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For-Profit Managers as Public Fiduciaries: A Neo-Classical Republican Perspective

Rob Atkinson

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FOR-PROFIT MANAGERS AS PUBLIC FIDUCIARIES:  
A NEO-CLASSICAL REPUBLICAN PERSPECTIVE*

ROB ATKINSON**

The Social Responsibility Of Business Is to Increase Its Profits.

—Milton Friedman¹

The enjoyment of property and the direction of industry are considered, in short, to require no social justification, because they are regarded as rights which stand by their own virtue, not functions to be judged by the success with which they contribute to a social purpose.

—R. H. Tawney²

All I have is grace to use it so,  
As ever in my great Task-Master’s eye.

—John Milton³

ABSTRACT

This Article examines the fiduciary duties of for-profit managers in modern liberal society. To arrive at the right “mix” of these duties, it compares the fiduciary duties implied by a standard descriptive model of our society with two competing normative models: Lockean libertarianism on the “right” and neo-

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classical republicanism on the “left.” This comparison shows that all three versions of liberalism, even the one with a Lockean night-watchman state, require far more extensive duties than we now expect, including a professionalization of management itself. And it shows that the version of liberalism with the most expansive state, neo-classical republicanism, requires the most appealing set of for-profit fiduciary duties. More basically, it concludes that what makes this latter set most appealing is that we ourselves are evaluating it from the perspective it recommends for for-profit managers: what is best, by our own best lights, for society as a whole.

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INTRODUCTION: ON BEES AND HIVES (AND BEE-KEEPERS AND HIVE-BUILDERS)

As my three epigraphs suggest, the possible duties of for-profit managers range across a very wide spectrum. The minimalist position, at the right pole of the spectrum, has for-profit managers focus solely on owners' profits. The mediating position insists that for-profit managers see not only profit-making but also private ownership itself as serving public functions to which both owners and managers should properly subordinate their pursuit of profit. The maximalist position, the “neo-classical republicanism” of my
title, has managers see both property and profit as serving the most expansive possible vision of the common good, the advancement of which is the proper task of owners as well as managers.

This Article suggests that we, as students of fiduciary duty, see this last view of managerial duties as also the best. More precisely, this Article suggests not merely that we should see the last as the best but also that we actually do see it that way already. This follows from our own function and the perspective from which we perform our function.

Our analysis of for-profit managers' fiduciary duties will require three basic steps. Part I, Analyzing the Analysis: How Functionalist Analysis Functions, defines the task. With functionalists before Plato and past R. H. Tawney we operate on the sensible premise that form follows function. If we are to know how something works best, we must first understand what it works for. So, if we are to find the proper range of managers' duties, we must, accordingly, determine the proper function of managers themselves. The duties of for-profit managers keep them to their proper task.

But that basic functionalist point presses us to broaden our inquiry further still. To appreciate something's purpose, be it a task or a tool, we must see it as part of a larger system. A glass beverage bottle, found by Neolithic folk, would be a great mystery, perhaps even a grave danger. And so it may prove to be with for-profit enterprise, isolated from the broader society it serves. Traditional warnings about the single-minded pursuit of profit prove, under modern analysis, profoundly prescient, if a bit overprotective. It may well be possible to serve two masters, private profit and the common good, but striking the proper balance may require managers to keep an eye on more than the bottom line. Our seminar's subtitle gives us the proper context for our particular analysis. Its four headings—Ethics, Politics, Economics,

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4. See TAWNEY, supra note 2, at 84 ("The essential thing is that men should fix their minds upon the idea of purpose, and give that idea pre-eminence over all subsidiary issues.").

5. This, you may well remember, is the premise of the comedic film THE GODS MUST BE CRAZY (C.A.T. Films 1980), in which a Coca-Cola bottle carelessly tossed from a jet airliner landed among the indigenous folk of the Kalahari.

6. Matthew 6:24 (King James) ("No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.").
and Law—provide the appropriately broad frame within which to analyze our particular subject.

Part II is The Analysis Proper: The Fiduciary Duties of For-Profit Managers. It examines the range of for-profit managerial duties implied by our three ideal-type liberal societies. Very generally stated, this is what I think we will find. On the one hand, each of our three ideal societies requires a much broader set of managerial duties than those that managers are now generally thought to owe investors. This is because each regime requires a basic commitment to the common good, not just to the private good of owners. On the other hand, the scope of the common good differs in each of the regimes. This difference, in turn, means that managers’ duties will differ across regimes, both in terms of what the duties are and in terms of how—to whom and from whom—they run. Our analysis starts with the regime with the least extensive set of fiduciary duties and moves to the regime with the most; as we find deficiencies in one, we seek to address them in the next. This process will lead us, ultimately, to the set of fiduciary duties implied by neo-classical republicanism.\(^7\)

