

## ORIGINAL ARTICLE

# Property as power: A theory of representation

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## 1 | INTRODUCTION

Inequalities in wealth are a major concern in societal debates today (Atkinson, 2015; Piketty, 2014). Economic analyses abound showing that wealthy individuals and corporations can achieve commanding heights in the economy. They dominate more vulnerable parties, such as workers, consumers, members of less developed countries, the natural environment, and democracy itself (Christophers, 2019; Eeckhout, 2021; Mazzucato, 2018). How to respond to private owners imposing widespread negative effects on non-owners?

Liberal-democratic theory and practice responds to this problem of ownership power by subjecting owners to the power of the state. The state apparatus is called upon to regulate owners in the public interest. Through state regulation imposed on owners, the interests of non-owners are represented *indirectly*. I call this “the regulation model.” The main claim of this paper is that liberal-democratic theory and practice should end its exclusive reliance on the regulation model and expand its toolkit of representation with an “incorporation model.” Under this model, non-owner interests are represented *directly*, by those who are owners, when they make decisions about how to use their assets. In most cases, this requires that property is incorporated, that is, transferred to a corporate legal structure, in which owners are held to account by non-owners. Representation is a key notion in political philosophy, expressing the demand that political rulers should rule in the interest of citizens, who can hold them to account for doing so. The present paper offers a systematic application of this concept to the powers granted with ownership.

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After an introduction of the regulation and incorporation models (Section 2), the first step is to identify the non-owners whose interests merit representation. Here I argue for a *representation imperative*: when the purposes determined by owners lead to structural effects on third parties, then these have a claim to be represented. This is an application of the all-affected principle, similar to the principle's application in the context of the boundary problem (Section 3). In the second step, I argue for an *incorporation imperative*: where non-owners are affected and state regulation is unable to represent their interests, then an incorporation structure should be imposed, through which non-owner interests are represented (Section 4). As a third step, I argue for a *power-sharing imperative*: to organize accountability, owners and non-owners should share power within the incorporated structure. Owners should not operate as independent trustees who can decide how to represent non-owners without any checks and balances; but nor should they be mere delegates of non-owners (Section 5). In Section 6, I respond to an egalitarian objection to my proposal, that is, that redistribution, not representation, is needed to tame ownership power. Finally, I reflect on some further questions about the relation between the incorporation and regulation models (Section 7).

## 2 | TWO MODELS TO TAME OWNERSHIP POWER

In this section, I contrast two models for taming ownership power; the regulation model and the incorporation model. The regulation model is the standard model in liberal-democratic theory and practice. I argue that it has its shortcomings, which leads to a regulation gap. The incorporation model can help representing the interests of non-owners whenever there is such a gap.

The core of “liberal-democratic theory,” as I use the term in this paper, is that a legitimate political relation is a democratic-representative one. This has become the standard view in political thought and practice.<sup>1</sup> I will follow Urbinati and Warren in their definition of democratic representation. Democratic representers “(a) must be authorized to act; (b), they must act in a way that promotes the interests of the represented; and (c) people must have the means to hold their representatives accountable for their actions” (Urbinati & Warren, 2008, p. 393). Under this definition, *representation* is summarized by the first two conditions. Representation becomes *democratic* through the addition of the final condition. In the political context of the relation between rulers (persons holding political power, like government officials and parliamentarians) and citizens, representation is a solution to the exercise of arbitrary power. Without representation, rulers can negatively affect the lives of their citizens without the latter being able to prevent this or object to it. The solution in liberal-democratic theory is to establish a relation of representation. Rulers are to rule on behalf of their citizens. This changes their merely causal power into a normative power, based on law. The relation between rulers and citizens becomes a reciprocal one.

Liberal-democratic theory also has implications for thinking about property. Owners receive their *normative powers* from the state, which legislates and enforces property laws. These powers enable owners to “rule over” the objects over which they have an ownership claim. However, given that this is an enforceable claim, ownership power also shapes the relation between an owner and all others, who are, with respect to the same object, in the position of non-owners. Non-owners have a duty to respect the owner's right over their things. State empowerment of owners vis-à-vis non-owners hence also gives owners *causal power* over non-owners.<sup>2</sup> The owner of the only water well in a desert area can determine whether the thirsty person lives or dies. Owners of crucial resources have potentially vast powers over the fate of

non-owners. Through the management of resources, owners can shape the lives of countless citizens. This is potentially as much an exercise of arbitrary power, as the arbitrary power of political rulers (tyrants and dictators). Should it also be turned into a normative power, by being subjected to effective demands of representation by citizens?

In the liberal-democratic model, the only way to ensure that ownership power is not exercised arbitrarily, is by subjecting it to regulation (see the left-hand side of Figure 1).<sup>3</sup> Non-owners are deemed to mobilize their representative relation to political rulers (the state) to press their demands. Owners can do the same. The democratic state then arbitrates these demands and formulates the public interest in question. Where non-owners' claims against owners are deemed to outweigh owners' claims, the state regulates the owners' exercise of their property rights. For example, states subject owners to taxation laws, laws enabling expropriation, regulations of access (e.g., to the beach), zoning laws, intellectual property rights law, etc. These measures impose duties on owners to take the interests of non-owners into account. In the liberal-democratic model, owners have these duties to the state, which acts on behalf of the non-owners. The latter are not themselves representatives. Representation of non-owners' interests hence happens indirectly, via the state.<sup>4</sup> Kantian property theory is an example of this model, where an omnilateral will represents the interests of all, and property is regulated by the state through the omnilateral will (Kant, 1996; Ripstein, 2017).<sup>5</sup> Arguably, however, the support for this division of labor between public and private actors is much broader, and philosophically deeply baked into liberalism.<sup>6</sup>

