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## Extending Democracy to Corporate Governace and Beyond: A Theory of Popular Economic Sovereignty

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# Extending Democracy to Corporate Governance and Beyond: A Theory of Popular Economic Sovereignty

Edward L. Rubin\*

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## I. INTRODUCTION

The only mode of governance that Western nations currently regard as acceptable is democracy. We demand democracy for the nation as a whole and for its subsidiary units such as states or provinces, cities, and sometimes even smaller or more specialized public bodies. It is therefore natural for us to ask whether this same model of control should apply to corporations, the most important economic organizations in our society.

Worker democracy is traditionally linked to socialism,<sup>1</sup> where the state owns the means of production. Proposals for corporate democracy within the framework of a capitalist system currently fall into three basic categories. The first is employee democracy, where those who work for the corporation, rather than the corporation's owners, exercise control of its operations.<sup>2</sup> The second is stakeholder

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1 See, e.g., BERNARD H. MOSS, *THE ORIGINS OF THE FRENCH LABOR MOVEMENT: THE SOCIALISM OF SKILLED WORKERS, 1830-1914* (Univ. of Calif. Press 1st ed. 1976) (unifying ideology of French workers' socialism was "a federalist trade socialism in which the means of production would be owned collectively within the framework of a federation of skilled trades"). See generally STEPHEN E. PHILION, *WORKERS' DEMOCRACY IN CHINA'S TRANSITION FROM STATE SOCIALISM* (Routledge 2009) (workers' democracy served as a discourse of resistance to the oppressive features of China's post 1980 privatization); DAVID SCHWEICKART, *AFTER CAPITALISM* (Rowman & Littlefield Publishers 2nd ed. 2011) (proposing worker democracy as the basis of a socialist successor to capitalism).

2. JERGEN GOUL ANDERSEN & JENS HOFF, *DEMOCRACY AND CITIZENSHIP IN SCANDINAVIA* 114-34 (Palgrave Macmillan 1st ed. 2001) (providing descriptions of worker participation and management programs). See generally Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis*, 49 *INDUS. & LAB. REL. REV.* 58 (1995) (surveying 43 studies indicating that

democracy, where those who are directly affected by the corporation—its employees again, but also its subcontractors, consumers and neighbors—exercise control.<sup>3</sup> Proponents of both these proposals treat them as a mode of corporate management. The third set of proposals can be either of these first two versions, but proponents tend to treat them as a way that people can become engaged in the process of governance and develop participatory habits or attitudes in a mass society where widespread involvement in national politics is difficult—and perhaps unrealistic.<sup>4</sup>

In all three of these approaches to corporate democracy, the relationship between political democracy and corporate governance is analogical. In the first two, the analogy is between public governance and private management. The assertion is that the mode of control or decision-making that is used in the public arena can be adopted in the private arena for different purposes. Democracy in the public arena is justified as a means of enabling citizens to control their destinies and avoid government oppression. As applied to corporate governance, democratic decision-making is proposed in the first case as a means of achieving efficiency and increasing job satisfaction or motivation. In the second case, it is primarily proposed as a means of controlling the corporation's impact on the range of people it affects and, secondarily, of achieving similar efficiency gains. The third case involves an analogy between individual behavior in the workplace and in the political arena. Thus, the connection occurs within the individual, rather than from one institution to another, but it is still an analogy.

This article proposes a different rationale for corporate democracy, one that extends more broadly to all forms of employment. It is based on an equivalence, not an analogy. The equivalence is that subordination feels essentially the same to an individual whether a public or a private entity is carrying it out. As recognized in the public arena, it undermines people's dignity and autonomy, and at least threatens—and often produces—actual oppression. Based on this equivalence, this article proposes a different argument for corporate democracy. Proponents of democracy in the public sphere believe that the citizens of a nation should control its government. For the same reason, it can be argued that those who work for a living should control the institutions for which they work. Thus, the norms of democracy, when translated into the economic realm, yield the principle that no

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most forms of worker participation and control increase productivity).

3. See, e.g., ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, *BUSINESS & SOCIETY: ETHICS, SUSTAINABILITY AND STAKEHOLDER MANAGEMENT* (Cengage Learning 9th ed. 2014); JAMES E. POST, LEE E. PRESTON & SYBILLE SACHS, *REDEFINING THE CORPORATION: STAKEHOLDER MANAGEMENT AND ORGANIZATIONAL WEALTH* (Stanford Business Books 1st ed. 2002); Ian Verbeke & Vincent Tung, *The Future of Stakeholder Management Theory: A Temporal Perspective*, 112 *J. BUS. ETHICS* 529 (2012).

4. See generally G.D.H. Cole, *Guild Socialism Restated* (1920); G.D.H. Cole, *Self-Government in Industry* (1919); Carole Pateman, *Participation and Democratic Theory* (Cambridge Univ. Press 1970).

person should work for their livelihood on terms established by another person. This can be called the principle of popular economic sovereignty.

The operational argument that can instantiate this assertion of equivalence between the state and the corporation is etiological. Both institutions, in their modern form, developed from Medieval corporatist thought. They are conceived as juridical persons, entities that are capable of independent action. As such, they have an equivalent capacity to dominate and oppress the individuals that they control. The way to provide these individuals with a sense of autonomy and protect them from oppression is to constitute them as a separate juridical entity that is authorized to control the state or the corporation, either directly or—in cases where the state or corporation is large—through chosen representatives.

The argument proceeds in four steps. The first is that our current way of conceiving both the state and the corporation developed from medieval corporatist thinking. Second, this same mode of thought generated the idea of representation that enabled individuals who were not leaders of a structured hierarchy to participate in state decisions. Third, representation became the mechanism by which democratic government was instituted. Fourth, as democracy developed, the scope of representation expanded to include all competent adults. Fifth, that this same expanded concept of representation can be extended to corporations and would serve the same purposes as it serves in the political arena. Part I will explicate the first two stages of the argument, corporatist thinking and the concept of representation in politics. Part II explicates the next two stages, the use of representation in democracy and the expansion of its scope. Part III then presents the argument that this expanded idea of representation can be extended to corporations on the basis on their common conceptual origin with the state. It concludes that employees—either directly or more typically by choosing representatives—should be the controlling force of modern economic entities. This principle, which serves the same purposes in the workplace that democracy serves in politics, is referred to as popular economic sovereignty. This concludes the argument, which is essentially theoretical. Part IV goes on to show that this principle, although it sounds radical and impractical, could in fact be implemented rather easily in a capitalist system for both major corporations and all other employment relationships as well.

## II. THE THEORETICAL BASIS FOR POPULAR ECONOMIC SOVEREIGNTY

We can often gain important insights into something that we take for granted if we approach it with a sense of wonder. The same is true for the nation state and the business corporation. Some version of these modes of organization were perhaps developed by the ancestors of Western civilization, but their modern form emerged from developments during the so-called Gothic period that the

Renaissance humanists associated with unlettered barbarians. Contrary to both these widespread but unsubstantiated images, this was one of the most creative periods in human history,<sup>5</sup> with the conception of the state and the corporation counting as two of its great achievements. Both are products of the same conceptual advance and thus possess a deep connection to each other that goes well beyond analogy.

In the Early Middle Ages—as Ernst Kantorowicz explains—religious thinkers regarded the bread of the Eucharist as the mystical body of Christ (*corpus mysticum*) and the Church as the true body of Christ (*corpus verum*).<sup>6</sup> This latter notion was derived from the view that what we now call organizations were groups of individuals united by affective bonds—bonds based on their feelings toward each other. Economic organizations were enterprises conducted by families, bound together by their biological relationship, or partnerships, bound by the partners’ personal commitments to each other.<sup>7</sup> Political organizations could be a city to which all citizens owed loyalty,<sup>8</sup> or a kingdom bound together by loyalty to its monarch. In response to the 11th century disputes regarding transubstantiation, the Church moved to the position that the bread was the actual body of Christ, the *corpus verum*. The idea of Christ’s mystical body thus became available as a description of the Church: a description that responded to and simultaneously advanced a variety of conceptual trends that were occurring at the time.<sup>9</sup>

To describe an organization as a mystical body invests it with a separate identity; it becomes a being of its own, an entity capable of action. Once the Church had been defined in these terms, its Medieval rival for authority—the state—could be conceived in similar terms. It became a *corpus mysticum* as well, but as a largely political institution. The mystical became juridical—still vaguely tied to sacerdotal concepts, but increasingly secular as the centralizing monarchies acquired staff, official records, and other features of administration. The result, as Kantorowicz notes, was “a corporational character signifying a ‘fictitious’ or ‘juristic’ person.”<sup>10</sup> In the 12th century, John of Salisbury invoked the familiar analogy between

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5. See generally R. W. SOUTHERN, *THE MAKING OF THE MIDDLE AGES* (Yale Univ. Press 1953); JOSEPH R. STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* (Princeton Univ. Press 1970).

6. ERNST KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY 195–97* (Princeton Univ. Press 1957).

7. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 1–12* (Modern Library 2003); ANDREAS TELEVANTOS, *CAPITALISM BEFORE CORPORATIONS: THE MORALITY OF BUSINESS ASSOCIATIONS AND THE ROOTS OF COMMERCIAL EQUITY AND LAW* (Oxford Univ. Press 2020).

8. HENRI PIRENNE, *MEDIEVAL CITIES: THEIR ORIGINS AND THE REVIVAL OF TRADE 35–48* (Frank D. Halsey, trans. 1952); MAX WEBER, *ECONOMY AND SOCIETY 1236–62* (Guenther Roth & Claus Wittich, eds. 1978).

9. KANTOROWICZ, *supra* note 6, at 197–208; see TOM HOLLAND, *THE FORGE OF CHRISTENDOM: THE END OF DAYS AND THE EPIC RISE OF THE WEST 351–90* (2010) (discussing the Gregorian Reform Movement as a principal trend).

10. KANTOROWICZ, *supra* note 6, at 209.

society and the human body: with the ruler as its head, its soldiers and administrative officials as its arms, and the peasants as its feet.<sup>11</sup> Now, however, this imaginary being could be seen as a functioning entity—the body politic—with the king as the head in his juridical, and thus immortal, capacity rather than his personal capacity. Kantorowicz quotes Lucas de Penna, a 14th century Italian jurist, for the idea that “men are joined together morally and politically in the *respublica*, the head of which is the Prince.”<sup>12</sup> The famous frontispiece of Hobbes’ *Leviathan*, where a monarch with a crowned head and a body composed of tiny subjects rises up above the countryside, grasping a sword and scepter, is a depiction of this concept.<sup>13</sup>

With both the Church and state conceived as juridical persons—separate from the people who composed them and thus free from the mortality to which those people’s physical bodies must succumb—the way was open for the creation of still other such immortal entities. Ever since the Germanic invasions ended centralized Roman authority in the West, the kings of the successor states had granted governance authority to their followers and allies, typically in the form of the land grants that defined the feudal system.<sup>14</sup> Beginning in the 12th century, as the revival of trade and manufacturing was turning feudalism from governance into ceremony,<sup>15</sup> the centralizing monarchs of the emerging nation states began issuing charters to groups of people who were creating, or being created by, this momentous economic development. In particular, the monarchs issued legal charters establishing the quondam family enterprises or business partnerships as the first corporations.<sup>16</sup> At the same time, they issued city charters to the expanding commercial centers.<sup>17</sup> Both types of charters created entities with the status of a juridical person, a *corpus mysticum*, with legal specification taking the place of mystery.<sup>18</sup>

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11. JOHN OF SALISBURY, *POLICRATICUS: OF THE FRIVOLITIES OF COURTIERI AND THE FOOTPRINTS OF PHILOSOPHERS* (Cary J. Nederman, trans., 1990).

