

Corporations and Conventionalism: Regulation, Taxation and Social Justice¹

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Another infirmity of a Common-wealth, is ... the great number of Corporations; which are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man.
– Thomas Hobbes, *Leviathan*, Chapter XXIX

Corporation, *n.*
An ingenious device for obtaining individual profit without individual responsibility.
– Ambrose Bierce, *The Devil's Dictionary*

1. Introduction

Corporations are the most important institutions of contemporary economic life. Many people spend a majority of their waking hours working for them; their success is one of the major determinants of the economic health of our societies; they have a very broad influence on the way in which income, wealth and opportunities are distributed within the economy; most people's pension funds are invested in them, and so our economic security depends upon them; and they exert a significant influence on politics through lobbying and other forms of influence. The political, social and economic landscape of the advanced liberal democracies shows the imprint of the effect of corporations in very many ways. Their influence on our lives is, to borrow a phrase from John Rawls, "profound and pervasive, and present from birth".²

Despite the enormous importance of commercial corporations, they have received insufficient attention from political philosophers. Although political philosophy is concerned with the distribution of economic goods and opportunities, and with the structure and allocation of political power, the discipline has not

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² John Rawls, (1999), *A Theory of Justice*, revised edition, (Cambridge, MA: Harvard University Press), p. 82.

given a great deal of attention to how theories of social justice should be developed so as to integrate an understanding of the role and significance of corporations. This has, no doubt, been one of the symptoms of a preference for ideal theory over more *applied* varieties of political philosophy. But, whilst ideal theory is of great importance in political philosophy, it is also important to address the gap between theories of justice and the more applied question of what consequences our theories of social justice should have for our social and economic institutions, in the non-ideal world in which those theories might come to be implemented.

The focus of this article is on the place of the limited-liability joint stock corporation in a satisfactory account of social justice and, more specifically, the question of how such corporations should be regulated and taxed in order to secure social justice. A full account of the relationship between corporations and social justice would touch on a broad range of issues, among them: the ways in which corporations can create social exclusion and bolster inequalities, and how these effects can be addressed; problems of worker autonomy, and how this can be addressed both with regard to self-determination at work (which relates to issues of workplace democracy³) and outside it (relating to issues regarding limitations on working hours); issues regarding the dispersal of ownership, and the democratization of shareholder ownership (and related issues of democratizing pension funds); and issues regarding the degree to which corporations should be made accountable to the interests of stakeholders other than shareholders. This broad range of issues will be outside the scope of the current discussion, which will instead look to answer the narrower question of what a just system of corporate taxation might look like. My claim is that the way in which we tax corporations – what we tax (the tax base) and how we tax them – is one of the issues that should be at the very heart of any conception of how social justice might be realized.

My approach is broadly Rawlsian, at least in the sense that I will be examining the question of how certain kinds of socioeconomic institutions can be justified to those who live under them, and whose lives are affected by them. I'll sometimes talk of the pursuit of social justice, as shorthand for the claim that we have a collective obligation to ensure something like the two Rawlsian principles of justice. But my approach does not depend on the Rawlsian account of justice being the correct one – one need only think, for example, that social justice required the achievement of fair equality of opportunity alongside some more modest, sufficientarian, degree of economic redistribution. Nothing in the general structure of the argument of this article depends on the precise elaboration of the content of principles of justice, although it does assume that the demands of justice are such that we need to be centrally concerned with the distribution of liberties, opportunities, power, wealth and income within our societies.

³ For discussion of liberal egalitarian arguments for forms of workplace democracy, or for other varieties of economic democratization, see Nien-hê Hsieh, (2005), "Rawlsian Justice and Workplace Republicanism", *Social Theory and Practice*, vol. 31(1), pp. 115-43, and Martin O'Neill, (2008), "Three Rawlsian Routes towards Economic Democracy", *Revue de Philosophie Economique*, no. 15.

2. Corporations and the Basic Structure

Most discussion in liberal political philosophy looks at state institutions, on the one hand, and individuals, on the other hand, without giving much attention to intermediate institutions such as corporations. This is in part a consequence of a certain degree of idealization in terms of the background model of society with which such theories operate. Intermediate institutions are in an important sense optional or discretionary, and one would be hampering an account of justice if it built-in from the start particular kinds of institutions which we could imagine doing without. The only non-state institution that has received adequate attention in political philosophy is the nuclear family, in part because of its pervasiveness and resilience. But the corporation is probably second only to the family in its significance, in terms of its effects on the lives of individuals, and yet has been left without adequate attention.

I therefore want first to motivate the thought that political philosophy should take the institution of the corporation seriously. One place to start is with Rawls's idea that the central subject matter of accounts of social justice should be the 'basic structure' of society. There have been long debates regarding the question of whether the family should be seen as part of the basic structure and, in discussions of global justice, as to whether there is such a thing as a *global* basic structure. One of the striking things about the corporation is that it looks like it uncontroversially does belong to this 'basic structure' of society, and so we would expect little disagreement about the significance of addressing the regulation of corporations under the broad ambit of thinking about social justice.

Here is Rawls's characterization of his idea of the 'basic structure' of society:

"... the basic structure of society is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time. (See *A Theory of Justice*, §2: 6) The political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form, all belong to the basic structure. The basic structure is the background social framework within which the activities of associations and individuals take place. A just basic structure secures what we may call background justice."⁴

The corporation, as a general type of socioeconomic organization, seems definitely to fit exactly within this Rawlsian description of the basic structure. Although Rawls doesn't give any real attention to corporations, as such, nevertheless the existence and nature of the corporate form is definitely at stake insofar as we are interested in "the legally recognized forms of property" and "the structure of the economy". Regulation and taxation of corporations *just is* one way of structuring and modifying "the legally recognized forms of property" and "the structure of the economy". Therefore, if the subject matter of justice is the basic socioeconomic structure of society, then it the questions of how we tax and regulate corporations is a central concern of social justice.

⁴ John Rawls, (2001), *Justice as Fairness: A Restatement*, p. 10.

One reason why Rawls takes principles of justice to apply especially to the Basic Structure is because “the effects of the basic structure on citizens’ aims, aspirations and character, as well as on their opportunities and their ability to take advantage of them, are pervasive and present from the beginning of life.”⁵ This description would seem to fit equally well when applied to the influence of corporations upon the wider society in which they operate. Corporations certainly have a deeply significant effect on the distribution of the Rawlsian primary goods of opportunities, powers and prerogatives of offices and positions of authority and responsibility, income and wealth, and “the social bases of self-respect”.⁶ In fact, in modern advanced economies, corporations are one of the *dominant* determinants of the distribution of these social primary goods.

