

## The future of democracy and work: the vote in our economic constitution

Ewan McGaughey<sup>1</sup>

### Abstract

What should be the future of democracy? Covid-19 has exposed a desperate need, not just for a green recovery, and a social recovery, but a political recovery, to remake our institutions for the future, for justice on living planet. Today we are seeing that the vote, ‘a most transcendent thing’, is becoming an essential part of our economic constitution: votes at work, votes in capital and votes in public services. This is already practised, however imperfectly, however forgotten, in universities like Toronto, Cambridge, Oxford or Harvard, and the movement is growing, as it should. The evidence shows we are more productive, innovative, happy, and less unequal, when we have voice. Having moved ‘from status to contract’ in the industrial revolution, the future of work involves a move ‘from contract to membership’. The ‘right to take part in the government’ of our societies is depending less and less on holding money, or ‘other people’s money’, but is becoming universal. The days where shareholders monopolize the votes in the economy, and asset managers or banks monopolize votes on shares, are numbered. The true investors in the wealth of nations, people at work, savers for retirement, and all members of our society, are the future of democracy.

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### 1. Introduction

It is an honour and a privilege to give this year’s Sefton-Williams lecture, and to be able to pay tribute to Larry Sefton and Lynn Williams, two towering figures of the towering United Steelworkers of America. I will say more about the Steelworkers soon. But let me start by saying that although we are doing this lecture by video, and I cannot physically be with you in Canada today, I am reminded that my grandmother was Canadian – and that I am connected to you not just by internet, but by history. My mother’s parents met during World War Two, when Stan was sent over from Britain for training in the Royal Air Force, and in New Brunswick he met Stella who worked as a teacher and then a typist for the war. They fell in love, and at the end of the war they were lucky enough to reunite.

For me, these are glimmers of light in darker times, because the fight against fascism that Stella and Stan – and Larry, and Lynn – lived through was not just about defeating a man with a silly moustache and flailing arms. It was also about overcoming an economic vision that concentrated all power into the hands of so called ‘leaders’.<sup>2</sup> Before these ‘leaders’ bankrupted Germany, and launched their campaign to enslave the world, the Nazis imprisoned the unions, conscripted the labour force, invented the idea of ‘re-privatization’ of enterprise,<sup>3</sup> entrenched monopolies and cartels, and concentrated shareholder votes, the commanding heights, into the hands of banks. All of this followed the ‘leadership principle’ (*das Führerprinzip*). As one crazed Nazi lawyer put it:

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1 Reader, School of Law, King’s College, London. Research Associate, Centre for Business Research, University of Cambridge. Please contact at [ewan.mcgaughey@kcl.ac.uk](mailto:ewan.mcgaughey@kcl.ac.uk) and [@ewanmccg](https://twitter.com/ewanmccg). I am incredibly grateful to Brian Langille, Liv Jores and Manoj Dias-Abey for discussion and comments.

2 E McGaughey, ‘The codetermination bargains: the history of German corporate and labour law’ (2016) [23\(1\) Columbia Journal of European Law](#) 135, 140-141, cf E McGaughey, *A Casebook on Labour Law* (2019) ch 11.

3 S Merlin, ‘Trends in German Economic Control since 1933’ (1943) [57\(2\) Quarterly Journal of Economics](#) 169

‘Democracy of capital will vanish just as it did in politics.’<sup>4</sup>

I start with this, because after the war, the very aim of the Universal Declaration of Human Rights, what Eleanor Roosevelt called the ‘Magna Carta of all’,<sup>5</sup> was to uproot the ‘spirit of fascism’ at its source. As Franklin Delano Roosevelt put it, ‘to return to the so-called “normalcy” of before would be to ‘have yielded to the spirit of Fascism.’<sup>6</sup> For my family, the silver lining of that terrible war was that it brought my grandparents together. For the world, the golden rules became ‘freedom of speech and belief and freedom from fear and want’.<sup>7</sup> This was the second attempt, after the ill-fated Versailles Treaty written in another global pandemic a century ago,<sup>8</sup> recalled that ‘peace can be established only if it is based upon social justice’.<sup>9</sup> The Versailles Treaty failed, based as it was on perpetual debt, not perpetual peace.<sup>10</sup> But it left us the International Labour Organization, and when the Universal Declaration was written, it put labour rights, democracy, and social justice at its core. As it says: ‘Everyone has the right to take part in the government’, to ‘just and favourable remuneration’, and we all owe each other the duty to build a society where ‘the free and full development of [our] personality is possible.’<sup>11</sup> It is a constant inspiration for our laws world wide, but we also know that fascism, in the Americas, in Europe, in Asia, in Africa, remains a clear and present danger. The United States has stared a sort of fascism-lite in the face for at least four years.<sup>12</sup> And so to realise the values of the Universal Declaration we have more work to do.

We are crossing a temporary stage of humanity, because we all bear witness to this defective social system, one unlikely to last if we want to solve humanity’s greatest problems: escalating inequality, climate damage, and war. The case I want to make to you today is that part of the solution is already there. This is to play out the next act in the future of democracy: secure the right to vote in every social institution.

The right to vote, as an old judge once said, is ‘a most transcendent thing’.<sup>13</sup> It is at once the voice of the individual, their expression of freedom, and a mode of collective action. It is the way we affirm both our autonomy and the social nature of our existence. We all understand our political constitution. We know the principle of one person, one vote. What we are witnessing now is a new suffrage movement for the extension of the right to vote in our economic constitution: votes at work, votes in capital, votes in public services. Our problems exist because we are not democratic enough: inequality, climate damage and war do not exist entirely, but mainly, because corporations are dominated by asset managers and banks, on Wall Street, Bay Street, in the

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4 JCD Zahn, *Wirtschaftsführertum und Vertragsethik im Neuen Aktienrecht* (1934) and F Kessler, ‘Book Review: *Wirtschaftsführertum und Vertragsethik im Neuen Aktienrecht*’ (1935) [83 University of Pennsylvania Law Review 393](#).

5 E Roosevelt, *Adoption of the Declaration of Human Rights* (9 December 1948) speech delivered in Paris.

6 FD Roosevelt, *Eleventh State of the Union Address* (1944)

7 Universal Declaration of Human Rights 1948 [Preamble](#)

8 N Johnson and J Mueller, ‘Updating the Accounts: Global Mortality of the 1918–1920 “Spanish” Influenza Pandemic’ (2002) [76 Bulletin of Historical Medicine 105](#), 115.

9 Treaty of Versailles 1919 Part XIII

10 I Kant, *Perpetual peace: a philosophical essay* (1795) translated by MC Smith (1903), also *Zum Ewigen Frieden* (1795) explaining that peace could last forever by (1) disposing of materials for war, (2) ending colonisation, (3) abolishing standing armies, (4) ending international debts, (5) prohibiting violent interference in other states’ affairs, and (6) having basic rules of war, such as prohibiting poisoners. Further, all states should (i) uphold freedom, the rule of law, and equal treatment of citizens, (ii) acknowledge the basis of international law as a ‘federation of free states’, and (iii) guarantee universal rights of hospitality for all ‘citizens of the world’. cf JM Keynes, *The Economic Consequences of the Peace* (1919)

11 UDHR 1948 [arts 21](#), art 23(3) and 29(1)

12 cf E McGaughey, ‘Fascism-lite in America (or the social ideal of Donald Trump)’ (2018) [7\(2\) British Journal of American Legal Studies 291](#), that fascism has long been an unconscious culture in the judiciary, and that we must not overestimate ‘the political self-awareness of the judges.’ O Kahn-Freund, ‘Autobiographische Erinnerungen an die Weimarer Republik. Ein Gespräch mit Wolfgang Luthardt’ [1978] *Kritische Justiz* 183, translated in (2016) [KCL Law School Research Paper No. 2016-34](#).

