ECONOMIC DEMOCRACY IN THE 21ST CENTURY: THE VOTE IN LABOUR, CAPITAL AND PUBLIC SERVICES

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Abstract
How should power be shared in the economy? This article offers a framework, and three models, for making choices about the economy's main legal institutions: for *property* in capital, the *obligations* related to work, and organisation of corporate *persons*. An authoritarian economic model entails financial institution or director control of capital; a duty to work and state control of unions; and the principle of 'leadership'. A neo-liberal model advocates individual capital ownership including employee share schemes; individual 'freedom' of contract and privatised unions; and information and consultation as the limits of voice. A democratic model advocates diverse share ownership through pensions, wealth funds, and public bodies; collective bargaining and independent unions; and codetermination for workers and citizens based on one-person, one vote. Most countries have an unsettled mixture of these models. The UK, Germany, and the US are analysed as case studies, and empirical evidence is summarised which suggests that a more democratic economy enables greater human development. Because reason and evidence will remain the basis for public policy and debate, it seems economic democracy in the 21st century will swiftly become reality.

Contents

1. INTRODUCTION

The desire for one theory of economic order is strong and influences ideals across the political spectrum. John Stuart Mill envisaged an economy based upon the 'Partnership principle' where workers becoming owners might produce the 'true euthanasia of trade unions'.[2] Sidney and Beatrice Webb argued the economy should be based on a functional separation of powers: management (which would be progressively nationalised) determining *how* things are produced, consumers determining *what* is produced, and unions settling the *conditions* of production in collective bargaining.[3] As the 20th century pendulum swung to nationalisation, and then back to privatisation two eminent lawyers, Henry Hansmann and Reiner Kraakman argued there was also an 'End of History for Corporate Law'.[4] The 'shareholder primacy' model, through the forces of logic, example and competition, was outcompeting its rivals: a director-oriented model (where managers are more autonomous, less accountable), a state-oriented model (with more public regulation), and a labour-oriented model (with worker votes for company boards). Of

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[2] See JS Mill, *Principles of Political Economy* (7th edn Longmans 1909) Book V, ch IX, §5. JS Mill, *Thornton on Labour and Its Claims* (June 1869) Fortnightly Review, Part II.

[3] S Webb and B Webb, *Industrial Democracy* (Longmans, Green & Co 1920) Part III, ch IV, 822.

[4] H Hansmann and R Kraakman, 'End of History for Corporate Law' (2000) 89 Georgetown Law Journal 439, 441-5

course, all great thinkers, those who are honest, recognise exceptions to rules in the real world, and can change their minds.[5] But in the world of ideals, people like Mill, the Webbs, or Hansmann and Kraakman, though very different, all held up one best model. Their theories implied it was to be all worker cooperatives, all public ownership, or all shareholder capitalism, with little room for anything else.

The reality of our economic constitution has always been mixed. Many sectors of enterprise are privately or socially owned, many are publicly owned, but all are subject to regulation in public courts: at the very least by rules of property, obligations, and legal personhood. Yet a conceptual chasm between public and private, between society and market,[6] meant that two debates over democratising the economy ran in parallel. The first debate concerned the balance of power between the investors of labour, investors of capital, and company directors.[7] As collective bargaining reached its height in the US, discussion of 'economic democracy' revived and spread.[8] As workers' retirement savings became an ever-greater share of the stock market, others began to talk of 'pension fund socialism'.[9] But much of this discussion, renewed as it was, was siloed: labour-oriented literature focused on worker ownership of individual firms,[10] often neglecting the wider shifts in stock market ownership in finance literature.[11]

The second debate concerned the proper scope of public ownership, typically based upon competing theories of justice, rights, natural monopoly, public goods,[12] or bargaining power. It also concerned the internal governance of public enterprise: from the Morrisonian model of Whitehall control (where 'expert' boards are exclusively appointed by the Minister, who is someone like Herbert Morrison),[13] to stakeholder models (where workers, and the public may also vote for representatives).[14] The difference in the discussion taking shape in the 21st century is that we have to do less guesswork about what works. We have unparalleled access to history, experience across dozens of countries, and data.

This article offers a conceptual framework for the choices surrounding economic democracy. Part 2 sets out three models of political economy: authoritarian, neo-liberal and democratic, based upon legal and historical development after the industrial revolution. The authoritarian economic model entails financial institution or director control of capital; a duty to work and state control of unions; and the

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5 e.g. Mill (1909) Book V, ch IX, §7 ff (exceptions to laissez faire include *everything* relating to corporate law and labour law). S Webb and B Webb, *The History of Trade Unionism* (1920) 760, Appendix VIII (advocating workers on boards). H Hansmann and R Kraakman, 'Reflections on the end of history for corporate law' in A Rasheed (ed), *The Convergence of Corporate Governance* (2012) 32, noting the 'end of history' was 'hyperbolic'. cf H Hansmann, 'When does worker ownership work? ESOPs, law firms, codetermination, and economic democracy' (1990) 99(8) Yale Law Journal 1749.

6 cf M Weber, *Economy and Society* (1922) vol II, ch VIII, i, 642. Compare O Gierke, 'The Social Role of Private Law' translated by E McGaughey with an introduction (2018) 19(4) German Law Journal 1017

7 See AA Berle and GC Means, *The Modern Corporation and Private Property* (1932) Book IV, IV.

8 See RA Dahl, 'A Prelude to Corporate Reform' (1971) Business and Society Review 17 and RA Dahl, *A Preface to Economic Democracy* (1986)

9 PF Drucker, *The Unseen Revolution: How Pension Fund Socialism Came to America* (1976)

10 e.g. AA Berle, 'How Labor Could Control' (7 September 1921) New Republic 37, 38 (advocating firm based worker share schemes) but changing his mind to advocate diversified funds in AA Berle, *Studies in the Law of Corporate Finance* (1928) 39.

11 AA Berle, *Power without property* (1959) 52-5 (warning about asset manager dominance) and AA Berle, 'Property, Production and Revolution' (1965) 65 Columbia Law Review 1, 17 (advocating the solution).

12 e.g. JE Stiglitz and JK Rosengard, *The Economics of the Public Sector* (4th edn 2015) ch 4

13 See H Morrison, *Socialisation and Transport: Organisation of socialised industries with the particular reference to the London passenger transport bill* (1933) ch XI, 189

14 e.g. K Kautsky, *The Labour Revolution* (1924) ch III, part VIII(e)

principle of 'leadership'. The neo-liberal model advocates individual capital ownership including employee share schemes; individual 'freedom' of contract and privatised unions; and information and consultation as the limits of voice. The democratic model advocates diverse ownership especially through pensions, wealth funds and public bodies; collective bargaining and independent unions; and rights of codetermination for workers, investors, and the public based on one-person, one vote. In practice, democratic polities exhibit an unsettled mixture of all three economic models, with the exception that only authoritarian political regimes place upon people a duty to work, or suppress independent unions. Yet the neo-liberal model largely conceals authoritarianism in substance with superficial freedom in legal forms.

Part 3 explains how the legal institutions of the UK (with EU law), Germany, and the United States operate, and highlights reform proposals that have emerged from each system. While the term 'Varieties of Capitalism' was a useful counter-narrative to the belief in convergence or an 'end of history',[15] it is now imperative to understand the 'commonalities of capitalism'. In all systems financial institutions – asset managers and banks – dominate the votes in the economy. This does not result from rational economic logic or political choice, but from the arbitrary patterns of bargaining power, which derives from inequality of income and wealth, collective organisation, and information.[16]

Part 4 examines the empirical evidence that is emerging about which models work best. Based upon 'leximetric' and quantitative research, cutting edge empirical work suggests a more democratic economy enables superior outcomes in human development, higher wages, equality and sustainability. Authoritarian and neo-liberal models make society poorer, and more unjust. 'Democratic' in this sense means corporate accountability, effective labour rights, and the all-important right to vote in the economy, as much as in politics. This matters because reason and evidence can inform policy decisions. Although democratic politics is under pressure, reason must ultimately remain the basis for public policy and debate. It follows that economic democracy in the 21st century will probably become reality soon.

2. Three economic models

While the economic constitution may seem a field of bewildering institutional complexity, it is better grasped by isolating three core models, based upon central legal forms: the law of property, obligations, and personhood.[17] Every economic system has some basis for sharing out ownership of property in social and economic institutions, particularly corporations. Every economic system has a set of obligations by which people are engaged to work, and mainly they use the law of contract. Every economic system arranges, regardless of ownership, the mechanics of power within each corporate 'person'.[18] Through

[15] See P Hall and D Soskice (eds), *Varieties of Capitalism* (2001) especially ch 10

[16] These three building blocks of bargaining power are highlighted by (1) A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book I, ch 8 ('...the masters can hold out much longer' due to resources), (2) Mill (1909) Book V, ch IX, §7 ff (collective action inequality between workers and employers), and (3) WS Jevons, *Theory of Political Economy* (3rd edn 1888) ch 4, §74 ('...comparative amount of knowledge of each other's positions').

[17] See Justinian, *Institutes*, Book I (persons), Bk II (things or property), Bk III (succession and obligations), Bk IV (crimes. Also W Blackstone, *Commentaries on the Laws of England* (1765) Bk I (persons), Bk II (things or property), Bk III ('private wrongs' or obligations), Bk IV ('public wrongs' or crimes).

[18] A legal person is simply a group of people or entity (like a corporation, a union, a partnership) that is the subject of legal

modern history and experience in western countries,[19] three central models of economic governance can usefully be identified as follows: authoritarian, neo-liberal, and democratic.

	Authoritarian	Neo-liberal	Democratic
Property in companies	Financial institution or director control of corporate voting rights.	Individual share ownership and employee share schemes.	Diverse ownership: pensions, wealth funds, public bodies.
Obligation for work	Duty to work. State controlled unions.	Individual 'freedom' of contract. Privatised unions.	Collective bargaining and rights. Independent unions.
Control of legal person	Leadership principle.	Information and consultation of stakeholders.	Voting rights for all contributing stakeholders.

(1) AUTHORITARIAN

(a) Property

The authoritarian model of property starts with financial or director control of corporations, regardless of who may technically 'own' them. 'Ownership' or 'property' is correctly understood in law as a 'bundle of rights'.[20] Just like a bundle of sticks, most legal systems enable the bundle to be separated and shared out: one person might get a 'revenue stick', another might get a 'possess it now stick', another might get a 'possess it after 10 years stick', another might get a 'control stick'. All component rights of 'property' can be unified or dispersed. Crucially in all legal systems corporate law (whether the corporation is private or public) enables dispersion of the incidents of ownership of the 'means of production', including the separation of ownership and control.[21] The corporate form endows property 'with the form of social capital... the abolition of capital as private property within the framework of capitalist production itself.'[22] Yet the authoritarian model's key innovation is that, whoever contributes to, or owns, or possesses the economic interests in a company, control is given to financial institutions or corporate executives.[23]

The purest example emerged in the German Public Companies Act 1937 (Aktiengesetz 1937), driven primarily by a bank lawyer and Harvard exchange student named Johannes Zahn. Weimar law had enabled companies to produce staggering concentrations of economic power, letting companies issue non-voting and multiple voting shares. By 1925, just one-fortieth of German capital accounted for 38.2 percent of shareholder voting rights,[24] a degree far beyond the experience of the US at the time.[25] This

rights and duties: like human persons, legal persons can hold property, sue, and be sued.