My claim, in brief, is that it is uncontroversial that corporations are significant parts of the basic socioeconomic structure of modern liberal societies. As such, an account of corporate regulation and corporate taxation should be at the heart of accounts of justice, and it is surprising that it has not been. Thus, insofar as we wish to close the gap between ideal theory and more applied forms of political philosophy, the corporation is one kind of really-existing institution that demands careful attention.

3. What Are Corporations?

a. Origins

In the past, corporations – such as the East India Company or the South Sea Company – were chartered (i) for a limited time, and (ii) for the performance of some particular public good. Initially there was much suspicion about the idea of a limited liability company. After the ‘South Sea Bubble’, which saw the collapse of the British South Sea Company’s share price in 1720, joint stock companies were banned in the UK by the 1720 South Sea Bubble Act. General purpose joint-stock limited-liability companies are a surprisingly recent invention, dating in the UK from the 1862 Companies Act.⁷ Such institutions could seem like such an astonishing novelty at the time that they found themselves satirized in Gilbert and Sullivan’s 1863 operetta, *Utopia Limited*:

All hail, astonishing Fact

All hail, invention new

The joint stock company’s Act

The Act of Sixty Two!

⁵ Rawls, *ibid.*, p. 10.

⁶ On the Rawlsian set of social primary goods, see Rawls, *ibid.*, pp. 58-9.

⁷ On the history of the corporation, see John Micklethwait and Adrian Wooldridge, (2003), *The Company: A Short History of a Revolutionary Idea* (Phoenix).

The general purpose joint-stock company is a similarly recent innovation in the United States. As Gar Alperovitz tells us: “For much of the nineteenth century, significant scale corporations in the main were authorized only to undertake specific public or quasi-public projects – for example, the construction of waterways and canals. Large, independent, limited-liability corporations evolved slowly, gaining real economic purchase only after the Civil War.”⁸ So, whilst the modern Anglo-American corporation has come to seem like a ‘natural unit’ of economic life, it is actually a creature of a particular, and surprisingly recent, set of political decisions and legal rules.

b. Privileges:

It is significant to note that the corporation, in its modern form, is granted certain significant privileges: firstly, the privilege of limited liability, whereby corporate investors are not held liable for losses beyond the value of their investments; and, secondly, the privilege of corporate ‘personality’, whereby the corporation is treated as an ‘artificial person’, legally distinct from its owners and managers, and with its own legal rights and entitlements. For example, the US Supreme Court found in 1886 (118 U.S. 394) that corporations, as artificial persons, are entitled to the ‘equal protection’ rights of the Fourteenth Amendment. Alongside the privileges of legal *personality* comes the related privilege of corporate *immortality* – for the corporation can, as an entity legally distinct from its managers, employees and shareholders, outlive them all. The legal *personality* of the corporation has come to seem such a natural phenomenon that the common perception of corporate entities is of ‘natural units’ of economic life, enjoying robust property rights that constrain space for government action.

These kinds of privileges, incidentally, mean that it is hard to make sense of the nature of corporations from a libertarian vantage point. Corporations, in their modern form, are not just the sum of individual, contractual decisions made by private individuals exercising their natural property-rights. Rather, corporations are possible only because of a rich background framework of institutions, policies and legal decisions.

4. The Conventionality of the Corporate Form

A cursory examination of the historical origins of the corporate form highlights the *conventionality* of corporations. I want to suggest that a failure to take seriously this *conventional* nature of the modern corporation has led us astray in our thinking about corporations and the ways in which they might be regulated. Rather than being a ‘natural’ unit of economic life, the legal form of the corporation is a product of a particular historical moment, and, as such, it should be subject to substantial reconfiguration and restructuring within democratic societies, insofar as this would serve valuable policy goals. A robust conventionalism would take seriously the idea that the corporate form exists only because of a background legal and institutional structure, which is itself under democratic control. This realization

⁸ Gar Alperovitz, (2005), *America Beyond Capitalism: Reclaiming Our Wealth, Our Liberty and Our Democracy*, (Wiley), p. 58.

should allow us to reverse the usual order of justification: from seeing corporate rights and entitlements as placing constraints on government policy, to seeing corporations as conventional economic units designed to further collective social goals. It should also make us rather wary of the very idea of corporate personality, or of corporations as ‘legal persons’. Instead, we should look on corporations as contingent and malleable social conventions, subject to the discretion of democratic political institutions.

This kind of switch in the order of justification would open up new avenues for innovation in public policy. Since corporations exist as the conventional consequence of political decisions, there is no reason why the way in which they are structured and regulated should not be changed so that they better serve the interests of the democratic states that give them their existence. In other words, societies should be sure that corporations really earn their ‘social license to operate’, and should therefore structure the legal and economic environment in which they exist so that the power of corporations is harnessed to the advancement of social justice, environmental protection, and other democratic goals, rather than working to undermine them.

There is a conventionality to the corporate form, just as there is a conventionality to the distribution of property under any particular system of taxation and property rights. There is, indeed, an analogy between these two kinds of convention, and between the ways in which each convention has become so deeply entrenched that it can create certain kinds of distortion in our political thinking. As Nagel and Murphy put it, in the case of the strength of people’s intuition that they have some right of ownership of their pre-tax income: “Most conventions, if they are sufficiently entrenched, acquire the appearance of natural norms; their conventionality becomes invisible. That is part of what gives them their strength, a strength they would lack if they were not internalized in that way.”⁹ Thus, argue Murphy and Nagel, it may seem natural to appeal to property rights when arguing about rules of taxation *even though* property rights are the result of a general system of legal and political rules, which include the rules of taxation. But, even though it may seem *natural* to argue in this way, it involves a deep confusion. For, if property rights are constructed by the legal rules of property, including the rules of taxation, then one is making an error of reasoning in appealing to property rights in order to justify specific kinds of changes in, say, taxation rules. As Nagel and Murphy, put it: “To appeal to the consequences of a convention or social institution as a fact of nature which provides the justification for that convention of justification is always to argue in a circle. One can neither criticize nor justify an economic regime by taking as an independent norm something that is, in fact, one of its consequences.”¹⁰ So, similarly, an error of circular reasoning is made whenever one hears an appeal to the rights of corporate rights, or to the entitlements of corporations considered as legal persons, with regard to questions of how we should regulate or tax those corporations.

⁹ Liam Murphy and Thomas Nagel, (2002), *The Myth of Ownership: Taxes and Justice* (OUP), p. 9.

¹⁰ Liam Murphy and Thomas Nagel, (2002), *ibid.*, p. 9.

