All Laws Are Created Equal, Some Just More Equal Than Others: How the Law Perpetuates Inequality

Jan Thomas Verberne

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago – Te Whare Wananga o Otago.

7 October 2016

Acknowledgements

To Michael Robertson, for your indispensable guidance and clarity throughout a project that seemed insurmountable at times.

To Paul Enright, for introducing me to critical thinking as best you could within the confines of the public school system.

To my friends, flatmates and colleagues, for making law school such a pleasure and providing a much needed counter-balance.

To my family, for their unconditional love and support.

To Laura, for reasons too ineffable to name.

Table of Contents

"In our age there is no such thing as 'keeping out of politics.' All issues are political issues…"

– George Orwell

Introduction

Levels of wealth and income inequality have reached dizzying heights. The wealthiest one percent has now accumulated more wealth than the rest of the world, while it takes only 62 of the wealthiest individuals to exceed the wealth of the poorest 3.6 billion.[1] Though the media spotlight has been shone on the issue of wealth and income inequality in recent years, it is a problem that has resolutely persisted.[2] The issue's importance stems not only from its patent unfairness, but also its pernicious consequences for virtually every aspect of our society.[3] Inequality has a detrimental effect on mental and physical health, drug use, obesity, levels of education, and levels of crime within society.[4] These negative effects are not confined to the poor, but rather pervade all of society, reaching those at the top of the wealth and income spectrum who otherwise seem to benefit from high levels of inequality.[5] It is thus unsurprising that Barack Obama has described income inequality as "the defining challenge of our time."[6] This dissertation seeks to highlight the role the law plays in creating, maintaining and perpetuating wealth and income inequality.

Chapter I illustrates that the ground rules that shape our society play a vital, though often overlooked, role in the distribution of wealth and income. This chapter examines the source of these ground rules, highlighting that they are

---

[1] Deborah Hardoon, Sophia Ayele and Ricardo Fuentes-Nieva *An Economy for the 1%: How Privilege and Power in the Economy Drive Extreme Inequality and How This Can Be Stopped* (Oxfam GB, Oxford, January 2016).

[2] Branko Milanovic, an economist for the World Bank, found that in the last 30 years the top one percent saw their income increase by 60% while those in the bottom five percent saw absolutely no change: Joseph Stiglitz *The Great Divide: Unequal Societies and What We Can Do About Them* (W.W. Norton & Company, New York, 2015) at 118-119.

[3] Robert Creamer "It's Economic Inequality Stupid — What to Do About the Biggest Crisis Facing America" (14 November 2013) <www.huffingtonpost.com>.

[4] Richard Wilkinson and Kate Pickett *The Spirit Level: Why Equality is Better for Everyone* (Penguin Books, London, 2010) at 49 – 145.

[5] at 173 – 184.

[6] Philip J Victor "Obama calls income inequality 'defining challenge of our time'" (4 December 2013) <www.america.aljazeera.com>

not naturally occurring and inevitable but rather created by the state and charged with contestable political decisions.

Chapter II centres on the free market. This chapter seeks to demonstrate that the free market is not the wholly private, preregulatory realm that liberal ideology professes it to be, but rather exists as the product of a host of ground rule decisions made by government. First, a consideration of the development of the liberal free market ideology will be undertaken. This will be followed by an attack of the ideology, employing Robert Lee Hale's texts to demonstrate that the public/private distinction that lies at the heart of liberal ideology is inherently flawed and that the state has a fundamental role to play in the free market by creating its ground rules. This will provide the basis for an examination of specific ground rules. Selected ground rules pertaining to property, contract and corporations will be examined in order to illustrate two important points. The first is that there are features of the free market that appear to be both neutral and natural but are in fact the product of contestable political decisions. The second is that the contestable nature of these decisions renders them amenable to being shaped by dominant groups in order to perpetuate their dominance.

Chapter III explores how the prevailing view of the free market as a private realm, free from state influence, is ideological in the sense that it acts to benefit dominant groups with society.

This paper does not constitute a panacea for inequality. However, it does endeavour to provide insight into the role that the law plays in both creating, maintaining and perpetuating wealth and income inequality.

Chapter I Rules of the Game

In light of the recent public attention that wealth and income inequality has attracted, economists, legal academics and political commentators have ventured to analyse its causes and effects. Many of the proffered causes have painted wealth and income inequality as an issue that has a relatively narrow cause, ranging from financial sector corruption,[7] to the absence of an effective tax system,[8] to globalisation.[9] However, the most compelling account of wealth and income inequality centres on the frequently overlooked ground rule policy decisions made by government that shape society.[10] The following section will traverse this argument, providing the foundation for a consideration of specific ground rule decisions.

A *The Importance and Ubiquity of Ground Rules*

Though ground rules are often so overlooked and unconsciously accepted that they appear invisible, they configure every aspect of our society. They create and mould the institutions we rely upon, constrain the choices that we have available to us, and are responsible for the distribution of wealth, power and knowledge. While ground rules such as the minimum wage and the existence of an income tax have an obvious impact on the distribution of wealth and income in society, such laws are only the tip of the figurative iceberg. Operating below the surface is an entire network of ground rules determining the design of society, "including such basic rules as that

---

[7] Jong-sung You and Sanjeev Khagram "A Comparative Study of Inequality and Corruption" (2005) 70 Am Soc Rev 136 at 154: "Corruption also is likely to… accentuate existing inequalities. Countries may thus be trapped in vicious circles of inequality and corruption…"

[8] Thomas Picketty *Capital in the Twenty-First Century* (Harvard University Press, Cambridge, 2014) at 493 – 540. See also Daniel Altman "To Reduce Inequality, Tax Wealth, Not Income" (12 November 2012) New York Times <www.nytimes.com>, and OECD "Income inequality and growth: The role of taxes and transfers" (January 2012) OECD <www.oecd.org>.

[9] Era Dabla-Norris and others "Causes and Consequences of Income Inequality: A Global Perspective" (1 June 2015) International Monetary Fund <www.imf.org>.

[10] See Robert Reich *Saving Capitalism: For the Many, Not the Few* (Alfred A. Knopf, New York, 2015), Stiglitz, above n 2, Joseph Stiglitz *Rewriting the Rules of the American Economy: An Agenda for Growth and Shared Prosperity* (W.W. Norton & Company, New York, 2016), Creamer, above n 3, and Shi-Ling Hsu "The Rise and Rise of the One Percent: Considering Legal Causes of Wealth Inequality" (2015) 64 Emory LJ Online 2043.

corporations can "own" factories, that no one "owns" the ocean, [and] that you have no legal obligation to help a starving stranger."[11] These often inconspicuous and foundational ground rules can have momentous ramifications with respect to the distribution of wealth and income within a society.

A common comparison used to illustrate the importance of ground rule decisions is to draw an analogy with the rules of a game.[12] For example, when demonstrating the importance of the ground rule decisions within the bargaining process, Duncan Kennedy did so with reference to the rules of basketball.[13] In making this comparison, Kennedy highlighted that even rules that apply to all parties equally still have the potential to create inequality, as they can act to benefit some groups over others. In basketball, there are rules such as the height of the hoop and the length of the court that apply equally to all players but have the effect of benefiting players that are tall and fast.[14] Similarly, when the state decides to endow parties to a contract with the freedom to enter into any bargain that they wish, the law applies equally to all parties yet has the effect of benefiting those who are wealthy and have bargaining power. Kennedy's point is that if we were to change rules such as the height of the hoop, the length of the court, or the amount freedom afforded to parties with substantial bargaining power, we could ultimately change the outcome of the game.

Economists and political commentators such as Joseph Stiglitz and Robert Reich have recently considered the creation and development of these ground rules.[15] Their emphasis is that ground rules are the result of contestable

[11] Duncan Kennedy "The Stakes of Law, or Hale and Foucault!" (1991) 15 Legal Stud F 327 at 329.
[12] at 328. See also Reich above n 10, at 5.
[13] Kennedy, above n 11, at 328.
[14] at 328.
[15] Stiglitz, above n 10. See also Reich, above n 10.

political decisions rather than being "natural outcomes of impersonal market forces."[16] Applied to the wider issue of wealth and income inequality, Joseph Stiglitz concisely summarised the core message, asserting that:[17]

> [The] economy is not out of balance because of the natural laws of economics. Today's inequality is not the result of the inevitable evolution of capitalism. Instead, the rules that govern the economy got us here.

Stiglitz's assertion accounts not only for ground rules that have an obvious and explicit impact on the distribution of wealth, but also rules of the market that determine what has been termed the "predistribution" of wealth.[18] Predistribution of wealth concerns the allocation of resources within society prior to any redistribution by way of tax. These are predominantly the rules pertaining to contracts,[19] property[20] and corporations,[21] but also extend to the rules that regulate labour[22] and govern bankruptcy.[23] One helpful example of how unconsciously these ground rules can be accepted is to consider the ground rules necessary in order for a simple transaction, such as a consumer purchasing goods or services from a corporation, to occur. To begin with, in order to enter into a contract with the consumer, the corporation has to have some form of legal personality. As such, a legal fiction was constructed that endows corporations with the status of legal persons that have rights and responsibilities. Also, numerous decisions must be made pertaining to the contract itself. For example, as Duncan Kennedy noted above, you cannot trade the sea but you can trade the copyright to a piece of music.[24] The delineation of what is and what is not able to be traded is not naturally

---

[16] Reich, above n 10, at 9 – 10.
[17] Stiglitz, above n 10, at x.
[18] This is an idea discussed by Robert Reich, above n 10, at xiv.
[19] at 48 – 59.
[20] at 16 – 29.
[21] at 29 – 48.
[22] S. Michael Link "Labour Law and the New Inequality" (2009) 59 UNBLJ 14.
[23] Joseph E. Stiglitz *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Norton & Company, New York, 2012) at 234 – 259.
[24] Kennedy, above n 11, at 328.

occurring, but rather emerged as a result of numerous political decisions. Finally, it is pertinent that the corporation is in a position where it can withhold its property unless the consumer meets its demands. A complex set of ground rules determining what constitutes property, and the rights that the property owner is endowed with, have been created in order to protect certain interests of property owners. Many of these rules escape critical analysis because they exist behind a veil of inevitability. Rather than being viewed as inherently contestable decisions, they are so deeply hidden in the background that they are often considered to be naturally occurring. However, it is important to remain conscious of the equivocal nature of these rules. As former Secretary of Labour under President Bill Clinton and now political commentator, Robert Reich, stated: "Such rules do not exist in nature. They must be decided upon, one way or another, by human beings."[25] By recognising the contestable nature of ground rules, we can look behind the veil and critically assess the content of these rules.

The importance of remaining cognisant of the contestable nature of these ground rule choices stems from their ability to be shaped by dominant groups in such a way that entrenches and perpetuates their dominance. To attribute an air of inevitability to these ground rules, rather than recognising their inherently contestable nature, provides dominant groups with the camouflage to shape ground rules for personal gain.

The importance of ground rule choices to levels of wealth and income inequality is of such great importance that Kennedy, when considering a cure for inequality, stated:[26]

> I think it would be possible to make "revolutionary" changes in the distribution of income, wealth, power and knowledge between social groups by changing only the ground rules (without using, say, the tax system) …

[25] Reich, above n 10, at xiv.
[26] Kennedy, above n 11, at 347.

The following section will consider the pervasiveness of contestable ground rule decisions within the free market. This will illustrate that the portrayal of the free market as a natural, neutral and private realm is a tautology. Rather, the market is simply the result of a collection of ground rule decisions. As such, these rules are amenable to being shaped by powerful groups in order to perpetuate their dominance.

Chapter II The Free Market

Free market ideology, though inherently contestable, has quietly cemented its dominance in society to the extent that the superiority of market forces is now presumed.[27] Free market proponents rest their arguments on the assumption that a private market, free from unnecessary government intervention, is possible. Within the market, individuals are encouraged to pursue their own self-interest in order to maximise the utility and efficiency of society.

The first part of this chapter will briefly examine the development of the free market ideology. It is hoped that this will provide context for, and insight into, the free market proponents' rejection of government participation within the market. The second part of this chapter will be a concerted attack on this position, proposing that the free market is in fact the child of a political decision making process, and therefore the state is deeply and inherently embedded within the fabric of the free market. By maintaining the façade of a public/private distinction, the role the state plays in creating the ground rules of the market is overlooked, and dominant groups in society are able to use the ostensible inevitability of the free market to their benefit. This criticism will draw upon the work of early critics such as Robert Lee Hale, as well as the modern critics involved in the Critical Legal Studies movement.

A *The Rise of Free Market Ideology*

The origin of free market ideology can be traced back to a single conversation. In 1681, the French Controller General of Finance, Jean-Baptiste Colbert, met with prominent capitalists to ask what he could do to assist them in their business endeavours. Their response was simple, "laissez nous faire", leave us alone.[28]

---

[27] Paddy Ireland "Property, Private Government, and the Myth of Deregulation" in Sarah Worthington *Commercial Law and Commercial Practice* (Hart Publishing, Oregon, 2003) 85 at 86.
[28] Gavin Kennedy *Adam Smith: A Moral Philosopher and His Political Economy* (Palgrave Macmillan, New York, 2008) at 248.

