There Is No Rawlsian Theory of Corporate Governance

Abraham Singer
University of Toronto

ABSTRACT: The major aim of this article is to show that John Rawls’s theory of justice cannot be applied effectively to questions of business ethics and corporate governance. I begin with a reading of Rawls that emphasizes both the critical and pragmatic nature of his theory. In the second section I look more closely at the notion of society’s “basic structure” and its place within Rawls’s theory. In the third section, I argue that “the corporation” cannot be understood as part of this basic structure and is not, therefore, a subject of justice for Rawls or his interpreters. Finally, I show that Rawls’s inability to speak to the corporation is a weakness, regardless of one’s particular view on the corporation. I conclude by considering what Rawls’s theory helps us to understand about the problems involved in integrating corporate governance, business ethics, and political philosophy.

KEY WORDS: Rawls, Corporate Governance, Basic Structure, Political Philosophy and Business Ethics, Normative Stakeholder Theory

INTRODUCTION

IN THIS ARTICLE, I argue for the following null hypothesis: that John Rawls’s theory of justice—arguably the most influential political theory in the past half-century—cannot be of any substantive use in addressing the “big” and “important” normative questions of business ethics or corporate governance. Among these “big” and “important” questions are several with significant social and political implications, among them: Should corporate governance be conceived of primarily as a solution to an agency problem between owners and managers, as Michael Jensen (2000) argues, or more broadly as a response to this conflict of interest, as well as “conflicts among shareholders, and conflicts between shareholders and the corporation’s other constituencies, including creditors and employees,” as John Armour, Henry Hansmann, and Reinier Kraakman (2009) contend? Or might it be more appropriate to conceive of corporate governance primarily in terms of a hold-up problem, as Margaret Blair and Lynn Stout (1999) assert? Does our political affirmation of democracy require greater democratic powers for corporate shareholders, or does the ability to sell shares offer an adequate mechanism for control, as property rights theorists of governance (e.g., Alchian 1978) maintain? More radically, should we expect workers to hold more democratic control, given the central role corporations now play in democratic societies? Should the state do more to facilitate or subsidize the ownership of firms?
by groups other than investors (Gould 2004; Malleson 2014), or should ownership rights go to whichever constituency (or “patron group”) will most efficiently use those rights, as determined by the market for ownership (Hansmann 1996)? Does something akin to political and legal authority exist within the firm, and must it be checked? (To both questions, Christopher McMahon [2013] answers yes, while Armen Alchian and Harold Demsetz [1972] answer no.) Should firms primarily pursue profit, as Milton Friedman (1962) famously advocates, or must they also take other constituencies’ concerns and interests into account, even at the expense of long-term profit, as stakeholder theorists and “true believers” in corporate social responsibility (CSR) (Whelan 2012) must maintain, almost by definition? Should the fiduciary duty of corporate officers be conceived of in thick, multiprincipal terms, as stakeholder theorists (Freeman et al. 2010) have sometimes argued? Or should it be conceived of as minimally as possible, as Frank Easterbrook and Daniel Fischel (1991) suggest? This is by no means an exhaustive list of the controversies affecting corporate governance, corporate law, and business ethics today; rather, it represents a small sample of some of the real issues framed by larger social and political concerns and principles, even if it is not at all clear how we can or ought to marshal our theories of justice and democracy to solve them.

My contention here is simply that Rawls’s theory of justice is of no real use for answering any of the aforementioned questions—not even for committed Rawlsians. Although the renewed search for ways to ground theories of business ethics in political philosophy is an admirable and worthy one, the Rawlsian “path” of political philosophizing reaches a dead end before we get close to justifying responses to the kinds of questions sketched in the previous paragraph. In this article, I will argue that, at best, Rawls’s theory offers an understanding of the liberal normative context in which our business ethics questions are situated, along with the ethical problems our research must address. But even Rawlsians must resist the impulse to apply Rawls’s methods and principles to the ethical and governmental dimensions of the corporation.

Since the argument to follow will be largely negative and critical in nature, it is worth keeping in mind a truism shared by all sides of the ethics and governance debates mentioned above: questions of how corporations ought to be organized, and upon which principles those in positions of corporate power ought to act, are important not just for the ethics of business but for the justice of societies in which businesses operate. Things get controversial as soon as we try to explain precisely how our concerns for business ethics, corporate governance, and justice ought to—or ought not to—be connected. Foundational work in academic business ethics has always taken this to heart. An early and influential account of stakeholder theory (Donaldson and Preston 1995), for instance, grounds its principles for managers to attend to all major stakeholders’ interests in something like an institutional application of Kant’s categorical imperative (see also Freeman 2001). Others (Jensen 2002; Hansmann and Kraakman 2000) argue that the governing concern for business ethics and corporate organization ought to be the maximizing of wealth for a corporation’s shareholders, and that this norm for managers and directors is largely grounded in claims of economic efficiency or aggregate social welfare—that is, something like...
utilitarianism (Heath 2011). Some of these theorists (Easterbrook and Fischel 1991; Friedman 1962) would permit the owners of capital to use their resources, organize their enterprises, and deploy their managers in any legally permissible way, in part because of the fundamental value placed on individual choice, on freedom, and on the property rights that secure such liberties. An appeal to rather different sets of political questions is stressed in the development of “integrated social contract theory” (Donaldson and Dunfee 1999), and more recently in myriad approaches to “political CSR” and corporate citizenship (Scherer and Palazzo 2007; Crane, Matten, and Moon 2008; Néron 2010; Whelan 2012; Néron 2013), as well as in calls for a “unified theory of firms, markets, and politics” (Heath, Moriarty, and Norman 2010). All of these make explicit use of concepts from political theory in attempts to tie together issues and methods from business ethics and political philosophy. One recurring theme in most of these integrated approaches is the recourse to the philosophy of John Rawls. Given that Rawls is largely considered to be the most important English-speaking political philosopher of our era, this recurrence is hardly surprising.

Consider again the Kantian approach to stakeholder theories, which has a clear affinity with the so-called “Kantian constructivism” of Rawls, post–Theory of Justice (or post-1971). As Edward Freeman (2002, 179) notes, “If we begin with the view that we can understand value-creation activity as a contractual process among those parties affected . . . then we can construct a normative core that reflects the liberal notions of autonomy, solidarity, and fairness as articulated by John Rawls, Richard Rorty, and others.” Freeman continues by providing a distinctively Rawlsian approach to the problem of the corporation, applying the basic logic of the original position thought experiment to the corporate contracting situation:

Imagine if you will, representative stakeholders trying to decide on “the rules of the game.” Each is rational in a straightforward sense, looking out for its own self-interest. At least ex ante, stakeholders are the relevant parties since they will be materially affected. Stakeholders know how economic activity is organized and could be organized. They know general facts about the way the corporate world works. They know that in the real world there are or could be transaction costs, externalities, and positive costs of contracting. Suppose they are uncertain about what other social institutions exist, but they know the range of those institutions. They do not know if government exists to pick up the tab for any externalities, or if they will exist in the nightwatchman state of libertarian theory. They know success and failure stories of businesses around the world. In short, they are behind a Rawls-like veil of ignorance, and they do not know what stake each will have when the veil is lifted. What ground rules would they choose to guide them? (Freeman 2001, 46)

Here, Freeman simply takes the corporate contracting situation as a parallel to the social contracting situation and therefore finds no trouble in applying Rawls’s theoretical framework to the corporation (see also Freeman and Evan 1990; Bowie 1999). A similar argument is made by contractarians who attempt to ground business ethics in an idea of fairness derived from Rawls’s decision procedure (Phillips 1997; Brock 1998; Toenjes 2002; Bishop 2008).
This type of Rawlsian argument has been criticized by James Child and Alexei Marcoux (1999). But theirs was a technical critique of how Rawls was applied, not a question of the application of Rawls’s theory in and of itself. The more general question of whether Rawlsian social contract theory can even be applied to the corporate context has yet to be addressed. For example, it has rarely been asked whether Rawls’s theory might consider business organizations as qualitatively different beasts than the kinds of social and political institutions for which it was initially designed. Robert Phillips and Joshua Margolis (1999) did pose this question, and they answered it with a reading of Rawls that sees business as fundamentally different from politics. They went on to argue that business ethics ought to be entirely distinct from political philosophy—an idea that garnered a fair amount of pushback, with some scholars arguing that Phillips, Margolis, and Rawls all overstate the distinction between business and politics because they misunderstand and distort the voluntary and intentional nature of the business firm (Hartman 2001; Moriarty 2005). In this article, I contend that each of these responses fails to grasp the deep-seated distinction between the business firm and the state, or between the political and the associational, upon which Rawls’s theory rests.