19 nb One salient model that is excluded is authoritarian communism, with state control of property in companies, yet the state is itself unaccountable to the public it purports to serve. This was the case in Soviet Russia, and partly in China. Putin's Russia fits most closely with the authoritarian model, with oligarch corporate owners, who are closely aligned to the state.

20 AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (1961) 113-128 lists eleven, non-exhaustive incidents.

21 G Means, 'The Separation of Ownership and Control in American Industry' (1931) 46(1) Quarterly Journal of Economics 68.

22 As it was put by K Marx, *Capital: volume 3* (1883) ch 27.

23 e.g. historically, the East India Company, with minimum thresholds of capital before voting rights were acquired: S Williston, 'History of the Law of Business Corporations before 1800. II. (Concluded)' (1898) 2(4) Harvard Law Review 149, 156.

24 R Müller-Erzbach, 'Die Entartung des Deutschen Aktienwesens seit der Inflationszeit' (1926) 20 Recht und Staat in Geschichte und Gegenwart 42

25 AA Berle and GC Means, *The Modern Corporation and Private Property* (1932) 98-102

empowered corporate executives who issued vast voting power to themselves to act independently from other stakeholders. Moreover a quirk of German civil law meant that share certificates had to be deposited for 'safe keeping' with a bank, and the courts empowered banks to appropriate the voting rights on those shares.[26] The 1937 Act made these shifts explicit, accelerated them, and entrenched them. First, whoever owned shares, the banks would have a statutory right and duty to cast votes upon them, supposedly in shareholders' best interests. Second, although shareholders were given a right to one share, one vote, with the same stroke the general meeting of shareholders was explicitly barred from any direct influence on the executive (*Vorstana*) of a company, and could only had voting rights (that banks appropriated) against a supervisory board (*Aufsichtsrat*).[27] Third, corporate executives could only be dismissed for a good reason, meaning that no vote of any stakeholder could bind without risking litigation and review by courts, which Hitler had thoroughly packed. The goal of Zahn, a manic Nazi sociopath, like the Dr Strangelove of corporate law was clear. 'Democracy of capital is to disappear as it did in politics.'[28] This position has been significantly amended, but not reversed in German law today.[29]

Recently the authoritarian model of property has been reincarnating in two main ways. First, regulation from 1926 in the US had limited the use of non-voting shares, and federal oversight through the Securities and Exchange Act of 1934 §14 had ensured the New York Stock Exchange prevented shares without votes. Parallel regulatory scrutiny in the UK had done the same, and these practices were mirrored through the Commonwealth. But in 1986, under competitive pressure from Nasdaq and Amex, the NYSE abandoned its rules against disenfranchising shareholders, and allowed multiple voting up to a 1:10 ratio.[30] By 2007, the US was the furthest developed economy from a one share, one vote norm.[31] Many public and union pension funds have fought hard to stall disenfranchisement.[32] But in the 21st century tech-monopolies, particularly Google and Facebook, issued massive volumes of multiple voting shares, ensuring their direct control.[33] Notably, Snap Inc launched its IPO in 2017 with 'class A' shares having not votes at all.[34] The Chinese company Ali-Baba has also recently caused Singapore and Hong Kong to enable voteless shares to be issued, through the threat of listing on American exchanges – a

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26 E McGaughey, *Participation in Corporate Governance* (2014) ch 6(2)(c) and E Micheler, 'English and German securities law: a thesis in doctrinal path dependence' (2007) 122 LQR 251, 272-277.

27 McGaughey (2014) ch 4(2)

28 JCD Zahn, *Wirtschaftsführertum und Vertragsethik im Neuen Aktienrecht* (1934) 93. In English, the book's title is *Economic Leadership and Contractual Ethics in the New Corporate Law*. See the excellent review in English by F Kessler, (1935) 83 University of Pennsylvania Law Review 393, 394. Zahn's book is filled with craven fascist delusion, e.g. at 95, 'When a genuine leader-follower relationship develops between the executive and shareholders, shareholder voting rights will lose virtually all meaning. The shareholder will have much less to say than before. But he will not feel himself to be a victim, because he will trust the leader.'

29 See below, part 3(2).

30 J Seligman, 'Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy' (1986) 54 George Washington Law Review 687, 707

31 ISS, Shearman & Sterling and ECGI, *Report on the Proportionality Principle in the European Union* (12 June 2007) 47-49

32 EB Rock and M Kahan, 'Embattled CEOs' (2010) 88(5) Texas Law Review 987.

33 Mark Zuckerberg controls 60% of votes with 16% of shares: D Crichton, 'Congress should demand Zuckerberg move to 'one share, one vote' (9 April 2018) TechCrunch. Sergey Brin and Larry Page have similar joint control: T Townsend, 'Alphabet shareholders want more voting rights but Larry and Sergey don't want it that way' (13 June 2017) Recode.

34 eg H Kuchler et al, 'Snapchat owner valued at up to $25bn in IPO filing' (2 February 2017) Financial Times.

threat it ultimately carried out.[35]

Second, in companies that are not dominated by executives, banks and asset managers have cornered the vast majority of voting rights on shares, whoever pays for them. Post-WW2, while collective bargaining strengthened, people saved money in pensions, collectively invested in securities markets. But particularly from 1980 large asset managers, offering investment services on standard form contracts, took over voting rights on the shares they handled. Today, if the shares of the three largest US asset managers – BlackRock, State Street, and Vanguard – were combined, they would be the largest shareholder in 438 out of the 500 largest US firms.[36] They support management 90% of the time, spending little: Vanguard employed 15 people for engagement and voting in 13,000 companies, BlackRock 20 people for 14,000 companies, and State Street under 10 people for 9,000 companies.[37] Less than fifty people dominate votes in the US economy, all unelected. They routinely support management, and oppose environmental, social and governance reform. This has been called 'the major new antitrust challenge of our time'.[38] The position in the UK, appears similar, if not more concentrated.[39] Financial institutions control the economy, all with 'other people's money'. It has become close, and possibly indistinguishable, from the old descriptions of a 'self-perpetuating oligarchy' of banks, asset managers, and boards.[40]

(b) Obligations

The authoritarian model of obligations imposes a duty to work, either indirectly or overtly abolishing consent in work contracts. In systems that abide by the rule of law, contracts are normally the gateway to employment, and a host of other social rights, such as housing, food, or social security.[41] As a consent-based obligation, contract differs from duties imposed by tort law (to compensate for wrongs) or unjust enrichment (to reverse unmerited gains). Unique in authoritarian politics, employment becomes a legal or a socially-binding duty, negating the ability quit or dissent. Again, this system was perfected in 1930s Germany by eliminating social security and replacing it with a duty to labour as the government directed: this still functioned through a supposed 'contract' between the worker and the employer, but the worker had no say in its terms.[42] It may have resulted in full employment, but it is the opposite of a free society.[43] Today, some people have been required to work at profit-making companies to get unemployment benefits, but modern judiciaries have rejected that 'workfare' programmes amount to forced labour.[44]

35 eg A Tan 'Singapore Exchange Takes on Honk Kong With Dual-Class Shares' (21 January 2018) Bloomberg, and P Lagerkranser and B Robertson, 'Hong Kong's Alibaba Courtship May Pay Off With Mega-Deal' (27 May 2019) Bloomberg.

36 EA Posner, FS Morton and EG Weyl, 'Proposal to limit the anti-competitive power of institutional investors' (2017) 81 Antitrust Law Journal 1, 2.

37 S Krouse, D Benoit and T McGinty, 'Meet the New Corporate Power Brokers: Passive Investors' (24 October 2016) Wall St Journal

38 EA Posner, FS Morton and EG Weyl, 'Proposal to limit the anti-competitive power of institutional investors' (2017) 81 Antitrust Law Journal 1, 2. The authors' proposal, however, of limiting shareholdings to 1% would be highly damaging, and disproportionate to the problem. This essentially mirrors the General Motors 'Treaty of Detroit' plan, at Part II.C.

39 See E McGaughey, 'Member nominated trustees and corporate governance' (2015) KCL Law School RP No 2015-26

40 e.g. *Norwest Holst Ltd v Secretary of State for Trade* [1978] Ch 201, per Lord Denning MR

41 See Universal Declaration of Human Rights 1948 arts 22-25.

42 FL Neumann, *Behemoth* (1941) 280

43 cf W Beveridge, *Full Employment in a Free Society* (1944)

44 e.g. *R (Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68

The authoritarian economic model of obligations also requires state control (hence eradication) of trade unions, which would oppose a duty to work. For example, on 3 May 1933, after arresting and murdering union leaders, Hitler created a new Nazi *Ersatz*-union called the *Deutsche Arbeitsfront* (German Labor Front). Every person who worked for a living, eventually including employed and self-employed people alike, was compelled to join. 'Although there [was] no legal compulsion to join the Labour Front, the pressure [was] so strong that it is inadvisable for anyone to stay out. The members [had to] attend meetings, but [could] not enter into discussion.'[45] Unions could also just be banned.[46]

(c) Personhood

The authoritarian model of personhood culminates in the 'leadership principle'. In every legal person, and in every social group, from chess clubs to corporate behemoths,[47] there is a leader. Everyone has to follow the leader, whoever it is, and in extreme cases to do so without question. In the words of the *Deutsche Arbeitsfront* leader (an alcoholic called Dr Robert Ley who committed suicide before his Nuremberg trial) officials were to act as 'the soldier-like kernel of the plant community which obeys the Leader blindly. Its motto is 'the Leader is always right."[48] Everyone in every social group must lose their own personality, and therefore the claim to shape the ethics or behaviour of the group to which they belong. As Johannes Zahn put it, 'the personality of the leader is decisive... any division of the leadership carries the seed of corporate weakness'.[49] As well as eliminating the rights of shareholders (including small savers or pension funds) to have any effective voice, the fascists swiftly abolished the right of workers and unions to codetermine members of the board of directors.[50] No voice for anyone, except the financial and corporate 'leaders'.

While the 'leadership principle' of Nazi Germany was partly rolled back after its military defeat, the glorification of 'leadership' has re-emerged. 'Leadership' courses are consistently popular in business schools,[51] and while obviously different from fascist ideology they are usually taught without reference to the central ideal of true leaders. This is, in the words of the Nobel Peace Prize recipient Desmond Tutu, that leadership means that one must be 'a servant... not in it for his own aggrandizement' but showing 'just how he is or she is a leader for the sake of the led by suffering'.[52] It is doubtful that any management textbooks engage with the importance, to be a leader, of 'suffering' for the sake of others.[53]

[45] F Neumann, *Behemoth* (1941) 341. Today, contrast the All-China Federation of Trade Unions. Authoritarian regimes may also simply ban unions or withdraw all legal rights, particularly the right to strike.