13 *Ashby v White* (1703) 92 ER 126, 137-139, per Lord Holt CJ

City, or in Frankfurt, and they are unaccountable to us. The psychopathic drive for unlimited profit,<sup>14</sup> whatever the social cost, whatever the ‘negligence and profusion’ as Adam Smith put it,<sup>15</sup> will probably end soon, so long as we put good models before us, to maintain a clear vision, of democracy and justice on a living planet. Out of Covid-19 we need a green recovery,<sup>16</sup> and a social recovery,<sup>17</sup> and we also need a political recovery.

So, that’s my central argument: we can become democratic, and this will create justice on a living planet, when we end the financialisation of our economy. But I also have three main points.<sup>18</sup>

- First, at work, and all fields of life, the basis of social relations is shifting from contract to membership, and this mirrors a shift from a society based on property to universal human rights.
- Second, our right to vote in the economy, at work, in capital, and public services, is already there in our most successful enterprises, particularly universities like Toronto, Cambridge, Oxford or Harvard. All credible empirical evidence, quantitative, qualitative, and behavioural, shows that the vote is the key to productivity, innovation, equality and happiness. This is becoming the goal of labour unions, and of democratic, labour, liberal and conservative politics: indeed *every* form of politics except fascism.
- Third, rival theories of economic governance, which advocate the monopolisation of power by shareholders, the monopolisation of shareholder rights by asset managers and banks, or the attempt to turn workers into shareholders, are total failures.

So, I want to persuade you not just that our current model is broken, though it certainly is, but that the alternatives we see and know for a better life can be won. We now have the technology and the understanding to write a new chapter in human freedom. Like a great farm workers’ unionist once said,<sup>19</sup> ‘yes, we can’ create a paradise on Earth.

## 2. From property to universal rights, and contract to membership

Before we get to that, I want to invite you back in time, through the ages of revolutions, to the worlds of property and contract. Toronto and a new town of York was just being founded in the Mississauga’s lands, the United States had declared independence and ratified its first constitution, and France had declared the *Rights of Man and of the Citizen*. There were and remain many justifications for human rights: that they are ‘self-evident’,<sup>20</sup> ‘natural, inalienable, and sacred’,<sup>21</sup> or like ‘the unwritten and unfailing statutes of heaven’.<sup>22</sup> By contrast, opponents, like Jeremy Bentham, believed rights were just ‘nonsense upon stilts’.<sup>23</sup> Nothing was inalienable, a position that may have seemed more justified as the guillotines in Paris began to fall. But another voice was Mary Wollstonecraft. She argued in *A Vindication of the Rights of Woman* that ‘rights and duties’, the ‘laws which bind

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14 cf J Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (2004) and *The New Corporation: How “good” Corporations Are Bad for Democracy* (2020) illustrating these tendencies.

15 A Smith, *The Wealth of Nations* (1776) [Book V, ch 1, §107](#)

16 See the *Green Recovery Act, executive summary and explanatory notes* (2020) with an introduction from M Lawrence ([Common Wealth 2020](#))

17 E McGaughey, ‘A Social Recovery, Workplace Democracy and Security: Covid-19 and Labour Law’ (2021) [32\(1\) King’s Law Journal](#)

18 See also JW Goethe, *Faust: Part One* (1655-1660) scene 7, para 1918, ‘your process of thinking Instead of being like eating and drinking, Spontaneous, instantaneous, free, Must proceed by one and two and three.’ Translated by D Luke (1987). Further, *Rhetorica ad Herennium* (ca 80 BC) translated by H Caplan (1964).

19 RJ Jensen and JC Hammerback, *The Words of César Chávez* (2002)

20 United States, *Declaration of Independence* (1776)

21 *Déclaration des droits de l’homme et du citoyen* (1789)

22 Sophocles, *Antigone* (441 BC) para 452, translated by RC Jebb (1917)

23 J Bentham, *Anarchical Fallacies* (1796)

society’, come not from the sky, and not on stilts, but from our ‘reason, virtue, and knowledge’. In her age, she said, from the ‘respect paid to property flow, as from a poisoned fountain, most of the evils and vices which render this world such a dreary scene to the contemplative mind.’<sup>24</sup>

So for this contemplative mind, property and universal rights were opposites. Property was for a few, rights for all. And in 1792, property was denied to people based on gender and race: you could not have property, when you were property. Property still conferred rights to vote in politics, and it also meant economic enfranchisement, because it was the source of bargaining power. As Adam Smith put it in Britain’s industrial revolution, anyone who had property, like employers over workers, could ‘hold out’ longer in any negotiation.<sup>25</sup> Both politically and economically, property was still the passport to participation in society.

We know the story well of how we won the vote in politics, by dismantling the property qualification, and barriers based on gender and race. We also know Henry Maine’s adage that in the economy, the ‘movement of the progressive societies’ was ‘from Status to Contract’.<sup>26</sup> Less familiar is how we kept requiring property to vote in companies, and if you were a worker with a contract, your investment of labour was not enough. The great enemies of democracy in the 19<sup>th</sup> century understood this well. Robert Lowe, later the British Chancellor, led the opposition to lowering the property qualification to vote for Parliament in 1867, and he has also been called the ‘father of modern company law’.<sup>27</sup> He called the right of property owners to incorporate an aspect of ‘human liberty’,<sup>28</sup> but he fiercely opposed extending the vote in Parliament because, he said, that ‘principle of equality’ would have to be applied to all other institutions, including companies. And, as he put it:

the elite of the working classes you are so fond of, are members of trades unions... founded on principles of the most grinding tyranny... It was only necessary that you should give them the franchise, to make those trades unions the most dangerous political agencies that could be conceived...<sup>29</sup>

Lowe lost the fight, and trade unions won freedom to collectively bargain, but our corporate laws kept equating property and the vote. There were exceptions. In the quiet recesses of Oxford, in 1852, the teachers revolted. They set up a Commission to reverse what they called ‘successive interventions by which the government of the University was reduced to a narrow oligarchy.’<sup>30</sup> On its recommendations, the Oxford University Act 1854 required that university fellows had the right to elect a majority of the university Council. In two years, Cambridge did the same.<sup>31</sup> Of course, neither corporation was fully democratic, excluding junior or non-academics. Yet the right to vote came from membership at work, not by a contract to invest property.

So as the industrial revolution moved into the corporate revolution, the calls for ‘industrial democracy’

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24 M Wollstonecraft, *A Vindication of the Rights of Woman* (1792) [chs I and IX](#).

25 A Smith, *The Wealth of Nations* (1776) [Book I, ch 8, §12](#)

26 HJS Maine, *Ancient Law* (1861) [ch V](#)

27 J Micklethwait and A Wooldridge, *The Company: A Short History of a Revolutionary Idea* (2003) 57

28 Hansard HC Debs (1 February 1856) vol 140, [col 131](#)

29 Hansard HC Debs (15 July 1867) vol 188, [col 1546](#)

30 Oxford University Commission, *Report of Her Majesty’s Commissioners appointed to inquire into State, Discipline, Studies and Revenues of University and Colleges of Oxford* (1852) 8. See also P Searby, *A History of the University of Cambridge: Volume III, 1750-1870* (CUP 1997) 518-23 and 530-533, on the parallel report aiming to end the ‘contradictory elements of democracy, anarchy, and oligarchic centralism’.

