The Public, the Private and the Corporation

Paul N. Cox

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THE PUBLIC, THE PRIVATE AND THE CORPORATION

PAUL N. COX*

PREFACE

It has been argued that there is in the 1990's a crisis in corporate law.¹ The alleged crisis arises from competing claims about normative foundations.² The antagonists in this competition are said to be contractarians, represented by legal economists of a broadly neoclassical variety, and communitarians.³

There may be a crisis, or at least, a substantial debate, in corporate law theory.⁴ It is questionable that there is a crisis in corporate law, in

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² Millon, Crisis, supra note 1, at 1373.
³ Id. at 1377-83.
part because it is doubtful that academic debates about the nature of the corporation directly determine concrete questions of corporate law.\(^5\) Still, the current debate reflects and seeks to systematize underlying tensions in both doctrine and practice and is therefore perhaps useful as a means of identifying the implications of these tensions. It is not to be expected, and, perhaps, not to be hoped that the debate will resolve these tensions, particularly if resolution requires a doctrinal victory for one or the other side in the debate. It is not to be expected because the current debate is merely another chapter in a long history of the tension


between the public and private character of the corporation. Corporate law doctrine fudges the tension by incorporating both the private claim and the public claim, steadfastly refusing to consistently choose between them. There is no apparent reason to expect that the current chapter in law review writing will do more than prior chapters in changing this state of affairs. It is perhaps not to be hoped that the current chapter will generate a final victory, because such a victory would threaten a fragile peace. American law practice in late Twentieth Century is largely a process of compromise and mediation between competing and highly antagonist political moralities; not a process of exposition from the premises of an agreed upon morality. An authoritative choice between competing political moralities would, indeed, generate a crisis.

Consequently, a general theme of this article is that the contractarian-


Communitarian debate in corporate theory is simply a reflection of clashing political moralities observed elsewhere in law, and observable, with introspection, within many if not most of those who have, in the spirit of at least some effort at detachment, thought about the questions raised by the debate. This theme is unremarkable. However, the more specific claim made here is that these clashing political moralities are imperfectly modeled as a confrontation between "communitarianism" and the neoclassical economic analysis of the firm.

There are three reasons for this claim. First, the communitarian notions that persons are not autonomous choosers of their preferences, purposes, projects or ends and are highly dependent upon historically contingent social forms are shared by positions within conservative and even classically liberal traditions. Corporate communitarian proposals reflect the concerns of an egalitarian, progressive or socialist tradition.


10. See, e.g., Millon, Crisis, supra note 1, at 1381-83 (arguing that corporate debate reflects rival ideologies); Bratton, Critical Appraisal, supra note 4, at 442-46 (noting rival corporate law theories as political theories); Roberta Romano, Metapolitics and Corporate Law Reform, 36 Stan. L. Rev. 923 (1984) (stating that reform debate reflects scholars distinct normative commitments).

11. By "egalitarian socialist tradition" is meant that tradition within which the means of production are subject to social control and to employment in the social interest where control is understood in democratic egalitarian terms and interest is understood in terms of a vision of human flourishing that entails notions of solidarity, participation, joint self realization, etc. The term "socialist" as used in the text does not necessarily imply central economic planning. For accounts suggesting this broader understanding, see N. SCOTT ARNOLD, THE PHILOSOPHY AND ECONOMICS OF MARKET SOCIALISM, A CRITICAL STUDY 3-11, 34-64 (1994) [hereinafter ARNOLD, PHILOSOPHY AND ECONOMICS OF MARKET SOCIALISM]; Jon Elster, Self-realization in Work and Politics: The Marxist Conception of the Good Life, in ALTERNATIVES TO CAPITALISM 128-58 (Jon Elster & Karl Ove Moene eds., (1989)) [hereinafter Elster, Self-Realization in Work and Politics]; John E. Roemer, Can There Be Market Socialism After Communism, in MARKET SOCIALISM, THE CURRENT DEBATE 89-107 (Pranab K. Bardhan & John E. Roemer eds., 1993) [hereinafter MARKET SOCIALISM, THE CURRENT DEBATE].

It is of course the case that some communitarians may and some may not be plausibly labeled "socialist," depending upon one's definition of socialism. The notion of "egalitarian socialist tradition" is intended to be broad enough to encompass elements of egalitarian liberalism, suggested, for example, by Charles Taylor's communitarianism and more clearly socialist and neo-Marxist positions, suggested, for example, by the work of Ronald Beiner and Michael Walzer. CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 181-203 (1995) [hereinafter TAYLOR, PHILOSOPHICAL ARGUMENTS]; RONALD BEINER, WHAT'S THE MATTER WITH
It is therefore doubtful that these notions uniquely justify a communitarian substantive agenda. In short, opposition to the normative proposals of corporate communitarianism can take "communitarian" forms. Second, neoclassical economic analysis is problematically viewed as "individualist" or contractarian in character. It is the case that individuals and contract are methodological devices within the neoclassical apparatus. It is also the case that mainstream neoclassical views of corporate law—those attacked by corporate communitarians—typically generate judgments consistent with individualist political commitments. However, the neoclassical normative commitment, in obvious keeping with its utilitarian cousin, is collectivist, even organic. Moreover, it will be argued here that neoclassical economic analysis and corporate communitarianism share some features related to a legal tradition arising from legal realism. They share a belief in the dependency of social phenomena on law, in the sense, at least, that desired end-states may be achieved through conscious manipulation of law. Third, corporate communitarians attack neoclassical analysis on the ground that it fails to account for the phenomenon and necessity of shared moral commitment, but this failure is not one of contractarian theory, more generally considered, and is not a failure that yields communitarian substantive agendas.

These reasons suggest that some more fundamental dispute underlies the debate and that communitarian and neoclassical arguments are employed by the debaters merely as means of conducting the dispute. A candidate for characterizing this underlying dispute is that it is methodological: perhaps corporate communitarians are in some sense "postmodernist" or "interpretivist" and perhaps neoclassical scholars are in some sense "positivist" or "rationalist." There is something to this. There is an element of "anti-scientism" in communitarian thought and an element of "scientism" in neoclassical thought, if "scientism" is understood as an aggressively assumed capacity to "objectively" predict,


12. This will no doubt come as something of a surprise to those communitarians who rely upon the insights of "law and society." To the extent that these insights suggest that social practice deviates from legal rules, a derivative conception of law may be implied (one that would conform law to practice). The implication is inconsistent with the assertion in the text. The assertion is nevertheless supportable if it is recognized that there is to be selectivity in identifying the practices to be legally incorporated (a problem, also, for species of liberalism that rely upon derivative conceptions of law). It is supported, as well, by communitarian tendencies to moral universalism. See infra text and notes 231-422 and accompanying text.
and, therefore, control, phenomena so as to achieve desired consequenc-es or end states.\textsuperscript{13} It will be argued here, however, that this method-ological candidate is inadequate. If both sides share a belief in their capacity to achieve desired end-states, both rest on forms of rationalism. Moreover, both entail, albeit perhaps in different degrees, a pretense to the objectivity of standing outside a practice in evaluating it. Moreover, anti-scientism does not explain differences in normative commitment, and hostility to neoclassical scientism is shared by positions hostile, as well, to the communitarian substantive program.

The better candidate for the underlying dispute is therefore competing individualist, substantive visions and communal, altruist, or egalitarian substantive visions of the good society. Such visions may compete in at least one of three ways.\textsuperscript{14} First, advocates of the visions may disagree about goods and bads. For example, it is possible that individualists and communitarians disagree about the goodness or badness of egalitarianism.\textsuperscript{15} Second, they may disagree about the institutional causes of an agreed upon good or bad. For example, they may disagree about whether a contractarian conception of the corporation produces alienation in and exploitation of employees and whether communitarian conceptions of the corporation yield these (undesirable) consequences. Third, they may disagree about the realm of the possible. It is here that charges of utopianism and countercharges of “false necessity” appear.\textsuperscript{16}

It is the ambition of political philosophy to resolve disagreements about goods and bads, but heroic efforts in this regard have not yielded

\begin{footnotes}
DENCE, \textit{supra} note 8, at 353-92.

\item[14] Cf. ARNOLD, \textbf{THE PHILOSOPHY AND EC\O NOMICS OF MARKET SOCIALISM}, \textit{supra} note 11, at 15 (identifying the first two of the possibilities addressed in the text).

\item[15] \textit{Id.} Further disagreements are possible. Persons may accept the general principle of egalitarianism and nevertheless disagree about “equality of what.” Amartya Sen, \textit{Equality of What?}, in \textit{LIBERTY, EQUALITY AND THE LAW} 137-62 (Sterling McMurrin ed., 1987). Persons may also disagree about matters of definition. For example, the terms “alienation” and “exploitation” may be differently defined. \textit{See ARNOLD, PHILOSOPHY AND ECONOMICS OF MARKET SOCIALISM, supra} note 11, at 65-92 (attempting a definition of exploitation that would be acceptable to “socialists”).

\end{footnotes}
resolution. In principle, questions of institutional cause and effect are resolvable by empirical inquiry. The difficulties are that there is not in fact agreement about empiricist principle, empiricism typically turns out to consist in fact of deduction from contestable premises and actual empiricism tends to yield messy "facts" subject to varying interpretations. The realm of the possible is not verifiable except by reference to experiment, including natural experiment, but experiments are evaluated by reference to commitments to goods and bads and to beliefs about causes and effects. This is not to say that empiricism is impossible or useless. Nor is it to say that a consequentialist method of moral, social, or economic inquiry is ruled out. It is to say, rather, that empiricism does not typically end debate.

This gloomy picture suggests that resolution, at least as a matter of intellectual exercise, is not in the offing. More particularly, it suggests that the fundamental underlying dispute will not be obviated as we learn more facts. "Facts" merely alter the details and direction of the debate (and perhaps, but only problematically, conceptions of the possible within the real world). The point is illustrated by corporate communitarianism. The proposals and ideas of corporate communitarians are derived from a long standing tradition, but the contemporary interest in these proposals and ideas follows and perhaps arises from not merely the alleged "excesses" of the 1980's in the United States, but also the collapse of the command economies of Eastern Europe and the

19. That is, there can be skepticism about empiricism on the ground that discovered "facts" are structured by the categories with which we approach them.
22. Sowell, supra note 8, at 13-17.
23. But see Posner, Problems of Jurisprudence, supra note 8, at 387 (postulating such progress).
Soviet Union. Faith in central planning has perhaps not survived that collapse as a respectable position, but commitments underlying that faith surely have survived. The collapse may therefore be viewed as stimulating interest in “capitalist” reform, in particular by reducing reformist ambition to the level of the “intermediary institution” from the level of the nation-state and in advocating some retention of markets (as in “market socialism” proposals). The reported death of central planning is an important “detail,” but the underlying debate remains.

This article does not seek that which its author, therefore, thinks implausible—a resolution. Its far less ambitious purposes are by way of suggested clarification. Specifically, it seeks to support three of the foregoing assertions: that the social construction of the individual generates no particular normative implication, that neoclassical economic analysis of the firm is both less contractarian and more collectivist than is suggested by corporate communitarian critiques, and that substantive communitarian proposals are not compelled by communitarian insistence upon or accounts of morality.

The article proceeds in two parts. Part I summarizes the author’s understanding of contractarian positions. It argues that “individualist” and “contractarian” positions arise from a variety of traditions, including some inconsistent with neoclassical analysis and consistent with communitarian premises. It also argues that corporate law may be conceived within a contractual theory as reflecting a type of formalism, one that relies upon socially generated norms while eschewing legal enforcement of these. Part II addresses aspects of communitarian positions. It argues that the substantive proposals of communitarians are not compelled by communitarian premises because liberal, even classically liberal agendas are also consistent with those premises. It also argues that corporate communitarianism, despite its appeal to “community,” is primarily an extension of the egalitarian liberal project, retaining the directive features of post-New Deal law, not a departure from

25. ARNOLD, THE PHILOSOPHY AND ECONOMICS OF MARKET SOCIALISM, supra note 11, at 34-36; ARNOLD, ALTERNATIVES TO CAPITALISM, supra note 11, at 1.

26. Taylor, Invoking Civil Society, in PHILOSOPHICAL ARGUMENTS, supra note 11, at 204-224. Tocqueville is typically relied upon for the intermediary institution theme. There is an obvious “conservative” counterpart to the theme in calls for decentralized government. ROBERT DEVIGNE, RECASTING CONSERVATISM: OAKESKOTT, STRAUSS, AND THE RESPONSE TO POSTMODERNISM, 65-69 (1994) [hereinafter DEVIGNE, RECASTING CONSERVATISM].

27. See, e.g., Elster, ALTERNATIVES TO CAPITALISM, supra note 11, at 1-33; Pranab K. Bardham & John E. Roemer, Introduction to MARKET SOCIALISM, THE CURRENT DEBATE, supra note 11.
advocacy of the "regulatory state" associated with that project.

I. INTRODUCTION TO THE CONTRACTARIAN AND COMMUNITARIAN MODELS

The contractarian/communitarian debate is generally framed as a contest over definition: for contractarians the corporation is merely a nexus of contracts (a variation on an aggregate theory); for communitarians, it is an institution determined by and infused with socially established norms (a variation on an entity theory). This framing of the question is of course too general; it masks the fundamental character of underlying disagreements. A difficulty, however, with any attempt to expose these more fundamental disagreements is that it risks caricature by failing to capture the diversity of opinion within each camp. The latter error is perhaps inevitable in any effort at explication by means of dichotomy and should be therefore forgiven in the interest of advancing explication. Indeed, forgiveness is sought for what follows here.

What is at stake in the debate? The "nexus of contracts" view takes a general and a specific form. The general form, in viewing the corporation as contractual, treats it as the product of private ordering—as a complex of devices adopted in service of the diverse purposes, projects, or ends of its participants. It therefore recommends a legal treatment of the corporation that is facilitative and non-directive: as the corporation is private, the law should merely enable and enforce agreements. Concrete implications of this view include the claims that corporate law rules are merely standard form agreements supplied by law but modifiable by agreement, that these rules should not be mandatory, that interests in the corporation should be freely alienable and that legal scrutiny of the behavior of corporate actors should be minimized in favor of the impersonal scrutiny of market forces. The special form, neoclassical economic analysis, shares this treatment and these recommendations, but supplies an analytical apparatus that provides both a means of implementation and a welfarist rationale for these features. (The extent to which the special form is consistent

28. Millon, Crisis, supra note 1; Millon, Theories of the Corporation, supra note 4; Mitchell, Cult of Efficiency, supra note 4; Johnson, Delaware Judiciary, supra note 4; Bratton, Perspectives From History, supra note 4; Cox, Indiana Experiment, supra note 6.
29. Millon, Crisis, supra note 1, at 1382 (recognizing this risk).
31. Id.; EASTERBROOK & FISCHEL, supra note 4, at 1-39.
32. See Robert C. Clark, Contracts, Elites, and Traditions in the Making of Corporate Law, 89 COLUM. L. REV. 1703, 1714-26 (1989) [hereinafter Clark, Contracts, Elites, and
with the general one is an issue to be addressed below.)

The corporate communitarian view treats the corporation as a thing, or as a set of relationships, having a reality and value independent of and distinct from the individual purposes implied by the contractarian’s instrumental view. This independent and distinct reality entails a notion of shared endeavor, of the value of participation in a common undertaking, and of adherence to a non-instrumental morality. Communitarian positions take two general forms. The first, often advocated within the rubric of “relational contract,” relies upon social norms or relation-specific norms as imperatives to be legally enforced. The second, which may be associated with neorepublicanism, advocates substitution of participatory political mechanisms for the contractual or hierarchical structures of the current corporation.

At bottom, both forms reject the contractarian notion that the corporation instrumentally serves, through mutual advantage, the individually held ends or purposes of its participants. The norm-based view substitutes the notion of adherence to a shared morality.

Traditions] (describing contractarian views of the corporation, economic views as a subset of these and the “disguised elitism” within the economic views); Lewis A. Kornhauser, The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel, 89 Colum. L. Rev. 1449 (1989) (employing economic arguments to challenge adequacy of pure contract metaphor).

33. See infra notes 73-97, 170-82 and accompanying text.
38. See, e.g., Bratton, Public Values, supra note 4; Johnson, Individual and Collective Sovereignty, supra note 4; Mitchell, Groundwork, supra note 34.
political view substitutes a notion of participation in a process of public justification.\textsuperscript{39} Concrete recommendations flowing from the relational form of communitarianism include the divorcing of the corporation from market forces viewed as threats to corporate relationships (as in advocacy of anti-takeover legislation)\textsuperscript{40} and the legal enforcement of "moral" norms in regulating managerial behavior (as in proposals for a fiduciary duty to all corporate constituencies).\textsuperscript{41} Concrete recommendations flowing from the neo-republican form of communitarianism include mandated worker participation programs,\textsuperscript{42} inalienable worker ownership of firms,\textsuperscript{43} and employee co-determination.\textsuperscript{44}

It should be noticed that many of these proposals have been made as well by persons who would not identify themselves, or typically be identified by others, as communitarians.\textsuperscript{45} Many, for example, would seem to follow from egalitarian or progressive liberalism.\textsuperscript{46} This may

\textsuperscript{42} O'Connor, *Socio-Economic Approach*, supra note 37.
\textsuperscript{43} Simon, *Social-Republican Property*, supra note 37.
\textsuperscript{44} Lewis D. Soloman & Kathleen J. Collins, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 J. CORP. L. 331 (1987).
\textsuperscript{45} Many of these proposals are similar to those made within a body of literature within business economics that advocates decentralization of decision making within firms, typically on anti-Taylorist, pro-Japanese, and Schumpeterian premises. Michael Best, *The New Competition*, INSTITUTIONS OF INDUSTRIAL RESTRUCTURING 106-134, 251-77 (1990); Mark Casson, *The Economics of Business Culture*, GAME THEORY, TRANSACTION COSTS, AND ECONOMIC PERFORMANCE 3-28, 225-42 (1991); Neil Fligstein, *The Transformation of Corporate Control* 295-314 (1990); Michael Piore & Charles F. Sable, *The Second Industrial Divide* (1984). This literature may support communitarian positions and may in part be motivated by communitarian commitments. It also tends to rely, as does much of the communitarian literature, on the notion that norms yield the "trust" necessary to economic cooperation. Nevertheless, the literature is distinguishable from the communitarian positions under discussion on the grounds that: (1) its organizing rationale tends to be that the proposed reforms will enhance "efficiency," or "productivity," so the reforms are instrumental to these ends; and (2) it tends to take the form of recommended internal changes (perhaps in combination with "industrial policy"), rather than the form of legal mandate regarding internal structure.
be because egalitarian liberalism's rejection of classical liberalism's commitment to inviolable "property rights" eliminates liberalism's insistence upon neutrality and the public/private distinction in the context of economic production, so distinctions between egalitarian liberalism and communitarianism are problematic in this context. It may also be because significant strains of communitarianism seek rather expressly to support egalitarian liberal agendas from non-liberal or anti-liberal premises.

Nevertheless, corporate communitarians are both accused of being communitarians and have identified themselves with the label. What, then, is distinctively "communitarian" about corporate communitarian literature? Perhaps nothing. The communitarian label may be attached to a variety of distinct positions, only some of

6, at 203-14.

Egalitarian liberalism means that species of liberalism associated with scholars such as John Rawls and Ronald Dworkin. JOHN RAWLS, A THEORY OF JUSTICE (1971); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985), and associated as well with post-New Deal American laws. See Jerry Mashaw, Rights in the Federal Administrative State, 92 YALE L.J. 1129 (1983) (contracting individual and statist rights and associating latter with egalitarian distributive themes). Egalitarian liberalism is therefore to be distinguished from "classical liberalism." The latter tends to emphasize property rights, to favor limited government and common law systems and to favor formal, as distinguished from substantive equality. For accounts of the distinction, see Christine M. Korsgaard, G.A. Cohen, Equality of What? On Welfare, Goods and Capabilities; Amartya Sen, Capability and Well-Being, in THE QUALITY OF LIFE 54-61 (Martha Nussbaum & Amartya Sen eds., 1993); LOREN E. LOMASKY, PERSONS, RIGHTS AND THE MORAL COMMUNITY 84-110 (1987); Steven Shiffrin, Liberalism, Radicalism, and Legal Scholarship, 30 UCLA L. REV. 1103, 1114-30 (1983). However, there is some tendency in these sources, particularly Shiffrin, to dismiss classical liberalism as confined to a Lockean natural rights theory. A point of this article is to claim that it is not so confined.

47. It is possible that "private property" is not the distinguishing feature of "market economics" or "capitalist systems," at least where their efficiency properties are emphasized. JOSEPH STIGLITZ, WHITHER SOCIALISM? 171-96 (1994). Much, however, would seem to depend upon one's definition of property rights. Indeed Stiglitz' invocation of a residual control conception of property suggests a conception in keeping with strains of classically liberal thought. Sanford J. Grossman & Oliver D. Hart, The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Organization, 94 J. POL. ECON. 691 (1986). Thus, Stiglitz suggests that ownership (or at least who owns) in the residual control sense matters because it affects the credibility of commitments not to intervene, and, therefore, degrees of decentralization. STIGLITZ, supra at 164-66, 176-77. Stiglitz also argues, perhaps in tension with classical thought, that well defined property rights are not essential to efficiency. Id. at 174-76. They may, however, be necessary to the plan, purpose or preference pursuit emphasized by classical liberalism, for a reason Stiglitz identifies: the credibility of commitments not to intervene in such pursuit.


50. Millon, Crisis, supra note 1.
which are incompatible with liberalism, including classical varieties of liberalism.\textsuperscript{51} Indeed, it will be argued below that many communitarian arguments fail to yield corporate communitarian proposals because contractarians can accept and even premise their positions on similar arguments.

An explanation of this point, foreshadowing the argument to come, is that the communitarian/liberal debate is in part a methodological one, one between distinct and competing understandings of "theory" in academic exercises. On this view, the "liberal" or contractarian view seeks to understand human behavior in terms of individual choice on the assumption that persons rationally seek to achieve their individually held goals, purposes or ends; theory is a matter of predicting behavior. The communitarian, or perhaps sociological view seeks to understand human behavior instead in terms of individual adherence to cultural mores or norms. The liberal as theorist treats rational goal pursuit as enabling theory as prediction about behavior. The communitarian as theorist rejects goal pursuit in favor of a complex account of motivation, an account in which theory is not prediction, but description—the postulating of concepts and of interactions between these concepts.\textsuperscript{52} The normative origins of these methodological and theoretical positions may be identified with the Enlightenment and utilitarianism, in the case of the liberal theorist, and with conservative reaction to these, in the case of the communitarian.\textsuperscript{53} The historical irony, given that the communitarians under discussion here fall within a "progressive" camp, is that the liberal origin is identifiable with reform and the communitarian origin with reaction. The irony is of course also a potential explanation of the compatibility of communitarian argument and some contractarian or classically liberal argument, as the strand of the latter to be emphasized here might be labeled "conservative."

There is nevertheless a distinctively communitarian position, substantive in character, to which corporate communitarians might adhere and by reference to which their proposals might be interpreted, that is clearly incompatible with even a "conservative" variation on classical liberalism. Specifically, there is a tradition that rejects the "liberal" notions of neutrality and of the separation of the public and private in favor of an organic conception of society in which the state is

\textsuperscript{52} Brian M. Barry, \textit{Sociologists, Economists, and Democracy} 3-7 (1978).
\textsuperscript{53} \textit{Id.} at 7-9.
The idea, in extreme form, is that there is a stark choice between a state-centered society in which all persons share in a common good, on the one-hand, and a individualistic one in which persons pursue their egoistic desires, on the other. The first of these options is thought to entail notions of reconciliation, belonging, and fulfillment through participation. The second is thought to entail social atomism, alienation and exploitation. The anti-liberal tradition obviously favors the organic view by which the state ensures that individuals reflect and adhere to a common good or hierarchically ordered set of goods. It therefore rejects the notion of a private realm distinct from the sphere of the state on the ground that such a realm will be characterized by atomism, egoism, alienation, and exploitation.

It is possible, but not entirely clear that corporate communitarians are advocating this stark picture of the alternatives and favoring the organic one. Much of their rhetoric is consistent with it and their proposals can obviously be interpreted as consistent with it. The relational form of corporate communitarianism obviously selects those social norms consistent with solidarity for legal enforcement and the neo-republican form obviously contemplates corporations as participatory democracies in which individual pursuit of self-interest is to be subordinated to a process of public justification. Although corporate communitarians tend to emphasize decentralization, so that corporations are viewed as intermediary institutions between the state and the individual, and although neorepublicanism leaves the substantive common good undefined, so that it becomes the future product of political deliberation, the role of the state is expansive in these proposals. In both examples, there is a state mandate precluding alternative "private" arrangements. If communitarians contemplated no such mandate, they would be contractualists. Nevertheless, corporate communitarians, like their neo-republican cousins, also emphasize their moderation, distancing themselves from the statist implications of the organic view and insisting on retention of "liberal" elements in their proposals.

54. The tradition has roots in German Romanticism, particularly as expressed in Hegel and roots in Rousseau. See CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 91-130 (1987); ANDRZEJ RAPACZYNSKI, NATURE AND POLITICS, LIBERALISM IN THE PHILOSOPHIES OF HOBBES, LOCKE, AND ROUSSEAU 248-75 (1987).
55. LARMORE, supra note 54.
56. See Gey, supra note 36 (recounting and questioning neo-republican moderation).
57. See, e.g., Johnson, Individual and Collective Sovereignty, supra note 4 (generally arguing that over and under-socialized accounts should be avoided); Millon, Crisis, supra note 1 (noting that autonomy is also a value to be preserved in communitarian thinking).
A difficulty with this moderate interpretation is that the basis upon which the organic view and its implications are to be limited or compromised is unclear, and the principles by which communitarians seek to assure contractarian individualists of this moderation may, therefore, be unconvincing.\textsuperscript{58} Perhaps, however, communitarian moderation can be understood in terms of pragmatic, contextualized judgment. It is plausible that in actual practice, the law engages in a pragmatic, contextualized and somewhat ad hoc accommodation of competing organic and individualist claims, but such a description is not a plausible basis for assessing the debate between communitarians and contractarians. Even pragmatists must approach context with theory\textsuperscript{59} and it is the theory with which context should be approached that is at issue in the debate. It may also be possible to conceive of communitarian moderation in terms of a “dialogue” in which particular (corporate law) decisions are treated as tentative hypotheses,\textsuperscript{60} but this, too, fails to say much about the merits of the perspectives from which hypotheses are advanced.\textsuperscript{61} It also assumes what is an issue in the important sense that “corporate law as dialogue” presumes a political baseline: the

\textsuperscript{58} See, e.g., Gey, supra note 36 (criticizing neorepublicanism on this basis); Will Kymlicka, Some Questions About Justice and Community, in Daniel Bell, Communitarianism and Its Critics 215-17 (1993) (criticizing Bell on this basis).


\textsuperscript{60} Bratton, Public Values, supra note 4, at 682-92.

\textsuperscript{61} Dialogue is a possible characterization of the process by which corporate law is made, but it does not, as such, seem to address the merits of positions within the dialogue. On the other hand, dialogue and the perhaps related idea of practical wisdom or practical reasoning, see Anthony Kronman, The Lost Lawyer 53-108 (1994); Charles Taylor, Explanation and Practical Reason, in Quality of Life, supra note 46, at 208, may imply a particular political commitment. As suggested in the text, invocation of dialogue presumes a form of neorepublicanism in that it presumes a requirement of public justification. This is particularly evident in Habermas, as his dialogic scheme rather clearly contemplates a constructivist transcending of society. Jurgen Habermas, Communication and the Evolution of Society 119-20 (Thomas McCarthy trans., 1979). Practical reasoning, albeit perhaps without the democratic baggage, makes a similar assumption. There is of course a certain inevitability to the presumption generated by the legal realist tradition that builds into modern legal thought a collective baseline (as though the claim that “private” activity has an ultimately legal basis in an allocation of power). It may nevertheless be possible to imagine an alternative baseline through the claim that there is no collective decision maker for a particular decision in the absence of a collective process for that decision. Robert Grafstein, Institutional Realism, Social and Political Constraints on Rational Actors 184-87 (1992) [hereinafter Grafstein, Institutional Realism]. See infra notes 183-230 and accompanying text.
"private" is obviated at the outset by making it a possible hypothesis subjected to collective approval or disapproval, rather than a sphere preserved from collective inquiry.

A third possible understanding of communitarian moderation is that individualism and communitarianism are to be enabled through reform of institutional structure. On this account, current structure (e.g., inadequately constrained markets) mandates individualism; reformed structure would permit communitarian elements. The moderation takes the form of a claim that particular substantive decisions or actions are not mandated, even though the structure within which these occur is mandated, so the role of the state is limited. Institutional reform is on this account enabling. There is something to this claim; the extent to which a given communitarian proposal approximates the state-centered organic view is of course a function of the content of the proposal.62

Whether or not communitarian moderation is viable, the present analysis assumes that some, perhaps limited commitment to an organic, state-centered common good and to the stark choice between this organic conception and an allegedly alienated, atomistic world is a viable interpretation of corporate communitarianism. The typical liberal response to the stark choice thesis is to deny it by postulating a third alternative. Specifically, the liberal claim is that the shared goods, sustained forms of life, feeling of belonging and commitment, etcetera, deemed by communitarians to be the desirable products of the organic view, can and are generated by "society" independently of the state. So the alternative to the "state perfectionism" of the organic view is not in fact the atomistic, alienated egoism postulated by communitarians.63 The obvious implications are that the social sphere is to be deemed "private," preserved from state control or interference, and that a limited state is to be "neutral" about the various conceptions of the good generated within this sphere. Call this the separation argument: state and society are to be separated.64

62. See Simon, What Difference, supra note 5 (describing proposals of Professors Johnson and Millon as moderate); O'Connor, supra note 4 (suggesting that Professor Bratton's proposals are moderate).


64. This point may require that some distinctions be made. It is clear that communitarians, particularly those influenced by Hegel, emphasize the notion of a "civil society." TAYLOR, PHILOSOPHICAL ARGUMENTS, supra note 11, at 204-224. So, too, do "conservatives"
There are, however, many versions of the separation argument. Progressive or egalitarian liberals may make it while simultaneously rejecting the notion that "private" property rights, markets and the organization of economic production are within the social sphere. Their position is at least difficult to distinguish from that of communitarians in the present context for the reasons earlier noticed: contemporary communitarians tend to import egalitarian commitments into their interpretations of organic society and progressive liberal or egalitarian critiques of property and of markets eliminate rights-based and private sphere obstacles from the application of the organic view to matters of economic production. Classical liberals tend to make the argument and to apply it precisely to such matters. The classical liberal position is therefore of interest because, given progressive or egalitarian liberalism's position on property and economic interaction, the classical position is the remaining "liberal" one in this context. It should also be noted that neo-conservatives, although committed to many communitarian positions,
tend both to make the separation argument in the context of economic production and to assert a species of the argument—in the form of decentralized governmental authority—more generally.\(^6\)

An interesting question, however, is the extent to which neoclassical economic analysis of the firm entails a commitment to the (classically) liberal argument. That analysis arises out of the utilitarian tradition, and that tradition, most obviously in Mill, is generally identified with classical liberalism. It is, however, a mistake to think classical liberalism (or, for that matter "liberalism" generally) is monolithic, either in its recommendations or in the means by which these are derived.\(^6\) It is surely the case that mainstream economic analysis postulates a form of "private sphere" in that it generally treats decentralized market processes as superior to state direction of economic activity. This respect for the "private," however, is conditional on the "private's" instrumental efficacy in generating collective welfare.\(^6\) It is also the case that economic analysis adopts a form of neutrality: welfare (e.g., wealth) is defined such that diverse conceptions of the good have formally equal claims.\(^7\) This, however, is a utilitarian version of neutrality; it maximizes a "common denominator" (utility or wealth) so its respect for diverse conceptions is contingent upon or instrumental to this common denominator.\(^7\) There is a further question: as economic analysis seeks to explain all behavior in terms of maximizing self-interest, has it not in a sense conceded the communitarian claim that atomistic egoism is the alternative to organic society and therefore foregone the liberal rejoinder? Of course, economic analysis may be viewed as denying that the organic society communitarians contemplate is possible, so perhaps it does not need the liberal rejoinder, but the present question is whether that rejoinder and economic analysis are compatible. It will be argued below that the answer to this question depends upon the neoclassical analyst’s assumptions about her capacity to identify and direct efficient allocations.\(^7\)

In sum, what is at stake in the debate is a variation on an old theme: the proper role of government, and, therefore, of law in economic

\(^{67}\) See DEVIGNE, supra note 26, at 78-118 (recounting various neo-conservative positions).

\(^{68}\) GRAY, LIBERALISMS, supra note 46, at 262.


\(^{71}\) See LARMORE, supra note 54, at 48-50.

\(^{72}\) See infra notes 93-97, 194-229 and accompanying text.
production. It is possible to frame this old theme in terms of a technical issue and therefore to hold out the hope of an empirical resolution to it. This, indeed, is how economic analysis of the firm seeks to proceed: the question is one of the efficiency of alternative arrangements. The technical issue gambit works, however, only if there is agreement that it is the issue. It should be apparent that this condition is not satisfied. There is instead a deeper issue of political morality. This deeper issue may be framed as an empirical one: what are the consequences of alternative state-directed and socially generated economic arrangements. The difficulty is that the relevant consequences—alienation, exploitation, egoism, etc.—are not only poor candidates for precise calibration in empirical investigations, but matters themselves laden with normative commitments and, therefore, problematic candidates for an agreed upon definition. Unfortunately, this is true as well of “efficiency,” at least if the informational difficulties in assessing the matter are recognized.

II. THE CONTRACTARIAN PERSPECTIVE

A. The Contractual Theory of the Firm

The standard “nexus of contracts” description of the corporation postulates four basic ideas. First, the description invokes, at least rhetorically, the entire complex of individualist political theory associated with contract. Specifically, it invokes the following notions:73 (1) The basic social unit for purposes of descriptive method (and on some accounts, normative commitment) is the individual; (2) individuals have

diverse preferences that are to be treated as exogenous for descriptive (and perhaps normative) purposes; (3) given scarcity, individual behavior consists of choice making, which choice making is undertaken purposefully or rationally—persons seek to satisfy their preferences through their choices; (4) such choice making presupposes a prior distribution of entitlements (property) which distribution is assumed, (except to the extent, as indicated below, that background norms must be specified to enable maintenance of this assumption); (5) given that the presupposed distribution is to be respected, choice entails decision to transfer or not to transfer entitlements, so transfer requires (some form of) consent; (6) the law’s functions are to enforce presupposed distributions (as by forbidding force and fraud) and to enable cooperation (by enforcing consensual transfer).

Second, this invoked complex of contractual ideas is applied to corporate relationships: these relationships are the products of contractual exchange. However, contractual exchange within the corporation

74. EASTERBROOK & FISCHEL, supra note 4; Butler, The Contractual Theory of the Corporation, supra note 4. It should be recognized, however, that there are a number of economic theories of the firm within a neoclassical (in a broad sense that incorporates neoinstitutional elements) tradition. These originate in Ronald Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937), in which the firm (e.g., the corporation) is distinguished from market transactions by hierarchical direction and explained by savings in the transaction costs of market negotiation. The hierarchical claim was challenged by Armen Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 AM. ECON. REV. 777 (1972), who explained hierarchy in contractual terms, treating the advantage of the firm as efficiencies generated through team production and hierarchy as contractual monitoring. See also Steven N. S. Cheung, The Contractual Nature of the Firm, 26 J. L. & ECON. 1 (1983). But see OLIVER E. WILLIAMSON, INTRODUCTION, in THE NATURE OF THE FIRM, ORIGIN, EVOLUTION AND DEVELOPMENT 10 (Oliver E. Williamson & Sidney G. Winter eds., 1991) (noting that Alchian and Demsetz now both recognize “fiat” as “distinguishing feature of the firm”).

is rendered complex by the necessity of projecting exchange into an uncertain future and by the costs of so doing. The terms of exchange are therefore incomplete. Incompleteness entails the necessity of discretionary decision made unilaterally by management, but its hierarchical authority is itself a term of the corporate contract.

Third, the discretionary authority of management is itself constrained both by the terms of any express contract between corporate participants and by the assumed objectives of the contractual relationship. These assumed objectives and their implications for the proper exercise of discretion are themselves conceptualized in contractual terms. Thus, the presumed objective of contributors of equity capital is maximized return (given a level of risk), and managerial discretion is to be exercised consistently with the supposition that equity capital was contributed in exchange for a promise to so exercise discretion. Similarly, the presumed objective of contributors of labor is a fixed wage, to be used by the worker in satisfying the worker's preferences in exchange for adhering to the directions of management. It is important to recognize at this point that, presumed objectives and presumed terms of exchange are just that, presumed, in this scheme. However plausible they may be, they are typically postulated from suppositions about the character, desires and other attributes of quite generalized persons, not from "findings" about the actual attributes of particular individuals or from the often non-existent terms of express agreements. The contractual conceptualization of corporate relationships—dubbed contractual "gap filling" by adherents of the theory—therefore relies upon two propositions derived from the individualist complex noticed above: Gaps are to be filled or terms supplied by reference to what persons having the supposed attributes would (hypothetically) have agreed to and such generalized (standard) terms may be trumped by express agreement to the contrary. It should nevertheless be apparent that this construction of structural terms is simultaneously an allocation of entitlements; it establishes the background assumptions necessary to enable consensual transfer.


75. See, e.g., Jensen & Meckling, supra note 74; Fama, supra note 74.


77. See, e.g., Cox, Reflections, supra note 9, at 90-100; Clark, Contracts, Elites and Traditions, supra note 32, at 1718-26.
Fourth, as standard or gap-filling contractual terms require suppositions about the attributes of contracting persons, some theory of attributes is required. It is here in particular that diversity in contractarian approaches might arise. The dominant approach, often identified with contractarian theory itself, is neoclassical economic analysis. The neoclassical approach employs efficiency, often specified as wealth maximization, as either a proxy for or substitute for hypothesized consent. Standard terms are thus those terms that maximize social wealth. Equivalently, standard terms are the terms that would have been hypothetically agreed to by the majority of rational maximizers.