12. KANTOROWICZ, *supra* note 6, at 216.

13. THOMAS HOBBS, *LEVIATHAN 2* (Richard Tuck, ed., Cambridge Univ. Press 1996) (depicting a reproduction of the original 1651 frontispiece in this edition).

14. *See* MARC BLOCH, *FEUDAL SOCIETY* 145–210 (L.A. Manyon, trans., 1961); HEINRICH FICHTENAU, *LIVING IN THE TENTH CENTURY: MENTALITIES AND SOCIAL ORDERS* 141–56 (Patrick J. Geary, trans., 1991). *See generally* F.L. GANSHOF, *FEUDALISM* (Philip Grierson, trans., 3rd ed. 1963).

15. *See generally* ROBERT S. LOPEZ, *THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES, 950–1350* (Cambridge Univ. Press 1976); PIRENNE, *supra* note 8, at 49–67.

16. *See* JOHN P. DAVIS, *CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND THEIR RELATION TO THE AUTHORITY OF THE STATE* 88–91 (G.P. Putnam’s Sons 1905). *See generally* GERMAIN SICARD, *THE ORIGINS OF CORPORATIONS: THE MILLS OF TOULOUSE IN THE MIDDLE AGES* (Matthew Landry, trans., 2015).

17. *See* ROBERT BARTLETT, *THE MAKING OF EUROPE: CONQUEST, COLONIZATION AND CULTURAL CHANGE, 950–1350* (Princeton Univ. Press 1994); Davis, *supra* note 16, at 92–129; DAVID NICHOLAS, *THE GROWTH OF THE MEDIEVAL CITY: FROM LATE ANTIQUITY TO THE EARLY FOURTEENTH CENTURY* 87–114, 141–57 (Routledge 1st ed. 1997); PIRENNE, *supra* note 8, at 35–48.

18. SICARD, *supra* note 16, at 199–217.

During this period, two forces were arrayed in opposition to the centralizing monarchs: the Catholic Church and the nobility. The Church, despite a somewhat desperate effort to secure its power by organizing the Crusades,<sup>19</sup> was rapidly losing ground as the newly founded universities provided graduates—mainly lawyers—who could counteract the Church’s previous monopoly of literate officers, and various territorial expansions or disruptions provided soldiers—mainly mercenaries—who fought for money rather than faith. Its effort to obtain control of episcopal appointments, although amplifying papal authority in the short run, triggered titanic struggles with the monarchs that attenuated Church authority as time went on.<sup>20</sup> There followed the self-inflicted wound of the Western Schism that largely ended the Church’s ability to oppose the monarchs,<sup>21</sup> adumbrating the more complete demise of its authority in the Reformation.<sup>22</sup>

The nobility proved more formidable. Their military power quickly ebbed though the development of mercenary armies who could defeat them in the field, and of artillery that could defeat them when they retreated to their castles. The levers of local administration remained in their hands somewhat longer due to their ownership of agricultural land, but gradually yielded to emerging royal administrations, staffed by those same university graduates.<sup>23</sup> One resource that the nobles retained, however, was law and custom, which in this case at least proved more durable than steel, stone, or soil. Feudalism was clearly in decline but the nobles, whose physical battles were increasingly limited to tournaments, defended their more abstract rights and privileges with undiminished energy.<sup>24</sup>

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19. *See generally* STEVEN RUNCIMAN, *A HISTORY OF THE CRUSADES, VOL 1: THE FIRST CRUSADE AND THE FOUNDATION OF THE KINGDOM OF JERUSALEM* (Cambridge Univ. Press 1987).

20. *See, e.g.*, HOLLAND, *supra* note 9, at xvi–xx, 374–90 (explaining the Investiture Crisis as Emperor Henry IV’s conflict with Pope Gregory VII over ecclesiastical appointments); L.S. ROBINSON, *HENRY IV OF GERMANY, 1056–1106*, at 105–236 (Cambridge Univ. Press 2003); W.L. WARREN, *KING JOHN 154–73* (Univ. of Cal. Press 2nd ed. 1978) (discussing King John’s conflict with Pope Innocent III regarding the appointment of Stephen Langton as Archbishop of Canterbury).

21. *See generally* JOELLE ROLLO-KOSTER, *AVIGNON AND ITS PAPACY 1309-1417: POPES, INSTITUTIONS AND SOCIETY* (2015); F. DONALD LOGAN, *A HISTORY OF THE CHURCH IN THE MIDDLE AGES 297–331* (Routledge 2nd ed. 2012); JOHN STRICKLAND, *THE AGE OF DIVISION: CHRISTENDOM FROM THE GREAT SCHISM TO THE PROTESTANT REFORMATION* (2020). The Great Schism involved the separation of the Eastern Orthodox Church from the Roman Catholic Church in 1054. The Western Schism, which lasted from 1376 to 1417, involved rival claimants to the papacy in Rome and Avignon, and is generally regarded as undermining people’s commitment to the Church as an institution.

22. *See generally* OWEN CHADWICK, *THE REFORMATION* (Penguin Books 1st ed. 1964); DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* (Viking Adult 1st ed. 2004).

23. *See* JONATHAN DEWALD, *THE EUROPEAN NOBILITY* (Cambridge Univ. Press 1st ed. 1996); NORBERT ELIAS, *State Formation and Civilization*, in *THE CIVILIZING PROCESS*, 257 (Edwin Jephcott, trans., 1994); Michael Rush, *The Decline of the Nobility*, in *DEMOCRATIC REPRESENTATION IN EUROPE: DIVERSITY, CHANGE AND CONVENIENCE* 29 (Maurizio Cotta & Heinrich Best, eds., 2007); Christopher Storrs & H. M. Scott, *The Military Revolution and the European Nobility, 1600–1800*, in *WARFARE IN EUROPE, 1650–1792*, at 3 (Jeremy Black, ed., 2005).

24. BLOCH, *supra* note 14, at 320–31.

Corporativism provided the centralizing monarchs with an effective response to the legal rights of the nobility. One reason that the nobility retained its position and prestige was that its status was based on the same source as the monarchs, that is, control of land. But the corporate charters that the monarchs issued for trade and manufacture created juridical entities whose owners and managers owed their wealth to lower-status occupations that kept them dependent on the monarch for their social standing. The cities that the monarchs chartered as corporate entities were similarly separate from the feudal system, and thus dependent directly, and exclusively, on the monarch as well. In the Holy Roman Empire, where the charters extended its boundaries to the east and established the Hanseatic ports, it was said that “*stadtluft macht frei*” (“city air makes one free”).<sup>25</sup> This was not, at least originally, a reference to sybaritic or anonymous character of urban life, but rather to the fact that serfs were released from their feudal obligations after spending more than one year in the city—thus becoming direct subjects of the king.

The newly chartered cities and other areas where commoners had obtained their freedom then produced the further conceptual advance of political representation. Feudal law and custom provided the kings with various sources of revenue with evocative names such as carucage, frankalmoign, scutage, tallage and merchet, but these proved insufficient for all the lawyers, administrations, soldiers, and artillery that they needed for their centralizing efforts. Kings could overcome these limitations and enact new taxes only if they obtained the consent of those they were proposing to tax.<sup>26</sup> Such consent had to be obtained from each of the three estates into which society was divided—the clergy, the nobility, and the commoners.<sup>27</sup> The means of making the request, if not necessarily obtaining the consent, was easy enough for the clergy, which organized itself in a strict hierarchy with clearly identified leaders. The nobility was similarly hierarchical under the feudal system, with a relatively small number being direct vassals, or tenants-in-chief, of the king. In England, these direct vassals numbered a mere twenty-five

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25. PIRENNE, *supra* note 8, at 4; Jeffrey S. Debies-Carl & Christopher M. Huggins, “City Air Makes Free”: A Multi-Level, Cross-National Analysis of Self-Efficacy, 72 SOC. PSYCH. Q. 343 (2009).

26. See generally Yoram Barzal & Edgar Kiser, *Taxation and Voting Rights in Medieval England and France*, 14 RATIONALITY AND SOC’Y 473 (2002); Bernd Schneidmüller, *Rule by Consensus: Forms and Concepts of Political Order in the European Middle Ages*, 16 MEDIEVAL HIST. J. 449 (2014).

27. The Estates General of France was organized according to this division. See generally MICHAEL HAYDEN, *FRANCE AND THE ESTATES GENERAL OF 1614* (Cambridge Univ. Press 1st ed. 1974) (describing the last meeting of the Estates General until the Revolution and summarizing its previous history). In the English Parliament, the clergy and nobility met together in the House of Lords, and the representatives of the commoners met in a separate chamber. See CLYVE JONES ET AL., *A SHORT HISTORY OF PARLIAMENT* (2012); J.R. MADDICOTT, *THE ORIGINS OF THE ENGLISH PARLIAMENT, 924–1327* (Oxford Univ. Press 1st ed. 2012). Medieval people generally thought about their society in terms of these three estates. See GEORGES DUBY, *THE THREE ORDERS: FEUDAL SOCIETY IMAGINED* (Arthur Goldhammer, trans., 1980); WEBER, *supra* note 8, at 236–37. This tripartite division was often described as oratores, bellatores and laboratores – those who pray, those who fight, and those who work.

when the Magna Carta was signed in 1215, and it was probably these twenty-five—and certainly not a petty jury—that the famous Chapter 39 references, when King John promised not to prosecute or punish any of the signatories except by “the lawful judgment of his peers.”<sup>28</sup>

Obtaining the consent of the third estate—free commoners who lived in the royally chartered cities or owned the land they farmed—posed a greater difficulty. This group had been rapidly expanding with the revival of commerce and, to an increasing extent, that was where the money was. But how could the monarch obtain the consent of this extensive, dispersed, and non-hierarchical mass of commoners? The solution that developed was that they were to meet in local groups and choose individuals who would then join the clerics and nobles in a council or assembly that could approve additional taxation. Scholars have identified the process by which the assembly members for the third estate were chosen as being derived from Roman civil law—specifically the provision of *quod omnes tangit, ab omnes approbetur*: “what touches all must be approved by all.”<sup>29</sup>

Roman law was being revived at this time by the glossators and postglossators,<sup>30</sup> so it is not surprising that a provision of this sort would have been conceptually available to people. But it could not have been extended from civil law settings to the fiscal management of the realm without the support of corporatist thinking. The group of people who approved or chose the representative had to be conceived as a juridical body, an entity that could take such action. The representative had to be conceived as acting for a juridical entity, of representing that entity’s collective act of agreement in a manner similar to the action of the Church—as *corpus mysticum*—or the small group of leading nobles. This was a tremendous advance, one that was unknown to Ancient Greece or Rome.<sup>31</sup>

Business corporations followed a somewhat different, but not unrelated, path. Here too, the concept of representation proved useful, but it was representation of capital contributions, not human individuals. A royal charter could grant particular markets to an individual or group of individuals, producing a corporate entity not very different from the individual who was granted a “farm” by the king to manage a particular royal property, collect taxes in a given area, or raise troops for military

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28. MAGNA CARTA 448, 461 (J.C. Holt ed., 1992).

29. OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 61–67 (Frederic Maitland, trans., 1958); ARTHUR MONAHAN, CONSENT, COERCION AND LIMIT: THE MEDIEVAL ORIGINS OF PARLIAMENTARY DEMOCRACY 97–133 (McGill-Queen’s Univ. Press 1st ed. 1987); GAINES POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100–1322 (1964); Gaines Post, *A Roman Legal Theory of Consent: Quid Omnes Tangit*, 1950 WISC. L. REV. 66 (1950).

30. See PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (Cambridge Univ. Press 1st ed. 1999); see also HERMANN KANTOROWICZ, STUDIES IN THE GLOSSATORS OF THE ROMAN LAW: NEWLY DISCOVERED WRITINGS OF THE 12TH CENTURY (1969).

31. See PAUL CARTLEDGE, DEMOCRACY: A LIFE 293–98 (2018) (describing the history of democracy focusing on Ancient Greece).

purposes. As time went on, larger enterprises that required capital were formed, and capital was raised by issuing stock—shares in the profits of the enterprise. Because these enterprises were conceived as juridical persons capable of independent action, elected representatives of the stockholders could manage these enterprises.<sup>32</sup> This organizational structure is not a democracy of any kind, and in fact pre-dated democracy by several centuries. But it shared democracy's conceptual origin in the corporatist thinking of the Medieval Era.

### III. REPRESENTATION AS THE MECHANISM OF POPULAR POLITICAL SOVEREIGNTY

As is apparent from the foregoing account, political representation did not develop as a feature of democracy. Quite the contrary, it was a device that centralizing monarchs used to expand their power, to obtain the economic resources that they needed to displace the Church, subdue the nobility, and—of course—make war against each other.<sup>33</sup> This device became vestigial in France and Spain due to the absolutism of the 16th and 17th centuries, when the monarchs were able to sweep feudal limits on their authority aside and impose whatever taxes the economy and the populace would bear.<sup>34</sup> In England, however, representation flourished, and the Stuarts' attempted absolutism ended in a revolution spearheaded by Parliament—the representative assembly.<sup>35</sup> There followed a dictatorship, a restoration of the Stuart monarchy, another revolution,<sup>36</sup> and then the gradual expansion of Parliament's role in governance.<sup>37</sup> By the end of the 18th

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32. See RON HARRIS, *GOING THE DISTANCE: EURASIAN TRADE AND THE RISE OF THE BUSINESS CORPORATION 1400 TO 1700* (2020); SICARD, *supra* note 16, at 146–99.

33. The idea that a representative assembly might be connected in some manner to the concept of democracy seems to have been developed for the first time during the English Civil War by a group of radical republican writers, notably James Harrington, Algernon Sidney, and Henry Neville. See CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* (2021). Harrington, for example, offered the following prescription: “Democracy . . . consists of distinct tribes . . . subordinate to a senate consisting of not above three hundred senators, and to a popular assembly not under a thousand deputies, each of these . . . readily changeable in one third part upon annual elections in the tribes, the senate having the debate, and the popular assembly the result of the whole commonwealth.” James Harrington, *A System of Politics*, in *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 261 (J.G.A. Pocock, ed., 1992).

34. See JOHN LYNCH, *SPAIN UNDER THE HABSBURGS, VOL. 1: EMPIRE AND ABSOLUTISM, 1516–1598* (New York Univ. Press 2nd ed. 1984); GEOFFREY TREASURE, *SEVENTEENTH CENTURY FRANCE: A STUDY IN ABSOLUTISM* (1967).

35. See generally MICHAEL BRADDICK, *GOD'S FURY, ENGLAND'S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS* (2009); DAVID R. COMO, *RADICAL PARLIAMENTARIANS AND THE ENGLISH CIVIL WAR* (2018).

36. EVELINE CRUICKSHANKS, *THE GLORIOUS REVOLUTION* (2000); STEVE PINCUS, *1688: THE FIRST MODERN REVOLUTION* (2011); EDWARD VALLANCE, *THE GLORIOUS REVOLUTION: 1688: BRITAIN'S FIGHT FOR LIBERTY* (2008).

37. The central figure in this process was Robert Walpole, generally regarded as Britain's first prime minister. See JEREMY BLACK, *WALPOLE IN POWER* (2001); BRIAN W. HILL, *SIR ROBERT WALPOLE: SOLE AND PRIME MINISTER* (Penguin 1st ed. 1989); JOHN MORLEY, *WALPOLE: THE FIRST PRIME MINISTER OF BRITAIN* (Lume Books 2015) (1889).

century, that process had produced a regime that we recognize as a democracy—one which revolutionary governments in France and the newly formed United States quickly paralleled.

Thus, political representation—although originally an instrument of monarchic centralization—evolved into a democratic system in England, which was then recruited by revolutionaries in France and the United States. By the 19th century, representation had become the essential feature, and perhaps the defining feature, of democratic government as that mode of governance became prevalent in Western society. Again, this development constituted a distinctive and momentous development. The approach was unknown to Ancient Greek democracy, certainly the principal predecessor of our current political system. In Athens, policy was set by an assembly of all citizens—what we now describe as direct, as opposed to representative democracy—while magistrates were chosen by lot.<sup>38</sup> In fact, the collapse of the Roman Empire might be at least partially attributed to its failure to develop a system of representation as a means of connecting people in its vast territory with its central government.

Once representation had been identified as the means of establishing democratic rule in modern Western regimes, the scope of the franchise became a matter of intense controversy. At the time that the transition to democracy occurred in Britain, many members of the House of Commons came from diminutive districts known as pocket boroughs because the handful of voters were in the pocket of a local magnate, or rotten boroughs because the magnate had secured that handful's support through various forms of bribery.<sup>39</sup> These districts, often with fewer than one thousand voters, elected the same two members of Parliament as burgeoning industrial cities such as Birmingham and Manchester, whose voting populations numbered in the tens of thousands.<sup>40</sup> Edmund Burke famously argued

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38. In the Ecclesia (Assembly), which at least in theory made the major decisions, all citizens were eligible and everyone's vote counted equally. The military commanders were elected, with one coming from each of Attic's ten tribes, but according to Aristotle, and probably the Athenians as well, election was an oligarchic practice, at odds with democratic governance. In any case, it was the Ecclesia that elected all ten, and the expectation was that they would constitute an effective general staff, not that they would speak for their tribe of origin. Although the members of the Boule (Council) that set the agenda for the Ecclesia and implemented its decisions came from each of the tribes in equal numbers, they were chosen by lot and the Boule was structured according to a principle of successive authority, rather than constituting a deliberative body with input from each tribe. See ARISTOTLE, *THE ATHENIAN CONSTITUTION* (P.J. Rhodes, trans., 2002) [hereinafter ARISTOTLE, *CONSTITUTION*]; Aristotle, *Politics*, in *THE WORKS OF ARISTOTLE* 476–502 (Benjamin Jowett, trans., 1952). See generally CARTLEDGE, *supra* note 31, at 77–90, 105–22. Scholars largely agree that The Athenian Constitution was not written by Aristotle, but rather is the one surviving example of a series of studies of Greek polis constitutions written by his students.

39. DEREK HIRST, *THE REPRESENTATIVES OF THE PEOPLE? VOTERS AND VOTING IN ENGLAND UNDER THE EARLY STUARTS* 29–43, 112–22 (1976); CHARLES SEYMOUR, *ELECTORAL REFORM IN ENGLAND AND WALES* 7–44 (1915).

40. SEYMOUR, *supra* note 39, at 45–76, 165–97; see *id.* at 166 (“In the small nomination boroughs . . . the power of the patron was so complete that the few votes cast could be secured without bribery. But in the larger boroughs, where there was something like an independent electorate, that independence was regarded as merely an opportunity for selling the vote to the highest bidder.”).

that representatives of these rustic rotten boroughs provided “virtual representation” to the residents of the industrial cities,<sup>41</sup> but this did not convince or mollify the city people. Their demands for proportionate representation became one of the most divisive issues in 19th century British politics, bringing the nation to the threshold of social revolution and generating two reform bills (1832 and 1867) that ameliorated the problem.<sup>42</sup>

A closely related issue involved the property qualification. In 1830, when William IV became the first truly constitutional monarch of what was by then the United Kingdom, only some 300,000 of a nation with 16 million people and 6 million adult men—could vote in parliamentary elections.<sup>43</sup> To say that property restrictions imposed this limit is perhaps an understatement. In fact, in a manner somewhat similar to corporate governance, it was ownership of property, not citizenship, that entitled a person to vote. A person who owned property in a particular district could vote there, even if he lived somewhere else, and one who owned property in multiple constituencies could vote in each of them. In the so-called burgage boroughs, the vote belonged to the occupants of specified properties that a candidate could purchase and rent out to grateful tenants.<sup>44</sup> Defending such arrangements, the Duke of Wellington, prime minister of the Tory government in power, inaccurately but revealingly asserted that a “democracy has never been established in any part of the world that it has not immediately declared war against property.”<sup>45</sup>

In both France and the United States, the idea that the nation was composed of human beings, not property owners, and that these human beings should count equally, was part of their revolutionary ideologies. France, in the midst of the Revolution, instituted universal manhood suffrage for the elections to the National Convention, but the conservative regime that followed Napoleon’s defeat enacted property restrictions that outdid Britain by limiting the franchise for legislative elections to 90,000 men, out of a population of over 26 million, which increased after the Revolution of 1830 to 241,000.<sup>46</sup> The Revolution of 1848, self-

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41. Edmund Burke, *Speech at Mr. Burke’s Arrival in Bristol*, in *THE PORTABLE EDMUND BURKE* 155 (Isaac Kramnick, ed., 1999); see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 168–189 (1967) (discussing Burke’s theory of representation, including the trustee versus conduit idea and virtual representation); Paul Langford, *Property and Virtual Representation in Eighteenth Century England*, 31 *HIST. J.* 83 (1988) (discussing the way in which Parliament, in the years preceding Burke, was able to conduct political debate despite the disproportionate representation of various constituencies).

42. WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH SPEAKING PEOPLES*, VOL. 4: *THE GREAT DEMOCRACIES* 43–50 (1958); SEYMOUR, *supra* note 39, at 57–76, 234–79; G.M. TREVELYAN, *HISTORY OF ENGLAND*, VOL. III, at 172–79 (1952).