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7. The modifier “neo-classical” is important; it distinguishes the version of republicanism applied here to business managers from the version of republicanism applied to fiduciary duties more generally in Evan J. Criddle, Liberty in Loyalty: A Republican Theory of Fiduciary Law, 95 Tex. L. Rev. 993 passim (2017). Criddle’s republicanism builds on the work of Phillip Pettit, Quentin Skinner, and others, which focuses on liberty as “non-domination” by power-holders in both public and private law. See id. at 1001-06; see also Samantha Besson & José Luis Martí, Law and Republicanism: Mapping the Issues, in LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 3, 13 (Samantha Besson & José Luis Martí eds., 2009) (“The most popular formulation of republican liberty is Pettit’s ‘freedom as non-domination.’ ”); Cécile Laborde & John Maynor, The Republican Contribution to Contemporary Political Theory, in REPUBLICANISM AND POLITICAL THEORY 1, 2 (Cécile Laborde & John Maynor eds., 2009) (“Pettit’s ideal of non-domination is (which the historian Quentin Skinner prefers to call independence) is central to contemporary republicanism.”). The architects of this version of republicanism are careful to distinguish it from classical republicanism with modifiers like “modern” or “inclusive” or “civic.” See PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 95–96 (1997) (discussing “modern or inclusive brand” as opposed to “traditional”). Republicans of the modern school reject, more or less explicitly, as a form of domination what I take to be the essence of classical republicanism, the notion that any meaningful approximation of individual justice as self-realization will entail the political rule of the wise for the good of all. See PLATO, THE REPUBLIC passim (A. D. Lindsay trans., Everyman’s Library 1992). That is the fundamental sense in which my republicanism is “classical” and theirs is not. To be sure, I join them in rejecting certain aspects of classical republicanism: militarism, patriarchy, and exclusivism. See Rob Atkinson, Reviving the Roman Republic: Remembering the Good Old Cause, 71 Fordham L. Rev. 1187, 1199–1205 (2003). But I see these objectionable elements as adventitious, not essential. Id. In terms of Isaiah Berlin’s classic distinction between “negative” and “positive” liberty, which itself traces back to Constant’s distinction between “the liberty of moderns” and “the liberty of the ancients,” their summum bonum of non-domination is a form of negative liberty, my summum bonum of self-realization is a form of positive liberty. ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY passim.
Explaining why that process leads us there is the task of Part III, *The Meta-Analysis: Fiduciaries of Fiduciary Duty*. Here we must step back from our functional analysis of the fiduciary duties of for-profit managers to examine our own function in that analysis. The very way in which we set these standards in our system, and the way we ourselves have reviewed them together, show us that our own system and our function in it embody the most basic principal of neo-classical republicanism already: seeking the common good, with the help of those who know where to find it, and how. That, we will see, is who we are and what we are doing.

These findings, I'm afraid, will come both as a bit of a surprise and a bit of an embarrassment. The surprise will be that our modern liberal society, once we recognize the fuller range of managerial duties that it implies, is already better than we let ourselves believe it could be. The embarrassment will be that we will see ourselves as very much a part of what makes our society as good as it is. We are the fiduciaries of fiduciary duty, because the eye of Milton's "great Taskmaster" is ours, even as it was his (although, we will have to admit, not necessarily his, much less ours, alone). This embarrassment, in turn, will make for a final surprise, and another embarrassment: our society would be a great deal better still if we could get past our misplaced modesty. We could, I believe, make global capitalism great again. That, indeed, is our fiduciary duty, as academic students of the fiduciary duties of for-profit managers in a modern liberal society.


For present purposes, the importance of these distinctions is this: From "modern" republicanism, Criddle derives a much narrower set of fiduciary duties than the set I derive from my neo-classical republicanism. I note these differences as they occur, below. I do not explicitly argue that modern republican theory could itself support a broader set of fiduciary duties (although I rather suspect that it could).
I. ANALYZING THE ANALYSIS: HOW FUNCTIONALIST ANALYSIS FUNCTIONS

Before we can properly begin our functional analysis of the fiduciary duties of for-profit managers, we must first step back and look, more broadly, at functionalist analysis itself. From that perspective, we need to see that it has two related aspects, one descriptive, the other normative. As in functional analysis itself, the descriptive logically precedes the normative.

A. The Preliminary Descriptive Task: How to Locate What We’re Looking for

Our descriptive task is to identify the full range of for-profit managers’ possible fiduciary duties, then to narrow that range down to the sets of duties implied by three ideal-type liberal societies: a libertarian night-watchman state, a standard model of modern liberal democracy, and a neo-classical republic.

1. The Three-Sector Sphere of Liberal Society

Modern liberal societies, as they exist and as they are modeled, have three public sectors: the economic, the legal, and the cultural. Economics and Law, the two of our subheadings that point to our descriptive task, identify two of our society’s three basic public sectors: the economic and the legal. In the background, and properly so, is our society’s third public sector, the cultural.\textsuperscript{8} This analysis, like our project generally, foregrounds the economic and legal sectors; it will nonetheless be helpful to recall the cultural sector and to refer to it at several critical points. As Figure 1 on the following page suggests, these three sectors, though analytically distinct, are functionally interpenetrating and inseparable. Each shapes, and is shaped by, the other two.

\textsuperscript{8} Scholars frequently, and rightly, identify a fourth sector of our society, the household. See Rob Atkinson, \textit{Philanthropy’s Function: A Neoclassical Reconsideration}, in \textbf{NOT-FOR-PROFIT LAW: THEORETICAL AND COMPARATIVE PERSPECTIVES} 15, 23–27 (Matthew Harding et al. eds., 2014). To do more than acknowledge that fourth sector here would unduly complicate our analysis.
As we have said, the fiduciary duties of for-profit managers imply for-profit enterprises; for-profit enterprises, in turn, imply some form of capitalist market economy. Capitalist markets, in turn, imply a certain level of legal infrastructure, including a basic recognition of transferable private property rights. And both the economic system in which for-profits operate and the legal system that sustains that economy operate against the background of a cultural sector in which these economic and legal arrangements are, at a minimum, acceptable.

As a legal academic, I’m torn between placing the cultural sector and the legal sector on the bottom of Figure 1, as the most basic sector. A Marxist, of course, would rotate the sphere to show that my two favorites are but “epiphenomena” of the truly fundamental economic sector.

The Marxist and I would agree, however, on one point critical to our analysis: Our current society is liberal, and that liberalism is reflected in the basic structure and function of each of its sectors. Our society has a capitalist market economy, a liberal democratic legal system, and a voluntary and pluralistic culture. Whatever “liberal” may properly mean, it refers here, for purposes of setting the “parameters” for our analysis, to a society with its three public sectors organized in these ways. Our three ideal-type regimes are all liberal possibilities within those three parameters.
2. The Matrix of Possible Managerial Duties: From Friedman’s One Toward Milton’s All

From this broadest background, we need next to focus in on the range of relationships in which business managers are embedded. Traditional legal analysis, like Milton Friedman’s famous editorial, tends to focus on the relationship between for-profit managers and the owners of for-profit firms. But that is barely the beginning of the analytic possibilities, because the relationship between entrepreneur and manager is only one of a very much wider set of relationships essential to every for-profit enterprise. Figure 2 below indicates some, but by no means all, of these additional relationships:

**Figure 2. Matrix of Business Relationships.**

<table>
<thead>
<tr>
<th>Duties Owed by</th>
<th>&quot;Owner&quot; Entrepreneur</th>
<th>&quot;Owner&quot; Investor</th>
<th>Manager</th>
<th>Consumer</th>
<th>Public</th>
<th>Public/State Agencies</th>
<th>Academic Evaluators</th>
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<tbody>
<tr>
<td>&quot;Owner&quot; Entrepreneur</td>
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10. See, e.g., RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 8.01 (AM. L. INST. 2006); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 (AM. L. INST. 1994). So, too, does modern republican analysis. See Criddle, supra note 7, at 1000 ("The republican theory also clarifies fiduciary law’s proper scope, explaining why some interpersonal relationships that pose a risk of harmful opportunism qualify as fiduciary relationships (e.g., trustee-beneficiary), while others do not (e.g., manufacturer-consumer."). Cf. Martin Gelter & Geneviève Helleringer, Constituency Directors and Corporate Fiduciary Duties, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 302 passim (Andrew S. Gold & Paul B. Miller eds., 2014) (noting that, in many civil law European countries, the fiduciary duties of managers extent to a range of "stakeholders" considerably more inclusive than those holding "equity" or "ownership" interests in the corporation).
Across the top of Figure 2, on the “X-axis,” runs a range of those involved in business transactions to whom fiduciary duties might be owed. They are possible “principals.” Down the left-hand side of Figure 2, on the “Y-axis,” runs a range of those involved in business transactions by whom fiduciary duties might be owed. They are possible “agents.” This rightly reflects that the relationships between those listed across the top and those listed down the side are necessarily reciprocal: Those down the side might “owe duties” to those across the top; those across the top might “hold entitlements” against those down the side.\textsuperscript{11}

3. The Three Dimensions of Each Fiduciary Duty

For the matrix in Figure 2 to do all the work we need it to, it must do more than merely indicate where we might locate fiduciary duties, the “boxes” we think should be “ticked” to indicate that a particular relationship requires a fiduciary duty in order to function properly. Beyond that, Figure 2 must also indicate what the “shape” of each duty should be. The duty we “draw” in any particular “box” would have three “dimensions.” Corresponding to “height,” we would indicate, along the left “side” of each box, how much of the agent’s “self” should be involved in the duty. The range of the agent’s involvement would run from a minimum of something like “It’s just a summer job, Man...” to a maximum of something like “It’s my whole life, Mama (or Love, or God)!”.\textsuperscript{12} Corresponding to “width,” we would indicate, along the “bottom” of each box, how much of the principal’s interests we want the agent to take into account.\textsuperscript{13} The range of the principal’s interests that should concern the agent would run from a minimum of something like “The kid’s only eating an ice cream cone” to a maximum of something like “The child’s life depends on this prosthetic!”\textsuperscript{14}

\textsuperscript{11} See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917).

\textsuperscript{12} This latter prospect implies the possibility of a much “higher” commitment on the part of the agent than does Criddle’s “modern” republican theory of fiduciary duty. See Criddle, supra note 7, passim. As we shall see, in neo-classical republican theory this will entail a level of commitment that requires at least some business managers to be functionalist professionals.

\textsuperscript{13} See Irit Samet, Fiduciary Duty as Kantian Virtue, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, supra note 10, at 125, 126–30 (describing how the duty of loyalty can be understood as “thick” or “thin”).

\textsuperscript{14} Criddle’s modern republican theory, by contrast, would seem to exclude purchasers from the focus of business managers’ fiduciary duty altogether. See Criddle, supra note 7, at 1000 (citing “manufacturer-consumer” as an interpersonal relationship that “pose[s] a risk of harmful opportunism” without qualifying as a fiduciary relationship).
The necessary third dimension of our analysis, representing the “depth” of each fiduciary duty, is a bit trickier, both graphically and conceptually. With a little help from classical perspective drawing, we must turn our “box” into a “cube.”15 “Depth” would reflect how aggressively we want to enforce the duty, and by what means. The depth of a duty might range from “soft” and informal social sanctions like managers’ loss of self-respect and the regard of their manager’s peers in the cultural sector, through loss of productivity bonuses or profit-shares in the economic sector, to imposition of “hard” and formal penalties in the legal sector, themselves ranging from corrective fines to punitive imprisonment.16

If we thought that a particular relation of possible principal and possible agent in our “Matrix of Business Relationships” should be guarded by a fiduciary duty, we would then turn the “box” at that particular intersection into a “cube.” A typical “cube” would look like Figure 3 below.

Figure 3. Fiduciary Duty “Cube.”

15. Anyone who has ever read even a few children’s books would realize that a “pop-up” feature would be hugely helpful here.

16. Here, yet again, my neo-classical republican theory calls for a larger fiduciary duty than Criddle’s modern republicanism. My theory would include the full range of legal and quasi-legal enforcement mechanisms; Criddle focuses primarily on the traditional range of duties available to redress breaches of fiduciary duties. See Criddle, supra note 7, at 998 (arguing that modern republican theory better accounts for two basic aspects of traditional fiduciary law than does alternative liberal theory); see also Andrew S. Gold & Paul B. Miller, Introduction to PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, supra note 10, at 1, 1 (“Compliance with these duties . . . is unusually demanding [and t]he remedial response to the wrongful violation of fiduciary duties is also notoriously harsh.”).
Once we expand our “Matrix of Business Relationships” from Figure 2 to include Fiduciary Duty “Cubes,” we can see the scope of our work: deciding which relationships should be protected by fiduciary duties, and what the “shape” of those duties should be. Fully forty-nine fiduciary duties are logically possible, each to be shaped in three related directions.

If you’re wondering, *Is all this really necessary (damn it)!?*, then we are on the same page, figuratively as well as literally.\textsuperscript{17} You have seen, I am confident, what a devil of a lot of detail a full analysis of even the most basic business relationships would necessarily entail. You have also seen, I am equally confident, that we cannot hope, within the limits of our time (not to mention inclination), to complete anything approaching so full an analysis. You will thus be receptive, I trust, to suggestions for legitimately limiting our task. I have three.

