on efficiency in a similar way to

---

[122] For example, outside of shareholder value maximisation, deception and fraud could be ruled out because of their inherent wrongness.

[123] I note here that Friedman's (1970) famous New York Times article moves, somewhat ambiguously, between defending the shareholder property rights approach (e.g., "a corporate executive is an employee of the owners of the business … [whose] responsibility is to conduct the business in accordance with their desires") and the shareholder value maximisation approach (e.g., "there is one and only one social responsibility of business – to … increase profits so long as it stays within the rules of the game"). On the whole, I take Friedman to be an advocate of shareholder value maximisation, given he defends this in other work (Friedman, 1962) and for the reasons articulated by Heath (2014: 31-36). It is also possible that Friedman does not think there is a great tension between the two approaches, on the grounds that shareholders' "desires … generally will be to make as much money as possible" (Friedman, 1970) and that property rights are themselves justified by their efficiency properties.

shareholder value maximisation,[124] or deontological, in which case it is grounded in different values to shareholder value maximisation. Whatever the justification, the shareholder property rights approach is distinctive to shareholder value maximisation because shareholders may permissibly instruct a manager to pursue objectives other than profit maximisation or to pursue profit maximisation strategies that may be inefficient (because they are unconstrained by the restrictions that apply to shareholder value maximisation). By contrast, under shareholder value maximisation, a manager is required to maximise shareholder value even if this goes against shareholders' desires and instructions.[125] Another argument for obliging managers to prioritise shareholders' interests is the shareholder vulnerability argument (Strudler, 2017), according to which shareholders should be assigned control of the corporation because their position as the residual claimant makes them the most vulnerable stakeholder in the corporation. This argument is also distinctive to shareholder value maximisation, both because it requires corporate governors to prioritise shareholder interests over profit and because it is grounded in vulnerability considerations, rather than efficiency considerations.

4.5.2 The market failures approach

Although there are different versions of shareholder value maximisation, there is a far greater degree of similarity amongst them than there is in the versions of stakeholder theory, and the main point of difference is what constraints there are on profit-maximising strategies. Where a specific version is called for, however, I pick out Heath's (2014) market failures approach. The market failures approach holds that corporate governors should maximise shareholder profits but are forbidden from taking advantage of what economists call market failures, which are market conditions that depart from those that are assumed in economic models of 'perfect' competition and lead to Pareto inefficiencies – such as market conditions where information between buyers and sellers is asymmetric, firms have price-setting power, or market transactions give rise to externalities that benefit or cost third parties not involved in the

[124] Hansmann (1996) justifies assigning primary control of the corporation to shareholders on efficiency grounds because shareholders have a greater degree of homogeneity in their shared interest in financial returns.

[125] Given that shareholders' desires do not play a decisive role in corporate responsibilities, one might argue that shareholder value maximisation is better described as 'profit maximisation responsibilities' or as the 'efficiency argument for profit maximization' (Hussain, 2012: 316). Whilst I am sympathetic to this view, I think the term shareholder value maximization is preferable, partly because it is widely used to describe this option and partly because maximising profits does indeed maximise shareholder value, as shareholders are the financial beneficiaries of the corporation's profits.

transactions. Accordingly, the market failures approach is distinguished from other versions of shareholder value maximisation in stipulating a set of meaningful constraints on profit maximisation that aim to minimise profiting from different types of market failure. For example, the market failures approach requires that the corporation maximises profits whilst also reducing information asymmetries between the corporation and customers, avoiding erecting barriers to entry, competing only through price and quality and minimising negative externalities (Heath, 2014: 37).

I will describe the market failures approach in greater detail in Chapter 6, but for now I emphasise two reasons for picking it out. First, the market failures approach is one of the most complete and defensible versions of shareholder value maximisation. Heath proposes the market failures approach as an extension and refinement of Friedman's (1962, 1970) argument that is, he argues, more directly grounded in economic theory and that more completely takes account of the full implications of economic theory for constraints on profit maximisation (Heath, 2014: 25-41; Heath and Norman, 2010: 444). Second, the market failures approach is one of the most comprehensively defended approaches from an egalitarian perspective.

4.6 The state of the egalitarian debate

On the face of it, it might seem that normative stakeholder theory is the more defensible egalitarian approach to corporate responsibilities because it appears to stipulate that corporate governors implement an egalitarian norm that considers the interests of all stakeholders. By contrast, shareholder value maximisation requires that corporate governors set aside egalitarian norms in their decisions and may even require anti-egalitarian actions, such as increasing pay inequality between the CEO and the lowest paid employees if doing so is expected to improve profits. As Heath (2014: 191) puts it, shareholder value maximization requires that "we refrain from applying the egalitarian norms that we would normally apply to assess cooperative interactions."

Despite this appearance, when it comes to egalitarian evaluations of these two approaches, stakeholder theory is on the back foot and there are at least four egalitarian arguments that appear to favour shareholder value maximisation over stakeholder theory. Indeed, even from a non-egalitarian perspective, stakeholder theory is arguably on the backfoot and many of these arguments are also relevant to non-egalitarian conceptions of justice (e.g., Norman, 2011, 2013; Orts and Strudler, 2010).

These arguments are, in brief:

(i) *The efficiency argument:* applying shareholder value maximisation leads to a more efficient economy than applying stakeholder theory (Heath, 2014: 25-92). Not only is shareholder value maximisation held to be more efficient because it is constructed to realise efficiency, but stakeholder theory is also held to be considerably inefficient and would make society considerably poorer;

(ii) *The institutional system argument:* distributive egalitarian values are better realised when society implements an institutional division of moral labour which tasks the corporation with realising efficiency and other institutions, such as society's social welfare system, with realising distributive equality (Heath, 2014: 10, 84, 191-203). According to the institutional system argument, the corporation should set aside any other justice-based considerations and aim solely at realising efficiency;

(iii) *The vagueness argument:* shareholder value maximisation is held to be considerably less vague than stakeholder theory. This gives it the dual advantages of being usefully action-guiding and also capable of holding managers to account so that they do not opportunistically run the corporation to advance their own ends (Friedman, 1970; Heath, 2014: 42-92); and

(iv) *The motive compatibility argument:* shareholder value maximisation is held to be more compatible with the typically prevailing motives in business, given it endorses the profit motive, whereas stakeholder theory makes demands on corporate governors that they will not, realistically, comply with (Heath, 2014: 145-204).

4.7 Conclusion

In the next two chapters, I reappraise this debate and argue that there is a strong social egalitarian case for a refined version stakeholder theory. My method for reappraising the debate, and developing the social egalitarian stakeholder theory, is to re-evaluate each egalitarian argument by re-considering the implications of the three specific social egalitarian values (see section 4.2.2 above) for the respective merits of stakeholder theory versus shareholder value maximisation.

In brief outline, then, the next two chapters proceed by examining each egalitarian argument alongside the three social egalitarian values as follows. In chapter 5, I re-evaluate the institutional system argument by considering the social egalitarian value of protecting the vulnerable. In chapter 6, I re-evaluate the remaining three egalitarian arguments by considering the social egalitarian values of efficiency and sustaining egalitarian attitudes.

CHAPTER 5: THE INSTITUTIONAL SYSTEM ARGUMENT AND PROTECTING THE VULNERABLE

ABSTRACT: The institutional system argument holds that shareholder value maximisation is superior to stakeholder theory not only because it is considerably more efficient, but also because distributive equality is better realised when there is an institutional division of moral labour in which the corporation aims solely at efficiency. In this chapter, I critique the institutional system argument by placing it within a social egalitarian framework and arguing that shareholder value maximisation is incompatible with the social egalitarian demand to protect the vulnerable from domination and exploitation. By contrast, a refined version of stakeholder theory that requires the corporation to protect the vulnerable is consistent with this important social egalitarian value.

5.1 Introduction

In this chapter, I develop the case for social egalitarian stakeholder theory by evaluating the two approaches to corporate responsibilities, stakeholder theory and shareholder value maximisation, against the social egalitarian value of protecting those who are vulnerable to domination and exploitation (*protecting the vulnerable*) (Anderson, 1999; Garrau and Laborde, 2015; Schemmel, 2021). In particular, I compare how effectively the two approaches respect and uphold this value by considering its implications for the institutional system argument (Heath, 2014: 10, 84, 191-203; Smith, 2018b), which is one of the main egalitarian arguments for shareholder value maximisation that, at least on the face of it, a social egalitarian would be inclined to endorse.

The institutional system argument, in its egalitarian rendering, holds that egalitarian values are better realised when society implements an institutional division of moral labour that tasks the corporation with shareholder value maximisation, on the grounds that this is efficient, and tasks other major social institutions with realising other egalitarian values including, most notably, egalitarian distributions of wealth. Although the institutional system argument typically presupposes a distributive egalitarian framework, the argument can be transposed to a social egalitarian framework, in which justice is also concerned with social equality, and nonetheless succeeds as an argument for shareholder value maximisation because a social egalitarian is also concerned with distributive equality. For the institutional system

argument to have force from a social egalitarian perspective it must be the case that either (i) social equality values permissibly disapply to the corporation, so that shareholder value maximisation is permissibly unconstrained by them, or (ii) shareholder value maximisation is consistent with social equality values, even though social equality values did not figure explicitly in the institutional system argument.

The argument I defend is that neither of these conditions hold in respect of the social egalitarian value of protecting the vulnerable. Protecting the vulnerable is a stringent constraint that must apply to the corporation and which shareholder value maximisation can conflict with. Moreover, protecting the vulnerable is specially relevant to the corporation because it intensifies vulnerabilities and, as a major social institution, shapes the structure of social relations. I show how even the market failures approach, as a well-developed version of shareholder value maximisation, is sometimes inconsistent in its implications with protecting the vulnerable and also threatens the egalitarian shape of social relations. By contrast, stakeholder theory can be refined in a social egalitarian direction so that it directly takes account of protecting the vulnerable and forbids the corporation from dominating or exploiting people.

The chapter proceeds as follows. In section 5.2, I outline the institutional system argument for shareholder value maximisation and identify the conditions it must satisfy to succeed in a social egalitarian framework. In section 5.3, I substantiate the social egalitarian value of protecting the vulnerable and its centrality to social egalitarianism. In section 5.4, I argue that the institutional system argument does not succeed as shareholder value maximisation does not satisfy either of the two conditions. In section 5.5, I develop a version of stakeholder theory that does protect the vulnerable. In section 5.6, I consider and reject an objection. In section 5.7, I conclude.

5.2 The institutional system argument

5.2.1 The argument in a distributive egalitarian conception of justice

Within an institutionalist egalitarian conception of justice, what matters, from the perspective of justice, is how society's major social institutions work together as a whole to realise justice,

and so there is a strong argument for implementing an institutional division of moral labour whenever doing so will better realise or uphold justice-based values.[126]

The institutional system argument that is used to defend shareholder value maximisation is an argument for a specific kind of institutional division of moral labour and, in this respect, is an application of the general institutional division of moral labour argument to the specific case of the corporation. In broad outline, the institutional system argument is that society should task the corporation with shareholder value maximisation, on the grounds that doing so helps to promote efficiency, and task other major social institutions with realising other egalitarian values, and that a strict institutional division of moral labour of this kind will better realise justice as a whole.

Typically, the institutional system argument is situated within a distributive egalitarian conception of justice (e.g., Heath, 2014: 10, 84, 191-203; Smith, 2018b)[127] and draws upon a 'maximise and redistribute' model. The model holds that the best way to realise distributive equality is to task the corporation with efficiency-based responsibilities so that corporate activity leads to a maximisation of wealth in society,[128] and to task society's redistributive institutions, such as its taxation laws and social welfare system, with allocating wealth according to egalitarian distributive principles. In so doing, the 'maximise and redistribute' model makes the reasonable presupposition that distributive equality is concerned both with improving the levels of wealth and with the dispersion of wealth. Moreover, although the 'maximise and redistribute' model typically focuses on the distribution of wealth as a relevant distributive criterion, this does not mean that it is the only relevant distributive criterion that justifies shareholder value maximisation. The model can also be justified on the grounds that

[126] As Smith (2018b: 607-9) emphasises, this general institutional division of moral labour argument is distinct to the division of moral labour argument that is sometimes used to defend institutionalism and which I discussed in Chapters 2 and 3. The division of moral labour argument justifies exempting individuals from many of the demands of justice on the grounds that society's major social institutions are primarily responsible for realising justice, whereas the institutional division of moral labour argument justifies separating out and allocating different justice-based tasks amongst society's major social institutions (see, e.g., Porter, 2009: 194; Rawls, 1996: 268; Scheffler, 2005a: 239-40). Although they are distinct, the two arguments typically go hand in hand (e.g., Rawls, 1996: 267-9) and it would be peculiar to endorse institutionalism but to reject having multiple, differentiated major social institutions.

[127] Néron (2015: 97-99), for example, uses the term 'the overall-distribution argument' to refer to the institutional system argument.

[128] Some versions of the institutional system argument allow regulating the corporation with considerations beyond efficiency, but typically these other considerations are either minimal and would apply to any major social institution (e.g., Heath (2014: 191) permits the minimum wage and unconscionable contracts to act as non-efficiency based boundary constraints on the market failures approach) or they are so vague it is impossible to discern what other values they might include (e.g., Friedman (1970) allows "law and custom" to restrict shareholder value maximization, see fn121).

the wealth generated by the corporation can be used to provide other distributive goods by funding other major social institutions, such as a universal education system that delivers fair equality of opportunity.

One justification for the 'maximise and redistribute' model is that different institutions are comparatively better at the respective tasks of maximising and redistributing wealth. Tasking the corporation with shareholder value maximisation will, it is argued, maximise wealth generation, partly because profit maximisation makes use of prices to allocate resources in accordance with the logic of supply and demand (Heath, 2014: 29-31). And tasking the state with distributing wealth will better realise egalitarian distributions because the state is better informed about the distribution of wealth across society and the likely effects that changes in the wealth of one group of people will have on the overall distribution of wealth amongst all citizens.[129] As such, the corporation's contribution to distributive equality should be judged in conjunction with the taxation and social welfare system, rather than by itself.

One example of the 'maximise and redistribute' model is Heath's (2014) institutional system argument for the market failures approach. Heath (2014: 183) justifies separating wealth maximisation and wealth redistribution partly by appealing to the First and Second Fundamental Theorems of Welfare Economics, which can be interpreted to show that efficiency considerations are theoretically separable from distributive considerations. Heath (2014: 10, 25-41) then defends the market failures approach as the most efficient way of regulating the corporation and argues that the corporation's contribution to justice should be appraised alongside other redistributive institutions. As Heath puts it, when justifying assigning efficiency norms not only to the corporation but also to regulate the market more widely:

> There is, in my view, a division of moral labour within our institutions, with markets being essentially special-purpose institutions designed to promote efficiency … Thus it is only when embedded within the broader context of a welfare state, which engages in both market-complementing and redistributive policies (primarily through the tax system), that capitalism as a whole can claim to be just. (Heath, 2014: 10).

[129] One important implication of the model is that society may apply differential taxation rates to the corporation, compared with other businesses and individuals, and that corporate governors have an obligation to support differential taxation rates if they are part of a just taxation system. As such, the corporate responsibilities associated with shareholder value maximisation include an obligation to support differential just taxes, and a prohibition on using any political influence the corporation has to influence the taxation system to unjustly advantage the corporation's shareholders.

As well as defending shareholder value maximisation, the institutional system argument is also used to reject stakeholder theory. Heath (2014: 84) argues that the case for stakeholder theory is sometimes based on a line of reasoning that assumes the corporation should be tasked with realising *all* justice-based values and that rejects the arguments for an institutional division of moral labour. However, the institutional system argument shows, Heath (2014: 56-67, 84) argues, that a version of stakeholder theory which tasks the corporation with realising distributive equality directly would lead to considerably worse distributive outcomes than the market failures approach. One reason for this is that applying distributive principles to the corporation is inefficient, as resources are not allocated according to the logic of supply and demand, the result being that there is considerably less wealth available to redistribute. A second reason is that requiring the corporation to implement distributive principles may be counter-productive because the corporation lacks the relevant knowledge about distributive outcomes. For example, it would be counter-productive to distributive equality if a corporation increased pay for its lowest paid employees, if they were also amongst the better off in society.

5.2.2 The argument in a social egalitarian conception of justice

Although the institutional system argument typically presupposes a distributive egalitarian framework, the argument is also applicable within a social egalitarian conception of justice, albeit with one qualification. A social egalitarian conception of justice is also concerned with distributive equality, both as an important determinant of the conditions for social equality and as an outcome of social egalitarian institutional structures (see Chapter 4.2.1). Accordingly, the institutional system argument that shareholder value maximisation makes more wealth available for egalitarian redistributions of wealth and to fund the institutional provision of other egalitarian distributive goods, such as fair equality of opportunity or good healthcare, is relevant to social egalitarianism to the extent that it is concerned with distributive equality.

There is, however, one important qualification to the applicability of the institutional system argument which is that it must be permissible to exclude directly considering other, non-distributive social egalitarian values when determining corporate responsibilities, in order to justify tasking the corporation *solely* with realising efficiency. Social egalitarianism is concerned with a range of non-distributive values that aim directly at dimensions of social equality, which I call *social equality values* (see Chapter 4.2.2), but which do not figure in the

institutional system argument. For the institutional system argument to succeed in a social egalitarian framework one of two conditions must, therefore, hold.

Either:

(1) *Disapply condition:* It is permissible to set aside social equality values when determining corporate responsibilities so that the institutional system argument is justified in disregarding them for shareholder value maximisation. For this condition to hold, either it must be possible for other major social institutions to protect or realise social equality values in a way that compensates for the corporation's disregard, or the corporation's disregard for social equality values does not threaten the social equality of people's overall relationships, or the efficiency gains are so very great that it is all things considered justified for the corporation to disregard social equality values.

Or:

(2) Consistency condition: Social equality values do apply when determining corporate responsibilities and place constraints on corporate responsibilities, but shareholder value maximisation is consistent with social equality values and operates within any relevant constraints. If this condition holds, then the institutional system argument is justified in not taking account of social equality values directly on the basis of an implicit assumption that shareholder value maximisation is consistent with social equality values.

The consistency condition is, for example, apparent as an implicit assumption in Heath's defence of the institutional system argument. Notwithstanding that Heath presupposes a distributive egalitarian framework, he also briefly acknowledges the importance of social equality values but argues that they are compatible with all versions of shareholder value maximisation. Shareholder value maximisation does not imply, he argues, that "shareholders' interests are intrinsically more important, and certainly not …[that] shareholders themselves, as individual persons, are more important than other persons" (Heath, 2014: 64).

5.3 Protecting the vulnerable from domination and exploitation

5.3.1 An external challenge to the institutional system argument

There are at least two types of challenge to the institutional system argument that have purchase from a social egalitarian perspective. The first, internal type of challenge is an objection from within the distributive egalitarian framework that the institutional system argument typically presupposes, and disputes that shareholder value maximisation is more efficient than stakeholder theory and/or that the 'maximise and redistribute' model is the best way of realising distributive equality. The second type of challenge rejects the institutional system argument on the grounds that shareholder value maximisation conflicts with one or more social equality values and neither the 'disapply condition' nor the 'consistency condition' is satisfied. Challenges of this second type are external in the sense that they are based on introducing values that do not typically figure explicitly in the institutional system argument.

In this chapter I develop a challenge of the second, external type.[130] I therefore set aside considering internal challenges, although I go on to dispute the efficiency of shareholder value maximisation in Chapter 6. Rather than looking at every social equality value, I focus on one social equality value – that of protecting the vulnerable from domination and exploitation – and I reject the institutional system argument by demonstrating that the institutional system argument does not satisfy either the disapply or consistency condition in respect of protecting the vulnerable.

5.3.2 Substantiating the value of protecting the vulnerable

Protecting people from domination and exploitation is a central social egalitarian value.[131] Social egalitarianism condemns relationships of domination, where people have unacceptable forms of power and control over others, and relationships of exploitation, in which people are taken unfair advantage of. And social egalitarianism requires, therefore, that people who are vulnerable to domination and exploitation are protected and able to stand up for themselves.

For my purposes here, I rely on a broad way of substantiating 'protecting the vulnerable.' On this broad conception, domination is when some people have an unacceptable use of power

[130] Other external challenges include Cohen and Peterson's (2017) and Smith's (2018a) argument that responsibilities in business should take account of "noneconomic values" (Smith: 2018a: 135) or McMahon's (2012: 150) argument that "morally important social values" should guide the corporation, as well efficiency. These external challenges are not, however, directly based on social equality values, but on values such as knowledge, public health, education, social mobility, and opportunity.

[131] These are not the only vulnerabilities that social egalitarianism is concerned with; it is also concerned with protecting people who are vulnerable to violence, physical coercion, marginalisation and humiliating forms of subjection (Anderson, 1999, 2008). See also Young (2011) on the multiple faces of oppression.

and control over other people's lives, and encompasses concerns with unacceptably subjecting someone's personal independence to the will of another (Anderson, 1999) or concerns where someone is able to exercise power over another to arbitrarily interfere in their choices, impose significant costs on them, boss them around or disregard their relevant interests, all without any accountability to them (Schemmel, 2021: 55-93). This does not mean that all forms of power or control are unacceptable, as power and hierarchy may serve valuable purposes, but rather that these forms of power and control are unacceptable. And exploitation is when someone takes advantage of someone else's weaker situation to secure unfair terms of exchange (Anderson, 1999). This broad conception overlaps with other, non-social egalitarian accounts of non-domination and exploitation including, for example, republican political theory (e.g., Pettit, 1997, 2012), but I set aside drawing out the boundaries between these accounts.

This broad conception does, however, have three features that are especially relevant to the institutional system argument. First, social egalitarianism's opposition to domination and exploitation is principally grounded in protecting people's status as social equals, rather than any of their distributive consequences. Relationships involving domination or exploitation are unjust primarily because they are relationships of social inequality, with unequal status and a lack of respect. As Anderson (1999: 315) puts it, "equals are not dominated by others; they do not live at the mercy of others' wills … Equals are not exploited by others… they are free to secure the fair value of their labor." As such, relationships of domination and exploitation are unjust even if the relationships are mutually beneficial or the distributive consequences are egalitarian.

Second, this conception recognises that vulnerabilities to domination and exploitation cannot be eliminated, but it assigns a special importance to protecting those who are vulnerable because of, or when mediated through, major social institutions. Vulnerability is an inescapable consequence of human relationships, in which people depend on and are exposed to other people (Garrau and Laborde, 2015: 52-56). But social egalitarianism registers a special concern with vulnerabilities that arise in the context of major social institutions, partly because these institutions structure some of the main ways in which people relate to one another, partly because they are especially capable of intensifying or lessening vulnerabilities, and partly because they are artificial constructions that are revisable and improvable (Garrau and Laborde, 2015; Schemmel, 2021).

Third, protecting the vulnerable is of paramount importance to social egalitarianism and it makes stringent demands of society and of its major social institutions. Being dominated

or exploited is a particularly objectionable and insidious form of social inequality. Someone who dominates another not only expresses contempt or disregard for someone, but also acts on this contempt to control them, and when someone exploits another, this is suggestive of contempt or disregard for the other person's interests. This does not necessarily mean that protecting the vulnerable acts as a constraint that cannot be trumped by other values, but it is certainly a stringent requirement.[132]

5.4 Rejecting the institutional system argument

Although the institutional system argument does not take protecting the vulnerable into account, the argument would nonetheless be defensible if either the disapply condition or consistency condition holds. In this section, I consider each condition in sequence and argue that neither condition holds, and that shareholder value maximisation unacceptably conflicts with protecting the vulnerable.

5.4.1 Why the disapply condition is not satisfied

The disapply condition permits setting aside a social equality value when determining corporate responsibilities, one implication of which is that it is permissible for the corporation to undermine or breach this value.[133] There are at least three potential defences of the condition, none of which are plausible in the case of protecting the vulnerable.

One defence is that it is permissible for the corporation to disregard the value because other major social institutions can offset or compensate for the way that the corporation might undermine or breach the value, so that the value is upheld by the major social institutions taken as a whole. This defence underpins the institutional system argument's case for disregarding distributive egalitarian norms, as any inegalitarian distributions of wealth that arise from shareholder value maximisation are offset by other redistributive major social institutions, so that the value of distributive equality is upheld overall. This defence works for the egalitarian distribution of wealth because wealth is a divisible and distributable good, so that any

[132] Schemmel (2021: 20, 289) claims that whilst protection from domination is a "particularly stringent" demand, it could be trumped by urgent concerns such as needs for basic sufficiency.

[133] Another implication of the disapply condition is that it is permissible for society not to specially protect those who are vulnerable to domination and exploitation by the corporation, and to tolerate, therefore, some degree of domination and exploitation by the corporation as one of society's major social institutions.

disruptions to egalitarian distributions caused by the corporation can be offset by redistributions, and because all that matters is the resulting wealth distribution, and not the processes that determine the distribution.

The defence does not, however, work for protecting the vulnerable. If someone is dominated or exploited by the corporation, it is not possible to offset their treatment with compensating protections or treatments by other major social institutions. Domination and exploitation are not divisible values with compensating opposites, so that someone who is dominated (or exploited) could be 'anti-dominated' (or 'anti-exploited') in some other area of their life so that they are not dominated (or exploited) overall. And nor can domination or exploitation be offset by symmetric forms of domination and exploitation; if person A dominates person B through one major social institution, but then person B dominates person A through another major social institution, this does not mean that there is no domination overall or that the relationships of domination balance out so there is no injustice overall.[134] Instead, there are two instances of domination, each of which is unjust.

