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ARTICLE

What Rendered Ancient Tyrants Detestable: The Rule of Law and the Constitution of Corporate Power

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Abstract The phrase "corporate tyranny" might seem to be nothing more than empty rhetoric, a muscular slogan with a plausible ring, but one lacking principled roots in the great tradition of political language which it echoes. In this Article, I aim to show that, on the contrary, it is indeed meaningful to apply the term *tyranny* in connection with contemporary corporate power—meaningful, that is, according to the criteria governing the use of that term within the limited government tradition's Rule of Law discourse. I also aim to demonstrate that, according to traditional criteria, certain terms used to lament the harms occasioned by manipulative state power—namely, *arbitrariness, slavishness* and *corruption*—might plausibly be employed against the large business corporation. The implications are significant. If the present constitution of corporate power were shown to be hospitable to those ills, then the legitimacy of corporate power would have been called into question on distinctive Rule of Law grounds. The notion that economic power is a limited government problem was a central and recurrent theme in public debates in the United States from the American Revolution until the middle of the twentieth century. Since then, however, the notion of "limited government" has become synonymous with the limitation of state, rather than "private", power; indeed, "limited government" has become a byword for the social philosophy that professes a belief in "small government"—a philosophy which, in effect, supports corporate power. In the light of that received wisdom, it is not surprising that there has been little scholarly inquiry into whether, and if so, how, the underlying moral commitments of the limited government tradition are incompatible with certain forms of contemporary corporate power. Within the confines of this Article, there is not the space to do more than demonstrate that further inquiry in this area would be worthwhile.

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1 Introduction

Do individuals, perhaps even whole communities, find themselves dependent on the *arbitrary power* of large corporations? Do those institutions resemble, in certain morally-significant ways, the *tyrants* whom we fear in the political realm? Does dependence on the arbitrary power of large corporations undermine the freedom of communities to govern their own affairs? And does it engender *slavishness* and *corruption*? In short, is modern corporate power the kind of thing that the limited government Rule of Law project might combat?[1]

How strange these questions seem today, in the light of current orthodoxies: we all know that "limited government" is exclusively about state power; just as we all know that there is no alternative to private corporate power.[2] However, not so long ago, especially in the United States, many invoked limited government ideas to condemn poorly constituted economic power, including corporate power. And the "many" included not only marginalized dissidents, but also notables, including founding fathers, presidents, and supreme court justices.[3] This US tributary flowed from an ancient stream of constitutional thought that sees relations of economic power and dependence as a potential source of oligarchical or plutocratic tyranny[4] as well as slavishness and corruption.[5] Thus Louis Brandeis, Supreme Court Justice from 1916 to 1939, wrote that people are "not free if dependent industrially upon the arbitrary will of another".[6] The current's origins can be traced to Harrington,[7] Milton,[8] and Sidney[9] in the seventeenth century, and, from there, all the way back to

[1] For an account of the limited government Rule of Law tradition and its distinctive notions of "arbitrariness" and "tyranny", see Sempill (2016), sections V–VI.

[2] In 1932, Justice Brandeis wrote: "The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed": *Louis K Liggett Co v Lee* 288 US 517, 548 (1932).

[3] For an overview, see: Sandel (1998), especially ch. 5; pp. 156–160, 177–185, 211–258; Sitaraman (2017), pts. I–II. For examples, see: Lloyd (1963); Louis D. Brandeis's extra-judicial and judicial writings in Strum (1995); Justice William O. Douglas in *US v Columbia Steel Co* 334 US 495, 536 (1948) ("[A]ll power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands, so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men"); Ickes (2009); Symposium on the constitution and economic inequality (2016).

[4] T Roosevelt, eg, spoke of the "tyranny of … plutocracy": Fishkin and Forbath (2016), p. 1491.

[5] Pettit (1999), pp. 29, 32–33, 39, 48.

[6] Brandeis (1995b), p. 27.

[7] "The man that cannot live upon his own must be a servant; but he that can live upon his own may be a freeman": Harrington (1992), p. 269. See further Pocock (1985), p. 107; Sitaraman (2017), pts. I–II.

[8] According to Milton, one is "under tyranny and servitude" if one is "wanting that power, which is the root and source of all liberty, to dispose and *oeconomize* in the Land…": quoted in Skinner (1998), p. 75.

[9] Sidney in a complicated way: "[N]o man, whilst he is a servant, can be a member of a commonwealth; for he that is not in his own power, cannot have a part in the government of others": Sidney (1989), ch. 2, §5, p. 103; see also ch. 2, §2, p. 89.

the classical age. I will call this the *anti-oligarchic current* of limited government Rule of Law thought.

Modern proponents of the anti-oligarchic current adapted this inherited mode of thought and speech in order to come to terms with emerging capitalist economic power, especially the power of large corporations. In doing so, they insisted: that large corporations are institutions embodying concentrated power; that corporations therefore pose threats similar to those posed by state institutions; and that the problem of corporate power would fit within the same constitutional, Rule of Law discourse that is used in connection with the state.[10]

That approach was meaningful because the tradition's moral commitments are concerned with the threats posed by concentrated power as such, whatever its basis. In 1870, Henry Adams declared that the concern is "[n]ot merely power in the hands of a president or a prince … but power in the abstract, wherever it existed and under whatever name it was known".[11] According to the tradition's moral commitments, there is no reason why one would advocate caution with respect to state power but not with respect to economic power. However, as contemporary limited government discourse illustrates, our understanding of the tradition's underlying principles risks being distorted by more or less conscious ideological gerrymandering in favor of corporate capitalism.

During the nineteenth and early twentieth centuries, anti-oligarchic ways of thinking and talking about the corporation helped to move inquirers in several directions—to the conclusion that we must dismantle "the trusts",[12] to calls for rigorous regulation[13] or constitutionalized social democratic welfarism,[14] and, less often, to more far-reaching demands for transformation of the corporate form and the economic system which it serves.[15] But then, by the conclusion of the Second World War, the anti-oligarchic current had been defeated,[16] falling not only into disuse but also into obscurity.[17] Ever since, the limited government Rule of Law vision has been treated as a doctrine devoted exclusively to the restraint of state power.

[10] On how the limited government Rule of Law tradition relates to constitutionalism, see Sempill (2017), p. 286.

[11] Quoted in Sitaraman (2017), p. 301.

[12] Sandel (1998), pp. 212–232; Sitaraman (2017), chs. 3–4.

[13] James M Landis, Dean of Harvard Law School, wrote, e.g., "The pressure for efficiency has led … to concentrations of power on a scale that beggars the ambitions of the Stuarts": Landis (1938), p. 46; Kessler (2016), p. 1547.

[14] See, e.g.: Fishkin and Forbath (2014); Sitaraman (2017), pp. 107–109 (FDR's "economic declaration of rights"), 184–191, 212.

[15] See, e.g., the discussion of Eugene Debs in Fishkin and Forbath (2016), pp. 1491–1493; Louis Brandeis: "We already have had industrial despotism. With the recognition of the unions, this is changing into a constitutional monarchy, with well-defined limitations placed about the employers' formerly autocratic power. Next comes profit-sharing. This, however, is to be only a transitional, half-way stage. The eventual outcome promises to be a full-grown industrial democracy": Brandeis (1995a), p. 96. Taken at face value, Brandeis's vision is incompatible with capitalism; though, to be sure, Brandeis might not have intended that to be the case; Sandel (1998), pp. 184–200, discussing the Knights of Labor; Sitaraman (2017), p. 287.

[16] Kessler (2016), p. 1552.

[17] Kessler (2016), pp. 1547–1553–; Sitaraman (2017), p. 199.

The demise of the anti-oligarchic current is underscored by the solicitude for the corporation that is evident in contemporary Rule of Law discourse. It is now commonplace, from the World Bank to the academy, to say that part of the Rule of Law's virtue lies in its capacity to promote the stability and certainty needed by investors.[18] It is assumed, in other words, that the Rule of Law should be supported partly for the sake of corporations—it is needed, we are told, in order to meet their, *and therefore our*, needs. Such thinking has reached its apogee in global trade law and in US constitutional jurisprudence, both of which grant corporations legal rights protecting them from state power; in some cases, such rights serve as a veto on state efforts to protect human beings from corporate harm[19]—as though corporations were humans and not institutions; and not themselves a source of arbitrary power.

With the rising tide of such views, and with the defeat of the anti-oligarchic current, worthwhile questions have not merely been obscured, they have come to seem nonsensical. That matters, because the questions we might otherwise ask—the questions posed at the outset—are now timelier than ever.[20] A phrase like "corporate tyranny", which once resonated with meaning, today appears to be nothing more than empty rhetoric—a muscular slogan with a plausible ring, but one lacking principled roots in the great tradition of political language which it echoes. That matters too, for the reasons that political rhetoric matters: as political agents, we need a shared language through which to express our convictions and to persuade others. And the rhetoric we use, if it is truly meaningful, always implies some more or less elaborate worldview, laden with assumptions and claims about how the world is or should be—as I demonstrate below. There is a need for a richer political language with which to describe and evaluate corporate power. Perhaps the tradition explored here can contribute to meeting that need.

This Article does not offer a firm view on that question, though I do not share others' enthusiasm for reviving the anti-oligarchic current as it was historically understood[21]: proponents of the anti-oligarchic current, notwithstanding their often incendiary rhetoric, seem unduly reticent about the fact that the ultimate source of the ills they lament is to be found in capitalism.[22] In both its historical and revived incarnations, the anti-oligarchic current is generally unwilling to explore the contradiction between the tradition's underlying principles and the present system of private ownership, which, as discussed below and elsewhere, effectively confers arbitrary power over persons.[23] Having sidelined the anti-capitalist implications of

[18] Waldron (2012), pp. 12–14; Raz (1979), pp. 214–216.

[19] See, generally, Kelsey (2015); Mitchell et al. (2017); Nicol (2010); Citizens United 558 US 310 (2010).

[20] Consider now, in the era of the Great Recession, the remarks of FDR's Secretary of the Interior, Harold Ickes, penned during the Great Depression: Ickes (2009), p. 35.

[21] See, e.g., Sitaraman (2017); Fishkin and Forbath (2014). "[B]y the turn of the twentieth century, proponents of the [anti-oligarchical] constitution of opportunity [which Fishkin and Forbath seek to revive] had come to accept that the United States 'was destined to have a vast, permanent class of propertyless wage earners'. In this respect, even the most radical political economists had made their peace with capitalism …": Kessler (2016), p. 1546. Footnote omitted.

