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Wealth creation without domination. The fiduciary duties of corporations

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ABSTRACT
Corporations wield power in today's economies, and political theories of the corporation argue about the legitimacy conditions of corporate power. This paper argues in favour of a double-fiduciary theory for corporations. Based on a concession theory of markets, it sees all markets as authorized by states (in the name of society), for the purpose of creating economic value, or wealth. Hence corporations, as much as non-incorporated firms, have a fiduciary duty to the state/society to create wealth, in the competitive structure of the market. However, their pursuit of wealth often creates unbalanced relations of power between corporations and their stakeholders, which can at some point be classified as instances of domination. Therefore, corporations need to be subjected to a second fiduciary duty, i.e. not to dominate others in the economy. This duty is also, in the final instance, owed to the state/society. In an era when everyone can incorporate their business, states/societies can be interpreted as having, through corporate law, mandated shareholders as 'proximate beneficiaries', to incentivize corporations to create wealth. Now states/societies need to think about how to prevent corporations from dominating others. New mechanisms of accountability towards stakeholders and/or citizens as proximate beneficiaries are needed. Only in this way can corporations be effectively held to account for both of the fiduciary duties which characterize their normative status.

KEYWORDS Corporations; firms; fiduciary duties; wealth creation; domination

Introduction

Corporations are pivotal actors in modern economies, shaping the patterns of production, employment and consumption on which we all depend. Arguably, the rise in the number and scale of corporations in the 19th century was a crucial episode in the development of industrial economies. On the other hand, there have been recurring waves of concern about corporate power. Corporations are regularly attacked for their treatment of workers, evasion of taxes, domination of markets, invasion of privacy, environmental pollution, etc. In political philosophy, there has been a renewed interest in

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thinking about corporate power politically. Several authors have proposed political theories of the corporation and/or the firm (Anderson, 2017; Ciepley, 2013; Ferreras, 2017; McMahon, 2012; Singer, 2018).

In thinking about corporate power, the distinction between corporations and firms turns out to be important. Firms are organized economic (productive) entities, which act on the market with a for-profit orientation. I will use the terms 'firms' and 'market actors' synonymously. Corporations are legal entities. A subset of all firms incorporates. When incorporated, a firm acquires the legal status of a separate legal person, with specific attributes (see section 1). Other firms (like partnerships) remain unincorporated. Theories starting from the nature of the corporation explain corporate power as a consequence of the special legal attributes of the corporate legal structure. The so-called concession theory, which has been defended especially by David Ciepley (2013), argues that corporations have acquired these powers by state concession. States grant ('concede') the right of incorporation to new corporations, hence their legitimacy depends on their compatibility with the public interest. For theories starting from the nature of the firm, the power of entrepreneurs over those whom they direct, their workers, is central. This turns our attention to the authority relation within firms, and the conditions under which it can be legitimized. This is exemplified in political theories of the firm as defended by Abraham Singer (2018), Elizabeth Anderson (2017) and Isabelle Ferreras (2017).

In this paper, I develop a new route, which synthesizes elements of both ways of thinking. After a preliminary sketch of the debate (section 1), I propose a *concession theory of markets*. All firms, incorporated or not, should be seen as operating on a government concession. They act under a requirement to create wealth (economic value), for which the state grants them rights to property and contract. While this is a private purpose from their own point of view (profit-making), by doing so they contribute to a public purpose from a societal point of view (section 2). The next step is to interpret this requirement as a fiduciary duty. Focusing on corporations, I argue that corporate directors have a fiduciary *duty to create wealth*, which they owe to the state (which represents society at large) as their 'ultimate beneficiary'. However, the law under conditions of free incorporation can be reconstructed as having delegated the state's position in this fiduciary relationship to shareholders, who act as the 'proximate beneficiaries' in their relationship to corporate directors (section 3). The final step is to broaden this fiduciary framework. In addition to their duty to create wealth, corporate directors also have a fiduciary *duty not to dominate* others in the economy, a duty also owed to their society/state. This double fiduciary duty is the best description of the peculiar normative position of corporations (section 4). In section 5, I consider two potential objections to this double fiduciary theory, and conclude.

Debating the governmental provenance of corporations

In this section, I first summarize the concession theory of the corporation. I then present the objection that the governmental provenance of corporations doesn't matter when assessing problematic exercises of corporate power. All market actors should be held to the same normative standards. In response, I suggest that we should retain the concession theory, but broaden its scope.

The concession theory of the corporation has recently been defended in political theory by several authors (Bakan, 2004; Ciepley, 2013; McMahon, 2012). The theory consists of a 'status claim' and a 'regulatory claim'.[1] The status claim is that corporations have a governmental provenance.[2] Corporations get special legal privileges from the state, which are not granted to unincorporated market agents (like partnerships, or sole proprietorships). Corporations have legal personality in perpetuity, provide limited liability for shareholders, have a fixed pool of capital that shareholders cannot withdraw (asset-lock in), and protections of corporate capital against shareholders' personal creditors (entity shielding)(Kraakman et al., 2009; Robé, 2011). These privileges are exceptions to standard rules of contract and property. They are granted to corporations by the state. This is so by necessity, since they cannot be established by private contracting (Ciepley, 2013, pp. 142–45). The regulatory claim holds that, given their governmental provenance, corporations must be held to a higher, more publicly-oriented standard. The link between both claims can be constructed as a *quid pro quo*. In exchange for extraordinary privileges from government, corporations bear heightened responsibilities towards government, in the name of the public at large (Ciepley, 2013, p. 153, 2019a, p. 1005).