In the subsequent years, laissez faire developed into a doctrine that sought to restrict the function of government to its narrowest possible limits. Central to this ideology was a trust in the immutability of the law of economics, the efficacy of self-interest, the merits of competition, and the inefficiency of government.[29] Rather than government, free competition was postulated as the great regulator of economic affairs, and government was advised not to interfere.[30] While proponents of laissez faire argued for minimal government intervention within the economy, it was widely accepted that the government had a duty to enforce contracts and ensure civil order.[31]

It was in the wake of this governing ideology that Adam Smith wrote his hallowed magnum opus, *The Wealth of Nations.*[32] Widely viewed as a foundational text for classical economics, Smith introduced the idea of "the invisible hand".[33] This metaphor has come to embody the idea that individuals pursuing their personal self-interest in a free market will transact with each other on terms that maximise their utility. When they do so, the natural forces of supply and demand are able to operate, and resources will be allocated, as if by an invisible hand, to where they are most efficiently positioned. The necessary corollary is that any interference by the state into the free market would distort the effects of these natural forces to the detriment of society as a whole. In the decades to come, eminent economists such as David Ricardo and John Stuart Mill adopted many of these ideas,

[29] Sidney Fine *Laissez Faire and the General-Welfare State* (University of Michigan Press, Michigan, 1956) at 52.
[30] at 9.
[31] Jacob Viner "The Intellectual History of Laissez Faire" (1960) 3 J Law & Econ 45 at 45.
[32] Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (W. Strahan and T. Cadell, London, 1776).
[33] While the exact phrase "the invisible hand" was only included once in the *The Wealth of Nations,* in subsequent years it has come to encompass Smith's idea that individuals acting independently in a free market will result in direct benefits to the rest of society as resources are allocated efficiently.

helping to cement the prominence and perceived splendour of the free market ideology.[34]

It was on the shoulders of these giants that renowned academics such as John Bates Clark made their ascent to prominence. Clark's most celebrated contribution was his theory of marginal productivity of labour.[35] Clark proposed that in a free market, unrestrained by the imposition of state regulation, the price of labour (wages) would equal the additional production that could be attributed to that employee. In other words, any contribution that labour made to the production process would be mirrored by the wage that it attracted. This could only occur in accordance with the natural laws of the free market.[36] As a pure neoclassical economist, Clark believed that "if nothing suppresses competition, progress will continue forever."[37]

The largely uncontended assumption that underpins the research of free market economists such as Smith, Mill, Ricardo and Clark is the idea that a clear and natural distinction between the private realm and public realm exists. To these economists, the market is quintessentially private.[38] Conversely, government represents the antithesis of the market. Inherently public, government intervention is regarded as skewing incentives, decreasing efficiency and distorting resource allocation.[39] In holding this view, free market proponents subscribe to the classical liberal account of private property.

---

[34] See David Ricardo *On the Principles of Political Economy and Taxation* (John Murray, London, 1817) and John Stuart Mill *Principles of Political Economy* (John Murray, London, 1848).
[35] John Bates Clark *The Distribution of Wealth, A Theory of Wages, Interest and Profits* (Macmillan, New York, 1899).
[36] at 3.
[37] John Bates Clark *Essentials of Economic Theory, As Applied to Modern Problems of Industry and Public Policy* (Macmillan, New York, 1907) at 374.
[38] Paul Starr "The Meaning of Privatization" (1988) 6 Yale L & Pol'y Rev 6 at 8.
[39] Roger E. Backhouse "The Rise of Free Market Economics: Economists and the Role of the State Since 1970" (2005) 37 History of Political Economy 355 at 357 – 360.

Resting on the work of philosophers such as John Locke and Jeremy Bentham, the classical liberal account of property provides multiple justifications for the protection of private property. Under the Lockean rights-based conception of private property, a property right emerges when an individual mixes their labour with property that is otherwise held in common.[40] Because these property rights are not dependant upon the state for their existence, they are thought to exist in "the state of nature", which is closely tied to the ideas of freedom and independence of the individual.[41] By grounding the theory firmly on the idea of protection of private rights, consequentialist considerations are essentially disregarded. The state's legitimate role is simply to protect the private rights of individuals, rather than to interfere with them in any way. In this respect, private property is lodged firmly in the private realm, away from the 'tyrannical' power of the state.

Liberal utilitarian theory is also a proponent of private property. Liberal utilitarians maintain that in order to maximise utility, private property rights are necessary to provide incentives for people to use their assets productively.[42] As such, the state is to avoid interference with private property rights so as to allow individuals to use their private property without the concern that the state will alter their property rights and, therefore, alter their incentives. Unlike the Lockean, rights-based justification, liberal utilitarians are concerned with the consequences of private property ownership. Their consequentialist justification is that societal utility will be maximised by allowing individuals to use private property in a way that maximises their personal utility. The common thread running through both of these liberal ideologies is that the state exists in the public realm, where it ought to refrain from interfering with property rights, while private property

---

[40] See John Locke *Second Treatise on Government* (Cambridge University Press, Cambridge, 1967) cited in Michael Robertson "Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Portland, 1999) at 241.

[41] Alex Tuckness "Locke's Political Philosophy" in Edward N. Zalta (ed) *The Stanford Encycopedia of Philosophy* (Spring ed, 2016, online ed).

[42] Robertson, above n 40, at 241.

exists in the private realm where its owner ought to be endowed with the freedom to determine how their property is to be used.

This distinction between public and private, and the need to retain a healthy distance between the two, was championed by two of the most influential economists of the twentieth century, Milton Friedman and Friedrich Hayek. Both Nobel laureates in economics,[43] Friedman and Hayek were unapologetic in their trust of free market forces and disdain for state intervention. However, far from limiting their ideas to the pages of academic journals, both economists wielded considerable influence in the political arena. Friedrich Hayek attracted admiration from Margaret Thatcher[44] and Ronald Reagan,[45] with both proclaiming that his work influenced their free market economic philosophy.[46] Similarly, Milton Friedman is regarded as having had a considerable influence on Margaret Thatcher, as well as being notoriously implicated in Chile's violent transition from a socialist to free market economy.[47]

It was during this period that the free market ideology started to take a stranglehold. As these ideas were assimilated into everyday discourse, they had the effect of inducing a belief that a social arrangement consistent with these ideas was just, natural, inevitable and legitimate.[48] The free market replaced the government as the key institution of society, and trust in its

---

[43] Friedrich Hayek was awarded the Nobel prize in 1974. Milton Friedman was awarded the Nobel prize in 1976.

[44] For an account of Hayek's relationship with Thatcher, see Alan Ebenstein *Friedrich Hayek: A Biography* (Palgrave MacMillan and Houndsmill, Hampshire, 2001) at 291 – 297.

[45] Ronald Reagan considered Hayek to be one of the greatest influences on his philosophy, and invited him to dinner at the White House during his Presidency. See Martin Anderson *Revolution* (Harcourt Brace Jovanovich, New York, 1988) at 164.

[46] Anderson at 164. See also John Ranelagh *Thatcher's People: An Insider's Account of the Politics, the Power, and the Personalities* (London, Fontana, 1992) at ix.

[47] Naomi Klein *The Shock Doctrine: The Rise of Disaster Capitalism* (Picador, New York, 2007) at 73 – 97.

[48] Karl E. Klare "The Public/Private Distinction in Labor Law" (1982) 130 U Pa L Rev 1358, cited in Nikolas Rose "Beyond the Public/Private Division: Law, Power and the Family" (1987) 14 J L & Soc'y 61 at 63.

ability to allocate resources and protect individual liberty arose with unwavering confidence.[49] The public/private distinction, synonymous with the state/market distinction, became so deeply baked into the conception of society that it now possesses an almost unquestioned authority.[50] The next section of this paper seeks to confront the idea that a distinction can be drawn between the state/market or public/private realms, unpacking the private realm in order to illustrate that the ground rules that create and shape the market are in fact contestable political decisions for which the state is necessarily responsible.

B *The Attack*

The idea that the free market exists in a private realm, free from the influence of the state is central to the free market ideology. The public/private dichotomy that lies at the heart of the free market is necessary in order to maintain a distinction between what occurs in the free market, and the regulation of that free market that occurs at the hands of the state. However, while the public/private distinction currently prevails, it has not escaped criticism.[51] Rather, the apocryphal nature of the distinction has been the target of concerted attacks by legal realists and, more recently, the Critical Legal Studies movement. Leading the vanguard was Robert Lee Hale. A legal realist with close intellectual ties to institutional economists,[52] Hale sought to illustrate that there was no functional content to the distinction between public and private action. Though his work fell into obscurity for a period

[49] Kenneth R. Hoover "The Rise of Conservative Capitalism: Ideological Tensions within the Reagan and Thatcher Government" (1987) 29 Comp Stud Soc'y & Hist 245.
[50] For a recent criticism of the distinction see Reich, above n 10.
[51] See Barbara H. Fried *The Progressive Assault on Laissez Faire, Robert Hale and the First Law and Economics Movement* (Harvard University Press, Cambridge, 1998), Cass R. Sunstein *Free Markets and Social Justice* (Oxford University Press, New York, 1997), Kennedy, above n 11, Ian Ayres "Discrediting the Free Market" (1999) 66 U Chi L Rev 273, Michael Robertson "Reconceiving Private Property" (1997) 24 J L & Soc'y 465, Ireland, above n 27, Sol Picciotto "Mediating Contestations of Private, Public and Property Rights in Corporate Capitalism" (2013) 3 Onati Socio-Legal Series 622, Warren J. Samuels "The Economy as a System of Power and Legal Bases: The Legal Economics of Robert Lee Hale" (1973) 27 U Miami L Rev 261, and Joseph William Singer "The Reliance Interest in Property" (1988) 40 Stan L Rev 611.
[52] Fried, at 10.

after his retirement in 1949,[53] it was revived in the 1970s and in the years to follow would attract high praise, being considered by some as "one of the cornerstones of American critical legal scholarship".[54]

This section will endeavour to rally the arguments of the critical academics of the last century into a comprehensive assault on the idea that the free market exists in a private, pre-regulatory realm free from state influence. First, the insights of Robert Lee Hale will be employed to illustrate that coercion is ubiquitous in even the purest instances of a free market. Then, the ground rules and necessary ingredients of the free market will be considered. By critically assessing the nature of these features, it is hoped that the inextricable involvement of the state in the free market will be evident.

C *The Absence of Freedom within the Free Market*

The relationship between liberty, freedom and private property rights is particularly influential in both legal academia and the field of economics. Taken to its outer limits, Richard Epstein has argued that property owners have a constitutional right under the Fifth Amendment to compensation any time government regulation diminishes the value of their property.[55] Robert Lee Hale took aim at this idea that the free market represented a private, pre-regulatory realm, arguing that, properly understood, property was a form of "private governing power" delegated to individuals by the state. [56]

In order to understand Hale's criticism, it is important to first understand his concept of coercion, which he considered to be inescapable in the private sphere in a form indistinguishable in nature and origin from governmental

[53] Ilana Waxman "Hale's Legacy: Why Private Property is Not a Synonym for Liberty" (2005) 57 Hastings L J 1009 at 1011.
[54] Neil Duxbury "Robert Hale and the Economy of Legal Force" (1990) 53 MLR 421 at 422.
[55] Richard A. Epstein *Takings, Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge, 1985) cited in Waxman, above n 53, at 1009.
[56] See Robert Lee Hale "Bargaining, Duress and Economic Liberty" (1943) 43 Colum L Rev 603 and Robert Lee Hale "Coercion and Distribution in a Supposedly Non Coercive State" (1923) 38 Political Science Quarterly 470.

coercion.[57] To Hale, coercion operated as a background constraint, limiting the socially available options from which an individual might choose.[58] The most important of these background constraints, he argued, were derived from property rights.[59] Property rights provide the holder of those rights with the ability to exclude others from the use of their property. This is not an issue for those who own enough property to consume without having to sacrifice their liberty in order to do so. However, for most people, in order to live they must induce the owners of things which they need to permit them to use them.[60] As such, property owners wield a considerable amount of coercive power through their ability to exclude others from use or access to their property unless their terms are agreed to. "In short", concluded Hale: [61]

> if he be not a property owner, the law which forbids him to produce with any of the existing equipment, and the law which forbids him to eat any of the existing food, will be lifted *only* in case he works for an employer. It is the law of property which coerces people into working for factory owners …

However, coercion is not exclusively exercised by the property owners. Rather, Hale noted that the structure is mutually coercive, as the power of one bargaining party is almost always met with a countervailing power by the other. In the context of the factory owner, a countervailing power is held by the customers and labourers of the factory. In both instances, the customer and labourer are able to withhold their money and labour respectively unless a satisfactory price or wage is offered by the factory owner.

Against this background, Hale stated that the coercive power afforded to property owners was in fact delegated and guaranteed by the government because private property rights allow the owner of that property to exclude

---

[57] Fried, above n 51, at 46.
[58] at 48.
[59] Ireland, above n 27, at 91.
[60] See Hale "Bargaining, Duress and Economic Liberty", above n 56.
[61] Hale "Coercion and Distribution in a Supposedly Non Coercive State", above n 56, at 473.

others with the knowledge that "the government will back him up with force".[62] If private property was not recognised and protected by the state, property owners would be left to protect their property with physical force, rather than with the state-delegated force of law. Therefore, the pejorative accusation of coercion that is often levelled at governments when they regulate the free market ignores the fact that coercion is already alive and well in the private realm. In reality, the regulation is just redistributing the coercive power between bargaining parties, rather than introducing it for the first time.

Hale's ideas, though far from orthodox, are still alive and well in contemporary discourse. For example, in a critical assault on the failures of corporate law, Kent Greenfield wrote:[63]

> Contract and property are no more neutral, private, or prelegal than statutory law. After all, if contract law were entirely prelegal, a party to the contract in which the other party did not live up to her end of the bargain would have no recourse in court. Instead, we as a political society have chosen to allow the government to have some hand in the underlying framework of contract law by providing suits for breach of contract and allowing parties to ask the state to force execution of their private agreements.

Greenfield's account is correct in that it highlights the importance of state influence within the realm of contract law, especially with respect to the enforcement of contracts. However, his statement overlooks Hale's more fundamental assertion, that parties would have no reason to contract in the first place unless state-enforced property rights existed that required them to obtain the consent of the owner in order to get access to the property that they wanted.[64]

---

[62] Hale "Coercion and Distribution in a Supposedly Non Coercive State", above n 56, at 489.
[63] Kent Greenfield *The Failure of Corporate Law, Fundamental Flaws and Progressive Possibilities* (University of Chicago Press, Chicago, 2006) at 34.
[64] Ireland, above n 27, at 91 – 92.

Hale's insights are important for a number of reasons. The first is that he makes a persuasive argument for the ubiquity of coercion, and therefore lack of freedom, within the free market. Furthermore, he highlights that this coercion is ultimately due to state action, as all coercive power is delegated by the state. Finally, when these insights are considered together, it is evident that state coercion is unavoidable within the free market, as the state is necessarily responsible for ground rules that create and shape the free market such as the existence of private property and the corollary need for contract. These legal ground rules that structure bargains within the free market play a causal role in the distribution of wealth and income within a capitalist society.[65] As such, when considering legal causes of wealth and income inequality within a society, it would be erroneous to proceed without first examining the ground rules that shape the market. The next section of this paper will highlight the inherently contestable and political nature of the decisions that are required in shaping the ground rules of the free market.

[65] Kennedy, above n 11, at 332.

