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Accountable Incorporation

Robert C. Hockett

Research Scholar, Global Institute for Sustainable Prosperity

Edward Cornell Endowed Professor of Law, Cornell University

Introduction

In mid-August Senator Warren introduced an innovative – or rather, restorative – new piece of legislation[1], the Accountable Capitalism Act[1]. Legislation along these lines is long overdue, and hence more than welcome. While one both can and should go beyond what Senator Warren proposes, as I shall argue below, even her Act as presently framed can begin the process of both (a) correcting long-standing problems in American corporate governance, and (b) putting in place a system of incorporation that produces better outcomes for all corporate stakeholders, not just for elite executives and mega-shareholders. In so doing, it can also begin to restore[1] to America's business landscape a critical element that lay at the core of the US's economic 'growth miracle' and 'social contract' alike during its most prosperous era[1].

The Original Purpose of Incorporation

'Perpetual' legal entities authorized to act and hold assets in their own names while shielding their owners from legal accountability are now so ubiquitous, and have been part of our legal landscape for so long, that many Americans have forgotten[5] the circumstances surrounding and the reasons behind their invention. Many have likewise forgotten[5] what an extraordinary departure these entities represented from commonsense understandings of responsibility and legal accountability when first they were invented. And thus many have also forgotten[5] the *strictly conditional* nature of 'the corporate privilege' when first it came to be granted by the states of our federal republic.

In the early days of the American republic, productive capital was in short supply[1], and state revenues were often quite limited and unpredictable. In consequence our law developed[6] an ingeniously pragmatic method of 'out-sourcing'[4] the construction of vital public infrastructures and the supply of widely needed public goods. That method was to permit – solely for specific and well-defined public purposes – the chartering of legal entities whose owners could not be held liable for losses inflicted or caused by those entities, and which could not be sued by creditors of their owners, so long as the losses occasioning suit were inflicted by the entity only in its authorized course of operation. This is all that 'the corporation' was – and remains all that the corporation should be.

1 https://www.warren.senate.gov/imo/media/doc/Accountable Capitalism Act.pdf
2 https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687
3 https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations
4 https://www.youtube.com/watch?v=q3bBxlJVtmA&t=1149s
5 https://www.youtube.com/watch?v=q3bBxlJVtmA&t=1140s
6 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621849

Hence, for example[6], a US state in need of canals, turnpikes, or other transportation networks in the early days of the corporate form would confer a corporate charter on syndicates of individuals who credibly promised to construct such infrastructures. It would thereby shield[6] those individuals' personal assets from suits that might be brought against their corporation for harms caused by defects in the relevant roads or bridges, for example. At the same time it would shield the corporation itself from suit that might be brought by some creditor of one or more (in the limit, even all) of its owners should the latter default in their individual capacities on obligations owed to third parties. This two-way 'asset-segregation[6]' facilitated long-term private investment in infrastructure and other public goods, and that facilitation was the sole purpose[6] of this extraordinary insulation from ordinary accountability.

These privileges were, again, extraordinary[6], and thus were conferred only for limited, well-defined public purposes. Ordinarily, one who provides funding to terrorists or other harm-causing enterprises, for example, is legally accountable for facilitating such harms, even if she or he does not 'directly' *inflict* the harm. Likewise, one who is found liable for harms will see his or her assets attached by his or her 'judgment creditor' if unable to pay damages determined by judgment in a court of law. Corporate privilege represented a profound departure[7] from these longstanding background principles of legal responsibility – a departure that only sovereigns like US states could authorize, and only for reasons of extraordinary necessity. Hence the familiar ring, until recently, of phrases like 'the [state-conferred] corporate franchise[4],' and adages like that pursuant to which corporations are observed to be 'creatures of the state[4].'

The corporate privileges were also, again, meant solely[6] to encourage the owners of scarce capital to organize and finance projects for the public good, during a time when capital was indeed scarce and reliable public revenue was correspondingly hard to come by. For this very reason, the privileges were operative *only* insofar as the incorporated entity was actually *pursuing* such projects. They were, in other words, strictly *conditional*[6]. And both the state's Secretary of State and committees of interested citizens had to agree that the conditions were likely to be met before any firm's corporate charter would be conferred or periodically renewed.

Incorporated entities that *strayed* from their publicly defined purposes were said to have acted '*ultra vires*[6]' – that is, outside of their limited powers – and thereby forfeited their privileges[4]. An entity that acted outside of its authorized powers could then be dissolved and its assets made available to creditors of its owners. Those owners, for their part, then could be sued for harms caused by their incorporated entity – just as one might be sued, for example, were his or her negligently parked car to roll down a hill and cause injury. All of this was because the owners of the firm had strayed from the purposes[7] that had warranted the departure from ordinary rules of legal responsibility and accountability in the first place. Fail the *purpose* of the privilege, the thinking went, and you *forfeit* the privilege.