Murphy and Nagel's treatment of the power of convention is with regard to the conventionality of property entitlements in general: "Private property is a legal convention, defined in part by the tax system; therefore, the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity."¹¹ If one believes in the conventionality of both the distribution of property within a society, and of the corporate form itself, then there is a kind of *double conventionality* with regard to corporate property rights. But, more significantly, *even if* one rejects Murphy and Nagel's thesis about the conventionality of the private property entitlements of natural individuals, one could still allow that corporate entitlements are themselves conventional. After all, corporations are a legally distinct entity over and above the natural individuals that own and operate them. Hence, it is quite difficult to make sense of corporations on a libertarian view, given that the corporate form cannot be derived straightforwardly from private property rights, but is a creature of legislation. For corporations are not simple contractual nexuses, whereby a group of individuals (the investors) hire another group of individuals (the managers and employees) to act as their agents. Instead, they are more complicated legal institutions, which, through the privilege of limited liability, protect the natural individuals who are their investors from the full liability faced by other natural individuals involved in commercial transactions.

Given this, there seems to be two acceptable positions with regard to the conventionality of corporate entitlements and property rights. If one agrees with Murphy and Nagel about the conventionality of property, as such, then one should view corporate property as *doubly conventional*. If, on the other hand, one rejects Murphy and Nagel's treatment of the property of individuals, one can and should still allow that the property-holdings and entitlements of conventional entities like corporations, which gain their determinacy only by virtue of specific sets of legal rules, are themselves conventional. Thus, there can be no appeal to corporate rights or entitlements as background constraints limiting our scope for regulation or taxation, or placing constraints on government policy.

5. The Social and Political Costs of Corporations

It would be difficult to deny that commercial corporations, operating within competitive markets, are one of the glories of modern capitalism. Corporations often do a great job of technological and managerial innovation, of widening the pool of capital available for productive investment, and of allowing investors to spread risk, through the diversification made possible by the availability of tradeable shares. But they can also be engines of widening inequality and of environmental degradation, and can work in ways that are contrary to the survival of a flourishing democracy (for example, through overly-narrow control of the media, the effects of advertising, lobbying and political influence, and through swallowing up too much of the time of their employees).

¹¹ Liam Murphy and Thomas Nagel, (2002), *ibid.*, p. 8.

The existence of economically and politically powerful corporations within democratic societies is a deeply problematic phenomenon. To take just one example, the rapidly widening ratios of pay within corporations, with managers earning ever greater multiples of the wages of their employees, is one of the main ways in which levels of inequality continue to increase in advanced capitalist societies. Yet, if we are serious about creating societies that allow the realization of conditions for social justice, then these kinds of rampant inequalities need, in one way or another, to be controlled. As Rawls puts it in *Justice as Fairness*, inequalities need to be regulated due to (i) their effect on the absolute position of the worst off; (ii) their effects in terms of the production of forms of social domination; (iii) impacts on status and self-respect; (iv) their corrosive effects on fair procedures and fair equality of opportunity.¹² Hence, corporations, as they currently operate, are corrosive of the possibility of social justice. Corporate power in a free market economy does not do enough to ensure fair equality of opportunity, a social minimum, or to protect the basic liberties of citizens. If we are serious about social justice, the worst excesses of corporate activity need either to be compensated for, or prevented.

6. Social Justice vs. Corporations?

Thus, at least at first blush, we may appear to have a dilemma: *either* we care about the central political values of justice, democracy, liberty and equality, and therefore act to purge the basic structure of these corporate behemoths; *or* else, we keep corporations and give up on these other values. In its starkest terms, it may seem that our options are between choosing prosperity, or choosing the value of social justice. The best *prima facie* solution would seem to be simply to abolish the corporate form, but I want to suggest that this step is too radical, even given a full-blooded commitment to achieving social justice. There are two sorts of reasons for stepping back from the ‘zero option’ of full-scale abolition. On the positive side, we should not under-emphasize the importance of corporations as tools for creating the conditions for economic prosperity. No other plausible economic institutions would do such a good job of:

- a. Increasing the pool of capital available for productive investment;
- b. Allowing investors to spread risk (through tradeable shares); and
- c. Subsuming the transaction costs of an atomized market of individual agents under the umbrella of a larger, more organized entities, and thereby creating scope for managerial efficiency within the economy.¹³

The more ‘negative’ reason for fighting shy of abolitionism is rather straightforward: it is simply that we have no reason to think (yet) that the corporation is completely impervious to reform. What we need to

¹² Rawls, (2001), *ibid.*, pp. 130-1. For discussion of the various reasons we have for favouring greater socioeconomic equality, including a discussion of Rawls’s treatment of the badness of inequality, see Martin O’Neill, “What Should Egalitarians Believe?” *Philosophy & Public Affairs*, vol. 36(2), pp. 119-56.

¹³ On the structural efficiencies of the corporate form see, for example, Ronald Coase’s famous paper, (1937), ‘The Nature of the Firm’, *Economica* 4.

discover is whether there may be strategies available to us which allow the peaceful coexistence of social justice with prosperity-creating commercial corporations.

7. Two Strategies: CSR vs. Taxation and Regulation

The two strategies for moving beyond abolitionism that I want to consider here are (i) strategies involving forms of ‘corporate social responsibility’ (‘CSR’)¹⁴, such that the requisite changes in corporations come as the result of ‘interior’ changes within those organizations, and (ii) forms of state regulation and taxation, such that the requisite changes in corporations come from *external* regulatory pressure.¹⁵ In the current climate of ‘deregulation’, ‘big government’ solutions to corporate problems are becoming to some degree out of fashion. Government regulation is seen as *coercive*, infringing the entitlement of corporate managers to behave as they would wish to do within the rules of an open free market. Indeed, it is the very power of the convention of thinking of corporations as the ‘natural’ units of economic activity that makes regulation and taxation seem so especially problematic.

The power of the convention works against regulatory solutions, and is part of what makes CSR-based solutions look so attractive. Rather than infringing the freedoms of managers and shareholders through coercive forms of regulation and/or taxation, we can instead look for change to come from *within*. CSR is the seemingly non-confrontational and consensual way of healing the worst excesses of corporate capitalism. The internalization of moral norms within corporate managerial structures may, it is hoped, lead to corporate activity that does not cause the plethora of social, political and environmental problems which are currently associated with untrammelled corporate activity. To some degree, one can see the attractions of this hope that strategies of corporate ‘self-transformation’ could create a business climate that was not inimical to the possibility of achieving social justice. So, we can grant that, only if CSR is *not* the way forward is it appropriate to focus on the levers of regulation and taxation. But, if CSR-based strategies of interior self-transformation are likely to be inadequate, then more robust strategies will need to be examined.¹⁶

8. Against CSR – Or, Why Milton Friedman is Right

There are a number of reasons we may have for thinking that CSR-based strategies to overcoming the worst social and political problems of corporate power are likely to be inadequate. I want to here raise

¹⁴ For the state of the art in corporate social responsibility, see Michael E. Porter and Mark R. Kramer, (2006), ‘Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility’, *Harvard Business Review*, 84: 12 (December 2006), pp. 78-92.