Recently, Abraham Singer has attacked concession theories. He accepts the status claim but argues that markets depend on government just as much as the corporation does. Governments make and enforce the rules of contract and property on which all market actors, incorporated or not, depend. The idea of governmental provenance is applicable to the market domain as a whole (Singer, 2019, p. 287). Therefore, he argues, morally speaking all market actors must obey the *same* public morality.[3] Whichever normative theory is chosen to spell out one's public morality, Singer's argument is that it must be applied equally to corporate and unincorporated market actors. For not applying the same standards would let powerful, exploitative unincorporated market actors off the hook. Concession theories, by insisting on the publicness of corporations, give away the rest of the market to the private sphere, and that is a misrecognition of the publicness of the market domain as a whole (Singer, 2019, pp. 290, 298–99).[4]

This objection, which has been made before against concession theory (Parkinson, 1993, p. 30), is important. The possibility that powerful

unincorporated firms exercise dominating power may be more theoretical than real, for as Jean-Philippe Robé argued: 'No large business, even when controlled by billionaires, is directly owned by these individuals. Corporate structures are always interposed between them and the business.' (Robé, 2011, pp. 21–22).[5] However, the fact that there is this possibility does suggest it is the phenomenon of business power, not its origins in state-based concessions that would be the basis for normative justifications for the regulation of dominating corporations. This would not just hold for corporations or unincorporated market actors. Indeed, dominating exercises of power in civil society – say by a powerful NGO – or in the personal sphere – say by a father – can also be legitimately regulated by the state. In these spheres too, the origins of these exercises of paternal or NGO power are unimportant to establish a justification for regulation. Singer's objection suggests that we can use one and the same normative theory for assessing all instances of domination in society.

The suggestion raised by this objection, that both unincorporated and incorporated firms can be seen as deriving from governmental concession, is valuable. However, I want to resist the conclusion that this makes governmental provenance inconsequential for normative theorizing. Instead, this is reason to broaden the scope of concession theory to include all market actors.

To explain why this would matter, I need to bring in a distinction between two versions of concession theory's regulatory claim, as helpfully articulated by Stephen Bottomley. According to a weak version, governments have legitimate regulatory authority over the corporation: 'there is a presumption in favour of state regulation of a corporation's post-incorporation activity', i.e. to give the state 'control over both the extent of the corporation's legal capacity and the exercise of that capacity' (Bottomley, 2007, p. 41). However, a stronger version can be put in terms of 'requiring not just compliance with public regulations but also creating a public duty to act in the public interest or in a socially responsible manner' (ibid.). This distinction between two types of concession theory is built on the social-ontological difference between a purpose (end) and a constraint (rule). Rules constitute the playing field, by defining which moves one can make and which moves are prohibited. Purposes are internalized convictions players themselves form, which determine which of the available moves they will choose. Rules determine the space of opportunities; while purposes guide actors in selecting the opportunities they will actually pursue, to obtain their purposes. It is one thing to argue for the legitimacy of regulations/constraints on the basis of a general normative theory. It is something else to show that corporations themselves should be animated by public purposiveness. For the latter, stronger claim, we need to build on the idea of governmental concession.

Historically, the concession theory was about public purpose. For example, in the early 19th century in the US, state legislatures only chartered business corporations for specific public purposes, such as building a canal, or running a bank. The incorporators got a monopoly right to execute a specific public work or service (Handlin & Handlin, 1947; Maier, 1993). In this they followed a longer English tradition, going back to the Middle Ages, in which the King needed to approve of corporations, and would do so only if they were 'for the advantage of the public' (Blackstone & Stern, 2016). During the 19th century this chartering practice was opened up to more and more lines of business, so that eventually every entrepreneur could start a business corporation. While the state still requires founders of a corporation to go through an administrative process to register, substantive checks of public purpose were abolished. These general laws providing 'freedom of incorporation' marked the end of the popularity of concession theory as the dominant legal understanding of the corporation. When everyone can start a corporation, the act of incorporation doesn't seem to involve a concession, in the sense of a privilege granted to some, but withheld from others (Mark, 1987, p. 1457). As a consequence, there seemed to be little left of the public purpose requirement. The private interest of profit became the only legitimate end of business activity. However, political theorists like Ciepley hold that concession theory remains relevant, even in an era of free incorporation. As Ciepley argues, 'business incorporation too is a state program. It is a state program for economic growth' (Ciepley, 2019a, p. 1004).

In my view, this is a fruitful direction to explore. Public purpose now lies in the abstract aim of wealth creation that is at the heart of doing business, i.e. for all firms. In the following sections, I will show how we can use this idea to broaden the scope of concession theory to all market actors.

Towards a concession theory for market actors

In this section, I present the idea of a concession theory of markets. I argue that the market should be conceived as a special sphere, created by the state, for the public purpose of creating wealth. This implies that states authorize market actors for this purpose, and hence impose a requirement to create wealth upon all of them.

