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CORE ANALYSIS

'Creabimus!' Creatively re-thinking the corporation and the social contract

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Abstract

This article rethinks the corporation and 'the social contract with business' for the post-pandemic era. It uses a double historical orientation centred on the turbulence of the 1930s in Europe and America to insist on the company's relationship with government, and to explore transformations in the social contract now needed to socialise and ecologise global business. One part of this history looks forward, from Adolf Berle's modern corporation to the neoliberal corporation and regulatory governance. The article criticises a transformation of regulatory priorities in this era, closely analysing the shift to procedural mandates and questioning the corporate law tactic of 'enlightening' companies. The second part looks backwards to industrial modernism and Walter Rathenau in Germany in the interwar era, and also earlier (the late 1890s), to salvage a different understanding of the company and social contract, built around more constructivist visions of law, government and social consciousness. This part of the article is insistent about the metaphysical aspects of law and about developing law's equalising powers around corporate impactfulness and injustice. It promotes 'thought' about collectivism (John Keynes) and the legal and regulatory recalibration that is needed to confront certain amassing challenges of the present. The article makes institutional transformation about shifting onto a different historical axis, whereby we might re-learn collectivist ambitions around the company that co-evolves with law and government, live to the public interest. It proposes a new social contract with business and a new regulatory modus involving law's 'Creabimus' and 'regulating dangerously' for situations of widely adverse corporate impactfulness.

Keywords: corporate law; social contract; political economy; regulatory governance; Walter Rathenau; John Maynard Keynes; Edward Munch and Adolf Berle

After the first peak of the COVID pandemic (May 2020), the United Kingdom (UK) government hosted a virtual meeting of the 'Responsible Business Roundtable,' involving policy makers, business, academics and civil society actors. Included in the agenda was discussion around a 'new social contract' and a 'new modern corporatism' that could improve the stability of social cooperation with business, after a period of dramatically changed economic conditions and interventionism. The meeting led to the commissioning of a report, which considered the 'rights' that the UK government had 'earned' during the pandemic to reset the agenda on the economy.[1] The report included research on the 'priorities' that (primarily) business leaders now 'wanted to share with the government,' and proclaimed a new willingness on the part of business leaders 'to support

[1]N Woods and R Collier-Keywood, 'Building Back Better with Business: An Agenda for Government' (2021), published by Blavatnik School of Government, University of Oxford <https://www.bsg.ox.ac.uk/sites/default/files/2021-04/Building%20Back%20Better%20Report.pdf> accessed 30 September 2022. The virtual meeting was reported on twitter (and confirmed), <https://twitter.com/rbrooks45/status/1291403651177644032> accessed 22 September 2023.

and welcome clear government actions on how businesses can contribute to "building back better."'[2] It sought to build upon the innovation and sense of shared purpose to improve outcomes, which businesses, governments and also members of the public were able to experience at different points in the global public health crisis.

This report is an apt starting point for this article about the corporation and 'the social contract with business,' where it sees in COVID, and the transformations that it catalysed in law and political economy and corporate purpose, some opportunities for rethinking the strategies for responsibilising and, also, ecologising business. Governments in Europe and the UK used innovative forms of interventionism (fiscal stimulus, business loans, rent, mortgage and employment protection schemes) to defend public interest at the peak of the crisis.[3] This creative approach disrupted an imaginary with a thought-lock on the approach of many governments to economic governance in recent decades, commonly referred to as 'neoliberalism,' and which has cultivated a retreat in collectivism (and government) and the encasement of social concerns in markets.[4] Many companies also connected to the public nature of the health crisis, and acted out imaginaries of stakeholder responsibility, moving resources to shield workers, creating flexible work patterns and producing vaccines and medical supplies needed urgently.[5] Notably, though, as many multinational companies exhibited more standard economic behaviour and concern for corporate welfare, invoking 'force majeure' in supply chain contracts, cancelling orders, imposing price deductions, and refusing to pay for goods despatched and/or in production. This had an impact on workers, as suppliers were forced to lower pay and make redundancies.[6] Such varieties and compromises in the ability of companies to act with solidarity matter, and stand out for this introduction, where they are a stark reminder that the origins of the social contract with business reaches not into the 'sharing nature' or 'voluntarism' of business - a telling reference, in the UK report, to the dominant imaginary of corporate (self) regulation over the last thirty plus years. They extend, rather, into the history of the corporation as an actor and institution in a contract with government, subject to public licence, captured as early as 1651 by Thomas Hobbes.[7]

[2]Woods and Collier-Keywood (Ibid), 3. See the key recommendations for government at 11-12, where a 'partnership' of government and business is outlined.

[3]A Tooze, *Shutdown: How COVID shook the world's economy* (Viking 2021). See also International Monetary Fund, *Policy Responses to COVID-19* (IMF Webpages) <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19> accessed 30 September 2022.

[4]D Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005). On important distinctions between neoliberalism and laissez-faire, in terms of how government and law are deployed across the two ideologies, for the 'retreat' of government (laissez-faire) and more positively for the 'encasement' or insulation of markets (neoliberalism), see Quinn Slobodian, *Globalists : the end of empire and the birth of neoliberalism* (Harvard University Press 2018).

[5]N Chanana and Sangeeta, 'Employee engagement practices during COVID-19 lockdown' (2021) 21 (4) *Journal of Public Affairs,* e2508. 'Every UK manufacturer helping to produce PPE and equipment for NHS workers' (The Manufacturer, 16 April 2022). See also Iain MacNeil and Irene-Marie Esser, 'The Pandemic Response in the UK in the Context of Corporate and Financial Law – within and without Law' (June 26 2020) available on SSRN at <https://ssrn.com/abstract=3636292>.

[6]M Islam et al. *Impact of Global Clothing Retailers' Unfair Practices on Bangladeshi Suppliers During Covid-19* (University of Aberdeen 2023). 'Corporations Receiving Bailout Billions Have Laid Off Staff and Paid Investors' (*Vice*, 4 August 2020).

[7]T Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge University Press 1996). Hobbes discusses corporations at Chapter XXII, On Systemes Subject, Politicall and Private, characterising these Bodies as 'being not a Common Benefit to the whole body' and that the merchant discretion to buy, sell and export at 'such prices as he thinks fit' is 'no Body Politique, there being no Common Representative to oblige them to any other Law, than that which is common to all other subjects.' He discusses 'city-corporations' at Chapter XXIX, entitled 'Of those things that Weaken, or tend to the Dissolution of a Common-wealth', identifying the 'great number of Corporations, which are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man.' In chapter XXIV, entitled 'Of the Nutrition, and Procreation of a Common-wealth', Hobbes addresses the Commonwealth's relation with trading corporations. For a discussion, see Mathias Hein Jessen, 'The State of the Company: Corporations, Colonies and Companies in Leviathan,' (2012) 1 (1) *Journal of Intellectual History and Political Thought*, 56–85.

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The present article draws inspiration from this second institutional scene. It looks at the potential of a social contract analysis to reframe corporate regulation and governance in an age of pressing public purposes.[8] It seeks to interrupt the controversial progress of neoliberalism as an economic but, also, *governance* project, which has put developing the voluntarism or autonomy of business before the relationship with government and society in many jurisdictions. The list of controversies motivating the research encompasses evidence of rising inequality and precarity, including outsized executive pay at companies and upward trends in shareholder payouts, which increased fourfold from 1992 to 2018.[9] It, also, includes an environmental crisis unabated by current rates of pollution and resource consumption,[10] and decline, inexperience and corruption at government itself, after decades of ideological estrangement and economism (which exacerbated the mismanagement of commercial relationships during the COVID emergency, in the UK).[11] The author does work, after these ruins, to reframe debate about the 'social question' in corporate law, sometimes referred to as the 'problem of corporate social responsibility' or CSR. The analysis is concerned with the impact of companies on society but, also, with matters concerning *public licence* (in Hobbes, '*with Bodies politique for the ordering of trade*'), and with how this licence or authority is configured at the level of constitutional government, including aspects of legal technique.[12] The author specifically introduces this notion of government and public licence as a means to address what the author perceives to be a deficit in contemporary treatment of the social question in corporate law studies. This deficit concerns the recent outgrowth of governance discussions, which *absorb* and *contain* societal issues within the walls of self-governing companies and economic rationality. Social contract matters are buried, or confused, in this literature with the question of 'in whose interest is the company run', and with regulatory developments concerning the quasi-public (but, also, quasi-private) development of directors' duties, risk management and disclosure.[13]

The article develops a historical approach to rethinking the corporation and the social contract with business, which is centred conceptually on the turbulence of the interwar era in Europe and America. This is the era in which the modern corporation was first implicated in social analysis (namely, in Adolf Berle and Gardiner Means' *The Modern Corporation and Private Property*, published in 1932).[14] The era also stands out, to the author, as an important time for forming and testing intervention in the economic sphere, as governments were forced to 'interact with new forces in mass society' after the devastations of World War I.[15] A period of progressive political

[8]For an introduction to social contract theory see, E Christodoulidis, M Goldoni and S Veitch, *Jurisprudence: Themes and Concepts* (3rd Edition, Routledge 2018) 17–35.

[9]European Commission, Directorate-General for Justice and Consumers, *Study on Directors' Duties and Sustainable Corporate Governance: Final Report* (EU Publications Office 2020) <https://data.europa.eu/doi/10.2838/472901> accessed 30 September 2022, at 10, 'from less than 1% of revenues in 1992 to almost 4% in 2018.' The UK is included in the study of European Union (EU) trends, as the date of enquiry is pre-Brexit. See also D Dorling, *Inequality and the 1%* (Verso Books 2014).

[10]J Hickel, 'The Contradiction of the Sustainable Development Goals: Growth versus Ecology on a Finite Planet' *Sustainable Development* 27 (2019) 873–84; G Monbiot, *How Did We Get Into This Mess? Politics, Equality, Nature* (Verso Press 2016).

[11]*Good Law Project + Others v SSHSC* (2021) EWHC 346 (Admin). National Audit Office, 'Investigation into government procurement during the COVID-19 pandemic' (Report by the Comptroller and Auditor General, Cabinet Office, 26 November 2020). UK Government Her Majesty's Revenue and Customs (HMRC), 'Error and Fraud in the COVID 19 schemes: methodology and approach (updated for 2022)' (HMRC, 18 July 2022).

[12]Hobbes (n 7), Chapter XXII.

[13]For a critical analysis of social contract at the level of corporate interest, see S Mansell, *Capitalism, Corporations and the Social Contract: A Critique of Stakeholder Theory* (Business, Value Creation, and Society Series) (Cambridge University Press 2013).

[14]A Berle and G Means, *The Modern Corporation and Private Property* (First Published in 1932, The MacMillan Company Edition 1933).

[15]P Pironti, 'Post-War Welfare Policies (Version 1.1)' in Ute Daniel et al. (eds), *1914–1918-online. International Encyclopedia of the First World War* <https://encyclopedia.1914-1918-online.net/article/post-war_welfare_policies>, on the role of the state in the interwar era, as 'the need to mediate between opposing interests and repair the unbalances of the economic system increased the compensatory role of states.'

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economy is widely considered to follow on from this interaction, and has often been studied in the corporate law studies context. This article, by contrast, drives its curiosity at slightly earlier events and more formative intellectual histories, which preceded – and in some sense contributed to bringing about – the progressive transformations of the mid 20th-century political economy (the New Deal, Keynesianism, the welfare state, industrial democracy, etc.). Specifically, it studies how the social question became embedded in company law, tracing the story from the 1930s to the present in an attempt to look for meaningful discontinuities, ie, moments where effective treatment of the social question was put at risk or went astray. This is before the author looks backwards to the 1930s and a preceding period, the end of the second industrial revolution, in an analysis that uses more *eccentric historical remains* to unsettle the necessity of mainstream thinking about corporate governance. This eclectic and historical analysis is centred on the creative energy of an ensemble of writers, thinkers and, also, a painter, connected through a shared interest in the 'consciousness' of the late 19th-nineteenth century and industrial age.[16] The aim is to unearth and to explore sidelined elements of economic and social history (ideas, nuances, circumstances, lineages), which might have meant more than those that went forward. A means for rethinking the company and social contract is, sought in such 'salvaged histories' or corporate law remains.

The article is divided into two parts (Part 1 and 2) and a summary analysis (Part 3). Part 1, A, defies everything just said about history and starts with the case of mass redundancies at major UK ferry operator, P&O, in early 2022. Part 1 uses this recent incident to place the so-called neoliberal company *fully in the present*, but, also, to illuminate the article's main themes and concerns. Scandals at the company are described, before being juxtaposed with more extended comments about how private governance techniques *underlie* the P&O regulatory crisis and outcome. The mind of the reader is turned in this context (and from the start) to how law and governance portend to resolve social conflicts at companies and to *applied* aspects of the *current* social contract with business (which the article then goes on to study).

Part 1, B, then continues by tracing the development of the social question in company law from the 1930s to the present. It starts with Berle and Means' classic text, *The Modern Corporation and Private Property*, published on the eve of the New Deal, in America, and eager to broker a new partnership between government and large industrial corporations. A new capacity for self-governance and 'enlightened administration' is foretold, in the narrative, in response to the rising autonomy of companies and their 'quasi-public' governing qualities, after the 'separation of ownership and control.' The book and statement have been much pored over since, for their capacity to redefine the social contract as a question about whether companies might engage with society directly via their governance processes, ie, by widening the concerns or the 'interests of the company' to include the stakes for communities and participants. Part 1 observes how this theory about stakeholder purposes at the company collided with a 'progressive' period of governance in the 1950s and 1960s, as government interventionism also worked to clarify social obligations that companies could and should attend. However, an aggressive turn against state interventionism and industrial democracy in the late 1970s and 1980s, the beginnings of the so-called 'neoliberal era,' would soon change the terms of corporate socialisation. Shareholder demands strengthened their hold over the governance of companies, and the role of the state was to shift from intervention (or ownership) to promoting the market coordination of needs and outcomes, wherever possible. Progressive regulatory theorists, working in capitalist economies, quickly had to rethink the best available means to maintain sight and application of the social question in this context. The biggest dedication of the research in the rest of Part 1 (C-D) is to describe and evaluate the terms of this rethink.

This part (C-D) critically studies the development of 'new' or 'regulatory' governance, in this historical context, as a regulatory technique that responded to (grew alongside) political-economic developments of the 1980s. Notably, it shows how legal scholars working on these ideas came to

[16]First-person plural future active indicative of creō, meaning to create, produce, make originate.

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share in the era's pessimism about law and government, identifying problems with the effectiveness of traditional (regulatory) techniques. Pressed about the social question in the context of globalisation and rising corporate power, regulatory theorists sought to repurpose the company as an alternative site for progressing regulatory agendas abandoned by the 1980s governments. They identified new spaces for creative adaptation within corporate autonomy and governance that could be 'responsive' to public conflicts. New procedural forms of regulation were instituted as a means to involve companies and the wider public, which went by the name of 'functional equivalents' (to traditional legal instruments). However, significant problems are identified, by the author, concerning the proliferation of these equivalents, which *maintain the neoliberal project* by confining the law to process and deputising legal force and function to a mix of price, competition and (increasingly) scandal ('a circumstance or action that offends propriety or established moral conceptions or disgraces those associated with it').[17] A deeper analysis seeks to explore how the social contract between companies and government is reconfigured in this context. The author remarks on the tendency of regulatory governance to supplant individualised solutions, created by companies for gain, for *public* authority and the damage that this does to law, justice and also comprehensive *understanding* of corporate economies and *their impactfulness*, insofar as government is (ideologically) resolved to be indifferent to outcomes, or over-invests in companies and markets as the means to collective creation.

Part 2 of the article develops a different perspective in response to this critique, standing at the turbulent hinge of the 1930s, again, but this time looking the other way. A lineage is drawn from Part 1 to Walter Rathenau, German industrialist, Weimar politician and scholar, writing on corporations in Germany (1917–1922). Part 2, A, explores some of the circumstances and associations of Rathenau, as a means to learn more about the commitments that he held and the corporate law concepts that he identified.[18] It finds that Rathenau's understanding of the company placed a lot of emphasis on the social contract and regulatory principles, even as he proclaimed advances in large-scale corporate administration and enlightenment. His theories did not contemplate a significant expansion of corporate self-government, but were closer in imagination to peers like John Maynard Keynes, also interested in the corporation and collectivism (and a government of 'intelligent design').[19] Part 2, B, seeks to deepen understanding of Rathenau's social contract insights. It extends the timeline over which Rathenau's interest in political economy developed to the *heat and disillusion* of the late 19th-century, exploring the rebellions against *fatalism* that informed and shaped Rathenau's perspective. Part 2 connects a spur to creation ('Creabimus!') and technical innovation, which Rathenau shared with the late 19th- century industrialists but also artists, to the co-evolution of companies *with* public government as a means to staying connected with the metaphysical dimensions of economic regulation (higher questions) and developing law's 'equalising' powers. The author also identifies key concepts to help with the reconstruction of the social contract with business from the analysis, including a reserve power to 'recognise what is amiss' (Rathenau), a regulatory 'Agenda' for government in the realm of the 'technically social' (from Keynes), and the potential for obligations and 'economic sacrifice' to be developed in situations of extensive (or emboldened) corporate abuse (Berle).

The final part of the article (Part 3) is more summative. It seeks to mobilise a more constructive instinct for corporate regulation using the social contract question, and after finding a more congruent reading of the company's relation with law and government in Part 2. Part 3 details some of the commitments and cooperation that could be required of companies under new legal and regulatory frameworks in exchange for public licence, limited liability or, in some circumstances, government and taxpayer support (as happened in the pandemic). Reforms for corporate governance are also covered

[17]Definition from Merriam Webster (est. 1828), online dictionary.

[18]Rathenau's work informs major concepts including the depersonalisation of ownership, the concept of the enterprise interest, and the notion of enlightened creation at companies.

[19]JM Keynes, *The End of Laissez Faire* (Leonard and Virginia Woolf at the Hogarth Press 1926).

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(briefly), though re-framed by the histories of the social contract, contrasted in Parts 1 and 2. The *proviso* to 'recognise what is amiss' (Rathenau) collides, in this part, with a wider call for institutional experimentation, which seeks to overturn a culture of economism and to constantly improve on law's ineffectiveness (flawed progress as an improvement on economic fatalism). A new modus of 'regulating dangerously' is identified in the last paragraphs, which underscores the importance of creative experimentation in instituting the social question and particularly for long neglected legacies of commercially beneficial destruction. The article makes institutional transformation about shifting onto a different historical axis, whereby we might re-learn collectivist ambitions around corporate organisations that co-evolve with law and government, enlivened by the public interest (and not as their functional equivalent). This regulatory modus the article titles *'Creabimus!'*

1. The neoliberal corporation and social contract

A. On corporate governance and scandal at P&O

In March 2022, P&O Ferries in the UK, part of the P&O shipping group originally chartered by a Londoner and a Shetlander in 1840, was scandalised in newspaper headlines across the country. The company had sacked all of its UK crews, comprising 786 employees.[20] Without notice, the company (reportedly) used MS Teams, phone and text messages to communicate a message that employment for the unionised crew members was terminated 'with immediate effect due to redundancy,' a communication tactic that added to the scale of negative publicity, due to its apparent lack of respect for the dignity of employees.[21] In the days after the mass redundancies, vital public transport services provided by P&O from England to Europe, Ireland and Scotland, were suspended, whilst the company located new crews and managed the scandal. Replacement staff were to be contracted from an agency supplier at lower wages (namely, non-UK based contractors to avoid domestic minimum wage and union laws), according to the firm's own publicised strategies. Such a substitution of labour was proposed to be in the service of flexibility and cost-savings, or a 'last resort' response to losses suffered by the firm due to COVID-19 and deficits in the pension fund.[22]

Significant public outrage followed the mass terminations, or (as UK labour lawyer Keith Ewing aptly names it) 'fire and replace' incident, much of which was focused on the company's callous approach to the rule of law.[23] Questions were raised by lawyers, trade unionists and politicians about the company's failure to comply with UK and international employment standards.[24] Specifically, the company had neglected to inform and consult workers' representatives about their decision to dismiss workers for reasons of redundancy, or to notify the Secretary of State or relevant authority in the flag state as required by the *Trade Union and Labour*

[20]'P&O Ferries could face an unlimited fine if sackings unlawful' (*The Guardian*, 18 March 2022).