¹⁵ I am, for present purposes, setting aside here issues of the internal democratization of corporations, either with regard to workers or with regard to stockholders. Such a process of democratization might help with regard to the implementation of some of some goals of social justice, and, moreover, democratization of this kind may itself be one important element of the goal of greater social justice.

¹⁶ I am here giving advocates of CSR the benefit of the doubt, insofar as I’m allowing that CSR-strategies can involve the genuine internalization of moral or political norms. Needless to say, much actually-existing CSR-activity is in reality just an exercise in cosmetic reputational risk management.

three plausible lines of objection against relying on *internal* strategies to solve the problems of the ways in which corporations can act to undermine social justice.

a. Informational and feasibility problems

One may think that expecting managers to pursue moral and/or political goals at the same time as making money amounts to asking corporations to do something that they are not well suited to, and which they are unlikely to do well. If we were to tell managers that they needed to pursue social justice at the same time as looking after the interests of their company, we would thereby make management into a particularly obscure business. We simply do not know how to pursue social goals through diffuse institutional mechanisms, such as a plethora of CSR-following corporations. Hence, there is a problem directly generated by the piecemeal and non-systematic nature of CSR-based strategies. The relevant actors are simply not sufficiently well-placed to be able to pursue systematic social goals, such as the pursuit of social justice.

b. Problems of democracy and legitimacy

If we allow the pursuit of valuable social goals to devolve to a plethora of individual corporate actors, then we must ask *who* gets to set the specific goals that each corporation (or each manager) will pursue. Unless there is some method of democratic authorization for the CSR-strategies of different corporations, then such strategies are likely to suffer from a lack of legitimacy. We may be left with nothing more than a series of corporate executives each pursuing social policy goals *as they see them* – but in a way that would not attract any broader endorsement.

c. Motivational problems

Excessively optimistic business writers like Michael Porter make the somewhat Panglossian claim that the ‘business case’ for CSR is such that there need be no real conflict between business goals and social goals. But this is very unlikely to be true in the general case, and it is easy to think of cases where there would be genuine conflict between, say, the pursuit of greater socioeconomic equality and the commercial success of a luxury goods manufacturer. In general, in a ‘business’ sense, the optimal level of CSR is that which meets reputational risk or which maximizes profits in some other way; anything beyond that will be commercially counter-productive. So, if we look to the motivations of corporate managers, there will never be any reason for them to go beyond a certain modest level of CSR activities. Anything more than that would be commercially disadvantageous for the corporation in question. Hence, if we look to CSR-based strategies to pursue social goals, we will find that there will be a *de facto* tendency to penalize *genuinely* ‘socially responsible’ corporations, in favour of only *apparently* or *instrumentally* socially responsible corporations, as the latter group will maximize profits whilst the former will not.

The combination of the democratic, feasibility and motivational problems of CSR mean that it cannot be a plausible strategy for rectifying the ‘social deficit’ of corporate activity. We therefore need to look in more detail at regulatory and tax-based strategies that might address the social downside of the actions of corporations. In doing this, I suggest that there need be nothing inconsistent for those who favour the pursuit of social justice embracing Milton Friedman’s famous objection to talk of “corporate social responsibility”. I claim that we can endorse Friedman’s principle without thereby capitulating to untrammelled free markets operating with a pure disregard for social and political consequences:

Friedman’s Principle: There is one and only one social responsibility of business – to use its resources and to engage in activities designed to increase its profits ... while conforming to the basic rules of society, both those embodied in law and those embodied in ethical custom.¹⁷

Where the advocate of taming the actions of corporations so that they do not undermine social justice need part company from Friedman is only with regard to the proper conception of “the basic rules of society”. If the rules of corporate regulation and taxation are themselves written with a focus on their consequences for securing social justice, then there need be no tension in pursuing social justice whilst endorsing Friedman’s principle. It is simply that, if one does so, the really salient questions will be addressed to the determination of what the rules of society, including its laws (and perhaps even its ethical custom) *ought to be*. Friedman’s assumption is that the ‘rules of the game should’ be minimalist and libertarian, but as experience has abundantly demonstrated, minimalist rules will *not* do enough to preserve background justice. The strategy for reforming corporations so that they can protect rather than undermine a just society will be to find and enforce rules that *will* do enough to preserve background justice.

9. Regulation, Taxation and the Division of Moral Labour

a. Conventional Entrenchment and the Timidity of Regulation

If change in corporate behaviour is to come from the state, rather than from within corporations themselves, then radical and energetic forms of regulation and taxation will surely be necessary.

Regulation, as it actually exists, has tended to be inadequate, perhaps in part because we’ve been caught in the picture of corporation as natural unit of economic life; we haven’t taken conventionalism seriously enough, and have hence tended to be too timid in our regulatory efforts, and too timid in the way we tax. The apparent *naturalness* of the corporate form is such that sufficiently fundamental questions have not been fully explored, regarding how it might be modified or updated. If we take conventionalism seriously, then there is an entitlement on the part of democratic government to set the terms of operation for corporations in much more radical and thoroughgoing ways. We should not start from the *fact* of corporate entitlement to operate more or less as they currently do, and should avoid giving excessive

¹⁷ Milton Friedman, (1970), ‘The Social Responsibility of Business is to Increase its Profits’, *New York Times Magazine*, September 13 1970.

weight to *status quo* entitlements. We should recall that, as Murphy and Nagel put things, “one can neither criticize nor justify an economic regime by taking as an independent norm something that is, in fact, one of its consequences.”¹⁸ Hence, *status quo* corporate entitlements have no standing whatever when we come to address the questions of how we *should* look to transform the regulatory background against which corporations exist and operate.

b. Reciprocity and the Idea of the ‘Social License to Operate’

Rather than starting from *status quo* entitlements and forms of regulation, we should instead start from the simple idea of reciprocity. Corporations (and, by extension, those who invest in them) are granted the substantial privileges of limited liability and immortal corporate personality by society, in being allowed to exist as distinct kinds of commercial entity. As a society, we collectively have no reason to grant these kinds of privileges if it is not for a concomitant public benefit. A straightforward conception of reciprocity suggests that, as we have granted these organizations the *benefit* of being treated as self-contained legal entities, so we can demand some social good back from them in return. Moreover, the benefit provided by corporations needs to be sufficiently substantial, such that we are able to justify these arrangements to the members of society who are affected by them.

