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§§ Introduction & thesis statement

Following the 2004 election of George W. Bush to his second term as President, the question of why certain groups of voters were apparently voting against their own economic interests became a topic of political moment in the United States. The question resulted in the publication of a best-selling popular book, *What's the Matter with Kansas: How Conservatives Won the Heart of America*, by Thomas Frank, a journalist, historian and native of Kansas.¹ In the book Frank examines the rise of conservative populism in a state once solidly leftist politically and home to the Populist movement of the late nineteenth century. Over the past several decades Kansas has been widely alleged to have become politically and economically conservative. This conservative voting pattern defies both history and expectations because it seems to many observers that the people of Kansas were supporting candidates and policies that were inimical to their rational interests. This example raises a more general question – why do people in democracies act in ways that seem contrary to what rational expectations would predict? *What's the Matter with Kansas* thus serves as a recent, popular expression of a deeper and long-standing problem in political theory – why do people vote against rational understanding and their own interests?

This informal example is an illustration of Wollheim's Paradox that is one of the focal issues of this essay.² The essay is concerned generally with an attempt to describe and analyse an enduring tension in the history of political thought between the obligation to do the politically right thing, i.e., right in the sense of scientifically and epistemologically correct according to expert knowledge on the one hand. On the other hand it acknowledges the need to comply democratically with the collective will of the people even when that collective will prefers an option that is not rationally or scientifically the best thing to do. Wollheim's Paradox then is that people know the right thing to do and still vote to do what's not in their rational self-interest.

¹ Frank, 2004.

² Wollheim, 1964.

Richard Wollheim has argued in a well-known article that democratic theory conceived in this way is not merely paradoxical in some loose sense; it is a strict paradox. He constructs the paradox in three steps.

1. As a citizen of a democratic community, I review the choices available to the community and conclude that A is the policy that ought to be implemented.
2. The people, in their wisdom or their willfulness, choose policy B, the very opposite of A.
3. I still think that policy A ought to be implemented, but now, as a committed democrat, I also think that policy B ought to be implemented. Hence, I think that both policies ought to be implemented. But this is incoherent.³

Thus, we can know {A} (that which is in our collective rational self-interest) but vote {B} (our collective will). And we are left in an untenable situation according to this version of the paradox.⁴

Political theorists and philosophers are unable to provide a formulaic or uniformly prescriptive answer to resolve this paradox. The reasons for this are complex, but ultimately come to rest upon our inability to determine which one of two doxia shall prevail: the obligation to adhere to that which is rationally correct, or to respect that which represents the popular will.

But there is more to the problem as it persists in the contemporary political arena. Specifically, this essay seeks to explore an additional dilemma, that I refer to as Walzer's Paradox.

The legislature is, if not the reality, then at least the effective representation of the people assembled to rule themselves. Its members have a right to act within an area. Judicially enforced rights can be understood in two different but complementary ways with regard to this area. First, they are boundaries circumscribing it. From this view, a simple equation follows: the more extensive the list of rights, the wider the range of judicial enforcement, the less room there is for legislative choice. The more rights the judges award to the people as individuals, the less free the people are as a decision-making body. Or, second, rights are principles that structure activities within the area, shaping policies and institutions. Then judges do not merely operate at the boundaries, however wide or narrow the boundaries are. Their judgments represent deep penetration raids into the area of legislative decision.⁵

Walzer is skeptical of liberal protections, in this case the protection afforded to rights claims, that have the effect of restricting democratic authority in the interest of avoiding democratic tyranny. Walzer would allow more latitude for democratic authority, even at the risk of democratic tyranny, because he perceives direct democracy as a good, and something not to be unnecessarily constrained in the interest of regulating majority impulses on behalf of the collective will. Walzer is of course dealing with natural persons' rights claims. My concern in this essay is the rights claims of fictive persons.

³ Wollheim, 1962, found in Walzer, 1981. P. 385.