31 Oxford University Act 1854 [ss 16 and 21](#)

grew.<sup>32</sup> But when the International Labour Organization was founded in 1919 there was not one model of what industrial democracy meant, but three.

First, in the US, the federal government tried to maintain an institutionalised system of litigation for labor rights overseen by the War Labor Board. The Board had five employee and employer representatives each, plus two public appointees, and it heard labor dispute appeals, like a court.<sup>33</sup> But when the Republicans re-gained Senate control by 1919, employers ignored the awards, and it was shut down.<sup>34</sup> Second, Britain set up 'Joint Industrial Councils', where unions and employers settled fair wage scales, institutionalising sectoral collective bargaining. But then, when the Conservatives retook control of the government in 1922, in its pursuit of austerity and cuts, the Councils lost their power.<sup>35</sup> Third, in Germany, the unions and industrialists concluded one of history's greatest collective agreements, the *Stinnes-Legien Abkommen*,<sup>36</sup> written into the Weimar Constitution by the great European labour lawyer, Hugo Sinzheimer. Article 165 said that workers and employers would 'cooperate... on an equal footing... in the entire field of the economic development of the forces of production'.<sup>37</sup> While in power, the Social Democrats passed a new Work Council Act 1920, giving elected work councils rights to co-operate in setting work conditions, manage pensions, and to veto unjustified dismissals. However, the Social Democrats left questions of wider 'socialisation' of enterprise to a Commission, and corporate board reform unfinished, before losing office. A board representation law passed in 1922 but watered-down.

So you see matters were very different back then: American labor ran into the ground with litigation and government shutdowns. British labour faced austerity and cuts. German labour had high ideals but it all got delayed in a commission. And they were in a global pandemic. What a completely different world it was.

Of course, rights in litigation, sectoral bargaining, and the right to vote at work were not alternatives, but complements. And there were experiments across politics. In Britain, Winston Churchill had piloted worker representation on the board of the Port of London Authority, and after the war the Conservative Minister for Transport proposed that one-third of railway boards should be elected by workers, like in Switzerland.<sup>38</sup> In America, Andrew Carnegie helped establish a university pension with representation for staff beneficiaries, which is now the jointly-managed Teachers Insurance and Annuity Association (TIAA). J.D. Rockefeller hired Canada's future Prime Minister, William Lyon Mackenzie King, to develop work council plans where 'questions affecting conditions of employment can be discussed'.<sup>39</sup> And in 1919, the Governor of Massachusetts, and future Republican president, Calvin Coolidge, passed a voluntary board codetermination law for manufacturing companies, still in force today.

It was only the fascists that could not accept the right to vote. Just as they torched Parliament, and

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32 See S Webb and B Webb, *Industrial Democracy* (1897) [vol II, part III, ch IV](#), 847, 'We ourselves understand by the words "Liberty" or "Freedom," not any quantum of natural or inalienable rights, but such conditions of existence in the community as do, in practice, result in the utmost possible development of faculty in the individual human being.'

33 RB Gregg, 'The National War Labor Board' (1919) [33\(1\) Harvard Law Review](#) 39, 40

34 E McGaughey, 'Democracy in America at work: The History of Labor's Vote in Corporate Governance' (2019) [42 Seattle University Law Review](#) 697, 717-8.

35 KD Ewing, 'The State and Industrial Relations' (1998) 5 *Historical Studies in Industrial Relations* 1, 16-25.

36 E McGaughey, 'The codetermination bargains: the history of German corporate and labour law' (2016) [23\(1\) Columbia Journal of European Law](#) 135, 154-158

37 Weimar Constitution 1919 [art 165](#)

38 E McGaughey, 'Votes at work in Britain: shareholder monopolisation and the 'single channel'' (2018) [47\(1\) Industrial Law Journal](#) 76.

39 *Final Report* (1916) vol VIII, 7766, Rockefeller appearing 25 January 1915.

torched public enterprise, they torched unions and votes at work. Their Stock Corporation Act 1937 codified a bank cartel agreement to take over shareholder voting rights, to secure total economic control. As the head of the Nazi Labour Front said, workers were part of the ‘plant community which obeys the Leader blindly. Its motto is ‘the Leader is always right.’”<sup>40</sup> If anyone was still unsure what industrial democracy should be, it was everything the fascists opposed.

So the Universal Declaration enshrined the opposite. ‘Everyone has the right’, it said, ‘to take part in the government’. Property was a human right as well, but now it was just one among many, and not for corporations holding property for production.<sup>41</sup> Rights came from membership, not contract. ‘Everyone, *as a member of society*,’ says the Declaration, ‘has the right to social security’, as well as fair pay, leisure, a union and to strike.<sup>42</sup> And crucially everyone has the right ‘to share in scientific advancement and its benefits.’<sup>43</sup> This came from experience in the New Deal, both in distributing a polio vaccine, and electrifying rural America. Private enterprise tended to restrict supply, out of apathy, profit or both, so positive public action was needed.<sup>44</sup> Today this affects everything from distributing Covid-19 vaccines, to ending climate damage from coal, oil and gas as fast as technologically allows, and to labour getting a fair share of what we make.<sup>45</sup>

The Universal Declaration marked the beginning of a global revolution, a constitution of humanity, but it did not tell us how to realise these rights: the governance structures to deliver social security, fair pay, or the benefits of science. Of course, minimum labour standards could be judicially enforceable in court, and in the 1950s, a quip was that now people were moving from contract back to status. The student of Hugo Sinzheimer, another great European labour lawyer, Otto Kahn-Freund, firmly scotched that notion, pointing out that far from fixing a ‘status’, the very point of rights is to give people flexibility to agree what they want beyond a minimum.<sup>46</sup> And the way to ensure *fair* standards beyond the minimum is to be a member with democratic voice: collective bargaining, and the vote.

So, the movement of progressive societies today has been a movement from contract to membership. The consent-based element of a contract is still a part of becoming a member in a social institution, like an employer organised in corporate form.<sup>47</sup> But the terms of work are set by a constitutional relationship, ultimately set by all members in a group. It is like, as Harry Arthurs has put it, ‘industrial citizenship’.<sup>48</sup> The core of membership is that in principle we all stand ‘upon an equal foot’.<sup>49</sup> And since access to membership is based on consent, not money, the right to vote is no longer just part of ‘property’,<sup>50</sup> but ‘a most transcendent thing’.<sup>51</sup>

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40 F Neumann, *Behemoth* (1944) 340. Compare the first edition of the ‘Human Resource Management’ journal, e.g. P Pignors, ‘How can a boss obtain favorable responses to his orders?’ (1961) 1 *Human Resource Management* 15, discussed in E McGaughey, ‘A human is not a resource’ (2020) [31\(2\) King’s Law Journal](#) 1.

41 AA Berle, ‘Property, Production and Revolution’ (1965) [65\(1\) Columbia Law Review](#) 1

42 UDHR 1948 [arts 22-24](#) and ICESCR 1966 [arts 7-9](#)

43 UDHR 1948 [art 27\(1\)](#) and ICESCR 1966 [art 15\(1\)\(b\)](#)

44 L Shaver, ‘The right to science and culture’ [2010] [Wisconsin Law Review](#) 121, 138-143

45 E McGaughey, ‘Will robots automate your job away? Full employment, basic income, and economic democracy’ (2021) [50 Industrial Law Journal](#), part 4. cf UN Sustainable Development Goals 2015, which aspire to do a list of things in the distant future, instead of realising rights now.