One reason why the defence does not work is that the requirement to protect the vulnerable is grounded in a concern with the structure of people's relationships, rather than a distributive outcome. Domination and exploitation undermine relationships of social equality and people's status as social equals, and so people's vulnerabilities to these forms of relationships must be protected against. A second reason is that protecting the vulnerable is plausibly partially constitutive of justice. A value that is partially constitutive of justice is both intrinsically important, meaning that it is a requirement of justice in and of itself, and also instrumentally important because of its contribution to realising justice (Shields, 2006).[135] As a value that is partially constitutive of justice, protecting the vulnerable is an intrinsically important requirement of justice in its own right (e.g., because of the injustice of domination

[134] I note that the main social egalitarian concern is with asymmetric domination and exploitation, in which one person (or group of people) consistently dominates or exploits another person (or group of people), and which is plausibly a greater injustice than symmetric domination and exploitation relationships, all other things being equal.

[135] I draw upon a tripartite categorisation of justice-based values here which has its origins in Socrates's dialogue with Glaucon about justice, from Plato's *Republic* and which is defended by Shields (2006). This tripartite categorisation divides justice-based values into those that are: (i) intrinsically important, in which case they matter to justice in and of themselves; (ii) instrumentally important, in which case they matter to justice purely because of their contribution to other justice-based values; and (iii) partially constitutive of justice, in which case they matter to justice both because they have an intrinsic importance and are instrumentally important in realising other justice-based values. In respect of a partially constitutive value, Shields (2006) offers the illuminating analogy of a well-played violin part that is partially constitutive of the good of an orchestra performance – the violin part is both good in itself and also instrumentally good because of its contribution to the orchestral performance as a whole.

and exploitation) and also instrumentally important for its contribution to realising equal social relations, and it would not be correct to say that protecting the vulnerable is of *only* intrinsic or *only* instrumental value. The implication of being partially constitutive of justice is that social equality values cannot be set aside and treated purely instrumentally, but must be upheld by all major social institutions both because of their intrinsic importance and because of their contribution to social equality.

A second defence is that social egalitarianism is concerned with people's overall relationship as citizens, and not with every relationship that is mediated by major social institutions. As such, social egalitarianism can tolerate the corporation disregarding protecting the vulnerable, so long as this does not lead to an overall relationship of dominance or diminish the overall equality of people's relationships. On the Walzerian view of justice as *complex equality* (Walzer, 1983), society is organised into different spheres based on different social goods. These different spheres of justice should be regulated by their own normative principles, which are sensitive to the social meanings of the social goods, and social inequality is permitted within one sphere so long as it does not lead to domination overall. Indeed, one aim of complex equality is to make it impossible for some people to dominate others overall; by using diverse distributive principles in different spheres,[136] it is impossible, Walzer argues, for one social good to become a "dominant good" (Walzer, 1983: 9) that enables people to exert overall control or command over a wide range of other social goods in other spheres.[137] Applying this view to the institutional system argument, the corporation could be regarded as a distinctive sphere of justice in which the corporation's social meaning is the realisation of efficiency and, as such, relationships of social inequality and some domination and exploitation are permissible, so long as these do not spill over into relationships of social inequality and domination and exploitation overall.

The defence does not, however, succeed for two reasons. First, the social egalitarian conception of protecting the vulnerable rejects the claim that it is only the overall social relationship that matters and is, instead, concerned with the character of every social

[136] It is because each sphere has diverse distributive principles for its social goods that Walzer calls his conception of justice complex equality, as opposed to *simple equality* which uses a single distributive principle to distribute all social goods.
[137] See also Miller (1998) who argues that equality of status does not require that people are socially equal within every major social institution, but rather that there is no overall social hierarchy that rigidly ranks people as superiors and inferiors or that gives some people the overall power to dominate others. As Miller (1998: 31) puts it, "what matters is how such differences [in power, prestige or wealth] are regarded, and in particular whether they serve to construct a social hierarchy in which A can unequivocally be ranked as B's superior."

relationship that is mediated by major social institutions. This is because, as I argued above, a particular relationship of domination and exploitation is unjust because it undermines social equality, and protecting the vulnerable is partially constitutive of justice. As Anderson (2008: 146) argues, social equality is about a "mode of relating to others in which no one is dominated, in which each adult meets every other adult member of society eye to eye, as an equal." This view requires that every social relationship is protected from domination and exploitation, so that people meet eye to eye as equals.

The second reason is that there are some tensions between opposing relationships of dominance overall, whilst also permitting relationships of dominance within particular spheres. One tension is that the character of people's overall relationship is not separable from how people relate in different spheres, but rather it is determined, to a considerable extent, by the character of their particular relationships as structured through different major social institutions. How people relate to one another overall is made up of all the different ways and instances in which they relate – as, say, director-and-employee, doctor-and-patient, or citizen-and-politician. As such, it follows that a concern with the injustice of an overall relationship of dominance should encompass a concern with particular relationships of dominance. A second tension is between holding that there is an injustice about an overall relationship of dominance but not a particular relationship of dominance. For if an overall relationship of dominance is unjust, why is a particular relationship not also unjust? These tensions are, I suggest, problems for the complex equality defence which the social egalitarian view does not face because protecting the vulnerable extends to all social relationships. Indeed, this problem with complex equality is especially relevant to the corporation where some of the relationships it structures, such as the manager-worker relationship, are often especially significant determinants of people's overall relationships given the amount of time many people spend working. It is perverse to permit dominance in a manager-employee relationship, which might govern most of the respective people's working week, on the grounds that the justice of the overall relationship is resilient to this particular relationship.[138] In rejecting this defence, I do not deny that social egalitarians should not be concerned with the overall relationship. Indeed, it is

[138] There is one possible further Walzerian defence for the complex equality view, to which I respond briefly to here. It could be argued that permitting some relationships of dominance in particular spheres is a way of giving room to the different, subjective social meanings that people ascribe to different social goods. To this, I reply that protecting against dominance still leaves room for different distributive principles and a range of different relationship structures, but it requires that these principles and relationships are conducted within a permissible boundary. As Schemmel (2021: 20) argues, social egalitarian constraints leave considerable room for people to pursue their own conceptions of the good as they concern the social meaning of goods or the conduct of relationships.

legitimate to be more concerned with dominance and exploitation in one relationship if it threatens to spill over and affect the character of other relationships, or if it is an especially significant relationship (such as, paradigmatically, people's relationships as citizens as determined by their political and constitutional rights).[139]

A third defence is that the gains to distributive equality from tasking the corporation with efficiency are so very great that it is all-things-considered permissible to disregard protecting the vulnerable. Although I admit that protecting the vulnerable could, in principle, be overridden by a concern for other values such as maintaining basic sufficiency (see section 5.3.2 above), this defence is implausible for the corporation in contemporary economies where basic sufficiency needs are (or, at least, with fair distributions could be) satisfied. This is because protecting the vulnerable is an especially stringent requirement, and the gains to distributive equality are unlikely to compensate for the harms to people's status as social equals.

In summary, none of the defences of the 'disapply condition' succeed and protecting the vulnerable is a meaningful constraint that applies to corporate responsibilities. Indeed, these arguments are consistent with claims about social egalitarian values generally, which hold that social equality values "normally override other social values" (Schemmel, 2011: 366) and place "searching egalitarian constraints" (Anderson, 2008: 147) on major social institutions that cannot be disregarded.

5.4.2 Why the consistency condition is not satisfied

Although protecting the vulnerable is a stringent constraint on corporate responsibilities, the institutional system argument could nonetheless succeed if shareholder value maximisation is compatible with this constraint, even though the institutional system argument does not directly take account of it.

On the face of it, shareholder value maximisation is not, however, consistent with protecting the vulnerable from domination and exploitation. This is because shareholder value maximisation obligates the corporation to maximise profits regardless of vulnerability considerations. Whilst the required profit maximisation strategy will be consistent with protecting the vulnerable in some cases, the problem is that in other cases profit maximisation will conflict with vulnerability considerations, and in these conflict cases shareholder value

[139] Anderson (1999) argues that an advantage of social egalitarianism over luck egalitarianism is that it articulates the "concerns of the *politically* oppressed" (my italics).

maximisation not only permits but requires that the corporation takes advantage of people's vulnerabilities in order to maximise profits. Indeed, many of the complaints about how corporations behave and are governed in contemporary society are objections to corporate domination or exploitation for the sake of maximising profits. These complaints include, for example: objections to taking advantage of vulnerable workers with unsafe working conditions, low pay, overly controlling and inflexible working patterns (Anderson, 2017); objections to taking advantage of vulnerable customers by exploiting biases through advertising (Akerlof and Shiller, 2015: 45-59) or charging excessive contract renewal fees, add-on fees, or ramp-up charges to dependent customers, such as property development companies hiking service charges far above service cost increases to their long-leaseholder customers (Financial Times, 2021a); and objections to polluting practices that are less costly to the corporation but which affect vulnerable third parties, such as water companies releasing untreated sewage rather than investing in treatment and over-flow capacity (Financial Times, 2021b).

To give shareholder value maximisation its due, however, the most plausible versions of shareholder value maximisation do not obligate the corporation to maximise profits without restriction, but constrain the range of permissible profit maximising strategies with a number of efficiency-based constraints (See Chapter 4.5). Heath's (2014) market failures approach, which is one of the most well-developed versions of shareholder value maximisation, constrains profit maximisation with at least ten meaningful constraints that aim to prevent the corporation from profiting from market failures in a way that is Pareto inefficient (see Chapter 6.2.1). And some of these profit constraints directly rule out profit maximisation strategies that would otherwise take advantage of the vulnerable. For example, profiting by polluting is ruled out (up to the point that it is inefficient) by the profit constraint that requires minimising negative externalities, and profiting from non-informative and manipulative advertising is ruled out by the profit constraint that requires competing only on price and quality (Heath, 2014: 37). Indeed, Heath argues that a strength of the market failures approach is that it rules out many objectionable forms of corporate behaviour that are permitted by less-developed versions of shareholder value maximisation.[140] And from the perspective of the market failures approach, some of the complaints I raised above about actual corporate behaviour are

[140] As Heath (2014: 35) points out, Friedman's (1970) version of shareholder value maximisation permits polluting activities, which the market failures approach forbids on the grounds of their inefficiency. From a social egalitarian framework, polluting activities should be forbidden on the grounds that they exploit third parties, and Friedman's version is, therefore, inconsistent with protecting the vulnerable.

legitimate and reflect normatively unacceptable behaviour on the part of corporate governors and/or normative failures in the structure of corporate law and regulation.

Accordingly, the question of whether shareholder value maximisation is consistent with protecting the vulnerable should be approached by considering whether the market failures approach, with its demanding profit constraints, is consistent with protecting the vulnerable. The answer that I give to this question is that the market failures approach *is* inconsistent, but for subtler reasons than the obvious way in which the less-developed versions of shareholder value maximisation conflict with protecting the vulnerable.

(a) Incomplete protection of the vulnerable and insensitivity to vulnerability intensification

Whilst there are fewer conflicts between permissible profit maximisation strategies and protecting the vulnerable under the market failures approach than under other, less well-developed, versions of shareholder value maximisation, the market failures approach does not completely protect the vulnerable and there are at least two types of domination and exploitation that are permitted. The first type concerns relationships of domination in which the corporation controls, bosses around or interferes with the choices of workers (see, e.g., Anderson, 2017). The profit constraints rule out using market power to set wages, but they do not constrain working conditions or practices and the market failures approach permits egregious forms of worker domination, such as worker surveillance, a highly supervised and controlled detailed division of labour per Taylor's scientific management philosophy (Arnold, 2012; Taylor, [1911] 2007), or zero hours contracts (which can be problematic in terms of domination where they lead to employer control and domination over a worker's time and personal freedom). The economic model of perfect competition that the market failures approach seeks to emulate does not contain any constraints on domination, and, indeed, worker domination is observable even in market sectors that operate with highly competitive conditions, such as the fast food industry (Fast Company 2022). Moreover, worker domination is especially relevant to the corporation because one of its structural features is that senior managers have greater power over workers because they control the corporation's assets (see Chapter 3.3.3).

The second type concerns exploiting people's firm-specific commitments to the corporation. The corporation's legal structure facilitates and encourages firm-specific commitments and firm-specific asset specialisation by the corporation's stakeholders (see Chapter 1.3.1), but these are vulnerable to opportunism and being taken unfair advantage of

precisely because their commitments are specific to the corporation and are not easily transferable to other economic relationships (Blair and Stout, 1999). Moreover, many of these firm-specific commitments are made on the basis of incomplete contracts (Anderson, 2015; Stout, 2011: 178-81), thereby exposing people to an even greater risk of being exploited because there are very few legal protections to safeguard them receiving a fair return for their commitments.[141] The market failures approach permits the corporation to opportunistically take advantage of all firm-specific commitments, bar those made by the corporation's shareholders. Indeed, such firm-specific commitments can be extensive, especially as concerns larger corporations, and include: commitments made by loyal customers who buy specialised products or services in a long-term relationship but are vulnerable to excess fee charges and loyalty premiums; commitments by employees who build up firm-specific knowledge and skills but are vulnerable to being unfairly rewarded; and commitments made by a local community that works in partnership with a corporation (or group of corporations) to specialise its infrastructure and its training institutions or that restructures its tax laws to attract corporations, but is vulnerable to the corporation(s) relocating purely for profitability reasons.

Such conflicts are to be expected because the profit constraints in the market failures approach are based solely on efficiency considerations, not on protecting the vulnerable from domination and exploitation, and even though there may be some overlap between these values, the two values are not co-extensive, especially in the context of the corporation. Moreover, the market failures approach is insensitive to the way that the corporation intensifies existing vulnerabilities and creates new vulnerabilities because of its legal features. The social egalitarian concern with protecting the vulnerable assigns a special importance to protecting vulnerabilities that arise from and / or are intensified by major social institutions (Garrau and Laborde, 2015: 10; Schemmel, 2021: 23). The corporation is a major social institution that paradigmatically creates and intensifies vulnerabilities, as many of the corporation's legal features that unlock efficiency benefits also disrupt the balance of power between people and

[141] As Stout (2011: 178-81) explains, all contracts are incomplete to some degree, as it is impossible to specify all contingencies or completely verify all contractual terms. On the spectrum of completeness to incompleteness, firm-specific commitments rely on contracts that typically have a high degree of incompleteness because they are complex and unverifiable, they are made over the long-term, and their fair reward is contingent on an uncertain future. For example, workers who specialise their skills to a particular corporation frequently rely on an incomplete contract with the corporation that they will be fairly rewarded with pay rises, promotions, or improved terms and conditions when the corporation becomes more successful, in addition to their explicit contract concerning their current pay and terms. One third of Fortune 500 CEOs, for example, have no written employment contract and another third have highly incomplete contracts that specify very few terms (Schwab and Thomas, 2006; Stout, 2011: 181).

weaken people's protections against being dominated or exploited.[142] The market failures approach, however, does not take into account the way the corporation exacerbates vulnerability. Some of its profit constraints, by coincidence, work to protect against some of the corporation's features – the profit constraint on negative externalities protects against the corporation taking advantage of limited liability to harm citizens, and the profit constraint on using market power to set prices mitigates the corporation making use of its enhanced capacity to scale. But significant gaps in the protection of the vulnerable remain, and in these cases the market failures approach requires that the corporation takes advantage of these vulnerabilities. Or, to put it another way, the market failures approach fails to take into account the tension between efficiency and vulnerability that lies at the centre of the corporation, and how the way that society structures the corporation for efficiency also exacerbates vulnerabilities.

(b) The problem of corporate disregard for protecting the vulnerable

A second problem with the market failures approach's disregard for protecting the vulnerable is that it structures and shapes social relationships in ways that are problematic. First, people have no grounds to stand up for themselves when the corporation either threatens to, or in fact does, take advantage of their vulnerabilities. People cannot raise their own interests in non-domination and non-exploitation as a complaint against corporate behaviour because the only justice-based value that the market failures approach aims at is efficiency. People are, in this respect, powerless vis-à-vis the corporation. Even though the profit constraints provide indirect protection against the corporation taking advantage of some of people's vulnerabilities, people have no way of defending themselves from having those vulnerabilities *that are unprotected* from being taken advantage of. Moreover, if the corporation does behave unjustly, according to the market failures approach, and violates a profit constraint, people cannot complain on the grounds that they are dominated or exploited as a result, but instead must complain on the grounds that the corporation's behaviour is inefficient. For example, someone who is dominated or exploited by the corporation cannot complain directly to the corporation's board of directors on the grounds that they are being mistreated, but instead must show that their treatment is incompatible with the profit constraints and with the corporation's institutionalised goal of efficiency.

[142] Limited liability, managerial asset control, firm-specific commitments and an enhanced capacity to scale are all features of the corporation that unlock efficiency benefits whilst also exacerbating vulnerabilities (see also Chapter 3.3.3 and 3.5).

Second, under the market failures approach, the corporation structures a way of relating between people that obligates corporate governors to sometimes act opportunistically towards others and sometimes exploit or dominate them. Corporate governors can legitimately treat people as instruments or means to realise profits for the corporation or be on the look-out for profitable ways of taking advantage of people's vulnerabilities. And, as a consequence, people are not secure or certain that they can relate to corporate governors without being exploited or dominated – even if the corporation does not take advantage of them, people must always be on their guard in case that could happen.

Third, the fundamental attitude that is expressed by the corporation towards the people it engages with and affects – as customers, employees, suppliers, and so forth – is, when guided by profit maximisation, one of disregard for their interests and opportunism in its direct interactions. On expressive accounts of social egalitarianism (e.g., Schemmel, 2011, 2021) this institutional attitude matters to justice in a way that is not reducible to people's attitudes within the institution. However, one does not necessarily have to endorse an expressive account that attributes an attitude to the institution itself to find this problematic. Institutions structure and organise a way of treating people which expresses and embodies the attitude that citizens have towards those people, reflects the status that those people hold within society and affects how other social relations outside of the institutional context might be conducted (Garrau, 2015: 48-50; Schemmel, 2011). As such, the disregard for vulnerability considerations by the corporation as a major social institution can also be problematic because it expresses a disregard, on the part of the citizens who have created this institution, for people's particular vulnerabilities that are exposed to the corporation.

On behalf of the market failures approach, Heath might reply that this would be a misinterpretation of the corporation's institutional attitude and that the corporation does not disregard people's interests because the reason for tasking it solely with efficiency is, in the institutional system argument, to advance people's interests fairly through the overall system of social cooperation. The problem is, however, that in tasking the corporation solely with efficiency, the corporation thereby disregards people's interests in non-domination and non-exploitation, at least in their direct interactions with the corporation. Just as particular relationships matter for an overall relationship of social equality, as I argued in section 5.4.1, so does the way that particular major social institutions treat people matter for social equality. If the corporation, as a major social institution, expresses an attitude of disregard for people's interests in non-domination and non-exploitation in the interactions that they have with the corporation, this is disrespectful to those people's worth. Moreover, it threatens people's self-

respect and self-worth because people are normatively powerless to register their own interests against being dominated or exploited as a way of constraining the corporation, nor do these interests count in how they relate with corporate governors or the corporation itself.[143] Respect for others, self-respect and self-worth are, however, of fundamental importance in a social egalitarian society and to people's status as social equals. And the severity of the threat to people's status as social equals increases the greater the corporation exacerbates vulnerabilities and the greater are corporations' significance in structuring people's relationships.

5.5 The stakeholder vulnerability obligation

There is, then, a serious flaw in the institutional system argument in terms of how shareholder value maximisation, including the market failures approach, fails to take into account protecting the vulnerable. By contrast, in its broad conception, stakeholder theory is consistent with protecting the vulnerable from exploitation and domination, as its requirement that the corporation gives weight to the interests of all the corporation's stakeholders can encompass giving weight to their interest in non-domination and non-exploitation.

Moreover, stakeholder theory can be refined in a social egalitarian direction so that it directly takes account of protecting the vulnerable with the following responsibility:

> *Stakeholder vulnerability obligation:* the corporation has an obligation to protect the vulnerable by refraining from dominating or exploiting its stakeholders, paying special attention to refraining from taking advantage of those who are especially vulnerable to the corporation.

As a refinement of stakeholder theory, the stakeholder vulnerability obligation need not be the only responsibility, and other stakeholder responsibilities could form part of a more fully refined *social egalitarian stakeholder theory* – indeed, in chapter 6, I defend another stakeholder responsibility that is grounded in efficiency considerations.

The stakeholder vulnerability obligation has two principal merits. First, the stakeholder vulnerability obligation fully protects the vulnerable and avoids the flaws in the market failures approach. It insists on complete protection of the vulnerable and rules out any corporate

[143] To use Rawlsian language, it is important that free people "regard themselves as self-authenticating sources of valid claims" (Rawls, 1996: 32) so that their objection to being dominated and exploited by the corporation is respected as valid because their worth matters intrinsically.

behaviour that exploits or dominates people, even when this conflicts with profitability or other targets. This prohibition extends to ways in which the corporation intensifies vulnerabilities, such as the vulnerability of those who are already disadvantaged in the market, or creates new vulnerabilities with its structural features, such as when making firm-specific commitments – indeed, the obligation requires that the corporation pays special attention to the way that the corporation exacerbates vulnerabilities. Moreover, the obligation sustains the egalitarian structure to social relationships: stakeholders can hold the corporation to account directly on the grounds of how they are treated; social relations between corporate governors and stakeholders can be conducted without disrespect and opportunism; and people's worth and status as social equals are directly upheld by the corporation.

The stakeholder vulnerability obligation rules out, of course, all of the problematic examples of corporate domination and exploitation that shareholder value maximisation (and, in some cases, the market failures approach also) permit, such as unsafe working conditions, overly controlling working patterns, manipulative advertising, excessive fee charges, pollutive activity, worker surveillance, and zero hours contracts, where they lead to dominance. But as well as prohibiting behaviours, the stakeholder vulnerability obligation can also act as a tool for normatively praising corporations that respect the obligation, particularly when the obligation acts as a meaningful constraint on profit maximisation. As an example, during the COVID-19 pandemic, those supermarket customers who were particularly at risk from COVID-19, due to pre-existing medical conditions or age, were suddenly placed in a more vulnerable position when shopping, and some of these customers had a long-term relationship with a particular supermarket. Rather than price gouging, and taking advantage of customers' vulnerabilities, some supermarkets prioritised online deliveries to and reserved special in-store hours for vulnerable customers without extra charge, and such behaviour qualifies as a way of satisfying the stakeholder vulnerability obligation.

A second advantage of the stakeholder vulnerability obligation is that it goes some way to addressing two criticisms raised against stakeholder theory which are that it cannot coherently identify stakeholders or which of their relevant interests count (Orts and Strudler, 2010). The corporation's stakeholders can be identified based on people's different type of vulnerability *to the corporation*, and each stakeholder's interest in non-domination and non-exploitation counts and acts as a stringent constraint on corporate behaviour. Indeed, through the main stakeholder categories – shareholders, employees, customers, suppliers, lenders, the local community and wider society – we have a way of identifying and grouping the different types of vulnerability that people are exposed to based on their relationship with the corporation.

For example, shareholders are vulnerable to being exploited by the corporation because they invest capital that becomes highly specialised and non-transferable within the corporation, has no contractual fixed returns and has only a residual claim on the corporation's retained earnings. Employees' vulnerability to the corporation is of a different type to shareholders' – employees are vulnerable to domination and having their working lives overly controlled, to exploitation by unfairly rewarding their firm-specific commitments to the corporation, or to exploitation if any socio-economic disadvantages are taken advantage of with unfair working conditions. And a local community's vulnerability is of a different type again, with the local community being especially vulnerable to, for example, negative externalities. But the advantage of stakeholder theory is that it requires the corporation to recognise the different types of vulnerability that people have vis-à-vis the corporation through their different relationships with the corporation, whilst also treating each person's vulnerability to the corporation with a similar importance by requiring that the corporation does not abuse people's vulnerabilities.

One implication of the variety of types of vulnerability is that the stakeholder vulnerability obligation can be cached out with a number of more specific and more practical guidelines for how the corporation should be run. The stakeholder vulnerability obligation does not necessarily mean that a corporate governor should refer to the obligation as a kind of managerial maxim, but rather the stakeholder vulnerability obligation is a normative principle to guide the formulation of corporate law, corporate codes of conduct and informal or extra-legal corporate norms. Indeed, one notable feature of voluntary corporate governance standards that set out criteria for assessing how sustainable or responsible a corporation is, or how well a corporation meets relevant environmental, governance and social standards, is that they contain numerous practical guidelines for the corporation, some of which can be understood as picking out specific vulnerabilities that are especially relevant to the corporation (and some of which are also too often taken advantage of); for example: criteria concerning fair pay, living wages, good working conditions, enhanced equality, diversity and inclusion policies, enhanced parental leave policies, and flexible working policies can be regarded as practical guidelines on how to protect employees from domination and exploitation; or criteria requiring reductions in the carbon intensity of production and the alignment of long-term business plans with net zero emissions targets can be regarded as practical guidelines on how to protect communities and societies from exploitation.