43. PAUL JOHNSON, *THE BIRTH OF THE MODERN* 403 (HarperCollins 1st ed. 1991).

44. Edward Porritt, *The Revolt Against Feudalism in England*, 9 *POL. SCI. Q.* 64 (1894).

45. CHURCHILL, *supra* note 42, at 49.

46. ALFRED COBBAN, *A HISTORY OF MODERN FRANCE*, VOL. 2, at 78, 98 (1961).

consciously modeled on its predecessor in so many ways, restored universal manhood suffrage, but the dictatorship of Louis Napoleon turned French elections into a charade—a political game where the result was known in advance and virtually the entire panoply of manipulative techniques was used to make the clues difficult for the voters to figure out.<sup>47</sup> Still another revolution was required before the people could deploy the revolutionary principle of universal manhood suffrage in genuine elections.<sup>48</sup>

In the United States, the Framers of the Constitution were so concerned with establishing the machinery for the indirect election of the President and Senators that they had little energy to devote to defining the franchise for Representatives—the only directly elected positions—and left the matter to the states.<sup>49</sup> Many states imposed property restrictions but these states gradually abandoned such restrictions in the succeeding decades,<sup>50</sup> probably as a result of the egalitarian spirit that Tocqueville observed.<sup>51</sup> But countervailing tendencies, such as the exclusion of “paupers” who were receiving poor relief, arose and continued for substantial lengths of time before states finally abandoned them.<sup>52</sup>

The franchise was restricted to men until the 20th century, with New Zealand being the first democratic nation to extend it to women in 1893.<sup>53</sup> Part of the justification was that the vote should be exercised by heads of households, or by fully independent persons, but the fact that widows and unmarried women—some of whom possessed substantial property—could not legally vote suggests that outright discrimination and misogyny were at least equally operative. It is not difficult to link the extension of the franchise to women’s changing position in civil society, but these changes were not alone sufficient to ensure women would have having the right to vote. The agitation of the suffrage movement—with women simultaneously exerting political pressure and demonstrating their capacity

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47. ROGER PRICE, *THE FRENCH SECOND EMPIRE: AN ANATOMY OF POLITICAL POWER* 95–133 (2001).

48. CHARLES SOWERWINE, *FRANCE SINCE 1870: CULTURE, POLITICS, AND SOCIETY* 25–39 (3rd ed. 2018).

49. U.S. CONST., art. I, § 2, cl. 1.

50. CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY* 117–280 (1960). See generally Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219 (2013).

51. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop, trans., 2000).

52. See generally Robert J. Steinfeld, *Property and Suffrage in the Early Republic*, 41 STAN. L. REV. 335 (1989).

53. PATRICIA GRIMSHAW, *WOMEN’S SUFFRAGE IN NEW ZEALAND* (1988); Francisco O. Ramirez, et al., *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women’s Suffrage Rights, 1890 to 1990*, 62 AM. SOC. REV. 735, 743–44 (1997) (listing nations that granted women suffrage between 1890 and 1990 with year when suffrage was first granted and arguing that women’s suffrage became an international norm that overcame the particularized conditions in many nations over the course of the twentieth century).

for independent action—was necessary before nations finally allowed them to vote,<sup>54</sup> in some cases as late as 1944 in France and 1971 in Switzerland.<sup>55</sup>

Burke's assertion that representatives of the fusty rustics or itinerant opportunists in Britain's pocket and rotten boroughs could provide virtual representation for the crowded, struggling populations of its industrial cities would seem implausible to the point of mindless traditionalism or outright corruption had he not demonstrated his sanity and good faith by acknowledging that no representative from England could provide such representation for the American colonists.<sup>56</sup> The 19th century would see that same assertion lead to independence for most of the colonial regimes in the Americas, which no longer believed that their founding nation would represent their interests.<sup>57</sup> In the 20th century, colonized peoples in Africa and Asia reached that conclusion as well.<sup>58</sup> To be sure, not all the liberated colonies became democracies, but a reasonable number have done so,<sup>59</sup> and several now have governments that are more democratic than the United States according to the independent rating agencies.<sup>60</sup> In any case, it is clear that none of these regimes could be counted as democracies unless they had gained their independence.

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54. HAROLD L. SMITH, *THE BRITISH WOMEN'S SUFFRAGE CAMPAIGN, 1866–1928* (2nd ed. 2009). *See generally* ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE* (New York: Simon & Schuster, 2020); DORIS WEATHERFORD, *VICTORY FOR THE VOTE: THE FIGHT FOR WOMEN'S SUFFRAGE AND THE CENTURY THAT FOLLOWED* (2020).

55. Ramirez, et al., *supra* note 53, at 744.

56. Edmund Burke, *Thoughts on the Cause of the Present Discontents; Speech on American Taxation; Speech on Conciliation with the Colonies; Letter to the Sheriffs of Bristol on American Affairs*, in EDMUND BURKE, *THE IMPERATIVES OF EMPIRE, AND THE AMERICAN REVOLUTION: AN INTERPRETATION* 1, 85, 143, 211 (H.G. Callaway, ed., 2016); BURKE, *supra* note 41, at 233–93.

57. MARSHALL C. EAKIN, *THE HISTORY OF LATIN AMERICA: COLLISION OF CULTURES* 149–210 (2007). *See generally* JOHN CHARLES CHASTEEN, *AMERICANOS: LATIN AMERICA'S STRUGGLE FOR INDEPENDENCE* (2008).

58. *See generally, e.g.*, BIPAN CHANDRA, ET AL., *INDIA'S STRUGGLE FOR INDEPENDENCE* (1989); LARRY COLLINS & DOMINIQUE LAPIERRE, *FREEDOM AT MIDNIGHT* (Book Club Associates 1st ed. 1975); *see also* SHIRAZ DURRANI, *KENYA'S WAR OF INDEPENDENCE: MAU MAU AND ITS LEGACY OF RESISTANCE TO COLONIALISM AND IMPERIALISM, 1948–1990* (2018). Algeria, due its particularly difficult struggle for independence and the inspirational character of the writers it both generated and attracted, played a particularly important role in framing the defeat of colonialism as a liberation movement. *See generally* JEFFREY JAMES BYRNE, *MECCA OF REVOLUTION: ALGERIA, DECOLONIZATION AND THE THIRD WORLD ORDER* (Oxford Univ. Press 1st ed. 2016); MATTHEW CONNELLY, *A DIPLOMATIC REVOLUTION: ALGERIA'S FIGHT FOR INDEPENDENCE AND THE ORIGINS OF THE POST-COLD WAR ERA* (2002); FRANTZ FANON, *A DYING COLONIALISM* (Haakon Chevalier, trans., 1965); ROBERT MALLEY, *THE CALL FROM ALGERIA: THIRD WORLDISM, REVOLUTION, AND THE TURN TO ISLAM* (Univ. of California Press 1st ed. 1996).

59. EAKIN, *supra* note 57, at 269–376. *See generally* JEFF HAYNES, *DEMOCRACY IN THE DEVELOPING WORLD: AFRICA, ASIA, LATIN AMERICA AND THE MIDDLE EAST* (Polity 1st ed. 2001); MARTIN MEREDITH, *THE FATE OF AFRICA: A HISTORY OF THE CONTINENT SINCE INDEPENDENCE* (2011).

60. ECONOMIST INTELLIGENCE UNIT, *THE DEMOCRACY INDEX 2020: IN SICKNESS AND IN HEALTH?* (2021); FREEDOM HOUSE, *FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE* (2021). The Economist Intelligence Unit ranked Chile, Costa Rica and Uruguay ahead of the U.S., as well as Australia, Canada, and New Zealand, the British settler colonies that achieved effective independence in the nineteenth or twentieth century. Other large post-colonial regimes that are regarded as democracies by the two organizations, albeit with defects, include Brazil, Argentina, Peru, Ghana, South Africa, India, Malaysia, Indonesia, and the Philippines.

The principle that underlies the extension of voting rights to urban populations, men without property, women, and colonized peoples is not difficult to discern. It is popular political sovereignty: the belief that everyone should have a voice in the democratic process, that no one should be dependent on another to speak for him or her. In a modern nation state—as opposed to Athens, or better still the diminutive polities that were more typical of Ancient Greece—people cannot speak directly, of course.<sup>61</sup> Political representatives—products of that great political innovation of Western society that began as an instrumentality of monarchic rule and evolved into the defining feature of the governments that displaced that rule—must transmit the voices of the people. Thus, the principle, more strictly stated, is that everyone must have a voice in the selection of the representatives who rule in their name.

An extension of this principle that has become widely accepted as democratic governments evolved is that everyone should have an equal voice in the selection of representatives. This does not mean that everyone's vote must have an equal effect. That is a much too demanding standard, one that is likely unachievable in practice and may not even be possible in theory.<sup>62</sup> Rather, the idea of the equality applies to the input, not the output. Everyone casts the same number of votes (often one, but not necessarily), even if some of the votes cast are more determinative of the result due to districting, counting methods, or demographic patterns. The normative principle is that every person acts independently of any other voter and is at least juridically—if not pragmatically—equal.

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61. See CARTLEDGE, *supra* note 31, at 145–69. See generally ERIC W. ROBINSON, *DEMOCRACY BEYOND ATHENS: POPULAR GOVERNMENT IN THE GREEK CLASSICAL AGE* (2015).

62. Procedures for electing members of a legislature vary, and each variation tends to favor one group of voters over another. The most basic distinction lies between single member and multi-member districts. Single member districts are now used in the United Kingdom and many British-influenced democracies such as the United States. In most cases, whoever gets the most votes wins, a method generally described by the horse-racing term “first past the post.” Most modern democratic nations use proportional representation. At one extreme, as in Israel, the Netherlands, and Slovakia, all members of the legislature are chosen at large; more commonly, the nation is sub-divided into districts electing a number of representatives that starts at two and can reach as high as 70. See generally AREND LIPHART, *ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945–1990* (1994); AREND LIPHART, *PATTERNS OF DEMOCRATIC GOVERNMENT: FORMS AND PERFORMANCE IN THIRTY-SIX DEMOCRACIES* (1999). If proportional representation is chosen, a further decision is needed to translate the voters' choices into seats. Suppose one party has received 48% of the votes, in a three-member district, the second has received 22%, and the third has received 17%. Should the first party receive two seats, since it obtained more than twice as many votes as the second, with the second party receiving one and the third party none? Or should each party receive one seat? The two most common methods for making this determination are the D'Hondt Divisors method and the Hare Quota and Largest Remainders method (HQLR), both named after the political theorists who provided definitive descriptions of them. While both are more favorable to minor parties than single member districts, Hare is more favorable to them than D'Hondt. See MICHAEL GALLAGHER, *THE POLITICS OF ELECTORAL SYSTEMS* 535–97 (2005); Eric S. Herron, et al., *Terminology and Basic Rules of Electoral Systems*, in *THE OXFORD HANDBOOK OF ELECTORAL SYSTEMS* (2018); PITKIN, *supra* note 41, at 61–66. All these methods are valid; they are not abuses like gerrymandering or voter suppression. But a choice among them, or similar variations must be made, and these choices will alter the impact of individual votes.