As a starting point, it is important to note that in a very wide sense, all legal action depends on a concession. Individuals, the law's 'natural persons', always also need to be recognized as legally capacitated (Kurki, 2019). All actors, individual or corporate, need legal authorization for their actions to have legally binding effects towards others. We tend to forget this prerequisite, since under normal circumstances every individual has legal capacity. However, where such recognition is withheld, as it is, for example, for irregular migrants, it becomes very visible that legal capacity cannot be taken for

granted. As Simon Deakin argued: 'it is no more a fiction to assign legal personality to those organizational structures than it is to grant it to natural persons. "Capacity" is not a natural concept but an institutional one, through which the law constructs its own notions of economic agency.' (Deakin, 2012, p. 354). This basic sense of authorization of legal capacity does not imply however, that *all* individual persons are subject to a public purpose requirement. If so, the idea of private action would be emptied of any content. Everyone would, all the time, be acting 'in the service of the public.' This does not follow, because legal authorization is not a homogenous category.

The dichotomous scheme of public and private is often used to explain the basic structure of liberal societies (Benn & Gaus, 1983). For *private actors*, legal authorization is merely a legal recognition of whatever private actions they choose to undertake. They can formulate and pursue their own conception of a good life. Public laws and regulations come in from the outside, serving as constraints on the ends that they choose for themselves. For *public actors*, state authorization is given for well-defined public works, such as building a bridge or running a railroad system. Government agencies indisputably have such a public purpose. Different government actors (parliament, the cabinet, civil servants, judges, regulatory agencies, etc.) specialize and take responsibility for one slice of the larger public good, which is delegated to them.

Firms do not fit neatly into this dichotomy. They are oriented towards their own commercial success, which suggests a private purpose is leading. However, by doing so they *do* contribute to the public good; and this legitimizes their existence. What is a private purpose from the point of view of the agent (their 'proximate' purpose which guides their deliberations and actions), is a contribution to a public purpose from a systemic point of view (the 'ultimate purpose'). We therefore need to understand them, as *market actors*, as a third category. That firms have this peculiar position is arguably the dominant view in economics since the 18th century, following from Smith's invisible hand theorem (Herzog, 2013; Smith, 1994). If functioning well, the market is a realm where each actor's orientation to her private benefits leads to public benefits. Competition is essential in establishing this harmony. Market actions are mediated by prices, established in a competitive process. Prices reveal the relative scarcity of the various resources involved in production, guaranteeing an optimal use of these resources (productive efficiency). Moreover, the price mechanism ensures that production maximally satisfices the market demand expressed by consumers (allocative efficiency). Finally, it incentivizes participants to innovate, develop new technologies and create new products (dynamic efficiency). While there may be trade-offs between these types of efficiency, competitive markets are supposed to enhance efficiency in all these dimensions (Viscusi et al., 2005, pp. 66–67).

We need to constantly remind ourselves that this is an ideal-typical description of markets. Later, I will account for the adjustments which need to be made given the fact that actual markets rarely live up to this ideal (see section 4). At this stage, the ideal-typical description of markets serves to establish the normative point that firms in competitive markets are meant to serve a specific public good: the abstract purpose of creating 'economic value' or 'wealth'. Firms transform a set of inputs into a set of outputs. Economic value is created if the value of the outputs is larger than the value of the inputs plus the costs of the transformation, as judged by the market actors themselves.

The next step in our argument is the recognition that this market-internal purpose of economic value creation in a competitive context is a *duty* for market actors, for which they are chartered by government. This claim is the heart of the concession theory of markets. Extending the language of 'corporate privileges', all market agents are understood as empowered by 'market privileges', i.e. through the state's protection of their rights to freely contract with others, own property and exclude others from its use, invest property and reap the benefits, etc.[6] The distinctiveness of market actors compared to private actors is perhaps not obvious, because both seem to be animated, in this scheme, by a 'private purpose', from their own point of view. However, there are at least two salient ways in which market actors are, compared to private actors, constrained.

Firms are under a requirement to focus on their own business success. If they fail to do so, they will be outcompeted by others. Firms cannot act *altruistically* without at some point losing out. Following market signals, for example, an entrepreneur may be forced to offer her employees a market-compatible wage, instead of the much higher wage she might ('personally'!) be inclined to give. There may be some leeway; but at some point such acts of charity will undermine the viability of her business.[7] To help orient firms to the creation of economic value, the ability and prospect of handing out parts of the profits to shareholders is an important incentive. Contrast this with non-profit organizations, which are subject to a 'non-distribution constraint' in organizational law.[8] They cannot share out any profits they have made to their donors. Surplus earnings must be retained within these organizations and be re-invested. The importance of this legal rule is to buttress different normative expectations: altruistic or social goals for civil society organizations, economic value for firms.

Second, firms are not supposed to use *all* self-interested strategies, but only competitive ones. The previous point stressed that firms need to orient themselves to their private good, narrowly construed, i.e. their own business success. This still leaves it open how this purpose is pursued; and it would often be advantageous to engage in *cooperation* with other firms, the kinds of 'conspiracies against trade' that have long been prohibited in the US

Sherman Act, the cartel provisions in the Treaty on the European Union, and similar antitrust laws elsewhere. Agreements should not amount to cartels, dominant market positions should not be abused, and mergers and acquisitions have to check for their anticompetitive effects. Competition law legally buttresses the Paretian morality of the market. Next to property and contract law, it thus is constitutive for the market sphere. Competition law requires firms to compete, otherwise the price mechanism cannot do its salutary work and guarantee a maximally efficient use of social resources.[9] Firms differ from public *and* private non-profit organizations, both of whom encounter no such systematic restrictions to cooperate with each other to reach their purposes.