The most obvious, and obviously legitimate, limit lies in our topic itself. Since our topic is the fiduciary duties of for-profit managers, we must, perforce, focus on duties running from them to the other relevant “stake-holders.” We need consider the duties that other “stake-holders” themselves might owe only as those duties shed light upon our focal duties—again, those owed by for-profit managers.

And, even with respect to managers, we must limit ourselves to a simplified picture, our second legitimate limitation: We must focus only on “higher” management, and we must generally assume that ownership is unified in one person, not divided among an ever-ramified range of individual stock-holders and institutional investors. This is, of course, a radically simplifying set of assumptions. But it is neither unrealistic nor unhelpful: Many of today’s most significant firms are structured pretty nearly as simply as that; that is, essentially, the shape of every successful high-tech firm up to the time of its initial public offering. And those high-tech firms pose some of the most salient examples of why the fiduciary duties of managers need to be both re-examined and expanded.

The third simplifying limit I have to suggest is, admittedly, a little counterintuitive: If we are to make our analysis of for-profit fiduciary duties not only possible but also most useful, we must add another level. Before we can determine what the proper scope

\textsuperscript{17} And it is worth noting, misery loving company, that we are not alone. See TAMAR FRANKEL, FIDUCIARY LAW 77 (bemoaning “so many actors, so many situations, and so many controversies”).
of any particular fiduciary duty should be, we must notice that any answer will depend, in all cases, on a prior question: In what kind of liberal regime will this duty be functioning?\(^{18}\)

This question is profoundly important, both practically and theoretically. As a practical matter, the long-running debate about the proper scope of business managers' duties has always been part of a larger debate about what kind of liberal society we should have. As a theoretical matter, we cannot assess the appropriate scope of fiduciary duties without tracing those differences back to their source, the different visions of liberalism from which they derive. In order to decide what the proper scope of for-profit fiduciary duties is, we must first evaluate them against the background of the regimes in which they function.

This means that, for both practical and theoretical reasons, we must assess fiduciary duties “wholesale,” as part of a larger “package,” before we can assess them “retail,” possible duty by possible duty, dimension by dimension. This, in turn, points us both back to our three epigraphs and forward to the second, normative, half of our task. Our three epigraphs, we can now appreciate, point us to three different “packages” of fiduciary duties, each representing a theoretically and practically important point on a scale of possibilities running from most to least demanding of managers in all three dimensions. On the far right, we have Lockean libertarianism, with the smallest package of fiduciary duties; in the middle, we have the package that goes with modern liberal societies;\(^ {19}\) and on the far left we have neo-classical republicanism, with the biggest possible package of fiduciary duties. Across the entire range of duties that for-profit managers might owe, we need to focus on just these three sets.

Having found those competing packages of fiduciary duties of for-profit managers, how are we to assess them? Here our functionalist analysis turns from its descriptive to its normative mode.

**B. The Preliminary Normative Task: How to Evaluate What We Find**

Functionalism's normative mode has two related foci, the macrocosmic and the microcosmic. We have just seen that two

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18. See *id.* at xiii ("Like all laws, fiduciary law is shaped by the society which it governs—by the pressures society exerts on its members outside the law, and the values society’s members feel constrained to follow.").

19. See *id.* at xv ("Fiduciary law rules should be examined, explained, and evaluated in light of America’s social pressures and values.").
headings of our symposium’s subtitle, Economics and Law, let us both situate and focus the first, descriptive part of our task: finding our three sets of fiduciary duties for for-profit managers. Now we need to see that the other two headings, Ethics and Politics, define the second, normative, part of that task: deciding which of those sets of fiduciary duties is, in the appropriate sense, best. Politics is the macroscopic focus; it looks at the good of the social system as a whole, functioning well in all its parts: the economic, the legal, and the cultural. Ethics is the microscopic focus; it looks at the good of the individual within the system, situated simultaneously in each of the system’s three public sectors. Our political analysis will focus on the role that each version of liberalism assigns the for-profit manager; our ethical analysis will focus on what kind of person each version of liberalism expects a manager to be.

With these two foci, Ethics and Politics, in mind, we must look at each of our three liberal societies from two different perspectives, one “inside” and the other “outside.” From the “inside” perspective, we see the set of fiduciary duties that is right for each regime, what set of fiduciary duties is “best” where “best” means most suited to advancing the values of that regime. This first, “inside” analysis is necessarily long but mercifully straightforward. It is long because it requires us to spell out in some detail the functions that the particular goals of each regime assign its for-profit managers. But it is straightforward because, once we discover what these requirements in a particular regime are, we know what is “right” for for-profit managers in that regime. It is, again, the “form” of fiduciary duties suited to their “function.” And it is, you will recognize, a kind of hypothetical imperative: If you want to have your managers to suitably serve this form of liberal society, this is the set of fiduciary duties they must operate under. If you want to run a regime like ours, or a regime of Lockean or neo-classical republicanism, this is what you will have your for-profit managers do, and this is how they should do it.

That brings us to our second, “outside” perspective. If analysis from the “inside” perspective is necessarily long but mercifully straightforward, analysis from the “outside” perspective can be ruthlessly short but must be profoundly fraught. From the “outside” perspective we must decide which of our three liberal

20. This distinction is, of course, a familiar one in both social science and jurisprudence. See TALCOTT PARSONS, THE SOCIAL SYSTEM passim (1951); H. L. A. HART, THE CONCEPT OF LAW 155–74 (2d ed. 1994).
regimes, including its best-suited set of fiduciary duties, best advances the values that we, as its evaluators, want to advance.

Here, however, we notice an odd parallel with our “inside” analysis. As our “inside” analysis of each regime will have a common structure, so, too, our movement from each regime to the next will have a common dynamic. Unsatisfactory aspects of each regime and its suitable set of fiduciary duties will press us toward the next regime and set of duties. We will trace our dissatisfaction to three related sources: the particular array of managerial duties that the regime produces, the particular ordering of social purposes that this array is meant to serve, and the theoretical underpinnings on which these social purposes themselves ultimately rest.