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[7] http://clsbluesky.law.columbia.edu/2015/10/12/bank-regulation-as-vestigial-corporate-regulation/

Contemporary Superfluity and Abuse of Incorporation

The corporate form as originally designed and just described proved a highly successful, characteristically American means of pragmatically partnering the public and private sectors[7] to provide transportation infrastructure, energy grids, sewage and water systems, schools and libraries, public assistance and other social services in a world of scarce capital and unpredictable public revenue. In the modern era, however, things began gradually to change[6]. For one thing, capital grew much less scarce[8], as (a) stock and real estate bubbles[9] throughout the 20th and early 21st centuries, (b) the current wave of 'stock buybacks[10],' and (c) the related wave of 'taking firms private[11]' all have made plain. For another thing, public revenue became much more reliable, as it remains to this day when tax codes are not radically changed over-frequently. And finally, in part precisely because of the first two developments, corporate chartering *itself* began to change.

As incorporated firms became less necessary for the supply of specific forms of public infrastructure, states began competing with one another[6] for the 'franchise tax' revenue that can be had by charging a fee for the granting of corporate charters. This competition took the form of increasingly lenient conditions' being placed on the *granting* of corporate charters, along with more and more 'manager-friendly,' 'small shareholder-unfriendly' bodies of corporate law that insulated elite corporate executives from accountability to their firms' smaller shareholders where executive compensation, corporate political activity, and corporate policy more generally were concerned.

This chartering competition, which remains underway to this day, bore all the attributes of an arms race – a classic collective action problem[12] – that no state could or can exit save by 'unilateral disarmament.' This is why the race came to be called, and is still called, a 'race to the bottom[13].' 'The bottom' here is a legal landscape in which nearly all states have unconditional, so-called 'general incorporation[6]' statutes, and few states encourage shareholder or stakeholder 'activism' of any kind that might appreciably limit the prerogatives – or pay – of increasingly unaccountable elite corporate executives who use the corporate form principally to enrich themselves[14] and large shareholders rather than to benefit smaller shareholders, rank and file employees, or the local and national economies.

The results of this historically anomalous 'free incorporation' environment are as familiar as they are legion. High-powered executives increasingly run firms more for their own benefit[14] than for the benefit of small shareholders, let alone other stakeholders and

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8 https://www.penguinrandomhouse.com/books/312886/the-age-of-oversupply-by-daniel-alpert/9781591847014/

9 https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2659&context=facpub

10 https://www.marketwatch.com/story/share-buyback-boom-continued-apace-during-recent-earnings-season-2018-05-22

11 https://www.thestreet.com/video/elon-musks-tesla-privatization-tweet-is-legal-but-may-spark-sec-probe-14677943

12 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239849

13 https://en.wikipedia.org/wiki/Race_to_the_bottom

14 https://hbr.org/2014/09/profits-without-prosperity

surrounding communities – the very people who used to have to approve grants of corporate charters in the first place. Unaccountable firms, meanwhile, impose massive inefficiencies[6] upon the public thanks to the 'moral hazard' and negative externalities[15] permitted – indeed, actively encouraged – by the limited liability regime that we first came to permit solely in order to encourage private investment in public infrastructures. All the while, precisely because capital is *now* so *abundant* as *not to require*[16] the conferral of special privileges on corporate investors, incorporated firms amass more and more capital from fewer and fewer ultra-wealthy interests[17], and in so doing grow much too large for states to monitor and control even were those states not already locked in the aforementioned 'race to the bottom[12].'

Clearly what we are confronted with now, in many cases, is an alien form of legally constructed 'Frankenstein's monster' or 'army of robots,' originally created by states and now well beyond state control. 'Private' firms enjoying publicly conferred corporate privilege in our states' coerced 'race to the bottom[12]' now monopolize or oligopolize entire industries – including such *de facto* public utility industries as the news media, telecommunications media, social media and payment platforms, banking and finance, healthcare and health insurance, and even transport and retail in some cases. The same firms' executives set their own pay and choose their own regulators – indeed, even their, and *our*, legislators – by determining through unaccountable and even shareholder-unapproved campaign donations and expenditures[18] who wins many of our elections.

Ironically, these firms even effectively fix elections themselves, and hence our democracy's very capacity for self-government, exorbitantly expensive[19] – by charging candidates huge fees for access to the public's own airwaves and communications infrastructure, which corporate executives control *only through public license*. This of course necessitates many of our lawmakers' spending hours each day seeking corporate money[18] for reelection rather than listening to, learning from, and doing the bidding of their constituents.

The states are, as mentioned before, both too small and too 'divided and conquered' to solve this massive cluster of collective action problems[12] with which the regime of 'free incorporation' now confronts them. Only the states' and the public's authorized collective agent[12] – our *federal* government – is both large enough and central enough to aid our states in addressing these collective action challenges and thereby restoring the great American tradition of conditioning publicly conferred corporate privilege expressly upon the fulfillment of legitimate public purposes.

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[15] http://digitalcommons.law.yale.edu/fss_papers/5035/
[16] https://www.newamerica.org/economic-growth/policy-papers/the-way-forward/
[17] https://www.forbes.com/sites/rhockett/2017/06/11/lets-get-real-about-financial-choice/#42d7e8af4c86
[18] https://www.brennancenter.org/issues/election-spending
[19] https://www.opensecrets.org/overview/cost.php

So What Should Be Done? A Comprehensive Proposal

What, then, might a renewed corporate public purpose regime – that is, an accountable incorporation regime – look like? In broad outline, I think what's ultimately requisite is something like the following.