It is worth noting here that the cross-pollination of ideas between business ethics and political theory has been largely unidirectional: political theorists have shown little interest in business ethics or corporate governance. In an important article in the American Political Science Review titled “Beyond Public and Private: Toward a Political Theory of the Corporation,” David Ciepley (2013) presents a rare project that engages explicitly in questions about the legal and political nature of the corporation. Other political theorists have examined the related topics of work and production (Stanczyk 2012; Arnold 2012; Moriarty 2009; Winkelman 2013). Although the aforementioned approaches hardly constitute a common or comprehensive research program, one common theme appears to have emerged: liberal political theories like Rawls’s that presuppose a fairly clear distinction between the private and the public or the political and the nonpolitical cannot be applied to questions of work, organizational hierarchies, and governance. As Ciepley (2013, 140) puts it, “Corporations . . . transgress all the basic divides that structure liberal treatments of law, economics, and politics: government/market, state/society, privilege/equality, status/contract, as well as liberalism’s major dichotomy of public/private. Corporations are not of liberalism and cannot be satisfactorily assimilated to its categories.” Ciepley may have uncovered a generic problem for much of liberal political theorizing in recent years—namely, an inability to understand and adequately address “meso-level” institutions, those that lie between large “macro-level” state institutions on the one hand and the actions of individuals on the other. Things like businesses, NGOs, political parties, organized religions, labor unions, or the professions (say, of lawyers, medical doctors, nurses, or accountants) do not fall neatly into the categories of public and private, or political and economic. These ideas refocus our attention on the problems that come with applying Rawls’s social contract theory to the corporate contract. We must either justify these problems in terms of Rawls’s overall logic (if we want to capture the strength and power of that logic for our own purposes in business ethics), or explain where and why Rawls went wrong, and why
an application of some Rawlsian ideas to the business corporation might remedy the defects in others.

There have been more subtle attempts to use Rawls for business ethics purposes: Nien-hê Hsieh, for instance, argues that Rawlsian theory supports the idea that businesses ought to be controlled by workers—a premise based on the idea of protection against “arbitrary interference,” which is, in turn, implied by Rawls’s claim that the “social bases for self-respect” are the most important of the primary goods that matter when assessing the justice of the distribution of the benefits and burdens of social cooperation (Hsieh 2008). Arbitrary interference at the workplace would be offensive to these rights, meaning that a well-ordered society would require institutional checks against it. For this reason, Hsieh claims that “workplace republicanism,” an institutional guarantee of worker involvement in decision-making processes, is required by a Rawlsian conception of justice (Hsieh 2005).

Hsieh’s argument is probably the most compelling attempt to speak to questions of internal corporate organization in terms of Rawls’s ideal theory. It is also illustrative of some important challenges in using Rawls for this purpose. First, the argument overlooks, or at least minimizes, Rawls’s reference to a “property-owning democracy,” where the distribution of human and productive capital is diffuse. In such a society, the exit option from any given workplace would be quite readily available to most, obviating the need for something like workplace republicanism. In order for Hsieh’s argument to work, one would need to draw on a moral notion of what is an acceptable cost of exit—that is, what costs of exiting a corporation would be considered so great a burden that the source of the pressure to exit would qualify as an arbitrary interference? This kind of value question is difficult to pose, let alone answer, within Rawls’s political conception of justice. Consider how Rawls deals with questions arising from the oppression of members of religious communities by that community’s own religious authorities. Rawls claims that because the exit option is available for religious communities, the principles of justice need not apply directly there; and this is an interpretation anyone concerned with religious freedom should want to retain. Of course, one who identifies strongly as a Christian would see exiting the church as entailing very great costs (e.g., homosexual Catholics and Mormons may face tremendous inequality and potential harm but still find the “costs” of leaving the church too great to bear). It seems the only way to distinguish the magnitude of exit costs is to import a comprehensive moral view of what constitutes an unacceptable cost of exit. But can one import such a comprehensive view while remaining true to Rawls’s theory? We will return to this problem in the next section when we look more closely at the architecture and substance of Rawls’s theory of justice.

Another issue with Hsieh’s argument is that invoking a republican conception of liberty for the corporation ignores the uneasy historical and theoretical relationship between institutions like corporations and republican thought. Republicans going back at least to Thomas Jefferson were incredibly antagonistic toward the power corporate institutions attempted to wield, since the concentration of economic power could easily lead to a dominated public. Similarly, it would seem that a republican theory of freedom and democracy could very well be more demanding than Rawlsian
justice when it comes to narrowing the range of acceptable sources of economic inequality. Rawls’s acceptance of inequality insofar as it benefits the least well-off is not obviously compatible with republicanism’s concern for the domination that tends to accompany social inequality, regardless of whether it benefits the least well-off. In order to draw on a republican understanding of freedom, one must question more deeply Rawls’s assumptions about the nature of cooperation and political society. While clearly in line with the spirit of Rawls’s enterprise, it is not clear that a concern for the arrangements within a corporation can actually fit within, or be inferred from, Rawls’s theoretical system.

It is an understatement that Rawls’s theory can be confusing and complicated. It seems to offer resources for business ethics in some passages, but closes off those resources at other points. My objective here is not to identify particular weak spots in others’ arguments by pointing to contrary passages within Rawls. I have two main aims here: one negative and one positive. The negative aim, again, is to show that projects attempting to use Rawls’s theory to ground approaches to business ethics and corporate governance are nonstarters. That is the null hypothesis. My positive aim is to use this null hypothesis as a way of understanding what a marriage between business ethics and political philosophy ought to look like, and what kinds of conceptual constraints such a union would impose. In this sense, while agreeing with much of the well-known critique by Phillips and Margolis, I distance myself from their stark thesis on the distinction between these two fields of normative theory. Put simply for now, what Rawls shows us for business ethics is that, in a liberal democratic political society, we need a plurality of normative principles to guide various types of institutions and cooperative activity.

RAWLS: POLITICAL AND EGALITARIAN

Rawls’s political theory is expansive and wide ranging, having been articulated over the course of three decades, in four books totaling more than 1,400 pages,1 in dozens of articles, and through a literature of secondary scholarship that is an industry unto itself. Furthermore, a broad range of debates and interpretations exist within this literature. There little consensus not only over the political consequences and prescriptions of his theory but also over the very nature of Rawls’s philosophical project in general (Laden 2003). More to the point, when it comes to John Rawls’s two greatest books, A Theory of Justice (Theory 1971) and Political Liberalism: Expanded Edition (PL 2005), Rawls himself seems to have changed his mind regarding certain elements of his theory without explaining how thoroughly he rejects his own earlier arguments. There is a question, therefore, of whether one can speak of “Rawlsian theory” or whether we need to speak of the early Rawls and the later, “political” Rawls. Little attention is paid to PL Within the business ethics literature, leaving any engagements with Rawls’s theory to be done on the terrain of Theory. This might be understandable if the business ethics literature were drawing heavily from Rawls’s explicit remarks about political economy, since there is much more of that in Theory. But, as it turns out, most citations to Rawls in the business ethics literature are
to his more familiar abstract concepts, such as the idea of a social contract, the “original position,” and his principles of justice.

