

# THE CORPORATION'S GOVERNMENTAL PROVENANCE AND ITS SIGNIFICANCE

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**Abstract:** Corporations cannot exist, scholars rightly note, without being constituted by government. However, many take a further step, claiming that corporations are normatively distinct from other market actors because of this governmental provenance. They are mistaken. Like corporations, markets and contracts also require government for their creation. Governmental provenance does not distinguish corporations normatively because our coercive social institutions are *pro tanto* justified in re-arranging both corporate and non-corporate market activities on behalf of social and political values. The corporation is distinct only practically and prudentially, in that it represents a more proximate instrument for effecting morality in the economy.

**Keywords:** Political Theory of the Corporation, Governmental Provenance, Nexus of Contracts, Transaction Costs, Public and Private

## 1. INTRODUCTION

One of the more interesting recent developments in normative political economy has been the growing consensus that corporations should be understood as governmental, not economic, institutions: the characteristic features of a corporation cannot exist but for the interventions of a government, or government-like institution, that creates them. It has been further supposed that this fact of governmental provenance has consequences for normative political thought, establishing the corporation as a normatively distinct institution, which would then inform various projects in business ethics and political philosophy. Let's

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call these sorts of arguments 'Normative Governmental Provenance' arguments (NGP). Of these, some say that these normative projects ought to be informed by the corporation's status as a 'public' institution, others say its status is between public and private, and therefore requires distinctively corporate norms. Either way, NGP begins with the corporation's governmental provenance, and then uses this claim to establish two normative claims: (1) the corporation is normatively distinct from an institutional arrangement arising through purely private contracting, and (2) there exists a set of 'public' or 'corporate' standards according to which the corporation ought to be assessed, and regulated by government.

There is a deeply compelling political and rhetorical aspect of the NGP: by asserting the governmental provenance of the corporation, such theorists helpfully breach the otherwise self-evident belief that corporations are private economic organizations protected from the normative scrutiny and intervention of government. In place of this commonsense view, the NGP suggests that if the corporation is created by government, there is no reason to think that there should be a presumption in favour of public deference to corporate arrangements. The rhetorical force of this approach notwithstanding, there has been less rigorous attention paid to explaining precisely why we should think that the corporation's governmental provenance has such normative ramifications. Intuitively, it seems like it must be very important. And yet, if one steps back a moment, this intuition is not so obvious. Unless we suppose the institutions and processes of markets to be natural and given, why should we think of governmental provenance as distinguishing corporations from markets in any substantive way? Indeed, one worries that deriving the normative distinction of corporations (*vis-à-vis* markets) from their governmental provenance actually serves to obscure the government's role in creating and enabling markets, and the legitimate social interest in ensuring they function for social purposes. While importantly challenging the view of the corporation as a mere 'nexus of contracts', the NGP risks purchasing a normative theory of the corporation at the cost of conceding the public and moral nature of contracts, markets and property rights in the first place. Can we articulate a theory of the corporation in a parsimonious manner without rendering the market a simply private institution?

In this paper I seek to clarify precisely how the governmental provenance of the corporation relates to its normative status and standards. My basic argument is that governmental provenance is of limited use in establishing the normative, moral dimensions of the corporation. A variety of institutional types require government for their creation and their operation, each with potentially different sets of moral standards for normative judgements and policy prescriptions.

Consequently the fact of government provenance cannot account for the distinctive normative problem of the corporation, nor the specific sorts of standards we should apply to it. Instead, I argue that if corporations are normatively distinct from markets, and require evaluative standards distinct from those we would apply to markets, it is by virtue of how they coordinate economic activity, not their relationship to the state. The normative implications of the corporation's governmental provenance are practical and pragmatic, not principled or ontological: because corporations rest on a more proximate form of governmental action, they are perhaps an easier institution to affect and to shape than other institutions. But there is nothing we should demand or expect of corporations that we shouldn't in principle also demand of, say, sole proprietorships, partnerships, or limited liability companies of comparable size, wielding comparable power.

This is part of a much more general point about the way in which we understand economic activity from the perspective of normative political theory. Political theorists often (understandably) focus on the norms and values related to government and governmental institutions: law, the state, democracy, rights, statutory involvement in the economy, and so forth. There is a resulting tendency, when normatively assessing processes, activity and institutions within the economy, to understand such things in terms of their relationship to the state or to government. This is true for the classically liberal, who see such activity as private and thus quarantined from such political analyses, and the progressive, who seek to identify such things with the government in order to bring them under social control and the purview of political norms and values. But we need not start with economic activity's relationship to the state in order to offer moral appraisal of it. Classifying activity as public or private first, and then normatively assessing it on that basis, is unnecessarily labyrinthine, needlessly encumbering our normative arguments with ontological positions that don't add as much as they might seem. Some activity may be of, or related to, government but not appropriately assessed according to norms we would use for more traditional state activity; similarly, some activity might genuinely be private, but still be subject to the moral scrutiny often reserved for statutory institutions. Part of the aim of this paper is to suggest that we de-emphasize such clever ontological argumentation, and simply focus directly on what's important: the moral reasons for regulating, constraining and ordering corporations, and economic activity more generally.