First, require all incorporated and other limited liability entities that reach certain size thresholds to apply for a new, federal charter. This charter would be in addition to, not instead of, any state charter. We might analogize this arrangement to that we employ in the regulation of mutual funds and other investment companies[20], which must register with the SEC once certain thresholds are crossed, in addition to seeking a state corporate or trust franchise. We might also analogize to systemically important financial institutions as determined by FSOC under Dodd-Frank[21], which fall subject to enhanced forms of prudential regulation additional to those to which smaller, less systemically significant firms are subject.

Needless to say, federal chartering should also be required of any non-domestic firm seeking access[22] to the American market once it has reached the specified size threshold. Any covered entity reaching these thresholds and not acquiring a federal charter would be prohibited from doing business in the United States, irrespective of any state or foreign charter – e.g., a charter conferred by an 'offshore financial center' such as the Cayman or Channel Islands – that it might hold. And any relevant executive of such a firm who fails to seek a federal charter for the firm would be held personally liable for causing his or her firm to do business unlicensed.

The size threshold, for its part, could be determined on the basis of any one or more of the following indicia: value of total assets held, understood in terms of some absolute dollar threshold; portion of assets held within a specific industry, understood as a *relative* dollar threshold; total market capitalization; share of market capitalization within an industry; market *share* within an industry; employment share within an industry. By the same token, we should be cautious about using total employment within an industry, or market share within states or localities, for fear of certain perverse incentives to which such determinants might give rise.

What conditions would have to be met for the federal charter to be granted? Recommendations doubtless will vary, but I suspect many would agree to the following minimal core.

First, the firm should have to state what public purpose or purposes will be served by conferral of the traditional corporate privileges – perpetual existence, asset insulation, limited liability – upon an entity of the relevant firm's size. We might think of this as a sort

[20] https://www.investopedia.com/terms/i/investmentcompanyact.asp
[21] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2796331
[22] https://www.forbes.com/sites/rhockett/2017/10/12/corporate-tax-reform-for-american-industry-tax-access-not-production/#65ada38310c5

of 'B Corp[23]' requirement triggered by any firm's becoming large and systemically important enough to cross one or more of the aforementioned size thresholds. The firm would then have to report on an annual or biannual basis to the chartering authority and a committee of affected citizens, more on which below, what it has done over the previous period in furtherance of its stated public purpose.

Second, the firm would be required to maintain liability insurance in an amount adequate to cover any harm that limited liability might otherwise incentivize it to externalize.

Third, the firm would have to include both employee and other stakeholder representation on its board. One possibility that I find attractive is a tripartite classified board structure[24] comprising one-third representing shareholders, one-third representing wage and contract labor, and one-third representing 'typical communities' in which the firm regularly operates. Consumer representation might also be considered. In effect, large firms would be governed a bit in the way regional Federal Reserve banks are meant to be governed[24] today, with governance structures reflecting the principal constituencies whom their operations routinely affect. Another partial analogy here is to the 'codetermination[25]' regime applicable to certain firms in Germany – a jurisdiction whose economic arrangements were explicitly patterned on the earlier American model, and one that is not known for unsuccessful or inefficient business firms.

Fourth, the firm would have to disclose publicly, and regularly update, all political expenditures and donations that it or its executive officers make. We might even do well simply to prohibit such expenditures in the case of such firms. While a prohibition of this sort might be challenged under *Citizen's United*[26], it is not clear that such a challenge could be sustained. For the federal charter would be a privilege, not a right, and firms could readily avoid triggering the federal chartering requirement simply by remaining under the size thresholds that engage it.

Fifth, the firm would be subject to regular audits by appropriate 'functional regulators,' such as the Department of Labor, the Federal Election Commission, the Federal Trade Commission, or the SEC, to ensure that it is not acting in manners that exploit its size, as determined by the chartering threshold criteria, at the expense of consumers, the American electorate, labor, or smaller competing firms. The appropriate functional regulator would of course coordinate with the federal chartering authority, more on which below, in discharging this oversight task – rather as functional financial regulators such as the Commodity Futures Trading Commission and SEC coordinate with the FSOC and Fed under the Dodd-Frank[27] and Gramm-Leach-Bliley[28] Acts today.

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[23] https://concurringopinions.com/archives/2016/01/b-corps-for-bankers.html
[24] https://www.washingtonpost.com/news/powerpost/paloma/the-finance-202/2018/08/16/the-finance-202-elizabeth-warren-takes-on-corporate-giants-as-she-lays-2020-marker/5b746bc91b326b7234392946/?utm_term=.6a555f3419c6
[25] http://bruegel.org/2016/10/codetermination-in-germany-a-role-model-for-the-uk-and-the-us/
[26] https://en.wikipedia.org/wiki/Citizens_United_v._FEC
[27] https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp
[28] https://www.investopedia.com/terms/g/glba.asp

Sixth, if the firm compensates its executive officers in the form of stock or stock options, conditions should attach to these so as to prohibit their liquidation, over some dollar threshold, until several years or more after the relevant executive has terminated his or her employment with the firm. This would help remove incentives to engage in short-term manipulations of share prices in manners that benefit corporate fiduciaries without benefitting their firms and those firms' constituents.