D *Ground Rules of the Free Market*

In order to have a free market, a number of fundamental ground rules must first be established. These are the aforementioned 'rules of the game'.[66] Every participant in the market is to act in accordance with these rules, though often they lie so deep, and seem so intuitive, that their constructed and contestable nature is overlooked. For example, a free market could not exist without a conception of property, laws of contract, and a determination of market participants. However, within each of these sets of rules, contestable political decisions are necessary. These decisions have the effect of privileging the interests of some groups over the interests of others.[67] As Joseph William Singer noted: [68]

> Property and contract rights are not self-defining. In allocating them, we must often choose between competing principles: between title and possession, between contract and reliance, between freedom and security, between voluntariness and duress.

This section will first consider the political nature of these fundamental decisions, using laws of property, contract and corporations, to illustrate how this plays out in practice. This will be followed by a consideration of how the current failure to recognise the ubiquity of the state in the private realm is ideological in the sense that it acts to benefit a dominant group in a hidden manner.

---

[66] Duncan Kennedy made this argument with reference to basketball in Kennedy, above n 11, at 328.

[67] Joseph William Singer "Legal Realism Now" (1988) 76 Cal L Rev 465 at 482.

[68] Singer, above n 51, at 647.

E *A Conception of Property*

The conception of what is and what is not property is a fundamental ground rule in any market economy. By endowing something with property status, the array of laws protecting private property is triggered. The owner is delegated the right to possess, sell, rent, or exclude others from use of that property to the detriment of non-owners. It is intuitive to understand that a house, car and land are property because each of these examples falls squarely within the traditional property paradigm.[69] Interestingly, we now also consider shares in a company, an idea for a novel invention and credits for carbon emissions as property. These latter examples fall outside the bounds of what we have traditionally perceived as property, however they have ultimately succeeded in achieving property status.[70] The contestable nature of the decision to endow each of these things with property status must not be overlooked.

First, this section will consider the effect of deciding whether or not to characterise a resource as property. The development of the law pertaining to intellectual property will be used as an illustration. Then, a proposal for an alternative approach to property will be assessed to demonstrate the potential for reconceiving our current ideas pertaining to private property.

---

[69] Paradigms shape the conceptual framework through which we view property. For discussion of this idea see Mark Rose "Copyright and its Metaphors" (2002) 50 UCLA L Rev 1 and Eduardo M. Peñalver "Property Metaphors and Kelo v. New London: Two Views of the Castle" (2006) 74 Fordham L Rev 2971.

[70] For an elaboration on the history of the property status of shares, see Paddy Ireland "Capitalism Without the Capitalist: the Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality" (1996) 17 Journal of Legal History 41. For an elaboration on the history of intellectual property law, see Toshiko Takenaka *Intellectual Property in Common Law and Civil Law* (Edward Elgar Publishing, Cheltenham (England), 2013) at 6 – 15.

1 *Endowing Property Status*

The policy decisions required when characterising a resource as property or otherwise have been considered by numerous academics.[71] In the words of Sarah Worthington: [72]

> [T]he classification of resources as property that can be owned by individuals is a matter of choice, not inevitability. The law's changing perception of what is property and what is not reflects the contemporary balance between commercial and economic demands, and social and moral constraints that society is prepared to condone.

As such, policy decisions are pervasive in this area of law. In making these decisions, policymakers are necessarily responsible for policy considerations such as the effect on incentives to innovate, shifting wealth, income and power distributions, creating scarcity where it may not otherwise exist, alongside a host of other factors that will have considerable implications on society generally. For example, while the classification of something as property can be granted in order to promote positive ends, it can just as easily be taken away to discourage negative conduct. One of the most explicit illustrations of this idea transpired during the Prohibition era in the United States. During that period, legislators specified that no property rights were to exist in alcoholic beverages.[73] The policy behind this law was explicit; the legislature sought to discourage transactions for the sale and purchase of alcohol.

---

[71] See Laura Underkuffler, The Idea of Property: Its Meaning and Power (Oxford University Press, Oxford, 2003), Arnold S. Weinrib "Information and Property" (1988) 38 U Toronto LJ 117, Sarah Worthington Equity and Property: Fact, Fantasy and Morals (University of Queensland Press, Queensland, 2009) cited in Lance Green "Does the Definition of "Property" in the Crimes Act 1961 Include Electronically Stored Data? The Computer Says "No"" (LLB (Hons) Dissertation, University of Otago, 2015) at 9, and C.B. McPherson (ed) *Property: Mainstream and Critical Positions* (University of Toronto Press, Toronto, 1978).

[72] Worthington, at 8 – 9.

[73] Weinrib, above n 71, at 137 – 139.

It is important to appreciate that the ground rule decision governing what is and what is not property has an unavoidable shaping effect on the market. The following section will illustrate that the decision of whether or not to endow a resource with property status has an impact on wealth and income inequality. To demonstrate, the property status afforded to intellectual property will be considered alongside the lack of property status afforded to jobs.

2 *Intellectual Property*

The development of intellectual property has been well traversed by legal historians.[74] Intellectual property is a resource that has a significant and unavoidable impact on all members of society. Its classification as property shapes how we view and treat novel ideas for inventions, music, films and art. This section will consider the importance of the ground rule decisions pertaining to intellectual property by examining how modern developments have transformed the marketplace of ideas as well as our conception of property. Though intellectual property has a broad definition which includes patents and trademarks, this section will focus solely on copyright.

The Statute of Anne,[75] enacted in 1710 by the Parliament of Great Britain, is often regarded as the starting point for the modern history of copyright law.[76] Before 1710, publishers would simply make a one-off payment to authors for their work. Publishers were then endowed with full rights in the printed work and the author's rights expired. The Statute of Anne was revolutionary as it prescribed a copyright term of 14 years to the author, with a right to renew for a further 14 years if the author was still alive when the first 14 year

---

[74] See Mark Rose *Authors and Owners: The Invention of Copyright* (Harvard University Press, Cambridge, 1993), L. Ray Patterson and Stanley W. Lindberg *The Nature of Copyright: A Law of Users' Rights* (The University of Georgia Press, Athens, 1991) at 19 – 102, Susan Sell and Christopher May "Moments in Law: Contestation and Settlement in the History of Intellectual Property" (2001) 8 Review of International Political Economy 467, and Isabella Alexander *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing, Oxford, 2010).

[75] The official title of the legislation is the Copyright Act (UK) 1710.

[76] Alexander, at 17.

period expired. Vesting an author with the copyright to their written work allowed them to bargain for better terms with their publishers. However, while the Statute of Anne is best remembered for its protection of authors, it is its effect once the period of protection had expired that is most remarkable. Before 1710, if a publisher purchased a piece of work, they would obtain rights in perpetuity, much like how we think of a standard sale and purchase of land today. As such, the idea of a public domain for literature was inconceivable. However, with the introduction of the Statute of Anne, a piece of literature entered the public domain as soon as its copyright expired. The result of this shift was that copyright only afforded a limited time period in which to generate profit. At the expiration of this period, the piece was able to be used by the public at large for general consumption, and as a launch for further creative pursuits.

The establishment of a public domain for literature by the Statute of Anne created a tension that would characterise the intellectual property debate for the next three hundred years; the balancing act between rewarding the work of individuals and allowing the public to benefit from new ideas. As Susan Sell and Christopher May noted:[77]

> Essentially the history of intellectual property has been a competition between two different characterizations of the legitimate ownership of knowledge. On the one hand is the belief that individuals should benefit from their intellectual endeavours, but on the other is the notion that these endeavours have such an extensive public worth that there is a clear social interest in their free dissemination.

The balance between these two ideas is reflected in the policy decisions pertaining to intellectual property. The relatively short time period of author protection provided within the Statute of Anne represents the high water

[77] Sell and May, above n 74, at 468.

mark for public interest protection, with the pendulum swinging powerfully towards protection of intellectual property in subsequent years.

Though the landmark decision in *Donaldson v Beckett*[78] rejected the publishing industry's argument that a common law copyright existed and survived the Statute of Anne, there has been a trend, especially within America, towards acting as if such a common law right exists.[79] This is reflected in enactments such as the Sonny Bono Copyright Term Extension Act 1998.[80] Following a host of amendments that had incrementally increased the copyright term, the Sonny Bono Act, which is still in force today, extended the basic copyright term to the life of the author plus 70 years. For anonymous or corporate works the period is 95 years from publication, or 120 years from creation, whichever is shorter.[81] Furthermore, following the implementation of the Berne Convention in 1988,[82] authors were vested with copyright upon creation of their piece rather than having to register for copyright protection.[83] This had the inevitable result of greatly expanding the amount of work protected by copyright to the detriment of the public domain.

These ground rule decisions have unavoidable consequences for wealth and income distribution within society. It is important to recognise that "[c]opyright protection is not an inherent right, but a statutory creation of

---

[78] *Donaldson v Beckett* (1774) 1 ER 837 (HL).
[79] Patterson and Lindberg, above n 74, at 37.
[80] The Sonny Bono Act was derisively regarded as the 'Mickey Mouse Protection Act' as a result of Disney's heavy lobbying for the copyright term extension. Its introduction coincided with the impending expiration of the copyrights for Mickey Mouse, Donald Duck, Goofy and Pluto: Lawrence Lessig "Copyright's First Amendment" (2000) 48 UCLA L Rev 1057 at 1065.
[81] Christina N. Gifford "The Sonny Bono Copyright Term Extension Act" (2000) U Mem L Rev 363 at 379.
[82] Berne Convention for the Protection of Literary and Artistic Works (opened for signature 9 September 1886, entered into force 5 December 1887). While the Convention was initially signed by the United Kingdom in 1886, large parts of the Convention were not implemented until 1988. America was not one of the original parties to the Convention but also implemented its provisions in 1988: David Vaver *Copyright Law* (Irwin Law Inc, Ontario, 2000) at 4.
[83] Patterson and Lindberg, above n 74, at 167.

government."[84] Copyright provides the holder with an exclusive right to use, distribute and profit from the subject of the copyright. The prevailing justifications for strong intellectual property protection are largely based upon individualistic paradigms, whereby the original author of a piece of work is protected for their hard work and creativity.[85] Extended periods of copyright prioritise this individual right over the right of the public to utilise existing ideas. However, the individualist appeal of this justification ignores the reality that a large majority of copyrights in the present day are held by large multi-national corporations (MNCs) rather than discrete authors.[86] As such, MNCs are able to monopolise the creative direction of society by their ability to decide when, by whom and for what purpose a copyrighted piece may be used.[87] In general, permission to use a copyright will only be granted when it has the effect of benefitting the holder of the copyright, rather than benefiting the public at large. In consequence, a trend towards extension of copyrights acts to perpetuate wealth and income inequality.

It is evident that the decision to afford property status to a resource such as intellectual property has an unavoidable impact on wealth and income inequality. The following section will consider how the decision *not* to endow a resource with property status can have the same effect.

3 *The Property Status of Jobs*

The prevailing view of the relationship between employee and employer is that it is governed by the laws of contract and labour law.[88] This stems from the view that there are sufficient mechanisms for protecting employee interests through contract and employment regulation.[89] It is also consistent

[84] Gifford, above n 81, at 395.
[85] See Rose, above n 69.
[86] at 15.
[87] at 15.
[88] Wanjiru Njoya *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate Publishing, Aldershot (England), 2007) at 203 – 204.
[89] at 203 – 204.

with the increasingly individualistic approach to labour law.[90] The idea that an employee may have a property right in their job is yet to be accepted. This section will first consider proposals for affording property status to jobs, illustrating that persuasive arguments have been made for the classification of jobs as property. This will be followed by a consideration of how the decision not to endow jobs with property status has the effect of perpetuating wealth and income inequality.

The concept of affording employees a property right in their job has a long history, with some academics tracing the idea back to the Middle Ages.[91] However, the emergence of the proposal within contemporary legal discourse occurred in the 1960s, as technological developments caused widespread redundancies in the manufacturing sector.[92] In 1967, the Turner Report proposed that the United Kingdom adopt a property right in jobs to the extent that it would provide a substantive right to job security.[93] The report sought to introduce "rights to a particular job at a particular place" and "more than a right of appeal against management decisions."[94] This proposal was recognised in the early interpretation of the Redundancy Payments Act 1995, with Lord Denning noting that "[t]he Act gives the employee a right in his job which is akin to a right in property."[95] At around the same time, the idea of a property right in jobs was also developing in America. Frederic Meyers argued that to conceive of the employment relationship as a contract analogous to any other exchange of goods and services ignored the important,

[90] Julian S. Webb "Contract, Capitalism and the Free Market: The Changing Face of Contractual Freedom" (1987) 21 The Law Teacher 23 at 27.
[91] In the medieval guild system, each trade was considered to be 'the collective property rights of the guild' which was vested in the producers (or workers): S. Deakin "The Contract of Employment: A Study in Legal Evolution" (ESRC Centre for Business Research, University of Cambridge, Working Paper No. 203, June 2001) at 8 – 11 cited in Njoya, above n 88, at 59.
[92] Njoya, above n 88, at 60.
[93] Herbert A. Turner, Garfield Clack and Geoffrey Roberts *Labour Relations in the Motor Industry: A Study of Industrial Unrest and an International Comparison* (Allen & Unwin, London, 1967) at 336, cited in Njoya, above n 88, at 60.
[94] at 60.
[95] *Brindle v H.W. Smith (Cabinets) Ltd* [1969] 1 WLR. 1653 at 1658 cited in Njoya, above n 88, at 60.

but often overlooked, relationship that workers have with their jobs.[96] In making this argument, it was noted that it is typical for workers to consider a job to be 'theirs', rather than simply viewing their job as a contractual relationship between them and their employer. In response, Meyers proposed the "objectification of the job",[97] to allow for jobs to be owned by workers. It is important to note that these references to property do not represent an argument that a job is analogous to a fee simple in land. Rather, the property status was intended to reflect that workers ought to be able to make certain claims founded on the fact that they were in possession of their job.