However, two caveats are in order: the degree of generality with which persons are to be viewed and the majoritarian default criterion are debatable matters within a contractarian paradigm. It is at least arguable that "default rules" tailored to particular transactions or transactors would be desirable from an efficiency perspective in, at least, nonmarket (e.g., closely held corporate) settings. Moreover, the efficiency objective may require a standard term specified independently of the presumed preferences of a majority of corporate transactors. It is efficiency, not predictability or majoritarian preference as such, that governs neoclassical default terms.

It is important to recognize that the efficiency criterion, like its utilitarian cousin, is a profoundly collectivist, not an individualist


normative concept. Neoclassical reliance upon individualist, contractualist schema is reliance upon a means to a social end; it is, at least formally, purely instrumental. Consent, for example, is not central to the neoclassical scheme; it merely serves an evidentiary role in establishing efficiency and is in any event present with respect to gap-filling terms only in the abstract sense of consent to a relationship, not in the concrete sense of consent to such terms. It would therefore be a mistake to suppose that the neoclassical economic theory of the firm is a rights based theory or, ultimately, a theory normatively predicated on the individual. It is rather a theory of the common good, albeit a good defined in welfarist terms, and one predicated upon some objective capacity to aggregate individual preferences (as measured, for example, by judicial guesses about willingness and ability to pay). Reliance upon an aggregative welfare criterion may be viewed as an "individualist" stance in the sense that it declines to evaluate by moral or social criteria the propriety of a preference; the weight of the preference is given by its strength (as measured by actual or hypothetical payment for its satisfaction) in the view or hypothesized view of the individual. However, this aspect of the analysis must be qualified by recognizing that the trade-offs contemplated in establishing a default term are those of a hypothetical generalized person of a particular rational, character. Estimates of the strength of (as well as the presence of) a preference must therefore rely upon some common, shared perception (more accurately, the perception of such a perception), and

81. See, e.g., Posner, Problems of Jurisprudence, supra note 8, at 376-80 (wealth maximization is a collectivist organic theory); Gary Lawson, Efficiency and Individualism, 42 Duke L.J. 53, 83-84, 88, 96 (1992) (stating that social welfare, pareto efficiency and wealth maximization are normatively collectivist).

82. See, e.g., Craswell, Contractual Settings, supra note 69, at 823 (discussing social welfare, not markets as such, in the logical prior goal; markets are means).

83. This does not preclude use of economic analysis as a basis for arguments ultimately supportive of rights based theories or its use as a proxy for a normative commitment to individualism. Lawson, supra note 81 (Judge Posner employs efficiency as proxy); see Kronman, supra note 61, at 234-35 (discussing economic analysis as proxy for libertarianism); Richard A. Posner, Overcoming Law 1-29 (1995) (stating compatibility of pragmatism, economic analysis and classical liberalism). To the extent that the analysis requires judgments (as it typically does given the absence of complete information regarding costs and benefits), underlying normative commitments may be revealed in these judgments. Nevertheless, the analysis conforms formally to the description in the text.

84. See, e.g., Coleman, Markets, Morals and the Law, supra note 78, at 115-29; Cox, Reflections, supra note 9, at 90-100; Anthony T. Kronman, A Comment on Dean Clark, 1989 Colum. L. Rev. 1748, 1749-51.

there is in this sense, therefore, a social criterion of value lurking in the background.\textsuperscript{86} Market prices, particularly given the Efficient Capital Market Hypothesis, often serve as this criterion in neoclassical analysis, as where market price is treated as the normative benchmark for assessing a "fair price" for shares. A form of "communitarian" reliance upon common perception may, however, also be invoked, as in claims that the costs of the duty of care exceed its benefits.

Neoclassical analysis is typically anti-regulatory, in the sense that it opposes governmental review of or constraints upon managerial discretion and favors market constraints on that discretion. Nevertheless, the efficiency criterion is sufficiently flexible to permit regulatory argument.\textsuperscript{87} Thus, government "intervention" may be recommended on efficiency grounds employing, at least formally, the conceptual apparatus of the neoclassical, contractarian scheme.\textsuperscript{88} Similarly, the individualist appeal of contractual argument may be employed, particularly through reliance arguments and "implicit contract" ideas to reach conclusions inconsistent with mainstream neoclassical views.\textsuperscript{89} It may be that the

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\textsuperscript{86} Id. at 15-16.


The implicit contract approach is closely related to models of the firm employing game theory. A prominent application within corporate law is John C. Coffee, Jr., \textit{Unstable Coalitions: Corporate Governance as a Multi-Player Game}, 78 Geo. L.J. 1495 (1990). The line of argument employed in the present context is to treat "gaps" in express corporate contracts as giving rise to non-cooperative behavior due to threats of expropriation or defection.
motivations for pro-regulation positions of these types are traceable to communitarian commitments, but the arguments fit formally within the contractarian scheme. Neither contract as a formal analytical device nor efficiency as an objective compels a particular stance on the question of governmental action with respect to the corporation, even though...
judgments about these matters or about the "facts" underlying them may be more or less persuasive in pointing to a particular stance.

Communitarians nevertheless attack several aspects of neoclassical theory: its treatment of preferences as exogenous (so neither the source nor the legitimacy of individual preference is examined), its assumption that persons are self-interested (that they are motivated by a desire to satisfy their preferences and not by the preferences, needs, or moral claims of others), its assumption that persons are rational (generally, that they behave consistently or that they behave as if they were acting correctly so as to maximize satisfaction of their preferences) and, therefore, its conception of human behavior as instrumental to preference satisfaction. These characterizations of the features of the neoclassical analytical apparatus are, as generalizations, accurate, but also exaggerated. Particular theories of the firm will relax one or more of the features. "Transaction cost" theory, for example, relaxes rationality and perfect information assumptions. Indeed, theories of the firm become interesting (and powerful) precisely because they relax assumptions and

Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties, 21 STETSON L. REV. 23, 36-41 (1991). The ability of others to obtain self-protection through contract depends crucially, however, upon the belief that the standard conditions for efficient express contract (e.g., full information, ex ante) are satisfied. The obvious countermove, fully within the categories of argument rendered relevant by the neoclassical framework, is to claim that these conditions are not satisfied. See, e.g., Stone, Employees as Stakeholders, supra note 4.

There is an alternative neoclassical move: one may seek to evaluate a phenomenon (such as the corporate takeover) by comparing gains and losses, treating the latter as indeed unanticipated and as therefore unallocated by contract. This is a species of property right allocation typical of "gap filling." If gains from the phenomenon exceed losses, the phenomenon should be encouraged by means of a standard term. Thereafter, gains and losses will be reallocated through the pricing system. Countermoves will typically fall outside the economic paradigm: either the cost/benefit calculus is rejected or the pricing system is challenged on grounds that it fails to account for all losses (values "lost" by reason of the phenomenon are not properly priced). E.g., Mitchell, Groundwork, supra note 34. Nevertheless, countermoves are possible within the paradigm. In the first place, the summing of gains and losses can be controversial. In the context of the takeover, this controversy has typically taken the form of short- versus long-term perspectives. See, e.g., Thomas Hazen, The Short-Term/Long-Term Dichotomy and Corporate Law, 70 N.C. L. REV. 137 (1991) [hereinafter Hazen, The Short-Term/Long-Term Dichotomy and Corporate Law]. Moreover, the claims that all losses are not accounted for either in neoclassical counting or in the pricing system can be framed in terms of contract and market failure arguments consistent with the economic paradigm. See, e.g., Hyde, Employee Ownership, supra note 88.

91. See, e.g., Johnson, Individual and Collective Sovereignty, supra note 4, at 2229-35; Mitchell, Groundwork, supra note 34, at 1482.

92. WILLIAMSON, INSTITUTIONS OF CAPITALISM, supra note 74, at 43-52; cf. POSNER, OVERCOMING LAW, supra note 83, at 433-37 (treating Williamson as indistinguishable from "mainstream economics" in his relaxation of assumptions).
therefore enable a focus upon the consequences of such a relaxation. The complaints registered against such theories therefore tend to be that assumptions are insufficiently relaxed.  

However, it should also be recognized that the operational viability of a theory falling generally within the neoclassical apparatus depends both upon the stringency with which its assumptions are maintained and the information it assumes. “Operational viability” means the capacity of the apparatus to generate “falsifiable hypotheses” and, therefore, its capacity to generate normative recommendations. Neoclassical theory seeks by hypothesis to predict behavior, but prediction is employed, in economic analysis of law, to yield recommendations about law. Control is an implication of prediction. Relaxation of an assumption renders prediction problematic. For example, the less rational persons are assumed to be the less predicable their behavior.

The information problem, moreover, is not merely that of assumptions about the information available to the actors studied by the apparatus, for much can be said, holding other assumptions constant, about the consequences of incomplete information. Rather, it is a problem of the information assumed to be in the possession of the analyst. The point is illustrated by neoclassical analysis of corporate law “default rules.” The rules recommended are those that are “efficient,” and, equivalently, those that would be chosen by rational parties seeking to maximize surplus from cooperation, but the appropriate default rule, given these criteria, requires both assumptions about rational maximization as a characterization of behavior and about that which is valued by “contracting” parties. This is recognized, at least in degree, by the neoclassical analyst: majoritarian default rules may be trumped by express agreement because, it is believed, they will not be efficient for a minority of parties—assuming that the analyst has guessed correctly about the majority.

There is therefore a sense in which the analysis is predicated upon a notion of “individual choice,” albeit for reasons instrumental to a common good. If default rules are non-mandatory, there is room for

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93. See, e.g., ETZIONI, MORAL DIMENSION, supra note 88, at 178-80.
94. EASTERTHROOK & FISCHER, supra note 4, at 35; Richard Craswell, Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships, 43 STAN. L. REV. 361 (1991) [hereinafter Craswell, Passing on the Costs of Legal Rules]. On problems of analyst (e.g., judicial) information, see Alan Schwartz, Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies, 21 J. LEGAL STUD. 271 (1992) (courts decline to act where information absent) [hereinafter Schwartz, Relational Contracts in the Courts].
choice. Nevertheless, there is also a sense in which the analysis obviates any question of "choice." Its predictions (predicated, again, on assumed information) about what a majority of transactors "would have agreed upon" is essentially behavioralist.\textsuperscript{95} Given the analyst's assumptions, transactors do not "choose" that which the analyst predicts; the choice is predetermined by the assumptions.\textsuperscript{96} To the extent that "transaction costs" inhibit deviation from this prediction, (default terms allocate transaction costs to those who wish to deviate from them) the prediction is also self-fulfilling.\textsuperscript{97}

What is distinctive about neoclassical economic analysis as a variant of contractarian theory is therefore its commitment to a particular form

\textsuperscript{95} Cf. Posner, Problems of Jurisprudence, \textit{supra} note 8, at 382 (noting behavioralism of economic analysis of law generally).


\textsuperscript{97} It should nevertheless be recognized that this matter is complicated by the neoclassical view of markets. If "standard form" agreements in markets are efficiently priced, persons are compensated for undesirable default terms (bad guesses about efficient terms made by legislatures and courts) \textit{ex ante} in price and incentives are created to correct such terms. To the extent that transactor preferences are heterogeneous, both distinct standard forms generated by distinct jurisdictions, and the presumption against mandatory terms, permit choices. This rosy picture requires additional assumption about informational efficiency and about legal conformity to the neoclassical model. It requires as well, however, the view that default terms are knowable in advance, or, at least, are matters subject to rational risk calculation (such that probabilities may be assigned prospectively to their content). Cf. Frank H. Knight, Risk, Uncertainty and Profit 19-20 (1957) (distinguishing risk and uncertainty). They might instead be viewed as random and arbitrary, a possibility enhanced where they take the form of open-ended standards (as in the case of fiduciary obligation). See William J. Carney, The ALI's Corporate Governance Project: The Death of Property Rights? 61 Geo. Wash. L. Rev. 898 (1993) (criticizing fiduciary duty, even as a standard term) [hereinafter Carney, The ALI's Corporate Governance Project]. On such a view, the information content of a particular adjudication is minimal, and equilibrium tendencies may be questioned. Cf. Gerald P. O'Driscoll, Jr., Spontaneous Order and the Coordination of Economic Activities, in New Directions in Austrian Economics 129 (Lois M. Sparado ed., 1976) (threat posed by radical subjectivism, based on uncertainty, to tendencies to equilibrium); but cf. Ralph K. Winter, Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, 42 Duke L.J. 945 (1993) (treating fiduciary duty regulation as raising cost of capital, thus implying that market rationally discounts for effects of uncertain regulation).

It should also be noticed that this market perspective works by its own terms only with respect to transactors (particularly investors) viewed as remote from the firm. A form of "institutional perspective" is arguably appropriate for transactors where relationships to the firm are not subject to the standardized packaging that enables market trading (such as employees with firm-specific human capital investment and shareholders in closely held firms). Market pricing (as a form of protection from ignorance) is not invocable from this latter perspective. Nevertheless, the problem of uncertainty (random and arbitrary content to default terms) remains.
of naturalism (the view that persons have an essential nature and that their behavior is determined by laws implicit in or derived from this nature). The particular form is "scientism," the belief that human behavior can be predicted and, therefore, controlled to achieve desired consequences.

B. Individualist Contract and Neoclassical Contract

Recall that the conceptual wedge by means of which governmentally determined "contractual" terms are formulated within neoclassical economic analysis is the contractual "gap"—parties to the corporate contract fail to specify the terms of their agreement due to "bounded rationality" and "transaction costs." Recall also that benevolent government fills these "gaps" by supplying terms the parties would have agreed to had they specified terms, assuming that the parties are the rational maximizers contemplated by neoclassical theory. The neoclassical scheme's individualist, contractarian reputation is preserved by means of a caveat: the standard terms supplied by efficiency analysis may be trumped by express agreement to the contrary (corporate law is "enabling", not "mandatory"). Nevertheless, the scheme is predicated upon a collective, welfarist, normative commitment, for capacity to trump is itself justified on the instrumental ground that it yields efficiency. It is useful to compare this scheme with alternative versions of individualistic or liberal contract.

An obvious difficulty in attempting such a comparison is that there are many varieties of liberalism. For present purposes, three distinct theories, roughly derivable from Kant, Hume, and Hobbes, may be identified. It is emphasized that the derivations are rough. Hobbes, for example, cannot be said to have been a liberal, but his rational

98. See Clark, Contracts, Elites and Traditions, supra note 32, at 1724-26.

99. Reasonably accessible summaries of these sources may be found in Volume 3 & 4 of THE ENCYCLOPEDIA OF PHILOSOPHY 305-24 (Kant), 74-90 (Hume), 30-46 (Hobbes) (1967) [hereinafter ENCYCLOPEDIA OF PHILOSOPHY]. There are of course other sources for and species of classical liberalism or of libertarianism left out of this account. The most obvious missing possibility is a natural rights theory of a Lockean variety. Nevertheless, it would seem reasonably clear that any classical theory must assume a minimalist rights theory, particularly a private property rights theory. Such a theory must be minimalist, because, on Hohfeldian premises, rights require obligations, and it is the point of classical theory to minimize legally enforceable obligations (indeed, to largely confine these to contract). On this point, as well as the derivation of property rights, see RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 10-18 (1985); ANTHONY DE JASONY, CHOICE, CONTRACT, CONSENT: A RESTATEMENT OF LIBERALISM 91-93 (1991); LOMASKY, supra note 46, at 111-41.
contracting scheme can be employed to yield liberal terms. And it is not pretended that these theorists said anything directly about a social institution, the modern corporation, about which they were obviously unfamiliar. The theories postulated here are reconstructions of current theories derived from ideas with which these theorists are currently identified, not theories authored by these theorists.

1. The Kantian Variation

The Kantian variation is predicated upon autonomous reason; freedom is a matter of detached rational assessment and choice of worthy ends or goods and is justified as necessary to the development of the moral, full, or complete person.100 Moreover, this "ideal of autonomy" entails a commitment to a universalistic morality: "the right" is prior to "the good" in the sense that, to be free, one must be detached from mere desire (and, therefore, from socially contingent ends or goods) and adhere to moral obligation for its own sake, not for reasons of the consequences, in terms of goods or ends, of adherence.101 It entails also, however, a notion of rationalistic self-governance: one achieves this ideal by rational discovery and adherence to moral obligation, detached from one's ends, purposes or versions of the good. To be rational is

100. CHANDRAN KUKATHAS, HAYEK AND MODERN LIBERALISM 31-42 (1989); LARMORE, supra note 54, at 77-90. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1-15 (1982) [hereinafter SANDEL, LIMITS OF JUSTICE]. For accounts of the influence of Kant on Rawls, see LARMORE, supra note 54, at 118-30; SANDEL, LIMITS OF JUSTICE, supra at 35-40, 117-22; RAWLS, A THEORY OF JUSTICE, supra note 46, at 251-57. It is the case that Rawls sought, in A Theory of Justice, to reconcile Kant and Hume, but the communitarian argument is that this reconciliation failed, in particular by reason of a commitment to the Kantian notion of detached rationality. SANDEL, LIMITS OF JUSTICE, supra note 46, at 168-73.

101. Universality in Kant is a matter of a set of rules, applicable to all, determined through applying a Kantian test of universalizability (roughly, the test of the acceptability of hypothetical application of the rule to all, or "what if everyone did this?"). In Rawls, it is a matter of building into the original position a perspective of detached rationality. RAWLS, A THEORY OF JUSTICE, supra note 46, at 251-57. See GRAY, LIBERALISMS, supra note 46, at 33-36 (criticizing universality as detached rationality). In his later work, Rawls, in response to communitarian critics, has sought to relax this universalism. John Rawls, Justice as Fairness: Political, Not Metaphysical, 14 PHIL. & PUB. AFF. 225, 228 (1985). What seems distinctive about Kantian rationality is universalism as impartiality: rationality is a matter of detachment from one's own goods or interests, so one constrains one's pursuit of one's interest (as by recognizing and conforming to the rights of another) because rationality as impartial detachment requires one to see the (conflicting) interests of others as on par with one's own. Moral constraint is thus both a product of exercises in Kantian rationality and, because detachment is identified with morality, built into that rationality. See THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM 90-124 (1970) (presenting account of rationality that insists on its detachment from individual projects, ends, or preferences).
therefore to be moral, and the morality contemplated is intersubjective—something known and capable of being adhered to by all.

In political terms, political neutrality regarding ends, purposes or goods is predicated in this Kantian account on the ideal of autonomy: the state should be detached from ends, purposes or goods. Persons, within such a regime, are conceived by virtue of this neutrality to be autonomous choosers of their ends (but also, to the extent they approximate the Kantian moral ideal, remain themselves detached from the ends they choose). These notions can be given classically liberal interpretations, but they are most clearly present in various versions of egalitarian or progressive liberalism. This classification seems supported by two elements of the “positive” liberty arising from the ideals of autonomy favored by egalitarian liberals. First, and most

102. KIYLMICKA, supra note 63, at 199-230; LARMORE, supra note 54, at 77-90.
103. See KUKATHAS, supra note 100, at 167-74 (noting Kant's influence on Hayek).
105. Positive liberty is typically contrasted with negative liberty, but there are many variations on these themes. ENCYCLOPEDIA OF PHILOSOPHY, supra note 99, at 221-25; Isaiah Berlin, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 118-62 (1969); GRAY, LIBERALISMS, supra note 46, at 45-68; Richard Fallon, Two Senses of Autonomy, 46 STAN. L. REV. 875 (1994); Charles Taylor, What's Wrong with Negative Liberty?, in 2 PHILOSOPHICAL PAPERS 211-29 (1985) [hereinafter Taylor, What's Wrong with Negative Liberty]. For Kant, negative freedom was freedom from animalistic impulse and positive freedom was capacity to universalize or abstract from particular ends. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 90-91 (1995).

Negative freedom is today typically understood as freedom from interference, or in terms of a realm of independence from direction, particularly of a conscious variety. There is a sense in which autonomy refers to negative freedom: one is autonomous to the extent free from coercion or manipulation and therefore engages in choice free from these constraints, but the rationality condition imposed by this variation on autonomy is a minimalist one, as the point of negative liberty is freedom from authoritative assessment. GRAY, LIBERALISMS, supra note 46, at 59. Positive freedom is typically understood as rational self-direction, requiring capacity for experiment (freedom to), but also requiring “freedom from” irrational impulse, mere desire or “false consciousness.” The latter requirement, entailing a detached rationality in the sense of a capacity to evaluate and discard unworthy ends, is a basis for libertarian or classically liberal criticisms of positive liberty, as it implies collective assessment and direction of such ends. Berlin, supra. Cf. DE JASON, supra note 99, at 33-51 (criticizing rights theories, and emphasizing liberty as Hohfeldian privilege). But see Taylor, What's Wrong With Negative Liberty, supra (defending positive liberty from this attack); Cf. JON ELSTER, SOUR GRAPES, STUDIES IN THE SUBVERSION OF RATIONALITY 109-140 (1983) (postulating phenomenon of adaptive preference, criticizing Berlin, criticizing utilitarianism for assuming preferences and suggesting possibility of collective reformation of preferences through rational public
The standard argument favoring positive liberty, made by Taylor and by egalitarian liberals, may serve to clarify the differences between the egalitarian liberal (and ultimately, communitarian or neorepublican) view and the libertarian or classically liberal view. The argument is that “we” assess liberty by reference to a collective background understanding of the importance of particular interests, so it is not a “general right to liberty” but particular liberties that are valued. Liberty is not an end, but a means to those ends deemed important, and (in the communitarian or neorepublican version of the argument) determinations of importance are to be made through participation in collective deliberation. See, e.g., Ronald Dworkin, We Do Not Have a Right to Liberty, in LIBERTY AND THE RULE OF LAW 167 (Robert L. Cunningham ed., 1979); KYMLICKA, supra note 63, at 137-45; Taylor, Whats Wrong With Negative Liberty, supra at 219. Notice that this argument already has built into it a presumed baseline of collective evaluation, for it is made from the perspective of a collective choice about liberty. Cf. GRAFSTEIN, INSTITUTIONAL REALISM, supra note 61, at 184-87 (stating that collective choice perspective assumes baseline of collective choice). Notice, also, that the argument is one of positive liberty in that it contemplates a rational evaluation and choice of “important” ends. An implication is that socially generated norms—practices and conventions yielded by “accident”—are themselves subjected to the process of rational justification contemplated by the argument. Cf. SUNSTEIN, supra at 64-67 (norms subject to revision through regulation). This does not mean that there are not differences among advocates of the argument. For example, Dworkin’s version treats certain preferred rights founded in an equality principle, as “trumps” on an assumed utilitarian baseline. Liberals, as distinguished from communitarians with egalitarian liberal leanings, tend to argue, at least within a neo-Kantian variation, that rights enable individuals to be detached from and to evaluate their ends, e.g., MACEDO, supra note 104, at 251-53. Whereas communitarians tend to push the argument to a point at which the individual rights recognized are ones to political participation in autonomous collective deliberation. See MACEDO, supra note 104, at 227-240.

A libertarian or classically liberal claim in favor of negative liberty, suggested by the Humean and Hobbesian variations outlined below, postulates the general right to liberty (as general right consistent with a formally equal right of all) attacked by the positive liberty argument. What is important to recognize is that this general right is intimately connected to a hostility to governmental direction, and, therefore, to a rejection of autonomy as rational deliberation about ends when this autonomy takes governmental forms. It is therefore intimately connected to a radical separation of the social and the political, as expressed in the notion of liberal neutrality. LARMORE, supra note 54, at 91-130; LOMASKY, supra note 46, at 250-54. From a Humean perspective, the relevant baseline is evolved social practice, so a rational collective autonomy is rejected as a threat to this practice. FRIEDRICH A. HAYEK, Rules and Order, in Vol. I LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 14-15 (1973) [hereinafter HAYEK, Rules and Order]; MICHAEL OAKESHOTT, Rationalism in Politics, in RATIONALISM IN POLITICS AND OTHER ESSAYS 6 (1981) [hereinafter OAKESHOTT, Rationalism in Politics]; but seeGRAY, LIBERALISMS, supra note 46, at 90-91 (portraying Hayek as positive libertarian given Kantian elements); KUKATHAS, supra note 100, at 166-228 (Humean and Kantian elements in Hayek are contradictory). From a Hobbesian perspective, the baseline is a multiplicity of incommensurable goods, individually held and pursued with instrumental rationality. On a Hobbesian account, rational collective deliberation about ends is an impossibility because it would entail in fact political warfare, not detached deliberation. JAMES M. BUCHANAN, THE LIMITS OF LIBERTY, BETWEEN ANARCHY AND LEVIATHAN 147-65 (1975) [hereinafter BUCHANAN, LIMITS OF LIBERTY]. Negative Liberty is in a sense a by-
obviously, positive liberty can be understood as possessing the means to effective pursuit of ends, so one is autonomous to the extent of this capability. This is a basis for egalitarian distribution. Second, positive liberty can be understood in terms of critical self-awareness and self-discipline: one is free to the extent that one engages in a rational evaluation or ordering of ends, detached from mere desire. This is a basis for preferring some liberties (such as speech) over others (such as property) and for treating the importance of a particular liberty as a matter of an evaluative judgment about the purposes it serves.\footnote{That is, “liberty” within egalitarian liberalism tends to be conceived in terms of intellectual liberty or detached reflection; it is not commercial or market liberty.}

Nevertheless, it cannot be said that Kantian autonomy is alien to classical liberalism, as Kantian autonomy (and variations on positive liberty) are often relied upon by classical liberals. In particular, Kantian autonomy may be employed in justification of classical conceptions of the law of contract by emphasizing contract as an expression of and necessary to the exercise of this autonomy.\footnote{See, e.g., KYM­LICKA, supra note 63, at 137-45.}

2. The Humean Variation

The Humean variation on classical liberalism combines a materialistic element, a skeptical element and a conventionalist element. The naturalistic element postulates certain regularities of the human condition, particularly scarcity, dispersed knowledge and self interest moderated by a limited capacity for “sympathy” (or empathy) and product of these baselines, a state of affairs left over from the constraints imposed on politics by virtue of the priority of the social or by virtue of treating government as the product of mutually advantageous agreement. The standard argument for positive liberty noticed above therefore assumes two positions rejected by assumptions built into its competitors. It assumes a Kantian capacity for rational choice of ends, but this is what Hume denied in contending that reason is the servant of passion. \textit{David Hume, A Treatise of Human Nature} 413-18 (Selby-Bigge, 2d ed. 1978) [hereinafter Hume, A Treatise of Human Nature]. See \textit{Encyclopedia of Philosophy}, \textit{supra} note 99, at 85-87. It also assumes a detached Kantian autonomy, but this is what is denied by Hobbesian self-interest. See, e.g., LOMASKY \textit{supra} note 46, at 182-83, 247-50. \textit{But see Binmore, Playing Fair}, \textit{supra} note 89, at 7-89, 147-59 (attacking Kant, particularly on ground that Kantian rationality is inconsistent with self interested behavior, but deriving modified Rawlsian difference principle from Humean notions of reciprocity and sympathy).\footnote{See, e.g., Kyl­licka, \textit{supra} note 63, at 137-45.}

\footnote{See, e.g., GRAY, LIBERALISMS, \textit{supra} note 46, at 90-91 (discussing Hayek’s Kantian positive liberty); CHARLES FRIED, \textit{Contract as Promise: A Theory of Contractual Obligation} 9-17 (1981) (Kantian moral basis for obligation to keep promises); cf. WEINRIB, \textit{supra} note 105, at 84-113 (defending “private law” on basis of Kant).}
benevolence, that limit (but do not exclusively determine) possible political and social arrangements. The skeptical element is skepticism about human reason and in particular about human capacity to rationally construct social orders. The conventionalist element is a "conservative" commitment to evolved social practice. Norms as conventions—understood as customary rules of behavior which individuals internalize and to which they attach feelings of moral obligation—respond both to the natural human conditions of scarcity and self interest and to the limitations of human reason by enabling "coordination," and "cooperation"—understood as tolerance of and mutually beneficial advancement of distinct and individually held purposes. Morality, including the morality of liberal "rights" in a society of liberal traditions is therefore determined by the material facts of the human condition as particularly revealed in and expressed by historical


111. There is, however, a potential distinction between problems of coordination and problems of cooperation. The former, suggested by Hayek's emphasis upon dispersed knowledge and the informational role of prices, do not entail the conflicts of interest that arise in the latter, and Hayek may be viewed as having neglected these. See Marina Bianchi, Hayek's Spontaneous Order, The "Correct" Versus the "Corrigible" Society, in HAYEK, COORDINATION AND EVOLUTION: HIS LEGACY IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 237-51 (Jack Birner & Rudy van Zijp eds., 1994) [hereinafter Bianchi, Hayek's Spontaneous Order]. Hayek's Humean commitment may be said to neglect Hobbesian insights, but, then, Hume did not conceive of human nature in the relentlessly selfish and rational fashion associated with Hobbes, permitting "sympathy" to establish commitment to "fair play."
practice.\textsuperscript{112} An implication is perhaps a form of indirect utilitarianism, functionalism or consequentialism, as successful coordination is potentially a criterion for assessing social practice.\textsuperscript{113} On the other hand, this variation's skepticism about human reason may dictate a simple conservative respect for tradition regardless of this criterion.

The "liberal" character of the Humean variation appears to the extent that the traditions of a particular society are of a liberal character, and to the extent that coordination and cooperation criteria are interpreted, individualistically, as serving to maximize the individual's prospects for advancing his self-interest (that is, his projects or purposes).\textsuperscript{114} A further aspect of these criteria, and of respect for tradition, is for "Humeans," in particular F. A. Hayek, the spontaneous order thesis: coordination and cooperation arise without direction through spontaneous generation within human interactions of norms and practices serving these ends.\textsuperscript{115} Norms serve these functions without being consciously designed. Notice that a strong implication of spontaneous order, in combination with skepticism about human reason, is distrust of conscious, articulate direction (as distinguished from the direction supplied by norm and practice) and, therefore, a distinction between the political/legal and social realms. Indeed, there is within "Humean" thought, particularly as represented by Hayek, substantial reliance upon inarticulate, tacit or practical knowledge, both as an explanation of human behavior and as a ground for rejecting direction through the use of articulated mandate. Since much of human knowledge is tacit, it cannot be captured in or employed by use of articulate command or even in articulate discourse.\textsuperscript{116}

\begin{enumerate}
\item KUKATHAS, supra note 100, at 23-25.
\item Compare GRAY, LIBERALISMS, supra note 46, at 121-25 (treating Hume as an indirect utilitarian), with KUKATHAS, supra note 100, at 197 (portraying Hume as a consequentialist, but not a utilitarian).
\item Hayek's notion, relying on Hume, is that abstract (neutral and formalistic) rules serve unknown particular ends, so that the relevant consequence is that of maximizing prospects for individual discovery and achievement of ends not collectively known. See HAYEK, Rules and Order, supra note 105, at 15-17. But see Norman P. Barry, The Road to Freedom, Hayek's Social and Economic Philosophy, in HAYEK, CO-ORDINATION AND EVOLUTION: HIS LEGACY IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 141-163 (Jack Birner & Rudy van Zijp eds., 1994) [hereinafter Barry, Road to Freedom] (criticizing later Hayek's move to a maximum population criterion as a measure of social success, particularly in THE FATAL CONCEIT (1988)).
\item HAYEK, Rules and Order, supra note 105, at 35-54.
\item F. A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 44 (1976). See MICHAEL POLANYI, THE TACIT DIMENSION (1967) (relying upon by Hayek in Studies); GILBERT RYLE, THE CONCEPT OF MIND 26-60 (1949) (distinguishing between "knowing how"
It should be noticed that there are both universal and particularistic elements to the Humean variation. Although scarcity, self interest, and limited reason are deemed universals, and serve as limitations on possible human arrangements in the sense that coordination and cooperation fail where these limitations are ignored, particular social arrangements within these limitations may be historically contingent.\(^1\) Moreover, there is within some modern "Humean," thought a "post-modern" element\(^1\) that rejects "scientism," favors a form of "inter-

\(^1\) Hume clearly thought "sympathy" a natural or universal quality, and self-love one as well, and treated "utility" (understood as tendency to bring about desirable consequences) as something with which humans universally sympathize. See, e.g., Hume, Principles of Morals, supra note 108, at 178-90. Nevertheless, this did not preclude his recognition of variations in cultures. See David Hume, Essays, Moral, Political and Literary 197-215 (Eugene Miller ed., rev. ed. 1987) [hereinafter Hume, Essays]. More importantly, Hume was an anti-universalist in the sense that he rejected natural rights and rationalist contracting explanations for adherence to moral or legal principle. See, e.g., Hume, Essays, supra at 479-81 (noting that some moral duties are instinctual; others are not based upon rational contract but on reflection about practical consequences); Hume, Principles of Morals, supra note 108, at 255-60 (stating that rules of justice do not arise from contract, but from conventions which tend to generate peace or order and are natural only in sense necessary to order); Hume, A Treatise of Human Nature, supra note 105, at 569 (stating that rules of justice are grounded in convention and interest all who desire peace and order). There is therefore in Hume a functionalism or consequentialism premised upon a universalistic view of human nature (which view was not that of narrow egoism), but this functionalism concerns the general tendencies of conventions.

There is of course a further sense in which Humeans are anti-universalists (or perhaps, anti-foundationists). Their anti-rationalism or tendencies to "empiricism" and to consequentialism constitute a form of rejection of Kantian universalism, in particular the notion that a universal morality may be derived from a "detached" view of the self. See, e.g., Hayek, Rules and Order, supra note 105, at 6, 34 (arguing that one cannot rationally establish ends, but one can rationally identify effective means to agreed upon ends); cf. Sandel, Limits of Justice, supra note 100, at 11-13 (identifying Hume with epistemological version of a sociological critique of Kantian liberalism); see infra note 118.


To the extent that post-modernism is understood as a rejection of empiricism (itself understood as human reception of sense data unmediated or unstructured by prior conceptual categories) it is arguably a rejection of Hume, in favor of Kant, so this aspect of Hayek is in fact non-Humean. See Gray, Hayek on Liberty, supra note 108, at 6-26 (Hayek's Kantian theory of knowledge, as influenced, inter alia, by his cousin Wittgenstein). See also Taylor, Philosophical Arguments, supra note 11, at 71-72 (Kant's critique of Hume's "atomistic" epistemology insisted upon a background structure by which Humean impressions are rendered intelligible). On the other hand, Hume's empiricism may be understood as a rejection of the view that behavior is to be assessed by reference to rational foundations in favor of the view that it is to be understood instead by reference to the observed givens of human interaction, Russell, supra note 108 at 71-82. It therefore finds a parallel in Hayek's
pretivism”\textsuperscript{119} and emphasizes the “social construction” of the individual,\textsuperscript{120} without thereby adopting an organic view of society.\textsuperscript{121}

This last point requires emphasis. If “Humeans” believe that persons are social products, such that their ends or goods are socially given and their behaviors largely socially determined, how can they then also believe that these ends are diverse, held individually and pursued self-interestedly? A partial answer is that the variety of social ends is a function of the characteristics of the society in question. A complex, “modern” society will be characterized by a greater number and variety of goods than a “primitive” one.\textsuperscript{122} Perhaps a more important answer is that emphasis upon the social is not incompatible with a commitment to subjectivity.\textsuperscript{123} If persons are socially constructed, there are impor-
tant senses in which they commonly value ends or goods: a good would not be recognizable as a good absent a common practice in which and by means of which it is intersubjectively so recognized. Moreover, persons will tend to comply with social "rules": their behavior will be partially determined by internalized conventions, including in the sense of unreflective conformity. Nevertheless, the particular, call it marginal, value placed on any good is subjective: it is individually formulated in comparison with other goods within the peculiarities of circumstances given that scarcity requires tradeoffs. Subjectivity on this account is both consistent with social construction of the individual (unless social construction is implausibly deemed to yield the identity of persons) and an unalterable "fact," such that it would be operative within, and tend to subvert efforts to compel conformity to common valuations. However, subjectivity is also on this account a normative

98. Notice that an implication of this variation is rejection of unmediated Humean empiricism: the "facts" viewed by the social scientist are conceived within the theory by reference to which these facts are approached. Another is the notion that observers are extremely limited in their knowledge of the assessments made by individuals, so that these assessments are inaccessible and not subject to detailed control. F. A. Hayek, Economics and Knowledge, in INDIVIDUALISM AND ECONOMIC ORDER 33-56 (1948). See JAMES M. BUCHANAN, COST AND CHOICE, AN INQUIRY IN ECONOMIC THEORY 23-26 (1978) [hereinafter BUCHANAN, COST AND CHOICE]; James M. Buchanan, Is Economics the Science of Choice?, in WHAT SHOULD ECONOMISTS DO?, supra note 96, at 39-63. A third but related notion is that costs, understood as opportunity costs, are subjective, such that substitution at the margin is unpredictable, uncontrollable and inherently individual, see HAYEK, FATAL CONCEIT, supra note 121, at 97-98 (equating marginalism and subjectivism). See also DAVID GAUTHIER, MORALS BY AGREEMENT 47-59 (1986) (defending subjectivist account of value).


125. HAYEK, Individualism: True and False, supra note 110.

126. F.A. Hayek, The Use of Knowledge in Society, in INDIVIDUALISM AND ECONOMIC ORDER 77-78 (1948). Neoclassical economics may also be said to advocate subjective value, but it also assumes the possibility of objective measurement by reference to equilibrium under perfect competition as a policy norm. James M. Buchanan, Introduction: LSE Cost Theory in Retrospect, in LSE ESSAYS ON COST 1-18 (James M. Buchanan & G. F. Thirlby eds., 1973); Harry Garretson, The Relevance of Hayek for Mainstream Economics, in HAYEK, COORDINATION AND EVOLUTION: HIS LEGACY IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 95-97 (Jack Birner & Rudy van Zijp eds., 1994) [hereinafter Garretson, The Relevance of Hayek for Mainstream Economics].