[21]P&O Ferries claimed that only a minority of the 800 staff on UK contracts who were sacked were fired by video message. A spokesperson said: 'All affected crew who were working yesterday were notified face-to-face and in person on board their vessels. Virtual meetings were also held but only 261 of our 800 affected staff were on those calls'. Others were told by e-mail or text message, P&O said, as well as individual phone calls. See 'Letter from P&O Ferries to Business Secretary Kwasi Kwarteng, 22 March 2002,' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1062461/Letter_from_PO_Ferries_to_Business_Secretary_Kwasi_Kwarteng_22_March_2022.pdf> accessed 30 September 2022.

[22]See 'Letter from P&O Ferries' (Ibid.)

[23]K Ewing, 'P&O Sackings Show Why Laws to Protect Workers Are So Important' *Comment for the Institute of Employment Rights (IER)*, available at <https://www.ier.org.uk/comments/po-sackings-show-why-laws-to-protect-workers-are-so-important/>; Ewing identifies the practice of fire and replace as distinct from 'Fire and rehire,' whereby an 'employer dismisses employees and then re-engages them on new contracts with worse terms and conditions.'

[24]Transport Committee & Business, Energy and Industrial Strategy Committee, 'Oral Evidence: P&O Ferries,' HC 1231 24, March 2022.

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Relations (Consolidation) Act 1992.[25] Wider questions arose about the liability of the company for unfair dismissal, breach of directors' fiduciary duties, the prospect of directors' disqualifications and shareholder actions for damages,[26] the safety implications of sailing with inexperienced crew,[27] the (uncertain) entitlement of agency workers to the UK National Minimum Wage (NMW),[28] and breaches of international human rights law codes and standards by the company, but, also, the UK government for failure to '*prevent, investigate, punish and redress*' abuses of rights taking place within its jurisdiction and territories.[29]

By January 2023 (the time of writing), P&O Ferries was reported to be waiting to take delivery of two new cross-channel ferries, 'its largest to date', having largely weathered the scandal.[30] Charges were not pursued by the UK government (after some months of consideration).[31] Despite this quieting of the scandal, the present article continues to take interest in the events at P&O, where the actions and reflexivity of the company at the height of the crisis speak to *essential features of the neoliberal corporation and social contract*, and their (troubling) continuity into the present. The events severed, for instance, the public spirit and collaboration, which the country tried to experience during COVID. Renewed optimism about the need for systemic change in the economy, including imaginative talk about the 'future of work' and respect for essential workers, was stymied and overshadowed by the cynically planned and executed redundancies at P&O. The clear resumption of economic priorities, as is involved in 'fire and replace', aligned less with hopes for 'a new social contract' and more with a recent history of the neoliberal corporation that aims at reducing labour and production costs, whilst increasing the portion of private gains for shareholders.[32] Private property dimensions to this company were also able to protect the business from any broader demand for *public* accountability or interventionism. What emerged, instead, was strategic development of the facilities of corporate autonomy in the private sphere, including space to create the cost-cutting scheme with lawyers skilled in 'creative' compliance, whilst relying on the facilities of corporate separate legal personality to justify (ie, rationalise) cuts within an otherwise profitable corporate group.[33]

[25]Section 193 and section 193A, concerning the ferry company's compliance with the public notification duty (requiring notice of the intention to make large-scale redundancies to the Secretary of the State or relevant authority in the flag state) and requirements to formally consult with workers' representatives in advance of the decision (section 188). See also the legal case launched by former P&O Ferries chef John Lansdown, seeking £76 million in damages and compensation from P&O Ferries and its parent company, DP World; an out of court settlement was reached in October 2022 after the company admitted 'unfair dismissal'; 'Chef of 15 years wins case for unfair dismissal' (Workers Union Blog, 3 October 2022).

[26]Disqualification called for by Frances O'Grady, in a letter to the Insolvency Service, see 'TUC Chief Calls for Directors of P&O Ferries to be Disqualified' (*The Guardian*, 22 May 2022).

[27]Marine Coastguard Agency (MCA) investigations followed the announcement of redundancy. See also testimony on safety in the Transport Committee & Business, Energy and Industrial Strategy Committee (n 24), Questions 17 and 18.

[28]See Transport Committee & Business, Energy and Industrial Strategy Committee, Ibid., questions 11–13. See also proposals in Queen's speech re: Harbours (Seafarers' Remuneration) Bill, reported at <https://www.theguardian.com/business/2022/may/10/grant-shapps-law-seafarers-minimum-wage-queens-speech> accessed 30 September 2022.

[29]K Ewing, 'P&O Ferries: Business and Human Rights' (*IER Blog*, 24 March 2022) <https://www.ier.org.uk/comments/po-ferries-business-and-human-rights/> accessed 30 September 2022.

[30]'P&O Ferries prepares for delivery of new Dover – Calais ship', see <https://www.niferry.co.uk/po-ferries-prepares-for-delivery-of-new-dover-calais-ship/> accessed 30 January 2023.

[31]As of October 2022, the Insolvency Service has ongoing civil investigations into the circumstances surrounding the recent redundancies made by P&O. The potential for a criminal investigation or charges was dismissed by the Service as 'having no realistic prospect' in August 2022, see 'P&O Ferries: Update from the Insolvency Service (19 August 2022).

[32]D Ciepley, 'Neoliberalism and the Corporation: Mutually Contradictory and Corrupting' (August 28 2018) <https://ssrn.com/abstract=3230520> accessed 30 September 2022.

[33]The parent company DP World Limited announced 'strong financial results for the year ended 31 December 2021', where revenue grew by 26.3%, overall profit after tax by 33% (to $1.2bn). $376.1 million in dividends were paid to shareholders in the past two years. See DP World (parent) financial statements, see DP World, 'Annual Reports', <https://www.dpworld.com/investor-relations/financials-presentation/financial-reports/annual-reports> accessed 11 September 2022, financials cited at page 53. For a mainstream press account of the crisis, citing group profitability, see 'P&O chief admits breaking law over mass sackings' (*Financial Times*, 24 March 2022).

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Members of the company board were questioned by the Government select committee in the days after the sackings were announced. Predictably but, also, meaningfully, P&O executives defended the actions taken in economic and competitive terms. Months of consultation with workers, although a legal requirement, would have 'undermined the business, caused disruption, which would have led to customers leaving for competitors,' said CEO Peter Hebblethwaite.[34] Avoidance of consultation had, in fact, 'safeguarded the long-term future of the company and the livelihoods of 2,200 employees.'[35] Employment law requirements, in such a view, were strategically treated by the management as a 'business cost' and 'efficiently breached.' Or (to translate the statement further) fiduciary duties, in the CEO's interpretation of UK company law obligations to promote the 'success of the company' for the benefits of the members could, in challenging circumstances, *perhaps even require some form of law-breaking* to protect the company's share price and long term viability. Similar thinking was applied by P&O Executives when explaining the company's approach to redundancy monies for workers, which were paid (up front) but without compliance with the statutory consultation process. Company legal representatives assessed the monies paid as being 'fair' due to their being comparable to the level of statutory compensation that would have been due, if the legal requirements were followed. In this context, the board claims to have had *'regard'* for the applicable legal requirements, just *without offering due process* at law.[36]

Such deep commodification of labour law is not new or unheard of (of course). Since at least the 1990s, it has been common to observe calculative reflexivities, like this, about law, regulation and common standards among business actors, tasked with maximising profit and dividends for investors on the global stage. A 'race to the bottom,' which mixes the dynamics of markets and competition and skills of regulatory arbitrage (ie, whereby firms capitalise on loopholes in regulatory systems in order to circumvent unfavourable regulations) has been widely problematised by anti-corporate activists, as chief among the exports of economic globalisation.[37] Each is now widely rooted in the global corporate and financial sphere.

The P&O Ferries' example is still distinct and interesting despite not being new, though, and not just because it carries to the UK what has been exported elsewhere, namely a market-bound mentality ready to act among (deplete) rights and duties for corporate 'success' (although it does this too). The events further cause shock because they force an awkward confrontation with a highly developed regulatory imagination, which for the last thirty years has encouraged companies to self-determine or 'regard' risks to themselves, and others, as a proxy for respecting law in the economic sphere. Such an extension of corporate rule, delivered at a 'best efforts' standard and on a competitive basis, has been widely presented as among the benefits of corporate social responsibility (CSR), for instance.[38] Justification for this approach is extended where the rule of law is weak and companies offer an opportunity to use their organisational habits and reflexive constitution to improve standards internationally, often where governments are unwilling or unable to

[34]P Hebblethwaite stated clearly before the House of Commons committee that '*there's absolutely no doubt we were required to consult with the unions. We chose not to do so*' (emphasis added). See Transport Committee & Business, Energy and Industrial Strategy Committee (n 24) at Q124.

[35]Ibid.

[36]For thorough discussion of these matters, see Bristol University and the Institute of Employment Rights, 'P&O Ferries Discussion: a roundtable on seafarers, industrial relations and the law', 14 April 2022, involving S Galani, A Bogg, K Ewing, T Novitz and P Turnbull <https://www.ier.org.uk/news/po-ferries-discussion-a-roundtable-on-seafarers-industrial-relations-and-the-law/> accessed 30 September 2022.

[37]A Tonelson, *The Race to the Bottom: Why a Worldwide Worker Surplus and Uncontrolled Free Trade Are Sinking American Living Standards* (Basic Books 2002). N Klein, *No Logo* (Originally Published in 1999, Fourth Estate 2010). On the state regulatory implications, P Simons and A Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge 2014).

[38]Corporate social responsibility (CSR) is defined in the UK as 'the responsibility of an organisation for the impacts of its decisions on society and the environment above and beyond its legal obligations, through transparent and ethical behaviour.' See the UK Department for Business Innovation and Skills, 'Corporate Responsibility: A Call for Views) (2013) BIS/13/964.

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legislate.[39] Relatable habits arise at P&O, where the CEO defends the company's breaches in terms of the extra 'insight' or pragmatism that he and his board can bring to the table (not consulting when the company already knows the outcome, for instance), and compares this by implication to the inefficiencies of UK state and judicial forums (when agreeing compensation without a court), which are being disinvested after the same imaginaries.[40] Volatility is evident as the *bet* (of conscience or good judgement) does not pay off (in this case); rather, without effective action (ie, enforcement), the risk of volatility passes down the line to other workers.[41]

Significantly, many of the scholarly proposals for improving corporate self-governance and reflexivity in fora like CSR do still imagine the company in a social contract, and law and government as *backing* the market-led organisation of interests (and so demur conceptually from a moment of *self*-constitutionalisation).[42] However, the deferential approach of the Conservative Government, as well as the recent UK report about governments 'sharing' in company purposes (in the introduction), allow us to glimpse an increasingly disembedded (as Karl Polanyi might have had it) approach to the rule and authority of companies, festering in the move to give companies law-creating powers.[43] The P&O Ferries case, as such, says something about the social contract dimensions to the systems of corporate government, developed and exported within advanced capitalist systems under conditions of neoliberalism. A social contract conflict erupts, at P&O, where one reading puts democratic law and government as the source of the company's licence and legitimacy, which then meets another that makes companies' economic functions (creating wealth, innovation, jobs) self-standing or *prior*. The latter is justified at P&O as the best (or only?) means for society to pursue collective creation, even where this involves standing down legal rights and facilities, if not the rule of law itself.

Such examples and prospects give the author occasion to find out more about the corporation and social contract. There is more to understand about how this economic and functional priority historically arises and reconfigures the social contract with business, including law's normative discovery and development, public supervision and enforcement, the realisation of common objectives, democratic input and deliberation, etc. Such things interest the author as *applied aspects* of the social contract with business and the contemporary institution or delivery of corporate regulation, formed in its midst.

B. How economic rationalities came to dominate the governance of 'wider interests'

It is common for business law scholars to use the 1930s as a point of departure for studying *modern* corporate social institutions, including the relationship between the company and society, or CSR.[44] This entry point to the modern company (the 1930s) reflects the era's ability to mix turbulence and transformation, as capitalist economies navigated the fall-out from World War I and the depression that developed after the 1929 stock market crash in America.[45] The era gives scholarly carriage, too, to *The Modern Corporation and Private Property (1932)*, by Adolf Berle and

[39]G Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' 18 (2) (2016) *Indiana Journal of Global Legal Studies* 617. Empirically studying private transnational governance and the social contract, R Locke, *The Promise and Limits of Private Power* (Cambridge University Press 2013).

[40]D Beizsley and S Hawley, 'Closing the UK's Economic Crime Enforcement Gap' (*Spotlight on Corruption Report*, January 2022), available <https://drive.google.com/file/d/1UzymaDZZSVF8By1WYGtahRN-gvBI2R-_/view> accessed 30 September 2022.

[41]E Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Oxford University Press 2021), at 3.3 and 3.4 on the volatilities embedded in the 'deep commodification of labour.'

[42]D McBarnet, T Campbell and A Voiculescu, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2008).

[43]K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (First Published in 1944, Beacon Press 2001).

[44]W Katz, 'Responsibility and the Modern Corporation' 3 (1960) The Journal of Law & Economics 75–85. J Parkinson, *Corporate Power and Responsibility* (Oxford University Press 1993).

[45]JK Galbraith, *The Great Crash 1929* (Originally published 1955, Penguin 2009).

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Gardiner Means, a seminal text for theorising the 'modern' corporation. The book transformed thinking about business by relating a new concentration in industrial power at companies to the 'social question' *and* to new features of business and investment, most notably 'the separation of ownership and control'.[46] Along with the involvement of Berle in the debates with Merrick Dodd in 1931 and 1932 about stakeholder versus shareholder governance, the book introduced new ways of interrogating the company's nature and purpose and relating corporate governance to societal issues.[47] Berle, a lawyer and academic, was also a speech writer for Theodor Roosevelt at the time of the book's writing (ie, on the eve of Roosevelt's election and the New Deal), a relationship that hints at the wider engagements of the book and authors in shaping the social contract with business during the interwar era.[48]

Berle and Means were, in many respects, writing a book for corporate lawyers about shifts in the balance of economic policy and decision-making, which were created by the emergence of large enterprises and new dispersed modes of stock ownership.[49] However, they were also keenly aware of how corporate governance had to adapt, for legitimacy and in the context of war and depression, to the *visible* capacity of powerful firms to malign as well as benefit public interests (companies could, they said, 'harm or benefit a multitude of individuals, affect whole districts, shift the current of trade, bring ruin to one community and prosperity to another).'[50] For the authors, countering this societal impact and depression meant transforming corporate power and authority by subjecting it to 'tests of public benefit': 'In time of depression, demands are constantly put forward that the men controlling the great economic organisms be made to accept responsibility for the well-being of those who are subject to the organisation, whether workers, investors, or consumers.'[51] Yet, the authors were also keen for political reasons, including the necessity of maintaining the 'confidence of business,' not to restrict business freedoms; they wanted, rather, to reform corporate power and social authority.[52] In this context, Berle and Means used logic and social optimism to reshape important parts of the social contract with business, envisaging a partnership with government, but also a reformulation of *corporate autonomy* as 'state-like' or 'quasi-public'. Citing the work of Walter Rathenau in Germany, they constructed a sense of companies being on the brink (after the separation of ownership and control) of gaining (earning) a new capacity to 'govern' in the general interest.[53]

In the last pages, in a chapter titled 'The *New Concept of the Corporation*', Berle and Means used this insight to form a *governance* perspective on the modern enterprise ('The institution here envisaged calls for analysis not in terms of business enterprise but in terms of social organisation').[54] New independence within the corporate entity from shareholder claims increased, in their

[46]Berle and Means (n14), at 9 on 'Property in Transition' and Chapter III on 'The concentration of economic power'; on the social question (the potential for the large corporation to harm or benefit the public) at 46. See also the last Chapter (where the question is more forcefully addressed', 'The New Concept of the Corporation.'

[47]A Berle, 'Corporate Powers as Powers in Trust' 44 (1931) Harvard Law Review 1049. M Dodd, 'For Whom Are Corporate Managers Trustees?' 45 (1932) Harvard Law Review 1145.

[48]R Thompson, 'Adolf Berle During the New Deal: The Brain Truster as an Intellectual Jobber' 42 (2019) Seattle University Law Review 663–95, at 663, 'His service as a brain truster for Franklin Roosevelt during the fall election gave voice to the transformative economic policies of the New Deal.'

[49]Berle and Means (n 14), 18–126.

[50]Berle and Means (Ibid.), 46. See also Galbraith (n 45) at 183–4 on corporations and speculation in the lead up to 1930 as a 'flood tide of corporate larceny.'

[51]Berle and Means (n 14) 353.

[52]See the letter of John Keynes to Roosevelt, published in the New York Times on 31 December 1933, where Keynes cautions Roosevelt to avoid 'upset to the confidence of business' in order that his programme of economic reforms might pass – this is an ambition that Berle would have also been keenly aware of, as Roosevelt's speech writer, see JM Keynes, 'From Keynes to Roosevelt: Our Recovery Plan Assayed' (*New York Times* 31 December 1933) <https://www.nytimes.com/1933/12/31/archives/from-keynes-to-roosevelt-our-recovery-plan-assayed-the-british.html> accessed 20 September 2022. Discussed by P Davidson, *The Keynes Solution: The Path to Global Prosperity* (New York: Palgrave MacMillan 2009) 14.

[53]Berle and Means (n 14), cite from Walter Rathenau, at 352, citing W Rathenau, *Von Kommenden Dingen* (Berlin S Fischer 1918), translated as *In Days To Come*, from German by Eden and Cedar Paul (London 1921), 120 and 121.

[54]Berle and Means (n 14) 352–7, 352.

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view, the potential for enlightened governance at companies, as management should evolve into a 'neutral technocracy,' capable of balancing 'a variety of claims by various groups.'[55] The book identifies potential changes in the character of the corporate profit stream, as related to this capacity for public governance. Profits earned could no longer be classified as purely private property; 'Claims on it must be adjusted by some other test, other than that of property right,' where shareholders, surrendering control, 'surrendered the right that the corporation should be operated in their sole interest.'[56] Berle and Means reference community claims 'put forward with clarity and force', which might move the company towards more responsive forms of production and action in this context.[57] They also explain their 'temporary' preference for *maintaining shareholder loyalty*, insofar as 'a convincing system of community obligations' was not yet (in 1932) in place (they talk about a need for obligations to be 'worked out' and communities generally 'accepting such a scheme').[58] Wider expectations that business practitioners would increasingly 'assume the aspect of economic statesmanship' and that corporate law might form a basis in 'constitutional law for the new economic state' are expressed, though somewhat ambiguously (ie, as advancing, but not necessarily being dependent on the enlarged respect for community interest).[59]

Such was the force and (perhaps) ambiguity of this description of the company as expanding in the means of self-government that Berle and Means were able to prophesy their own origins moment: 'How will this demand [for responsible power] be made effective? To answer this question would be to foresee the history of the next century.'[60] After World War II, social and labour movements would advance further on the governance prospects elaborated by the authors and on the company's quasi-public orientation, as the corporatist collaboration for growth and jobs was instituted.[61] By the 1960s, John Galbraith, in *The New Industrial State*, was able to narrate the company's 'socialised' and 'bureaucratic' transformation. The book highlighted new forms of motivation among directors suited to advancing the public interest and the long-term success of corporate organisations engaged thus, which Galbraith termed 'enlightened administration.'[62] Importantly, these capacities in governance grew during a period of constancy in corporate legal frameworks (ie, no new duties were introduced for companies or directors in the law) but, also, strong public government and collectivism (social legislation, regulated finance) and collective bargaining. In the terms used by Berle and Means in 1932, this wider instrumentalism granted 'clarity and force' to many of the era's normative expectations of business.[63] In support of this view, when writing for Roosevelt, Berle had earlier talked about companies sacrificing 'this or that private advantage' and seeking 'general advantage.' Such enlightenment involved not voluntarism,

[55]Berle and Means (Ibid.) 353, named as constituents.

[56]Berle and Means (Ibid.) 355, 'they have released the community from the obligation to protect them to the full extent implied in the strict doctrine of property rights.'