A second implication of the range of vulnerabilities is that it is likely that the obligation should primarily be applied with extra-legal rules. It would be difficult and costly to specify all the types of vulnerability in a way that is suitable for legally protecting them, and infeasible

for those stakeholder vulnerabilities that are based on firm-specific commitments with incomplete contracts. Of course, additional legal safeguards may be appropriate when protecting against forms of domination or exploitation that are especially egregious and easy to identify. One example in the UK is the Modern Slavery Act which legally enforces a prohibition on forced labour and human trafficking, a particularly objectionable form of corporate domination.

Another implication of categorising stakeholder groups by type of vulnerability is, of course, that the stakeholder groups are likely to be more granular than the simple categories of shareholder, employee, and so on, and require sub-groupings of stakeholders such as grouping shareholders by different classes of shares, employees by their degree of firm-specific commitment, or the local community according to the different ways the corporation impacts it. Moreover, these stakeholder groupings may well be quite particular to the corporation, its market sector and, sometimes, to the circumstances it operates in. The granularity in stakeholder groupings might be regarded by some as a flaw in the stakeholder vulnerability obligation on the grounds that it is too firm-specific and context-specific to be able to properly hold the corporation to account. I will address this objection in the next chapter, where I consider the objection that stakeholder theory is too vague (see Chapter 6.6).

Finally, it might be objected that the stakeholder vulnerability obligation does not go far enough as a way of protecting the vulnerable, and stakeholders should be empowered with a voice in, representation on or control over the corporation, to fully protect them from being dominated or exploited. This may well be true, but the stakeholder vulnerability obligation is not inconsistent with some of these requirements – greater stakeholder voice and some stakeholder representation on the board could be required as ways of fulfilling the stakeholder obligation. But I have confined the evaluation in this thesis to a comparative analysis of stakeholder theory and shareholder value maximisations, that presumes shareholder control (See Chapter 4.3), and so I have not considered whether stakeholder control is also required. Within these confines, the stakeholder vulnerability obligation is the minimum that a social egalitarian society should demand of the corporation.

5.6 An objection and a clarification

5.6.1 Other institutional protections

One objection to the argument thus far is that society should use other major social institutions to protect those who are vulnerable vis-à-vis the corporation. The objection recognises the importance of protecting the vulnerable from the corporation but holds that corporate responsibilities do not need to take account of vulnerability considerations directly so long as other major social institutions can protect people. Society should use consumer protection law, contract law, employment law and other similar laws and regulations to protect people in their interactions with the corporation, as well as protective redistributions and social security which give people the resources and financial security to resist domination and exploitation. Under this system, employment law could protect vulnerable workers in their employment terms, working conditions and health and safety standards, and social security support could give workers a robust safety net so that they can challenge, or reject, employment terms that are dominating or exploitative. The objection is a nuanced variation on the consistency condition, in that it holds that shareholder value maximisation can be made consistent with protecting the vulnerable through countervailing legal protections by other major social institutions.[144]

Countervailing legal protections face, however, the same two problems that the market failures approach faces. First, they will be incomplete in protecting the vulnerable, because there is a wide and granular range of ways that a profit-maximising corporation can dominate and exploit people, as discussed above. Indeed, many of the vulnerabilities are so granular that they are inappropriate for legal protections of the kind contemplated by the objection, and non-corporate laws cannot protect against the specific vulnerabilities that the corporation creates, such as those concerning firm-specific commitments. Second, the problem remains of the corporation's disregard for vulnerability considerations in its particular interactions with people, including the ways that this can undermine and corrode social relations of equality. Whilst robust protections in law and social security might mitigate these problems, they cannot obviate them entirely.

This is not to say that these other protections are not useful or not required. Given the importance of protecting the vulnerable, there may be an argument for bolstering the stakeholder vulnerability obligation with legal protections in other major social institutions.

[144] Although it is not based on social egalitarianism, the line of thinking behind this objection is defended by some legal theorists who argue for shareholder value maximisation whilst also granting that there are other important values beyond efficiency. For example, Strine (2015) argues that other important values that are connected to the public good should be protected by non-corporate laws rather than by legal responsibilities in corporate law.

But such an argument can justify these legal protections as complementary mechanisms to further protect against some, not all, of the relevant vulnerabilities.

5.6.2 The vulnerability argument for shareholder primacy

One prominent argument for shareholder primacy is that the corporation should be run in shareholders' interests because they are the most vulnerable stakeholder group, given their position as residual claimants with no contractual, fixed return (Marcoux, 2003; Strudler, 2017). The similarities between this shareholder vulnerability argument and the stakeholder vulnerability obligation call for some clarifications about the relationship between the two arguments, including whether the stakeholder vulnerability obligation could entail shareholder primacy given how vulnerable shareholders are.

The two arguments differ, however, in their conception of vulnerability. The shareholder vulnerability argument considers only vulnerability to exploitation and registers a concern only with the *most* vulnerable stakeholder group, as it awards control of the corporation to shareholders on these grounds. Whereas the stakeholder vulnerability obligation has a wider definition of vulnerability that encompasses both exploitation and domination, and it conceives of vulnerability protection as a stringent constraint on corporate behaviour that requires that everyone's vulnerabilities are protected. Accordingly, the stakeholder vulnerability obligation does not, when worked through, entail shareholder primacy as all stakeholders' vulnerabilities should be protected against. In any case, it is difficult to see why shareholders should be considered the most vulnerable stakeholder group (see, e.g., Mayer, 2013). Workers are subject to a comparatively larger range of vulnerabilities, given they also make firm-specific commitments to the corporation, they are often reliant on pay as their main source of income and they cannot spread their risk in the same way that shareholders can spread their risk across shareholdings in different corporations. Workers' job search and switching costs are more costly than changing share ownership is, and workers typically have more risk-averse attitudes than shareholders given they are typically less wealthy.

5.7 Conclusion

The institutional system argument does not succeed in a social egalitarian framework because shareholder value maximisation is inconsistent with protecting the vulnerable from domination

and exploitation. Whilst the market failures approach fares better than less well-developed versions of shareholder value maximisation in terms of protecting the vulnerable, it fails to guard against the ways that the corporation disrupts power balances, intensifies vulnerabilities and undermines social egalitarian relations in the particular interactions the corporation structures. By contrast, a refined version of stakeholder theory that contains a stakeholder vulnerability obligation protects the vulnerable in a way that sustains social egalitarian relations. Moreover, the stakeholder vulnerability obligation directly responds to the central tension in the corporation as a major social institution, which is that its legal features unlock considerable efficiencies that enable the corporation to meet people's wants and needs whilst also exposing people to considerable vulnerabilities. The stakeholder vulnerability obligation responds to this tension by safeguarding people's vulnerabilities.

CHAPTER 6: EFFICIENCY, VAGUENESS, AND MOTIVE COMPATIBILITY

ABSTRACT: There are three arguments that purportedly favour the market failures approach, as a version of shareholder value maximisation, over stakeholder theory, and that are relevant to a social egalitarian conception of justice: an efficiency argument; a vagueness argument; and a motive compatibility argument. In this chapter, I identify important flaws in these arguments, and develop positive arguments for a refined version of stakeholder theory. This version, which I call social egalitarian stakeholder theory, adds an efficiency-based obligation to the vulnerability-based obligation from the previous chapter, and is, I argue, either superior to or just as good as the market failures approach when evaluated against the criteria of efficiency, vagueness and motive compatibility. As such, social egalitarian stakeholder theory is superior overall to the market failures approach.

6.1 Introduction

In this chapter, I evaluate three further egalitarian arguments that purportedly favour shareholder value maximisation, and in particular the market failures approach, over stakeholder theory: (i) the efficiency argument that shareholder value maximisation is considerably more efficient than stakeholder theory and leads to a more efficient, productive and altogether wealthier economy that better advances peoples' interests (Friedman, 1962; Heath, 2014: 25-92); (ii) the vagueness argument that shareholder value maximisation is considerably less vague than stakeholder theory, and is, therefore, more usefully action-guiding and more capable of holding corporate governors to account (Friedman, 1970; Heath, 2014: 42-92); and (iii) the motive compatibility argument that shareholder value maximisation's endorsement of the profit motive makes it more compatible than stakeholder theory with the prevailing motives in business (Heath, 2014: 145-204).

I evaluate these egalitarian arguments by comparing the market failures approach with a refined social egalitarian version of stakeholder theory, which comprises the stakeholder vulnerability obligation (from Chapter 5) and a new stakeholder efficiency obligation, which is grounded in the team production theory of corporate law (Blair, 2019; Blair and Stout, 1999; Stout, 2002). The stakeholder efficiency obligation requires that the corporation assembles a coalition of production stakeholders and aims to generate a large surplus through implicit, as well as explicit, contracts that also advance the interests of all its production stakeholders. The

application of the team production theory of corporate law to business ethics and its modification into a stakeholder-oriented obligation is a novel contribution to business ethics.

The claim I defend in this chapter is that when the market failures approach is compared to social egalitarian stakeholder theory, the egalitarian arguments either favour social egalitarian stakeholder theory or there is no clear-cut difference between the two approaches. When these egalitarian arguments are taken together with the evaluation of the institutional system argument and the importance of protecting the vulnerable (see Chapter 5), social egalitarian stakeholder theory emerges as superior to the market failures approach. There are, broadly speaking, two reasons underpinning this evaluation. One reason is that social egalitarian stakeholder theory, being a more definite version of stakeholder theory that is grounded in social egalitarian values of protecting the vulnerable and efficiency, can meet the various objections that a general version of stakeholder theory cannot. A second reason is that the egalitarian arguments for the market failures approach are, when scrutinised closely, weaker than claimed. And this is a serious problem for shareholder value maximisation in general because the market failures approach is one of its most well-developed versions and some of the flaws and weaknesses in the market failures approach apply *mutatis mutandis* to other versions of shareholder value maximisation.

To preview some of the main arguments in the chapter, with respect to the efficiency argument I argue that the efficiency case for the market failures approach is flawed by pressing an objection based on the general theory of the second best (Lipsey, 2007; Lipsey and Lancaster, 1956), which proves that there is no systematic causal connection between removing a market failure and efficiency. Building on arguments developed by others (e.g., Moriarty, 2020; Repp and Contat, 2019; Steinberg, 2017), I argue that the theory of the second best means that the market failures approach is flawed and, moreover, that it raises serious doubts about the efficiency case for shareholder value maximisation in general. By contrast, there is a plausible efficiency case for a version of stakeholder theory that is based on the team production theory of corporate law (Blair, 2019; Blair and Stout, 1999; Stout, 2002). With respect to the vagueness argument, I argue that the market failures approach is vaguer in its normative instructions than it at first appears and that social egalitarian stakeholder theory is clearer than other versions of stakeholder theory. The upshot is, I show, that there is no marked difference between the two approaches in terms of their clarity and ability to guide action. Finally, as regards the motive compatibility argument, I argue that although the market failures approach endorses the profit motive, it is no more compatible with self-interested motives in business than is social egalitarian stakeholder theory because its profit constraints are very demanding.

Moreover, a social egalitarian society is also concerned with how compatible corporate responsibilities are with sustaining egalitarian attitudes (Norman, 2015; Rawls, 1996: 269), and, on this criterion, social egalitarian stakeholder theory has some advantages over the market failures approach.

The three egalitarian arguments are 'egalitarian' in the sense that they are grounded in considerations that are relevant to a social egalitarian conception of justice. Nonetheless, the three egalitarian arguments, and the considerations that underpin them, are also relevant to *distributive* egalitarian conceptions of justice, and the efficiency argument and vagueness arguments are relevant to some non-egalitarian conceptions of justice. Therefore, the evaluations of these egalitarian arguments have a wider significance beyond social egalitarianism, and there are reasons to recommend social egalitarian stakeholder theory to non-social egalitarian conceptions of justice.

The chapter starts, in section 6.2, with an outline of the purported efficiency argument for the market failures approach followed by, in section 6.3, an evaluation of the argument and a defence of the efficiency of the stakeholder efficiency obligation. Section 6.4 summarises the resulting social egalitarian stakeholder theory. Sections 6.5 and 6.6 cover the vagueness argument, and sections 6.7 and 6.8 cover the motive compatibility argument. Section 6.9 concludes by drawing these arguments together with those in the previous chapter to articulate the overall case for social egalitarian stakeholder theory.

6.2 The efficiency argument

Efficiency is the cornerstone value on which the case for shareholder value maximisation is built, and the efficiency argument holds that shareholder value maximisation is considerably more efficient than stakeholder theory (Friedman, 1962, 1970; Heath, 2014: 25-92; Jensen, 2002). Efficiency is a relevant consideration in a wide range of normative frameworks, not merely social egalitarianism, and, as such, the efficiency argument counts as a reason to favour shareholder value maximisation across a range of conceptions of justice. For example, in the Chicago School's 'law and economics' approach, the supposed efficiency of shareholder value maximisation is taken to be a virtue because it purportedly also maximises aggregate social welfare.

Within a social egalitarian conception of justice, efficiency is an important justice-based value that is relevant to the determination of corporate responsibilities because society

has a justice-based reason to develop major social institutions that work to the mutual benefit of all citizens (see Chapter 4.2), and an efficient corporation makes more resources available for realising egalitarian distributions through an appropriate institutional division of moral labour (see Chapter 5). Moreover, efficiency is especially important when determining corporate responsibilities because the main justification for creating the corporation, as a distinctive major social institution with a special governmental provenance and special legal privileges, is that it realises efficiency gains that are unrealisable within the general rules of the market (see Chapters 1-3). Given that society creates the corporation for efficiency reasons, it is important that corporate responsibilities secure these efficiency gains so that, at a minimum, the corporation is more efficient than other non-corporate legal forms.

I focus here on Heath's (2014: 25–92) efficiency argument for the market failures approach for three reasons. First, in defending the efficiency of the market failures approach, Heath pinpoints a causal mechanism that supposedly links shareholder value maximisation to efficiency and that is also fundamental to other versions of shareholder value maximisation, most notably Friedman's (1962, 1970). Second, Heath (2014: 25-41) argues that the market failures approach remedies important deficiencies in other versions of shareholder value maximisation and, as such, it is purportedly the version of shareholder value maximisation that takes efficiency the most seriously. Third, Heath (2014: 68-92) also contrasts the efficiency of the market failures approach with the inefficiency of stakeholder theory, and Heath's efficiency argument *for* the market failures approach doubles as an inefficiency argument *against* stakeholder theory.

Before reviewing the efficiency argument, I note that there is some ambiguity about whether the market failures approach is based on Pareto efficiency, whereby it is not possible to improve any one person's situation without worsening another's, or Kaldor-Hicks efficiency, whereby someone's situation can be improved by worsening another's but only on the condition that it would be possible, in principle, for the winner to compensate the loser and reach a Pareto efficient outcome.[145] Although, in the main, Heath defends the market failures approach because it is Pareto efficient – for example, it aims at a "Pareto-optimum" and realises a "Pareto improvement" (Heath, 2014: 40) – elsewhere he argues that "Paretianism must be hedged and qualified in numerous ways, in recognition of the fact that any action that affects a sufficiently large number of people is bound to produce both winners and losers" (Heath, 2014:

[145] See Chapter 4.5 for some of the different efficiency definitions that are used to defend shareholder value maximisation.

197), a qualification which Moriarty (2020: 117-119) interprets as necessitating moving to the Kaldor-Hicks efficiency criterion.

Notwithstanding this ambiguity, I take it that the market failures approach is based on Pareto efficiency and, unless otherwise stated, 'efficiency' refers to Pareto efficiency. As I will discuss, the market failures approach is grounded in an economic model that generates a Pareto efficient result, and the aim of the market failures approach is to direct the corporation towards profit-maximising strategies that are Pareto improving, so that there are no losers from corporate actions and there is no need to move to a Kaldor-Hicks efficiency criterion. Moreover, across the many defences of the market failures approach, Heath (2014) repeatedly uses the Pareto efficiency criterion and, even when hedging and qualifying it (Heath, 2014: 197), he does not endorse Kaldor-Hicks efficiency. Indeed, it is possible that the point of the 'qualified' Pareto efficiency criterion is to recognise that it is impractical to insist on strict Pareto efficiency in actual markets, where people are so inter-connected and actions can affect many people in multiple ways.

A second clarification is that I also follow Heath (2014: 40) in using 'efficiency' as a shorthand for aiming at a "Pareto-optimum" and realising a "Pareto improvement," rather than realising a strict Pareto optimum.

6.2.1 The first fundamental theorem argument

Heath (2014: 25-41) defends the market failures approach with two arguments. The first argument, which I call the *first fundamental theorem* argument, begins by articulating a general efficiency argument for shareholder value maximisation, and then develops the market failures approach in order to remedy a weakness in this general argument.

The efficiency argument for shareholder value maximisation is, Heath argues (2014: 29-31), that there is a strong causal connection between profit maximisation and efficiency within competitive markets. This causal connection is a central insight from economic theory that has its roots in Adam Smith's 'invisible hand' defence of markets and that is proven by the first fundamental theorem of welfare economics (or *first fundamental theorem*) (see, e.g., Green et al., 1995). The first fundamental theorem mathematically proves that profit-maximising behaviour is Pareto efficient when markets are perfectly competitive, which is to say that they are characterised by a set of "Pareto conditions" (Heath, 2014: 34) that include full and symmetric information between market participants, zero transaction costs, no

asymmetric market pricing or bargaining power between market participants, and no externalities (i.e. positive or negative external effects on third parties to a transaction). In perfectly competitive markets, profit maximising behaviour produces efficient outcomes because it means that the corporation allocates resources by responding to price signals that reflect the relative scarcity of and intensity of demand for resources. The profit maximising corporation will, for example, enter a new market when there is a profit opportunity in purchasing resources at a lower price and transforming them into goods and services which it can sell at a higher price, and in doing so bring about Pareto improvements for the consumers and producers of those resources. Or the profit maximising corporation will compete for profit with other suppliers in its market by undercutting them on price or improving product quality, and in so doing realise a Pareto efficient outcome for consumers and producers.

Importantly, the efficiency of profit maximisation is unconnected to the presence, or size, of an actual profit, but comes from the behaviours which the pursuit of profit maximisation requires. Profit maximising behaviour is efficient because it requires the corporation to rely on the price mechanism to allocate resources, and to compete on price and quality until the market clears and all opportunities for Pareto improvements from market transactions are exhausted. Indeed, in the first fundamental theorem, even though corporations aim to maximise profits, the competitive dynamics mean that their realised excess profits are zero. As Heath (2014: 89) puts it, "the profit-seeking orientation of the [corporation] is valued only because of the role that it plays in sustaining the price system, and thus the contribution that it makes to the efficiency properties of the market economy as a whole."

This causal connection, in perfectly competitive markets, between profit maximising behaviour and efficiency is, Heath argues, the fundamental justification for shareholder value maximisation and underpins Friedman's (1962, 1970) defence of shareholder value maximisation. For, by making it a normative requirement that the corporation should aim to maximise profits, shareholder value maximisation obligates the corporation to act in such a way that it realises an efficient allocation of resources in the market.

Heath argues that there is, however, a deficiency in the efficiency argument for shareholder value maximisation, at least as an obligation to maximise profits simpliciter. The problem is that the efficiency argument is predicated on perfectly competitive market conditions, but actual markets are not perfectly competitive, and the Pareto conditions are never satisfied in their entirety. Actual markets are characterised by information asymmetries, non-negligible transaction costs, market power imbalances, and externalities, amongst other

things.[146] In actual market conditions, the causal connection between profit maximisation and efficiency can break down and profit maximising behaviour can lead to Pareto inefficient outcomes – or, as economists call such situations, 'market failures.'[147] For example, a profit maximising corporation may use its informational advantages to mislead its customers about product quality, or it may profit from high levels of polluting production activity that impose negative externalities on other citizens, or it may use its market power to temporarily set loss-leading prices so as to force new entrants out of the market and then set prices above market clearing prices.

Given that market failures are pervasive, Heath argues that shareholder value maximisation must discriminate between efficient and inefficient profit maximising strategies. Most versions of shareholder value maximisation draw some such distinctions, but no version of shareholder value maximisation comprehensively rules out all inefficient profit maximising strategies. For example, an efficiency rationale arguably underpins Friedman's prohibition on profiting through "deception or fraud" (1962: 133), but, as Heath (2014: 35) points out, Friedman argues against constraining profit maximisation to reduce pollution even though pollution can be a negative externality.

Heath proposes the 'market failures approach' as a modified version of shareholder value maximisation that addresses this problem. The market failures approach obligates the corporation to maximise profits but only in ways that do not take advantage of any market failures, the idea being that if the corporation acts as if it is operating in a perfectly competitive market, then the connection between profit maximisation and efficiency will be restored. Or, as Heath (2014: 36-37) puts it, "how should an ethical corporation behave in such a world? The answer is quite simple. The firm should behave as though market conditions were perfectly competitive, even though they may not in fact be."

[146] There is an extensive range of ways in which actual markets diverge from perfectly competitive markets (see, e.g., Lipsey, 2007). Most markets are oligopolistic or monopolistic markets in which corporations are not price-takers due to economies of scale, corporation-determined barriers to entry, product differentiation or regulatory barriers to entry; informational asymmetries are widespread; externalities, both positive and negative are widespread; people have unstable and / or other-regarding preferences; there are overlapping oligopolies based on spatial locations; government intervenes with regulations, taxes, subsidies, tariffs and non-tariff barriers; and technological change is endogenous, being path-dependent on previous innovations and dependent on the market structure.

[147] A market failure is a situation where market processes are Pareto inefficient because of a divergence in actual market conditions from the Pareto conditions.

Importantly, Heath (2014: 37) argues that the Pareto conditions can be transposed into a set of moral imperatives that should constrain the corporation when maximising profits, as follows:

1. Minimize negative externalities.
2. Compete only through price and quality.
3. Reduce information asymmetries between firm and customers.
4. Do not exploit diffusion of ownership.
5. Avoid erecting barriers to entry.
6. Do not use cross-subsidization to eliminate competitors.
7. Do not oppose regulation aimed at correcting market imperfections.
8. Do not seek tariffs or other protectionist measures.
9. Treat price levels as exogenously determined.
10. Do not engage in opportunistic behaviour toward customers or other firms.

The imperatives may take the form of extra-legal obligations, partly because it may be too difficult and costly to enforce them legally, but they are stringent and demanding restrictions on a corporation's profit maximising behaviour. These constraints therefore mark the market failures approach as a distinctive version of shareholder value maximisation and, Heath argues, they draw a clear and complete boundary between permissible profit maximisation strategies that are efficient and impermissible profit maximisation strategies that are inefficient.

6.2.2 The bottom-up strategy

The market failures approach faces an important objection, however, based on the general theory of the second best (Lipsey and Lancaster, 1956), which explores the efficiency properties of markets in which the Pareto conditions do not hold. Heath (2014: 38-41) identifies the objection but claims it can be defeated by supplementing the first fundamental theorem argument with a second, *bottom-up* strategy for the market failures approach.

The theory of the second best mathematically proves that when the Pareto conditions do not hold and markets are characterised by market failures, there is no systematic causal connection between removing a market failure and efficiency.[148] Removing a market failure,

[148] I use the phrase 'systematic causal connection' to indicate that whilst there is a causal connection, because altering a market failure will affect efficiency, there is no systematic relationship or rule that describes the causation. The only reliable connection between market failures and efficiency is when

whilst other market failures remain, may sometimes improve efficiency or it may sometimes create more inefficiencies, but there is no systematic rule as to what the effect will be.[149] Market failures interact with one another, in complex ways, and trying to bring about an efficiency gain by removing one market failure will have positive and negative effects on the efficiency of other market failures, so that there is no reason to think that there will be an efficiency gain overall. Consider, for example, a polluting monopolist that operates in a market with numerous market failures including negative externalities and asymmetric market power. Breaking up the monopolist's market power may increase efficiency, by improving the welfare of customers who benefit from the lower prices and higher volumes that come with greater competition, but it may also decrease efficiency because of the damage to third parties' welfare that comes from the increase in negative externalities from higher production. Absent any further information, the overall effect on efficiency from removing a market failure is indeterminate. (And in actual markets, the effect on efficiency may be further complicated by factors such as how competition affects research and development and technological progress, the disclosure of information to customers, or the degree of risk-taking and market stability).

The theory of the second best poses a serious problem for the market failures approach, as Heath acknowledges. The logic of the first fundamental theorem argument is that there is a systematic and positive causal connection between respecting the profit constraints and efficiency – the closer the corporation can get to simulating the conditions of perfectly competitive markets, the more efficient it will be. However, the theory of the second best proves that there is no such systematic causal connection, and there is no reason to think that a corporation that respects more of the profit constraints will be more efficient than a corporation that respects fewer of them.

Heath claims that the objection can, however, be defeated by using a "sort of 'bottom-up' reasoning" (Heath, 2014: 41) that moves away from considering the general conditions for market efficiency and looks instead at the particular efficiency gains that the corporation can realise for three major groups that it engages with – its shareholders, employees and customers. Heath does not lay out what this reasoning looks like, or why it looks at only these three groups, except to say that it should take a "resource custodianship perspective" (Heath, 2014: 40) in

there are zero market failures, in which case there is an efficient result. But as this result is outside of the scope of the theory of second best, when I state that there is 'no systematic causal connection' I am presupposing that there is at least one unavoidable market failure, i.e. although it may be possible to alter market conditions to satisfy more Pareto conditions it is impossible to satisfy all Pareto conditions.