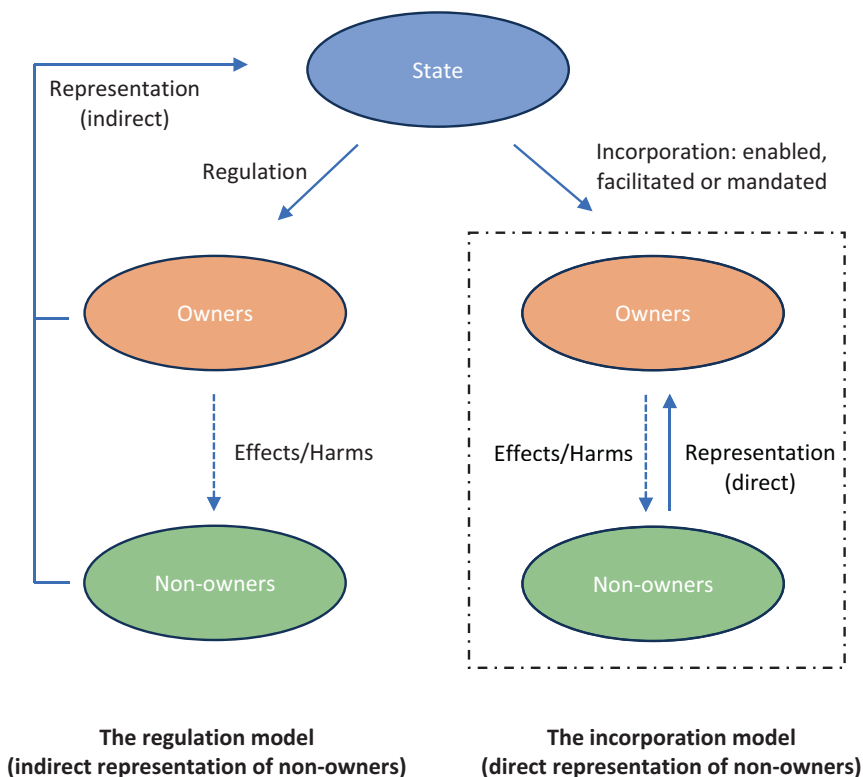


FIGURE 1 Two models of non-owner representation.

The regulation model is only *one* of two ways of dealing with the problem of ownership power. This paper wants to highlight an alternative, which I will call the incorporation model. This model is equally legitimate from the point of view of liberal-democratic theory's basic assumptions about the legitimacy of power, as stated above, since it only requires *that* power must be subjected to a demand of representation but should be flexible as to *how* this must be done. Now my argument in the following is not that the incorporation model should replace the regulation model, but that it should supplement it, enhancing the toolkit of liberal-democratic theory and practice.

To motivate this project, we need to remind ourselves of the shortcomings of the regulation model. Waheed Hussain, in his recent investigation of the legitimacy of the market mechanism in liberal democracies, highlights several shortcomings of state regulation (Hussain, 2023, pp. 124–133). One shortcoming is epistemic: regulators often have great difficulty knowing what happens on the ground. They are put at an epistemic distance with respect to the production processes and actors they are deemed to regulate. Collecting and processing information is costly and time-consuming. The regulatees can make strategic use of this distance, and actively withhold information for the regulators. A second shortcoming has to do with the pace of innovation in markets. Regulators always lag behind the latest developments and their regulatory frameworks therefore do not cover the newest production processes and techniques. Moreover, regulatees can respond to regulations by exploiting loopholes which then take precious time to close, after which the cat-and-mouse game enters a new cycle. Both of these shortcomings are located at the “regulation” arrow in Figure 1.

Hussain mentions a third shortcoming, which he refers to as “obstacles to political mobilization” (ibid., p. 128). Ordinary citizens often have great difficulties in influencing political actors and building coalitions to change state policies in their interests. This shortcoming is located at the “representation” arrow in Figure 1. But this problem should be seen in conjunction with another problem, that is, state capture. In his recent discussion of state capture, Samuel Bagg argues on the basis of a wealth of empirical literature that concentrated private interests are able to set political agendas to favor their own interests, to the detriment of more dispersed, poorer constituencies. In its most extreme manifestations, this leads to corruption and the establishment of façade-democracies which are better characterized as oligarchies (Bagg, 2024, pp. 83–88). Hence it is not only that wider groups of citizens (or non-owners) face obstacles in organizing collective action but also that elites (owners of concentrated wealth) actively hinder this, through their privileged access to the state's regulatory capacity.

Given these shortcomings in regulating ownership power indirectly, via the state, it seems that there will always be a “regulation gap,” a residue of untamed ownership powers, exercised arbitrarily over non-owners without effective normative control through state regulation.<sup>7</sup> The incorporation model provides an alternative which can fill this gap. Its basic idea is that the relation of representation between affected non-owners and owners can also be organized directly, at the level of the exercise of ownership rights. In this model, owners become representatives, rulers subject to demands of representation vis-à-vis non-owners. The dynamic of decision-making (about how to use certain assets/resources) and accountability for these decisions, then takes place at a “lower” level. The role of the state is here more in the background. It can enable, facilitate or mandate such a representative structure; but it doesn't itself formulate the substantive duties to which owners' decisions become subject, as it would when it regulates (see the right-hand side of Figure 1).