[57]Berle and Means (Ibid.) 355–6.

[58]Berle and Means (Ibid.) 355–6.

[59]Berle and Means (Ibid.) 353 and 357. A scheme concerning fair wages, security to employees, reasonable service to their public and stabilisation of business is described.

[60]Berle and Means (Ibid.) 355–6, 354.

[61]C Maier, 'The Postwar Social Contract: Comment' 50 (1996) International Labor and Working-Class History 148–56, on a linking of wages to productivity, made possible by post-war Keynesianism.

[62]J Galbraith, *The New Industrial State* (First Published in 1967, Princeton University Press 2007), at 89–107. For an overview of corporate 'social consciousness' over the post-war era, see P Ireland, 'Financialization and Corporate Governance' 60 (2009) Northern Ireland Legal Quarterly 1–34.

[63]L Talbot, 'Trying to Save the World with Company Law? Some Problems' 36 (3) (2016) Legal Studies 513–24, 524: 'Wider interests, particularly those of labour were met through political reforms . . . equality was sought through fiscal policies and the wealth of individual capital holders in companies . . . was taxed at punitively high rates . . . These were some of the political shifts that led politicians . . . to characterise the company as one that no longer pursued shareholder interests and was a creature of the community. But company law stands out as making no contribution to this.'

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the writing clarifies, but a prospect that should companies 'use its collective power contrary to public welfare, the government must be swift to enter and protect the public interest.'[64]

A different deployment of corporate autonomy and corporate socialisation, which again speaks to the ambiguities of how the modern company was theorised in the 1930s, was to emerge after the mid 1970s. Corporate law scholars talk about the sudden disappearance ('overnight') of the motivational ethos and collaborative underpinning of the 'Galbraithian corporation.'[65] A powerful rewriting of the post-war social contract was going on against the backdrop of rising social and economic conflicts – an oil crisis, inflation, and industrial and competition from manufacturing economies in the Global South.[66] Intellectuals like Milton Friedman (discussed by Bartl, this issue) and Fredriech Hayek, who had been writing against the post-war social contract and corporatism since the 1940s, waded into the turbulence, this time. The new ideas and theories sought to relate rising conflict around the economy and industrial participation to the dangers of instrumental law and government ('the road to serfdom'),[67] and a government's ill-adaption to the 'knowledge' or 'discovery' demands of a decentralised market society (others talked about the 'overloaded state').[68] Such ideological interventions proposed adaptations in the social contract, to make law and government more minimal (the enforcer of contracts and property rights). On the other hand, however, governments were also expected to extend their involvement in creating, steering and facilitating exchange and markets, as a means of advancing the core idea that social institutions, planning, and fixed structures were all ineffective, and (through the efforts at improvement that this catalysed) always on the road to becoming more repressive.

By the 1980s, elected politicians began to institute transformations in the social contract with business that expressed these new beliefs or theories, through anti-union legislation and wider policies that aimed at reducing state control over the economy (privatisation, capital liberalisation, deregulation).[69] This programme aimed at growing the role of markets, as allocative devices, and reducing 'red

[64]Evidenced by a speech that Berle wrote as part of the 1932 election campaign, delivered by Roosevelt, *The Commonwealth Club Address* (23 September 2023). The speech is clear about the need for the 'Princes of Property' (large industrial and financial corporations) to fall under government restriction: 'I am not prepared to say that the system which produces them is wrong. I am very clear that they must fearlessly and competently assume the responsibility which goes with the power. So many enlightened businessmen know that the statement would be little more than a platitude, were it not for an added implication. This implication is, briefly, that the responsible heads of finance and industry instead of acting each for himself, must work together to achieve the common end. They must, where necessary, sacrifice this or that private advantage; and in reciprocal self-denial must seek a general advantage. It is here that formal government-political government, if you choose, comes in. Whenever in the pursuit of this objective the lone wolf, the unethical competitor, the reckless promoter, the Ishmael or Insull whose hand is against every man's, declines to join in achieving and end recognized as being for the public welfare, and threatens to drag the industry back to a state of anarchy, the government may properly be asked to apply restraint. Likewise, should the group ever use its collective power contrary to public welfare, the government must be swift to enter and protect the public interest.' Attributing authorship to Berle, see C O'Kelley, 'The Evolution of the Modern Corporation: Corporate Governance Reform in Context' 3 (2013) University of Illinois Law Review 1001–49, at 1025–6, 'On the night of September 22, 1932, Roosevelt received Berle's final draft; it was Roosevelt's first look at the speech. "He read it over, made a few slight corrections, and that was that. The following day, at noon, Roosevelt delivered "his" famous speech to the Commonwealth Club in San Francisco,' 1026.

[65]O'Kelley (n 64), 1045.

[66]D Edgerton, *The Rise and Fall of the British Nation: A Twentieth Century History* (Allen Lane 2018), see Chapter 15 (on declinism and technocratic critique) and Chapter 16 (on the early 1970s and the high-point of the welfare state). Specifics to the corporation, at O'Kelley (n 64), 1045–6.

[67]F Hayek, *The Road to Serfdom* (First Published in 1944, Routledge Classics 2001).

[68]F Hayek, 'The Use of Knowledge in Society' 35 (1945) The American Economic Review 519–30, 520-524 on the 'economic problem of society' as concerning adaptation to rapid changes in the 'particular circumstances of time and place' that 'cannot be conveyed to any central authority in statistical form,' or 'conscious direction', but must be resolved through 'some form of decentralisation'; F Hayek, 'Competition as a Discovery Procedure' in F Hayek (ed), *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge & Kegan Paul 1978).179-190, contrasting the socialist or 'genuine economy' and the spontaneous market order or 'catallaxy', critiquing macrotheory and 'social justice' ('this is a principle that cannot be implemented in general without destroying the foundations of the market order').

[69]Edgerton (n 66) Chapter 18. See also W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso Books 2014), Chapter 2.

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tape', the ideologically loaded tag for public regulation and standards.[70] New governance rationales for companies were developed by 'law and economics scholars', interested in growing the discipline of markets over the company's decision-making process, which involved reviving the purposes of shareholder value maximisation (such had receded in the 1950s and 60s).[71] Where modern law scholars had emphasised the quasi-public components to corporate governance, the new scholars were keen to amplify neoclassicist ideas about the stark separation of the economic and political spheres (minimising the chance of interventionism). They sought to simplify corporate social interactions as a bulwark against (so-called) shirking, agency costs and discretion at corporate institutions, which the theories discredited as a form of unlawful 'plundering' against the interests of members.[72] Like the political programme, such theories also offered potential for organising life around individual preferences (the good life) and for (crude) economic resolution of social and labour conflicts, which had become a source of creative difficulty for companies *and* for the under-fire governments of the 1970s.

Importantly, and in a part of the story that is less commonly addressed, the emphasis on deficiencies of government planning and collectivism also filtered into legal scholarship. New kinds of pessimism about law and government grew among the 1980s trend for 'new public management' (NPM), which brought the language of economic rationalism to the public sector, and 'better regulation', which met the concern about 'red tape' and sought to simplify the regulatory environment.[73] Related but, also, distinct movements arose around the *globalised activities* of companies that became more *ungovernable*, as they sought to maximise competitive opportunities in different jurisdictions and markets, made possible by a more liberalised corporate and financial regime (offshoring production, new chances to lower labour and production costs, etc.). New social movements met this problem (of ungovernability) by theorising the concentrated power held by multinational companies (moving beyond Berle's theories of the modern company) and starting campaigns of direct action (against Nike, Shell, etc.).[74] Legal scholars, keen to avoid traditional (or stereotyped) regulatory responses and admitting their own generalised scepticism towards constructivist models of law, sought new regulatory mobilisations that built on this notion of direct action (and theories of global corporate power that supported it).[75] They built visions for enacting more governance in the *private sphere*, pressing on the incentive to profit and

[70]The Conservative administration produced the report *Burdens on Business* in March 1985. The report recommended a number of new anti-regulation processes, which were followed through into the 1986 White Paper *Lifting the Burden*. In 1986 the Conservative government published another White Paper *Building Businesses, Not Barriers*, which announced the creation of the Enterprise and Deregulation Unit (the EDU) with extensive deregulatory duties, as well as Departmental Deregulation Units. On the long-term rhetorical assault on regulation in the UK as 'burdensome,' under Conservative Governments and also New Labour (including the Hampton Review of regulation and enforcement in 2004), see S Tombs, *Social Protection after the Crisis: Regulation without Enforcement* (Policy Press 2016).

[71]Ciepley (n 32).

[72]L Talbot, *Progressive Corporate Governance for the 21st Century* (Routledge Press 2013) at 117–29. See also L Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler Publishers 2012).

[73]C Hood 'The "New Public Management" in the 1980s' 20 (2) (1995) Accounting, Organisations and Society 93–109; UK Cabinet Office Cabinet Office. *News Release 46/97 'Better Regulation – Not Deregulation*' (3 July 1997).

[74]Theorising the global corporation: Klein (n 37); Tonelson (n 37). On the campaigns of direct action, S Soule, *Contention and Corporate Social Responsibility* (Cambridge University Press 2009). Theorising globalisation, the increasing integration of societies and economies, and the transformations that this brings for the individual, U Beck. 'Living Your Life in a Runaway World: Individualization, Globalisation and Politics' in W Hutton and A Giddens (eds), *On The Edge. Living with Global Capitalism* (Vintage 2001), 164-174.

[75]P Nonet and P Selznick, *Law and Society in Transition: Toward responsive Law* (Harper & Row Press 1978). I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992). Nonet and Selznick, *Law and Society in Transition* at p 6, envisaging the 'potential resilience and openness of institutions,' as being 'more careless of authority, more accepting of challenge and disarray,' and where 'to be responsive the system should be open to challenge at many points, should encourage participation, and should expect new social interests to make themselves known in troublesome ways.'

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property and decentralising the activities of norm production and discipline.[76] Such transformations could, scholars reasoned, extend the responsiveness of law over complex, globally distributed, corporate action. Regulation could be re-conceptualised to mean broad kinds of 'influence' over others and, thereby, inclusive of sources beyond formalised law and/or state.[77] Such legal theories were also designed to address long running problems of defective compliance at companies (tick box, avoidant), inspiring new forms of creativity at individual or entrepreneurial units *about the social question, itself*, thus overcoming law's more 'repressive' qualities.[78]

Repurposing the company has consistently been central to the operationalisation of the legal theories and imagination of new governance. In a landmark article on the subject of corporate fiduciary duties, written in 1985, regulatory scholar Gunther Teubner returned to the suggestion (by Berle and Means, in 1932) that 'the development of social pressure' over companies might be a basis for socialising economic behaviour.[79] Notably, Teubner's assessment of corporate autonomy, in this context, develops the separation of ownership and control to observe the content or construction of the 'enterprise interest', or '*Unternehmensinteresse*' – a term that Teubner also draws from Rathenau (1917) and his notion of 'enterprise as such' [*Unternehmen an sich*]. Specifically, Teubner undertakes to address the ambiguity about the 'balance' between shareholder and community interests (temporarily resolved in favour of shareholders in 1932) by re-developing corporate 'autonomy' and the 'enterprise interest', as 'functional' alternatives for *carrying out regulatory functions* abandoned by governments within the private sphere. Companies are uniquely placed and incentivised, in this analysis, to operationalise 'knowledge' and 'discovery' mechanisms of the market, *including* discoveries about social norms and value preferences. Teubner foresaw a possibility, as private power rose under globalisation, that companies could combine their role as economic actors with social functions, which reached beyond the territorial and planning (or knowledge) limits of states. Companies might, that is, be encouraged to maintain a focus on the negotiation of economic interests (ie, maximising the enterprise interest) whilst *also* increasing their responsiveness to social pressures, expressed with 'clarity and force' in the market or (in his terminology) in the company's 'environment' (Teubner writes the article from a systems theory perspective).

The law and principle of the social contract shifts, in this theory, from setting standards and rights-based negotiation to instituting markets and reflexive processes, which promote 'externally stimulated internal reflection' about the pressures, conflicts, and concerns mounting in the company's environment.[80] Law is 'indirect,' rather than interventionist; it guides or steers a process of market-led reflection and accommodation, extending the gaze of the company and the calculative 'regard' of corporate decision-makers to the sources of conflict or 'irritation' (this regard is embodied for Teubner in the fiduciary duties).[81] Such a means to social reflexivity was proposed, by Teubner, to overcome the limitations of legal instrumentalism and of law's 'ineffectiveness,' caused in Teubner's analysis by a lack of translatability that exists between the operational logic of different functional subsystems (not least, regulators that do not understand or cope with complexity). It was designed, too, to reduce discretion at company boards, ie, balancing the needs of

[76]Beck (n 74), 'Living your life in a runaway world', on the overcoming of state, class and collective allegiance, and the deep (and in this paper shown to be ambiguous) responsibilisation of the individual.

[77]J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' 54 (1) (2001) Current Legal Problems 103–46.

[78]Nonet and Selznick (n 75) links ineffectiveness to the downsides of traditional legal authority and 'repressive law' (which overreaches and fails to manage complex or pluralist demands, as a means of absorbing 'requirements' of government', at 39). Black (n 77) 106, summarily citing deficits in law's capacity for knowledge, information, responsiveness, focus, selectivity, consensus difficulties, or the negative nature of regulation's focus on 'restriction' over 'motivation.'

[79]G Teubner, 'Corporate Fiduciary Duties and Their Beneficiaries. A Functional Approach to the Legal Institutionalisation of Corporate Responsibility' in KJ Hopt and G Teubner (eds), *Corporate Governance and Directors' Liabilities* (Walter de Gruyter 1986) 149–77.

[80]Teubner (Ibid.), 160.

[81]The indirect role of law is described at more length in C Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press 2002).

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different social groups, moving the governance modus that he developed beyond the stasis of the shareholder versus stakeholder debate.[82] Organising social 'integration' more directly within the market sphere proposed a more effective (responsive) mode of learning about and resolving conflicts, which uses the guarantee of the price mechanism (rather than discretion or thought). It opened itself up in 'functional' terms to bettering the guarantee of future needs (than a planner could).[83] Companies could in this view be encouraged to accommodate stakeholder and social causes, wherever such can be demonstrated to have a *bearing on corporate self-interest*, conceptualised nominally as 'gain' (and usually also the shareholder interest). So, it was possible to observe, in Teubner, the reconfiguration of public government and, also, the stakeholder versus shareholder dichotomy (the double is important) by *economically instrumental rationalities*, which assume certain *creative* 'functions' (ie, enabling companies to sort through the claims that might attain meaning or presence in markets, using the calculation of 'enterprise' interest).[84]

This controversial (private, market-integrative) regulatory structure currently underlies most of the mainstream legal frameworks, expressive of the company's social role in the UK and EU, including CSR, corporate sustainability and (to a more mixed extent) business and human rights (BHR). It aims at the internalisation, by companies, of externalities (human rights violations, modern slavery, missing tax receipts, preventable carbon, environmental pollution, waste) within the sphere of the enterprise interest. Corporate law frameworks institute the regulatory technique in duties of 'process', by which companies and directors are expected to follow and to acquire social 'reflexivity' (as regulatory theorists develop the idea of consciousness, built between systems).[85] The mandates concern the development of corporate regard, reporting, and diligence (RRD) about stated risks (human rights, workers expectations, the environment, etc.), with companies encouraged to consider the short and long term costs to the company of protecting (or not protecting) affected constituents.[86] It is open to governments and other authorities to add to the list of factors that companies may need to RRD, and, thus, to stretch the systems to new and emerging concerns (to carbon, net zero goals, suppliers' impacts, modern slavery, etc).[87] Mitigation is expected or required in the sense of being actionable by the members, acting in

[82]Teubner (n 79) 162. See also with relatable concerns about discretion (but no social solution) F Hayek, 'The Corporation in a Democratic Society: In Whose Interest Ought It to and Will It Be Run?" in F Hayek, *Studies in Philosophy, Politics, and Economics* (University of Chicago Press 1967), 300-313 (Chapter 22), concerning the 'tendency to allow and even impel the corporations to use their resources for specific ends other than those of a long-run maximisation of the return on the capital placed under their control that tends to confer upon them undesirable and socially dangerous powers' (at 300).

[83]Teubner (Ibid.), 162. This is important to overcoming law's knowledge problems, or limits on insight about the future course of events and creativity.

[84]Teubner (Ibid.), 164–5; social groups are 'reduced to an instrumental role' but are 'in a position to control the fiduciary duties', it 'no longer makes sense to search for legitimate group interests which have to be protected.'

[85]Teubner (Ibid.).

[86]See UK Companies Act 2006 section 172 and section 414A–D, as examples of the base CSR instruments. In Europe, see the structure of the governance contract outlined by the European Commission, 'Corporate Social Responsibility: a new strategy for 2011-2014' COM (2011) 681 final, where the different roles played by business ('integrating' social and environmental concerns in their core operations and business strategy), consumers and investors ('enhancing market reward') and governments (promoting CSR, facilitating) is set out. Internationally, key is the United Nations Guiding Principles on Business and Human Rights (2011) <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 30 September 2022. Note the distinction of BHR as a framework based on public international human rights law rather than corporate law. It still however largely consists of obligations built around RDD, presently.

[87]See, as recent additions and areas of focused reflexivity in the UK, Modern Slavery Act 2015, Companies (Directors report) and LLP (Energy and Carbon Report) Regulations 2018, UK Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2021. See also the high-profile additions around human rights and sustainability due diligence, in the EU context, European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937,' (2022) COM/2022/71 final; European Parliament, 'Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)). Internationally essential is the growing extension to decarbonisation, United Nations Climate Change, 'Race to Zero Campaign' <https://unfccc.int/climate-action/race-to-zero-campaign#eq-7> accessed 30 September 2022.

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the company interest, to the extent that this is consistent with (directors' assessments of) the company's 'success' (the calculative aspect).[88]

C. Corporate responsibility and regulatory governance: 'they see no masses'

The present author has written in previous work about the instability of this regulatory model in terms of its ability to create adequate responsibilisation among economic actors for hazards affecting people and planet.[89] Three sets of (related) problems are worth recounting.

First, where the deployment of economic institutions and incentives smooths the resolution of social conflicts, making it easier 'to get things done,' it also transforms the burden of engagement and understanding. Companies (and governments) are released in new governance from substantive forms of consensus building, as such work falls to the enterprise interest; companies adapt to 'learning pressure' whilst remaining formally accountable only to shareholders; the price mechanism sorts through claims. Such market accountability is commonly criticised for the weak position that this accords to stakeholders, consulted or listened to, but, also, ignored when contradictions to corporate pricing strategy and/or profit are identified. More subtle is a change in the burdens of creating understanding and responsiveness to the conflicts generated by business, where regulatory governance shifts these important aspects of 'governing' towards communities affected or bearing risk. This point sounds counter-intuitive and can be hard to spot, where it is companies that are, in law, expected to conduct RDD and to engage with the process of improving reflexivity. However, if such engagements are to be more than superficial, it is (in practical terms) consumers, civil society, communities and constituents that bear the heavier responsibility of 'enlightening companies' in post-state regulatory theory, which maximises (celebrates) individuated mechanisms and the self-reliance of participants.[90] The claimed 'freedom' of the market is reframed, as communities and stakeholders must undertake actions to regulate economic actors by 'resurrecting interest', and generating internal reflexion at companies, which 'cannot be voluntary' and 'needs to be stimulated by powerful external forces' (as otherwise it invites unlawful amounts of discretion from directors, or planners).[91]

This is difficult, extensive and sometimes dangerous work.[92] Participants commonly relate the time-consuming effort involved in securing influence and remedy. Heightening learning pressure to the point of bearing on corporate self-interest, and before harms are executed or materially visible (publicised), can be a high and sometimes impossible barrier.[93] Progress is hampered

[88]A Keay, 'Section 172(1) of the Companies Act 2006: An Interpretation and Assessment' 28 (2007) Company Lawyer 106–9. On the potential that this scope is not extensive or coherent from a CSR perspective, see Andrew Johnston, 'The Shrinking Scope of CSR in UK Corporate Law' 74 (2017) Washington and Lee Law Review 1001.

[89]L Moncrieff, 'Karl Polanyi and the problem of corporate social responsibility' (2015) 43 (4) Journal of Law and Society, 434–54.