[46] e.g. Iraq (under US occupation) Law 150, banning public sector unions. cf *Demir and Baykara v Turkey* [2008] ECHR 1345 and *Ognevenko v Russia* [2018] ECHR 950

[47] K Robert, *Hitler's Counterfeit Reich* (1941) 27–28

[48] Neumann (1941) 340

[49] Zahn (1934) 15.

[50] E McGaughey, 'The codetermination bargains: the history of German corporate and labour law' (2016) 23(1) Columbia Journal of European Law 135, 161-164.

[51] cf T Ben-Shahar and A Ridgway, *The Joy of Leadership: How Positive Psychology Can Maximize Your Impact (and Make You Happier) in a Challenging World* (2017) co-authored by one of the ex-Harvard Business School's popular courses.

[52] See Nobel Prize, Desmond Tutu on Leadership (9 November 2007) YouTube. Interviewer: 'What makes a good leader, what qualities?' Tutu: 'Ha! Yes. It is a question we have had to deal with quite a bit, looking at the leaders we have had who have sometimes led their countries into disastrous situations. I think ultimately you want a leader who is also a servant... not in it for his own aggrandizement. He leads on behalf of, for the sake of... the great leader will show just how he is or she is a leader for the sake of the led by suffering.'

[53] nb the 'servant' model of 'leadership' is well known, but it would seem to be empty without the components of sacrifice and

This economic model of 'leadership' has also shifted from popular culture into politics. In 2016, the "Donald Trump' model of workplace relations', where an irrational authority figure barks 'you're fired' at aspiring 'apprentices', moved from freak-reality television into the White House.[54] The 'leader' proclaims 'I am your voice',[55] and usurps the individuality of all other people in the group. Dissent is irrelevant. While resulting in part from 'sweeping and systemic' attack from the Kremlin regime,[56] strong support for this ideology was built by the US Supreme Court, where it was said that 'whoever controls the corporation' determines what the corporation does – especially unlimited political spending – and this was (supposedly) true by analogy to political parties.[57] This included denying the right to contraceptive health care for women workers: whatever conflicts with the beliefs of the 'leader'.[58] The leader's values matter more than the values of every other person combined, and the reason why is absolute power. True values, that 'leadership' may be require 'intelligence, trustworthiness, humaneness, courage, and discipline',[59] are poisoned and inverted by the abolition of accountability.

(2) NEO-LIBERAL

How does the neo-liberal economic model differ from authoritarian models of property, obligations and personhood? The answer is that neo-liberalism lays great emphasis on formal freedom. Neo-liberalism views individuals as fully capable, rational actors. Those who are driven by profit, even to cruelty, cannot affect the free choices of others, so long as force and fraud is banned.[60] Everyone is rational, except when those same people organise the 'coercive' machinery of the state.[61] In these respects, property is the same, and should be subject to the same rules, whether it is your personal toothbrush, or a listed corporation. Contracts are the same, whether between Sunday traders at a 19th century horse fair, or a consumer and a multinational bank. Personhood is the same, whether a human being or a corporation. Different rules are not needed.[62]

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self-effacing conduct, which run counter to mainstream ideals of success.

54 E McGaughey, 'Fascism-lite in America (or the social ideal of Donald Trump)' (2018) 7(2) British Journal of American Legal Studies 291

55 D Trump, *Republican Party Conference Speech* (2016)

56 RS Mueller, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (2019) 1. T Snyder, *The Road to Unfreedom: Russia, Europe, America* (2018) 104-110 and ch 6.

57 Scalia J in *Citizens United v Federal Election Commission*, 558 US 310 (2010) ('giving the leadership of the party the right to speak on their behalf'). *Burwell v Hobby Lobby Stores, Inc.*, 573 US _ (2014) page 53 of the transcript ('whoever controls the corporation'). Contrast the fascist tract by R Michels, *Political Parties* or *Zur Soziologie des Parteiwesens in der modernen Demokratie: Untersuchungen über die oligarchischen Tendenzen des Gruppenlebens* (1911) 362.

58 *Burwell v Hobby Lobby Stores, Inc.*, 573 US _ (2014)

59 Jia Lin's commentary to S Tzu, *The Art of War: Complete Texts and Commentaries* (2003) 44, translated by T Cleary.

60 cf Mill (1909) Book V, ch I, §2 ff explaining why absence of force and fraud is not enough.

61 eg R Nozick, *Anarchy, State and Utopia* (1974) and R Plant, *The Neo-Liberal State* (2010)

62 O Kahn-Freund, 'Hugo Sinzheimer 1875–1945' in *Labour Law and Politics in the Weimar Republic* (1981) 102, 'The technique of bourgeois society and its law [is] to cover social facts and factors of social existence with abstractions: property, contract, legal person. All these abstractions contain within them socially opposed and contradictory phenomena: property used for production and property used for consumption, agreements between equal parties and agreements between unequal parties, capitalist and worker. Through abstraction it is possible to extend legal rules, which are appropriate to the social phenomenon for which they were originally developed, to other social phenomena, thereby concealing the exercise of social power behind a veil of law.'

(a) Property

The neo-liberal model of property in companies prizes individual share ownership. Shareholders dominate corporate governance through rational economic logic. According to Oliver Williamson, shareholders make firm-specific investments that cannot be protected as easily as the interests of other stakeholders, especially workers. In insolvency shareholders are (supposedly) the residual claimants: when a company goes bust, they get paid last, and therefore have the greatest risk. Shareholders' greater risk means they are best placed to monopolise governance power because, it is said, they will rationally seek to maximise the company's total product. Because they are paid last, their work apparently benefits all other stakeholders. In any event, according various accounts, having diverse represented on company boards will mean more conflict, and therefore slow the efficient operation of business.[63] This vision of individual shareholder ownership, its inherent efficiency, means shareholder primacy materialises not 'by history but by logic'.[64]

Reality reveals a different logic. Since the 1970s at the latest, asset managers and banks came to control votes on most shares, and be the registered shareholders, in almost all listed companies, and all with 'other people's money'. They do not bear risk on insolvency, and so are not the 'residual claimants'. They make no 'firm-specific investments'. They generate fees and pass all risks on to the true contributors to capital, who are usually employees saving for retirement through pensions, life insurance or mutual funds. The theories of Williamson and others were based on factual error in their own terms even when they were written. Nevertheless, this idea of ownership exercises tremendous psychological power, and has been the basis for promoting inclusive ownership by employees, by figures ranging from Churchill, to Carnegie, to Kelso, to Thatcher. In the early 20th century, the causes of employee share schemes, profit-sharing, or co-partnership were, according to Sydney and Beatrice Webb, often 'taken up by the most reactionary persons' and widely seen as 'at least a proposal for the supersession of Trade Unionism, that it aroused the fiercest opposition.'[65] But for its believers, the neo-liberal dream meant that 'the labourer will become, as it were, a shareholder' and 'would not be unwilling to stand the pressure of a bad year because he had shared some of the profits of a good one'.[66] The 'workmen and capitalists' would be 'pulling and owning the same boat.'[67]

So, in 1958 a lawyer named Louis Kelso argued in *The Capitalist Manifesto* that every worker should get equity-sharing plans to shift 'from absolute dependence on toil as the source of his income to dependence, in a substantial degree, on his ownership of a capital interest.'[68] The prize was *How to Turn Eighty Million Workers into Capitalist on Borrowed Money*,[69] and so how to avoid the need for unions, social

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63 Hansmann (1990) 99(8) Yale Law Journal 1749, 1803. Also H Hansmann, *The Ownership of Enterprise* (1996) 111-112, DF Vagts, 'Reforming the "Modern" Corporation: Perspectives from the German' (1966) 80 Harvard Law Review 23, 52-53 and JCD Zahn, *Wirtschaftsführertum und Vertragsethik im neuen Aktienrecht* (1934) 15.

64 O Williamson, *The Economic Institutions of Capitalism* (1985) 323-4.

65 S Webb and B Webb, *A History of Trade Unionism* (Longmans 1920) 653.

66 W Churchill, *Speech at Claverton Manor* (26 July 1897) extracted in M Gilbert, *Winston S. Churchill: Youth, 1874-1900, pt. 2. 1896-1900* (Heinemann 1966) 772.

67 Commission on Industrial Relations, *Final Report and Testimony* (1916) vol 9, 8288, Andrew Carnegie.

68 L Kelso and M Adler, *The Capitalist Manifesto* (1958) 202-4.

69 L Kelso and P Hetter, *How to Turn Eighty Million Workers into Capitalist on Borrowed Money* (1967)

security, or full employment, all of which Kelso bitterly opposed. The Catch-22 for workers was that,[70] because they had little bargaining power, they would never be earning enough money to have real voice in the companies where they got 'ownership'. And without any voice, they would not be able to influence wages, to buy voice. There was no question that unions were better than share ownership schemes.

However, share schemes could serve short-term political goals. Margaret Thatcher's re-privatisation schemes,[71] particularly in buses, heavily utilised employee share schemes. The public lost its property, and that property quickly re-concentrated in private hands as workers (needing the money) sold off their shares for cash. The same process, on a national scale, occurred in post-Soviet Russia,[72] impoverishing the country for a decade, and creating the oligarchs that rule to today. In the US, one of the most salient examples of employee share schemes was Enron, where workers were discouraged from placing 401(k) retirement savings into independent funds, and encouraged to buy Enron shares. When Enron went bankrupt, workers lost nearly two-thirds of their pensions.[73] Paradoxically, the psychology of a worker ownership stake – even on the disastrous basis of individual, undiversified investment – still holds an intense appeal among many labour-oriented scholars.[74] The better view is that, just like in any other share portfolio, investments must be diversified.[75]

(b) Obligations

The neo-liberal model of obligations appeals to the ideal of individual 'freedom of contract', while denying the existence or relevance of unequal bargaining power. Unequal bargaining power, said Adam Smith, means that employers can 'hold out' longer in any negotiation because they hold more resources.[76] But, according to Richard Posner, it had 'no economic basis'.[77] Unequal bargaining power, said John Stuart Mill, means corporations can exploit collective action problems of workers to redistribute more wealth to themselves.[78] But according to the Chicago School this had no relevance because a corporation was just another 'person', while unions should be treated as cartels.[79] From Alfred Marshall and others, it was well-established that distribution of gains affects the motivation to work, both by demotivating the under-paid,[80] and by making the overpaid lazy.[81] But according to Ronald Coase the redistribution of

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70 cf J Heller, *Catch-22* (1961) a fictional novel referring to the rule that if you were crazy, you could be exempt from flying practical suicide missions in WW2. The catch was that if you were not crazy, you would pretend that you were crazy to escape flying, and therefore not be crazy. And if you *were* crazy, you would probably want to fly anyway.

71 The concept of 're-privatisation' originated in Nazi Germany: see S Merlin, 'Trends in German Economic Control since 1933' (1943) 57(2) Quarterly Journal of Economics 169.