The epistemological problem with central planning—that the knowledge necessary to economic coordination under it is not available to the planners — follows from subjectivity understood as individual knowledge of trade-offs, at least if some version of welfare is the
commitment, as it implies state neutrality. That commitment is further reflected in the “Humean” account of social rules, as these are interpreted as “abstract” and “procedural,” enabling coordination of individual “plans” in pursuit of individually held ends, but not directive of these ends.\textsuperscript{127}

A final important aspect of the Humean variation is that it does not rely upon rational calculation of cost and benefit either as a depiction of human behavior or as an explanation of rules or norms. Hume, of course, relied upon “sympathy” or empathy, a limited capacity to vicariously experience the welfare of others, as well as self-interest, to explain behavior, and both Hume and Hayek relied upon uncalculating norm compliance in their depiction of that behavior.\textsuperscript{128} Both viewed norms as conventions, evolved rules tending to serve in the long run (but not necessarily in the circumstances of a given case), coordination or cooperation, understood in terms of mutual advantage.

3. The Hobbesian Variation

It is evident that Hobbes may be cited as a basis for economic analysis of the firm and as a basis for economic analysis of human behavior generally. There are, however, variations on Hobbesian rational calculation that yield moralities consistent with classically liberal themes. The Hobbesian variations in question employ Hobbes’ rational self-interest supposition to construct a contractarian explanation of existing or preferred human arrangements, but deny that this method yields Hobbes’ version of Leviathan.\textsuperscript{129} The basic argument starts with the proposition that persons are partial to their projects: they are “self-interested” in the sense that they have reasons to prefer their projects and no reasons, or less powerful ones, to assess these projects from an objective of central planning. For an overview of the central planning debate consult Willem Keizer, \textit{Hayek's Critique of Socialism}, in \textsc{Hayek, Co-ordination and Evolution: His Legacy in Philosophy, Politics, Economics and the History of Ideas} 207-31 (Jack Birner & Rudy van Zijp eds., 1994) [hereinafter Keizer, \textit{Hayek's Critique of Socialism}].


\textsuperscript{129} BUCHANAN, \textit{Limits of Liberty}, supra note 105; GAUTHIER, supra note 123; LOMASKY, supra note 46; JAN NARVESAN, \textsc{The Libertarian Idea} (1988).
impersonal, detached viewpoint. It then argues that the source of “morality” (or of rights) may be found in the agreement of self-interested actors seeking mutual advantage.

Three aspects of such Hobbesian theories are of particular interest. First, Hobbesians reject the Kantian conception of rationality as detached impartiality in favor of an instrumental conception: impartiality is denied by a premise of partiality to one’s own purposes or goods and rationality is a matter of efficacious pursuit of these purposes or goods. Second, moral constraint is explained by rational self interest. It is not something shared by virtue of autonomous reason divorced from individually held ends, nor is it something explained in part by a human capacity for sympathy. Rather, it is something rational persons would impose on themselves because it serves their ends. The notion is that, in contexts of human interaction, gains from cooperation are possible. Some Hobbesians, call them neo-Hobbesians, claim, for example, that a rational persons will cooperate (“trust” in the sense of “risk defection”) if (1) the gain he expects from mutual cooperation exceeds the payoff from expected mutual defection (non-trust or non-cooperation), and (2) he assigns a sufficiently high probability of cooperation from the other(s) engaged in the interaction. Contrary to the predictions of standard

130. GAUTHIER, supra note 123, at 21-59; LOMASKY, supra note 46, at 19-34. This notion of partiality does not require in any of these thinkers a “narrow egoism;” it requires merely an individuated conception of the good, understood in terms of subjectivism. GAUTHIER, supra note 123, at 47-59; LOMASKY, supra note 46, at 244-46; cf. LARMORE, supra note 54, at 71-73 (even if all ends were benevolent, there would be no unanimity of opinion about the content of the good life).

131. For an overview and critique, see KVMLICKA, supra note 63, at 125-32. The statement in the text equates moral constraint and rights, but this is an oversimplification of Gauthier’s view. See infra note 133.

132. GAUTHIER, supra note 123, at 6-7, 236-37; LOMASKY, supra note 46, at 42-45, 247-50; cf. LARMORE, supra note 54, at 77-90 (rejecting Kantian rationality as source of motivation). But see GAUTHIER, supra note 123, at 344-51 (retaining species of autonomy as some capacity for reflective choice of ends).

133. GAUTHIER, supra note 123, at 157-89. Gauthier’s particular theory is that the content of the moral constraint to which bargainers would agree from an original position conforms to “minimax relative concession” in division of surplus, one that typically yields equal or proportional shares of surplus to contributors. See id. at 129-56. Moreover, Gauthier distinguishes rights from moral constraints yielded by this bargaining by treating the former as initial starting points. See id. at 190-232. These starting points are generated in his theory by an interpretation of the “Lockean proviso” that follows Nozick, in effect a variation on a pareto criterion (one is entitled to a thing if one’s acquisition leaves others no worse off as measured by one’s hypothetical absence from the scene). Id. at 203-05. Nevertheless, the theory predicates these rights on mutual self-interest. See id. at 216-17. Lomasky, by contrast, predicates rights, understood in terms of moral constraints, on an evolutionary process by which mutual advantage in compliance is recognized; or at least becomes dominant, among
forms of rational choice and game theory, as well as strains within neoclassical economic theory of the firm, neo-Hobbesians predict cooperation on the basis that persons cultivate and communicate cooperative dispositions. One implication is that moral constraints are sustainable as practices to the extent that they serve self-interest. Another is that practices should be interpreted by reference to this framework.

Third, neo-Hobbesians argue that moral constraints, founded in rational self-interest, serve as a basis or framework from which and within which persons come both to value these constrains as goods and to value participation with others in instrumental activity. There are a number of interrelated thoughts here. Persons engage in purposive or instrumental activity because they value the ends served by that activity, but value, as well, the activity; the activity of striving is essential to human fulfillment, but fulfillment requires instrumentalism. Persons comply with rational constraints—those that maximize their expected payoffs given the expected actions of others—but come to intrinsically

persons who are partially empathetic or altruistic. LOMASKY, supra note 46, at 62-83. Lomasky's Hobbesianism is therefore moderated by a Humean device. Narveson generally follows Gauthier's rational choice/contract approach, but finds both Gauthier's minimax relative concession criterion and his distinction between moral constraint and rights unnecessary. NARVESON, supra note 129, at 187-97. Binmore rejects both minimax relative concession and Gauthier's reliance upon disposition as a basis for non-defection in the one-shot prisoner's dilemma. BINMORE, PLAYING FAIR, supra note 89, at 78-84, 179-87. He nevertheless suggests a social contract (set of ethical conventions) predicated on "enlightened self-interest" and "reciprocity." See BINMORE, PLAYING FAIR, supra note 89, at 1-92. For present purposes, these differences are unimportant. The principal "Hobbesian" point is that cooperation, including non-defection for self-interested reasons, has its source in self-interest and is sustained by self-interest.

134. GAUTHIER, supra note 123, at 165-89; LOMASKY, supra note 46, at 70-71, 244-45. The argument here is distinct both from an arguments from strategy (such as tit for tat) in repeated play, see ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984), and from arguments from reputation. See DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELING 65-87 (1990); David M. Kreps, Corporate Culture and Economic Theory, supra note 89. The notion, at least in Gauthier and perhaps in Lomasky, is one of the disposition, rather than calculation. Cf. NOZICK, RATIONALITY, supra note 89, at 50-59 (relying upon evidential decision theory and symbolic utility—utility from conformity to a person's view of the kind of person he wishes to be—to generate cooperation). But see BINMORE, PLAYING FAIR, supra note 89, at 173-256 (rejecting dispositional theories as solutions to prisoner's dilemma).

value constraints having this instrumental character; persons cooperate with others in search of their individual ends, but come to value intrinsically this cooperation. To the extent that neoclassical economic analysis may be deemed a branch of Hobbesian thought, it typically ignores (and perhaps rejects) this notion of valued constraint. Consider the matter of the constraint of the norm of promise keeping. For the legal economist, the matter of keeping, or not, a promise entails a rational cost/benefit calculation in which performance or breach are purely instrumental. For Hobbesians entertaining a valued constraint hypothesis, performance itself may be valued, and may be weighed as such in this cost/benefit calculation.

4. Some General Distinctions

Three initial questions arise from this summary of distinct positions with a “liberal” camp: (1) what are the principal distinctions between the positions, (2) what are the distinctions between these positions and neoclassical economic analysis, and (3) what are the implications of the positions for a contractual conception of the firm.

It would seem reasonably clear that the positions, if employed by a classical liberal, have in common commitments to a private sphere immunized from requirements of public justification, and, therefore, commitments to a neutral and confined version of the state that precludes “state perfectionism” (endorsement by or pursuit of a good by the state). On a classical interpretation of each, all define this sphere at least in part in terms of several property rights and all reject redistributionist notions, including those founded on positive liberty as affording equal means to satisfaction of individual ends. Moreover, each would seem to support some version of a classical contract theory, one deeming contract (and legal enforcement of contract) justified by the “freedom” of the individual to pursue his autonomously chosen or socially given ends and, therefore, one predicated upon some version of consent.137

137. For contractual theories predicated on freedom and consent, see, e.g., CHARLES FRIED, CONTRACT AS PROMISE (1981); Randy E. Barnett, A Consent Theory of Contract, supra note 73. Fried’s theory relies upon Kantian autonomy, FRIED, supra at 9-17. Barnett’s relies heavily upon Hayek. Barnett, The Sounds of Silence, supra note 73. This leads to distinct conceptions of consent, reflected in the distinction between subjective and objective views of contract. Craswell, Philosophy of Promising, supra note 73, at 524-25. Kantian autonomy would seem to require “true” subjective consent and to justify, at least on some variations of positive liberty, substantial judicial control of the conditions under which contract was formed. Cf: MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (1993) (generally presenting a balanced account of contract, linking issues of meaning and scope of
Nevertheless, there are important distinctions between the positions. The Kantian view implies, at least as an ideal, detached capacity for evaluation both of available ends or goods and of the social arrangements within which these are pursued. Rationality is on this view a matter of this evaluation. An implication of this non-instrumental view of (ideal) human reasoning is a non-consequentialist view of ethics; the moral is not a function of consequences, so adherence to the moral is required even though it may generate undesirable consequences. The Hobbesian, by contrast, either denies or de-emphasizes detached evaluation of ends, asserting in its place self-interest as partiality to given ends or goods. Rationality, for the Hobbesian, is the instrumental rationality of achieving given ends at least cost, including by means of reciprocal constraint on this activity. An implication of this instrumental view of reasoning, evident in utilitarianism and in economics, is a consequentialist view of ethics; that which is "moral" is to be judged by its consequences. The Humean view shares, in degree, the Hobbesian's partiality postulate, rejecting the Kantian's detached rationality about ends. However, the Humean denies the completeness of this postulate. Instead, partiality is constrained by moral obligation, and although the substantive content of obligation may have its origin in self-interest and mutual advantage, obligation is conventional and the sense or sentiment of obligation is partially founded in empathy, not rational calculation.

138. For Hume, reason is the servant of "passion." HUME, A TREATISE OF HUMAN NATURE, supra note 105, at 413-18. Hayek may be viewed as rejecting the notion of human nature in favor of cultural determinism. KUKATHAS, supra note 100, at 90-91, 128. However, it is reasonably clear that for Hayek, man is a partially purposeful creature, that purposes are diverse and that value, at the margin, is subjective. What distinguishes Hayek is that these matters are treated in terms of dispersed "knowledge" or information. Hayek, Individualism: True and False, supra note 110, at 13-14; Hayek, The Use of Knowledge in Society, supra note 126, at 77-78. Of course, if dispersed knowledge includes knowledge of individually held purposes, this distinction breaks down. Cf. Bianchi, supra note 111, at 240 (noting that cooperation problems entail conflicts of interest that cannot be reduced to problem of dispersed knowledge).

139. HUME, TREATISE OF HUMAN NATURE, supra note 105, at 484-501. See Hayek, Individualism: True and False, supra note 110, at 13-14 (rejecting narrow egoism). Whether there is a real distinction between Humeans and Hobbesians on this point is problematic. Compare GAUTHIER, supra note 123, at 236-38, 308-09 (making the distinction), with LOMASKY, supra note 46 at 62-79 (deriving rights in part from an appeal to empathy). See BUCHANAN, WHAT SHOULD ECONOMISTS DO?, supra note 96, at 52-63 (arguing in favor of subjectivism and questioning homo economicus). Indeed, the theorists here identified, roughly,
Moreover, the Humean denies that human behavior may be explained by instrumental rationality understood in terms of calculational efficacy.\(^\text{140}\) Persons, according to the Humean, act purposefully,\(^\text{141}\) but often incompetently; social conventions in the strong sense of institutional patterns having causal efficacy\(^\text{142}\) serve as sources of ends or goods,\(^\text{143}\) as structures defining that which is instrumentally intelli-
ble and as moderators of incompetence given an imperfect human tendency to calculational efficacy.\textsuperscript{144} The Humean tendency to explain norms or social rules as instrumental but to view persons as followers of these rules implies traditionalist ethics: the Humean, albeit a consequentialist of sorts, rejects fine tuned consequentialist assessments and therefore opts for the morality implicit in or revealed by convention.

Humeans and Hobbesians may therefore be said to be committed to distinct conceptions of contractarianism. Hobbesians explain human behavior, moral norms, and institutional patterns in terms of contract, as products of rational exchange, and favor contract as the formal legal (state-enforced) means of human interaction. Humeans explain behavior, norms, and institutions as conventions, or products of evolutionary processes that tend to generate order of a classically liberal variety, not as rational bargains, but also favor contract as the occasion for state enforced interaction. There is, perhaps, a more radical distinction. Reliance upon socially generated norms for purposes of ensuring social order may be viewed as an alternative to state enforced contract. Humeans favor the norm alternative; Hobbesians tend to favor the contractual one. The Hobbesian tendency, when pushed, generates a form of legal centrality: human relationships are reconceived in contractual terms and the state is assumed to have a central role in formulating and enforcing these terms.

Still, the matters distinguishing Humean and Hobbesian positions are less severe than those separating them from the Kantian position. They share a rejection of Kantian detachment and a commitment to the notion that morality, and certainly law,\textsuperscript{145} must be predicated on a recognition

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\textsuperscript{144} For Hayek, rationality is itself a social phenomenon, not a property of the individual; reason is an interpersonal process, not one articulated (as through politics), but revealed in action and introspection. See Hayek, \textit{Individualism: True and False}, supra note 110, at 8-9, 15.

\textsuperscript{145} There are, however, a number of complexities to the point. First, Hobbesian theorists tend to derive "morality" and "basic moral rights" from a prudential, contractual framework within which partiality to one's ends is basic, but to indicate that legal (or political) instantiations will vary with cultural context. See Gauthier, \textit{supra} note 123, at 340-42; Lomasky, \textit{supra} note 46, at 103-05. A separation of law and morality is a potential interpretation. Second, Humeans may be viewed as distinguishing law from morality by treating "justice" as predicated solely upon partiality (interest) and morality as arising from empathy or sympathy. See Gauthier, \textit{supra} note 123, at 308-09 (so viewing Hume). \textit{Cf.}
of individual partiality to diverse ends, and therefore a conception of law as *modus vivendi*, that is, as a prudential means to ensuring peace.\(^{146}\) If one is to make judgments about or claims on others in moral terms, morality must be an intersubjective phenomenon, but it is not for Humeans and Hobbesians, as it is in Kant, an objective obligation independent of ends or independent of its instrumental efficacy in achieving desired ends. Agreement about the dictates of morality, therefore, largely rests for Humeans and Hobbesians upon intersubjective appreciation of the utility or prudential usefulness of moral dictates, upon habitual compliance with conventions originating in such utility and, in Hume, upon sympathy as limited vicarious pleasure from the welfare of others.\(^{147}\)

Rejection of Kantian detachment implies that Humean and Hobbesian positions are compatible with the communitarian notion that persons are socially constructed in the sense, at least, that purposes, projects or ends are largely given. Insistence upon partiality nevertheless places limits on sustainable social institutions under both positions. Moreover, the distinctions between the Humean's emphasis upon rule or norm governed behavior and the Hobbesian's emphasis upon rational calculation can be exaggerated. The neo-Hobbesian notion that persons

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LOMASKY, *supra* note 46, at 228-54 (distinguishing basic rights from morality). Hayek's version of liberal neutrality (abstract general rules) has its source in his "dispersed knowledge" conception of partiality (and skeptical view of the capacity of authority to discover a common substantive good), but neutral law for him is a matter of deriving it from an evolved social practice interpreted as neutral and facilitative. If law is derivative, the distinction between law and morality is unclear. On the other hand, if the social practice to be legally enforced must be of a particular type, the distinction may reappear. FRIEDRICH A. VON HAYEK, *The Mirage of Social Justice*, in Vol. II LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LEGAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 56-78 (1976) [hereinafter Hayek, *The Mirage of Social Justice*]. For overviews of Hayek's theories of law consult Norman P. Barry, *The Road to Freedom, Hayek's Social and Economic Philosophy, in HAYEK, CO-ORDINATION AND EVOLUTION: HIS LEGACY IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS* (Jack Birner & Rudy van Zijp eds., 1994); GRAY, *supra* note 108, at 56-78; Symposium, 23 SW. U. L. REV. 425 (1994). Third, nevertheless, the Humean and Hobbesian theories under consideration seem clearly to contemplate a neutral state (one precluded from endorsing a good) not because such a state reflects an ideal of detached evaluation, but because partiality (or partiality as ignorance) demands it.

146. LARMORE, *supra* note 54, at 70-77 most clearly expresses the *modus vivendi* view, but it is a notion consistent with Hayek, KUKATHAS, *supra* note 100, at 225-27, and with the thrust of the Hobbesian analysis. Cf. COLEMAN, RISKS AND WRONGS, *supra* note 73, at 65-72 (markets serve function of enabling stability given diverse conceptions of good, are, contra Gauthier, a form of cooperation, and this commitment to stability is Humean, rather than Hobbesian or Kantian).

come to value the rules or norms that constrain instrumental action at least suggests that norm compliance need not entail continuous rational calculation in each instance of such compliance. The neo-Hobbesian effort is to explain norms, rules and rights in terms of rational calculation, not necessarily human acts of compliance in these terms. Persons on such an account of norms, may behave "as if" rational, even when they are subjectively non-calculating.148

What distinguishes neoclassical economic analysis from these positions? It should be apparent that the Humean and Hobbesian rejection of Kantian detachment is reflected in the legal economists' assumption of exogenous preference. Neoclassical analysis assumes individually held ends or goods (without inquiring into their legitimacy or source) and analyzes the instrumental pursuit of these ends on the further assumptions of partiality (self-interest) and calculational efficacy (compliance with the formal requirements of rational choice).149 The Humean, but not the Hobbesian, will assert partial objections to these features of the economist's analysis: assumptions about calculational efficacy are for the Humean in doubt, and, while partiality may be assumed, the economist's specification of that which individuals seek, made in service of prediction, violates the Humean's commitment to subjectivity.150 The Humean is skeptical about calculational efficacy,

148. GAUTHIER, supra note 123, at 326-29; LOMASKY, supra note 46, at 72-74; NARVESON, supra note 129, at 144-45.

At a general level, the Austrians (and other economists, such as James Buchanan influenced by them) claim that value (and therefore opportunity cost) is a matter of the evaluation by persons in particular contexts, a calculation inaccessible to observers. See, e.g.,
Buchanan, *LSE Cost Theory In Retrospect*, in *LSE ESSAYS ON COST*, supra note 126; E. C. Pasour, Jr., *Cost and Choice, Austrian vs. Conventional Views*, in *AUSTRIAN ECONOMICS, A READER*, supra at 281-303. This does not preclude inter-subjective recognition of a good as a good; rather it precludes observer specification of the particular value of a recognized good relative to other goods and to particular persons in particular contexts. See Richard Ebeling, *Toward a Hermeneutical Economics: Expectations, Prices and the Role of Interpretation in a Theory of the Market Process*, in *SUBJECTIVISM INTELLIGIBILITY AND ECONOMIC UNDERSTANDING* 39, 46-52 (Israel Kirzner ed., 1986). Cf. GAUTHIER, supra note 123, at 53-55 (making similar argument). It should be noted that there is a debate within Austrian circles about the degree of subjectivism that should be assumed, particularly in the context of uncertainty about the future and therefore about the possibility of coordination. See, e.g., Norman Barry, *Commentary, in AUSTRIAN ECONOMICS, PERSPECTIVES ON THE PAST AND PROSPECTS FOR THE FUTURE* 45, 51-52 (Richard M. Eberling ed., 1991). It should also be noticed that there is an ambiguity in the notion of subjective value. It may refer to the inability of an observer to detect the valuation of another (the problem of observer knowledge), in which event it is abstractly possible that valuations will be identical among persons even though they cannot be observed. It may refer to the particular chooser’s lack of complete knowledge (the problem of chooser knowledge), in which event it is abstractly possible that there is a common valuation given complete information, even though this complete information cannot be observed. It may refer to the (asserted) difference between choosers, such that it is claimed that, given that choosers possess equivalent and full information, they would still (or potentially still) make distinct choices. The first of these possibilities expresses skepticism about prediction and control, the second skepticism about perfect information assumptions and the third a claim about the distinctiveness of individual persons. All three appear present in Austrian thought.

An Austrian claim is that neoclassical analysis assumes objectivity. *See e.g.*, Roy E. Cardato, Welfare Economics and Externalities in an Open Ended Universe, A Modern Austrian Perspective 4-10 (1992) [hereinafter CARDATO, WELFARE ECONOMICS]; Garrestson, The Relevance of Hayek for Mainstream Economics, supra note 126, at 94-108; S. C. Littlechild, The Problems of Social Cost, in *NEW DIRECTIONS IN AUSTRIAN ECONOMICS* 77-93 (Louis Spadaro ed., 1978). This claim may seem odd, as economists within a neoclassical tradition also claim that their theories rest at least aspirationally on an approximation of subjective choice. *See, e.g.*, POSNER, ECONOMIC ANALYSIS OF LAW, supra note 70, at 12-16. The Austrian claim may be understood in a number of ways. First, the claim may be that, to the extent neoclassical analysis (and particularly welfare economics) specifies a welfare function, it is expressly objective, and this objective measure is unrelated to “utility” (understood as satisfaction). This seems clearly to be the case: wealth, if specified as the objective, is specified to avoid the problem of interpersonal comparison of utilities. Lawson, supra note 81, at 92-96; Coleman, Markets, Morals and the Law, supra note 78, at 105-11. Cf. David Charny, Hypothetical Bargains: The Normative Structure of Contract Interpretation, 89 Mich. L. Rev. 1815, 1843-44 (1991) (noting that the taboo on interpersonal comparison is violated in assumptions about uniformity of transactors in hypothetical contract) [hereinafter Charny, Hypothetical Bargains]. This objective measure is undertaken so as to enable the welfare analysis, so this Austrian complaint would then seem to be either that wealth is a poor proxy for utility; cf. Herbert Hovenkamp, Positivism in Law and Economics, 78 Cal. L. Rev. 815 (1990) (making a diminishing marginal utility variation on this claim). See Israel M. Kirzner, Another Look at the Subjectivism of Costs, in *SUBJECTIVISM, INTELLIGIBILITY AND ECONOMIC UNDERSTANDING*, supra at 140, 148-51 [hereinafter Kirzner, Another Look].

Second, the Austrian claim may be understood in terms of the incompleteness or inadequacy of the neoclassical analyst’s information. This problem is partially recognized by
mainstream legal economists in their preference for voluntary (pareto superior) allocations over directed allocations. Posner, Economic Analysis of Law, supra note 70, at 15. The Austrian variation is to challenge equilibrium prices as an adequate reference. Consider this neoclassical argument: given a perfect competitive equilibrium, the opportunity cost of a commodity is the same for all consumers—the market price (dollars that must be given up for the commodity). One Austrian response to this reasoning is that the utilities given up are not the same as the dollars given up. Kirzner, Another Look, supra at 150-151. Another is to question equilibrium, as the Austrian view is that, while there is a tendency to equilibrium (a point denied by sufficiently radical subjectivists), it is not a state of the real world. If equilibrium is not a real state, prices are information, but not objective information, as they are incomplete reflections of a constantly changing state of affairs. See Cardato, Welfare Economics, supra at 95-99 (criticizing Coasian property rights analysis and mainstream economic analysis of law generally for reliance on assumption that market prices reflect all relevant information). A further implication is that competitive equilibrium is not a benchmark or criterion for assessment of real world phenomena, or a state to be mimicked. If the real world is one of constant change, a static equilibrium state is not one that can or should be directed. See, e.g., Gerald P. O'Driscoll & Mario J. Rizzo, The Economics of Time and Ignorance 22-27, 140-42 (1985).

Third, the Austrian claim may be understood as one about the fictitious character of social cost: one cannot contemplate efficiency as a state of equalizing all cost and benefit (or of internalizing the social cost, or cost to others, of one's activity) because there is no "one" available for engaging in this activity. That is, if cost is subjective, and if there is no group mind, then there cannot be such a thing as a social cost. See, e.g., Buchanan, Cost and Choice, supra note 123, at 70-74; Kirzner, Another Look, supra at 151-55. There is another way of putting this point. In Coasian terms, externalities generate inefficiency only in the presence of transaction costs, so the notion of externality and the notion of transaction costs become equated. See Ronald Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). Neoclassical analysis of law recommends rules or allocations that conform to a hypothetical state of affairs, one without transaction costs. The Austrian claim is that this hypothetical state of affairs is illegitimate because it requires a fictional, objective estimate. Kirzner, Another Look, supra at 152-55. An implication is that "efficiency" is not a state independent of transaction costs. For example, a decision not to bribe a polluter where the neighbor values use of the air more than the polluter but transaction costs preclude exchange cannot be said to be inefficient because there is no one who can say that in fact the neighbor values use of the air more than the polluter in the absence of an actual exchange. See Coleman, Markets, Morals and the Law, supra note 78, at 135-50 (discussing Buchanan); Carl Dahlman, The Problem of Externality in the Theory of Market Failure, A Critical Examination 209 (Taylor Cowen ed., 1988) (externalities imply no welfare problem where transaction costs recognized as constraints).

Notice, however, that this claim is implausible to the extent that it is interpreted as denying the existence of externality; surely actor X's activity may impose costs on actor Y as Y perceives them, even if they can impose no "social cost" as a fictive social mind would perceive them. A more plausible interpretation is this: It can be granted that Y experiences a subjective cost from X's activity, but it is not possible to adjudicate the conflict between X and Y by reference to an authoritative estimate and comparison of the benefit to X of the activity and the cost to Y of the activity. This conclusion would seem to preclude most of neoclassical economic analysis of law. But see Dahlman, supra at 231-32 (Coasian analysis permits comparative institutional assessment). However, it also presents a problem for the Austrian economist. The Austrian can say that the conflict can be "efficiently" resolved by agreement between X and Y (because the Austrian defines efficiency as voluntary agreement—i.e., as plan coordination), but agreement requires assumed allocation of initial
but even more skeptical about the economist's "scientism" and "constructivism." The Humean is therefore a traditionalist because, he claims, the economist lacks the "information" necessary to her analysis and because, he further claims, the analysis misrepresents, through oversimplification, the complexities of human interaction. The neo-Hobbesian, however, may also be a traditionalist: if norms (and sustainable legal arrangements) have their origins in rational bargaining, they are both entitled to respect on this basis and potentially forces structuring what is conceivable to persons who do not directly perceive

rights (to engage or not in X's activity). However, the Austrian's subjectivism apparently precludes him from saying anything (at least in terms of efficiency) about this allocation. See CARDATO, WELFARE ECONOMICS, supra at 99 (an "ethical approach," rather than efficiency, must be invoked to allocate rights); cf. POSNER, PROBLEMS OF JURISPRUDENCE, supra note 8, at 442-53 (traditionalism, including Hayek's, provides no basis for critique of practice); COLEMAN, MARKETS, MORALS AND THE LAW, supra note 78, at 145-50 (Buchanan's subjectivist realism precludes social choice unless these assumptions are relaxed); KIRZNER, THE MEANING OF MARKET PROCESS, supra note 141, at 186-88 (Hayekian critique of welfare economics generates Panglossian risks).

It should be noticed, however, that this self-disabling does not necessarily preclude the Austrian from saying something political or moral. Austrians tend to think they can say something about institutional structure (as distinguished from hypothetical exchange or allocation within structure). Specifically, they favor institutional structures of fully specified property rights and voluntary exchange, arguing that such structures serve plan coordination as a normative commitment. See, e.g., CARDATO, WELFARE ECONOMICS, supra at 99-108; KIRZNER, MEANING OF MARKET PROCESS, supra note 141, at 189-92, 209-276. But see Lawson, supra note 81, at 96-97 (questioning whether this criterion can survive radical subjectivist critique). Similarly, Austrian "conservatism" or "traditionalism"—the tendency to favor adherence to evolved custom or convention even where such adherence may not be "wealth maximizing" in particular circumstances from a neoclassical perspective—may be explained as a solution to the problem of the disabling implications of subjectivism. Social norms, because not rationalistically directed (e.g., not consciously designed to serve the end of maximizing social wealth) are not products of an "objectivist" error. Given an evolutionary hypothesis to the effect that norms serving coordination will win out in cultural competition, see HAYEK, FATAL CONCEIT, supra note 121, a species of indirect utilitarianism is implied. See, e.g., Gerald P. O'Driscoll, Sr. & Mario S. Rizzo, Subjectivism, Uncertainty and Rules, in SUBJECTIVISM, INTELLIGIBILITY AND ECONOMIC UNDERSTANDING, supra at 252-67.

151. See supra note 150. The Humean is also skeptical about the Hobbesian's "constructivism," as the Humean views society as an historical artifact, not as a contractual design. See HAYEK, Rules and Order, supra note 105, at 9-10 (Hobbes criticized as rationalist); HAYEK, FATAL CONCEIT, supra note 121, at 12 (Hobbes wrong in postulating pre-social man). Hume, of course, attacked Hobbes on the ground that the "social contract" assumed a social practice of contracting. HUME, PRINCIPLES OF MORALS, supra note 108, at 151. This Humean hostility to "constructivism" is reciprocated. See POSNER, PROBLEMS OF JURISPRUDENCE, supra note 8, at 433-53 (attacking "Neotraditionalism"). For an interesting account of the distinction between the Neoclassical and Hayekian positions, see David Charny, Illusions of a Spontaneous Order: "Norms" in Contractual Relationships, 144 U. PA. L. REV. 1841 (1996).
this instrumental rationality.\textsuperscript{152}

Humean, and perhaps neo-Hobbesian traditionalism is in substantial tension with the economist's insistence upon depicting behavior in terms of rational calculation. Consider this point in terms of the threat posed by game theory, or, at least, that aspect of game theory that depicts human behavior in terms of variations on the prisoner's dilemma, to neoclassical contract: pure rationality may preclude contract, or result in inefficient contract, and particular bargaining results (or equilibria) cannot therefore be predicted. Humeans and neo-Hobbesians may be viewed as addressing (or anticipating) this problem; Humeans by injecting empathy and uncalculating, norm-governed behavior, neo-Hobbesians by redefining rationality.\textsuperscript{153} Both measures may be characterized as rendering arms-length, mutually beneficial contract dependent upon a background condition of expected compliance with norms that constrain rational pursuit of narrowly construed self-interested ends.

It is true that the economist shares Humean and Hobbesian commitments to the "fact" of individual partiality to the particular end or good individually held, so she shares the notion, contrary to utilitarian moral hopes, that individuals are motivated by this partiality. But the economist remains also committed to maximizing a common, at least formally measurable end; individual motivation is to be manipulated (through incentives) to achieve this end.\textsuperscript{154} It is also true that the economist, like the Humean and the Hobbesian, has no substantive conception of a common good, but the economist nevertheless seeks to maximize, through a common impersonal and impartial standard, the

\textsuperscript{152} See, e.g., GAUTHIER, supra note 123, at 330-55. Moreover, it is at least questionable whether Hobbes shared the Hobbesian's faith in human rationality. See Micheal Oakeshott, \emph{Introduction} to THOMAS HOBBES, LEVIATHAN vii (Oxford 1948).

\textsuperscript{153} See supra note 89.

\textsuperscript{154} For examples of this characterization of utilitarianism, see, e.g., GAUTHIER, supra note 123, at 7, 52, 341; LARMORE, supra note 54, at 49-50, LOMASKY, supra note 46, at 53-54. For Hayek's similar characterization and critique of utilitarianism see HAYEK, \emph{Mirage of Social Justice}, supra note 145, at 17-23.

Judge Posner (then Professor Posner) sought to distinguish utilitarianism and wealth maximization in RICHARD POSNER, \emph{THE ECONOMICS OF JUSTICE} 48-87 (1981). The major ground for such a distinction is that wealth maximization adopts a species of subjectivism: it is cautious about pronouncements about value (and utility) and thus tends to rely on revealed preference in markets. See \emph{id.} at 79-84. Nevertheless, these pronouncements are permitted in cases of "market failure." \emph{Id.} at 79. And revealed preference in markets remains a means to an end, that of serving "wealth" as a common denominator. See POSNER, \emph{PROBLEMS OF JURISPRUDENCE}, supra note 8, at 370-77 (wealth maximization as organic concept).
sum of individually held goods. What distinguishes Humeans, and perhaps neo-Hobbesians, is in part their insistence that (a type of) "morality" is a meaningful category. The type in question, "coordination" of diverse and partially held ends, has consequentionalist elements, but it is not a notion captured by "scientific" maximization of a common quantity, for it entails a commitment to, as well as description of persons both as individuated project pursuers and as "honorable" cooperators—beings who comply with norms necessary to the mutually advantageous coordination and cooperation of individuated project pursuers. The economist, by contrast, tends to deny that morality, at least for purposes of predictive analysis, is a meaningful category. What tends also to distinguish Humeans is their denial that maximization of a common quantity is an epistemic possibility.

155. The standard, in classical utilitarianism, is weighted by intensity of feeling "happiness." The standard, under wealth maximization, is weighted by the willingness and ability to pay. POSNER, ECONOMIC ANALYSIS OF LAW, supra note 70, at 12-16. The distinction between these quantified standards and the "coordination" criterion employed by Humeans (particularly Hayek) might be interpreted as one between a mutual advantage theory and a "interpersonal additive welfarism." RUSSELL HARDIN, MAGIC ON THE FRONTIER: THE NORM OF EFFICIENCY, 1987, 1990-98 (1996). If so, the Humean's normative commitment to "coordination" can be understood as one to the institution of contract, but there remains the problem that this criterion says little about initial allocations. See supra note 150.

156. GAUTHIER, supra note 123, at 5-7; LOMASKY, supra note 46, at 19-34.

157. See HAYEK, Mirage of Social Justice, supra note 145, at 17-23 (noting that utilitarianism, which is understood as explicit effort at social level to achieve just end state, was criticized on ground of lack of sufficient knowledge). However, Hayek was a consequentalist of sorts. See id. at 17 (approving of "means utility," or functionalism). He has been characterized as an indirect utilitarian. GRAY, HAYEK ON LIBERTY, supra note 108, at 58-61 (Hume and Hayek as indirect utilitarians). More specifically, Hayek's conservative traditionalism was founded on the notion that spontaneously generated and evolved social rules would serve the objective of coordination of diverse individual "plans." Such rules are therefore respected for the consequentalist reason that they serve the end of coordination, and this consequentism is distinguished from Benthamite utilitarianism by the absence of an effort to achieve a precise, measurable end and a refusal to subject such rules to a criterion of justification having such precise, measurable (rationalistic) features. The difficulties, however, are that (1) it is not clear why traditionalism should be expected to yield liberal norms, e.g., GRAY, LIBERALISMS, supra note 46, at 95; and (2) it is not clear how Hayek's anti-rationalism can be reconciled with any form of consequentialism. KUKATHAS, supra note 100, at 191-201; cf. POSNER, PROBLEMS OF JURISPRUDENCE, supra note 8, at 433-53 (Hayekian traditionalism provides no leverage for criticizing practice). On the other hand, perhaps there is a basis for reconciliation, albeit a messy one: Hayek may be viewed, given that he is committed to a set of classically liberal normative criteria, as proposing "modesty" or an anti-hubristic "rationalism," in the sense that he advocates a set of institutional arrangements thought to have desirable (consequentialist) tendencies but denies that any form of precise prediction concerning welfare as satisfaction is possible. Judge Posner argues that such an approach is "a mood rather than a method of analysis." Id. at 443. Perhaps, but the Hayekian
What does all this imply for corporate law? Perhaps nothing. In the first place, the Kantian, Humean, and Hobbesian variations on a classically liberal theme are too abstract and general to warrant a claim that particular recommendations follow from them, and the themes of "constructivist rationalism" places in question "methods of analysis."

It may be questioned whether the distinction between the economist's common denominator and the classical liberal's coordination criterion is sustainable. See supra notes 135, 155. Maximizing coordination may mean maximizing civil peace or maximizing the channels for successful pursuit of individually held projects or maximizing knowledge, etcetera. For the classical liberal, the means by which this maximization is to occur is an institutional structure entailing (1) a set of negative rights conferring moral space for pursuit of individually held ends; (2) a contractarian structure enabling exchange as a means to these ends; and (3) a formal equality of rights and of access to this structure. Are these not, however, also typically the features recommended by the legal economist as means to the end of welfare? And are the justifications for both the classical liberal's and the economist's recommendations not instrumental and consequentialist? A possible basis for distinguishing the economist's and the liberal's consequentialist is that the former supports the argument that the recommended institutional structure is contingent upon its efficacy in promoting welfare, whereas the latter's consequentialist argument is not necessary to his commitment to that structure; the liberal has necessitarian arguments (e.g., that the structure is compelled by the nature of man or by the realities of the human condition) as well as consequentialist ones. This distinction, however, understates the commitment of both positions to the consequentialist argument; neither is likely to be convinced that the structure fails to generate predicted consequences. A second possible basis for distinction is that the liberal's consequentialism tends to take an indirect or rule utilitarian form and the economist's an act utilitarian form: the liberal (especially the Humean one) treats the structure as in some long term sense yielding maximization; the economist is more inclined to a case by case assessment of maximization. Apart from the proposition that the liberal's commitments to the structure are independent of the consequential arguments employed to support it, this second distinction would explain the liberal's insistence upon the inviolability of negative rights and the economist's (and utilitarian's) insistence upon continuously dispensing with or redefining them in service of maximization.