Corporations, rather than being holder of *ex ante* entitlements, therefore need to earn their ‘social license to operate’. One important way in which they can do this is if they can be placed in a regulatory framework, and taxed in such a way, that they are conducive towards the pursuit of social justice, rather than inimical to such goals. If particular corporations cannot demonstrate that they meet such a standard, then we have no reason to grant them their ‘social license to operate’; and we would be infringing no *ex ante* rights or entitlements if we outlawed any forms of corporate activity that created substantial barriers to the attainment of social justice, or other shared democratic goals.

c. The Idea of the Institutional Division of Moral Labour

The model that I’m here advocating is rather Rawlsian in its structure. What we may hope for is to have a ‘social division of labour’ model. A concern for the preservation of background justice should lead us to set up a tax regime (and other elements of a regulatory framework) that looks to constrain and mould corporations, considered as important elements of the basic structure, at a deep level. This approach is diametrically opposed to the CSR-based approach of devolving responsibility for morally (or socially) laudable action to particular individual managers.

This approach has substantial benefits over CSR. Managers are free to manage, and to work for *profit*, which is presumably what they are best placed to do. They can be freed from the need to do piecemeal social policy, of the kind that CSR demands. Moreover, because the tax regime and regulatory framework

¹⁸ Murphy and Nagel, (2002), *ibid.* p. 8.

is set by a democratic government, we do not have the kind of problems of democratic legitimacy which exist with regard to CSR-based approaches to constraining corporations. Thus, all of the informational, democratic and motivational problems which bedevil CSR can be eradicated if we separate the state function of ensuring the resilience of background justice from the corporation's function as an engine for producing employment and prosperity of a kind that is generally beneficial to society as a whole. If the basic structure – including the forms of corporate taxation and regulation – is constructed in the right way, then corporate managers need not be the agents of justice, but can instead pursue goals of profit-maximization in a way that harmonises with, instead of precluding, the maintenance of background justice.

What is being advocated here is very similar to the Rawlsian idea that the institutional division of labour can allow individuals to get on with their private pursuits without having to act always with an eye to promoting justice. Their obligations of justice are exhausted by their being prepared to uphold and support just political institutions. As Rawls puts it: “What we look for, in effect, is an institutional division of labour between the basic structure and the rules applying directly to individuals *and associations* and to be followed by them in particular transactions. If this division of labour can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.”¹⁹ Similarly, we can allow that corporations can get on with pursuing their stated goals (typically profit-maximization) as long as they meet their ‘social license to operate’ through (i) operating within rules which ensure the preservation of background justice, and (ii) themselves contributing towards the achievement of collective social goals through contributing to the overall prosperity of society. In effect, by bringing questions of corporate regulation to the centre of the basic structure, and by treating the regulation and taxation of corporations as one of the central mechanisms for ensuring background justice, one is able to free individual corporate managers or shareholders from having themselves to take on the government's role in ensuring conditions of background justice.

Intriguingly, this suggests that a liberal egalitarian approach to corporate regulation is, indeed, fully consistent with advocating Friedman's principle about the social responsibilities of corporations. Corporations further goals of social justice *precisely* by creating the general affluence (and tax receipts) that make for a flourishing society, and which can be used in part to fund necessary social programs. As long as they pursue profit within the ‘rules of the society’, they are fully meeting their ‘social responsibilities’. So, one might say that this liberal egalitarian approach *subsumes*, rather than simply opposes, Milton Friedman's conception of the nature of corporate social responsibility – it agrees that the responsibility of corporations *is* to make profits, but stresses the parallel importance of their doing so within the right kind

¹⁹ John Rawls, (1993), *Political Liberalism*, (Columbia UP), pp. 268-9.

of regulatory framework, and given that background justice is being maintained by separate mechanisms within the basic structure of society.

d. A Conjecture: Corporations, Profit Maximization and Social Justice

Thus, against views which might claim that social justice can only be achieved through the *internal* transformation of commercial corporations, through CSR-related strategies that lead corporations directly to pursue social goals, I want to offer a rival conjecture.

Conjecture. A just basic structure can accommodate, and may even require, the existence of private limited corporations which (i) primarily behave in a profit-seeking manner, but (2) which minimally “conform to the basic rules of society” (Friedman)

As long as the “basic rules of society” are sufficiently robust to ensure the preservation of background justice, this conjecture seems to me to be plausible. Needless to say, though, this is not to say that CSR-based strategies are wholly to be rejected in all cases, or that there is anything wrong with corporations like ‘Ben & Jerry’s’, which look to promote particular social and environmental goals as well as producing profits.²⁰ But it is to say that the transformations needed in order to square the existence of large corporations with our hopes for social justice can be transformations imposed, democratically, upon corporations from outside, and need not be transformations that issue from within those corporations. Indeed, it seems further plausible to suggest that it is only because of a failure of *background* justice that CSR-based strategies have of late come to be seen as desirable. The failure to enact a proper protection of background justice has left individual consumers and managers feeling that they have to rush in to fill the moral void. But that void can be filled by creative regulatory strategies, motivated in part by the insight that the corporation’s conventionality justifies an enormous freedom of movement for democratic societies in setting the terms under which corporations can act within them.

10. Corporations, Taxation and Tax Avoidance

The case of corporate taxation presents us with a study in how a failure to take the *conventionality* of corporate personality seriously enough has led us to adopt irrational policy strategies. Moreover, it is a case where “taking conventionalism seriously” allows us to see how different strategies of regulation and taxation might be pursued. In the rest of this essay, therefore, we will concentrate on the case study presented by corporate taxation. The two aspects of corporate taxation on which I want to concentrate

²⁰ ‘Ben & Jerry’s’, although famous for its charitable and environmental activities, is perhaps not such a good example: the company was sold in full to the multinational corporation Unilever in 2000.

are (i) the tax-base, i.e. what it is that we tax, and (ii) strategies of enforcement, and the issue of tax avoidance. As things stand, corporation tax has these two features:²¹

a. Corporation Tax: Profit as the Tax Base

Most advanced capitalist countries levy some kind of tax on the *profits* of corporations. In the U.K., for example, the headline rate corporation tax stands at 28% of corporate profits.²²

b. Presumptive Entitlement, Corporate Property Rights and the Burden of Proof

With regard to the enforcement and collection of corporation tax, countries such as the U.K. take corporate property rights rather seriously, and allow corporations to enact complex tax avoidance schemes, so long as they fall within the *letter* of the law. The burden of proof in contesting any of these complex schemes of tax avoidance lies with the state agency charged with tax collection – in the case of the UK, with Her Majesty’s Revenue and Customs (HMRC). Perhaps unsurprisingly, this has given rise to a *massive* tax avoidance industry in throughout Europe and North America (and elsewhere), whereby many thousands of people are employed for and within corporations, pursuing strategies to reduce the tax exposure of those corporations.