Once we reach the final regime, the neo-classically republican, we will find, not that we are affirmatively deciding in its favor but that it is the only alternative left. But, paradoxically, that regime will not win by mere default. It will, rather, be the regime that we ourselves have made, based on the values that we bring with us to any functional analysis. As we will see, it is the regime where for-profit managers are required to be what we ourselves are: trustees of the common good.

C. Summary

Our analytic task, we have seen, has two complementary components, the descriptive and the normative. On the descriptive side, we have narrowed our search down through three distinct levels—liberal society as a whole, the range of possible business-related fiduciary duties within liberal societies, and three ideal-type liberal societies. On the normative side, we have identified two perspectives from which to evaluate the three “packages” of fiduciary duties we identify, one from “inside” each ideal-type society and the other from “outside.”

In thus setting up our inquiry, we have been in two double binds. To make our proper analysis manageably short, our preliminary analysis had to be tryingly long. And, to keep it from being longer still, it has had to be all too abstract. If there is a way out of these binds, it has to be in the analysis proper: it will flesh out the very dry bones of this preliminary analysis, even as this preliminary analysis will keep it lean and clean. And it will tell us, within the space we have, what we really need to know: not only what the proper fiduciary duties of managers are but also about how we should best go about setting them.
II. THE ANALYSIS PROPER: THE FIDUCIARY DUTIES OF FOR-PROFIT MANAGERS

This Part outlines the fiduciary duties of for-profit managers under three ideal-type liberal societies: Lockean libertarianism, modern “Western” societies, and neo-classical republicanism. The point of the comparison, again, is to guide our assessment of for-profit managers’ duties in the intermediate category, the predominant society today. Our analysis moves from the regime that entails the fewest and thinnest managerial duties to the regime that entails the most and the thickest, from the libertarian state, through the modern liberal state, to the neo-classical republic.

A. Lockean Libertarian Society: What’s Good for the Bee Is Good for the Hive (and “Good” Is Either God’s Will or a Quasi-Newtonian Normative Gravity)

Our epigraph from R. H. Tawney nicely captures the Lockean notion of private property and private economic enterprise:

The enjoyment of property and the direction of industry are considered, in short, to require no social justification, because they are regarded as rights which stand by their own virtue, not functions to be judged by the success with which they contribute to a social purpose.\(^\text{21}\)

I follow Tawney’s lead in beginning with the Lockean version of liberalism for essentially the reasons Tawney himself gave: “Today that doctrine, if intellectually discredited, is still the practical foundation of social organization.”\(^\text{22}\) If anything, the case for starting with Locke is stronger in our time and place than in his.\(^\text{23}\)

\(^{21}\) Tawney, supra note 2, at 24. Tawney does not explicitly mention Locke, and the libertarian theory of property that Tawney outlines could, quite conceivably, have non-Lockean foundations. Indeed, as Tawney points out, it very much needs them. It is this reference to shaky foundations of the popular understanding of libertarian property that makes me sure he’s alluding to Locke.

\(^{22}\) Id. at 24–25.

\(^{23}\) In the English-speaking world beyond the British Isles, particularly in the United States, Lockean notions of property and politics are even more thoroughly rooted in the popular notions of proper social order. See Louis Hartz, The Liberal Tradition in America 9–11 (1955) (“There has never been a ‘liberal movement’ or a real ‘liberal party’ in America: we have only had the American Way of Life, a nationalist articulation of Locke which usually does not know that Locke himself is involved.”); see also P. S. Atiyah, The Rise and Fall of Freedom of Contract 47 (1979) (“But what was prescriptive in England became descriptive in the United States, where the Federal Constitution embodies Locke’s ideas concerning the relationship of Government to property.”); Morton J. Horwitz,
Locke’s interlocking theories of property and politics, already intellectually dubious in Tawney’s time, have enjoyed a robust revival in our own.24 Given the continuing appeal of Locke’s model (or, perhaps more precisely, the continuing appeals to Locke’s model), we need to see that this model itself implies a wider and more robust range of managerial duties than is generally recognized.

We look, first, at the appeal of Locke’s ethics and politics to those who take the narrowest possible view of managers’ fiduciary duties. We then notice that Locke’s ethics and politics imply a more robust set of managerial duties than they, or we, tend to recognize. Even so, we note, finally, that the fiduciary duties extrapolated from Locke’s theory may well not satisfy us and that Locke’s foundations of his ethics and politics give us ample warrant to look elsewhere.

1. The Foundations of Locke’s Liberal Politics

In our time as in Tawney’s, efforts to expand private property rights to their maximum and to reduce conceptions of the common good to its minimum tend naturally to settle on something like Lockean foundations.25 As Tawney suggests, this is because Locke’s system shifts the burden of proof on two critical questions so radically as to essentially beg those questions: What are the respective functions of private property and political society? For Locke, even as Tawney recalls, private property is a sort of a priori entitlement, part and parcel of human rights in a fundamental if far-off state of nature, and the basic function of political society is to protect those rights. From explicitly Lockean foundations, if not

24. See Martin S. Flaherty, History “Lite” in Modern American Constitutionalism, 95 COLUM. L. REV. 523, 528 (1995) (“Theorists such as Richard Epstein, committed to at least one version of foundational rights, claim to look at the American past but see little more than John Locke.”).

25. See, e.g., RICHARD EPSTEIN, Takings 314–18, 321–22 (1985) (arguing that the modern welfare state, even in its most modest United States form, violates sound Lockean principles of property and politics); Robert A. Goldwin, Locke and the Law of the Sea, 71 COMMENTARY, no. 6, June 1981, at 46 passim (opposing on Lockean grounds the provisions of the United Nations Law of the Sea Treaty that recognize the seabed as the common heritage of humankind); D. F. Libling, The Concept of Property: Property in Intangibles, 94 L.Q. REV. 103, 104 (1978) (arguing that the common law includes the principle that “[f]any expenditure of mental or physical effort, as a result of which there is created an entity, whether tangible or intangible, vests in the person who brought the entity into being, a proprietary right to the commercial exploitation of that entity, which right is separate and independent from the ownership of that entity”).
by the most compelling of steps, modern liberals of the libertarian stripe derive their minimalist, night-watchman state.\textsuperscript{26}

In classical terms, Locke explicitly subordinates politics to ethics, what is more, to an ethics that is radically individualistic. Every person has “natural” rights to life, liberty, and property; each person has a reciprocal duty not to interfere with the equal “natural” rights of every other person. The state is, essentially, a kind of joint venture the sole legitimate purpose of which is to protect these individual rights better than individuals themselves could protect them through purely private means in the “state of nature.”