## 2. NORMATIVE GOVERNMENTAL PROVENANCE

A number of different scholars and writers have made arguments that I see as roughly falling into the category of what I am calling NGP. In

particular, I have in mind Bakan's (2004) work in legal theory, Ciepley's (2013a) work in political theory, McMahon's (2012) work in political philosophy, and the various people they have influenced. While these theories differ in various ways, and they prioritize it to different degrees, they all take on, or hint at, the NGP argument in some form, which I reconstruct here. Put simply this argument has three components: (1) the empirical claim that a corporation possesses a special grant of powers that private citizens don't possess, and therefore requires government for its existence (the 'governmental provenance' step); (2) the normative claim that this fact implies distinct normative standards for the corporation in contrast to ordinary market relations (the 'distinctive morality' step); and (3) the political claim that this implies a greater permission or obligation for governments to structure the corporation according to these standards (the 'government action' step).

### 2.1. Governmental Provenance

The establishment of governmental provenance is done in weaker and stronger ways. On the weaker side are claims that corporations have a 'social license to operate' (Gunningham *et al.* 2004; Matten and Moon 2008) or are governed by 'integrated social contracts' (Donaldson and Dunfee 1994, 1999) to operate, and therefore owe their existence to social consensuses, and their manifestation to public and governmental institutions. This means that a corporation is permitted by society 'to undertake a trade or carry out a business activity, subject to regulation or supervision by the licensing authority', in the same way that a bar is licensed to sell alcohol, or in the way a man on the corner is not licensed to sell heroin (Nielsen 2013). Whatever the merits of this sort of claim, it is weak because it does not show that corporations require government to exist, but only to exist legally (which would seem to be true of all legal activity).

The stronger claim for governmental provenance is the claim that corporations are entities that cannot exist without the actions of government; without government action there would be no corporation to license in the first place. Drawing on 'concession' theories of the corporation, the claim is that incorporation is not a power that market actors possess inherently, but is conceded by government for public purposes (McMahon 2012: 14). This has been given greater specificity by Ciepley (2013a: 144–5), who argues compellingly that three important features of incorporation – limited liability (particularly against tort), entity shielding and asset lock-in – are things that cannot be generated by the normal rules of contract or property: individuals cannot normally contract to grant themselves limited liability for tort claims; contractual arrangements to create assets that perpetually cannot be withdrawn by

their contributors have often been struck down by courts in cases of partnerships; and the shielding of corporate assets from the claims that creditors have on individual contributors' assets could not be contracted by the shareholders alone – this would have to be arranged between the shareholders and each of their creditors. In short, corporations require government to step in and create a corporate personality and assign property to it, which it now owns as a distinct entity, separate from its shareholders (Hansmann and Kraakman 2004). The corporation, then, is given existence not by individuals who contract with one another, but from a government that endows it with certain extra-contractual rights and powers. The result is that corporations are not 'creatures of the private market but governmental colonizers of it' (Ciepley 2013a: 152). We ought not to see corporations as the spontaneous result of market interaction, but rather as 'states writ-small', franchise governments with state-granted charters that endow them with specific rights and responsibilities.

## 2.2. Distinctive Morality

Given the fact of governmental provenance, NGP claims that corporations are governed by a different set of normative criteria. McMahon (2012: 16–20) distinguishes the private morality that governs interactions of private individuals pursuing their own ends (e.g. duties not to cause immense harm to others, duties of beneficence, etc.) and the public morality that governs people who occupy positions that require them to act in the interest of the public based on morally important social values. Whereas people in markets are generally governed by private morality, according to McMahon corporate executives, by virtue of occupying governing positions within institutions created by government for public ends, are governed by public morality as well, which requires a disinterested commitment to the common good. Others have made similar points within the debate on whether corporations ought to be considered part of the Rawlsian 'basic structure' of society (e.g. Rawls 1977; Doppelt 1981; Blanc and Al-Amoudi 2013; Neron 2015; Singer 2015; Martins 2016; Welch and Ly 2017; Singer 2018a).<sup>1</sup> Blanc (2016: 416–17), for instance, argues that because corporations and corporate law are borne of actions from the state, we ought to see them as distinct from the associational realm, and instead subject to the norms (i.e. Rawlsian egalitarianism) that would apply to the more public realm of the basic

<sup>1</sup> Note that there is a deeper debate about whether the Rawlsian basic structure is merely those institutions that comprise the state, or whether it can be conceived in more expansive terms. The argument here is not concerned with the Rawlsian framework, and so does not weigh in on that particular debate. Instead, we concern ourselves simply with governmental provenance, and whether it implies normative distinction, regardless of how we understand the content of such normative distinction.

structure. Governmental provenance, then, has the normative ramification of holding the corporation and those within it to higher normative standards than those that would obtain in, say, the market.

I refer to this as ‘distinctive morality’, and not ‘public morality’ following McMahon, because other scholars are more nuanced on this count. Ciepley, for instance, argues that corporations are ‘between public and private’ because, despite the crucial role of government, they are financed privately. They therefore, more exactly, are not governed by the public morality of governments, but by distinctively corporate norms. This distinction seems correct. For our purposes here, however, we only need to note that although Ciepley (2013a: 152) does not refer to this as ‘public’ morality, his argument is still that the corporation’s governmental provenance implies a set of norms distinct from those that govern market interactions. The important part is not how corporations are to be distinguished from governments (which Ciepley only gestures toward anyway) but how their relationship to government – their status as ‘franchise governments’ – normatively distinguishes them from those of the market.