11. The Power of Conventions: Corporate *Personality* and the Structure of Corporate Taxation

In this section, I want to look at the ways in which the picture of the corporation as a ‘natural’ economic unit has come to affect how we tax corporations. My suggestion is that both the selection of the tax-base for corporate taxation, and the strategies of enforcement which allow a massive industry of tax avoidance, fit with a mistaken picture of corporations as ‘natural’ and rights-bearing units. If one were to take the more *conventional* view of corporations advocated in this essay, both of these aspects of corporate taxation might come to seem, by contrast, rather mysterious.

a. Profit and the Picture of Corporation as Person

In treating corporate profit as the base for corporate taxation, we effectively treat corporate profit as on a par with individual income. Indeed, rates of personal taxation on income and corporate taxation on profit have tended to rise and fall together in the U.K. Taking corporate profit as a suitable tax-base seems to fit very well with the image of the corporation as a legal person, with the ‘personal income’ of the corporation being its profit, treated as being structurally analogous to the individual income of natural individuals. Under the picture of the corporation as a legal person, this taxation strategy therefore seems like the most natural and commonsensical one to pursue. On further reflection, though, we may consider that there is something distinctively odd about seeing corporate *profit* as an appropriate target for taxation.

²¹ In what follows, specific details relate to arrangements in the UK. Nevertheless, the UK is broadly representative of the types of regime of corporate taxation that are in existence in all the industrialized countries.

²² As of the 2007 Budget, which moved the headline rate of corporation tax to 28%, down from 30%.

The oddness of taxing corporate profits can be captured if one considers three of the central role of taxation:

- (i) Revenue raising (in order to spend on transfer payments, social programs, and on other forms of government expenditure);
- (ii) Direct (comparative) redistribution (i.e. levying a higher marginal tax rate on a better-off individual than on a worse-off individual has the direct effect of compressing the income differential between those two individuals);
- (iii) Incentivizing particular kinds of behaviour (i.e. ‘Pigouvian’ taxation)

Obviously, role (i) of taxation, revenue-raising, holds across the personal and the corporate cases. But the picture starts to look more problematic if we look at roles (ii) and (iii). The second role of taxation, as a direct mechanism for compressing differences in income, and thereby effecting a form of comparative redistribution, makes a lot of sense (especially from the standpoint of promoting social justice) with regard to individuals. But it makes no sense whatsoever in the case of corporations. Society has no interest in making sure that the most successful corporations do not make much more profit than unsuccessful corporations, or in compressing the profit differentials between different corporations. Society has obligations to ensuring at least some minimal ‘welfare floor’ for *natural* individuals, but there is simply no analogy in the case of individual corporations. Similarly, a just society cares about comparative differences in the incomes of its (natural) members, but it should have no analogous concern for the comparative profit levels of the corporations that exist within it. To put things very starkly: we can happily countenance corporate death, but not the death of individual citizens. Indeed, regular corporate death is the sign of a dynamic economy (and need not have excessively bad effects if combined with rigorous social welfare policies for the *natural* individuals who are employed by ‘dying’ corporations).

Taxation of profits acts as a brake on high-growth, high-profit companies, and a *de facto* subsidy for unsuccessful companies. This is an unwelcome outcome insofar as we have no collective interest in either penalizing successful corporations or in comparatively subsidizing unsuccessful corporations. But this form of taxation is also hard to condone when we consider the third role of taxation – the Pigouvian incentivization of particular forms of behaviour. We may welcome the brake that taxation of income applies to growth in real individual incomes at the upper end of the income spectrum. But there is no analogy in the corporate case, and therefore taxation of profits provides the wrong kind of incentive structure for corporations. After all, if the primary responsibility of businesses is to generate profits, it seems particularly perverse to select corporate profit as the target for taxation. Thus, if we consider the incentivization function of Pigouvian taxation, then (as we shall go on to explore), taxation needs to be directed at very different aspects of corporate performance.

Given the need to raise revenue, we may very plausibly need to tax corporations in some way or other. But my suggestion is that, on the basis of the foregoing considerations, we should conclude that it is reasonable to tax corporate profits only if we really have no better alternative. In the next section, I'll consider what some of the alternative strategies might be, but I shall first turn to the other way in which the convention of the corporation as legal 'person' has led us towards clearly suboptimal policies in our treatment of corporate taxation.

b. Avoidance and the Burden of Proof

Under current arrangements, corporate property rights are taken just as seriously as individual property rights, and so the burden of proof falls on state agencies in demonstrating that any particular strategy of tax avoidance falls outside the letter of the law. All too often, we allow corporations to have enormous latitude in pursuing ever more elaborate strategies of tax avoidance, all at enormous cost to state revenues. It would be hard to make sense of this state of affairs if we saw corporations as conventional units that were bound to conduct themselves under whatever set of rules a democratic society would wish to impose upon them. Instead, current arrangements suggest a view whereby corporations have robust property-entitlements which may be modified by taxation only under conditions of utmost stringency and only where the burden of proof in setting the limits of tax avoidance have been met with great care by state agencies.

Taking conventionalism seriously would mean, by contrast, that we should understand that we do not owe the same 'duty of care' to corporations as we do to individuals with regard to their situation relative to the tax system. We should remember that corporate property entitlements are, so to speak, doubly conventional – given the conventionality of both the corporate form and of the tax system itself as a means of allocating property rights. Moreover, even those who would want to give a stronger, pre-institutional account of *individual* property rights would find it difficult to mount a similar defence of the inviolability of *corporate* property rights. Thus, there is no reason for the burden of proof, with regard to the permissibility of tax avoidance schemes, to fall on the side of the taxation authorities, rather than on the side of the corporations themselves. Instead, it would make sense to allow the taxation authorities presumptively to outlaw broad classes of avoidance schemes, in accord with the intention of prior primary legislation. This would have the capacity to transform the conditions of corporate tax enforcement, and a great potential benefit to state revenues.

12. Taking Conventionalism Seriously, I: Reconfiguring the Tax Base

I have claimed that the taxation of corporate profits is difficult to justify. But this does not mean that we should not tax corporations at all. Instead of taxing profits, our aim should be to tax the real social and economic costs (broadly construed) of corporate behaviour. That is to say, our tax-base should be

constructed with an eye to the economic externalities, *and also* ‘social externalities’ produced by corporations. What I have in mind here when I speak of ‘social externalities’ are the ways in which corporations act to frustrate or undermine the achievement of important political values of social justice, liberty or equality.

Instead of taxing the creation of profit, which is, after all, what we want corporations to do in our economies, we should instead tax social costs and externalities, and arrange our tax system so as to incentivize welcome forms of corporate behaviour, and punish forms of corporate activity that undermine our public values. Our corporate tax regime should be composed of Pigouvian taxes (such as environmental taxes, designed to disincentivize environmentally unfriendly behaviour); and taxes designed to safeguard background justice – through changing the background against which corporations act, and ensuring the kind of revenue needed for necessary social programs.