⁴ Harrison, 1993.

⁵ Walzer, 1981. P. 391.

Commercial corporations want to claim rights to be able to satisfy their appetite for profit-maximisation, among other things. This stems from their focus on a narrow set of values that I refer to below as economic monism. People, however, want rights for a wide variety of reasons including those of eudaemonia, justice, equality, and charity as well as for the interests of families, communities, environmental preservation and future generations. These interests are expressed in a language of multiple values. Thus, another concern of this essay is with assertions of rights by fictive persons (such as corporations) and granting of rights to those fictive persons. Unlike human rights for natural persons, where these rights are held naturally by individuals prior to governments and civil society, these are rights of fictive persons that are claimed counter-intuitively for entities that are distinctly not human and are historically anomalous.

I will briefly re-describe Walzer's Paradox as the granting and expansion of rights of natural persons to include rights claimed by fictive, or legal persons, and the subsequent recognition of, defence of and granting of reparations for violation or denial of the claimed rights. Then the essay addresses how recognition of obligations to the rights of persons (including juristic persons) constrains the democratic process. I will follow Walzer's equation in posing another question: What are the consequences when more extensive rights claims lead to less room for legislative (democratic) choice when rights are granted and extended, again, not only to natural persons, but to juristic persons, i.e., persons as legal fictions? Does this lead to a situation where the rights claims of non-natural persons can only be interpreted through the judiciary and other experts leaving the determination of justice for those entities in the hands of holders of specialised legal (and other) knowledge? What are the consequences for democracy, legitimacy of the democratic process and the collective will? Are we led to consider the advent of a form of democracy of, by and for those special interests possessing or having access to specialised knowledge, knowledge that is beyond citizens who are merely natural persons?

Before turning to a consideration of the nature and political role of fictive persons I wish to make clear

the main tasks of the paper by citing its several aims. The conflation of the Wolheim and Walzer paradoxes is intended to address the impact on democracy of rights-bearing fictive persons (primarily commercial corporations). Corporations are held to be providers of expert knowledge that increasingly gives them authority in democratic decision-making. Democratic plasticity is constrained in the process of legal recognition of their rights-claims. Natural persons and fictive persons hold divergent values that differentially affect outcomes of the democratic process.

§§ Fictive Persons

Fictive persons, i.e., persons that are created in law, but that are not natural human beings, are claiming and are granted legal rights. They behave politically as holders of rights equivalent to those of citizens. Because instances of these rights claims are proliferating, we are compelled to ask what is at stake for democracy. Rather than ask what is to be done, it may be more instructive to know something of the risks and uncertainties involved if the political status of natural persons is challenged and displaced by fictive, or juristic persons. This seems especially the case if the basis for the displacement rests on assumptions of the greater expertise, more extensive knowledge or effective institutional capacity for political action of those juristic persons compared to that of natural persons. In this essay references to juristic, fictive, or legal persons is intended to indicate institutional actors. This includes but is not limited to institutions such as commercial corporations, NGOs, non-profit organisations and similar entities. To explore this question this essay conflates these two paradoxes in political theory. The purpose is, first, to address the question of what is at stake with respect to Walzer's Paradox where legal recognition of claims to rights constrains democratic authority and flexibility.⁶ It also raises the question of what is the proper role of expert knowledge in democracies following Wollheim's Paradox.⁷

The conflation of the two paradoxes reveals a contradiction between democratic constituencies (voters) granting, or at least assenting to, legal (and moral?) rights to institutions that may be acting on

⁶ See Walzer, 1981.