Even given these distinctions, however, is that which is to be maximized in the two positions distinct? Perhaps not: maximizing chances for successful pursuit of projects might be understood as maximizing prospects for allocating to highest valued use, where "chances" and "prospects" are understood in rule or indirect utilitarian senses. On the other hand, maximizing utility in a strict sense is maximizing the sum of human satisfaction, and the economist's devotion to welfare may be understood in this strict sense as ultimately dependent upon satisfaction as the common denominator. This may be so even though wealth is formally independent of satisfaction and therefore not subject to objection from the problem of interpersonal comparison; wealth appears to be employed in economic analysis as a (problematic) proxy for satisfaction. The distinction may therefore be that coordination is independent of satisfaction in the sense that it is a value in itself, not a proxy for satisfaction. If so, the liberal's conception of human flourishing is one of maximized chances for successful pursuit as such, not as a means to happiness. Cf. Hayek, Mirage of Social Justice, supra note 115, at 23 (our ignorance precludes utilitarian project of maximizing pleasure).

158. See Gauthier, supra note 123, at 342 (noting that his theory does not consider concrete questions of "political procedure and institutional design"); Lomasky, supra note 46, at 107 (particular instantiations of basic rights will vary with community). Cf. Posner, Problems of Jurisprudence, supra note 8, at 55 (complaining that "autonomy" theorists...
within even one of these variations may point in distinct directions. Consider the Humean variation. Humean traditionalism would seem generally to suggest a derivative conception of law, one in which legal norms are derived from social ones.\textsuperscript{159} It also suggests, however, a separation of the legal and the social, such that a "neutral" legal formalism would characterize the former and an evolving social morality the latter.\textsuperscript{160} If a coordination criterion is employed, so that only those norms tending to yield coordination of individual plans become candidates for incorporation into law,\textsuperscript{161} it remains necessary both to supply some content for the coordination norm and to reconcile this consequentialism with traditionalism. Moreover, Humean traditionalism faces a substantial difficulty when it confronts a society of heterogenous traditions. A contractarian tradition is a potential response to heterogeneity, but it is also a tradition in competition with other traditions.\textsuperscript{162}

\textsuperscript{159} See HAYEK, Rules and Order, supra note 105, at 85-88, 94-123.

\textsuperscript{160} See HUME, PRINCIPLES OF MORALS, supra note 108, Appendix III. For Hayek, proper law is neutral and formal in the senses that (1) it has no end or purpose independent of the expectations of those subject to it, (2) it establishes a protected domain for the individual, and (3) this domain is established by the predictability of law (it "falls out" of the "rules"). See HAYEK, THE CONSTITUTION OF LIBERTY, supra note 110, at 142, 207-09. On the other hand, he (later, under the influence of Bruno Leoni) treats these features as arising out of the situational logic and traditionalism of common law method. HAYEK, Rules and Order, supra note 105, at 94-123. See BRUNO LEONI, FREEDOM AND THE LAW 58-94 (3d ed., 1991). For criticisms of the resulting tensions see GRAY, HAYEK ON LIBERTY, supra note 108, at 61-71, GRAY, LIBERALISMS, supra note 46, at 89-102, KUKATHAS, supra note 100, at 148-65.

\textsuperscript{161} 161. HAYEK, Rules and Order, supra note 105, at 119. See Robert D. Cooter, Decentralized Law for a Complex Economy, 23 SW. U. L. REV. 443 (1994) (selection of efficient norms for incorporation into law) [hereinafter Cooter, Decentralized Law].

\textsuperscript{162} See GRAY, LIBERALISMS, supra note 46, at 99 (noting that Oakeshott, unlike Hayek, recognizes competing "constructivist" tradition). It is often thought that this problem of competing traditions obviates liberal neutrality. Cf. MACEDO, LIBERAL VIRTUES, supra note 104, at 260-77 (liberalism is non-neutral). To the extent, however, that traditions in competition with liberalism advocate non-neutrality (as in the case of communitarian insistence upon state selection and enforcement of goods), it is not surprising that liberalism is "non-neutral" about neutrality; nor is this species of non-neutrality a telling threat to liberal neutrality. Potentially more telling is the problem of adjudicating clashes between liberal rights; it is then difficult to see how these adjudications can be made without some evaluation of the competing ends for which the competing "rights" were exercised. See GRAY, LIBERALISMS, supra note 46, at 140-60. Hayek's solution resembles neoclassical accounts of default terms in contract: Once a term is established, known, and predictable, it is possible to plan one's activities so as to conform to or circumvent it (as though pricing). Neutrality "falls out" of formalism. An objection is that this fails adequately to preserve "freedom," but this objection may ignore the minimalist version of (property) rights contemplated. If rights in the Hohfeldian sense of the enforceable obligations of others are minimized, liberty, in the Hohfeldian sense of privilege may be maximized. DE JASONY, supra note 99, at 33-51.
There is a further problem: the corporation, for the "Humeans" considered here, is not typically viewed as a "spontaneous order." Rather it is viewed as a "directed order," one characterized not by spontaneous coordination of diverse purposes, but by subordination of diverse actors to particular (albeit instrumental) purposes through rational planning.163

Consider also the neo-Hobbesian variation. It is possible to rule out on Hobbesian premises a corporate law predicated on pure altruism; if morality is grounded in self-interest understood as partiality to individually held ends, legal and nonlegal corporate norms must be explicable by reference to and are sustainable only if consistent with a species of cooperative self-interest, even where they become themselves valued. There is, however, no dearth of "Hobbesian" justifications for communitarian corporate norms. A significant strand of corporate communitarian thought justifies its proposals for (mandatory) legal norms on the basis that they rationally serve mutual (long-term) interests.164 So Hobbesian premises may not yield unique conclusions.

Nevertheless, it is the contention here that Humean and Hobbesian themes can serve as explanations of diverse contractarian positions within corporate law debates.165 In the first place, it is possible to view them as informing mainstream neoclassical analysis of the firm, despite the tension between the formally collectivist commitments of the neoclassical apparatus and the individualistic commitments of classical liberalism. From a neoclassical economic point of view, the individualistic commitments of classical liberalism justify contract (as by grounding it in a

163. HAYEK, Rules and Order, supra note 105, at 48-52. Cf. HAYEK, Political Order of a Free People, supra note 118, at 89-90 ("organizations" should not be subject to "discretionary supervision" by government, but their activities may be restricted to greater degree than individuals). Although the matter is not free from doubt, Hayek's views may be consistent with an immanent contractarian view of the firm. His conception of contract was expressly one that treated contracts as largely constructed as "standard forms" and therefore as matters largely determined by legal norms. F. A. HAYEK, Free Enterprise and Economic Order, in INDIVIDUALISM AND ECONOMIC ORDER 110 (1948). He also treated the law of corporations as a subspecies of this point. Id. at 116. His "contractual" view of the corporation reflects, moreover, the tension in his thought. On the one hand, government should not impose "rigid limits" or have "considerable powers of direct interference" over them; on the other, they are largely products of legal decision (rather than purely "free contract") and may be legally limited (particularly if their size inhibits "competition"). Id.

164. See, e.g., Hazen, The Short-Term/Long-Term Dichotomy and Corporate Law, supra note 90 (emphasizing long-term mutual benefit); O'Connor, Socio-Economic Approach, supra note 37 (enhance worker productivity by means of participation); Stone, Employees as Stakeholders, supra note 4 (mutual benefit within implicit contract).

165. See infra notes 206-16 and accompanying text.
principle of consent), but fail to provide determinate guidance for interpreting express agreement or for establishing the background norms that will control a contractual relationship in the absence of express agreement.\textsuperscript{166} As it is essential that the law assume some background understanding, perhaps there should be no classically liberal objection to rendering this understanding consistent with that of rational joint wealth maximization.\textsuperscript{167} If so, liberal concerns with autonomy, negative liberty, etcetera are satisfied within the neoclassical account of contract by rendering (the analyst's specification of) rational joint wealth maximization optional, a non-mandatory norm that may be trumped by express agreement. Moreover, this background norm is obviously consistent with Hobbesian partiality and rationality\textsuperscript{168} a plausible means of facilitating "coordination,"\textsuperscript{169} and arguably consistent with consent.\textsuperscript{170} While it is

\textsuperscript{166} Craswell, \textit{Philosophy of Promising}, supra note 73, at 513-16. Cf. Charny, \textit{Hypothetical Bargains}, supra note 150, at 1825-29 (identifying varieties of "autonomy" theories and their potential implications). Craswell and Charny both use an "autonomy" label to refer, broadly, to contractual theories predicated on the value of individual "freedom." I therefore view them as not limiting their analyses to Kantian variations on the freedom theme. See Charny, \textit{Hypothetical Bargains}, supra note 150, at 1825-26 (liberal autonomy serves range of values). In fact Hayek recognized these arguments at an early point:

\begin{quote}
[B]eware of the error that the formulas "private property" and "freedom of contract" solve our problems. They are not adequate answers because their meaning is ambiguous. Our problems begin when we ask what ought to be the contents of property rights, what contracts should be enforceable, and how contracts should be interpreted or, rather, what standard forms of contract should be read into the informal agreements of every day transactions.
\end{quote}


\textsuperscript{168} Gauthier's express reliance upon the economist's version of rational choice is suggestive, even if his conclusions (e.g., division of surplus proportional to contribution) may be debated. See GAUTHIER, supra note 123, at 315-29.

\textsuperscript{169} The legal economist's notion that she is seeking to mimic the market under circumstances where the market is inoperative (e.g., because of transaction costs) is suggestive. See POSNER, \textit{OVERCOMING LAW}, supra note 83, at 463. The Hayekian emphasis on "coordination" differs in that it tends to deny that the knowledge necessary to this effort is attainable, see supra notes 109-128, 135, 150, 155, 157, and accompanying text. Therefore, in its belief that the adjudicative effort should be in institutional design rather than particular allocations. However, the line between institutional design and particular allocation blurs if general (non-particularized or non-tailored to context) rules are generated by neoclassical analysis. In that event, subsequent contracting parties are confronted with a background norm they can price or contract around, in apparent keeping with Hayekian recommendations. If these recommendations are taken as requiring merely a specified set of several entitlements plus "freedom of contract," the grounds for specification may be arbitrary, and even an epistemically hubristic specification would therefore seem to suffice.
the case that the economist justifies this scheme (including the opt-out privilege) on the ground that it serves a collective end, the recommendations yielded by the scheme may not be inconsistent with classically liberal commitments.\textsuperscript{171}

In short, the contractual, enabling and anti-mandatory stance of mainstream economic analysis of the firm is conceptually attractive to the anti-regulatory bias of the classical liberal, and this stance can be rendered through particularized judgment compatible with that liberal's commitments to subjectivity, constrained knowledge and a derivative conception of law. For example, although the neoclassical economist claims that no one owns the corporation,\textsuperscript{172} this claim may be rendered functionally indistinguishable from a penchant for conceiving of the corporation as shareholder property\textsuperscript{173} by adding the neoclassical economist's further claims that the shareholder's unspecified and unspecifiable contract and the desirable incentives implied by the shareholder's residual status counsels a shareholder wealth maximization criterion.\textsuperscript{174} The neoclassical economist's tendency to respect the survival properties of common practice on an assumption of presumed efficiency\textsuperscript{175} parallels Humean respect for evolved norms. These coincidences may be attributable to the fact that the neoclassical economist and the classical liberal share many common assumptions, in particular methodological individualism and the postulate of self-interest in human behavior, even though these assumptions may be given distinct interpretations.\textsuperscript{176}

\begin{itemize}
\item \textsuperscript{170} See Barnett, \textit{Sounds of Silence}, supra note 73, at 906-11 (stating when implicit understandings and conventions run out, that which is rationally efficient may serve as default term to which parties can be taken as consenting).
\item \textsuperscript{171} \textit{Cf.} Richard Posner, \textit{Overcoming Law}, supra note 83, at 11-29 (adopting a stance of combining "pragmatism," economics and "liberalism"). Posner's version of classical liberalism is derived from Mill. \textit{Id.} at 23-29. This enables retention of the "scientism" of the utilitarian tradition, a tradition criticized in Humean variations on the classically liberal theme. \textit{See supra} note 150.
\item \textsuperscript{172} Bainbridge, \textit{supra} note 4, at 1426-28.
\item \textsuperscript{173} Cox, \textit{supra} note 6, at 236-40.
\item \textsuperscript{174} Easterbrook & Fischel, \textit{supra} note 4, at 35-39.
\item \textsuperscript{175} \textit{Id.} at 31.
\item \textsuperscript{176} \textit{See supra} notes 153-57 and accompanying text. In particular, the self-interest postulate is turned into a rather loose "purposeful behavior" postulate by Austrians. Israel M. Kirzner, \textit{Self-Interest and the New Bashing of Economics}, 4 CRITICAL REV. 27 (1990). Moreover, Hobbesians are quick to reject "narrow egoism" as the meaning of partiality or self-interest. \textit{See, e.g.,} Gauthier, \textit{supra} note 123, at 87, 187-89; Lomasky, \textit{supra} note 46, at 159, 244-46. \textit{Cf.} Larmore, \textit{supra} note 54, at 71-72 (noting the problem of diverse goods held partially would exist even if all persons benevolent).
\end{itemize}
An alternative explanation of coincidence is that the apparatus of efficiency analysis does not generate determinate solutions. As earlier noticed,\(^\text{177}\) it is at least formally possible to employ variations on the apparatus to yield recommendations inconsistent with the positions of the neoclassical mainstream. Mainstream positions, given also by formally correct manipulations of the apparatus, may be attributable to judgments informed by values outside the apparatus. In short, although efficiency analysis may be employed to support “statist intervention,” the coincidence of neoclassical economic and classical liberal recommendations may reflect use of the efficiency apparatus as a proxy for common commitments.\(^\text{178}\)

5. Facilitation and Formalism

Apart from the possibility that classical commitments inform judgments within neoclassical analysis, Humean and Hobbesian themes may serve both as explanations of features of corporate law doctrine and as bases for normative theories of corporate law. Consider two possible implications of classical liberalism concerning law: legal facilitation and legal formalism. By facilitation is meant the notion that the law’s function is to facilitate pursuit of individually held goods, purposes or ends. In the hands of some, this notion suggests that the law should provide what contracting parties “would have wanted” even where they failed to address the matter, and is a justification for legally supplied “default terms” and interpretive norms that invoke hypothetical consent.\(^\text{179}\) In the hands of others, however, the notion may be taken further, to suggest that a set of mandatory norms as background conditions to contracting are essential. If, as Humeans, neo-Hobbesians and some aspects of game theory suggest, a moral commitment to cooperation as constrained pursuit of self interest is essential to contract, perhaps the role of corporate law is to supply an assurance of this

\(^{177}\) See supra notes 87-90 and accompanying text.

\(^{178}\) Cf. Lawson, supra note 81, at 77 (hypothesizing that Judge Posner employs wealth maximization as a proxy for moral intuitions). The proxy characterization seems clear in THE ECONOMICS OF JUSTICE, supra note 154, and largely confirmed, albeit with recognition of potential tensions, in OVERCOMING LAW, supra note 83. Notice that the proxy thesis generates some irony. Committed welfarists tolerate liberal commitments on the basis that they tend to serve welfare. Clark, Contracts, Elites and Traditions, supra note 32, at 1716-17. The classical liberal tolerates welfarist analysis on the basis that it tends to serve “liberty.”

\(^{179}\) Craswell, Philosophy of Promising, supra note 73, at 503-05; Charny, Hypothetical Bargains, supra note 150, at 1819-21.
commitment.\textsuperscript{180} If Humean insistence upon the importance of norms is conceded, facilitation implies both that law should be derivative from practice and that law should be evaluative of practice: norms should be incorporated into law to the extent consistent with a coordination criterion or an efficiency criterion.\textsuperscript{181}

By "legal formalism" is meant a refusal to facilitate, or, at least, to push facilitation this far. More specifically, a court committed to legal formalism would tend to insist upon expressions of "actual consent" (albeit perhaps of objective or conventional varieties) before "intervening," and would therefore tend to dismiss claims not grounded in such expressions, leaving losses "where they fell."\textsuperscript{182} Thus, legal formalism,


\textsuperscript{182} Cf. Charney, Hypothetical Bargains, supra note 150, at 1827 (portraying formalist as conventionalist). This understanding of formalism may be controversial. In some accounts, formalism is associated with a failure to appreciate the complexity of circumstances, indeterminacy, competing values, etcetera and insistence upon conformity to unitary, universalistic or foundational propositions. GRANT GILMORE, \textit{The Ages of American Law} 104-11 (1974). For a corporate communitarian identification of corporate contractarianism with such a species of formalism, see Johnson, \textit{Individual and Collective Sovereignty, supra note 4}, at 2235-45. As employed here, formalism is a device by which complexity, indeterminacy, and competing values are recognized and utilized, universalistic or foundational propositions (at least of certain types) are rejected, in the sense that the effort is to limit occasions for authoritative pronouncement. Cf. GRANT GILMORE, THE DEATH OF CONTRACT 52-54 (2d ed. 1995) (contradiction between bargain theory of contract and absolute liability given contract potentially resolved on theory of limiting litigation). Indeed, Gilmore's conception of (properly constrained) law, deemed anti-formalist in his account, resembles Hayek's, where Hayek speaks in a "formalist" mood. Compare GILMORE, AGES OF AMERICAN LAW, supra at 109-110 (noting that law's function from mood of skeptical relativism is to settle disputes under generally conceived principles), with HAYEK, Rules and Order, supra note 105, at 112-18 (proper law is not purposeful in sense of a desire for bringing about a desired end-state, but, rather an expression of principles implicit in an undirected order). There is of course an element of "pin the tail on the formalist" in all of this: formalism is commonly thought to be a "bad" and, therefore, a useful label to attach to one's opponent in debate. It should be suspected that what is really going on in the attachment of such a label is disagreement about which normative principles are to be derived from practice or deemed supported by consensus.

Formalism has multiple but perhaps interrelated definitions, typically supplied by its critics. One such definition equates formalism with legal autonomy: the law is independent of and not subject to assessment or intrusion from realms (e.g., the realm of the moral or the realm of the economic) outside it. Another definition equates formalism with a single correct answer thesis: it is both possible and desirable that there be correct applications of a legal rule. Formalism is often therefore identified with textualism—the belief that the meaning of a rule
as here depicted, is about minimizing governmental decision. Formalism resides in textual statements of the rule and that these statements therefore mandate particular correct applications. This identification, albeit an effective polemical tool for undermining formalism, is clearly erroneous: a belief that there are right answers but that these are to be found in principle, or coherence or communal practice rather than texts remains a formalist belief if formalism is a right answer thesis. Indeed, Hayek's formalism resembles Dworkin's in its depiction of mechanism. Barry, Road to Freedom, supra note 114, at 152. Cf. LEONI, supra note 160, at 94 (distinguishing textualist and non-textualist understandings of certainty in law).

These definitions are related when viewed from the perspective of the value they seek to implement. That purpose or value is a rule of law notion: law should be stable and predictable so that persons can know in advance what the state will require of them and conform their conduct to these requirements. This value, although related to “formalism” as that term is employed here, does not adequately capture the meaning of the term as so employed. The difficulty is that a pervasive authoritarian legal system might nonetheless be a predictable one. Formalism as the term is employed here requires legal minimization, as well as predictability. It perhaps therefore requires an assumption, in Professor Schauer's terminology, that the legal system is non-comprehensive, or, at least, that it entails a permissive comprehensive default rule. A legal system, such as a common law system, may be viewed as comprehensive if it purports to provide answers to all disputes. FREDERICK SCHAUER, PLAYING BY THE RULES, A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 224 (1991) [hereinafter SCHAUER, PLAYING BY THE RULES]. The view that a “gap” in the law or in a contract is something to be judicially filled assumes such a comprehensive view and further assumes that there is no comprehensive default rule. Id. at 225. A comprehensive default rule is one that either permits the action complained of where a gap exists (so the plaintiff loses unless she can invoke a pre-existing rule) or prohibits it (so the plaintiff wins where a gap exists). The legal realist's assumption that "private" decision is necessarily traceable to "public" or "political" decision would seem to be correct if it is understood as asserting that a default rule in a comprehensive system is the source of the plaintiff's power to prevent the defendant's complained of action or of the defendant's to prevent the plaintiff's (or, by virtue of such a default rule, to charge a price for foregoing this power). On the other hand, a comprehensive default rule that permits what is not expressly prohibited (given that this entails some interpretive range for specifying that which is express) operates to confer "jurisdiction" precisely because it confers power (on the defendant). That which the defendant does is not a matter predicted either by a substantive rule (since there is a gap) or by the default rule (since, prospectively, it by its nature declines to address the defendant’s conduct). Cf. SCHAUER, supra at 158-62 (viewing rules as conferring jurisdiction). The realist is correct that a permissive default rule is "political" in the sense that it reflects a position about the rule and the competence of officials wielding the particular forms of coercive power that are those of the state. She is not correct, in the formalist's view, in thinking that this means the defendant's acts are the decisions of those officials, or in presuming that these acts are matters to be collectively evaluated (in terms, e.g., of their effects on collective welfare). A conscious collective choice about an action is a possibility, but it is an existing reality only if there is an actual mechanism by which such a collective choice is made. GRAFSTEIN, supra note 61, at 182.

On some depictions of the common law, including Professor Schauer's, id at 174-81, formalism understood as non-comprehensive or as entailing a permissive and comprehensive default rule would be inconsistent with the common law's conferral of comprehensive authority on judges. On the other hand, formalism may have been approximated by the common law in some eras. Id. at 179-80; cf. LEONI, supra note 160, at 76-94 (viewing common law as derivative from social norms, predictable and consistent with classical liberalism).
is typically depicted in terms of the rigidity of the “rules” it recommends, but this rigidity is a means to minimization. To say that the law should examine the “substance” rather than the “form” of a transaction (as in the case of defacto merger) is to say that a governmental agent should decide in at least some respects the merits of the transaction, in terms of some collective “policy” or value. To say that form should be respected (as in the case of the “independent significance” of transactional forms) is to deny this. Formalism is also typically depicted as postulating the law’s autonomy, but this depiction, too, may serve formalism as that term is employed here. Claims that the law is not autonomous are claims that it is or should be consciously, rationally and purposely shaped by criteria external to it—a political morality, efficiency, etc. “Formalism,” as the term is employed here, minimizes governmental decision, so it also minimizes the extent to which purposive pursuit of criteria “outside it” shape decisions. If Humean insistence upon the impor-

183. See, e.g., Rothschild Int’l Corp. v. Liggett Group, Inc., 474 A.2d 133 (Del. 1984); Federal United Corp. v. Havender, 11 A.2d 331 (Del. 1940). Notice that formalism can be non-facilitative. Consider, for example, the formalism of judicial efforts to demand conformity to formal corporate norms in the context of closely held corporations. See, e.g., McQuade v. Stoneham, 189 N.E. 234 (N.Y. 1934) (invalidating agreement impinging on director authority on basis that this formalism preferable to judicial inquiry into director motives). So formalism can be inconsistent with contractarian stances where it invokes a mandatory term in service of minimizing governmental decisions.


What, however, is meant by the concession that a governmental choice is inevitable? The concession operates at a number of levels. First, there is obviously a choice between competing political moralities in adopting formalism as a stance. In neutrality terms, a commitment to “neutrality” is not neutral about neutrality. Second, there is obviously a choice in the empowering of some class of persons (or place holders) that is implicit in the formalist’s adherence to a “general rule” (or refusal to undo that which some member of that class has done). Thus, Delaware’s “equal dignity” rule, supra note 183, empowers corporate planners. On the other hand, there is no (formal) choice about what is to be done with the power thus created, for underlying the formalist stance is the claim that this will be determined by the interaction of the empowered and forces outside law. (The analogous neoclassical claim is that market pricing and the incentive generated by it will adjust so as to render the “disempowered” not so). There is therefore no government choice about what is to be done even
tance of norms is again conceded, formalism implies substantial reluctance to legally enforce norms or to evaluate them on the basis of external criteria.\textsuperscript{185}

In what senses may facilitative and formalist conceptions be deemed consistent with a contractual conception of the corporation? Both may be viewed as suggesting a contractual conception in the sense that they would enforce express consensual agreement and generally eschew mandatory terms. The facilitative conception is contractarian to the extent that the facilitative terms it recommends are the product of a rational constructivist exercise in hypothetical contract. The formalist conception is obviously not contractarian in just this latter sense: it rejects this rational constructivism.\textsuperscript{186} But the formalist conception is contractarian in a further sense: it emphasizes freedom from state enforced obligation not traceable to a formal, private invocation of the state (as through express “consent”), and, therefore, renders behavior subject to the forces of non-legal social practice.

Facilitation and formalism may be derived from Humean and Hobbesian themes. Facilitation has a roughly Hobbesian thrust to it: the sovereign provides a means by which persons may cooperate in achieving their self-interested ends, a means they are unable to provide for themselves.\textsuperscript{187} This ambition is consistent both with Hobbesian though there is government choice about the structure within which it is to be done. Critics of formalism implicitly recognize this by insisting that there should be a governmental choice about what is to be done.


187. However, Humeans, in some moods, are facilitators. \textit{Cf.} Hayek, \textit{Free Enterprise and Competitive Order}, supra note 163, at 115-16 (noting the legal specification of background rules is inevitable and specification should be that which is conducive to a competitive system). On the other hand, Hayek, in his more libertarian moods, may be read as an extreme formalist. \textit{See} POSNER, \textit{PROBLEMS OF JURISPRUDENCE}, supra note 8, at 57 (viewing Hayek as an advocate of clear rules known to all and not subject to interpretation). Perhaps Hayek’s position is ultimately incoherent. \textit{GRAY, LIBERALISMS}, supra note 46, at 97. However, he may be read as seeking “facilitation” through predictable “general rules” and as objecting to detailed, case-specific rules in service of substantive (non-facilitative) purposes. \textit{Cf.} Charny, \textit{Hypothetical Bargains}, supra note 150, at 1821 (using general and idealized default rules versus particular and non-idealized default rules). For a facilitative approach based largely on Hayekian premises, see Barnett, \textit{Sounds of Silence}, supra note 73, at 874-95.
emphasis upon means-ends rationality and with the conviction that the Hobbesian analyst possesses the means of implementing that rationality on a large, political-social scale. Formalism has a roughly Humean theme to it: conventions as norms provide the means by which coordination of diverse purposes is achieved and facilitation assumes a capacity for rational prediction and control of consequences the Humean denies. The role of law, for Hume, was limited to preservation of stable and predictable property rights rigidly enforced; interaction within this framework was to be primarily non-legal.188

A species of facilitation is the expressed position of mainstream neoclassical analysis of the firm: corporate law is to provide a standard form agreement or set of default terms, the content of which is determined by an exercise in rational hypothetical contracting. Moreover, legal economists (even ones with classically liberal inclinations) attack formalism on grounds that borrow heavily from the legal realist tradition (and from social choice theory more generally): some set of background understandings is essential for contract given the limitations of language (and consequent need for interpretation) and given limitations on information and rationality (and consequent need for gap fillers).189 The formalist is therefore thought by the economist to be wrong in supposing that a judicial refusal to interpret is possible and that a refusal to supply terms is not itself a choice of terms. On some views, this line of argument obliterates the public/private distinction.190 On the facilitative view under discussion, that distinction is preserved by an acceptability criterion: The state is constrained in the interpretations and default terms it supplies because these (ought to be) non-mandatory, and the “private” will prevail over the “public” if contracting parties do not accept supplied terms.191 Thus, the Coase

The Hobbesian basis for facilitation may be grounded in Hobbes’ notion that obligation requires law. A Humean basis may be derived from the notion, suggested particularly by Oakeshott, that society has so disintegrated that rules backed by law are necessary for order. Devigue, Recasting Conservatism, supra note 26, at 121-22.

188. Hume, Principles of Morals, supra note 108, at App. III.

189. See, e.g., Craswell, Philosophy of Promising, supra note 73, at 503-05; Charny, Hypothetical Bargains, supra note 150, at 1816-19, 1819 n.21.


191. See Alan Schwartz, The Default Rule Paradigm and the Limits of Contract Law, 3 S. Cal. Interdisciplinary L. Rev. 389, 397-403 (1993) (arguing that if default rule is unacceptable, parties will opt out, where benefit of doing so exceeds contracting cost) [hereinafter Schwartz, Default Rule Paradigm]. Moreover, and given that persons are in a
Theorem in effect operates as the legal economist’s version of both the reality and priority of a private realm, while maintaining the legal realist’s premise that a “public,” legal decision (allocation of entitlements) underlies that realm: absent transaction costs, an allocation of entitlement (e.g., a background or default term) is essential, but initial public allocations do not matter, as private reallocation will trump “the public.”192 The legal economist becomes a facilitator at the point at which she is inclined both to recognize transaction costs (particularly where these are broadly defined to include strategic or opportunistic behavior) and to assume competence in a “public” agency to specify the allocation that would occur in their absence. As earlier noticed, however, facilitation can include a Humean recognition of the importance of socially generated norms, as through use of efficiency criteria in the selection of norms for legal enforcement.193

The formalist’s countercharge is that legal facilitators are paternalists,194 and incompetent ones. This point might be characterized as a Hobbesian “discipline” hypothesis: “gap filling,” whether in service of fairness or efficiency, is undesirable because rational contracting persons will learn from their mistakes (in failing to anticipate and specify) if the law, by insisting upon relatively express agreement, declines to correct them.195 It is, however, a point that may be grounded in a number of Humean views. Formalism is at least a possible implication of the contentions, again pushed rather far, that value is subjective, that central authority lacks information necessary to detailed allocation, and that stable entitlements and reliance upon social norms or conventions are therefore better means of coordinating diverse purposes than cost benefit analyses.196


193. See supra note 182 and accompanying text.
194. Cf. Clark, Contracts, Elites, and Traditions, supra note 32, at 1718-76 (making the paternalism charge from non-formalist perspective).
195. Charny, Hypothetical Bargains, supra note 150, at 1826. A discipline hypothesis is suggested by some aspects of Austrian economic theory in the spirit of Hayek. See generally Wonnell, supra note 150.
196. See supra notes 150-52 and accompanying text. Examples in recent commentary that rely on these themes (without thereby necessarily adopting a fully formalist stance) include Cooter, Decentralized Law, supra note 161 (law should be derived from efficient social norms); Schwartz, Default Rule Paradigm, supra note 191, at 404-06 (noting that court’s lack of information constrains its ability to supply defaults); Alan Schwartz, Relational Contracts in the Courts, supra note 94 (noting that courts will decline to go beyond terms of
Consider in particular the last of these contentions: it is a point, in the hands of some facilitators, that justifies reliance on convention as a source of law and use of efficiency as a criterion for determining which conventions should be incorporated into the law. The formalist suggests, however, a different spin on the point: undirected social practice is preferable to law, so law, even law incorporating convention, should be minimized. Implicit in the formalist’s stance is rejection of the legal realist’s claim that a refusal to decide is necessarily a legal, political or public decision, for there is a “decision-making” struc-

agreement where lack of information exists about relational terms). Cf. Clark, Contracts, Elites, Traditions, supra note 32, at 1726-46 (emphasizing and giving presumptive force to tradition).


198. This spin is implicit in claims that law should be derived from socially generated norms and in the anarchist strains in Hayek’s thought. Lomasky, supra note 46, at 108-09. Lomasky argues that reliance on social norms would eliminate “rights” (including Libertarian property rights). This would seem true in a sense and not in another. The Humean conception is that rights (and morality generally) arise out of an implicit understanding grounded in self-interested reciprocity: persons recognize that it is in their interest to defer to another provided the other defers to them. Hume, Treatise of Human Nature, supra note 105, at 489-90. Therefore, they are not rights in the Kantian sense in that they are not rationally justified (where rationality is understood in terms of access to a binding moral principle without reference to a self-interested motive). See Binmore, supra note 89, at 127-31 (viewing rights as conventions sustaining equilibria in “game of life”); Edna Ullman-Margalit, The Emergence of Norms 84 (1977) (viewing norms as conventions). The anarchist implication of all this requires another premise: that the conventions thus generated will be self-sustaining without legal coercion. Cf. Ellickson, supra note 124 (arguing a theory of social norms and presenting evidence of their efficacy independent of law within “close-knit” contexts); John Owen Haley, Authority Without Power, Law and the Japanese Paradox (1991) (examining Japan in which Japanese social order is explained in terms of social recognition of authority as entitlement to command not backed by coercion, and therefore on non-legal social control, but without cultural belief in universal moral values). An alternative premise is that law is in some degree necessary, a premise that will generate a limited version of the role and function of law, along “formalist” lines, if coordination remains the objective and if the competence of law, government or the “political” is deemed modest. Cf. Ellickson, supra note 124, at 181-82 (viewing law as cure for “social failure” to generate efficiency); Richard Epstein, Bargaining With the State 28-29 (1993) (arguing that spontaneous order theories fail when they move from particular trading communities to general societies). For a cost-based explanation of why non-legal sanctions may be preferred to legal ones, see David Charny, Non-legal Sanctions in Commercial Relationships, 104 Harv. L. Rev. 373 (1990) [hereinafter Charny, Non-legal Sanctions].


The Legal Realist point may be understood as one that equates the legal and the social
ture, spontaneous, self-regulating social order, that is said by the formalist to be an alternative to formalized, collective, conscious, and purposeful legal structure. The formalist claim is this: the legal realist's view smuggles in an unarticulated assumption that all decisions are collective in a formal, purposeful sense and this assumption is erroneous in the absence of such a formal, purposeful procedure.200

Is this formalist position a mistake? It is if (mis)characterized as denying that an implicit allocation of entitlement (or a "default term") underlies the law's refusal to assess behavior in service of some "public" purpose. To say, for example, that there is no fiduciary obligation within a category of corporate relationships is in effect to entitle persons to act in a fashion inconsistent with what such an obligation, if recognized, would require. And to favor a regime of several property and enforcement of express contract is clearly to favor with state power a particular institutional structure over other institutional alternatives. These points, however, are not denied by the formalist. Rather, the formalist notion is precisely that a legal refusal to recognize an obligation of this sort confers "power" to make choices on persons not compelled to justify their acts in terms of common goods or public purposes. Formalism allocates decision making authority to the realm of "contract" or to the realm of the vicissitudes of an inarticulate "spontaneous order," and finds this allocation good precisely because it distrusts articulate, rational, purposeful "public" decision (a reason that explains the typical intellectual’s hostility to formalism). The formalist’s position is not that no entitlement is allocated by the law's refusal to decide, but, rather, that entitlements should be so constructed and allocated as to minimize the occasions for articulate public justification.201

(as by denying the formalist’s distinction) and as one that denies that liberal neutrality is possible. KELMAN, supra note 87, at 327-22 n. 60. In its transformative moments, the Realist argument appears intent upon overcoming the "social" given that persons are constructed by it. See Gary Peller, The Classical Theory of Law, 73 CORNELL L. REV. 300 (1988) (arguing that mistake in classical law was not formalist "intellectual error," but "false" conception of human condition that denies community). See also Johnson, Individual and Collective Sovereignty, supra note 4, at 2235-45 (linking communitarian commitment to attack upon formalism as desire for legal certainty).

200. Cf. GRAFSTEIN, INSTITUTIONAL REALISM, supra note 61, at 179-82 (arguing that social choice theorists assume a baseline under which property is product of political decision; public choice theorists assume property is ex-ante private). Along these lines, Posner states the "idea that everything is really public is as metaphysical and unpragmatic as the idea that there really is a realm of purely private action." POSNER, OVERCOMING LAW, supra note 83, at 281.

201. Cf. F.A. Hayek, Free Enterprise and Competitive Order, supra note 163, at 112-16 (recognizing the necessity of legal specification of property rights and of default terms in
It should be noticed that legal economists, despite their expressed preference for facilitation, can be formalists in just this sense. The economist inclined to minimize the presence of transaction costs and to distrust the competence of public agencies to specify the allocation that would occur in the absence of such costs is inclined to formalism. Indeed, much of mainstream neoclassical analysis, albeit often expressed in facilitative terms, may be formalist in the sense suggested here. The tendency of the analysis is to postulate a default term that minimizes governmental decision (employment at will is an example), and to justify this in part on the basis of an assumption that the costs of overcoming this term by express agreement are minimal. The minimal private cost assumption, however, is at least problematic, and may reflect a belief that an alternative default term entailing greater degrees of governmental decision (such as a good cause discharge term) will, given governmental incompetence, entail greater social cost.

It also should be noticed that formalist rejection of the legal realist’s assumption regarding the necessity of collective decision is not necessarily rejection of the legal realist’s account of the nature of human decision. The realist account emphasizes the underdetermined character of rules and either (under the strand of legal realism associated with Llewellyn) practical and largely inarticulable reasoning dependent upon convention and tacit understanding or (under the strand of legal realism associated with scientism) instrumental rationalism. The formalist can agree with the version of this account that emphasizes practical and inarticulable reasoning, but thinks the realist is wrong in supposing that it is necessarily the judge (or other law giver) who engages and must engage in the bulk of this activity. Formalism seeks to allocate decision making authority (including “decision” as unarticulated and perhaps largely unexamined rule following) to a non-legal, “social” realm, but the mechanism by which this is to be accomplished need not entail a positivist’s conception of legal rules. (Indeed, Humean formalists can be contracts, but advocating that these should enable a “competitive order”).


204. See Kronman, THE LOST LAWYER, supra note 61, at 209-270 (recounting these strands of the realist tradition and associating the latter with both economic analysis of law and critical legal studies).
quite Wittgensteinian in their accounts of human language).\textsuperscript{205} It requires instead a normative commitment to the formalist's favored allocation, quite possibly effected through "judgment" as tacit or implicit understanding of the meaning of this commitment in contextual practice.

Formalism is supposed to be dead, but much of corporate law may be viewed as reflecting the formalist view. Consider, for example, strong versions of the business judgment rule,\textsuperscript{206} the judicial insistence upon express limitations on managerial discretion in debt contracts,\textsuperscript{207} the reluctance of at least some judges to impose "good faith" or fiduciary limitations on controlling shareholders\textsuperscript{208} and, for an example on the edge of "corporate law," the employment at will doctrine.\textsuperscript{209} Consider, also, a formalist stance within neoclassical economic analysis of the firm: securities pricing in an informationally efficient market obviates fairness justifications for legal interventions on behalf of shareholders.\textsuperscript{210} The thread at least stringable through these examples is the formalist denial of the legal realist's assumptions. Although efficiency explanations of the examples are clearly available, so, too, are Humean explanations grounded in skepticism about judicial access to information necessary to efficiency calculations.\textsuperscript{211}


\textsuperscript{208} See Jordan v. Duff & Phelps, Inc. 815 F.2d. 429, 448-49 (7th Cir. 1987) (Posner, J. dissenting).