[90]Beck (n 74); Hayek (n 68).

[91]Teubner (n 79) at 164–5. The EU Commission (n86) attributes clearly this responsibility for generating pressure, at 3.1, on civil society actors that might 'identify problems, bring pressure for improvement,' and 'enhance market reward for socially responsible companies through the consumption and investment decisions that they take' whilst 'media can raise awareness of both the positive and negative impact of entreprises.'

[92]D Birchall, 'The Role of Civil Society and Human Rights Defenders in Corporate Accountability,' in *Research Handbook on Human Rights and Business*, S Deva and D Birchall (eds.) (Edward Elgar 2020), 423–424 and 440–443 on difficulties that are encountered, including strategic lawsuits and threats to the life of human rights defenders.

[93]As one example, consider the destruction in Australia of the Juukan Gorge, where Anglo-Australian mining giant, Rio Tinto, destroyed two 46,000-year-old cave shelters when mining for iron ore worth (reportedly) $135 million in 2020, amidst long standing agreements and consultation commitments with Aboriginal owners concerning the impact to land and heritage rights (and holding information about the sacredness of the sites). Shareholder protest and international media coverage led to resignations from the board, reparations and an apology from the company for the destruction (ie learning), as well as a parliamentary inquiry, but *only after the event reached the public consciousness* (and the economic consequences were made visible and extensive). Reported at 'A year on from the Juukan Gorge destruction, Aboriginal sacred sites remain unprotected.' (*The Guardian*, 23 May 2021). More legal protection for land and heritage rights is currently proposed.

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by the complexity of corporate structures and the circumstances of production, which can make knowledge partial (insofar as consumers and others are removed from certain times and places of production). It is often unwound by companies as societal pressure recedes.[94] More practically, the effort to engage the resilience and courage of individuals in a world that is already tipped in power balances to the autonomy of transnational companies, like PO (Shell, Amazon, etc), is disconnected from the way that this imbalance already makes everyday exchanges more difficult for people (from contesting a gas bill to refusing unsafe work), never mind more ambitious forms of civic regulation.

A second (related, entangled) problem with the market-led modus of corporate responsibility concerns the growing transfer of public 'authority' to the private sphere. The observation starts (again) from the potential exposure of individuals and communities in corporate legal orders (as interests to be productively employed but, also, resurrected), and how this exposure is intended to be balanced and mitigated by collaboration across that sphere - with companies, but, also, with other (comparably associated) actors and institutions, including civil society organisations, trade unions, technical experts, etc. This collaborative dimension is important to the institutional imaginary of regulatory governance and its cultivation of normative resources or expertise within the 'environment' of the company. It operates as a means of collecting values, community interests and claims together, improving 'clarity and force' (the link between Berle and Means and societal constitutionalism, discussed also in this issue by Jean Robé).[95] Such is designed to develop the 'functional differentiation' of worldviews, and to pluralise forms of authority, which is relevant to rigour of regulatory governance and its claim to be nurturing of law and democracy.[96]

A major problem here, however, is the insistence of regulatory governance that differentiation of this order does not 'weigh' against competing considerations. Collaborators do not just raise problems with companies, or generate more 'thought' about their concerns. They need to find a place within bigger projects of market building (abstraction and commodification), which can ensure that their claims can undergo individuation and translation into the logic specific to the focal system ('the enterprise interest'). This 'enterprise interest' operates within regulatory governance as a mechanism for making claims 'compatible,' ensuring closure and decisiveness through the price mechanism.[97] Such decisiveness and self-organising (spontaneous coordination) is needed according to Teubner's analysis, in 1985, to reduce the operation of discretion and/or 'the risk of abandoning the definition of corporate responsibilities to the mercy of the constantly changing result of shifts in the balance of power between social interest groups.'[98]

The wording here is striking where it seems to render exceptional routine aspects of management, attributing 'creativity' to the onward resolution of markets and price-based coordination. This fatalism is (again) derivative of functional autonomies of the 'new governance' system, ie, the effort to avoid burdening companies with unfamiliar value-systems or rationalities. It lends itself awkwardly to many aspects of corporate responsibility, however, including historic, diffuse and recurrent harms, and to communities that struggle to correspond through the price mechanism and align their own interests with corporate reputation or prove a competitive interest (non-humans, the environment, the poor and precariat, the far away). This imprecision to generating

[94]At P&O, for instance.

[95]Berle and Means (n 14) 355 and 356.

[96]Birchall (n 92) on these collaborative aspects to civil society participation, 427–434. See also Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' In Christian Joerges, Inge-Johanne Sand and Gunther Teubner, eds. *Constitutional and Transnational Governance* (Oxford University Press 2004) pp 3–28.

[97]Gunther Teubner, 'After Legal Instrumentalism? Strategie Models of Post-Regulatory Law' in Teubner (ed) *Dilemmas of Law in the Welfare State* (De Gruyter 1986), 299–36, at 305–306. See importantly Hayek (n 68) (1945) at 528, citing Alfred Whitehead (mathematician) on the fundaments of a market civilization that is based on price adjustments and operations that 'we can perform without thinking about them'.

[98]Teubner (n 79) 158. This critique of managerialism and of 'discretion' at companies and in (consciousness-led or non-instrumental) CSR as arbitrary is echoed within Hayek, see n 82 (his key corporate governance text).

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learning pressure is often cited as an advantage (the flexibility and focus that can be brought to regulation through individuation and economic force), but it can create long-standing normative and cognitive problems for companies and society about the real extent of corporate impactfulness; many of the learning exchanges between companies and constituents are fragmented, incomplete and unsuited to the nature of the impacts under scrutiny.[99] It, also, entrenches companies' overall power, as social coordinators, economic functionaries and wealth generators, to manage the whole process of social learning and responsiveness in the present and future. This includes the power to announce the overall adequacy of conflict resolution, and 'respect' for rights or codes, as fits the enterprise interest.[100]

To these claims, the paper wishes to add a third (related) aspect. It concerns the rising (over time) tendency towards 'scandalisation' that has embedded itself in regulatory governance. This is where individuals and social groups seeking to 'control' or 'moderate' companies in regulatory governance, and in the private sphere, might transform or even shorten normative debate in the effort to improve the public's chances of impacting the company's reputation, and influencing behaviour. Participants are forced by the regulatory modus to extend the amount of civic and/or normative expression that can be carried in the market's (simplistic) communicative exchanges, through the formation of buycotts, boycotts, making threats to reputation (corporate, individual), publicising protests around exit or voice, etc.[101] Communities are drafted in as stakeholders and encouraged to generate pressure on their own initiative, but are confined by opportunities to create or remove market rewards (as a balance to the open-invitation). Such a narrowing of communication is designed to deliver shocks in attention but can, also, be distortive of normative practices, generalising a boycott mentality and creating different levels of (justified and unjustified) melodrama (due to forced simplification), which is ineffective in terms of stabilising economic systems and/or protecting a general interest (ie, banker bashing). Alternatively, scandal, in distinction to law and duty, loses its grip on the world and energy quickly, meaning that calculation is never far behind in corporate (or peer) responsiveness, even when market-organised discipline and collaboration over corporate targets are successful.

A mandate for normative simplification is a logical extension of the reliance on functional equivalents to law and government, and of the wider refrain that systems theorists have established around thought and the 'clash of rationalities' that is expected to occur when one rationality or subsystem tries to influence the other. It is the effort to avoid extended clashes that produces such a high estimation among governance scholars of corporate self-governance and economic functionalism (as a means of improving the social effectiveness of economic action). But governance through economic functionalism also carries the notable frailty of not (always) being generalisable, through not having entered into constitutionally diverse forms of communicative deliberation and exchange, ie, of having justified itself across different subsystems.[102] Regulatory force in the economic sphere, instead, commonly exhibits (one or more of) market rise and fall, structural ignorance wherever the profit lines inscribe, particularity in responsiveness and 'therapeutic' change among private sector actors put under high amounts of commercial

[99]For a practical example of the regulatory difficulties of relying on 'learning exchanges' for complex harms and between consumers and retailers in the context of (globalised supply chain) modern slavery, see The Bingham Centre, 'Effectiveness of Section 54 of the Modern Slavery Act' (2021) available at: <https://modernslaverypec.org/resources/tisc-effectiveness>, where learning pressures appear to be absent among consumers and other market participants, and the circumstances of production remote and difficult to appreciate and regulate.

[100]Moncrieff (n 89). See also Kimberly Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 *Washington University Law Quarterly*, 487–544.

[101]Interventions explained in the CSR context within Soule (n 74).

[102]Christodoulidis (n 41), 259–277, on 'constitutionalism adrift', after the rise of regulatory governance and the displacement of duty and normative expectation in the constitutional sphere by 'functional equivalents'. 'At stake in constitutional reflection is the common interest, objective of collective decision-making and measure of its correctness and, as undetermined, the common interest imports an 'open and indeed reflexive quality', 267.

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pressure (or scandalisation). Implicit too is a dramatic change in the force and function of 'law', which is confined to process and to revealing subjects that might be pushed over the line of market integration (ie, command the enterprise interest). Codes, non-binding instruments, guidance and taxonomies do not properly establish subjects of duty and deliberation (when commanding corporate responsiveness), in other words. They establish, rather, fixed points in reality or (in simpler terms) descriptions, which possess few rights, powers and opportunities to actually renegotiate the substantive terms of accommodation (of counting).[103] Scandal appropriately names the activity and frustration of participants annotated and responsibilised thus (for their own counting) and, also, separated, in kind, from longer civic histories of metaphysical inquiry and norm creation, solidarity and collectivism, etc.

Inequalities in outcome easily form among the forces for accommodation and the responses of companies, which emanate from the tactic of enlightenment, but tend not to attract the tag of discretion or arbitrariness, as the criterion of profit persistently holds. This unevenness is widely evident wherever governments step back from supervision and civic regulators cannot keep up. It is maintained in the call to try and make sure corporate actions and impacts are rendered, through reporting, 'comparable', even as the outcomes are inconsistent or (in some cases) even not fully true (ie, materially relatable to experiences of the affected). But the role of law and government remains less to insist on external or substantive control of corporate conduct (eg, less carbon), and more about facilitating the development of market structures within which responsibility (ie, less carbon) might arise as a rational economic opportunity for the company (in its 'external mobilisation of internal self-control resources'). The difficulty for the civic regulators is in trying to fit (always) more into this idea that change is economic, rather than justified and/or duty-bound, and how this makes some ways of thinking about the world and justice less possible. Such characteristics eventually burden (rather than inspire) a public exhausted by carrying out the function of regulation, unconvinced by the 'liberties' of supervising multinational corporations registered off-grid for tax-purposes,[104] and amidst the larger 'socialisation of risks, privatisation of rewards' schema that the corporate economy expounds.[105]

D. The corporation and regulatory governance: the social contract implications

The post-1980s theorisation of the company by (both) law and economics and regulatory governance scholars as a *calculative* (rather than legal or social) institution is essential to understanding the mandate that companies presently have to safeguard public interests. Often this mandate is underestimated or misunderstood as a more open-ended form of socialisation or enlightenment. Yet, new governance offers to improve on government and collectivist efforts at resolving conflicts by using the company as a *decisive economic mechanism* (not managerial organ), which can integrate diverse claims and interests (ie, make them compatible). Such a strategy deliberately deters and supersedes efforts to weigh different interests and/or equalise bargaining power between companies and their constituents - a 'conservative strategy', according to Teubner's writing in 1985 (and yet at threat in the UK again from conservative anti-strike laws and the inexhaustible march of consultation).[106] Corporate power is accepted and reconfigured, in this market-led model of

[103]Christodoulidis (Ibid.) names this the substitution of normative expectation for cognitive expectation, see 224–8.

[104]On the interesting relationship between CSR (as a form of corporate socialisation and license) and tax, and the tendency of some companies to see CSR as a substitute for fulfilling their domestic tax obligations, see Angela Davis et al. 'Do Socially Responsible Firms Pay More Taxes?' (2016) 91 *The Accounting Review*, 47–68. For a contrasting view, see R. Lanis, G. Richardson, 'Is Corporate Social Responsibility Performance Associated with Tax Avoidance?' (2015) 127 *Journal of Business Ethics*, 439–57. A good summary of this area of research in Tânia Menezes Montenegro, 'Tax Evasion, Corporate Social Responsibility and National Governance: A Country-Level Study' (2021) 13 *Sustainability* 11166.

[105]M Mazzucato, 'The entrepreneurial state' (2011) 49 *Soundings*, 131–42.

[106]R Dukes, 'Banning Strikes by the Backdoor? A First Look at the Strikes (Minimum Service Levels) Bill' *University of Glasgow School of Law Blog* (13 January 2023) <https://www.uofgschooloflaw.com/blog/2023/1/13/banning-strikes-by-the-

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governance, as a site of responsiveness, innovation and learning ('power is not seen as a source of inequality and injustice but as a social instrument for the effective transfer of decisions').[107] Governments, for their part, are expected to 'regulate internal processes in systems indirectly', so as to '*drastically decrease the requirements of cognitive capacities of law and politics, since they no longer attempt to directly influence economic action*'.[108] The state assumes the role of 'mediator, facilitator, enabler,' in the post-state regulatory complex, and, because of the commitment made on its behalf to improving the overall compatibility of different rationalities, the 'skills of diplomats rather than bureaucrats,' as Julia Black puts things by 2001.[109]

It has been common to read these post-regulatory transformations in the social contract, and the displacement of the state by the '*global and mezzo*', as pluralist, additive (resourcing law and government with more than state) and progressive for the last 30 years. Yet, recent events, including post-pandemic inequality, profiteering, and climate change create more visibility and suspicion around what has also been depleted or even given away by regulatory governance, amidst its association with the trends of neoliberalism. These wider trends have been recognised (in the words of Bourdieu) as affecting the rigour of 'collective institutions capable of counteracting the effects of the infernal machine, primarily those of the state, repository of all of the universal values associated with the idea of the *public realm*.' They concern, also, the imposition of 'a sort of moral Darwinism that, with the cult of the winner, schooled in higher mathematics and bungee jumping, institutes the struggle of all against all and *cynicism* as the norm of all action and behaviour' (emphasis in original).[110] The commitment of new governance scholars to 'decreasing the cognitive requirements' of law and politics and to 'no longer attempt to directly influence economic action' sits awkwardly within this bigger schema of collectivist destruction. This remains the case, despite the strong insistence of some governance scholars that regulatory capitalism 'has nothing to do with neoliberalism.'[111]

A social contract perspective is helpful, in this context, to help regulatory theorists to observe more about how, discouraged from 'providing, distributing, and regulating', growing corporate power and injustices might be accompanied by government that 'atrophies' or fails to develop.[112] This is where a post-regulatory state becomes increasingly disconnected from outcomes, managed and known about (mainly) in the private sphere.[113] Such developments aptly characterise recent political economic disorder in the UK, which (of course) cannot be divorced from the ideological

backdoor-a-first-look-at-the-strikes-minimum-service-levels-bill> accessed 2 February 2023. The march of consultation is inexhaustible, in the present analysis, because it solidly defends the priority of the 'enterprise interest' as the framework for decision-making and governance. See the expanded provisions concerning stakeholder consultation in the (UK) *Corporate Governance Code 2018*, applicable on a 'comply or explain' basis, 1.D-E and 1.5–6. On the inappropriateness of the code and comply or explain to stakeholder issues see B Cheffins and B Reddy, 'Thirty Years and Done – Time to Abolish the UK Corporate Governance Code' (2022) Journal of Corporate Law Studies, Doi: 10.1080/14735970.2022.2140496, especially at Part 7.

[107]Teubner (n 97) 318.

[108]Teubner (Ibid.), 320, emphasis added.: 'The "economic" advantage of reflexive law,' says Teubner, 'is that it requires only general knowledge of the self-referentiality and needs not to control specific effects. It is sufficient to restrict "understanding" to the strategic structures according to which reflexion processes take place within the social subsystem concerned, since reflexive law intends only to change those general forms of procedure and organisation.' Teubner gives examples, which are recognisable for how things work today, about how monetary policies might be steered less through intricate planning and reality models, and more through 'social knowledge about the banking sector and its political processes', or corporations through using 'simple models about their internal decision-making in order to influence reflexion processes through norms of organisation and procedure.'

[109]Black (n 77) 146.

[110]P Bourdieu, 'The Essence of Neoliberalism' (*Le Monde Diplomatique*, December 1998).

[111]J Braithwaite, 'Neoliberalism or Regulatory Capitalism (October 2005). RegNet Occasional Paper No. 5, <https://ssrn.com/abstract=875789> accessed 30 September 2022.

[112]Braithwaite (Ibid.) provides a description of the role of the state.

[113]Predicted by P Grabosky, 'Beyond *Responsive Regulation*: The Expanding Role of Non-State Actors in the Regulatory Process' 7 (2013) Regulation & Governance 114–23.

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investment that some governments make in this direction (ie, resolved to be indifferent to market outcomes; over-investing in commerce and markets as the best means to collective creation). Yet the point that the author is making here is about the separate responsibility that falls to lawyers and policy makers *to recognise the justice failures that arise beyond the preference-based authority of market actors, and to radically multiply the means of justification and redress.* For this recognition and capacity for attenuation stand to be *weakened* (rather than strengthened) by a regulatory commitment to 'reduce the cognitive requirements of law and government.' Low cognition makes institutions vulnerable to remoteness, structural ignorance, and corruption. It increases the number of situations where regulators depend on the actors and/or systems that they govern for information, deepening conflicts of interest. Deeper, too, is the bureaucracy that attends to the transformation of the regulatory professions into 'diplomats', as public practitioners are removed from substantive experience of the economic system's infractions and pressure points.[114] They are less trusted as public functionaries – ie, capable of acting on collectivist insight and evidence – as regulatory tasks are always neutralised and excessively fragmented (decentered, individuated), if not undercut by a basic 'clash' of interests (individuating harms, undermining understanding of shared or recurrent aspects).[115]

To put the same point another way, in situations of *pressing* public knowledge (eg, about the contours of a just transition, modern day slavery, pandemics, mass redundancies, etc), it is becoming increasingly strange to watch governments and law makers defer and sometimes (even) protect their ignorance about the general public interest. Citations of complexity (as a justification for governance) look disingenuous after sight of some of the functional equivalents for steering business, which include the recent trend for using public science to develop hugely *complex* taxonomies and schemas, which corporate and financial actors, then, need to be pressured to adopt.[116] Similarly, where the tactic of 'enlightening' corporate decision-makers has not proved to be that effective in terms of changing company behaviour, after fifteen plus years, low cognition would appear to be misguided in the sense of constantly degrading the potential for recognising and interrupting a word (and affect) sludge.[117] Of course, such a deferral of public power and

[114]See the interesting discussion in K van Wingerde and L Bisschop, 'Measuring Compliance in the Age of Governance: How the Governance Turn Has Impacted Compliance Measurement by the State' in B van Rooij and M Rorie (eds), *Measuring Compliance: Assessing Corporate Crime and Misconduct Prevention* (Cambridge University Press 2022) 55–70, observing a meaningful shift in the skills and judgement of regulators, at 55.

[115]This legal translation (to a 'clash of interests') is also relevant to the trend for relying on private law and litigation as a means of corporate accountability (usually in delict/tort, but also contract and consumer law); it observes how information and experience about harm sometimes ebbs away (due to the nature of the interests protected, the challenges of establishing jurisdiction, causation, the duty of care, etc.), or is lost in the common tendency for companies to settle if a successful claim is likely (removing details from the public realm). Litigation that is aimed at enforcing companies' CSR policies is difficult, where courts pay attention to the 'reflexivity' developed at companies and are not keen to create disincentives (ie, by second guessing the balances struck by companies), even when this is defective. See *Das v George Weston Limited (2018)* 2018 ONCA 1053 and D Doorey, 'Lost in Translation: Rana Plaza, Loblaw, and the Disconnect Between Legal Formality and Corporate Social Responsibility' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265826> accessed 30 September 2022.