### 2.3. Government Action

Finally, there is the claim that government has the permission, and even obligation, to interfere with the arrangements made under ordinary corporate law to ensure it discharges the public duties and responsibilities that come with a more public morality. This is a simple enough claim. Because corporations are creatures or extensions of government, and because they have specific moral responsibilities due to this fact, it is incumbent upon government to ensure that corporations live up to these responsibilities. However, a more powerful aspect of NGP is not simply that corporations can be interfered with by government, but that by being granted such special powers, corporate executives have a responsibility to discharge their duties in a certain public fashion, and to see the offices they hold as a quasi-public, governmental office. The result is a call for a variety of admirable and relatively progressive policy prescriptions that blur the distinction between the corporate and the public: for corporate law to be a part of public law (Greenfield 2008); for the entrenchment of greater worker rights (Ciepley 2013a); for corporations not to have rights against government, contra Supreme Court decisions like *Citizens United* or *Hobby Lobby* (Ciepley 2013b); for greater intra-corporate democracy (Matten and Crane 2005); and so forth.

## 3. THE CONSTRUCTED STATUS OF MARKETS

Assuming that the claim about governmental provenance is essentially correct, it would seem like the NGP argument is quite sound. And

indeed I don't wish to dispute any of the claims that NGP makes about the corporation per se: I am quite convinced by Ciepley's account of governmental provenance, I believe the claim that corporations should be held to standards greater than that which we require of private individuals, and I agree that governments have the responsibility to shape corporations to reflect this. My objection is that NGP scholars mischaracterize *non-corporate* institutions and relations. By using the governmental provenance of the corporation as the basis for its normative distinctiveness, the market is rendered a domain of private action by contrast, where the norms of private morality unsurprisingly apply.

This is intuitive, but I think incorrect. As many historians, political scientists and critical theorists have pointed out, the market as a form of modern social organization is also the creation of government and very much a 'public' institution: contracts require the force of the state and the existence of publicly shared meanings and values in order to do the work we expect of them (see Durkheim 1984), private property cannot exist but for the recognition of government (as well as the action of government to impose such rules by force on populations) (see Scott 1998; Graeber 2011), and competitive markets are established and sustained by the legal, regulatory and coercive powers of government (see Polanyi 2001 [1944]). As Nedelsky (2011: 129) puts it: 'property takes its power and importance in large part from "the market" – which is itself defined by the legal system. "The Market" in modern states is not a freestanding, natural phenomenon but, rather, consists of rules defined by law and backed by the power of the state.' Indeed, the very distinction between the economics of the market and the politics of the state is relatively new (Blaug 1962; Mitchell 2005, 2008). The private morality of the market therefore must be explained and justified, and not simply assumed as a contrast to the corporation.

We should note that Ciepley is slightly ambiguous on this score. Ciepley is certainly aware that markets require something like a government in order to function and flourish, and would likely not want to be seen as endorsing this part of the NGP. While I don't wish to misrepresent him, his argument sometimes seems to slip away from this basic point. For instance, Ciepley (2013a: 145) explicitly distinguishes his approach from the legal realist perspective that state action pervades all economic activity: 'legal realism gives us no reason to place corporations in a category separate from proprietorships or partnerships (which we may fairly denominate "private", while remaining mindful that their flourishing depends on a variety of state services).' While Ciepley notes that markets are not purely domains of private action sequestered from public concern, he does want to maintain that they are more private than corporations because of the special governmental action necessary to constitute the corporation (more on this below). As he puts it later

(152), his 'conception clearly identifies all corporations, regardless of size and impact, as governmental, even if not fully public. It makes them proper objects of political theory, and it justifies placing them in a distinct category, subject to rules and norms beyond those applied to properly private business entities.' The question of why we should see this non-corporate realm as 'properly private', in contrast with 'proper object of political theory', and why that realm should be subject to different normative criteria than the more public corporation is not addressed. Insofar as Ciepley agrees with my critique of NGP, the aim is to clarify, not to criticize, his overarching views.<sup>2</sup>

Some will not find the claim about the governmental provenance of the market convincing, either citing the historical existence of property rights, contracts, and small-scale markets prior to the advent of the modern state, or making an analytic distinction between the common law that governs property spontaneously, and the legislation that enforces government intervention. I don't mean to dispute the historical claim entirely; clearly, nascent forms of such institutions exist without government. However, it is a hard day's drive from the existence of such things in small-scale to a modern market economy; the sustenance of such institutions over a large enough population is dependent upon government to work. Thus, even if markets historically don't have government provenance, modern market economies are government-dependent.<sup>3</sup> However, even if one were to concede the point entirely, it is no objection to the nature of my criticism. If one argues that markets, contracts and property *can* exist solely through norm and custom, without the enforcement of a government or third party, it is not hard to imagine the existence of a shielded entity for which assets are locked in and limited liability is provided for, which is also created and enforced through social custom. Put differently, regardless of one's historical view, the same mechanism that establishes and secures property and contractual rights can secure the existence of a corporation: if markets require governments for their existence, then they are not very different from corporations on that front; if markets *do not* require government, and can be created and enforced solely through custom and convention, then why couldn't corporations be created in a similar fashion?

Either way, this normative distinction of corporations, relative to markets, evaporates. If corporations require government to exist, so do

<sup>2</sup> In a certain way, Ciepley's ambiguity on this score illustrates just how pervasive the idea is that markets and economics are private, and that political theory is properly focused on the 'public' and governmental.