If we take seriously the ‘social pollution’ or ‘social externalities’ created by corporations, then an interest in social justice should push us towards constructing the system of corporate taxation with an eye to its effects on social equality, upon democratic vitality, and upon individual liberty. Some suggestions for how this would play out at the level of concrete public policy (there could be many more) might be: taxing excessive wage levels in the upper echelons of corporate management structures within corporations (one way of incentivizing the compression of *ex ante* income); taxing excessive working hours; imposing taxes on corporations that fail to enact some level of workplace democracy, and so on. The system of corporate taxation could be used as a much more dynamic ‘Pigouvian’ tool for putting the right kinds of pressures on corporations, such that their deleterious effects on important social values could be reduced. And, perhaps most importantly, all of this could be done whilst removing the current pressure on corporate profits, thereby removing any disincentivization of economic dynamism. In short, more active and thoughtful policy solutions could be found, within a general approach to corporate taxation that tries to save the conditions needed so that corporations can be embedded in a just background institutional scheme. A full exploration of the different strategies that might thereby be pursued is beyond the scope of the current discussion, but I hope at least that the general idea is a promising one. By embracing the ‘Pigouvian’ taxation of the real costs of corporations, whilst keeping in mind a broad view of those costs as including the social and environmental problems generated or exacerbated by the actions of corporations, we may hope to have found general principles for the construction of a fully just and rational system of corporate taxation.

13. Tax Avoidance and Social Justice

a. Tax Evasion and Tax Avoidance

Having suggested some ways in which the tax-base might be changed, I want now to turn to the question of how we might transform corporate tax *enforcement*. In addressing this question, it will first be useful to look at the issue of tax avoidance. Traditionally, the distinction has been drawn between tax evasion, which is the illegal activity of evading one's full tax liabilities, and tax avoidance, which is the legal activity of arranging one's affairs, within the letter of the law, so as to minimize one's tax exposure.

Unsurprisingly, it is hard to hold a clear line between the two, and many schemes of tax avoidance shade over towards the borders of tax evasion. Indeed, some writers on tax have coined the term 'avoision' to refer to those schemes which fall somewhere in the disputed borderlands between tax avoidance and tax evasion. Clearly, large corporations are concerned to avoid downright *illegality*, and so tend not to practice tax evasion. But they are very concerned to minimize their tax exposure, and so practices of tax avoidance are extremely widespread.

b. Democracy, Social Justice and the Problems of Tax Avoidance:

Despite its technical legality, tax avoidance is an extremely troubling practice, especially when practiced on the scale that it is practiced by large corporations. Insofar as we are concerned to create just, democratic societies, the question of how tax avoidance might be addressed and curtailed is an extremely important one. Some of the problems with practices of tax avoidance are these:

- (a) Tax avoidance is deeply anti-democratic. It frustrates the legislative *intentions* embodied in tax legislation, in favour of allowing the distribution of ownership in the economy to be determined by the machinations of tax avoiders themselves.
- (b) Tax avoidance ignores the principle of reciprocity discussed above. If the privileges of limited liability incorporation are to be balanced by corporate responsibilities to society, then the very minimum of meeting those responsibilities should be meeting the full expectation of a corporation's tax contribution. Tax avoidance thereby oversteps the legitimate freedom of movement of corporations in a democratic society. It makes corporate tax avoiders fail in living up to their side of the 'social contract'.
- (c) Tax avoidance destabilizes the institutional division of labour. Given the argument of the foregoing sections of this paper, we may consider that corporations earn their "social license to operate" insofar as they contribute to the general good of the societies in which they exist, and facilitate rather than frustrating the achievement of social justice. They can only do this when they contribute towards the achievement of social justice through providing revenue to the state that can be used to pursue valuable social policies. A corporation which shirks its minimal commitment to uphold "the basic rules of society", including its taxation rules, frustrates the agencies of the state in performing the functions which hold up the state's side of the division of

moral labour. It thereby undermines the conditions of background justice which would otherwise legitimize the corporation as existing as a purely profit-seeking entity within a regulated market.

Despite these problems, it would seem that tax avoidance is the *inevitable* result of a co-ordination problem among competing firms. If your competitor is avoiding tax, then you will have to do so as well, if you are not to suffer a sizeable commercial disadvantage by comparison. Moreover, tax avoidance is incredibly wasteful: it consumes the efforts of thousands of high-energy, talented, imaginative people; and it does so for a destructive social end. If tax avoidance could be structurally outlawed, then the enormous energy and imagination that goes into pursuing it could be redeployed to more genuinely productive occupations, and directed towards technical and managerial innovation, instead of just ‘cooking the books’. There is, so to speak, something of a Prisoner’s Dilemma in operation. We would all be better off if this practice of tax avoidance could be eliminated, but it is individually rational for each corporation to engage in such practices. The question to be faced, therefore, is how we might bring it about that such practices could be stopped.

14. Taking Conventionalism Seriously, II: Transforming Enforcement

Some recent writers on tax have come to propose the enactment of a General Anti-Avoidance Rule (GAAR) as a way of dealing with the problems of tax avoidance. Such a rule would involve the enactment of a provision which stated that the tax authorities would be presumptively entitled to ignore any commercial transaction the sole purpose of which was simply the avoidance of tax. The burden of proof would switch from the corporations to the tax authorities, such that it would now be up to corporations to show that any tax avoidance manoeuvre should be considered to be a genuine commercial transaction, rather than simply a mechanism for reducing tax liability. Thus, the tax authorities would become entitled to distinguish between classes of ‘real’ or ‘genuine’, as against merely notional, transactions, and levy tax on the basis only of genuine transactions.

Given the *rationality* of tax avoidance for any particular corporation, we should never expect it to die out simply through a transformation of motives, or through the internalization of norms of good corporate citizenship. This is one area where it is surely the responsibility of the state to set the terms under which corporations operate so as to take them out of the way of temptation, by strongly and definitively outlawing forms of socially harmful corporate activity. How a GAAR would function would be, in effect, to collapse the legal distinction between avoidance and evasion, by subsuming the former under the terms of the latter. The effect of bringing a GAAR into law is to erode the distinction between avoidance and evasion, through granting administrative and judicial discretion over the interpretation of the *spirit* as well as the *letter* of tax statutes.