The remaining exclusions from the franchise can be explained in terms of the rationale for the progressive expansion of the franchise, although they can be challenged as well on this same basis. The right to vote is not a human right, like freedom of conscience or freedom of speech, but a political right: a right of participation in an organized governmental entity. It depends on the dual concept of corporatism that developed in the Middle Ages. First, the state must be conceived as a juridical body, an entity with specific contours that is capable of action. Second, the constituency of each representative must be conceived a juridical body, an entity that can choose a single person or small group of persons to act in its interest. Thus, voting is limited to people recognized as members of the state and members of the constituency. These are the people who are entitled to have a voice, and it is they who therefore speak for themselves. But questions may arise regarding resident aliens who are not recognized members of another political entity,<sup>63</sup> an issue that implicates more general rules about naturalization or admission into the community.<sup>64</sup> The defensible basis for excluding non-members of the community from the franchise is not that others are speaking for them, but that they are not entitled to speak in that community.

Children are a second notable exclusion from the franchise and unlike aliens, they are members of the community who the state denies their own voice in the polity. The rationale is familiar, but again subject to challenge. First, children below a certain age are in fact incompetent to make political judgments and express their views. In that case, however, a boundary must be drawn, and as excluded individuals approach the boundary, the rationale will cease to apply to an increasing number of them. This would be true for any boundary however, and the cost of making individualized determinations of competence is typically regarded as prohibitive.<sup>65</sup> Second, the exclusion of children is non-invidious because every single person who is currently an adult was once a child, and excluded from the franchise on that basis for the exact same length of time every other person. Third—and most relevant for present purposes—society considers enfranchised

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63. See generally Ludvig Beckman, *Citizenship and Voting Rights: Should Resident Aliens Vote?*, 10 *CITIZENSHIP STUD.* 153 (2006). The argument is that, at some point, resident aliens are members of the community, even if the nation's naturalization laws deny them citizenship. But no one argues that tourists should have the right to vote in the place that they are visiting.

64. In general, the condition of statelessness is a serious human rights issue in the modern world, particularly in light of the Westphalian system of international relations that divides the entirety of the habitable territory of the planet into sovereign states. See generally BRAD K. BLITZ, *STATELESSNESS, PROTECTION AND EQUALITY* (2009); Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 *INT'L J. REFUGEE L.* 156 (1998).

65. This point can be challenged, however. See DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 136–44 (Routledge 3d. ed. 2014); Eric Wiland, *Should Children Have the Right to Vote?*, in *THE PALGRAVE HANDBOOK OF PHILOSOPHY AND PUBLIC POLICY* 215 (David Boonin, ed., 2018). See generally Steven Lecce, *Should Democracy Grow Up? Children and Voting Rights*, 9 *INTERGENERATIONAL JUST. REV.* 133 (2009); John Wall, *Children and Youth Should Have the Right to Vote. An Argument for Proxy-Claim Suffrage*, 24 *CHILDREN, YOUTH & ENVIRONMENTS* 108 (2014).

adults fully adequate to speak for children because they will make decisions based on their own children's interests. Of course, some adults do not have children, but virtually all children have at least one parent responsible for their welfare.<sup>66</sup> Our society has chosen to delegate almost unregulated authority over children to their parents, on the theory that parents can be relied on to act in their children's best interests. Such broad authority is generally regarded as encompassing the right to speak for the child on matters of political representation.<sup>67</sup>

A third excluded group are incompetent adults—those society judges too mentally or emotionally impaired to understand what is at stake in the election or perhaps what it means to cast a vote. This is also a matter of controversy because many American states have enacted laws that embody outmoded or prejudiced ideas about mental disability.<sup>68</sup> For present purposes, it is sufficient to note that any normatively valid restriction of this sort must define disability as a person's inability to care for themselves and function in the world as an independent being. The denial of the right to vote for such persons is thus based on the same rationale as exclusion of children from the franchise; namely, that our legal system as a whole has determined that the persons in question cannot act for themselves and thus must have some other person act in their stead.<sup>69</sup> One other group of people who some governments in the United States often exclude from the franchise are convicted felons and ex-felons.<sup>70</sup> The rationale for felons is again the same; the law has determined that they must be under another person's supervision and prohibited from acting on their own. The rationale for excluding ex-felons from

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66. At present, there are about 73 million children in the United States. See U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, <https://www.childstats.gov/americaschildren/tables/pop1.asp> (last visited Aug. 25, 2021) (on file with the *University of the Pacific Law Review*). The number of children who are not under parental supervision and are in foster care is 443,000, or only about 0.6 percent. Moreover, it can be argued that foster care itself embodies the policy that every child should be under the supervision of a parent or surrogate parent.

67. On this basis, it can be argued that parents should have the right to exercise a proxy vote on behalf of their children. For a discussion of this issue, see generally Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children? Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503 (1999); Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463 (1998).

68. See Paul S. Applebaum, "*I Vote, I Count*": *Mental Disabilities and the Right to Vote*, 51 PSYCHIATRIC SERV. 849, 850 (2000) ("Persons with mental disabilities, though, are one of the few groups still singled out for special treatment at the polls. As of 1997, 44 states had language in their constitutions, statutes, or case law barring voting by some subgroups of persons with mental illness or mental retardation."); Sally Balch Hume & Paul S. Applebaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Right to Vote*, 38 MCGEORGE L. REV. 931, 936–45 (2007) (summarizing state laws regarding rights of mentally disabled people to vote).

69. A countervailing argument is that voting is a socially integrative activity that can be beneficial for those with mental health problems. See generally Applebaum, *supra* note 68; Michael Nash, *Voting as a Means of Inclusion for People with Mental Illness*, 9 J. PSYCHIATRIC & MENTAL HEALTH NURSING 697 (2002).

70. See generally JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006); Pamela S. Karlen, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1137 (2004).

the franchise need not detain us. There is no such rationale, and this current practice of many American states is a massive human rights violation.

#### IV. THE MECHANISM OF REPRESENTATION AS THE BASIS FOR POPULAR ECONOMIC SOVEREIGNTY

We are now in a position to extend the corporatist thinking described in Part I and the concept of representation described in Part II from the political to the economic realm. Political theorists who envision this extension have typically focused on wealth distribution. For some, such as Aristotle<sup>71</sup> or the Duke of Wellington,<sup>72</sup> the possibility that democracy would demand or encourage a certain level of redistribution has been a source of grave concern. In fact, the issue flummoxed Aristotle so much that it disrupted his usual clarity of thought. In the *Politics*, it is clear he regards “democracy” as a perverted form of government,<sup>73</sup> but unclear whether he is defining it as the rule of the many or the rule of the poor.<sup>74</sup> Perhaps his account can be treated as coherent if the majority of people in an Ancient Greek city state can be plausibly regarded as poor, but our current levels of material wealth lead us to view the poor as a minority.

For many modern writers, the possible connection between democracy and wealth distribution is an aspiration rather than a danger. One of the more extreme proposals comes from John Rawls, who derives both democratic government and his fairness principle from a theory of justice. The fairness principle would only allow disparities in wealth if they improved the position of the poorest people in the society.<sup>75</sup> A more moderate and widely endorsed view is that democracy requires sufficient redistribution of wealth to ensure that the minimal needs of every member of society are satisfied.<sup>76</sup> The rationale is that people cannot participate in government—they cannot effectively exercise their right to vote or take advantage of their opportunity to engage in more active participation—if they are hungry, homeless, sick, or uneducated. Hegel, although not a proponent of

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71. Aristotle, *Politics*, *supra* note 38, at 491–93, 506–07.

72. See CHURCHILL, *supra* note 42, at 49.

73. Aristotle divides the rule of the many, like the rule of one or the rule of the few, into a virtuous and perverted form. In the virtuous form, which he calls politeia, the many rule in the interest of the common good. In the perverted form they rule in their own interest only, and in that case they loot the wealthy for their own benefit. Aristotle, *Politics*, *supra* note 38, at 278–79.

74. Although Aristotle defines democracy as the perverted form of the rule of the many when he presents his tripartite division (rule of one, rule of the few, rule of the many), *see id.* at 278–79. He presents another definition based on the distribution of wealth, where he defines democracy as the rule of the poor. *Id.* at 277.

75. JOHN RAWLS, A THEORY OF JUSTICE §§ 11–13 (Belknap Press 2nd rev. ed. 1999).

76. See generally GANESH SITARAMIN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2018); JOE SOSS, REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY (2010); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2006); GORAN THERBORN, INEQUALITY AND THE LABYRINTHS OF DEMOCRACY (2020); ELIZABETH WARREN, THIS FIGHT IS OUR FIGHT: HOW TO SAVE AMERICA’S MIDDLE CLASS (2017).

democracy, argued that ownership of property was an essential first step in an individual's rational development: that it provides the ability to define one's personal will by embodying that will in the possession of objects.<sup>77</sup>

Scholars have written extensively about both the dangers that democracy poses to property and that lack of property poses for democracy. For present purposes, the important point is that none of the proposed connections or conflicts between the two are organic; that is, none assert a basic structural linkage between democratic governance and wealth distribution—either for better or worse. Empirical arguments based on the performance of actual democracies are not supported by historical fact. Contrary to Aristotle's confused concern and the Duke of Wellington's hysterical pronouncement, democracies have hardly ever engaged in extreme—or even extensive—redistribution of wealth. On the other hand, democracies seem able to survive despite the resulting disparities. According to the World Bank's GINI Index,<sup>78</sup> a standard measure of income inequality, the top ten percent of nations that have the most equitable wealth distribution include Denmark, Finland, and the Netherlands, among the most democratic nations in the world, but also Belarus, Kazakhstan, and Algeria. In contrast, the bottom ten percent in income equality include South Africa, Belize, and Brazil—which are democracies—but also the Central African Republic, Mozambique, and Honduras.

The connection that political theorists attempt to make between democracy and wealth distribution seems equally weak from a theoretical perspective. Wealth distribution is a policy that elected representatives determine. There is no obvious reason why either they or the voters should systematically favor any particular approach. If the voters or their representatives are seen as motivated primarily by self-interest, the voters will decide based on whether they think that redistribution will be to their benefit or detriment—and not necessarily in favor of greater equality. It follows that the representatives will decide based on what policy will appeal to the voters, which again does not necessarily lead to economic equality.<sup>79</sup> If the voters and representatives also decide based on ideological or second order

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77. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 38–42 (T.M. Knox, trans., 1962). See generally JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1991) (concluding that the implication of Hegel's view is that every member of the state or community should own at least some property).

78. *GINI Index (World Bank Estimate) Country Ranking*, WORLD BANK DEVELOPMENT RESEARCH GROUP, <https://www.indexmundi.com/facts/indicators/SI.POV.GINI/rankings> (last visited Aug. 25, 2021) (on file with the *University of the Pacific Law Review*).