Finally seventh, the firm might also be required, or perhaps instead offered more 'positive' inducements ('carrots'), to adopt Employee Stock Ownership Plans or similar plans that enable *non-executive* employees *also* to accumulate small ownership stakes in their firms. This can both 'align incentives' and enable more Americans to augment their labor incomes with capital incomes.

One can imagine additional requirements on which federal chartering might be conditioned. But any number of the foregoing proposed requirements, I think, would constitute a reasonable and promising start.

Who would be the chartering authority? I think that a 21st century rendition of the original corporate chartering regime would be best. First, then, an office newly created within the Department of Commerce for this purpose would be established. And second, committees of likely affected citizens would be impaneled to aid the Authority in its charter-conferral and charter-renewal functions. These committees might be selected from pools of applicants responding to notices published in the Federal Register in connection with specific charter applications. Perhaps needless to say, these same announcements can be used to solicit APA-style public comment on the same applications.

This Chartering Authority's role relative to Commerce here might be analogized to that of the Office of the Comptroller of the Currency[29] relative to Treasury, and the public role in chartering decisions can correspondingly be analogized to its role in connection with bank-chartering decisions. There would, however, be one very important difference. Whereas national bank charters operate separately from and parallel, as alternatives, to state bank charters, the federal corporate charter would be an 'add-on' to state charters, applicable only to 'big' firms that states acting separately cannot adequately oversee. This suggests that the national chartering authority would do well to coordinate not only with concerned citizens, but also with state chartering authorities in the interest of holding large firms with corporate privileges accountable to the public.

In this sense, the new chartering regime that I here advocate would serve further to empower the states in our federal system. It is the very model of 'our federalism' that the founders so wisely crafted over 230 years ago.

[29] https://www.occ.treas.gov/

And What Does Senator Warren Propose? How the Accountable Capitalism Act Begins to Do What Needs Doing

Senator Warren's Accountable Capitalism Act[30] does not go as far as what I advocate here. It does, however, take *critical first steps* in beginning to realign our regime of incorporation with its original purposes along the lines sketched above. Specifically, it does so by doing the following:

First[30], by recognizing a new category of very large American corporations called 'United States corporations,' which must obtain a federal charter that obligates company directors to consider the interests of *all* corporate stakeholders, not just mega-shareholders, in their decision-making: American corporations with more than $1 billion in annual revenue must obtain a federal charter from a newly formed Office of United States Corporations at the Department of Commerce. The new federal charter obligates company directors to consider the interests of all corporate stakeholders – including employees, customers, shareholders of all sizes, and the communities in which their companies operate – not just large shareholders. This approach is derived from the (now only optional) benefit corporation[31] model adopted by 33 states and the District of Columbia.

Second[30], by requiring robust worker representation on the boards of United States corporations: Every United States corporation must ensure that no fewer than 40% of its directors are selected by the corporation's employees. Again Germany has a similar requirement[25] for large corporations and has seen robust economic growth and wage improvements for decades.

Third[30], by imposing restrictions on the sale of company shares by the directors and corporate officers of United States corporations: To ensure that corporate decision-makers are focused on the long-term interests of all corporate stakeholders, rather than on enriching themselves on the basis of short-term gains in their companies' manipulable share prices[17], the bill prohibits United States corporations' directors and officers from selling any company shares within five years of obtaining the shares or within three years of an open-market stock buyback.

Fourth[30], by requiring United states corporations to obtain shareholder and board approval for, and publicly to disclose, all political spending: In keeping with a proposal[32] from John Bogle, the founder of Vanguard Group, United States corporations would have to receive the approval of at least 75% of their shareholders and 75% of their directors before engaging in political expenditures. They also would have to disclose all political and lobbying expenditures.

And fifth[30], by establishing a process for revoking United States corporations' charters when they engage in repeated misconduct: State Attorneys General are authorized to submit petitions to the Office of United States Corporations to revoke a United States

[30] https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act.pdf
[31] http://benefitcorp.net/policymakers/state-by-state-status
[32] https://www.nytimes.com/2011/05/15/opinion/15bogle.html

corporation's charter. If the Director of the Office and the Secretary of Commerce find that the corporation has a history of egregious and repeated misconduct and has failed to take meaningful steps to address its problems, they may grant the petition. The company's charter would then be revoked a year later – giving the company time before its charter is revoked to make the case to Congress that it should retain its conditional charter in the same or in modified form.

All five of these features would facilitate state and federal collaboration in beginning to tame the nation's largest incorporated firms, bringing their operations more into line with the original purpose of the corporate form[4] and its extraordinary privileges. In so doing, they would also begin the process of restoring that uniquely pragmatic, quintessentially American mode of partnering the public and private sectors in delivering broadly inclusive, sustainable prosperity to our citizenry. That is how we did things[7] during our 'miracle' years, when we created the greatest middle class[4] that the world has ever known. That is how we must do things again.

