

Toward a Pragmatist Approach to Corporate Personality and Responsibility: Why Democracy Matters

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ABSTRACT

Scholars have recently turned to philosophical pragmatism as a normative framework for approaching questions of corporate personality and responsibility. This has been a welcome development. This article builds on this project by taking seriously the normative emphasis that pragmatism places on democracy as a form of social problem-solving. The argument, in brief, is that there are no pragmatic grounds to reject—and good grounds to accept—the idea of the corporation as a person, with the attendant rights and responsibility that come with that status. However, once granted, the question of what corporate personality implies in terms of substance—i.e. what sort of moral and legal considerations the corporate person is owed—is far messier. Corporate personality does not settle the contentious issues—what rights corporations have and do not have, what obligations corporations have or do not have. Pragmatism is comfortable with this and demands that we generally try to avoid demarcating, a priori, what sort of thing the corporate person is, preferring for us to leave it open to experimentation and deliberation. However, because of the priority that pragmatists accord democracy, pragmatism requires that such experimentation and deliberation be open and inclusive, meaning that our interpretations of corporate personhood, responsibility, and agency are not limitless; they must be bounded and informed by a concern for maintaining the viability and integrity of these democratic procedures and deliberative channels.

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“[T]he entire discussion of personality, whether of single or corporate personality, is needlessly encumbered with a mass of traditional doctrines and remnants of old issues.”¹

Dewey’s dismissal of debates over the nature of corporate personality is probably one of the most-quoted passages in arguments relating to the doctrine of corporate personhood. The claim, which has proven quite influential, was essentially that one’s more metaphysical or ontological perspective on what sort of thing the corporate person is has little to no relevance on how we should normatively assess the corporation.² Put simply: what we ought to do with the corporation from the perspective of the law, morality, political theory, and public policy is a question about what state of the world we want to achieve or effect, not what we must be committed to by *a priori* principle. There has recently been greater scholarly interest in Deweyan pragmatic approaches to corporate personality and responsibility. I find this development collegial. However, contemporary scholars have not been attentive enough to changes in how pragmatist political thought is currently understood. In particular, recent developments in philosophical pragmatism have emphasized the *political* nature of the pragmatist position, drawing particular attention to the significance that pragmatism places on democracy as a mechanism of problem-solving and social cognition. This article takes its cue from these recent developments in order to consider what a pragmatist approach to corporate personality and agency entails.

The argument is extremely modest and speculative. I begin with the premise adopted by most pragmatists in this area, that there are no grounds to reject—and good grounds to accept—the idea of the corporation as a person, with the attendant capacity to bear the rights and responsibility that come with that status. However, once granted, the question of what corporate personality implies in terms of substance—i.e., what sort of rights, to what extent, and what moral and legal considerations the corporate person is owed—is far messier. The simple acceptance of the idea of corporate personality does not settle these contentious

1. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926).

2. See William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1491 (1989).

normative and legal issues. Pragmatism is comfortable with this. It demands that we generally try to avoid demarcating, *a priori*, what sort of thing the corporate person is, preferring for us to leave it open to experimentation and deliberation. However, because of the second-order “priority” that pragmatists accord democracy, I contend that pragmatism demands that such experimentation and deliberation be open and inclusive. Consequently, the pragmatist is not devoid of normative or prescriptive commitments; our interpretations of corporate personhood, responsibility, and agency are not limitless. Instead, they must be bounded and informed by a concern for maintaining the viability and integrity of these democratic procedures and deliberative channels.

Taking this seriously requires a slight addendum to the practical and pragmatic approaches to corporate personhood. As we shall see, others have suggested, based on pragmatist leanings, that our normative assessments of corporate personhood ought to be informed by an analysis of corporate purpose. Indeed, I have said similar things previously, claiming that a “relational” approach to corporate law points toward a consequentialist and purposive approach to corporate civil and political rights.³ I do not wish to back away from this line entirely. Instead, I wish to tie this consequence and purpose-oriented account with my “justice failures” argument, which says that businesses must avoid profiting from the predictable malfunctioning of justice-securing political and social institutions.⁴ These two positions are connected more intimately than they might first appear. I suggest that, to properly understand and assess the nature and implications of some corporation’s purpose, we must also consider how a particular corporation—situated in some particular way—contributes to or detracts from democratic procedures, institutions, and norms.