\textsuperscript{209} See Charny, Non-legal Sanctions, supra note 198, at 417-25 (addressing employment at will from perspective of non-legal regulation, but questioning the doctrine); Rock & Wachter, supra note 185 (defending employment at will as desirable non-enforcement of social norm); Andrew Morriss, Bad Data, Bad Economics and Bad Policy: Time To Fire Wrongful Discharge Law, 74 Tex. L. Rev. 1901 (1996) (defense of at-will doctrine in part on basis of judicial incompetence).

\textsuperscript{210} Easterbrook & Fischel, supra note 4, at 25-34.

\textsuperscript{211} In each of the cited instances, there is a judicial refusal to recognize obligations that are not contractually express and in each this refusal is justified by an appeal to judicial incompetence. There is also in each a judicial assurance that the complaining parties or the class within which they are members may protect themselves through express contract, are protected by the market (e.g., through ex ante price reflecting the risk of the event of which they complain) or are protected by means of informal, non-legal sanctioning mechanisms (e.g., reputation).

It may be said that there is also in each instance an assumed baseline representing, in effect, a judicial decision about proper activities or, at least, allocations of power. Consider, for example, Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504 (S.D.N.Y. 1989). There, the court declined to require fiduciary duty or good faith constraints on a leveraged buy-out having adverse wealth consequences for bondholders and positive ones for
There are of course also counterexamples. Fiduciary obligation to shareholders is at least difficult to reconcile with formalism unless it takes the now largely discredited form of categorical do's and don'ts. It is possible to view fiduciary obligation as consistent with that brand of facilitation deeming legal enforcement of a background morality essential to contract, and, therefore, to a contractual theory of corporate law that nevertheless includes such mandates. There is also clearly a justifica-
tion for fiduciary obligation in state maintenance of tradition, at least to the extent that the obligation's content can be tied to a tradition. So fiduciary obligations can be justified in terms of Humean and neo-Hobbesian themes and tied to a facilitative, rather than formalist treatment of these themes. Fiduciary obligation has obviously been challenged with some success by legal economists, who would render it a default term expressing merely that to which rational parties would have agreed (or that which is consistent with maximizing a common quantity). It has also, been challenged by more clearly formalist arguments, as in proposals to abandon it. Nevertheless, fiduciary obligation has largely survived in mandated doctrine, so it may fairly be said to constitute a facilitative exception to a strong formalist theme within corporate law.

It has thus far been suggested that formalism is a conceptual possibility (in the sense that it is not defeated by legal realist argument) and is in fact a prominent feature of contemporary corporate law. If these propositions are assumed, the question remains whether formalists can consistently maintain a formalist stance, particularly when contemplating the corporation. Formalism as here depicted is the judgmental following of a meta-rule to the effect that legal direction should be minimized, but this meta-rule has as its point the preservation of an undirected or "spontaneous order" within which individuals pursue their individually held and valued purposes. Minimized law is supposed to enable this order by means of stable entitlements and enforcement of (at least relatively express) promises. "Coordination" is in part a matter of this state enforcement and in part a matter of socially generated conventions, mores or norms consistent with commitments to respect for

214. Consider, for example, the "tradition" of deeming shareholders owners of the firm. That tradition might be enforced through strong forms of fiduciary obligation.


entitlements and the keeping of promises. There would seem, however, to be three problems in thinking formalism is a means to these ends.

First, the corporation is in Humean, particularly Hayekian terms a "directed order," not a spontaneous one. It appears at least facially to subordinate individuals to a common purpose and to do so through quite rational direction. Formalism may exacerbate this distinction. If formalism entails a legal refusal to enforce norms, either of social or of local, relation-specific varieties, might this not have the effect of enhancing the corporate tendency to rational, centralized direction?

Second, formalism, if its point is to preserve an individualistic state of affairs of the sort indicated, depends not only upon conventions, mores or norms having a particular substantive content (respect for entitlements and promise keeping), but upon the survival and efficacy of these. A variation on communitarian critiques of markets is that they undermine the norms supporting them, particularly by rewarding rational calculation. It is an implication of neoclassical economic models of rational self-interest that moral commitment may be dispensed with in favor of properly designed incentive structures. Ironically, formalists and communitarians thus share a belief in the necessity of commitments and communitarians and neoclassical economists may share a belief in the threat posed to moral commitments by rational calculation. If communitarians are correct in their depiction of the effects of rational calculation, and legal economists wrong in their faith in rational calculation, a formalist refusal to enforce expectations arising from norms and conventions (or "implicit contracts" as distinguished from express ones) may undermine the social foundation on which formalism rests. It should be obvious that this possibility is a basis for a species of facilitation that would insist upon legal enforcement of a background morality, as through incorporation by law of norms reflecting such a morality.

Third, even if facilitators, like legal realists, exaggerate in presuming that, because the law must inevitably fill gaps in contracts, law directs behavior within these gaps, it remains the case that a judicial refusal to purposely fill a gap nevertheless fills it. Such a refusal entitles, at least in the sense of a Hohfeldian privilege, for example, a corporate employer to discharge employees "arbitrarily" absent formal agreement

217. Wesley N. Hohfeld, Some Fundamental Legal Conceptions As Applied In Judicial Reasonings, 23 YALE L.J. 16 (1913) (distinguishing rights and privileges); cf. SCHAUER, PLAYING BY THE RULES, supra note 182, at 168 (distinguishing permissions from rules requiring or forbidding behavior).
to the contrary or corporate management to adversely affect the market value of corporate bonds absent formal indenture restrictions on managerial discretion. Some criterion for allocating, or at least for recognizing such entitlements would seem necessary. While legal minimization is such a criterion, it may, standing alone, be an inadequate one, even for the limited purpose of maintaining a contractual regime. Resort to convention, to the allocation implicit in some practice, is a plausible further candidate for gap filing, but this clearly implies some incorporation of norms into law. (Indeed, at a higher level of abstraction, enforcement of formal contract itself is largely parasitic upon a practice of making, keeping or excusing promise). If some incorporation is inevitable, some criterion both for determining when this should be done and for adjudicating perhaps equally inevitable conflicts among norms is required. Perhaps such a criterion is itself discernable from practice, but an alternative is a criterion, such as efficiency, "outside" practice. And even if efficiency is deemed itself to be the principle implicit or latent in practice, the act of purposely seeking efficiency is one in substantial tension with the formalist impulse precisely because that act is both evaluative of and potentially distortive of practice.  

Can formalism survive these problems? Consider first the matter of the corporation as a "directed order." The Humean view that the corporation is a "directed order" finds a parallel in a standard criticism of classical liberalism from egalitarian or "progressive" perspectives. The criticism is that classical liberalism is myopic in its concern with the coercive power of the state; it fails to account for or to be concerned with formally private power (or, in legal realist accounts, with the state sources of private power). This criticism is often made in particular with respect to the corporation. "Private power" is in this context the hierarchical authority of management and is thought, by the terms of the critique, to be unaccountable, unconstrained or arbitrary. A communitarian variation on the criticism is the alleged alienation generated by


rationalized, private bureaucracy. Implicit in the critique, at least in its standard form, is an imagined alternative state of freedom from the private power of rationalized bureaucracy. In the communitarian form of the critique, at least in its neo-republican variation, the alternative is an imagined state of collective, deliberative autonomy. In the norm-centered variation of communitarianism, the alternative is an imagined state of common commitment to a shared morality of an egalitarian type.

The neoclassical economic account of the firm responds to this critique in part by way of treating efficiency as justification, and in part by way of recharacterizing bureaucracy in terms of facilitative contract. Private power as a threat to the individual is reconceptualized as the mutually beneficial means by which diverse individual ends are advanced. Humean formalism, in partial contrast, concedes that the corporation entails strong elements of rationalized bureaucracy in its "directed order" characterization. Humeans nevertheless seek to subjugate that bureaucracy. They do so in part by treating these elements as embedded within and moderated by a complex (ultimately unknowable and uncontrollable) "system" of convention and of competition within this "system," and in part by denying that large

221. See Easterbrook & Fischel, supra note 4, at 1-39.


There are, again, substantial tensions in Hayek's thought. See supra note 157, 166, 187. It is, for example, reasonably clear that he viewed the corporation as a directed order, distinct from the spontaneous order of the market, and that a degree of quite "constructivist" legal direction is appropriate with respect to it. Hayek, Free Enterprise and Competitive Order, supra note 163, at 116. Nevertheless, Hayek is best interpreted as confining this direction to institutional framework, particularly in service of "competition." See id. Note that competition, for Hayek, is not the "perfect competition" of neoclassical economics; rather it is absence of state-conferred "privilege." See Hayek, The Meaning of Competition, supra. Cf. Ronald Coase, Essays on Economics and Economists 86 (1994) (favoring Adam Smith's view of competition as process of rivalry over neoclassical view of competition as condition of high elasticity of demand); Posner, Overcoming Law, supra note 83, at 419 (criticizing Coase); Joseph E. Stiglitz, Whither Socialism? 109-38 (1994) (rejecting perfect competition as price taking in favor of competition as, apparently, a form of rivalry).

There are, of course, a number of rubs here. One is that some basis for assessing matters of degree of legal direction is necessary. Another is that some basis for distinguishing "privilege" from (legitimate) entitlement is necessary. Hayek's views on corporate law answers to such questions were undeveloped. Moreover, it is not entirely clear whether a "formalist" label, as that label is employed here, is entirely appropriate for Hayek, given that he has often spoken in quite facilitative terms. See supra note 166. Nevertheless, his derivative conception of law emphasizes a traditionalism that is at least a variation on the formalist theme. Hayek, Rules and Order, supra note 105, at 86. See Kukathas, supra note 100, at 187-88 (later Hayek less confident of our capacity to rationally modify tradition and therefore more inclined
scale rationalized bureaucracy can survive within such a system, at least without adopting measures of decentralization within it and therefore undermining its (at least as popularly conceived) character.223

The corporation on this formalist account is both constrained and enabled by an institutional framework characterized by several property, contract, markets and competition, but, as importantly, by undirected conventions, norms and practices operating within the corporation and among its actors. These are constraints on power because informal sanctions follow from deviation, because self-interest supports them and because they are not objects of authoritative evaluation. Notice that this turns rational bureaucracy on its head: it asserts that, while the corporation entails "centralized planning," it cannot survive, at least under competitive conditions, without decentralization (for reasons, for example, of access to information) and is highly dependent upon commitment to norms (perhaps those associated with Puritan ethics) given limitations on rational control (e.g., "costly monitoring").224 The notion of a "corporate culture"—including one that contains elements of mutual obligation generating "trust"—is not alien to a Humean account of what nevertheless remains a relationship of exchange.

The argument that the corporate "directed order" is nevertheless one dependent upon and largely governed by informally generated norm systems raises, however, the second of the noted objections to formalism.

to passively accept spontaneously generated social traditions). In short, the depiction in the text is suggested by Hayek, but it is not claimed that it is an accurate representation of all his positions.

223. The contemporary argument explaining internal decentralization is technology driven, but also recognizes the impact of increased competition. Roy Helfgott, Labor Process Theory vs. Reform in the Workplace, 6 CRITICAL REV. 11 (1992). An argument Hayekian in spirit and is that centralization runs into problems of human fallibility and localized information. Compare HAYEK, Rules and Order, supra note 105, at 49 (emphasizing that rules of an "organization" must be general, permitting discretion, given decentralized knowledge), with HAYEK, Political Order of a Free People, supra note 118, at 78-80 (arguing that large corporate size undesirable but government power to direct size is greater threat).

Ironically, given communitarian distaste for markets, it may be the case that corporate bureaucracy is in decline (as through corporate restructuring) "because of" market pressure.

224. Cf. JAMES M. BUCHANAN, ETHICS AND ECONOMIC PROGRESS 60-88 (1994) (discussing ethical constraint mimicking exchange and as reflected in Puritan ethic as generating mutual benefit); BUCHANAN, WHAT SHOULD ECONOMISTS Do?, supra note 96, at 201-17 (discussing dependence of markets on ethics). Buchanan, as a rational contracting theorist, might best be deemed "Hobbesian" and he is surely a "facilitator" at levels of general institutional design, but his rejection of "objective" estimates of efficiency arguably places him within the "formalist" camp depicted here. The point about monitoring costs is obviously that these costs would be excessive if no moral commitment of "Puritan" varieties could be assumed.
If corporate bureaucracy is constrained by and dependent upon both an institutional framework entailing market competition and conventions, norms and commitments, the claim that market rationality undermines conventions, norms, and commitments threatens the formalist’s sanguine view of the corporation.

Consider a concrete example of a criticism of this type, one associated with corporate communitarians: the corporation is dependent upon “trust,” but rational calculation (particularly as reflected in the market for control) undermines “trust.”

There would thus seem to be an “empirical” issue dividing formalists and communitarians: can “society,” understand the corporation as a complex of common normative commitments (or a corporate culture, similarly understood) that survive within a market order? Both contractarian formalists and contractarian facilitators will predict survival: markets are themselves undirected norm systems and it is not in the rationally conceived interest of market actors to destroy or undermine valuable corporate cultures. It is, however, doubtful whether this empirical issue is resolvable. A reason, to anticipate arguments to come later here, is that the formalist and the communitarian have quite distinct understandings of “society,” and in particular of the complex of norms in question. The formalist and the communitarian may agree, in degree, about the limits of rational calculation, and even agree that such matters as “trust” are essential, but this does not mean that they agree about the normative matter of the substantive content of “trust.” This question of the normative distinctions between the formalist and the communitarian is explored here later, but may for now be foreshadowed by asserting that the formalist’s commitment is to the norm of honesty and the communitarian’s to the norm of solidarity. The distinction is suggested by the matter of “trust”:


226. Cf. TAYLOR, PHILOSOPHICAL ARGUMENTS, supra note 11, at 207 (recognizing competing versions of “civil society,” including one resembling “formalism” as it is depicted here, but predicting that it will fail in competition with successful “corporatist” economies such as Japan and Germany). This is an old theme. See generally Albert Hirschman, Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble, 20 J. Econ. Lit. 1463 (1982) [hereinafter Hirschman, Rival Interpretations of Market Society]. It is one occasionally shared by conservatives. Irving Kristol, When Virtue Loses All Her Loveliness—Some Reflections on Capitalism and “The Free Society,” 21 THE PUBLIC INTEREST 3 (1971). Taylor’s claim, at least as of the dates of this writing (1994-96) is ironic given the substantial economic difficulties encountered both by Japan and Germany, particularly those of corporatist Germany. See Redesigning the German Model, THE ECONOMIST, Jan. 27, 1996 at 41; Unhappy Families, THE ECONOMIST, Feb. 10, 1996 at 23.
communitarians tend to speak in terms of relationships of trust—trust as an end or objective in itself. Contractarians, including Humean ones, tend instead to speak of trust as a means, even if a valued one, of coordination or cooperation—as necessary to the pursuit of diverse other purposes.\textsuperscript{227}

Apart from this obstacle to the empirical question of the effect of markets on norm systems, a formalist answer to the charge that markets threaten norms is to take refuge in his skepticism about rational direction. The difficulty with the market threat argument from a formalist perspective is that it assumes a capacity to identify the norm to be preserved, the nature of the threat posed and appropriate measures of preservation. It is these capacities, particularly when they are to be exercised through an articulate, purposive legal process, the formalist denies. For example, a formalist answer to the communitarian claim that preservation of corporate trust requires fiduciary obligation to non-shareholder constituencies or requires worker participation programs is not to deny that a species of trust is essential, or to deny that it may be vulnerable to breach of trust from ignorance or hubris, or to deny that worker participation may be a valuable innovation. Rather, the formalist answer is to both deny that these matters can be evaluated by the centralized authority implied by communitarian mandate and to assert that they can and will be in varying degrees recognized and resolved locally, largely through inarticulate trial and error processes.

This formalist faith in decentralized, non-legal (in the sense of state-centered) practice raises, however, the third of the noted objections to formalism. It was earlier rhetorically asked whether a formalist can consistently maintain his formalism when confronting the corporation and argue that he can by depicting the corporation as embedded in and dependent upon an undirected, "social" order. Nevertheless, there is a sense in which the answer to this question must be "no." The formalist who pushes this claim about legal incompetence too far risks becoming an anarchist.\textsuperscript{228} Anarchy would seem precluded by formalist commitment to legal enforcement of "property rights" and express contract. However, the formalist's commitment to such legal enforcement raises the problems, clearly identified by facilitators, that entitlements must be specified, that incomplete agreement requires at least some state reliance upon criteria outside agreement and that state reliance upon socially

\textsuperscript{227} See supra note 89.

\textsuperscript{228} See LOMASKY, supra note 46, at 108-10 (noting that Hayek's spontaneous order risks anarchy).
generated norms requires some criterion for evaluating the norms to be incorporated into law. The formalist inclined to avoid anarchy will make concessions to facilitation, particularly in the form of reliance in law upon norms derived from social practice or perceived expectation. Such reliance will necessarily be selective, and this selectivity might well be governed by some variation upon an efficiency theme. Certainly it will be governed, at some level of abstraction, by individualist normative commitments. If contractarians favor promise keeping and communitarians favor solidarity, incorporated norms will be those reflecting the former of these alternatives. The formalist's state incompetence thesis, however, will render him disinclined to accept legal mandates, rules conferring discretion on state functionaires, or case-specific governmental calculations of cost and benefit. That these matters are ones of degree subjects the formalist to charges of ambivalence and ambiguity, indeed of compromising the formalist ideal of predictability.

The formalist's vulnerability in this respect parallels the moderate communitarian's vulnerabilities: the formalist must make concessions to the state to avoid charges of anarchism and the communitarian must limit the state to avoid charges of organic state perfectionism. Both tend to resort to the claim that they favor a state-enforced institutional structure within which detailed behavior is not state-directed, but the communitarian's tendency with respect to this institutional gambit is to demand articulate justification in terms of a common good, and the formalist's tendency is to reject articulate justification in favor of spontaneous, self-governing social process. The formalist's state incompetence thesis may therefore be described as a "mood" rather than a theory, in particular, a mood of skepticism about ambition in law. However, a "mood" is potentially something that, when grasped, can serve as a basis for predicting the decisions of persons entertaining the mood and, if the formalist's incompetence thesis is correct, all that is available to us as a basis for prediction.


230. Consider, by way of illustration, the problem of leveraged restructurings. Such restructurings have had, at least in some instances, two consequences generating calls for legal limitations: wealth transfers from shareholders to debtholders and business failures (in the sense of subsequent inability to meet debt obligations). One species of complaint is therefore "unfairness;" another is that the traditional wisdom of avoiding "excessive leverage" should be reaffirmed. A formalist stance suggests that neither complaint would warrant legal
III. THE COMMUNITARIAN PERSPECTIVE

The communitarian model is difficult to describe for a reason shared with the contractarian model—the diversity of views it encompasses. This effort nevertheless identifies features of the model, derived in part from the positions of corporate law commentators who have articulated communitarian commitments and in part from general communitarian literature.

Communitarians generally attack what they conceive to be "atomism" or self-interested individualism. Atomism is a feature of contractarian and neoclassical economic theory in the corporate law context.\textsuperscript{231} It is a feature of these, and in some but not all instances "liberalism" in the more general communitarian literature.\textsuperscript{232} Communitarian attacks on atomism parallel sociological, institutional and organizational attacks on neoclassical economics, which parallel may explain the tendency of communitarians to rely upon sociological, institutional, and organization-

intervention, at least on grounds of unfairness, but what of "intervention" on grounds of traditional wisdom (the "norm" of conservative leverage)?

The formalist's governmental incompetence thesis suggests that moderate leverage cannot be directed (how much leverage is immoderate?). It suggests, on the other hand, at least some distrust of "rationalistic" theories of the virtues of leverage (e.g., that the traditional wisdom can be jettisoned in the interest of preventing managerial waste of free cash flow). It suggests, as well, both that private actors will make mistakes (so the formalist, unlike the neoclassical analyst, cannot rely upon the projected rational behavior of such actors) and that there will be a tendency to self-correction (the traditional wisdom will reassert itself).

Where does this leave the formalist? Probably in about the same place as the neoclassical analyst, but without the latter's strong predictions about efficient outcomes. The formalist will be an agnostic about the virtues of leveraged restructurings and concerned about excessive leverage, but not in a degree that would justify "excessive" directive constraints upon it. \textit{Cf.} Douglas S. Baird, \textit{Fraudulent Conveyances, Agency Costs, and Leveraged Buyouts}, 20 J. LEGAL STUD. 1 (1991) (employing economic analysis that, albeit expressing faith in eventual empirical assessment of costs and benefits, suggests degree of agnosticism and favors an "insolvency rule" limitation on leverage on the ground that it limits scope of judicial inquiry and resembles the business judgment rule in this respect).


\textsuperscript{232} See, e.g., \textit{BELLAH}, supra note 24, at 287-89 (1991); \textit{BELL}, supra note 58, at 36-40; E\textit{TZIONI, MORAL DIMENSION, supra note 88, at 6-11; ALASDAIR MAC\textit{INTYRE, AFTER VIRTUE} 204-05 (1981); SANDELL, \textit{LIBERALISM AND THE LIMITS OF JUSTICE}, supra note 100, at 59-65; Charles Taylor, \textit{Atomism, in PHILOSOPHY AND THE HUMAN SCIENCES} 187 (1985) [hereinafter Taylor, \textit{Atomism}]; \textit{RAZ, THE MORALITY OF FREEDOM, supra note 104, at 390-95. The attack on liberalism is particularly evident in MacIntyre. Taylor and Raz are typically viewed as liberals.
al literature in support of their positions. (For convenience, this literature is hereafter in this part labeled “institutional”).

The institutional position asserts that fundamental units of analysis are institutions, that individual behavior is predominantly routinized, and that the individual is cognitively constructed by his institutional environment, such that experience is conceived by the individual in terms of rules, norms, scripts or schemes institutionally given. Communitarians employ these features of the institutional position or parallel claims in attacking contractarian, liberal, utilitarian and neoclassical economic analysis descriptively, typically through the short-hand claim that individuals are “socially constructed.” (For convenience, liberal, utilitarian and neoclassical economic positions are now labeled contractarian, with the caveats, however, that there are contractarian and liberal positions that share at least versions of the institutional position, so the extent to which contractarian positions are “atomistic” is problematic).


234. For an overview of institutional thought, contrasting traditional and neoinstitutional approaches, see Paul DiMaggio & Walter Powell, Introduction, to New Institutionalism, supra note 142, at 1-38; W. Richard Scott, Unpacking Institutional Arguments, in New Institutionalism, supra note 142, at 164-82; but see Grafstein, Institutional Realism, supra note 61, at 184-187 (arguing that dominant forms of institutionalism are merely conventionalist).

235. However, neoclassical analysis is about institutional determinates of behavior in the sense that (1) it treats individual behavior as determined by the incentive structure faced by persons, and (2) it seeks to explain institutions in functional terms. It is deterministic in the sense that it is behavioralist. Posner, Problems of Jurisprudence, supra note 8, at 381-82.

It is of course the case that neoclassical analysis is methodologically individualist and that, in a broad sense, the sociological tradition is hostile to methodological individualism. But even this point of contrast is misleading. The individual in neoclassical analysis is not the “free chooser” he is sometimes made out to be in sociological critique. He is instead a creature stripped of individuating characteristics who responds, behavioristically, to manipulation of institutional structure.

Moreover, a focus on the individual is essential, and conceded to be so, even by analysts intent upon giving institutions causative roles; institutions are not observable independently of individual behavior. See, e.g., Jepperson, supra note 142, at 163 n. 33 (only individuals have ontological status, unless one follows Hegel); Friedland & Alford, Bringing Society Back In: Symbols, Practices, and Institutional Contradictions, in New Institutionalism, supra note 142 at 949-50 (noting that behavior makes sense only by reference to non-observable symbolic relations and symbolic relations make sense only in terms of behavior).

Of course many communitarian theorists do follow Hegel, at least to the extent of
The principle points of contrast between contractarian and institutional positions, at least as seen from institutional perspective, therefore appear to be these: (1) For the contractarian, the basic unit of analysis is individual choice; for the institutionalist, the basic unit is the institution or collective, social entity. The contractarian therefore tends to see stable patterns of behavior as "caused by" individual choice; the institutionalist sees them instead as causing individual behavior; (2) for the contractarian, preferences are exogenous (given, not further examined); for the institutionalist, the source of preference is the point of inquiry; (3) for the contractarian, choice is "free," in the sense, at least that individuals engage in acts of selection among alternatives within a structure of incentives; for the institutionalist, behavior is at least in substantial measure predetermined, in the sense, at least, that conceivable action is institutionally defined; (4) for the contractarian, human action is purposeful, calculating or rational; for the institutionalist, human action is unconscious rule, script or schema compliance.

Although communitarian positions on the nature of persons and of their relationship to community or society parallel and often rely upon institutional analysis, these positions may also be traced to the perhaps related development of communitarian political philosophy, derived from sources as otherwise diverse as Aristotle, Rousseau, Hegel, and Heidegger. However, a particular communitarian may hold only rejecting universal morality in favor of community based morality, emphasis on the public (and rejection of the private). CHARLES TAYLOR, HEGEL AND MODERN SOCIETY (1979); Drucilla Cornell, Toward A Modern/Post-Modern Reconstruction of Ethics, 133 U. PA. L. REV. 291 (1958). There are, however, "conservative" theorists with classically liberal inclinations who also "follow" Hegel. Oakeshott, for example, may be viewed as attempting a reconciliation of Hegel and Hobbes. GRAY, LIBERALISMS, supra note 46, at 207. Finally, there is nothing in methodological individualism that precludes a substantial causative role for society in the construction of individual identity. Madison, supra note 118. Of course, this point may depend upon one's definition of methodological individualism. If one means that individual behavior is the sole observable, there is no inconsistency between methodological individualism and institutionalism. If one means that there are no institutional "causes" of individual behavior, there is an obvious conflict. If one means that there is a complex interaction between individual behavior and institutional phenomenon, such that behavior is simultaneously caused by such phenomenon and a cause of such phenomenon, conflict would seem to depend on just how "radical" one's emphasis might be.


some of the positions. Moreover, and as will become apparent below, only some of the positions, and only some interpretations of or variations on a given position, are identifiable with a particular normative or political commitment. More specifically, although each of the positions to be examined are relied upon as grounds for commitments and proposals associated with "progressive," "socialist" or "left-wing" perspectives, variations on most are relied upon as well for commitments and proposals associated with "conservative," "classically liberal," and even "libertarian" perspectives. The implication is that the positions do not compel particular substantive outcomes. Perhaps this point can be interpreted as a claim that a variety of normative commitments are "communitarian," but the term "communitarian" will be reserved here for those perspectives that employ the examined positions for purposes of justifying the egalitarian, participatory or altruistic commitments associated with "progressive" theorists.

It should also be recalled that communitarianism appears divisible into two branches, a neo-republician branch, devoted to displacement of individualized, contractual decision or choice and its replacement with pervasive participatory and democratic procedure, and a norm-centered branch, devoted to state enforcement of socially generated norms of egalitarian, altruistic varieties. Moreover, there may be a division within the latter branch between a contractarian wing that would employ these norms as default terms and a mandatory wing that would require adherence to them regardless of express agreement to the contrary. Corporate communitarians within the norm-centered branch tend to adhere to the mandatory position. These divisions suggest both degrees of "radicalism" and distinctions in institutional focus. The norm-centered branch, particularly its contractarian wing, assumes a

238. See supra notes 35-37 and accompanying text.

239. The contractarian wing is suggested by, e.g., MacNeil, The New Social Contract, supra note 35; Feinman, supra note 35. There is also a division within this wing between those who would rely upon general social norms and those who would rely instead upon the norms or expectations generated within a particular relation. Schwartz, Rational Contracts in the Courts, supra note 94, at 275. Notice that this division is also reflected in a national versus local community focus. On distinctions between the communitarianism of relational theory and sociological theory, see Ian MacNeil, Rational Contract Theory as Sociology: A Reply to Professors Lindenbery and De Vas, 143 J. INSTIT. & THEORETICAL ECONOMICS 272 (1987).

240. See, e.g., Bratton, Public Values and Corporate Fiduciary Law, supra note 4 (justifying mandatory terms on basis of dialogue theory).

court-centered institutional focus and advocates a normative commitment to be implemented through a common law method arguably consistent with existing practice. The neo-republician branch, at least where applied in the corporate context, advocates rather radical institutional restructuring.

Finally, it should be noted that communitarianism may be further divided into national and local varieties. Indeed, there is a tension within general communitarian theories between advocacy of Tocquevillian intermediary associations standing between the state and the individual, requiring a measure of autonomy from the state, and advocacy of a national community with common normative commitments. The tension is reflected in corporate communitarianism: if particular corporations are viewed as particular, localized communities they must presumably enjoy substantial independence from the state, but if national markets present a threat to the communitarian normative vision or prediction about the substantive practices of these communities, common normative mandates are implied.

Given these divisions or tensions as background, communitarian positions are now addressed. These positions are descriptive or methodological, they concern the matters of the nature of persons, the relationship between persons and society or community, and the method by which persons and this relationship is to be best understood. From these positions communitarians derive their substantive commitments. The burden of the argument to be made here is that these substantive commitments are not justified by the positions.

A. Social Construction

First, and paralleling the institutionalist's cognitive construction of the individual, communitarianism claims that individual identity is constituted or constructed by community. Contractarians are therefore said to


243. Compare Lyman Johnson, Sovereignty Over Corporate Stock, 16 DEL. J. CORP. LAW 485 (1991) (rejecting uniform federal securities regulation in one-share, one-vote controversy as threat to federalism), with Johnson, Corporate Life, supra note 231, at 875, 934 (celebrating Delaware judiciary's arguable effort to conform corporate law in takeover context to underlying social norms and recognizing that Delaware corporate law is generally authoritative).

244. See supra notes 231-32. Useful overviews of communitarian theory include Slomo Avineri & Avner de-Shalit, Introduction to COMMUNITARIANISM AND INDIVIDUALISM, supra notes 231-32.
ignore the social origin of individual identity, individual preference and the structures within which individual behavior is enabled and rendered intelligible to the persons engaged in that behavior. An implication is that behavior is “caused by,” in some particularly strong sense, social norms, rules, structures etc., rather than by purposive or rational choice.

A particularly strong causal hypothesis is implied because an emphasis on social construction of the individual is not, in some forms, incompatible with contractarian commitments. Thus, some contractarians accommodate social construction and institutionalism by treating individual, purposive choice as occurring within systems of norms and institutional structures viewed as incomplete constraints and by postulating functional, enabling explanations for these structures. Humean and Hobbesian accounts may be viewed, for example, as functional or instrumental in treating norms or conventions as enabling coordination of diverse, individually held purposes or ends or as advancing enlightened self-interest. Communitarians (and institution-
alists) tend to reject functional or instrumental explanations (as by finding practices inconsistent with efficiency)\textsuperscript{248} and emphasize the cognitive dimension of social construction: both ends (preferences) and means to these ends are socially determined and these are experienced as natural or inevitable, such that alternatives are not contemplated.\textsuperscript{249} In communitarian terms, moreover, "constraints" are experienced as values in themselves, not as instrumental means to individually determined ends.\textsuperscript{250} (In particular, norm compliance occurs independently of self-interest, so behavior, according to communitarians, cannot be

attached, should be understood in terms of the origin of these norms in some species of rational calculation or contract. Humean functionalism or instrumentalism can be understood in terms of conventions arising from mutual recognition of and "sympathetic" appreciation of their utility (usefulness) given the "circumstances" of scarcity and self-interest. Neither view would necessarily exclude the historical possibility of norm-formation through trial and error processes. Sociological functionalism would seem distinct in that it tends to conceive of norms as products of a group mind, or at least infers function from postulated collective purpose, rather than from a set of "methodologically individualist" precepts.

\textsuperscript{248} ETZIONI, MORAL DIMENSION, supra note 88, at 114-35, 166-80; DiMaggio & Powell, Introduction, supra note 234, at 9-11. The anti-functionalist argument is made in the corporate context in Johnson, Individual and Collective Sovereignty, supra note 4, at 2231-32. There are, however, ambiguities in the notions of functionalism or instrumentalism that should be noted. Much of the sociological, institutional and "law and society" traditions entail "functionalism" of a sort, typically postulating norms as serving such functions as the survival of social units or serving (or perhaps constituting) values, such a solidarity, e.g., Ian MacNeil, Exchange Revisited: Individual Utility and Social Solidarity, 96 ETHICS 567 (1986), and communitarians seem clearly to wish to select norms or restructure practices to serve the ends (e.g., participatory state of being) they prefer. The anti-functionalism or anti-instrumentalism in question may therefore perhaps be best understood as a claim that norms do not serve ends communitarians disapprove (e.g., "selfish" ones). Indeed, perhaps communitarian anti-functionalism is sociological functionalism: theorizing about norms as concepts explaining behavior as distinguished from predicting norms from postulates of behavior. See generally BARRY, SOCIOLOGISTS, ECONOMISTS AND DEMOCRACY, supra note 52.

\textsuperscript{249} See, e.g., BELL, supra note 58, at 40-41; ETZIONI, MORAL DIMENSION, supra note 88, at 93-113; DiMaggio & Powell, Introduction, supra note 234, at 19-27.

\textsuperscript{250} In general communitarianism, this notion is expressed in the ideas that "true freedom" is experienced within constraint, TAYLOR, HEGEL AND MODERN SOCIETY, supra note 235, at 157, and in the notions that the good is a common good of shared ends, SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, supra note 100, at 183, or is a good found or discovered by inhabiting a social role, MACINTYRE, AFTER VIRTUE, supra note 232, at 204-05. In corporate communitarianism, it is suggested by emphasis upon corporate relationships as ends-in-themselves. See, e.g., O'Connor, Socio-Economic Approach, supra note 37, at 1539-46 (discussing trust as end in itself); O'Connor, The Human Capital Era, supra note 41, at 930 (same). Simon, Social Republican Property, supra note 37, at 1343-44 (discussing protection of relationships through inalienability). However, the communitarian argument typically entails a claim that existing, individualist institutional patterns should be reformed to enable relationships viewed as ends in themselves. See, e.g., Mitchell, Groundwork, supra note 34 (arguing that corporate actors should be freed from narrowly defined economic roles so as to behave as moral persons).
explained as simply a pursuit of self-interest).

Nevertheless, there are a number of questions that may be raised both about the meaning of the social construction thesis and about its efficacy as a basis for distinguishing liberal or contractarian positions. First, and despite communitarian emphasis on the notion of social construction, the communitarian use of the notion is conventionalist. Communitarians tend to say both that persons are socially constructed and that they may by design be reconstructed: both institutions, norms etcetera and the individuals constituted by them are "plastic" in that they may be altered by collective choice. This latter claim requires an additional "ought" for its implementation, the ought that alteration should occur, but questions may be raised about the "can." If persons are socially constructed in a very strong sense, what enables the communitarian (or the collective procedure she contemplates) to stand outside social practice, particularly one deemed excessively atomistic, and criticize or reform it? A strong version of social construction is in tension with a reformist agenda.

Second, and particularly given communitarian emphasis upon the plasticity of persons and institutions, the social construction thesis may be understood as an attack upon "naturalism"—the notion that persons have an essential nature and are governed by "laws" they do not control, or, and even in the absence of such a nature, are governed by a set of conditions (scarcity, dispersed knowledge) that necessitate a limited range of possible human responses. This interpretation of strong forms of the social construction thesis would clearly distinguish even Humean varieties of contractarianism or liberalism, but at a substantial cost in the plausibility of the thesis. Communitarian attacks upon neoclassical economic depictions of the "essential nature" of persons may be credible, given that the neoclassical ambition is to predict behavior, and prediction requires a capacity in the neoclassical analyst to specify preference. However, this credibility trades upon the narrowness and specificity of the economic depiction. A strong claim that self-interest, more broadly construed, is a mere artifact of historically contingent social arrange-

251. By conventionalist in the present context is meant the idea that conventions may be changed, particularly through conscious direction. Cf. GRAFSTEIN, supra note 61 (generally attacking institutionalism on the ground that it is conventionalist and advocating an institutional view that treats institutions as deterministic structures of human games).

252. See, e.g., Johnson, Individual and Collective Sovereignty, supra note 4, at 2231 (advocating choice of good and rejection of bad norms); Mitchell, Groundwork, supra note 34, at 1481 (advocating rejection of current social role of management).

253. See supra note 150.
ments (as distinguished from a weaker claim about the contingency and potential variety of social modes of expression of such a broadly construed human nature) lacks plausibility.\textsuperscript{254}

A viable response to these points is that communitarians do not make such a strong claim. Rather, they make the claim that persons are socially constructed “in part.”\textsuperscript{255} A difficulty with this understanding of the claim is that liberals, even those who rely upon Kantian autonomy as the central motif of their liberalism, are perfectly happy to concede that persons are socially constructed “in part” without thereby deeming their commitments threatened by the concession.\textsuperscript{256} Moreover, there are liberals, particularly of Humean varieties, who, as we have seen, both reject Kantian autonomy and accept versions of social construction.\textsuperscript{257} Indeed, they ground their liberalism on the epistemic impossibility both of standing outside practice and of engaging in a conscious, collective reordering of practice, \textsuperscript{258} or, at least, a reordering beyond incremental adjustment.

The point is this: the difficulty with the plausible notion that persons are “in part” socially constructed, is that it compels nothing in particular. As Professor Gardbaum has demonstrated, one cannot derive a substantive communitarian agenda from the premise of social construction; such an agenda does not follow from the premise.\textsuperscript{259} There are at least three ways of seeing that this is so. First, as just indicated, the premise is shared by a variety of substantive positions, including transformative communitarianism, conservatism, and some varieties of

\textsuperscript{254} At least it lacks credibility for this writer and one dares say many others as well. This question of human nature may constitute the fundamental point in dispute and the ultimate source of irreconcilable difference between contractarian and communitarian perspectives, and one not susceptible to resolution.


\textsuperscript{256} KYM LiCkA, \textit{CONTEMPORARY POLITICAL PHILOSOPHY, supra} note 63, at 208-13.