So Who Could Object? Predictable Criticisms of Accountable Incorporation – And Why They Fall Flat

Of course Senator Warren's proposal – and hence, *a fortiori*, my own somewhat farther reaching recommendations – will tend to draw certain predictable objections. Indeed, Senator Warren's Act already has.

Apologists for a dysfunctional *status quo* commonly resort to sophistry when their publics are no longer convinced by poorly reasoned good faith apologetics. And so it is with the objections thus far registered. All of them resort to certain tried-and-true (though hardly truthful) methods of would-be mind-manipulation – methods as old as is bad faith argument itself.

The first of these methods is to recycle a bad argument that has already been discredited and rejected, after dressing it up in what looks superficially to be more acceptable garb, in hopes that now it might 'pass.' Think of this as the underage kid who tries to buy liquor and is 'carded.' The same kid comes back with a borrowed i.d. and a pair of mustachioed Groucho Marx spectacles[33], hoping to get by the vigilant cashier this time.

The second method is the old 'slippery slope' routine. This one's especially favored by those who are seeking to undermine 'sensible middle' positions along some continuum found between two extremes. What you do here, from your favored extreme, is to accuse the position you *don't like* of being 'on the way' to the *other* extreme – the extreme opposite your own.

If, for example, you were a communist attacking that uniquely American form of 'accountable capitalism' that prevailed in, say, the 1950s, you would say that this form of capitalism is 'on the way' to anything-goes, 'cowboy capitalism' of the sort that

[33] https://www.123rf.com/photo_10746442_a-version-of-the-classic-disguise-mask-easily-added-on-to-a-face-.html

immiserates all but a rich few and thus tends to culminate in violent revolution. If, on the other hand, you were one of those rich few who resented our uniquely American 'mixed economy[34],' you would accuse it of … wait for it … yep, 'communism.'

People who argue like this – the 'cowboys' and communists alike – of course have something in common with one another and with old George W. Bush. They 'don't do nuance[35].' Unlike Senator Warren and myself, who seek to moderate the extremes of state-planning and out-of-control capitalism while being immoderate only in commitment to our besieged middle class, they are unmoved by the sage Benjamin Franklin's great motto: 'moderation in all things – including moderation.'

Both sophists' preferred styles of argumentation are on full display in the objections now raised to Senator Warren's Accountable Capitalism Act.

The 'Argument from Q'

Let's start with the first strategy – what I'll call 'the retread.' The first, rejected form of the argument here is that wealth and income *ought* to accumulate at the top of the distribution – that we should *celebrate* dramatic inequality – because those at the top of the distribution are 'job creators[36]' whose wealth 'trickles down[37].'

This was of course a popular line taken by the 'robber barons' of the late 19th century before the 1907 crash, by Calvin Coolidge ('the business of America is business[38]') and Herbert Hoover before the 1929 crash, and by those intoxicated by 'deregulation' and 'tax-reform' before the 2008 crash. Its highbrow form was dubbed 'supply side economics[39]' by Reagan groupies during the 1980s, and rightly repudiated by George H. W. Bush – who, unlike his son, *did* 'do nuance' – rhetorically (as 'Voodoo Economics[40]') in 1980 and practically (via the tax code) during his presidency.

Where corporate governance is concerned, the old supply side economics feeds into the 'shareholder value[41]' imperative popularized by vulgar-libertarian Milton Friedman[42] back in the 1970s and 1980s. Since the ownership of more than 84% of American corporate shares is concentrated in the top wealth decile[43] of our population, calling for 'shareholder

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[34] https://www.thebalance.com/mixed-economy-definition-pros-cons-examples-3305594
[35] https://www.washingtonpost.com/archive/opinions/2004/02/17/bushs-war-against-nuance/1f2af155-c701-47f9-8dc0-84d270b4d1c5/?utm_term=.384c94b1e920
[36] https://www.forbes.com/sites/robbmandelbaum/2017/08/17/meet-job-creators-network-defenders-of-the-free-market/#6f6a132277f2
[37] https://www.thebalance.com/trickle-down-economics-theory-effect-does-it-work-3305572
[38] https://www.historycentral.com/Bio/presidents/coolidge.html
[39] https://www.investopedia.com/articles/05/011805.asp
[40] https://www.investopedia.com/terms/v/voodooeconomics.asp
[41] https://www.forbes.com/sites/stevedenning/2017/07/17/making-sense-of-shareholder-value-the-worlds-dumbest-idea/#4615b6b42a7e
[42] https://www.libertarianism.org/people/milton-friedman
[43] https://www.nytimes.com/2018/08/04/business/shrinking-stock-market.html

value' maximization and greater wealth inequality were and are more or less extensionally equivalent. Operationally they come to the same thing.

The old trickle down / shareholder value argument doesn't fool anyone anymore[44]. It simply cannot be argued with straight face any longer, now that we have literally decades and decades of empirical evidence showing that skewed wealth and income fuel asset price bubbles and busts rather than real, sustained, and inclusive macroeconomic growth. And shareholder value maximization, until we spread share-ownership itself far more equitably[45], just is more wealth inequality. This is the kid who got carded at the liquor store. Nice try, kid.