In conclusion, firms are required to focus on the public purpose of creating economic value. Key provisions in organizational law and competition law incentivize and constrain them, so as to focus on this goal. Altruistic and cooperative action-orientations are to be avoided. Their private purposes must be a business purpose and must be pursued competitively. Within these limits, firms can choose their own particular market strategies. But this does not make them into 'private actors', or at least not in the same sense as other private actors, such as the fathers and NGO's mentioned in section 1, who do not operate under these constraints.[10] The latter can focus on their private ends; hence when they start to dominate others, their behavior must be regulated from the outside. Firms, however, are required to orient their own actions to the public purpose of wealth-creation (section 3). When they start to dominate, their proximate purpose (private profit-seeking) itself must be adjusted (Section 4).

The fiduciary duty to create wealth

In this section, I bring the discussion back to corporations, because in practice these are the main actors for which the concerns about power and domination mentioned in the introduction arise. However, in line with the general concession theory of market actors, the argument that follows can *mutatis mutandis* be applied to dominating unincorporated firms.[11] My purpose is to classify corporations' duty to wealth creation as a fiduciary duty. I will argue this duty is owed ultimately to the state (representing society), who however can be understood in a free incorporation system as delegating it to shareholders as the proximate beneficiaries.[12]

Fiduciary relations are a special kind of relation, in which a fiduciary exercises discretionary power over her beneficiary. The beneficiary is vulnerable to the fiduciary, who has duties of loyalty and care, so as not to betray the trust of her beneficiary (Miller, 2014, p. 69). This normative and legal framework is different from contractual relationships, since the fiduciary must orient herself towards the beneficiary, and identify with her purposes and interests, to an extent that goes beyond one's duties to be of good faith

towards one's contract partners (Clark, 1985, p. 71). Relations between doctors and patients, parents and children are standard examples of fiduciary relationships. Most pertinent to our topic, directors of corporations are also widely accepted to be fiduciaries (Frankel, 2011, p. 50). The crucial question in the corporate context is towards whom they are fiduciaries. The formula in many legal systems is that they are fiduciaries towards 'the corporation and its shareholders' (Stout, 2012, p. 28). How to understand this ambiguous legal formula, and whether to broaden or change it to include other parties, is the subject of much debate.

In line with the concession theory for market actors, I propose to extend the figure of fiduciary relations from its traditional home base in private law, to public law. Recently, some legal scholars have argued that the concept of a fiduciary relationship can also be applied to public and political relations between citizens and states, with special extensions to courts, public officials, civil servants, etc. The basic idea is that states, as fiduciaries, exercise discretionary power over citizens, on behalf of them. In developing this fiduciary notion for political theory, some of these scholars rely on a fiduciary interpretation of the Hobbesian model of authorization (Fox-Decent, 2011; Miller, 2018). According to Hobbes, by covenanting with each other citizens – as 'authors' – create an abstract new person, the 'Commonwealth' (state), and authorize a sovereign (the 'actor') to act as its representative. The sovereign (a king, or a parliament) brings to life the abstract legal person of the state by governing it according to the mandate given by the citizens (Hobbes, 1991, pp. 111–15, 120–21). Hence citizens, as beneficiaries, are vulnerable to their sovereign, who as a fiduciary is subject to duties of loyalty and duties of care, not to betray the trust of his citizens.

Now let's bring corporations in. In Hobbes (who, as one of only few authors in the canon of political philosophy discusses corporations), corporations are chartered for specific public purposes. They are subordinated to the authorizing power of the state. Following his own authorization model, this puts corporations into a fiduciary relation to the state. This is the line I want to pursue as well (see also Claassen, 2021b). We need to make one major adjustment, however. For Hobbes was writing in the era of special charters, before the generalization of incorporation. How can we update the idea of a corporation's fiduciary duty to the state, if their generalized purpose is wealth creation, and the main functional party on behalf of whom they pursue this goal, are shareholders?

My suggestion is that when the state creates the legal structure of the corporation (as an investment vehicle) and makes it available to everyone who wants to do business, then it must be interpreted as putting shareholders in the role of 'proximate beneficiaries' of the corporation. As proximate beneficiaries, shareholders are meant to exert the same incentives on directors that sole entrepreneurs provide to themselves; to create economic

value. Hence their right to elect the directors. As we saw, the ability to distribute profits to themselves serves as a vital incentive to market agents to create economic value. For unincorporated firms, the incentive falls upon the sole entrepreneur or partners in a joint venture. For corporations, the legal separation between ownership and control complicates matters. Now the incentive is exercised by shareholders (irrespective of who they are: outside shareholders, workers, consumers, etc.), who put pressure on directors to govern the corporation so as to create profits, which they can receive as dividends.[13] In this structure, the state itself remains the 'ultimate beneficiary'. Corporate directors fulfill the mandate of the state as ultimate beneficiary by directing the corporation to the wishes of its proximate beneficiary, i.e. the shareholders. Finally, note that in this structure, references to 'the state' should be understood in light of the fact that the state itself is a fiduciary of its citizens, so the most-ultimate beneficiary is 'society' at large, operating through its representative, the state. In the following I will refer to 'society/state' as the ultimate beneficiary, to emphasize this point.