46 O Kahn-Freund, ‘A Note on Status and Contract in British Labour Law’ (1967) [30 Modern Law Review](#) 685

47 E McGaughey, ‘Social rights and the function of employing entities’ (2017) [37\(2\) Oxford Journal of Legal Studies](#) 482

48 H Arthurs, ‘Developing Industrial Citizenship: A Challenge for Canada’s Second Century’ (1967) [45 Canadian Bar Review](#) 786

49 *Stoughton v Reynolds* (1735) 93 ER 1023, per Lord Hardwicke CJ, ‘We must therefore resort to the common right, which is in the whole assembly, where all are upon an equal foot.’

50 *Pender v Lushington* (1877) 6 Ch D 70, per Lord Jessel MR.

51 *Ashby v White* (1703) 92 ER 126, 137-139, per Lord Holt CJ.

Two recent cases in Canada and Britain illustrate the transcendence of rights over contract. Last year, in *Uber Technologies Inc v Heller*, the Supreme Court of Canada held that regardless of the contract, Uber's drivers could claim employment rights in Canadian courts, not (as the contract said) go through sham arbitration in Holland. The majority held that such a term was 'unconscionable' and void. Unconscionability was based on unequal bargaining power. And like Adam Smith said, this begins with '[d]ifferences in wealth'.<sup>52</sup>

And just last month, the UK Supreme Court held in *Uber BV v Aslam* that drivers are workers, at least entitled to the minimum wage and paid holidays for all time they switch on the app, regardless of what a contract says. The contract, held the Supreme Court, is not even 'the starting point'.<sup>53</sup> In sum, what Juliet Schor has called the 'halo of positive feelings' that the so called 'sharing economy' tries to create,<sup>54</sup> that 'glitzy rhetoric of technoutopia', was seen as a fraud.<sup>55</sup> The *Uber* cases make clear that a real sharing economy is not one based on apps and spin, a dishonest business model, tax evasion, or predatory pricing. A real sharing economy is based on human rights. Those include the right to social security, to fair pay, to organise, and ultimately the vote.

### 3. Votes at work, in capital, and in public services

So now let us unpack three main ways that the future of democracy is unfolding today, and why: with votes at work, votes in capital, and votes in public services. This has come from collective bargaining, from ideas, and simply from experience that our economic constitution must improve.

#### (1) VOTES AT WORK

First, 'votes at work' mean the right to vote for the governing board of an enterprise, an elected work council with binding rights in management, or both.<sup>56</sup> A majority of the richest countries in the OECD have some kind of law requiring workers vote for directors in corporate boardrooms. For example, Sweden requires around a third of boards are worker- or union-elected in companies with over 25 staff. Germany requires that just under one-half of supervisory boards in companies with over 2000 staff are worker- or union-elected. Both systems are embedded in sectoral collective bargaining, so that staff have voice within an enterprise, while fair wage scales are agreed across an industry to prevent unfair competition.<sup>57</sup> This is the best way to raise pay, productivity, happiness and innovation. There are three main types of evidence.

First, there is behavioural evidence. Already in 1968, Paul Blumberg recounted the old story of Australian Harvard researcher, Elton Mayo, at the Hawthorne Works. Mayo took a group of workers out of a factory into a lab, and fiddled with the lighting as they did their shifts, hoping to show light intensity would

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52 *Uber Technologies Inc v Heller*, 2020 [SCC 16](#), [67]. cf Uber, *2020 Investor Presentation* (6 February 2020) 7, stating it has 5 million drivers. All of these people are employees in law, whether or not the law is adequately enforced. See the ILO, *Employment Relationship Recommendation*, 2006 ([no 198](#))

53 *Uber BV v Aslam* [2021] [UKSC 5](#) and *Gisda Cyf v Barratt* [2010] [UKSC 41](#), [39] 'The need to segregate intellectually common law principles relating to contract law, even in the field of employment, from statutorily conferred rights is fundamental.' The UK Supreme Court could, however, be more explicit like the Canadian Supreme Court in recognising the importance of inequality of resources to unequal bargaining power, and this to rights. On the relevance of contract for rights there is agreement.

54 J Schor, 'Dependency and Precarity in the Sharing Economy' ([December 2018](#))

55 E McGaughey, 'Uber, the Taylor Review, Mutuality, and the Duty to Not Misrepresent Employment Status' (2019) [48\(2\) Industrial Law Journal](#) 180

56 Discussed in T Piketty, *Capital and Ideology* (2020) ch 11 and I Ferreras, *Firms as Political Entities: Saving Democracy through Economic Bicameralism* (2018) proposing the strongest form of elected work council to have a veto on all or most issues.

57 cf S Webb, 'The economic theory of a legal minimum wage' (1912) [20\(1\) Journal of Political Economy](#) 973

improve productivity. It did not. But the one sure finding was that workers were happier and more productive in the lab, not the factory. Blumberg explained, this was because they were away from the boss, and the researchers asked the staff how they wanted to organise their shifts and breaks.<sup>58</sup> This illustrates what the great economist, Herbert Simon, called the ‘participation hypothesis’, that people will work and change positively when they ‘participate in deciding what the change shall be and how it shall be made’.<sup>59</sup>

Second, there is quantitative evidence. For example, in 2013, Professors Acharya, Baghai and Subramanian, showed that job security rights, including codetermination, have a significant positive impact on innovation. Based on data in the evolution of five countries’ laws from the Cambridge Centre for Business Research, they found that the number of patents filed goes up a lot with stronger job security laws.<sup>60</sup> And the strongest job security laws, of course, give staff the right to vote for directors, and elect work councils to veto or delay unjustified dismissals.<sup>61</sup> Now, the Cambridge Centre for Business Research has expanded its database to 117 countries, with 40 indicators of labour law changes since 1970. We can see, better labour rights, including board representation and work councils, increase employment, decrease unemployment and raise labour’s share of national income.<sup>62</sup>

Third, there is qualitative evidence. Clearly meaningful votes at work invite high participation. In Germany, voter turnouts for work council elections are around 70 to 80%.<sup>63</sup> Votes at work also reduce conflict, including strikes,<sup>64</sup> by promoting information exchange, trust and confidence. To take just one example, the great Lynn Williams bargained for worker representation on five steel company boards for six years in 1993.<sup>65</sup> He saw it as part of ‘making an investment in companies’, to ensure those struggling had an ‘economically viable plan’, and to ‘share in the financial gains when companies became profitable again’.<sup>66</sup> As Lynn Williams said in 1999:

We must continue to build on the strategic approaches to collective bargaining. We must never forget how important the quality of management is to our members and their future and how important it is that we have input across the range of the corporation, shop floor, management levels, strategic planning, and boards of directors.<sup>67</sup>

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58 P Blumberg, *Industrial Democracy: The Sociology of Participation* (1968) chs 2 and 3, and see E McGaughey, ‘Behavioural economics and labour law’ (2014) [LSE Legal Studies Working Paper No. 20/2014](#)

59 HA Simon, ‘Recent Advances in Organization Theory’ in SK Bailey, *Research Frontiers in Politics and Government* (1955) ch 2

60 VV Acharya, RP Baghai and KV Subramanian, ‘Labor Laws and Innovation’ (2013) [56\(4\) Journal of Law & Economics 997](#)

61 See now Z Adams, L Bishop, S Deakin, *CBR Labour Regulation Index: (Dataset of 117 Countries)* (June 2016) 272, indicator 22, on Germany including the role of elected work councils in dismissal policy.