[149] To put it another way, there is no systematic rule for the second best (i.e. second most efficient result after the first best of removing all market failures).

which the corporation's aim is to channel resources to best satisfy consumers' needs. Heath asserts that this bottom-up reasoning will justify profit maximisation, because a profit maximising corporation makes use of the price system to guide its allocation of resources, and that bottom-up reasoning will establish similar profit constraints to those stipulated by the first fundamental theorem argument:

> Using this sort of "bottom-up" reasoning, I believe that all of the constraints outlined… could be justified in some form. In this framework, the Pareto conditions would function as a set of heuristics, allowing us to determine what type of conduct, in general, is likely to constitute an illegitimate source of gain. However, actually making the case requires a more detailed analysis, one that examines the specific conditions of the market in question. (Heath, 2014: 41).

Although these comments on the bottom-up strategy are brief, the bottom-up strategy appears to have four features that differentiate it from the first fundamental theorem argument: (i) it looks at efficiency amongst a subset of the economy, being the particular corporation's shareholders, employees and customers, rather than considering efficiency across the whole economy; (ii) it uses resource custodianship reasoning to work out the best way to realise efficiency gains within the subset; (iii) it appears to allow for some flexibility in the market failures approach's profit constraints, so that they are not rigidly based on the Pareto conditions; and (iv) this flexibility in the profit constraints is justified by considering specific market conditions, whereas the Pareto conditions are designed to apply across all market conditions.

6.2.3 The purported inefficiency of stakeholder theory

The efficiency argument for the market failures approach also serves as an inefficiency argument against stakeholder theory. A key feature of stakeholder theory is, Heath argues, that it disregards the price system, either by requiring that the corporation advances the interests of its stakeholders or by requiring that the corporation allocates resources according to norms of distributive fairness (Heath, 2014: 68-92, 173-204). The efficiency argument suggests, however, that this will be inefficient because the corporation is not allocating resources according to the scarcity of and intensity of demand for resources. Stakeholder theory and, indeed, any normative theory which does not accommodate a role for the price system, is, Heath (2014: 199-200) claims, "anticapitalist" because it disregards the "compensating

benefits of the proper operation of the price system." Indeed, stakeholder theory's inefficiency is evidenced, Heath and Norman (2004) argue, by state-owned enterprises which, they claim, were inefficient because of a lack of price signals to guide the allocation of resources.

6.3 Evaluating the efficiency argument

6.3.1 Flaws in the efficiency argument

The argument I make here is that the implications of the theory of the second best are more problematic for the market failures approach than Heath acknowledges. There is already a collection of arguments that either object to or raise problems with the market failures approach based on the theory of the second best (Moriarty, 2020; Repp and Contat, 2019; Steinberg, 2017).[150] The argument I develop here adds to these objections by focusing on the bottom-up strategy, potential modifications to the market failures approach (Norman, 2011) and the implications of the theory of the second best for shareholder value maximisation in general.

(a) The theory of the second best and the bottom-up strategy

The theory of the second best clearly blocks the first fundamental theorem argument. This is a point that Heath concedes, to a certain extent, and which is well-argued by Steinberg (2017), Repp and Contat (2019) and Moriarty (2020). The market failures approach relies on there being a systematic and positive causal connection between respecting profit constraints that aim to remove market failures and efficiency, and yet the theory of the second best proves that there is no systematic causal connection between removing a market failure and efficiency. As such, the first fundamental theorem argument that it improves efficiency if the profit-maximising corporation is required to respect the Pareto conditions does not succeed.[151]

[150] Steinberg (2017) argues that the first fundamental theorem argument does not succeed because of the theory of the second best; Repp and Contat (2019) endorse Steinberg's argument and also reject the bottom-up strategy on the grounds that the theory of the second best also applies to subsets of the economy; and Moriarty (2020) argues that the theory of the second best means that the market failures approach cannot be directly applied to the real world of business, although he suggests some possible ways to modify the market failures approach.

[151] The one scenario in which the first fundamental theorem argument would theoretically succeed is if all corporations were able to perfectly mimic all the conditions of perfect competition. This scenario is, however, impossible in practice, given the pervasiveness of market failures, and it would also rely on the unrealistic assumption of perfect compliance with the market failures approach by all corporations.

What is perhaps less clear is that the theory of the second best also means that the bottom-up strategy cannot justify the market failures approach either. Consider the first two features of the bottom-up strategy – that it looks at a subset of the economy and uses resource custodianship reasoning. As Repp and Contat (2019: 17-19) argue, the scope of the theory of the second best also applies to subsets of the economy (Lipsey and Lancaster, 1956: 26) and, therefore, to the subset that is the shareholders, employees and customers of a particular corporation.[152] The market failures approach cannot, therefore, be justified by looking only at this subset. In addition, however, moving to a different type of reasoning, based on resource custodianship, will not avoid the objection of the theory of the second best. The assertion in the bottom-up strategy is that by using a different kind of reasoning, and approaching the efficiency problem from a somewhat different perspective, profit constraints that are based on the Pareto conditions can, nonetheless, be justified. It is not, however, the type of reasoning that is at fault in the market failures approach, but the formulation of the profit constraints themselves. Since the theory of the second best proves there is no systematic causal connection between the Pareto conditions and efficiency, it proves that profit constraints cannot be based on the Pareto conditions. Whatever the reasoning process that is used to consider efficiency gains, so long as it is worked out correctly, it will not derive a set of profit constraints that are based on the Pareto conditions, and it will not generate the market failures approach.

The impossibility of justifying the market failures approach through bottom-up reasoning can be illustrated by engaging in resource custodianship reasoning of the kind that Heath suggests. Consider trying to think through the profit constraints that should apply to realise efficiency gains for shareholders, employees, and customers in the example of the polluting monopolist from earlier. On the one hand, resource custodianship suggests that the corporation should not use its market power to set high prices but should lower its prices so as to channel more resources to consumers and realise efficiency gains for them. But on the other hand, resource custodianship suggests that higher sales volumes will also increase pollution and impose efficiency losses on the corporation's shareholders, employees, and customers.[153]

[152] Repp and Contatt (2019) also argue that choosing which groups belong in this subset is contentious and raises an identification problem that is analogous to the problem stakeholder theory faces in identifying its stakeholders, and which Heath (2014: 82) raises elsewhere.

[153] It will also impose an efficiency loss on third parties due to the negative externality of pollution, but Heath rules out considering this group in the bottom-up strategy. This is a curious omission, particularly as Heath (2014: 35) criticises Friedman (1962, 1970) for overlooking the inefficiency of profiting from negative externalities, and it makes it impossible to derive the market failures approach's profit constraint of 'minimizing negative externalities' from the bottom-up strategy, even if it was granted that bottom-up reasoning could be successful.

Moreover, there is the impact on the corporation's research and development programmes to consider. Should the corporation use its market power to maintain high profits and direct resources into projects that may realise efficiency gains in the future for customers, or should it cut prices, profits and, therefore, research and development, and focus on channelling resources to customers at the lower price? Bottom-up reasoning does not give a clear recommendation, because the overall efficiency effect of respecting these various profit constraints is unclear. Engaging in bottom-up reasoning does not lead to the market failures approach, just as the theory of the second best predicts.

In proposing the bottom-up strategy, Heath opens up the possibility that the market failures approach could be modified a little, as the other two features of the bottom-up strategy allow for some flexibility in the form that the profit constraints take and for adapting the profit constraints based on the specific market conditions. Is it possible, therefore, that the bottom-up strategy could justify a modified, more flexible version of the market failures approach?

Before answering this question, it is important to note that there are some limits to the modifications that can be applied to the market failures approach, otherwise it ceases to be recognisable as the market failures approach. Presumably the modified market failures approach must retain the profit maximisation obligation – the bottom-up strategy cannot allow the corporation to determine the allocation of resources by weighing up the efficiency gains and losses to its shareholders, employees and customers using context-specific information, as this would resemble a form of stakeholder theory. Presumably, also, the modified market failures approach must contain profit constraints that draw clear boundaries between permissible and impermissible profit maximisation strategies – Heath (2014: 37) argues that the profit constraints should act as "imperatives" so that the market failures approach is "an intermediate-level deontology" (Heath, 2014: 199). Within the space that remains, one possible version of a modified market failures approach is Norman's (2011: 53) proposal that the market failures approach should forbid profiting from "pernicious market failures." Norman defines pernicious market failures as those things that "even non-economist citizens will recognise as irresponsible" and that "genuinely leave [people] worse off." The first definition is rather subjective but the latter definition could be fleshed out as an imperative 'not to exploit market failures where they are especially large' or 'not to exploit the largest market failure.' Applying the flexibility that the bottom-up strategy allows for, perhaps the corporation should look at its market context, evaluate which are the largest market failures and refrain from exploiting those. Returning to the earlier example, this would instruct the corporation not to take advantage of

its market power because, as a monopolist, taking advantage of its market pricing power will be one of its largest market failures.

A modified market failures approach along these lines will not, however, avoid the objection from the theory of the second best either. This is because the theory of the second best has a wider scope than only the Pareto conditions – not only does the theory of the second best prove that there is no systematic causal connection between rules based on the Pareto conditions and efficiency, but it also proves that there is no systematic causal connection between *any* general rules, even ones which depart from the Pareto conditions, and efficiency.

It is instructive here to take a step back and review some of the responses to the theory of the second best within economic theory (see, e.g., Lipsey, 2007). The theory of the second best catalysed an extensive research programme into the possibility of developing general policy rules for realising efficiency improvements in conditions of imperfect competition. One branch of research focused on the possibility of developing 'second best' policy rules, which departed from simply trying to realise the Pareto conditions, but which could be applied to realise piecemeal improvements in efficiency. Examples of these second best policy rules include maxims such as 'reduce the highest market distortion,' 'two small distortions are better than one large one,' or 'reduce all distortions proportionately' (Atkinson and Stiglitz, 1976; Lipsey, 2007: 359-360). Even though it can be proven that these second best policy rules will generate an efficiency result in certain conditions, these second best policy rules cannot be applied as guidelines in actual market conditions. This is because the models either assume an unrealistically small handful of market failures compared to actual markets, or the models make unrealistically restrictive assumptions about market conditions, or they do not take account of the effects on efficiency from the policy's impact on technological change and growth (Lipsey, 2007: 358-360).[154] Or, to put it another way, these models circumvent the problems raised by the theory of the second best by assuming different, simpler market conditions.[155]

[154] Successful implementation of a second best policy rule also requires an infeasibly high level of knowledge about market conditions, so that the policy maker can select the second best policy rule that is appropriate for the particular market conditions.
[155] Another branch of research explored whether 'first best' policy rules based on removing market failures could, nonetheless, be justified in certain contexts (e.g., for special subsets of the economy, or in situations with particular technology functions, market structures or preference structures). Although there are models that prove that first best policy rules can be applied to certain situations, this does not mean that the first best rules can be applied to actual markets for similar reasons as with second best rules – the models' assumptions are either based on unrealistically small numbers of market failures or they are unrealistically restrictive, so that the modelled situations do not resemble actual market conditions (Lipsey, 2007).

Viewed against the backdrop of these developments in economic theory, Norman's (2011) proposal to prohibit only pernicious market failures is a kind of second best rule and, accordingly, it cannot succeed as a solution to the theory of the second best. Taking the example of the monopolist, there is no guarantee that prohibiting taking advantage of market power (because it is a large, or the largest, market failure) is an efficient rule. It might be that the efficiency losses from increasing the corporation's polluting activities and cutting its research and development, although too small individually to count as pernicious market failures, aggregate to an efficiency loss that outweighs the efficiency gain to consumers from cutting prices. Just as there are no second best policy rules that can be applied directly to actual markets to guarantee efficiency improvements, it is not possible to develop a modified, rules-based market failures approach that is efficient.

(b) Some problems for shareholder value maximisation

Not only does the theory of the second best mean that the efficiency argument for the market failures approach is seriously flawed, but it also points to a serious problem in the efficiency argument for shareholder value maximisation in general.

The problem can be seen by summarising how the efficiency argument for shareholder value maximisation contrasts with the deficiency the market failures approach identifies and with the implications of the theory of the second best. The efficiency argument for shareholder value maximisation is that profit maximising behaviour requires the corporation to allocate resources according to price signals that reflect the relative scarcity of resources. But this efficiency argument only succeeds in conditions of perfect competition, which are far from actual market conditions. In actual market conditions, which are imperfectly competitive, some profit maximising strategies will be inefficient, as Heath points out. The solution, which Heath proposes in the market failures approach, is to discriminate between efficient and inefficient profit maximising strategies. And yet, the theory of the second best proves that attempts to discriminate between efficient and inefficient profit maximising strategies based on general rules, as per the market failures approach, cannot succeed. The implication is, however, not only that the market failures approach is flawed, but also that shareholder value maximisation faces a dilemma. On the one hand, unrestricted profit maximisation is not justified as being efficient because there are pervasive market failures. But on the other hand, the theory of the second best proves it is impossible to place rule-based constraints on profit maximisation so that shareholder value maximisation is efficient.

Another way of looking at this dilemma is that it points to some problems in the usefulness of relying on price signals to realise efficiency. On the one hand, the efficiency argument for shareholder value maximisation depends on the claim that prices communicate information about how to transform and allocate resources efficiently. Indeed, Heath (2014: 219-224) links the efficiency argument to Hayek's (2002) information argument that one of the main functions of prices is that they reveal, and aggregate into a useful form, information about how resources should be allocated. On the other hand, however, when there are market failures, prices are not entirely reliable signals about how to allocate resources, and prices do not only reflect scarcity and demand intensity, but they also reflect how widespread and symmetrical information is, the balance of market power and barriers to entry, the level of transaction costs, and so forth. Given the pervasiveness of market failures, shareholder value maximisation requires some method for adjusting the price signals, or for adjusting how the corporation interprets them and alters its profit maximising behaviour, if it is to efficiently allocate resources. But it is unclear what this method should be and the method proposed in the market failures approach does not succeed. (Indeed, when viewed in this way, although the efficiency argument for the market failures approach is based on the efficiency properties of price signals, the profit constraints effectively require that the corporation discounts the price signals it receives and adjusts its behaviour based on its knowledge about negative externalities, market power, information, and so forth.)

To be clear, this is not to say that prices are uninformative as guides for resource allocation in conditions of imperfect competition, but neither are they perfectly informative. And given that actual markets are imperfectly competitive, the efficiency argument for shareholder value maximisation is flawed.

6.3.2 The stakeholder efficiency obligation

Not only is the efficiency argument for shareholder value maximisation in general, and the market failures approach in particular, flawed, but there is also a plausible efficiency argument for a version of stakeholder theory that is based on Blair and Stout's (1999) team production theory of corporate law (see also Blair, 2019; Stout, 2002). Whilst team production theory has had some influence on business ethics (see, e.g., Brink, 2010), its implications for an efficiency-based version of stakeholder theory have not, as far as I am aware, been explored.[156]

[156] Brink's (2010) argument that employees should be specially protected is not based on efficiency.

I argue, however, that team production theory justifies a plausible version of stakeholder theory that is efficient and that has considerable advantages over the market failures approach.

The argument for this version of stakeholder theory has a similar structure to the first fundamental theorem argument for the market failures approach: I take a model that generates an efficiency result by presuming certain corporate behaviours (Blair and Stout, 1999), and then defend a set of corporate responsibilities that require the corporation to act as the model presumes. Importantly, however, it is justifiable to use the team production model as a guide for regulating corporate behaviour because the model assumes realistic market conditions, unlike the first fundamental theorem argument.

(a) Team production theory

'Team production' is a kind of joint production where people work together as a team, by combining and co-ordinating different inputs (which can span a range of types of resource and productive contributions), to jointly produce an output that is non-separable, meaning that portions of the output cannot be separately attributed to the individual team members' contributions (Alchian and Demsetz, 1972: 779; Blair and Stout, 1999: 249). Team production can be more productive than non-team production, particularly where production depends on firm-specific commitments (i.e. where production depends on commitments of specific effort for the duration of the production project), on firm-specific investments and asset specialisation (i.e. specialised investments that have little value outside of the productive relationship and that are difficult to recover or withdraw once committed to the project), and on co-ordinating horizontal production relationships (i.e. production relationships that depend on incentivising voluntary contributions and investments from team members, as opposed to vertical production relationships where contributions and investments are co-ordinated using power or authority). When team production has some of these features, team production can generate new kinds of output or output of a higher quantity and/or quality than non-team production, and team production can deliver a large surplus, meaning that the value of the output exceeds the costs of team members' contributions and investments, which can be allocated so that each team member receives a positive return on their contributions – which is to say, that team production can generate large efficiency gains for the team members.

It is, however, difficult to write and enforce complete, explicit contracts – concerning commitments, investments and the allocation of the surplus amongst team members – that will generate the maximum (or even, sometimes, a material) surplus. A central reason for the

difficulty is that non-separability raises different problems depending on whether the explicit contracts are structured before or after production (Blair and Stout, 1999: 249-50). Ex ante explicit contracts that establish principles for dividing the surplus prior to production can encourage shirking, since team members have an incentive to 'free ride' on the investments and efforts of others. Shirking reduces the size of the surplus because shirkers make fewer productive contributions, and, moreover, it disincentives other team members from contributing their share of the optimal investment and effort. But ex post explicit contracts, where the surplus is divided up after it is generated, incentivise opportunistic rent-seeking as team members may seek to implement sharing rules that are more favourable to them. Such ex post rent-seeking can erode the surplus by directing effort and resources to squabbles over sharing rules, and the prospect of such disputes can, moreover, disincentivise team members from contributing their optimal investment and effort to production. These challenges caused by non-separability are compounded when team production is complex and continuous (i.e. production and output run continuously alongside each other, and ex ante and ex post periods are not clearly separable), and are ubiquitous when production involves firm-specific commitments and investments, which often create firm-specific production resources. Moreover, these challenges interact with other factors that make complete explicit contracts difficult, including: the difficulties of specifying, monitoring, measuring and evaluating contributions from team members; the challenges of co-ordinating interactive production, which depends on multiple, mutually dependent actions; the uncertainty about the size of a future surplus, including the uncertainty of future demand for the output; and the high transaction costs involved in attempting to specify a complete, explicit contract.

There is, because of these challenges, a 'team production problem.' Whilst team production can potentially generate a large surplus, it is difficult to write and enforce explicit contracts that do generate a large (and, especially, the maximum) surplus from team production. Here is a stylised example of the problem. The production of a new range of electric cars depends on assembling a diverse team of people, with skills ranging across the technological, operational, financial, and marketing spheres (to name but a few), who commit their time and energy, and specialise their skills, to the project. And the production also requires capital investment to create, jointly with the contributions of other team members, specialised technology, software, know-how, and production lines. Non-separability means it is impossible to determine who is individually responsible for a part of the value of the electric car, and production is complex, interactive and people's contributions are hard to monitor and evaluate.

Accordingly, it is difficult for this team to structure explicit contracts amongst its members that are complete and that fully mitigate the risks of shirking and rent-seeking.

There is a range of different solutions to the team production problem, which typically involve varying who governs the team, who owns its resources, or who is entitled to the surplus, but many of these proposed solutions either apply only to a very narrow (and unrealistic) kind of team production problem or they create new problems of their own.[157] In the team production theory of corporate law, Blair and Stout (1999) argue that the corporation's legal structure is capable of optimally solving the team production problem because the corporation is uniquely capable of organising production in a way that makes use of implicit contracts.[158] Building on Rajan and Zingales's (1998) economic model, Blair and Stout argue that the corporation can generate a large surplus because it enables the team to delegate governance of the team, including decisions about task and reward allocation, and ownership of firm-specific resources and of the surplus, away from the team itself and to a potentially neutral third party that is the corporation, as a separate legal entity, and the directors who govern it.

As a third party, the corporation can act as a "mediating hierarch" (Blair and Stout, 1999: 319) between team members. By making use of implicit contracts, the corporation can elicit optimal contributions from team members on the understanding that team members will be treated considerately when the surplus is allocated and that implicit terms will be honoured. As a third party to the team members, the corporation is well-placed to monitor contributions (as best it can, given the challenges of monitoring) and no team member can overly influence, hold-up or wastefully squabble over how the surplus is allocated. And, as team members reasonably expect that their contributions will be appropriately rewarded and that their implicit

[157] See Blair (2019: 199-202) for an overview of some of the proposed solutions. As Blair (2019: 199) notes, Alchian and Demsetz (1972) proposed one of the first solutions, when they argued that the team should appoint a monitoring specialist who has hiring and firing authority over the team members, pays team members their opportunity cost and is entitled to all of the surplus. This solution only works, however, when contributions are easily monitored, production is not interactive, and team members do not make firm-specific commitments or investments, i.e. long-term relationships between team members are not important to production and people do not specialise their human capital to production. When these conditions do not hold, however, Alchian and Demsetz's solution is not efficient. Indeed, Holmstrom's (1982) 'impossibility theorem' proves that, when some of these conditions do not hold, it is mathematically impossible to write explicit contracts amongst team members that will generate the maximum surplus.

[158] An implicit contract refers to a contract that is not entirely explicit, so that some of its terms are based on understandings rather than explicit, legally enforceable terms. For example, an employment contract is an implicit contract to the extent that, although it contains explicit terms regarding pay and hours, it contains implicit understandings concerning flexibility in working patterns, how to work with other team members, job security, opportunities for promotion and so forth. See also Chapter 5.5: 154 fn141.

contracts will be honoured by this third party, then they are motivated to make firm-specific commitments and investments and to coordinate their effort in ways that raise the productivity of the corporation as a whole. In effect, by delegating key governance and surplus allocation decisions to the directors, the directors can apply their judgement about how best to structure and then honour implicit contracts and how to allocate the surplus considerately, and can thereby increase the surplus overall.

Crucially, this solution depends on directors acting in concert as a mediating hierarch that aims to maximise the surplus.[159] Directors must regard their role, and the function of the corporation more broadly, as that of assembling a productive coalition that generates a surplus to the benefit of all its contributing team members. And they must recognise that, to fulfil this role, the corporation must enter into and honour implicit contracts, and the directors must resolve disputes and allocate the surplus considerately.[160] In this respect, Blair and Stout (1999: 289) argue that team production theory has both positive and normative implications. From a positive perspective, team production theory is amongst the best explanations of how corporate law works in practice, including how to interpret directors' legal fiduciary duty to act in the interests of the corporation as a whole. And from a normative perspective, team production theory suggests that directors *ought* to run the corporation in this way in order realise efficiency benefits.

(b) The stakeholder efficiency obligation

Building on Blair and Stout's claim that team production theory has normative implications for corporate law, I argue that team production theory grounds an efficiency argument for a version of stakeholder theory that places legal and extra-legal obligations on the corporation. To put it briefly, the argument is that the corporation, and in particular its directors, should act as a mediating hierarch between team production members, as is assumed in the team production model, in order to realise the efficiency gains that come from generating a large surplus. And this obligation is a version of stakeholder theory because it obliges the corporation to advance

[159] Specifically, Stout (2002: 1198) claims that directors should "maximise the sum of all the risk-adjusted returns enjoyed by all of the groups that participate in" the corporation.
[160] In fulfilling this role, directors may, and frequently do, delegate this role to the corporation's managers. As Blair and Stout (1999: 282) note, the mere presence of a mediating hierarch who is known to act neutrally can lead team members to resolve many of their disputes themselves, rather than referring them to the directors. Indeed, Blair (2019: 199, 203-4) argues that it is typically only the "most conflict-laden" decisions about the surplus that are referred to the directors, such as the appointment and remuneration of the CEO, plans for mergers or acquisitions, or the award of dividends.

the interests of people who make production contributions based on implicit contracts (*production stakeholders*), albeit the group of production stakeholders is a narrower group of stakeholders than in other versions of stakeholders.

Before expanding on the argument, I clarify that this version of stakeholder theory does not assign any ownership rights over the corporation to production stakeholders. The clarification is necessary because Blair and Stout (1999) claim that team production theory is an alternative to the stakeholder approach to corporate law,[161] whereas I argue it is compatible with a version of stakeholder theory. A stakeholder approach to corporate law is, however, an approach that changes the legal structure of the corporation so that stakeholder groups have ownership and voting rights over the corporation and positions on the board as directors. Whereas the version of stakeholder theory I defend here does not alter the corporation's legal structure (see Chapter 4.3), but instead assigns responsibilities to the corporation that are based on stakeholders' interests. As such, this version of stakeholder theory is consistent with the team production model.

Team production theory justifies a stakeholder efficiency obligation of the following kind:

> *Stakeholder efficiency obligation:* the corporation has an obligation to assemble a coalition of production stakeholders that aims at generating a large surplus, by entering into and honouring implicit, as well as explicit, contracts that advance the interests of all production stakeholders.

The stakeholder efficiency obligation requires that the corporation aims directly at advancing the interests of its production stakeholders, which requires the corporation to honour implicit contracts that advance their interests and to treat all production stakeholders considerately when allocating the surplus. And in doing so, the corporation is able to realise efficiency gains for the production stakeholders, because the corporation is able to foster productive relationships that are based on firm-specific commitments, firm-specific investments, and coordinating horizontal production. The corporation should also make use of explicit contracts to realise a large surplus, but it is the implicit contracts that are the most important for realising a large surplus in the specific context of the corporation.