Wanjiru Njoya reinvigorated this debate in 2007, considering the history of these arguments in order to provide the most persuasive account of why property rights in jobs ought to be recognised.[98] Njoya stressed that two common preconceptions regarding the nature of property rights had to be addressed in order to understand how property rights could be associated with a job. The first was the idea that a proprietary interest was something that had to be able to be bought and sold. The second was that endowing a worker with a property interest in their job would create an implication that workers were entitled to their jobs "for life", effectively extinguishing an employer's right to dismiss an employee, no matter how incompetent they were. [99] These two preconceptions represent an "overly simplistic understanding of property",[100] based on the paradigm of ownership of land. However, because proprietary interests are simply a "bundle of rights", they are extremely versatile. As such, a property right in jobs could exist in a form almost unrecognisable as compared with property rights in land. Njoya proposed that if a worker were endowed with a property right in their job, those rights would exist alongside, rather than in conflict with, the contractual

[96] Frederic Meyers *Ownership of Jobs: A Comparative Study* (UCLA Press, Los Angeles, 1964) at 2 – 15.
[97] at 99.
[98] Njoya, above n 88, at 25 – 83 and 151 – 200.
[99] at 1.
[100] at 1.

rights that had been agreed upon. This argument rested on the view that there are aspects of the employment relationship that are not able to be fully addressed within the contractual framework, which has a tendency to award damages. She highlighted numerous cases in which judges have recognised extra-contractual or property rights in the employment relationship to illustrate that the notion of property rights in jobs is much less controversial than it initially appears.[101]

Within her argument, Njoya affirmatively cited Joseph William Singer's 1987 proposal to create a reliance interest in property for workers.[102] While Singer later confessed that his new approach to private property was more utopian than realistic,[103] it was one of the "most cited articles" of 1988.[104] Singer argued that a property right in the form of a 'reliance interest' ought to be recognised when a company has a long standing relationship with its workers and the community in which it exists.

Singer introduced his idea by telling the story of the United States Steel Company (USSC).[105] In 1979, the USSC board of directors met to decide whether to modernise or demolish two of its steel plants that, after operating for more than 60 years, had deteriorated into obsolescence. Together, the two plants employed 3,500 workers, and as many as 13,000 people would be affected by the decision.[106] Local union representatives fought to prevent the closure of the plants, arguing that a property right arose from the lengthy relationship that USCC had with the communities in which it operated its plants. However, when the case came before the court, Judge Thomas Labros

---

[101] See, for example, *Allen v Flood* [1898] AC 1, cited in Njoya, above n 88, at 40 .
[102] Njoya, above n 88, at 70 – 75.
[103] Joseph W. Singer "The Reliance Interest in Property Revisited" (2011) 7 Unbound: Harvard Journal of the Legal Left 79 at 79.
[104] Fred R. Shapiro "The Most-Cited Law Review Articles Revisited" (1995-1996) 71 Chi-Kent L Rev 751 at 776.
[105] Singer, above n 51, at 614 – 618.
[106] at 615.

decided that USSC was able to do with its property what it wished.[107] On appeal, the Sixth Circuit agreed with Judge Lambros, concluding that such a property right did not exist in legislation or common law, and that the court lacked the authority to create it.[108] As such, the two plants were destroyed.

Singer argued that by searching for the 'owner' of the property, and then proceeding to assume that the owner is allowed to do whatever they want with their property, the court was engaged in a fundamentally flawed approach to the problem before it.[109] He contended that the court ought to have considered the relationships between the thousands of people who participated in the ongoing affairs of the business, rather than subscribing to the liberal conception of property, whereby a single owner is endowed with an almost unconstrained power to use their property how they wish. Singer advocated that the workers' relationship with the company created a property right in the form of a 'reliance interest'.

In making this argument, Singer discussed counter-principles of property that have been suppressed and marginalised by the free market vision.[110] The most compelling argument was the recognition of the complex and problematic nature of the association between private property and freedom. The free market property ideal allows for the owner to do with their private property anything that they wish, so long as it is not expressly prohibited. It is this fundamental characteristic of private property that has seen it so closely tied to the liberal idea of individual freedom. However, this bond between private property and the freedom of its owner has the effect of hiding the potential for private property to be used in such a way that restricts the freedom of others. In this respect, private property possesses a public dimension.

---

[107] at 617.
[108] at 620.
[109] at 637.
[110] at 637 – 647.

The value of Singer's proposal lies in its endeavour to both rethink and restructure the ground rules of property. His paper provides a realistic, though controversial, reconception of private property with hopes that it will mitigate the power imbalance between companies and their employees and result in a more egalitarian market system. Though Singer's proposal was not wholly without political support, [111] the prevailing political opinion steadfastly remains that a company is free to do what it wishes with its property.[112] The corollary of this is the continuation of the power imbalance between companies and their workers, and the limitation of a worker's rights to only what they are able to bargain for in their employment contracts.

This section has sought to illustrate that the characterisation of something as property is an inherently contestable political decision. Further, the effect of this ground rule decision has a considerable impact on the type of society which will result. By recognising that we are faced with these unavoidable choices, it is possible to depart from the idea that our current conception of property is, in any sense, natural or inevitable, and consider proposals for reconceiving private property to reach more egalitarian ends.

4 *Property Rights*

Recognising that the characterisation of a resource as property is a contestable political decision provides an important, though incomplete, insight into the public dimension of private property. Necessarily accompanying this insight is a contestable set of property rights that are associated with ownership of property. This is consistent with the prevailing understanding of property as a "bundle of rights." [113] These rights contribute to the relative levels of

---

[111] Singer, above n 103, at 80.

[112] In 2008, Fisher and Paykel closed its Dunedin factory resulting in 480 job losses: Simon Hartley "Bitterness after 480 jobs axed" (21 April 2008) The Otago Daily Times <www.odt.co.nz>. In 2016, it closed its factory in East Tamaki resulting in 187 job losses. Patrick Smellie "Job losses after Fisher & Paykel Appliances closes factory" (April 6 2016) The New Zealand Herald <www.nzherald.co.nz>.

[113] J.E. Penner "The 'Bundle of Rights' Picture of Property" (1995) 43 UCLA L Rev 711 at 712. This idea of property as a 'bundle of rights' can be traced back to the work of Wesley

coercion afforded to bargaining parties as contemplated by Hale, providing property owners with a state delegated power to exclude others.[114] As Joseph William Singer noted:[115]

> Important consequences follow the definition of property rights: To a large extent, the legal rules about access to property determine the social distribution of wealth, power, and prestige.

Private property rights are often associated with the idea of exclusive control of property with the right to exclude others.[116] As William Blackstone articulated, this view of property represents the "sole and despotic dominion... in total exclusion of the right of any other individual in the universe."[117] Stringent protection of the right to exclude others is consistent with the liberal conception of private property, which ties private property rights to the freedom of the individual. However, the simplicity of this private property paradigm is highly misleading. While the right to exclusive possession and control is an important twig in an owner's so-called 'bundle of rights', it is subject to a number of exceptions, stemming from both the common law and statutory provisions.[118] The prevalence of these exceptions to the general rule that an owner has the right to an exclusive and unimpeded right to use their property how they wish renders the paradigm inadequate. In reality, the bundle of property rights afforded to property owners varies greatly depending on the nature of the property and the context in which it is used. Furthermore, property rights are often paired with largely overlooked

---

Hohfield: Jane B. Baron "Rescuing the Bundle-of-Rights Metaphor in Property Law" (2013) 82 U Cin L Rev 57 at 62.

[114] See Hale "Bargaining, Duress and Economic Liberty", above n 56.

[115] Singer, above n 51, at 664.

[116] Gregory S. Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell L Rev 745 at 747.

[117] William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1766) vol. 2 at 2, cited in Carol M. Rose "Canons of Property Talk, or, Blackstone's Anxiety" (1998) 108 Yale LJ 601 at 601.

[118] Alexander, above n 116, at 747.

social obligations to others.[119] The inherently contestable content of the bundle of rights associated with different types of property has a considerable impact on the distribution of wealth and power within a society.[120]

A helpful touchstone when considering property rights is to consider the property rights afforded to home-owners who have a fee simple in land. This paradigm is powerful as the idea of home ownership is a property relationship familiar to many.[121] Although the bundle of rights pertaining to a family home, including the right to exclusive possession and use, are well protected, they are far from absolute. Rather, laws have been created that limit the rights of home-owners, requiring them to abide by easements and preventing them from causing nuisances. The fact that private property rights in a family home are strongly protected is reflective of the largely private nature of the use of the property. While private property rights prevent others from use of the land, they do not endow the owner with any powers that can be used oppressively.[122] As such, the property rights afforded to home-owners do not have a considerable detrimental impact upon the 'public interest'.[123] In light of these features, endowing owners with a relatively strong bundle of private property rights has very little risk of creating sizeable imbalances in the allocation of power and wealth within a society.

Because the bundle of rights afforded to owners of a family home provides them with a considerable scope to do what they wish with their property, owners of other forms of property have endeavoured to clothe their property

---

[119] at 749. See also Tony Honoré "Ownership" in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford University Press, London, 1961) 107 at 147.

[120] Underkuffler, above n 71, at 4: "… different conceptions of property … are not the products of random choice, but are the products of identifiable, understandable, and predictable power relations."

[121] The family home is often used as the paradigm for organising our thinking about private property rights and duties. See Michael Robertson "Property and Ideology" (1995) 8 Can J L & Juris 275 at 282.

[122] Robertson, above n 121, at 279 – 280.

[123] The public interest, in the context of private property rights, is used to justify state modification of private property rights. See Underkuffler, above n 71, at 64 – 70.

with the same set of rights. Owners of factories and intellectual property have both sought to argue that their property is analogous to the family home and, as a result, ought to be treated the same in the eyes of the law. Factory owners have drawn the analogy to the private home to argue that they have a right to exclude unions and regulators from their property in the same way that individuals can prevent people from entering their homes. For example, before the United States Supreme Court decision in *Marshall v Barlow's Inc*,[124] the Occupational Safety and Health Administration (OSHA) was able to inspect any business for safety violations without alerting the owner. However, the Supreme Court ruled that OSHA was required to obtain a search warrant or receive permission from the owner before entering the premises on the basis that corporations had the same protection from police searches as natural persons.

Similarly, intellectual property owners have endeavoured to draw an analogy with private home ownership in order to attract the same bundle of rights. Rather than having an exhaustible period of intellectual property protection, it has been argued that copyrights are in fact estates, and ought to be treated as such.[125]

The structural impact of drawing an analogy between home ownership and ownership of intellectual property and factories is not to be underestimated. Curiously, the idea that the private property rights of owners of factories and intellectual property ought to be stringently protected in the same way that rights in a family home are protected is often vehemently advocated for by those that are detrimentally impacted by such rights. This confusing position is the result of a dominant belief structure that abstracts and conceptualises ideas such as 'ownership', endowing them with a shared meaning that everyone can relate to.[126] Thus, threats to an owner's property rights with respect to one type of property are often perceived as threats to the property

[124] *Marshall v Barlow's, Inc* 436 US 307 (1978).

[125] Rose, above n 69, at 6 – 8.

[126] Robert W. Gordon "New Developments in Legal Theory" in David Kairys (ed.) *The Politics of Law: A Progressive Critique* (Pantheon Books, New York, 1982) 413 at 418 – 420.

rights associated with other types of ownership as well.[127] However, it is important to remain cognisant of the versatile nature of property rights, and their ability to apply differently to different forms of property.

Robert Gordon has proposed that the most effective ways to raise awareness of the contestable nature of these ground rule decisions is to unpack the belief structures that we operate within and provide empirical disproof of the supposed inevitability of the ground rules.[128] By doing so, it becomes apparent that the ideas that govern our conception of property are "not found in nature, but are historically contingent."[129] Thus, for example, the bundle of rights governing home ownership is not necessarily directly transferable to other property contexts. As such, with empirical analysis it is evident that property rights are far from the resolute and predictable instrument that they claim to be.[130]

The contestable set of property rights associated with ownership of property has a direct impact on the amount of coercion afforded to the owner. As such, it is important that the bundle of property rights that owners are supplied with accurately reflects the nature of the property in question. By allowing for dominant groups to successfully proclaim that their property is analogous to a family home, they are able to protect their property with extensive property rights even though it may be fundamentally different in nature to the family home. This perpetuates wealth and income inequality as the wealthy are able to protect their extensive property rights in profitable forms of property by dressing any regulation as an assault on property rights generally, and consequently obtaining the support of the general population.

---

[127] at 419.

[128] at 418 – 422.

[129] at 420.

[130] On the idea of property and contract rights: "[I]t can be shown … that they can be applied quite differently in quite different circumstances, sometimes 'paternalistically', sometimes strictly, sometimes forcing parties to share gains and losses with each other, and sometimes not at all." at 421.

F *Laws of Contract*

In a free market system, contract law plays the vital role of enforcing agreements that have been voluntarily entered into. The notion of "freedom of contract" allows bargaining parties to enter into agreements on any terms that they wish, or not to enter into any agreement at all. One of the foundations upon which this doctrine was developed was Adam Smith's theory of political economy.[131] As such, freedom of contract developed to reflect the idea that when individuals transact freely and in their own self-interest, the market will function efficiently and effectively. However, far from being tied only to economic efficiency, freedom of contract also came to reflect freedom of the individual. The marriage between freedom of contract and the individualism that lies at the heart of liberal ideology is ostensibly both logical and intuitive. If one accepts that society functions best when individuals pursue their own self-interested conception of the good life, then it is congruous to accept that they ought to be able to enter into any agreement that they see fit, and to have that agreement backed up with the force of law.

This section will consider how the notion of 'freedom' of contract can be illusory. It will do so with specific reference to standard form contracts, considering how the use of standard form contracts by large corporations has the ability to vitiate any real sense of freedom on the part of the consumer. Importantly, it will illustrate that the state is inevitably involved in this outcome through its formation of the background legal rules.

1 *Freedom of Contract*

With the development of a market-based society, it was important that the legal institution safeguarding the exchange of goods and services was flexible enough to account for the vast array of agreements that could be created. The answer was to endow the bargaining parties with the freedom to create their own bargains that could be enforced by law. The narrative justifying freedom

[131] Webb, above n 90, at 23.

of contract was analogous to that of the liberal ideology generally; individuals left to their own accord will maximise society's utility by transacting on terms that they wish with parties of their choosing, with minimal state intervention. In this respect, freedom of contract obtained a moral justification, as it was consistent with the idea that if individuals were free to pursue their own self-interest, they would, in aggregate, serve the interests of society by maximising utility.[132] However, while the liberal account of freedom of contract is alluring, the veracity of the narrative is equivocal. As a number of critical commentators have endeavoured to illustrate, strong bargaining power wielded by one party to a contract can have the ability to restrict the freedom of the other party considerably.[133] This is apparent in many contracts between employers and employees,[134] but is especially evident in standard form contracts between large corporations and consumers.[135]

The standard form contract evolved alongside the development of the modern corporation. Characterised by mass production and distribution, corporations needed an instrument that would allow them to contract with a vast group of consumers as efficiently as possible. The response was to create standard form contracts, whereby one contract with standardised terms would be used by a firm in every bargain dealing with the same product or service. The prevalence of standard form contracts has resulted in a situation where consumers have become inured to their unavoidable existence, whether it be with respect to their contracts for power, internet, insurance, flights or gym membership. While these contracts undoubtedly save time and trouble in the bargaining process, the inequality in bargaining power that often exists between parties to these contracts, paired with the fact that the terms of the contract are for all intents and purposes uniformly determined,

---

[132] Friedrich Kessler "Contracts of Adhesion – Some Thoughts About Freedom of Contract" (1943) 43 Colum L Rev 629 at 640.