<sup>3</sup> I should note here that I doubt very much the Hayekian claim that markets, and the common law that governed them, arose purely spontaneously, without third party enforcement of some kind, even in their most primitive form.



markets; if government provenance creates a normative status that applies to corporations, it should apply to markets as well. If we want to find what is normatively distinct about corporations, governmental provenance does not seem like the most likely place to start.

### 3.1. Extraordinary Governmental Action

Now most advocates of the NGP would not likely deny the dependency of modern markets on modern states. McMahon explicitly rejects a Lockean account of natural property rights, and (as noted above) Ciepley is quite aware that our conceptions of private and public are social and political conventions. Does the NGP require a view of markets as natural or pre-political in order to distinguish them from corporations? In fairness, I think not. The more compelling version of NGP, which most advocates likely have in mind, concedes that a market depends upon government, while still arguing that the corporation's special governmental status implies normative distinction.

Two claims can be made for such an argument. First, even if the rules of the game (property law, contract law, etc.) owe their existence to government, they are still rules that must be contravened in order to create a corporation. We can call this the 'extraordinary action' claim: corporations represent an exception to the normal procedures laid down by government, and have different normative standards because of this extraordinary form of government intervention. Second, even if markets require government for their existence, they are created in a manner that allows for individuals to pursue their private ends within the market, with the intended result being the achievement of some public good. Call this the 'private ends' claim: even if markets do have governmental provenance, individuals within the market are not required to think about the public good, whereas corporate executives are required to think about the good of an organization and therefore must think of the public good; this distinction in orientation creates different normative standards.

These claims are plausible enough. Anyway, let us assume for the sake of argument that both claims are sound: corporations are in fact an exceptional suspension of the normal market rules, and individuals within markets are distinct from those within corporations in pursuing decidedly private ends. Such claims seem to invite two important questions: why are the normal rules of the game suspended in favour of this extraordinary action, and what purpose were the rules of the game meant to serve in the first place? Put differently, what is the normative status of the 'normal rules' and what is the status of their suspension in the case of the corporation? This shifts the normative question from 'why are public interventions into corporations *pro tanto* justified?' (which the

NGP answers by reference to extraordinary governmental action) to 'what are the *all-things-considered* reasons for largely not interfering in the market in the first place?'

Note that this question directs our attention away from the ontological status of corporations and toward the instrumental logic of markets and, as a result, the instrumental logic for creating a non-market institution like the corporation. It is not enough to merely note the extraordinary status of the corporation in relationship to the market; by recognizing both institutions as the product of social convention and governmental actions, we need to reconstruct the normative rationale for why both of these things happen: why we create relatively free markets, and why we suspend this normal functioning to create corporations. The corporation's exceptional nature is therefore secondary to the reasons for granting this exception; the fact that non-incorporated individuals and corporate executives are oriented toward different sorts of goals is less important than what we are trying to accomplish by situating people in such a manner. In answering this sort of question, we invite the possibility that the norms and evaluative criteria we use to assess the market and market actors can be used to explain the extraordinary actions of government to create corporations and corporate actors. The fact that government intervenes to different degrees to secure different sorts of institutions does not necessitate different normative criteria for each.

#### 4. A NORMATIVE RATIONALE FOR MARKETS AND CORPORATIONS

The argument therefore shifts from what the fact of the corporation's governmental provenance tells us about government's authority in the market, to a reconstruction of the normative rationale for various forms of government intervention and non-intervention; that is, what seems to be the best account of government's rightful exercise of authority in the market. To that end, we want to ask four questions. First, granting their dependency on government, why are markets characterized by their relative autonomy? Second, what is the rationale for government to involve itself in normal market operations? Third, why does government suspend its normal mode and further involve itself in the market by creating corporations? Fourth, according to what standards should citizens abide when they are in these various institutional contexts?

##### 4.1. 'Social Paretianism'

There are obviously many different rationales offered for the market in a modern society. To fix ideas, let us establish a toy theory of normative political economy, which I call 'Social Paretianism' (SP). SP holds that economic institutions and activity ought to be structured in such a

manner so as to increase wealth and efficiency insofar as doing so does not seriously undermine other social values we hold. It is a toy theory so I leave this intentionally vague and under-specified. While we all might disagree with the details, SP captures what I take to be widely held views about markets and morality: namely, that enabling mutually beneficial transactions is a good thing (hence the 'Paretian'), but it is not the only thing (hence the 'Social') for our institutions to achieve. What priority the Paretian element ought to have amongst our various social values is a question that, for our purposes, SP does not need to answer now.

#### 4.2. A Social Paretian Justification of Markets and Government Intervention

SP, then, would justify various aspects of markets in particular ways. First, SP holds that the market is left to operate according to its own logic for largely Paretian reasons: allowing the price mechanism to coordinate exchanges between competitive producers and consumers will tend to maximize the number of mutually beneficial exchanges, thereby moving us as close as possible to the Pareto frontier. Thus, both how government engages in markets, and the morality of individuals within this system, is determined by virtue of this Paretian rationale (see McMahon 1981; Heath 2013). This is in contrast to a Lockean or Nozickian account, where market processes are defended in terms of some notion of natural right or liberty. Such a view is essentially ruled out if we start with the assumption that the market is not a natural phenomenon, but a socially constructed institution. As such, the rights that market actors have are not natural, or pre-governmental, but granted and established by government. While the operating of a market might very well serve to increase people's ability to freely do all sorts of things, this would still, ultimately, be the result of government action, not its absence.