79. See generally THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA* (2005) (showing Americans in economically-depressed areas that would benefit from government programs regularly vote against their own self-interest because they have been persuaded to pay more attention to social values issues like abortion and gay culture); HEATHER MCGEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* (2021) (arguing that racist attitudes lead people to oppose collective undertakings that would benefit them); JONATHAN M. METZL, *DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA'S HEARTLAND* (2020) (concluding that voters in backward areas who need improved medical care oppose federal programs because of their ideological opposition to providing assistance to minorities that they consider undeserving).

considerations—which seems more likely—there will be even greater variability. Rawls’ argument is based on our intuitions about fairness, which he interrogates by means of the original position.<sup>80</sup> The argument has great intuitive appeal with respect to minimal needs: few people would want a society where they were at risk that such needs would not be met. But his fairness principle, and even more moderate approaches to equalization, seem to lack that same appeal: many people might prefer to take a chance at having more than average wealth. Similarly, the connection between wealth and participation is only persuasive with respect to debilitating hunger, extreme illness, or total destitution. There seems to be no reason why poor people cannot mobilize to demand more equal treatment.

The mutual origin of our modern conception of the state and the business corporation in Medieval corporatist thinking provides a more direct, organic link between democracy and the economy. Rather than focusing on wealth distribution, it addresses corporate organization. Medieval thinkers conceived of the state as a juridical person, capable of action. They saw this person as composed of the three traditional estates: the nobility, the clergy, and the commoners. They then proceeded to treat groups of commoners, such as city residents or free, non-noble landowners, as juridical persons who could act through a representative. This dual conception of corporate entities led directly to our current system of representative democracy when the authority of the first two estates was overthrown and the representatives of the common people became the controlling force in government.<sup>81</sup>

That same conception can be directly applied to our economic system as well. We already conceive of our dominant business organizations as corporate entities. As Eric Orts points out, it is important to keep in mind that this is a legal construct.<sup>82</sup> Corporations are persons with their own rights and ability to act, but

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80. RAWLS, *supra* note 75, §§ 4, 20–30. This is not Sandel’s argument that placing people behind the veil of ignorance detaches them from their social context and thus distorts their preferences. See MICHAEL SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 140–66 (2010). Rawls is not subject to this criticism because he is addressing his readers in their social context and using the veil of ignorance as a device by which they can interrogate their own views about justice. The problem with the fairness principle is that idea that every increase in wealth, no matter how justly earned, must benefit the poorest members of society, or be taxed away, seems unlikely to emerge from that interrogation.

81. In England, this occurred with Reformation, which subordinated the English Church to civil authorities, see DIARMAID McCULLOCH, *THE LATER REFORMATION IN ENGLAND 1547–1603* (Red Globe Press 2nd ed. 2000), and the gradual reduction in the legislative authority of the House of Lords, from a coordinate branch of the legislature to a ceremonial and judicial body, see WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (Oxford Univ. Press reissue ed. 2009) (1872); Corinne Comstock Weston, *Salisbury and the Lords, 1868–1895*, in PEERS, *POLITICS AND POWER, 1603–1911*, at 461 (Clyve Jones and David Lewis Jones, eds., 1986). In France it occurred when the Estates General was reconstituted as the National Assembly in the first stages of the French Revolution. See SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 428–70 (1990); TIMOTHY TACKETT, *BECOMING A REVOLUTIONARY: THE DEPUTIES OF THE FRENCH NATIONAL ASSEMBLY AND THE EMERGENCE OF A REVOLUTIONARY CULTURE 1789–90*, at 117–208 (1996).

82. ERIC ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 27–52 (2013). (“Law recognizes firms as organizational ‘entities’ with rights and responsibilities that are enforceable in court—thus endowing them with ‘legal personality.’ . . . At the same time, these organizational persons should be recognized to possess

the law determines the nature and scope of these rights, just as in the Middle Ages when the kings granted corporate charters. We can also view the employees of the corporation as a legal entity capable of acting through chosen representatives—just as we view political constituencies. With this emendation, we can then use law to produce a model of the corporation that serves the same purpose in the economic realm as democracy serves in the political realm.

As democracy has evolved, our concept of representation has expanded until it includes all competent adults. The idea behind this expansion is that every competent adult should have an equal voice in determining the way that they are governed. Extended to the economic realm, this principle provides that every employee should have an equal voice in determining their conditions of employment. As in the political sphere, the only way to achieve this when large institutions are involved is through the process of representation. Thus, the principle is that all people who work in large organizations should have a voice in determining their conditions of employment by choosing representatives who manage the corporation and determine its policies toward its employees.<sup>83</sup> This is the basic conception of popular economic sovereignty.

The purposes of both popular political and popular economic sovereignty are the same. Their positive purpose is to enable individuals to determine, to at least some significant extent, the policies and practices of institutions that exercise extensive control over their lives. We need not succumb to all the grandiose clichés of self-government—the idea that these institutions are, or could be, fully or primarily controlled by those they govern. The goal in both cases—the existing election of political leaders and the proposed election of corporate leadership—is to grant some measure of control and provide otherwise powerless individuals with at least some feeling of personal autonomy. To be sure, the state possesses a greater range of authority and more symbolic significance, so exercising control of it is arguably more important for the individual. On the other hand, an employer often exercises a more direct and immediate authority over the individual’s life, and its smaller size and range of action is likely to provide employees with a greater sense of control when they elect the corporation’s leaders. Again, this is a direct equivalence. The extension of democratic principles to the economic realm is serving the same purpose: granting autonomy and—using the same mechanism—representation.

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important legal responsibilities as well as legal privileges.”).

83. Some corporations, as well as the non-corporate employment settings to be considered in the next section, are small enough so that their employees can dispense with representation and control the firm directly. This is, of course, analogous to the direct democracy that was used by Greek city states and that they, and Aristotle, regarded as the only form of democracy. *See generally* ARISTOTLE, CONSTITUTION; *see* Aristotle, *Politics*, *supra* note 38, at 476–502; CARTLEDGE, *supra* note 31, at 77–90, 105–22. The issue will be further discussed in notes 95–96, 108 *infra*.

The negative purpose of both mechanisms is to protect individuals from oppression and provide them with a fair and just environment in which to live their lives. The idea is that those who exercise control over individuals are chosen by those individuals and are thereby constrained from engaging in harsh and oppressive practices. It would be difficult to say whether the state or the corporation is the greater engine of potential oppression. The state can deprive people of their basic liberties—such as the right to speak or worship—and impose ultimate sanctions such as imprisonment or death. Moreover, the average person has no viable exit option from the state’s authority. On the other hand, the more limited oppressions to which a corporation can subject its employees occur daily and typically exercise a more direct impact. Many people may not care very much about expressing political opinions, but most will care a great deal about their conditions of employment. Admittedly, workers possess an exit option, but it is easy for people with savings or tenure to overestimate the ease with which most people can leave a job that provides them with their livelihood. In the absence of corporate democracy, moreover, the effect of exercising this option is only to place themselves in the clutches of another equally oppressive employer. Here again, the extension of political democracy to the economy is not either an analogy or a means of practicing political skills, but the same protection of the individual against oppression in a different setting.

Social theorists often divide society into the political realm, the economic realm, and civil society,<sup>84</sup> which emerges from the actions of ordinary people and involves the complex systems of norms and beliefs that govern their daily lives.<sup>85</sup> There are, of course, possibilities for the mistreatment or oppression of individuals through social stigmatization or exclusion, in civil society, but it seems reasonable to suppose that these possibilities have become attenuated in an open, mobile society like our own. The political and economic realms, in contrast, possess increased possibilities for oppression of the individual. In part, this is because increasingly large institutions with greater capacity for effective intrusion into people’s lives dominate these realms. Moreover, their complexity renders them virtually impossible for the ordinary person to comprehend. Habermas refers to this development as the colonization of the lifeworld.<sup>86</sup> Democratic decision-

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84. See JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION, VOL. 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy, trans., 1987); TALCOTT PARSONS, *THE SYSTEM OF MODERN SOCIETIES* (1971); WEBER, *supra* note 8.

85. See generally JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992).

86. HABERMAS, *supra* note 84, at 301–403; see also *id.* at 153–97 (uncoupling of system and lifeworld). Lifeworld is a concept that originates with Husserl’s phenomenology. See generally EDMUND HUSSERL, *THE CRISIS OF THE EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY: AN INTRODUCTION TO PHENOMENOLOGY* (David Carr, trans. 1970); EDMUND HUSSERL, *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY* (W.R. Boyce Gibson, trans., 1962). The lifeworld is the individual’s entire set of subjective experiences. Information that comes from others enters the individual’s lifeworld through a process of intersubjective communication. Habermas is arguing that in the pre-modern world, most of the forces that

making serves as a countervailing force to these developments. It gives the individual some measure of control over institutions in the political realm and produces some necessity for these institutions to explain their actions to the individual. The argument is that the institutions that dominate the economic realm are the product of the same corporatist conception as those that dominate the political realm, and that the same corporatist solution—the election of representatives to exercise control of these institutions—can serve the same purposes of granting autonomy and counteracting oppression in that setting.

#### V. ECONOMIC SOVEREIGNTY AS A PRACTICAL MEANS OF ORGANIZING OUR ECONOMY

The idea of popular economic sovereignty has developed here as a means by which the principles that underlie democracy—the only acceptable mode of political organization for most people in the Western World—can be extended into the economic realm. It has not been proposed as a means of managing businesses more efficiently, the most common argument for corporate democracy. In the rather abstract form above, popular economic sovereignty might appear extreme and impractical, demanding a complete transformation of our economy, and constituting a prescription for economic disaster. In fact, neither is the case. Popular economic sovereignty would be a relatively limited alteration of current practices and might well produce a more efficient and equitable economic system. This final section will address these issues. Although the proposal is general, this discussion will refer to conditions in the United States to simplify the discussion. The United States ranks near the bottom among Western democracies on social justice issues<sup>87</sup> but is economically successful, so focusing the discussion in this manner does not prejudice the analysis in the direction of reform.

It should be noted at the outset that popular economic sovereignty goes beyond the scope of corporate governance. The principle that no one should be employed

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operated on the individual were comprehensible to the individual. In modern times, however, the individual's lifeworld has been "colonized" by external forces too large to comprehend, much as an African or Asia society that once ruled itself was controlled by a European nation during the colonial period. To take an example from the political and economic spheres: a pre-modern European village was generally controlled by the local landowner and the parish priest, two familiar figures whose actions were observable and comprehensible. The modern small town is controlled by administrative agencies located in the capital, whose staff has year of specialized training. A pre-modern conveyance was a carriage, a simple device which could be understood by any reasonably intelligent person and repaired by the average local artisan. Modern conveyances are automobiles with complex engines and electronic controls that can no longer be repaired even by local auto mechanics.