[22] The capitalist constitution is described in Sect. 3.1 below. See also Sitaraman (2017), p. 287.

[23] See the discussion in the main text from footnote 62 and Sempill (2017).

such principles, largely without explanation or argument, the current's mainstream has tended to favor a social democratic program that would involve an eventual détente with a wealthy few.[24] But that must be a utopian aspiration, at least according to the tradition's own beliefs about how those with great power tend to see the world—beliefs borne out by the great neoliberal reaction, which is still underway.[25] For, as *Cato's Letters* put it:

> it is senseless to imagine, that Men who have great Possessions, will ever put themselves upon the level with those who have none, or with such as depend upon them for Subsistence or Protection, whom they will always think they have a Right to govern or influence, and will be ever able to govern, whilst they keep their Possessions.[26]

This Article's purpose is to offer some resources that might enhance the exploration of these matters. Among other things, I seek to show that it is indeed meaningful to apply the term *tyranny* in connection with contemporary corporate power—meaningful, that is, according to the criteria governing the use of that term within traditional Rule of Law discourse. I also set out to demonstrate that, according to traditional criteria, certain terms used to lament the harms occasioned by manipulative[27] state power—namely, *arbitrariness, slavishness* and *corruption*—might plausibly be employed against the large business corporation, at least in the case of the corporation as constituted in Anglophone jurisdictions.

The implications are significant. If the present constitution of corporate power is hospitable to tyranny, arbitrariness, slavishness, and corruption, it generates the kind of ills which might be combatted by the Rule of Law. And if corporate power were shown to lend itself to those ills, then the legitimacy of corporate power would have been called into question on *distinctive Rule of Law grounds*. This strategy has the following aims.

Firstly, as mentioned above, the notion that great corporate power is a limited government problem was a central and recurrent theme in public debates from the American Revolution until the middle of the twentieth century. I suspect that many who have recently spoken of "corporate tyranny"—e.g., the activists of the Occupy or Bernie Sanders movements—are no more than vaguely aware of the historical precedents and rich theoretical implications of the phrase. There has been little scholarly inquiry into whether this recurrent theme of political discourse has a

[24] See, e.g., Sitaraman's eloquent argument for a revival of the anti-oligarchic current. In keeping with the current's mainstream as practiced historically in the US, the argument seems not to take seriously enough the possibility of a non-capitalist economic order: Sitaraman (2017). Although I have concerns about the parameters and assumptions that shape his political program, I should make explicit what my footnotes imply: my inquiry plainly has much in common with Sitaraman's, and I have learned a great deal from his meticulously researched book, which I had the good fortune to discover just before this Article went to press. Moreover, I take it that proponents of the anti-oligarchic current's revival are not merely open to debating their project, but wish to encourage debate: see, eg, Symposium on the constitution and economic inequality (2016).

[25] See Sect. 4 below.

[26] Trenchard and Gordon (1722), nos. 84–85.

[27] For an explanation of the notion of "manipulative" power as used in this Article, see Sempill (2016), section IV.

principled basis in the Rule of Law tradition whose vocabulary it appropriates. This Article is intended to contribute to the revival of interest in this and related questions.[28] It aims to show that the underlying principles of the limited government Rule of Law tradition are indeed engaged by certain forms of contemporary corporate power.

Secondly, this Article aims to demonstrate to supporters of the Rule of Law that failure to properly consider applying terms such as arbitrariness, tyranny, slavishness, and corruption to economic power reflects "social insensitivity or a failure of social awareness",[29] as well as a betrayal of the tradition's commitment to oppose the ills just mentioned. In other words, the Article employs the method sometimes referred to as immanent critique.

Thirdly, the exercise undertaken in this Article is, in effect, an intellectual experiment, an experiment in the innovative adaptation of political vocabulary. The notion that political vocabulary may be subjected to innovative adaptation is not novel. As J. G. A. Pocock has shown, it is through linguistic adaptations of the kind entertained here that normative vocabularies develop over time, particularly in response to challenges posed by changing circumstances. A relevant example is the early socialists' use of the term "wage-slavery" to describe wage-labor—a meaningful adaptation of "slavery" as classically understood for the purposes of enriching the rhetorical resources for describing and evaluating capitalism.[30] Pocock observes that:

> Political speech is… practical and informed by present necessities, but it is none the less constantly engaged in a struggle to discover what the present necessities of practice are.

Some of the users of political speech will be engaged in "exploring the tension between established linguistic usages and the need to use words in new ways".[31] They may do this by "acting upon language so as to induce momentary or lasting change in the ways in which it is used".[32] For instance, a "problem or subject normally considered by applying one idiom may be considered by applying another":

> These moves may be rhetorical and implicit… or they may be explicit and theoretical, explained and justified in some critical language designed to vindicate and elaborate their character…[33]

In the second approach, the author is not simply "using some language in a new way, but proposing that it be used in a new way and commenting on the language uses of his society". Here, "philosophy and practice" are "coexisting rather than… separable".[34] This Article adopts the second approach. It addresses the problem of

[28] See, eg, Symposium on the constitution and economic inequality (2016); Sitaraman (2017); Fishkin and Forbath (2014).

[29] Skinner (2002), p. 165, and his discussion of a similar rhetorical strategy at p. 183.

[30] Sempill (2017).

[31] Pocock (1985), p. 13.

[32] Ibid, p. 6.

[33] Ibid, p. 16.

[34] Ibid, pp. 15–16.

corporate power, which is normally considered through the idiom of "regulation", by applying the alternative idiom of the limited government tradition's Rule of Law project. In particular, this Article uses terms such as tyranny, slavishness, and corruption in relation to corporate power, and it does so in ways that are shown to be faithful to the moral criteria governing the use of those terms. These moves are explicitly proposed, explained, and justified using a critical language designed to vindicate and elaborate their character.

This intellectual experiment furthers the second aim noted above, which is to provoke inquiry and reflection among supporters of the Rule of Law: this Article's experiment ought to encourage them to explore new ways of seeing corporate power, ways that are faithful to the tradition's declared suspicion of great power. This task involves persuading such readers that although the linguistic conventions and putative "common sense" of our time make it *seem* implausible to apply the tradition's principles and idiom to economic power, that impression might be misplaced. This Article's preliminary inquiry suggests that, according to the tradition's underlying principles, it is in fact strange that proponents of the Rule of Law do not at least consider so applying such principles and idiom. To the extent that readers are persuaded of this, they should come to see economic power "in a new moral light".[35]

Fourthly, this Article undertakes another intellectual experiment. Its aim is to show that root and branch criticisms of capitalism conventionally made in Marxist terms might also be made in an idiom and on grounds supplied by the limited government Rule of Law tradition. Accordingly, familiar criticisms of the modern business corporation will be aired, but they will appear in an evaluative framework and vernacular that are normally at home in an altogether different context.

That strategy should prove challenging not only for liberals, but also for Marxists and other anti-capitalists. How so? Because in general both contemporary liberals and anti-capitalists have too hastily assumed that the limited government Rule of Law tradition is intrinsically at peace with capitalism. However, anti-capitalists might consider whether the reconstitution[36] of concentrated economic power along Rule of Law (and meaningfully democratic) lines might be part of a transition to a non-capitalist future. Classical Marxists might see it as a temporary measure, to be adopted during the period before "the narrow horizon of bourgeois right [can] be crossed in its entirety"[37]—though, in the light of experience, it might be wiser to

[35] Skinner (2002), p. 182.

[36] On the nature of constitution and reconstitution, see: Sempill (2017). Although the nature of reconstitution is beyond the scope of this Article, it is important to note that the reconstitution of corporate power along limited government, Rule of Law lines would be inconsistent with what, in the Marxist tradition, is called "private ownership of the means of production": ibid, section 1.1.1. Reconstitution of corporate power is therefore to be distinguished from conventional "corporate social responsibility" proposals which by and large seek to reconcile such "responsibility" with the capitalist constitution: see, e.g., Bottomley (2007), discussed at note 161 below. See Glasbeek's critique of CSR, which demonstrates that CSR is fundamentally flawed insofar as it tends to advance schemes that are either so modest as to be derisory, or if more ambitious, incoherent and politically naïve because they unrealistically envisage the reconciliation just mentioned: Glasbeek (1988).

[37] Marx (1875), p. 20. Or: before the concentration of economic power is abandoned, should that be considered feasible and worthwhile. See, further, Sempill (2019).

proceed on the basis that hope and caution should be held in a state of constructive tension.[38]

The strategy might also prove challenging for some "neo-republicans" and others who seek to revive the anti-oligarchic current; in general, they have marshalled ideas such as those explored below to reach social democratic rather than fundamentally anti-capitalist conclusions.[39] This Article leaves open the question whether it would be better to advance criticisms of capitalism in Marxist terms, in limited government terms, in other terms, or not at all. The point of the exercise is rather to offer food for further thought.

Fifthly, although no attempt is made to argue that corporate power ought to be reconstituted along Rule of Law lines—and this Article remains neutral on that question—readers are invited to see reconstitution (accompanied by far-reaching democratization) as an alternative to more familiar mechanisms for rendering corporate power safe, such as regulation. This Article does not attempt to compare the relative merits of reconstitution (-plus-democratization), regulation, or other alternatives. Rather, it seeks to promote conditions under which it would occur to anyone to engage in such a comparative evaluation in the first place: the prevailing Rule of Law and regulatory orthodoxies mean that the possibility of engaging in such a comparison is not even on the agenda. Within the confines of this Article, there is not the space to do more than demonstrate that each such aim merits further inquiry.

The Article has the following structure. Section 2 briefly clarifies the conception of the Rule of Law that is the subject of this Article. Section 3 explains how corporate power is to be understood for the purposes of this Article's inquiry. Section 4 offers an account of traditional notions of tyranny, arbitrariness, slavishness, and corruption. Section 5 applies those notions to the phenomenon of corporate power.

2 The Limited Government Rule of Law Vision

This Article is about the limited government tradition's conception of the Rule of Law. Historians of ideas have traced the origins of the tradition to Classical Athens and Rome, identifying the echoes of Aristotle and Livy in John Locke, Algernon Sidney, James Harrington and the US Founding Fathers.[40] Notwithstanding the differences between their accounts of the Rule of Law, the tradition's modern

[38] GA Cohen suggests that a "defensible socialist constitution must contain a bill of individual rights, which specifies things which the community cannot do to, or demand of, any individual. To those who say that socialism is, or could lead to, tyranny, socialists often reply that, on the contrary, socialism is complete democracy, that it brings within the ambit of democratic decision issues about production and consumption which capitalism excludes from the public agenda. That reply, I now think, is markedly unsatisfactory": Cohen (1986), pp. 86–87. Though some might argue that we should strive to move beyond individual rights: West (2011).