\textsuperscript{257} See, e.g., Hayek, \textit{Individualism: True and False, supra} note 110, at 6-13; GAUTHIER, \textit{supra} note 123, at 6-8, 236-37, 343-44; LARMORE, \textit{supra} note 54, at 77-85; LOMASKY, \textit{supra} note 46, at 42-47.

\textsuperscript{258} HAYEK, \textit{Mirage of Social Justice, supra} note 145, at 8-30. It should be noted that Hayek’s theory of mind resembles Kant’s theory in important respects. KUKATHAS, \textit{supra} note 100, at 47-59. It is detached Kantian autonomy that Hayek’s social constructionism denies. \textit{See id.} at 175-77.

\textsuperscript{259} Gardbaum, \textit{supra} note 51. \textit{See KUKATHAS, supra} note 100, at 217-27 (claiming Hayek not subject to communitarian critique).
Indeed, the position is shared by varieties of classical liberalism bordering on libertarianism. Second, the social construction thesis is consistent with an individualistic, contractarian conception of our particular society. It is possible to imagine or to identify "gemeinshaft" communities in which ritualized routine dominates, but ours is a society that has constructed persons as individual choosers. If it had not done so, communitarian critiques of this individualism would be unintelligible. Third, if the social construction of individual "identity" means that individual purposes, preferences, ends or projects are socially determined, this implies nothing about the social order in which they should, as a normative matter, be worked out.

Still, there must be something to moderate, "in part," social construction that warrants the communitarian belief that it is a powerful

260. Gardbaum, supra note 51, at 697-705. For variations of the theme, see e.g., James Buchanan, Domain of Subjective Economics, supra note 141, at 7 (portraying individual behavior as both active and reactive). See also Friedland & Robert Alford, supra note 235, at 255-56 (noting that at a concrete individual and organizational level, instrumental behavior is constrained but not determined by institutions); Jepperson, supra note 142, at 157-58 ("[R]ational choice often includes institutional elements and institutionalism often addresses adaptive responses."); Elinor Ostrom, Rational Choice Theory and Institutional Analysis: Toward Complimentarity, 85 AM. POL. SCI. REV. 237, 239 (1991) (discussing choice within the set of permitted actions given by rules). Cf. Buchanan, What Should Economist Do?, supra note 96, at 95, 210-16 (recognizing persons are to a large degree programmed; markets require minimum set of moral standards); Ludwig Mises, Human Action 42-43 (3d ed. 1966) (stating that methodological individualism is not inconsistent with significance of collective wholes); Hayek, Constitution of Liberty, supra note 110, at 36 (stating that man is creature of civilization); Frank H. Knight, Freedom and Reform 84 (Liberty Press ed. 1982) (stating that individuals are largely formed by social process); Hayek, The Counter-Revolution of Science, supra note 109, at 149-50 (discussing how men use social knowledge in form of habits, institutions and concepts).

261. If libertarianism is defined to mean a commitment to a pre-social, pre-political conception of persons as rights bearers, it is facially incompatible with the social construction thesis. If it is defined instead to mean a general commitment to "individual liberty" and hostility to government, it resembles the classical liberalism of theorists like Buchanan, Hayek and Knight, all of whom recognize forms of the social construction thesis. See the citations to works of these theorists, supra note 260. Gardbaum suggests that the social construction thesis precludes libertarianism, Hobbesian social contract theory and rational choice theory. Gardbaum, supra note 51, at 692. It perhaps precludes versions of these that purport to be complete descriptions of human behavior. It would not, in moderate form, preclude, for example, a theory of rational choice as a partial description. See, e.g., Jon Elster, The Cement of Society (1989) nor does it, as Gardbaum recognizes, supra note 51, at 692 n.22, preclude a normative commitment to, e.g., libertarianism.

262. In Tonnies distinction, community is limited to primitive, closely-knit, communal societies. Ferdinand Tonnies, Gemeinschaft and Gesellschaft (Charles P. Loomis ed. & trans., 1940) (1887).

263. Gardbaum, supra note 51, at 703.

264. See MacIntyre, After Virtue, supra note 232, at 244-55.
basis for critique. To what "liberal" or "contractarian" or "individualist" view is the moderate social construction thesis a threat? The thesis is a threat to extreme views of individual autonomy, as it suggests that persons do not "freely choose" their ends. Perhaps, then, the point of the social construction thesis is to delegitimize liberalism by claiming that its basis in this strong, Kantian conception of autonomy is false. This would work, would constitute something in particular following from social construction, if individual autonomy were indeed the sole available basis for or version of "liberalism," but it is not the sole basis. Humean and Hobbesian varieties of liberalism are not grounded in any strong form of autonomy. They are grounded, instead, on diversity within the socially given.

Consider: even if ends are socially determined, this implies common ends only at extreme levels of abstraction; at more concrete levels, there are (particularly within individualist cultures) a vast variety of socially given and partially determined ends. It does not follow that these ends are social "property" subject to conscious social direction, for it is as consistent with social construction to claim that the individual's ends, albeit socially given, are the individual's "property" subject to the individual's (conscious, unconscious or partially conscious) direction. Indeed, this conclusion follows, within Hobbesian and Humean schemes, from the "fact" of diverse socially given ends within modern societies and recognition of subjectivism or marginalism within the intersubjective reality of the socially given. Human interaction is no doubt made possible by common understandings, structures of intersubjective meaning, etcetera, but this does not preclude differences in individual valuation of ends, goods, projects or preferences. Person A is capable of recognizing person B's preference as a preference by virtue of the social construction of shared meanings, but A and B can and do engage in trades (contracts) because their marginal subjective valuations, their trade-offs between mutually recognized "goods," even understood as valued and "moral" ways of being, differ.

Perhaps, however, this emphasis on socially constructed ends mistakes the communitarian point. Perhaps means to ends are socially constructed: even though persons have diverse (or diversely valued) purposes,
and even if their behavior is partially a matter of their pursuit of these purposes, that behavior is nevertheless channelled in socially approved ways. Perhaps, also, this is what is meant by the communitarian notion that norms are not means, but ends-in-themselves: the social channeling or structuring of behavior so constructs individual perception that the distinction between ends and means breaks down. Conformity to that which is socially deemed moral becomes an end to which individual purposes are subordinated or reconciled, so behavior is not merely instrumental to individual purposes. Call this interpretation a norm commitment variation on social construction.

There is surely a great deal of validity to this variation on the social construction theme. It is not possible to account for common understandings of the expected and of the admirable without granting that validity. To what "liberal" or "contractarian" position, however, is this variation a threat? The most obvious candidate is neoclassical economic analysis, at least given a particular interpretation of that analysis. Neoclassical analysis assumes preferences and treats human behavior as rational pursuit of these preferences. It does not seem particularly threatened by its treatment of preferences as given (exogenous, or not objects of inquiry), for it is then merely incomplete as a full explanation of human behavior. The social construction thesis suffers from a similar infirmity: it treats the norms or values said to determine individual identity as exogenous to the analysis by declining to explain their origins (as in rejecting instrumental accounts). Nevertheless, what may be threatening about social construction is the prospect that the economic story about rational pursuit of given ends is erroneous.

For example, consider the matter of cooperation through agreement (for example, through an "implicit contract" between management and employees regarding job security). Why do persons keep, or not, their promises? According to the rational pursuit of given preferences

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270. Cf. ELLICKSON, ORDER WITHOUT LAW, supra note 124, at 149 (making this claim about the "law and society" school). That possible subspecies of "communitarianism" that relies on "power" theories, such that the powerful manipulate norms or the consciousness of the powerless to serve the ends of the powerful provides an explanation, but it is one resembling Hobbesian (or, perhaps, Machiavellian) rationality.

271. See Stone, Employees as Stakeholders, supra note 4 (generally treating employee-corporate relationship in terms of implicit contract).
story, the parties engage in a calculation of the costs and benefits of contract (and later, of contractual compliance), where these costs and benefits are assessed by reference to the preferences or purposes of each actor. The contract (cooperation) is a mere means, an instrument by which ends apart from the contract may be advanced or retarded. Thus, a party's decision to breach (e.g., management's decision to exploit employees following their investment in firm-specific human capital) is determined, for the neoclassical analyst, by that party's calculation of the costs and benefits to that party of breach; the cooperative arrangement is not itself an object valued within this calculation.272 Given the analyst's collectivism—her commitment to efficiency—the legal questions, in the absence of express agreement about job security, are whether wealth would be maximized by job security (whether rational maximizers would agree to it) and, if so, what remedy will ensure that the managerial actor includes costs to employees within the breach calculation.273 If the social construction thesis means that persons do not calculate in the fashion suggested by this story, that they instead make promises through tacit understandings of and expectations of commitment to norms and they keep promises or are excused from so doing because these behaviors are simply perceived to be the "thing to do," the thesis obviously threatens the story. At least it threatens the story if the story is intended as a depiction of actual behavior.

Does the thesis also threaten Hobbesian accounts? The neo-Hobbesian view of promise keeping is distinct, but similar to the economic one. It, perhaps unlike the neoclassical view, predicts non-defection (promise keeping) in circumstances in which defection could be advantageous to the non-defecting actor.274 The similarity is that action in both conceptions is instrumental to the partially ("selfishly") held purposes of individuals. The distinction is subtle. Promise keeping in circumstances of advantageous defection may be predicted by the neoclassical analyst by adopting a "long-term perspective" and by therefore including additional costs from defection: the actor now

272. Williamson, Calculativeness, Trust and Economic Organization, supra note 89.
274. See GAUTHIER, supra note 123, at 177-89. Recall that "Hobbesian" is not identical to that which Hobbes would have approved. See supra notes 99-100 and accompanying text.
contemplates the reputational effects of defection. The neo-Hobbesian's emphasis, by contrast, is on the notion that disposition to participate in a practice or commitment to promise keeping, always assuming a perception of reciprocal participation by other parties, advances the actors' purposes.

Social construction as non-calculating norm compliance is a threat to this depiction to the extent that calculation is a prominent feature of the depiction, particularly if disposition or commitment is a matter of continuous calculation (as distinguished from a routine). Moreover, the neo-Hobbesian emphasis is upon the question of defection, a matter that assumes a promise, not one that supplies the content of a promise. The communitarian conception of promise keeping appears to suggest such a content: defection (breach of promise) entails escape from a relationship, so non-defection may imply for the communitarian an "implicit" promise to preserve the relationship.

Does the communitarian thesis (that human behavior is noncalculating) threaten Humean accounts? Humeans may not be significantly distinct from some Hobbesians in treating norm compliance instrumental to coordination of individual ends, or cooperation for mutual advantage, but the Humean tendency is to view norm compliance as uncalculated. Given a Humean commitment to partiality (self-interest as partiality to individually held ends), a norm of promise keeping would not be sustainable absent its tendency to pay off. Nevertheless, the Humean treats norm compliance or rule following as "natural," in the sense that the actor generally perceives compliance as the conceivable course of action and attaches moral weight, a sense of moral obligation, to compliance.

Norms on some Humean accounts are instrumental to the coordination and mutual achievement of individually held ends,

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275. See, e.g., EASTERBROOK & FISCHEL, supra note 4, at 181-83.
276. GAUTHIER, supra note 123, at 165-89; LOMASKY, supra note 46, at 62-83. Contra BINMORE, PLAYING FAIR, supra note 89, at 173-256.
277. The similarity lies in the shared notions that persons are partial to their ends or interests and that norms (or morality generally) is a solution to the problems generated by this partiality, the presence of more than one person, scarcity, and the possibility of coordination or cooperation. However, Hobbesian morality, at least in its pure form, is grounded in rationality, not in sympathy, altruism or benevolence. GAUTHIER, supra note 123, at 69-70. Hobbesian morality is enabled in part by "sympathy." HUME, TREATISE OF HUMAN NATURE, supra note 105, at 316-24. Cf. KUKATHAS, supra note 100, at 90 (stating that Hayek offers no theory of egoistic human nature; his theory is instead one of man as a rule-follower).
279. HUME, TREATISE OF HUMAN NATURE, supra note 105, at 523; 3 HAYEK, The Political Order of a Free People, supra note 118, at 156-58.
but they are not merely objects of rational calculation by individuals assessing them as means to their ends; rather, individuals follow rules.\textsuperscript{280} Instrumentalism does not imply conscious design; in the Humean view, conscious design is denied even though the long-term instrumental character of norms is simultaneously insisted upon.\textsuperscript{281} A practice becomes regularized as a norm to the degree that it is successful in coordinating diverse ends, particularly by rendering behavior predictable.\textsuperscript{282} It is instrumental in this global sense, but it is perceived, individually, as the "thing to do."

It should be noted, however, that norms, albeit perceived as obligations, have a procedural, rather than substantive character and a certain flexibility in this Humean account. They are procedural globally in that they are instrumental to coordination and cooperation. They are procedural at the level of the individual because, although value may be attached to acts of coordination and cooperation, these activities are themselves about some objective beyond them; they are valued, but they are not their own justifications.\textsuperscript{283} This may imply something about the content of the promises to which Humeans would attach the norm of promise keeping. There is nothing in the Humean account that would deny, and much within it that would support an implicit promise: persons may well make and accept promises through tacit understandings and expectations of compliance with norms.\textsuperscript{284} However, an instrumental view of the point of a promise suggests that the content of the implicit promise will not simply be that of preservation of relationship; any such

\textsuperscript{281} Hayek, \textit{Rules and Order}, supra note 105, at 37; Hume, \textit{A Treatise of Human Nature}, supra note 105, at 533-34.
\textsuperscript{283} Cf. Elster, \textit{Self Realization}, supra note 11 (making this point from a distinct perspective); Gauthier, supra note 123, at 337 (same).
\textsuperscript{284} Hayek treats social norms as "flexible," Hayek, \textit{Individualism: True and False}, supra note 110, at 23, but flexibility in the Humean position is a species of inflexibility. The notion is that a norm or rule must be sufficiently known and certain to serve its function of generating predictable behavior: coordination requires that expectations about the conduct of others be confirmed. At the same time, the norm cannot dictate substantive details without threatening the notion that ends are diverse and subjectively valued. See Hayek, \textit{The Mirage of Social Justice}, supra note 145, at 146 (noting that morality within an open society, as distinguished from a primitive one, is general at the price of reducing the content of duty to others); Hayek, \textit{Constitution of Liberty}, supra note 110, at 97-98 (rejecting desert as moral norm). See also Cubeddu, \textit{Philosophy of the Austrian School}, supra note 150, at 205 (distinguishing cultural values and ends).
implicit promise of preservation will be highly qualified by a condition of continued mutual advantage. Whether unilateral termination of relationship entails a breach of the norm of promise keeping or is instead an instance of compliance with that norm will be a matter of substantial complexity of tacit understandings. Humean tendencies to formalism may be explained in part by skepticism about state capacity to detect these complexities.

This discussion of "promise-keeping" as a social norm has thus far suggested that the communitarian account of socially structured behavior, if accepted as descriptively accurate, is a threat to the neoclassical, economic, and, in degree, to the Hobbesian accounts, to the extent that these rely upon individuated instrumental rationality within each case or instance of human behavior. It suggests, as well, however, that there are substantial parallels between the communitarian and Humean depictions of behavior as rule or norm governed. These suggestions must, however, be qualified.

In the first place, neoclassical rational calculation can be given a behavioristic interpretation that renders it less clearly threatened by social construction than the depiction suggests. On the behavioralist interpretation, persons do not consciously calculate. Instead, they behave "as if" they were rational maximizers because they respond to an incentive structure. The incentive structure is for the individual, a social given, paralleling norms in alternative accounts. If norms are instrumental to coordination and cooperation, as in the Humean view, they may generate "as if" rationality in the neoclassical view. This is not to say that the accounts become identical; it is to say, rather, that the neoclassical position does not lack a functional analogue for norms. Moreover, this functional analogue is manipulable in the neoclassical view: incentives can be reformed so as to bring about desired consequences or end-states. This manipulability is an analogue to human plasticity. Communitarians may think that individual identities may be altered through norm selection, but legal economists think behaviors may be altered through incentive manipulation.

The second qualification is that the communitarian and Humean


286. Cf. Gary S. Becker, Irrational Behavior and Economic Theory, in The Economic Approach to Human Behavior 153-68 (1976) (noting that economist's predictions follow even assuming irrational decision units, such as irrational firms, from changes in opportunity sets—i.e., scarcity).
accounts, although similar in their contentions that behavior is rule or norm governed (and perhaps, that norms are undesigned social products), differ strikingly over their characterizations of norms and the implications of agreed upon premises. Communitarians tend to deny that norms are instrumental to the advancement of individual ends and to deny that the survival of a norm is dependent upon its instrumental character. They tend, therefore, also to invest more heavily than Humeans in the notion that conformity to a norm is itself an end. For the Humean (and for some Hobbesians) norms come to be perceived by persons as moral values, but are explained as solutions to a problem of scarcity or dispersed knowledge. For the communitarian, norms are ends in the strong senses that conformity is an act of participation in a collective good and that this participation itself, not an objective outside it, is its own explanation: the human good is not satisfaction through coordination or cooperation of individual preferences, but, rather, this participation. Moreover, communitarians employ this strong concep-

287. This is most strikingly evidenced by MacIntyre, whose chief villain is Hume and chief hero is Aristotle, but who recognizes parallels between them. See MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY?, supra note 237, at 318-25, 338.

288. ETZIONI, MORAL DIMENSION, supra note 88, at 166-80; Johnson, Individual and Collective Sovereignty, supra note 4, at 22-33; Mitchell, Groundwork, supra note 34, at 1482-83. However, some corporate law commentators who may be identified with the communitarian camp do support the norms they favor with instrumentalist arguments. See supra notes 87-89 and accompanying text. It should be noticed that communitarian anti-instrumentalism is in part anti-rationalism. That is, the argument tends to be that persons do not behave “rationally” when rationality is understood (instrumentally) as the best or least cost choice of means to ends. Norms on this account are limitations or constraints on means-selection or are ends (values) balanced against “selfish” ends. The last point suggests a second sense in which communitarians attack rationality: persons are not (wholly) self-interested. The notion, however, that norms are constraints is not alien to Humean or Hobbesian accounts; and the notion that persons are not perfect calculators is certainly consistent with Humean accounts. What does seem distinct is the claim by Humeans and Hobbesians that norms as constraints serve coordination or cooperation and that coordination and cooperation have their sources in partially held ends.

289. KUKATHAS, supra note 100, at 54, 58 (discussing Hume’s philosophy that rules solve problem of scarcity, whereas for Hayek, rules solve problem of ignorance). For a Hobbesian contention that participation and norm compliance, albeit instrumental, come to be valued see GAUTHIER, supra note 123, at 350-55. For Hume’s account of adherence to convention and non-contractarian, non-rationalist account of the formation of convention, consult HUME, TREATISE OF HUMAN NATURE, supra note 105, at 489-90.

290. For neorepublicans, participation is a matter of a participatory democratic politics. Mark Barenberg, Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production, 94 COLUM. L. REV. 753, 879-917 (1994); O’Connor, Socio-Economic Approach, supra note 37; Simon, Social Republican Property, supra note 37, at 1349-50. For communitarians who emphasize altruistic or communal interpretations of socially generated norms, participation is compliance with these. Johnson, Individual and Collective
tion of norms as ends to invest in the state the task of enforcement: socially generated norms are to be authoritatively interpreted (and selected) by reference to values (solidarity, altruism, preservation and stability of relationships), reflecting this conception of the human good. 291 (Neo-republicans conceive of these values as informing the construction of political procedure; the socially generated practices deemed norms in alternative accounts become features of life contingent upon collective approval within these procedures). Humean formalists, by contrast, contemplate a limited state dedicated to enforcement of those norms encompassed with the notion of stable and predictable property rights and express contractual exchange; norm compliance is deemed otherwise sustainable outside the state. 292 For the communitarian, for example, markets are threats to favored norms and stable relationships. 293 For the Humean, markets are both enabled by and

Sovereignty, supra note 4, at 2231; Mitchell, Groundwork, supra note 34, at 1487-88.

291. See, e.g., Etzioni, Moral Dimension, supra note 88, at 237-51 (favoring communitarian morality); Johnson, Individual and Collective Sovereignty, supra note 4, at 2231 (discussing how society is to collectively choose good over bad norms); Mitchell, Groundwork, supra note 34, at 1481 (favoring “morality” over “social role”).

It is possible, however, to read some corporate communitarian proposals as “deregulatory.” See Mitchell, Groundwork, supra note 34, at 1481-88 (proposing to free managers from legally imposed rule so that they become free to comply with morality). Moreover, much of this commentary characterizes corporate law, particularly as constructed by the neoclassical economic position, as distinct from and alien to socially generated norms. E.g., Johnson, Corporate Life and Corporate Law, supra note 231, at 932-33. And much of the commentary conceives of markets, particularly the market in control but also the very notion of alienability of shares, as a threat to the solidarity norms favored by the commentary. E.g., Simon, Social Republican Property, supra note 37, at 1338-49. Two points may, however, be made about these characterizations. First, “deregulatory” proposals are typically accompanied by “re-regulatory” ones. Compare Mitchell, Groundwork, supra note 34 (deregulation), with Mitchell, A Critical Look at Corporate Governance, supra note 4 (re-regulation). De-regulation turns out to be the substitution of one set of state-enforced norms for another. Second, and particularly if one believes that “re-regulation” is an inevitability (i.e., if the public/private distinction is rejected), the characterizations depend crucially upon assuming that the norms or interpretations favored by the commentators are those that would be socially generated (that existing corporate law or market behavior is artificial or imposed). The Humean and Hobbesian would of course not deem communitarian solidarity the “natural” baseline, as their instrumental account implies a distinct “natural” baseline.

292. See Hayek, Individualism: True and False, supra note 110, at 23-24; supra notes 183-230 and accompanying text.

293. Johnson, Corporate Life and Corporate Law, supra note 231, at 903-08, Simon, Social Republican Property, supra note 37, at 1343-44. “Conservatives” tend to share the view that (national) markets are threats to (the species of solidarity) they favor and to advocate, like some communitarians of the left, localized economic regulation. E.g., Kristol, supra note 226. On the history of this theme generally, consult Hirschman, Rival Interpretations of Market Society, supra note 226.
sources of favored norms.  

These distinctions, however, are about the content of norms and the state's relationship to them, not their capacity to construct behavior. Both the communitarian and the Humean deny that norm compliance entails rational calculation. The communitarian's rejection of instrumental explanations of norms is employed in part for the purpose of asserting the phenomenon of commitment, but Humeans recognize and rely upon commitment: the social stability they favor requires uncalculated compliance. An instrumental explanation of norms rules out neither the social embedding of the individual nor the dependence of instrumental norms upon non-instrumental commitment to them. If, however, it is not the phenomenon of norm commitment but instrumental characterization that distinguishes Humeans from communitarians, what is the nature of this distinction?  

The significant distinction between the instrumental and non-instrumental characterizations of norms may be normative: the Humean's instrumentalism entails a particular norm, that of promise keeping as honesty, or adherence to prior commitment, a norm that assumes promise as an instrument for achieving a desired

294. See HAYEK, THE FATAL CONCEIT, supra note 121, at 38-47, 89-105 (discussing markets as spontaneous orders). It should be noticed, however, that, for Hayek, markets are not the "perfect competition" systems contemplated by neoclassical theory, and norm-based relationships are integral to his markets. See Hayek, The Meaning of Competition, supra note 220, at 92-104. In this regard compare Gauthier, supra note 123, at 83-112 (noting that markets are morally free zones where market is understood in terms of perfect competition), with COLEMAN, RISKS AND WRONGS, supra note 73, at 59-72 (discussing cooperation as condition for competition).

295. The dispute might be viewed as empirical: are norms instrumental or are they not? See POSNER, PROBLEMS OF JURISPRUDENCE, supra note 8, at 382-87 (emphasizing that incentives matter, as demonstrated by fall of communist systems); ELLICKSON, ORDER WITHOUT LAW, supra note 124, at 167-229 (noting that empirical studies reenforce hypothesis that social norms enhance joint welfare, at least within closely-knit groups, with discussion of counter-examples); id. at 149-55 (criticizing various interpretations of norm content, including sociological functionalism, with a species of which Ellickson identifies Hayek, and interest group theory).

Law and Society scholars tend to share the claims that socially generated norms govern behavior and that law does not. E.g., Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963). Communitarians who rely on this literature tend to interpret norms as inconsistent with at least "efficiency" versions of instrumentalism and as consistent with solidarity values. See, e.g., Feinman, supra note 35. Alternatively, they tend to adopt interest group theories of norms: norms (illicitly) serve the interests of the powerful. See, e.g., Dallas, supra note 220. Notice that there is again a question here of instrumental to what; group survival, welfare, coordination and power are all possibilities.
end.\textsuperscript{296} The communitarian's anti-instrumentalism instead entails, even where framed in terms of promise keeping, solidarity; understood as unity of purpose and of value and as conformity to these, arguably an end itself.\textsuperscript{297}

This possibility may be illustrated by confronting an argument that promise keeping collapses into solidarity in the corporate context. The argument is that the distinction between promise keeping and solidarity is illusory in the context of the "relational contracts" that characterize

\textsuperscript{296} See Gerald Radnitzky, Hayek's Contribution to Epistemology, Ethics and Politics, \textit{in} \textit{Contending With Hayek} 65, 73-85 (Christoph Frei & Robert Nef eds., 1994) (interpreting Hayek and indicating that promise keeping norms of extended order are grounded in deontological account, relying largely upon Anthony de Jasay, \textit{A Stocktaking of Perversities}, 4 \textit{Critical Rev.} 537 (1990)). Communitarians, particularly ones relying upon implicit contract theory, might reply that they, too, are merely concerned with promise keeping. The difficulty with this reply is that solidarity norms inform, if not wholly overwhelm honesty norms in implicit contract analyses. See Katherine Wezel Stone, \textit{Labor Markets, Employment Contracts and Corporate Change, in Corporate Control and Accountability, supra} note 4, at 88-89 (discussing remedies for breach of contract not limited to damages for harm to expectation interest, but include structural mandates). Stone contemplates mandates—e.g., employee representation on corporate boards—as remedies that clearly go beyond the notion of promise keeping. See also Simon, \textit{What Difference Does It Make?}, \textit{supra} note 5, at 1701 (noting that managers can avoid reliance claims by discouraging reliance, so more radical reform than implicit contract is necessary); Simon, \textit{Social Republican Property, supra} note 37, at 1338-50 (discussing inalienability as necessary to prevent tendencies to self-interest).

\textsuperscript{297} Simon, \textit{Social Republican Property, supra} note 37, at 1403 (noting that efficiency may be traded off against value of community through collective decision). The distinction between a norm of promise keeping and a norm of solidarity is roughly this: promise keeping, albeit explained instrumentally, entails commitment, so compliance from the perspective of the promise keeper is not simply instrumental. Nevertheless, the substantive nature of promise making is that it is instrumental to the advancement of individually held and distinctly valued goods, so promise keeping cannot be wholly divorced from this nature. At the same time, the honoring of a promise in circumstances where doing so fails to be instrumental (say circumstances of efficient breach) cannot be explained solely in even long-term instrumental terms (in the fashion of neo-Hobbesians) if Humean depictions are to be retained. So non-instrumental, uncalculating commitment also cannot be divorced from the practice. \textit{Hume, Treatise of Human Nature, supra} note 105, at 518-23. \textit{Cf. Nozick, Rationality, supra} note 89, at 45-49 (discussing symbolic utility in combination with evidential expected utility). Apart, however, from this inseparability of instrumentalism and commitment, promise keeping is or is largely impersonal: it is not dependent upon identification with or commitment to the promisee (as distinguished from commitment to the practice). This commitment to others is what is meant here by solidarity. Notice that this is not to say that commitment to others is so alien to a promise keeping system as to be absent; it is rather to say that the keeping of a particular promise within such a system is not dependent upon mutual identification with a particular substantive end. Commitment to the system as an abstract or general good is necessary to the system's survival. By contrast, one acts from solidarity by reason of a commitment to a shared, substantive end and from identification with the others sharing, or made to share this end; the point of solidarity is that of ensuring the sharing.
corporations because *ex ante* promises (including implicit ones) cannot, given unpredictable future contingencies, be "discrete." This means, *inter alia*, that what a promise requires *ex post* cannot be specified *ex ante*. An implication communitarians may favor is that Humean honesty is inadequate to sustain a relational contract because Humean honesty may contemplate an *ex ante* specification.

Consider the corporate communitarian variation on this theme: corporate relationships entail the dependence of one contracting party (e.g., employees) on the good faith or non-opportunistic determinations of another party (e.g., managerial determinations regarding employee performance) given incapacity to specify *ex ante*. Dependent parties are induced to accept risks of opportunism (to "trust" management) through managerial signaling of adherence to a principle or norm of fidelity. However, this signaling will prove inadequate; the credibility of a managerial reputation for fidelity requires legal backing, as through fiduciary obligation. This is something of a Hobbesian viewpoint, and appears at first glance to be a quite instrumental one: fiduciary obligation serves to encourage corporate contracts. The communitarian twist is that fiduciary obligation is to reflect morality: instrumentalism requires non-instrumental commitment backed by law.

Is this understanding inconsistent with Humean commitments? With some of the calculating overtones left out, it is not inconsistent, at least up to the point of legal enforcement, with Humean honesty, because it is a story framed in terms of fidelity to an understanding. True this understanding, one about what may constitute good faith or opportunism, is quite unspecified *ex ante*, but specification is not, contrary to the allegation assumed above, a necessary feature of Humean norms (even if it is one of formalist contract). Indeed, tacit and inarticulate knowledge is central to Humean understandings of human interaction. The rub comes with legal enforcement, and it is this rub that enables a communitarian gloss on the story.

The difficulty with legal enforcement, at least from a Humean perspective, is that the unspecified, tacit, and inarticulate becomes judicially specified *ex post*, and there is no assurance that this specification will or can approximate through articulation the inarticulable. This is the reason why Humean formalists prefer non-legal, informal or social

298. This is the theme of relational contract literature of the communitarian variety. See * supra* note 35 and accompanying text.
300. See * supra* note 116 and accompanying text.
sanctions even at the (perhaps substantial) risk of their inadequacy.\textsuperscript{301} Moreover, the communitarian gloss on the story follows from articulate state specification. Legal enforcement risks a subtle shift from (1) enforcement of a norm of fidelity to an understanding to (2) enforcement of a norm of fidelity to the interests of the dependent, and from there to (3) fidelity to the unity of state conceived interests and objectives that is the norm of solidarity.\textsuperscript{302} It can be granted by the Humean that uncalculating commitment to the principles of a “corporate culture” may arise spontaneously as an non-instrumental solution to the instrumental problem of inducing the “trust” of parties contemplating a relationship of dependence. The story is in fact quite Humean. What the Humean cannot grant is that the understanding represented by this culture should be made uniform across corporations, can be captured by legal authority standing outside it, or necessarily entails in character or degree the “norms of reciprocity, equality, and cooperation”\textsuperscript{303} communitarians contemplate.

It is of course possible that the refusal to grant these matters will have the consequence of disabling productive corporate relationships; it may even be “inefficient.” Whether this is true is likely an unresolvable empirical issue of the sufficiency of social sanction. But this empirical issue does not turn on social construction of the individual, even when construed as the phenomenon and utility of uncalculating commitment.

In sum, social construction, even when understood as a thesis about norm governed behavior, is not an exclusively communitarian precept and does not compel, without the addition of substantive normative commitments not themselves derived from the thesis, communitarian interpretations or recommendations (or, for that matter, “liberal” ones). The particular “is” of social construction yields no particular “ought.”\textsuperscript{304}

\textsuperscript{301} Cf. Jordan v. Duff & Phelps, 815 F.2d 429 (7th Cir. 1987) (Posner, J. dissenting) (noting that underlying rationale of contract law should not be confused with its actual requirements by implying pledge to avoid opportunistic conduct).

\textsuperscript{302} See Bratton, supra note 89, at 166 (describing “socio-economic approach”).

\textsuperscript{303} \textit{Id.}

\textsuperscript{304} See Hume, \textit{A Treatise on Human Nature}, supra note 105, at 468-70 (stating that “ought” cannot be derived from “is”); Jeffrey Friedman, \textit{The Politics of Communitarianism}, 8 CRITICAL REV. 297 (1994) (criticizing communitarians for failing to bridge the is/ought gap) [hereinafter Friedman, \textit{The Politics of Communitarianism}]; Gardbaum, supra note 51, at 697-705 (discussing how social construction compatible with variety of normative positions). Charles Taylor has made a similar point. TAYLOR, PHILOSOPHICAL ARGUMENTS, supra note 11, at 182-85. However, Taylor’s point is that liberal critics of communitarianism mistake communitarian ontological theses for commitments to political collectivism. This,
B. Community and Morality

"Community" is given a normative and, in a sense, epistemological status in communitarian thought, again paralleling institutionalist claims about human cognition. Community is the source of knowledge about "the good" understood as the purpose or end or way of living that is valued but also as that which is deemed "moral." One implication is rejection of foundationalist, universal truths or values in favor of communal contextualism. A further implication is that the good varies: distinct communities embody distinct goods. That is, the good is to be discovered within the context of particular communities, through interpretive and dialogic means, not through deduction from foundational principle or scientific method. These implications have the potential to link communitarian political philosophy to post-modern interpretive or contextualized epistemology, to some forms of pragmatism, and to the

Indeed, would be a mistake, but the point in the text is that it is at least often one made by communitarians.

This is not to say that communitarians are without a mechanism by which they hope to derive authoritative oughts: they resort to a hermeneutical process from which a best account of practice may be derived. They contemplate, moreover, criteria for this best account, as in the claim that one account is better than another if it can explain the other and the other cannot explain it. See Charles Taylor, Explanation and Practical Reason, supra note 61, at 208-231. There are parallels in Hayek to these notions. See Hayek, Mirage of Social Justice, supra note 145, at 24-27.

It should be noticed that a modus vivendi conception of appropriate social and legal arrangements must, however, ultimately reject these proposals. There are two reasons: (1) The proposals contemplate a procedure that assumes values rejected by the modus vivendi view (the advocate of the view wishes to be left alone, he is not curious about the prospects for resolution). Cf. Steven L. Winter, Contingency and Community in Normative Practice, 139 U. Pa. L. Rev., 963, 970 (1991) (noting that dialogue theories build into their procedure controversial commitments). (2) The advocate of the modus vivendi view suspects that the proponents criterion is rigged, as he thinks the proponents accounts cannot, except arbitrarily, make claims to superior explanation. Notice that the superior explanation criterion is itself rigged; it assumes the activity of explanation as the good, thus privileging the good of academic, scientific or philosophical inquiry. See infra notes 361-79 and accompanying text.

305. The second claim is in fact an aspect of the first: if persons are "embedded," such that their identities are socially determined, it follows that their knowledge of the good is social. Transformative or reformist communitarians reject current (individualist) institutional patterns, and corporate law commentators associated with communitarianism are typically transformists. Although corporate communitarians are typically transformative, the tendency of some to rely upon interpretation, particularly interpretation of social norms or moralities as sources of corporate law links them to the community (here, large, social community) as source of good notion. See, e.g., Bratton, Public Values and Corporate Fiduciary Law, supra note 4 (arguing for imposition of social norms); Millon, Theories of the Corporation, supra note 4, at 247 (relying on conventionalist, communal account of meaning and interpretation); Mitchell, Groundwork, supra note 34, at 247 (invoking social morality).
contextualized ethics of some strands of feminism. However, it also has the potential to link communitarian philosophy to political and social conservatism and even to certain strands of classical liberalism. To the extent that the good is identified with the practices of a community, a conservative emphasis on tradition is implied. To the extent that a particular tradition is itself a liberal one, liberalism also may be identified with “the good.”

However, this communitarian emphasis upon “the good” is simultaneously an attack upon “liberalism’s” alleged “priority of the right over the good,” where “right” is understood as a neutral morality ultimately grounded in the “foundation” of an autonomous Kantian will. Egalitarian or progressive liberalism tends to predicate neutrality on a Kantian vision of autonomy linked to versions of “positive liberty”: individuals create the good for themselves through acts of choice and require for this activity the means to render the activity meaningful. The ideal is one of self-realization through self-direction. Prominent strands of communitarianism attack this notion: as individuals are constituted by community, they realize themselves through the activity of discovering and participating in a good already given by community, not through choice from among competing goods. Neutrality is on this account a threat.


307. Variations on the community as source of value theme are evident in cultural conservatism (the anti-individualist notion that common morality should be enforced by law), Gardbaum, supra note 51, at 719-23, and in some variations on classical liberalism. The “conservatism” of Michael Oakeshott has, at least until recently, an example of the latter. See Jacob Segal, A Storm From Paradise: Liberalism and the Problem of Time, 8 CRITICAL REV. 23 (1994) (discussing Oakeshott). Another possible example is John Gray, who engages in a critique of liberalism on anti-universalistic grounds, but also advocates a post-modern, “conservative liberalism.” JOHN GRAY, LIBERALISMS, supra note 46; JOHN GRAY, POST-LIBERALISM (1995).

308. See supra notes 100-107 and accompanying text.

309. See, e.g., SANDEL, LIMITS OF JUSTICE, supra note 100, at 160-61. One variation on this theme is that ends, not simply means to ends, are properly subjects of inquiry; ETZIONI, MORAL DIMENSION, supra note 88, at 11-13, and that constitutive ends are communal, not merely a matter of preference, but of meaning. CHARLES TAYLOR, SOURCES OF THE SELF, 95-97 (1989). Another is that unconscious routinization, not rational choice, characterizes human behavior. BELL, supra note 58, at 33-41. A third is emphasis upon interpretation, conversation and deliberation (as distinguished from rational calculation). BELL, supra note 58, at 55-89; Taylor, Atomism, supra note 232; Michaelman, Law’s Republic, supra note 36, at 1495-1503. A fourth is hostility to “bureaucracy” understood as Weber’s ordered, rationalized activity. MACINTYRE, AFTER VIRTUE, supra note 232, at 254; MacNeil, Bureaucracy, supra note 35. These themes are evident in corporate communitarian commentary. See, e.g., Bratton, Public Values, supra note 4 (invoking dialogic theory and proposing that economic instrumentalism should be limited by social values); Johnson, Individual and Collective
to self-realization.