I. THE CORPORATE PERSON: SOME BASIC POINTS

I begin by noting that I use the term “corporate person” in the conventional sense, not as a claim about the humanity of the corporate entity. Following Maitland, I use the term to indicate its status as a “right-and-duty-bearing-unit.”⁵ I take this to be a fairly uncontroversial claim. Yet, in stating it this way, notice that one immediately screens out a particular (and particularly popular) criticism of the doctrine, which claims that treating a corporation as a person is to unjustifiably and immorally conflate the corporate with the human. By using “person” not in the idiomatic way many use it, but in the more technical Maitlandian sense, we can mostly set this criticism aside. By taking this minimal definition of corporate personhood as a starting point, we also start with the assumption that there is nothing *inherent* to the idea of corporate personhood that says corporations are

3. See generally Abraham Singer, *The Corporation as a Relational Entity*, 49 POLITY 328 (2017).

4. See generally Abraham Singer, *Justice Failures: Efficiency, Equality, and the Corporation*, 149 J. BUS. ETHICS 97 (2018) (offering “the concept of ‘justice failure,’ as a counterpart to the familiar idea of market failure, in order to better understand managers’ ethical obligations.”).

5. F.W. Maitland, *Moral Personality and Legal Personality*, in STATE, TRUST, AND CORPORATION 63–64 (David Runciman & Magnus Ryan eds., 2003).

the same, or require the same or similar treatment, as human persons. When we ask the question: “how should we understand corporate personhood?” we are essentially asking: “what sorts of rights and duties ought we to understand the corporation as having? What powers and constraints ought we, as a society, impose upon and expect of a corporate entity?”

These sorts of questions are generally where the controversies are located. Should corporations have speech rights and the liberties of political expression and religious exercise? What sorts of due process rights should corporations have? These are crucial and difficult questions. However, one must also note that there are rights and responsibilities for which it is quite uncontroversial to claim belong to the corporate person. Nobody denies, for instance, that corporations have and should retain the right to own property, or to enter into contracts. Similarly, nobody seriously denies that corporations have some responsibility to follow laws, pay taxes, and so forth. Insofar as we accept these less controversial claims, we accept the corporation as a legal person, and we do so independent of any claim about how similar or dissimilar the corporate person is from the human person in terms of juridical and moral status.

Of course, the fact that corporate personality does not require that corporations have the same or similar schedules of rights and responsibilities as human persons does not answer the question of whether they should have those rights or, if not, why they should not. The question is not whether corporations can have rights as a categorical matter (they can), nor whether they must have the full complement of rights as a categorical matter (they need not). Rather, given that corporations *can* have a variety of different sets or complements of rights, the questions become: which rights *ought* we see corporations as having claim to, and what scope ought these rights to have? Taking a pragmatist approach to this question, I answer in ways similar to other pragmatists: corporations’ rights are not derived from the fact of their personhood, but rather from their purpose. My amendment to this position is the application of a slightly different understanding of pragmatist political theory. According to this theory, pragmatists—despite their anti-foundationalism and their consequentialism—must be committed to democratic politics and norms in their social theories. Consequently, when we think about the kinds of social purposes corporate personhood must conform to, democracy must be a central—and not an incidental or ancillary—part of this calculus.

In the next sections, I review the pragmatist approach to political theory and highlight recent analyses that emphasize the place of democracy.

II. PRAGMATISM AND THE CORPORATE PERSON

Many articles and law school syllabi on the topic of corporate personality begin by reviewing the classic competing ontological accounts of the corporation. The first claims that corporations are simply stand-ins for an aggregation of individuals. On this view, a corporation’s rights are simply derivatives of the rights

held by the incorporating individuals.⁶ The second account sees corporations as concessions of state power. On this view, a corporation's rights are derivatives of the government's power, privilege, and responsibilities.⁷ While very intelligent and learned people have made arguments for each position, inevitably both of these views run into the problem that corporations cannot fit comfortably into either category singly. Corporations clearly involve the initiative and resources of individuals, but they also require the power of the state, and its recognition and bestowal of various privileges.⁸ This has led to growing interest among theorists in this debate to follow Dewey's famous admonition that because debates about the nature of corporate personality "needlessly encumber" us with metaphysical perspectives and historical doctrines, we should seek a more pragmatist approach to the question of corporate personhood.

By pragmatist, such scholars often simply mean something like a consequentialist, or non-metaphysical, account. Instead of trying to derive normative prescription about what rights corporate personhood entails from first ontological principles, these scholars try to do the normative work on the basis of Not needed the expected effects of endowing a corporation with *x* rights or *y* responsibilities. This requires a thinner account of the type of thing a corporation is.