I add the following interpretation of Rawls’s work to the litany of others with two main aims, the first of which is to reconstruct Rawls’s theory as a largely coherent theoretical enterprise by reading him backwards, so to speak: I begin with concepts from his later book, PL, and use them to interpret his arguments about political economy and distributive justice in his earlier book, Theory. In so doing, I make no claims that Rawls himself intended or pretended to achieve unity in his works; rather, I contend that reading his work in this way brings out the strong critical and pragmatic nature of his arguments and gives us reason to forgive some of the more grave problems his theory faces, which others have written about elsewhere (Gauthier 1974; Harsanyi 1975; Sandel 1984; Gutmann 1985; Hampton 1980; Benhabib 1986). The second aim here, however, is to emphasize some of the concepts Rawls developed in PL in order to highlight their importance for business ethics scholars. If one wishes to make use of Rawlsian resources for arguments about corporate activity and business organization, then one must take seriously the “political” ideas developed by the later Rawls. Both of these aims, perhaps unfortunately, involve a fair amount of Rawls exegesis. While I make a point of explaining Rawlsian terms and concepts as I use them, a certain degree of familiarity with the Rawlsian enterprise is assumed throughout.

The Rawls I wish to reconstruct and defend should be thought of as a critical theorist, someone offering a critique, in the service of human emancipation, of prevailing social practices. His theory of fairness enables us to criticize contemporary political and social institutions that fail to live up to their presupposed normative justifications. If the philosophical significance of Rawls was placing normative questions about politics back on the agenda of Anglophone philosophy, his historical and political significance was articulating a principled commitment to egalitarianism in terms that could resonate in a liberal society dominated by consequentialism and individualism. This critical and pragmatic nature of Rawls can be seen by considering four important Rawlsian concepts: (1) the vocabulary of “a political conception” of justice; (2) the method of the “original position” thought experiment; (3) the two principles of justice comprising Rawls’s concept of “justice as fairness”—namely, “equal basic liberties” and “fair equality of opportunity”; and (4) the prescription of a “property-owning democracy” or “liberal socialism” as the sets of institutions that would fit best with this conception of justice. Here I briefly go through these four components.

The first component of Rawls’s theory is his attempt to establish a “political conception” of justice, as opposed to a metaphysical or comprehensive conception. A political conception of justice has three main features that serve as crucial constraints on the scope of his theory. First, it applies only to the “basic structure” of society, its “main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next” (Theory 6–10; PL 11). A political conception of justice, then, only lays out prescriptions and principles for these institutions, and does not extend to the choices and activities individuals make within this structure. Second, but related to the first
feature, a political conception of justice is presented as “freestanding,” in that it
does not rely upon any specific moral or metaphysical doctrine but rather can be
affirmed by people holding a wide range of comprehensive doctrines or religious
beliefs (PL 12). Third, a political conception of justice is expressed “in terms of
certain fundamental ideas seen as implicit in the public political culture of a demo-
cratic society” (PL 14). The significance of this feature is the idea that the content
of justice is both “implicit” and “public” in nature; a political conception of justice
is one that articulates the very principles implied by the political institutions and
traditions themselves. Furthermore, these implied ideas are drawn not from the
cultures of specific associations or traditions but from those public institutions that
have allowed these various associational and private practices to flourish. A political
conception of justice, then:

• is restricted in scope to the main political institutions of society,
• is presented and defended in terms that do not presuppose contentious
  moral doctrines, and
• expresses the philosophical principles that are inherent in actually-existing
  political society.

The desire to restrict the theory of justice in such a manner comes mainly from
the recognition of the “fact of pluralism,” and the ongoing disagreement that
accompanies it, within a modern democratic society. Because pluralism of moral
and religious beliefs is inevitable in a free society, we cannot and should not expect
moral disagreements to disappear, even in an ideal society. The consequences of
this fact are more significant than they first appear to be. Since we view the coercive
power of the government in a constitutional democracy as ultimately the power of
the public, the use of coercive authority must be accountable and justifiable to
that public. The question, then, is upon what grounds the use of political power can be
justified in a society marked by this “fact of pluralism” (PL 136). The “political
conception of justice” was Rawls’s attempt to answer this question and allow philos-
ophy to engage with political problems: by applying only to those legally coercive
institutions, by not appealing to a particular moral outlook, and by trying to derive
principles from the practices and institutions which already exist, Rawls presented
a picture of how nontrivial principles of justice could be produced and affirmed in a
pluralistic society. (Of course, whether Rawls was successful in presenting a theory
of justice that was truly political is a heated question.)

Understanding this idea helps us to understand the significance of Rawls’s famous
philosophical innovation in Theory, the “original position.” Briefly put, the original
position asks us to imagine that individual representatives of each individual citizen
are placed behind a “veil of ignorance,” where they know no particular details about
those they represent (their sex, position in society, religious and moral beliefs, talents,
and so on). So positioned, the representatives are presented with a menu of different
principles upon which the basic structure of society might be organized. What
principles would they choose? This procedure is an explicit attempt to resurrect and
salvage the social contract tradition while also appealing to modes of rational choice
reasoning (once behind the veil of ignorance, the parties are presumed to be rational,
and can therefore be modeled using game theory). In proceduralizing the social contract in this way, Rawls asks us “to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves” (PL 16). Understanding this in terms of Rawls’s later “political conception” vocabulary, the original position might be said to model the moral intuitions inherent in current social and political practices.

What intuitions are these, precisely? Rawls argues that people have two relevant moral powers: the power to be rational and the power to be reasonable. Rawls defines rationality in the manner familiar to us from neoclassical economics: the ability of an individual to select the ends she wishes to achieve, and the competency to select the best manner of achieving those ends. Reasonableness, on the other hand, is defined as the desire and ability of people to live in a social context “in which they, as free and equal, can cooperate with others on terms all can accept” (PL 50). The original position is meant to isolate these two moral powers and model how they would lead hypothetical moral agents to reason: rationality is modeled on the assumption that contracting parties in the original position are seeking to settle on the principles that would best achieve their ends and their own good; reasonableness is modeled in the stipulations that parties are placed behind a veil of ignorance, removing all knowledge about what those ends are or about the extent of any other nonmoral powers they might possess. The parties must now rationally deliberate from the position that they might be anybody with any given set of strengths, weaknesses, beliefs, etc.

Put differently, the original position models our privileging of self-interest and advantage by assuming the parties are rational agents. However, by placing them behind a veil of ignorance, the original position models our liberal commitment to equality and a sense of cooperation. The original position, in this light, abstracts from practices and principled commitments latent in liberal democratic regimes and asks what our society would look like if we really did organize our basic structure according to these principles. Furthermore, the veil of ignorance attempts to delimit a reliance on any particular brand of moral commitment. By keeping the hypothetical persons ignorant of others’ commitments to a particular vision of the good life, the principles selected within this procedure should be neutral with respect to a wide range of visions of the good. It should be stressed that Rawls himself did not make this claim; actually, he explicitly noted that justice as fairness, as defended in Theory, was presented as a comprehensive Kantian doctrine. Rawls later distanced himself from this doctrine and de-emphasized the original position argument (Chambers 2012). However, if we consider the key features of the original position, and Rawls’s own connections between the original position and his subsequent writing on the reasonable and the rational, the original position can be interpreted within a political conception of justice. The principles hypothetically selected in the original position would be presented as freestanding, pertaining only to the basic structure, and inherent in the political culture of liberal democracy. In short, they would be political (and not metaphysical) in the Rawlsian sense of the word.