87. See ECONOMIST INTELLIGENCE UNIT, *supra* note 60 (ranking the United States 25th on its Democracy Index, as a "Flawed Democracy," below every country in Western Europe except Italy, Malta and Portugal, and also below the other British settler nations, Taiwan, Uruguay, Chile, Costa Rica, Mauritius, Japan and South Korea); FREEDOM HOUSE, *supra* note 60 (ranking the United States below every country in Western Europe, the other British settler nations, the nations listed above for the Economist ranking except South Korea, with which it is tied, and also below a number of other nations including Argentina, Belize, Croatia, the Czech Republic, Latvia, Mongolia, Slovakia, Slovenia, and most of the island nations in the Caribbean).

by another person—and thus depend on another person for their livelihood—applies to all economic organizations. Corporations are the largest employers in our economy and the most influential business entities, but there is a vast array of smaller-scale employment relationships that are nonetheless significant and need to be considered if the argument that economic sovereignty is plausible and practical is to be sustained. This section will begin by discussing corporations, but then proceed to briefly discuss other types of employment relationships.

Although popular economic sovereignty could be a means of implementing socialism,<sup>88</sup> it is fully compatible with capitalism as well, and would not require any significant alteration of current ownership patterns in the American economy. The reason lies in Berle and Means' recognition that the modern corporation has separated ownership from management.<sup>89</sup> This insight leads to agency theory, perhaps the leading account of how large corporations are managed.<sup>90</sup> It asserts that those who own the corporation through possession of its voting stock are typically too numerous, too dispersed, and insufficiently knowledgeable to actually manage the organization that they own. Very often, they own the stock merely as an investment, viewing it as a better place to put their money than a bank account, government bonds, real estate, or their mattress. Even when one individual owns a majority of the voting stock and thus controls the corporation, they will often lack either the desire or the capacity to manage it. Instead, a board of directors—elected by the non-democratic principle that votes are conferred by ownership of stock—manages a modern corporation. The board appoints the principal managers of the corporation (who may or may not become members of the board), and they in turn make the decisions regarding the operation of the firm.<sup>91</sup> The owners, acting directly or through the board, retain the authority to decide its basic ownership and structure, however. They can disband the firm, merge it into another firm, change its character by acquiring other firms, or restructure its general approach and lines of business.

There is no reason why the appointed managers of a corporation could not be replaced by managers elected by the corporation's employees. This idea is not particularly radical or exotic; extensive worker participation or management has been implemented in a number of cases within the structure of a capitalist

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88. See *supra* note 1 on the traditional connection between worker democracy and socialism.

89. ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

90. See generally Frank Easterbrook, *Two Agency Cost Explanations of Dividends*, 74 AM. ECON. REV. 650 (1984); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327 (1983); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

91. See, e.g., DAMBISA MOYO, *HOW BOARDS WORK: AND HOW THEY CAN WORK BETTER IN A CHAOTIC WORLD* 61–116 (2021).

economy.<sup>92</sup> Worker-elected management would function here as a means of implementing the basic principle of popular economic sovereignty—that each person should function as an economically independent actor and no person should be employed by another. An argument that elected representatives of a corporation’s employees would not truly provide the employees with control of the corporation’s management is not relevant to this discussion. The question here is whether democracy’s underlying principle of popular political sovereignty can extend into the economic realm in a plausible and practical manner. Whatever defects afflict the representation process in a worker-managed firm are no different—and possibly less severe—than those which afflict voters in a political democracy.

Nonetheless, there are issues that arise in the process of political representation that are worth considering in the context of corporate democracy. The most obvious is the structure of representation. One possibility is that the entirety of the employees would elect representatives at large, equivalent to nations such as Israel that elect all their legislators at large.<sup>93</sup> A large and geographically dispersed corporation could use the principle of geographic subdivision that is most common in politics and have the employees in each factory or regional office elect either one representative using first past the post, or several using proportional representation. Another possibility, much easier to manage for a corporation than a nation, is to have employees vote by functional category, with for example, clerical employees, supervisors, salespersons, and factory floor workers voting as a group. The particular arrangement can often affect the results, but all these options readily fulfill the basic principle of popular employee sovereignty. Every employee would have an equal voice in the management of the corporation, thus serving the positive purpose of representative democracy. Additionally, the managers of the corporation, as representatives of the workers, would tend to avoid oppressive practices, thus serving its negative purpose.<sup>94</sup>

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92. *See generally* PAUL BLUMBERG, *INDUSTRIAL DEMOCRACY: THE SOCIOLOGY OF PARTICIPATION* (1968) (documenting various examples of worker management at different levels of control). One notable example that exercised substantial influence on the field involved the composite longwall system in the Durham (England) coalfields. *See* E.L. TRIST, *ORGANIZATIONAL CHOICE: CAPABILITY OF GROUPS AT THE COAL FACE UNDER CHANGING TECHNOLOGIES: THE LOSS, RE-DISCOVERY AND TRANSFORMATION OF A WORK TRADITION* (1963). More recent attention has focused on a number of worker participation projects in Sweden. *See generally, e.g.*, Olaf Bergqvist, *Worker Participation in Decisions within Undertakings in Sweden*, 5 *COMP. LAB. L.* 65 (1982); Clyde Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 *U. PA. L. REV.* 175 (1984).

93. *See supra* note 63.

94. One current theory of the firm is managerial hegemony, where the appointed managers are not only independent, but use a variety of techniques to control and dominate the workers. *See generally* J.W. LORSCH & ELIZABETH McIVER, *PAWNS OR POTENTATES? THE REALITY OF AMERICA’S CORPORATE BOARDS*, in THOMAS CLARKE, ED., *THEORIES OF CORPORATE GOVERNANCE: THE PHILOSOPHIC FOUNDATIONS OF CORPORATE GOVERNANCE* 108 (2004). While the capacity of managers to these various techniques can be questioned, *see* Steven P. Vallas, *The Adventures of Managerial Hegemony: Teamwork, Ideology and Worker Resistance*, 50 *SOC. PROBS.* 204 (2003), it can be regarded as a real threat to workers. Having the managers elected by the workers

Although attention tends to focus on the large corporations that dominate our economy, employing tens or hundreds of thousands of workers and generating billions of dollars in income, many corporations are quite small, and there is typically no lower limit to the size of a firm that can make use of the corporate form. Below a certain size—say one hundred employees in a single location—representation is not necessary, and at an even lower size—say twenty-five employees—it does not even make sense. But the principle of popular economic sovereignty can be instantiated in such settings by direct participation, the equivalent to the political mechanism of direct democracy. This solution is not a problem for the idea of popular economic sovereignty. In fact, according to many classic democratic thinkers, such as Aristotle and Rousseau,<sup>95</sup> direct democracy is the only acceptable form of democracy, and even many modern thinkers regret its impossibility in modern mass society and regard representative democracy as the problematic modality.<sup>96</sup>

Worker cooperatives—worker-owned corporations—would satisfy the principle of popular economic sovereignty. But so would stockholder-owned corporations. Far from being an intrusion on capitalist principles of ownership, the division of authority between the owners and the managers in a system of popular economic sovereignty would be essentially the same as it is at present. The employee's representative would control all the conditions of employment, but the owners, again by means of voting stock, would determine the continued existence and general structure of the firm. The two would negotiate with each other regarding the division of income among wages, benefits, improvement of working conditions dividends, loans, and corporate savings, much as the managers and owners now negotiate with an effective employee union.<sup>97</sup> There would probably be a greater tendency to provide employees with profit-based compensation of some sort, but this is not necessarily inefficient. The owners might favor popular economic sovereignty as a means of giving the employees an incentive to support

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would seem to provide an effective antidote.

95. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (G.D.H. Cole, trans., 1920) (1762). As noted above, Aristotle does not consider a government run by elected officials to be a democracy at all. Aristotle, *Politics*, *supra* note 38, at 476–502; CARTLEDGE, *supra* note 38, at 77–90, 105–22.

96. *See generally, e.g.*, BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (1997); John G. Matsusaka, *Direct Democracy Works*, 19 *J. ECON. PERSP.* 185 (2005).

97. This boundary is likely to be complex, given the number and variety of modern firms. While some investors, even large ones, make choices on the basis of portfolio management and make no effort to influence managerial decision-making, others take a more active role, although rarely at the level of day-to-day management. *See generally, e.g.*, Alon Brav, et al., *Hedge Fund Activism, Corporate Governance and Firm Performance*, 63 *J. FIN.* 1729 (2008) (describing how hedge funds employ distinct forms of shareholder activism that effectively reduce agency costs); Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 *YALE J. REG.* 174 (2001) (explaining how activism by mutual funds and pension funds rarely achieves significant shareholder benefits). In fact, shareholder activism, whatever its current value, might be more beneficial for worker managed firms than it is at present, both because it would provide a more contrasting perspective for managers chosen by workers than for current managers, and because it might reassure the market that the firm is being managed with fiscal considerations in mind.

long-term corporate growth strategies, while the employees might favor it as a savings vehicle with upside potential.

It is difficult to know whether this mode of management would be more or less efficient than the current system in the United States. The most glaring defects in the current system are the agency problems that emerge directly from the Berle-Means analysis and have been the focus of so much corporate governance scholarship. Due to interlocking boards of directors and a woeful lack of regulation, managers salaries are currently set at excessively high levels.<sup>98</sup> Managers also have an easy exit option because they can readily move to another company or retire in excessive luxury, and the notorious “golden parachutes” that managers award to each other exacerbate this problem.<sup>99</sup> In addition, when stockholders loosely control managers, the managers can engage in various irrational strategies, such as making excessive political contributions to conservative politicians who are in fact bad for business<sup>100</sup> or favoring the acquisition of companies to satisfy their personal idiosyncrasies.<sup>101</sup>

If worker representatives selected managers, the managers might be more likely to adopt the stewardship approach that some commentators favor.<sup>102</sup> Perhaps they would tend to grant employees overly high wages, more extensive benefits, or more gracious working conditions.<sup>103</sup> But they would be less likely to obtain their currently exorbitant compensation if they could only retain their position when elected by the workers. While any given employee certainly has an exit

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98. LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004); STEVEN CLIFFORD, *THE CEO PAY MACHINE: HOW IT TRASHES AMERICA AND HOW TO STOP IT* (2017); Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71 (2003); David Yermack, *Good Timing: CEO Stock Option Awards and Company News Announcements*, 52 J. FIN. 449 (1997).

99. Philip L. Cochran, et al., *The Composition of Boards of Directors and Incidence of Golden Parachutes*, 28 ACAD. MGMT. J. 664 (1985); Judith C. Machlin, et al., *The Effect of Golden Parachutes on Takeover Activity*, 36 J.L. & ECON. 861 (1993).

100. See generally Alan S. Binder & Mark W. Watson, *Presidents and the US Economy: An Econometric Exploration*, 106 AM. ECON. REV. 1015 (2016) (analyzing economic performance under presidents from Truman to Obama reveals: that job growth was 2.2 times greater under the Democrats; that unemployment decreased an average of 0.8% under Democrats and increased by an average of 1.1% under Republicans; that real GDP growth was 1.7 times greater under Democrats; that budget deficits increased by 0.7% more under Republicans; that the S&P index returned an average of 8.4% under Democrats and 2.7% under Republicans, or 3.1 times as much; and that 41 of the 49 quarters when the economy was in recession during the time period studied occurred during Republican administrations).