This would be an accurate *and* complete picture of the fiduciary structure, if markets would always be the ideal types sketched in the previous section. But since markets are not always functioning well, but often harbor domination, the picture is not yet complete. Therefore I will argue in the next section that the fiduciary duty to create wealth, needs to be counterbalanced by a fiduciary duty not to dominate.

However, the argument is by now sufficiently developed to compare my proposal to three competing views on the fiduciary relations pertaining to business corporations. These three views are:

(1) Directors owe a fiduciary duty to shareholders (Friedman, 1970)
(2) Directors owe a fiduciary duty to 'the corporation' (Singer, 2018, p. 179; Ciepley, 2019b, pp. 276, 284) or to 'the corporate purpose', as formulated in the charter (Miller & Gold, 2015).
(3) Directors owe a fiduciary duty to multiple stakeholders (multi-fiduciary stakeholder theories)(Freeman & Evan, 1988; Robé, 2011).

The first position is based on Friedman's view of the corporation. It is not so much wrong as it is incomplete, in two senses. First, shareholders are not the only beneficiaries – this point will be developed in the next section, so I bracket it here. The other sense in which this position is incomplete, lies in the fact that it misses the way in which the proximate fiduciary duty towards shareholders is mandated by an ultimate fiduciary duty to the state/society. Some authors have exploited this insight, as they propose to impose on shareholders responsibilities towards society. For example, Raelin and Bondy have defended a 'double-layered agency theory', in which directors

are the agents of shareholders as their principals; but shareholders in turn are the agents of society, as their principal (Raelin & Bondy, 2013). On such a view, shareholders must, when they control corporate directors, not focus on their private wealth, but act in the interest of society at large and aim to maximize social wealth.[14] While this is an interesting avenue, I will explore a different direction in the next section, where 'society' acts to incorporate broader, non-economic interests, not via shareholders, but through a separate, direct channel.

The second position is to construe fiduciary duties as due to the corporation itself, i.e. the abstract entity. Of course, the office of directors is established to make them act as the representatives of the corporation. In that sense, the statement that their fiduciary duty is owed to 'the corporation' is trivially true. But since the directors must bring the abstract person to life in their decisions and actions, referring back to the abstract entity itself is not very helpful for helping them to determine *how* to act. Stating that the corporation is the beneficiary begs the question for whom the corporation must act. A well-specified purpose in the charter may partially make up for this and give some guidance, but this still provides ample space for interpretation and discussion. Moreover, ultimately the charter-based purpose must refer to interests of human (and perhaps non-human) persons as beneficiaries. An abstract legal person (as expressed by the charter's purpose) cannot be the ultimate beneficiary, in any meaningful sense of this word. The basic private law concept of fiduciary relations relates two persons from flesh-and-blood to each other, centering on the phenomenological experiences of trust, vulnerability and loyalty (or the absence thereof) between two persons. While the concept can be used in large organizational contexts as well, abstracting away reference to (groups of) persons altogether, seems to betray the interpersonal nature of the concept.

This suggests moving to the third view, i.e. to extend fiduciary status to the stakeholders affected by corporate action. Like shareholders, it is often argued, stakeholders are also vulnerable, since their contracts do not give them adequate protection. Hence, they should also be seen as beneficiaries to whom directors owe fiduciary duties, and not as mere contract partners. This multi-fiduciary approach has been vehemently disputed. At one level this is a dispute about the (empirical) question whether stakeholders are indeed vulnerable, in a sense similar (enough) to shareholders. But at a second level, the application of the concept itself is at stake. Critics of multi-fiduciary theories argue it is impossible to have fiduciary duties to several (conflicting) parties. Being a fiduciary implies being partial, giving priority over all others the particular interests of the one (set of) persons one is representing (Marcoux, 2003, p. 4; Heath, 2014, p. 84). However, the political literature on fiduciary relations argues partiality is not at all a necessary feature. Fiduciaries

can have fiduciary relations to multiple beneficiaries, who have competing interests. In these cases, they have a duty of 'reasonableness' and 'fairness' in balancing their interests (Fox-Decent, 2011, pp. 34–37).

That stakeholders are vulnerable to corporate power, and often can't protect their legitimate interests through contract alone, is something I agree with. However, the traditional stakeholder construal of fiduciary duties leaves three matter unresolved.

(1) We need a reason why the corporation should further the interests of stakeholders, beyond its contractual obligations to them (justification).
(2) We need a theory of a 'reasonable' and 'fair' distribution of the benefits of cooperation between all stakeholders involved (specification).
(3) We need a response to the traditional objection that such a multi-fiduciary structure is unworkable in practice for corporate boards (implementation).

These points motivate the introduction of the other half of the proposed double-fiduciary theory, to which I now turn.

The duty not to dominate

The depiction of the duties of market agents so far has relied on the idealization of a competitive market, in which all parties (except for shareholders) are able to protect their interests through contract. Such a market serves as a device for societally beneficial wealth creation. While incentives are present, power is absent in this idealization. Now it's time to get closer to the real world, in which corporations exercise various types of power, and hence various parties are vulnerable to domination by corporations.[15] I first sketch three main types of corporate power, and then argue that corporations have a fiduciary duty to their society/state not to dominate others in their operations.