Rawls famously contended that in the original position, parties would select his two principles of justice over other plausible options such as various forms of utilitarianism or perfectionism. The second principle is where things get controversial.
and interesting, especially when we turn back to issues arising in corporate governance. In Rawls’s final articulation of it, the second principle states that “social and economic inequalities are to satisfy two conditions; first they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)” (JaF 42–43). An important point argued by Rawls is that attention to the second principle comes only after complete fulfillment of the first; violations of the first principle (i.e., violations of the most basic and fundamental individual liberties) can never be justified by reference to the second principle (i.e., a justified inequality, or a benefit of the least well-off). Or, as Brian Barry (1973, 274) puts it, “Liberty can only be restricted for the sake of liberty.” Why would the parties in the original position affirm this second principle? For clarity’s sake, it is worth quoting one of Rawls’s final explanations at length:

A political conception of justice must take into account the requirements of social organization and economic efficiency. The parties would accept inequalities in income and wealth when these work effectively to improve everyone’s situation starting from equal division. This suggests the difference principle: taking equal division as the benchmark, those who gain more are to do so on terms acceptable to those who gain less, and in particular to those who gain the least. We get that principle, then, by taking equal division as the starting point together with an idea of reciprocity. (JaF 123)

In defending the difference principle, Rawls takes the liberal sense of moral equality represented by the veil of ignorance and uses it to show how material and social inequalities can be just only if they are justifiable to those least well-off; the only way this would ever be the case is if the least well-off benefit under the arrangement. So, by referring to ideas inherent in liberal democracy, and without reference to a moral commitment to material equality, Rawls produces a principled restriction on the level of inequality tolerable in a free and democratic society.

Rawls was emphatic that in proposing these principles he was not simply legitimating a capitalist welfare state. On the contrary: he was certain that such a political economic system could not be justified by his theory (JaF 137–38). Whereas a capitalist welfare state sought only to insure a social minimum, the reciprocity inherent in the original position requires a more demanding institutional arrangement. Rawls explicitly claims that a “property-owning democracy” or “liberal socialism” would best realize the principles of justice he proposed (JaF 135). A liberal socialist regime involves the social ownership of the means of production, but with multiple parties vying competitively for political power, and with a dispersion of economic power among many competitive firms, allowing for freedom of occupation and efficient competitive markets, in contrast to state socialism with central planning (JaF 138). A property-owning democracy would allow for the private ownership of the means of production, unlike liberal socialism; but unlike capitalism, it would seek to ensure widespread ownership of productive capital and human capital by equalizing access to real capital, education, and institutions that develop the necessary skills (Theory 247; JaF 139). A property-owning democracy does not merely compensate an underclass but seeks to eliminate such a phenomenon nonexistent to the greatest
No Rawlsian Corporate Governance

possible extent; the institutional arrangements and the ideal of equality to which a property-owning democracy aspires are quite radical when compared with that of even the more generous welfare states in Western capitalist democracies. 4

Rawls’s political and theoretic achievement, then, was the justification of a society in which equality was a central guiding ideal for social justice. What made this such a significant achievement was not simply his philosophical precision, but the articulation of this vision in largely “political” terms; the case for equality was made in terms of, and on principles affirmed by, the practices of our very unequal liberal democracies. Rawls’s philosophy can therefore be read as an immanent critique of those “liberal” regimes (specifically, for Rawls, the United States) that create large inequalities in life chances, economic power, and political control. Seen through the original position, we learn that such practices ought to be intolerable to a society that affirms liberal principles and seeks to justify its main social institutions on terms acceptable to everyone affected by them.

THE BASIC STRUCTURE PROBLEM AND ITS UNAVOIDABILITY

So much for what I take to be the rationale, method, and content for Rawls’s theory of justice, and some of what he himself took, somewhat speculatively, to be its likely implications for political economy. We return now to our central problem—namely, what implications, if any, can Rawls’s theory of justice have once we do something that Rawls himself did not really do, open up the “black box” of the firm or modern corporation and ask whether we can argue from abstract principles of justice to much more specific institutions of governance and organization.

Given that Rawls saw this theory as prescribing a massive restructuring of political economy in liberal democracies, one might expect to find a similar radical prescription with regards to the corporation. “The corporation” is, after all, a key institution of the modern capitalist system that has been accused of perpetuating the many ills that concerned Rawls (Greenfield 2006). But by framing his criticism in terms of a “political” conception and by limiting the scope of his criticism to the “basic structure” of society, Rawls’s theory is unable to account for power dynamics operating in many other parts of society, including, it seems, the corporation. This may explain why Rawls says very little about the corporation in his writings. More important, however, it makes clear why attempts to formulate a position on corporate governance using the normative resources offered by Rawls are bound to fail.

The first difficulty one must face, if trying to apply Rawls’s theory to corporate governance, is finding a clear definition of the “basic structure.” This is needed to pursue the first obvious question: are corporations part of the basic structure? In his first articulation of the concept, Rawls claims the basic structure is the manner in which the key social institutions distribute rights and obligations, privileges and duties, and the advantages flowing from social cooperation (Theory 6). Later, he emphasizes not merely this scheme of institutions, but also how such institutions “fit together into one system of social cooperation.” The institutions of this system that Rawls mentions are the constitution, an independent judiciary, a scheme of property rights, the structure of the economy, as well as “the family in some form.”
The purpose of the basic structure, from the standpoint of justice, is to provide “the background conditions against which the actions of individuals and associations take place” (Rawls 1977, 160; see also JaF 10). In this respect, the political nature of justice is inseparable from a focus on, and a conception of, a basic structure that secures basic prerequisites of justice. In order for individuals to strive for their own understandings of the good, a basic structure is necessary to secure the right conditions; in order to make sure such a basic structure does this fairly, the notion of justice governing it must be conceived of in political terms.

Some ambiguity exists over which institutions Rawls considered part of the basic structure. Arash Abizadeh (2007, 319) has helpfully given three plausible ways of whether an institution merits inclusion in the list: they must be institutions that 1) structure the terms of social cooperation; 2) have “profound and pervasive impact” on people; or 3) subject people to legal coercion. Much of the discussion on this topic has centered on readings 2 and 3, since the mandate that the institutions “structure the terms of social cooperation” is rather vague and leads to questions about which forms of cooperation are considered basic and which terms are those governed by justice. Thus, the question becomes whether we mean those institutions that legally coerce or, more expansively, those that simply have pervasive impact. The ambiguity on this issue is understandable. For one thing, Rawls says that the basic structure is significant for a theory of justice because “its effects are so profound and present from the start,” raising the question of whether all institutions with profound effects are parts of the basic structure, or whether it is simply a statement of the basic structure’s importance (Theory 7). Furthermore, in later writings, Rawls de-emphasized the “profound effects” language, making the basic structure’s outlines more open to debate.

This was brought to a head in discussions of the family, particularly through Susan Moller Okin’s famous feminist critique of Rawls. Okin (1989, 97) claimed that Rawls’s theory did not subject the family to the same scrutiny it did other institutions, leaving a rather glaring blind spot in his theory: “Rawls’s failure to subject the structure of the family to his principles of justice is particularly serious . . . for the gendered family, and female parenting in particular, are clearly critical determinants in the different ways the two sexes are socialized.” Put differently, for Okin the family clearly has a “profound and pervasive” effect on both individual and society, and should therefore be subject to Rawls’s principles of justice. Rawls responded by claiming that the family was, in fact, part of the basic structure because it is essential in producing and reproducing society across generations (JaF 162). This would seem to address Okin’s concerns, as well as provide good evidence for the “profound and pervasive impact” interpretation of the basic structure. Yet, on the next page, Rawls contends that “the principles of political justice are to apply directly to [the basic] structure, but they are not to apply directly to the internal life of the many associations within it, the family among them” (JaF 163, emphasis added). Here, Rawls does not seem to see the family as being “of the basic structure” but rather as one of the “many associations” that are allowed to flourish by virtue of being within the reach of a just basic structure. Indeed, shortly thereafter, the question of whether the family is part of the basic structure is compared with questions about
churches, universities, and—important for our purposes here—business firms. The principles of justice do not pertain to the governance or internal structures of any of these associations, but rather constrain them from without.