Of course, the Paretian justification of markets is an idealization; while this idealization captures an important virtue of markets, we must note that very often markets do not conform to this picture. Market exchanges may very well not be Pareto-improving, absent various preconditions. To this end, SP also helps us reconstruct the reasons why markets are not in fact the autonomous institutions that some might think they are or ought to be. Governments act within markets in all sorts of ways other than the enforcement of property right or contract. There are two complementary rationales. First, governments help secure Pareto improvements by regulating industries encumbered by information asymmetries, correcting un-internalized externalities, solving collective action problems, and providing public goods that markets will under-produce; that is, governments can act in seemingly extraordinary

ways to help solve market failures. The Pareto standard does double duty in terms of markets and efficiency: it explains why a market with freely trading agents will make possible various Pareto improvements, and it also explains how the state, with its unique ability to solve large collective action problems, can enable classes of Pareto improvements that free markets will fail to achieve.

But of course, governments do not only intervene in these ways. The second way that governments act within the market is to prevent or disincentivize various otherwise-Pareto-improving transactions because they violate other social values that we hold important. Thus, we have laws proscribing child labour, working in dangerous work environments, and so forth, which also affect how market actors ought to conceive of their moral duties (Norman 2011; Moriarty 2012). This is why we say it is '*Social Paretianism*': the general rationale for a market economy is the capture of efficiency gains through the proliferation of mutually beneficial exchanges, but within the constraints of other social values like justice and equality (however understood). Thus, while markets are primarily mechanisms for efficiently coordinating activity, they are not domains of interaction quarantined from other values (Smith 2017; Singer 2018b). Significantly then, governments can assess and act within markets to further their efficiency (by correcting market failure), or constrain them in pursuit of equality, and still be rightfully exercising their authority. Similarly, we might normatively assess market actors according to such standards, even in the absence of such explicit extraordinary government action.

### 4.3. Social Paretianism and the Justification of Corporations

We can see how SP provides a normative reconstruction of why governments create relatively autonomous markets, and why they intervene in them in various ways. Can this rationale be used to explain the extraordinary action that creates corporations and the norms that would apply to those incorporated actors? In recognizing the exceptional nature of the corporation's governmental provenance, SP suggests two points as important: (1) there is a Paretian rationale for engaging in such practices, and (2) those practices can be constrained by concerns for other normative values.

What is the Paretian rationale? It is that which is offered by transaction cost economics: we supersede the price mechanisms by using hierarchy and administered transactions in order to secure various mutually beneficial gains that would otherwise be under-produced in an open market (Williamson 1985). While the archetypical example of this is the employer-employee relationship characteristic of firms generally, administered transactions are also used to secure financing for asset-specific goods

that would otherwise be underinvested in using the price mechanism. Where assets are easily redeployed, debt will be the more efficient form of financing; when they are not so easily redeployed (when investments are 'asset specific'), equity will often be more efficient because it gives more control to those doing the financing and, therefore, further incentivizes investment (Williamson 1988: 581). The extraordinary features of the corporation discussed by Ciepley are precisely the mechanisms through which investment is induced for such enterprises. Governments involve themselves in the market in these extraordinary ways in order to correct a market failure: the failure of the market to produce investment vehicles that are needed to establish enterprises for which there is demand.

The Social Paretian rationale thus captures the idea that corporations ought to be oriented toward the public good, which the NGP argues for, but does so in an indirect way. Corporations are oriented toward the public good not because corporate actors act in a completely public-minded way, but through their contribution to competitive markets and by solving collective action problems through the introduction of hierarchy in employment and financing (Boatright 2013: 479). Of course, the fact that incorporation represents an *in principle* efficiency-gain for various businesses does not mean that incorporation always *in fact* practically leads to such improvements: small firms, once incorporated, often encounter bureaucratic, decision-making and agency costs that can outweigh the increased stores of capital that they have access to; large corporations, in their pursuit of profit, often seek to externalize costs or avoid regulation in a manner that is offensive to the Paretian rationale of both markets and corporations. This must be protected against.

Furthermore, once admitted that there is a Paretian rationale for the government provision and regulation of corporations, SP would then suggest that not all ways of organizing the corporation are proper for us as a society to engage in: it is not enough that corporations represent a potential gain in efficiency, since certain gains in efficiency might be in violation of other important social values such as non-domination, equality, democracy, anti-exploitation and so forth. So, while we allow corporations to suspend normal rules of contract and property to create entity shields and asset-lock in, we don't allow (or should not allow) corporations to suspend individuals' constitutional rights or labour law standards in order to secure longer-term work arrangements, even if that could possibly create a gain in efficiency. This may very likely also require further regulation and protection of workplace rights and claims to worker governance, even if such values might not be evidently efficient. The governmental creation and regulation of corporations is tractable by SP for both 'social' and 'Paretian' reasons.

#### 4.4. Social Paretianism and a Hypothetical Nexus of Contracts

What, then, does the extraordinary governmental provenance do to alter the normative standards we apply to the corporation, or our understanding of the rightful exercise of governmental intervention in the corporation's affairs? The answer, I think, is not much. The SP rationale can be offered for both.