The attractions of the incorporation model are the flip side of the shortcomings of the regulation model. Since owners are more aware of relevant information than external bodies (such

as state agencies) the problem of epistemic distance is largely absent. The problem of temporal lag between innovation and regulation is also absent when representation is built into the owners' decisions directly; for owners must take into account the repercussions on non-owners at the same time when they decide to introduce innovations. Finally, one would expect collective action by non-owners to be easier when they get direct standing vis-à-vis owners, since their interests are then less dispersed. If representation works well at the level of ownership, then it would even turn the owner into a true representative of the non-owners' interests, hence change the owners' self-centered motivation and identity, which leads to state capture under the regulation model.<sup>8</sup>

Of course, representation at the level of ownership may also have shortcomings of its own. The aim of this paper is therefore *not* to show that the incorporation model is superior to the regulation model. Rather the aim is to question the current state of liberal-democratic property theory, with its exclusive reliance on the regulation model, and offer a picture in which both models are equally plausible from point of view of the demand for representation that is at the heart of the liberal-democratic tradition.<sup>9</sup> If my argument is successful, then representation at the level of ownership gains the same intuitive appeal as provincial or municipal democracy, or democratic elections for fire brigades or water boards. The fact that the state is organized democratically, does not take away the soundness of also organizing representation relations at these lower-level organizations that rule particular geographical areas or execute certain functional tasks. In the private realm, where owners accumulate vast powers over non-owners, a similar logic may apply. Both models can supplement each other so that the current representation gap resulting from regulatory failures is filled.

### 3 | THE REPRESENTATION IMPERATIVE: IDENTIFYING THE RELEVANT INTERESTS OF NON-OWNERS

To develop the case for including the incorporation model in a theory of representation, I proceed in three steps. The first step, in this section, is a determination of which non-owner interests ought to be represented. This step is common to the regulation model and the incorporation model: for the operation of both models a determination of relevant non-owner interests is needed. The next two steps (in Sections 4 and 5) will be particular to the incorporation model.

For this first step, it is helpful to apply the theoretical tools developed in the context of discussions of the boundary problem. Normally the boundary problem refers to the problematic legitimation of the state. The state can only be legitimately authorized by its citizens, but prior to the act of authorization, how to non-arbitrarily determine who should belong to the authorizing citizenry? Pointing to the actual citizen body on a given territory at a given point in time seems arbitrary, since this excludes outsiders (refugees, animals, future generations, etc.) who however may be coerced, subjected or affected by state actions without having had a say. We need a more principled determination about who should be included (Näsström, 2007; Whelan, 1983). The property-theoretic analogue to the boundary problem is: which non-owners interests need inclusion (either indirectly, through the regulation model, or directly, through the incorporation model)? To answer this question, we now need to apply one of the alternative principles from the boundary problem literature: the all-coerced, all-subjected, and all-affected principles (Abizadeh, 2012; Goodin, 2007; Näsström, 2011). The all-affected principle has been favored by many on the grounds that the other two principles have problematically

underinclusive tendencies. This was argued recently by Philipp Stehr in a plea for adopting the all-affected principle with respect to decision-making in business corporations. While only workers are subjected, suppliers, future generations, consumers, etc. may be relevantly affected by the decisions of corporate owners (Stehr, 2022). I agree, and propose that this is true for property generally, not just for property held in business corporations. Let's define the *representation imperative* for property as follows: if and to the extent that an owner gives property a purpose which structurally affects the interests of others, they have a claim to have their interests represented. Instead of the old rallying cry “no taxation without representation,” we would arrive at “no property without representation,” or more precisely: “no property without a test for checking whether representation of non-owner interests is necessary.”

Under such an imperative, a lot of property will not have important effects on non-owning others. As the formulation of “a test for checking” makes clear, we are not envisaging a situation in which each and every exercise of a property right becomes subject to a demand to include representation mechanisms towards non-owners. This raises the question where to put the boundary line. The wording of the representation imperative above, with its reference to “structurally” affecting the interests of non-owners, is meant to exclude incidental and trivial effects on others. Intuitively, many consumption items, from furniture to food, from pots and pans to pencils, would be exempted, while property in the means of production would be the main target. This is also the dividing line that theorists have often taken—think of Rawls' restriction of the right to property under his first principle of justice to “personal property” (Rawls, 1999, p. 53).<sup>10</sup> We can indeed take this as a heuristic, but we should remember that on principle, this dividing line is too coarse grained. A rich person using their private jet in acts of consumption may structurally affect the neighbors' opportunities for undisturbed living, causing severe nuisance. Some means of production (think of the carpenter's tools) won't structurally affect the lives of others.

Rather than a distinction between types of property which draws the boundary in the ontology of goods, then, a normative theory would be needed to spell out which non-owner interests are so weighty that when they are “structurally affected” a requirement for representation would kick in. This is not just a feature of the incorporation model defended in this paper, but it also applies to the familiar theories of regulation—both types of representation need such a normative theory. In the context of regulation, for example, economic theories of market failure have often been called upon to fulfill this function. They draw attention to certain problems (externalities, information problems) which would justify regulation. Other normative theories (focusing on justice, or exploitation) can draw wider or narrower boundaries. I will not here venture into this rich terrain, since whatever theory is used, it can be plugged in at this point in the argument. The contribution here is to argue that whenever such a successful normative argument applies, we have two options for representation—regulation and incorporation—not just one.

Whichever normative theory is used, it would have to be applied on a case-by-case basis to particular ownership structures. Without doing this full analysis, it is not hard to identify some “usual suspects,” that is, groups that will often be implicated as affected in the exercise of ownership rights, especially in the context of production. Workers are often exploited, despite formal protections of the labor contract. They may accept working hours and wages under duress, given their precarious bargaining position vis-à-vis the owners of the means of production (Anderson, 2017). Where owners exploit natural resources without adequate compensation, they affect the lives of peoples depending on these resources; from local communities suffering from pollution to future generations affected by climate change (Wright & Nyberg, 2015).



Consumers will also sometimes be a structurally affected group, especially where the products they buy harm them, for example by making them addicted (Akerlof & Shiller, 2015), or when they depend on producers for necessities such as life-saving drugs. Each of these—and sometimes other—groups could become the subject of a representative claim towards owners.