[161] Blair and Stout (1999) argue against sharing ownership and governance of the corporation amongst stakeholders because this removes the neutrality and independence of the corporation and the board, on which the team production solution depends. If stakeholders own or run the corporation, there is a risk of ex post and ex ante inefficiencies from shirking and rent-seeking respectively.

The stakeholder efficiency obligation is able to meet, to a certain extent, two criticisms levelled against stakeholder theory – that it does not identify who is a 'stakeholder' and what counts as their relevant interests (Ors and Strudler, 2010; see also Chapter 5.5). A production stakeholder is anyone who contributes to the corporation's production, whether it is a contribution of their time, energy, effort, skills, resources, or investment, on the basis of an implicit contract.[162] Production stakeholders can be grouped into some of the major categories that are standard to stakeholder theory, on the basis that these groups make similar production contributions and have similar implicit contracts with the corporation, in which case the production stakeholders include the corporation's shareholders, employees, suppliers, lenders, and the local community, to the extent that it makes productive commitments to or investments in the corporation. Notably, these groups of production stakeholders exclude two other categories that are standard to stakeholder theory, the customers and the environment, and I justify this exclusion below. These standard groupings are not, however, rigid, and the groupings of production stakeholders can take a more granular form and allow for sub-groups of stakeholders if different production stakeholders make different types of contribution or have different types of implicit contract. As with the stakeholder vulnerability obligation (see Chapter 5.5), the precise stakeholder groups will be particular to the corporation. Moreover, the relevant stakeholder interests are those that are represented in the implicit contracts the corporation enters into. They will typically include the production stakeholder's financial interest in sharing the surplus (e.g., by way of additional payments, promotions and pay rises, dividends, and so forth), but they can also include their non-financial interest in other things that matter to them (e.g., employees' interest in job security, flexibility and training, or in the corporation's social or environmental effects).

The stakeholder efficiency obligation is also primarily an extra-legal obligation. Partly, this is because implicit contracts are, by their nature, difficult to legally enforce. And partly this is because the obligation requires that directors exercise their judgement over such factors as who should join the corporation as a production stakeholder, what implicit contractual terms will best elicit productive contributions, and how to allocate the surplus amongst productive stakeholders – all of which are contextual to the particular corporation and its market context. Indeed, although Blair and Stout (1999) argue that team production theory should (and, to a

[162] The stakeholder efficiency obligation therefore identifies a similar group of stakeholders as do the quasi-property right based stakeholder theories (Asher et al., 2005; Donaldson and Preston, 1995), but the rationale for identifying them is based on their instrumental contribution to efficiency as opposed to an intrinsic contribution-based right.

certain extent, does) guide corporate law, they also argue that the law should allow for directors to exercise a considerable degree of judgement.

Practically speaking, the stakeholder efficiency obligation requires different corporate behaviours to shareholder value maximisation. The differences are clearest in terms of how to allocate the surplus; shareholder value maximisation requires that a corporation's surplus should be allocated as profit for shareholders, and either distributed as dividends or reinvested in projects that are expected to generate even greater profits for shareholders. The stakeholder efficiency obligation, by contrast, requires that the corporation's surplus is allocated to all its production stakeholders in accordance with implicit contracts. Such allocations should include rewards to shareholders, as they are important production stakeholders, but it also suggests actions such as raising salaries and employee benefits (e.g., increasing pension contributions, improving sick leave or childcare benefits), or contributing to the local community if it has supported the corporation (e.g., community investment programmes or job creation schemes). Another clear difference is that the stakeholder efficiency obligation requires that the corporation honours implicit contracts, whereas shareholder value maximisation requires that implicit contracts be broken if doing so will improve profits. If the corporation is acquired by a different group of shareholders or if there is a change in CEO, the stakeholder efficiency obligation therefore requires that directors ensure that implicit contracts continue to be honoured and will result in greater continuity. Whereas shareholder value maximisation, in disregarding implicit contracts, permits the new shareholders or new CEO to implement dramatic changes.

Methodologically, the stakeholder efficiency obligation is justified by a similar logic to the first fundamental theorem argument for the market failures approach, insofar as the obligation is based on a model that realises an efficiency result. However, the stakeholder efficiency obligation has three advantages over the market failures approach in this respect. First, the team production theory model assumes realistic conditions that resemble the conditions that corporations actually operate in. Indeed, the aim of the team production theory is to clarify the kinds of problems that team production actually faces and develop a solution to these problems. The realism of the conditions means that there is a strong efficiency case for requiring the corporation to act as per the team production theory model because the corporate behaviour that the obligation requires is the same behaviour as that the model presumes, and that generates an efficiency result. Whereas the problem with the first fundamental theorem argument is that because the model's assumed conditions do not resemble actual market conditions, the market failures approach requires corporate behaviour that is different

behaviour to that which is presumed in the first fundamental theorem. Rather than a straight read across from modelled behaviour to actual behaviour, the market failures approach requires that corporate behaviour is adapted to compensate for the fact that the Pareto conditions in the first fundamental theorem do not match actual market conditions.

Second, the greater realism of the assumptions that justify the stakeholder efficiency obligation means that it avoids the objection of the theory of the second best. One of the reasons the theory of the second best objection arises is that the market conditions diverge so very greatly, and in such complex ways, that it is inappropriate to apply rules (and reasoning) that are based on the first fundamental theorem. Whereas, because the team production theory model does resemble the conditions the corporation faces, it *is* appropriate to apply the rules assumed in the model.

Third, the efficiency argument for the stakeholder efficiency obligation depends on the corporation's special legal features, namely its separate legal personality and its director governance. This is an advantage because it means the efficiency argument is built on the distinctive legal features of the corporation, and how the corporation is especially capable of facilitating implicit contracts and realising efficient production in ways that transactional, non-corporate market mechanisms cannot. By contrast, the market failures approach does not differentiate the corporation from other market participants, and its obligations are based on trying to make transactional market mechanisms and the price mechanism as efficient as possible. Although this approach is deliberate (Heath, 2014: 19), it is problematic because it does not engage with the corporation's distinctive potential for facilitating non-transactional, non-price sources of efficiency gains.

Notwithstanding these advantages, there are some limits and caveats to the efficiency argument for the stakeholder efficiency obligation. First, by focusing on the team production problem, the stakeholder efficiency obligation does not engage with the efficiency effects the corporation has on other, non-production stakeholders – most notably its customers and third parties, such as environmental impacts.[163] Second, it is unclear what the obligation requires in situations where there is no team production problem, such as when contributions are easy to monitor or production does not depend on firm-specific contributions and investments, and production could be coordinated predominantly by explicit contracts. These are, I accept, weaknesses in the efficiency argument, but I will not address them here. Instead, whilst noting

[163] In those cases where customers make productive contributions, such as when they provide information and data resources to the corporation, then the obligation can accommodate the efficiency effects on customers.

that it has some weaknesses, I claim that the efficiency argument for the stakeholder efficiency obligation is plausible and is, moreover, stronger than the efficiency case for the market failures approach, for the reasons given above.

6.4 Social egalitarian stakeholder theory

The stakeholder efficiency obligation can be combined with the stakeholder vulnerability obligation to formulate a social egalitarian stakeholder theory that is based on two social egalitarian values, that of protecting the vulnerable from domination and exploitation, and advancing efficiency. The resultant social egalitarian stakeholder theory requires the corporation to:

(1) protect the vulnerable by refraining from dominating or exploiting its stakeholders (the *stakeholder vulnerability obligation)*; and

(2) assemble a coalition of production stakeholders that aims at generating a large surplus, by entering into and honouring implicit contracts that advance the interests of all production stakeholders (the *stakeholder efficiency obligation).*

The arguments that I have made thus far justify the plausibility of these two obligations individually and defend social egalitarian stakeholder theory as more justifiable than shareholder value maximisation, and the market failures approach in particular.

When combined, these two obligations cohere with each other in a workable way. The stakeholder vulnerability obligation rules out generating surpluses by dominating or exploiting stakeholders (including customers and third parties who do not figure in the stakeholder efficiency obligation), but within these constraints the stakeholder efficiency obligation requires the corporation to advance the interests of production stakeholders.

Social egalitarian stakeholder theory as presented here is *not* a complete stakeholder theory. Most notably, the corporation’s effects on non-production stakeholders are omitted from the efficiency argument, and there are other social egalitarian values to consider (see Chapter 4.2). I will not, however, develop social egalitarian stakeholder theory any further because, as it stands, the theory is sufficiently tractable to evaluate it against the remaining two egalitarian arguments.

6.5 The vagueness argument

A third argument that purportedly favours shareholder value maximisation over stakeholder theory is that shareholder value maximisation is clear in its normative instructions (Friedman, 1970; Heath, 2014), whereas stakeholder theory is vague.

The vagueness argument claims that the obligation to *'maximise the corporation's profits for shareholders'* is clear and action-guiding,[164] as corporate governors know what it means to maximise profits and can distinguish which strategies are, broadly speaking, more or less likely to be profitable. Sometimes the profit constraints that distinguish between acceptable and unacceptable profit-making strategies are vague; Friedman's (1970) version of shareholder value maximisation is particularly vague in its requirement that profit maximisation should be constrained by "the basic rules of the society, both those embodied in law and those embodied in ethical custom" and should stay "within the rules of the game …without deception or fraud." Heath (2014: 31-41) argues, however, that the market failures approach addresses this weakness by stating a list of ten, supposedly clear, profit constraints (see section 6.2.1 above; Heath, 2014: 37).

By contrast, stakeholder theory's requirement to *'take account of the interests of all of the corporation's stakeholders'* is held to be unclear in many respects (Heath, 2014: 79-85; Orts and Strudler, 2010). One reason is that it is unclear who the corporation's stakeholders are, particularly as different versions of stakeholder theory use different definitions. A second reason is that it is unclear which of a stakeholder's various interests are relevant to the corporation's decisions. Third, it is unclear what it means 'to take account of' stakeholders' interests, and whether this requires a kind of equality in how different stakeholder's interests are considered and advanced by the corporation or whether this requires an ordering of stakeholders' interests – in which case, it is unclear how to rank stakeholders' interests. A fourth reason is that stakeholder theory is sometimes held to have multiple, simultaneous objectives so that it is unclear which objective should be prioritised (Jensen, 2002), or, indeed, contains a degree of incoherence insofar as stakeholder theory might require the corporation to simultaneously maximise all stakeholders' interests.

In this chapter, I am concerned with the vagueness argument as it applies to social egalitarian stakeholder theory. As such, the issue is whether the stakeholder vulnerability

[164] E.g.: "the criterion of performance is straightforward" (Friedman, 1970).

obligation and stakeholder efficiency obligation are vague in terms of what they require the corporation to do or how they constrain its actions, and, in particular, whether these obligations are unclear in how they identify stakeholders or stakeholders' interests, and how the corporation should rank and order their interests.

Vagueness gives rise to two serious problems that are relevant to an egalitarian conception of justice. First, if corporate responsibilities are vague, then they cannot be action-guiding. Well-intentioned corporate governors will not know how they should govern the corporation, and the egalitarian values that underpin the corporate responsibilities may not be realised or respected. Second, directors and managers may take advantage of the ambiguity in their obligations to advance their own ends, whatever these may be. For example, directors and managers may shirk and seek the easy life, award themselves overgenerous pay awards, seek status through corporate empire-building, or over-prioritise their own, purportedly social justice-based, concerns (Friedman, 1970). The risk of 'managerialism' whereby "ownerless corporations" (Berle and Means, 1932) with great power and resources are run in the interests of managers is a recurrent concern in business ethics and corporate governance, and vagueness compounds this risk because it means that corporate responsibilities are incapable of holding opportunistic managers to account. Corporate governors may claim they are meeting their responsibilities but, without a clear standard against which to evaluate their performance, the risk is that they are in fact running the corporation according to their own standards and interests (Heath and Norman, 2004).[165] Such a lack of accountability is doubly problematic because not only does it mean that corporate governors would be failing to realise or uphold the relevant egalitarian values they are tasked with, but they would also be taking advantage of their position in the corporation to exploit other people – namely, shareholders, in the case of shareholder value maximisation, and stakeholders in the case of social egalitarian stakeholder theory – which, given that protecting vulnerable people from exploitation is an important social egalitarian consideration, a social egalitarian has added reason to be concerned about.

6.6 Evaluating the vagueness argument

If the comparison is between a general version of shareholder value maximisation and a general version of stakeholder theory, then I grant that the vagueness argument would count in favour

[165] Depending on the standards to which someone thinks the corporation should be held to account, this particular problem of claiming that the corporation meets an obligation when it does not is sometimes called sustainability-washing, green-washing, purpose-washing or SDG-washing.

of shareholder value maximisation. An obligation to maximise profits is relatively clear and the profitability metric can be used to hold directors and managers to account, whereas an obligation to take account of stakeholders' interests is vague and has no coherent standard for accountability. This is not, however, the relevant comparison, and a social egalitarian society should contrast the most well-developed and justifiable versions of these two approaches, being the market failures approach and social egalitarian stakeholder theory. When these two approaches are compared, I argue that there is no clear-cut difference between them in terms of their degree of clarity.

To a certain extent, the clarity of the two approaches is a secondary consideration to their merits in terms of protecting the vulnerable and efficiency. Given that social egalitarian stakeholder theory is superior to the market failures approach on these two criteria (see Chapter 5, and sections 6.2 and 6.3 of this chapter, above), one could argue that it would still be superior even if it were considerably more vague, on the grounds of Keynes's adage that it is better to be vaguely right than precisely wrong. Nonetheless, given the problems that vagueness can give rise to, I think it is important to compare the clarity of the two approaches.

Although some of the profit constraints in the market failures approach are reasonably clear (e.g., "reduce information asymmetries between firm and customers"), others are not as clear as they might at first appear. The profit constraint to "treat prices as exogenously determined" cannot tell a corporation with a degree of market power how to set its prices. A monopolist, for example, can set any selling price and a monopsonist in the labour market can set any wage level, so what does it mean to treat its prices as exogenously determined? This profit constraint, which is highly relevant to many corporations given that most markets are highly concentrated ones in which corporations have a degree of market power (Lipsey, 2007), does not give clear guidance. Presumably it instructs a corporation with market pricing power to set its prices so that they are lower than the profit-maximising prices it could charge if it used its market pricing power, but it does not tell the corporation *how much* lower it should set its prices, and the profit constraint is in fact vague. Another profit constraint which is vague concerns how the corporation should respond to externalities. If a corporation has a production process that produces pollution as a negative externality, the profit constraint to "minimise negative externalities" does not tell a corporation by how much to reduce its pollution. If the effects of pollution on third parties were accounted for in the market so that, say, there was a Pigouvian tax on the negative externality, the efficient level of pollution would not be zero, but it would be set at a quantity where the marginal social benefits were equal to the marginal social costs. But how is the corporation supposed to know what level of pollution will minimize

the negative externality, in the absence of a Pigouvian tax? The problem is that the corporation cannot know what the appropriate level is and, moreover, the problem is magnified given that the corporation is required to minimise all of its different negative externalities.[166]

The underlying problem that generates the vagueness of these profit constraints comes from the tension within the market failures approach of requiring the corporation to act 'as if' it operates in conditions of perfect competition when it does not (see section 6.3.1). The corporation cannot know what prices would look like in conditions of perfect competition, particularly given how pervasive market failures are, and so the market failures approach's requirement to act 'as if' the corporation is in a perfectly competitive market is, in fact, unclear in terms of what it bids the corporation to do in actual market circumstances and requires a considerable amount of speculation on the part of the corporation.

By contrast, social egalitarian stakeholder theory is a clearer version of stakeholder theory. Its two obligations contain a definition of the relevant stakeholders (based on whether they are vulnerable to the corporation or contribute to its production, respectively), and a definition of which of their interests count (based on their interest in not being dominated or exploited, or the implicit contracts they agree with the corporation, respectively) (see Chapter 5.5, and section 6.3.2 above). Moreover, social egalitarian stakeholder theory is clearer than other versions of stakeholder theory in how to weigh up stakeholders' interests, with the stakeholder efficiency obligation requiring the corporation to enter into and honour implicit contracts that maximise the surplus, within the constraints of the stakeholder vulnerability obligation.

One feature of social egalitarian stakeholder theory is, however, that its obligations place requirements on the corporation that can be quite corporation-specific. Which stakeholders are especially vulnerable to domination and exploitation depends on the particular ways that the corporation engages with people, and the relevant interests of production stakeholders depend on the implicit contracts which the corporation enters into. This corporation-specificity, and also the corporation's reliance on implicit contracts, means that some of the obligations implications are unsuited to legal enforcement, as this would require a greater degree of consistency in the relevant standards across all corporations.

[166] The ten profit constraints are only "some examples" (Heath, 2014: 37) of the constraints that the Pareto conditions should generate, and there are potentially further problems with vagueness in respect of other constraints that would arise if the profit constraints were listed in full. For example, presumably the market failures approach should also require the corporation to 'maximise positive externalities' as well, which further adds to the vagueness of the constraints.

Corporation-specificity and a reliance on extra-legal enforcement is not, however, the same as vagueness. Indeed, within these constraints, the obligations could be clearly articulated by requiring different kinds of corporation in different sectors to develop and be held to account to voluntary, sector-specific corporate governance standards, which set out the typical vulnerability and efficiency issues (i.e. the typical implicit contractual terms) that are relevant to the corporations in their sector. Moreover, the implication of extra-legal obligations is that the corporation should be regulated in extra-legal ways. As Mill (2011: 74-80)[167] explains, there are a range of 'sanctions'[168] of morality which societies use to modify behaviour and secure compliance with obligations, based on both positive incentives and negative disincentives to comply. These 'sanctions' include informal rewards and penalties, such as praise for fulfilling or moral criticism for not fulfilling moral obligations (Scanlon, 1998: 152-58), and the "internal sanctions" of conscience (Mill, 2011), such as self-approval or self-disapproval. In the corporate context, society should therefore make use of appropriate extra-legal sanctions to regulate the corporation, which might include measures such as customer boycotts, public pressure, media coverage or, in extreme circumstances, requiring corporate governors to appear before public select committees.

In summary, when the market failures approach is contrasted with social egalitarian stakeholder theory, there is no clear-cut difference between them in terms of clarity. Moreover, to the extent that some of the obligations in social egalitarian stakeholder theory are extra-legal, the corporation should be held to account against voluntary codes and standards, using extra-legal sanctions.

6.7 The motive compatibility argument

A final argument for shareholder value maximisation is that it is more compatible with the typically prevailing motives in business than stakeholder theory is (Heath, 2014: 25-31, 93-115, 173-205). The motive compatibility argument approaches reasoning about corporate responsibilities from the perspective of non-ideal theory.[169] Although there are different ways

[167] Chapter III, paragraphs 3-11.

[168] 'Sanctions' is sometimes taken to indicate a form of approval (i.e. to sanction somebody to do something is to approve or permit them to do something) or of disapproval (i.e. to sanction somebody is to apply a punishment to them). Mill's usage of 'sanction' also has this dual meaning, and uses the term sanctions to refer to the sources of pleasure and pain which in fact motivate people to act.

[169] In this respect, the motive compatibility argument has similarities to "business institutions as objects for 'non-ideal' theory" (Néron, 2015: 99) arguments, which hold that there are limits to the demands

of distinguishing between ideal and non-ideal theory (Valentini, 2012), the conception of non-ideal theory here is that justice-based obligations should be tailored to take account of compliance issues and feasibility constraints.[170] Whereas ideal theorising presupposes full compliance with obligations, even with obligations that are demanding and that substantially conflict with people's own interests, non-ideal theory must respond to partial compliance and aim to develop obligations that can feasibly be complied with, taking into account the realistic influence that legal enforcement and extra-legal social norms will have on compliance. This does not mean that obligations cannot conflict with self-interested motives – as Heath (2014: 26-9) argues, business ethics is not 'ethics' if it reduces to self-interest – but it does mean that the conflict cannot be so great that people will not realistically comply with them. In short, obligations must be reasonably "incentive-compatible" (Heath, 2014: 204), based on a realistic characterisation of people's motives and of the legal and extra-legal mechanisms available to enforce and encourage compliance.

In the context of business ethics, Heath (2014: 173-205) argues that incentive-compatibility has two implications. First, business is a domain with some special empirical characteristics, which raises special problems of incentive-compatibility when it comes to the implementation of distributive egalitarian principles. Not only are markets imperfectly competitive and subject to market failures, but markets are also characterised by large-scale and anonymous interactions that significantly weaken people's motivation to comply with moral constraints. In other domains, by contrast, people's motivation to comply with moral constraints is higher because there is a greater level of social solidarity. As an example, Heath (2014: 181) points to Cohen's (2009) camping trip, where, because people cooperate through small-scale, face-to-face interactions, strict egalitarian distributive principles, such as sharing all food and shelter equally, are feasible. The empirical facts about markets mean, Heath argues, that egalitarian principles cannot regulate market interactions as people will not forego their self-interest for the sake of realising an egalitarian distribution. Indeed, Heath argues that the dominant motive in business (and in the market more widely) is a kind of self-interestedness that is particularly concerned with personal financial enrichment, and that businesspeople

---

that an egalitarian conception of justice can feasibly make of businesspeople because they are particularly driven by self-interested motives.

[170] Drawing on Valentini (2012), this conception of the ideal/non-ideal distinction maps onto the full/partial compliance distinction and the utopian/realistic assumptions distinction, but not the ideal state/comparative states distinction.

typically act in ways that are self-serving and competitively adversarial, as opposed to being altruistic or cooperative (Heath, 2014: 26-29, 93-115).

Second, Heath argues that the incentive-compatibility problem with egalitarian principles is so great in business, that egalitarian principles are infeasible – which is to say that they cannot be implemented effectively, or the costs of enforcing compliance would be so great that it becomes self-defeating or raises other normative problems such as unjustifiable restrictions on liberty. Rather than weakening the egalitarian principles (e.g., by making weaker, but nonetheless egalitarian, demands on businesspeople), however, Heath argues that business should be regulated by a different normative framework entirely and by one that gives up on egalitarian principles but nonetheless realises an important normative value in an incentive-compatible way.[171] And the Pareto efficiency criterion is, Heath argues, the most demanding alternative normative framework that meets these criteria. Accordingly, although it is not the ideal normative framework to regulate business, Heath argues that Pareto efficiency is, nonetheless, the most demanding normative standard that is also compatible with business motives, and it is the "last principle standing" (Heath, 2014: 198).

The motive compatibility argument justifies, therefore, the market failures approach, which aims at Pareto efficiency, as the most demanding normative standard that can be applied to business, whilst also being reasonably incentive-compatible.[172] Although Heath mainly focuses on the incentive-compatibility problem that egalitarian principles face, the argument might be thought to defeat stakeholder theory too. It could be argued, for example, that stakeholder theory is incompatible with self-interested motives in business because it rejects the profit motive and requires businesspeople to act with a kind of altruism in considering the interests of all stakeholders.

[171] This is a particular instance of a more general claim that Heath (2014: 173-205) defends, namely that empirical facts can make a normative framework so infeasible that a new normative framework is required. Heath develops this general claim by developing a novel "nth-best normative framework" (Heath, 2014: 182), which supplements the ideal/non-ideal distinction by distinguishing between first-best, second-best through to nth-best normative frameworks that map onto different forms of idealisation about empirical facts. Here, however, I set aside discussing this nth-best normative framework framework.

[172] Interestingly, the motive compatibility argument is independent to the institutional system argument, which Heath endorses elsewhere (see Chapter 5). The claim in the motive compatibility argument is that it would ideally be better to apply egalitarian principles directly to the corporation, but these are infeasible because of the incentive-compatibility problem, whereas the institutional system argument holds that it is better to apply efficiency principles to the corporation.

6.8 Evaluating the motive compatibility argument

I begin by noting that the motive compatibility argument depends on three claims that are disputable, but which, nonetheless, I grant here. One, it could be argued that a normative framework should not be altered or adapted to make it more incentive-compatible, and if a normative framework contains demanding obligations then so be it. I set aside this objection, however, partly on the grounds that it has less force in the context of corporate responsibilities. The corporation is, as I argued in the Corporate Fair Reciprocity Argument, a major social institution that is created by society and to which society can assign special corporate responsibilities. Incentive-compatibility is, therefore, especially relevant when determining corporate responsibilities because there would be no use in society creating the corporation only to make unrealistic and infeasible demands of the people who govern it.[173]

Two, there is considerable ambiguity in the motive compatibility argument about *whose* motives it is concerned with. This is especially relevant in the context of the corporation because there are three main groups – the managers, directors and shareholders – who each have a role in governing the corporation, but for whom the degree of compatibility of corporate responsibilities with their motives will be different. For example, managers and directors do not directly benefit from profit maximisation and so it would be incorrect to claim that the market failures approach is more incentive-compatible for these groups. Here, however, I set aside considering the degree of incentive-compatibility for each of these groups, and instead assume that the motive compatibility argument is primarily concerned with shareholders' motives (although it could plausibly be extended to directors and managers if, for example, their compensation is very closely linked to the corporation's profitability).