Now, the common objections to strategies such as the adoption of a GAAR is that it undermines the requisite certainty and determinacy of the law. This is certainly a significant line of objection. The rule of law is definitely predicated on a level of determinacy of expectations, and it is important to avoid the arbitrary imposition of unclear rules. Nevertheless, many of the reasons why this determinacy is so important apply much more in the case of natural individuals than they do in the case of entities like corporations. An individual's capacity for rational self-direction over time is an extremely valuable capacity to protect, and it is a capacity that may be threatened by being subject to an unclear or indeterminate set of legal restrictions. But it is not so clear that corporations have an interest in determinacy that is at the same level of normative importance. Planning is of course important for corporations, but the state's obligation to keep their expectations of the legal system as stable and determinate as possible does not seem to be as pressing as it would be in the case of real individuals. Hence, even if a GAAR were wholly inappropriate if applied to natural individuals, this does not mean that it should not be applied in the corporate case.

Moreover, it is worth addressing the question of whether a certain level of indeterminacy or uncertainty over the legality of corporate tax avoidance schemes would really be such a bad thing. No doubt, such legislation would cause certain kinds of 'chilling effects', whereby schemes that were close to, but not quite over, the border of illegality would be abandoned due to their risk of crossing over from the legal to the illegal. 'Inexact' legislation can create forms of self-policing such that individuals and other entities are forced to modify their behaviour, given their concern over the 'legal risks' of behaviour which might, on further investigation, turn out to be perfectly legal. But the case of tax avoidance is quite different to those cases where 'chilling effects' are genuinely unwelcome, for example with regard to restrictions on freedom of speech. Indeed, a degree of self-policing with regard to tax payments may be very welcome indeed. So, perhaps surprisingly, this may be one area where, all things considered, a certain legislative vagueness is to be welcomed. Finally, though, it should be noted that many of these worries are really quite notional. There are very many tax avoidance schemes that serve no useful commercial function whatsoever, other than the *de facto* defrauding of state revenues. Thus, many of the cases that would be outlawed by a GAAR are very clear-cut indeed, and many of the worries raised about such strategies, in terms of determinacy and the rule of law, are actually made in bad faith.

I want to end this brief discussion of enforcement by discussing another strategy that opens up once we take seriously the conventionalism of the corporate form. This is the strategy of what one might call *discorporation*. *Discorporation* would be the ultimate consequence of taking conventionalism seriously. The idea in question is that of 'looking through' or disregarding the corporate structure within which individuals act whenever they grossly overstep the reasonable bounds of corporate activity. If we look upon corporations as the conventional products of particular sets of legal rules, we allow that government sets the terms of the corporate convention. When there is a violation of those terms, whether through the

most egregious forms of tax avoidance, or by virtue of some other malfeasance, the government is entitled to suspend or ‘look through’ the convention in that case. Responsibility for wrongdoing can then devolve to individuals. In short, when the terms of the corporate convention are violated, the protections of the corporate form can be suspended. This is actually the route taken by the recent US Sarbanes-Oxley act, and analogous to the strategy pursued by the British policy of ‘surcharging’ local councillors who acted outside the terms of their role, or who were guilty of abuses in power.

Much more could be said about strategies of this kind, but it is clear that they have a number of important virtues. Firstly, the strategy of *discorporation* takes seriously the conventionalism of the corporate form, and allows that the convention should be suspended whenever its terms are broken. Secondly, the threat of more ready criminalization of certain abuses by corporate managers provides the right kind of incentive structure for individuals to be wary of abusing corporate power. To make use of a Rawlsian idea, one might say that the incentives provided by the threat of *discorporation* actually lessen “the strains of commitment”, as they put individuals in a position where it is individually more rational to do the right thing, and to make sure that their behaviour as managers does not serve to undermine collective democratic goals. Lastly, this kind of legal remedy provides institutional backing for guarantees of compliance by corporations with the terms which societies might choose to set for their existence, hence facilitating the reciprocity and stability which are important elements of what we are all owed by the corporations that we collectively allow to exist. The incentives provided by more robust forms of regulation, and the legal sanctions that accompany them can, if skilfully deployed, actually make it easier for corporations to go on earning their ‘social license to operate’.

16. Conclusion – Corporations, Taxation and Social Justice

The argument of this paper has been rather quick and schematic in places, and many details need to be filled in by future work. In conclusion, I shall just draw together some of the main points of my discussion.

a. Corporations and Taxation

With regard to corporate taxation, I have argued that a failure to take seriously the conventionality of corporations has led to an unimaginative view of corporate taxation as being structurally analogous to the taxation of individuals. There are, in fact, many disanalogies between the two: corporate profit should not be treated as analogous to individual income; low-profit corporations should not be treated advantageously by a tax system in the same way as it should treat low-income individuals; and, most significantly, corporations are not owed the same level of care and determinacy as individuals with regard to the tax rules that they face. Breaking the perceived link between individual taxation and corporate taxation makes room for a reassessment of the structure and purpose of corporate taxation. We should reconfigure the tax base, so as to move from the taxation of corporate *profits* to the taxation of the social,

political and environmental externalities produced by corporations. We could tax carbon footprints, intra-corporate wage-differentials or excessive working hours, for example, within a tax system that nevertheless did more than the current system does to favour economic dynamism, through shifting taxation away from corporate profits. Moreover, as some writers on tax law have recently suggested, we should move to an approach to corporate taxation which instantiates a ‘General Anti-Avoidance Rule’ (GAAR), thereby shifting the burden of proof with regard to the permissibility of tax avoidance schemes from the state to the corporations themselves. Such a shift in the burden of proof would perhaps be impermissible with regard to individuals, but more relaxed standards may be justifiable with regard to corporations.

b. Corporations and Social Justice

Taking a step back from issues focussed narrowly on taxation, as such, there is a general need to integrate normative issues regarding corporations into our understanding of the proper configuration of the basic structure of a democratic society. In our current non-ideal circumstances, the corporations we actually have are corrosive of the possibility of social justice. In part, this is because we’ve been blinded by a certain picture of corporations as ‘*natural*’ economic entities, and have been too timid and unimaginative in the ways in which we subject corporations to political regulation and constraint. A robust conventionalism would allow us to reverse the usual order of justification: from seeing corporations as placing constraints on government policy, to seeing corporations as conventional economic units that should be embedded in an institutional and regulatory structure that delivers social justice.

This *gestalt switch* opens up wide vistas for public policy innovation. Thus, this is an area in which applied political philosophy has an important home. First, conceptually, it opens up policy spaces which are easy to ignore when one is in the grip of an earlier picture. Secondly, in order to make sense of theories of liberal egalitarian justice, we need a better idea of their institutional setting, and this means moving *beyond* (or at least supplementing) overly-schematic debates about the relative significance of government agencies and individual behaviour. We also need to think about how the basic structure of society should be organized so as to marshal its most significant economic institutions in directions which are conducive to the pursuit of social justice within a democratic society.