Rawls’s discussion of the family, then, does not actually strengthen the case for a “profound and pervasive impacts” reading of the basic structure. Instead, we get a picture of the basic structure as those institutions of legal coercion whose effects are so profound and pervasive that they constrain and/or enable all the associations within it, including the family. While the pervasiveness of the basic structure would forbid certain family arrangements (ones in which children or wives were subject to domestic abuse, or where damage was done to family members’ fair value of equal opportunity), it would also allow for a wide range of family structures within this. It would seem, then, that Rawls cannot say anything about Okin’s primary concern, concerning the justice of gender roles and norms, because families with distinctively gendered divisions of labor would have to be allowed within this sphere of association.

Why must this be the case? Picking up on Okin’s critique, G. A. Cohen contends that principles of justice ought to apply to choices and actions people make beyond legal compliance, leading him to endorse a “profound and pervasive impacts” understanding of the basic structure: “Why should we care so disproportionately about the [legally] coercive basic structure?” (Cohen 1997, 23, reprinted in Cohen 2008) If we recognize that other social institutions and structures do much in the way of perpetuating harm and inequality, then focusing on the legal-coercive seems arbitrary. Indeed, Okin’s claim regarding the family provides grist for this particular mill: why focus on the legal institutions when things like gender norms in the family seem to be where the action is? Why not set the sights of a theory of justice on all those practices that structurally affect the life-chances and social position of people? Some such thought is surely behind the rarely explicit presumption among business ethics scholars that the justification or critique of business and market institutions must ultimately appeal to more general principles of justice. Why not?

There are three potential answers to this question. The first is to note that for Rawls we must secure basic liberties before dealing with questions of equality of opportunity, material equality, or economic efficiency. This answer, however, seems to miss the point: many institutions and social structures outside the basic structure do, in fact, render unequal the basic schemes of rights and liberties that the first principle is supposed to guarantee for many citizens (particularly women, visible minorities, immigrants, etc.). The priority of liberty, therefore, cannot be used to justify the more limited scope of the liberty principle itself. A second answer is to say that the legal structure of a state represents a special case of coercion because of its formality and claims to legitimacy (this is implied throughout PL and LoP). There is something to this argument, but it requires investigating a much more detailed conceptual argument about the nature of power and coercion—as well as empirical examinations into the degree of power and coercion exerted from various institutions and structures—than can be dealt with here. The third and most helpful explanation for why Rawls cannot conceive of the basic structure so expansively involves the constraints Rawls imposed on his theory by arguing for a political conception of
justice. If we recall that, fundamentally, Rawls attempted to intervene in questions about inequality and justice in a society marked by inexorable pluralism, then we must remember that the theory of justice is constrained not only by the way in which it is presented and justified but also by the way it scope is defined.

One consequence of limiting the scope of principles of justice is that they cannot be part of a comprehensive moral theory: the whole point of a political conception of justice is the recognition that it can be widely adopted by parties who will inevitably disagree about other questions of value. This does not mean the political is amoral; rather, it means that a political conception of justice cannot and should not address the entire universe of moral questions. On some questions, a political conception of justice must be merely suggestive but not compulsory (the family would seem to be one such example for Rawls); on others, it must be agnostic. The claim that principles of justice should extend to all instances of “profound and pervasive” impact is to turn the political conception of justice into a comprehensive doctrine, which would require distinguishing and privileging certain moral and religious outlooks over others. Political philosophy, for Rawlsians, cannot simply be applied moral philosophy; instead, it must be built up from the principles implied by a shared political culture and those institutions that affect all in the same manner. If we are to acknowledge the fact of pluralism and strive for a political conception of justice, it must apply to the basic structure understood as the coercive legal institutions of a social system, and it must allow for people to pursue their varied understandings of the good life, and associate on those terms.

SO, CAN THE CORPORATION BE SEEN AS PART OF THE BASIC STRUCTURE?

We find ourselves now in an interesting position. On the one hand, we have a powerful critique of modern political society that demands great social and economic change; on the other hand, this critique’s very power rests upon delimiting its scope to a particular (though unspecified) set of institutions. Just how thoroughgoing is Rawls’s critique of our current political and economic order? Again, it all hinges on what we include in the basic structure. So, if we want to address the kinds of business ethics and governance questions raised at the outset, we must ask whether the corporation can be considered part of the basic structure. If it can be considered so, then we can ask whether the principles of justice would have implications for the internal structure of the firm. If not, then they can only constrain from without, and we must ask what these constraints would imply.

Rawls indicates that the corporate form is not part of the basic structure. In summarizing the features of the original position, Rawls points out that the subject of justice is the basic structure of society, as opposed to “rules of corporate associations” or the “law of nations” (Theory 126). The conceptual reasons for seeing things like corporations as outside the basic structure is explained by Rawls in his distinction between a society (which has a basic structure) and an association; most significantly, a society has “no final ends and aims,” unlike associations, which are formed to achieve particular ends (PL 41–42). Because a corporation does have
particular ends, it would appear not to be part of the basic structure. And, finally, as mentioned earlier, when Rawls says that the principles of justice do not apply to the “internal life” of most associations, he explicitly mentions the business firm among them (JaF 164).

This would appear to be fairly straightforward. However, there are at least two other aspects of Rawls’s writings that might lead one to think his theory can speak to corporate governance. The first is that Rawls clearly claims that the “system of property rights” is part of the basic structure (Rawls 1977, 159). Insofar as several fundamental questions of corporate governance involve issues of property rights (Fama and Jensen 1983; Alchian and Demsetz 1973), it would seem that some conception of corporate governance would be implied by the basic structure. Second, Rawls considers the question of worker-owned and worker-controlled enterprises and how an economy dominated by such enterprises would fit with his theory (JaF 178). Rawls says that such a system—as imagined by John Stuart Mill (1848/1987), where it peacefully replaces an economy of investor-owned firms—could be completely in accord with his two principles. He leaves the door open for an argument that a just society ought to subsidize or in some other way support these enterprises, though he stipulates that such an argument would have to be made in political terms.

So it seems that although the principles of justice do not apply directly to the structure of a corporation, Rawls was ambivalent about whether a political argument might be developed in the future for some preference or support for certain types of corporate governance. With all Rawls has to say about so many things, it seems odd that he would remain so vague and noncommittal on the question of the corporation. It is worth noting that the corporation is not the only entity on which Rawls stays mum. As mentioned earlier, meso-level institutions in general are not dealt with much at all; for whatever reason, Rawls has basically nothing to say, for instance, about political parties, professional associations, schools, or municipal corporations, despite their obvious importance for a scheme of social cooperation.

Because of this lacuna, Rawls’s explicit statements on the corporation will not be of much use; it is therefore worth considering what can be proposed using Rawlsian theoretical resources. One can attempt the argument that the business corporation is distinct from other associations and therefore should be considered part of the basic structure. This claim would have to make a case not only about the importance of the corporation and its impact on people’s lives but also about its nature as a legally coercive institution. As Rawls makes clear in his discussion of ecclesiastical organizations (one of the few meso-level institutions he does consider), the ability of believers to exit allows for discretion and freedom in establishing the terms of church governance. The ability to exit the authority of an institution and its leaders therefore seems like a decent test for whether it can be considered part of the basic structure. If one has the ability to leave the church, it is not legally coercive to such an extent that it could be considered part of the basic structure. To make the claim that the corporation is part of the basic structure, then, one would need to claim that the exit option is not available for individuals who contract with the corporation.
While it is certainly the case that for some individuals, in certain situations, the ability to exit is not freely or realistically available, this is by no means universally true in the way that parallel obligations under a tax regime or a constitutional doctrine would be. For Rawls, the problem of exit would be minimized in a well-ordered property-owning democracy anyway, since human capital and productive assets would be more diffuse, and individuals would find, say, quitting a job to be much less risky. Issues of injustice within the firm would be alleviated by empowering everyone with the ability to exit the firm (in addition to basic laws against unsafe or undignified working conditions; or in favor of minimum wages, unemployment insurance, or a guaranteed basic income; and so on).