Some seek to ground such a pragmatist account in terms of the corporation's purpose. On this view, corporations are unique in the sense that they are essentially purposive agents, in ways that human persons are not.⁹ Whether explicitly or implicitly, this is generally meant in two senses. In the first sense, corporations are formed by their incorporators as a means for facilitating some sort of collective action with a particular end; that is, *a* corporation has a particular sort of purpose. Second, the act of incorporation is facilitated by our social institutions in order to contribute to a social purpose of some sort; that is, *the* corporation as a form, has a particular sort of purpose, which might be as specific as providing services to some particular region or as general as facilitating freedom of speech and association, or contributing to an efficient economy.¹⁰ Both of these points suggest an important distinction between corporate and human persons. We as a society cannot assume a particular telos or purpose for humans, and consequently cannot legitimately aim to push humans toward certain life-pursuits. In contrast,

6. See, e.g., FRANK EASTERBROOK & DANIEL FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991).

7. See, e.g., JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 153–55 (Free Press 2004) (2003).

8. See generally ABRAHAM SINGER, *THE FORM OF THE FIRM: A NORMATIVE POLITICAL THEORY OF THE CORPORATION* 14–16 (2018); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 152–56 (2013).

9. See Singer, *supra* note 3, at 337; Turkuler Isiksel, *Corporations as Rights Bearers*, Presentation at the Ass'n for Pol. Theory Conf. (October 20, 2018).

10. See Waheed Hussain & Joakim Sandberg, *Pluralistic Functionalism about Corporate Agency*, in *THE MORAL RESPONSIBILITY OF FIRMS* 66, 74–75 (Eric W. Orts & N. Craig Smith eds., 2017); Richard Schragger & Micah Schwartzman, *Some Realism about Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 345, 367–69 (Micah Schwartzman, Chad Flanders, & Zoë Robinson eds., 2016).

corporate persons cannot help but to have a telos or purpose, over which social institutions do have legitimate influence and control through their ability to legally recognize and facilitate.

In a similar manner, Eric Orts attempts to characterize corporations according to a pragmatic institutional approach, where we understand corporations by emphasizing how the law establishes them as particular sorts of institutions. For Orts, what makes corporations interesting is that their relationship to law is both *jurisgenetic* and *jurispathic*.¹¹ It is *jurisgenetic* in the sense that corporations are enabled to establish their own laws and policies over their members, which govern the ends a corporation seeks and the manner in which it seeks them. But corporations are also subject to the *jurispathic* elements of the law in that their *jurisgenetic* nature is constrained by, and beholden to, the more general dictates of the legal order in which they exist. Our normative approach to what sorts of rights, privileges, and constraints corporations ought to have is therefore based on what sorts of laws corporations make for themselves and what sorts of laws corporations must be subject to.

While distinct in various ways, these views can be grouped together based on their eschewal of metaphysical approaches to corporations' normative commitments. More generally, we might say they all assert two key theses. First, our normative assessment of the corporate person ought not to be grounded in their ontological status or some deontological moral principle, but rather should be fundamentally consequentialist in nature. Second, when assessing the consequences of adopting some or another conception of the corporate person, we ought to be emphasizing the structure and purpose of the corporation by asking two sorts of questions. We need to address what I refer to as the question of the corporation's "local purpose": what rights and privileges will facilitate the aim and nature of the specific kind of corporation in question? But we also need to address the question of our "social interest" in incorporation: what rights and privileges will serve or undermine the aims inherent in allowing incorporation more generally? A pragmatist approach to corporate personhood thus proceeds by arguing that some conception of corporate rights and obligations will result in some good or bad consequence for either the local purpose that some corporations seek to achieve and/or for the social interest that we have in establishing the legal and institutional form of the incorporation.

Of course, what counts as a legitimate local purpose for a corporation, or a social interest for us to pursue through incorporation, is an open question. As a result, pragmatist approaches to corporate personhood generally do not provide definitive conclusions regarding which rights the corporate person has, and to what extent. Indeed, in some sense pragmatists are committed to *not* providing such definitive answers to these more substantive questions. As Isiksel puts it: "an account that makes the rights of a corporation contingent on its particular

11. ERIC W. ORTS, BUSINESS PERSONS 16–17 (2013).

purposes is intentionally underdetermined. The purposive approach is an acknowledgment that corporate autonomy is indeed an ‘endless problem.’”¹² The approach constrains and provides a language for articulating, normative ideas of corporate responsibility, but it does not answer them definitively. For the pragmatist, these questions are simply not for political philosophy to answer.

This is, I think, as it should be. However, this is also not the end of the story. If we take the pragmatist project seriously, we can make some further substantive claims on behalf of concerns for democratic processes and norms.