[39] Pettit (1999).

[40] The distinction between the "rule" or "empire" "of law" and that "of men" was taken from Aristotle via Livy by, *inter alios*, Harrington (1992), pp. 20–21, and was assimilated by the Founding Generation, e.g. in Article XXX of the 1779 Massachusetts Declaration of Rights. Ripstein (2009), p. 145; Arendt

proponents—irrespective of whether one wants to label them "liberal" or "republican"—are united by their commitment to certain underlying principles, namely moral equality and freedom from manipulative social relationships.[41]

Today, the limited government Rule of Law vision is often associated with so-called "thick" or "substantive"[42] conceptions.[43] Dworkin's work offers the most notable contemporary encapsulation of the relevant ideas.[44] According to this vision of the Rule of Law, we are morally obligated to establish and support a legal system that (i) identifies or creates genuinely respect-worthy interests, expectations, and moral rights and (ii) holds to account state officials should they fail to give those respect-worthy things due weight when they exercise power. On this view, the Rule of Law requires positive law that (a) tells powerholders what is genuinely respect-worthy, and (b) provides ways to encourage compliance, and secure accountability, should powerholders be inclined to ignore respect-worthy interests, expectations, and moral rights.[45] That relationship between law, power, and respect-worthy things ought to apply to the executive and judicial branches at a minimum; for some, it ought to apply to the legislative branch as well.[46] In this Article, all references to the "Rule of Law" are to the limited government tradition's understanding of the Rule of Law, whose distinctiveness I explore elsewhere in detail.[47]

3 Corporate Power

Observation and reflection leads to the identification of a range of phenomena that might be seen as instances of "corporate power". This Article focuses on only one form of such power—"investment power"—whose nature I will now outline.[48]

Footnote 40 continued
(1965), ch. 4; Ostwald (1989); McIlwain (1947); Gough (1955); Jaffe and Henderson (1956); Reid (2004); Compare Green (2012); Sempill (2016).

[41] Sempill (2016), section IV.

[42] On the distinction between "formal" or "thin" and "substantive" or "thick" accounts, see Craig (1997). Compare Gardner (2012), pp. 1–18; Fallon, Jr. (1997).

[43] I agree with F. Michelman that "[i]t would be a plain misreading to reduce the American constitutionalist premise of the government of laws to the 'rule of law' or *Rechtsstaat* idea concerned only with the regularity of legal administration and, derivatively, with the form of legislation… [S]urely it will be agreed that in American constitutional rhetoric the notion of 'a government of laws' has also shared the meaning of formulas like 'higher law.'" Michelman (1988), p. 1501, footnote 28. See further, Arendt (1965), p. 161; Corwin (1928); Nelson (1988), ch. IV.

[44] Dworkin (1998), p. 93. See also Allan (2013).

[45] Sempill (2016).

[46] See, e.g., Dworkin (1996) and Allan (2013). Compare, e.g., Alexander Hamilton in The Federalist No 84: Hamilton (1788).

[47] Sempill (2016), (2019).

[48] For an exploration of the relationship between employer power and the principles of the limited government Rule of Law tradition, see: Sempill (2017).

3.1 The Capitalist Constitution

Resource owners exercise power over persons whose welfare depends upon access to such resources. Power of this kind has its origins in certain structural features of contemporary Anglophone societies, which, taken together, I call the *capitalist constitution*.[49] For the purposes of the argument below, I assume that the capitalist constitution has the following features:

(i) the substantial approximation in practice of the "paradigm of pure private property",[50] and the widespread subscription to the pure ideal by influential participants in public discourse.[51] This ideal includes, among other things, the presumption that private property is legitimately *for* "self-seeking exploitation";[52]

(ii) most productive wealth is privately owned, including both resources necessary for basic survival as well as those required for the satisfaction of basic needs and culturally conditioned wants and needs;

(iii) private ownership of such resources is highly concentrated;[53]

(iv) the economic way of life is partly conducted through structured relations we call "markets", which know "but one general principle, that of obtaining a maximum return from limited resources…"[54];

(v) the combination of (i)-(ii), means that property owners are sometimes "armed with power over others by virtue of a capacity to dictate the use of the resource" (which power is augmented when (iii) is added).[55]

(vi) economic power is concentrated and institutionalized in *large* business corporations, which are legally constituted to require that profit-maximization be treated as the institution's paramount goal.[56]

It should already be apparent, and will become increasingly clear below, that the elements of the capitalist constitution acquire their distinctive significance from the

[49] I am using the term "constitution" to denote an idea resembling Leo Strauss's interpretation of *politeia*: "*Politeia* means the way of life of a society rather than its [legal] constitution": Strauss (1965), pp. 136–137. Since the time of writing, I have learned that David Singh Grewal also uses the term "capitalist constitution", though he uses it to denote ideas different from those I intend to capture: Grewal (2017).

[50] Craig (1991), p. 542.

[51] Sir William Blackstone provides a famous account of this idea of property. See the discussion in Simpson (1995).

[52] Harris (1995), p. 433.

[53] Wearden (2014). See, further, Piketty (2014); Stiglitz (2015).

[54] Fuller (1969), p. 171. The claim that ours is a "free market" economy needs to be qualified in the light of numerous instances of monopoly, oligopoly, and other symptoms of "market failure": see Offer (2012).

[55] Harris (1995), pp. 422–423.

[56] Bainbridge (2008), p. 53: "the shareholder wealth maximization norm … indisputably is the law in the United States". See *Dodge v Ford Motor Company* 204 Mich 459 (1919). Although the meaning (and importance) of the case are contested (see, e.g., Stout (2008)), the paramountcy of shareholder wealth-maximization remains good law; as to the UK and Australia, see footnote 84 below.

ways in which they combine and interact. For example, J. W. Harris observes that elements (i)–(ii) arm property owners with power over others (element (v)), which is accentuated by concentrated ownership (element (iii)). The exercise of such power is often mediated by market relations (e.g., the relations of the labour market) premised on profit maximization (element (iv)), which is the only end the most powerful economic institutions can pursue for its own sake (element (vi)).

3.2 Power over persons distinguished from power over mere things

The "classical view of property as a right over things resolves it into component rights such as the *jus utendi, jus disponendi*, etc.".[57] Ownership of a thing entails a "legal liberty to use it in certain ways".[58] Another aspect of *private* ownership "is always the right to exclude others".[59] This is one reason why it is often pointed out that the legal relations entailed in ownership are not between an individual and a thing, but rather between individuals.[60] As Jeremy Waldron puts it, "legal relations cannot exist between people and Porsches, because Porsches cannot have rights or duties or be bound by or recognize rules".[61] Inasmuch as the owner of a car has a right to exclude others from it, and this right is efficaciously superintended by the state, the owner in one sense has power in relation to others. Should you want to drive my car, I have the power to decide whether you may or may not. Insofar as private ownership confers a liberty to use a thing in certain ways, this always affects the distribution of liberty between persons. As G. A. Cohen points out, "It is necessarily associated with the liberty of private owners to do as they wish with what they own, but it no less necessarily withdraws liberty from those who do not own it".[62] My ownership of a car affects your liberty with respect to it. However, the power relations at issue in this Article involve something more than the relations of power and liberty between persons that are ordinarily entailed in ownership of a single motor-car.

The power entailed in the liberty to use, and the right to exclude others from, some thing or collection of things may or may not confer the kind of power over persons which is relevant to the Rule of Law project. On my interpretation, the project is concerned with power that effectively allows its holder to govern substantial aspects of the way of life of one or more others by compelling them to acquiesce in the power-holder's say-so, irrespective of their preferences. I will call this *power over persons*. My ownership of a car typically does not confer power over persons; I will call the power it entails *power over mere things*.

It is conceivable that, under certain circumstances, private ownership would not give rise to power over persons at all. However, under the capitalist constitution, private ownership forms part of a set of conditions of dependence which tend

[57] Cohen (1928), p. 12.

[58] Waldron (1988), p. 27. I adopt Waldron's definition of "ownership" at p. 47.

[59] Cohen (1928), p. 12.

[60] Ibid; Waldron (1988), p. 27.

[61] Ibid, p. 27.

[62] Cohen (1981).

effectively to confer on some owners more or less substantial power over persons. Harris's description of how owners may be "armed with power over others" captures the relevant idea:

> Property has a dual function, since it governs both the use of things and the allocation of items of social wealth. It is in this duality of function that its controversiality principally resides. It is one thing to say that a society ought to afford to an individual the use of some resource. It is another to say that the individual should be armed with power over others by virtue of a capacity to dictate the use of the resource. "Property" encompasses both.[63]

So, power over mere things is distinct from power over persons: the former is not associated with the kind of relations of dependence that allow some people to govern others. The relevant conditions of dependence arise from the combination of certain elements of the capitalist constitution, as described above. And they are systemic, in the sense that they are constitutive features of a system that is embedded in the capitalist constitution, which effectively is a system of power.[64] As the Rule of Law's principles pertain to power over persons, property rights affording power over mere things fall outside the scope of the Rule of Law project, and therefore outside the scope of this Article.

This Article's concern is the power that large business corporations enjoy over persons whose welfare depends on access to resources that the corporations own.[65] I will call the power in question *investment power*. Investment power is associated with the freedoms to invest wealth or not, to withdraw wealth from investment, and to change how wealth is invested.[66] Such freedoms are fundamental incidents of private ownership as it is currently conceived. The conditions for the existence of investment power, and the disposition to exercise such power for the

[63] Harris (1995), pp. 422–423.

[64] It is necessary to set aside non-standard relations of dependence which may arise due to the peculiarities of certain individuals, even though such relations might also be due in part to elements of the capitalist constitution: that your emotional welfare depends upon spending Sunday afternoons meditating on the roof of my car does not instantiate a characteristic feature of a system of power. The limited government Rule of Law project is concerned with the *standard* features of systemic power over persons, typically the power of the state over the subject. Corporate power of the kind examined here concerns the systemic relations of dependence—and, in turn, power over persons—associated with access to resources required to satisfy more or less *standard* needs and wants (as contemplated by the phrase I use below: "a reasonable standard of living"). For the purposes of this Article, what matters is how the right of an owner to "exclude others from their *necessities*" tends effectively to confer on *some* property-owners power over persons: Cohen (1928), p. 18.

[65] The power exercised over employees in particular is examined elsewhere: Sempill (2017).