[133] See Kessler, above n 132, Robert J. Steinfield *Coercion, Contract, and Free Labor in the Nineteenth Century* (Cambridge University Press, Cambridge, 2001), Jay M. Feinman "Critical Approaches to Contract Law" (1983) 30 UCLA L Rev 829.

[134] See Steinfield, above n 133, and Webb, above n 90.

[135] See Kessler, above n 132.

renders them a troublesome fit within the classical account of freedom of contract.

The classical account of contract envisaged "the free bargaining of parties who… meet each other on a footing of social and approximate economic equality."[136] As such, it was thought that freedom of contract was a source of liberty for anyone that engaged in a contract. Given this apparent benefit to the individual, the orthodox approach of the courts has been to simply enforce the rights created by the parties' contracts and to refrain from imposing any obligations that have not been voluntarily assumed.[137] However, the courts' ignorance of the effects of the asymmetry of bargaining power translates into an ignorance of the ability of the stronger contracting party to limit the freedom of the other. In the words of Friedrich Kessler:[138]

> Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms.

The imbalance in bargaining power that often exists between parties to a standard form contract manifests itself in a variety of ways. Importantly, the consumer is rarely placed in a position to shop around for better terms with another corporation, either because the corporation possesses some of the powers of a monopolist,[139] or because all competitors use the same clauses.[140]

---

[136] Kessler, above n 132, at 630.
[137] Feinman, above n 133, at 831.
[138] Kessler, above n 132, at 640.
[139] Richard W. Bauman *Ideology and Community in the First Wave of Critical Legal Studies* (University of Toronto Press, Toronto, 2002) at 92.

The effect is that consumers' freedom of contract is diminished and they are forced into either foregoing the products offered by these corporations or accepting the array of standard form clauses that are included within all of these contracts. This renders the market forces inoperative, as consumers are deprived of any real choice with respect to standard form clauses. In practice, this means consumers are forced into accepting a host of undesirable terms including comprehensive exclusion clauses, asymmetric cancellation provisions and automatic contract renewals. One recent example featured a telecommunications company in New Zealand that had included clauses within their standard form contract stipulating that it had the right to unilaterally increase a consumer's monthly plan price. Consumers were required to pay a significant termination fee if they chose to cancel the contract, including in response to a price increase. When the company unilaterally increased the monthly price, consumers protested and threatened to leave, however the company simply enforced their significant termination fee which was also provided for in the contract.[141] Clauses of this nature, that protect the interests of the company to the detriment of the consumer, are commonplace within standard form contracts.

Numerous commentators have criticised the application of the classical theory of freedom of contract to standard form contracts.[142] It has been argued that in light of the sizeable imbalance in bargaining power between corporations and consumers, it is mistaken to apply a theory that rests on the assumption that parties are endowed with relatively equal bargaining power. To do so is to allow corporations an almost unbridled freedom to contract in the "authoritarian manner" supposed by Kessler.[143] In response to these

---

[140] Kessler, above n 132, at 632.
[141] Commerce Commission "Submission on the Consumer Law Reform Bill" at [54.1].
[142] See Kessler, above n 132, Nicholas S. Wilson "Freedom of Contract and Adhesion Contracts" (1965) 14 International and Competition Law Quarterly 172, Kate Tokeley "New Zealand Moves to Prohibit Unfair Terms: A Critical Analysis of the Current Proposal" (2013) 37 U West Aust L Rev 107 and Alexandra Sims "Unfair Contract Terms: A New Dawn in Australia and New Zealand?" (2013) 39 Monash U LR 719.
[143] Kessler, above n 132, at 640.

arguments, measures have been adopted to limit the ability of corporations to exploit their bargaining power and incorporate unfair terms that can then be relied upon to the detriment of the consumer. While freedom of contract remains a fundamental concept that applies to all contracts, these measures have effectively altered the ground rules pertaining to standard form contracts.

In early 2015, the Fair Trading Act 1986 was amended so as to prevent unfair contract terms in standard form consumer contracts.[144] This disruptive amendment was met with mixed reviews, as commentators expressed concern regarding its impact on freedom of contract, sanctity of contract and certainty.[145] Departing from a strict adherence to the classical account of contract, the amendment restricted freedom of contract for corporations, providing statutory recognition of the imbalance of bargaining power between corporations and consumers. The effect is that corporations are no longer able to include, apply, enforce or rely on unfair terms in their standard form contracts.[146] While there remains uncertainty regarding the application and effectiveness of the provisions,[147] the amendment is valuable for its transformative impact on the ground rules of contract law. As a result of successful lobbying, insurance contracts have escaped the amendment relatively unscathed.[148] In contrast to all other standard form contracts, any insurance contract that was entered into before the amendment came into force, even if it is subsequently renewed or varied, is able to contain unfair

[144] Fair Trading Act 1986, s 26A provides the general prohibition. Sections 46H – 46M provide the process for having a term declared unfair as well as providing guidance as to what constitutes an unfair term.
[145] Tokeley, above n 142, at 111.
[146] Fair Trading Act 1986, s 26A(1).
[147] Section 46L(1)(b) mandates that a term is not unfair if it is "reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term". There is a possibility that an expansive interpretation could mitigate the effectiveness of the ban. Also, under s 46I(1), the right to apply for a declaration that a term is unfair is solely afforded to the Commerce Commission. As such, unfair terms may persist for extended periods of time before they are challenged before a court.
[148] NBR "Consumer NZ campaign targets unfair contract terms as law change kicks in" (16 March 2015) National Business Review <www.nbr.co.nz>.

terms.[149] Furthermore, a list of terms specific to insurance contracts are provided and expressly deemed not to be unfair for the purposes of the Act.[150]

The amendment to the Fair Trading Act provides a useful blueprint for changing ground rules when they act to perpetuate wealth and income inequality. Before the amendment, standard form contracts were interpreted and applied as if they were an agreement that was the result of free bargaining between individuals of relatively equal bargaining power. As such, state interference with either the bargaining process or the performance of the contract was regarded as inappropriate. However, by preventing unfair terms from being included within standard form contracts, the state has prevented one of the pernicious consequences of the considerable imbalance in bargaining power between corporations and consumers.

It is important to remain conscious of Robert Lee Hale's contributions when considering an amendment such as this. While this type of regulation is typically interpreted as state interference with the natural market forces of supply and demand, we must not forget that the state is necessarily responsible for the ground rules that led to this situation. The prevalence of the classical account of freedom of contract, and its equal application to corporations and individuals, was a decision that was made by the state. As such, though the imbalance in bargaining power has been mitigated by the amendment, the existence of the imbalance in the first place was a result of state decisions.

[149] Fair Trading Act 1986, s 26A(3).
[150] Section 46L(4).

G *Corporations and the Law*

It would be erroneous to provide an analysis of how the law perpetuates wealth and income inequality without highlighting the role that corporate law plays. Nowhere is the effect of our current law more alarming, or the opportunity for improvement more compelling, than in this area of the law. Corporations are now the most dominant economic institutions in the world, with power that rivals that of nations.[151] This section will consider the cluster of ground rule decisions responsible for this situation. First, a brief consideration of the legal and ideological history of the modern corporation will be undertaken. This will provide context for the second section, which will examine how the ground rule decisions that furnished corporations with legal personhood and limited liability have allowed corporations to achieve their dominance.

1 *History*

Corporations were not always the dominant force that they are today. Initially, corporations were more appropriately regarded as existing in the public, rather than private, realm. Early corporations in both the United States and the United Kingdom required a corporate charter to be granted by the state, which often imposed a host of conditions that often protected the public interest, in return for the privilege of incorporating as a company.[152] Furthermore, the vast majority of corporations that were granted corporate charters had public functions, such as the provision of water.[153]

While the archetypal corporation of the eighteenth century was a public body charged with carrying out public functions, by the end of the nineteenth century the paradigm had evolved so that corporations were seen in much the

[151] Greenfield, above n 63, at 4 – 5.

[152] For an account of the early history of American corporations, see Greenfield, above n 63, at 35 – 40. For an account of the early history of UK corporations, see Rob McQueen *A Social History of Company Law: Great Britain and the Australian Colonies 1854 – 1920* (Ashgate Publishing, Aldershot, 2009).

[153] Scott R. Bowman *The Modern Corporation and American Political Thought: Law, Power, and Ideology* (Pennsylvania State University Press, Pennsylvania, 1996) at 38.

same light as modern business corporations today; businesses organised to pursue private ends for individual gain.[154] This shift was partly the result of sweeping amendments to corporate law. One of the most important changes was the ability for any legitimate business to incorporate and obtain limited liability for shareholders. As James D. Cox observed, "[w]hat had at one time been a carefully guarded royal favour or a special parliamentary concession became a right available to all businesses on terms and conditions prescribed by general law."[155] Also, corporations took on what has been retrospectively termed "corporate individualism", the idea that corporations are afforded not only the legal rights and capacities of individuals, but are also viewed in the eyes of the law as an individual, rather than the collective group of individuals that they are.[156] This was exemplified in the hallowed case of *Lochner v New York*.[157] In that case, the U.S. Supreme Court struck down New York's maximum hour law, which capped how many hours a baker could work, on the basis that it violated the bakers' Fourteenth Amendment right to freedom of contract. The decision provided an explicit recognition that corporations possess rights, in that case to freedom of contract. In subsequent years, this decision has been seen as the legal manifestation of the prevailing view of both corporations and the market. Corporations were considered to be an individual just like any other market participant while the market was regarded as a neutral playing field that ought to stay insulated from the regulation of the state.[158]

These law changes did not occur in a vacuum, but rather reflected and perpetuated the ideology that prevailed at the time. Corporate individualism fostered a notion that regarded corporations and individuals as equals. The

---

[154] Morton J. Horwitz *The Transformation of American Law 1870 – 1960 The Crisis of Legal Orthodoxy* (Oxford University Press, Oxford, 1992) at 111 – 112, cited in James D. Cox, Thomas Lee Hazen and F. Hodge O'Neal *Corporations* (1st ed, Little, Brown and Company, New York, 1995) vol 1 at [2.7].
[155] Cox, Hazen and O'Neal, at [2.6].
[156] Bowman, above n 153, at 8.
[157] *Lochner v New York* 198 US 45 (1905).
[158] Greenfield, above n 63, at 29.

public nature of corporations was jettisoned and the legal fiction that deemed them to be persons for the purposes of the law morphed into an ideological reality.[159] Freed from their association with the state, corporations were able to challenge "discriminatory" regulations that would have otherwise been the norm within their corporate charter. The aforementioned case of *Marshall v Barlow Inc,*[160] whereby safety inspectors were precluded from entering premises without permission or a warrant, exemplifies the ability of corporations to utilise their legal personhood to avoid onerous regulations.

The classification of corporations a "legal persons" provided the ideological justification for corporate power by implying an analogy between the success of a corporation and the success of an individual. The power of this idea prompted Thurman Arnold to write:[161]

> The ideal that a corporation is endowed with the rights and prerogatives of a free individual is as essential to the acceptance of corporate rule in temporal affairs as was the ideal of the divine right of kings in an earlier day.

The following section will consider how both corporate personality and limited liability provide owners of corporations with the ability to accumulate considerable wealth and power.

2 *Corporate Personality*

The decision to furnish corporations with a form of legal personhood is one that has immediately apparent benefits for any market society. By creating the legal fiction that corporations are legal persons, corporations are able to effectively participate in the market, enter into contracts, own property and owe duties to others. The distinct legal personality of the corporation also

---

[159] The recognition of corporations as persons reaches back at least as far as the 1886 decision of the United States Supreme Court in *Santa Clara County v. Southern Pacific Railroad* 118 US 394 (1886).

[160] *Marshall v Barlow's, Inc* 436 US 307 (1978).

[161] Thurman Arnold *The Folklore of Capitalism* (Yale University Press, New Haven, 1937) at 185 cited in Bowman, above n 153, at 182.

decreases transaction and monitoring costs for investors.[162] It does so by assigning ownership of the assets and liabilities of the corporation to the corporation itself, rather than its investors. As such, when an investor purchases shares in the corporation, there is a change of ownership with respect to the shares, but the ownership of the assets and liabilities remains with the corporation. The notion of the corporation being a distinct legal person from its owners was reflected in the language used in legislation. In the 1856 Joint Stock Companies Act, persons were permitted to "form themselves into an incorporated company".[163] This demonstrated that the company was an entity made *of* the owners.[164] In the 1862 Companies Act, the corresponding section authorised persons to "form an incorporated company."[165] This shift represented that companies "were now made not *of* people, but *by* them, in much the same way that a chair or table might be made by a carpenter."[166]

The commitment to the reification of corporate personality was illustrated in the venerated case of *Salomon v Salomon.*[167] In that case, Mr Salomon incorporated his boot making company. He retained 20,001 shares for himself and provided his wife, daughter and four sons with one share each. In doing so, he satisfied the requirement that an incorporated company must have at least seven members. Before the company failed, Mr Salomon had taken measures to ensure that he would be a secured creditor by issuing debentures to himself, effectively insulating himself if the company were to fail. When the company failed, all of its assets were sold but debts were still owed to

---

[162] See Frank H. Easterbrook and David R. Fischel *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, 1991) at 41 and David Goddard "Corporate Personality – Limited Recourse and its Limits" in Ross Grantham and Charles Rickett (ed) *Corporate Personality in the 20th Century* (Hart Publishing, Oxford, 1998) 11 at 25.
[163] Joint Stock Companies Act 1856 (UK), s 3.
[164] Ireland, above n 70, at 47.
[165] Companies Act 1862 (UK), s 6.
[166] Ireland, above n 70, at 47.
[167] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL).

creditors. Liquidators acting on behalf of the creditors sued Mr Salomon personally for the debts owed by the company. While both the Court of Chancery and Court of Appeal found in favour of the liquidators, the House of Lords took a literal approach to the Companies Act, ruling that Mr Salomon was not responsible for the liabilities of the company. As Lord McNaughton held:[168]

> It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other dependant person, and with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

This case represented the "radical separation of company and shareholders, which had come to characterise the modern doctrine of corporate personality."[169] However, the decision also cemented the metaphor of the corporation as a legal person. Validated by both statutory and judicial recognition, the metaphor of the corporation as a legal person "assume[d] a life of its own."[170] While the value of this metaphor lies in its ability to transform what is an "overwhelmingly complex reality"[171] into a form that can be easily comprehended, it has been exploited in subsequent years to allow corporations to obtain the rights of legal persons but avoid an array of responsibilities. Numerous academics have contended that a re-examination of this concept ought to be carried out, as many of the presumptions associated with corporate personality have become inadequate.[172]

---

[168] at 30.