[116]Ambitious efforts to 'steer' (rather than regulate) investment towards the green economy and energy transition is available in Regulation (EU) 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment. See the explainer for the 'EU taxonomy for sustainable activities' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en>; see also on the intonation of a governance ambition, European Commission, A New Industrial Strategy for Europe, COM/2020/102, bringing down 'red tape' at 1 and growth at 2.2. See also 'ESG exposed in a world of changing priorities' (*Financial Times*, 3 June 2022). 'How ESG Came to a Reckoning' (*Financial Times* 6 June 2022).

[117]A Keay and T Iqbal, 'The Impact of Enlightened Shareholder Value' 4 (2019) Journal of Business Law 304–27. D Attenborough. 'Corporate Disclosures on Climate Change: An Empirical Analysis of FTSE All-Share British Fossil Fuel Producers' 23 (2022) European Business Organisation Law Review 313–46, citing a 'lack of monitoring and enforcement capabilities' alongside 'incentive misalignments' and companies' tendency to manage more 'visible' factors as mitigating the effectiveness of RDD (disclosure), as a means of changing corporate behaviour, or meeting public accountability. See also Cheffins and Reddy on the UK Code (n 106).

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government (collectivism) references a hope that, somewhere, more dynamic, knowledgeable and motivated actors take an interest in theconsequences, and that exchanges in the private sphere can still qualify as such a place (despite the limits imposed by knowledge of circumstance, scandalisation and individuation). But long-term deference in this direction puts into decline (rather than grows) *law's creative spirit*, *distorting* the normative and political dimensions (exchanges, visibilities) of building a world that is just.[118] Over time, it also undermines institutions and respect for democratic government and the rule of law (as was evident at P&O). Such weakens the authority of institutions where suspicion of collectivism and bureaucracy prevents rational organisation, as well as the accumulation of *experience* among governments and regulators, increasing the risk of their failure.

Such prospects for the status of government and the function of law attract the legal scholar's attention, as a group of equally serious (if not more?) issues to the problem of 'law's effectiveness', which motivated the transformations in regulatory theory in the 1980s. They suggest ongoing difficulties with contextualising companies in their social and regulatory aspects among markets, and a possible breach in some essential elements of the social contract with business when granting a monopoly of public authority to corporate actors whilst squandering legitimate government (and regulatory) power.

2. Rethinking the social contract and corporation

This second part turns the historical perspective on the company around. It looks from the turbulence of the 1930s in the opposite direction, towards events that informed the conceptual arc of the company's socialisation. It collects fragments of the company's legal history to form *an alternative sense of a past for corporate social regulation* and to raise this collage to a higher degree of reality.[119] The ambition is to work against the *necessity* of the way things are (ie, oddly arranged, normatively passive, unjust). It also compounds the gist of an essay written by Keynes in 1926 about the social contract and 'the end of laissez-faire,' where Keynes talks about an economic dogma that 'had got hold of the educational machine; it had become a copybook maxim. The political philosophy, which the 17th and 18th centuries had forged in order to throw down kings and prelates, had been made milk for babes,'[120] after a line of political philosophers were to 'retire in favour of the businessman – for the latter could attain the philosopher's *summum bonum* by just pursuing his own private profit.'[121] Recovering powers of collectivism, if not the 'emancipation of the mind,' needed 'thought' for Keynes about the constructive arrangements and implications of human economic affairs, and 'a new set of convictions, which spring naturally from a candid examination of our own inner feelings in relation to the outside facts.'[122]

This 'thought' project is resurrected around the company and the social contract in Part 2, and centred on the industrial modernism of Walter Rathenau, as an origins figure in the modern

[118]Christodoulidis (n 41), 276, 'The *loss of the concept* of the constitution – and the loss of the orientation value it offers – leaves the thinking of justice founded, outwitted at the juncture where it is generalised across orders' (emphasis in original).

[119]The method has an intuitive development, informed by the history, materials and narrative encountered. Some inspiration was also taken from R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' 25 (2) (1998) Journal of Law and Society 171–92 and critical theory, particularly W Benjamin, 'On the Concept of History' in H Arendt translated by H Zorn (eds), *Illuminations* (Vintage Publishing 2015). W Benjamin, *The Arcades Project* (Harvard University Press 2002) as informing the search among the fragments to a dominant narrative.

[120]Outlined by Keynes (n 19), 14–5, 'I trace the peculiar unity of the everyday political philosophy of the nineteenth century to the success with which it harmonised diversified and warring schools and united all good things to a single end. Hume and Paley, Burke and Rousseau, Godwin and Malthus, Cobbett and Huskisson, Bentham and Coleridge, Darwin and the Bishop of Oxford, were all, it was discovered, preaching practically the same thing – individualism and *laissez-faire*.'

[121]Keynes (Ibid.), 11.

[122]Keynes (Ibid.), 53–4.

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lineage of socially conscious corporate law and institutions (Rathenau's work is referenced by Berle and Means, in 1932, and also Teubner). Part 2 seeks to revisit Rathenau's thinking at the end of the war (when he was writing about the company) and also earlier (a more formative period), as a means to recover what was original about the organisation that he observed. It uses a collage built around Rathenau, his circumstances and associations, to further question the way that the social contract with business has developed, as a functional support for corporate autonomy that fails and frustrates many, and to argue that such is historically discontinuous with progressive law and political economy.

A. Walter Rathenau and the corporation: the making of the modern company

When German industrialist, scholar and early Weimar politician Walter Rathenau (1867–1922) wrote about the modern industrial corporation it was 1917.[123] Rathenau had recently been involved in the German war effort as head of Germany's Raw Materials department where he was involved in wartime planning, including the national distribution of economic supplies.[124] He was recruited to this role for his experience as an executive and industrialist at the family company Allgemeine Elektricitäts-Gesellschaft AG (AEG), where he had been a board member since 1899 (he also held positions at many other companies).[125] After the war, Rathenau wrote about his belief that public benefits were among the significant outputs of industrialisation but, also, of the corporations that were at the helm of European economies from the end of the 19th-century. The scale at which large companies were able to touch public interests in the age of *'mechanisation'*,[126] combined with the 'de-personalisation of ownership',[127] was creating new centres of public governance and autonomy at the entity level ('the enterprise as such').[128] Rathenau related this new *autonomy,* at the corporation, to a retreat in shareholder interventionism and to the capacity within the corporate institution for 'creation' (the 'faculty of envisioning what does not exist'), 'responsibility ('we encounter an official idealism identical with that which prevails in the state service. .. the executive instruments labour for the benefit of times when. .. they will long have ceased to be associated with the enterprise') and 'technocratic management' ('the undertaking itself, now grown into an objective personality, maintains itself, creates its own means just as much as it creates its own tasks').[129]

[123]W Rathenau, *Vom Aktienwesen. Eine geschäftliche Betrachtung* (1917), which might be rendered as "On the role of joint stock companies: Commercial considerations". The modern corporation is also discussed and analysed in W Rathenau (n 53), *In Days to Come*, particularly 119–225, on enterprise and 'large-scale private property' that 'shoulders the risk of the world economy' (119).

[124]For biographical details of Rathenau's life, the author draws from (amongst others) J Ryan, 'Walter Rathenau' 11 (43) (1922) Studies: An Irish Quarterly 379–99; A Brecht, 'Walther Rathenau and the German People' 10 (1) (1948) The Journal of Politics 20–48. Deep and lyrical, by a close associate, is CH Kessler, *Walter Rathenau: His Life and Work* (First Published in 1928, Beston Press 2007).

[125]Brecht (n 124), 13, 'His industrial stature grew rapidly, and at one time he played a leading part in eighty-six German and twenty-one foreign enterprises, including some in Italy, France, Spain, Switzerland, Russia, South America and Africa.'

[126]Rathenau (n 53), 25–29, on mechanisation ('*mekanisierung*'). He uses the term to describe a force distinct from capitalism (at 26) and more comparable to modernisation; it references 'a new ordering of economics and life', involving universality and interconnectedness (27–8) and 'a liberation of forces in the old substrata' and a new 'mentality' adequate to the work required in the mechanical determinism to care for 'life and the future.'

[127]Rathenau (Ibid.), 121, 'the relationship we have been describing signifies that ownership has been de-individualised ... the de-individualisation of ownership simultaneously implies the objectification of the thing owned ... the claims to ownership are subdivided in such a fashion, and are so mobile, that the enterprise assumes an independent life, as if it belonged to no-one.'

[128]Rathenau (Ibid.), 121, 'The detachment of property from the possessor leads to a point where the enterprise becomes transformed as it were into a trusteeship, or perhaps it would be better to say into an institution resembling the state. This condition. I shall denote by the term 'autonomy'.'

[129]Rathenau (Ibid.), 122–3.

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Throughout his writings about the economy, Rathenau is careful to distinguish the public or 'community' interest at companies from (purely) private property and the (command of the) shareholder interest, which was understood, by him, as erratic, ill-informed and too remote from an understanding of the company's day to day operations to be informative (ie, incompetent).[130] Rathenau steered at the same time away from economic liberalism, wherever he worried about the 'global idolatry of the market,' the spiritual worth of purely material achievement, and the propensity of material processes or abstractions like efficiency to degrade consciousness *and* the world (including nature). Rathenau concerned himself, too, with the growing inequity of the modern economic system and suggested that 'if we have availed ourselves of mechanisation for the sake of its integrating powers, we have now to call it to account, concerning its secret tendencies to promote disintegration.'[131] 'Too long,' Rathenau observed, has 'the rationalist notion of individual rights and liberties' proved 'tardy and mutinous in yielding to collective needs and requirements, which require regulation.'[132] Rathenau highlighted the possibility that societies could usefully increase state regulation and supervision over companies for their '*material strength and equalising energy*' (emphasis added) as the latter's industrial capacities and influence (autonomy) grew.[133] Indeed, contrary to the classic mid 19th- century characterisation of the laws for incorporation, which sought to liberate companies from government charter, and catalyse the private sphere, Rathenau viewed consumption and production 'not as private affairs but as matters of public interest,' rooted on some level in the 'state' or common institutions, which the individual '*did not create.*'[134]

Rathenau was assassinated by the far right in Germany, in 1922, whilst occupying the post of a minister in the Weimar Government (foreign minister). He would not live to see the new social and economic order that he thought was emerging.[135]

The collapse of Weimar and subsequent ascendancy of the Nazi party in Germany saw Rathenau's books burned by the Deutsche Studentenschaft (Dsf) as 'un-German' (Rathenau was Jewish) in 1933.[136] His ideas about the corporation and community interest, however, were still entered into discourse about company law and regulation in Germany, via the work of scholars interested in corporate institutional theories.[137] Nazi-era law reforms sought to gain more

[130]Rathenau (Ibid.), 119–120, on the 'community' interest in the economic enterprise, and 120–1, on the passivity of the shareholder ('in a great many instances the fact that he has become a shareholder in a limited company hardly enters into his consciousness.' For more background on Rathenau's critique of shareholders, see M Gelter, 'Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light' 7 (2011) New York University Journal of Law and Business 641, 43–5, where he discusses the German context in which Rathenau's critique of shareholders developed – as concerning the difference between long-term shareholders (expecting an adequate yield on their investment and speculators seeking short-term capital gains. Rathenau was preoccupied mainly with the latter group and denounced, for example, the fact that corporate law no longer required a minimum time period of stock ownership before a shareholder was entitled to vote. Also key here is how John Ryan (n 124) 382, explains some of the biographical background to Rathenau's scepticism in regard to shareholders in his powerful obituary for Rathenau, concerning his father's (Emil Rathenau) negative experience of investors and preference for doing his own banking (and for maintaining high reserves at AEG and relying on banking once he had 'worked himself free of capitalists').

[131]Rathenau (n 53) 28. See also F Stern, 'Walter Rathenau and the Vision of Modernity' in F Stern (ed), *Einstein's German World* (Princeton Press 2016), Chapter 4.

[132]Rathenau (n 53) 76.

[133]Rathenau (Ibid.), 76 and page 123.

[134]Rathenau (Ibid.), 75 and also 203, 'the state will become the moving centre of all economic life. The greater part of the economic surplus will accrue to it; all the wellbeing of the country will be incorporated. The state will assume the powers now wielded by the dominant classes. Much misdirected energy will be directed into new channels.'

[135]Prophesied most forcefully in W Rathenau, *The New Society* (First Published in 1919, translated from the German by Williams and Norgate 1921).

[136]See 'Book Burning' (Holocaust Encyclopedia), dated as 10 May 1933 <https://encyclopedia.ushmm.org/content/en/article/book-burning> accessed 30 September 2022.

[137]Martin Gelter (n 130) 51, and Teubner (n 79) 154, where Teubner describes the 'preparatory debate' to the German corporate law reforms of 1937, 'which lasted for almost twenty years and involved the worlds of Rathenau, 1917;

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control of the economy, linking 'company interest' (which in some quarters of legal scholarship grew out of Rathenau's conception of the 'enterprise as such') and *national interest*, eroding shareholder rights – moves that created lasting suspicion about state involvement in private enterprise.[138] Yet, around the same time, other scholars, including John Maynard Keynes in England and Berle in the US, would *also* take an interest in Rathenau's contemplation of autonomy at large companies and make it an ally of the 'new industrial state.'[139] 'A point arrives in the growth of a big institution – particularly a big railway or big public utility enterprise, but also a big bank or a big insurance company,' said Keynes in 1926, 'at which the owners of the capital, ie, its shareholders, are almost entirely dissociated from the management, with the result that the direct personal interest of the latter in the making of great profit becomes quite secondary.'[140] Berle, as Part 1 illustrated, developed Rathenau's notion of depersonalisation in the ownership of companies to observe the separation of ownership and control, and the company interest as a faculty that might encompass responsibilities to communities or stakeholders. Such theories have often been taken as the origins point for the later fascination with corporate self-government and autonomy, which later regulatory theorists pick up and redevelop (as responsive companies, reflexivity – see Part 1).

Yet, Rathenau's reflections on corporate autonomy come chronologically before Berle and Means, and perhaps offer a different historical *axis* for thinking about the future of the social contract and corporation (sending us somewhere different from where we are). Writing about the company at the end of World War I, and being praised for his work as a government economic planner, Rathenau did not anticipate anything like the generalisation of corporate governance questions, or the domination of markets as a means to societal integration. In fact, his text shows few inklings towards corporate *self*-governance, or for 'pressuring' business in the economic sphere as a means to bettering regulatory outcomes. Rathenau shared the interest of the Americans in 'enlightened administration' and wrote at some length about his interest in rational organisation. He highlighted the satisfaction that business managers experience when addressing, with technologies of the machine age, public interest (the 'joys' of industrial creation).[141] Yet, his work never sways substantively towards corporate law as 'constitutional law for the new economic state', or studies the implications of *privatising* the social contract and instilling government at corporate bureaucracies and/or among their constituents (ie, he does not stride into the shareholder versus stakeholder debate).

Instructive in this context is the era that Rathenau was living and writing within. Despite there being only 15 years between Berle and Rathenau's writing, *different worlds* and *generations* collide in the recanting of Rathenau's corporate law theories and reflections in the Anglo-American context (from the 1930s and beyond). Rathenau, more specifically, was born in 1867, Berle and Means 1895 and 1896. Keynes, for reference, stood between the two sets of contributors and was born in 1883. Berle, between 1930 and 1932, was writing about company law and individualism at the end of the roaring twenties after the Great Crash, and ex post to an extended period of speculation (where there was 'only the pursued, the pursuing, the busy and the tired', F Scott Fitzgerald).[142] Berle and Means were also only born a few years before the English judgement of *Salomon v A.*

Haussmann, 1930/31, Netter, 1932: 502; see also Wiethölter, 1961: 36, leading to the Aktiengesetz-AktG-1937 … where the executive board was required "to direct the company in accordance with the requirements of the enterprise and its working force and the common welfare of the people and the empire". (Sec. 70 AktG 1937).'

[138]Teubner (n 79) 154–5.

[139]Galbraith (n 62).

[140]Keynes (n 19) 42–3.

[141]Rathenau (n 53) 121–4.

[142]FS Fitzgerald, *The Great Gatsby* (Originally Published 1925), at page 79, spoken by Nick Carraway, the narrator, and where all the main characters in the novel, set in the 1920s, appear to fit within these descriptions. Galbraith, *The Great Crash, for* statistics on the 'lively' and hugely 'speculative' 1920s economy, at pp 7–28. Also at pp 179–91 (looking at the 1920s as a preceder to the depression).

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Salomon and Co Ltd in 1897,[143] and lived wholly within the era of general incorporation laws that took the company private during the second part of the 19th-century.[144] The Rathenaus, by contrast, would have been among the first business owners in Germany seeking to avail themselves of the limited liability business form (AEG was incorporated in 1882 by Rathenau's father, Emil Rathenau). Yet, as a family, they (the Rathenaus) also lived and worked much closer to the pre-existing system of state-chartered companies (Emil was born in 1838 and had various ventures before AEG), considered 'public' to the extent that they received their licence and accountability from government.

Rathenau's writing about political economy shows affinity with this earlier historical view of the company, and, perhaps through his experience as a political planner, with the legitimacy of a *constructive regulatory principle*, which he wanted to adapt in his contemplation of the company for a 'new society.'[145] In pessimistically prophetic paragraphs on the resource impacts of fossil fuels for instance ('coal, the noblest raw material on our planet', 'torn out from the hidden recesses by the men of our generation, and is devoted by them to the ignoble service of thoughtless and wasteful burning'), Rathenau is explicit about the necessity of using legislation to protect the environment and public interest, and to 'act against the squandering of energy by the employment of imperfect mechanical appliances, by false parsimony, and by the wasteful use of labour power.'[146] He observes a constructive role for the state as 'guardian and administrator' and also in providing 'enormous means' for public investment 'at the disposal of all productive occupations, whilst making it a *condition* that those to whom such means are ceded shall' abide by obligations; he observes that companies 'pay the normal rate of wages.'[147] At the governance level, Rathenau describes the potential for 'agencies of consultation' to advise on the formation of corporate objects, and as bodies that could be consulted by directors concerning strategic or controversial decisions.[148] Indeed, he also promotes such institutions and pluralism in perspective more widely, as a means of balancing the advance of capitalism, identifying scope for 'the artist, the thinker, the man of learning', to grow 'independent of the decrees of a market' where 'we see a continuous intermingling.'[149]

Beyond the different generational understandings of industrial companies and the social contract that governed business, Rathenau carried wider fragmentations of sense and rebellion from the historical period in which he was writing from the 1890s to 1922, also known as the second industrial revolution or the 'machine' age.[150]

Historians describe the 1890s in Europe, when Rathenau was in his 20s and 30s, as a period of intellectual transformation and rebellion. Social thinkers were gaining a new perspective on ideas of the 18th century, sensing with some melancholy the 'demise of an old society' and of 'old practices no longer conforming to social realities.'[151] A revolt was forming against positivism and mechanistic thinking, particularly in the context of the intellectual achievements of Charles

[143]*Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.

[144]On the passage of the general incorporation laws see, P Ireland, 'The Triumph of the Company Legal Form, 1856–1914' in J Adams (ed), *Essays for Clive Schmitthoff* (1983), at 29–58 (England) and W Roy, *Socialising Capital: The Rise of the Large Industrial Corporation in America* (Princeton University Press 1997) 41–77, on the US. See also G Baars, *The Corporation Law and Capitalism: A Radical Perspective on the Role of Law in Global Political Economy* (Haymarket Books 2020) 65–75.

[145]Rathenau (n 135). See also Stern (n 131).

[146]Rathenau (n 53) 79–80.

[147]Rathenau (Ibid.), 126.

[148]Discussed in B Segrestin. 'When Innovation Implied Corporate Reform: A Historical Perspective through the Writings of Walther Rathenau' (2017) *Gérer et Comprendre. Annales des Mines*. <https://halshs.archives-ouvertes.fr/halshs-01736509/document> accessed 30 September 2022, at page 6.

[149]Rathenau (n 53) 126.

[150]The 'technological revolution.' D Landes, *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present* (Cambridge University Press 2003). J Hull, 'The Second Industrial Revolution: The History of a Concept' 36 (1999) Storia Della Storiografia 81–90.

[151]S Hughes, *Consciousness and Society. The Reorientation of European Thought 1890–1930* (Harvester Press 1979) 14.