[66] Under the capitalist constitution, the exercise of investment power, especially by large corporations, has the potential to affect significant aspects of a way of life, not only within but also beyond a particular enterprise. It involves a substantial capacity to influence the "structures of normality" across society, and this through its ability to affect not only what is produced, and where and how, but also the built and natural environments, as well as the tastes, desires, and compulsions which advertising encourages us to experience as second nature. Alasdair MacIntyre suggests that this quotidian dimension of a way of life is embodied in the "structure of normality", which comprises sets of ongoing and *collective* practices, habits, rituals, roles, hierarchies, which enable us to identify, distinguish, and compare reasonably determinate and *shared* ways of life: MacIntyre (2001), pp. 24–25. As to tastes, etc., e.g., Ewen (2001); Beder (2001); Cohen (2000), p. 306.

aggrandizement of the owners of great wealth, are both functions of the combination of all of the elements of the capitalist constitution described above.

Imagine that a community needs continued access to resources owned by certain corporations in order for its members to maintain a reasonable standard of living. All other things being equal, property law holds that the corporations may decide whether the community can continue to access their resources, and if so, on what terms. Unless the community can find resources elsewhere, or is willing to suffer a diminution in its standard of living, its members might reasonably feel that, because of their dependence, (i) it is in their interests to conform to the corporations' stated, or perhaps perceived, wishes, and that (ii) they have no real option to do otherwise.[67]

Sometimes holders of substantial investment power will seek to exercise it in a manner that could be described as *penal*. Investment power is put to penal use:

(a) when a private property owner relies upon investment power in order to *threaten* a community with harm as a means of securing the community's cooperation; or
(b) when a private property owner exercises such power to *inflict harm* as punishment in default of cooperation.[68]

Investment power is typically wielded in such ways in order to advance public policy agendas tending to promote the wealth of the chief human controllers and beneficiaries of large corporations. The penal use of investment power exploits the relations of economic dependence described above in order to obtain the cooperation of economic dependents in some design conceived by the power-holder.[69] Usually, the harm in question is the diminution in community welfare that results from the withdrawal of investment on a large scale. For example: loss of employment, and in turn material and psychological harm for redundant employees and their loved ones, not only in connection with the enterprises controlled by the relevant owner(s) but also in dependent businesses; decline in the overall level of demand and economic activity; decline in tax revenue and therefore in funds available for public services, etc.

[67] Cohen (1928), p. 12.

[68] The penal use of investment power is to be distinguished from the reliance upon investment power in a way not intended as a threat or a punishment. A decision to withdraw an investment following a community's failure to comply with a threat may be sufficiently justified by business reasons other than any interest in the deterrence value of making good on one's threats. In other words, not every withdrawal of investment following a threat will be exclusively or even partly penal in *intent,* though it may nonetheless be penal in effect, insofar as its consequence is to deter future non-compliance.

[69] I agree with Robert Hale's view that "it seems better, in using the word 'coercion,' to use it in a sense which involves no moral judgment' nor any legal judgment"; and with his definition which sees coercion as yielding "conduct… motivated, not by any desire to do the act in question, but by a desire to escape a more disagreeable alternative". Penal economic power is coercive to the extent that it can yield such conduct. I also agree with this statement: "If I plan to do an act or to leave something undone for no other purpose than to induce payment, that might be conceded to be a 'threat.' But if I plan to do a perfectly lawful act for my own good, or to abstain from working for another because I prefer to do something else with my time, then if I take payment for changing my course of conduct in either respect, it would not be called a threat". Penal economic power is therefore to be distinguished from the reliance upon investment power in a way not intended as a threat. I share Hale's analysis of the distinction between "threats" and "promises": see Hale (1923), pp. 470–477.

Any government that had been warned that such consequences would follow the introduction or maintenance of a certain law or policy might reasonably fear the disapproval of its electors and, possibly, electoral defeat should it proceed in any case. Because of these factors, among others, holders of great economic power may wield investment power in a penal manner in the reasonable expectation of securing community and state compliance with their conceptions of how to solve major public policy problems and, in turn, how to shape socially significant patterns of order.

Although the penal use of investment power is not even a marginal presence in contemporary Rule of Law thought, it is hardly a marginal or obscure presence in modern social life. Take the following typical scenario, versions of which are often reported in the media: the directors of a company—e.g., one manufacturing motor vehicles—threaten to "take production offshore" unless the state lowers one or more costs—e.g., taxes, social charges, wages, environmental and occupational safety measures, union rights, unfair termination laws, etc.—and/or increases certain benefits—e.g., direct or indirect subsidies, tariff barriers, etc. Consider, by way of example, the battle waged by Nissan against the unionization of its car plant in Canton, Mississippi, in which the corporation:

> …threatened the local community, saying that if the plant in Canton was unionized, it would move somewhere else.[70]

Another striking example involved the not at all decorous public warnings by members of the UK financial services sector that if any post-financial-crisis laws were sufficiently antithetical to their perceived interests, they would exercise their investment power to withdraw substantial resources from active investment in the UK economy. These warnings were both anticipated and amplified by public commentators and they became a major topic of media interest.[71] Those issuing the warnings could reasonably have expected them to exert considerable pressure. This is largely because of the significant number of people employed by the UK financial services sector and the size of its share of Gross Domestic Product. The examples could be multiplied.[72]

Take another case, one which has often arisen in connection with the candidacy of social democratic, or parliamentary socialist, parties or politicians (e.g., François Mitterand and the French Parti socialiste after 1981)—I will call the relevant type of party *Party S*. Imagine this scenario: certain powerful corporations announce that they will withdraw their investment from a community should Party S win or retain office; the corporations' controllers think that Party S's policies are not conducive to profit-maximization.[73] Fear of the harm generated by such withdrawal might intimidate one or more voters; because of the corporations' threats, citizens might

[70] Sanders (2017).

[71] E.g., Moore (2010); Duke (2011); Treanor (2011); Neate (2012).

[72] E.g., Jenkins (2014).

[73] Justice Stevens cites an amicus brief to the effect that "[C]orporate participation in elections, any business executive will tell you, is more transactional than ideological": Citizens United 558 US 310 (2010), p. 468. Internal quotation marks omitted.

exercise their civil liberty to vote contrary to their own conviction but according to the corporations' preference. Likewise, the same fear, or perhaps only the fear of losing the election, might intimidate members of Party S to adopt policies which conform to the corporations' wishes.[74] F D Roosevelt's Secretary of the Interior vividly sums up the relevant phenomenon:

> [T]he sixty [wealthiest] families [whose wealth is deployed in the largest corporations], unwilling to learn to do business upon the democratic terms of 1937, began to make demands and threats. To Franklin D. Roosevelt and the overwhelming millions who have three times approved his policy they have made a threat like that which Nicholas Biddle of the Bank of the United States 100 years ago made to Andrew Jackson—a threat that they will refuse to do business at all unless the president and the Congress and the people will repeal all that we have gained in the last five years and regrant them the suicidal license they had enjoyed in 1929. To the 120 million people of the United States they have made the threat that the professional operators of the American economic system and the professional managers of the capital funds of the United States—capital to which every American man and woman over four generations has contributed sweat and blood—will refuse to operate that economic system, will refuse to let that capital be employed unless they are once more given full power to wreck American democracy in their own sweet way. To the 120 million people of the United States they have made the threat that, unless they are free to speculate free of regulations to protect the people's money; unless they are free to accumulate through legal tricks by means of corporations without paying their share of taxes; unless they are free to dominate the rest of us without restrictions on their financial or economic power; unless they are once more free to do all these things, then the United States is to have its first general sit-down strike—not of labor, not of the American people, but of the sixty families and of the capital created by the whole American people of which the sixty families have obtained control.[75]

Corporate controllers often say, in effect, "We've told you that unless you do what we say is needed in order to make our shareholders wealthier, we have the power to make your community poorer; *that* is your reason to cooperate". Or, more diplomatically, "If you do what we say, you will be better off than you would be should you refuse". The manipulative use of a lawful discretion or prerogative in order to threaten or cause harm has often been a powerful weapon in the hands of state tyrannies.[76] The penal use of

[74] John Locke declares that, "He *acts* also *contrary to his Trust*, when he either imploys the Force, Treasure, and Offices of the Society, to corrupt the *Representatives*, and gain them to his purposes: or openly pre-ingages the *Electors*, and prescribes to their choice, such, whom he has by Sollicitations, Threats, Promises, or otherwise won to his designs", etc: Locke (1689), §222. In Citizens United, Justice Stevens implies that a politician may "owe a political debt to a corporation, seek to curry favour with a corporation, or fear the corporation's retaliation": 558 US 310 (2010), p. 433.

[75] Ickes (2009), pp. 36–37. In the late nineteenth-century, former president, Rutherford B Hayes wrote of the US, "It is a government by the corporations, of the corporations, and for the corporations": quoted in Sitaraman (2017), p. 160.

[76] The objection is not to threats as such, but to the manipulative variety: Sempill (2016), footnote 78.

investment power by large corporations provides a peculiarly capitalist, "private" example of the use of manipulative threats for the sake of, to adapt Algernon Sidney's words, "the pleasure, greatness or profit"[77] of those who wish to be at the summit of manipulative social relations.

3.3 A Preliminary Objection and Skeptical Response

Defenders of the capitalist constitution are almost certain to object to the foregoing account. They might say, among other things, the account gives the misleading impression that corporate attempts to secure, and community efforts to provide, what are often called "favorable conditions for investment" are somehow sinister. On the contrary, such defenders might respond, the community that strives to meet corporations' stated or perceived wishes acts freely, in clear-eyed recognition of its own economic needs and therefore interests. However, the persuasiveness of that response depends in part on whether the community ought truly to be considered free in such circumstances.

As explained below, the limited government tradition supplies reasons to be wary of arguments whose upshot is the notion that a community is free notwithstanding its state of dependence on the arbitrary power of a few. Further, the tradition is skeptical of arguments which (i) presuppose the immutability of a state of dependence and then (ii) suggest that it is *therefore* in the interests of the dependent many to serve the interests of the few upon whom they depend.