Even if we were to consider the corporate form as part of the basic structure, it is not clear that the parties in the original position (or in the later stages of the so-called “four-stage sequence” [Theory 195–201], where they get to contemplate more specific principles, given somewhat more specific knowledge of their actual society) would produce terribly demanding prescriptions or principles for a corporation’s ownership structure and internal ordering. Rawls argues that an efficient economy is something parties in the original position would desire, hence the selection of some form of free market (whether in a property-owning democracy or liberal socialist order). He implies that this has fairly minimal implications for corporate form: “Whatever the internal nature of firms . . . they take prices of outputs and inputs as given and draw up their plans accordingly—individual households and firms are free to make their decisions independently, subject to the general conditions of the economy” (Theory 241). Note how firms and households are still treated as “black boxes” with utility functions here, in the manner of mid-twentieth-century microeconomics textbooks. Whatever way firms organize themselves in order to respond effectively to their market environment is fine, as long as they don’t violate the law. There is little interest for Rawls in how the internal structure of a firm affects, or is affected by, its interaction with the market. Rawls’s main concern about capitalism is the fact that these firms generate great inequalities of wealth and political power for their owners and executives. And yet, his theory fails to account for how the different governance and ownership structures for modern corporations might contribute to the very inequalities that concern him most, as well as how they might generate relationships internally that are, say, coercive or liberating in ways that would be germane to his conception of justice.

For this reason, Rawls would have no response to, and might even have to endorse, a view of the corporation coming from libertarian-friendly interpretations of the now-dominant nexus-of-contract theory of the firm. This approach views the corporation as basically a voluntary form of association, and takes corporate law to be simply “a set of terms available off-the-rack so that participants in the corporate ventures can save the cost of contracting” (Easterbrook and Fischel 1991, 34). By leaving the terms of corporate governance open for freely contracting parties to decide, the nexus-of-contract theory holds that corporate law is able to achieve a diversity of corporate forms, friendly to both the goals of efficiency and freedom.
As Frank Easterbrook (a Reagan-appointed appellate judge who succeeded Richard Posner) and Daniel Fischel have put it:

What is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined? Is there anything wrong with corporate charity? Should corporations try to maximize profit over the long run or the short run? Our response to such questions is: who cares? If the *New York Times* is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation’s tempered commitment to a profit objective. . . . Corporate ventures may select their preferred “constituencies.” (Easterbrook and Fischel 1991, 35–36)

In this view, the corporation is simply “an instrument of the stockholders who own it” (Friedman 1962, 135), and therefore ought to be left alone. A stricter and less permissive approach to the corporation, then, would privilege certain objectives for the corporation and would have the effect of undermining both the claim to a political conception of justice and the goal of an efficient allocation of corporate ownership rights.

And so, even if they consider the corporation as part of the basic structure, Rawlsians would have to endorse a familiar and minimalist corporate law, due to the role accorded to efficiency and the limits of a political conception of justice. Compare, for instance, the earlier quotation from Easterbrook and Fischel to Marc Cohen’s summary of a Rawlsian approach to business ethics:

As a result of pluralism, questions about fairness in organizations will not be settled in a theoretical way, [and] we cannot expect to generate consensus in practice or as a matter of philosophical argument. Instead, there will be a market of sorts in which persons will choose to affiliate with/work for certain organizations, or not. What Rawls refers to as the free use of human reason will produce any number of organizations built along competing models of fairness, and individuals are free to choose where/when to participate. (Cohen 2010, 572)

Although in the same article Cohen seems to ignore his own conclusions and tries to contend that Rawlsian political philosophy implies a stakeholder theory of business ethics, the passage here suggests that Rawls’s concern for both efficiency and pluralism forces him to leave the business corporation outside the domain of his principles of justice.

A more plausible strategy for Rawlsians concerned with social justice is to argue that certain patterns of corporate governance can erode the conditions of background justice over time, allowing for a legal intervention to correct this structural problem. Against critics like Robert Nozick (1974), who contended that all that is needed for a just social arrangement is a principle of just acquisition and just transaction, Rawls held that the end result of myriad just transactions can still be an unjust arrangement: he noted that “the invisible hand guides things in the wrong direction producing unjustified inequalities and restrictions on fair opportunity” (PL 267). The whole point of having a basic structure with a suited conception of justice is to effect justice through extra-voluntary means. Therefore, this kind of Rawlsian
might argue, even if we accept corporations to be voluntary organizations that not
part of the basic structure, the long-run effects of certain corporate governance
arrangements might still lead to unjust distributions of wealth and power, thereby
bringing the internal dynamics of a corporation within the purview of political
justice.

The difficulty here is that Rawls affirms a division of labor between the basic
structure’s securing of “background justice” and other laws that “govern the
transactions and agreements between individuals and associations,” among which
he includes the law of contracts (PL 268–69; see also JaF 54). Here it seems that
Rawls is still committed to the freedom of individual transaction and association
to the point that he wants to separate these laws from those ensuring justice. The
purpose of these laws is to secure an efficient and honest economy of transactions,
not to pursue egalitarian transfers that happen through the basic structure. Just as he
thinks the problem of exit should be solved through social equalization as opposed to
association-level norms, Rawls seems to think that the long-run unjust outcomes of
a particular organizational scheme are best solved through a society-wide distribu-
tion policy as opposed to organizational restructuring. In other words, the long-run
pervasive effects of meso-level institutions like the corporation are to be dealt with
through the basic structure and not at the meso-level itself.

WHERE DO WE GO FROM HERE?

Out of respect for the fact of pluralism, Rawls narrows his theory of justice in scope
(to the basic structure) and in content (to those principles that can be presented as
freestanding and intrinsic to an already-existing society). The result is that, when
approached with questions of corporate governance, Rawlsians are backed into
a corner. It seems difficult to imagine how the corporation could be seen as part
of the basic structure in any meaningful way, at least as Rawls uses the concept.
Furthermore, the political principles implied by our political culture do not seem to
allow us to extend the basic structure in any useful way so that the corporation could
legitimately become a part of it: the corporation becomes relegated to the realm of
the voluntary and associational. As a result, a thoroughgoing critique of corporate
governance cannot be accomplished through a theory expressed in “political” terms,
leading to what I referred to at the outset as my null hypothesis: Rawls’s theory is of
no use for the big normative questions of business ethics and corporate governance.
I conclude by suggesting various ways that other features of this same analysis
might, nevertheless, help us to clarify issues of corporate governance and business
ethics and their relationship to political philosophy.