III. PRAGMATISM, INSTITUTIONAL VARIETY, AND THE PLACE OF DEMOCRACY

When people invoke pragmatism in a discussion of corporate personhood, they often mean something like a non-foundationalist argument—one which avoids weighty and prior metaphysical, ontological, or moral assumptions in making normative claims. This is, of course, a crucial part of the pragmatist approach. Pragmatism is fundamentally an instrumentalist philosophy; a pragmatist understands the concepts and linguistic categories we use as tools of action that we create and wield because of their supposed or hoped-for effects. What distinguishes pragmatism from other instrumentalist approaches is that it does not assume the ends we are not assume the ends we are seeking. Instead, pragmatism holds that the positing of some end or another should itself be assessed on consequentialist grounds. Such radical consequentialism is indeed hard to square with a foundationalist *a priori* commitment.

But pragmatism is not *only* a non-foundationalist doctrine. Pragmatism, at its heart, is committed to a kind of reflexive inquiry aimed at acting in the world. That is, it is not only about action but what Jackson refers to as “intelligent action.”¹³ This characterization he takes from Dewey: “doing which has intelligent direction, which takes cognizance of conditions, observes relations of sequence, and which plans and executes in the light of this knowledge.”¹⁴ The emphasis on inquiry is important. Pragmatists are not just concerned with the consequences of adopting some such view or position, but the process by which we develop, maintain, amend, or disavow these conceptual and practical instruments.

A. *The Commitments of Pragmatism*

Synthesizing the sweep of pragmatist thought, Knight and Johnson contend that pragmatism is characterized by its commitment to a (1) fallibilistic and (2) anti-skeptical approach to human knowledge, which is put in service of a (3) broad sort of consequentialism.¹⁵ I discuss each of these in turn.

12. Isiksel, *supra* note 9, at 34.

13. See JEFF JACKSON, EQUALITY BEYOND DEBATE: JOHN DEWEY’S PRAGMATIC IDEA OF DEMOCRACY 178 (2018).

14. See *id.* (quoting JOHN DEWEY, THE QUEST FOR CERTAINTY 36 (1929)).

15. See JACK KNIGHT & JAMES JOHNSON, THE PRIORITY OF DEMOCRACY: THE POLITICAL CONSEQUENCES OF PRAGMATISM 27 (2011).

Pragmatism is committed to fallibilism in two senses. First, we must recognize that our currently-held beliefs—whether, empirical, moral, aesthetic, or theoretical—may very well turn out to be wrong. Second, we must be committed to the idea that whatever certainties we do have are a function of their continued subjection to the possibility of falsification. Falsifiability, then, is simultaneously an epistemic and socio-ethical commitment: it is both a thesis about the nature of our knowledge (that it is provisional and always potentially mistaken) and about how we ought to act considering this (we should remain open to new experiences and ideas, especially those that might challenge that of which we are certain). The anti-foundationalism of the pragmatist is, in a sense, a direct result from this commitment to fallibilism. We cannot commit ourselves to any principles *a priori* given what we know about our fallible nature.

The flipside of pragmatists' commitment to fallibilism is its commitment to anti-skepticism. That is, while we must act with the knowledge that we are fallible, and therefore with some doubt about the certainty of our conceptual, empirical, and moral repertoire, we are not entitled simply to deny our ability to get these things right either. That is, we must subject our skepticism to scrutiny and possible falsification in the same manner we do with our confident assertions. Neither belief nor doubt can be assumed but must be accepted only insofar as there are reasons to accept them.

Finally, as has already been mentioned, the “reasons” for accepting some or another concept are consequentialist in nature for pragmatists. The effects of endorsing or using some concept are essentially the meaning of the concept itself. Thus, while moral consequentialists of a sort, pragmatists are consequentialists more generally: if we endorse *x* as good/true/beautiful/earnest/valid, etc., what will the effects of this be?

These three commitments lead pragmatists to favor experimentalism as the best way to resolve doubt and to address disagreements, not just for topics casually associated with the sciences, but also, and perhaps most importantly, for questions of politics and public policy.¹⁶ The special danger that politics poses, for pragmatists, is that it always entails disagreements among many people, and it is always in danger of resolving these disagreements by recourse to authority and received wisdom. Because of this, it is all the more urgent to develop institutions, practices, and habits of mind that support the testing and experimenting of our political and social commitments. Without this, we always risk falling back onto an unfounded certainty or endorsing conventional wisdoms despite their poor consequences.