Note that the application of the boundary problem here implies a rejection of state socialism. In discussions of the political boundary problem, some argue for accepting current national boundaries, and then ask about the inclusion of constituencies one by one for different decisions (or decision areas). But others want to have a global demos make the decisions about state boundaries at the first stage (Agné, 2010; Bartelson, 2008). Applied to property, this latter strategy would mean that the state decides the purposes for which all property is used (central planning), canceling the idea of private property altogether. The theory of representation developed here takes the first strategy. It can accept that the state sets apart under a regime of public property any assets that it deems best owned publicly. The theory is agnostic as to the size of this publicly owned domain relative to all resources in the economy. But it applies the all-affected principle to all other assets, held privately.<sup>11</sup> For these assets private owners get the *right to private initiative*: to set a purpose for the objects of their property rights. For different types of use, different sets of people will be affected by the owner's use of their goods. The application of the all-affected principle accepts these purposes set by private owners, and then seeks to identify the non-owners affected, given these purposes.

Finally, note that the representation imperative by itself doesn't yet dictate whether representation should take place through the regulation model or the incorporation model. Consider David Owen's objection to the all-affected problem. In his view, being affected does not establish a right to become a full member of the polity; it only requires "impartial treatment" of one's interests. This right could also be guaranteed when there is a "form of legal governance" in place that requires the affecter to exercise "impartial governance" towards the affected. He specifies: "This could be accomplished through the subjection of the polity to either a legal order or to a second-order polity which has the authority to regulate the actions and choices of the first-order polity in order to secure the impartial treatment of the legitimate interests of all affected." (Owen, 2012, p. 137; similarly Saunders, 2011, p. 290). The analogy to the property problem is striking. Under Owen's arrangement, the second-order polity (e.g., an International Public Organization with coercive powers) enforces representation of the affected in the legal order of the nation-state, just as—in the regulation model—the nation-state represents non-owners by regulating owners' behavior. In both cases this is an alternative to direct representation; in Owen's example for the political context, inclusion as member of the nation-state; in the property context, inclusion of non-owners through incorporation at the level of ownership.

Objections such as Owen's, however, do not provide a reason for rejecting the all-affected principle as a principle for the identification of relevant interests. They merely warn us to keep an open eye to what the best way is to organize the representation of these interests. In some cases, the interests of affected third parties are best dealt with through state regulation of owners' activities, while in other cases the representative burden is best discharged at the level of ownership itself. How much of each model is appropriate is a complicated question, which needs an answer finetuned to various types and objects of property. It is unlikely, however, that state regulation will always perfectly promote the legitimate interests of non-owners. To the extent that it does not, and a regulation gap ensues (see Section 2), the incorporation model becomes attractive.

## 4 | THE INCORPORATION IMPERATIVE

What does the representation imperative require in practice? In the previous section, I defined it as a claim by non-owners imposed on owners. This can be understood as a moral claim. But when the affecting is structural and severe, a legal regime enforcing the claim will be necessary. What would that imply?

Here too, let's start from representation theory for the political sphere. As Mónica Brito Vieira and David Runciman argue, the concept of representation is closely linked to the concept of a corporation: "It was only when the concept of representation was brought together with another legal idea, that of the corporation, that its political potential began to be realized." (Brito Vieira & Runciman, 2008, p. 10).<sup>12</sup> A set of persons chooses a common representative when they want to form a polity. A representative structure creates a community. These representative communities since the Middle Ages were often referred to as a corporation (*universitas*). For individuals to become a political group is to incorporate, to become a unity in one corporate body. This body was sometimes referred to as a "fictive person" (*persona ficta*) or "representative person" (*persona repraesentata*), that was accepted as a person in law to act on behalf of its members. The concept of the corporate legal person was first used in relation to collectivities such as guilds, universities, towns and monastic orders, but soon came to be used for states (commonwealths) as well (Ciepley, 2017; Tierney, 1982). The acts of representation of the body politic by the governing person or board within the corporation, are the glue that holds such corporations together.<sup>13</sup>

In the property context, the representation imperative implies that when relevant non-owners are structurally affected by an owner's power, and regulation cannot sufficiently protect their interests, then an incorporated structure should be created for these property-holdings, through which non-owners' interests are represented. Call this the *incorporation imperative*. For example, when a billionaire would affect the lives of countless others (as does Bill Gates when using his wealth to cure diseases) these others would deserve representation. Bill Gates would have to set up an incorporated structure, such as a non-profit foundation or a business corporation, whose rulers (officials, such as directors) have the duty to represent their interests. In the following, I will work with this notion of incorporation, which implies a formal legal structure. However, we can imagine that for some cases a lighter, informal form of representation would do. For example, individual landowners consulting on a regular basis with neighbors can "incorporate" their interests where relevant, without this leading to the creation of a formal legal structure of incorporation between them.<sup>14</sup> Incorporation in the end is about the substantial process of interest representation, whether or not set apart in a legal form.<sup>15</sup>

A prescription of enforced incorporation may seem a highly provocative consequence of the theory of representation developed here.<sup>16</sup> However, this is less of a revolutionary consequence in practice than one might think, given the fact that formal legal incorporation is already standard practice in the economy. Bill and Melinda Gates have *already* set up the Bill and Melinda Gates Foundation for this purpose. Almost all exercises of property rights that structurally affect the lives of non-owners already happen through incorporated structures: states and other public organizations, foundations, associations, trusts or business corporations. Hence this wealth is already subject to a representative structure.<sup>17</sup> The real normative problem—from the perspective of the representation imperative—is that these structures are often only *imperfectly* representative of the interests of non-owners.