Does Rawlsian theory endorse current corporate practice? There is, of course, a
response to my null hypothesis: “So what?” If Rawls’s theory of justice is unable
to criticize the status quo of corporate governance, then we may have good rea-
son to conclude that there is no problem with this status quo from the Rawlsian
perspective. This is what we might think of as the libertarian interpretation of
the foregoing analysis. Because corporations exist outside the basic structure, they
are free to do as they wish so long as they don’t violate the constraints imposed by
the law. Corporations are not subjects of a political conception of justice; rather, they are mostly the outcome of individuals freely contracting and associating with one another. (And we have contract and tort law, among other tools, to deal with contracting and associating that does not seem voluntary in the right ways.) According to this interpretation, Rawls endorses a contractual view of corporate governance, which sees the corporation in voluntarist terms. Eric Orts (2013, 10) calls this long-standing view of firms a “bottom-up” conception: “Although the law may provide the basic social structure and ‘rules of the road’ for the creation and operation of business firms, participants who invest their own wealth, time, labor, and knowledge in a business enterprise . . . see the firm as representing, derivatively, their own interest and expectations, rather than those of the sponsoring government.” If Rawls really does need to be committed to this view, it puts him in the company of Friedrich Hayek, whose “spontaneous order” of firms is a “bottom-up” conception with similar features (Orts 2013, 10–11). But one suspects that many Rawlsians keen to extend the theory to cover corporate governance would be instinctively inclined toward the rival long-standing conception of the firm as a “top-down” concession from, or creature of, the state.

The problem with the libertarian interpretation is that it forgets that Rawls’s argument works within the ideal circumstances of a well-ordered society. For Rawls, the idea that private arrangements and contracts are compatible with social conditions of justice comes with the assumption that there is a basic structure and that parties act from a sense of justice. That is, because Rawls is concerned with ideal theory or “realistic utopia” (Theory 7–8; JaF 65), the fact that something resembling a current practice or institutional setup could be justified within Rawls’s theory does not imply that it is justified here and now. Without large-scale redistribution of wealth, or equal access to educational and professional opportunities, there is no reason to think that various parties are, for example, always free to exit a particular corporation without great sacrifice. Without the requisite “background justice” being achieved by a basic structure in what Rawls calls a “well-ordered society,” we are not entitled to assume that current corporate arrangements reflect a just order simply because they have (theoretically) resulted from the free contracting and associating of citizens.

What is the relationship between business ethics and ideal theory? Unfortunately, Rawls does not offer much guidance on the use of his ideal theorizing—which presupposes a world in which “principles of justice … regulate a well-ordered society… [and everyone] is presumed to act justly and to do his part in upholding just institutions” (Theory 8)—for the justification of policies and practices when ideal conditions do not exist. This has a number of consequences. As I just noted, it means that a set of institutions that would be justified were there a functioning and just basic structure cannot be justified when such a structure is absent, as it is in our “non-ideal” world. It also means we are at a loss when it comes to envisioning a positive normative program or incremental institutional reform. As economic theory has shown us, the second-best option is often not simply the closest approximation to the ideal, but generally requires a different approach with
a different set of institutions and laws (Lipsey and Lancaster 1956). Joseph Heath offers the following explanation of the conceptual principle: if your first preference is to fly to Hawaii but you only have enough fuel to get 90% of the way there, your second-best option is not to go 90% of the way to Hawaii but to choose a different vacation destination entirely (Heath 2009). Indeed, Heath argues that as we move down the ladder of idealized abstraction we might need to alter our regulative principles and not merely our institutional designs. Heath (2014, 175–82) himself argues that Rawls is best understood as working within “ideal second-best theory,” in that he recognizes the practical trade-off between efficiency and equality, given well-grounded assumptions about human psychology, and adopts the difference principle as a response to this.

All this is to say that even if we affirm the Rawlsian emphasis on the basic structure we are not left with any good ideas of how to approach corporations in the absence of ideal conditions, nor can we simply assume that we ought to approximate these things as best we can. We need a new “vacation destination.” Not only, then, is the would-be defender of the corporate status quo without the theoretical resources needed to make his case, the would-be critic finds herself directed only toward the herculean task of trying to achieve a just basic structure, because there is no framework for understanding how the basic structure connects to meso-level institutions like the corporation.  

Is the corporation a blind spot for Rawls? This article began with the truism that a theory of business ethics and corporate governance must be grounded in principles that address themselves to a more general concern for justice in our political and social institutions. Yet, the critical poignancy of Rawls’s theory comes with the stipulation that the question of corporate governance gets left outside the scope of the political. This is a problem for Rawls on his own terms because of what we now appreciate as the great normative stakes in corporate governance and corporate law. Indeed, as mentioned earlier, Rawls seems to imply that some of these questions are so important that “the long-run prospects of a just constitutional regime may depend on them” (JaF 179). Rawls-the-citizen, if you will, seems to bemoan that Rawls-the-philosopher has painted himself into a corner on this question: he knows it is a crucial question, but decades of philosophical theory-building have left him in a position where he can say nothing philosophically or normatively interesting about it.

To understand what is at stake, we might simply point to the incredibly large profit margins and budgets that many large corporations possess, some dwarfing the economies of decently sized countries, and insist that they therefore ought to be the concern of both theories of the firm and theories of social justice (Orts 2013, 231–39). More specifically, we cannot ignore that over the past thirty years in the United States, the growth of inequality has occurred in tandem with outsized executive compensatory schemes. Jacob Hacker and Paul Pierson report that in 2004 over 40 percent of the top one-tenth of a percent of the American income bracket were non-financial executives, managers, and supervisors (including finance puts the number at close to 60 percent) (Hacker and Pierson 2010, 46). As they
No Rawlsian Corporate Governance

Note: “CEOs have been able to take advantage of a corporate governance system that allows them to drive up their own pay, creates ripe conditions for imbalanced bidding wars in which executives hold the cards, and prevents all but the most privileged insiders from understanding what is actually going on” (Hacker and Pierson 2010, 62). But, more directly to the point: this is not an accident of the system. Executive compensation began to “run away” in the 1980s as the direct result of the emphasis being placed on maximizing shareholder value as a key norm and mechanism in corporate governance (Fligstein 2010). Agency theorists in economics (e.g., Jensen and Murphy 1990) have argued that problems arising from the separation of ownership and control could be overcome by turning executives into shareholders, and the economic theory of the firm came to justify the sudden bulge in executive compensation (though most of that bulge was concealed from view since it was not included in the executives’ official salary, nor was it present on corporate books until recently) (Armour, Hansmann, and Kraakman 2009).

Executive compensation (Bebchuk and Fried 2006) is a relevant example because this type of practice shows just how connected a particular regime of corporate governance is to the larger social and economic trends with which Rawlsian justice is concerned. Moreover, given the semi-social nature of corporations, there is ample space for personal earnings and power to be hidden as corporate income, thereby sheltering it from the view of statutory bureaucracy and legal enforcement—in other words, from the very institutions in the basic structure that Rawlsians are counting on to ensure fairness and compliance in a well-ordered society. It is not clear that the legal coercive instruments of the basic structure are up to the task of addressing these social ills. Such issues are best dealt with by actually rethinking the ways in which corporations are governed: whose interests ought to be relevant for executive decision-making, and how should executives be monitored and motivated by corporate law? To address such questions within a political conception of justice, we would need the internal structure of corporations to be opened up and considered within the purview of the basic structure. But again, it is not clear that Rawlsians can make this move without divesting themselves of fundamentally important aspects of Rawls’s system.