Corporate power can take different forms. The first one I call *firm power*. As Coase has argued, firms come into being as an exception to markets, by creating long-term, open-ended relations between employers and employees that economize on the transaction costs of hiring labour on an open market (Coase, 1937). Thereby authority relations are created, and the firm's management becomes a 'government' ruling over its employees, in much the same way that state governments rule over citizens. Economists have sometimes denied that firms are built on authority relations, on the argument that the employment relation is grounded in contract (Alchian & Demsetz, 1972). This is a misunderstanding. As Anderson points out, one can voluntarily contract oneself into a relationship of subordination. Indeed, both the

subordination of citizens to the state (the social contract) and the subordination of employees to the day-by-day orders and sanctions of their employers is based on that idea (Anderson, 2017, pp. 55–56; Singer, 2018, pp. 96–97). This helps us see that contract and power are not mutually exclusive. Contract partners are involved in a balancing act, with more or less power on each end of their mutual relationship.

A second form of corporate power is *market power*. This in a narrow sense refers to the power to set prices and supply levels within the market, as theorized in economics. In today's economy, monopolistic or oligopolistic market structures, dominated by a handful of corporations, are prevalent. Hence, in contrast to the textbook model of perfect competition, firms often can act as price-setters, not price-takers. They can, to the detriment of consumers, charge higher prices than their cost-structure would warrant, reduce supply below the optimum, and lower the price/quality ratio of their products. Escaping the disciplining effect of competition, firms thus exert market power over consumers. The term market power can also be used more widely. Consumers are just one example of all the *contractual partners* of the corporation which are necessary to deliver its final product. Supplier firms and creditors are two other examples. Beyond this, there are *non-contractual partners*, on which corporate actions may have effects (externalities). For example, corporate actions affect the lives of animals, the quality of the natural environment and the prospects of future generations, and the well-being of the local communities in which they are physically embedded. All of these parties can be vulnerable to corporations.

A third form of power is *political power*: the ability to influence the rules of the (market and firm/corporation) game. Doris Fuchs usefully has classified businesses as having three types of political power (Fuchs, 2007; Mikler, 2018). Instrumental power refers to the direct use of corporate resources to enlist political actors in the interest of businesses, e.g. by lobbying politicians or financing their campaigns. Structural power refers to the ability to make politicians act in the interest of business without doing anything; merely by possessing a structurally favourable position. The ability of corporations to move abroad when politicians do not enact tax breaks or lower regulatory burdens is a primary example. Finally, discursive power is the power exercised over public discourse, via think tanks and the media, to create a favourable climate for doing business. Each of these ways of exerting power points to avenues for corporations to influence the political process, which is supposed to regulate the economy. These three forms of corporate political power are especially prevalent in the international context, where effective political processes to regulate economic transactions are often absent (Ruggie, 2018).

We can remain agnostic here about the exact explanation of these forms of corporate power, and the extent to which they are a necessary consequence of the corporate form. One part of the explanation may have nothing to do

with corporations per se, but with markets more generally. For example, some argue that markets have inherently exploitative tendencies (Kuch, 2020). Another part of the explanation may have to do with the legal privileges of corporations, which enables the accumulation of capital (hence power) under one unified command structure. Yet another part of the story may have to do not with the corporate form as such, but with shareholder control of this form. The separation between ownership and control in corporations brings about a different situation, with respect to the material incentives to create economic wealth, than the situation faced by a sole entrepreneur or partnership. Shareholders are sheltered from downside risk, as they only lose the value of their initial capital, but are not liable for the debts of the corporation. This incentivizes them to take risks beyond what an unincorporated firm would do. When put in the drivers' seat, shareholders have incentives to make corporate directors and managers engage in excessive risk-taking (Ciepley, 2019b; Ireland, 2018; Mayer, 2018).

Whatever the exact mixture of explanations for corporate power which one adopts, the normative point is that at some point, each of these exercises of power will become an instance of *domination*. Exerting power over somebody else is in tension with the idea of voluntary actions. While nominally voluntary, if you pressure me to accept an offer which I cannot refuse (because of the background conditions of the situation, which make refusal costly for me), then you exert power over me. Power is a function of the power balance between two actors. If they would have equal amounts of power, these would cancel each other out. Perfect symmetry or equality between two parties may be unachievable except in rare cases, but at some point a disbalance becomes problematic: it becomes a case of *domination*. How exactly to theorize this point, is a matter of controversy (for my own view, see Claassen & Herzog, 2021). I will here simply work with the rough idea of domination as a problematic disbalance of power in relations between two (or more) parties, assuming that the fiduciary framework presented in this paper is compatible with several, perhaps even most, specific theories of domination.[16]

A suitably worked-out theory of domination hence provides a justification for imposing on corporations a duty not to dominate. Corporations risk pursuing their wealth-creating strategies at the cost of dominating others. This insight needs to be plugged into our fiduciary theory for corporations. Instances of domination are a subversion of the public good, as much as wealth creation is a contribution to it. Hence, we should understand a corporation's public purpose in terms of a two-pronged assignment: *(i) create as much economic value as possible (ii) without wielding dominating power over others*. Fulfilling this public purpose is the corporation's fiduciary duty. The fact that this purpose is double-edged implies that, to the extent

that both duties conflict, a trade-off between economic efficiency and dominating power is required (Bennett & Claassen, 2022).