To get at this, let us imagine a fictional world where the nexus-of-contracts view of the corporation was correct, and that corporations could actually be constituted solely by the normal rules of contract, property and tort. So, in this world we have standard market contracts, and we have corporations, which are simply understood as catalactic arrangements arising from individuals freely contracting with one another. Assume that we accept that contracts depend on governmental action for their existence, and that therefore there would be no *a priori* reason why government could not interfere with market contracting arrangements; the relative sacrosanctity of the contract, and the relative autonomy that people have to engage in such relations, would be seen as a convention adopted by society for various prudential or consequential reasons, not out of a respect for some inviolable principle. Voluntary contracts could be outlawed because of their perverse effects, or could come with stipulations that parties did not agree to, because of the beneficial effects such stipulations carry. In this hypothetical world, there would be no reason that corporations could not be evaluated according to, or affected in order to achieve, some social value despite its contractual provenance.

To illustrate, let us assume, for the sake of argument, that one of the social values that we as a society can agree upon is that extremely authoritarian or dangerous workplace arrangements are offensive to our core values; preventing such arrangements, in our estimation, would constitute a sound rationale for foregoing gains in efficiency. Given the conventional status of contracts, we believe our social institutions can prohibit, veto, or in some way disincentivize, contracts that establish such relationships. A corporation understood as a nexus-of-contracts would be just as subject to such strictures as a non-corporate contract. It would therefore be within the rightful exercise of government authority to interfere with the arrangements of corporations, *regardless of their status*: if they are of special governmental provenance, then government has prerogative to structure the institutions it creates according to values it wishes, *ceteris paribus*; if they are of contractual provenance, then government still would have the prerogative to structure it, since government's deference to contractual arrangements in the market is a conventional position adopted for, and presuming the obtaining of, a variety of social values, the failing of which can warrant further government action.

What the toy theory of SP shows is that the normative standards and rationale for government intervention can be the same for the market or the corporation, regardless of how we understand the nature of the corporation. Indeed, the only justification for market contracting that would seem to yield a different outcome would be one based on a conception of natural property or contracting rights that government protects but does not establish or create. If this natural rights view is what NGP theorists have in mind (which I doubt) then they cannot simply help themselves to these rights; they must explain whence these rights come, and how such a view can be justified in a society marked by a diversity of metaphysical and moral worldviews. If, however, we recognize private property, markets and contracts as political and social conventions that we adopt because of their consequences, then we must recognize a *pro tanto* justification for government to structure our ability to contract in light of these consequences. This *pro tanto* justification can then be worked up into a justification for those standards to apply to corporations. Different forms of government intervention do not require different overarching norms; a common set of norms can explain the variety of institutions that government establishes in various ways.<sup>4</sup>

## 5. CORPORATE JUSTICE: ADMINISTERED, PRACTICAL AND EFFICIENT

Another way of stating all of this as an objection to the NGP is this: by basing the claim for more stringent normative standards and government intervention on the corporation's extraordinary governmental provenance, we leave too much out of our analysis. If an unincorporated firm grows large enough to wield power over its employees or stakeholders, or possesses enough financial influence to affect our political processes,

<sup>4</sup> Another potential advantage of using something like SP as opposed to the NGP for understanding the normative dimensions of corporations is that it may help us navigate the difficult fact of transnationalism in corporate activity. While corporations surely need to be chartered by some specific government, one might wonder which society's values ought to apply to a corporation that largely operates or services multiple jurisdictions. What SP helps clarify is that the values that large transnational or multinational corporations ought to be governed by might not be localized to one particular state of origin or operations; instead we might demand that a company import the values (i.e. wage scales, worker protections, etc.) of a more protective nation to a more lax one, because these values ought to transcend national boundaries. Or we might demand that multinational corporations comply with specific transnational norms that may be more lax or demanding than either their country of incorporation or operation may demand. SP of course is a toy theory and we can't expect it to answer these sorts of questions in detail. But it does illustrate how a theory like this helps us to understand this multinational dimension of corporations in a more effective way than NGP approaches do.

we would want such standards to apply to them as much as corporations. But the NPG cannot do this: by describing the corporation's extraordinary features in contradistinction to those of market arrangements, it must concede too much to those who see the market as a domain of private interaction, even if it does not intend to.

Here I draw attention to other features of the corporation that better account for its normative distinction, and do so without sacrificing the normative and governmental nature of the market. First, I argue that the distinctive norms for corporations are not due to their governmental provenance, but their use of administered transactions, which would apply to firms more broadly understood, as well as corporations narrowly. Second, I argue that governments may see corporations as particularly singled out for reform or stringent regulation, but that this is due to their proximate relationship to government, not their principled status as franchise governments.

### 5.1. The Relevant Normative Features: Governance, Not 'The Government'

In arguing against the relevance of governmental provenance, I do not mean to claim that theorists are mistaken in thinking that corporations are distinct in some way, or that they require particular normative scrutiny. It is just that this distinction cannot be derived from their governmental provenance. However, if this is the case, then where does the corporation's normative specificity come from?

The relevant feature of the corporation that distinguishes it from a standard market interaction is that it functions through 'administered transactions' (Shipman 1999: 187–188). Whereas markets are largely characterized by individuals pursuing their own ends, and cooperating with one another accidentally by responding to price signals, the cooperation within the corporation is achieved not through the 'invisible hand' of the market, but the 'visible hand' of corporate hierarchy (Chandler 1977). The difference in this form of cooperation leads to various normative considerations that need to be accounted for. Given the nature of how markets achieve efficient allocations, various forms of behaviour like strategic and opportunistic actions, competition and adversarial behaviour are all necessary and required. In contrast, within the corporation people don't cooperate accidentally through market competition, but consciously according to the rules of the corporation, the dictate of those in charge, and the norms of the workplace (Jackall 1988). We require different norms according to which we can assess intrapersonal relationships within the corporation, and different legal standards for when and how government action is necessary to intervene in such arrangements (Martin 2013).