1. Communitarian Autonomy and "Positive Liberty"

Nevertheless, there are senses in which communitarian versions of self-realization are derived from and extensions of Kantian self-realization and of the egalitarian liberalism that reflects this ideal. Corporate communitarians in particular appear to endorse Kantian themes, thereby generating something of a tension between the "social source of the good" notion and these themes. In the first place, communitarians tend to accept egalitarian liberal precepts but believe that egalitarianism is more firmly predicated upon communal commitment and obligation than on abstract autonomy. Secondly, within the traditions of autonomy and positive liberty is the notion that true or authentic self-direction requires that false, or unworthy choices are excluded; true self-direction entails mastery over self-destructive impulse. A minimalist seed for this notion is evident in even libertarian insistence upon contractual competence. A contemporary corporate suggestion of the notion may be found in the claim that investors display a short-term bias that ought not to be the guide to corporate decision. A critical legal variation on the theme is the diagnosis of "false consciousness."

The notion of authentic self-direction implies, however, that there exists an authoritative standard by reference to which inauthentic or unworthy choices, and therefore, false alternatives may be excluded. It is, therefore, perhaps a short step from the notion of self-direction to a communitarian common good. Consider in this regard Rousseau as a source of communitarian themes. Kant's liberalism may be viewed as having turned Rousseau's communitarian collective autonomy on its head by individualizing it; for Rousseau, collective self-direction was

Sovereignty, supra note 4, at 2235-39 (rejecting universalistic, scientific approaches in favor of contextualism and criticizing contractual theory of the firm as ignoring bureaucratic reality); O'Connor, Socio-Economic Approach, supra note 37, at 1540-45 (trust as non-instrumental value).

311. Id. at 323-26.
312. Berlin, supra note 105.
313. Hazen, supra note 90.
central. Moreover, Rousseau's anti-Humean distaste for tradition clearly contemplates detachment from the existing "goods" reflected in tradition. Communitarianism may therefore be understood as in a sense predicated upon autonomy and even as recommending neutrality, but these take on collective forms. For example, the neo-republican strain of communitarianism postulates a form of collective autonomy and a form of neutrality: the common good is to be chosen through a political dialogue that is constrained by a requirement of public justification (rendering private justification inauthentic), but is not constrained by a prior commitment to a particular common good (rendering the process content-neutral).

The norm-focused branch of communitarianism appears also committed to collective autonomy, for it postulates a collective freedom to choose good and discard bad norms, perhaps by reference to a set of substantive values outside these norms or, at least, outside those deemed "bad."

There may be a further Kantian element in corporate communitarian thought, for the morality emphasized in this thought is non-, indeed anti-consequentialist. Consider corporate communitarian proposals to free managers from the organizing principle of shareholder primacy: managers are thought then to become free to pursue moral commitments and therefore to preserve valued relationships as ends, independently of or regardless of "efficiency."

Such proposals, quite in keeping with

315. RAPACZYNSKI, supra note 54, at 239-62.
316. Michaelman, Law's Republic, supra note 36, at 1504; Sunstein, Beyond the Republican Revival, supra note 36, at 1554, 1576.
317. See, e.g., Johnson, Individual and Collective Sovereignty, supra note 4, at 2231; Mitchell, Groundwork, supra note 34, at 1481. Neorepublicans clearly treat their vision of politics as capable of transcending current goods, preferences and norms through collective choice. Sunstein, Republican Revival, supra note 36, at 1554.
318. Johnson, Corporate Life and Corporate Law, supra note 231, at 1487-88; Mitchell, Groundwork, supra note 34, at 1487-88. See Bratton, Public Values, supra note 4 (postulating a supplementary ethics as trumping cost of regulation in some cases); Bratton, Ethical Case, supra note 4 (recognizing tension between communitarian ethics and dominant welfarist premises of corporate law). Kantian deontological ethics may be understood as resting on the right/good distinction, such that what is right is not dependent upon what should be valued as good, and communitarianism is largely identified with a rejection of this distinction. Deontology is also identified, however, with anti-consequentialism: the moral does not depend upon the good in the sense that it does not depend upon the value assigned consequences of action, so, for example, one must adhere to principle even if this has bad consequences. It is in this latter sense that corporate communitarians appear Kantian, even if (which seems disputable) they do not rely upon "foundations" for the source of morality. It should be noticed that, ironically, consequentialists are in a sense deontologists: utilitarianism, and wealth maximization, for example, require a deontological commitment to maximizing utility or wealth. LARMORE, supra note 54, at 147. They also clearly reject the notion of the priority
a plasticity thesis of human nature and institutions, reflect a form of heroic or romantic individualism—the view that individuals, or individuals in democratic combination, are free to consciously determine and intentionally direct common purposes and the structures within which these purposes are pursued. Corporate communitarian hostility to contractual market orders follows from this romantic view, for it is a central feature of such an order, and of the Humean perspective generally, that persons within it are subject to impersonal direction.

2. Classical (Negative) Liberty

It seems reasonably clear that a classically liberal version of contractarianism will be hostile to autonomy as self-direction when taken either to the lengths suggested by egalitarian liberalism or to those suggested by communitarianism. A species of liberal neutrality more in keeping with a classically liberal commitment may be predicated on “independence,” understood in terms of a protected sphere for the individual or as “negative liberty” or “freedom from interference.” State “neutrality,” on such an account, protects this sphere. The content of the sphere consists of the projects, purposes, preferences or ends of the individual; it is these and their pursuit that are protected. Boundary problems (defining that which constitutes impermissible interference) obviously arise and must be resolved by reference to some principle (such as an equal liberty principle or a theory of rights or a theory of the prudential accommodations that will arise from recognition of mutual advantage). Resolution of these boundary problems is no doubt problematic, but the upshot is a negative view of "freedom": freedom is understood in terms of interpersonal relationships (freedom from particular forms of coercion by others) rather than in terms of an intrapersonal state (rational self-direction or authentic exercise of autonomy). Notice that this sphere is not one of freedom from "social interference," or impersonal direction. The “rights” it contemplates are minimal; they constrain only some forms of coercion by others (e.g., force and fraud). An implication is a relatively minimalist state, albeit

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320. GRAY, LIBERALISMS, *supra* note 46, at 90.
one that, in some variations on this theme may be facilitative.\textsuperscript{321}

The act of contracting, for example, entails positive freedom in that it entails an act of choice and constrains negative freedom by conferring a power on the promisee, but a requirement of contractual consent preserves negative freedom and contract enables pursuit of the personal projects or purposes it is the object of negative freedom to protect from interference.\textsuperscript{322} The contractual theory of the firm, at least in a formalist variation, reflects these notions in two respects: it assumes specified, pre-corporate entitlements, freedom from interference or obligation in the use of these entitlements and post-corporate or contractual obligation limited to (some version of) consent (and to obligations implied by social norms but enforced by non-legal sanctions).\textsuperscript{323} The contractual theory, viewed at least through the lens of a Humean spontaneous order, rejects the heroic autonomy of managers. The firm on this view is contractual, not in the sense that any given managerial act is necessarily traceable in any precise sense to a specified term of agreement, but rather, in the sense that managers are (and should be) highly constrained by impersonal market direction and by the spontaneously generated norms or rules underlying and enabling that direction.\textsuperscript{324} Managers might on this view be freed from threats of state force,\textsuperscript{325} but they are not freed from the punishments of impersonal direction. Negative freedom from interference on this account is rather precisely a rejection of heroic autonomy; impersonal direction is the favored alternative to conscious, articulate and purposeful determination or direction.

3. Classical Liberalism and the Social Source of Morality

If it is correct that this negative conception underlies classically liberal commitments, is that conception incompatible with communitarian notions? It is clearly incompatible with communitarian autonomy as collective self-direction, but what of the communitarian notion of discovery of the good already given by community? The negative conception would not seem incompatible with the view that individual identities are constituted by community or the view that community is

\begin{itemize}
\item \textsuperscript{321} See \textit{supra} notes 183-230 and accompanying text.
\item \textsuperscript{322} \textsc{Narvesan}, \textit{supra} note 129, at 60.
\item \textsuperscript{323} See \textit{supra} notes 183-230 and accompanying text.
\item \textsuperscript{324} \textsc{Hayek}, \textit{Political Order of a Free People}, \textit{supra} note 118, at 82.
\item \textsuperscript{325} Cf. Carney, \textit{ALI's Corporate Governance Projects}, \textit{supra} note 97 (advocating abandonment of fiduciary regulation).
\end{itemize}
the source of the good unless these views are given a far more precise, and substantive content than thus far suggested. It is not a feature of the negative view that the individual projects, purposes, ends or preferences protected by it are or were autonomously chosen; they may be given by the historical accident of being "embedded" in a particular community. 326 There is therefore no necessary notion within the negative view that freedom consists of autonomous choice of ends or freedom from social causation. Nevertheless, communitarian objections to the negative view, founded in the communal source of morality, warrant exploration. These will be treated here as objections to subjectivism.

Subjectivism is a feature of the negative view; the individual projects protected are ones valued above other alternatives by the individual concerned. 327 Both protection from "interference" and "interference" itself are unnecessary absent interpersonal disagreement. However, a socially constructed individual could not value a project absent a social source both for the project and for its being valued; so a purely descriptive version of the social source of "goods" thesis is satisfied. Nevertheless, perhaps a stronger version of the "community as the source of the good" thesis is inconsistent with subjectivism. 328 The stronger sense communitarians appear to favor equates "the good" with moral or ethical precepts—norms not merely as constraints, but as valued ways of life. Subjectivism may be understood as the claim that the individual, rather than community, is the source of the good. The individual may be deemed the source of the good because (1) the good is a mere preference, or (2) the good is created by the act of choice, or (3) that which is good is binding on the individual only by reason of the individual's decision to make it so. 329

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327. See supra note 150. Perhaps the partiality implied by subjectivism is untrue of Hayek's position, as he has been said to have no position on human nature. Kukathas, supra note 100, at 90. However, partiality may be built into Hayek's notion of dispersed knowledge: the unique knowledge of the individual would seem necessarily to include his preference, and Hayek's conception assumes purposive behavior. Hayek, Individualism: True and False, supra note 110, at 13-14. What is missing from Hayek's view is a specified preference or objective, as specification is alien to his "anti-scientism."


329. Gardbaum, supra note 51, at 705. There are on Gardbaum's account three possible positions on the question of the source of the good: goods are universal or objective; goods are individual or subjective and goods are particularistic and social. Id. at 706. Given this categorization, one might say that both individualists and communitarians reject universal goods and that the battle between them is over the individual or social basis for the good.
These notions would seem to entail threats to morality if interpreted as precluding a shared or intersubjective meaning and force to ethical norms, as moral claims by their nature apply across persons. (One cannot plausibly claim that a moral constraint applies only to others). The Hobbesian solves this problem by appealing to an instrumental rationality: goods are mere preferences, but are achieved through rational compliance with norms. The Kantian solves it by appealing to a universal morality: autonomous rational beings choose the "right" understood as a non-instrumental morality. The Humean solves it by appealing both to sympathy as appreciation of instrumental "utility" and to "sympathy" as vicarious pleasure from the welfare of others—both thought by Hume to be universal tendencies of human nature and to be reflected in custom or tradition. The intersubjective validity of moral claims is therefore a feature of all three positions. Subjectivity nevertheless remains also a feature of each: the marginal value of goods as projects, purposes or ends is expressed through choice individually within the limits imposed by instrumental rationality, universal obligation or tradition. Communitarian objections to this scheme appear to entail a rejection of Kantian universality and a rejection of instrumentalism. The Kantian notion of non-instrumental binding obligation outside the individual is retained, but the Kantian’s grounding of this obligation in a morality individually (as distinguished from collectively) “self-given” is rejected.

For example, consider self-interest as a Hobbesian justification for norm enforcement: enforcement is justified because there are reasons, grounded in self-interest, for compliance. The communitarian complaint is this grounding of the justification of enforcement; the justification seems to deny that a norm can be recognized as a good, as something valuable and binding, apart from its instrumental efficacy to the individual. Indeed, this would seem to be the source of the communitarian’s stronger claim about community as the source of the good and of her objection to subjectivism. The stronger claim is that goods were simultaneously both subjective and social.

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330. See supra notes 100-07 and accompanying text.
331. HUME, TREATISE OF HUMAN NATURE, supra note 105, at 317-20; HUME, PRINCIPLES OF MORALS, supra note 108, at 173-78.
332. Although simple self-interest as a motive for obedience is the prominent understanding of Hobbes, this understanding may be questioned as too-simple; there are elements of moral obligation in Hobbes, albeit ones tied to law. OAKESHOTT, RATIONALISM IN POLITICS, supra note 105, at 283-344.
goods (and in particular moral norms) are not merely generated by, but binding upon individuals, and this binding feature is something outside the individual, having value independent of the individual and therefore independent of its instrumental utility to the individual.333 The normative implication is that norms should be obeyed, not because there is a universal morality ascertainable through reason, but just because individuals are part of and dependent upon community practice.334

It is difficult to know what to make of this stronger claim. If it merely asserts that there is an intersubjective reality to norms outside the individual, it appears non-threatening. The Humean insists upon such a reality.335 Even a Hobbesian would admit that there is such a reality, at least in the sense that norms and their accompanying sanctions are perceived as constraints. Perhaps, however, the strong claim means that norms are subjectively perceived as obligatory apart from self-interest. The implication may be that norms, ways of life, and accepted modes of behavior are not traded-off or perceived in terms of choice. On this interpretation, persons are committed to norms in the sense that they reason from the symbolic and expressive structure of norms, so the meaning of norm compliance to persons engaged in compliance is non-instrumental.

Perceived obligation is a threat to Hobbes, and to neo-classical economic analysis, if these are interpreted as depicting human behavior as rational cost/benefit calculation in each instance of such behavior, with sanctions playing the role of costs. This, however, is not the Humean depiction, and need not be the interpretation given Hobbesian depictions.336 Humeans, and perhaps Hobbesians, can plausibly say that subjective assessment occurs within the constraints imposed by and even cognitive limits structured by norms, ways of life and accepted modes of behavior. Indeed, Humeans and Hobbesians tend to say that subjectivity is enabled by perceived obligations of compliance, because this permits

333. See, e.g., Johnson, Individual and Collective Sovereignty, supra note 4, at 2229-35; Millon, Crisis, supra note 1, at 1382-83; Mitchell, Groundwork, supra note 34, at 1482. See also MACINTYRE, AFTER VIRTUE, supra note 232, at 205; Charles Taylor, Hegel, History and Politics, in LIBERALISM AND ITS CRITICS 184 (M. Sandel ed., 1984).

334. See, e.g., SANDEL, LIMITS OF JUSTICE, supra note 100, at 179; Millon, Crisis, supra note 1, at 1482.

335. See supra notes 123-28, 150 and accompanying text.

336. Cf. Buchanan, Domain of Subjective Economics, supra note 141 (discussing how persons follow rules or norms without calculation in some contexts and not in others). See supra notes 123-28 and accompanying text.
prediction about the behavior of others. They can also plausibly say that norms, although perceived as obligatory, are explained and owe their survival to their efficacy in advancing individually held (but socially generated) projects. To say such things is not inconsistent with describing persons as perceiving obligations of compliance and does not require rational calculation about compliance. Subjectivity can survive as a phenomenon within the constraints or cognitive limits imposed or created by perception so long as the content of the norm, way of life or mode of behavior in question permits this subjectivity. And subjectivity clearly survives as conflicting interpretation of norms, ways of life, and modes of behavior.

A further possible interpretation of the strong communitarian claim is that objective norms—one's outside and binding on the individual—imply something about the process by which they are formulated. To claim that norms are outside and binding upon the individual is to claim that they are collective products, not things created by the individual. But what is the nature of the collective process yielding these products? Some communitarians appear to derive from the proposition that norms are collective products the conclusion that they are or should be within articulate control, in the sense of subjected to public justification and examination through debate, as by means of democratic political process or dialogue. There is, however, an alternative explanation: norms arise out of and are continually modified within informal, chaotic human interactions, gaining concrete, but largely tacit and inarticulable meanings within localized contexts, and this process should be maintained. There is nothing in this alternative that denies that the product is collective and is one of a collective process, it merely asserts that this collective process is made up of the constrained multiple subjective assessments of self-interested individuals over time, and that the product is not consciously, purposely, or intentionally generated.

What the alternative does deny is that the collective products of a process not characterized by articulate control constitute mere artifacts conferring power. Is the denial warranted? Arguably not; even a

337. Hayek, Individualism: True and False, supra note 110, at 23. Cf. GAUTHIER, supra note 123, at 157-89 (noting the rationality of disposing oneself to cooperation).


339. See supra notes 108-128 and accompanying text.

340. The claim denied is expressed in, for example, Habermas. JURGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY 124 (Frederick Lawrence trans., 1987). And
formalist insists that a minimal set of "norms," those entailed in a stable property rights regime, be articulated (and enforced) through the formal collective processes of the state. And rights, even if minimal, are by their nature conferrals of power. The distinction between types of collective process nevertheless holds, and for reasons suggested by advocates of articulate process: the property rights and market regime effectively forces interaction within it to be informal, chaotic and free of a requirement of articulate justification.341

A final interpretation of the strong claim that norms are binding is that the "utilitarian" or at least consequentialist reasons Humeans and Hobbesians would give for valuing norms are incompatible with the communal source of morality. Consider an indirect "utilitarian" understanding of the value of norms: the norms of a classically liberal community are valuable, not intrinsically, but because they indirectly serve some end, such as civil peace, general welfare, or coordination, which end persons have self-interested reasons to deem good.4 A modus vivendi view of norms is consequentialist, or instrumentalist in this sense.

It is clearly the case that Humeans and Hobbesians engage in justificatory assessments of this type,343 but does this render these efforts inconsistent with the communitarian thesis? It should first be

in MACINTYRE, AFTER VIRTUE, supra note 232, at 244-55. For both Habermas and MacIntyre, however, the ultimate point is to overcome or revise existing "norms" by means of dialogue or of neo-republican politics.


342. See GRAY, LIBERALISMS, supra note 46, at 120-39 (indirect utilitarian interpretation of Hume and Mill).

343. Cf. Cooter, Decentralized Law, supra note 161 (stating that law should be derivative from norms that serve to coordinate). This is a source of a standard criticism of Hayek—that his "anti-constructivism" is inconsistent with his tendency to "constructivist" criticism of post-New Deal law. See, e.g., KUKATHUS, supra note 100, at 206-15. However, the criticism is well founded only if Hayek's "anti-constructivism" is understood as precluding any critique of social practice, including the social practice of "constructivism." It is not inconsistent to say that centralized rational planning should be replaced with "spontaneous order" or to "construct" an institutional framework that permits such an order. The larger difficulty in Hayek is that his themes are too abstract to provide determinate answers to concrete questions, at least if one's criterion for the viability of a theory is such determinacy. Still, it is not impossible to make judgments about the relative degree of "constructivism" within alternative institutional structures, even if those structures are themselves the products of a species of "constructivist" design.
noticed that, if the communitarian thesis is that normative criteria must be found within communal practice,\textsuperscript{344} there is a sense in which peace, welfare and coordination satisfy this requirement. To the extent that these ultimate values are intelligible to us, and they seem clearly to be so given that the standard practices of "our community" entail their justificatory invocation, this invocation is not inconsistent with the thesis that community is the source of value.\textsuperscript{345}

An alternative understanding of the communitarian objection to consequentialist justification, however, is that consequentialist or instrumentalist assessment of norms is inappropriate even if these criteria are themselves social products. Perhaps the binding norm claim is a species of deontological claim about the nature of morality. There are a number of variations on this theme: political morality is autonomous, not subject to assessment by reference to criteria outside it;\textsuperscript{346} rationalistic assessment or "scientism" is inappropriate to human affairs,\textsuperscript{347} appropriate method is interpretive, in the sense that the intersubjective meaning of practices, norms and actions, not their consequences or their conformity to rationalistic, imposed orders, is the viable means of social inquiry.\textsuperscript{348} This line of argument would seem most clearly invocable against Hobbesian efforts to construct morality (or at least to explain it) in terms of rational self-interest, but it seems an odd claim to make against Humeans, as they make rather precisely these arguments and derive politically "conservative" recommendations from them.\textsuperscript{349}

Nevertheless, it is the case that Humeans, Hayek in particular, incorporate consequentialist or instrumental elements, particularly in the

\textsuperscript{344} Gardbaum, supra note 51, at 707-10 (attributing this view to Rorty).
\textsuperscript{345} Cf. Richard Rorty, Postmodernist Bourgeois Liberalism, 80 J. PHIL. 583 (1983) (discussing how liberalism, albeit of an egalitarian variety is justified by reference to practical advantages our tradition's understanding of these).
\textsuperscript{346} Cf. Gardbaum, supra note 51, at 694 (discussing politics as autonomous sphere) (relying on Michael Walzer, Philosophy and Democracy, 9 POL. THEORY 379, 397 (1981)).
\textsuperscript{347} See Taylor, Interpretation and the Sciences of Man, supra note 13. "Scientism" may be understood as the inappropriate application of the methods of the natural sciences to human affairs. If the natural sciences are rationalistic in the sense of instrumental, such an understanding is perhaps invocable, but the sense in which "scientism" is used in Taylor's claim is that the meaning or value of a practice to its participants is missed by a perspective limited to instrumental assessment of the practice. \textit{See also} Lawrence Lessig, Social Meaning and Social Norms, 144 U. PA. L. REV. 2181 (1996) (making similar claim).
\textsuperscript{348} Id.; Taylor, Explanation and Practical Reason, supra note 61.
\textsuperscript{349} HAYEK, THE COUNTER-REVOLUTION OF SCIENCE, supra note 109; OAKESHOTT, ON HUMAN CONDUCT, supra note 64; OAKESHOTT, RATIONALISM, supra note 105. Moreover, Oakeshott, at least, would deny that it is a viable claim against Hobbes. MICHAEL OAKESHOTT, supra note 105, at 283-344.
form of an indirect "utilitarianism." This "utilitarianism" has "no determinate end-state" and it is not assumed; indeed, it is denied that practices may be rationally designed to achieve a determinate end state. The notion, rather, is that the immanent logic of socially generated norms, at least within "liberal" societies, is one of coordination of diverse plans. To "interpret" norms as coordinating (or, in Hobbesian account, to interpret them as rational) is of course to assert that they are means to individual purposes. This, however, does not preclude the propositions that the activity of norm compliance is valued or has meaning to its participants not fully captured by its instrumental function. It precludes only the proposition that norms lack an instrumental function.

To the extent communitarian critiques of consequentialist or instrumental accounts call attention to dimensions of social practices (to their symbolic and expressive dimensions), neglected by instrumentalists, they are warranted. To the extent such critiques assert that compliance with or participation in norms exhausts their meaning and value, and thus deny an instrumental or consequentialist dimension, they seem implausible. Norms may be both means and ends: adherence to a norm may be a valued activity but it may also be an activity engaged in for a purpose beyond itself. The practice of making and keeping promises is, for example, a valued social product. Promises may be kept and the keeping may be valued even where individually held purposes become defeated by the keeping. But promises are not made and kept simply for

350. Compare CROWLEY, supra note 338 (viewing Hayek as authoritarian liberal); Leland B. Yeager, Utility, Rights, and Contract: Some Reflections on Hayek's Work, in THE POLITICAL ECONOMY OF FREEDOM: ESSAYS IN HONOR OF F. A. HAYEK 161-80 (Kurt R. Leuber & Albert H. Zlabinger eds., 1984) (viewing Hayek as rule utilitarian); Jacob Segal, A Storm From Paradise: Liberalism and the Problem of Time, 8 CRITICAL REV. 23 (1994) (viewing Hayek as consequentialist), with JOHN GRAY, LIBERALISMS, supra note 46, at 95-100 (viewing Hayek as both a Humean, indirect utilitarian and as conservative relying on cultural evolution). Donald W. Livingston, Hayek as Humean, 5 CRITICAL REV. 159 (1991) (viewing Hayek as overwhelmingly Humean). It is also possible to view Hayekian spontaneous order as rejecting particular ("socialist") normative visions by reason of a commitment to another normative vision (a species of liberalism). See, e.g., Laurent Dobzinskis, The Complexities of Spontaneous Order, 3 CRITICAL REV. 241, 251-55 (1989) (Hayek's liberal bias). But cf. GRAY, HAYEK ON LIBERTY, supra note 108, at 120 (stating that liberalism is not a necessary product of spontaneous order). Utilitarianism in Hayek should again be understood in terms of maximizing coordination or maximizing the prospects for fulfillment of individually generated plans or projects, not in terms of objective measurements of wealth, happiness etcetera.

351. KUKATHUS, supra note 100, at 64.

352. See GAUTHIER, supra note 123, at 330-37 (stating that intrinsic value depends upon instrumental value); JON ELSTER, SOUR GRAPES, supra note 105, at 91-100 (stating that participation must have a point beyond the good of participation as the latter is a by-product).
the sake of engaging in these practices; promises are about something. And it may be doubted that promise making and keeping would survive as socially given valued activities if they generate a tendency to defeat the something about which promises are made. Norms must be interpreted, their meaning and value to the persons adhering to them is an important element in understanding them, so it is plausible to say that their content cannot be reduced to their function. But it is not plausible that either this meaning or social explanation is independent of function.

At least this is so if the norm in question is one like promise keeping. Perhaps the norm that communitarians favor—solidarity—is not of this type. Perhaps, solidarity has no purpose beyond itself, so analysis of solidarity must take the form solely of interpreting its meaning (or of deeming the "function" of some behavior the expression of solidarity). If so, however, communitarian objections to functionalism, consequentialism or instrumentalism turn out to be objections to particular norms and advocacy of others.

4. Community Values and Communitarian Normative Commitments

Communitarians probably intend more by linking community and "the good" than a descriptive claim about social origins. They wish to make normative claims, claims inconsistent with classically liberal normative stances. One implication of the classical stance is that there are distinct projects reflecting distinct and contradictory conceptions of good lives even within the general concept socially given. Another is that persons are partial to their particular projects. While persons may intersubjectively recognize a project as valuable (given their social construction), under the classical view, they place distinct marginal (subjective) values on it when engaged in trade-offs. If the communitarian normative claim is that there should be a collective and authoritative prioritization and integration of projects, and, therefore, an authoritative marginal valuation, communitarians must reject these implications. If this rejection is to be grounded on community as the source of the good, the interpretations communitarians wish to obtain from an examination of the meaning of "our community's" morality is one that excludes or at least subordinates pursuit of individually held purpose as an element of that meaning and as an element of the explanation of that morality.

Here is a concrete corporate law example, arising from the communitarian perspective, of these normative possibilities: The dominant, contractual theory of corporate management's responsibility, that of
maximizing shareholder wealth,\textsuperscript{353} is inconsistent with the meaning of "our morality" as this morality is conceived by the corporate communitarian. In the first place, the contractual explanation of this responsibility assumes that corporate contracts, for example, the corporate "contract" with employees, is a relationship instrumental to individually held purposes (the purposes for which the employees' wages will be employed and the purposes for which the shareholders' "profits" will be employed). In the second place, both the instrumental value and any intrinsic value of the relationship recognized by the contractual explanation are subjective: wages and leisure are compared and traded-off individually by the employee; job security and its cost in flexibility are compared and traded-off in management's estimates of that which will enhance productivity; the values of "doing a good job" or "belonging to a team" are compared to other goods and traded off by both manager and employee. In the third place, neither the corporation nor its constituent relationships have a meaning or value apart from their instrumental function in the contractual theory, or, at least, any such value is subordinated or is itself given a function. Thus, being an employee of corporation X has no symbolic value or influence on identity, except as it may be deemed efficacious to productivity. And a norm of managerial loyalty to employees (expressed, for example, in an implicit promise of job security) has no meaning or value under the theory independent of its efficacy in ensuring a supply of competent employees.

This line of argument, albeit perhaps an accurate depiction of a neoclassical analysis, is not a plausible account of a Humean one. The values it claims are absent from a contractual theory of the firm are clearly present in the Humean theory. Nevertheless, the depiction may be accurately applied to the formalist corporate law suggested by Humean theory, for these values are not subjects of legal inquiry within that formalism.\textsuperscript{354} The corporate communitarian, by contrast, wishes to conform corporate law to "our morality" as she sees it by making the meanings and values relegated to trade by the contractual theory visible in the law.

This communitarian position can now be expressed concretely in terms of corporate communitarian recommendations: The law is to


\textsuperscript{354} See supra notes 183-230 and accompanying text.
recognize a managerial obligation to employees\textsuperscript{355} or is to restructure ownership of the firm in service of employees.\textsuperscript{356} Subjective tradeoffs are to be eliminated or minimized in favor of an authoritative valuation under these proposals. For example, a managerial tradeoff of job security and flexibility in terms of estimated productivity is obviated, or at least, subjected to legal reassessment if a fiduciary obligation to employees is recognized, and it is doubtful that an employee assessment of a wage/job security tradeoff could be respected in communitarian hopes for this obligation.\textsuperscript{357} Although corporate communitarians sometimes justify such proposals in instrumental and consequentialist terms, it is clear that norms of solidarity and commitment trump function under the proposals. For example, inalienable employee ownership of the firm, if it generates inefficiencies, is nevertheless politically justified.\textsuperscript{358}

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\bibitem{356} Simon, \textit{Social Republican Property}, supra note 37, at 1344-49.
\bibitem{357} See, e.g., Johnson, \textit{Individual & Collective Sovereignty}, supra note 4, at 2241-42 (noting that corporate law concern should be with distribution as well as efficiency); Millon, \textit{Redefining Corporate Law}, supra note 4, at 274-75 (private ordering inequitable because reflects inequality of wealth); Millon, \textit{Crisis}, supra note 1, at 1383, 1385 (noting communitarian conception of liberty as a positive one requiring that primary needs be satisfied; efficiency ignores unequal distribution of wealth); Simon, \textit{Social Republican Property}, supra note 37, at 1344-49 (recounting distributive egalitarianism of republican tradition).
\bibitem{358} Simon, \textit{Social Republican Property}, supra note 37, at 1403 (noting that evidence of private, individual decisions regarding organization of economic production cannot settle issue of desirability of neorepublican organization, as this is political issue ). It is of course possible that a worker controlled enterprise might seek to maximize "profit," although this may be doubted from perspectives critical of political processes. Cf. Henry Hansman, \textit{When Does Worker Ownership Work? ESOPs Law Firms, Codetermination and Economic Democracy}, 99 YALE L.J. 1749 (1990) (discussing how heterogeneity of interests in worker controlled enterprises generate prohibitive costs). The point of communitarian proposals along these lines appears, however, to be that "profit" maximization conceived as lowest cost production responsive to consumer demand is to be moderated, or foregone, because the human costs of maximization are what is complained of. Worker control would not seem a plausible alternative to shareholder primacy if workers behave as if they were shareholders.

None of this denies that forms of worker democracy may be the best means of achieving "efficiency," understood as lowest cost response to consumer demand. The point is that worker democracy conceived as an end or common good in itself is not grounded upon efficiency. The problem generated by proposals of this type is therefore the source of outside capital. To the extent that there are alternatives to worker controlled firms (and assuming that worker controlled firms are inefficient), outsiders would invest elsewhere (equivalently, would demand higher rates of return for the vicissitudes of worker democracy). An implication is
There is of course a difficulty with all of this: on what grounds may it be said that this legal program is derived from the thesis that community is the source of value? Communitarianism, and corporate communitarianism, are predominantly transformative: they contemplate a new community, not the one we have. If the traditions of American society reflected in its law are excessively individualistic traditions, as communitarian critics of that society contend, and if the communitarian depiction of the contractarian corporation reflects this excessive individualism, it is difficult to see how to ground a normative commitment to a transformative program of conversion to a nonindividualistic community on them. Indeed, these excessively individualistic traditions would seem to justify an individualistic agenda. It is possible, for example, to construct a defense of neoclassical economics on the "community as source of value" notion: neoclassical analysis of law may be a proxy for the normative commitments of an individualist tradition.

This, however, is perhaps too quick. It is possible to ground transformative commitments on the community as source of value notion by denying that our tradition is one of a thoroughgoing individualism. This, indeed, is a standard argument of transformative communitarians. They argue, quite plausibly, that our traditions, albeit dominantly contractual restrictions on democracy (i.e., workers who offer these restrictions to avoid the high cost of capital). To the extent that there are no investment alternatives, lower levels of investment are predictable. A solution is state allocated capital, with allocation presumably based upon political considerations, but this solution then either directly leads to resource "misallocation" (i.e., investment by reference to criteria other than consumer preference) or state "banks" operating as entrepreneurial capitalists and a return, therefore, to a contractarian market regime. See GRAY, LIBERALISMS, supra note 46, at 173-79; DeBow & Lee, supra note 1, at 413-22. Cf. Mark Blaug, Hayek Revisited, 7 CRITICAL REV. 51, 58-59 (1993) (socialism is viable at low levels of economic development or in war time command economics; it is unworkable where consumers demand a mix of products).

359. Holmes, The Community Trap, THE NEW REPUBLIC, Nov. 28, 1988 at 27-28; Tatsuo Inove, The Poverty of Rights-Blind Commonality: Looking Through the Window of Japan, 1993 BYU L. REV. 417, 523-24; Kymlicka, CONTEMPORARY POLITICAL PHILOSOPHY, supra note 63, at 215; Nancy Rosenblum, Another Liberalism, supra note 244, at 162. For evidence that corporate communitarians view the status quo as excessively individualistic, see Johnson, Individual and Collective Sovereignty, supra note 4, at 2299-35 (arguing both a social construction thesis and a claim that dominant conceptions can be reformed); Mitchell, Groundwork, supra note 34, at 1479-81 (arguing for replacement of the dominant ethic of self-reliance with "morality" and that currently defined social roles can be changed to conform with this morality).

360. See POSNER, ECONOMIC OF JUSTICE, supra note 154, at 65-115 (treating neoclassical analysis as compatible with individualist intuitions). But see POSNER, PROBLEMS OF JURISPRUDENCE, supra note 8, at 376-82 (treating neoclassical analysis as inconsistent with individualist intuitions).
individualistic, are both ambiguously so and accompanied by egalitarian and altruistic strands. This strategy of partial denial is evident in the literature of critical legal studies (where it typically takes the form of the "contradiction" between individualism and altruism in legal doctrine) and in the literature of neo-republicanism (where it takes the historical form of a resurrection of a lost or submerged republicanism of the founders). It is a strategy reflected in corporate communitarian claims that the common morality of the man on the street is incompatible with the recommendations of neoclassical economics and that conventionalist accounts of meaning nevertheless permit reformist interpretation within the broad limits of convention.

The strategy of partial denial, however, does not obviate the complaint that transformative communitarianism is inconsistent with reliance upon the norms of existing community. In the first place, the competing norms story relies heavily upon characterizing the traditions in question. It is rather easy to "discover" an altruistic tradition if its individualistic competitor is characterized as narrow, materialistic egoism, but this characterization is disputable. In the second place, and assuming both that egalitarian, altruistic norms compete with individualist norms in our tradition and that it is possible to derive a transformative agenda from interpretation of the altruistic and egalitarian strands of that tradition, it is implausible that the choice of egalitarian altruism over individualism can be justified on the basis of community. The point of the strategy of partial denial is that "our community" is composed of

361. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976) (noting that conflict between self-reliance and altruism permeates adjudication) [hereinafter Kennedy, *Form and Substance*]; Kennedy, *Distributive and Paternalist Moves*, supra note 20. Professor Balkin’s interpretation of CLS, that it presents a structuralist view in which legal doctrine can be seen as relatively individualistic (in comparison to some alternatives) and relatively altruistic (in comparison to others) and that it is simultaneously deterministic while holding possibilities for transcending determinism, suggests the point. Balkin, *supra* note 255, at 1158-64, 1167-69. Roberto Unger’s notion that a political principle is subject to multiple interpretations and therefore does not compel a particular doctrinal result is also suggestive of this strategy. See ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 5-7 (1986). However, Unger ultimately opts for a foundational, universalist commitment to a general political theory. See KRONMAN, LOST LAWYER, *supra* note 61, at 248-64.


competing and contradictory norms; the basis for choosing between these is problematic. There would seem to be three possibilities: One may justify one's choice on some source outside a community, one may resort to an arbitrary choice of commitments, or one may explain one's choice as itself socially constructed, as in the thesis that normative commitments are manifestations of competing political cultures. The first possibility is a resort to universal principle, not community. The second and third possibilities explain the commitments of particular persons, but provide no reason attractive to persons who do not share these commitments. These complaints, once it is recognized that "our community" is one of competing traditions, apply as well, to individualist, including classically liberal positions. A consistent adherence to Humean formalism could require as much of a transformation as communitarian reform and cannot provide reasons for its interpretations of the normative commitments of "our community" attractive to communitarians.

To this the transformative communitarian can reply that this problem of competing traditions is recognized and resolved in communitarian thought by devices here earlier rejected: a process, dialogue or technique of practical reason operating within a political, governmental, "public" realm. It was earlier conceded here that these devices are plausible.

366. See Gardbaum, supra note 51 (distinguishing substantive community, derived from an extra-communal, universalistic norm from metaethical community, the notion that norms are to be found within contextual practice); Jeffrey Friedman, The Politics of Communitarianism, supra note 304, at 311-12, 317-20 (discussing how Taylor, Sandal, Walzer, and MacIntyre all contradict their particularism by resorting to universalistic stances from which they criticize individualist culture).

367. It is sometimes claimed, however, that the interpretive technique discovers "deep" commitments, typically of egalitarian varieties. See, e.g., BELL, supra note 58, at 57-89 (deep commitments); WALZER, supra note 11, at 35 (deeper shared meanings entailing "complex equality"); ROBERTO UNGER, LAW AND MODERN SOCIETY 242 (latent solidarity in legal practice). Cf. Kennedy, Form and Substance, supra note 361, at 1724 (predicating choice on intuition within particular factual contexts). This move is unconvincing. That which is relatively more "deep" or shallow is a partisan characterization. It is of course quite possible to engage in shallow or deep interpretation, but the experience of "deep" interpretation is one in which uncertainty and incommensurability are more likely discoveries than certainty and reconciliation. Indeed, these are so more likely that their discovery may serve as a plausible proxy for "depth" of interpretation. Cf. Kymlicka, Appendix I: Some Questions About Justice and Community, in BELL, supra note 58, at 212-14 (questioning "deep" commitments).