There is, it is important to see, a common good in Locke’s politics, even as Aristotle said there must be in all political systems, almost as a matter of logic.\textsuperscript{27} But Locke’s common good is little more than the protection of everyone’s private rights. Even Locke’s notion of “the commons,” the great store of resources beyond individuals’ bodies, is really just a place where individuals can take what they will, virtually whenever they want.

2. Implications for For-Profit Managers

On first reflection, the minimalist, property-protective society of Locke’s liberalism seems an ideal fit for the minimalist, owner-oriented view of managerial duties of Friedman’s titular epigraph: \textit{The Social Responsibility Of Business Is to Increase Its Profits}.\textsuperscript{28} But, as soon as Friedman himself begins to unpack that slogan, we see that this cannot be all:

In a free-enterprise, private-property system, a corporate executive is an employe[e] of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.\textsuperscript{29}

\begin{thebibliography}{99}
\bibitem{26} See, \textit{e.g.}, \textit{Epstein, supra note 25, passim.}
\bibitem{28} Friedman, \textit{supra note 1.}
\bibitem{29} \textit{Id. at 33; see also Milton Friedman, Capitalism and Freedom 133 (1962) (“In a free economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”).}
\end{thebibliography}
Even as Friedman asserts that the manager's primary duty is to increase owners' profits, he admits two telling social limits: law and ethical custom. As soon as we elaborate those two limits from Locke's libertarianism, we find that each is far more extensive than Friedman's statement of business duties would have us believe.

a. Lockean Limits on Friedman's Profit-Making Mandate

Both Locke's ethics and his politics, radically individualistic though they are, imply important duties from for-profit managers to others besides their employers and, even more significantly, for those owner-managers themselves. These are profoundly significant for the function of all three of society's public sectors: the economic, the legal, and the cultural.

This is both most obvious and most relevant in the economic sector. Owners' use of their private property for profit is, in Locke's system, subject to their ethical duty not to harm others. This is an ethical duty, strictly speaking; it is a matter of "natural law" even when not supported by state sanctions in Locke's ideal political regime. On this basis, one could found a fair number of seriously restrictive obligations of business owners themselves, rather like our common law torts of product liability and fraudulent misrepresentation. And these ethical limits on owners would doubly apply to managers; principals must not do through agents what they must not do themselves. And, under Locke's basic ethical principles, managers as individuals operate under their own direct "no-harm" obligation to other individuals.

This ethical obligation of business owners and managers in the economic sector implies parallel limits on profit-making in the legal sector. The same Lockean ethical principles that limit the rights of business owners in the economic sector justify the state itself in taking on a fairly robust regulatory role. Libertarians like to think of the Lockean state as a night-watchman, limited to protecting owners from criminal harm to their persons and property. But the state might also legitimately enforce private rights against a wide range of tortious harms as well.

What is more, the legitimacy of these laws implies additional duties of owners and managers. Because legislation to enforce these rights of consumers is in accord with the basic function of the state, business owners and managers could not, as a matter of both ethics and politics, legitimately oppose such legislation. More

30. Friedman, supra note 1, at 33.
specifically, they could not lobby legislators to vote against such legislation, and they could not campaign against legislators on the basis of their voting for such legislation. They could, of course, argue that state money spent here might better be spent somewhere else. But that line of argument would take them, ultimately, from the expenditure side of the ledger to the revenue side. And on that side Locke himself imposes a very real limit.

If it is hard to find a principled limit in Locke for business’s anti-regulatory lobbying, it is easy to find a limit for their anti-tax lobbying. Indeed, as soon as we “map” Friedman’s “increase profits” business mandate onto Locke’s ethical and political theory of taxation, we notice a conflict of interests. Paying taxes is, of course, a legal obligation, and Friedman admits that business’s pursuit of profit must be legal. But behind this legal obligation lies a business opportunity. Even as the legal obligation to pay taxes inevitably reduces net profits, so the possibility of lowering taxes offers an opportunity to increase profits—an opportunity which, in Friedman’s system, would be a right of owners and hence an obligation of managers. It is entirely legal to lobby to convince legislators to lower taxes or to campaign to convince voters to elect legislators who will lower taxes. But how much lower? Friedman’s “increase profits” mandate suggests the answer is asymptotic toward zero; the lower taxes are, the higher profits will be. Here Locke’s political and ethical theory, individualist though it is, imposes a very different limit (albeit with a bit of embarrassment):

[It is] true, Governments cannot be supported without great Charge, and [it is] fit [that] every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it.  

Like everyone else who enjoys its benefits, business owners have a duty to pay their fair share of the cost of government; government only exists, remember, as their joint venture with other citizens for the mutual protection of private property and

31. Id.
32. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 71–72 (Mark Goldie ed., Oxford Univ. Press 2016) (1690). What goes for “estate” goes also for other “natural rights,” including both liberty and labor. See id. at 65 (“[He] engages his natural Force...to assist the Executive Power of the Society, as the Law thereof shall require. For being now in a new State, wherein he is to enjoy many Conveniences, from the Labour, Assistance, and Society of others in the same Community, as well as Protection from its whole Strength; he is to part also with as much of his natural Liberty, in providing for himself, as the Good, Prosperity, and Safety of the Society shall require; which is not only necessary, but just; since the other Members of the Society do the like.”).
other individual rights. If business owners try to lower their legal tax burden below their fair share, then those owners are, in effect, breaching their original private contract with their fellow citizens in forming the state and their on-going obligation under that contract to both their fellow citizens and the state itself. And, notice, this is not a “garden-variety,” “buyer-seller” business contract but the very contract on which the entire political community rests. A business manager who assisted in that effort would, in Locke’s society, be assisting in the breaching of just that contract.