72 B Black, R Kraakman and A Tarassova, 'Russian Privatization and Corporate Governance: What Went Wrong?' (2000) 52(6) Stanford Law Review 1731

73 D Millon, 'Worker ownership through 401(k) retirement plans: Enron's cautionary tale' (2002) 76 St John's LR 835, 840.

74 RB Freeman, 'Who owns the robots rules the world' (May 2015) IZA World of Labor. Freeman has advanced the same idea before, most recently in JR Blasi, RB Freeman and DL Kruse, *The Citizen's Share: Putting Ownership Back into Democracy* (2013)

75 Berle (1965) 65(1) CLR 1, 17.

76 Smith (1776) Book I, ch 8.

77 RA Posner, 'Reflections on Consumerism' (1973) 20 University of Chicago Law School Record 19, 24-25. See also OE Williamson, *The Economic Institutions of Capitalism* (1985) 237-258.

78 Mill (1909) Book V, ch IX, §7 ff

79 RA Posner, *Economic Analysis of Law* (1973) ch 11 and cf *Loewe v Lawlor*, 208 US 274 (1908)

80 e.g. A Marshall, *Principles of Economics* (3rd edn 1895) Book VI, ch 4, 649

81 e.g. AA Berle and GC Means, *The Modern Corporation* (1932) 114.

resources from unequal bargaining power has no consequences for productive efficiency.[82] Crucially, it had to be denied that wealth inequality forces some people to work for others, on terms chosen by the owners of property. According to Hayek or Friedman, unemployment was natural, and was exacerbated by labour rights. In the neo-liberal model everything is on its head, with evidence-free assertions of 'unintended consequences'. Full employment accelerates inflation, and unemployment is natural. Unions are cartels, and corporations are persons. Contracts are free, and private power does not exist.

The neo-liberal economic model further aims to privatise the trade union movement, if authoritarian suppression is not itself feasible. First, the law should empower workers to exercise their 'freedom of contract' to give up the right to unionise.[83] Second, sham staff associations should pre-empt independent unions.[84] These sham bodies should be called work councils,[85] or company 'unions', to confuse them with democratically elected bodies, much like a 'Bank of Sweden prize' should be called a 'Nobel prize' to conflate it with Alfred Nobel's will. Any interference in the right to contract out of a union, or contract into a sham union, restricts individual freedom. In the US, the National Labor Relations Act of 1935 §8(a)(2) prohibited all company unions, where the employer influences or funds a labour organization.[86] Pushed by the Republican Party, the Teamwork for Employees and Managers Act of 1995, would have abolished the protections for independent unions in §8(a)(2). It passed Congress and had to be vetoed by President Clinton. But paradoxically, and like with the psychology of ownership, the desire for 'reform' of §8(a)(2), continues to capture support from labour-oriented writers, on the flawed assertion that the ban on management-controlled voice somehow prevents independent work councils.[87]

(c) Personhood

The neo-liberal model of personhood typically denies its existence, as it regards personhood as a 'legal fiction', so companies are merely a 'nexus of contracts',[88] or can reducible to its 'property foundations'.[89] They cannot be seen as social institutions. Of course, the fact that contract and property are (if one wishes to speak in these terms) themselves legal fictions must quietly be ignored. It must also be ignored that companies (with the state, society or the family) are among the most important social institutions, because as a matter of psychological fact each social group acquires a behaviour that differs from any individual

82 RH Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1, 8, asserting 'the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.' It followed for Coase that the principle source of market failure is transaction costs, not bargaining power. Contrast the person who actually developed the concept of transaction costs: JR Commons, 'Institutional Economics' (1931) 21 American Economic Review 648, who understood bargaining power well: JR Commons and JB Andrews, *Principles of Labor Legislation* (Harper 1916) ch 1, 9.

83 *Coppage v Kansas*, 236 US 1 (1915)

84 e.g. *PDAU v SS for Business, Innovation and Skills* [2017] EWCA Civ 66

85 National Industrial Conference Board, *Works Council Manual* (1920) Supplemental to Research Report No 21, 25, Appendix, Model Article II(1) saying 'the management of the business… reserved exclusively to the company'.

86 e.g. *NLRB v Newport News Shipbuilding Co*, 308 US 241, 249-250 (1939)

87 e.g. *Dunlop Commission on the Future of Worker-Management Relations: Final Report* (1994) 24, 98-100. cf McGaughey (2019) 42 Seattle University Law Review 697, 738-9 and 751.

88 e.g. MC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305, 311.

89 e.g. J Armour and MJ Whincop, 'The Proprietary Foundations of Corporate Law' (2007) 27(3) Oxford Journal of Legal Studies 429.

within, or even their sum.[90] Why deny the meaningfulness of personhood? It enables the neoliberal model to return to its theory of why shareholders rationally come to lead the corporation: they have just made the most efficient firm-specific investments (even though asset managers make none). Neo-liberalism professes to be agnostic to participation by other stakeholders. This will happen if efficient. The fact that voice for workers and citizens is not more widespread (at least in the UK or US) is the supposed proof that stakeholder rights are inefficient.

This said, neo-liberalism promotes 'information and consultation', provided that 'officials of the company may decide any question without consulting committees or employes' representatives.'[91] 'Good employers,' said the Conservative Party Manifesto of 1983,[92] 'involve their employees by consulting them and keeping them fully informed. This is vital for efficiency as well as harmony in industry... to establish a long-needed sense of common purpose with their workforces.' This view is consistent with 'the promotion of share-ownership and profit-sharing', because it presents the illusion of inclusion. The EU Information and Consultation Directive follows the same ideal, as actual worker participation rights were opposed by the UK government.[93] The common duty of company directors to pay 'regard' to the interests of workers and other stakeholders,[94] or even to have it as a central goal,[95] is entirely acceptable so long as nobody shares in direct voting rights, other than those who rationally hold power. Duties on paper are fine, so long as the substance of power is unchanged. Paradoxically, many progressive advocates are also captured by the need to reform duties or the 'purpose' of the company. This is power of neo-liberalism's duplicity: by falsely purporting to embody worthy goals it diverts and divides its opponents.

(3) Democratic

(a) Property

How does a democratic model of the economy compare to its authoritarian or neo-liberal rivals? First, a democratic conception of property requires that ownership is both diversely held, and diversified between many firms. 'Justification for the stockholder's existence', wrote A.A. Berle, 'depends on increasing distribution' and is complete only when every 'family has its fragment of that position and of the wealth by which the opportunity to develop individuality becomes fully actualized.'[96] Three main ways that ownership of property can be dispersed and diversified are through (1) pension or retirement funds, (2) democratic wealth funds, and (3) ownership by public bodies under a democratic government.

First, through the 20th century, as more people collectively bargained occupational pensions in the UK or US, the money was invested in the stock markets. Germany, France, Italy and others developed

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90 E McGaughey, 'Ideals of the corporation and the nexus of contracts' (2015) 78(6) Modern Law Review 1057.

91 From the Rockefeller's work council constitution: B Selekman and M Van Kleeck, *Employes' Representation in Coal Mines: A Study of the Industrial Representation Plan of the Colorado Fuel and Iron Company* (1924) 291, quoted by Hogler and Grenier (1992) 28.

92 *Conservative General Election Manifesto 1983* (1983)

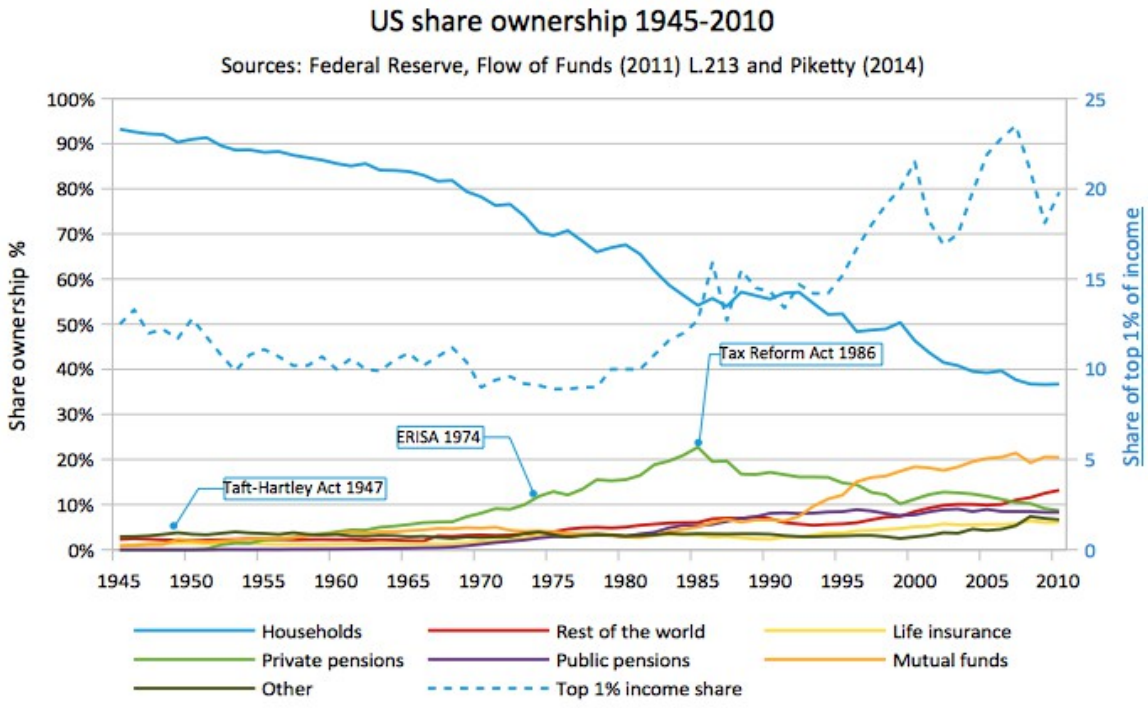
93 F Beckett and D Hencke, *The Blairs and Their Court* (2004) 201, 'Britain went to war to block the Directive', is how John Monks puts it.'