101. OLIVER WILLIAMSON, *THE ECONOMICS OF DISCRETIONARY BEHAVIOR: MANAGERIAL OBJECTIVES IN A THEORY OF THE FIRM* (1964); Michael Jensen, *Agency Costs of Free Cash Flow, Corporate Finance and Takeovers*, 76 AM. ECON. REV. 323 (1986).

102. See James F. Davis, et al., *Toward a Stewardship Theory of Management*, in CLARKE, *supra* note 94, at 118.

103. In considering the welfare of the workers, they might adopt policies more beneficial to the firm than current managers, even if those managers are relatively free from agency problems and motivated to maximize shareholder value. See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC* (2012).

option,<sup>104</sup> it is probably more limited than the managers', and the mass of employees have no such option at all. They are bound as a group to the corporation, and thus incentivized to increase its income and viability. Moreover, the size of the group would tend to suppress idiosyncratic behavior and move toward considerations of the common good—a feature of democracy noted by Rousseau<sup>105</sup> and supported by the work of contemporary political theorists.<sup>106</sup>

The idea of popular economic sovereignty obviously extends beyond public corporations to include all business enterprises, as well as many individuals who employ other individuals. Popular economic sovereignty requires a somewhat greater departure from current practice, but the required changes would not be overly disruptive and might have significant collateral advantages. Partnerships would not present a problem. For the most part, a business partnership functions as a direct democracy and thus satisfies the principle without any alteration from its present form.<sup>107</sup> At some point, a partnership might involve certain inequalities in voting or other forms of control that—while acceptable under state law—would raise questions regarding economic sovereignty, but these occur at a level of detail that specific regulation would need to resolve. It is also true, of course, that a partnership can employ non-partners, but then it is functioning as a private employer, the category below.

Non-corporate entities also employ many people. These can be partnerships, firms organized under some other provision of state law, or individuals. Many of these employment relationships have a structure that is too small scale and informal for the corporate democracy model where employees elect representatives. In numerous cases, this is more similar to a personal relationship than any sort of formalized structure would disrupt. There is, nonetheless, a plausible and pragmatic way to institute popular economic sovereignty in this context. No one, with exceptions discussed below, could permissibly hire another person directly. Instead, the hiring party would need to contract with an employment agency or labor exchange. Consistent with the principle of popular economic sovereignty, these agencies or exchanges would be either worker cooperatives or—more likely—corporations that worker-elected representatives manage.<sup>108</sup>

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104. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (2004) (contrasting the decision by members of an organization to leave the organization with their decision to remain and either object to its policies or commit themselves to the existing situation).

105. ROUSSEAU, *supra* note 95.

106. DAVID ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHIC FRAMEWORK* (2009).

107. See, e.g., DANIEL S. KLEINBERGER, *EXAMPLES AND EXPLANATIONS FOR AGENCY, PARTNERSHIP AND LLCs* 245–357 (Wolters Kluwer 5th ed. 2017); GEOFFREY MORSE, *PARTNERSHIP AND LLP LAW* (Oxford Univ. Press 8th ed. 2015).

108. A clarification that is perhaps at a level of detail beyond the range of this discussion may nonetheless be helpful. Large labor exchanges would have managers chosen by representatives of its employees, which in this case would be both the workers being placed (who would, in effect, be working for the exchange that was in

The relationship between employers and these labor exchanges can take two basic forms. First, an employer might apply to the exchange for employees, then interview and select the people who the labor exchanges provide in response to the request. The employer and exchange would negotiate the terms of employment, including responsibilities, wages, benefits and working conditions. Second, an employer might want to hire a specific individual. In that case, the person would be required to join an exchange, and the terms of employment would again be negotiated between the exchange and the employer. The labor exchanges would of course need to follow strict non-discrimination rules, subject to exceptions stated below, and thus accept any person who wants to join in order to accept employment. They would be allowed however, to restrict their activities to particular types of jobs or particular industries. Since they would generally be for-profit firms, they would have an incentive to place as many people as possible, either generally or in their chosen field. In both cases, consistent with the principle of popular economic sovereignty, the employee would in effect be working for the employee-controlled labor exchange, not directly for the employer.

As for economic practicalities, there would undoubtedly be some increased transaction costs involved in the indirect mode of hiring, although standard form contracts would ameliorate the problem. But there would also be a substantial economic benefit for the employees, and for the society as a whole. One of the most distinctive features of the recent (say, the last fifty years) economy is the rise of outsourcing and the use of part-time employees. This may be the result of modern data processing capacities; a complex schedule of part time employees that would previously have incurred prohibitive transaction costs can now be easily managed. Whatever the cause, the result has been grinding oppression for many of these part time workers.<sup>109</sup> They do not receive benefits, they have no job security, they cannot depend on regular hours or a regular income, and they are subject to deleterious working conditions. Intermittent, instrumental connections with their employer have replaced the personal relations that might moderate their treatment. Employers of all sizes are using this approach, from the largest corporations to small shops with a dozen part-time workers.

This is precisely the sort of abuse that the employment relationship makes possible, and that popular economic sovereignty would succeed in preventing. Every employer would need to obtain workers from a labor exchange. The exchanges, although in competition with each other, would presumably negotiate for decent terms, particularly given that they would be employee-controlled. They

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contract with the firm that hired them) and its own staff who carried out the work of the exchange itself. This might be a case where it would be useful to divide the electorate by category of workers.

109. KATHRYN EDEN & H. LUKE SHAEFER, *\$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA* (2016); BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2011); ARNE L. KALLEBERG, *GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S* (2011).

would be able to have skilled professionals negotiating their contracts, something obviously beyond the reach of a single, low-wage employee. The exchanges might well be able to satisfy the legitimate need of employers for flexibility, such as seasonal variations in the number of workers required, while protecting the workers against the uncertainties and dislocations that would otherwise result.

Presumably, popular economic sovereignty would take the place of unions, at least in most situations. While unions and collective bargaining agreements were a natural response to the oppression of workers by owners, and may have saved capitalist nations from being torn apart by social revolution, they have not proved to be a particularly effective model in the modern economy.<sup>110</sup> Where they are very strong, unions have sometimes undermined the economic viability of their employees because of their ethos of worker solidarity unconnected to specific firms.<sup>111</sup> More often, employers have readily out-maneuvered unions, which have proven ineffective in preventing the movement toward part-time workers. In any event, unions protect only one in every ten workers.<sup>112</sup> Popular economic sovereignty would provide all workers with more reliable protection because it would impose conditions that employers could not readily circumvent.

There would obviously be many complexities in designing a system of popular economic sovereignty that would deal with the great variety of employment relationships in the modern economy. Certain exceptions that do not appear in popular political sovereignty would be necessary or desirable because the analogy between the political and economic realms breaks down at certain points. Although every adult family member has the right to vote, it may be appropriate to exclude family enterprises from the labor exchange requirement on grounds that a family is an economic unit. Religious institutions would be exempt with respect to employees who carry out their basic functions, but not for those performing maintenance tasks such as bookkeepers or janitors. Government employees would also be exempt, on grounds that popular political sovereignty already secures the

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110. RONALD L. FILIPPELLI, *COLD WAR IN THE WORKING CLASS: THE RISE AND DECLINE OF THE UNITED ELECTRICAL WORKERS* (1994) (describing the conflicting ideologies that undermined the unity of the union movement); DAVID WITWER & CATHERINE RIOS, *MURDER IN THE GARMENT DISTRICT: THE GRIP OF ORGANIZED CRIME AND THE DECLINE OF LABOR IN THE UNITED STATES* (2020); William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950-1980*, 38 *ILR REV.* 323 (1985); C. Timothy Koeller, *Union Activity and the Decline of American Trade Union Membership*, 15 *J. LAB. RSCH.* 19 (1994).

111. *See, e.g.*, ALEX TAYLOR III, *SIXTY TO ZERO: AN INSIDE LOOK AT THE COLLAPSE OF GENERAL MOTORS – AND THE DETROIT AUTO INDUSTRY* (2010) (describing how United Auto Workers Union was able to negotiate lucrative wage, benefit and retirement packages that GM could not sustain as its market share sank, leading to its ultimate bankruptcy).

112. *Union Members Summary*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/news.release/union2.nr0.htm> (last visited Aug. 25, 2021) (on file with the *University of the Pacific Law Review*) (noting in 2020, the percent of wage and salary workers who were members of unions—the union membership rate—was 10.8 percent, up by 0.5 percentage point from 2019 and the number of wage and salary workers belonging to unions, at 14.3 million in 2020, was down by 321,000, or 2.2 percent, from 2019).

fairness of their treatment, and that economic sovereignty might impede that more basic form of citizen control.

## VI. CONCLUSION

This article argues that there is a deeply organic link between democratic government and corporate organization based on their etiology. Both the state and the corporation—as we currently conceive them—emerged from the corporatist thinking of the Middle Ages and the idea that an institution could be socially constructed as a juridical person capable of action. That type of thinking also led to the construction of groups of individuals as a juridical entity that could elect a representative to act for them. Originally a mere device developed to advance monarchical centralization, this notion proved so powerful that it could serve as the basis of democratic governance for massive modern states. Groups of citizens could elect representatives to control the state and induce it to act in their interest—a process that can be described as popular political sovereignty.

Based on the common origin and conceptual structure of the state and the corporation, this notion can extend from politics to economic institutions. The connection is not the usual one of treating democratic principles as a more effective means of corporate management, nor the less common but still prevalent one of using worker participation as practice for politics. Rather, the extension suggested here is direct and normative. Just as our understanding of political representation has evolved to the point where we recognize that every competent adult should have the right to vote, every working person should have the right to control his or her own working conditions—either directly or more commonly—by electing representatives who control the setting where they work. No one should be subject to an employer's control. This principle—popular economic sovereignty—would serve the same deeply felt, normative purposes that democracy serves in the political arena. It would provide workers with a sense of autonomy and dignity, and it would protect them from oppressive treatment.

Clearly, popular economic sovereignty will not be implemented any time soon—and probably not ever. But the inquiry is useful in highlighting problematic features of our current economic system and the way in which it is essentially inconsistent with the democratic norms on which we insist for our government. Exploring the way in which the underlying principles of our political system can extend into our economic system reveals the subordination and oppression to which people are subject, whether they work in one of our largest firms, a corporation employing hundreds of thousands, or one of the smallest employment settings, such as a household or shop with a single employee. It warns us not to rest content with the National Labor Relations Act<sup>113</sup> or the Occupational Safety

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113. Pub. L. No. 74-198, 49 Stat. 449 (1935), codified as amended at 29 U.S.C. §§ 151-169.

and Health Act,<sup>114</sup> but to continue developing ways to create a just and equitable society for the vast majority of our citizens who must work for a living.

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114. Pub. L. No. 91-596, 84 Stat. 1590 (1970), codified as amended at 29 U.S.C. § 651 et seq.