That said, we must notice the other side to the coin of the owner-manager relation. Even if managers’ duty to owners is, for soundly Lockean reasons, secondary to their duties to the public, managers’ duties to owners are, of course, prior to managers’ own economic self-interest. That, after all, is what they are basically for. When we think of “capitalists,” we must be careful to avoid what in America is a false dilemma often posed as “Wall Street vs. Main Street.” Advanced capitalism offers markets for capital itself. As a result, those who are consumers on one side of the market are often “investors” on the other. Those who produce and consume on Main Street also invest on Wall Street, particularly though retirement plans. In fact, of course, the savings of many state employees (myself included) are largely invested in private enterprises. With this in mind, we can now appreciate another problem: managers themselves lobbying to have their fiduciary duties to owners “lowered” in their own interest. Lockean principles would seem to forbid this; good evidence suggests that has happened, rather close to “home” for some of us.

All of this means that we must, on Locke’s own principles, check several more “boxes” in our matrix of possible fiduciary duties, the “boxes” indicating duties of both owners and managers to both fellow citizens and the state. And the “cube” in Figure 3 depicting the dimensions of these duties should cast a shadow that is deep indeed. Breaching those duties undermines the Lockean “Social Contract” itself; it is subversion, if not treason. Modern Lockeans must know that this is perverse, even as they also know that it is pervasive.

But, again, it may not be, perhaps cannot be, illegal. Even if, on Lockean principles, the state could not legitimately outlaw these

33. And, even as “investors” are often consumers, so “managers” are, in a very significant industry, often “owners”: the financial services industry.

tax-shirking efforts, they would still, on a strictly Lockean normative analysis, be both ethically and politically wrong. That brings us to the third public sector, the cultural. For Locke, as for all liberals, this sector is, as a matter of positive law, both voluntary and pluralistic. The state cannot adopt an official ideology of its own, nor can it impose sanctions on the expression of private opinions, including opinions on ethics and politics. This, for Locke, is a basic “natural” liberty that individuals cannot “cede” to the state. Individual expression in a Lockean society must, as a matter of ethics and politics, be legally free.

But, quite significantly for our analysis, that does not make legally protected individual expression free of either ethical or political duties. As we have seen, misleading others for one’s own benefit in both the economic and legal spheres, even if protected legally, is forbidden both ethically and politically. And the same conclusion should apply in the cultural sphere as well: In our ordinary discourse with our fellow-folk, we harm them when we mislead them; the more serious the subject of our discourse, the more serious their harm. And, if the harm is intentional, or even careless, then it is also wrong. Thus, even under strictly Lockean principles, business owners and their agents are ethically and politically bound not to mislead their fellows. The temptation will be great where the potential gain is great: in general, gaining adherents to the view that what is profitable for business is good for the public; more specifically, promoting opposition to legitimate taxation and regulation. The Koch Brothers and their agents, it is safe to say, read their Locke either very differently or much more selectively.

All these for-profit managerial duties inferable from Lockean principles suggest that a particular pair of virtues would be appropriate for managers: the intellectual virtue of knowing the public good and the political virtue of commitment to that good. These are, you may notice, the shared virtues of all professionals. In addition to their specific “occupational knowledge”—management or medicine or law—and the “garden variety” virtues of care and loyalty to their clients, professionals must also know how the good of the public limits what they can properly do for their private clients. These professional virtues are not

35. Even the more thorough-going of modern libertarians, it is worth noting, concede the legitimacy of state regulation to ensure this kind of knowledge. See, e.g., CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 182 (2007) (acknowledging “the reasonable demand that doctors, pharmacists, lawyers, accountants, and many others be competent and that the government certify that competence”).
something for which principals are likely to pay a premium; properly professional virtues benefit the public, not the principal. Nor are they virtues that the law can practically impose, because they involve personal commitments that are hard to police in practice and improper to impose in principle. And yet, from the perspective of the functioning of a complex social system, they are political, not just “personal,” virtues: they don’t just make professionals ethically better people, in terms of their own personal values; they also make the system better, in the narrow “inside” sense of better serving its own self-defined purposes. This is true, we can now see, even in a system as fundamentally individualistic as Locke’s liberalism.37

This suggests a final, truly expansive possibility: If professional virtue were in short supply (for reasons that modern economics neatly explains, as we shall see), then it would seem that the Lockean state would need to take affirmative steps to shore it up. The Lockean state, as a liberal state, could not say that these virtues were good, absolutely, but it could say that they are necessary, at least on the part of some, if the Lockean state is to function best. And, again, if these virtues are in short supply, this is not merely something the Lockean state could say but something that, by its own principles, it should say.

The Lockean system, systematically examined, requires more expansive managerial duties than either its supporters or its opponents might have thought. The difference between Milton Friedman and R. H. Tawney is not as great as our epigraphs suggest, because even Locke’s liberal principles move Friedman’s profit-maximizing maxim closer to Tawney. We now need to notice that Locke holds some surprises in the other direction.

b. Limits on Locke’s Limits on Profit-Making (and His Ethics and His Politics)

Locke’s ethical theory of individual rights, as we have seen, constrains the content of Locke’s politics, his norms for all three public sectors. This ensures that, across a wide range of job-related activity, managers who are performing their occupational duties are also acting in accord with their ethical duties. But, we now to need to notice, the sum of both sets of norms is remarkably “thin.”

37. On this theory they are not state-sponsored cartels, as Friedman argues, see FRIEDMAN, supra note 29, at 137–60, nor are they merely a means of protecting the “buyers” of professional services from incompetent “pseudo-professionals.” Beyond that, and more basically, professional regulation ensures that professionals know the public good they are obliged to serve.
It is only ever negative, about exercising one’s freedom without harming others. It is never positive, about exercising one’s freedom to help one’s neighbor or even to improve oneself.