94 e.g. Companies Act 2006 s 172

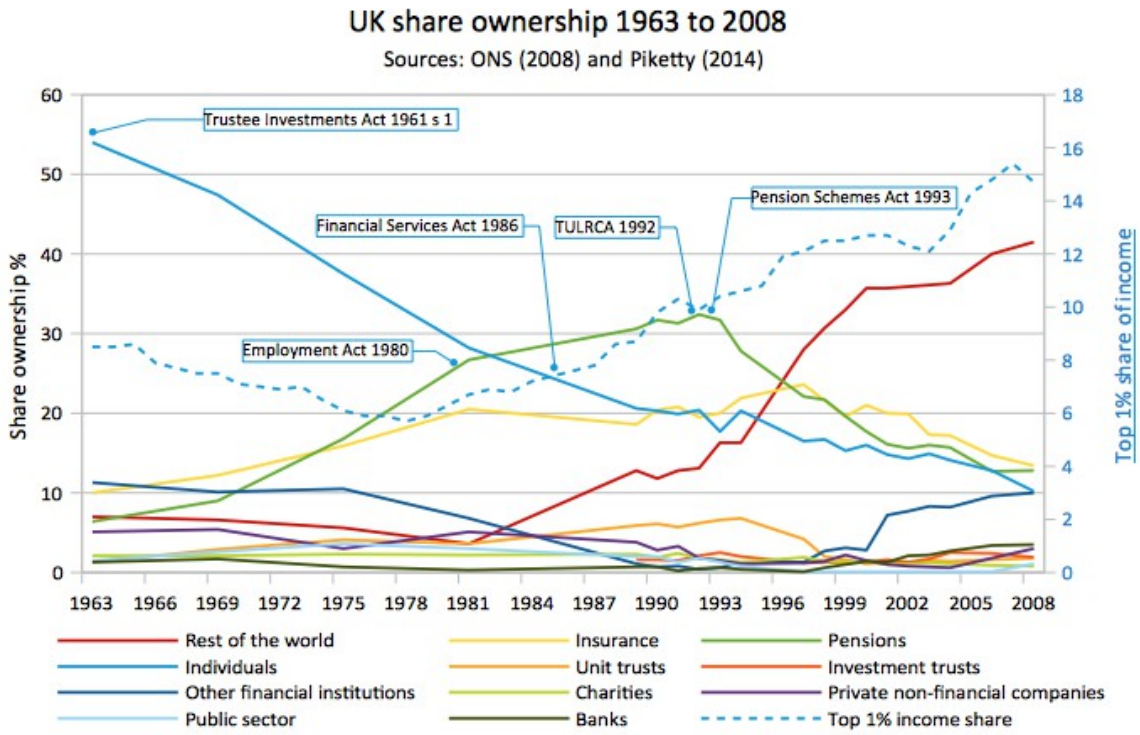
95 See C Hansen, 'Other constituency statutes: a search for perspective' (1991) 46(4) Business Lawyer 1355

96 AA Berle, 'Property, Production and Revolution' (1965) 65(1) Columbia Law Review 1, 17

smaller stock markets because their state pension provided an income-linked retirement benefit. People had less need for occupational pensions, which would be invested. But in the UK and US, retirement money flooded the stock market. Ownership became less individual, more institutional. When unions bargained for pensions, they required that beneficiaries had representation, either through the union, or with one member, one vote. In 1965, Berle advocated 'that the law would increasingly encourage an ever wider distribution of stocks' particularly 'through tax policy'.[97] This would have equalised capital ownership, and therefore equalised voting power in the economy, ever closer to one person, one vote in the stock market. But in the 1980s that trend was reversed.



[97] Berle (1965) 17



Second, some states developed democratic wealth funds, to hold revenue from natural resources, tax, or corporations. In the 1970s, the Swedish Rehn-Meidner plan proposed companies should issue new shares for each 20% of a company's profits, with shares held by new wage-earner funds, but the capital still held by companies. Unions would control the wage-earner funds, and use their votes.[98] It was calculated that they would have 49% of Swedish company shares in 35 years.[99] But with a government change in a 1984 Act, five funds were established, merely entitled to buy existing company shares. They would have 9 government and 5 worker representatives, were banned from participating in company affairs, and were limited to holding 8% of any company. In Norway, the discovery of North Sea oil led to the establishment in 1990 of the Public Pension Fund Global (*Statens pensjonsfond Utland*) to hold surplus revenue from oil production.[100] For the UK's share, the Thatcher regime left all profits to be privatised by British Petroleum plc, and the tax revenue to be squandered in the consolidated fund. The Norway oil fund was able to build up $1 trillion in assets, held on trust for every Norwegian citizen.

Third, the democratic economic model requires public property ownership. No democratic country has gone so far as John Stuart Mill's early prediction, to say that anything which could be done by a company could be done better by a government.[101] Instead, an economic consensus has been developing that many enterprises function with greater efficiency when publicly owned compared to shareholder ownership because the incentives from competition among private investors fails, because the enterprise is

[98] R Meidner, 'Collective asset formation through wage earner funds' (1981) 120(3) International Labour Review 303, 317.
[99] S Sjöberg and N Dube, 'Economic democracy through collective capital formation, the cases of Germany and Sweden, and strategies for the future' (2014) 5(4) WRPE 493, 497-515.
[100] See HW Nagell, 'Investor responsibility and Norway's Government Pension Fund – Global' (2011) 5(1) Nordic Journal of Applied Ethics 79, 86-92
[101] Mill (1909) Book V, ch XI, §11 and see Smith (1776) Bk V, ch 1 §121 (suggesting sectors which should be public).

a natural monopoly, or because the bargaining power of consumers and citizens is structurally weak. A growing social consensus argues, conversely, that it is government's duty to guarantee economic and social rights, and those rights should be delivered by private entities only where evidence supports it. Publicly owned enterprises appear more successful (and clearly so) for health care, education, natural resources, water, rail, roads, and communications infrastructure. Public ownership of central banks, planning decisions over all land, and electronic media standards are the norm, with the most successful systems also operating public options in each (e.g. the Sparkasse, the National Trust, the BBC). It is no use comparing a well-run privatised enterprise with a poorly-run public enterprise, or vice versa. One must ask, not whether a departure from *laissez faire*, property and contract are justified in the abstract,[102] but whether private markets or public ownership is justified based on reason and evidence.

(b) Obligations

The democratic conception of obligations promotes collective bargaining, rights, and independent trade unions. Two central functions of the law are, first, to provide a mechanism for fair standards according to democratic norms of justice. This means a system for workers to bargain with employers (who are typically organised in corporate form) to agree a fair wage scale. The strongest systems involve sectoral collective bargaining, rather than bargaining for one enterprise or firm. Ultimately a democratic government must set default expectations of what counts as fair, and set wages according to law if social partners refuse to bargain.[103] Second, the contract of employment is infused with a minimum set of rights, creating a floor through which nobody can fall. Rights are infused into what would otherwise be a relationship of power and subordination from property and contract.[104] Central among these rights is to join an independent trade union (which achieves fairness beyond other minima) without any fear of detriment from the employer or the state. This is a fundamental human right in international law.[105]

(c) Personhood

The democratic economic model of personhood requires that in every social institution every contributor to the enterprise has the right to a voice and a vote. In the early 20th century, the leading advocates of 'industrial democracy' were at one on the principle, if not the form. Louis Brandeis, the 'people's advocate' who became a US Supreme Court judge said that 'the end for which we must strive is the attainment of rule by the people, and that involves industrial democracy as well as political democracy.'[106] Hugo Sinzheimer, in the Weimar Constitution, wrote that workers had a right to 'cooperate in common with employers' in determining all wages and work conditions 'in the entire field of the economic

[102] Mill (1909) Book V, ch XI, §7
[103] See KD Ewing, 'The State and Industrial Relations: 'Collective Laissez-Faire' Revisited' (1998) 5 Historical Studies in Industrial Relations 1.
[104] O Kahn-Freund, '*Labour and the Law* (1972) 7
[105] UDHR art 20(1) and 23(4). ILO Conventions 89 and 96.
[106] L Brandeis, *Testimony to Commission on Industrial Relations* (1916) vol 8, 7659–7660.

development of the forces of production.'[107] Sidney and Beatrice Webb saw that after the War placing workers on company boards would be a 'real social gain',[108] and therefore a complement, not a rival to collective bargaining and progressive public ownership. It is irrelevant that shareholders invest 'property' (i.e. money) in a company, and that the law counts workers' contribution of labour only in terms of a 'contract'. Labour has real value, and maybe more than the capital it creates.[109]

What is the right balance of interests among the contributors to enterprise? Capital and labour conflict often tends to overshadow discussion of citizen or consumer interests, especially when citizens' bargaining power is structurally weak. As a starting point Karl Kautsky advocated a tripartite representation model, involving the worker, the consumer, and the investor – which in a socialised industry would be the state.[110] More recently, Simon Deakin has conceptualised the corporations as a form of commons, where each stakeholder has a claim to voice, and certain standard rights.[111] This does not mean every enterprise is the same, and that one rule must fit all. Consumers of the occasional bag of pretzels do not have much of a stake in a pretzel company, but the citizens who drink water do have a stake in their water company. The essential principle in the democratic conception of personhood is that stakeholders have a vote whenever it is necessary to justly vindicate their rights.

3. How our economic constitution works now

Since no country's legal system follows any single economic model, it is useful to summarise three cases of economic constitution. The UK, Germany, and the US are good examples because of their size, their influence in corporate governance, and because they differ. Generalising crudely, one might say the UK is more neo-liberal, Germany is more democratic, and the US is more authoritarian. But in fact, key elements of authoritarianism pervade all three, particularly in German banks' and UK and US asset managers' control of shareholder votes: this is the central 'commonality of capitalism'. But also, all are pioneers in the democratic model. The UK's and US's codetermination of pension funds (or some of them), Germany's workplace codetermination, and sector-specific citizen representation in public services in all three. UK Labour Party and US Democratic Party proposals foresee significant change, possibly leaving German law lagging behind as a *Wirtschaftsdemokratie*. Yet nothing will stay still. This part summarises stakeholder rights as follows: (1) of company directors and members, (2) of the ultimate investors of capital against shareholders, (3) of workers' rights in companies, and (4) of citizen rights in public services.

(1) UK and EU law

The governance of UK enterprise may be closer to a neo-liberal model, constructed since 1979, but is also

[107] Weimar Constitution 1919 art 165
[108] S Webb and B Webb, *The History of Trade Unionism* (1920) Appendix VIII, 760
[109] See A Lincoln, *First Annual Message* (December 19, 1861)
[110] K Kautsky, *The Labour Revolution* (1926) chs III and VIII(e)
[111] S Deakin, 'The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise' (2012) 37(2) Queen's Law Journal 339. See also T Raiser, 'The Theory of Enterprise Law in the Federal Republic of Germany' (1988) 36(1) American Journal of Comparative Law 111.

the most likely to undergo swift qualitative change with the next government. Despite the so called 'Brexit' poll in 2016, where around 26% of UK residents expressed a desire to 'leave' the European Union (on undefined terms), the UK has decisively shaped EU company law and financial regulation, because of the size of UK multinational corporations, the City of London, and the legal expertise that goes with each.