62 Z Adams, L Bishop, S Deakin, C Fenwick, S Martinsson and G Rusconi, ‘The economic significance of laws relating to employment protection and different forms of employment: Analysis of a panel of 117 countries, 1990–2013’ (2019) [158\(1\) International Labour Review 1](#).

63 eg Institut der deutschen Wirtschaft Köln, ‘Works Council Elections 2010: High Voter Turnout’ (2011) [Newsletter in English](#), recording 79% average turnout in 2010.

64 S Vitols, ‘Prospects for Trade Unions in the Evolving European System of Corporate Governance’ (August 2005) [SEEUROPE](#)

65 ‘The Unions Step on Board’ (27 October 1993) *Financial Times*.

66 BE Kaufman, ‘An Interview with Steelworkers’ President Lynn Williams’ (2001) 22(1) *Journal of Labor Research* 145, 160-1. The Steelworkers were long active in joint union-management committees: e.g. *First Annual Report of the National Commission on Productivity* (March 1972) 17, saying United Steelworkers of America AFL-CIO, in its 1971 collective agreement required ‘joint union-industry committees on productivity at the plant level.’ See also *Fourth Annual Report* (March 1975) 21, making clear these ‘committees are not a substitute for nor an alternative to collective bargaining’

67 BE Kaufman, ‘An Interview with Steelworkers’ President Lynn Williams’ (2001) 22(1) *Journal of Labor Research* 145, 166, adding at 169, ‘We also must continue to press for more representation on corporate boards, as in steel or as with Steve Yokich of the UAW being on the DaimlerChrysler board. This gives us more access to and input in what the companies are thinking and planning and assists us in developing appropriate strategies for our own future.’



The evidence is driving reform across English speaking countries, and political parties. Like Churchill's Port of London Act, or the early railway proposals, in 2016 our Conservative government proposed worker representation on boards. It was watered down into a comply-or-explain duty on listed companies in the UK Corporate Governance Code, but it was a start. The British Labour Party, in which I have played a part,<sup>68</sup> is also committed to reform. We have drafted a law, the Democratic Society Act, that would create a default right to vote for workers in the general meetings of every company startup. And when companies reach over 250 staff, companies must have at least one-third of the board worker-elected.<sup>69</sup> One worker, one vote.

And in the US, Senator Tammy Baldwin released the Reward Work Act, to ensure employees can elect at least one-third of listed company boards. Then Elizabeth Warren proposed that \$1 billion companies should have 40% of their boards elected by employees. Then, Bernie Sanders, not to be outdone, proposed \$100 million companies should have 45% of their boards elected by employees. These are federal proposals, but every democratic state, like New York, California, Massachusetts, Delaware, could amend its corporate laws today.<sup>70</sup> Kamala Harris has joined calls for a Securities and Exchange Commission investigation into worker representation,<sup>71</sup> and Barack Obama has said it is a 'good new idea'.<sup>72</sup> This is a real big deal, because we need a 'clean slate' for labour rights,<sup>73</sup> and votes at work are entirely established in American tradition, not just for Democrats.<sup>74</sup> Opinion polls also show majority support for votes at work among Republicans.<sup>75</sup> As former Republican Senator, Jacob K. Javits said, 'an effort to open up corporate board room opportunities to workers' would improve workers' understanding of management 'as well as exposing management to workers' ideas.'<sup>76</sup> The only politics that cannot support votes at work is fascism.

If we want proof that it works, we just need to look at universities. Combining the majority staff election models of Cambridge and Oxford, and the alumni-elections at Harvard, the University of Toronto Act 1971 requires roughly a third of the Governing Council is elected by staff, alumni and students, and the lieutenant governor.<sup>77</sup> This system is not perfect,<sup>78</sup> but everyone at Toronto should get involved and run, because your Council controls how you work, how all budgets are made, or where your endowment fund is invested. At Cambridge University, an incredible scholar, Dr Ellen Quigley (who is originally from Saskatoon) organised for the university's funds to divest from fossil fuels.<sup>79</sup> Good, because coal, oil and gas have been the worst

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68 See the Institute for Employment Rights, *Manifesto for Labour Law* (2016) and the *Rolling Out the Manifesto for Labour Law* (2019). Further, see the forthcoming book E Miliband, *Go Big: How to Fix Our World* (2021)

69 See the draft 'Democratic Society Act 2020' on [lawarxiv](https://www.lawarxiv.com/).

70 On further proposals see GM Hayden and MT Bodie, *Reconstructing the Corporation: From Shareholder Primacy to Shared Governance* (2021)

71 *Letter to Jay Clayton* (15 October 2018) noting 'Congress has proposed several pieces of legislation to promote worker engagement with corporate management and in the selection of directors.'

72 B Obama, *Remarks at the University of Illinois* (7 September 2018) *The Atlantic*, 'Democrats aren't just running on good old ideas like a higher minimum wage, they're running on good new ideas, like Medicare for All, giving workers seats on corporate boards...'

73 S Block and B Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* (2019)

74 See also T Malleon, *After occupy: Economic democracy for the 21st century* (2014) 183-4, advocating worker cooperatives, and replacing equity capital with publicly controlled debt capital.

75 E Anzelotti, 'Want Fairer Workplaces? Give Employees Seats On The Board' (6 April 2018) [Fast Company](https://www.fastcompany.com/3998888/want-fairer-workplaces-give-employees-seats-on-the-board), showing 43% of 'lean Republican' voters support employee board representation and 31% oppose.

76 Quoted in RJ Kühne, *Co-determination in Business: Workers' Representatives in the Boardroom* (1980) ch 9, 105

77 University of Toronto Act 1971 [s 2](#) and see M Boggs, 'Ontario's University Tuition Framework: A History and Current Policy Issues' (2009) 39(1) *Canadian Journal of Higher Education* 73

78 Optimal board size is more like 12, not 50 people, and the voter turnout could be improved. See *2020 Governing Council Elections - Announcement of the Results* (18 February 2020)

79 'University plans to cut greenhouse gas emissions to zero by 2038' (1 October 2020) and M Taylor, 'Cambridge University to divest

investments every year since 2017,<sup>80</sup> and they must end to end climate damage.<sup>81</sup> Votes at work are common to the world's best universities.

So now let me tell you of my workplace, King's College, London. Around one-third of our governing Council was elected by staff until 2009, when votes were unilaterally abolished.<sup>82</sup> So, we started a petition last year to have a majority elected again by staff and students. Nearly 800 signatories, which you can see at [www.kclisdemocratic.net](http://www.kclisdemocratic.net), are committed to democratising work, plus our students' union. So is our workplace union, and at the same time we are concluding our first written collective agreement in over a decade. We are seeing really positive, genuine engagement from the chair of our Council and our Principal. Our case is that our workplace will be better for everyone when we have staff votes. We have proposed different options to change our university's constitution, and we are consulting all staff now.<sup>83</sup> Support will continue to mount. Even before legislation, this can be done in *every* workplace, as well as universities: with moral persuasion, engagement, and collective bargaining, for corporate change.

## (2) VOTES IN CAPITAL

The second main element of a democratic economy is votes in capital. Workers' capital makes up most of the stock market, from pensions, life insurance or mutual funds. But there are two problems. First, not all funds have directors elected by the beneficiaries and workers. Second, pensions often delegate investment services to asset managers or banks, and they cast the votes on shares that workers' capital buys.