It should be noted that Rawls himself would probably have been quite friendly to calls for corporate governance reform. Many of his writings acknowledge the potentially corrupting influence large concentrations of wealth and power could have on a democratic society (e.g., PL 449). Also, as mentioned above, Rawls noted his concern and sympathy for the idea of worker-owned enterprises. He was clearly troubled by problems of worker alienation and exploitation that modern corporate capitalism can facilitate. But our question is not whether Rawls personally would have advocated reform of corporate governance and corporate law. It is rather whether he can make an argument for such reforms within the architectonics of his theory, or whether his personal political opinions outpaced his philosophical system. Due to his emphasis on the political and his pragmatic approach to critically engaging with the politics of his day, Rawls left the corporation outside of his analysis. The result is a theory so focused on articulating the contours of a just basic structure that the very social ills it is challenging are let in just underneath its gaze.
How can we better reconcile business ethics and political philosophy? While I have attempted to show the problems with using Rawls as the normative platform for reforming corporate governance and business ethics, such a thesis need not be interpreted solely as a null hypothesis. The first thing to note is that it is primarily the Rawlsian emphasis and definition of the “political” that is spoiling the party. This emphasis prevents us from prescribing too much to the internal life of the business corporation because of its strictures against imposing comprehensive conceptions of the good on individuals; it is also what prevents us from interpreting the basic structure in such a way so as to include the corporation within its purview. As we have seen, Rawls’s deep respect for the inevitability of pluralism in a modern democracy leads him to define “the political” in terms of a moral realm that is free from metaphysical or comprehensive moral assumptions. This prevents a political conception of justice from seeing the corporation as fitting within the basic structure, or from applying stringent criteria to the internal governance structure of the corporation. Therefore, Rawlsian political prescriptions cannot be applied to corporate governance—in the form of, say, an application of the original position thought experiment or of the difference principle to the corporate contracting situation; or in prescribing worker democracy. Rawls gives us no reason to think that the principles of political life can apply to constructs like the corporation.

Liam Murphy (1999) criticizes Rawls for having a “dualist” approach to political philosophy. By this he means that Rawls sees a division of labor between those principles that deal with institutional design, on the one hand, and those that deal with personal conduct on the other. This is distinct from the monism of Murphy and Cohen, who argue that principles applying to institutions ought also to apply to personal conduct. It would seem that once we take the problem of pluralism seriously and seek to devise principles that could be the subject of an “overlapping consensus,” an agreement between parties who hold apparently different and irreconcilable normative commitments, we are immediately placed on dualist terrain. For the corporation, this means that we cannot simply derive our approach from overarching political principles. Instead, we should be thinking in terms of complementarity, principles that can be applied to the corporation and do not contradict (but are also not the same as) those applied to the coercive elements of the state.

What the problem of the corporation brings to light is that Murphy’s dualist language is misleading insofar as it implies that there are only two realms of normative principles. Instead of a duality, why not, in addition, include a concern with the particular nature of meso-level institutions (corporations, civic associations, NGOs, media organization, social-media platforms, and so on) and with how these institutions inhabit territory that both overlaps with, but is distinct from, the statutory and personal realms? We can imagine a continuum where on one end is the design of the primary political institutions and their regulative principles, characterized by their compulsory nature, and on the other is the conduct of individuals governed by their own comprehensive conceptions of the good in a tolerant, pluralistic society. Between those two, we find the meso-level organizations and institutions that fit imperfectly into either category; they are less mandatory than the coercive legal set of statutory institutions but less voluntary than the particular moral doctrines we might capriciously choose to endorse. If we wish to abide by the liberal toleration
of Rawlsian theory and still think normatively about the corporation, we need a conceptual understanding of which aspects of the corporation are properly subject to the principles applying to the coercive legal institutions, and which are subject to the maximal freedoms of personal conduct. A political liberal approach to business ethics and corporate governance must be derived from principles that apply specifically to those associations and organizations voluntarily entered into, yet are crucial for economic and social cooperation.

What if we don’t accept Rawls’s definition of the political? All of the above is what is required if one wishes to work within the Rawlsian liberal paradigm. However, as Ciepley has suggested and I have hinted at, it is possible that the corporation itself points to precisely how inadequate the assumptions of liberalism are. In this case, we need a more expansive and inclusive understanding of the “political” to deal with the problem of the corporation. Another way of putting this is that there are modes of political philosophy that are not Rawlsian, and that pursuing these might offer better possibilities for a normative political theory of the corporation. There are a variety options in this regard; I will describe one for the sake of illustration.

Instead of concerning ourselves with principles that could be agreed upon in a pluralistic society, we might see the crucial political project as the creation of institutions that allow for everyone to flourish to the greatest extent possible. Political institutions would exist precisely for the purpose of violating those comprehensive doctrines undermining the ability for humans to develop their capacities. One can see how this would alter the terrain of political philosophy. From this perspective, a theory of justice would be political in the sense of using statutory authority to promote a large-scale normative and emancipatory system of cooperation, regardless of the moral or religious doctrines held by citizens within that system of cooperation. This would certainly expand the scope of possible principles we can apply to business ethics and corporate governance. We might, for instance, wish to articulate a eudemonistic approach to the corporation, one that highlights how particular governance structures promote or hinder the flourishing and happiness of individuals within the various constituencies contracting with the firm. This idea underlies what Mill (1848/1987, 768–93) was thinking of in his vision of an economy dominated by worker-cooperatives, and is what Pateman’s (1970, 26–34) participatory account of work attempted to revive. There is certainly something appealing about this approach to business ethics and corporate governance, yet it seems to alter our background assumptions to such a degree that I’m not sure they would be palatable to most scholars engaged in business ethics, let alone to Rawls. For instance, it requires asserting a particular idea of the human good that ought to be enforced or promoted by the state, as well as a drastic rethinking of the role that the market’s price mechanism plays in disciplining and directing corporate action. These are legitimate and important questions for political philosophy, though it is worth noting that they may not contribute to the project of business ethics as much as they obviate it. A theory of business ethics that rejects the context in which businesses actually operate does not appear to be much of a theory of business ethics at all. Still, a political theory could address these problems, just not a Rawlsian political theory—Rawls’s own personal convictions notwithstanding.
The point is that either way we turn we must resist the impulse to reach for Rawls when dealing with the corporation. We can accept his liberal vision of political society, in which case we cannot apply his theory to the corporation, or we can apply the spirit of his critique to the corporation and, in so doing, reject his larger vision of a liberal plural society. Either way, a political approach to business ethics and corporate governance requires an even more complicated and nuanced theoretical apparatus than the one Rawls has given us.

ACKNOWLEDGEMENTS

I would like to thank the following people for helpful feedback on earlier drafts of this paper: Kiran Banerjee, Simone Chambers, Emily Hallock, Joseph Heath, Rasmus Karlsson, Chris Macdonald, Wayne Norman, Matthew Scherer, and participants in the 2013 Canadian Business Ethics Research Network PhD Workshop, particularly Dragana Bodruzic, Sean Geobey, Hilary Martin, Sareh Pouryousefi, and Hamish van der Ven.

NOTES

1. For ease, I use the following abbreviations when referencing Rawls: “Theory” (Rawls 1971); “PL” (Rawls 2005); “LoP” (Rawls 2001a) and “JaF” (Rawls 2001b). Note that I refer exclusively to the expanded edition of PL.

2. The idea of “public reason” would also be an example of this type of vocabulary, but I leave out a discussion of it for considerations of space.

3. Those familiar with Rawls’s work will note that I have given the components of Rawls’s theory in reverse chronological order, with the concepts developed in Political Liberalism presented before those developed in Theory of Justice.

4. The idea of a property-owning democracy is not made entirely clear by Rawls, which is frustrating concerning how verbose he is on other topics. In JaF, Rawls himself cites as instructive Richard Krouse and Michael McPherson (1988). For more insight, see Amit Ron’s (2008) conceptual history of “property-owning democracy.”

5. I have left out consideration of Rawls’s Law of Peoples, which is far less critical, and might be even be characterized as being apologist for the current international order.

6. I want to be clear that I am not claiming Rawls was comfortable with, or supported, a gendered family and division of labor; rather, his theory seems to require that we allow such families to exist (despite anyone’s personal objections).

7. “In developing a conception of justice for the basic structure . . . we do not assume that variation in numbers alone accounts for the appropriateness of different principles. . . . It is the distinct purposes and roles of the parts of the social structure, and how they fit together, that explains there being different principles for distinct kinds of subjects” (PL 262).

8. In order to understand how the lack of a basic structure affects the ethical obligations of business, see Blanc and Al-Amoudi 2013.

BIBLIOGRAPHY