[169] Paddy Ireland "Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility" (2010) 34 Cambridge Journal of Economics 837 at 847.

[170] Nicholas James "Separate Legal Personality: Legal Reality and Metaphor" (1993) 5 Bond LR 217 at 217.

[171] at 219.

[172] See, for example, Ross Grantham "Commentary on Goddard" in Ross Grantham and Charles Rickett (ed) above n 162, at 65, James, above n 170, and Ireland, above n 70.

The decision to endow corporations with legal personhood, and our subsequent commitment to the analogy between corporations and natural persons, has resulted in a number absurdities. The first is the tendency to overlook important distinctions that exist between corporations and natural persons for the purpose of legal rights. This results in an application of the same considerations that underpin the legal rights of natural persons to the legal rights of corporations. The strict application of the idea of separate corporate personality also ignores the modern development of corporate groups whereby parent companies mitigate their possibility of loss by spreading risk amongst subsidiary companies.[173] Finally, the concept of limited liability, which is closely tied to corporate personality, allows owners of corporations to take considerable risks whilst capping their liability to the value of their investment.

3 *Granting Rights to Corporations*

The idea that a corporation, as a legal person, needs to be endowed with certain legal rights is logical. As corporations are expected to participate in the market, it is necessary that they have the right to own property and enforce their contracts.[174] However, while the metaphor of the corporation as a person is useful to the extent that it allows them to participate in the market, to then attribute a vast array of rights to the corporation on the basis that it is a legal person is mistaken. As Bryant Smith noted:[175]

> It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes... is to make of... corporate personality... a master rather than a servant, and to decide legal

[173] See generally Phillip I. Blumberg "The Corporate Entity in an Era of Multinational Corporations" (1990) 15 Delaware J Corp L 283.
[174] The "roots of the [corporate personality] doctrine are based in concerns about the property and contract interests of shareholders": Elizabeth Pollman "Reconceiving Corporate Personhood" (2011) 2011 Utah L Rev 1629 at 1630.
[175] Bryant Smith, "Legal Personality" (1928) 37 Yale LJ 281 at 298, cited in James, above n 170, at 221.

> questions on irrelevant considerations without inquiring into their merits. Issues do not properly turn on a name.

The absurdity of equating the rights of corporations with the rights of natural persons on the basis of legal personhood is evident in the controversial decision of the United States Supreme Court in *Citizens United v Federal Electoral Commission.*[176] In *Citizens United,* the Court had to decide whether corporations had the right to spend unlimited amounts of money on "electioneering communications"; advertisements of political support or opposition for particular candidates. The case turned on the application of the First Amendment protection of free speech to corporations. In a "refreshingly simple" opinion in what is a notoriously complex area of law, Justice Kennedy, writing for the majority, held that no person – even when that person is a legal fiction – may be subject to independent campaign finance restrictions.[177] While the decision was celebrated by some,[178] it raised serious concerns for others.[179]

The *Citizens United* decision strikes at the heart of the debate surrounding the extension of rights to all legal persons. Supporters of the decision claim that it represents a success for the freedom of speech and democracy.[180] This view is formed on the basis that First Amendment rights ought to be "unified, universal and indivisible"[181] and that "the more speech we have, the better off

---

[176] *Citizens United v Federal Electoral Commission* 558 US 310 (2010).
[177] Molly J. Walker Wilson "Too Much of a Good Thing: Campaign Speech After *Citizens United"* (2010) 31 Cardozo L Rev 2365 at 2367.
[178] See Joel M. Gora "The First Amendment... United" (2011) 27 Georgia St U L Rev 935.
[179] Barack Obama described the decision as "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.": Mary Hall "State of the Union: Obama Walking in the Footsteps of FDR" (3 February 2010) Huffington Post <www.huffingtonpost.com>, cited in Walker Wilson, above n 177, at 2366. Lawrence Lessig proposed a constitutional amendment providing that nothing in the Constitution restricts the power to limit campaign expenditures of non-citizens of the United States during the last 60 days before an election: Lawrence Lessig "Citizens Unite" (16 March 2010) Huffington Post <www.huffingtonpost.com>.
[180] See Gora, above n 178.
[181] at 939.

we are."[182] However, extending the right to free speech to corporations has also been heavily criticised. Important differences exist between corporations and natural persons for the purpose of rights protection. Corporations exist as instruments of individuals. Their legal personality is simply a legal fiction created by statute and thus they lack any inherent ontological existence beyond that created by legislators.[183] This feature makes the application of rights that were created for natural persons troublesome.[184]

The right to free speech is one of utmost political importance. It has two important attributes for the purpose of political expression; the individual's right to say what they please, and the right of the individual to hear all points of view.[185] Proponents of corporate free speech have argued that the corporation is simply the vehicle through which natural persons can express their views.[186] Further, as the corporation is simply another person adding their view to the "marketplace of ideas", it is consistent with the second strand of freedom of speech, that individuals have the right to hear all points of view. However, as corporations do not have the capacity to form views of their own or comprehend the views of others, the application of the right to freedom of speech is an imperfect fit.

This rationalisation of the extension of freedom of speech to corporations ignores a number of pertinent characteristics of corporations. For one, to attribute the speech of the corporation to the owners of that corporation ignores the fact that a "deep separation" exists between the ownership and

---

[182] at 940.
[183] Sussana K. Ripken "Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle" (2009) 15 Fordham L Rev 97 at 100.
[184] See Dale Rubin "Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals" (2010) 28 Quinnipiac L Rev 523.
[185] William Patton and Randall Bartlett "Corporate 'Persons' and Freedom of Speech: The Political Impact of Legal Mythology" (1981) 3 Wisconsin L Rev 494 at 498.
[186] at 498.

control of corporations.[187] As such, extending freedom of speech to corporations endows the individuals in control of the corporation with a distinct, state-created form of free speech that is not afforded to others.[188] Another important but often-overlooked characteristic of corporations is that they are a creation that is, in some respects, analogous to the state.[189] A corporation, like a government, is the instrument of an aggregation of individuals who have an interest in how the institution is run, but do not necessarily have the right to run it themselves. As the instrument of a specific group of profit-motivated owners, corporations must be regulated to ensure that their pursuit of profit does not create detrimental effects for the rest of society. To allow corporations to then "capture" the regulators through the financing of political advertisement results in a situation in which the subject of the regulations has power over its regulator.[190] Finally, from a pragmatic perspective, endowing corporations with an equal right to freedom of speech disregards the vast imbalance that exists between the ability of corporations and natural persons to exercise their right to freedom of speech. A helpful metaphor that has been used to illustrate the benefit of freedom of speech in the political context is to imagine the political process as an expansion of a local town meeting, where individuals are free to express their views and receive the views of others.[191] Under this conception of the political process, all members of the community are free to address the group, whether they are the local plumber, teacher or multinational corporation. This metaphor

---

[187] Ripken, above n 183, at 111. Also, for a consideration of the extent to which this control of the corporation is placed in the hands of CEOs, see Steven A. Ramirez and Cheryl L. Wade "Toward a Critical Corporate Law Pedagogy and Scholarship" (2014) 92 Washington U L Rev 397.

[188] Ripken, above n 183, at 159 – 160.

[189] Daniel J.H. Greenwood "Essential Speech: Why Corporate Speech is Not Free" (1998) 83 Iowa L Rev 995 at 1008.

[190] Molly Walker Wilson used behavioural science to examine the effects of strategic campaign spending. It was found that "there is a nexus between campaign spending, manipulative communication, and distorted voting decisions.": Walker Wilson, above n 177, at 2368.

[191] It has been proposed that this was the implicit view of the United States Supreme Court in another freedom of speech case pertaining to corporations, *First National Bank of Boston v Bellotti* 435 US 765 (1978): Patton and Bartlett, above n 185, at 501.

assumes that the nature of the speaker does not have an effect on the impact of their speech. If this view of freedom of speech is accepted, the government ought to refrain from interfering in the meeting, as its interference would limit a bona fide political discussion.[192] However, when corporations are granted free speech, this conception of the town meeting does not provide an accurate portrayal of reality. Rather than being a gathering of all members of the community to equally sound their views, the town meeting becomes a gathering of a few representatives of large corporations, each yelling through a megaphone to a largely empty town hall. This is because money influences an individual's ability to effectively exercise their freedom of speech,[193] and corporations are able to accumulate vast amounts of wealth through their perpetual lifespan. In fact, following the *Citizens United* decision, there was an astounding increase in independent spending related to federal races. During the 2012 federal election cycle, spending exceeded $1 billion, approximately three times more than spending in 2008 and approximately six times more than spending in 2004.[194]

When these factors are considered together, it is evident that the application of freedom of speech to corporations is not without inherent difficulties. However, the strength of the notion of corporate personality results in a tendency towards rights being extended to corporations without a comprehensive consideration of their suitability or effect. As Daniel Greenfield summarised:[195]

> [T]he Court simply applied doctrines designed for individuals to the corporation, with no discussion or consideration of how the corporation, as a collective entity, would use them, or to what end, or of whether protecting

[192] Patton and Bartlett, above n 185, at 501.
[193] "Statistical correlations support … that money often plays a pivotal role in determining … chances for election.": C. Edwin Baker "Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech" (1982) 130 U Pa L Rev 646 at 648.
[194] Douglas M. Spencer and Abby K. Wood "*Citizens United,* States Divided: An Empirical Analysis of Independent Political Spending" (2014) 89 Ind LJ 315.
[195] Greenwood, above n 189, at 1011.

> corporations was supportive of, compatible with, or antagonistic to protecting human freedom."

The extension of freedom of speech to corporations has an unavoidable impact on democracy. Corporations, endowed with an equal right to freedom of speech, are able to promote political candidates that further their pursuit of profit. Because corporations have the ability to dominate the marketplace of ideas with their substantial wealth, individuals are effectively precluded from having their point of view heard. This allows corporations to shape the dialogue surrounding elections to favour political candidates that favour their interests, thus exacerbating imbalances in levels of wealth and income but also imbalances in political power.[196]

Corporate personality is a helpful tool for endowing corporations with rights for the purpose of allowing them to participate in the market. However, any time the rights of natural persons are extended to apply to corporations, a thorough consideration of the purpose and possible effects of doing so must be carried out. The application of freedom of speech to corporations has had a vastly different effect to its application to natural persons. It has had a detrimental impact on the marketplace of ideas as well as wealth, income and political inequality. As such, the justification for this ground rule must be re-examined in light of these consequences.

4 *Limited Liability*

The idea that a corporation has its own distinct legal personality is closely tied to its limited liability status.[197] Limited liability is the notion that an investor's liability is limited to the amount they have invested into the corporation,[198]

---

[196] For a comprehensive discussion of the connection between inequality and political influence, see Martin Gilens *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton University Press, Princeton, 2014).

[197] "Historically... limited liability was a synonym for treating a company as an artificial person...": Ali Imanalin "Rethinking Limited Liability" (2011) 7 CSLR 89 at 89.

[198] For a comprehensive history of limited liability, see P.W. Ireland "The Rise of the Limited Liability Company" (1984) 12 International Journal of the Sociology of Law 239.

and is so widely accepted that it is now considered a "birth right" of corporations.[199] Its introduction as a fundamental ground rule of company law was the result of the political power of the investing class, rather than imperatives of rationality or efficiency.[200] Proponents have heralded limited liability as one of the most "precious characteristics" of the modern corporation, contributing substantially to all of the progress and innovation that has occurred within company law.[201] However, limited liability is not without its dissidents. Allowing for liability to be limited to the amount of capital that is owned by the company disadvantages involuntary creditors and provides considerable insulation for members of corporate groups. Furthermore, it incentivises corporate irresponsibility as limited liability caps the potential loss associated with risky ventures. This section will illustrate how the decision to limit the liability of owners of corporations acts to perpetuate wealth and income inequality, providing an alternative approach to limited liability in order to demonstrate the contestable nature of this ground rule.

While limited liability provides considerable advantages to investors by way of limiting risk and decreasing transaction and monitoring cost, the law and economics scholars have iterated that limited liability comes at a cost.[202] The ability to limit liability renders creditors the primary bearers of the cost, as they are precluded from pursuing individual shareholders or decision makers behind the 'corporate veil' for unpaid credit.[203] While it may be argued that creditors are able to bargain for security and thus protect themselves to some extent from the potentially harsh consequences of limited liability, not all

---

[199] David W. Leebron "Limited Liability, Tort Victims, And Creditors" (1991) 91 Colum L Rev 1565 at 1569.

[200] Ireland, above n 169, at 848.

[201] B.F Cataldo "Limited Liability With One Man Companies and Subsidiary Corporations" (1953) 18 LCP 473 at 473 – 474, cited in Imanalin, above n 197, at 89.

[202] Paul Halpern, Michael Trebilcock and Stuart Turnbull "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 U Toronto LJ 117.

[203] The idea of the corporate veil represents the separation of the corporate personality from the personality of the shareholders or individuals that are making the decisions on behalf of the corporation.

creditors will have sufficient bargaining power to achieve this. This exposure to the consequences of limited liability is especially true for involuntary creditors, paradigmatically a tort creditor,[204] as they are unable to reflect the additional risk posed by limited liability through contractual terms.[205] The danger posed to involuntary creditors by limited liability was demonstrated in *Walkovsky v Carlton*.[206] In that case, the plaintiff was injured by a taxi owned by the defendant. The defendant was the owner of ten corporations, each of which had two taxis registered to its name. The defendant had taken out the minimum liability insurance required by law. It was apparent that the business had been set up in this manner for this exact purpose, to minimise liability if a negligent driver were to cause harm. The plaintiff sought to either have the ten corporations considered together or to hold the defendant personally liable as the sole shareholder. The majority dismissed the plaintiff's claim on similar grounds to the *Soloman* decision, ruling that the requirements of a valid corporation had been satisfied and that there were no grounds for piercing the corporate veil in order to hold the defendant liable. This seemingly unjustified outcome, whereby corporations can avoid tortious liability either due to insolvency or by way of being part of a corporate group has spurred a call for a departure from limited liability in these circumstances.[207] By allowing for corporations to arrange their affairs in such a way that the burden of risk is shifted onto involuntary creditors, corporations experience a windfall. They become the sole beneficiary of any profit from a successful risk but do not carry the burden of the cost if the risk fails.