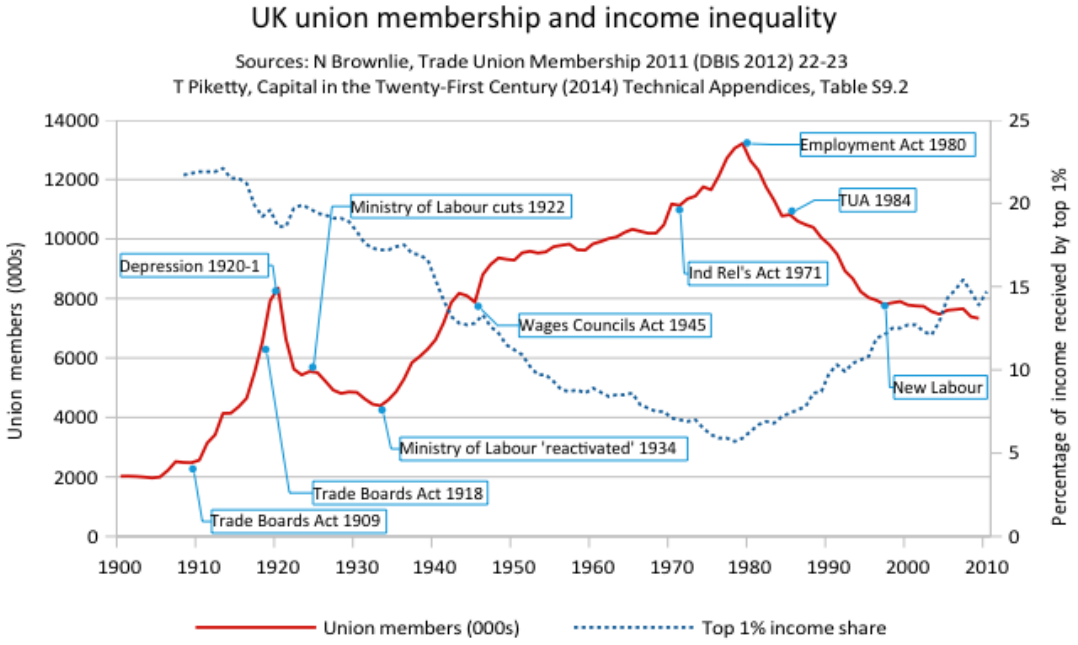
First, all companies have a 'board of directors', which can be dismissed by a simple majority in the 'general meeting' of 'members'.[112] There is no duty to promote 'shareholder value' or act in the best interests of shareholders in UK law. Shareholders are not even mentioned in the codified list of directors' duties.[113] Nevertheless, the 'members' of a company, those on the members' register, invariably are shareholders because workers lack bargaining power to become members. 'Shareholder value' is a cultural norm, not a legal norm,[114] and it is driven by shareholders' bargaining power and their resulting monopolisation of voting rights. Whatever the duties, directors respond most keenly to the interests of those who give them their jobs, or can take their jobs away. One share, one vote is the long-standing norm in listed companies, buttressed by regulatory scrutiny and institutional investor desire. With 5% of the voting rights, members can bring proposals of any kind for consideration by the company's general meeting. Similar minimum standards on proposals and meetings were spread through the EU in the Shareholder Rights Directive 2007.[115] With a 75% vote, members can usually give the board instructions to undertake specific action,[116] and amend the company constitution.[117]

Second, who are the shareholders? Invariably shareholders in the largest FTSE 100 companies are asset managers, such as Legal and General, Schroders, BlackRock, State Street, and Vanguard. These asset managers invest other people's money, mostly from pension funds, life insurance policyholders, and other 'mutual' or collective investment schemes. One way or another, the ultimate investors are mostly people saving for retirement. The largest pension funds include the Universities Superannuation Scheme, the BT Pension, and Railpen: funds that were collectively bargained and held together. Members or unions have a minimum right to appoint at least one-third of the pension fund's board or its trustees.[118] Increasingly, UK citizens have been given individual pension accounts, as employers closed collectively held, defined benefit plans. Asset managers take over the voting rights on shares. This enables asset managers to exercise votes in companies to which they also sell retirement products: a systematic conflict of interest. Only in 2016 did a new 'Association of Member Nominated Trustees', representing beneficiary-elected and union trustees, organise to instruct asset managers on how to cast votes.[119] So far, asset managers have refused to shift: an indication, however transient and in defiance of legal duty, of their market power. Although the Shareholder Rights Directive 2007 and the Companies Act 2006 requires that shareholders

[112] Companies Act 2006 s 168
[113] Companies Act 2006 s 172
[114] S Deakin, 'The coming transformation of shareholder value' (2005) 13(1) Corporate Governance: An International Review 11
[115] Shareholder Rights Directive 2007/36/EC arts 5-6
[116] Companies (Model Articles) Regulations 2008, Sch 3, para 4
[117] CA 2006 ss 21 and 283
[118] Pensions Act 2004 ss 241-243
[119] Association of Member Nominated Trustees, *The Red Lines: Voting Instructions* (2016)

can appoint proxies to vote on their behalf, the position in equity that fiduciaries must follow voting instructions has not yet been codified.[120]

Third, UK workers have a scattered charter of rights at work, such as the minimum wage, paid holidays, equal treatment, basic job security, and the all-important right to join a union, collectively bargain, and strike. However, those rights are 'the most restrictive on trade unions in the western world', and since 1979 have contributed to soaring inequality.



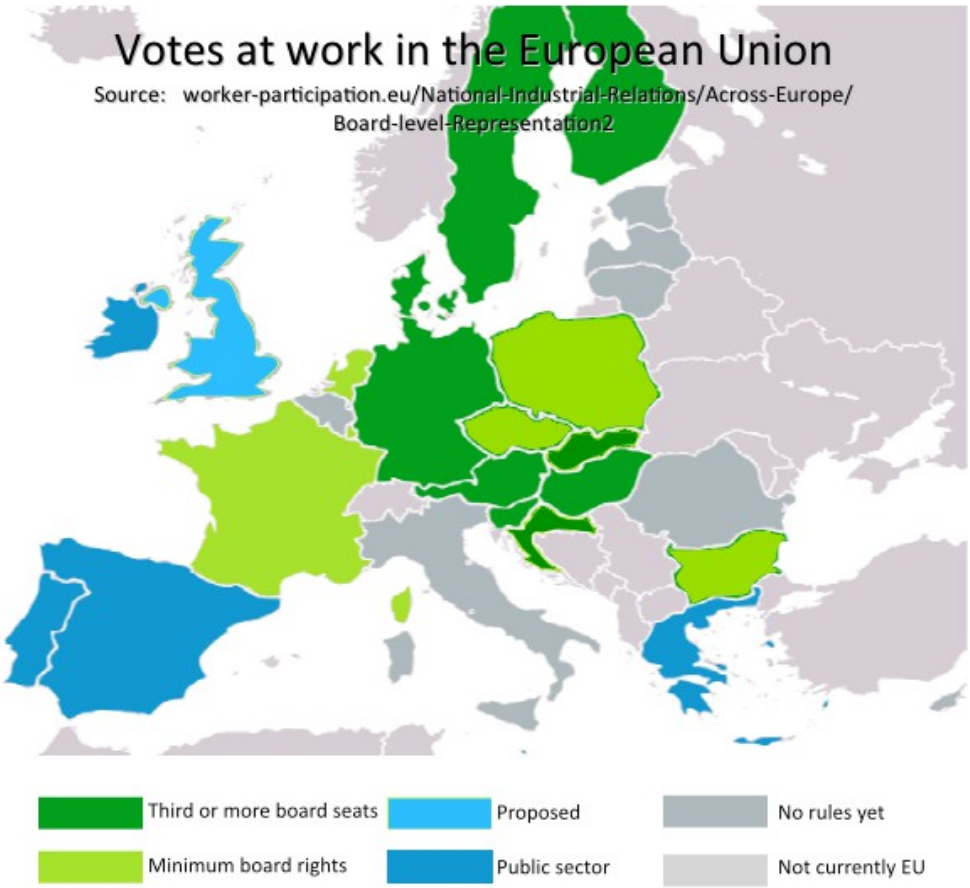
Most enterprises have no meaningful worker representation on company boards, although a recast UK Corporate Governance Code from 2019 required listed companies to comply or explain with one of three worker 'involvement' options, including appointing a director from the workforce. At the time of writing, no company has conducted elections by workers. Instead a few have had managers screen applicants and appointed them. By contrast, in universities, the practice of staff electing a part, occasionally the whole, of the governing body is widespread. Cambridge, Oxford, and the Scottish universities are the most democratic. Staff voting power was used, for example, to end to a major strike in early 2018 after university employers attempted to close the defined benefit pension, and shift to defined contribution accounts based upon spurious misrepresentations of the fund's accounts.

Fourth, while most sectors of enterprise were 're-privatised' by the Thatcher, Major, Blair, and Cameron governments, pockets of representation for citizens and users of public services have remained. In universities, as well as staff, students have representation on many governing bodies, often via the student union. In the NHS, foundation trusts are required to have representatives of patients and local community members. Even in privatised sectors, regulation still requires some representation (even if tokenistic) such as rail passenger forums. With regulators' powers to fix prices and mandate minimum

[120] *Butt v Kelson* [1952] Ch 197

standards of service, this is continuing recognition that certain privatised markets systematically fail to represent the 'consumer' interest. Culturally, there remains a strong aversion to seeing the student, patient, passenger, ratepayer, or local resident as some form of 'consumer' or 'customer', rather than a member of the public with legitimate stake in their (privatised) public service.

The UK's economic constitution is the most likely to change after the next election. First, the Labour Party conference in 2016 approved the *Manifesto for Labour Law*, a group of policies that included requiring that workers have at least 20% of votes in the company general meeting, and at least two elected representatives on company boards of directors, amendable upwards by the Secretary of State.[121] In a 2018 speech, the shadow chancellor committed labour to one-third representation on company boards, and for workers to be transferred up to 10% of company shares, where voting rights could be exercised, and dividends received up to a £500 cap, the surplus going to Treasury. The shares would not be saleable.[122] It seems that corporate tax is a more effective route to raise revenue, that company membership is preferable to shareholding, and diversified pension holdings are preferable to shares concentrated in one-firm. The details of these plans are not finalised, yet on any view they represent an advance. The UK would join the majority of wealthier countries with effective workplace democracy.



Further proposals include prohibiting asset managers from voting on shares without instructions, and a

[121] KD Ewing et al, *Rolling out the Manifesto for Labour Law* (2018) ch 5
[122] The genesis of these ideas are found in IPPR, *Prosperity and Justice: A Plan for the New Economy* (2018)

requirement that asset managers follow all voting instructions. Labour has also committed to bringing electricity, water, rail, and buses into public ownership, and a major report by 'We Own It' is proposing a worker and citizen representation model for each new public service. While 'Brexit' threatens unprecedented destruction of UK citizens' voting rights in international affairs, the proposals to democratise the economy probably represent the largest expansion of voting rights in modern history.

(2) GERMAN AND EU LAW

German enterprise governance has far stronger representation of workers' interests than the UK, but leaves the power of banks (*Bankenmacht*) in capital almost unrestricted. First, German public or listed companies (*Aktiengesellschaften*, AGs) have two-tier boards. This innovation was originally imposed by Prussian states on Hanseatic states during the 1871 unification because a supervisory board was convenient for the Prussian authorities to monitor business executives.[123] Two-tier boards were fully entrenched by the fascist regime in 1937.[124] The executive board (*Vorstand*) is meant to 'lead' the company in day to day affairs, and is appointed by the 'supervisory board' (*Aufsichtsrat*) which is meant to 'supervise' the executives.[125] In most companies with over 2000 staff, one executive must retain the confidence of the workforce. Among the supervisory board directors, just under half must be elected by the workforce (who can delegate their votes to their union) while the other half are elected by shareholders. However, the board chair, with a casting vote, is a shareholder representative.[126] In companies with over 500 staff, workers may elect one-third of directors, but again only on the supervisory board.[127] The executives cannot be removed without a good reason, and supervisory directors can only be removed with a 75% vote.[128] Workers or capital investors only influence those who manage companies indirectly, much as if your local councillors elected your Member of Parliament or the Bundestag instead of you.