So what is the Groucho disguise[46] worn by the kid now, in his second bite at our economic apple? Why, Tobin's *q*[47], of course!

Tobin's *q* is essentially a ratio comparing the values of firms with the values of their capital assets. The idea is to get some rough estimate of the value that a firm, with its particular mode of organizing productive activity, 'adds' to the value of what it uses in that productive activity. The idea to track this relation actually originates with Kaldor, in the form of what Kaldor called '*v*' – the 'valuation ratio[48]' – but Tobin popularized it[49] as '*q*,' so we all call it '*q*.'

There are sundry variations on Tobin's particular rendition of this ratio – e.g., assets' market value relative to replacement value, assets' and liabilities' market value relative to book value, and, at the 'macro' level, aggregate stock market valuation relative to corporate net worth. But what they all have in common is their attempt to get at how much value our firms, as would-be synergistic systems of wealth-producing capital-use, add.

But 'add' to *what*? Add to *whom* or *whose wealth*?

We do well to keep those questions in mind as we consider the first, retread argument raised against Senator Warren's Accountable Capitalism Act.

Here is the argument:

Tobin's *q*, we are told[50] familiarly enough, 'is simply the ratio between the market value of a company and the book value of its invested capital.' Hence, '[p]ut simply, a Tobin Q ratio higher than 100% means that a company is creating economic value, and a Tobin Q

[44] https://www.thebalance.com/supply-side-economics-does-it-work-3305786
[45] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=931049
[46] http://heroism.wikia.com/wiki/File:Groucho-glasses.png
[47] https://www.investopedia.com/terms/q/qratio.asp
[48] https://marketbusinessnews.com/financial-glossary/q-theory-definition-meaning/
[49] https://cowles.yale.edu/publications/cfdp/cfdp-427
[50] https://www.realclearmarkets.com/articles/2018/08/20/do_massachusetts_voters_know_what_sen_warren_wants_to_do_to_their_savings_103393.html

below 100% means that a company is destroying value.' That is indeed to put the point 'simply,' but again, close enough. Yet now comes the Groucho disguise[46]…

From the two trivial observations just noted, we are told, it somehow follows[51] that '[t]he most fundamental social responsibility of a company is to add value to the capital it employs, so the most fundamental job responsibility of a corporate CEO is to keep the Tobin Q ratio of the company he or she leads above 100%.' It also follows[50], since 'America's Tobin Q ratio has averaged more than 100%' since 1995, 'while Germany's Tobin Q ratio has averaged about 55%,' that 'America's … corporations are creating economic value, while Germany's … companies are doing the equivalent of burning 45% of the euros entrusted to them.'

That's pretty remarkable, isn't it? The US, which has the worst inequality[52], second-highest poverty[53] and highest incarceration rates[54], as well as the worst health[55] and mediocre education[56] outcomes relative to the rest of the developed world while careening from bubble to bust and bubble to bust like a manic-depressive[57], is doing just fine where 'creating economic value' is concerned. Meanwhile Germany, whose economy, education system, and social safety net are the envy of most of the world[58] in part thanks to[58] its pragmatic, can-do, Warren- and formerly American-style corporate social contract, is simply 'burning value.'

So what is the problem with this argument? How can its conclusion be so at odds with what anyone looking – or reading – can see?

Well, there are multiple problems with it, some of them stemming from problems with *q* itself. For example, *q*'s numerator – typically operationalized as the market price of shares – assumes that price is equivalent to long-term value. But nobody who's lived through our recent decades of boom and bust can seriously believe that any longer – not, that is, unless they are willing to go full Ptolemy by arguing that not radical uncertainty[59], credit conditions[60], herd behavior[59] or recursive collective action problems[12],

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[51] https://blogs.forbes.com/rhockett/wp-admin/he%20most%20fundamental%20social%20responsibility%20of%20a%20company%20is%20to%20add%20value%20to%20the%20capital%20it%20employs,%20so%20the%20most%20fundamental%20job%20responsibility%20of%20a%20corporate%20CEO%20is%20to%20keep%20the%20Tobin%20Q%20ratio%20of%20the%20company%20he%20or%20she%20leads%20above%20100%25
[52] https://www.stlouisfed.org/on-the-economy/2017/october/how-us-income-inequality-compare-worldwide
[53] https://qz.com/879092/the-us-doesnt-look-like-a-developed-country/
[54] https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.498eb30bf873
[55] https://www.healthsystemtracker.org/chart-collection/quality-u-s-healthcare-system-compare-countries/#item-hospital-admissions-preventable-diseases-frequent-u-s-comparable-countries
[56] http://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/
[57] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2204710
[58] https://www.newsweek.com/2014/07/25/top-world-could-be-start-century-german-success-259410.html
[59] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367278
[60] https://www.interdependence.org/resources/debt-deflation-and-debacle-of-private-debt-write-down-and-public-recovery/#.W3t3ZJNKjMI

but inexplicably sudden changes in firms' 'fundamental value' itself[61] are what bring on bubbles and busts. Likewise, *q*'s denominator – typically taken for the value of firms' assets – tends to miss many intangible assets like non-monetized 'intellectual capital,' new modes of organization, and firms' 'goodwill' value.