Take a charitable foundation. A founder (A) authorizes an officer (B) to represent the foundation (fictive person, C), for the purpose of benefiting a (set of) beneficiaries (D). Or take a



business corporation, in which a set of shareholders (A) authorize a board of directors (B) to represent the corporation (fictive person C), so as to make profits. Here too third parties (D) exist such as workers, consumers, the environment and many other “stakeholders” affected by corporate power. In both these cases, the affected parties (D)—in most jurisdictions today around the world—do not have a voice in the representative structure. Note that in these structures, the corporate entity (the fictive person) itself becomes the owner of the assets. The former owner is now either the founder who has given away their money or a shareholder who gets shareholding rights. The officials (directors) are not owners but “asset managers,” managing their property on behalf of the shareholders (business corporation) or of the purpose set by the founder in the charter (charitable foundation) (Ciepley, 2020). The representation structures serve their interests, and their interests alone. This explains why Bill and Melinda Gates (and other wealthy individuals) readily use incorporation. It is an extension of their power. It *better* serves their interests than leaving their wealth unincorporated.

In *The Code of Capital* Katharina Pistor explains how assets are coded by law, i.e. given certain attributes which extend the claims of their holders and protect them against others. How and for whose benefits these assets are coded, are core questions for the “political economy of capitalism.” (Pistor, 2019, p. 4) In a chapter on land, she describes how the pre-industrial economy in the UK was revolutionized through the enclosure movement. One of the key legal inventions to protect the assets of landowners was the trust. The trust helped landowners to shield these assets from creditors, and remains a “favorite legal coding device among the wealthy who wish to protect their assets from tax authorities and other creditors” (Pistor, 2019, p. 43).<sup>18</sup> Similarly, in a chapter on business corporations, Pistor describes how these are wealth-shielding devices for shareholders: the use of the legal corporate form “can be turned into a capital minting operation by employing the ability to partition assets and shield them behind a chain of corporate veils to access low-cost debt finance, and to engage in tax and regulatory arbitrage.” (Pistor, 2019, p. 48).<sup>19</sup>

Differential access to these legal structures (via hiring legal expertise) allows the wealthy to profit, at the expense of the interests of third parties. Representative property structures at first sight may seem to make concentrations of wealth accountable to a larger group of people (in the same way that public offices are meant to make political power accountable to the population). But the officials in charge are being charged with taking care of the interests of a *particular* set of persons. Former owners initiate these structures for their own interests and can use them as shells to evade taxation and liability. This reality accounts for the widespread adoption of incorporated structures. These representative property structures are best seen as the extension of the ownership power of the “ultimate beneficiary owners” (shareholders or donors).<sup>20</sup>

What form of incorporation structure is most apt to protect all affected interests will of course depend on the purpose to which assets are being put to use, and the range of interests thereby affected. Business corporations and foundations were mentioned as important applications above. There are variations of each of these more strongly embodying a concern for non-owners. For example, in the context of business corporations, there are social enterprises which are incorporated under “Benefit Corporation” laws, which allow directors to consider non-stockholder interests through so-called “constituency statutes” (Alexander, 2018a, 135ff). Alternatively, standard business corporations could be mandated to provide voting rights to other parties than shareholders (see also Section 5). In the non-profit context, a relatively recent innovation is to go “beyond human ownership” (Sanders, 2018) and incorporate natural areas (such as rivers, or mountains), to protect the interests of nature itself. A board of trustees is then charged with protecting these interests. In practice this requires balancing the interests of

various groups, such as indigenous peoples but also the national government. In the context of housing, Community Land Trusts provide shared ownership of homes, and give governance rights to home owners, but also to the local communities in which CLT's are embedded and to municipality officials (Moore & McKee, 2012). These and other forms of incorporation (see also Section 6) are examples of structures aiming to give representation to various non-owner interests.

In these examples, we already see various types of distribution of power between non-owners and owners. Considering this more systematically will be third and final step to take in the elaboration of the incorporation model.

## 5 | THE POWER-SHARING IMPERATIVE: EMPOWERING NON-OWNERS

The definition of representation adopted in Section 2 highlights that representation only becomes *democratic* representation when people have the means to hold their representers to account. This is true for ownership power as much as for political power. Mechanisms of accountability (such as elections) empower non-owners. Without this, they are at the mercy of their representers (owners). How should power be distributed between owners and non-owners?

With this question, we enter the field of another classic problem of representation theory, which Hannah Pitkin called the “mandate independence controversy.” (Pitkin, 1967, p. 145). Representation can follow a trustee model or a delegate model. Trustees follow their own judgment when deciding what is in the best interests of their constituencies, they operate on a model of independence. Delegates closely track the mandate as it has been given by their constituencies, hence they operate on a model of responsiveness to expressed preferences. They do not second-guess what is in their constituencies' interests, but just follow their explicit guidance, as an agent. In trustee-representation, the constituencies largely remain passive, while in delegate-representation they take a more active stance, exercising oversight over the delegate's work. The trustee model has somewhat autocratic overtones. The representer is subject to a moral obligation to act on behalf of the represented, but in practical terms, their hands are free, since no mechanisms of accountability are in place. The delegate model is more democratic, in giving powers of control to the represented. We can think of these as the two extremes of a spectrum of positions with respect to the balance of power between representers and the represented.