---

[204] Halpern, Trebilcock and Turnbull, above n 202, at 145.

[205] See Frank H. Easterbrook and Daniel R. Fischel "Limited Liability and the Corporation" (1985) 52 U Chi L Rev 89 at 98 – 99.

[206] *Walkovsky v Carlton* 223 NE 2d 6 (NY 1996) cited in Halpern, Trebilcock and Turnbull, above n 202, at 119.

[207] See Imanalin, above n 197. See also, Blumberg, above n 173. Also, an exception has appeared in New Zealand whereby a director or employee who is deemed to "control" the company may be joined in proceedings for tortious acts. See, for example, *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517. However, the situation in *Walkovsky v Carlton* would not fall within the ambit of this exception as the driver was not in control of the company.

Another way that the law protects corporations to the detriment of their creditors is through the anachronistic view of corporations as distinct and independent legal persons. The rise of corporate groups has made the current approach to corporate law, especially limited liability, inadequate. A corporate group is a collection of interrelated corporations that share a common source of control. For example, Mobil Oil Corporation, while regarded as one corporation by economists, consists of hundreds of separate and distinct corporations in the eyes of the law.[208] This situation is enabled by the fact that there is no distinction drawn between human and corporate shareholders.[209] As such, so long as there is no fraud and the subsidiary is not a sham,[210] the corporate veil will not be lifted to allow for plaintiffs to pursue the corporate shareholder. However, material differences exist between investor shareholders and corporate shareholders. Corporate shareholders are typically not passive investors. Rather, their ownership of stock in the corporation often exists for the purpose of benefitting the wider corporate group.[211] By disregarding the nature of corporate groups, corporations are able to engage in risky ventures through their subsidiaries knowing that any failure will be limited to the assets of that corporation. [212]

Finally, limited liability has the general effect of incentivising risky behaviour. [213] Because limited liability insulates decision makers from personal liability, they are incentivised to take risks disproportionate to the

[208] Blumberg, above n 173, at 326.
[209] Imanalin, above n 197, at 93.
[210] R*e Securitibank Ltd (No 2)* centred on when it was appropriate to lift the corporate veil in order to allow the plaintiff to pursue the parent company. It was held that there was no justification for lifting the corporate veil as there was no fraud, the company was not a sham and there were no breach of public policy.
[211] The idea that subsidiary groups and associate companies are purchased for the commercial benefit of the parent company was accepted as "common commercial practice" in R*e Securitibank Ltd (No 2)* [1978] 2 NZLR 136 at 171.
[212] There are, however, exceptions if it is established that the subsidiary is acting as an agent for the parent company or if it acted as a de facto or shadow director.
[213] See Ireland, above n 169.

real cost of the venture.[214] This is a classic case of moral hazard, whereby "the residual owner of a company loses nothing when the company collapses due to bad business, but becomes richer if the risk of failure does not materialise."[215] Furthermore, shareholders have little financial incentive to ensure that managers behave legally, ethically or decently for the same reason.[216] As discussed, the cost of this excessive risk is shifted onto creditors, both voluntary and involuntary.[217]

The extensive form of limited liability that currently exists for corporations is a fundamental ground rule decision. However, its existence in its current form is far from inevitable. An alternative approach was illustrated in France, where ground rules that decoupled limited liability from control rights were created.[218] Under this system, investors that contribute capital but remain passive and inactive with respect to the management of the corporation enjoy the privilege of limited liability. Conversely, anyone with managing responsibilities is subject to unlimited liability. If a passive investor interferes with management, they forfeit their limited liability status.[219] The rationale is that by redacting limited liability for investors with managerial influence, irresponsible behaviour will be minimised.[220]

It must always be remembered that corporations are created, shaped and maintained by law.[221] Corporations are the result of a host of ground rule decisions that are charged with political considerations. As such, it is

---

[214] There is, however, an exception provided with the Companies Act 1993. Section 135 of the Act prohibits reckless trading. However, this section only has bite if the threshold of carrying out business "in a manner likely to create a substantial risk of serious loss to the company's creditors" is met.

[215] Imanalin, above n 197, at 91.

[216] Harry Glasbeek *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy"* (Between the Lines, Ontario, 2002) at 129.

[217] Easterbrook and Fischel above n 205, at 91.

[218] Ireland, above n 169, at 852 – 853. This form of partnership is relatively rare today but is still utilised by some corporations.

[219] at 852.

[220] at 852.

[221] Patton and Bartlett, above n 185, at 496.

important to remain cognisant and critical of how these ground rules operate. The tendency to regard corporations as a natural or neutral creation allows for those rules to be shaped in such a manner that cements the dominance of corporations. As such, ignoring the contestable nature of these ground rules serves to legitimise, but also disguise, the power wielded by large corporations.[222]

[222] Bowman, above n 153, at 33.

Chapter III The Ideological Nature of Free Market Ground Rules

The preceding section illustrated the inescapably political nature of decisions shaping the free market. Nonetheless, the free market continues to be perceived as existing in a private realm, free from the influence of the state and subject to natural and neutral ground rules. The following section will consider how this predominant view of the free market is ideological in the critical sense that it is utilised to maintain the power of one group over others.[223]

While describing how ideology is constructed, James Kwak recognised the power of dominant groups, noting that:[224]

> the marketplace of beliefs is another field of combat, and one where money talks. Ideology does not fall ready-made from the sky. Its raw materials are ideas, good or bad, that are often genuinely developed by their proponents and adopted by their adherents. Those ideas are then manufactured into political weapons …

The idea that the free market is naturally occurring and exists in a private realm is a political weapon. By promoting the free market as a private realm with neutral ground rules, a narrative is developed that inextricably links the market with individual freedom. This has important and pernicious effects. The first is that the freedom afforded to powerful parties allows them to accumulate enough power to limit the freedom of others. This was illustrated in the context standard form contracts, where the application of the classical account of freedom of contract ignores imbalances in bargaining power and simply applies the terms as they objectively appear. The result is that the party with weaker bargaining power loses any material freedom of contract. However, because the liberal ideology supposes that the state holds a monopoly over coercion, it is inconceivable on this view that the free market

[223] This broad definition of ideology was articulated in Robertson, above n 121, at 275.
[224] James Kwak "Incentives and Ideology" (2014) 127 Harv L Rev Forum 253 at 257.

could limit rather than maximise individual freedom. This presupposition acts to benefit those dominant groups that have the ability to exploit their dominance to the detriment of weaker parties. Furthermore, the decision to endow corporations with an assortment of rights that were initially created for natural persons provides them with another layer of freedom, as they can challenge laws that breach their rights on the basis that because they are a legal person, they deserve the same rights as natural persons. The ideological nature of this assumption is evident in the context of freedom of speech, whereby corporations dominate the marketplace of ideas due to their considerable wealth to the detriment of the intended subjects of the right, natural persons.

The second issue with the current free market ideology is that the ostensibly private nature of the market makes explicit state regulation appear to be an unwelcome and inefficient overreach. According to the prevailing ideology, because the market is able to allocate resources efficiently through the natural forces of supply and demand, any state interference necessarily decreases the welfare of society. The trouble with this conception of the market is that it ignores the unavoidable ground rule decisions that the state is forced to make in order for the market to function. The examples discussed include the decision to endow intellectual property with property status, specifically highlighting the seemingly perpetual extension of copyright terms, the commitment to the classical notion of freedom of contract and the recognition of corporations as legal persons with limited liability. By ignoring the fact that these are contestable decisions, and instead regarding them as natural, neutral and inevitable rules, their corollary impact on the distribution of wealth and income within society is overlooked. As a result, the decisions avoid the recognition and spotlight that their impact on society demands.

The ability for a free market to exist in a private realm, free from state influence, is a chimera. However, the free market ideology that advances the liberal conception of the market has been persuasive to the extent that "[t]o

the conventional eye, governing power is invisible save when exerted by public officials wearing official trappings of the political state."[225] State influence in the free market is ubiquitous due to its unavoidable role in creating the ground rules, and to conceive of the market as a neutral, natural and private realm is ideological.

[225] Robert Lee Hale as cited in Duxbury, above n 54, at 435.

Conclusion

The idea that levels of wealth and income inequality are the result of 'natural' market forces is a powerful tautology. The free market is the product of contestable ground rules and, as such, is susceptible to having ideas 'baked into its building blocks.'[226] By ignoring the prevalence of ground rule decisions, those with wealth and power are able to shape these ground rules in such a way that advances their interests while dressing them up as natural an inevitable outcomes.

Robert Unger, a prominent and imaginative critical legal theorist,[227] professed that considerable social change can be brought about through giving the central organising concepts of a society different content, rather than rejecting them completely.[228] In light of this idea, it is important to note that this paper is not intended as an assault or rejection of the free market generally. The purpose is to elucidate that the hidden nature of the political decisions that shape the free market acts to benefit a dominant group. It is hoped that by recognising the contestable nature of these political decisions, a more transparent and informed debate surrounding ground rules such as the conception of property, contract law and corporate law will eventuate. The idea that changes to the ground rules of the free market can transform the market and result in more egalitarian outcomes is one that has been widely championed by experts in the fields of law and economics.[229]

The current level of wealth and income inequality is not an inescapable side effect of living in a society that treasures the free market. Rather, it is the outcome of political decisions that hide behind a façade of inevitability. However, by identifying ground rules as the cause of inequality, by accepting

---

[226] This was a recurring idea in Reich, above n 10.

[227] Hugh Collins "Roberto Unger and the Critical Legal Studies Movement" (1987) 14 J L & Soc'y 387 at 387.

[228] Robert Unger "The Critical Legal Studies Movement" (1983) 96 Harv L Rev 561, cited in Robertson, above n 51, at 466.

[229] See Kennedy, above n 11, Reich, above n 10, Stiglitz, above n 10, and Sunstein, above n 51.

their prescribed rather than preordained nature, and by altering the groups that stand to gain, changes to the ground rules may be the cure to the dizzying heights of inequality that we are currently experiencing.

Bibliography

Cases

New Zealand

R*e Securitibank Ltd (No 2)* [1978] 2 NZLR 136.

Trevor Ivory Ltd v Anderson [1992] 2 NZLR 517.

United States

Citizens United v Federal Electoral Commission 558 US 310 (2010).

First National Bank of Boston v Bellotti 435 US 765 (1978).

Lochner v New York 198 US 45 (1905).

Marshall v Barlow's, Inc 436 US 307 (1978).

Walkovsky v Carlton 223 NE 2d 6 (NY 1996).

United Kingdom

Allen v Flood [1898] AC 1 (HL).

Brindle v H.W. Smith (Cabinets) Ltd [1969] 1 WLR 1653.

Donaldson v Beckett (1774) 1 ER 837 (HL).

Salomon v A Salomon & Co Ltd [1897] AC 22 (HL).

Legislation

New Zealand

Companies Act 1993.

Fair Trading Act 1986.

United Kingdom

Companies Act 1862.

Copyright Act 1710.

Joint Stock Companies Act 1856.

USA

Copyright Term Extension Act 1998.

Books

Alexander, Isabella *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing, Oxford, 2010).

Altman, Andrew *Critical Legal Studies: A Liberal Critique* (Princeton University Press, Princeton, 1990).

Anderson, Martin *Revolution* (Harcourt Brace Jovanovich, New York, 1988).

Bauman Richard W. *Ideology and Community in the First Wave of Critical Legal Studies* (University of Toronto Press, Toronto, 2002).

Bowman, Scott R. *The Modern Corporation and American Political Thought: Law, Power, and Ideology* (The Pennsylvania State University Press, Pennsylvania, 1996).

Clark, John Bates *Essentials of Economic Theory, As Applied to Modern Problems of Industry and Public Policy* (Macmillan, New York, 1907).

Clark, John Bates *The Distribution of Wealth, A Theory of Wages, Interest and Profits* (Macmillan, New York, 1899).

Cox, James D, Hazen, Thomas Lee and O'Neal, F. Hodge *Corporations* (1st ed, Little, Brown and Company, New York, 1995) vol 1 at [2.7].

Easterbrook, Frank H. and Fischel David R. *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, 1991).

Ebenstein, Alan *Friedrich Hayek: A Biography* (Palgrave MacMillan and Houndsmill, Hampshire, 2001).

Feldman, David and Meisel, Franklin *Corporate and Commercial Law: Some Modern Developments* (Lloyd's of London Press, London, 1996).

Fine, Sidney *Laissez Faire and the General-Welfare State* (University of Michigan Press, Michigan, 1956).

Fried, Barbara H. *The Progressive Assault on Laissez Faire, Robert Hale and the First Law and Economics Movement* (Harvard University Press, Cambridge, 1998).

Friedman, Milton *Capitalism and Freedom* (University of Chicago Press, Chicago and London, 1962).

Gilens, Martin *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton University Press, Princeton, 2014).

Glasbeek, Harry *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy"* (Between the Lines, Ontario, 2002).

Greenfield, Kent *The Failure of Corporate Law, Fundamental Flaws and Progressive Possibilities* (University of Chicago Press, Chicago, 2006).

Kairys, David *The Politics of Law: A Progressive Critique* (3rd ed, Basic Books, New York, 1998).

Kelman, Mark *A Guide to Critical Legal Studies* (Harvard University Press, Cambridge, 1987).

Kelsey, Jane *The FIRE Economy* (Bridget Williams Books, Wellington, 2015).

Kennedy, Gavin *Adam Smith: A Moral Philosopher and His Political Economy* (Palgrave Macmillan, New York, 2008).

Klein, Naomi *The Shock Doctrine: The Rise of Disaster Capitalism* (Picador, New York, 2007).

Locke, John *Second Treatise on Government* (Cambridge University Press, Cambridge, 1967).

Mill, John Stuart *Principles of Political Economy* (John Murray, London, 1848).

McPherson, C.B. (ed) *Property: Mainstream and Critical Positions* (University of Toronto Press, Toronto, 1978).

McQueen, Rob *A Social History of Company Law: Great Britain and the Australian Colonies 1854 – 1920* (Ashgate Publishing, Aldershot, 2009).

Njoya, Wanjiru *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate Publishing, Aldershot (England), 2007).