But far more important than any of these problems, which stem from imperfect valuation methodologies and bad finance theory, is something far more egregious. That is that the argument doesn't add anything - doesn't, dare we say, 'add any value' - to the argument it pretends to replace. This is what makes it what I've called a retread. It simply but surreptitiously *equates* 'value' with share price, then purports to 'conclude' from that *ipse dixit* (a) that corporate officers, along with our system of corporate governance itself, are obligated to aim for a maximal *q* – that is, to maximize 'shareholder value' – and (b) that economic powerhouse Germany, of all countries, has simply been 'burning' 45% of its companies' inputs.

Why resort to an 'argument' of this sort? What drives the sophistry? Two things, I'll wager. One is the need for the Groucho disguise[33]. The old arguments are discredited and long since discarded. Hence they have to be tarted up and refurbished – they must be retread – if they're to be recycled and reused. The other driver doubtless is the 'scientific' whiff of an argument that employs terms of art used in technical disciplines.

If you want to come across as an 'authority' on some matter of psychological interest, for example, you'll throw around magic words like 'transference,' 'cathexis,' 'sublimation,' or 'penis envy' if you want to sound Freudian[62], or perhaps 'stimulus,' 'response,' 'conditioning,' and so on if you want to sound Pavlovian or Skinnerian[62]. Just so, if you want to sound authoritative on matters corporate or financial, you say things like 'something something Black-Scholes[63],' 'something something Modigliani-Miller[64],' 'something something CAPM[65],' 'something something EMH[66],' 'something something Steve Ross[67],' or 'something something APT[68].' Then your puzzled listener, you hope, concludes 'wow, this guy's an *expert*.' Or she looks up the word, sees it explained in a manner that employs mathematical or statistical formulae, and *then* concludes, 'wow, this guy's an *expert*.'

But though you might hope this, your readers will eventually get wise to you. They'll see that you're actually just 'putting lipstick on a pig,' or better yet pulling a Woody Allen in *Zelig*[69].

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61 https://www.newyorker.com/magazine/2010/01/11/after-the-blowup
62 https://www.newyorker.com/magazine/2017/08/28/why-freud-survives
63 https://www.investopedia.com/university/options-pricing/black-scholes-model.asp
64 https://www.investopedia.com/terms/m/modigliani-millertheorem.asp
65 https://www.investopedia.com/terms/c/capm.asp
66 https://www.investopedia.com/terms/e/efficientmarkethypothesis.asp
67 https://en.wikipedia.org/wiki/Stephen_Ross_(economist)
68 https://www.investopedia.com/terms/a/apt.asp
69 https://www.youtube.com/watch?v=qUW8JsLDsNo

Because the 'argument from *q*' is no more than a cheap retread of the old trickle-down, 'shareholder value' argument – because it is simply a kid wearing Groucho glasses[70] – it is deserving of no more respect than that earlier argument itself. The fact that generations of earlier politicians and corporate officers *bought* the old argument in its earlier guises is precisely *why we've now squandered* our national wealth, *hollowed-out* our great middle class, and begun to look like the 'sick man[71]' of the developed world – a once-great economy and society in decline.

Senator Warren and other advocates of accountable incorporation aim to do no more and no less than to begin to *reverse* this degenerative disease. To argue against us that this will 'lower our national *q* ratio' is accordingly like 'objecting' to the firemen that 'that there water is liable to put out the fire.' It simply isn't an argument against the proposal.

It's also quite incorrect, since a restored middle class will be able to buy more, restore real macroeconomic growth, and thereby boost corporate profits[16], as any demand-sider[72] will tell you. Hence a related crude argument[73] out there, that Senator Warren 'would destroy trillions in market value,' is as incorrect as it is irrelevant. But let's leave this to one side rather than beat the now long-dead dead animal.

The (Very, Very) 'Slippery Slope' Argument

What about the other sophistical argument that *status quo* champions are raising against accountable incorporation – the slippery slope argument? This one's the funniest of all right now in its wild-eyed fantasies and zany hysteria.

Senator Warren's and others' 'progressivism,' we are warned[50], is simply a 'form of communism.' And '[b]oth progressivism and socialism,' we are told, 'inevitably lead to totalitarianism.' This is the spit-take[74] version of the argument, the one that results in your spraying your coffee all over the page[75] as you try not to laugh. There is also a less breathless rendition[76] out there, to the effect that the Accountable Capitalism Act would 'fundamentally upend the way the most productive companies in the American economy work.' And then there's an ironical, pot-calling-the-snow-black variant of the argument that calls Senator Warren's proposed legislation 'feudal[77]' – ironic because the new, *un*accountable capitalism now gutting our middle class has led many to note that