Applying this spectrum to property, we find at the trustee end of the spectrum that non-owners can only resort to *moral persuasion* to have their interests represented. This can be a powerful tool in situations where owners are receptive to moral signaling or to pressure mounted in the public sphere, for example because they care about their reputation in a context of market competition. But in all other situations, non-owners will lack real power when their claim is merely a moral one. At the delegate end of the spectrum, there is a cluster of options for legally mandating *control rights* for affected non-owners. Owners can be required to release information (disclosure requirements) or to take into account advice (consultation requirements) from affected parties. Even more control for these parties would mean to grant them voting rights in the incorporated structure. The best-known example of this is the German system of co-determination, where workers get voting rights in larger companies roughly if not completely on a par with shareholders (Ferrerias, 2017, pp. 48–53). Proposals for workplace

democracy hence can be a consequence of the application of the incorporation model; although it should be reminded that the latter is not in principle restricted to workers but considers a wider range of affected parties as those to be represented in corporate decision-making, depending on the purposes to which property is set to work in a specific corporate context.<sup>21</sup>

How to choose a position on this spectrum? At the extremes, according to Pitkin herself, the models aren't properly forms of representation any longer. An extreme delegate position would make representation superfluous; the delegate could just as well do the work herself. A pure trustee position cuts the trustee loose from her constituency, she becomes an unaccountable autocrat (Pitkin, 1967, p. 166). The delegate model is more democratic, but more control isn't necessarily always better. Control takes time and effort for citizens who must do this work. Trust may be cheaper. And too much control may lead to a decline in trust and hinder the ability of the elected to do their work (Castiglione & Warren, 2019, pp. 29–30). A distribution of power where representatives have some but limited independence may therefore be best.

This suggests a *power-sharing imperative*: the representation structure should search for a balance between independence in decision-making (for representers) and opportunities for control (by the represented), such that the balance of interests of all (owners and affected non-owners) is best realized. To get our heads around this abstract task, consider the economic literature. It discusses this problem in terms of the optimal relation between principals and agents. Traditionally, agency-theorists have argued that principals (the represented) face agency costs because their agents (the representers) have an incentive to behave opportunistically (Fama, 1980; Lan & Heracleous, 2010). This militates in favor of disciplining agents by empowering principals (i.e., moving towards a delegate position). But recently Goshen and Squire have argued that agency theory provides only half of the picture. There are also “principal costs.” These are the costs involved when principals acquire control rights. They mention “competence costs” (when principals are insufficiently competent) and “conflict costs” (when principals disagree between themselves).<sup>22</sup> An optimal governance structure minimizes overall agency plus principal costs. It balances, for every given situation, the risks of incompetence and conflict on the agency side against those on the principal side (Goshen & Squire, 2017).

I take this as an example of the kind of analysis that would serve the property theory advocated here. Perhaps other costs and benefits would have to be included as well. The important point is that some kind of power-sharing calculus is needed, that is fully inclusive of the interests of affected parties (respecting the representation imperative), but a priori agnostic as to where on the trustee/delegate spectrum to pinpoint the optimal representation structure. It all depends on the costs and benefits, which in turn depend on the nature and identity of the property and parties involved. For example, a representational regime for future generations in oil companies will have a different shape from a representational regime for malaria patients in the Bill and Melinda Gates Foundation. And each of these may be different from the best regime for workers of either oil companies or charitable foundations.

With this third step, I have concluded the three steps outlining the incorporation model. Let's now move to consider an objection.

## 6 | REDISTRIBUTION OR REPRESENTATION?

If unaccountable ownership powers are a problem, one may wonder why the answer should not be to redistribute ownership rights. Why bother with representative structures if, through the tax-and-transfer system, everyone can get a claim on society's wealth? From an egalitarian

perspective, the best protection of non-owners is to *make* them into owners. Structural wealth (p)redistribution is necessary, perhaps along the lines of proposals for property-owning democracy (O'Neill & Williamson, 2012; Thomas, 2017). This makes such property available to all—where each person's exact ownership claim may vary depending on one's specific theory of distributive justice.

In response to this objection, I would emphasize two points. First, many problems with affected interests are not best resolved through redistribution. Our economies have moved from the eighteenth-century economy of self-employed farmers, in line with Adam Smith's ideal of independent proprietors, to an industrial economy, in which large firms arose as a consequence of economies of scale and independent workers became wage workers (Anderson, 2017, pp. 29–36, 48–51). The emergence of large firms, where ownership is pooled under a centralized command structure, cannot be undone, hence the question arises how to make decisions over these corporate structures accountable. For example, the fact that big tech platforms can undermine (intentionally or not) democratic processes by spreading misinformation, points to exploitative uses of their assets. But this problem must be resolved on the platform itself. This is a matter of ensuring their directors (representers of the incorporated structure) make decisions which take non-owner interests into account. Affected parties in these cases do not need ownership but effective control. Wealth redistribution on the individual level through tax-and-transfers, and representative rights for affected parties in corporate property structures can be complementary parts of an egalitarian program. The point is that redistribution alone is not enough.

A second answer to the egalitarian challenge is that redistribution and representation can—instead of being complementary solutions to ownership power—also be merged. This happens in proposals for spreading share ownership amongst citizens. In the previous section, I focused on control rights, but affected parties can also get *economic rights* within the incorporated structure. These are rights to gain an income when profits are made (dividends) and to profit from capital gains when selling their shares. This effectively makes non-owners into owners.<sup>23</sup> Roemer's coupon socialism is an older version of this (Roemer, 1994) but recently these proposals have made a comeback, as plans for “citizens' trusts” (O'Neill & White, 2019), “public stock ownership” (Corneo, 2018), or a “universal citizen fund” (Stout et al., 2019). All these plans redistribute the economic rights to corporate production to the whole citizen body. We could also imagine similar proposals targeted at more specific affected parties, instead of all citizens, as in proposals for the “commons” (Dagan & Heller, 2001) or “group ownership” (Al Salman, 2022).

This also clarifies the relation between the position defended here, and socialism. In Section 2, I presented my proposal as an extension of liberal-democratic theory. In Section 3, I pointed out that state-based socialism—socializing property at the *state* level—is incompatible with the theory espoused here. But here we see how certain proposals to socialize property at the *corporate/group* level are compatible with the theory. They are one institutional option amongst others, to instantiate the (liberal-democratic) idea of bringing property under the control of those affected by it.

## 7 | THE RELATION BETWEEN THE REGULATION AND INCORPORATION MODELS

So far, I have argued the regulation and the incorporation model should be seen as supplementary. Now that we have a better view of the incorporation model, I want to end by making three

further remarks about the relation between both models, by way of an agenda for further research.