Consider how Aesop's fable of *The Belly and the Members* was appropriated by Menenius Agrippa to convince the Roman plebs to end their secession aimed against the Senate. In the fable, the belly faces a rebellion when other parts of the body decide that the belly was reaping most of the rewards of their work but contributing very little itself. The hands, mouth, and teeth struck, but they soon discovered that they were becoming unwell. They realized that unless they cooperated with the belly, they would die with the whole body. Agrippa argued that although the Senate was indeed well-fed by the plebs, the Senate returned the favor by infusing the republic's blood with nutrients needed for the survival of all. The organic metaphor performs the crucial function of giving the impression that a body politic which disproportionately favors an *élite* is like the basic structure of the human body: natural and essentially immutable.[78]

Early proponents of the limited government project had to reject similar arguments which suggested that the community had an interest in unlimited government. Such arguments depended for their force upon the taking for granted of conditions which consigned some to weakness and allowed others to exploit it, conditions which were in fact mutable. Consider for instance the following characterization of the community's interests: I have riches and men at arms; I can offer you protection according to my terms; without my protection your properties and persons will be vulnerable; all I ask in return is that you offer me an appropriate

[77] Sidney (1989), ch. 1, §6, p. 21.

[78] L'Estrange (1967), p. 21.

tribute and do not attempt to interfere with my prerogatives; but fear not, so long as I am secure in my position, you will be in yours too.

In our day, a parallel case is often made in defense of the claims of great economic power, though it is not self-evidently appealing, especially when stated baldly: I have riches to which I may permit you access according to my terms; without such access, you will be poor and vulnerable; it would be in your interests, then, to agree to my terms; all I ask in return is that you do not attempt to interfere with my private economic prerogatives and that you offer me appropriate tribute in the forms of your labor and other conditions favorable to my flourishing. The terms of this compact seem plausible if it is regarded as morally acceptable that a community should be dependent on the prosperous few in the first place. If that proves difficult to demonstrate, as well it may, defenders of such relations of dependence can always resort to the argument that the relations are inevitable—as Menenius Agrippa and many since have done when troubled by wayward plebs. In either case, the legitimacy of what the Marxist tradition calls "private ownership of the means of production" would need to be defended.

The application of limited government Rule of Law ideas to investment power thus raises the prospect of a confrontation with established property rights. Indeed, the suggestion that investment power is constituted as a form of arbitrary power—a form of power which lends itself to tyranny, slavishness and corruption—effectively calls into question the capitalist constitution as a whole. In the face of such a challenge, proponents of the Rule of Law who are also defenders of a "private" economy would need to answer the following questions. Should private ownership of resources confer any power over persons? And, if so, should such power be capable of being exercised according to prerogatives as expansive as those that are at least plausibly defensible in the case of ownership of mere things? A negative answer to either or both questions might afford grounds for the reconstitution—perhaps along limited government lines—of existing economic institutions that exercise power over persons. Needless to say, that would be a very large step, and one that might involve the effective confiscation of certain established property rights.

As this thumbnail sketch of objections and replies demonstrates, once the limited government Rule of Law lens is turned from the state and in the direction of "private" economic power, intriguing and controversial lines of inquiry come into view. However, their magnitude places them beyond the scope of this Article. For now, it is sufficient to note that it would not be enough, as a matter of principle, for defenders of the capitalist constitution simply to assert the established nature of existing property rights. Established property rights do not merit respect simply because they are established[79]: whether or not they deserve respect is to be evaluated according to moral principles whose authority transcends the pronouncements of conventional authority, which has no presumptive dignity as such. The tradition's early adherents recognized that their cause would be lost were they to defer to established right. What mattered, they asserted, were the moral implications of any claimed rights. In the seventeenth century struggles over absolutism, Sidney sought to show that Sir Robert Filmer's

[79] Waldron (1988), p. 18.

invocation of the established right of kings amounted to giving the subject the "choice" of "acting or suffering, that is":

> doing what is commanded, or lying down to have his throat cut, or to see his family and country made desolate. This he calls giving to Caesar that which is Caesar's; whereas he ought to have considered that the question is not whether that which is Caesar's should be rendered to him, for that is to be done to all men; but who is Caesar, and what doth of right belong to him, which he no way indicates to us: so that the question remains entire, as if he had never mentioned it, unless we do in a compendious way take his word for the whole.[80]

We might equally say: if a holder of existing property rights claims such rights are morally justified solely in virtue of being established, "he" does not say truly "what doth of right belong to him", "so that the question remains entire". That question opens up a large and controversial subject, a subject that this Article puts to one side. All that can be done here is to foreshadow the challenging questions and debates that would arise were readers to accept this Article's invitation to further inquiry.

4 Tyranny, Arbitrariness, Slavishness and Corruption

The archetypal tyrant seeks power over persons chiefly so that they can be used as instruments for the tyrant's aggrandizement. The tyrant denies the proposition that there is a moral obligation to observe limits on such power for the sake of others' respect-worthy interests, expectations, and moral rights. As John Milton put it, "neither can any Tyrant require more than that his will or reason, *though not satisfying*, should yet be rested in, and determin[e] all things".[81]

A necessary condition of tyranny is the absence of the type of framework embodied in the Rule of Law—that is, a legal framework that is effective in holding the powerful to account should they fail to give due weight to respect-worthy interests, expectations, and rights. Put differently, a successful tyranny requires a state of affairs wherein power is constituted in a manner that permits, de facto or de jure, the "arbitrary" exercise of power: for, on the traditional view, power is exercised arbitrarily where a powerholder seeks compliance or cooperation without giving due weight to genuinely respect-worthy things.[82] Contrary to the animating spirit of the Rule of Law project, the archetypal tyrant exercises power over persons arbitrarily, as though they were merely means to be manipulated for the tyrant's ends.[83] I will call the outlook of the archetypal tyrant *the tyrant's outlook*.

[80] Sidney (1989), ch. 1, §3, p. 16.

[81] Quoted in Skinner (1998), p. 49 (emphasis added). Even a democratic majority might adopt this tyrannical attitude, as the Founding Fathers thought. See Arendt (1965), p. 157.

[82] On the limited government tradition's conception of arbitrariness, see Sempill (2016), section V.

[83] Tom Paine describes monarchs as tyrants who seek "arbitrary power in an individual person; in the exercise of which, *himself*, and not the *res-publica*, is the object". Quoted in Pettit (1999), p. 56 (emphasis in original).

According to the tradition's early modern writings, the Rule of Law fosters liberty, while the tyrant's arbitrary power breeds slavishness and corruption.

Recall element (vi) of the capitalist constitution: viz. the legal duty of corporate directors to exercise power over persons in order to maximize profits. In Anglophone corporate law, human persons are to be regarded merely as human resources, potential instruments or means in the service of profit-maximization.[84] The law of directors' duties—which is the corporate equivalent of public administrative law—provides for the judicial review of directors' decision-making, among other things, to ensure that they do not treat humans as ends in themselves.[85] These inhuman legal principles, which define the corporate constitution, bear poisonous fruit: in keeping with their nature, corporations routinely conduct themselves without true respect for the good of the community or individual persons as such—a *modus operandi* productive of material wealth as well as great "illth", to use John Ruskin's term for the economy's prodigious ills.[86] To be sure, corporations are subjected to an impressive array of "regulations", which seek to deter, piecemeal, certain forms of harmful corporate conduct. However, such measures are merely superimposed on the corporate constitution, and they neither delegitimize nor transform its inhuman outlook.[87]

In sum, then, under the capitalist constitution, corporations are legally designed to overlook the moral equality of those subject to their power, treating so-called "natural persons" as mere means in a ceaseless quest to accumulate.[88] The corporation thus embodies the vice of *pleonexia*—the drive to take more and more without end. For the Classical Athenians, *pleonexia* was the essence of the tyrant's outlook and the spiritual antithesis of the Rule of Law.[89] According to the traditional conceptions of arbitrariness and tyranny, corporations are disposed to wield investment power arbitrarily and according to the tyrant's

[84] *Parke v Daily News Ltd* [1962] Ch 927. Brian Cheffins notes that the provision enacted to overturn Parke "provides only scant protection for workers" because it requires shareholder approval "before a company can make payments" of the kind impugned in Parke, and shareholders "are unlikely" to give their approval: Cheffins (1997), p. 254.

[85] S.172 of the Companies Act 2006 (UK) does not alter this analysis. As Robin Hollington QC puts it, the "duty to act in the interests of shareholders remains the primary duty of directors, so that the duty to have regard to the listed factors, which are not obviously consistent with the interests of shareholders, is subordinate to and in aid of that primary and overriding duty" at p. 7: Hollington (2008).

[86] Quoted in Glasbeek (2017); see also, Glasbeek (2002). Of course, corporate law permits directors to cause the corporation to act in a manner which in effect enhances the welfare of affected humans—say through what is misnamed "philanthropic" giving. But that permission is granted by corporate law on the strict proviso that any welfare-enhancing results spring not from a concern for human welfare as such, ie. not from philanthropy properly so-called, but from the pursuit of profits. *Parke v Daily News Ltd* [1962] Ch 927, pp. 943, 950–951, 962 applying Lord Justice Bowen in *Hutton v West Cork Railway Co* (1883) 23 Ch D 654, especially 671.

[87] For a lengthier discussion of the contrast between "regulation" and "reconstitution", see Sempill (2017), section 1.1; although the discussion relates to the constitution of employer power, its substance is applicable to corporate power, *mutatis mutandis*.

[88] Of course, natural persons possessing investment power might choose to give as much weight as they like to the public good and to individuals' respect-worthy interests, expectations, and moral rights. However, property law permits them not to do so, while capitalism encourages them, by material and cultural means, to avail themselves of that licence.

[89] Jaeger (1947), pp. 358–359.

outlook—that is, without giving due weight to respect-worthy things and for the sake only of the shareholders' aggrandizement.[90] If a community is economically dependent upon powerful agents of that kind, then the limited government Rule of Law tradition would expect slavishness and corruption to follow—a prognosis I now explore.

4.1 Freedom and Slavery

A collection of eminent authors has argued that the classical and neo-roman idea of liberty has progressively been obscured by its late modern, "negative" counterpart.[91] Some scholars attach the label "republican" to the early modern proponents of the neo-roman notions of liberty and slavery. However, I am reluctant to use that label here as it might prompt distracting questions concerning how to classify various limited government thinkers.[92] Although the labels "liberal" and "republican" might matter in other contexts, nothing turns on them for this Article's purposes: what matters here are not the labels, but the normative implications of the relevant limited government principles.

For the tradition's early modern adherents, liberty could be predicated of whole communities as well as of individuals.[93] And so "what it means for an individual citizen to possess or lose their liberty must be embedded within an account of what it means for a civil association to be free".[94] Freedom is associated with the capacities of individuals and of a community to enjoy a certain form of self-government,[95] as well as the absence of certain forms of *dependence*. In Sidney's words, "I… esteem myself free, because I depend upon the will of no man".[96]

In order to describe and to indict this oppressive dependence, the tradition's early modern adherents often use the term *slavery*, as "nothing denotes a slave but dependence on the will of another".[97] In the traditional vernacular, the criteria governing the use of "slavery" do not confine its application to the juridical

[90] On the importance of holding shareholders to account for what is done by their corporate vehicles, see Glasbeek (2017).