[70]https://www.google.com/search?q=groucho+glasses&tbm=isch&source=iu&ictx=1&fir=fBqmUpg9XsMdtM%3A%2CVY5yFlPNHENpFM%2C_&usg=AFrqEzfv7x0lWqQuBjm8HHh5d-d7c6DmPQ&sa=X&ved=2ahUKEwjcgPK5kv3cAhVsxFkKHcVFAA0Q9QEwAnoECAEQBA#imgdii=eBkAL3xAUGVVEM:&imgrc=fBqmUpg9XsMdtM:

[71] https://en.wikipedia.org/wiki/Sick_man_of_Europe

[72] https://www.investopedia.com/ask/answers/040915/what-demandside-economics.asp

[73] https://www.investors.com/politics/editorials/elizabeth-warren-accountable-capitalism-act/

[74] https://www.merriam-webster.com/words-at-play/spit-take

[75] https://www.youtube.com/watch?v=eW5_ZUFaKEw

[76] https://www.nationalreview.com/2018/08/elizabeth-warren-accountable-capitalism-act-terrible-idea/

[77] https://thefederalist.com/2018/08/20/elizabeth-warrens-accountable-capitalism-proof-progressive-feudalism/

we're *now* 'going feudal[78],' looking ever more like the neo-feudal[79] 'banana republics[80]' in which wealth was skewed upwards and economies were accordingly basket cases[81].

But hold on, don't panic just yet. This is all simply hysteria or, if not being put forth in good faith, old fashioned McCarthyite red-baiting. Were progressivism simply a form of communism, then we'd all have been 'communist' even before the Soviet Union, during the presidencies of progressive Republican [82] Theodore Roosevelt and progressive Democrat[82] Woodrow Wilson, for example. Many Americans know that our country was in many ways 'ahead of the curve' during what generally is called 'the progressive era[82]' of the early 20th century. But it will be news to most everyone that Rough Rider[83] Teddy Roosevelt and patrician Virginian[84] Woodrow Wilson were ahead of Lenin and Trotsky in bringing communism to an advanced nation.

Similarly, if progressivism and socialism lead 'inevitably … to totalitarianism,' then totalitarianism had better get a move on. For, over a century after the TR and Wilson presidencies, there seems no totalitarianism in sight – unless, of course, that would come from the present administration, itself the product of our middle class's hollowing-out. It seems to be late in coming to Britain, Denmark, Finland, France, Germany, Italy, Norway, Spain, Sweden and other social democrat countries as well, all of which adopted American-style mixed-capitalism after the Second World War, and all of which do better at delivering prosperity to their great middle classes now than does the one country that has abandoned the American model – America itself.

One also wonders, of course, how we've managed to avert totalitarianism since the 18th and 19th centuries themselves, what with our socialist military[85], socialist sheriffs and police forces[85], socialist Pony Express and Postal Service[85] – heck, even socialist money and finance [86] and socialist local, state, and federal legislatures and executives[85]. Actually, almost no one wonders about this at all – because almost no one finds Chicken Little style, slippery slope hysteria on steroids persuasive.

What about the less breathless slippery slope warning, then – the one about 'upending' how our 'most productive' companies work? Here too a deep breath and deep data dive should calm the nerves of the knock-kneed. There are[43] some 1.7 million C Corps in the U.S. Of these, about 1,900 public companies and perhaps 200 private concerns have sales over $1 billion – the triggering condition for Senator Warren's bill to kick in. This means less than 1/10 of 1%[43] of U.S. businesses would be affected by the legislation.

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78 http://scholarship.law.wm.edu/tucker/1/
79 https://en.wikipedia.org/wiki/Neo-feudalism
80 https://en.wikipedia.org/wiki/Banana_republic
81 https://www.amazon.com/Kicking-Away-Ladder-Development-Perspective/dp/1843310279
82 https://en.wikipedia.org/wiki/Progressive_Era
83 https://en.wikipedia.org/wiki/Rough_Riders
84 https://en.wikipedia.org/wiki/Woodrow_Wilson
85 http://www.dorfonlaw.org/2010/07/ssrn-stop-socialism-right-now.html
86 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820176

Add to this the fact that newer, smaller firms are the primary drivers of growth and employment in our economy[87], and you see at once that Senator Warren's Accountable Capitalism Act and my own proposals elaborated above are 'narrowly tailored' to cover precisely those firms that it ought – namely, those slow-growth mega-firms that are too large for states to oversee, and so large that their officers can do mega-harm, exacerbate mega-inequality, and unaccountably spend mega-bucks they don't own on their own compensation packages and our elected officials. Unaccountability on this massive a scale simply isn't sustainable. It is precisely what ultimately brings far-right and far-left extremism – the antithesis of Aristotle's 'golden mean'[88] and Ben Franklin's 'moderation in all things' - to a society once ruled by common sense.

Conclusion

If we wish to *preserve* capitalism, then, we must make *our* capitalism *accountable* capitalism again. That starts with making incorporation itself accountable again. This is both all and only what Senator Warren and other 'restorationists' among us, myself included, are trying to do.

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[87] https://www.usatoday.com/story/opinion/2016/06/07/grow-economy-grow-small-businesses-bloomberg-buffett-column/85526778/

[88] https://en.wikipedia.org/wiki/Golden_mean_(philosophy)