Put differently, it is not its being constituted by the government that makes the corporation special, but its use of *governance*. Whereas the price mechanism gets people to cooperate through the pursuit of their self-interest, corporations use hierarchy, organizational culture, and extant social norms surrounding authority and teamwork to induce cooperation, which introduces normative concerns that are less salient in market transactions. Thus, while both markets and corporations have Paretian rationales, the mechanism through which they effect efficiency gains is different; markets induce efficiency by allowing Pareto-improving transactions, while corporations (like governments) induce efficiency by correcting market failure through hierarchy, norms and cultural expectation (see Singer 2018b). It is this difference in mechanism, and not the provenance of the institution in question, that requires different norms to understand how our Paretian achievements ought to be constrained by other social values. Hierarchy and authority can be wielded in unfair exploitative ways, organizational culture can create unjustified power imbalances, and the use of extant norms can perpetuate and amplify extant social injustices: we require criteria according to which we can navigate these distinctive moral problems.

Now, to say that corporations effect efficiency gains through governance is not the same as saying that the corporation is analogous to government and is therefore subject to the *same* type of norms as governments, which Ciepley correctly notes (cf. Dahl 1985; Landemore & Ferreras 2016). The fact that the corporation exists within a market, and operates for an express purpose, makes this analogy ill-fitting (see Malleson 2013). However, its hierarchically organized administered transactions do make certain forms of concerns more relevant here than would be the case in the open market. If, for example, we are concerned with interpersonal domination, subservient relationships that potentially stunt human potential, or the reproduction of wider social injustices, such dynamics are more likely and predictably to be found in institutions where hierarchy formally exists than in a market where it does not.

The reason why it is important to distinguish the governance mechanism of an institution from its government provenance as the source of normative specificity is that it enables a wider scope of application. If the relevant normative feature is governance as opposed to government, then these standards would not apply to corporations specifically but to firms more generally. A non-incorporated firm still uses administered transactions to coordinate its activity, and therefore should still be the subject of governance-centred norms. Corporate governance is only the most conspicuous and complex example of the more general phenomenon of firm governance. A normative account of the

corporation that centres on its governance, as opposed to its government provenance, is therefore better able to track what distinguishes it morally from the market, while also speaking to a wider set of institutions.

Note how this dovetails with recent work in the political theory of workplaces and firms. On Anderson's (2017) account, for example, governments are not co-extensive with statutory institutions; instead, governments exist simply where we find some with the sanction-backed authority to give commands to others. On this view, then, all workplaces (corporate and unincorporated alike) are instances of government. The normative payoff is not derived from the workplace's relationship to the state, but rather from our normative intuitions about how and for whom governments ought to be organized. Contemporary capitalist workplaces are forms of private government not because of their distance from the state, but because they are ruled solely in the interests of those who own them; this, she argues, runs afoul of our commitment to, for instance, non-domination. For this reason, Anderson contends that we must strengthen various forms of workplace protection, collective bargaining and worker governance, to render workplace government more in line with our intuitions regarding the proper relationship between freedom and legitimate government. Similarly, Ferreras (2017) has made the argument that we too quickly confuse corporations for the firms they are connected to, which leads to confusion about the normative concerns at stake. On Ferreras's account, firms are not merely defined by their (government-assisted) corporate investments, but also by the investments of labour made by workers. This account is then leveraged into a normative argument for 'economic bicameralism', the inclusion of labour representatives into the governance of firms.

While I find their arguments congenial, I don't mean to endorse Anderson or Ferreras's conclusions entirely. Indeed, they don't wholly agree with one another: Anderson's conclusions rest largely on a concern with freedom, and Ferreras's rest more on an account of political 'expressive' rationality already being present within the firm. The bigger point is how both Anderson's and Ferreras's arguments allow for normative criticism of contemporary corporations based on social/political values, without requiring a normative argument drawn from the corporation's relationship to the state. Instead, in fitting with something like SP, both Anderson and Ferreras argue that all workplaces ought to be re-organized on behalf of the values that we demand from our commercial and economic institutions generally, not simply those associated with the state. By securing efficiency gains through governance, corporate firms *qua firms* ought to be subject to greater normative scrutiny, due to the moral concerns we have with such forms of power.

## 5.2. Proximity and Practicality

The normative theory of the corporation, on this account, should lead us to the more general normative theory of the firm. Insofar as this allows us to speak to more topics while assuming less, this is a virtue of the argument. Yet, a worry remains that what this account gains in theoretical parsimony, it loses in real-world tractability; aside from forfeiting the rhetorical quality of the NGP, this theory might also lose sight of the social fact that specifically *corporate* power is in fact a salient and worrisome phenomenon in our world. While unincorporated firms can be the sources of problematic power, and therefore should be the subject of the norms we apply to corporations, we cannot ignore that corporations are often the institutions that are in fact motivating our concern. Is there a way we can normatively distinguish corporations from firms more generally, in order to account for the specific political problems they pose, but without appealing to their governmental provenance?