[91] Most notably, Pettit (1999), pp. 298–299; Sandel (1998); Skinner (1998).

[92] Although Locke and Kant both used relevant neo-roman concepts, they are regarded by many as founders of liberalism, and are not conventionally labelled republicans; J. S. Mill (Mill (1989), p. 227: "No longer enslaved or made dependent by force of law, the great majority are so by force of poverty") and Hayek (Hayek (1960), p. 12), also conventionally called liberals, indict dependence along similar lines; and the most prominent contemporary proponent of the limited government Rule of Law tradition is Dworkin, a self-styled liberal.

[93] Skinner (1998), p. 24. See also Pettit (1999), p. 125.

[94] Skinner (1998), p. 23.

[95] Sidney (1989), ch. 3, §21, p. 440. "[W]e have no other way of distinguishing between free nations and such as are not so, than that the free are governed by their own laws and magistrates according to their own mind, and that the others either have willingly subjected themselves, or are by force brought under the power of one or more men, to be ruled according to his or their pleasure. The same distinction holds in relation to particular persons. He is a free man who lives as best pleases himself, under laws made by his own consent".

[96] Ibid.

[97] Ibid, ch. 3, §16, p. 402.

category of chattel slavery. They are broad enough to encompass *any* potentially manipulative relations of dependence, political *or* economic. Indeed, the notion of slavery is particularly useful for present purposes, insofar as it provides a way of seeing power that does not encourage unexamined moral distinctions to be drawn between political and economic power; this is because it does not conform to the modern way of seeing power, which tends to obscure economic power over persons.

In the seventeenth century struggle against absolutism, the term "slavery" was adapted to indict the *political* relations which obtain between a tyrant and those whose welfare depends on the tyrant's will. In the nineteenth century, the early socialists coined the neologism "wage slavery", which was an innovative adaptation of the idiom to condemn the *economic* relations of dependence between employer and employee.[98] It is not farfetched, then, to entertain further innovative adaptations:

(i) to use the term "slavery" to characterize the condition of a community whose fortunes depend upon arbitrary investment power[99];
(ii) to describe as "tyrannical" the institution that wields such power without submitting itself to limitations designed to prevent arbitrariness.

4.2 Two paths by which freedom can be undermined

According to the English neo-roman writers of the seventeenth century, a distinction is to be drawn between two paths by which the freedom of individuals or of communities can be undermined.[100] I will argue that both paths are relevant to corporate investment power.

Via the first path, the liberty of an individual or of a community is infringed if either is coerced "into performing (or forbearing from performing) any action neither enjoined nor forbidden by law"[101]: "a body politic, like a natural body, will be rendered unfree if it is forcibly deprived of its ability to act at will in pursuit of its chosen ends".[102] The experience of historical tyrannies suggests that where tyrants think it expedient to do so, they will seek to coerce others through threats and punishments, which are meted out at will, with impunity, and more or less systematically, for the sake of their own self-aggrandizement.[103]

[98] On wage-slavery and the limited government tradition's Rule of Law project, see Sempill (2017). Until the twentieth century, those using the idiom explored here assumed that the employment relationship involved an oppressive condition of dependence. Abraham Lincoln, e.g., thought that "those who spend their entire lives as wage laborers are comparable to slaves. He held that both forms of work wrongly subordinate labor to capital": Sandel (1998), p. 182.

[99] And, indeed, investment power generally.

[100] Skinner (1998), p. 68.

[101] Ibid, p. 68.

[102] Ibid, p. 47.

[103] Ibid.

When large corporations put investment power to penal use by making threats or inflicting punishments, they are deliberately following the first path. The capitalist constitution: (i) provides the conditions of economic dependence which lend potency to the penal use of investment power; and (ii) it in effect makes this coercive instrument available to large corporations, whose legal design requires them to exercise all their powers, including investment power, for the sake of the "one general principle" of "maximum return", with indifference to the good of the community as such or of individual persons as such.[104]

Contemporary liberals dignify this state of affairs by promoting the putative ideal of "economic freedom"[105]—a pat slogan which does not differentiate between my freedom not to buy a car and a corporation's freedom to close a car plant, despite their vastly different social significance. However, as suggested by the automobile manufacture, financial sector, and election scenarios described earlier, this aspect of the "economic freedom" of large corporations can be employed deliberately to coerce individuals and communities such that the freedom of humans to enjoy certain civil liberties is undermined. The community that is coerced into refashioning its public policies, the individual who is pressured to change his or her voting intentions, each loses an opportunity for self-government as a result of the coercive threats which are permitted and encouraged by the capitalist constitution.

The tradition's early modern adherents held that merely inhabiting a state of dependence on the arbitrary power of another interferes with freedom. Even if the superior party to a relationship of dependence elects not to harshly exploit that dependence against the inferior party, the welfare of the inferior is precarious because it depends upon the goodwill of the superior.[106] Recall James Harrington's famous contrast between the "greatest bashaw" and the "meanest Lucchese".[107] Harrington thought that to be under the power of the sultan is to have less freedom than a citizen of Lucca, because one's freedom in Constantinople, *however permissive the sultan may be*, depends entirely on the goodwill of the sultan.[108] The condition of being at the mercy of someone else's will is slavery, the antithesis of freedom. This is the second path by which the freedom of individuals or of communities can be undermined.

As Skinner describes this second path, once "you recognize that you are living in such a condition, this will serve in itself to constrain you from exercising a number of your civil rights".[109] The constraint arises through a *self-imposed* counsel of prudence which dictates that you conduct yourself to please, or to avoid displeasing, those upon whose will you depend. Any individual or community that is in such a predicament is enslaved.

[104] Fuller (1969), p. 171.

[105] Waldron (2012), pp. 14, 110.

[106] Skinner (1998), p. 86. For similar notions in Kant's thought, see Ripstein (2009), pp. 14–15.

[107] Harrington (1992), pp. 20–21.

[108] I am paraphrasing Skinner's account: Skinner (1998), p. 86.

[109] Ibid, p. 84.

It may seem surprising, Skinner notes, that the term "slavery" is used by some writers to capture the second path to unfreedom, and not only the first.[110] But, for this current of thought, the essence of the slave's plight lies in being in perpetual *danger* of suffering injury as a result of an exercise of arbitrary power, irrespective of whether that injury is ever inflicted, or even deliberately threatened.[111] In the seventeenth century, the second path to unfreedom was often associated with prerogative powers that could arbitrarily inflict negative consequences on those who displeased the powerholder.[112] Charles I's assertion of a veto power—or "negative voice"—over legislation placed before him by parliament drew particular ire. In *Eikonoklastes*, Milton criticizes the veto as part of a more general attack on arbitrary discretions in general:

> Every Common-wealth is in general defin'd, a societie sufficient of it self, in all things conducible to well being and commodious life. Any of which requisit things if it cannot have without the gift and favour of a single person, it cannot be thought sufficient of it self, and by consequence no Common-wealth, nor free.[113]

Milton explains that a free community will determine the conditions of its "well being" through "the joynt voice and efficacy of a whole Parliament".[114] A community is unfree, however, if parliament's decisions can "at any time be rejected by the sole judgment of one man".[115] Skinner points out that "Milton is objecting not to the exercise but to the very existence of the royal veto".[116]

It is telling to consider investment power in the light of Milton's remarks. The capitalist constitution concentrates the "requisit things" "conducible to well being and commodious life" in large corporations, which have investment power relevantly unconstrained by law: that is, a largely uncontrolled discretion to invest or not, or to withdraw an investment, or to change its nature, without being required by law to systematically take into account the community's or any individual's good as such.[117] Whether and on what terms members of the community can access "requisit things" depends on how corporations exercise their investment power. This means that a community living under the capitalist constitution is not "sufficient of it self", but is instead dependent on "the gift and favour" of large corporations.[118]

[110] Ibid, p. 39.

[111] Ibid, p. 72.

[112] Ibid, pp. 51, 72–76.

[113] Quoted in ibid, p. 51.

[114] Quoted in ibid, p. 52.

[115] Quoted in ibid.

[116] Ibid.

[117] For the characteristically systematic and comprehensive qualities of the Rule of Law as compared with the ad hoc and fragmentary nature of regulation, see Sempill (2017), section 1.1.1.

[118] The capitalist constitution of investment power in general, and not only penal economic power, would seem objectionable on the foregoing basis. But my focus is on penal economic power.

Given this condition of dependence, the penal use of investment power represents a particularly potent "negative voice", which corporations can exercise at their pleasure to coerce a community that tries to assert its independence—say by designing public policy for the "Common-wealth"—foolishly or bravely, as though it were "sufficient of it self". But even if corporations don't exercise their veto, the mere existence of arbitrary investment power may nonetheless cow a community. As Milton puts it:

> Grant him this, and the Parliament hath no more freedom than if it sate in his Noose, which when he pleases to draw together with one twitch of his Negative, shall throttle a whole Nation.[119]

A community that has both understood the nature of arbitrary investment power and has taken the measure of corporations' self-aggrandizing, tyrannical outlook might think it wise to shape public policy so as to foster "business confidence" (meaning corporations' confidence that they will get what they want) by creating "favourable conditions for investment" (meaning conditions favoured by corporations). Above all, it would seem advisable to avoid measures likely to provoke the drawing together of the noose, which, depending on the corporation and the nation in question, may plausibly "throttle a whole Nation".

4.3 Slavishness and corruption

Dependence on a tyrannical and arbitrary power may affect not only what communities and individuals do, but also their character. Those who inhabit such a state of dependence are at risk of becoming slavish or corrupt—in Thomas Jefferson's words, "[D]ependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition".[120]

Although the following account is framed in terms of the harm suffered by an individual, it could equally refer, *mutatis mutandis*, to the condition of any community which is dependent for its welfare on an arbitrary will. Firstly, the knowledge that important aspects of my welfare depend systematically on the arbitrary power of another renders my condition slavish insofar as I am subjected to a certain kind of indignity. My condition is undignified because I cannot be assured of the respect entailed in being treated as a moral equal: dignified relations between moral equals depend upon each being able effectively and systematically to insist upon being respected by the other in morally important ways.[121] Where my welfare depends upon the arbitrary power of another, we both know that I cannot effectively insist upon such respect; I might fear that I would place my welfare in jeopardy were I to attempt to insist upon being respected systematically.