⁷ See Wollheim, 1964.

their own unique interests and, according to Walzer, consequentially constrain democracy on the one hand. On the other hand, voters knowingly and democratically vote to do this, or consent to it contrary to their own recognised rational democratic interests as against the interests of institutional actors. Wollheim is useful here for comparing the interests of natural persons to fictive, or legally defined persons such as corporations to highlight the conflicting interests of institutions. Commercial corporations, say, can know collectively through their internal decision structure, codes of conduct, by-laws, corporate responsibility charters and other official documents what is the right action.⁸ It is essential to understand this complex problem because it is not only that democratic principles are confounded when constituencies give away their decision-making power to experts, but also that when the experts are institutions rather than natural persons there is a compounding of the issues of both who (or what) is a legitimate political ruler as well as the issue of rationality. Furthermore, there is the problem of granting legitimacy to those institutional rights claims through the demands of those institutions and the subsequent effects on democracy when adjudicators have no alternative to recognising the rights of institutions as if they were natural persons. That is, when legislation compels judges to treat the rights claims of natural and fictive persons as equivalent under the law.

Perhaps the essential issue here is whether corporations have any legitimate role in the democratic process. Charles Lindblom cites three reasons why a question of fairness and equality arises when commercial corporations exercise political power in democratic systems.⁹ To the extent that democracies ensure personal freedom, especially individual economic freedom, they must defend private property, free enterprise, contracts and choice. Liberal democracies protect these liberties from over-reaching or arbitrary government authority. However, the “public function” of corporations in their relations with government in decision-making about industrial technologies, work force organisation, economic resource utilisation, and the like give them powerful influence over national economic structures and practices. Consequently, governments are influenced by corporate power and the demands of corporations for favourable treatment in the interest of operating efficiency, just as

⁸ See French, 1984 about his CID (Internal Decision Structure).

⁹ Lindblom, 1977.

governments try to influence, regulate and control corporate behaviour. Clearly, corporations have a heavy impact on democratic systems. Yet, according to Lindblom, the essential difference between government and corporations is that government authority is politically constrained by the rules of democracies. Corporations are powerfully induced by their profit-making nature to exercise three advantages and thus gain undue and undemocratic political influence, especially compared to individual citizens. One advantage is their access to vast economic resources to lobby legislators and contribute to election campaigns. Another is their organisational capacity which allows them to concentrate their resources to coherently pursue political matters in ways that ordinary citizens and groups cannot. Finally, corporations are well connected, having access to powerful government officials, ministers and political figures with whom they interact frequently and in ways that are difficult if not impossible for citizens, or for citizen groups.

Comparing how fictive persons differ from natural persons and how corporate entities (as fictive persons) are different from citizens (as natural persons) with respect to rights claims will allow us to more fully understand why we might well be sceptical of the role of corporations in democracies. It is widely held that corporations are not the same kind of entity as natural persons. They are not capable of citizenship with respect to collective interests in the same way as a natural person. For a natural person democratic participation requires subordinating their particular interests in favour of the general will; this is essential to democracy. But corporations are instruments of only particular interests, and must put those particular interests above any other regardless of the outcome for the common good. The idea of the good for a corporation (to increase shareholder value) is not the same as the good for a natural person when he or she considers social or political unity, nor is it the same for a collectivity of political agents. For corporations to subordinate their interest to that of the collective will contravenes not only their dedication to profit-maximisation but also their legal obligation to shareholders. Is this the essential difference between natural persons in a democracy and fictive persons? When is a commercial collectivity equivalent to a political collectivity? Both are aggregates of natural persons, and both have the task of seeking a common good for their constituents. The

people that constitute the political state however form a different entity (as the sovereign) in contrast to the conglomerate form of the corporate entity (as a legally chartered institution subject to law) formed by shareholders, officers and directors because their ultimate purposes are fundamentally different.