Simply describing the situation shows how absurd it is. In the US, the 'big 3' asset managers, BlackRock, Vanguard and State Street, if combined, would be the largest shareholder in 438 out of the top 500 corporations.<sup>84</sup> They have around 50 people in their corporate governance departments, casting all the votes on all the company shares.<sup>85</sup> Their vote policies are controlled by the chief fund directors, probably about 12 people.<sup>86</sup> Their preferences conflict with the real investors. The 'big 3' hold 20% of the shares in the oil giants that are burning our planet,<sup>87</sup> and yet they have done nothing but greenwash to replace fossil fuels as fast as technologically possible. They have done nothing to end the gender pay gap. They pay themselves astronomical bonuses, with fees extracted from pensioners, and they oppose living wages and unions across the board. They especially oppose collective, defined-benefit pensions, because as Professor David Webber says, they are intent

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from fossil fuels by 2030' (1 October 2020) [Guardian](#)

80 B Nauman, 'Sharp rise in number of investors dumping fossil fuel stocks' (9 September 2019) [FT](#). '2019 Stock Index Results Show Fossil Companies as Worst-Performing Segment' (14 January 2020) [Energy Mix](#). S Benstead, 'Oil is this year's worst performing stock market sector – should you invest?' (18 November 2020) [Telegraph](#). The answer is 'no', and that fossil fuels damage pensions.

81 *Green Recovery Act, executive summary and explanatory notes* (2020) with an introduction from M Lawrence ([Common Wealth 2020](#)) and *Green New Deal for Europe: Blueprint for Europe's Just Transition* (Dec 2019)

82 King's College, London Act 1997 s 15. The Act did not, however, explicitly state rules on changing the College constitution. Though before my time, the ex-principal appears to be mainly remembered for yelling at people and causing a large number of staff to leave. He also appears to have had few coherent ideas about governance: e.g. R Trainor, 'What the head of a university expects from the leadership of a dental school' (2019) [87 Journal of Dentistry](#) 62. By contrast, his successor, Sir Ed Byrne, started a shift by restoring three staff members elected via Academic Board to Council, coincidentally in the same year as being given a copy of the KCL Act 1997, in a law school meeting.

83 See 'Options for democratic reform of the KCL Council: consultation background' (2021) [kclisdemocratic.net](#)

84 EA Posner, FS Morton and EG Weyl, 'Proposal to limit the anti-competitive power of institutional investors' (2017) [81 Antitrust Law Journal](#) 1, 2.

85 S Krouse, D Benoit and T McGinty, 'Meet the New Corporate Power Brokers: Passive Investors' ([October 24, 2016](#)) *Wall Street Journal*

86 cf JC Coates, 'The Future of Corporate Governance Part I: The Problem of 'Twelve'' (2018) [Harvard Public Law WP No. 19-07](#)

87 A Christie, 'The Agency Costs of Sustainable Capitalism' (2021) [55\(2\) UC Davis Law Review](#)

on ‘smashing and scattering’ everyone’s savings into individual accounts to take more fees.<sup>88</sup>

And who are they accountable to? Well if you take a look at the share registers, BlackRock’s biggest shareholders are Vanguard, BlackRock itself, and State Street, Vanguard’s insiders control themselves, and State Street’s biggest holders are Vanguard and BlackRock.<sup>89</sup> This is a self-perpetuating oligarchy. Worse still are the big 3 private banks in Germany: Deutsche Bank, Commerzbank and Unicredit. Before public statistics were cancelled in 2005, we could see the banks exercised around 60% of voting rights on German public company shares.<sup>90</sup> They have done this since they formed a cartel to take over other people’s votes in 1930,<sup>91</sup> and the Nazi Stock Corporation Act 1937 codified bank power, still not reversed today (though it probably violates EU competition law).<sup>92</sup> These financialised institutions, these asset managers and banks, threaten fair competition, our planet, fair pay and equality. And all their power comes from ‘other people’s money’.<sup>93</sup>

The good news is that there are excellent models for reform. First, in Canada the best pensions are collectively bargained, with at least equal employer and employee representation. The new Ontario University Pension Plan is a fine example, and designed to protect defined benefit pensions. In the UK, we require at least one-third member-nominated trustees, and the Minister can raise this to one-half at any time.<sup>94</sup> The Canada-based Committee on Workers’ Capital has done brilliant work in organising pension fund trustees worldwide.

Second, in Switzerland, a 2013 reform required that banks only vote on shares based upon instructions from pension funds, and pension funds have a duty to formulate voting policy. And in 2019, the Bernie Sanders campaign, which I had the privilege of working with, proposed in its *Corporate Accountability and Democracy* plan that asset managers or banks should only vote based on instructions from their clients. As it said, the ‘voting power asset managers control comes from other people’s money. It doesn’t belong to them, it belongs to us.’<sup>95</sup>

And when people control their capital, they use it well. For example, in 2010, a phenomenal woman called Janice Turner organised an ‘Association of Member Nominated Trustees’ for the UK’s elected and union pension representatives. In 2016 the AMNT produced a superb document on how asset managers should cast votes on pension money called ‘Red Line Voting’.<sup>96</sup> This requires that shares are voted against directors if they do not disclose a plan to end coal, oil and gas, reach gender parity in boardrooms, pay living wages, recognise an independent union, or have directors earning over 100 times the average worker. London’s asset managers are still refusing to follow instructions, and uniformly so. This suggests either they are acting as an illegal cartel, or there is a market failure that invites regulation. Our Pensions Minister has set up a working group to change it.<sup>97</sup>

This all shows the solutions are already before us: we need to take back our votes in capital.

88 D Webber, ‘The Real Reason the Investor Class Hates Pensions’ (5 March 2018) [NY Times](#), and D Webber *The Rise of the Working-Class Shareholder: Labor’s Last Best Weapon* (2018)

89 See major holders for [BlackRock Inc](#), and [State Street](#) on [finance.yahoo.com](#).

90 Deutsche Bundesbank, *Statistische Sonderveröffentlichung 9* (2005) 32 and (1998) 32.

91 Centralverband des deutschen Bank- und Bankiergewerbes (1930) BankA 1930-31, 116, Beschluß ‘daß die Mitglieder unseres Verbandes einander gegenüber die Verpflichtung übernehmen, an die Besitzer bei ihnen hinterlegter Aktien eine ausdrückliche Anfrage über die Art der Ausübung des Stimmrechts zu richten, wenn ihnen von einem anderen Verbandsmitglied zwei Wochen vor der Generalversammlung die Absicht einer Opposition bekanntgegeben worden war’. That is, a decision that the members of the bank cartel assume the duty among one another to expressly consult the owners of shares if contentious issues arise on votes, and otherwise vote as they pleased.

92 Aktiengesetz 1937 §114 and see now Aktiengesetz 1965 §135. See E McGaughey, *Participation in Corporate Governance* (2014) [ch 6\(2\)\(d\)](#)

93 A Smith, *The Wealth of Nations* (1776) Book V, [ch 1](#), §107. LD Brandeis, *Other People’s Money and How the Bankers Use It* (1914).