So far it would seem as if the ultimate authorization of the society/state has been completely subsumed by the proximate role of the shareholder as beneficiary of the corporation. Any remaining public interests the state would have to impose directly on corporations in the form of regulation, as it would for private actors. But fiduciary duties require fiduciaries to make judgments. They are open-ended duties which do not specify concrete behaviors ex ante, unlike most forms of regulation (see the distinction on purposes versus constraints, in section 1). This means 'creating wealth' and 'behaving in a non-dominating way' are intertwined for corporations. These are two different requirements imposed on the same set of corporate decisions. When corporations create wealth in a dominating way, they do not pursue the public purpose they were authorized for by their society/state. What is needed is a re-activation of the ultimate fiduciary duty of corporations towards their society/state. The state ought to create one or more other 'proximate beneficiaries', or itself function as proximate beneficiary, to counterbalance the control of shareholders and hold corporations to account with respect to the power they exercise over other stakeholders. Since fiduciary duties bear on end-setting, it is always open to interpretation whether an agent has fulfilled its fiduciary duties or not. For corporations, the state needs to specify concrete mechanisms for such interpretations. When shareholder control leads corporations to systematically focus on one of their fiduciary duties (wealth creation) but to violate the other (non-domination), then additional and/or other mechanism(s) to control corporations need to be put in place.

The assignment of stakeholders as proximate beneficiaries is one such mechanism. There are theoretical resources to justify such a move. For example, on the analysis given by Blair and Stout, multiple parties invest in the firm, which should be seen as a 'team production' (Blair & Stout, 1999). For Blair and Stout themselves, this provides an argument to create independent boards, which as 'mediating hierarchs' should make decisions when stakeholder interests conflict. However, acceptance of this line of thought could lead one to accept reforms of corporate law so that multiple other types of stakeholders get control rights. For example, as labour shareholders, workers could get half of the control rights in a 'bicameral' structure (Ferreras, 2017). Taken to its logical conclusion, this strategy of extending the circle of proximate beneficiaries would give *all* stakeholders a share of control rights, so that each and every possible instance of domination is checked upon within the corporate structure itself. Yet another possibility is for the state itself to implement an evaluation process checking how corporations are fulfilling their fiduciary duties towards all stakeholders. Elsewhere, I propose a practical solution in this direction, making use of citizen panels (Claassen, 2021a). Whatever mechanism is

adopted, it needs to give practical incentives for corporations to take their fiduciary duty to their society/state seriously.

The emphasis on society/state as the ultimate beneficiary of corporate fiduciary duties differentiates my theory from stakeholder theories. When a state chooses to rely on stakeholder control as its favorite implementation mechanism, this is a pragmatic choice, to let those most closely involved specify what counts as corporate-induced domination. It remains the case that, on the theory presented here, stakeholders will act as proximate beneficiaries, on behalf of society at large.

Two objections

In closing, it is perhaps helpful to address two potential objections to the double fiduciary theory. The first one argues that my proposal isn't radical enough in curbing corporate power; the second one that it is too radical, and risks creating a dominating state.[17]

On the one hand, one may object that the theory still accepts too much of the conventional description of fiduciary duties as aimed towards shareholders, and the conventional description of corporate purpose as profit-making (wealth creation). These conventions, one may think, are at the root of the problem. They have created a financially driven corporate system which continues to problematically exhaust the natural environment, exploit workers, and subvert the sovereignty of state power. Balancing this with a duty not to dominate is not enough. A more fundamental reorientation is necessary. This is especially so if one looks at the enormous ecological challenges facing us (climate change and biodiversity loss being the most obvious ones). A production system staying within planetary boundaries must cut back on economic value creation itself.

Huge issues lie behind this objection. I have indeed here taken the market, with its internal competitive logic aiming for economic value, as a given. The theory accepts markets as our primary mechanism for organizing economic activity, and asks: what should, given this context, be the duties of corporations? However, one can distinguish different types of corporate objective functions, where the more radical ones turn non-financial (e.g. social and environmental) conditions of production into purposes which must be integrated with financial purposes, and then maximized (Schoenmaker & Schramade, 2019, pp. 21–28). Making such a radical shift in the corporate function is compatible with the theory proposed here. The duty not to dominate aims to protect social and environmental harms (broadly conceived). The theory itself doesn't say anything about the threshold for domination (or what ultimately amounts to the same thing: the right trade-off with economic value creation). If one would integrate social and environmental concerns with economic value in a unified value framework, then

both fiduciary duties are reduced to one: to create 'value' in all its dimensions. Specifying the trade-offs that go into such a measure, however, remains a normative, eventually political, task. Practically speaking, one can see recent developments in the development of new corporate forms, like the benefit corporation, as facilitating these new kinds of trade-offs, by buffering corporate boards from the demands of shareholders to focus on maximizing financial value (Alexander, 2018). In the end, if these new kinds of corporations would become widespread (or even mandatory), a corporate landscape would emerge which competes on multiple dimensions, perhaps a blend of the non-profit sector and the market sector as we know it today.