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Darwin (*On The Origin of Species* was published in 1859, *The Descent of Man* in 1871).[152] Rathenau wrote in a way that wanted to problematise 'false objectivities', associated with mechanistic thinking about science, human fate and the economy. This included a deterministic government of society by markets (government by laissez-faire), where 'Knowledge is power, we say, and time is money; thus knowledge passes unrecognised and time is wasted joylessly.'[153] Rathenau was a contemporary of Max Weber (b. 1864).[154] He shared the sociologist's interest in organisation and the *fate* of humanity under conditions of modernity. Each (in a different way) contested the focus of a positivist enlightenment on material progress over concern with the wider public *science* of action, organisation and state.[155] New theories were being centred around consciousness and subjectivity in perspective (Sigmund Freud, b. 1856, was another contemporary). People wanted to understand the circumstances and conditioning that limited freedom (ie, the vision of man as a self-consciously rational being), as well as to look underneath, at consciousness and 'communication from within.'[156]

Such ideas caught Rathenau's interest, as a means of contemplating the potential for disenchantment after industry and mechanisation (the loss of individuality, dehumanisation). Rathenau was active in the cultural circles of his day, as he wrote and spoke about and studied such themes.[157] He was an acquaintance of Berlin-resident and expressionist painter, Edvard Munch (b. 1863), and once considered becoming a painter himself (before entering industry through business, engineering, chemicals and power).[158] Indeed, Rathenau was an early benefactor and supporter of the pioneering rebel of consciousness, Munch: Rathenau bought his first painting from Munch in 1893, the year after Munch's 1892 Berlin exhibition was dramatically cancelled after one week, due to the controversies – perhaps, the inner turmoils and anxieties of modern life – depicted.[159] Rathenau was painted by Munch in 1907 [Figure 1].[160]

The period in which Rathenau lived is interesting, to the present article, where it creates a 'different dramatic abbreviation' around the corporation and social contract, making a new archetype more proximate and debatable.[161] The next subsection will seek more evidence in support of this goal, as it looks at two texts that Rathenau wrote in 1898, under a *nom de plume (*W. Hartenau).[162]

[152]C Darwin, *The Origin of Species* (Originally Published in 1859, Wordsworth Editions; Revised ed. edition,1998). C Darwin, *The Descent of Man and Selection in Relation to Sex* (Originally Published in 1871, Wordsworths Editions Paperback Classics 2013).

[153]Rathenau (n 53) 31.

[154]E Schulin, 'Max Weber and Walter Rathenau' in W Mommsen and J Osterhammel (eds), *Max Weber and His Contemporaries* (Allen & Unwin 1987) 311-322. The two men did not reference or read each other publicly; Ernest Schulin remarks that Weber may have thought Rathenau to be too 'unscholarly', at 313.

[155]Weber and Rathenau had different views on the role of the state in political economy, with Rathenau more optimistic about the potential of the state power and interventionism (after his experience of planning in the WW1 Raw materials department and also through his business associates and industrial achievements) to be employed for the collective good and with efficiency, see Schulin (Ibid.), 316–7.

[156]Hughes (n 151).

[157]On Rathenau's involvement in Berlin's counter-cultural scene, see Stern (n 131) and also Kessler (n 124).

[158]Ryan (n 124) 380.

[159]JP Hodin, *Edvard Munch* (Thames and Hudson Press 1972), on the friendship between Rathenau and Munch, at 62; on the cancellation of the Berlin exhibition, 'an insult to art', said the critics, at 61.

[160]E Munch, 'Walter Rathenau' 1907. Part of The Collection of Rasmus Meyer, Bergen, Norway. Reproduced in Hodin, Ibid., 115.

[161]E Friedlander, 'Walter Benjamin's Arcades Project and the Heightened Intuitability of History' 3 (2016) Dibur Literary Journal 55–65, reading Benjamin on method, 'We think, not merely of *covering* more and more different phenomena that belong to a certain passing historical time, but rather of concentration, bringing out how things internally belong to one another and thereby fully realising that archetype in the present.' at 63.

[162]Rathenau only wrote in his own name from 1902; previous to this he used a number of pseudonyms. See L Kaplan. 'Walter Rathenau's Media Technological Turn as Mediated through W. Hartenau's "Die Resurrection Co". An Essay at Resurrection' 62 (1994) New German Critique 39–62, at 55; and also the bibliography of Rathenau's works in P Berglar, *Walther Rathenau, Ein Leben zwischen Philosophie und Politik* (Styria 1987) 309–10, where the different names that he wrote

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Figure 1. *'Walter Rathenau' painted by Edvard Munch (1907)*, Wikimedia Commons.

The aim is to collect evidence of Rathenau's intuition about the collective responsibility to regulate commercial outcomes *that impact people and planet. Such a project has not always been recognised as central to Rathenau's work on the corporation. Contemporary corporate law and enterprise scholars tend to focus on* governance *aspects of the 'enterprise as such' and corporate creation, which meet this era's own expectations and sensibilities (after neoliberalism and systems theory). Social contract matters and collectivism are more readily associated with later scholars in the 1920s and 1930s (including Keynes), as concern about war and economic depression deeply set in.*[163] *Yet, Rathenau writes about these themes earlier and, by doing so, experiences a different kind*

under are recorded. Reacting to a new wave of anti-Semitism that arose during the economic hard times of the 1890s, see W Rathenau, '"Höre Israel!" ["Hear, O Israel"]', in 5 (1897), Die Zukunft [The Future] 454–62.

[163]Keyes (n 19); Berle (n 14); M Horwitz, 'The History of the Public/Private Distinction' 130 (6) (1982) Journal of Pennsylvania Law Review 1423–8, on the legal realist movement and political economy, 1426. See also Polanyi (n 43).

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of thought revolution at the end of the 1890s, where he lived among (experiences) ruptures in more than one kind of fatalism (evolution, God, laissez-faire) and, also, opening up in the private sphere.

Rathenau's 1898 writings address the *'knowledge controversies'* that the 'machine age' was causing, rather than the legal ramifications of corporate personality (limited liablity, directors duties) or economic planning policies. They grasp from within the industrial sphere how a resolution of such controversies was fundamental to the 'working out' of the social contract and the private/public distinction. A uniquely cross-disciplinary existence (business man, planner, inventor, philosopher and even worker) made Rathenau highly appreciative of the different subsystems and occupations involved in these transformations; this seemed to increase his intent about balancing collectivist intuition and the emancipation of the individual.[164] Such observations inform the author's intention to salvage more from Rathenau's younger years and earlier texts as a means to recontextualise the polarisations and the economic fatalisms embedded within the corporation and the social contract of the present.

B. One year after Salomon: the 1898 texts

The first 1898 text studied, written by Rathenau (but under his nom de plume 'W. Hartenau'), is a contribution to the '*Ignorabimusstreit'* debate in Germany. The debate concerned the 'hard problem of consciousness' and 'knowledge', a major intellectual concern of the late 19th century.[165] Rathenau was responding to physician and physiologist Emil Du Bois-Reymond, who presented a lecture 25 years earlier (in 1872) about Darwin and his theories of evolution and man's origins (Darwin's 'The Descent of Man' was published for reference in 1871). The lecture heralded the high level of achievement of the natural sciences and of Darwin's new thinking about 'man's evolution', but also insisted upon the 'problem of consciousnesses' as marking a continuing *limit* for scientific knowledge. 'We are '*ignorabimus!*' Du Bois had ended his 1872 lecture, suggesting that we do not and cannot know of consciousness or mind, as God could (the speech was thought to be religiously motivated), and in contrast to the new emerging sciences of nature and matter.[166]

Du Bois' proposition generated considerable controversy in the 1870s and 1880s among philosophers and social thinkers, about scientific dogmatism (which distorts and scandalises other forms of knowledge) and the extent to which du Bois' thesis postulates a 'mythical' domain unavailable to knowledge.[167] At a time 25 years after the lecture, the debate gave Rathenau cause to outline his standpoint in *Die Zukunft (The Future)* in a new cultural climate (the late 1890s). Rathenau moves, in this writing, to vindicate the link between rational inquiry and the wider enterprise of metaphysics, as 'the right to think about ultimate values' and 'what the individual wants to get out of life.'[168] He criticises Du Bois *not* for stating limits to natural science and discovery (Rathenau agrees that they exist), but for falling into a trap of mechanistic thinking – ie, banishing other forms of thought and knowledge about the human condition and inner self. Rathenau's contribution seeks, in this context, to expose myth as well as empiricism. He

[164]Ryan (n 124) captures the personal contrasts and contradictions on 381, contrasting Rathenau's pursuit of the arts and philosophy with his immersion in a 'grimy, smoky industrial world,' where 'he applied himself to work with extraordinary energy, at first in the humble capacity of technical worker in an aluminium factory', patents and management followed, before he was allowed to join AEG as a board member.

[165]W Rathenau, 'Ignorabimus' 22 (1898) Die Zukunft 524–36. Discussed in F Beiser, *After Hegel: German Philosophy 1840–1900* (Princeton University Press 2014) 97–132 (On the Ignorabimus controversy) and 122–32 on Rathenau's contribution. The author is relying on secondary sources for translations of the original text.

[166]Besier (n 165) explains the lecture as among conservative efforts in the 1870s to limit the reach of Darwinism in schools and science, to retain the authority of the church over the soul, to appease Catholics. Others took issue with this, as it denied differences in perspective and explanation (eg, transcendental and natural philosophy).

[167]Besier (Ibid.) describes controversies re: understanding actions according to intentions and contexts, rather than subsuming events under natural laws. Highlighting the difference between natural sciences and historical or social sciences, as between explanation and understanding (*Verstehen*).

[168]Beiser (Ibid.), 127.

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encourages his readers to look beyond (both) scientific and economic forms of fatalism, to the moral, political and cultural aspects of society, which enable (in his view) a creative, inquiring and synthesising treatment of knowledge.[169] Rathenau's article protests '*Ignorabimus!*,' and its entanglement with only fatalistic thinking, with a counter-call to 'Creabimus!' – cultivating an art of creativity and of daring to think that passes through human agency and the generations.

At the time that Rathenau wrote the text, he had had first-hand experience of a '*Creabimus*' in the industrial context, as a *fin de siecle* pioneer in industrial development of public infrastructure and new technologies of mass i electrification, power and transport.[170] Culturally, the friendship with Munch might also have informed (echoed, shared, catalysed, sparked) Rathenau's thinking. In 1898, Munch was working on paintings for *The Frieze of Life Exhibition: Eighteen Pictures from the Modern Life of the Soul.*[171] In the exhibition, Munch sought to bring publicity to the human *experience* of mechanisation, mathematical thought and technical progress, revealing their inner side but, also, their *common aspects* (not twisting the visage into the resilience or courage of the individual).[172]

Corroboration and extra insight into Rathenau's views on knowledge, experience, spirit, and industrialism are provided by a second 1898-piece, a (weird) story, called *Die Resurrection Co*.[173]

In this story, Rathenau uses his family's experience of modern telecoms and electrification to tell a tall tale about remorseless mechanisation and disenchantment in the machine age.[174] Writing again as Hartenau, Rathenau uses comedic events and narrative devices to tell the story of a burial yard that contracts a newly listed telecommunications company to network (via phone and bell) the recently dead and buried; the service is installed after someone was buried alive by the *over-efficient* methods of the modernist burial companies (an incident of scandal).[175] The story parodies efficiency and mechanisation, as well as the freedom and fictions of the joint stock company in an atmosphere of economic turbulence and speculation. It links the 'problem' of corporate organisation and governance to late 19th-century concerns with consciousness and the (construction of the) visible. Yard occupants presumed to be dead shock administrators, in the story, by using the new

[169]Beiser (Ibid.), 124–6.

[170]On electrification, see W Schivelbusch, *Disenchanted Night: The Industrialization of Light in the Nineteenth Century* (University of California Press 1988) 114–34 detail cultural changes surrounding the advances of electric street-lighting, and the shifting meanings of night, dark, lighting that were forming for communities after the technologies. The Rathenau were involved in electrifying trams, street lighting and building power stations, amongst other innovations.

[171]MH Wood, *Edvard Munch: The Frieze of Life* (Yale University Press 1994). Hodin (n 159), 50, the objectives were humorously understated by Munch himself: 'No longer shall I paint interiors with men reading and women knitting. I will paint living people who breathe and feel and suffer and love' and 'This was a declaration which resulted in the *Frieze of Life* collection, the tale of man's destiny' in an industrial age.

[172]GH Hamilton, *Painting and Sculpture in Europe 1880–1940* (Published Originally in 1967, Penguin Books, Third Edition 1981) 123–5, on Munch's interest in making an exhibition that could deliver 'a continuous cumulative effect', realised in the Frieze of Life, 'the fullest statement any artist has left of the fin-de-siecle mood of disillusionment with man's material and social development ... the tensions between instinct and society as he presents them can never be resolved.' See also Hodin (n 159) 8–9, on Munch as creating and emboldening a 'universal style which appears in time of great spiritual tension' and in which 'spiritual experience asserts itself against the tyranny of mathematical thought and technical progress, in fact against the dehumanisation and mechanisation of culture.'

[173]W Hartenau and L Kaplan (translator). 'Die Resurrection Co' 62 (1994) New German Critique 63–9. The story was originally published by Rathenau in Die Zukunft 24 (1898), and is published in his works at W Rathenau, *Gesammelte Schriften* vol. IV (Fischer 1918) 287–97.

[174]Ryan (n 124) on the Rathenau's involvement in electrification and the building of modern power stations, 381–5, and at 384 to give a sense of the scale of the operations, 'Already existing works for the production of dynamos, Diesel-motors, carriages, wire and cable, rolled brass, aluminium, porcelain, paper and rubber, as well as works for the manufacture of fittings in infinite variety were acquired by the company until it had absolute control of everything directly or indirectly required in the electrical trade. In 1910 the company had a capital of 100, 000, 000 marks, and employed 60,000 hands.'

[175]Hartenau (n 173) 65–6, 'The idea of the enterprise appeared to be simple and convincing. Each buried coffin was to be linked via electric cable with the administration building. Telephones and electric bells would be connected up to the lines and each customer could not only report to the administration instantaneously if the occasion arose, but could also give the necessary orders to his doctor, his banker, and family (listed by Rathenau in that order).'

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comms systems to demand connection to other (dead) members of the network. They communicate defects in drainage, gravel and doors that they need repaired, and make disruptive protests at disliked or disloyal visitors. Dilemmas of corporate responsiveness and reflexivity about the 'social' (absurdist, comedic, non-compliant) pressures on the service are reported to a Director, lost for what to do, in a parody of the legal, reputational and financial dynamics that attend efficiency in the machine age.

The story was published one year after the English decision of *Salomon v A. Salomon and Co Ltd* (1897), which crystalised the concept of limited liability as a core aspect of modern company law.[176] It is not clear from Rathenau's writings if he was familiar with the Court decision. However, the themes, combined with Rathenau's status and position in the business world, fit the possibility that he was commenting on this revolution, ie, on the new abstractions that could be entered into (as investors and speculators, industrialists, directors) in 1898. The author has identified three other points of interest in Rathenau's 1898 works, which pertain to the current study.

The first point concerns Rathenau's entwinement with cultural debates about consciousness, and how these apply to corporate actors and management (compared to reflexivity, to use the mechanised adaptation of the facility by systems theorists) at the end of the century. Rathenau was an early (first) proponent of enlightened corporate administration (including co-determination and democratisation). However, social obligation at companies, for Rathenau, was never only the product of constituent interactions (ie, communities or workers, as stakeholders in the *company's* purposes). Public interest (and knowledge) is something that forms, for him, beyond the bounds of the company and the market sphere. Such a conviction is readily expressed in the *Die Resurrection Co.* story, where the enterprise interest comically fails to accommodate the claims and existence of an underground network, which is made *no less real* by this failure (ie, at translation). Trying to resolve problems at the graveyard involves a mix of trade, investor, religious and political authorities, who each differently respond to the scandal of dead people, communicating and complaining (about each other). Such a view of the social contract makes a transformative point, in the context of neoliberalism, which tends to re-characterise everything as part of the economic domain, ie, as reflective of the economic bargains reached between private parties (including law). Rathenau's work contests such a reduction of the social contract to the economic domain or to 'the clash of interests'; 'clash' and 'interest' are both elusive in the 1898 story, as all of the complainants are still in a state of being dead, whenever their claims are investigated.[177] Rathenau insists, thus, on the *breadth* of normative and metaphysical reflection that is necessary for people to live together in a (market) society, including his insistence on what appears to elude (human, living, visible) 'interest.'[178]

The second point concerns Rathenau's characterisation of political authority and the regulation principle, across the different sources of his (known and obscure) work. In contrast to governance scholars' concern with 'law's effectiveness,' Rathenau's conceptions of law and regulation were informed by a new generation of writers and artists working in the late 1890s, worried about socially conservative ideologies, which made egregious use of self-interest and competition as an explanation for the natural reign of the powerful. Rathenau stood against such ideas in his turn towards the consciousness of society, but also in his interest in institutions and common protections, which related to the solidaristic aspects of human life – ie, to institutions and capabilities which individuals (in isolation) 'did not create.'[179]

[176]The landmark case (n 143) concerns the liability of the shareholder for the company debts. The court (the House of Lords) held for the first time that so long as the company was duly and properly incorporated, it should be seen at law as a separate legal person. Mr Salomon was not personally liable to pay the debts of the company; the court established that there was a 'corporate veil' between the company and shareholder. See Paddy Ireland (n 144) 29–58 on the growing popularity of the limited liability company amidst the 'tumult' of the Great Depression of 1873 to 1896 (which created an inducement to limited liability); on *Salomon v A. Salomon Co. Ltd*, 49–58.

[177]No physical changes to the condition of death are detected underground, when graves are dug up, leaving the communications capacity of the occupants (geist) a mystery.

[178]Beiser (n 165) 125 and 127, citing Rathenau in 'Ignorabimus', 'I cannot perform a single deed whose effects last beyond my own life – like planting a forest, writing a book, caring for my children – without, so to speak, taking a step into a metaphysical realm.'

[179]Rathenau (n 53) 75.

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Rathenau observes, in this common aspect, a constructivist assertion of public powers; 'the very air which he breathes is not free; it is protected and purified [by common institutions] from exhalations and vapours, from disease germs and poisons.'[180] Critical to this regulatory modus, in Rathenau, is that the advance of law is not evocative of state superiority (over enterprise)[181] or myth (ignorant of law's ineffectiveness). It is, instead, aimed at the beneficial *attenuation of competition and market ordering in the general interest*.[182] 'No mechanical management of the property of the world. .. can bring about a moral or just regulation of the property system,' he says; 'the community must ask itself what claims it is entitled to put forward in the name of a higher law.'[183] Rathenau in this context locates the problem of law's effectiveness not as concerning perturbations to the 'functional autonomy' of a subsystem (economy, law, etc), but to its opposite – ie, shrinking back from the *negotiations, duties and compromises* that inform the stability of common existence. 'In days to come' he says, 'people will find it difficult to understand. .. that any individual was justified in any practice however absurd and however harmful to the community, provided he always remained able to pay his way' – an understanding compromised in the present, for instance, after P&O.[184] Rathenau would observe closely in later post-war writings the difficulties that economic fatalism, released from this constitutional work, could cause in terms of neglecting regulatory oversight of the outcome of consumptive practices (for 'private gratification'), including his concerns about unmet waste, pollution and the unequal allocation of scarce resources.[185]

This leads to the article's third and perhaps more subtle interest in 'W. Hartenau' and 'W. Rathenau,' as two doppelgängers that develop formative concepts for industrial modernism and corporate law during a crisis in modern consciousness.[186] Rathenau uses the events of *Die Resurrection Co.* (and as cultural critic Louis Kaplan says of the story) to 'mock the mystery of the whole' at a time of rising disenchantment and, also, anti-semitism.[187] He counters a seeming revival of soul/*geist*, and of religion in the context of accelerating mechanisation, with evidence of how 'resurrection' and new communications media might operate in sync, transfiguring death and knowledge through the 'alchemical and occult' of the machine.[188] Communicative technologies are the symbols of higher *tolerance* and *flawed* progress, as the underground residents refuse to moderate demands (they each fully enjoy non-compliance; the reader fully recognises them as the kind of people that we all know or even are in real life).[189] But, the spirits also unsettle

[180]Rathenau (Ibid.), 75.