If anything makes the corporation especially subject to specific normative concern, it is that its relationship to government is more proximate than that of firms more generally. This is a practical and consequential argument, not an ontological one.<sup>5</sup> Because firms or partnerships that are not incorporated require no extraordinary action by government to come into being, but instead are built up from more-or-less standard market contracts, they do not have a more obvious point of entry for social or governmental scrutiny. Social control and regulation of such institutions must be done more indirectly or through more costly forms of monitoring. In contrast, because the corporate charter (to take one feature of the corporation) is something that must be granted by special government action or procedure, there is an easy point at which social institutions can put pressure on the structure of the corporation. At this point in the process of incorporation, we can ask incorporators to promise to organize themselves in particular ways, or at least try to incentivize such choices, that better accord with our social values.

Put another way, the extraordinary government action of the corporation is an additional and more direct policy lever for integrating normative values into commercial activity. This is important because the cost, inefficacy and otherwise blunt nature of governmental administration and bureaucracy would otherwise make integrating such norms into the economy difficult or undesirable. However, because government is already in the extraordinary business of incorporation, such costs are

<sup>5</sup> While I think Ciepley would be friendly to this account, we must note that he appears to cut himself off from what I argue. As we saw earlier, Ciepley claims that his account of corporations rests not on their public consequences, but their being constituted by government so as to straddle the distinction beyond public and private by their ontological nature.

no great argument against using such extraordinary measures to alter incorporation in a manner that is more consistent with particular social values. Thus, insofar as corporations should come under special scrutiny, it is because practically they may be the easiest institutions to monitor and shape, not because they have special ontological status. We might wish to nudge corporate firms toward worker empowerment through the chartering process or regulation through the SEC in a way that is more difficult, or perhaps even prohibitively expensive, to do for unincorporated partnerships or sole proprietorships. While we might have every reason to try and affect the structure of such firms in order to protect particular social values, the extraordinary action necessary to institute a corporation means that we can use this power with less worry about government inefficiency in the particular case of corporate firms.

However, we must also resist being overly sanguine about our ability to use corporations as more proximate vehicles to effect social values in the economy. While practical concerns help us understand the corporation's normative specificity, this practicality cuts both ways. That there are principled reasons to try and affect the workings or structure of firms, and practical reasons to specifically target corporations, does not mean that any attempt to do so will be beneficial or prudent, even if there is a social value at stake. While efficiency is not the only value, or even necessarily the most important value, for our social institutions, it asserts itself practically when we're thinking about economic institutions like the corporation. This is because corporate policies created without a concern for efficiency will tend not to be terribly effective. Because corporations compete in markets, parties to a corporation always can defect from some imposed corporate arrangement, and instead privately contract into non-corporate arrangements (Singer 2018c).

Or, simply put, people have the ability to contract around corporate regulations, and they will have the incentive to do so if a regulation is introduced that is particularly efficiency-reducing. For example, many have argued that the rate of incorporation has dropped in the wake of the 2002 Sarbanes-Oxley Act, with people opting to organize themselves in businesses other than public corporations to avoid the monitoring and governance costs imposed by the post-Enron act (see Kamar *et al.* 2009; Ribstein 2010). Now, this is not necessarily an argument against Sarbanes-Oxley; if more responsible accounting requires imposing costs that reduces the number of corporations, then that is not necessarily a problem. However, as I have suggested, the whole point of attending to the corporate firm as especially deserving of normative scrutiny is because it offers a more practical way of injecting social values into the economy. If a policy of regulating corporations tends not to inject these social values, but rather serves to incentivize the avoidance of corporate arrangements in the first place, then it seems a misguided policy, not because it imposes

efficiency losses, but because in doing so it also less effectively achieves the other social values it seeks to promote.

Attempts to make corporate relations more just must satisfy one of two requirements, purely from a practical perspective. First, they must ensure that such relations would still be preferable to private contracting – which is to say, that they still improve efficiency – otherwise they will fail to bring the non-efficiency values to bear. Alternatively, such policies can be more general, and target both corporate and non-corporate relationships; that is, instead of making sure that the imposed corporate arrangement is efficiency-enhancing, an economic policy can make sure that the private contracting option is not more attractive, that it comes with the same sorts of constraints as those being imposed upon the corporation. Of course, this gets back to the more general argument, that what is normatively interesting about the corporation is actually generic to many other types of firms, and therefore our prescriptive policies ought to apply to this larger universe of cases.

## 6. CONCLUSION

The NGP has been an important development in normative political economy. By asserting the governmental provenance of the corporation, it helps to dispel the belief that corporations are private, economic organizations that ought to be granted deference and independence in a liberal market economy. However, I have argued that such approaches are limited in a number of ways. First, by distinguishing the corporation as public and governmental from the market as private and economic, they obscure the government's role in creating and enabling markets, as well as the legitimate social interest in ensuring they function for social purposes. Second, by attaching special normative consideration to corporations by virtue of their governmental provenance, they are not able to account for the norms we would want to apply to unincorporated-but-socially-worrisome firms, at least not in a parsimonious or elegant way.

In contrast, I have argued that our moral judgements of corporations need not rely on their government provenance. Instead, we can reach roughly the same sorts of judgements as the NPG, which I illustrated through a 'social Paretian' approach to commercial activity more generally (including markets, unincorporated firms and corporations proper) and a practical principle of proximity that suggests that public concern with corporations is particularly warranted because corporate governance and charters are more proximate and effective policy levers than other alternatives. Together these provide a framework for normatively assessing corporations, which also applies to non-corporate entities. Such a framework can also account for the corporation's particular place in our economy, while recognizing the not insignificant place that efficiency as

a value must play in our prudential considerations of when and how to interact with corporate affairs.

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