Another objection would be that the double fiduciary theory opens the way to state domination. Inspired by Friedman, one could argue that we need powerful corporations as a bulwark against a dominating state (Friedman, 2002). By subjecting corporate behavior to state scrutiny, the healthy balance they provide against the power of the state gets lost.

To this objection, I would respond by accepting that state power needs to be checked and balanced. However, checks on state power should not come from business corporations, but from citizens, individually and collectively organized in grassroots movements, NGO's, trade unions, independent professions that speak 'truth to power' (the media, universities). Moreover, it should come from constitutional separations: having three branches of government, an independent judiciary, lower levels of government with their own tax base and jurisdiction, etc. Now one might say this is naïve. 'Power follows money' and these citizens, organizations and professions are too poor to organize effective counterweights. Only corporations have the wealth to organize effective opposition against a dominating state. But this points to an argument for property-owning democracy, so that citizens have a substantial economic basis from which they can organize. It doesn't point to politically empowering corporations as the only or best way to curb the absolutist tendencies of states.

In conclusion, keeping our states democratic while keeping corporations under democratic supervision, are two tasks which both require permanent attention. The double fiduciary theory of corporations hopefully helps towards this end, in specifying the normative relations between markets, firms, corporations, society and the state.

Notes

1. The terminology is derived from Bottomley (2007, pp. 40–41). For the legal debates about concession theory and its rivals, see, (Avi-Yonah, 2005; Millon, 1990).

2. I restrict myself to the 'weak' version of this claim, about the legal existence of corporations. A stronger version claims that corporations derive from government in a metaphysical sense (Bottomley, 2007, p. 41).
3. Singer's own reconstruction of this morality is 'social Paretianism' (Singer, 2019, p. 294). Singer presents his position as a 'relational' version of the so-called 'real entity' theories, traditionally opposed to concession theories (Singer, 2017, 2018). I discuss this opposition in (Claassen, 2021b).
4. Singer himself argues in favor of the normative specificity of firms, as hierarchies, characterized by authority relations between employer and employee (Singer, 2018). This emphasis on the governmental nature of intra-firm relations can also be found in Elizabeth Anderson (2017) and Isabelle Ferreras (2017).
5. For the essential role of the legal structure of corporations in the creation of corporate power, see, also (Pistor, 2019).
6. While the text so far has generated the duty to create wealth as an internal functional requirement of the market as a competitive sphere, one may wonder why this is a duty all things considered: should the state authorize market actors and hence create markets at all? Several normative theories can be used to justify a positive answer to that question (e.g. republican, liberal, welfarist). I remain agnostic about them (see also section 5 on the future of the market).
7. Waheed Hussain criticized Michael Jensen's value maximization argument for disrespecting the choices people can make in 'the personal sphere' (Hussain, 2012). While this may be a justified criticism with respect to non-profit organizations, my argument implies that it is problematic with respect to market actors.
8. For example, in German law, 'A tax-exempt organization must not distribute its assets to its members, directors, officers or to any third person if it does not receive an adequate value in return.' (Von Hippel, 2010, p. 207). Similar provisions apply in other countries.
9. Interfirm cooperation to further specific public interests can sometimes be defended within this framework, but competition on other aspects of product price/quality remains the rule. See, (Claassen & Gerbrandy, 2018).
10. This leaves open that other private actors (e.g. certain civil society organizations) should also fall under the description given here of market actors, as having certain public responsibilities. My argument here only establishes three categories (public, private, market) and focuses on classifying firms correctly. Finally, my discussion focuses on the market actors on the supply side (firms) and leaves the (duties of) market actors on the demand side (consumers) out of consideration. This deserves a separate treatment.
11. Incorporated and unincorporated firms are normatively similar; both types of firms are subject to the double fiduciary duties I argue for. However, the additional legal privileges of corporations may be reason to impose higher expectations, and higher levels of scrutiny, on corporations in practice. One holds all parts of the army to the same duty, to fight for the same purpose (victory), but the elite troupes, by virtue of their special capacities, are nonetheless held to it more closely ('noblesse oblige').
12. In focusing on the state, I leave the international dimension and the specific problem of multinational corporations out of consideration. A more fully worked out theory would have to address this dimension.
13. Hence the argument here does not rest on the controversial claim of 'ownership' of the corporation by shareholders, but rather on the position of

shareholders as residual claimants. It does not presume they are the only residual claimants, however (see the next section).

14. A similar idea is to argue that corporations must not maximize shareholder wealth, but 'shareholder welfare', which includes the non-financial, pro-social preferences that their shareholders (may, but need not!) have (Hart & Zingales, 2017). Yet another view in the same direction is to conceptualize the state as a second type of 'investor' in firms, to whom fiduciary duties are owed (Schlossberger, 1994).
15. I remain agnostic about whether any or all of these forms of power are best theorized as divergences from the ideal-type of perfectly competitive markets, as in the market failure theory of business ethics (Heath, 2014). The power within firms, as well as some forms of political power, may be compatible with perfect competition.
16. One can – if one wants – integrate the concept of domination into a theory of justice. A just society avoids relations of domination. The occurrence of domination between corporations and their stakeholders prevents the latter from getting their 'fair share' of the benefits of cooperation, as defined by one's theory of domination/justice.
17. I thank both reviewers for bringing up these objections.

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