Secondly, knowledge of being the subordinate in such a state of affairs will tend to corrode my character. It will encourage me to behave in an undignified and

[119] Quoted in Skinner (1998), p. 52.

[120] Quoted in Sitaraman (2017), p. 98.

[121] Ripstein (2009), p. 37. See, further, Darwall (1977).

slavish manner and to develop a slavish disposition.[122] Unless I am exceptionally courageous, or simply foolhardy, fear will seem prudent, and I will be fearful. I will hope to "avoid the effects of his rage", in Sidney's words, by allowing myself to be treated with contempt instead of insisting upon respect.[123] I should not even raise my voice against this; nobody can "speak truth to power if everyone is obliged to cultivate the flattering arts required to appease a ruler on whose favour everyone depends".[124]

Eventually, it may not even occur to me, or to many in the subject community, that there is a choice between compliance or defiance; the culture may simply take it for granted that defiance doesn't even bear thinking about. In such circumstances, fear and resignation would be less significant factors in any explanation of the community's acquiescence. Force of habit and education might make it seem that efforts to please and appease the tyrant are a matter of "common sense". This impression would be reinforced insofar as these efforts became part of the community's structures of normality,[125] just as offerings to volatile and vengeful gods might be part of a society's daily routine.[126]

"Respectable" and "responsible" intellectuals and public figures may explain to the rest of the community why such efforts at the behest of the tyrant are in fact conducive to the public good, and such explanations would become part of the community's public philosophy: not only the community's material prosperity, but also its freedom, it might be said, are promoted insofar as the privileges and prerogatives of those with great power are preserved.

The loss of a community's liberty, then, may not only come about where its "ability to act at will in pursuit of its chosen ends" is overborne by outright coercion.[127] It may also arise where its members are placed in a slavish condition and so tend to acquire slavish characters. In the grip of fear, and in the face of the seeming futility of self-assertion, the community may at first suppress, and progressively simply lose, the will even to assert its capacity to pursue its chosen ends.[128]

In some, slavishness may manifest itself in the self-abasement and self-abnegation I have just been describing. Others, however, may show themselves no

[122] See, e.g., Sidney (1989), ch. 3, §19, pp. 434–435.

[123] Ibid, ch. 2, §28, p. 271.

[124] Skinner (1998), p. 90; Sandel (1998), p. 215.

[125] MacIntyre (2001), pp. 24–25.

[126] The mentality of resignation just described might be reflected in the outlook of Party S. Indeed, it arguably sums up a key aspect of the dominant outlook of many social democratic parties today, including the British Labour Party under New Labour and increasingly the French Parti socialiste.

[127] Skinner (1998), p. 47.

[128] By way of illustration, recall the fictitious Party S which was part of the election scenario described earlier. Party S could be any of the social democratic parties of Western Europe. The decisions of these parties to relinquish programs aimed at reducing their communities' dependence on arbitrary investment power is *partly* explained by their having experienced or observed the force of the penal use of investment power. Consider, e.g., the *volte-face* of the Parti socialiste after the "capital strikes" against the policies of the early Mitterrand years. Or the British Labour Party's decision to amend Clause IV of its Constitution to render itself "electable". Whether investment power is eventually put to penal use against the Labour Party under Jeremy Corbyn remains to be seen, though it seems probable.

less slavish by choosing to "make themselves subservient to the lusts of a man who may nourish" their "vices"; such personalities "abhor the dominion of the law, because it curbs" them.[129] They show themselves not only to be slavish, but to have been readily corruptible and corrupted; "slavishness" and "corruption" sometimes share a common referent.[130]

Montesquieu asserts that "avarice" is likely to fill the vacuum left by the exhaustion of public-spirited community engagement with the workings of great power:

> The misfortune of a republic is when intrigues are at an end; which happens when the people are gained by bribery and corruption: in this case they grow indifferent to public affairs, and avarice becomes their predominant passion. Unconcerned about the government and everything belonging to it, they quietly wait for their hire.[131]

For the avariciously corrupt, the option of serving the power-holder may seem a ready path to rewards. "[F]latter his humour" and so "be accounted" one of "his friends",[132] in the hope of crumbs from his table, or perhaps even feasts in the case of his most valued servants: "They who were corrupted in their minds, desired to put all the power and riches into his hands, that he might distribute them to such as served him. And he who was nothing less than covetous in his own nature, desired riches, that he might gain followers".[133]

Sidney argues that the success of tyrants depends in part on how effective they are in taking advantage of the fact that "[m]en are naturally propense to corruption". He suggests that they typically seek to do so by using the resources of "power, honors, riches" concentrated in their hands, and disposable according to their arbitrary discretion, as "the baits by which men are drawn to prefer a personal interest before the publick good",[134] which is the essence of corruption.[135] And "the number of those who covet them is so great, that he who abounds in them will be able to gain so many to his service as shall be sufficient to subdue the rest". He continues:

> 'Tis hard to find a tyranny in the world that has not been introduced this way; for no man by his own strength could ever subdue a multitude; none could ever bring many to be subservient to his ill designs, but by the rewards they received or hoped.[136]

[129] Sidney (1989), ch. 2, §19, p. 191. On the repudiation of the restraints of law by persons of this type, see: ch. 2, §20, p. 193.

[130] David Hume recognized the overlap, or intimate connection, between slavish dependence and corruption: Teachout (2014), p. 53. Lawrence Lessig makes the two words into a compound term, "dependence corruption": Lessig (2011).

[131] Quoted in Teachout (2014), p. 52.

[132] Sidney (1989), ch. 3, §19, p. 435.

[133] Ibid, ch. 3, §6, p. 350. Sidney posits a mutually-reinforcing cycle of corrupting influence between patron and client: ch. 2, §27, p. 266; ch. 2, §28, p. 274; ch. 3, §19, p. 434.

[134] Ibid, ch. 3, §6, p. 350.

[135] See, generally, Pocock (1985); Teachout (2014).

[136] Sidney (1989), ch. 3, §6, p. 350.

According to Sidney the lesson of these experiences "obliges" those who "think fit to have kings, yet desire to preserve their liberty… to set limits to the glory, power and riches of their kings". Power-holders must not be "furnished with the means" to corrupt others, namely arbitrary control of vast inducements.[137]

Some of Sidney's strongest criticism is reserved for the obsequious, though grasping, spirit who would seek rewards by "rendering himself subservient"[138]:

> Those who are ignorant of all good, careless or enemies to it… slide into a blind dependence upon one who has wealth and power; and desiring only to know his will, care not what injustice they do, if they may be rewarded. They worship what they find in the temple, tho it be the vilest of idols…[139]

We can only properly understand the limited government Rule of Law vision by appreciating how it was conceived by its early modern proponents as a way of constituting power in order to marginalize and neutralize would-be tyrants, to avoid arbitrary power, and, *in turn to minimize slavishness and corruption*. And unless we appreciate why these ills were considered so loathsome, we cannot understand what drove the limited government tradition's adherents to spill so much ink and blood in pursuit of their vision. Most importantly for present purposes, it is necessary to identify the *substance* of the defects against which the tradition has set its face, so that we may be alive to their emergence in *new forms*.

5 Corporate Power: Slavishness and Corruption Today

In the previous Section, I presented a traditional portrait of slavishness and corruption, which reach their apotheoses when both are normalized.[140] In the light of this portrait, we might examine our own culture for evidence of how the community's dependence on arbitrary and tyrannical corporate power is connected with slavishness, corruption, and their normalization. Consider, as possible evidence, how we speak casually, either with approval or resignation, not only of the *need* to "please" and "appease" "the markets", but also of the "race to the bottom" which occurs when different communities make sacrifices in order to compete for the "gift and favour" of large corporations, to use Sidney's phrase. In many cases, ad hoc concessions are made in response to sector-specific conjunctural factors such as targeted lobbying[141] and more or less concerted rumblings about disinvestment; but, increasingly, the suppression and preemption of civilizing

[137] Ibid, ch. 3, §6, p. 350.

[138] Ibid, ch. 2, §27, p. 266.

[139] Ibid, ch. 3, §19, p. 435.

[140] Benjamin Franklin pessimistically held that the new constitution was "likely to be well administered for a course of years, and can only end in despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic government, being incapable of any other": quoted in Teachout (2014), pp. 15–16.

[141] US corporations spend $2.6 billion on lobbying each year, "which is more than is spent on the maintenance of the two Houses of the U.S. legislative branch": Glasbeek (2018).

measures is being placed on a systematic and long-term footing through various "free trade" measures, such as "Maquiladoras" or "Special Economic Zones"[142] and "Investor-State Dispute Settlement" and international economic law.[143]

Our freedom, it is often said, includes "economic freedom", the cause of which is advanced by the enlargement of *corporations'* freedom. Sidney once pointed out the "extravagance" in Sir Robert Filmer's "assertion, that *the greatest liberty in the world is for a people to live under a monarch*" who "is endowed with an unlimited power of doing what he pleaseth, and can be restrained by no law. If it be liberty to live under such a government, I desire to know what is slavery",[144] for:

> there is no such thing in nature as a slave, if those men or nations are not slaves, who have no other title to what they enjoy, than the grace of the prince, which he may revoke whensoever he pleaseth.[145]

It is frequently repeated that our prosperity depends on treating corporations' prosperity as our first priority. Such assertions are plausible, on the assumption that we maintain the relationship of dependence enshrined in the capitalist constitution. Echoes of Menenius Agrippa's adaptation of Aesop's fable of *The Belly and the Members* can often be heard in the mouths of today's cultural elites, complete with the fable's misleading suggestion that the social order is a natural one.[146] Opponents of political absolutism once confronted a similar set of claims, which Sidney attributed to Sir Robert Filmer, whose vocation was to defend them:

> [T]hose who will have a king, are bound to allow him royal maintenance, by providing revenues for the crown; since it is for the honour, profit and safety of the people to have their king glorious, powerful, and abounding in riches.[147]

Prominent among the most prized vocations in our time are those promising the "baits" of "power, honors, riches, and the pleasures that attend them". These inducements are concentrated in the hands of large corporations, which are thereby "furnished with the means" to exploit our natural "propense to corruption", to recall Sidney's words.[148] What is taken to be excellence in such fields is assiduousness in "desiring only to know" the "will" of large corporations.[149] Those most suited to such pursuits "care not what injustice they do" but "worship what they find in the temple".[150] Some worship sincerely, while others must simulate

[142] Ibid.

[143] See, generally, Kelsey (2015); Mitchell et al. (2017); Nicol (2010).