[181]Rathenau (Ibid.), 73. 'If the socialistic method of the nationalisation of capital be excluded as impracticable and ineffective'.

[182]Rathenau (Ibid.), 73. See also Stern (n 131) 178, where Stern records a letter from Rathenau to Maximilian Harden (German journalist and editor of Die Zukunft): 'Now capital dominates society; some day society will not possess but dominate capital.'

[183]Rathenau (Ibid.) 76. Such a perspective (on the regulation of the economy) was not unusual among scholars of Rathenau's generation, see, for instance, the words of German economist, Werner Sombart (b. 1863 to d. 1941): 'Freedom from external constraint characteristic of the period of full capitalism is superseded in the period of late capitalism by an increase in the number of restrictions until the entire system becomes regulated rather than free. Some of these regulations are self-imposed—the bureaucratization of internal management .... Others are prescribed by the state—factory legislation, social insurance, price regulation. Still others are enforced by the workers—works councils, trade agreements.' Cited in R Dukes and W Streeck, 'Post-Industrial Justice? Normativity and Empiricism in a Changing World of Work' in P Van Seters (ed), *The Anthem Companion to Peter Selznick* (Anthem Press 2021) 91-110, 98, and quoting from Sombart's entry ('Capitalism') in the *Encyclopaedia of the Social Sciences*, Vol. 3, edited by Alvin Johnson and Edwin Seligman, 195–208 (Macmillan 1930).

[184]Rathenau (Ibid.), 76.

[185]Rathenau (Ibid.), 76–80.

[186]Rathenau is often described by biographers in some such double terms: 'This seeming dualism remained characteristic of him; all his life he stood with one foot in Utopia and with the other in reality,' Brecht (n 124) 31, and also Kessler (n 124) 21 on his 'dual personality, 'which seemed to revolve around two disconnected axes.'

[187]Kaplan (n 162) 59.

[188]Ibid.

[189]Letter from Rathenau, No. 120, 'I am not this creature of clarity and harmony you seem to think I am. Like all of us, I suffer from worry and passion, from fear and desire, from misery and foolishness.' Cited in Kessler (n 124) 165.

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'mechanisation' and the immediacy of the presence that guarantees the 'truth' of the system (ie, of calculation, of myth and prejudice). With this, Rathenau uses subterranean or unworldly demands to push the 'clash of interests' towards something else – ie, towards *understanding*, made possible by the technological revolutions of the second industrial revolution (which courses through complexity at rapid speed). This understanding is though, also, always *sceptical* of existing progress (efficiency buries the not dead), and, as such, proposes *eternal discovery and justification processes,* as the means to accommodating business, about whether the protestors are living or dead, of the short circuits and earth currents that the telephonic wires carry, above and below ground, concerning relations, business and social affairs, etc.

Such discoveries about disenchantment and technology had an influence on Rathenau in his engagement with universal values, and the sentiments that this gave him about the chances (flawed progress) of interventionism and 'Creabimus.'[190] Rathenau's revelation that some of the critical *experience of companies* lies among underground spirits relates to Part 1's findings, concerning the losses involved in fatalistic approaches to organisation and the need for scepticism about the whole (integration). Rathenau uses expressions about strange and complicated human needs ('our deepest longings', 'what we need to know most'), in the 1898 story, not to pressure or embarass the burial or bell companies (scandalisation), but to insist on the need for always *redoubling exchange in the ethical licence of technology and profit* ('only after prolonged tensions can they arrive at judgements').[191] The story, as such, replaces pessimism about normative and political commonality (the basis of laissez faire, the law's problems of effectiveness) *with a revolution in law and government's constructivist efforts.*[192] The law is not *purposed* by its effectiveness in this exchange – disenchantment and failure are always present, even unending (flawed progress) – but by its material energy, the demand for justification, and equalising power.

So, the yard administrator is cynical and exhausted by the end of the story, as the burial company expands to new markets, generating waves of speculation in the service of needs, themselves, contestable. However, the victory for Rathenau is not in upping the melodrama (ie, developing social pressure, driving scandal). It is rather in improving the *social institution* of corporate autonomy, after law, metaphysics and commonalities. The aim is to render more *visible* the consequences of industrialism and to collectivise experience, so that we might learn as much as possible about what such terms as (corporate) success, efficiency and sustainability really mean.

C. Rathenau and Keynes: Creabimus! and the agenda of government

Rathenau's ideas about the social contract were abstract, concerning the need for individualist economics to maintain a relation with 'higher law' (normative expectation), but also specific, in their focus on the framework within which enterprise takes place (corporate, tax, employment law) and accountability (legislating to counter pollution, over-consumption and waste). As a modern industrialist, Rathenau was naturally familiar with property and competition-based incentives to learn about new needs, and to be inventive (he himself held patents). However, his engagement with the arts made him also insistent about the tendency of 'Creabimus' to reach across the public *and* private spheres. He was sceptical in fact about the (laissez-faire) argument that interference was methodologically ineffective or inexpedient, insisting on the *constant* and *legitimate* public power to 'recognise what is amiss.'[193] Rathenau, in this context, echoes the positive sentiments and approach of Keynes, about 'the human eye' having potential for 'the demonstration of design,

[190]Rathenau (n 53) 28, 'The essence of mechanisation involves universality; through this system, the world is unconsciously brought into [a] . . . continuous community of production and economic life . . . it comes about because united we can work to better effect that we can work individually, and because concentration and organisation are indispensable to the ordering of life's forces.'

[191]Rathenau (Ibid.), 204.

[192]Rathenau (Ibid.), 79.

[193]Rathenau (n 53) 79.

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miraculously contriving all things for the best.'[194] Where problems with industrial development and regulatory effectiveness emerge, the intelligent instinct for Keynes and Rathenau, was not pessimism and collectivist retreat (of government), but to 'furnish us with better knowledge than we have now for taking the next step.'[195]

Rathenau's work, in this context, is also interesting because it lends to the reader a deeper understanding of what Keynes' constructive approach to government and political-economy developed out of, and aimed at. The call to *'Ignorabimus'* ('we will forever be ignorant') that Rathenau contested, in 1898, was what Keynes also found problematic about the ideology and thought-pathways of laissez-faire. Keynes' 1926 essay describes the draw of laissez faire to political philosophers and economists, who blended individualism and (duties of) equality ('bringing I and others to a parity') to insist on a 'divine harmony' between private and public good.[196] Keynes was critical of the imagined reconciliation: 'The beauty and the simplicity of such a theory are so great,' he said, 'that it is easy to forget that it follows not from the actual facts.'[197] Principally, however, Keynes (in this 1926 essay) really regretted the *pessimism* that the new economic dogma embodied, whereby limits on government and legislative interventionism were enforced 'sadly rather than triumphantly; not as admirers of the social order at present resulting from "natural liberty", but as convinced that it is at least preferable to any artificial order that government might be able to substitute for it' (citing English economist, Henry Sidgwick, emphasis added).[198]

Notably, the works of the two men show few signs of associating creativity with the absence of bureaucracy ('red tape'), perhaps because they worked closely with artists, authors, and philosophers, who worked cooperatively, loved to make things (through craft), and believed in human consciousness, non-conformity, adaptability, skill and design (for their own sake).[199] Keynes specifically talked about government as concerning 'coordinated acts of intelligent judgement', and as operating in the domain of the 'technically social', under the 'Agenda' (as he puts it) of government.[200] He draws the terms from Jeremy Bentham's Manual of Political Economy in 1843, as naming 'functions which fall outside the sphere of the individual, to those decisions which are made by no one if the State does not make them.. . The important thing for the government is not to do things which individuals are already doing, and to do them a little better or a little worse; but to do those things which at present are not done at all' (emphasis all added).[201] Keynes lists the control of currency and credit, savings and investment, and immigration policy as falling into the 'Agenda' and 'technically social,' in 1926, as matters that should not 'be left entirely to the chances of private judgement and private profits, as they are at

[194]Keynes (n 19) 14.

[195]Keynes (Ibid.), 48.

[196]Keynes (Ibid.), 32.

[197]Keynes (Ibid.), 32–3, cites 'a variety of unreal assumptions', and gaps in foreknowledge related to complications and divergences in interest, for example, '(1) when the efficient units of production are large relatively to the units of consumption, 2)) when overhead costs or joint costs are present, (3) when internal economies tend to the aggregation of production, (4) when the time required for adjustments is long, (5) when ignorance prevails over knowledge and (6) when monopolies and combinations interfere with equality in bargaining.' Keynes also cites the work of Alfred Marshall (1842–1924), at p 36, as being 'directed to the elucidation of the leading cases in which private interest and social interest are *not* harmonious.'

[198]Keynes (Ibid.), 22.

[199]A Upchurch, 'John Maynard Keynes, the Bloomsbury Group and the Origins of the Arts Council Movement' 10 (2) (2004) International Journal of Cultural Policy 203–17. Kessler (n 124) on Rathenau.

[200]Keynes (n 19) 39–49. Rathenau also broadly made moves towards such an 'Agenda' (capital in original), when he talks in Rathenau (n 53) 76, about how, when the demands of higher law have been met, 'there will accrue to individualist economics whatever is left over, whatever is indispensable to the maintenance of its mechanism and to the provision of an adequate standard of life for its overseers.'

[201]Keynes (n 19) 46–7; He talks in the same context about the '*technically social*' (rather than 'technically individual') and (more assertively) 'the greatest economic evils of our time', which are, 'fruits of risk, uncertainty, and ignorance' (and form the basis of 'great inequalities in wealth').

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present.'[202] However, he also makes it clear that the important thing is having an agenda (rather than a non-agenda) for government and collective interventions, and that he means the category (the 'Agenda' of government) to be open, and adaptable to (expressive of) the general needs of the present.[203]

Importantly, the spirit of creation or 'Creabimus!' that Rathenau and Keynes imagined at law and government did not scandalise the company (categorically). They sought to inform and condition (regulate) commercial behaviour at scale, but, also, to nurture the company's own creative powers and collectivism.[204]

Rathenau talked about instituting the company as society's organ for 'adventuring into the unknown' and 'pushing back the bounds of what is known.'[205] Detached 'from the individual life', the modern company is a 'monument of an outwardly-working existence' and 'analogy with the idea creation of a work of art.'[206] Degeneracy of the creative instinct, in this view, concerns not state bureaucracy or competitive restraints (through regulation or otherwise), but the transformation of companies into a 'support for functionless shareholders' and its 'cultivation of privileged castes.'[207] Rathenau's emphasis was not, as such, on the superiority of government (again), but about instituting a balance, ie, looking at the institutional proportion of obligations needed to ensure that public and normative expectation is understood, coordinated, and met at companies (rather than assumed to mechanically coordinate through preferences). This fits together with the historical view of companies noted here. It also collides with the view of industrial modernism that Rathenau held as a planner of large-scale public infrastructure, which would not have been possible without corporations *or* 'coordinated acts of intelligent judgement', not to mention public investment. This is not to say that such partnership is, *by itself, obvious or* virtuous. Contrary examples persist powerfully in the historical imagination of colonialism, genocide and slavery organised precisely, thus.[208] It is, rather, to say that the measure of the 'social contract with business' is not the blind choice between interventionism or steering, planning or catallaxy, but about 'recognising what is amiss' (knowing more about that over which we need power) and developing an 'Agenda' that fits the contemporary force of the social question (ie, the ruins, the masses, the full potential of individuals, humans and non-humans).

As an end to Part 2, a corroborating intuition and perspective is presented by William Roy in his intricate monograph (1997) on US corporate-government cooperation during the early to mid-19th century, the era of construction for mass transport infrastructure (rail, canal, road).[209] Governments, in the beginning of this era (the 1800s to 1830s), observes Roy, chartered 'companies to do things rational business men would not do because they were too risky, too expensive, too unprofitable, or too public, that is to perform tasks that would not have gotten done if left to

[202]Keynes (Ibid.), 48–9.

[203]Keynes makes it clear by saying that these things are examples that he is working on, but other possibilities will arise and form necessities, pages as above.

[204]H Laski, 'The Personality of Associations' 29 (4) (1916) Harvard Law Review 404–26.

[205]Segrestin (n 148) 4.

[206]Rathenau (n 53) 124.

[207]Rathenau (Ibid.), 125.

[208]Including at AEG, where the company was to become a partner to the Nationalist Socialist Government in Germany before and during World War II. After 1933, AEG is reported to have donated to the Nazi party and began a logistical collaboration that is reported to have engaged the company in war, inhuman work, forced labour and genocide. See 'Company linked to Nazi Slave Labor Pays $2 Million' (*New York Times*, 9 January 1986). On slavery and the institutional embedding by law, charter, and contract, H Appel, *The Licit Life of Capitalism: US Oil in Equatorial Guinea* (Duke Press 2019) 95, 'the slave trade in particular was so capital intensive that it could only be run by chartered corporations – which operated by means of chartered monopoly, subsidies, and special rights (including the right to wage war) conferred by the British Monarchy.'

[209]Roy (n 144). An era powerfully portrayed in Stefano Massino, *The Lehman Brothers Trilogy* (National Theatre, England, October 2018). See <https://www.nationaltheatre.org.uk/shows/the-lehman-trilogy> accessed 30 September 2022; seen in person at the National Theatre, London, in 2018.

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the efficient operation of markets.'[210] Significant use was made of state power to 'define what the corporation was and the particular rights, entitlements and responsibilities that owners, managers, workers, consumers and citizens could legally exercise,' as well as for capitalising infrastructure, including through facilitating the private development of public finance.[211] However, as the decades wore on, significant pressures around the projects, including rising public debt, corruption, impactfulness, and whether the boards were meeting the demands of technology transformations (ie, the passing of the canal era), fed into growing disputes about the status of corporations. The involvement of government attracted particular controversy, as new ideas about the distinction of the political and economic sphere started to reshape the definition of state powers (ie, the terms of the social contract), and newfound utilitarian concerns around 'efficiency' and 'maximising production' were able to establish themselves (as part of the ideas genesis for 'laissez faire'). Roy's historical analysis distinguishes this utility logic from the responsibility and anti-privilege (or public) ethic that preceded it, and occupied some protestors, before the general incorporation laws started to take shape (from 1844), as the dominant response to the controversies arising.

Roy specifically observes the non-necessity of privatising the company as a response to the political pressures, seeing scope instead for developing the responsibility ethic against corporate corruption (ie, concerning the need for better 'public' accountability): 'Considering all the rights, entitlements, and responsibilities of property,' he says, 'it is curious that states [in the general incorporation laws] defined the members as owners. States could have created commissions with citizens who served as directors. Such organisations could have raised capital through financial instruments like bonds or through the powers of taxation, like municipal corporations.[212] Roy observes, too, the enduring public benefits and democratisation, which accompanied corporate-government cooperation in the 1800s, despite the pessimism about government involvement and ineffectiveness, and where, debt and calamity from the market perspective aside, the collaborations of the era sought to fulfil 'widespread democratic demand for equal access' (emphasis added) in public infrastructure like canal and the rail. It produced, in other words, 'transportation for a generation of merchants and farmers in a relatively egalitarian fashion'.[213]

In the sustainability era, such prospects are powerfully redoubled. The democratic benefits and collectivist energies embodied within 19th century mass transport systems and public infrastructure arguably did nothing to counter (or degenerate) economic development over time, but, in fact, carried within them a level of foresight inaccessible to many capitalists and financiers of the age, as a means to long-term collective creation.[214] Roy's follow-on point, that 'efficiency theory is problematic not only because it neglects the dynamics of power, but also because it attends only to short-term change', reflects the writer's Part 1 findings, about structural ignorance (built into mechanistic thinking) and the unbalanced command or priority of the 'enterprise interest'.[215]

[210]Roy (n 144).

[211]Roy (Ibid.), 55 and 74; 'These were cost intensive projects, and involved extensive social, political, economic, and technological negotiation to fulfil 'widespread democratic demand for equal access'. See also Mazzucato (n105) for a more contemporary exploration of this role for the state (as driving innovation).

[212]Roy (Ibid.), 66, mayors and council members do not own the city but exercise binding authority within it. Business corporations, however, typically required financial resources from a small number of wealthy individuals who demanded control in Roys analysis of the mid-19th century. The new private company still used the established 'public' corporate form, but the general incorporation laws transformed the property rights in companies, so that owners had the rights of ownership but not all the responsibilities (the establishment of limited liability). Roy observes this as out of sync with the common law of property at the time (where property rights were accompanied by responsibilities and liabilities).

[213]Roy (Ibid.), highlighting how the fulfilment of publicly made promises by political representatives, sitting on boards, enabled the works to connect even small towns to new canal or rail networks (*to fulfil 'widespread democratic demand for equal access'*), for instance; this carried higher public tensions and demands into commercial infrastructure projects, increasing engineering costs and difficulties and leading to 'declining revenues' (hence the controversies in Roy's analysis that led to the general incorporation laws) but also, in many cases, significant public benefits.

[214]Roy (Ibid.), 66.

[215]Roy (Ibid.), 77.

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It raises the issue of the inventions and/or accountability facilities that the world might (now) be missing out on, due to the privity of contracts and capital interests, when 'instead of a responsibility ethic, which legitimised corporations on the basis of what they did for the public and criticised them when they served private interests, an efficiency ethic legitimises corporations for how effectively they could serve private interests, whilst criticising public corporations for how ineffectively they serve the public.'[216]

3. A new social contract with business?

This article has used a double-historical orientation to problematise the present social contract with business. By looking at the historical development of the social question in two directions – from the 1930s to the late 20th century in Part 1 and, then, from the early 20th century back to the late 19th century in Part 2 – the author uncovers meaningful ambiguities concerning the advance of corporate self-government, since the separation of ownership and control was first identified (by Berle and Means in the 1930s, by Rathenau from 1917). The discovered ambiguities concern, broadly speaking, the terms of 'the social contract with business' and (particularly) the company's relationship with government and law. Where regulatory principles that relate back to public authorities remain firm in the early analyses of corporate power and publicity (Rathenau), later theorisations (Berle) place more emphasis on the company as an entrepreneurial and self-thinking (reflexive) actor. By the end of the 20th century, such beliefs about the corporation were to hook up with new legal theories concerned with improving law's effectiveness, and became the mark of new responsive modes of economic regulation, characteristic of the 'governance turn.' This later characterisation paralleled wider shifts in the role of government in capitalist political economy since the 1980s, associated with neoliberalism. The state retreated from interventionism and became more 'light-touch' (or facilitative) to business, as a means to avoid overstepping perceived limits on centralised government, knowledge and planning, whilst encouraging preference-limited market exchange as an idealised site for innovation and aggregate *creativity*.

The critical parts of this article (Part 1 A-D) carefully examine legal, political-economic and ideological aspects of the governance turn. Efforts to stretch the company's gaze and market instrumentalism ever wider are criticised, in 1, C, for their capacity to exhaust countervailing pressures and to substitute norm by price (or sometimes scandal). 1, D, also, makes arguments about the declines at law and government, which accompany a retreat from the metaphysical and from the deployment of collectivism to inequality, pollution and human rights abuses in supply chains. In Part 2, the author adds a different range of historical arguments, designed to promote thought about the history of the social contract, and about how *'tests of public benefit'* (Berle and Means), might better assume legitimacy over companies. The author contests, specifically, the suggestion that such tests (of public benefit) might be returned to corporate actors as figures more adapted to knowledge or creation, and that law might retreat or be committed to proceduralisation. Part 2, B, used historical texts to argue that this mode of regulation is adapted to *fatalistic thinking* and '*Ignorabimus*.' It sits awkwardly with the histories of progressive political economy, which in this study have underlined the sacrifice involved in meeting community obligations (Berle), sought government for 'metaphysical questions' (Rathenau), and to 'redress' individualist economics with collectivist methods (Keynes). There is, in other words, *no historical or normative case for generalising corporate law* as (actual) 'constitutional law for the new economic state,' nor for privatising the social contract (as it concerns business). Regulatory governance risks breaching the social contract, wherever it grants companies monopoly on public authority, and where legal scholars and practitioners lose the door to core parts of the profession – ie, democratic law making and collectivist interventions, developing countervailing powers.

[216]Roy (Ibid.), 75.