368. See generally Ellis, supra note 8, (postulating competing individualist and egalitarian political cultures as determinants of political preferences).

369. See, e.g., Charles Taylor, Explanation and Practical Reason, supra note 61, at 208 (discussing practical reason as alternative to skepticism and relativism); MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY?, supra note 237, at 348-88 (discussing resolution by means of tradition's inability to resolve problems within it); Alisdair MacIntyre, Epistemological
accounts of at least some actual legal practices.\textsuperscript{370} However, it is this communitarian program that is transformative: it contemplates that conflicting norms, practices or traditions are to be authoritatively resolved by public, political, and legal means. The communitarian point is to extend the realm of the political, displacing the social, by seeking resolution through these devices.

Perhaps, however, this merely recognizes a communitarian tradition at another level: among our traditions is that of public, political, or legal centrality, or at least, of its advocacy. Indeed, the tradition of public centrality, despite communitarian complaints about excessive individualism, is arguably the presently dominant one, even though this tradition’s manifestation in the post-New Deal regulatory state may be deemed excessively rationalistic by some communitarians. Recognizing this different level, however, reproduces the problem: a dialogue or technique of practical reason as a mechanism in law for resolution of competing normative commitments is itself a partisan choice: it assumes a “public,” in the sense of political, rather than a “private,” in the sense of social, resolution.

Communitarians invoking notions of articulate dialogue tend to rely upon a criterion of the superiority of one interpretation over another or upon a procedural technique for fudging the matter of consent. The criterion of superiority, invoked in the context of practical reason, is some variation on a better explanation theme: one party to the conversation identifies a premise or good to which her opponent is committed, and shows how this requires a conclusion distinct from that the opponent had maintained.\textsuperscript{371} The technique is proposed in opposition to “scientism,” understood as explanation by reference to some “objective,” neutral, and consequentialist criterion outside commit-

\textsuperscript{370} See supra notes 58-61 and accompanying text.
The procedural technique is to infer consent to a dialogic procedure and to deem this sufficient to justify authoritative conclusions about substantive matters despite the objections of losers. The dialogic justification of consent to procedure has a rather clear Hobbesian parallel in the "social contract." The problem, however, is that dialogic procedure and interpretive technique assume a particular project, the intellectual's project of "grasp[ing] what the world is like." This is an unlikely account of the projects of others. In seeking to extend the reach of authoritative reason or of authoritative dialogue the intellectual is engaged in imperialism.

It might be said that this imperialism is inevitable, that the content of corporate law (even an "individualistic" one) is already an account of what the world is like and is therefore an account with which persons not engaged in grasping are stuck. There are two levels at which this rejoinder may be made. First, the individualist or contractorarian status quo is itself a partisan choice, and one itself justified through some

372.  Id. at 213-15; Taylor, Interpretation and the Sciences of Man, supra note 13.
375.  There is also a Hobbesian parallel to the better explanation theme. The technique would seem straightforward: if one's opponent agrees that some state of affairs is a "bad," it may be possible to come to an agreement that a proposal should not be adopted because it will generate this "bad." This, indeed, is a typical neoclassical move. See, e.g., Craswell, Passing on the Costs of Legal Rules, supra note 94. It is not, however, necessary to adopt the full neoclassical apparatus to engage in modest degrees of consequentialism, see Buchanan, What Should Economists Do?, supra note 96, at 52-62 (distinguishing "Smitean" institutional recommendations from "scientism"). Cf. Rorty, supra note 345 (emphasizing practical consequences of institutional arrangements). One potential communitarian response is nevertheless that the mechanism by which predictions about consequences are made remains in dispute (e.g., the self-interest assumption). Another is that there is in fact no agreement about the normative status of a predicted consequence (e.g., "efficiency," or coordination, or a specified form of distribution are normatively problematic).
intellectual efforts at grasping. This is true, in the sense that, if the status quo is individualist or contractarian, it is not communitarian. This, however, is not surprising. Liberals are not neutral about neutrality, and legal formalists, understood as minimizers of authoritative practical reasoning and of public justification through dialogue, are not neutral about the desirability of these. Second, it might be argued that the behavior of corporate actors within the status quo is traceable to the collective choice of a practical or dialogic type. The argument, however, entails an implicit choice of a baseline. It is the case that “private” behavior is potentially subject to a collective demand for justification, so it is perhaps contingent upon this potential, but it is also the case that the law can decline to make this demand. Private behavior is not legally determined if there is no legal mechanism for assessing it, even though that behavior is in a sense enabled by the refusal to assess it.\footnote{378}{If the reader likes, the “private” or social realm is rendered possible through a refusal to hear “other voices,” by a refusal to entertain a dialogue. The possibility is confirmed by communitarian complaints about corporate law. To assert that corporate behavior should be subjected to the practical reasoning of legal authority is to assert a demand for justification, a demand (largely) absent from the status quo.\footnote{379}{Resolution of conflicting normative visions through law conceived as a political process or dialogue, or as the practical wisdom of legal authority is not a resolution compelled by the norms of our community. Rather, it is a choice of one tradition over another. That choice is not itself justified by reference to the tradition chosen; it is merely explained by reference to the chooser’s prior commitment to that tradition. This is equally true of a classic liberal formalism. State perfectionism is built into the communitarian’s dialogic project, but contract is built into the formalist’s skepticism about that project.}}

Resolution of conflicting normative visions through law conceived as a political process or dialogue, or as the practical wisdom of legal authority is not a resolution compelled by the norms of our community. Rather, it is a choice of one tradition over another. That choice is not itself justified by reference to the tradition chosen; it is merely explained by reference to the chooser’s prior commitment to that tradition. This is equally true of a classic liberal formalism. State perfectionism is built into the communitarian’s dialogic project, but contract is built into the formalist’s skepticism about that project.

5. Community and Plasticity

The previous section questioned the claim that “community as the source of moral value” justifies a transformative program. To this line of argument there is an obvious answer: the transformative program

\footnote{378}{See supra notes 200-206 and accompanying text.}
\footnote{379}{It is largely absent; fiduciary duty is an obvious counter example. See supra notes 212-16 and accompanying text. Debates about fiduciary duty, however, reflect the discussion in the text. Communitarians tend to argue (as has this writer on occasion) in favor of intensified fiduciary regulation; contractarians tend to argue in favor of abandoning that regulation.}
does not in fact rely upon this thesis, it relies instead upon a substantive vision of community, alien to the values of current community, or at least to those thought to be dominant in current corporate law, and seeks to displace these values. This position employs the social construction thesis to enable a transformative agenda by adding a plasticity thesis: given that persons are socially constructed, it is possible to reconstruct persons by reconstructing the society in which they are embedded.\(^{380}\) For example, the answer enables the claim that persons are not naturally “selfish” but are capable of altruism and are rendered “selfish” because of the society that has constructed them.\(^{381}\) Another example: as preferences are socially given, there is no warrant to respecting preferences deemed socially dysfunctional.\(^{382}\) Indeed, perhaps the point of moderation in corporate communitarian accounts of the social construction thesis is that individualist/contractarian norms, institutions and traditions are revisable—persons are only “partly” constituted by these and may transcend them.\(^{383}\)

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\(^{383}\) Johnson, *Individual and Collective Sovereignty*, supra note 4, at 2229-35 (arguing that both over- and under-socialized accounts of behavior should be avoided). The point, then, of plasticity is that of enabling displacement of the “social” with the “political,” or, at least, with a new, politically mandated reform. This displacement is in fact the essence of the substantive communitarian vision; the notion of a common good and of participation in its creation is a denial of markets and of contract because the latter presuppose diverse goods pursued individually. MACINTYRE, *AFTER VIRTUE*, supra note 232, at 244-55. Nevertheless, communitarian programs typically call merely for partial displacement, criticizing self-interested acquisitiveness and calling for limiting it or for adding participatory structures. BELL, supra note 58, at 58-60, 70-72; BELLAH, supra note 24, at 281-87; ETZIONI, *MORAL*
Notice that the plasticity thesis entails the positions both that persons are plastic (identities, preferences, etcetera are socially determined) and that the social structures yielding constructed persons are plastic. The former position is an interpretation of the social construction thesis. It may take a moderate form (persons are "partly" constructed), in which case a role for "natural" inclination (persons are partially self-interested) and conscious choice (persons can choose between selfish and altruistic behaviors) would seem to be assumed. The latter position requires, in addition to social construction, both that social structures (institutions, norms, etcetera) are things subject to conscious, intentional design and that the reforming agent is competent to reconstruct social structures to conform to that agent's normative vision. Of course, transformative communitarianism requires, in addition to plasticity, a claim to the validity of its normative vision. This claim no more follows from plasticity than it follows from social construction. Nevertheless, it is enabled by plasticity and social construction in the sense that it is rendered possible if these are assumed.

The plasticity thesis explains transformative communitarianism's reliance on social construction without attributing to it the mistake of deriving a substantive agenda from social construction. It further explains why transformative communitarianism’s substantive agenda appears inconsistent with the individualist norms of current community: the agenda does not rely on such norms; it contemplates a substitution (or, at least, favors interpretation and exposition of one strand of tradition over interpretation and exposition of another). What the plasticity thesis does not do is justify the substantive program of the transformative vision. One cannot persuasively say that this program is compelled by "our morality" if our moral practice is to be transformed; one needs instead an argument for the superiority of the transformed practice. This is not to say that corporate communitarians have not

DIMENSION, supra note 88, at 237-51. On the displacement generally, see KYMLICKA, supra note 63, at 216-30 (communitarian state perfectionism ignores role of society in liberal thought). Gardbaum, supra note 51, at 727 (discussing how good can be embedded in social practice without political pursuit of common good).

Corporate communitarianism reflects the displacement both in its critique of contract and market and in its proposals for constituency participation in corporate governance. See, e.g., O'Connor, Socio-Economic Approach, supra note 37 at 1546-56 (discussing employee voice via participation); Johnson & Millon, Who's in Control?, supra note 355, at 1179-80 (calling for democratization of corporate governance); Lewis Soloman & Kathleen Collins, Humanistic Economics: A New Model for the Corporate Social Responsibility Debate 12 J. CORP. LAW 331 (1987) (advocating employee co-determination); Simon, Social Republican Property, supra note 37 (discussing economic democracy via inalienability and participation).
offered such arguments; some have, and in quite consequentialist terms, thus mimicking neoclassical economic analysis. Rather, it is to say that a transformative agenda is not a conclusion reachable from a communitarian premise regarding the communal source of morality.

C. Decentralization, Direction, and Conformity

The preceding section of this article strongly suggests that classical and communitarian perspectives are to be normatively distinguished by the former's commitment to decentralized decision, "freedom" within a nondirective legal structure and tolerance of diversity within the socially given, and, by contrast, the latter's commitment to centralization, direction and conformity. It is not likely that communitarians would accept this suggestion, largely because the meanings of centralization, direction and conformity, and for that matter the meaning of "freedom" are in dispute. This section attempts an exploration of some of the elements in this dispute.

1. National and Local Communitarianism

In addition to the conservative/transformative tension generated from claims about community as a source of norms, a local/national tension is generated by such claims. If the source of norms is community, it is possible to conceive of the nation-state as the relevant community on the ground that the set of norms in question is shared by the inhabitants of the nation state. It is, however, equally possible to identify sets of norms shared only by subparts of the nation state (often, but not necessarily geographically distinct ones) and therefore to conceive of the relevant community in localized terms. Such a localized communitarianism may be viewed as a species of decentralized decision making authority, albeit the decentralized authority of communal units.

These possibilities occur within corporate communitarianism: particular corporations may be viewed as the relevant community or all corporations may be so viewed. Corporation communitarians who contemplate reform of corporate law to foster communitarian values, particularly through mandatory and uniform rules, may be viewed as adopting the nation-state conception. Corporate communitarians

384. See supra notes 87-89 and accompanying text.
385. See generally Torke, supra note 242.
386. See, e.g., O'Connor, Socio-Economic Approach, supra note 37, at 1539 (discussing mandatory co-determination). Proper characterization is however problematic, because mandatory terms of the sort O'Connor advocates could be viewed as fostering localized
who emphasize notions of exclusive membership within particular enterprises, particularly as suggested by variations on employee ownership themes, may be viewed as adopting the localized conception.\textsuperscript{387} There is of course a parallel to this dichotomy in the question of federalism generally and in the question of federal versus state corporate law particularly.

One basis for this distinction between local and national community is a descriptive claim about homogeneity, or common, shared norms. Commitments to local or to national community may also or instead reflect the distinction between commitment to community as source of value (a particularized view of community) and a commitment to transformed community (a universalist community). A localized understanding of community implies relativism: it suggests that different local communities may exhibit quite distinct norms. It also implies, or is at least most compatible with viewing norms as spontaneously generated and perpetuated through a localized history.\textsuperscript{388} An egalitarian conception of local community is of course possible, so an egalitarian link between local community and transformative communitarianism is also possible, but the local conception also implies exclusion of non-members and, therefore, inequalities.\textsuperscript{389} A national view of community is more compatible with the transformative impulse because the normative vision contemplated by that impulse is intolerant of deviation from it and of the inequality generated by the exclusionary tendencies of localism. In short, although neither moral particularism nor moral universalism compels any given definition of the scope of community, the moral particularism of the claim that community is the source of value is at least suggestive of and compatible with localism, and the universalism of transformative communitarianism is at least suggestive of and community. Still, the notion that participatory work programs should be mandatory for all corporations strongly suggested a common set of values within the nation-state as a whole.


\textsuperscript{388} \textit{Cf.} Gardbaum, \textit{supra} note 51, at 705-19 (contrasting particularism of metaethical community with universalism of substantive community).

\textsuperscript{389} Simon, \textit{Social Republican Property}, supra note 37, at 1403-12. Consider, for example, a standard neoclassical argument against regulation of plant closings: loss to one local community is gain to another. Communitarian emphasis on loss ignores the "loss" to the community that would have been advantaged by a move if this move is, on communitarian grounds, precluded.
compatible with national community.\footnote{390}

One point suggested by the foregoing is obviously that corporate communitarianism is ambiguous in its understanding of relevant community, and that resolution of this ambiguity is likely to depend upon the individual commentator’s relative taste for the universality of the substantive position she favors. Another is that the distinction between enabling and protecting local community on the one hand and dictating the norms of such a community, on the other, may prove to be elusive.\footnote{391}

\footnote{390. Torke, \textit{supra} note 242, at 39-42. The notion that a particular corporation has a “corporate culture” worthy of legal protection, Paramount Communications, Inc. v. Time, Inc. 571 A.2d 1140 (Del. 1990), obviously suggests a local community focus. So, too, does commentary supportive of employee ownership. See Hyde, \textit{Employee Ownership, supra} note 88, at 164-74 (defending employee ownership as potentially efficient and arguing that such ownership depends upon local conditions). Professor Simon’s communitarian conception of production is clearly decentralized. Simon, \textit{Social Republican Property, supra} note 37. See Simon, \textit{What Difference Does It Make, supra} note 5, at 1702 (noting that without local community ownership, communitarianism unlikely). See also Gunther Teubner, \textit{The “State” of Private Networks: The Emerging Legal Regime of Polycorporatism in Germany} 1993 BYU L. REV. 553 (postulating networks as “intermediary institutions” with communitarian characteristics).}


Notice that this tension in corporate communitarianism finds a parallel in the neoclassical theory of the firm. The master concept in neoclassical analysis of the federalism issue is market competition: state competition generates a market in charters that in turn generates optimal law and a market in control serves to provide management with an incentive to shop for this optimum. Roberta Romano, \textit{The State Competition Debate in Corporate Law, 8 CARDOZO L. REV.} 709 (1987). The tension arose when state efforts to eliminate a national market in control threatened to eliminate (or at least reduce) this incentive. Responses to this state effort, such as preemption of state law through securities regulation and invalidation of state law through the commerce clause, required, however, a threat to state competition in charters. Paul Cox, \textit{The Constitutional “Dynamics” of the Internal Affairs Rule: A Comment on CTS Corporation}, 13 J. CORP. L. 317, 358-60 (1988). The Supreme Court’s resolution, particularly through its reliance upon the internal affairs rule of choice of law, maintains state competition, but, from a neoclassical point of view, may permit elimination of a necessary incentive to that competition. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

Consider, however, this resolution from the perspective of a Humean baseline: competition not as generating an optimum, but as maximizing the prospects for accomplishing individual projects. The Supreme Court’s resolution \textit{formally} precludes uniformity in the sense that states, by virtue of the internal affairs rule, cannot monopolize the market. Exit from a “local community” is therefore maintained as a formal possibility. Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir.). This does not obviate the incentive problem, so the substantive consequences of the resolution might be otherwise, but ignoring this possibility is consistent with formalism. \textit{See supra} notes 183-230 and accompanying text.

Nevertheless, there is a national/local tension within classical liberalism as well. On the one hand, localism would seem attractive to the liberal so long as exit is plausible: it reflects
Consider a form of "liberal" understanding of the distinction between local and national: on a contractarian conception of corporate law, there is no objection to a corporation operated on principles of democratic equality with restrictions on alienability; such a corporation may be created by agreement. There is, therefore, no cognizable (legal) barrier to a "local" corporate community having these features. Moreover, an agreement to create such a corporation will be (or at least on individualist assumptions should be) enforced, so that democratic, egalitarian norms expressed in such an agreement will be the relevant norms in the event of disputes. The difficulty with this understanding from the point of view of a transformative communitarianism is obvious: not only is liberal neutrality inconsistent with the transformative project of a common good, the contractual solution to community creation assumes (wrongly on this account) the legitimacy of the individual preferences that are the building blocks of that solution.

What, however, of a particularized communitarian point of view, one concerned with localized community? A facilitative contractual solution might be attractive to such a view; it promises toleration of diversity and interpretation predicated on the internal norms of particular communities. Corporate commentators associated with communitarian themes who advocate contractual analyses, such as implicit contract, as a basis for these themes, and commentators who advocate legal reforms designed to stimulate contractually created employee ownership may therefore be understood as adopting an enabling conception of localized community compatible with liberal or contractarian tolerance. On the other hand, there is, even within this literature, a tendency to proclaim that a failure of "private" contracting or of the market to yield business communities possessing the democratic, egalitarian characteristics desired.
should call forth a public, collective decision to "impose" them, precisely on the ground that a communitarian perspective rules out the products of contractarian processes. Moreover, the communitarian view that markets are threats to localized community implies substantial possibilities for rejecting market verdicts on the viability of enterprises adopting the operating principles contemplated in this commentary.

A rejection both of private contracting and of market verdicts is of course consistent with those strands of communitarian thought that contemplate a collective, political creation of a common good, and is obviously not consistent with a liberal, contractarian conception of enablement or of tolerance of communal diversity. If liberal, contractarian conceptions of the enabling/directive distinction are ruled out, an implication is that localized community, at least at some point, collapses into national community: local variation is tolerated so long as it yields norms consistent with a national, transformative vision.

2. Centralization and Decentralization

The national/local community theme may be expressed as a centralization/decentralization theme. It is therefore possible to understand the localized community strands of communitarian thought as advocating, contrary to much of what has been said here, decentralization. How might the communitarian view be conceived as advocating decentralization? The corporate communitarian literature suggests that they may be so conceived in this way: managers freed from the

393. O'Connor, Restructuring, supra note 89 (mandatory fiduciary obligation); Stone, Employees as Stakeholders, supra note 4 (communitarian remedies for breach of implicit contract).

394. See, e.g., Morey McDaniel, Stockholders and Stakeholders, 21 STETSON L. REV. 121 (1991) (defending anti-takeover legislation on grounds of protection of stakeholders from losses generated by market in control); Simon, Social Republican Property, supra note 37 (advocating preservation of corporate relationships from threat posed by markets). On the threat posed to stable relationships by unrestrained markets, see Jeffrey Gordon, Corporations, Markets and Courts, 91 COLUM. L. REV. 1931, 1971-86 (1991) (invoking KARL POLANYI, THE GREAT TRANSFORMATION (1944) to explain political reaction against markets in control); Hirschman, supra note 226 (recounting various theories of self-destructiveness of capitalism and self-reinforcement of capitalism); Kristol, supra note 226 (postulating destruction of capitalism because of dependence of same on communitarian values of traditional variety). Both the notion that capitalism is doomed because it tends to destroy its bourgeois moral underpinnings and the notion that constraints on markets are necessary to achieve production efficiencies are famously articulated in JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (3d ed. 1950).

organizing principle of shareholder primacy are free to pursue moral commitments and to therefore promote valued relationships.\textsuperscript{396} Managers are freed from shareholder primacy when freed from the discipline of capital markets, as by means of corporate constituency statutes.\textsuperscript{397} One implication is that ends apart from shareholder wealth may be therefore recognized. Another is that managers are to have discretion: freedom from shareholder centrality does not dictate any particular action or end, it merely enables commitment to norms conceived in communitarian terms.

There are, however, a number of difficulties with this view. If managers are to have full discretion, they are free to contract with providers of capital to abstain from commitment to communitarian norms.\textsuperscript{398} This freedom is an unlikely communitarian prospect, as investor demands are that from which managers are to be freed in these proposals.\textsuperscript{399} Moreover, managerial discretion to determine the meaning and weight of norms of deference in particular contexts is an unlikely feature of the communitarian position. Proposals to free managers are often accompanied by proposals to regulate their behavior so as to conform it to communitarian interpretations of norms.\textsuperscript{400}

There is an obvious communitarian reply to these arguments. There is nothing in the freeing managers proposal or in neorepublican democracy that requires detailed direction. The objection to centralized direction may be interpreted as one to detailed centralized direction. Freeing managers need not be accompanied by detailed regulation of their conduct and may therefore constitute decentralization: centralized (governmental) regulation by reference to a norm of shareholder primacy is abandoned. Moreover, neorepublican democracy can take the form of a decentralized democracy—the corporation of subparts of it organized along neorepublican lines.

There is merit to this reply. Freeing managers proposals may be

\textsuperscript{396} Johnson, \textit{Corporate Life and Corporate Law}, supra note 231, at 930-36; Mitchell, \textit{Groundwork}, supra note 34, at 1487-88. See Johnson, \textit{Individual and Collective Sovereignty}, supra note 4, at 2235-45 (treating neoclassical economic theory of firm as an effort at achieving legal objectivity to be imposed “from the top down”).

\textsuperscript{397} See, e.g., Millon, \textit{Redefining Corporate Law}, supra note 4.

\textsuperscript{398} Cox, \textit{Indiana Experiment}, supra note 6.


interpreted as deregulatory moves. Constituency statutes, for example, can be viewed as variations on a business judgment rule theme. Indeed, they may be viewed as in effect reallocating entitlements, such that managers become the "owners" of firms.\(^4\) The result is consistent with a market order: managers are free to employ their entitlements in pursuit of their individually held purposes, projects, or ends subject to the impersonal direction of markets (e.g., subject to the constraints of the contractual obligations that may be imposed by investors) should managers seek capital. Neorepublican proposals may also be viewed as consistent with spontaneous order. The Humean argument against detailed planning works well against the centralized economic planning that was its original target,\(^4\) but it may also work well against the hierarchically organized corporation; it may explain both their past failures and their current efforts to decentralize.\(^4\) The Humean argument may therefore support forms of decentralized democracy, such as worker participation programs. In particular, decentralized neo-republican process may be a means of retrieving within corporate bureaucracies the dispersed and individually held "knowledge" thought in spontaneous order theories to be retrieved through market processes.\(^4\)

There are nevertheless reasons to doubt that a decentralized

401. Cox, Indiana Experiment, supra note 6.
402. HAYEK, Individualism and Economic Order, supra note 110, at 119-208.
404. In economic terms, the point is that a cost of hierarchy is foregone information. KIRZNER, THE MEANING OF MARKET PROCESS, supra note 141, at 161-62. See generally JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATION (1958) (emphasizing routine and habit as characteristics of organization and managerial direction as establishing norms and rules generating this routine and a bargaining process where goals are not shared); HERBERT SIMON, MODELS OF MAN (1957) (discussing bounded rationality; subgoal pursuit). General organizational literature tends to treat organizational behavior as largely independent of shareholder wealth maximization. A similar conclusion would seem to follow from the Hayekian critique of directed order. But cf. JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 436 (1990) (offering depiction of organizations resembling markets in their internal structure). A distinction is that the organizational literature tends to view this independent behavior as attributable to arbitrary power to be harnessed, through direction, to egalitarian ends. See WILLIAMSON, INSTITUTIONS OF CAPITALISM, supra note 74, at 206-39 (recounting and challenging arguments of this type).
interpretation of communitarian proposals is viable. One is that the interpretation provides no guarantee that freeing managers will result in pursuit of communitarian norms, particularly if freed managers remain subject to markets and, therefore, to an institutional influence communitarians deem responsible for material selfishness. There is therefore a tendency for communitarians to propose renewed regulation: fiduciary obligation grounded on shareholder centrality is to be abandoned, but fiduciary obligation to multiple constituencies is to be adopted.405

A second reason to doubt decentralized interpretations of communitarian proposals is their tendency to possess a mandatory character.406 A mandate is not a local product reflecting the advantages of local information; it is the product of central direction lacking these advantages. For example, neorepublican worker democracies may be unworkable if interests are diverse.407 It may be workable if diversity is absent or subject to moderation. The extent of its workability is dependent upon the complexities of any circumstance.408 Mandated democracy ignores this complexity. Decentralized production may better serve to capture localized knowledge, but whether it will is itself a piece of localized knowledge. It is of course possible to deny that there is a problem of diverse interest, or to deny that it would be within communitarian institutions, but these claims themselves seem to deny the localized character of information, or to assume institutional reform of the type that goes beyond the local.409

What, however, of decentralizing communitarian proposals that lack mandatory character? Consider, for example, this proposal: reallocate initial entitlements to favor the disempowered, but then permit free alienation of these entitlements.410 Such a proposal would be objec-

405. Mitchell, Groundwork, supra note 34.
406. O'Connor, Social-Economic Approach, supra note 37, at 1540; Simon Social-Republican Property, supra note 37, at 1403. At bottom, the problem with the communitarian view of decentralization is that its denial of "self interest" is a denial of the diverse meaning that decentralization accepts. Such a denial of diverse meaning is suggested for example, by Rousseau. Jean Jacques Rousseau, The Social Contract and Discourse, in 1 The Social Contract Ch. 6 (Gerald Hopkins trans., Oxford 1947). For a similar contemporary view, see Benjamin Barber, Strong Democracy 136-37 (1984). In "republican" conceptions, this denial takes the form of an anticipated common meaning generated through politics.
408. Hyde, Employee Ownership, supra note 88.
tionable from an efficiency point of view to the extent that existing allocations are thought to be consistent with efficiency and would be objectionable from a formalist point of view to the extent that reformed allocations entail greater degrees of state decision than status quo entitlements (e.g., a good cause discharge default term as a substitute for an at will term). However, the proposal is generally consistent with a decentralization theme. Indeed, it may be questioned whether a "communitarian" (as distinguished from one-shot redistribution) label is appropriate. The relevant objection to this proposal is the credibility of its commitment to post-redistribution decentralization. As alienability can be expected to upset the distributive baseline desired by the proposal's proponents, what is to prevent further redistributive moves in service of reestablishing that baseline? 411

3. Diverse Community

Localism and decentralization imply diversity. It was argued above that communitarian commitments tend to undermine diversity. A similar claim might be made, however, of contractarian commitments. If a decentralized contractual order generates diversity, why is shareholder primacy a near universal feature of the contractually conceived corporation?

An answer to this question is implicit in the contractual theory of the firm. An enabling (contractual) view of the firm presents no legal obstacle to opting out of standard terms, so there is no centralized, conscious, and intentional direction of shareholder primacy. Firm behavior consistent with shareholder primacy is therefore attributed to contract. These answers are of course variations on a more general contractarian theme: contract assumes diversity and preserves it by limiting legally enforced cooperation to mutual advantage serving individually held ends. Communitarian proposals instead assume collective ends that subordinate individually held ends, compelling their justification and evaluation in terms of these collective ends, and thus reject diversity.

A difficulty with this answer is that it assumes a particular conception of diversity incompatible with communitarian conceptions. Communitarians view spontaneous orders—particularly markets—as relentless generators of a commonality. According to communitarians, markets are

threats to diversity because they render "ways of life" that are not instrumental to material satisfaction, and even the moral norms essential to the operation of markets, atrophied or abandoned.\footnote{See supra note 226. A diversity theme, grounded in autonomy, is particularly evident in the communitarian liberalism of Joseph Raz. Raz, The Morality of Freedom, supra note 104.} The matter may be put in terms of the non-neutrality of the "liberal vision." In corporate law terms, the impersonal direction of the capital market is said by communitarians to preclude, for example, commitment to the long-term, to moral norms and to relationships as ends. Diversity in the contractarian theory is a matter of formal possibility: the theory presents no state-enforced obstacle to diversity and permits no "force or fraud" as an obstacle to diversity. Communitarian diversity is a matter of observed, substantive result. It is also a matter of freedom from impersonal constraint, for transformative communitarianism's commitment to heroic autonomy implies a further commitment to the capacity of persons to create a way of life that deviates from that "dictated" by "social norms" or "market forces."\footnote{For an example of objection to the "disempowerment" implied by this impersonal direction, see Alan Wolfe, The Modern Corporation: Private Agent or Public Actor?, 50 Wash & Lee L. Rev. 1673, 1685 (1993).}

One way of dealing with these opposing contentions is again to treat them as raising empirical issues. Thus, the hypothesis of the depressing commonality generated by markets may be opposed by the hypotheses that ways of life that are in fact valued will survive because their value will be reflected in markets. A difficulty with characterizing the debate as raising an empirical issue is that diversity is in the eye of the beholder. The extent to which markets generate a depressing commonality is in part a matter of the level of abstraction employed in description. A second and more important difficulty is that the contending hypotheses are grounded in distinct and incommensurable normative positions. A "way of life" not valued in a market—say the way of life of "small town America" or of "family farm"—is not a valued way of life from a perspective consistent with a commitment to impersonal direction. It is of course valued, quite apart from the answers provided by markets, from a communitarian perspective.

Candor requires, however, a recognition that market orders are indeed engines of "creative destruction" and that regret follows from this recognition. It is a silly pretense to claim that the loss of "small town America" (or the family farm, etcetera) is not a regretted consequence
of a market order, even though candor should also require recognition that romanticized views of lost institutions are dubious. What is not silly is to believe that regret may be outweighed by commitment to impersonal order. The notion that ways of life may be effectively preserved through direction—and in particular through direction by law—is grounded in heroic autonomy. Rejection of heroic autonomy does not preclude regret, but it does preclude the beliefs that directed preservation can be effective or normatively justified.

Consider, however, another way of dealing with the question of preserving diverse ways of life. Both classical liberalism and the communitarian strand that emphasizes local community share hostility to centralized direction. This shared hostility may be combined, in the manner suggested by some forms of conservative communitarianism, by rendering the central state a minimal one. The notion is that the liberal state, in its social democratic, welfare, or egalitarian liberal form, is responsible for the destruction of community, understood as a localized community of shared culture, of belonging, commitment and obligation, and as one that excludes strangers. The family, traditionally conceived, and “small town America,” as conceived in its idealized form, are perhaps paradigmatic examples of the local communities contemplated. The egalitarian liberal welfare state is thought by conservatives to be responsible for the destruction by reason of its insistence upon imposing an ideal of individual autonomous choice—the notion of self-realization through free choice of goods—“all the way down.”

A way of putting the point is that the egalitarian liberal state generates “too many” rights. Another way of putting it is that negative liberty—the liberty of freedom from interference—should be construed as the liberty of localized communities, not the liberty of individuals within these. Such a construction is consistent with a version of the social construction thesis: individually held projects are (or should be) the projects of localized community internalized (as though disciplined education) by its members. Both ways of putting the point imply a minimal (classically liberal) centralized state. Do they

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416. LOMASKY, supra note 46, at 4-7; cf. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (making the “too many rights” argument from a somewhat distinct perspective).
417. Simpson, supra note 415, at 167-68.
imply a minimal localized state? Perhaps, for one version of this line of argument is that persons are naturally inclined to form localized communities of this sort, so social sanctions short of coercion may be sufficient local common goods. There is, however an obvious counter-position, for the common good of a conservatively conceived localized community would clearly seem to justify state coercion within it.

The conservative line of argument postulates a form of decentralization that may generate a diversity of communities and it supplies the conditions necessary to community of the type communitarians attack liberalism for failing to provide and nurture—one of belonging, commitment, and common or shared goods. The prospects for the corporation, or at least for the species of corporation that operates within and is made possible by national and international markets are, however, potentially grim if localized community is conceived in geographical and statist terms. The line of argument from localized community then implies a geographically localized governmental control of economic production. In concrete terms, it is unlikely that Wal Mart will be welcomed in a “small town America” empowered by minimalizing the central state, at least if communitarian versions of the (nonconsumer) preferences yielded by such an empowerment are assumed.

An obvious difficulty with a geographical conception of localized community is that its realization is implausible in the extreme: homogeneous localities are things of the past, or, at least rarities. Perhaps this accounts for corporate communitarian conceptions of particular corporations as potential “localized” communities. It is, however, implausible to view a corporation engaged in geographically dispersed activity as sufficiently homogeneous in the composition of its “constituencies” to approximate a conservative conception of the localized community. Moreover, the relationship of a business corporation viewed as a local community to concerns such as family solidarity and education of the young is problematic, unless it is contemplated that the corporation is to become an all encompassing means of organizing the lives of persons associated with it, and as therefore a contemporary version of the “company town.”

The important point, however, is not the practical problems

associated with local community of a conservative type. It is, rather, that transformative communitarians of the left are unlikely to find conservative community attractive. A voluntarist version of conservative community, one that minimized in some degree the coercive authority of local states, may well be compatible with classically liberal conceptions of spontaneous social order. However, the features of conservative community that enable diversity among localized communities and enable the realization of belonging, commitment and shared commonality are incompatible with transformative communitarianism's egalitarian commitments. This is most obviously illustrated by the necessary tendency of local community to exclude strangers—a necessary tendency if homogeneity is to be preserved and one that cannot be restricted by central authority without thereby destroying diversity. It is illustrated as well by the tendency of some communitarians to insist upon neorepublican democracy, an insistence incompatible with local control over and variation in organizational form. It is finally illustrated by the plasticity thesis itself, for that thesis supposes a capacity to choose between good and bad norms—between good and bad communities—not a localized capacity to perpetuate diverse traditions.

This is not to say that similar tensions are absent from conservative or classically liberal conceptions of diversity or localism. Communitarian normative limits on the content of decentralized community confine the potential scope of diversity, but conservative and liberal limitations on a decentralization theme do this as well. To the extent, for example, that national markets or democratic forms of localized government are mandated, some forms of “diversity” are precluded, in part because the survival of some “ways of life” is threatened by competitive pressure. The point is not that communitarianism is unique in this respect. It is, rather, that “diversity” is intimately connected to the normative vision giving it content.

419. See HAYEK, Political Order for a Free People, supra note 118, at 145-47. Notice, however, that classically liberal limitations on the power of local government parallel communitarian limitations on the content of local community.

420. Cf. Friedman, Politics of Communitarianism, supra note 304, at 293-320 (discussing how Taylor, Sandel, Walzer, and MacIntyre all modify their “particularism” with universalist commitments, particularly to equality and neorepublicanism); Gardbaum, supra note 51, at 729 (stating that neorepublicanism is a universalist stance).


422. U.S. CONST. art I, sec. 8, cl. 3; Id., art. IV, sec. 4. Cf. Torke, supra note 242, at 27 (recognizing tension between small community and anti-discrimination policy).
IV. CONCLUSION

The perhaps rare reader who has managed to reach this point in an admittedly lengthy discourse will have noted that largely absent from this article is any attempt at an application of the concepts prescribed here to a concrete legal problem. This is by reason of this article’s limited, (albeit protracted in execution) ambition. The primary point has been to express skepticism about the terms of debate within “corporate law theory,” not to generate concrete recommendations.

Still, a rather abstract and general type of recommendation is obviously suggested by this skepticism, one that shares much with communitarian premises and much with neoclassical conclusions. It is that the law’s role, where law is understood as decision by state functionaries, is, can, and should be quite consciously limited, not because such limitation is the best means of achieving an articulable social state of being, whether this state be one of solidarity or efficiency, but because the processes of articulate argument prized within contemporary conceptions of law, while unavoidable in moderation, are incomplete, feeble and very often perverse means of seeking to control that social state of being. There is no gainsaying that this recommendation is political, non-neutral, or even “public” at some level of abstraction, for the notion of a limited role has a substantive content (of what in contemporary jargon is a conservative variety) and is implemented by a type of law, not by law’s complete absence. It is also a recommendation reached painfully by one “partially constructed” by the contemporary conceptions of law it rejects.

In what way is a legal minimization criterion consistent with communitarian premises and neoclassical recommendations? It is consistent with the former in its acceptance of “community,” understood as norms of behavior to which persons attach moral meaning, as essential to order and in its skepticism about rational calculation as a substitute for commitment to these norms. It is consistent with the latter to the extent that the latter tends to yield a conservative respect for status quo entitlement and distaste for egalitarian redistribution. These consistencies of course render the criterion inconsistent with both communitarian and neoclassical analysis in a respect that suggests characteristics they share—in particular their faith in the capacity of intellectual authority to engage in conscious, purposeful control.

What the legal minimization criterion lacks is what economic analysis purports to have achieved and what communitarian analysis, if this critique has been successful, lacks as well: a systematic mechanism for
generating determinate, consistent recommendations. Legal minimization does not obviate the necessity of law, it merely counsels lack of ambition in law. Nor, as has been conceded, does it avoid a political commitment. Nevertheless, the dictates of that commitment are less than clear cut; and formalist criteria for choice among possible entitlement allocations will constrain, but not determine these.

With what, then, does the minimization recommendation leave us? It clearly leaves a distinction in normative stance, for the justifications it offers for a debatable recommendation will be as intolerable to a communitarian as the latter’s justifications will be to one attracted to the recommendation. It leaves otherwise a “mood.” While moods will not pass muster as adequate modes of analysis for the scientifically inclined, and while this particular mood will not be attractive to communitarians, it might at least be recognized by the latter as not alien to their method.