B. Experimentation, Disagreement, and Democracy

This emphasis on experimentation is important for informing a pragmatist understanding of the corporate person. When it comes to coordinating social interactions, we are always confronted with a number of options for decision-

16. See, e.g., JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS*, 57–58 (Melvin Rogers ed, 2012).

making and institutionalization—markets, hierarchies, bureaucracies, democracy, etc. The fallibilism of pragmatists implies that we should not have any particular principled preference for one or another institution. Instead, we should endorse institutional variety and leave it as an open question as to what sort of institution is best for any particular set of interactions.¹⁷ The corporation, with its attendant notion of personhood, is one such institutional option, the existence of which should neither be assumed nor dismissed. Instead, we inquire into the reasons why we have developed corporations in general and enabled some corporation in particular. As we have seen, this leads to something like the purposive and institutional accounts of corporate personhood reviewed above. But the pragmatist analysis does not end at the mere consideration of reasons: we must also be open to reconsidering whether these reasons are good or not, or whether some other altered institution or set of institutions might be preferable.

As we have seen, disagreement is endemic to politics. The disagreement, furthermore, runs deep. It is not just over what institution we ought to select in some situation, or what its features ought to be (“what rights ought a corporation have?”). Societies are also marked by disagreement over the criteria on which we ought to make such a selection (“on what basis ought corporations be seen as having some set of rights?”). Going deeper still, we disagree over the standards by which we would know we were right or wrong in our selection (“how do we know that we were right about that basis for choosing that conception of a corporation?”). Pragmatism’s commitment to fallibilism and anti-foundationalism means that we cannot and should not expect theoretical reasoning to provide a once-and-for-all resolution of this disagreement. Instead, we need some social or political mechanism that can address our need to assess this institutional configuration, while also addressing the various perspectives that inform our inevitable deep disagreements. We do not just need to assess the purpose of an institution. We also need to ensure that the proper conditions obtain so that we can have confidence in our assessments.

This is why the pragmatist commitment to experimentation has an intimate connection with the idea of a democratically organized community. The conditions for institutional functioning and assessment are those that allow individual and collectively-held beliefs to be challenged (following the commitment to fallibilism) but also leave open the possibility that we can come to a viable and stable agreement (following the commitment to anti-skepticism). The inherent diversity and inevitable disagreement within a society are virtues to the pragmatist, as they provide the possibility of being confronted with difference and the need to consider revising one’s views. Democracy is the institutional means for 1) channeling and amplifying these diverse perspectives for decision-making, and 2) for

17. In this way, I take pragmatists to run very close to Elinor Ostrom’s work on the variety of institutions capable of solving social problems. *See, e.g.,* ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 14–15 (1990).

maintaining the possibility of revision and reflexivity of our own perspectives by assuring we are always confronted with this perspectival diversity.

Pragmatism, on this view, does not assert the importance of democracy solely for its intrinsic normative properties the way some radical, deliberative, and liberal democrats do—on grounds of equal respect, solidarity, or aspiration toward the general will.¹⁸ To the contrary, pragmatists are open to economic and social activity being facilitated through a variety of non-democratic means. These include price-coordinated markets, hierarchically coordinated firms, democratic organization, or simply extant social custom. Particular democratic procedures—voting, majoritarianism, open deliberation, etc.—are not claimed to have special moral priority as first-order means for coordinating activity or making decisions. Instead, pragmatists grant democracy a “second order priority,” a special status as the best institution for monitoring, assessing, and coordinating these other institutional forms.

[A pragmatist will] insist upon the need for some institutional mechanisms that will enable relevant parties to monitor the existence of those initial conditions, propose remedies when the relevant conditions do not actually obtain, and assess the effectiveness with which particular institutions, in fact, coordinate ongoing interactions across various domains.¹⁹

The institutionalized equality that comes with democratic procedure and practice best mobilizes and enfranchises the perspectival diversity—the “distributed intelligence”—of a community. Attempts to further democratize one’s society, from this view, look less like attempts to place “the people” in power and more like attempts to disrupt extant power asymmetries that might stunt the best use of such perspectival diversity.²⁰

Even more than equality and access, however, it is its *reflexivity* that makes democracy uniquely competent at this second-order task of monitoring and assessment. Because losers of the political contest remain in the system, participating and voicing disagreement, decisions can be reviewed and revisited, as can the manner by which those decisions were made.²¹ Democratic procedures are relatively best at assessing and monitoring other institutions because they attempt to bring together diverse perspectives on more-or-less equal footings, and they allow for on-going disagreement in a productive and open-ended way. Democracy also does this in a manner that allows for parties to reflect not only on

18. Though, as MacGilvray rightly notes, pragmatists in the Deweyan tradition do also place a normative, non-epistemic value on social equality. Their position, which MacGilvray disputes, is that the epistemic and egalitarian defenses of democracy dovetail. See Eric MacGilvray, *Democratic Doubts: Pragmatism and the Epistemic Defense of Democracy*, 22 J. POL. PHIL. 105, 117–20 (2014).