First, one may be skeptical about the prospects for introducing the incorporation model, at least in those situations where regulatory failure is caused by state capture (Section 2). For if owners of concentrated wealth are able to block attempts at regulation, won't they just as much block attempts at enforcing incorporation? One need only note that reforming corporate governance in more democratic directions has proven as hard as regulating (which includes taxing) wealth. I acknowledge state capture is also a problem for implementing an incorporation model. Still, it does not undermine the rationale for the addition of the incorporation model to liberal-democratic theory. First, the incorporation model remains valuable to the extent that regulatory failures go back to the epistemic and time-lag problems mentioned earlier, not to state capture. Second, in contexts of widespread state capture, the incorporation model can also be introduced without mandatory state action, as long as the state recognizes the relevant legal models as valid forms of action. In those cases, voluntary initiatives from pro-socially oriented owners, or social pressures from non-owners, can still lead to the adoption of democratic forms of incorporated ownership.

Second, in this paper, I have presented the incorporation model as filling the gaps of the regulation model, that is, as a supplementation where regulation fails. But one can also imagine that incorporation can replace regulation, where it is relatively more efficient or attractive. While I have presented the incorporation model as (merely) residual, we can (also) understand the representation work done by the two models as communicating vessels. In particular, more democratic representation at the level of ownership could relieve pressures on state regulation. This would raise complicated questions about how to determine the optimal relation between both models. This leads to similar questions as those confronting designers of federal systems, where they think about whether to put certain powers in the hands of states or the federal level.

Third, the picture of communicating vessels may suggest that the two models would “divide the normative work” but would not interact with each other. But this is unlikely to be the case in practice. One can imagine negative and positive interactions. On the negative side, one can think of the competence battles between different levels familiar from federal systems. But let me emphasize the positive potential as well. When owners (i.e., the boards of incorporated structures) have to operate as representatives for non-owners, this could incentivize them to work with the spirit of state regulation, as opposed to evading regulation, or restricting themselves to merely formal compliance with the letter, but not the spirit of regulation. If so, the introduction of both models could create important synergies, working in tandem to better anchor the interests of non-owners. Representatives under one model would be able to signal or pick up the slack where representatives under the other model fail (in the same way that three branches of government are to complement and counterbalance each other).

These remarks hopefully help to stimulate further reflection on how property rights can interact with representation, and hence how property theory and democratic theory can be more fruitfully connected.

## 8 | CONCLUSION

Representation has proven essential in thinking about how to tame exercises of arbitrary power in politics. Liberal-democratic theory and practice is built upon the belief that arbitrary political

power needs to be held to account, by converting rulers into representatives of their citizens. In this paper, I have argued representation is equally important for thinking about the power of owners. Prevailing liberal-democratic theory and practice relies on state regulation to tame ownership power. However, property can also be subject to representative structures, when—like political power—it becomes incorporated. It then becomes managed for a purpose.

The practical upshot of the paper becomes clear once we realize that in modern economies a lot of wealth is already held in incorporated legal structures. These are representative, but accountable only to their beneficial owners (in for-profit corporations) or their donors (in non-profit foundations and trusts). A representation lens suggests that these legal structures are currently insufficiently representative, since in many cases the actions undertaken with these assets structurally affect other parties, and regulation is insufficiently able to compensate for this. Binding the power of owners to direct—in addition to indirect—forms of representation towards non-owners can then be a strategy to which liberal democrats should feel attracted. It provides a strategy to accomplish their mission in the private sphere, that is, to hold all arbitrary forms of power to account.

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The authors declare no conflicts of interest.

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### ENDNOTES

- <sup>1</sup> I use the category of liberal-democratic thought here in a deliberately broad sense, encompassing the traditions of classical and high/egalitarian liberalism. Hence this encompasses various ideas about the scope of restrictions on property as well as the normative justifications for private property (see Freeman, 2011, pp. 31–35).
- <sup>2</sup> For a good exposition of this power, see (Dagan, 2021, pp. 60–62), with reference to Cohen's classic statement of property as a form of sovereignty over others (Cohen, 1927).
- <sup>3</sup> One may object: what about redistribution? I postpone this issue to Section 6.
- <sup>4</sup> The historical background for this focus on state regulation is in liberalism's commitment to a clear separation between a private sphere (based on property) and a public sphere (based on political office), as Blaufarb explains (Blaufarb, 2016). Liberalism pitched itself explicitly against the feudal order, in which (land) owners' (lords) did have duties to those subjected to them on their lands (Grey, 1980). By relieving owners from these



duties, all the weight to regulate owners came to rest on the shoulders of the state. Ownership itself then becomes an absolutist power. This is sometimes referred to as the ‘classical liberal’ conception of property, expressed in the famous words of the 17th century lawyer William Blackstone’s as a “sole and despotic dominium.” (Blackstone, 2016, p. 1). Lawyers trace the breakthrough of this concept to its adoption in the Napoleonic Civil Code, which described property as “the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes.” (Di Robilant, 2023, p. 141). But as this quote shows, this conception ascribes an absolute (i.e., discretionary, arbitrary) command over things to owners *within the limits imposed by state regulation*. Such an absolutist concept is hence not just at the heart of classical liberal theories of property and justice, but shared by egalitarians as well (Di Robilant, 2023, p. 29; Olsen, 2021, p. 127)—the latter just favor a (much) more expansive regulatory agenda.

<sup>5</sup> Ripstein’s paper provides a particularly clear illustration of the liberal position, explicitly counterposing it against what he refers to as a stewardship model of ownership. In some other property theories, (limited) room is created to diverge from state regulation and ascribe positive obligations to owners (see e.g., Alexander, 2018b, pp. 39–73; Dagan, 2021, pp. 139–142). These theories move in the same direction as the position defended here.