Three, it could be disputed that people in the business domain are not, in fact, especially motivated by self-interest. Business relationships are not always as anonymous as Heath claims but can be based on fostering personal relationships of trust, and many businesspeople are arguably motivated by non-self-regarding motives, which range from a desire to benefit the people they interact with personally to a desire to contribute to wider societal social or environmental goals. Here, however, I grant that there may be a special problem of incentive-

[173] The Corporate Fair Reciprocity Argument has two further implications here. One, given that incorporation is a substantial legal privilege for shareholders, there is an added incentive to abide by corporate responsibilities, even if they are demanding and conflict with self-interested motives. Two, if certain corporate responsibilities are required to justify society creating the corporation, but they are nonetheless incompatible with incentives, then the corporation itself could not be justified.

compatibility when it comes to business, in particular because self-interested behaviour in business can be especially financially rewarding.

With these three caveats in mind, I argue, however, that the market failures approach is no more compatible with self-interested motives in business than is social egalitarian stakeholder theory. In part, this is because the market failures approach places (in some cases extraordinarily) demanding restrictions on profit maximisation and conflicts, to a considerable extent, with shareholders' self-interest in the corporation's profitability. This is a point which Heath (2014: 37-8, 202-3) acknowledges, as he recognises that the market failures approach is a demanding and meaningful ethic that restrains purely self-interested behaviour in business.[174] The extent of the conflict is considerable because market failures are a substantial, and sometimes immense, source of profit for corporations (Norman, 2012: 52). Some empirical surveys suggest, for example, that negative externalities are so substantial a source of profit that many of the top industries would not be profitable if negative environmental externalities were fully costed (Trucost, 2013). And market power is a considerable source of profitability for many of the world's largest and most profitable corporations; Apple and Microsoft, two of the most profitable corporations in the world, make combined profits of over $100 billion that depend on significant market power (Investopedia, 2020), but the market failures approach requires that they forego much of their profits until they make zero excess profits, as they would in a perfectly competitive market. Market power and the presence of barriers to entry (through, for example, branding, economies of scale, product differentiation, patents) are such significant sources of profitability that some of the leading business strategies are based on developing ways to take advantage of these market failures. For example, some of Porter's (1990) principles for developing a sustainable competitive advantage are based on developing or maintaining barriers to entry and reducing competitive rivalry. It is, therefore, incorrect to claim that the market failures approach is incentive-compatible with self-interested motives

[174] Heath (2014: 37, 202) sometimes claims that the market failures approach may be so demanding that it is not capable of being fully complied with, particularly given the competitive pressure to maximise profit, and that in these circumstances corporations would have a "higher-order obligation" to take steps collectively to reform market conditions or press for regulatory and legal standards that will prevent the unethical behaviour. If the market failures approach cannot be complied with, however, this would undermine the motive compatibility argument in two ways. First, it should also be open to stakeholder theory to reform market conditions and introduce various standards to prevent unethical behaviour. Second, it is unclear why Heath thinks the market failures approach should not be disregarded if it is so very incompatible with incentives. Here, however, I presume that Heath holds that the market failures approach is capable of being complied with.

when its profit constraints are in fact incredibly demanding and would require an extraordinary re-orientation in how corporations do behave**.**

Social egalitarian stakeholder theory also constrains the amount of profit shareholders may realise but there is no reason to think that these constraints are less incentive-compatible than the market failures approach. Some of the constraints that are required by the stakeholder vulnerability obligation are similar to those that are required by the market failures approach (see Chapter 5.4.2). And although the stakeholder efficiency obligation requires that the corporation does not maximise profits and instead advances the interests of its production stakeholders, in some corporations this can be expected to generate greater profits in the long-term for shareholders by generating a substantially larger surplus.

Finally, a social egalitarian society is not only concerned with incentive-compatibility as regards self-interested motives but is also concerned with sustaining egalitarian attitudes. It is important that individual attitudes are sufficiently supportive of the main aims of a social egalitarian society. Social egalitarianism relies on a sense of social solidarity and a willingness amongst citizens to develop and abide by fair terms of social cooperation, and so institutional arrangements should be such that they maintain the requisite social egalitarian attitudes (Rawls, 1999: 230-1).

Sustaining egalitarian attitudes is relevant to the choice of corporate responsibilities because of a "feedback loop" (Norman, 2015: 44) between institutional structures and individual attitudes. People's attitudes are neither fixed nor formed entirely independently of their social context, but are malleable and shaped, at least in part, by the social and institutional setting which they live within. In particular, the normative standards that apply to people within institutional settings shape people's general normative attitudes. As Rawls puts it:

> Everyone recognises that the institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kinds of persons they are … So an economic regime, say, is not only an institutional scheme for satisfying existing desires and aspirations but a way of fashioning desires and aspirations in the future. More generally, the basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of their good. (Rawls, 2003: 269).

There are good reasons to think that the feedback loop between corporate responsibilities and businesspeoples' individual attitudes is strong, especially given the prevalence and influence

of the corporation over people's lives (Anderson, 2017) and the research on the formative effects of business culture (Guiso et al., 2015a; Guiso et al., 2015b).

Given this feedback loop, a social egalitarian society should favour corporate responsibilities that sustain egalitarian attitudes over those that threaten it, and in this respect social egalitarian stakeholder theory has two advantages over the market failures approach. First, as I discussed in Chapter 5, the market failures approach requires that the corporation seeks to maximise profits even when doing so will take advantage of people's vulnerability and dominate or exploit them. And by doing so, it requires that corporate governors have an attitude towards others that undermines a sense of social solidarity and respect, which risks, given feedback loops, shaping corporate governors' attitudes towards justice and eroding their egalitarian attitudes.[175] By contrast, the stakeholder vulnerability obligation requires that corporate governors refrain from dominating or exploiting people who are vulnerable and that they consider how the corporation can attenuate existing vulnerabilities. Accordingly, it encourages attending to people's vulnerabilities, which can foster attitudes or respect and greater feelings of common sympathy with people, and to sustaining egalitarian attitudes. Second, in maximising profits, shareholders[176] can fail to appreciate how dependent are their financial returns on both the special governmental provenance and special legal privileges of the corporation and on the contributions of all the production stakeholders who work with the corporation.[177] Whereas, in requiring that the corporation advances all of the production stakeholders' interests in order to generate a surplus, the stakeholder efficiency obligation encourages greater recognition of the interdependencies between different production stakeholders, and the extent to which shareholder returns depend on the productive contributions of others.

[175] Relatedly, Norman (2015: 44-46) argues that shareholder value maximisation can cause people to alter their conception of justice so that it is less egalitarian, because people come to think that the values which are given prominence within the corporation should be the values of justice across society as a whole. Shareholder value maximisation can erode support for social egalitarian policies, especially egalitarian redistributive policies by the state.

[176] To the extent senior managers and directors are rewarded based on profitability, they too can fail to appreciate these dependencies.

[177] For example, some high net worth individuals sometimes refer to themselves as 'high-capability individuals.' As indicative evidence of this as a more general phenomenon, income inequalities can cause the better off to downplay the extent to which their income depends on social institutions (Tawney, 1964: 37-8; Voorhoeve, 2020: 154), and the better off may come to believe that they fully deserve and are entitled to their wealth (Scheffler, 2020). Moreover, people in team production settings sometimes fail to recognise how dependent they are on the productive contributions of others (Dietsch, 2008).

Although it is difficult to find empirical evidence that can fully test these claims, there is indicative evidence that stakeholder theory is more supportive of integrity values than shareholder value maximisation. In a study of corporate culture, Guiso et al. (2015a) found that cultures of integrity, as measured in terms of the value of keeping one's word or loyalty to customers, are on average weaker in those corporations that follow a norm of shareholder value maximisation, and stronger in those corporations that give priority to stakeholder interests. As Guiso et al. (2015a: 61) put it "it looks like a focus towards shareholders' value-maximization undermines the ability of a company to sustain a high level of integrity capital."

In summary, whilst social egalitarian stakeholder theory is no less compatible with self-interested motives in business than the market failures approach, there are good reasons to think that it has some advantages in terms of sustaining egalitarian attitudes.

6.9 Social egalitarian stakeholder theory on the front foot

Stakeholder theory is typically on the back foot when compared to shareholder value maximisation, and to the market failures approach in particular (see Chapter 4.1). In this chapter, and the preceding two chapters, I have developed a version of stakeholder theory, social egalitarian stakeholder theory, that is superior to the market failures approach when judged, in the round, against the criteria that are contained in the four egalitarian arguments. Social egalitarian stakeholder theory is more compatible with protecting the vulnerable from domination and exploitation (Chapter 5), it is plausibly more efficient and better at sustaining egalitarian attitudes than the market failures approach. Moreover, in terms of vagueness and incentive-compatibility, there is no clear-cut difference between the two approaches. Accordingly, social egalitarian stakeholder theory should be on the front foot compared to the market failures approach.

CONCLUSION

I. Concluding remarks

I close the thesis with some concluding remarks that draw together the main arguments and point towards the directions for future research. In section II, I review the Corporate Fair Reciprocity Argument and the case for social egalitarian stakeholder theory, with an emphasis on their contributions to the existing literature. Then, in section III, I briefly comment on a handful of relevant topics that are not addressed directly in the main thesis. Finally, in section IV, I outline the potential research agenda that the thesis opens up, and indicate some of the implications of the thesis's arguments for the regulation and governance of corporations.

II. The thesis's main claims and contributions

The thesis contributes to the topic of the institutional political philosophy of the corporation by defending two main claims about the corporation: first, there are strong *pro tanto* reasons for singling out the corporation for special corporate responsibilities; and second, in a social egalitarian society, corporate responsibilities should be based on a novel social egalitarian version of stakeholder theory as opposed to shareholder value maximisation. The resulting view of the corporation is that it is a special institution within society's institutional landscape and should be subject to a distinctively corporate ethic that comprises special obligations towards the corporation's stakeholders.

(a) The Corporate Fair Reciprocity Argument

The first half of the thesis addresses the following question concerning the corporation's normative status: does the corporation have a special normative significance within society that means it should be regulated with special moral responsibilities? The question picks out the specific debate within business ethics about the soundness of NGP arguments (Ciepley, 2013; McMahon, 2012; O'Neill, 2009a, 2009b) and the plausibility of their claim that the corporation should be singled out for special corporate responsibilities that differ to the moral responsibilities that regulate other non-corporate businesses, associations, institutions, or individuals in their everyday, non-corporate activity.

The view of the corporation defended by NGP arguments is controversial within the existing literature, as I explain in Chapter 1. Focusing on Ciepley's (2013) influential rendering of the argument, the standard NGP argument rejects the prominent contractual view of the corporation (Easterbrook and Fischel, 1991; Hessen, 1979) and holds that the corporation has a special governmental provenance and comes with special corporate privileges for its shareholders (Chapter 1.4.1). Moreover, the standard NGP argument holds that the corporation's provenance and privileges are not merely positive (i.e., factual) claims about the corporation but also have a normative significance and justify singling out the corporation for special corporate responsibilities. The main reason given is that these positive claims place the corporation in a uniquely corporate normative domain, separate to the standard public and private normative domains of liberal institutional theory, but a second reason is that the corporation should realise a public benefit in return for the publicly awarded privileges its shareholders enjoy. This normative significance claim is, however, disputed by three objections (see Chapter 3): one, the corporation's special governmental provenance does not normatively differentiate it from other market participants who also depend on governmental action (Singer, 2019); two, the corporation's contribution to efficiency is sufficient to justify the corporation and no further corporate responsibilities are needed; and three, corporate responsibilities unacceptably conflict with freedom (Hasnas, 1998; Hussain, 2012).

The thesis contributes to this debate by defending a novel version of the NGP argument. Rather than defend the standard NGP argument outright, I develop a new version of the argument for three main reasons. The first reason is that there are some hitherto unidentified weaknesses in the standard NGP argument and its normative significance claim (see Chapter 2.2.2); the underlying political-philosophical framework that the argument presupposes is unclear, the justificatory reasons for the normative significance claim are underdeveloped, and there are considerable ambiguities about the conditions that place the corporation in its own normative domain, how the argument generalises to other instances of governmental action and/or legal privileges outside of the corporation, and how the content of corporate responsibilities should be determined. The second reason is that these weaknesses mean it is unclear how the standard NGP argument can respond to some of the objections raised against it. And the third reason is that the standard NGP argument overstates the normative significance of the corporation with the implausible claim that that the corporation belongs in a unique normative category – augmenting the main liberal institutional normative domains of the public and private with a third, corporate normative domain.

The new version of the NGP argument that I defend in the thesis is the Corporate Fair Reciprocity Argument (see Chapter 2, especially 2.5). The Corporate Fair Reciprocity Argument endorses the two positive claims in the standard NGP argument but develops and refines the normative significance claim by situating the corporation within a political-philosophical framework of justice as fair reciprocity in which justice requires that citizens formulate and abide by terms of fair social cooperation that both advance their interests and realise fairness (Gibbard, 1991; Rawls, 1996, 1999, 2001; White, 2003). Within this framework, society has a justice-based reason to use special governmental action to create the corporation because the corporate legal form has the potential to realise efficiency gains that work to advance citizens' interests. And the corporation's special governmental provenance and corporate privileges are normatively significant because they ground two *pro tanto* reasons to single out the corporation with special corporate responsibilities. First, the corporation's special governmental provenance marks the corporation out as a distinctive major social institution that structures how citizens cooperate. As such, there is a special permission to, and a strong presumption that society should, regulate the corporation with corporate responsibilities that better realise justice-based values. Second, there is a strong presumption that society should regulate the corporation with corporate responsibilities so that the corporation makes a fair contribution to society's justice-based values as a *quid pro quo* for the corporate privileges that the corporation's shareholders enjoy. Uniting these two reasons is the idea that the corporation should be structured as a fair deal for all citizens and corporate responsibilities are *pro tanto* justified as a way of realising a fair deal.

The Corporate Fair Reciprocity Argument makes several original contributions to the existing literature. First, the argument is a novel development of the NGP argument that addresses the weaknesses in the standard NGP argument and makes a more defensible normative significance claim. By grounding the argument in the political-philosophical framework of justice as fair reciprocity, the Corporate Fair Reciprocity Argument has clear normative foundations and clears up ambiguities concerning the domain conditions, the generalisability of the justificatory reasons and the framework for determining corporate responsibilities (see Chapter 2.6). Moreover, the Corporate Fair Reciprocity Argument modifies the standard NGP argument by claiming that the justification for corporate responsibilities is *pro tanto* rather than decisive and by treating the corporation as a major social institution within the political domain rather than as an entity in a separate corporate normative domain. Indeed, the standard NGP argument's claim that there is a corporate normative domain is mistaken. Even though the corporation has some unique features – such

as a distinctive way of allocating property rights, assigning liability and apportioning responsibility – these features nonetheless prescribe one way, amongst many diverse ways, for citizens to cooperate with one another using socially constructed terms of social cooperation, and, as such, the corporation belongs in the political domain (see Chapter 2.5.2(a)). And although there is a strong *pro tanto* case for corporate responsibilities, the standard NGP argument's claim that the corporation *must have* corporate responsibilities is also mistaken because society should only assign corporate responsibilities once multiple factors have been taken into consideration, including their effectiveness and how the corporation interacts with other major social institutions in the political domain (see Chapter 2.5.2, 2.6).

Second, in defending the Corporate Fair Reciprocity Argument, I develop original replies to the objections faced by NGP-style arguments. To the *contractual view objection*, I offer additional reasons to hold that the corporation depends on governmental action based on the realism of the corporation's legal personality (see Chapter 1.4.2(i)), and I defend the claim that corporate privileges are a substantial benefit even for corporations whose success depends on entrepreneurial effort (see Chapter 1.4.3). To the *no normative significance objection*, I identify that the objection's main dispute concerns the institutionalist criterion for identifying a major social institution, and I then defend the Terms Account of the institutionalist criterion (Melenovsky, 2013) over the objection's Profound Effects Account of the institutionalist criterion (Berkey, 2016: 721; Cohen, 2008: 136-8; Singer, 2019: 292-5) (see Chapter 3.3). To the *efficiency is sufficient* objection, I offer further reasons for assigning corporate responsibilities based on regulating the corporation's contribution to fairness values and as a way of directing the corporation towards making efficiency gains, as there is no guarantee that the corporation will automatically realise efficiency gains in the absence of regulations or social norms concerning corporate conduct (see Chapter 3.5). And to the objection that corporate responsibilities *conflict with freedom*, I argue that the special governmental provenance view of the corporation plays a crucial role in blocking this objection as corporate responsibilities are consented to as part of the incorporation process and do not conflict with freedom (see Chapter 3.7).

The reply to this last objection exemplifies a third contribution of the Corporate Fair Reciprocity Argument, which is that it has fruitful implications for longstanding debates in business ethics. The Corporate Fair Reciprocity Argument resolves the debate about whether special responsibilities in business conflict with freedom by considering only corporate responsibilities (as opposed to business responsibilities) and then arguing that these are permissibly assigned to the corporation as part of the fair deal with society. Another such

fruitful implication of the Corporate Fair Reciprocity Argument is that it justifies corporate responsibilities of the kind found in 'business morality as special morality' approaches to business ethics and contains the tools to evaluate these approaches based on how well they realise a determinate set of justice-based values (see Chapter 2.6), which is the exercise I undertake in Part 2 of the thesis where I compare stakeholder theory with shareholder value maximisation.

(b) Social egalitarian stakeholder theory

Given that there are strong *pro tanto* reasons for corporate responsibilities per the Corporate Fair Reciprocity Argument, the second half of the thesis addresses a follow-on question about what the content of corporate responsibilities should be. Rather than consider all the possible types of corporate responsibilities, I approach this question by evaluating the merits of the two leading 'business morality as special morality' approaches to business ethics – stakeholder theory and shareholder value maximisation – from within a social egalitarian conception of justice, which is plausibly a more specific version of justice as fair reciprocity (see Chapter 4.2).

Within the existing literature, egalitarian evaluations of these two approaches strongly favour Heath's (2014) market failures approach version of shareholder value maximisation over stakeholder theory – indeed, non-egalitarian evaluations also favour the market failures approach for some of the same reasons. The market failures approach is a well-developed approach to business ethics and it is purportedly superior to stakeholder theory because of four arguments that an egalitarian has reason to endorse, namely that the market failures approach is more efficient, better realises the advantages of an institutional division of moral labour, is less vague, and is more compatible with motives in business than is stakeholder theory (see Chapter 4.6).

There are, however, three notable gaps in the existing egalitarian evaluations, which this thesis addresses. One gap is that there is no version of stakeholder theory that is comparable to the market failures approach in being well-developed and firmly grounded in specific justice-based values. A second gap is that there is no specifically *social* egalitarian comparison of the two approaches that evaluates them according to how they advance or protect important social egalitarian values. And a third gap is that there is, with one exception, relatively little scrutiny of the strength of the egalitarian arguments for the market failures approach. The exception is the efficiency argument, which is disputed by Moriarty (2020), Repp and Contat (2019) and

Steinberg (2017), but even amongst these critiques there is comparatively little scrutiny of Heath's (2014: 38-41) bottom-up strategy argument for the efficiency of the market failures approach (see Chapter 6.2).

The thesis contributes to this literature by developing a social egalitarian version of stakeholder theory that is superior to the market failures approach. Social egalitarian stakeholder theory comprises two obligations – a stakeholder efficiency obligation and a stakeholder vulnerability obligation – that are grounded in the social egalitarian values of, respectively, efficiency and protecting the vulnerable from domination and exploitation. These obligations demand that the corporation assembles a coalition of production stakeholders whose interests it aims to advance by honouring explicit and implicit contracts, whilst also refraining from dominating or exploiting all those stakeholders who are vulnerable to the corporation. The stakeholder efficiency obligation is justified on the grounds that the corporation's structure is ideally designed for solving team production problems (Blair, 2019; Blair and Stout, 1999; Stout, 2002) and the corporation will generate a large surplus if its directors incentivise firm-specific commitments and investments from, and encourage horizontal production relationships amongst, its production stakeholders by acting as a mediating hierarch that allocates the surplus considerately and according to explicit and – importantly – implicit contracts with its production stakeholders (see Chapter 6.3.2). The stakeholder vulnerability obligation is justified on the grounds that protecting the vulnerable is a stringent constraint that must apply to the corporation, as one of society's major social institutions per the Corporate Fair Reciprocity Argument. And vulnerability considerations are especially relevant because the corporation intensifies the vulnerability of those who are already disadvantaged by disrupting the balance of power between people, and the corporation also creates new vulnerabilities by encouraging firm-specific commitments from stakeholders on the basis of implicit contracts that are vulnerable to opportunism because they lack the legal protections of explicit contracts (see Chapter 5.5). Moreover, the corporation shapes the structure of social relations, affecting the degree to which stakeholders are able to stand up for themselves against the corporation, the mode with which corporate governors and stakeholders relate to one another, and the degree to which citizen's worth and status as social equals is upheld by and expressed through the corporation as an institution (see Chapter 5.4(b)).

Social egalitarian stakeholder theory is a novel conception of corporate responsibilities. In this respect, social egalitarian stakeholder theory addresses two of the gaps in the existing literature by contributing a well-developed version of stakeholder theory that is grounded in and evaluated against social egalitarian values.

A second major contribution to the literature is a set of novel arguments that defend the superiority of social egalitarian stakeholder theory over the market failures approach. These novel arguments proceed by re-evaluating the four egalitarian arguments that purportedly favour the market failures approach, and, in doing so, I subject the market failures approach to a level of scrutiny that it has not hitherto faced in the existing literature. Taking each of the four egalitarian arguments in turn, I demonstrate that the institutional system argument favours social egalitarian stakeholder theory because it protects the vulnerable whereas the market failures approach's focus solely on efficiency is indefensible because it sometimes demands that the corporation dominates and exploits people (see Chapter 5.4). The efficiency argument also favours social egalitarian stakeholder theory partly because this version of stakeholder theory, unlike other versions, contains an efficiency-based obligation, and partly because the full implications of the theory of the second best (Lipsey, 2007; Lipsey and Lancaster, 1956) sink the efficiency-based case for the market failures approach (see Chapter 6.3.1). Given that market failures are pervasive and unavoidable, the theory of the second best proves that there is no systematic causal connection between the market failures approach's constrained profit maximisation obligation and efficiency. Accordingly, Heath's (2014: 38-41) conjecture that a bottom-up strategy could rescue the market failures approach is wrong. There is, moreover, a serious problem in the efficiency argument for any version of shareholder value maximisation. In a second-best world, there are no general rules that can be assigned to the corporation to systematically realise efficiency, and the price signals that a profit maximising corporation responds to are imperfect guides for the efficient allocation of resources. Finally, there is no clear-cut difference between the two approaches when it comes to the vagueness argument and motive compatibility argument. Social egalitarian stakeholder theory is clearer in its instructions than less well-developed versions of stakeholder theory (see Chapter 6.6), and close scrutiny of the market failures approach reveals that its instruction that the corporation acts "as if" it is in conditions of perfect competition is inescapably vague and its demand that the corporation refrains from profiting from market failures substantially conflicts with shareholders' self-interested motives (see Chapter 6.8).

A third contribution is that some of these egalitarian arguments are relevant to other conceptions of justice beyond a social egalitarian framework. In the thesis, I develop this version of stakeholder theory within a social egalitarian framework so that it is firmly grounded in a definite conception of justice that is both attractive and underexplored within the business ethics literature (Néron, 2015), and that also coherently joins together the values of protecting the vulnerable and efficiency. However, the scope of social egalitarian stakeholder theory is

not confined to a uniquely *social egalitarian* conception of justice, and can be applied, *mutatis mutandis*, to other conceptions of justice. The value of protecting the vulnerable from domination and exploitation also figures in republican conceptions of justice (Pettit, 1997, 2012) and in Goodin's (1985) utilitarian-style framework. And considerations of efficiency, clarity and motive-compatibility are relevant to distributive egalitarian conceptions of justice and to some non-egalitarian conceptions of justice, including the Chicago School's law and economics approach to business ethics (Friedman, 1962, 1970; Heath et al., 2010). Viewed in broad terms, there are, therefore, reasons to recommend social egalitarian stakeholder theory to many non-social egalitarian conceptions of justice, albeit further work is required to determine how straightforwardly the arguments for, and precise form of, social egalitarian stakeholder theory carry over to alternative conceptions of justice. For example, although there is a *prima facie* case for the stakeholder vulnerability obligation within Goodin's (1985) framework, it is likely that this obligation would be grounded in the importance of protecting the vulnerable as a general moral requirement (Goodin, 1985: 114), and not on further considerations about the structure and character of social relations (see Chapter 5.4.2(b)).

(c) Combining the two arguments

The overall view of the corporation's normative status is, then, that it is a special institution with special responsibilities to its stakeholders. The corporation is not like other market actors and neither is it like the various kinds of voluntary associations that it is sometimes mistaken for by those who adopt a contractual view of the corporation. Instead, the corporation is a special institution that is created by society, in the sense that it depends on corporate law for its distinctive legal form and legal features, and it should be normatively regulated with a 'corporate ethic' so that it advances society's justice-based values, just as society's other major social institutions also advance justice-based values.

This corporate ethic should comprise special obligations to stakeholders, so that the corporation advances the interests of all those stakeholders who contribute to the corporation's productive activities without dominating or exploiting the wider group of stakeholders who are vulnerable to the corporation. In contrast to the profit-maximising imperatives of shareholder value maximisation, these social egalitarian stakeholder obligations require that the corporation shares any surplus it generates amongst all its production stakeholders (as opposed to maximising shareholder returns), honours implicit contracts by advancing production stakeholders' various financial and non-financial interests (e.g., improved working conditions

and terms for workers) and refrains from taking advantage of its customers, workers, shareholders or the local community, even though doing so may result in lower profits.