Second, German shareholders are often other companies who build up significant capital from their workers' own retirement plans.[129] The volume of domestic capital in the German stock market is proportionally smaller than in the UK or US, because most German workers receive an income-linked state pension. There is less need for occupational pensions – they are widespread but smaller. As a consequence, Germany has more blockholding shareholders: essentially the rich, and large corporations. When pensions are provided, an employer may choose among five legal forms: if an employer chooses a 'contract' pension they may retain and invest the assets. If they choose among two 'insurance' based pensions, the money goes to an insurance company, such as the giant Allianz. If they choose among two 'fund' based pensions, there is a right of codetermination for workers, but with the same two-tier board

123 E McGaughey, *Participation in Corporate Governance* (2014) ch 4(2) and W Schubert, 'Die Abschaffung des Konzessionssystems durch die Aktienrechtsnovelle von 1870' (1981) 10 Zeitschrift für Unternehmens- und Gesellschaftsrecht 285, 306.
124 Aktiengesetz 1937 §75(1), replacing the Handelsgesetzbuch 1897 §182(2).
125 Aktiengesetz 1965 §§76 and 111
126 Mitbestimmungsgesetz 1976 §§1, 7, 27-9 and 33
127 Drittelbeteiligungsgesetz 2003 §1
128 Aktiengesetz 1965 §84(3) and 103
129 For this section, see E McGaughey, *Participation in Corporate Governance* (2014) ch 6(2)

structure that suppresses worker voice in the executive. Originally, labour lawyers argued that the right of codetermination applied to all pensions, whatever their legal form because the law's purpose was to 'constrain the one-sided distribution and administration rights of the employer, and so the potential for arbitrary conduct, by giving employees the ability to participate.'[130] The Federal Labour Court, relying on its own judges' unreasoned commentaries from the 1930s, rejected that view.[131] Thus codetermination in capital in Germany is far behind either the UK or US.

The crux is that whoever the shareholder, shares are mostly deposited with banks. In standard form contracts banks have appropriated voting rights since the 1920s. In 1937, the fascist government codified a duty of banks to cast votes in shareholders' supposed 'best interests', and to take instructions. Through apathy and employer control, few shareholders send instructions. The law's fundamentals have not changed.[132] Banks own many shares in insurance companies, which sell retirement products to companies that banks vote in. This inflates insurance companies through mass self-dealing, and conflicts of interest. The concentration banking among Deutsche Bank, Commerzbank and Unicredit lends extraordinary power. The EU Shareholder Rights Directive, even with amendments, makes no change.

Third, as explained above, German workers have significant codetermination rights in large companies. These came from collective agreements struck by unions in the years after both world wars. German workers also have significant rights to job security (guaranteed by elected work councils), the minimum wage, and paid holidays, and adequate rights to equal treatment.

Fourth, in many public services, workers also have codetermination rights, as do citizens. State law typically frames the constitution of enterprises, such as electricity, in public or municipal ownership. For instance, the North Rhine Westphalia law on electricity requires that staff elect between two members and one half of the board, and local councils should have at least two representatives.[133] Similar rules are found in water, universities, and health companies. There is little in rail, but until 2007 there was a unique power for public representation in Volkswagen. North Rhine Westphalia held a 'golden share', enabling vetoes over company policy, until the Court of Justice of the EU decided that golden shares impeded 'free movement of capital'. This rejected the idea that everyone who bought shares in Volkswagen did so knowing about the government's involvement, and in no way hindered free capital movement. Since the cancellation of the state's influence, Volkswagen's management conspired in installing devices to cheat regulatory monitoring of VW diesel exhausts, killing thousands of people.[134] As major shareholders, to whom governance power reverted, the Porsche family were evidently not concerned to deter such practices so long as it made them money.[135]

What proposals are there for reform of German law? In 1979 the Geßler Report proposed that

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130 G Flatow and O Kahn-Freund, *Betriebsrätegesetz* (1931) 348.

131 BAGE 27, 194 (12 June 1975) 3 ABR 13/74, DB 1975, 1559 = AP Nr 1 zu §87, ultimately relying on A Hueck and HC Nipperdey, *Lehrbuch des Arbeitsrechts* (2nd edn 1930) Bd II, §66 Nr 9 (note that Hueck was subject to denazification after WW2).

132 Aktiengesetz 1965 §135

133 Gemeindeordnung Nordrhein-Westfalen 1994 §§108a and 113

134 J Armour, 'Volkswagen's Emissions Scandal: Lessons for Corporate Governance?' (2016) Oxford BLB pt 1, 2

135 'Volkswagen to be sued by Norway fund over emissions scandal' (16 May 2016) BBC News

banks should have committees elected by the true investors who would cast voting rights upon shares deposited with the bank. Reform never occurred, and even statistical collection of banks' voting power was halted in 2005. However the Swiss – with a very similar system of bank depositary voting – passed a referendum in 2013 that banned banks from voting without instructions, and placed a duty on pension funds to send instructions. The SPD has proposed reforms to extend codetermination rights of workers both to foreign companies in Germany, and to give foreign workers of German companies the right to vote. However, the institution of the two-tier board, which substantially restricts worker voice, has not yet been debated.[136]

(3) UNITED STATES LAW

While the US system may be the most authoritarian system, where directors are least accountable, there is also huge diversity reflecting its sheer size. First, most companies incorporate in Delaware, a small state that won a charter competition race against New Jersey in the early 20th century, and has accumulated considerable expertise in corporate lawyers that tends to lock-in its position. Delaware, California and New York (due to their size), account for two-thirds of all incorporations. The Delaware General Corporation Law tends to drive standards, and its standards are low. Companies can choose whether or not their board can be dismissed by a simple majority of shareholders, or if the directors can only be removed for a good 'cause'. Shareholders generally are unable to make proposals at meetings, unless the company's by-laws allow it. However, constitutions can usually be amended by a simple majority vote of shareholders. Because of this, public and union pension funds have made consistent, concerted efforts to ensure directors can be easily removed, as well as to hold to the principle of one-share, one-vote.

Second, like in the UK, most registered US shareholders are asset managers. BlackRock, State Street and Vanguard, if combined would be the largest shareholder in 438 of the largest 500 companies. Most of their money comes from individual savers, especially 401(k) accounts, and many small or medium pension funds. But unlike in the UK, the largest US public and union pension funds have taken their voting in house. CalPERS, CalSTRS, the New York Public Employee Pension Fund, and many others have become increasingly active and successful, against tremendous odds and inertia at maintaining accountability among boards of many companies. Most public pension funds have around one-third employee representation, as well as political representation. Old pre-1947 union funds are typically managed by the union. Collectively bargained multi-employer pension funds since 1947 must have at least one-half representation for the employer. There are not yet standards for single-employer funds. Still, almost all social proposals in company meetings, if not excluded, fail by significant margins because of the grip by asset managers on voting rights, all from other people's money.[137]

Third, there is as yet no general codetermination law in the US, but it has a long history of experiment. In 1919 a Massachusetts law was enacted under Calvin Coolidge to enable manufacturing

[136] An option is to abolish the Vorstand, bringing the German law closer to Swedish company law, with more worker influence.
[137] S Hirst, 'Social Responsibility Resolutions' (2018) 43 Journal of Corporation Law 217, 224-227.

companies to have employees on their board: while voluntary this is probably the world's oldest codetermination law continually in force. Through the 1970s and 1980s, companies ranging from AT&T to Chrysler faced campaigns by unions to get board representation: at Chrysler they were successful.[138]

Fourth, incorporated in Florida, the global encyclopedia network Wikipedia, owned by the Wikimedia foundation, gives voting representation to its editors and to regional organisations that represent editors: a form of both volunteer 'worker' and citizen voice.[139] Wikipedia contrasts starkly with the power-concentration in, and monetisation of, originally free services like Facebook and YouTube. Furthermore, in universities, a kind of staff representation is well-established on many academic boards. In addition, Harvard University's constitution requires that its governing body is elected upon a vote for alumni: this means past students, but current staff who are often also alumni are particularly active in using their rights. An array of state and municipal public services also use models of citizen and resident representation.

The proposals in the US for reform from the Democratic Party have, in the 2020 presidential campaign, been unprecedented. In the draft Reward Work Act, cosponsored by three presidential candidates, it is proposed that all listed companies have one-third employee representation on their boards. In the Accountable Capitalism Act, sponsored by Elizabeth Warren, it is also proposed that companies with over $1 billion in revenue should have 40% employee representation, as well as being federally (rather than state) chartered. Another proposal, repeatedly co-sponsored by Bernie Sanders since the 1980s under the name Workplace Democracy Act or Employee Pension Security Act, is that all single-employer pension plans should have half-employee representation. There is currently discussion about reforms to fiduciary duties of asset managers, which could lead to changes similar to the ban on broker-voting, resembling the Swiss model. Finally, there have been pledges by a large number of contenders to have a single-payer health system, and for all public universities to become tuition free. It is logical that some form of patient and student representation may accompany these changes.

4. The evidence supports a more democratic economy

Given the proposals for democratic change, across the UK, Germany, the US, and many other countries, it is necessary to ask what the evidence suggests such changes might have. This question, of course, presumes that evidence matters for policy, by changing people's preferences. This may be bold. In the US, since 1980, the Democratic Party has only been able to legislate for 4 years, when it has briefly held the Presidency, House and Senate at once. In one study looking at polling data since 1981, it was found there is no relationship between people's preferences and ultimate policy in the US, a fact which must ultimately be put down to the corruption of politics by money. However, this fact is now recognised vividly in mainstream politics which, as the presidency descended into the hands of a 'very stable genius', has

[138] E McGaughey, 'Democracy in America at work: the history of labor's vote in corporate governance' (2019) 42 Seattle University Law Review 697

[139] Wikimedia Bylaws (2019) art IV, §§1-3 and see Florida Statutes, Title 32, ch 617.0206.

become increasingly organised. In the UK and Germany policy is more related to people's preferences and evidence, despite the pressing problems that each, along with the EU, faces with far-right fanatics.

The three main kinds of empirical evidence are behavioural, qualitative and quantitative data, but by far the most evidence has been collected in the field of work, as opposed to capital or public services. First, behavioural economics research shows that when people are fairly treated they are motivated to work, and therefore be more productive. In particularly, if people perceive real inequality in their treatment, this tends to cause demotivation, with no corresponding gain for the party that 'benefits' from the inequality.[140] The evidence also suggests that when people have collective autonomy over setting their wages, productivity rises.[141] This strongly supports what Herbert Simon called the 'participation hypothesis', that people respond positively to more voice at work.[142] This supports democracy at work. The shortcoming of behavioural evidence is it can always be contested whether analogies can be drawn between small controlled experiments and the grander scale of a whole society.