<sup>6</sup> For an instructive discussion of the “Rawlsian framework” in this respect (see Dagan & Dorfman, 2018). See also Hussain’s book, discussed hereafter.

<sup>7</sup> As Paul Babie argues: “recognizing the place of regulation within the concept of private property is not to say that a system achieves perfect symmetry. Comparing the legal protection of choice to regulation always yields a surplus of individual choice and a deficit of regulation.” (Babie, 2017, p. 139). See for a further analysis of this asymmetry (Robé, 2020). Jeffrey Winters argues that in liberal-democratic regimes, the wealthy are—through the protection of property rights—even more secure in their wealth than in non-liberal regimes (Winters, 2011).

<sup>8</sup> My call for looking at non-state forms of representation in the context of property, has affinities with similar calls in constructivist theories of representation (see e.g., Disch, 2019; Saward, 2010, pp. 98–101). Along these lines, the acts of representation under the incorporation model would have the potential to re-construct and co-construct the identity/interests of both the representer (owner) and the represented (non-owners). I thank one of the reviewers for this suggestion.

<sup>9</sup> In this paper I stay within the confines of this broad category of liberalism. However, I think the argument could *mutatis mutandis* also be supported by republican political theory, by theorizing arbitrary ownership power as a form of domination. By contrast, my argument is not compatible with libertarian views, since they have no (or only a minimal) aspiration to tame ownership power. Finally, how the argument relates to socialism I briefly discuss in Section 3 and at the end of Section 6.

<sup>10</sup> For a theory of the means of production, see Edmundson (2020).

<sup>11</sup> This can be contrasted with the “deep public ownership” theory proposed by Nili (2019).

<sup>12</sup> They trace the theorization of representation in Hobbes and Locke (pp. 29–32) but argue that Rousseau understands politics *without* representation (pp. 32–34). However, here I think they underestimate Rousseau’s debt to Hobbes—Rousseau too accepts Hobbes’ deeper sense in which all politics is representative (Tuck, 2015, p. 137). On Hobbes, and the link between representation and corporations more generally, see my (Claassen, 2021a).

<sup>13</sup> Interestingly, the development of an abstract notion of corporate legal personality happened around the notion of the management of corporate property (the so-called *fiscus* for the state, the *christus* for the church). This was crucial in the development away from arbitrary, absolutist rule, towards rule bound to the wishes of the people (North et al., 2009, pp. 67–69, 158–166).

<sup>14</sup> In the environmentalist context, property lawyers talk about landowners as “stewards.” See Yannacone (1978) and Lees (2019).

<sup>15</sup> My theory at this point derives inspiration from legal theories describing property as an office. See Katz (2017) and Essert (2013).

- <sup>16</sup> One can imagine that there are cases where there is a structural affecting of non-owners, but the weight (value) of the effect is trivial. I leave underspecified what the threshold is where the theory's prescription would kick in.
- <sup>17</sup> Individual household wealth may seem to be an exception to my claim that all other-affecting property is already incorporated. But (i) to the extent that it is reinvested in financial assets it is incorporated in corporations; (ii) to the extent it is held in cash or bank savings, it doesn't structurally affect anyone (yet); similarly for consumptive goods. The only exception seems to be housing; real estate wealth is a major part of overall wealth, and the effects of inequalities in this market on others can be significant. Applying the representation imperative would require enforced incorporation for housing where it has these effects. Thinking through this consequence I have to leave for another day.
- <sup>18</sup> Trusts are technically non-incorporated structures. However, they are representative, fiduciary structures, where the trustee acts on behalf of beneficiaries. The difference in practice are often small: the function and features of the trust mimics that of corporations (Morley, 2016).
- <sup>19</sup> For further arguments about how the structure of business corporations externalizes costs to non-shareholders, see Mayer (2013), Ciepley (2013) and Robé (2011).
- <sup>20</sup> Some have feared that making owners into representers of non-owners' interests means moving back to feudalism. See Grey (1980, pp. 73–74). Legal scholars criticizing Katz and Essert (see note 15 above) have characterized the idea of office as amounting to bringing 'premodern' or 'feudal' property forms back in. See Ripstein (2017, p. 254) and Penner (2020, p. 312). However, the diagnosis suggested here is diametrically opposed to those who fear such a return. If anything, we should not have less representative property, but more. Or rather: the question is not whether to have representative property forms or not; on most occasion, wealth is already incorporated. The question is who profits from these legal forms. For my own account about the link between property and (neo-)feudalism, see (Claassen, 2021b).
- <sup>21</sup> Some argue workers have a special position in the firm, compared to other stakeholders, which would justify restricting representation to them (in addition to shareholders) (Ellerman, 2020; Ferreras, 2023). Others argue in favor of a wider set of constituencies to be represented in corporate decision-making (Fleurbay, 2023; Lazonick & Shin, 2020). I here side with the latter. More generally, it may be thought that theories of workplace democracy (Frega et al., 2019) already do what the proposal in this paper argues for, that is, making corporate property into a representative structure. However, beyond the broader focus (on other parties than workers), my proposal is also broader in scope in that it does not just relate to business corporations (firms) but also to non-profits (see the examples above of foundations and trusts). Finally, note that some theories of workplace democracy are based on property theoretic foundations, such as (Gould, 1980, p. 726), but others are rather based on the coercive nature of the employment relation, often in combination with an analogy to the coercive nature of the political relation between governments and citizens (Dahl, 1985; González-Ricoy, 2022; Landmore & Ferreras, 2016).
- <sup>22</sup> The latter are also central to Hansmann's theory of firm ownership (Hansmann, 1996).
- <sup>23</sup> As we have seen, this is a technically incorrect expression when property is incorporated. Shareholders are not owners of the assets of a corporation, since the corporation itself is the owner. Shareholders merely hold specific (legally determined) rights.

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