In classical liberalism, people are judged to be the best judge of their own wants and, limited only by the state and by others' rights, they are free to the extent that they can realise those wants. But in democratic systems the ambiguity of the term "people," the *demos*, indicates a general problem about membership in the state. The people is not all the people, all the time and everywhere. Democratic majorities express the will of the people as a whole leaving minorities forced to accept the will of the majority. The assumption is that the *demos*, those who are ruled, is a conglomeration of all the people, but it is clear that not all of them, given a dissenting minority, constitute the majority will. Interrogating this assumption, we can ask if "the people" in the sense of that entity – the state or some other governing benevolent construct – that rules, is a singular term, one that invites consideration that it includes a special kind of participating person or entity, one that is perhaps not even a collection of ordinary persons. Here we encounter a question of rule with the participation of citizens and rule with the participation of institutions. If institutions such as corporations are legal persons and subject to the law we are led back to the idea of their representation in the collective will. What are the rights of corporate entities in these circumstances? Are the rights of corporate entities fully and legitimately equivalent to those of natural persons just because they are codified as law? If we accept the proposition that constitutional power needs to be embedded in constitutional theory that can explain the difference between legitimate law and the mere wielding of power, then a jurisprudential theory that politically empowers both natural and fictive persons must explain how they are legitimately equal subjects under the law, and not merely the result of corporations using their economic and organisational power to assert standing comparable to that of human constituents. In further consideration of that we can ask who has the power to make a constitution? Is it possible for those with the power to create a constitution to thereby surrender their authority to the institutions that are

instantiated through the constitutional form that they enact?¹⁰ If natural persons have moral rights that can be asserted as human rights claims, should the same be true for juristic persons? If this is true, then do the moral responsibilities of natural persons translate into equivalent responsibilities for fictive persons? Can it be asserted that the rights of corporate entities are the same sort of rights (civil and political) as those of individual citizens construed as natural persons? Another way of addressing these questions is through Walzer's concern with rights claims. Should we accept a thick interpretation of legal rights in which the declaration of rights trumps any demand for democratic flexibility, or should we advocate a constitutionally thin understanding of rights to preserve values and options about democratic processes and procedures that might be lost when rigid rights assertions prevail? At stake is the promulgation of a general notion of distinctively human rights if there is an assertion of a specific rights doctrine on behalf of juristic persons. This is the problem that Walzer is concerned with. Strict construction is a more rigid interpretation of the law, and in this case it is a form of adjudication or jurisprudence that in judicial decision making or legal theory leads to an assertion of rights that both expands the realm of rights and reciprocally diminishes and constrains the realm of democracy.

The more the judges are 'strict constructionists' of philosophical doctrine, the more the different communities they rule will look alike and the more the collective choices of the citizens will be confined. So the exaggeration makes a point: the citizens have, to whatever degree, lost control over their own lives.¹¹

While it is not possible to fully answer these questions within the limits of this essay we are drawn to ponder the ontological differences between natural persons and corporations. To consider how different are the nature and practices of fictive persons we turn to briefly examine the telos of the corporation to further illuminate its character as an instrument of particular interests.

§§ The Telos of the Corporation

I argue that corporations and people are different with respect to “the good.” Corporations want one kind of “good”, i.e., a specific and more nearly homogeneous set of outcomes from their actions in

¹⁰ Laughlin and Walker, 2007.

¹¹ Walzer, 1981. P. 395.

society and more exactly, in the marketplace. Human beings in democracies want various kinds of “good,” a heterogeneous, competing and sometimes contradictory set of outcomes resulting from the wide spectrum of interests they pursue as individuals, families, and communities. These indicate how the political good and the corporate good are fundamentally different and can be argued as not being fundamentally the same. When we differentiate these forms of the good, do we define a unique good for that which is political? The telos of the corporation, simply and perhaps not uncontroversially stated, is profit maximization.¹² Corporations use diverse means to this end including capital accumulation, the exercise of institutional power and a persistent pursuit of relief from regulation and interference by government. These produce a rigorous institutional defence of autonomy and frequently manifest themselves as unaccountability for the consequences of corporate action. When corporations act in both the economic arena and in the political arena they seek profit-maximisation. Rousseau would say that this can be characterised as mere appetite – the goods that commercial corporations pursue are satisfaction of such mere appetites as those of accumulation and power.¹³