Second, qualitative evidence is very positive in endorsing a more democratic workplace. Interviews and personal accounts of company directors in the UK Post Office,[143] during periods of worker representation, or in Germany's codetermined companies, invariably suggest that worker participation builds trust and confidence, and reduces conflicts and strikes.[144] The shortcoming of qualitative work is it can always be contested whether the accounts found merely reflect anecdotes, and are outweighed by other anecdotes.

Third, there is quantitative evidence: often revered more by economists because it involves more maths, and is therefore regarded as more scientific. The cutting edge evidence also supports a more democratic workplace. At Cambridge's Centre for Business Research, a Labour Regulation Index, which has compiled a database of 117 countries' laws of 40 types since 1970, has been available since 2016 for econometric regression analysis.[145] Preliminary results show a positive link between codetermination rights and improvements in productivity, employment, and equality.[146] Further research based upon a new database of International Monetary Fund conditionality and structural adjustment programmes suggests a strong link between privatisation and corruption.[147] The shortcoming is that such empirical evidence can

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[140] A Cohn, E Fehr, B Herrmann and F Schneider, 'Social Comparison in the Workplace: Evidence from a Field Experiment' (2014) 12(4) Journal of the European Economic Association 877

[141] G Charness, 'The hidden advantage of delegation: Pareto improvements in a gift exchange game' (2012) 102(5) American Economic Review 2358.

[142] HA Simon, 'Recent advances in organization theory' in SK Bailey, *Research Frontiers in Politics and Government* (1955) ch 2, 28-9. See further P Blumberg, *Industrial Democracy: the sociology of participation* (1968)

[143] e.g. Viscount Trenchard, Hansard HL Deb (12 December 1979) vol 403, cols 1158-66 and P Brannen, 'Worker directors: an approach to analysis. The case of the British Steel Corporation' in C Crouch and FA Heller, *Organizational Democracy and Political Processes* (Wiley 1983). Also, in pensions, T Schuller and J Hyman, 'Trust Law and Trustees: Employee Representation in Pension Schemes' (1983) 12 Industrial Law Journal 84, 91-93.

[144] e.g. W Däubler, 'Co-Determination: The German Experience' (1975) 4 Industrial Law Journal 218, 226, 'up till 1969 there was not a single strike in the iron and steel industries, and even afterwards only wild-cat strikes'. cf R Kraakman et al, *The Anatomy of Corporate Law* (2017) 105, doubting the existence of empirical evidence 'in the absence of econometric studies'.

[145] Z Adams, L Bishop and S Deakin, *CBR Labour Regulation Index: Dataset of 117 Countries* (Centre for Business Research, 2016)

[146] Z Adams, L Bishop, S Deakin, C Fenwick, S Martinsson and G Rusconi, 'The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990-2013' (2018) CBR Working Paper No 36/2018

[147] B Reinsberg, T Stubbs, A Kentikelenis and L King, 'Bad governance: How privatization increases corruption in the

be contested on the basis that correlation amounts to causation: of course it does not. But the more the evidence builds, the harder it is to defend a financialised, and shareholder monopolised economy. After all, there is no credible evidential defence for this at all. As Adam Smith put it, when some are in charge of 'other people's money' (or of other people's labour) 'negligence and profusion must always prevail'.[148]

5. Conclusion

The democratisation of society has not just been confined to politics. Over the 20th century, with the increasing freedom of people to vote for those who exercised power over them, the law has recognised the same kind of right in all social institutions: at work, in capital, and in public services. While significant elements of authoritarianism remain through financial institutions' control of votes on capital, there is also an increasing awareness of the problems and resolve for reform. A majority of developed countries now guarantee the right of workers to vote for company boards. More and more require codetermination in pension funds, and may be set to follow the Swiss model, to stop banks or asset managers voting on 'other people's money', and to follow voting instructions of the true investors' elected representatives.

As countries' experience has shown that privatised enterprises often fail to deliver social and economic rights, or value for money, and public ownership expands once more, discussion about the votes of citizens has been revived. An old enemy of democracy, and the father of modern company law, called Robert Lowe once put it best: 'This principle of equality... is a very jealous power... When you get a democratic basis for your institutions, you must remember that you cannot look at that alone, but... you impose on yourselves the task of re-modelling the whole of your institutions, in reference to the principles that you have set up.'[149] Taken together, these changes promise economic democracy in the 21st century. Evidence and reason are on their side.

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148 Smith (1776) Book V, ch 1, §107

149 Robert Lowe MP, Hansard HC Debs (15 July 1867) col 1543

Appendix: an 'Economic Democracy Act' for the UK

Note: This Appendix serves as potential draft legislation to democratise the UK economy. Given that it would be largely amending legislation, it is written so that it can be understood, rather than as formal legislative drafting requires.

Section 1 Principles of governance

The purpose of this Act is to ensure that people who exercise executive authority in all enterprises are accountable to the people who make significant contributions to the enterprise in a proportionate manner.

Section 2 Boards accountable to workforce

The Companies Act 2006 section 154 shall be amended as follows [**adding the words in bold**]:

154 Companies required to have directors

(1) A private company must have at least one director.

(2) A public company must have at least two directors.

(3) A company with more than 250 workers must have at least two directors who are elected by the company's workers. The Secretary of State may decrease the threshold of 250 workers, and may increase the threshold of two directors, to any number or proportion of the board, by statutory instrument.

(4) For the purpose of this section, a 'company's workers' includes any person who works for a subsidiary or other entity over which the company has decisive influence, and is not genuinely self-employed.

(5) In determining who is a 'worker', a tribunal or court must be guided by the purpose of securing labour rights for everyone, and in particular for those who lack the bargaining power to secure minimum rights themselves.

Section 3 Worker right to be members

The Companies Act 2006 sections 8, 113, 284 and 285 shall be amended as follows:

8 Memorandum of association

(1) A memorandum of association is a memorandum stating that the subscribers—

(a) wish to form a company under this Act, and

(b) agree to become members of the company and, in the case of a company that is to have a share capital, to take at least one share each **or become workers of the company**.

(2) The memorandum must be in the prescribed form and must be authenticated by each subscriber.

113 Register of members

(1) Every company must keep a register of its members. Every worker counts as a member.

(2) There must be entered in the register—

(a) the names and addresses of the members,

(b) the date on which each person was registered as a member, and

(c) the date at which any person ceased to be a member.

(3) In the case of a company having a share capital, there must be entered in the register, with the names and addresses of the members, a statement of—

(a) the shares held by each member, distinguishing each share—

(i) by its number (so long as the share has a number), and

(ii) where the company has more than one class of issued shares, by its class, and

(b) the amount paid or agreed to be considered as paid on the shares of each member**, or**

(c) the percentage of total voting rights of members, but in no case less than thirty per cent, who are workers. The Secretary of State may increase this threshold by statutory instrument.

284 Votes: general rules

(1) On a vote on a written resolution—

(a) in the case of a company having a share capital, every member has one vote in respect of each share or each £10 of stock held by him, **or in the case of members who is a worker, one vote per person**, and

(b) in any other case, every member has one vote.

285 Voting by proxy

(1) On a vote on a resolution on a show of hands at a meeting, every proxy present who has been duly appointed by one or more members entitled to vote on the resolution has one vote. This is subject to subsection (2).

(2) On a vote on a resolution on a show of hands at a meeting, a proxy has one vote for and one vote against the resolution if—

(a) the proxy has been duly appointed by more than one member entitled to vote on the resolution, and

(b) the proxy has been instructed by one or more of those members to vote for the resolution and by one or more other of those members to vote against it.

(2A) A member holding a contract of employment may choose to appoint a proxy, but only to a trade union which is independent within the meaning of section 5 of the Trade Union and Labour Relations (Consolidation) Act 1992.

SECTION 4 MEMBER-NOMINATED TRUSTEES

The Pensions Act 2004 sections 241-243 shall be amended as follows:

241 Requirement for member-nominated trustees

(1) The trustees of an occupational trust scheme must secure—

(a) that, within a reasonable period of the commencement date, arrangements are in place which provide for at least one-half of the total number of trustees to be member-nominated trustees, and

(b) that those arrangements are implemented. [...]

(4) The arrangements may provide for a greater number of member-nominated trustees than that required to satisfy the one-**half** minimum mentioned in subsection (1)(a) only if the employer has approved the greater number.

s 242 Requirement for member-nominated directors of corporate trustees

(1) Where a company is a trustee of an occupational trust scheme and every trustee of the scheme is a company, the company must secure—

(a) that, within a reasonable period of the commencement date, arrangements are in place which provide for at least one-**half** of the total number of directors of the company to be member-nominated directors, and

(b) that those arrangements are implemented. [...]

(4) The arrangements may provide for a greater number of member-nominated directors than that required to satisfy the one-half minimum mentioned in subsection (1)(a) only if the employer has approved the greater number.

s 243 Member-nominated trustees and directors: supplementary

~~(1) The Secretary of State may, by order, amend sections 241(1)(a) and (4) and 242(1)(a) and (4) by substituting, in each of those provisions, "one-half" for "one-third".~~

~~(2) Regulations may modify sections 241 and 242 (including any of the provisions mentioned in subsection (1)) in their application to prescribed cases.~~

SECTION 5 PROHIBITION ON COLLECTIVE INVESTMENT SCHEME VOTING

A new Financial Services and Markets Act 2000 section 241A shall be inserted as follows:

Chapter IIA Corporate governance obligations

241A(1) A collective investment scheme shall in no case vote upon the share capital it possesses without express voting instructions from its clients.

(2) Each scheme shall pass all company information on voting resolutions and meetings to its client.

(3) Each scheme shall expeditiously follow instructions of its clients in respect of their stake of equity, free of charge and by electronic means.

(4) Detailed regulations for compliance with subsections (1) to (3) may be issued by the Secretary of State.

SECTION 6 REQUIREMENT FOR ACCOUNTABLE TRUSTEES

A new Financial Services and Markets Act 2000 section 241B shall be inserted as follows:

241B(1) Every collective investment scheme dealing in company shares shall designate a corporate governance committee.

(2) The corporate governance committee shall have the exclusive right to exercise voting rights upon the share capital of the collective investment scheme, subject to subsection (5).

(3) The corporate governance committee shall consist of at least four persons.

(4) Not less than one-half of the corporate governance committee shall be elected by the policyholders of the collective investment scheme in proportion to their investment.

(5) The collective investment scheme may by agreement segregate a fund to be managed exclusively at the direction of that client.

(6) Detailed regulations for compliance with subsections (1) to (5) may be issued by the Secretary of State.

SECTION 7 ACCOUNTABLE PUBLIC SERVICES

(1) The Secretary of State may make or require any necessary amendments to Acts of Parliament, Royal Charters, company articles, or other constitutional document, to enable the right of members of the public to vote in selecting up to one-third of the board or directors, executive or other governing body, of specific enterprises.

(2) In this section, 'specific enterprises' shall include health care, education, banking, natural resources, transport, water, electricity, gas, railways, telecommunications, postal services, media, and other such enterprises as the Secretary of State may define by statutory instrument.