[144] Sidney (1989), ch. 1, §5, p. 17 (emphasis in original). Bertrand Russell declaimed: "Advocates of capitalism are very apt to appeal to the sacred principles of liberty, which are embodied in the maxim: The fortunate must not be restrained in the exercise of tyranny over the unfortunate": Russell (1926).

[145] Sidney (1989), ch. 1, §5, p. 17.

[146] Think of the strand of liberal public philosophy which claims a quasi-natural status for the capitalist constitution. For the fable and its Roman adaptation, see L'Estrange (1967), p. 21.

[147] Sidney (1989), ch. 3, §6, p. 348.

[148] Ibid, ch. 3, §6, p. 350.

[149] Ibid, ch. 3, §19, p. 435.

[150] Ibid.

"worship". From the tyrant's outlook as housed in the corporation, it doesn't matter which mode obtains, provided that *pleonexia* is nourished: a "survey of thirty-four directors of US Fortune 200 companies" reported that "thirty-one of them would cut down a mature forest or release a dangerous unregulated toxin into the environment to increase corporate earnings".[151]

The archetypal tyrant is regarded by the modern limited government tradition as a political power-holder. It is telling, then, that today we often think of our political leaders as seriously constrained by how their public policy and electoral prospects depend upon maintaining the goodwill of economic power-holders.[152] Party S which featured in the election scenario described earlier is a recognizable contemporary type.[153]

Noting that "[b]usiness corporations must engage the political process in instrumental terms if they are to maximize shareholder value",[154] Justice Stevens of the U.S. Supreme Court observes that "[i]f a corporation's goal is to induce officeholders to do its bidding, the corporation would do well to cultivate stable, long-term relationships of dependency".[155] Notice how these remarks reflect the traditional ideas of dependence and slavery.

The enslaving influence exerted by large corporations on the processes of representative government is by no means new.[156] Consider Woodrow Wilson's complaint regarding the constraints imposed by great economic power. Informed by the tradition's anti-oligarchical current, Wilson alluded to the idea of slavishness I have been exploring:

> Have we come to a time when the President of the United States or any man who wishes to be the President must doff his cap in the presence of this high finance, and say, "You are our inevitable master, but we will see how we can make the best of it"?[157]

During the era of the anti-oligarchical current's influence, the great power of corporations was widely portrayed as alarming and *mutable*.[158] However, with that current's demise, and especially since the rise of neoliberalism and the retreat of socialism and social democracy, corporate power has increasingly been treated as one of the facts of life, something about which it is futile and unsophisticated to be

[151] Cited in Mayer (2013), p. 27.

[152] President Clinton remarked on this problem, colorfully: see Woodward (2005); Woodward adds, "The administration would have to come up with a credible plan it could sell, Clinton said", to the bond markets: pp. 73–74.

[153] See discussion of contemporary social democracy at notes 126 and 128 above.

[154] Citizens United 558 US 310, 454 (2010).

[155] Ibid.

[156] Though they may have been accentuated by the rise of "neo-liberalism" and the purported necessities of "globalization".

[157] Quoted in Sandel (1998), p. 215.

[158] L Friedman in The History of American Law records that before corporations had acquired their present appearance of being almost as natural as "natural persons", it was widely "feared" that they "could concentrate the worst urges of whole groups of men": quoted in Citizens United 558 US 310 (2010), p. 427 (Justice Stevens).

alarmed: we have indeed "come to a time when" they are the "inevitable master", it is often implied, so all that can be done is to "see how we can make the best of it".

The pervasive grip of this mentality, even among some who are uncomfortable with our "inevitable master", has meant that the idea of considering the reconstitution of economic power along limited government Rule of Law lines is usually ruled out in advance. Many contemporary critics of corporate impropriety set out, in effect, to "see how we can make the best of it" by seeking to curb the "worst excesses" of corporations[159]: elaborate "regulatory" schemes are proposed, some emphasizing the threat of punishment, others "reputational" incentives.[160] Although all such schemes envisage ameliorating the tyrant's conduct to a greater or lesser extent, none would overturn the relations of economic dependence which place the community at the mercy of arbitrary investment power.[161] The inadequacy of regulation was lamented by Henry Demarest Lloyd, a nineteenth century member of the anti-oligarchical current:

> The possibility of regulation is a dream. As long as this control of the necessaries of life and this wealth remain private with individuals, it is they who will regulate, not we. The policy of regulation, disguise it as we may, is but moving to a compromise and equilibrium within the evil all complain of. It is to accept the principle of the sovereignty of the self-interest of the individual and apply constitutional checks to it. The unprogressive nations palter in this method with monarchy. But the wits of America are equal to seeing that as with kingship and slavery so with poverty—the weeding must be done at the roots.[162]

At present, both positive law and Rule of Law discourse place corporate power outside the scope of the Rule of Law mechanisms aimed at systematic recognition, creation, and accountability designed to ensure that powerholders give due weight to respect-worthy things. In the absence of mechanisms obliging controllers of concentrated economic power to give due weight to the good of the community and of individual persons as such—e.g., a combination of Rule of Law and democratic accountability mechanisms—investment power may be exercised arbitrarily, including for penal purposes, according to the tyrant's outlook. As a result of being so dependent on an arbitrary will, individuals and communities suffer a loss of freedom which affects not only what they do, but also tends to shrivel their characters.

According to the Rule of Law's traditional conceptions of tyranny, arbitrariness, slavishness, and corruption, the present constitution of corporate power seems

[159] On certain fundamental limitations of the regulatory project, see Sempill (2017), section 1.1.1.

[160] For a discussion of different models, see Parker (2002), Introduction, ch. 1.

[161] Stephen Bottomley asks whether certain aspects of political constitutionalism should be applied to corporations: Bottomley (2007). But he "does not challenge the pivotal role of shareholder primacy in corporate law", because challenging it "would depart too dramatically from the prevailing mindset of corporate managers and officers": Corbett and Spender (2009), p. 151. Imagine if the same weight had been given to the entrenchment of a certain mindset in the managers and officers who served monarchs harboring absolutist pretensions. For a powerful critique of the *genre*, see Tombs (2015).

[162] Lloyd (1963), p. 182.

defective. And the tradition's Rule of Law project offers at least part of a vision for how to reconstitute it. Following the example of their early modern ancestors, who sought to substitute an "empire of laws" for dependence on the arbitrary power of political tyranny,[163] the tradition's contemporary supporters ought to consider whether, and if so how, to attempt the equivalent in respect of the corporate tyranny of our day.

6 Conclusion

In this Article, I have argued that, under the capitalist constitution, (i) corporations have not been constituted in conformity with limited government Rule of Law principles, and (ii) great power has been put at their disposal, and that, as a result, (iii) the limited government tradition confronts an opponent just as formidable as the political tyrants with which it once did battle. Sidney's remarks regarding the tyrants of his day are strikingly apposite to the threat posed by non-human legal persons that are constituted to be inhuman:

> 'Tis good to use supplications, advices and remonstrances; but those who have no regard to justice, and will not hearken to counsel, must be constrained. 'Tis folly to deal otherwise with a man who will not be guided by reason, and a magistrate who despises the law: *or rather, to think him a man, who rejects the essential principle of a man*… Nero's madness was not to be cured, nor the mischievous effects of it any otherwise to be suppressed than by his death.[164]

Corporations are constituted to be insensible to, and indeed to resist, all appeals to the genuinely human goods that ought to guide the exercise of power over persons. They are constituted to reject "the essential principle of a man", and they exert a corrupting influence, among other things, by inducing humans to share in their rejection of that principle. In a moral inversion of the kind the tradition condemned in absolutist government—and which the Marxist tradition perceives in commodity production—these artificial creations enslave and render slavish their creators, the human beings that corporate law calls *natural* persons.

The limited government Rule of Law tradition is defined by its proponents' belief that one cannot put a lasting end to tyranny, arbitrariness, slavishness, and corruption simply by subscribing to the motto of the Commonwealth of Virginia, *sic semper tyrannis*. Those ills can only be systematically averted if power is constituted in a way that is inherently inhospitable to them. This means that—although the primary task is to defeat the humans who use the corporate form as a mask and a shield, the better to pursue wealth and power[165]—it is also important to

[163] On Livy, Harrington, Sidney and the "empire of laws", see Skinner (1998), pp. 70–75. For republicans, the Rule of Law is indispensable for this task: Pettit (1999), pp. 21, 36, 65, 101, 107, 122, 304.

[164] Sidney (1989), ch. 3, §40, p. 545 (emphasis added).

[165] Glasbeek (2017).

rid the world of the kind of institutions which offer such people a context in which they can flourish.

Where the tradition has faced institutions constituted in ways hospitable to the tyrant's outlook, it has insisted on their *reconstitution*. Should the tradition's contemporary supporters insist on the reconstitution of the corporation? One aim of this Article is to encourage the tradition's proponents to get to the bottom of this question, a pressing task, which has been obscured by contemporary received wisdom about the outer limits of the Rule of Law project.

Another aim is to force a response from those who would respond in the negative; it remains to be seen whether they can propose a case which amounts to more than a mere apology for great power. If they cannot, we might echo the words that Sidney used in order to criticize Sir Robert Filmer, a leading apologist for seventeenth century absolutism:

> [W]ith all his wit and learning he could not give a reason why those who did the same things that rendered the ancient tyrants detestable, should not also be in our days.[166]

Just as Sidney sought to appropriate the normative vocabulary of the ancients in order to evaluate the great power of his time, we might stand on his shoulders and undertake the equivalent task in our own age.

I anticipate that some readers will remain unpersuaded by my efforts to use terms such as tyranny, arbitrariness, slavishness and corruption beyond their familiar political context. Still, my efforts to challenge certain conventions of discourse will not be utterly wasted if they succeed in provoking a response of a certain kind. To adapt Pocock's words, it is unlikely—except where the reader is "a Stalinist bureaucrat", or rather the bureaucrat's capitalist equivalent—that a sceptical response will simply reiterate "the existing conventions of discourse as if I had never challenged them". It is more probable that the response to my move would entail a countermove, which, even if it is aimed at restoring the conventions, will "contain and register" an awareness that something new has been said and "will to that extent" include something new of its own[167]:

> To my injection of new wine you will respond by presenting old wine in new bottles. What I "was doing" includes obliging you to do something, and partly determining what that shall be.[168]

That, at the very least, is what I hope I am doing.

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[166] Ibid, ch. 2, §30, p. 288.

[167] Pocock (1985), p. 19.

[168] Ibid.

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