19. KNIGHT & JOHNSON, *supra* note 16, at 41–42.

20. This is similar to a position being developed by Bagg. See Samuel Bagg, *The Power of the Multitude: Answering Epistemic Challenges to Democracy*, 112 AM. POL. SCI. REV. 891 (2018).

21. KNIGHT & JOHNSON, *supra* note 16, at 162.

the practices they are monitoring, but also on the standards and criteria they are using to monitor those practices. Democracy enjoys a second order priority because democracy itself can become the subject of democratic scrutiny, thus making it the closest approximation of the enabling conditions for proper experimentation and, consequently, confident conclusions. This gives it a unique competence at this second-order task.

As a consequence, a pragmatist approach to corporate personality, while committed to some sort of indeterminacy in terms of substance—that is, after all, what must be figured out, not stipulated *ex ante*—is not actually wholly agnostic regarding the substantive outcomes. Pragmatists have a consequentialist commitment to maintaining the integrity and functioning of democracy as a meta-institutional condition for believing whatever we end up concluding is as right or good as it can be. We saw above that a pragmatist approach to corporate personality tries to determine the rights and responsibilities of the corporation through an analysis of the legitimate local purpose it is trying to advance, and the more general social interests we have in enabling those local interests. We add to this: pragmatism *also* demands a concern for determining those interests in a good and smart way, which requires certain background democratic conditions. Insofar as some rights and responsibilities we assign to the corporate person can be shown to undermine the democratic processes through which we assess the corporate person, pragmatists should advocate curtailing those things. Insofar as such rights and responsibilities support these democratic processes, pragmatists ought to support such things.

IV. WHAT “DEMOCRACY” DEMANDS?

To say that democracy ought to inform the way we understand the corporate person raises the question of what democracy is. While pragmatist political theorists generally assert some commitment to democracy, I do not wish to claim that pragmatists all agree on what democracy entails. Some like Knight and Johnson,²² Rogers,²³ and Bohman²⁴ emphasize the deliberative aspects of democracy. According to such views, democracy entails the formal procedures of popular elections and accountable legislators as well as the fora and venues for social deliberation. But democracy also requires an ethic among citizens to engage in such democratic deliberation in the right spirit. On such accounts, our ability to achieve the “intelligent outcome” that we are required to inquire into also demands a certain kind of engagement with others that, though entailing disagreement, also entails an attempt to engage with others on certain sorts of civil and rationalized terms. Other pragmatists deny that democracies require such civility,

22. See KNIGHT & JOHNSON, *supra* note 16, at 122.

23. See MELVIN L. ROGERS, *THE UNDISCOVERED DEWEY: RELIGION, MORALITY, AND THE ETHOS OF DEMOCRACY* 21 (2009).

24. See James Bohman, *Democracy as Inquiry, Inquiry as Democratic: Pragmatism, Social Science, and the Cognitive Division of Labor*, 43 AM. J. POL. SCI. 590, 590–92 (1999).

claiming that the democratic aspiration toward social equality demands a more agonistic social ethic, legitimating non-deliberative, combative action on behalf of the disempowered.²⁵ On such views, democracy demands more coercive activity like labor strikes, barricades, and other forms of civil disobedience in order to challenge extant undemocratic inequalities of power and influence.

I have no wish to fully settle the debate here, if it, in fact, can be settled at all. The more important point is that the pragmatic emphasis on purpose, consequences, and non-foundationalism presupposes a mode of inquiry for determining and revisiting the criteria and the facts of the matter. From a political theoretic perspective, this requires a commitment to some form of democratic society, where our ongoing institutional and social projects can be hashed out, monitored, and reconsidered in an ongoing process of formal and informal engagements.

Whatever else it might entail, a pragmatist's commitment to democracy, then, will generally include a commitment to four things: 1) the formal, institutional guarantees of free participation, familiar to us from liberal notions of rights; 2) the equal distribution of these liberal guarantees, familiar to us from the historical extension of liberal rights to women, racial and ethnic minorities, those without property, and so on; 3) the means necessary to give effect to these rights in an equal manner, including both relatively equal capacities to engage in free participation, and the social relationships necessary not to inhibit such participation; and 4) the necessary informal venues and media needed to facilitate informal social deliberation and communication. Put differently, pragmatists assert the legitimate social interest in securing both the formal rights to participate in the democratic assessment of social institutions and the formal and informal means to do so effectively. Insofar as these conditions are not met, we have reason to doubt our competent assessment of our first-order institutions' performance and purpose. Insofar as first-order institutions—be they bureaucracies, community-empowerment associations, activist movements, expert-led research communities, competitive markets, or corporations—encroach upon such conditions, we can say that they are biting the enabling hand that feeds them.