Profit-maximisation can be interpreted as a form of fundamentalist, economic monism. Although monism is traditionally associated in philosophy with the concept of a supreme being, I use it here in the sense of reliance upon a single framework of analysis. It tends, to borrow a phrase, to be focused on one universal value – exchange value. This is typical of the vernacular of rational choice theory. The definition that I want to establish for this essay is that a monistic framework of analysis with respect to profit-maximisation, although not monistic in the strict philosophical sense, conforms closely enough to serve as a comparative criterion against the pluralism of liberal democracies. Economic utilitarianism as a monistic form restricts as “good” only those activities and policies with special, specific claims of profit-maximisation, and this is the good for which rights claims are made by institutions with predominately economic interests. Rational choice plays a primary role in

¹² Friedman, 1970.

¹³ See JJ Rousseau, *Social Contract*, Bk I, Ch. 8, p. 196, 1993.

defining monistic economic interests. Rational choice focuses on rational, self-interested atomised-agents as the principal economic unit of consumption and minimally with families, communities and local social and political units as epiphenomena, not as producers of critical social goods and services. Financial and economic monism is promoted as a dominant, overriding value. This raises other concerns because institutional economic monism is ideologically purist thinking about economic outcomes that asserts positive effects for all under conditions where a just distribution of scarce resources is optimised. But it is one that also has negative social and political consequences as a consequence of its singular view of economic benefits. This monistic world view promotes a free market fundamentalism in social and economic thought and policy. It endorses unlimited economic growth and consumption as predominant values despite growing concerns with sustainability and environmental protection. Privatisation and deregulation of government and state functions are typically held to be essential policy goals. This also prevents or evacuates the historical instantiation of the speech conditions necessary to public democratic discourse. Erosion of the public sphere results in falling public literacy about politics, economics and society. Corporate monism as a political rubric then, results in greater political dormancy of the public and tends to shift the publics' attention to consumption as a legitimate life focus rather than democratic political engagement and in communities of political interest. As a relatively recent historical phenomenon, the doctrine that undergirds institutional monism stands in contrast to another more traditional view of democracy. I will sketch here only in outline the telos of contemporary democracy as a way of illustrating the contrast with the telos of the corporation and economic monism.

§§ The Telos of Democracy

The telos of contemporary democracy is to seek and provide policy for the common, collective good. Pluralistic values in democracies include political diversity, a defence of individual and cultural identities and promotion of minority group rights within an inclusive framework of the collective good. Social welfare and social insurance ameliorate personal insecurity and diminished life chances from the consequences of accident, economic misfortune and ill-health. The pursuit of justice –

through social, economic, legal and political policies – addresses inequalities consequent to highly competitive, globalising markets. This universalism of values and principles demands that all individuals have the right to be treated justly, fairly, equitably within their own groups and inclusively in the largest group, that of all humankind, in common-good programs of social justice. Democracy reserves to the people the right to make errors while pursuing notions of collective capacity (the government's role for regulating and redistributing in the common interest) even as they promote other pluralistic values: It tends, again borrowing a phrase, to be focused on use value. Profit-maximisation is a distinctly different good to the “common good.” It is not possible to buy and sell every person's version of the good life. The collective good, i.e., the good sought by a democratic polity, is dynamic – seeking to meet emerging and changing needs of the people. This is in contrast to monistic institutional good that is predetermined and changes to adapt to market conditions of trade and commerce. In comparison to liberal democratic dynamism the telos of the corporation is relatively static in the sense that it is consistent in seeking only a predetermined set of outcomes, those of exchange value.