Patterson, L. Ray and Lindberg, Stanley W. *The Nature of Copyright: A Law of Users'Rights* (The University of Georgia Press, Athens, 1991).

Picketty, Thomas *Capital in the Twenty-First Century* (Harvard University Press, Cambridge, 2014).

Ranelagh, John *Thatcher's People: An Insider's Account of the Politics, the Power, and the Personalities* (London, Fontana, 1992).

Rashbrooke, Max (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2013).

Rashbrooke, Max *Wealth and New Zealand* (Bridget Williams Books, Wellington, 2015).

Reich, Robert *Saving Capitalism: For the Many, Not the Few* (Alfred A. Knopf, New York, 2015).

Ricardo, David *On the Principles of Political Economy and Taxation* (John Murray, London, 1817).

Rose, Mark *Authors and Owners: The Invention of Copyright* (Harvard University Press, Cambridge, 1993).

Smith, Adam *An Inquiry into the Nature and Causes of the Wealth of Nations* (W. Strahan and T. Cadell, London, 1776).

Steinfield, Robert J. *Coercion, Contract, and Free Labor in the Nineteenth Century* (Cambridge University Press, Cambridge, 2001).

Stiglitz, Joseph *The Great Divide: Unequal Societies and What We Can Do About Them* (W.W. Norton & Company, New York, 2015).

Stiglitz, Joseph *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Norton & Company, New York, 2012).

Sumner, Colin *Reading Ideologies: an Investigation into the Marxist Theory of Ideology and Law* (Academic Press, London, 1979).

Sunstein, Cass R. *Free Markets and Social Justice* (Oxford University Press, New York, 1997).

Takenaka, Toshiko *Intellectual Property in Common Law and Civil Law* (Edward Elgar Publishing, Cheltenham, UK, 2013).

Turner, Herbert A, Clack, Garfield and Roberts, Geoffrey *Labour Relations in the Motor Industry: A Study of Industrial Unrest and an International Comparison* (Allen & Unwin, London, 1967).

Underkuffler, Laura *The Idea of Property: Its Meaning and Power* (Oxford University Press, Oxford, 2003).

Vaver, David *Copyright Law* (Irwin Law Inc, Ontario, 2000).

Westen, Peter *Speaking of Equality: An Analysis of the Rhetorical Force of Equality in Moral and Legal Discourse* (Princeton University Press, Princeton, 1990).

Wilkinson, Richard and Pickett, Kate *The Spirit Level: Why Equality is Better for Everyone* (Penguin Books, London, 2010).

Chapters in Books

Goddard, David "Corporate Personality – Limited Recourse and its Limits" in Ross Grantham and Charles Rickett (ed) *Corporate Personality in the 20th Century* (Hart Publishing, Oxford, 1998) 11.

Gordon, Robert W. "New Developments in Legal Theory" in David Kairys (ed.) *The Politics of Law: A Progressive Critique* (Pantheon Books, New York, 1982) 413.

Grantham, Ross "Commentary on Goddard" in Ross Grantham and Charles Rickett (ed) *Corporate Personality in the 20th Century* (Hart Publishing, Oxford, 1998) 65.

Honoré, Tony "Ownership" in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford University Press, London, 1961) 107.

Ireland, Paddy "Property, Private Government, and the Myth of Deregulation" in Sarah Worthington *Commercial Law and Commercial Practice* (Hart Publishing, Oregon, 2003) 85.

Robertson, Michael "Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Portland, 1999) 239.

Tuckness, Alex "Locke's Political Philosophy" in Edward N. Zalta (ed) *The Stanford Encycopedia of Philosophy* (Spring ed, 2016, online ed).

Journal Articles

Alexander, Gregory S. "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell L Rev 745.

Ayres, Ian "Discrediting the Free Market" (1999) 66 U Chi L Rev 273.

Backhouse, Roger E. "The Rise of Free Market Economics: Economists and the Role of the State Since 1970" (2005) 37 History of Political Economy 355.

Baker, C. Edwin "Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech" (1982) 130 U Pa L Rev 646.

Baron, Jane B. “Rescuing the Bundle-of-Rights Metaphor in Property Law” (2013) 82 U Cin L Rev 57.

Blumberg, Phillip I. “The Corporate Entity in an Era of Multinational Corporations” (1990) 15 Delaware J Corp L 283.

Collins, Hugh “Roberto Unger and the Critical Legal Studies Movement” (1987) 14 J L & Soc’y 387 at 387.

Duxbury, Neil “Robert Hale and the Economy of Legal Force” (1990) 53 MLR 421.

Easterbrook, Frank H. and Fischel, Daniel R. “Limited Liability and the Corporation” (1985) 52 U Chi L Rev 89.

Feinman, Jay M. “Critical Approaches to Contract Law” (1983) 30 UCLA L Rev 829.

Freeman, Alan and Mensch, Elizabeth “The Public-Private Distinction in American Law and Life” (1987) 36 Buff L Rev 237.

Galanter, Marc “Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 L & Soc’y Rev 95.

Gifford, Christina N. “The Sonny Bono Copyright Term Extension Act” (2000) U Mem L Rev 363.

Gora, Joel M. “The First Amendment... United” (2011) 27 Georgia St U L Rev 935.

Greenwood, Daniel J.H. “Essential Speech: Why Corporate Speech is Not Free” (1998) 83 Iowa L Rev 995.

Hale, Robert Lee “Bargaining, Duress and Economic Liberty” (1943) 43 Colum L Rev 603.

Hale, Robert Lee “Coercion and Distribution in a Supposedly Non Coercive State” (1923) 38 Political Science Quarterly 470.

Halpern, Paul, Trebilcock, Michael and Turnbull, Stuart “An Economic Analysis of Limited Liability in Corporation Law” (1980) 30 U Toronto LJ 117.

Hoover Kenneth R. “The Rise of Conservative Capitalism: Ideological Tensions within the Reagan and Thatcher Government” (1987) 29 Comp Stud Soc’y & Hist 245.

Horwitz, Morton J. “History of the Public/Private Distinction.” (1982) 130 U Pa L Rev 1423.

Hsu, Shi-Ling "The Rise and Rise of the One Percent: Considering Legal Causes of Wealth Inequality" (2015) 64 Emory LJ Online 2043.

Imanalin, Ali "Rethinking Limited Liability" (2011) 7 CSLR 89.

Ireland, Paddy "Capitalism Without the Capitalist: the Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality" (1996) 17 Journal of Legal History 41.

Ireland, Paddy "Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility" (2010) 34 Cambridge Journal of Economics 837.

James, Nicholas "Separate Legal Personality: Legal Reality and Metaphor" (1993) 5 Bond LR 217.

Kessler, Friedrich "Contracts of Adhesion – Some Thoughts About Freedom of Contract" (1943) 43 Colum L Rev 629.

Kennedy, Duncan "The Stakes of Law, or Hale and Foucault!" (1991) 15 Legal Stud F 327.

Klare, Karl E. "The Public/Private Distinction in Labor Law" (1982) 130 U Pa L Rev 1358.

Kwak, James "Incentives and Ideology" (2014) 127 Harv L Rev Forum 253.

Leebron, David W. "Limited Liability, Tort Victims, And Creditors" (1991) 91 Colum L Rev 1565.

Lessig, Lawrence "Copyright's First Amendment" (2000) 48 UCLA L Rev 1057.

Link, S. Michael "Labour Law and the New Inequality" (2009) 59 UNBLJ 14.

Mankew, N. Gregory "Defending the One Percent" (2013) 27 Journal of Economic Perspectives 21.

Mayer, David N. "Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism" (1990) 55 Missouri L Rev 93.

Mnookin, Robert H. "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation" (1981) 130 U Pa L Rev 1429.

Patton, William and Bartlett, Randall "Corporate 'Persons' and Freedom of Speech: The Political Impact of Legal Mythology" (1981) 3 Wisconsin L Rev 494.

Peñalver, Eduardo M. "Property Metaphors and Kelo v. New London: Two Views of the Castle" (2006) 74 Fordham L Rev 2971.

Penner, J.E. "The 'Bundle of Rights' Picture of Property" (1995) 43 UCLA L Rev 711.

Picciotto, Sol "Mediating Contestations of Private, Public and Property Rights in Corporate Capitalism" (2013) 3 Onati Socio-Legal Series 622.

Pollman, Elizabeth "Reconceiving Corporate Personhood" (2011) 2011 Utah L Rev 1629.

Pongrace, Donald R.C. "Stereotypification of the Fourth Amendment's Public/Private Distinction: An Opportunity for Clarity" (1985) 34 Am U L Rev 1191.

Ramirez, Steven A. and Wade, Cheryl L. "Toward a Critical Corporate Law Pedagogy and Scholarship" (2014) 92 Washington U L Rev 397.

Ripken, Sussana K. "Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle" (2009) 15 Fordham L Rev 97.

Robertson, Michael "Property and Ideology" (1995) 8 Can J L & Juris 275.

Robertson, Michael "Reconceiving Private Property" (1997) 24 J L & Soc'y 465.

Rose, Carol M. "Canons of Property Talk, or, Blackstone's Anxiety" (1998) 108 Yale LJ 601.

Rose, Mark "Copyright and its Metaphors" (2002) 50 UCLA L Rev 1.

Rose, Nikolas "Beyond the Public/Private Division: Law, Power and the Family" (1987) 14 J L & Soc'y 61.

Rubin, Dale "Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals" (2010) 28 Quinnipiac L Rev 523.

Samuels, Warren J. "The Economy as a System of Power and Legal Bases: The Legal Economics of Robert Lee Hale" (1973) 27 U Miami L Rev 261.

Sell, Susan and May, Christopher "Moments in Law: Contestation and Settlement in the History of Intellectual Property" (2001) 8 Review of International Political Economy 467.

Shapiro, Fred R. "The Most-Cited Law Review Articles Revisited" (1995-1996) 71 Chi-Kent L Rev 751.

Sims, Alexandra "Unfair Contract Terms: A New Dawn in Australia and New Zealand?" (2013) 39 Monash U LR 719.

Singer, Joseph W. "The Reliance Interest in Property Revisited" (2011) 7 Unbound: Harvard Journal of the Legal Left 79.

Singer, Joseph William "Legal Realism Now" (1988) 76 Cal L Rev 465.

Singer, Joseph William "The Reliance Interest in Property" (1988) 40 Stan L Rev 611.

Smith, Bryant "Legal Personality" (1928) 37 Yale LJ 281.

Smith, Henry E. "Exclusion and Property Rules in the Law of Nuisance" (2004) 90 Virginia L Rev 965.

Spencer, Douglas M. and Wood, Abby K. "*Citizens United,* States Divided: An Empirical Analysis of Independent Political Spending" (2014) 89 Ind LJ 315.

Starr, Paul "The Meaning of Privatization" (1988) 6 Yale L & Pol'y Rev 6.

Sunstein, Cass R. "Two Faces of Liberalism (1986) 41 U Miami L Rev 245.

Tokeley, Kate "New Zealand Moves to Prohibit Unfair Terms: A Critical Analysis of the Current Proposal" (2013) 37 U West Aust L Rev 107.

Unger, Robert "The Critical Legal Studies Movement" (1983) 96 Harv L Rev 561.

Viner, Jacob "The Intellectual History of Laissez Faire" (1960) 3 J Law & Econ 45.

Walker Wilson, Molly J. "Too Much of a Good Thing: Campaign Speech After *Citizens United"* (2010) 31 Cardozo L Rev 2365.

Waxman, Ilana "Hale's Legacy: Why Private Property is Not a Synonym for Liberty" (2005) 57 Hastings LJ 1009.

Webb, Julian S. "Contract, Capitalism and the Free Market: The Changing Face of Contractual Freedom" (1987) 21 The Law Teacher 23.

Weinrib, Arnold S. "Information and Property" (1988) 38 U Toronto LJ 117.

Wilson, Nicholas S. "Freedom of Contract and Adhesion Contracts" (1965) 14 International and Competition Law Quarterly 172.

You, Jong-sung and Khagram, Sanjeev "A Comparative Study of Inequality and Corruption" (2005) 70 Am Soc Rev 136.

Reports and Dissertations

Green, Lance "Does the Definition of "Property" in the Crimes Act 1961 Include Electronically Stored Data? The Computer Says "No"" (LLB (Hons) Dissertation, University of Otago, 2015).

Hardoon, Deborah, Ayele, Sophia and Fuentes-Nieva, Ricardo *An Economy for the 1%: How Privilege and Power in the Economy Drive Extreme Inequality and How This Can Be Stopped* (Oxfam GB, Oxford, January 2016).

Stiglitz, Joseph *Rewriting the Rules of the American Economy: An Agenda for Growth and Shared Prosperity* (W.W. Norton & Company, New York, 2016).

Internet Materials and Newspaper Articles

Altman, Daniel "To Reduce Inequality, Tax Wealth, Not Income" (12 November 2012) New York Times <www.nytimes.com>.

Creamer, Robert "It's Economic Inequality Stupid — What to Do About the Biggest Crisis Facing America" (14 November 2013) <www.huffingtonpost.com>.

Dabla-Norris, Era and others "Causes and Consequences of Income Inequality: A Global Perspective" (1 June 2015) International Monetary Fund <www.imf.org>.

Hall, Mary "State of the Union: Obama Walking in the Footsteps of FDR" (3 February 2010) Huffington Post <www.huffingtonpost.com>.

Hartley, Simon "Bitterness after 480 jobs axed" (21 April 2008) The Otago Daily Times <www.odt.co.nz>.

Lessig, Lawrence "Citizens Unite" (16 March 2010) Huffington Post <www.huffingtonpost.com>.

OECD "Income inequality and growth: The role of taxes and transfers" (January 2012) OECD <www.oecd.org>.

NBR "Consumer NZ campaign targets unfair contract terms as law change kicks in" (16 March 2015) National Business Review <www.nbr.co.nz>.

Smellie, Patrick "Job losses after Fisher & Paykel Appliances closes factory" (April 6 2016) The New Zealand Herald <www.nzherald.co.nz>.

Sunstein, Cass R. and Ullmann-Margalit, Edna "Inequality and Indignation" (February 19 2002) The Social Science Research Network Electronic Paper Collection <www.ssrn.com>.

Victor, Philip J "Obama calls income inequality 'defining challenge of our time'" (4 December 2013) <www.america.aljazeera.com>.

Other Resources

Berne Convention for the Protection of Literary and Artistic Works (opened for signature 9 September 1886, entered into force 5 December 1887).

Commerce Commission "Submission on the Consumer Law Reform Bill".