In the next section, I offer some thoughts as to what this analysis suggests in terms of the rights, duties, and restrictions of corporate persons.

V. CORPORATE RIGHTS AND RESPONSIBILITIES

As we saw, pragmatists reject two categorical theses: 1) that corporate persons *cannot* have the same rights as natural persons by virtue of their governmental provenance or 2) that they *must* have the same right as human persons by virtue of their merely being an extension of those individual rights-bearers. Pragmatists instead say: corporations ought to have those rights that enable them to secure the rights and interests of natural persons and ought to be curtailed insofar as such curtailment secures social and individual interests. If we accept the idea that such

25. See, e.g., JACKSON, *supra* note 14, at 145–47; Alexander Livingston, *Between Means and Ends: Reconstructing Coercion in Dewey's Democratic Theory*, 111 AM. POL. SCI. REV. 522 (2017).

a pragmatic analysis presupposes a commitment to democratic institutions, procedures, and norms, how does this alter our analysis?

First, it clarifies what sorts of individual rights and interests we ought to consider as important. This is significant, as pragmatic analysts like Orts and Isiksel and others have tended to help themselves to stipulations about individual rights without explaining the grounding for such starting points. For instance, I have argued previously that we ought to see corporations dedicated to journalism as having free speech and free press rights.²⁶ The reasoning behind this is that if we do not do this, we are harming human persons' ability to effectively use their rights. The individual's right to freedom of press seems to require a similar corporate right. However, I also suggested that it might be reasonable to restrict non-journalistic for-profit corporations' free speech rights. Why? Why should we care about individuals' free speech rights in some instances, but not in others? I did not answer this directly.

The pragmatist commitment to democracy helps us understand this. The ability to speak publicly, to establish channels and media for communication of information and opinion, is crucial for our social ability to assess and revisit the institutional structure of our ongoing cooperative interactions. The *New York Times* and the *Wall Street Journal*, as corporate entities, ought to be recognized as having such rights because doing so gives effect to individuals' ability to participate freely in democratic processes. These are rights that, when granted to specific types of corporations, help secure background democratic procedures.

Given this, why might a pragmatist think that some corporations ought not to have such rights? Not because, as Justice Stevens argued in his dissenting opinion in *Citizens United*,²⁷ corporations derive from government and are, therefore, not entitled to such protections from government interference. Instead, the purposive approach would say simply: for-profit business corporations are formed to further people's economic interests, not their freedom of speech. Business corporations exist to contribute to the coordination of economic activity²⁸ and by granting them the same free speech rights as individuals, we place institutions designed to accumulate stores of wealth on the same discursive plane as individuals. Consequently, we contribute to an unequal ability of people to participate in democratic procedures and deliberation, thereby undermining democracy's attractive experimental and reflexive qualities.

But there is perhaps another rationale. Orts captures it well, if inadvertently:

Allowing the economic representatives of firms to act also as political representatives of the firm's business participants is to mix apples with oranges. It does not respect the different roles that individuals play in different social

26. See Singer, *supra* note 3, at 345–47.

27. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 426–29 (2010) (Stevens, J., dissenting).

28. See, e.g., JOSEPH HEATH, MORALITY, COMPETITION, AND THE FIRM 173–204 (2014); Hussain & Sandberg, *supra* note 10, at 83.

spheres of life: as economic business participants, on one hand, and as political citizens, on the other. Acting as a single individual, one can sometimes combine or switch between these two roles of economic actors and political citizen. The specialized organization of a complex business firm cannot.²⁹

Orts means this as a further institutional elaboration of the disproportionate wealth—and therefore disproportionate power—that corporate speakers wield when granted equal speech rights. However, he also illustrates the specific sorts of capacities that distinguish corporate actors from other actors, namely a greater rigidity regarding beliefs and purposes. The problem is not simply that corporations have large resources at their disposal to sway political processes. It is that they do so without the kind of constitution that makes them good participants in these processes. Corporate actors are encouraged economically, socially, and legally to emphasize particular sorts of financial and economic concerns, and not to think about broader social and political concerns. Coupled with their power, such imperatives give us good reason to worry that the full scope of corporate speech rights will damage our ability to democratically monitor social and economic institutions. Therefore, we ought to limit corporate influence in things like elections and campaigns.