The social egalitarian stakeholder obligations take account of the double-edged nature of the corporation's legal structure. The corporate legal form is ideally structured to realise the efficiency gains from team production whilst at the same time exacerbating and creating new vulnerabilities, and the stakeholder obligations respond to these features by seeking to regulate the corporation so that society realises the benefits of the corporation whilst mitigating its dangers.

In principle, the social egalitarian stakeholder obligations can operate through either legal or extra-legal means, but a substantial part of this corporate ethic must be upheld using extra-legal measures such as social norms and social sanctions because the efficiency gains from the corporation depend on implicit contracts and on directors exercising their judgement in allocating shares of the surplus amongst production stakeholders (see Chapters 5.2: 139-140, 6.3.2(b): 165-6, 6.6: 172-3). Finally, although these social egalitarian stakeholder obligations apply to all those people who govern the corporation, they apply primarily to the directors of the corporation, given their central role as the main governors of the corporation.

III. Other relevant matters not covered in the thesis

The institutional political philosophy of the corporation is a broad topic and there are several relevant matters that are relatively unaddressed in the thesis, three of which I briefly comment on here.

One such relevant matter is the real entity theory of the corporation (Laski, 1916; List and Pettit, 2011; Maitland, 2003; Pepper, 2019; Phillips, 1994; Scruton and Finnis, 1989).[178] According to real entity theory, the corporation counts as a real entity in society's ontological landscape, meaning that the corporation exists as a real thing in a way that is not entirely reducible to the natural persons connected to it. This corporate realism claim is typically based on identifying attributes that are widely held to be important properties for the realism of natural persons and then arguing that the corporation also has these attributes, although there is considerable variation amongst different versions of real entity theories as to the relevant

[178] See Pepper (2019: 43-76) for a summary and critique of some of these arguments, and a defence of the public corporation as a real entity.

attributes.[179] For example, List and Pettit (2011), argue that the corporation counts as a group agent that is just as real as individual agents because it makes sense to ascribe beliefs, desires, intentions and a degree of rationality to it.[180] The main normative implication of the corporate realism claim is that the corporation itself has moral responsibilities that are not entirely reducible to the moral responsibilities of the people connected to it; just as individual persons have moral obligations against which they can be held morally accountable because they possess agency, intentionality and rationality, so too does the corporation have moral obligations as a real entity. And importantly, real entity theorists hold that this view of the corporation should inform the legal status and legal responsibilities of the corporation including, inter alia, recognising the corporation as a legal person, enforcing its moral responsibilities with legal responsibilities, or assigning it constitutional rights (see, e.g., Phillips (1994: 1068-9) for a discussion of some of these implications).

I do not directly address real entity theory when developing the Corporate Fair Reciprocity Argument for two reasons. One reason is that I focus on identifying those features of the corporation that make it unique as a type of business and that are capable, therefore, of justifying uniquely *corporate* responsibilities. This focus leads to an institutional analysis of the corporation, rather than a real entity analysis, because it is the corporation's socially determined legal features that make it unique, i.e., its special governmental provenance and corporate privileges. By contrast, real entity theory concerns the ontological and normative status of certain kinds of group, and it neither applies to the corporation uniquely, nor does it apply to all types of corporation. According to real entity theory, *any* group that has certain relevant attributes (e.g., beliefs, desires, intentionality, rationality) counts as a real entity and so the scope of the theory encompasses a range of groups including, in principle, all business firms (regardless of whether they are corporations or not), as well as church communities, NGOs, and professional bodies. Moreover, as real entity theory applies only to groups, it does not apply to single-person corporations. Given that my focus in the thesis is on the special normative significance of the corporation specifically (meaning *all* corporations including single-person ones, but *only* corporations), real entity theory does not make much headway on that question since its normative claims about the corporation apply both more broadly to all other real entities and more narrowly only to multi-person corporations.

[179] Phillips (1994: 1068) also notes that some versions of real entity theory identify attributes that are unique to the corporation and are not shared with natural persons.
[180] See also Goodpaster (1983: 15) and Pepper (2019: 68-69).

A second reason is that it is possible to make progress on the institutional theory of the corporation without taking a definitive position on the merits of the real entity view, subject to one caveat. As the Corporate Fair Reciprocity Argument is based on the implications of the corporation's legal features, it is possible to hold the view that the corporation should be assigned special corporate responsibilities independent of a view about the realism of groups as real entities. If the real entity view is false, then it is only the corporate governors who are the bearers of the institutionally assigned corporate responsibilities. Whereas if the real entity view is true, then multi-person corporations are real entities and are themselves the bearers of the institutionally assigned corporate responsibilities, as well as the corporate governors given that they control the corporation and determine its actions. But either way, society has strong *pro tanto* reasons to regulate how the corporation is run *as an institution* by assigning special corporate responsibilities to whomever is responsible for the conduct of the corporation.[181,182] The one caveat is that if one does hold that real entity theory is true, then real entity theory must be modified to admit that the corporation cannot exist without its special legal features, as per the special governmental provenance claim (see Chapter 1). It does not, therefore, make sense for the real entity view to claim that the corporation exists *prior to* its legal recognition or that the corporation's legal status should be a normative consequence of its status as a real entity. Instead, the real entity view must accept that the corporation necessarily exists as a legally recognised entity, since legal personality is a constitutive property of being a corporation (see Chapter 1.2.2), but the view could then hold that the (multi-person) corporation is also a real entity. Or to put it another way, although concession theory – of which the Corporate Fair Reciprocity Argument is a version (see Chapter 1.3.1) – and real entity theory are typically regarded as alternative views of the corporation, it is possible to hold a hybrid view in which they are complementary. One can hold that the corporation is a concession of government because it depends on special legal rules, whilst also holding that the (multi-person) corporation has beliefs, desires, intentions and a rationality such that it also counts as a real entity.

[181] Each of these alternatives can be extended to social egalitarian stakeholder theory in the following way; if the corporation is not a real entity, then it is the corporate governors who bear the responsibility for running the corporation according to the stakeholder obligations, whereas if the corporation is a real entity, then the corporation itself also bears some responsibility for meeting its obligations towards its stakeholders.

[182] See Chapter 1.4 for a similar argument that the contractual theorists' denial of the corporation's group agency does not have a bearing on the corporation's status as a real legal person.

A second relevant matter is whether social egalitarian stakeholder theory can resolve the adjudication problem for stakeholder theory. In requiring that the corporation balances the interests of its stakeholders, stakeholder theory assigns to the corporate governors the task of adjudicating between different stakeholders to determine who gets what. Defenders of stakeholder theory hold that corporate governors are capable of performing this task, with Freeman (2002: 44) suggesting that managers can and should act like the wise King Solomon. Opponents, however, raise the adjudication problem as an objection to stakeholder theory on the grounds that corporate governors are given an impossible task. Since stakeholder theory does not give much guidance as to how to balance stakeholders' interests, corporate governors have few (and, sometimes, no) evaluative criteria for what counts as a fair or just judgement. Moreover, corporate governors cannot act as if they are the agents of multiple stakeholders since this leads to the multi-principal problem whereby a servant told to serve multiple masters becomes answerable to no-one and may opportunistically advance their own interests (Easterbrook and Fischel, 1991: 38; Heath, 2014: 81-82).[183]

The adjudication problem frequently crops up in the difficult real-life decisions that corporate governors face. One example is the dilemma faced by the directors of General Motors in 2008 about the future of an assembly plant in Janesville, USA, when faced with a recession and falling customer demand (Pepper, 2022). The decision about whether to close the plant would affect General Motors' shareholders, its employees, and the local community, with the added complexity that General Motors was an anchor employer in the town and indirectly supported the livelihood of many people in the local community (Goldstein, 2017), but also operated plants in other locations and had ties to those other communities too. Given that there are many stakeholders with different and conflicting interests in this situation, stakeholder theory will encounter the adjudication problem if it does not give sufficient guidance to the directors about how to weigh up and balance stakeholders' interests.

Although I consider the clarity and action-guiding properties of social egalitarian stakeholder theory (see Chapter 6.5, 6.6), I stop short of considering the adjudication problem specifically. The reason for this is that it is sufficient for my defence of social egalitarian stakeholder theory to establish the comparative claim that social egalitarian stakeholder theory

[183] It should be noted that the adjudication problem applies specially to stakeholder theory, and does not apply to shareholder value maximisation which tasks corporate governors with realising the singular criterion of maximising profits. As such, the adjudication problem could be viewed as a further, fifth egalitarian argument for favouring shareholder value maximisation over stakeholder theory, in addition to the four egalitarian arguments I scrutinise in this thesis (see Chapter 4.6).

is similar to the market failures approach in terms of the clarity of its instructions to corporate governors, rather than the threshold-style claim that would be required to meet the adjudication problem and which would hold that social egalitarian stakeholder theory is clear enough to be sufficiently action-guiding for directors. The comparative claim is sufficient to neutralise the vagueness argument as a reason to favour the market failures approach, and makes it possible to defend social egalitarian stakeholder theory as the superior approach when adjudged against the other criteria of protecting the vulnerable, efficiency and motive-compatibility.

For social egalitarian stakeholder theory to be a truly viable option for corporate responsibilities, it is, however, important that the demands it makes of corporate governors are sufficiently clear to meet the adjudication problem. Whilst it would require further research to determine whether social egalitarian stakeholder theory can satisfactorily meet this problem, there are two reasons to be optimistic that it can. First, social egalitarian stakeholder theory is already more specific than the existing versions of stakeholder theory against which the adjudication problem is raised. It has a clearer definition of who counts as stakeholders, what their relevant interests are, and is based on two specific obligations. Second, neither of the two stakeholder obligations require that directors adjudicate between stakeholders without any underlying evaluative criteria. The stakeholder vulnerability obligation does not require any adjudication as it is a binding constraint on corporate action that rules out dominating or exploiting stakeholders. And although the stakeholder efficiency obligation tasks directors with sharing the surplus amongst production stakeholders without specific guidance about how to determine these shares, the obligation references an underlying evaluative criterion in its requirement that directors should ultimately aim to maximise the total surplus in a way that benefits all production stakeholders.

For these reasons, social egalitarian stakeholder theory holds out the promise of avoiding the adjudication problem in scenarios such as the Janesville dilemma. Social egalitarian stakeholder theory instructs the directors to aim at maximising the total surplus for the benefit of all of General Motors' production stakeholders as the main evaluative criterion, whilst not taking advantage of any vulnerable stakeholders. Applying these obligations to the plant closure decision, the normatively permissible decision carves out a role for director judgement in determining which action will maximise the total surplus[184] and it also depends

[184] Importantly, the stakeholder efficiency obligation will always assign a role to director judgement, since the means through which directors can maximise the surplus is by exercising their judgement to select who are the production stakeholders, to determine what are the explicit and implicit contracts, and to allocate how the surplus is shared. In this respect, the obligation would resolve the adjudication

on some of the relevant details, such as the prospects for a productive coalition of stakeholders (e.g., the outlook for customer demand and whether it is expected to recover after the recession) and the implicit contracts that already exist with the employees, the local community and shareholders. Say, for example, that the fall in customer demand was expected to be (relatively) temporary and to recover after the recession, and that General Motors had made implicit contracts with the employees, local community and shareholders that included commitments about job security and supporting the local community, and transparency about the risks to shareholder dividends. If this were the case, then it is likely that social egalitarian stakeholder theory would require that General Motors keeps the plant open and that the (relatively) temporary recession-induced deficit is borne amongst the production stakeholders through pay and dividend reductions, albeit with shareholders bearing a larger share of the reduction.

A third relevant matter is the extent to which the arguments in the thesis are conditional on some restrictions to their scope and on certain presuppositions about the configuration of other institutions. In the thesis, I restrict the scope of the arguments by taking the corporate legal form to be fixed and considering only two social egalitarian values (see Chapters 1.2, 4.2, 4.3), and I presuppose that the other, non-corporate major social institutions are similar to those in contemporary Anglo-American societies, e.g., comprising of contract and property law, employment and environmental laws, consumer protections, and a redistributive welfare state that nonetheless tolerates historically high degrees of wealth and income inequality (see Chapters 1.3, 2.5, 3.3.3, 5.6.1). This raises questions about whether the thesis's arguments can be sustained if these restrictions are relaxed or the presuppositions altered. If other social egalitarian values are contemplated – such as, for example, equality of standing, equality of esteem or equality of authority (Anderson, 2007; 2008; 2017: 3-5) – is social egalitarian stakeholder theory still defensible, or would these values call for significant changes in the corporate legal form and in corporate responsibilities, such as replacing the joint stock mechanism with multi-stakeholder participation? Or if other major social institutions were structured along more comprehensively egalitarian lines, such as that of a Rawlsian property-owning democracy (Rawls, 2001: 138-140, 158-162) in which capital is widely distributed, would the *quid pro quo* reason for corporate responsibilities still stand, or would widespread share ownership dissolve this reason? Or, to put it another way, might the thesis's arguments

---

problem not by prescribing precise or formulaic ways of allocating shares amongst stakeholders, but rather by stipulating an underlying aim and carving out a sizeable role for the exercise of judgement.

apply only to a narrow set of non-ideal circumstances, with no relevance to an ideally structured social egalitarian society?

I offer three justifications for restricting the thesis's arguments in this way. First, the two over-arching questions that the thesis sets out to address also make similar restrictions and presuppositions. The debates about the normative significance of the corporation and the merits of stakeholder theory versus shareholder value maximisation also typically take the corporate legal form as given and presuppose a set of background institutions that are like those in contemporary Anglo-American societies. In order to contribute to these debates, it is therefore constructive to develop the thesis's arguments within some of the boundaries that are already set by these debates. Second, business ethics is often viewed as a branch of applied ethics in which some of the relevant issues concern the justification for and normative regulation of *already existing* business structures within contemporary society's *already existing*, and admittedly non-ideal, institutional structure. And, to this extent, the thesis's normative claims have a practical value in that they apply to corporations as they currently exist in some contemporary societies and are not conditional on making more radical and comprehensive changes to the corporate legal form or to other institutions. Third, there is some value in making progress on normative questions about the corporation alongside some restrictions, even if such progress is only part of an iterative step towards an ideal theory account of the corporation (see Chapter 4.3). It is, I suggest, methodologically difficult to consider what is the ideal corporate structure and ideal corporate responsibilities, if all structural features, responsibilities, and even all background institutions are capable of being revised simultaneously. It is methodologically more straightforward to make normative progress by fixing many of these features and varying only a few of them at any one time, as I have done by fixing the corporate legal form and institutional background whilst varying the possibilities for corporate responsibilities. And this is methodologically justifiable so long as the conditionality of the resulting arguments is recognised, and the arguments are viewed as iterative steps towards a final, ideal account of the corporation.

That being said, it should not be assumed that the thesis's arguments are relevant *only* to those circumstances that match the arguments' restrictions and presuppositions. Certainly more work would be required to determine how generalisable the arguments are, but there are some reasons to think that the arguments would hold in other circumstances. For example, even if share ownership were relatively equally distributed, the corporation would still stand out as a major social institution because of its separate legal personality, and the assignment of asset ownership, liability and responsibility to the corporate legal entity, rather than to persons

connected to the corporation. And even if a widening of social egalitarian values to include equality of authority gave rise to some reasons to move towards multi-stakeholder governance, the stakeholder efficiency obligation holds that director governance is more efficient than multi-stakeholder governance and is a countervailing reason against such a change – the reason being that director governance is a structural feature of the corporation that can reduce the inefficiencies from shirking and rent-seeking in a way that multi-stakeholder governance cannot (see Chapter 6.3.2(a)).

IV. Directions for further research and implications for corporate governance

There are two main topics that stand out as promising directions for substantive research agendas, in addition to those already identified in the preceding remarks.[185] The first topic concerns the expansion of and deepening of social egalitarian stakeholder theory. As it stands, social egalitarian stakeholder theory is sufficiently tractable to rival the market failures approach, but it is not complete (see Chapter 6.4). There is, therefore, a research agenda to fully substantiate social egalitarian stakeholder theory, which could cover the following items: consideration of other social equality values, which may perhaps lead to additional stakeholder obligations; consideration of how efficiency gains could be realised by taking account of the non-production stakeholders who do not figure in the existing stakeholder efficiency obligation, such as customers and the environment; scrutinising social egalitarian stakeholder theory to confirm that it can resolve the adjudication problem; and identification of those other conceptions of justice, beyond social egalitarianism, for which social egalitarian stakeholder theory is a compelling approach to corporate responsibilities.

The second topic concerns the practical implications of the thesis's arguments for corporate governance. In many societies, there is an active debate amongst the business community, policymakers and citizens about the role and responsibilities of the corporation, which encompasses questions about the corporation's purpose, appropriate corporate governance standards, and the role of directors.[186] The thesis opens up a promising research

[185] Those research areas already discussed above include enquiry into the resilience of the thesis's arguments to the consideration of a wider set of social egalitarian values and of a different background institutional structure, the relevance of social egalitarian stakeholder theory to other non-social egalitarian conceptions of justice, and the ability of social egalitarian stakeholder theory to meet the adjudication problem.

[186] See, for example, the British Academy's Future of the Corporation Project ((https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/).

agenda for applying the thesis's arguments to this debate, and for exploring some of the other philosophical questions within this debate. For example, social egalitarian stakeholder theory could be extended to evaluate, and potentially refine, the range of corporate governance standards that purport to uphold a version of stakeholder theory under the umbrella of an ESG (Environment, Social and Governance), sustainability, purposeful business or responsible business framework. And there is scope to explore the more philosophical question of the appropriate boundary for enforcing these stakeholder standards between legal and extra-legal regulation.

Finally, not all of the practical implications require further research, and there are three immediate practical implications from the thesis's arguments. First, in respect of the public debate about the corporation's purpose, the corporation should advance the interests of its stakeholders and it should not be tasked with maximising profits for its shareholders. The thesis sides with those in the public debate who favour stakeholder theory, by providing strong philosophical arguments for this position and giving stakeholder theory a more definite shape in the form of social egalitarian stakeholder theory.

Second, corporate law should specify a corporate purpose that aligns with social egalitarian stakeholder theory and that enables corporations to fulfil their responsibilities to stakeholders. In the UK, Section 172 of the Companies Act 2006 legally requires directors to run the corporation according to enlightened shareholder value (Company Law Review Steering Group, 1999), which is to say that they should maximise value (i.e., typically profits) for shareholders whilst also taking into account how considering the interests of other stakeholders can contribute to shareholder value.[187] Effectively, the Companies Act 2006 legally enshrines the version of shareholder value maximisation that is called strategic stakeholder theory (see Chapter 4.4: 111), and is in conflict with social egalitarian stakeholder theory. One implication of the thesis is, therefore, that policymakers should amend Section 172 of the Companies Act 2006 so that the corporation is not obliged to maximise shareholder value, but instead has obligations towards its stakeholders, as some campaign groups within the business community are calling for.[188]

[187] Section 172 of the Companies Act 2006 stipulates that directors should "promote the success of the company for the benefit of its members [i.e., shareholders] as a whole and in doing so have regard (amongst other matters) to" considerations such as the long-term consequences of decisions, the interests of some other stakeholders, and maintaining a reputation for high standards of business conduct.

[188] See, for example, the Better Business Act (https://betterbusinessact.org).

Third, corporate governors should recognise that the corporation is a special institution and that they occupy a special role as governors of this institution. They should not think that they can use the corporation solely to pursue their own personal interests, or without giving any special consideration to other stakeholders. Instead, in their roles as directors, shareholders or managers, they should recognise that they are bound by a special corporate ethic and have special responsibilities towards the corporation's stakeholders.

BIBLIOGRAPHY

Akerlof, G. and Shiller, R. (2015). *Phishing for phools: The economics of manipulation and deception*. Princeton, NJ: Princeton University Press.

Alchian, A. and Demsetz, H. (1972). Production, Information Costs, and Economic Organization. *American Economic Review,* 62: 777-795.

Anderson, E. (1999). What Is the Point of Equality? *Ethics,* 109: 287–337.

Anderson, E. (2007). How Should Egalitarians Cope with Market Risks? *Theoretical Inquiries in Law,* 9(1): 239–70.

Anderson, E. (2008). Expanding the Egalitarian Toolbox: Equality and Bureaucracy. *Aristotelian Society Supplementary Volume,* 82(1): 139–60.

Anderson, E. (2010). The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians. *Canadian Journal of Philosophy*, 40(1): 1-23.

Anderson, E. (2015). The Business Enterprise as an Ethical Agent. In: Rangan. S. (Ed.), *Performance and Progress: Essays on Capitalism, Business, and Society:* 185-202. Oxford: Oxford University Press.

Anderson, E. (2017). *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It).* Oxford: Princeton University Press.

Armour, J., Hansmann, H., Kraakman, R. and Pargendler, M. (2017). What is Corporate Law? In Armour, J. et al. (Eds.), *The Anatomy of Corporate Law* (3rd ed.)*:* 1-28. Oxford: Oxford University Press.

Arnold, D. and Harris, J. (2012). *Kantian Business Ethics: Critical Perspectives.* Cheltenham: Edward Elgar.

Arnold, S. (2012). The Difference Principle at Work. *The Journal of Political Philosophy*, 20 (1): 94-118.

Asher, C., Mahoney, J. M., and Mahoney, J. T. (2005). Towards a Property Rights Foundation for a Stakeholder Theory of the Firm. *Journal of Management & Governance*, 9(1): 5–32.

Atkinson, A. and Stigltiz, J. (1976). The Design of the Tax Structure: Direct Versus Indirect Taxation. *Journal of Public Economics,* 6: 55-75.

Bakan, J. (2004). *The Corporation: The Pathological Pursuit of Profit and Power.* New York: Free Press.

BBC. (2021). NHS Highland pays out millions to bullied staff. Available at: https://www.bbc.co.uk/news/uk-scotland-highlands-islands-58718290 (accessed 17 January 2022).

Berkey, B. (2016). Against Rawlsian Institutionalism about justice. *Social Theory and Practice,* 42(4): 706-32.

Berkey, B. (2020). Rawlsian Institutionalism and Business Ethics: Does it Matter Whether Corporations are Part of the Basic Structure of Society? *Business Ethics Quarterly* 31(2)*:* 179-209.

Berle, A. and Means, G. (1932). *The Modern Corporation and Private Property*. London: Transaction Publishers.

Berlin, I. (1969). Two Concepts of Liberty. In: Berlin, I. *Four Essays on Liberty.* London: Oxford University Press.

Blair, M. (2003). Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century. *UCLA Law Review*, 51: 387-455.

Blair, M. (2019). Corporate Law as a Solution to Team Production Problems. In: Clarke, T. et al. (Eds.), *The Oxford Handbook of the Corporation:* 197-215. Oxford: Oxford University Press.

Blair, M. and Stout, L. (1999). A Team Production Theory of Corporate Law. *Virginia Law Review,* 85(2): 247-328.

Blanc, S., and Al-Amoudi, I. (2013). Corporate institutions in a weakened welfare state: A Rawlsian perspective. *Business Ethics Quarterly*, 23(4): 497–525.

Boatright, J. (2000). *Ethics and the Conduct of Business* (3rd ed.). New Jersey: Pearson/Prentice Hall.

Boatright, J. (2013). Review of Public Capitalism: the Political Authority of Corporate executives by Christopher McMahon. *Business Ethics Quarterly,* 23(3): 477-480.

Bowles, S. and Gintis, H. (1998). Is Egalitarianism Passé? Homo Reciprocans and the Future of Egalitarian Politics. *Boston Review,* 23: 1-27.

Brink, A. (2010). Enlightened Corporate Governance: Specific Investments by Employees as Legitimation for Residual Claims. *Journal of Business Ethics,* 93: 641-651.

Business Roundtable (2019). Business Roundtable Redefines the Purpose of a Corporation. Available at: https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans (accessed 8 January 2020).

Cappelen, A., Hole, A., Sørensen, E., and Tungodden, B. (2007). The Pluralism of Fairness Ideals: An Experimental Approach. *The American Economic Review,* 97(3): 818-827.

Carr, A. (1968). Is Business Bluffing Ethical? *Harvard Business Review,* 46(1): 143-153.

Carroll, C., Slacalek, J., and Tokuoka, K. (2014). The Distribution of Wealth and the MPC: Implications of New European Data. *European Central Bank Working Paper Series*, 1648: 1-22.

CBC. (2009). Facebook 'cash flow positive,' signs 300M users. Available at: https://www.cbc.ca/news/technology/facebook-cash-flow-positive-signs-300m-users-1.826223 (accessed 8 January 2020).

Ciepley, D. (2013). Between Public and Private: Toward a Political Theory of the Corporation. *American Political Science Review,* 107(1): 139-158.

Clarke, T., O'Brien, J., and O'Kelley, C. (Eds.) (2019). *The Oxford Handbook of the Corporation.* Oxford: Oxford University Press.

Coase, R. (1937). The Nature of the Firm. *Economica,* 4(16): 386-405.

Coase, R. (1960). The Problem of Social Cost. *The Journal of Law and Economics,* 3: 1-44.

Cohen, G. (1997). Where the Action Is: On the Site of Distributive Justice. *Philosophy & Public Affairs,* 26: 3-30.

Cohen, G. (2008). *Rescuing Justice and Equality.* Cambridge, MA: Harvard University Press.