94 Pensions Act 2004 ss 241-243

95 See also EMPOWERS Act (11 December 2020) [Press Release](#)

96 AMNT, *The Red Lines: Voting Instructions. Environmental, Social, Governance* (2016)

97 AMNT: ‘Asset owners should take charge of ESG voting’ (4 December 2020) [Portfolio Institutional](#)

### (3) VOTES IN PUBLIC SERVICES

The third main element of economic democracy is votes in public services. Many major enterprises are not suited to shares traded among capital investors. Nobody really wants to nationalise fashion, electronics, or craft beer production, because we know competitive private enterprise can advance the public interest *if* there is broadly equal distribution of assets and finance for production.<sup>98</sup> But where we are talking about education, health, banking, water, the electric grid, transport, or communication networks, when left to the capital market, these enterprises always fail. In nearly every country, they have been taken into public ownership in whole or part, or put under sector-specific regulation, or members of the public have binding rights, or all three. When ‘voting with your feet’ as a consumer no longer works, a democratic society creates voting for real.

We are not yet fully past the old “Morrison model” of nationalisation, where the ‘expert’ Minister, like the old Transport Secretary Herbert Morrison, monopolised appointments to public enterprise boards.<sup>99</sup> But this is changing. First, universities, again like Toronto, illustrate the success of including student or alumni votes in governance. This does not solve everything, because we are still not realising the universal right that: ‘Higher education shall be made equally accessible to all... by the progressive introduction of free education’.<sup>100</sup> But whether the funding is from forced fees or fair tax, students need a voice and a vote. Second, in the best health systems, including in Spain or the UK National Health Service, we see patients and residents’ groups, alongside doctors and nurses, having the right to vote for hospital boards.<sup>101</sup> Third, in public services from water to electricity to transport, in France, Germany or Switzerland, we see ratepayers, local residents and passengers having the right to codetermine the management of their services.<sup>102</sup>

Fourth, in communications and media, staff and audiences often have the right to vote. My favourite example is Wikimedia, which runs one of the world’s biggest websites, Wikipedia. Incorporated in Florida, half of its board is elected by the editors and readers: anyone can register an account and get to vote.<sup>103</sup> Editors also determine Wikipedia’s policies: these include good faith dialogue, no harassment or bullying, no bots or sockpuppets, and accurate and impartial information. This contrasts with Facebook which, to its credit originally gave ‘users’ the right to vote on its privacy policy.<sup>104</sup> But then ahead of its 2012 initial public offering, Facebook unilaterally abolished its users’ vote.<sup>105</sup> In the drive for money from ads, it then enabled user data to be harvested without consent, by the psycho-ops companies Cambridge Analytica and Aggregate IQ. That data fuelled psychologically targeted propaganda in the Brexit, Ted Cruz and Trump 2016 campaigns.<sup>106</sup> So you see that the

98 E McGaughey, *Principles of Enterprise Law: the Economic Constitution and Rights* (Cambridge University Press 2021) ch 2 (forthcoming)

99 H Morrison, *Socialisation and Transport: Organisation of socialised industries with the particular reference to the London passenger transport bill* (1933) [ch XI, 197](#)

100 International Covenant on Economic, Social and Cultural Rights 1966 [art 13\(2\)\(c\)](#) and UDHR 1948 [art 26](#). cf R Chetty, N Hendren, P Kline, E Saez and N Turner, ‘Is the United States still a land of opportunity? Recent trends in intergenerational mobility’ (2014) [NBER Working Paper 19844](#), Figure 4. College Attendance Rates vs. Parent Income Rank by Cohort

101 National Health Service Act 2006 [Sch 7, paras 3 and 9](#). J Carvel and G Tremlett, ‘Milburn seeks hospital role model in Spain’ (6 November 2001) [Guardian](#).

102 e.g. ‘Liberté, égalité, and a glass of fizzy water?’ (31 August 2018) [WeOwnIt Blog](#). Gemeindeordnung Nordrhein-Westfalen 1994 [§§107-113](#). HL Dienel and M Schiefelbusch, *Public Transport and its Users: The Passenger’s Perspective in Planning and Customer Care* (2009).

103 Wikimedia Bylaws (2019) art IV, §§1-3

104 P Sloan, ‘Commenters push Facebook policy changes to public vote’ (27 November 2012) [Cnet](#)

105 J Constine, ‘Facebook Asks Users If It Can Abolish Their Right To Vote On Future Site Governance Changes’ (21 November 2012) [TechCrunch](#). But see Federal Trade Commission, ‘Agreement containing consent order’ (2011)

106 R Mueller, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* (2019) [II. Russian “Active Measures” Social Media Campaign](#). T Snyder, ‘Fascism is back. Blame the Internet.’ (21 May 2018) [Washington Post](#), and see further *The Road to*

right to vote really does matter. Votes create a truly ‘social media’, and they are part of a true system of democratic enterprise.<sup>107</sup>

#### 4. The total failure of shareholder monopoly

There is, however, a different view. A dwindling minority of corporate law theorists still argue our economic constitution should exalt ‘shareholder primacy’ and ‘value’. Shareholders should monopolise the votes in the economy, and this is the ‘end of history for corporate law’. Especially from the 1970s, this minority view, starting with Milton Friedman, challenged the long-standing consensus from the great New Dealers, A.A. Berle and Gardiner Means, that a corporation is a ‘social institution’ which should serve ‘all society’.<sup>108</sup> No, said Friedman, the social responsibility of corporations is to make profit for shareholders.

But why? Well, Friedman’s reasons were never coherent, simply asserting that shareholders are ‘owners’ of corporations. This got private property wrong: shareholders own their shares, not the corporation. But then in 1979, Michael Jensen and Bill Meckling argued that because a shareholder is (supposedly) ‘the residual claimant on the firm’s cash flows’ – the party to be paid last on a corporation’s bankruptcy – the shareholder is likely to be the best monitor, and workers or others will be far less efficient.<sup>109</sup> In 1983, Frank Easterbrook and Daniel Fischel argued that shareholders monopolize votes because ‘[v]oting flows with the residual interest in the firm’ and if the law does anything else ‘there will be a needless agency cost of management’.<sup>110</sup> In 1984 Oliver Williamson said that shareholders make the only ‘asset-specific’ investments in corporations that cannot be protected unless they appoint the whole board. Workers’ interests could be protected with job security, but the ‘capital is always at hazard’.<sup>111</sup> And in 1996, Henry Hansmann (who I respect greatly) argued because shareholders all want profit, and workers or the public have divergent interests, shareholder monopolised boards will fight less and be better. This was the ‘end of history for corporate law’.<sup>112</sup>

So, the primary intellectual justification for shareholder monopoly rested on the notion that shareholders invest money in companies. Their money is at risk. They have the incentives to manage best. But none of this is true, because shareholders today – and back in the 70s, 80s or 90s – are mainly asset managers and banks. They do not invest their own money, they take votes from other people’s money. They have fundamental conflicts of

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*Unfreedom: Russia, Europe, America* (2018). E McGaughey, ‘Could Brexit Be Void?’ (2018) [29\(3\) King's Law Journal 331-343](#)

107 See further S Deakin, ‘The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise’ (2012) [37\(2\) Queen's Law Journal 339](#) and T Raiser, ‘The Theory of Enterprise Law in the Federal Republic of Germany’ (1988) [36\(1\) American Journal of Comparative Law 111](#).

108 See AA Berle and GC Means, *The Modern Corporation and Private Property* (1932) [Book V, chs III, 351 and IV, 356](#). It is often, mistakenly, said that Berle believed in shareholder primacy, because of a misunderstood debate with Merrick Dodd. On the contrary, Dodd thought that directors should be the guardians of what they supposed was in the public interest, and Berle said that as against control by unaccountable directors, shareholders should have primacy. But ultimately, he believed that corporations must be run in the public interest. He also believed that ‘How Labor Could Control’ would be through distributed investments in pension funds, shifting away from initial ideas of share plans in single enterprises: E McGaughey, ‘Democracy in America at work: The History of Labor’s Vote in Corporate Governance’ (2019) [42 Seattle University Law Review 697, 698](#).