Importantly, though, such a rationale would extend beyond business corporations, to corporate persons more generally. Charitable and non-profit corporations, while perhaps not generating the same kind of financial power, will also have fixed points of interest and purpose. This need not be a problem—as it need not be a problem with business corporations more narrowly. If there is a large ecosystem of non-profit companies, pursuing a variety of different ends and representing different perspectives and worldviews, the fact that some individual corporate person is not engaging in the democratic procedure with the properly reflective or reflexive disposition need not mean that such reflexivity cannot be achieved in the aggregate.³⁰ On the flipside, however, the absence of such a congenially symmetric organizational ecosystem may invite greater restriction.

The larger point this suggests is that a pragmatic approach to corporate personhood should not just focus on corporate purpose. When assessing what rights corporations should or should not have, we also ought to look at the corporation's *capacity* and *context*. A small for-profit corporation with a strong history of embeddedness in a community may have a strong claim to being able to participate strongly and robustly in political speech—and with good democratic rationale. In this instance, the corporation in question has the capacity to contribute effectively to the democratic process and does not have the capacity to undermine it. On the other hand, we may see reason to restrict the rights of a large news

29. ORTS, *supra* note 11, at 246.

30. This is a thesis advanced recently by deliberative democrats who have advocated a “systems turn” to democratic theory. See Jane Mansbridge et al., *A Systemic Approach to Deliberative Democracy*, in DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE 1, 2–4, 6 (John Parkinson & Jane Mansbridge eds., 2013).

company that has dominated the journalistic space to its detriment, with similarly good rationale. In such a case, the corporation, despite being journalistic in purpose, has the capacity to undermine democratic background conditions given the particular context in which it operates. In either case, it is not enough to point to the corporation's purpose, or the kind of corporation it is, to consider its rights and responsibilities. We must assess it, as it were, in situ.

CONCLUSION

The aim here has been to sketch out what a pragmatic, non-foundationalist approach to corporate personhood requires and, specifically, to argue that it requires a concern for the viability and vitality of democratic practices and procedures. As others have said, the rights and duties that we accord to corporate persons ought to be based on their purpose, not on some foundational commitment. I have argued that we ought to understand this purpose in two senses: a specific sort of corporation's "local purpose" and society's more general "social interest" in securing incorporation as an institution. However, to make this claim is to raise the question of how we know what purposes and interests are legitimate and how we know that our corporate institutions are living up to these legitimate ends.

Pragmatism's most profound and unsettling contribution to this debate is the suggestion that there is no theoretical or philosophical resolution to such problems. Instead, we must hash this out through the various social and political means we have developed for coordinating activity and settling disagreements. This implies, however, a special concern for democracy. Democracy is the meta-institution that oversees and revisits these disagreements' provisional institutional solutions. Practices that undermine or harm democracy's ability to perform these corrective actions are ones we have a social interest in discouraging or avoiding. Consequently, the rights and duties of the corporate person must be articulated with a concern for how corporations can potentially harm or contribute to the functioning of democratic practices and norms. This concern must include the capacities of the corporation in question and the context in which it operates, all of which counsels against a general, legalistic approach to the question of corporate personhood.

By way of conclusion, I would like to address one potential confusion about pragmatism's relationship to democracy. Some hear this pragmatist emphasis on democracy and assume a sort of proceduralism as follows: "if society is sufficiently democratic, then the conclusions we reach within that society are correct, good, and/or legitimate." This is, possibly, the opposite of what pragmatism's endorsement of democracy entails. It is not that pragmatists endorse democracy because it is the procedure that allows us to decide that "we now have gotten it right." Democracy's pragmatic benefit is precisely that it enables more people to more effectively register that they believe we have gotten it wrong. The goal of democratic procedures is to enable and channel disagreement toward its most productive and intelligent use, not to give us a vantage point from which to declare we have risen above the disagreement.

To put this in terms of the debates about corporate personality: we should not simply accept the doctrines we currently have because they are the result of a democratic society's procedures and norms. Instead, we note that the democratic expression and exchange of views has produced a number of different disagreements about these doctrines—the extent and scope of corporate speech rights, the degree and protections afforded by limited liability, etc.—as well as numerous potential ways of resolving these disagreements. Democracy is not a *deus ex machina* that saves us from such debates, which are endemic to politics. Instead, democracy is a set of practices that invite us to face such disagreements head on and to approach them animated by fallibilism, experimentation, openness, and reflexivity. Insofar as entrenching certain sorts of corporate rights can undermine this spirit and these practices, we have reason to challenge such legal and political actions.