Cohen, G. (2009). *Why Not Socialism?* Princeton: Princeton University Press.

Cohen, J. (1989). Democratic Equality, *Ethics,* 99(4): 727-751.

Cohen, M. and Peterson, D. (2017). The Implicit Morality of the Market and Joseph Heath's Market Failures Approach to Business Ethics. *Journal of Business Ethics,* 159: 75-88.

Collison, D., Cross, S., Ferguson, J., Power, D., and Stevenson, L. (2011). Shareholder Primacy in UK Corporate Law: An Exploration of the Rationale and Evidence, *Certified Accountants Educational Trust Research Report,* 125: 1-53.

Company Law Review Steering Group (1999). *Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework*. London: Department for Trade and Industry.

Crane, A., McWilliams, A., Matten, D., Moon, J. and Siegel, D. (Eds.) (2008). *The Oxford Handbook of Corporate Social Responsibility.* Oxford: Oxford University Press.

Dahl, R. (1973). Governing the Giant Corporation. In: Nader, R. and Green, M. (Eds.), *Corporate Power in America.*

Davoudi, L., McKenna, C. and Olegario, R. (2018). The Historical Role of the Corporation in Society. *Journal of the British Academy,* 6(1): 17-47.

Deakin, S., Muniesa, F., Stern, S., Talbot, L., Kaplinsky, R., O'Neill, M., Ortiz, H., Sahlin, K., Schwittay, A. (2018). Markets, Finance, and Corporations: Does Capitalism Have a Future? In: International Panel on Social Progress (IPSP) (Eds.), *Rethinking Society for the 21st Century: Report of the International Panel on Social Progress:* 225-254. Cambridge: Cambridge University Press.

Deloitte Millennial Survey (2018). Millennials disappointed in business, unprepared for Industry 4.0. Available at: https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html (accessed 29 July 2019).

Dietsch, P. (2008). Distributive Lessons from Division of Labour. *Journal of Moral Philosophy,* 5: 96-117.

Donaldson, T. and Preston, L. (1995). The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications. *The Academy of Management Review,* 20(1): 65-91.

Durkheim, E. (1984 [1893]). *The Division of Labor in Society*, trans. Halls, W. New York, NY: Free Press.

Easterbrook, F. and Fischel, D. (1982). Antitrust Suits by Target of Tender Offers. *Michigan Law Review,* 80(6): 1155-1178.

Easterbrook, F. and Fischel, D. (1989). The Corporate Contract. *Colombia Law Review*, 89: 1416-1448.

Easterbrook, F. and Fischel, D. (1991). *The Economic Structure of Corporate Law.* London: Harvard University Press.

Edelman Trust Barometer. (2019). Available at: https://www.edelman.co.uk/research/2019-trust-barometer (accessed 29 July 2019).

Evan, W. and Freeman, R. (1993). A Stakeholder Theory of the Modern Corporation: Kantian Capitalism. In: Beauchamp, T. and Bowie, N. (Eds.), *Ethical Theory and Business.* Englewood Cliffs, NJ: Prentice Hall.

Fast Company. (2022). We are fast food executives: If our industry is to survive, workers need a greater voice. Available at: https://www.fastcompany.com/90714685/we-are-fast-food-executives-if-our-industry-is-to-survive-workers-need-a-greater-voice (accessed 30 January 2022).

Federal Reserve (2016). Federal Reserve Survey of Consumer Finances. Available at: https://www.federalreserve.gov/econres/scfindex.htm (accessed 15 September 2021).

Ferreras, I. (2017). *Firms as Political Entities: Saving Democracy Through Economic Bicameralism*. Cambridge: Cambridge University Press.

Financial Times (2020). How America's 1% came to dominate equity ownership. Available at: https://www.ft.com/content/2501e154-4789-11ea-aeb3-955839e06441 (accessed 5 July 2021).

Financial Times (2021a). 'We are trapped': residents hit with soaring charges at luxury London homes. Available at: https://www.ft.com/content/b135b814-dc9e-4abc-bb64-f378d11179d8 (accessed 5 January 2022).

Financial Times (2021b). Sewage spills highlight decades of under-investment at England's water companies. Available at: https://www.ft.com/content/b2314ae0-9e17-425d-8e3f-066270388331 (accessed 5 January 2022).

Fortune. (2011). Timeline: Where Facebook got its funding. Available at: https://fortune.com/2011/01/11/timeline-where-facebook-got-its-funding/ (accessed 8 January 2020).

Fourie, C., Schuppert, F., and Wallimann-Helmer, I., (Eds.) (2015). *Social Equality: On What It Means to Be Equals.* New York: Oxford University Press.

Freeman, R. (1984). *Strategic Management: A Stakeholder Approach.* Boston: Pitman.

Freeman, R. (2002). Stakeholder Theory of the Modern Corporation. In: Donaldson, T. et al. (Eds.), *Ethical Issues in Business*, Seventh Edition. Saddle River, NJ: Prentice-Hall.

Freeman, R., Harrison, J., Wicks, A., Parmar, B., and de Colle, S. (2010). *Stakeholder Theory: The State of the Art.* Cambridge: Cambridge University Press.

Freeman, R., Jones, T., and Wicks, A. (2002). Stakeholder Theory: The State of the Art. In: Bowie, N. (Ed.), *Blackwell Guide to Business Ethics.* Blackwell: Oxford.

Freeman, S. (2007). *Rawls.* London: Routledge.

Friedman, M. (1962). *Capitalism and Freedom.* Chicago: University of Chicago Press.

Friedman, M. (1970). The Social Responsibility of Business Is To Increase Its Profits, *The New York Times Magazine,* 13 September.

Garrau, M., and Laborde, C. (2015). Relational Equality, Non-domination, and Vulnerability. In: Fourie, C. et al. (Eds.), S*ocial Equality: On What It Means to Be Equals*: 65-86. New York: Oxford University Press.

Gauthier, D. (1986). *Morals by Agreement.* Oxford: Oxford University Press.

Greenfield, K. (2006). *The Failure of Corporate Law.* Chicago: University of Chicago Press.

Gibbard, A. (1991). Constructing Justice, *Philosophy and Public Affairs,* 20(3): 264-279.

Goldstein, A. (2017). *Janesville: An American Story*. New York: Simon & Schuster.

Goodin, R. (1985). *Protecting the Vulnerable: A Reanalysis of our Social Responsibilities.* Chicago: University of Chicago Press.

Goodpaster, K. (1983). The Concept of Corporate Responsibility. *Journal of Business Ethics,* 2 (1): 1–22.

Graeber, D. (2011). *Debt: The First 5000 Years*. Brooklyn, NY: Melville House Publishing.

Green, J., Mas-Colell, A., and Whinston, A. (1995). *Microeconomic Theory.* Oxford: Oxford University Press.

Guiso, L., Sapienza, P., and Zingales, L. (2015a). The Value of Corporate Culture, *Journal of Financial Economics,* 117: 60-76.

Guiso, L., Sapienza, P., and Zingales, L. (2015b). Corporate Culture, Societal Culture, and Institutions, *The American Economic Review,* 105 (5): 336-339.

Haldane, A. (2015). Who Owns a Company? Available at: https://www.bankofengland.co.uk/speech/2015/who-owns-a-company (accessed 18 July 2019).

Hansmann, H. (1996). *The Ownership of Enterprise.* Cambridge, MA: Harvard University Press.

Hansmann, H. and Kraakman, R. (2000). The End of History for Corporate Law. *Harvard Law School Discussion Paper*, 280: 1-34.

Hansmann, H., Kraakman, R., and Squire, R. (2006). Law and the Rise of the Firm. *Harvard Law Review,* 119(5): 1333-403.

Harris, R. (2000). *Industrializing English Law*. Cambridge: Cambridge University Press.

Hart, H. (1955). Are There Any Natural Rights? *The Philosophical Review,* 64(2): 175-191.

Hasnas, J. (1998). The Normative Theories of Business Ethics: A Guide for the Perplexed. *Business Ethics Quarterly*, 8: 19–42.

Hayek, F. (2002). Competition as a Discovery Procedure. *Quarterly Journal of Austrian Economics,* 5: 9-23.

Heath, J. (2014). *Morality, Competition and The Firm: The Market Failures Approach to Business Ethics.* New York: Oxford University Press.

Heath, J. and Norman, W. (2004). Stakeholder Theory, Corporate Governance and Public Management: What can the History of State-Run Enterprises Teach us in the Post-Enron era? *Journal of Business Ethics,* 53: 247-265.

Heath, J., Moriarty, J. and Norman, W. (2010). Business Ethics and (or as) Political Philosophy. *Business Ethics Quarterly,* 20(3): 427-452.

Hessen, R. (1979). A New Concept of Corporations: A Contractual and Private Property Model. *Hastings Law Journal,* 30(5): 1327-1350.

Hobbes, T. (1994 [1651]). *Leviathan.* Indianapolis: Hackett Publishing.

Hobbs, J. (1996). A transaction Cost Approach to Supply Chain Management. *Supply Chain Management,* 1(2): 15-27.

Holmstrom, B. (1982). Moral Hazard in Teams. *Bell Journal of Economics,* 13(2): 324-40.

Hsieh, N. (2005). Rawlsian Justice and Workplace Republicanism. *Social Theory and Practice,* 31(1): 115-43

Hsieh, N. (2008). Survey Article: Justice in Production. *The Journal of Political Philosophy,* 16(1): 72-100.

Hsieh, N. (2016). The Responsibilities and Role of Business in Relation to Society: Back to Basics? *Business Ethics Quarterly,* 27(2): 293-314.

Hsieh, N., Meyer, M., Rodin, D. and Klooster, J. (2018). The Social Purpose of Corporations. *Journal of the British Academy,* 6(s1): 49-73.

Hussain, W. (2012). Corporations, Profit Maximization and the Personal Sphere. *Economics and Philosophy,* 28: 311-331.

Investopedia. (2020). 10 Most Profitable Companies in the World. Available at: https://www.investopedia.com/the-world-s-10-most-profitable-companies-4694526 (accessed 20 January 2022).

Jensen, M. (2002). Value Maximization, Stakeholder Theory, and the Corporate Objective Function. *Business Ethics Quarterly,* 12: 235–256.

Jensen, M. and Meckling, W. (1976). Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. *Journal of Financial Economics,* 3: 305-60.

Jones, T. (1995). Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics. *Academy of Management Review*, 20(2): 404–37.

Jones, T., and Felps, W. (2013a). Stakeholder Happiness Enhancement: A Neo-Utilitarian Objective for the Modern Corporation. *Business Ethics Quarterly*, 23(3): 349–79.

Jones, T., and Felps, W. (2013b). Shareholder Wealth Maximization and Social Welfare: A Utilitarian Critique. *Business Ethics Quarterly*, 23(2): 207–38.

Jones, T. and Quinn, D. (1995). An Agent Morality View of Business Policy. *Academy of Management Review,* 20(1): 22-42.

Kamm, F. (2007). *Intricate Ethics: Rights, Responsibilities, and Permissible Harm.* Oxford: Oxford University Press.

Koehn, D. (1995). A Role of Virtue Ethics in the Analysis of Business Practice. *Business Ethics Quarterly,* 5: 533-39.

Larmore, C. (2012). What is Political Philosophy? *Journal of Moral Philosophy,* 10(3): 276-306.

Laski, H. (1916). The Personality of Associations. *Harvard Law Review,* 29 (4): 404–426.

León, Francisco. (2012). Reciprocity and Public Support for the Redistributive Role of the State. *Journal of European Social Policy,* 22(2): 198-215.

List, C. and Pettit, P. (2011). *Group Agency. The Possibility, Design and Status of Corporate Agents.* Oxford: Oxford University Press.

Lipsey, R. (2007). Reflections on the General Theory of Second Best at its Golden Jubilee. *International Tax Public Finance,* 14: 349-364.

Lipsey, R. and Lancaster, K. (1956). The General Theory of Second Best. *The Review of Economic Studies,* 24: 11-32.

NHS. (2021). Working in the NHS. Available at: https://www.jobs.nhs.uk/about_nhs.html (accessed 17 January 2022).

Maitland, F. (2003 [1911]). *State, Trust and Corporation*. Runciman, D. and Ryan, M. (Eds.). Cambridge: Cambridge University Press.

Marcoux, A. (2003). A Fiduciary Argument Against Stakeholder Theory. *Business Ethics Quarterly,* 13: 1-24.

Matten, D. and Moon, J. (2008). 'Implicit' and 'Explicit' CSR: a Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility. *Academy of Management Review,* 33(2): 404–424.

Mayer, C. (2013). *Firm Commitment: Why the Corporation is Failing us and How to Restore Trust in it.* Oxford: Oxford University Press.

Mayer, C. (2016). Reinventing the Corporation. *Journal of the British Academy,* 4: 53-72.

McMahon, C. (2012). *Public Capitalism: The Political Authority of Corporate Executives.* Philadelphia, PA: University of Pennsylvania Press.

Melenovsky, C. (2013). The Basic structure as a System of Social Practices. *Social Theory and Practice,* 39(4): 599-624.

Mill, J.S. (1906 [1859]). *On Liberty.* New York, NY: Everyman's Library.

Miller, D. (1998). Equality and Justice. In: Mason, A. (Ed.), *Ideals of Equality*: 21–36. Oxford: Blackwell.

Millon, D. (1993). Communitarians, Contractarians, and the Crisis in Corporate Law. *Washington and Lee Law Review,* 50: 1373-1394.

Moriarty, J. (2020). On the Origin, Content, and Relevance of the Market Failures Approach. *Journal of Business Ethics,* 165: 113-124.

Mueller, W. (1971). *New York Times*, 31 October: 63.

Néron, P. (2010). Business and the Polis: What Does It Mean to See Corporations as Political Actors? *Journal of Business Ethics,* 94(3): 333–52.

Néron, P. (2015). Rethinking the Very Idea of Egalitarian Markets and Corporations: Why Relationships Might Matter More than Distributions. *Business Ethics Quarterly,* 25(1): 93-124.

Norman, W. (2011). Business Ethics as Self-Regulation. *Journal of Business Ethics,* 102(1): 43–57.

Norman, W. (2013). Stakeholder Theory. In: Lafollette, H. (Ed.), *The International Encyclopedia of Ethics:* 50001-5011. Hoboken, NJ: Blackwell Publishing Limited.

Norman, W. (2015). Rawls on Markets and Corporate Governance. *Business Ethics Quarterly,* 25(1): 29-64.

Nozick, R. (1974). *Anarchy, State and Utopia.* New York, NY: Basic Books.

O'Neill, M. (2008a). What Should Egalitarians Believe? *Philosophy and Public Affairs,* 36(2): 119–56.

O'Neill, M. (2008b). Three Rawlsian Routes toward Economic Democracy. *Revue de Philosophie économique,* 8(2): 29–55.

O'Neill, M. (2009a). Corporations and Conventionalism: Regulation, Taxation and Social Justice. *MANCEPT Working Papers Series,* ISSN 1749 9747: 1-23.

O'Neill, M. (2009b). Entreprises et Conventionnalisme: Régulation, Impôt et Justice Sociale. *Raison Publique*, 10: 171-200.

OECD (2021). Income Inequality Data. Available at: https://data.oecd.org/inequality/income-inequality.htm (accessed 15 September 2021).

ONS (2020). Office of National Statistics, UK Business; activity; size and location: 2020. Available at: https://www.ons.gov.uk/businessindustryandtrade/business /activitysizeandlocation/bulletins/ukbusinessactivitysizeandlocation/2020 (accessed 14 January 2021).

Orts, E. and Strudler, A. (2010). Putting a Stake in Stakeholder Theory. *Journal of Business Ethics*, 88: 605–15.

Padfield, S. (2015). Corporate Social Responsibility and Concession Theory. *William & Mary Business Law Review,* 6(1): 1-34.

Pepper, A. (2019). *Agency Theory and Executive Pay: The Remuneration Committee's Dilemma.* Palgrave Macmillan.

Pepper, A. (2022). What is the Purpose of the Corporation? *Forbes.* Available at: https://www.forbes.com/sites/londonschoolofeconomics/2022/06/20/what-is-the-purpose-of-the-corporation/?sh=5d142a2259a3 (accessed 8 July 2022).

Pettit, P. (1997). *Republicanism. A Theory of Freedom and Government.* Oxford: Oxford University Press.

Pettit, P. (2012). *On the People's Terms. A Republican Theory and Model for Democracy*. Cambridge: Cambridge University Press.

Phillips, M. (1994). Reappraising the Real Entity Theory of the Corporation. *Florida State University Law Review,* 21 (4): 1061–1123.

Phillips, R. (2003). *Stakeholder Theory and Organizational Ethics*. San Francisco, CA: Berrett-Koehler.

Phillips, R. (2011). *Stakeholder Theory: Impact and Prospects*. Cheltenham and Northampton, MA: Edward Elgar.

Pogge, T. (2003) Relational Conceptions of Justice: Responsibility for Health Outcomes. In: Anand, S., Peter, F., and Sen, A. (Eds.), *Public Health, Ethics, and Equity:* 135-61. Oxford: Oxford University Press.

Polanyi, K. (2001 [1944]). *The Great Transformation: The Political and Economic Origins of our Time*. Boston: Beacon Press.

Porter, T. (2009). The Division of Moral Labour and the Basic Structure Restriction. *Politics, Philosophy and Economics:* 173-199.

Porter, M. and Kramer, M. (2011). Creating Shared Value: The Link Between Competitive Advantage and Corporate Social Responsibility. *Harvard Business Review,* 89(1/2): 62–77.

Post, J., Preston, L. and Sachs, S. (2002). Managing the Extended Enterprise: The New Stakeholder View. *California Management Review,* 45(1): 5-28.

Rajan, R. and Zingales, L. (1998). Power in a Theory of the Firm. *Quarterly Journal of Economics,* 113(20: 387-432.

Randles, G. (2017). *Contracts Are King, But Don't Forget Tort Law.* Available at: https://www.stoel.com/legal-insights/article/contracts-are-king,-but-don't-forget-tort-law. (accessed 4 February 2020).

Rawls, J. (1971). *A Theory of Justice.* Cambridge, MA: Harvard University Press.

Rawls, J. (1996). *Political Liberalism.* New York: Colombia University Press.

Rawls, J. (1997). The Idea of Public Reason Revisited. *The University of Chicago Law,* 64(3): 765-807.

Rawls, J. (1999). *A Theory of Justice: Revised Edition.* Cambridge, MA: Harvard University Press.

Rawls, J. (2001). *Justice as Fairness: a Restatement.* Cambridge, MA: Harvard University Press.

Repp, C. and Contat, J. (2019). Does Heath Have a Good Answer to Steinberg? *Business Ethics Journal Review,* 7(3): 14-20.

RepRisk (2020). RepRisk Special Report: Most Controversial Companies (MCC) 2019. Available at: https://www.reprisk.com/content/static/reprisk-most-controversial-companies-2019-report.pdf (accessed 20 March 2020).

Scanlon, T. (2018). *Why Does Inequality Matter?* Oxford: Oxford University Press.

Scheffler, S. (1982). *The Rejection of Consequentialism.* Oxford: Oxford University Press.

Scheffler, S. (2003). What is Egalitarianism? *Philosophy and Public Affairs,* 31: 5-39.

Scheffler, S. (2005a). The Division of Moral Labor: Egalitarian Liberalism as Moral Pluralism. *Proceedings of the Aristotelian Society,* 79(1): 229–53.

Scheffler, S. (2005b). Choice, Circumstance, and the Value of Equality. *Philosophy, Politics, and Economics,* 4: 5-28.

Scheffler, S. (2015a). Distributive Justice, the Basic Structure and the Place of Private Law. *Oxford Journal of Legal Studies,* 35(2): 213-235.

Scheffler, S. (2015b). The Practice of Equality. In: Fourie, C. et al. (Eds.), S*ocial Equality: On What It Means to Be Equals*: 21–44. New York: Oxford University Press.

Scheffler, S. (2020). Is Economic Inequality Really a Problem? *New York Times.* Available at: https://www.nytimes.com/2020/07/01/opinion/economic-inequality-moral-philosophy.html (accessed 10 August 2020).

Schemmel, C. (2011). Distributive and Relational Equality, *Politics, Philosophy, and Economics,* 11(2): 123–48.

Schemmel, C. (2021). *Justice and Egalitarian Relations.* Oxford: Oxford University Press.

Schwab, S. and Thomas, R. (2006). An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For? *Washington and Lee Law Review,* 63: 231-70.

Scott, J. (1998). *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed.* New Haven, CT: Yale University Press.

Scruton, R. and Finnis, J. (1989). Corporate Persons. *Proceedings of the Aristotelian Society, Supplementary Volumes,* 63: 239-274.

Sen, A. (1980). Equality of What? In: *The Tanner Lecture on Human Values*, (I): 197–220. Cambridge: Cambridge University Press.

Serafeim, G., Zochowski, R. and Downing, J. (2019). Impact-weighted Financial Accounts: the Missing Piece for an Impact Economy. *Harvard Business School*. Available at: hbs.edu/impact-weighted-accounts (accessed 1 August 2021).

Shields, C. (2006). Plato's Challenge: The Case Against Justice in *Republic* II. In: Santas, G. (Ed.), *The Blackwell Guide to Plato's Republic:* 63-83. Blackwell.

Singer, A. (2015). There is No Rawlsian Theory of Corporate Governance. *Business Ethics Quarterly,* 25(1): 65-92.

Singer, A. (2018). The Political Nature of the Firm and the Cost of Norms. *The Journal of Politics*, 80(3): 831-844.

Singer, A. (2019). The Corporation's Governmental Provenance and Its Significance. *Economics and Philosophy,* 35: 283-306.

Strine, L. (2015). A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications. *The Harvard John M. Olin Discussion Paper Series,* 804: 1-73.

Smith, J. (2003). The Shareholders vs. Stakeholders Debate. *MIT Sloan Management Review,* 44(4): 84-90.

Smith, J. (2014). Corporate Social Purpose and the Task of Management. In: Urban, G. (Ed.), *Corporations and Citizenship*: 57-73. Philadelphia: University of Pennsylvania Press.

Smith, J. (2018a). Navigating our Way Between Market and State. *Business Ethics Quarterly,* 29(1): 127-141.

Smith, J. (2018b). Efficiency and Ethically Responsible Management. *Journal of Business Ethics,* 150(3): 603–18.

Smith, J. (2019). Corporate Responsibility and the Plurality of Market Aims. *Business and Society Review,* 124: 183-199.

Sollars, G. (2002). The Corporation as Actual Agreement. *Business Ethics Quarterly,* 12: 351-70.

Solomon, R. (1993). *Ethics and Excellence: Cooperation and Integrity in Business.* New York: Oxford University Press.

Steinberg, E. (2017). The Inapplicability of the Market-Failures Approach in a Non-Ideal World. *Business Ethics Journal Review,* 5(5): 28-34.

Stout, L. (2002). Bad and Not-so-Bad Arguments for Shareholder Primacy. *Southern California Law Review,* 75(5): 1189-1210.

Stout, L. (2011). *Cultivating Conscience: How Good Laws Make Good People.* Princeton and Oxford: Princeton University Press.

Stout, L. (2012). *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public.* San Francisco: Berrett-Koehler.

Strudler, A. (2017). What to Do with Corporate Wealth. *Journal of Political Philosophy,* 25: 108-126.

Sundaram, A. and Inkpen, A. (2004). The Corporate Objective Revisited. *Organization Science,* 15: 350–63.

Tan, K. (2004). Justice and Personal Pursuits. *Journal of Philosophy,* 101(7): 331-62.

Tawney, R. (1964). *Equality* (5th edition). London: Unwin.

Taylor, F. (2007 [2011]). *Principles of Scientific Management.* Sioux Falls, SD: Nuvision Press.

Trucost. (2013). *Natural Capital At Risk: The Top 100 Externalities of Business.* Available at: http://naturalcapitalcoalition.org/wp-content/uploads/2016/07/Trucost-Nat-Cap-at-Risk-Final-Report-web.pdf (accessed 18 November 2019).

Valentini, L. (2012). Ideal vs. Non-Ideal Theory: A Conceptual Map. *Philosophy Compass,* 7(9): 654-664.

Voorhoeve, A. (2005). Incentives and Principles for Individuals in Rawls's Theory of Justice. *Ethics and Economics,* 3(1): 1-7.

Voorhoeve, A. (2020). Why Health-Related Inequalities Matter and Which Ones Do. In: Norheim, O., Emanuel, E., and Millum, J. (Eds.), *Global Health Priority-Setting: Beyond Cost-Effectiveness:* 145-161. Oxford: Oxford University Press.

Walzer, M. (1983). *Spheres of Justice. A Defence of Pluralism and Equality.* New York: Basic Books.

White, S. (2003). *The Civic Minimum: On the Rights and Obligations of Economic Citizenship.* New York: Oxford University Press.

Williamson, O. (1975). *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization.* New York: Free Press.

Williamson, O. (1988). Corporate finance and corporate governance. *Journal of Finance,* 43(3): 567–591.

Wolff, J. (2015). Social Equality and Social Inequality. In: Fourie, C. et al. (Eds.), S*ocial Equality: On What It Means to Be Equals*: 210–225. New York: Oxford University Press.

Young, I. (2011). *Justice and the Politics of Difference*. Princeton, NJ: Princeton University Press.