109 MC Jensen and WH Meckling, ‘Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination’ (1979) *Journal of Business* 469, 485-6

110 F Easterbrook and D Fischel, ‘Voting in Corporate Law’ (1983) *26 Journal of Law and Economics* 395, 409. The authors also suggest that this is the reason that a one-share, one-vote norm prevails. Basic historical understanding shows, such a norm does not prevail in absence of regulation. See E McGaughey, *Participation in Corporate Governance* (2014) ch 5.

111 OE Williamson, ‘Corporate Governance’ (1984) *93 Yale LJ* 1197, 1210 and OE Williamson, *The Economic Institutions of Capitalism* (1985) 29

112 H Hansmann, *The Ownership of Enterprise* (1996) and H Hansmann and R Kraakman, ‘The End of History for Corporate Law’ (2001) [89 Georgetown LJ 439](#)

interest with the real investors. And even where shareholders *are* the real investors of capital, the job risks that workers face when they invest their labour are greater. So are the risks to the public of bankrupt banks, health that does not care, trains that do not run, or ad-driven surveillance websites. In any case, the very point of a constitutional governance structure is not to embody evidence-free economic theory, but to reconcile ‘people of fundamentally differing views’.<sup>113</sup> The public must have the right to vote where markets fail, the real capital investors often, and workers always.

And history did not ‘end’ in shareholder primacy. Good, because it has accelerated inequality, it is burning our planet, and it bankrolls the industries of war. On the positive side there is a steady spread of votes in the economy. But on the negative side, the spirit of fascism has re-emerged in big business. It is said now that the only shareholders who need to have votes are the ‘entrepreneurial founders’ of companies. To take just one example, Zuckerberg at Facebook took multiple voting shares. He cannot be removed. As he became the world’s third-biggest ad-man, Zuckerberg argued against any standards. Let Nazis deny the Holocaust to mass audiences. On Facebook, he said, people should be able to ‘get things wrong, even multiple times’ while Facebook profits from ads.<sup>114</sup> He has only changed his mind after the genocide in Myanmar, televised mass shootings, and the national terrorist attack on the US Capitol.<sup>115</sup> Nobody can hold Zuckerberg to account until we restore, not just user votes, but the one share, one vote laws that we had from the New Deal. This matters in the UK, because our Financial Conduct Authority is considering allowing dual-class share structures for premium listed companies, egged on by the food delivery company, Deliveroo. Like Uber, Deliveroo also misrepresents the employment status of its staff. Dual-class shares for this or any other company, like an old phone, are not smart.

Finally, there is the argument that workers should become shareholders. Shareholder primacy is fine, so long as workers and capitalists are ‘pulling and owning the same boat.’<sup>116</sup> This argument has long been made by Richard Freeman, who adds that if robots are ‘taking our jobs’, then we should just own the robots and do it through share schemes.<sup>117</sup> I have sympathy for this, but it can quickly be seen that what really matters is not shares in a single firm, but the vote in how technology is used and the benefits shared. There is nothing inherently wrong with workers having some shares in a company, except that it should never be a substitute for actual pay or rights. And we must be very clear that employee share schemes break the cardinal rule of prudent investment: to diversify the portfolio. For example, the American energy company, Enron, bankrupted in 2001, encouraged its staff to invest their pensions in its share scheme. When it went down, workers lost around two-thirds of their savings.<sup>118</sup> Any big employee share scheme risks violating the universal right to social security. Share schemes have always been used to divide and screw workers with disastrous results, from Thatcher’s privatisation of British buses, to post-Soviet shock therapy that gave us the Russian oligarchs.<sup>119</sup> Workers are

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113 cf *Lochner v New York*, 198 US 45 (1905) per Holmes J

114 K Swisher, ‘Full transcript: Facebook CEO Mark Zuckerberg on Recode Decode’ (18 July 2018) [Recode](#), ‘I just don’t think that it is the right thing to say, “We’re going to take someone off the platform if they get things wrong, even multiple times.”’

115 ‘A Genocide incited on Facebook, with posts from Myanmar’s military’ (6 November 2018) [NY Times](#). ‘Facebook, YouTube sued over Christchurch shootings video’ (26 March 2019) [BBC News](#). T Hatmaker, ‘Zuckerberg blames Trump, not Facebook, for the Capitol attack’ (25 March 2021) [TechCrunch](#).

116 See *Final Report* (1916) [vol IX, 8288](#), Andrew Carnegie.

117 RB Freeman, ‘Who owns the robots rules the world’ (May 2015) IZA World of Labor. Discussed in E McGaughey, ‘Will robots automate your job away? Full employment, basic income, and economic democracy’ (2021) [Industrial Law Journal, forthcoming](#).

118 PJ Purcell, ‘The Enron Bankruptcy and Employer Stock in Retirement Plans’ (11 March 2002) [CRS Report for Congress](#)

119 B Black, R Kraakman and A Tarassova, ‘Russian Privatization and Corporate Governance: What Went Wrong?’ (2000) [52\(6\) Stanford Law Review 1731](#) and J Hamilton and S Deakin, ‘Russia’s Legal Transitions: Marxist Theory, Neoclassical Economics and the Rule of

entitled to a vote and stable pay, without shares. The best shareholding entities are pension funds, and other diverse, democratic ownership funds. And if we want a democratic economy, what matters is the vote.

## 5. Conclusions

So what is the future of democracy and work? The answer must be people at work, savers for retirement, and all members of our society: the true investors in the wealth of nations are the future. We have moved away from a society based on property and contract and we are perfecting one now based on universal rights and membership. We simply need to see our economic constitution for what it is. There is no moral or intellectual justification for letting a tiny group of men, like the heads of BlackRock, Vanguard, State Street, monopolise the votes in our economy. Their control over corporations is hurting us, our planet, and democracy. So we just need to build on the good models that we already know.

And I want you to just imagine what the world can be like once we overcome these temporary problems. Instead of a life so dreary to the contemplative mind, a life of struggling to pay the bills, of coal fumes and car fumes, and of relentless conflict on our airwaves and in our minds, we can raise everyone's pay, clean our air, and have a society that lives in peace. Imagine if everyone had a more democratic workplace, where when things go wrong, we all get a vote to set it right. Imagine if all the big financial firms, instead of shouting about quarterly profits and concealing their annual fees, used their power to raise pay, go green, and support human rights. Imagine if the big tech monopolies, instead of monetising your eyeballs and data, became part of a network of universal public services. The benefits of our technology would be shared by everyone, and we will use it to extend our weekends and holidays,<sup>120</sup> our childhoods and our retirement, and our freedom to enjoy what is truly valuable in life: friends, family, sport, music, art, literature, philosophy, and contemplating the wonders of our world and our existence. We have all felt at times how much we miss these things in this pandemic, and as we come out of Covid-19 we need a green recovery, and a social recovery. We also need a political recovery. We need to change the paradigm of our economic constitution, with that familiar friend, and that most transcendent thing: one person, one vote.

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Law' (2015) [7 Hague Journal of the Rule of Law](#) 283

<sup>120</sup> See also D Kameråde, S Wang, B Burchell, SU Balderson and A Coutts, 'A shorter working week for everyone: How much paid work is needed for mental health and well-being?' (2019) [241 Social Science & Medicine](#) 112353