In a world made rapidly more complex and technologically sophisticated there are cases where the scarcity of scientific knowledge makes democratic decision-making less efficacious. As scientific literacy and numeracy among electorates declines both absolutely and in relation to the sophistication and complexity of the problems should scientific-technical elites take more decisions themselves? This would arguably contribute to the decline of public discourse and democratic process. This essay does not aspire to policy prescriptions, but seeks to articulate a question about the nature of democratic political power when fictive persons act as citizens. One must ask what happens to the nature of democratic political power when rights claims are made not by natural persons, but by fictive persons and, following Walzer's argument, the effect this has to constrain or curtail democratic flexibility and authority as it is conventionally understood in democratic political theory. This raises a further question of who actually rules in a democracy where fictive persons enjoy vastly greater asymmetric power and resources to influence and control political processes than the power and efficacy of natural

persons as citizens. Political power – is this what is at stake? Political power is defined as the right to command others. It monopolises the right to punish (as a legitimate monopoly on coercion).

Who should have the right to hold this power? In democratic theory the right to hold power is granted to the sovereign through the consent of the governed. Legitimate power is based on the right of the governed to give up to the sovereign rights that they have in nature, but fictive persons and other institutions have no equivalent natural rights and exist only at the pleasure of the legal system that grants them standing as persons. Moreover, corporations cannot give up profit-maximisation or any rights claims in service of it. This raises questions about the essential nature of the power that fictive persons have in democracies. It also raises questions about the nature of knowledge and who knows best what is the rational thing to do with respect to democratic power. Is it rational for voters to grant the political power to decide to those who allege to know the rational thing to do? This essay will not attempt to answer the question of who should have the authority to rule and exercise legitimate power. Under constitutional democracies there must be embedded in the system of law, in the documents of government, and in the theory upon which it is based, some coherent understanding of legitimacy, as contrasted with the mere exercise of power.

Legitimacy comes from the authority of a domestic constituency to form a government and it might be successfully argued that a constituency can legitimately forfeit its authority to an alternative authority in circumstances where there is a political or security crisis. However, in cases where the complexities and demands upon specialised knowledge for governance are so extreme that they tempt the constituency to give over to institutions or other bodies using the documents and structure they have formed to do so, is this also legitimate? We must ask – what does it mean to rule when the political circumstances and the political agents do not conform to conventions of political theory?

§§ Conclusion:

This essay began by citing how the voters of Kansas acted in a way that cast doubt on the rationality of their political behaviour. While the case of Kansas in 2004 may not be a clear and unequivocal expression of preference for pluralistic cultural values over monistic values of economic rationality

their behaviour did express the interests of voters in asserting their individual liberties. The case illustrates the complexities of the two paradoxes that this paper has been concerned with and the difficulty in finding a balance between compelling competing interests. What the proper roles of expert knowledge as against the collective will shall be in adjudication of conflicting collective and commercial interests looms as a arena of increasing dispute and a continuing threat to democratic plasticity. This is especially the case as the collective interests that are at stake in public health, climate, food safety and other critical public policy matters test both expert knowledge and the democratic process against the demand for economic development.

The main focus of this essay has been to begin an exploration of the impact on democracies of rights-bearing fictive persons possessing expert knowledge that gives them authority in decision-making. But it raises two more sets of questions. One question is whether corporations can use their stores of knowledge to actively displace democratic constituencies. This raises a reciprocal question of whether voters might legitimately and rationally trade their traditional democratic role for expert knowledge held by corporations to solve pressing problems. The other question is whether corporations can legitimately claim rights at the cost of constraining democracy. The reciprocal of this question is whether constraining democracy is a small price for the expertise and knowledge corporations may provide to resolve matters of national or global urgency. Must we rely on expert knowledge based in commercial corporations to sustain democracy in an increasingly complex world where the implementation of uninformed policy may pose grave risks? Should rights claims be acknowledged for non-human political actors if they provide expertise otherwise unavailable but critical to sustaining democracy or the viability of ecosystems? The ontological nature of corporations as fictive persons, their enjoyment of political agency and their proper role in democracies raise important philosophical questions about a vast array of issues. It seems that the only way to continue to address these questions that satisfies a sense of justice is in open democratic discourse and it is precisely that which is at risk.

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