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Part 2 does important work, at this juncture, to link these institutional transformations (shaping sacrifice, working through metaphysical questions, collectivist interventions) to *creabimus* and the social question, as faculties that underlie the status and authority of government and law. Part 2, C captures Keynes' creative determination to be inventive about the economic but, also, *institutional challenges* that scholars, working in the 1920s and 1930s, were having to face. This fearlessness emerges well before Keynes' famed analyses of the business cycle or macroeconomics, and might remind observers of the *particularity* of the solutions Keynes developed in the 1930s, as interventions particular to *those times*; such is a necessary counter to post-war nostalgia (and regurgitating past solutions). In Keynes' wider sights, however, is 'neglect in improvements in the techniques of modern capitalism by the agency of collective action.' His 1926 essay seeks to develop the collectivist intuition around adaptations in the *Agenda* (rather than non-agenda) of government to current conditions and/or priorities. This Agenda is delimited, by Keynes, as the domain of the 'technically social', which, in turn, concerns 'functions which fall outside the sphere of the individual, to those decisions which are made by no one, if the State does not make them.'[217] With this refinement in hand, the writer links the question of rethinking the corporation and the social contract to more familiar legal positions on 'democratic experimentalism.'[218] It seeks the strengthening of a transformative imagination in the legal and regulatory sphere, concerning the domain of the technically social, and the 'redress of law' (constitutional limits) to an outsized market project, which has now formed the subject of institutional fetishism since the 1980s.[219]

Three more specific discoveries derive from the findings about the social contract with business and how it might be rethought. They concern the need for more attention to the relationship with government (over self- governance), the characterisation of the law as creative and metaphysical (rather than procedural), and the invocation of law's equalising (rather than repressive) powers.

This schema can be used to *critically* evaluate current reform options for corporate social regulation. It provides, for instance, help with dissecting the current governance mandates for companies to 'balance the interests of stakeholders' in corporate decision-making, and to 'integrate sustainability aspects into business strategy', including over supply chains. Such mandates emerge alongside recent reform of the incentives for shareholders (to lengthen shareholding periods), earnings and board composition guidance, stakeholder consultation rules, and (beyond the UK) new forms of mandatory due diligence duties in sustainability and human rights.[220] As Bartl demonstrates (this issue), a number of recent reforms contain evidence of some *shifting institutional* (and social contract) *imaginaries*. In the recent EU Proposal for a Directive on Corporate Sustainability Due Diligence (CSDD), for example, public regulators are expected to play a role (supervising the administration and publication of human rights due diligence plans, developed for global supply chains).[221] New forms of civil liability are proposed that could improve the ability of private individuals to do something (themselves) about violations of their fundamental rights, which can be traced to companies and their breaches in CSDD.[222] However, the overall structure of the reform, in the Proposal, is still confined by many of the techniques of regulatory governance

[217]Keynes (n 19), 46–7.

[218]R Unger, *What Should Legal Analysis Become?* (Verso Press 1996).

[219]Christodoulidis (n 41).

[220]A useful overview of the different options for reforming corporate governance, widely discussed among scholars and policy makers, is provided within the European Commission (n 9), generally known as the 'Ernst and Young report' where the report was commissioned from the global accounting multinational (reminding us of how the influence and reflexivity of the company also operates and *commands* government at this level). See the Assessment of Options at 5.1–5.8.

[221]European Commission (n 87). See also D Augustein, 'Towards a New Legal Consensus on Business and Human Rights: A 10th Anniversary Essay' 40 (1) (2022) Netherlands Quarterly of Human Rights 35–55, on the changing BHR field.

[222]European Commission (n 87). The envisaged Directive imposes cross-sectoral HRDD obligations on small and medium-sized undertakings that are publicly listed or that operate in high-risk sectors; and it extends the scope of these obligations to all business partners and value chain relationships. It proposes civil liability (for breaches of the HRDD duty), and a new national supervisory authority for each Member State, which could impose fines on companies in cases of non-compliance (ie failure to carry out and report on HRDD). On the French experience with due diligence and civil liability, see E Savourey

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and, thus, stacked against transformation. The CSDD mandates institute more rules about the scope of corporate reflexivity (extending it across the supply chain) and amend the process companies (are expected to) put in place when translating risks for others into risks for the self. But, this reflexivity is still protective of corporate autonomy, property and allocative efficiency (as governance scholars theorised in the 1980s). Impacts litigated by the community will involve difficult and exhausting work (as argued in Part 1). Governments, in the meantime, remain focused on facilitating *market integration (*of risk), rather than on instituting collectivist or regulatory solutions (ie, standards of outcome, public enforcement and collectivist creation).[223] Such techniques, according to the analysis above, shorten 'the right to think about ultimate values' (Rathenau) to what market actors are willing to price. They cultivate *'Ignorabimus'* by making growth still dependent on the claims that cannot be heard or accommodated, whilst inviting transformation in the bodies and claims of constituents that demand counting. Or scandal.

The schema also works constructively, for creatively rethinking the corporation and the social contract with business, starting with a new 'Agenda' for government in collectivist aspects of what companies do or impact – what Keynes referred to as the 'technically social.' This concept maps closely on to core aspects of present-day CSR routinely failed by regulatory governance, including environmental harm, fundamental rights violations dispersed over supply chains, and mass arbitrage of tax and pay considerations (inequality). It, also, returns to the initial example of COVID-19 interventions, which prompted thought about the level of transformation that is possible when market imaginaries are (even) partially balanced, and law reformers have a chance to 'steadily pursue a clear and definite object with their intellects and their feelings in tune' (Keynes). Countries that added conditionalities to standard corporate economic functions (ie, executive pay, tax, and dividends) in exchange for taxpayer support (loans, furlough) highlighted the potential for imposing new obligations of social cooperation on companies.[224] Recent case law in the area of international human rights law and climate change has, similarly, demonstrated how a new 'Agenda' for government might be cascaded down to companies, and distilled into concrete (ie, outcome-focused) obligations.[225] A possibility arises, in this context, that other conditions over public licence or limited liability could be developed, as a means to intervention and action on public interest objectives. If so, they could regulate priorities that stretch from Rathenau to the present, regarding the common interest in regulating work, waste, pollution, and tax, thus shaking out some of the normative sensibility that lies hidden in the (1990s) melodrama of complexity.

and S Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' 6 (1) (2021) Business and Human Rights Journal 141–52, in Part 1V (159–152, on civil liability).

[223]There is some ambiguity in the official language surrounding business and human rights about the site of integration – ie, at the level of state responsibility and economic planning, or at the level of the market and economic actors? See United Nations Human Rights Council, 'Overcoming Multiple Crises: Realising the SDGs through a Human Rights Enhancing Economy' Concept Note, 19 January 2023.

[224]See IMF (n 3). More conditionalities extended to banks and some major corporations (for instance) in Switzerland, Germany, and New Zealand. In the UK: on 19 May 2020, the Bank of England stated a need for companies to demonstrate 'restraint' over dividends and executive pay, though no consequences were advised or enforced; Bank of England, 'Update to the COVID Corporate Financing Facility' (2022) <https://www.bankofengland.co.uk/news/2020/may/update-to-the-covid-corporate-financing-facility> accessed 30 September 2022.

[225]Recent global constitutional and administrative law cases seeking to enforce international *state* obligations on climate change, like *Urgenda Foundation v State of the Netherlands* (2019) ECLI:NL:HR:2019:2007, Judgment (Sup. Ct. Neth. Dec. 20, 2019) (Neth.), might be characterised as instituting collectivist sensibilities and setting important 'tests of public benefit', concerning the (whole) fossil fuels industry. Pressure to translate such government 'agenda' (Keynes) or 'higher values' (Rathenau) to the corporation is also emerging in the Netherlands, see *Milieudefensie v Royal Dutch Shell* (*Milieudefensie et al. v Royal Dutch Shell PLC* (2021) ECLI:NL:RBDHA:2021:5339), where the court closely analyses the shared responsibility of non-state actors for fulfilling the *state's* obligations, under the Paris Agreement, and cites the United Nations Guiding Principles for Business and Human Rights (UNGPs) in this context, as generating new grounds for corporate regulation (the case is under appeal), available in English and Dutch at, <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> accessed 30 September 2022.

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Such ambitions mobilise further to a reserve power in the social contract, for law and government to 'recognise what is amiss' (Rathenau), and for institutions to maintain substantive interest in the social (Keynes). But they need to brave the problem of law's (or market) ineffectiveness by daring to *'create dangerously,'* as the French philosopher Albert Camus would later (than Rathenau and Munch) annotate *'Creabimus!'* for artists (in 1957).[226]

Camus' statement about creativity, like the figures in the current article, connects the demand (for Creabimus) to the social question (ie, the visibility of the masses): 'For a hundred and fifty years the writers belonging to a mercantile society, with but few exceptions, thought they could live in happy irresponsibility. They lived, indeed, and then died alone, as they had lived,' Camus says. 'But we writers of the twentieth century shall never again be alone. Rather we must know that we can never escape the common misery and that our only justification, if indeed there is a justification, is to speak up, insofar as we can, for those who cannot do so.'[227] Camus calls on the artist to journey into the unsaid for transformation ('even silence has dangerous implications').[228] The essay also creates for its readers insight into a more involved but also questioning role for creatives, when becoming alive to the public interest, as 'justifier' (rather than diplomat), 'perpetual advocate of the living creature' (the metaphysical that Rathenau talks about) and 'bound to question' reality in its 'eternally unfinished aspects' (to recognise what is amiss).[229] Such a role (as justifier) is important where it creates scope for breaking with the recent proceduralism to legal technique, and for reinventing efforts to recondition company, property and capital rights that can 'negate frontiers and the crudest implications of history.'[230] Implicit is that legal scholars might understand such work - of *creating* and specifically *'regulating dangerously'* - not as repressive, but as proposing collective solutions to collective projects (a-massing consequences) and, therefore, suited to tackling different kinds of knowledge projects, inbuilt in the licence (justification) of power.

So, how, then, are the social contract and company rethought? Recalibrating the company in its social aspects among regulatory principles, rather than markets, is the first step. The author connects collectivist intuition to the public interest in situations of widespread harm and abuse, which go unresolved at the level of preferences and interest (the Agenda). It supports an internationally legally binding instrument on human rights to regulate the *activities but*, also, *outcomes* of companies, or domestic and supranational interventions to control recurrent harms in areas of the 'technically social' rife with competition and economic trade-offs.[231] Duties might be shared over corporate groups, networks, sectors, and different generations of polluters, to mitigate the use of corporate separate legal personality as a means to distinguish and avoid liabilities (motivating compliance rather than reflexivity). A case exists for more publicly *funded expert regulators* with the time, perspective, and experience to pursue the maintenance and enforcement of common standards. Routinising such work and supervision of companies has, arguably, become vanguard or 'dangerous' after forty plus years of neoliberal policies, which confine professional and expert knowledge (embed it within firms, benchmark it) rather than collectivise it. Establishing new private sector regulators (eg, in modern slavery, decarbonisation, global tax) could offer a means to counteract the ambiguous freedom commonly sold to impacted communities in deep marketisation (identified in Part 1) – ie, that the chance to scandalise or litigate multinationals is worth as much as the chance to be protected from rights violations (and harms). Understanding of

[226]A Camus, *Create Dangerously* (First Published in 1957, Penguin Random House 2018).

[227]Camus (Ibid.), 25–6.

[228]Camus (Ibid.), 1–2.

[229]Camus (Ibid.), 24 and 22. Camus talks about a 'literature of consent' as needing to be transformed.

[230]Camus (Ibid.), 33.

[231]The emphasis on 'outcomes' is intended to distinguish what the article would logically support – ie, duties of outcome as recently developed by the court in *Milieudefensie v Royal Dutch Shell* (n 225) on the matter of carbon emissions reduction – from the more likely emphasis on duties of reflexivity (due diligence obligations in particular), which is widely reported to be 'favoured even by many corporations and investors.'

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widespread corporate impacts, including their patterning and deep entrenchment, could be productively assisted by mass public reporting and data collection at (and among) public regulators, whilst being underwritten by law's equalising powers.

A second set of transformations is needed in the context of corporate governance, which in this analysis comes *after* the re-establishment of the social contract principle, and not before (contrary to the mainstream assumption that it is possible to start with the company and corporate purposes, as the main frame of reflexive accommodation). Stronger legal foundations for constituent representation and collective bargaining at companies are necessary to ensure that public accountability (more than shareholders) becomes routine, and could extend to new participants (communities, holders of land and heritage rights, the environment). This is important so as to nurture the distinction of collective and life bearing rationalities (from price) and collect their experience of the company, improving understanding.[232] It is also key to build up *normative sensibilities at the sub-state level*, which inform how companies might 'sacrifice this or that private advantage', for the sake of a 'general advantage' (Roosevelt and Berle).[233] Such sacrifice depends not on the will or voluntarism of companies (the world is not fitted to price and/or the balance between shareholders and stakeholders), or even on social pressures that gather 'clarity' or 'force' in markets (in case this gets diluted to scandal). It depends, rather, on developing understanding and evidence about the 'general acceptance' by the community of corporate obligations (Berle and Means in 1932), which is where *law gives and organises presence*. The law in this context might also limit and/or condition capital rights, not so much to increase director discretion over wider interests (the argument usually made in relation to enlightenment strategies and for 'board primacy'), but so as to increase the overall certainty of expectation for investors, concerning their responsibilities for good governance but, also, for the satisfaction of obligations that concern the public interest.[234]

Problems of ineffectiveness remain in this modus, as COVID-19 interventionism in the UK tended to show. But such is not itself a good reason to relinquish creative government, or to defer to fatalism (the rule of the market) and *ignorabimus* (the naturalised defeat of unmarketable or uncompetitive claims). As Camus put it, 'To create today is to create dangerously. Any publication is an act, and that act exposes one to the passions of an age that forgives nothing.'[235] The author in this context wants not to revisit (restore, recalibrate) the debate about 'government or markets' (planning or catallaxy), but to supersede the distortions of this over-simplistic and purifying dichotomy, which has gathered pace again since the 1980s, and puts normative systems at risk of degrading justice. The summative analysis proposes 'rethinking' the form and function of law in holding *public authority* over the corporation and the social question together, but also apart (Camus talks about 'wrenching apart').[236] Such authority has recently been over-analysed for its capacity to guarantee the autonomy of companies and pricing in the economic sphere. The author juxtaposes a different historical axis and mode of isolation, which it gestures to with *Creabimus*. This term references the modernism that made the company dominant in the technological era of the industrial revolution, before it came to a different maturity, at the end of the

[232]See Dukes and Streeck (n 183). On the potential mobilisation of 'incipient law' (the term is drawn from Philip Selznick) among workers as 'occupational communities', when able to organise in spaces away from the gaze of employers and calculative actors. The authors highlight an important role for law and institutions in *nurturing* this juridical space for the *discovery of* collective 'interests, action potential, new procedural and substantive rules that are effective on the ground', and link such discoveries to the recovery of industrial citizenship and justice, post-neoliberalism.

[233]Roosevelt (and Berle) in the Commonwealth Club Address (1932).

[234]This is not called 'stewardship.'

[235]Camus (n 226) 3.

[236]Camus (Ibid.), 22. 'There is no need of determining whether art must flee reality or defer to it but rather what precise dose of reality the work must take on as ballast to keep from floating up among the clouds or from dragging along the ground with weighted boots.' Poul Kjaer identifies this 'dual' function as a 'literally simultaneous function of separating and reconnecting political and economic processes through legal means'; the author seeks to develop the social contract around this function as 'template for modern law-based political economy.' See P Kjaer, 'The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law' 2 (1) (2021) Global Perspectives 1–17. See also Christodoulidis (n 41).

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19th century, as a social, normative and institutional practice that *resisted fatalism at large*, including the fates created by humans (technology, markets, misery, pollution). This maturation is needed again, in a new age of 'human' consequentialism, not because it ruins corporate autonomy (such remains).[237] It is needed to moderate (re-regulate) companies as part of a democratic project that wants to turn the page on decades of collectivist weakening, and to refuse the (dark) promise of living among corporate monopolies that retain the power to coil the spring of enlightenment, only ever one step away from governance by P&O.

4. Conclusion

'I was walking along the road with two friends – the sun went down – I felt a gust of melancholy,' said Munch in his diary (22 January 1892), recording his sentiments when creating his most famous painting, '*The Scream*' (1893/4). 'Suddenly the sky turned a bloody red. I stopped, leaned against the railing, tired to death – as the flaming skies hung like blood and sword over the blue-black fjord and the city – my friends went on – I stood there trembling with anxiety – and I felt a vast infinite scream through nature.'[238]

As an end to this long paper, the author cites the 'gust of melancholy' that Munch sought to capture in the work, as a meaningful sensibility for braving rising economic chaos in the present. Munch's refusal to 'close his eyes to the modern inferno' captures something about the combination of scepticism and constructivism that many wish for after decades of neoliberalism.[239] Munch also influenced the main character of the article's drama (Rathenau) when he sought to illuminate the 'consciousness' of human beings, against the machinations of the era. He wanted to create insight into the tensions and inner experiences that make us sceptical (questioning) about industrial modernity, if not human experience as a whole ('There never existed a painter with a greater desire for a lyrical emotional life; but his unhappy intellect never lets him forget the worm concealed in every bud').[240] Munch's artistry communicated in the face of this disenchantment, however, not a retreat to fatalism (the scream into the void), but painting, as a means to *understanding*, pressing new subjects and common miseries into the public gaze (transforming silences, a 'dangerous creation'). Such constructivist acts, like the telephone wires that Rathenau extended deep into the subterranean, in 1898, were to counter the cult of *'Ignorabimus!'*, which the young people were questioning and wanted to put into the past.[241]

It is this final gesture towards Creabimus, of putting pessimism in its place (with experience of the world) and the crossing out of Gods, which reverberates through the historical fragments and thinkers studied in this paper. The paper interprets it to suggest that the 'technically social' aspects of corporate impactfulness be eternally questioned by reformers, and creatively worked on

[237]Keynes (n 19) 'There is nothing [here] which is seriously incompatible with what seems to me to be the essential characteristic of capitalism, namely the dependence upon an intense appeal to the money-making and money-loving instincts of individuals as the main motive force of the economic machine.' A new age of human consequentialism – sometimes referred to as the 'anthropocene.'

[238]E Munch and G Holland, *The Private Journals of Edvard Munch: We Are Flames Which Pour Out of the Earth* (University of Wisconsin Press 2005) 124. E Munch, *The Scream,* 1893/94, is currently exhibited in the National Museum in Oslo.

[239]Hamilton (n 173) 122. Profile of Munch 122–9, 'The Scream' is reproduced 124.

[240]R Heller, *Munch, The Scream'* (Allen Lane 1973). The comment is by an art critic, on Munch's *The Frieze of Life,* which Munch worked on from the late 1880s to 1906 or 1907. On the biographical sources of melancholy: Munch's early life was full of illness, death and melancholy; his father also liked to tell the children of the family stories by Edgar Allen Poe. He lost his mother at a young age (1868) and older sister (1877) to tuberculosis and was brought up by his father, with whom he entered into conflict during his formative years as a painter (his father, a doctor, wanted him to be an engineer [or something like it] and regretted Munch's occupation with bohemian life). This is set out in Heller at 16–20, and Hodin (n 159) (in more detail) chapters 1 and 2.

[241]Rathenau's book, *Zur. Mechanik des Geistes* (Mechanism of the Mind), Published in 1913, starts with a dedication to 'the young generation.' Cited in Kessler (n 124) at p 158.

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(worked out) within the regulatory frameworks that a social contract with business requires. This creative legal and regulatory recalibration would seek to develop the public power to 'recognise what is amiss' within market coordination, and to multiply the means of justification and address for certain amassing challenges of the present (environmental crisis, inequality, the disenchantments of the neoliberal present). For the company, the article makes institutional transformation about shifting onto a different historical axis, whereby we might re-learn that fatalistic approaches to the social question were never intended to form part of progressive institutional developments. Corporate creation, which operates as an alternative to the state, retains an essential normative relationship with law and government, live to the public interest. It is with this higher relation in full view that the author has proposed a new social contract with business, and a regulatory modus involving law's 'Creabimus' and also 'regulating dangerously' for situations of widely adverse corporate impactfulness.

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