To get a sense of this, notice something peculiar about Lockean professionalism: Although Locke’s politics requires managerial professionalism to ensure the proper function of all three of his public sectors, Locke’s ethics requires professionalism only in a distinctly derivative, conditional way. That is, if you decide to become a manager, you must not do a range of ethically and politically “bad” things; to avoid doing those bad things, you must become a properly educated and committed professional.

But deciding to become a manager, as opposed to pursuing some other career path, is entirely optional, as an ethical matter. Nothing in Locke’s ethics commends the managers’ work, or, for that matter, any other. Locke’s ethics does, somewhat surprisingly, have self-regarding duties. Locke’s ethical duties to one’s self are neatly congruent with his ethical duties to others: As you may not deprive others of their liberty by enslaving them or their life by killing them, so you may not deprive yourself of your liberty by enslaving yourself or your life by committing suicide. Without those very wide bounds, you are own your own, left to your own ethical lights.

This takes us to a more basic point: Locke’s ethics itself is peculiarly limited, and this peculiarity marks, and mars, not merely Locke’s professionalism but also the entire political system that he builds upon his ethics. Both his ethics and his politics are fundamentally “negative.” This is notoriously true of Lockean politics; his version of liberalism is perhaps the paradigm of Berlin’s “negative liberty,” freedom from state interference. But, we need to remember, Locke’s politics of negative liberty is founded, ultimately, on his more basic ethical liberty. Being an ethical person clearly entails not harming your fellow-folk, but it does not clearly entail helping them. Cain, in Locke’s state of nature, is surely forbidden to kill Abel; Jacob, in the same state, seems also free to withhold porridge from Esau until his starving brother agrees to give up his birth-right in return. In Locke’s world, we are, indeed, our brother’s keepers, but we are not required to keep them very well. Locke’s liberalism, often faulted for being long on liberty and short on equality, has, in fairness, an

38. LOCKE, supra note 32, at 10–14.
39. See BERLIN, supra note 7, passim; see also PETTIT, supra note 7, passim, for a discussion on “non-interference” versus “non-domination.”
equality perfectly matched to its liberty. What it really lacks is the third value in the liberal triad, fraternity.

We are, of course, free to adopt a more “siblingly” ethic toward our fellow-folk; that, as we have seen, is an aspect of the voluntary pluralism of Locke’s cultural sector. We can make our motto, in all aspects our life, the good of others, or the good of all, including ourselves.

Here, indeed, we must not be too hard on Locke himself. He, presumably, assumed that those who followed his politics would also be following the ethics of the pervasive, and at least nominally other-regarding, Christianity of his time. He did not need to supplement that religious ethic; he simply needed not to impose any political obligations in conflict with it. Modern libertarians, of course, operate against a very different ethical background, from which at least some of them feel free to choose radically self-regarding ethical systems. Even so, as we have just seen, Locke’s political and ethical theories themselves impose a more robust range of managerial duties than his latter-day libertarian-leaning enthusiasts seem to appreciate.

But notice that, on this very important point, Friedman’s profit-maximizing mandate presents a problem to which Locke’s system offers no solution. The problem is a potential conflict of interest. If we are business managers, any additional ethical duties we adopt and apply in our business life are, strictly speaking, exogenous and, in that sense, “personal,” even idiosyncratic. On the other hand, any purposes that our employer wants to advance or indulge, within the political and ethical limits we have identified, are his prerogative.


42. And, we must note, not all of Locke’s latter-day enthusiasts are at all libertarian-leaning. Some, happily, lean distinctly Left; these Left-Lockeans tend to find, to various degrees disputed among themselves, limits within Locke’s own theory on the more extravagantly private property protective implications that libertarian Lockeans insist on drawing from the same source. See Penner, *supra* note 40, at 138 (arguing for an expansive reading of “Locke[s] famous[] claim[] that first appropriations of the material resources of the world was subject to a proviso, that there be ‘enough and as good’ left for others similarly to appropriate”).
This presents a rather dark side to Friedman’s observation that “their desires . . . generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”

Your bosses might, as Friedman suggests, be generally inclined to make as much profit as is legitimate under Lockean principles. Then again, they might be willing to sacrifice a bit of their net gain to engage in a bit of free expression. They might, for example, buy every employee a bright gold cross or star or crescent. And they might insist that employees wear those gold symbols at work or work elsewhere. The less religiously inclined might require a measure of feudal obeisance. What we would call quid pro quo sexual harassment would become a contractually grounded *droit de seigneur*.

Matching business owners’ freedom to hire is their freedom to sell. Even as owners may decline, for purely personal reasons, to hire employees, so they may decline, also for purely personal reasons, to sell to customers. They might, in the exercise of this aspect of their inherent freedom, reject customers who wear different religious symbols, customers who exercise different “lifestyle preferences,” and customers of a different gender or nationality or race.

And, even as owners could, in these ways, exercise their freedom of contract to limit their profits, so, too, they could exercise their freedom of contract to increase their profit. In particular, they could agree with other producers not to hire any workers above an agreed wage, not to buy from suppliers above a set price, or not to sell to any consumers below an agreed price. Not only was this widely done; it was widely objected that it was beyond the state’s power to forbid that it be done. In the United States, this gave “trust” a rather unsavory secondary meaning, synonymous with artificial monopoly.

If we find these corollaries objectionable, we are forced back to two prospects. We can question whether they are properly derived from the system’s basic premise, the priority of individual liberty, or we can question that basic premise itself. The first alternative,

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43. Friedman, *supra* note 1, at 33.
45. *See* ATTIYAH, *supra* note 23, at 618 (“The reality of the economy was that oligopoly and monopoly and anti-competitive Trade Associations existed in almost every industry throughout the length and breadth of the country [England].”)
I’m afraid, is more than we have time for; what’s more, if we’ve gotten it wrong, we haven’t gotten it by way of parody. The conclusions we reached are the same that modern Lockeans reach. The other direction is thus likely to be a more fruitful line of inquiry: Where does Locke get the primacy of individual liberty in the form on which he bases his entire social system?

All the objectionable features of the array of managerial duties implicit in Locke’s regime trace back to the sole end of that regime: protecting individual liberty. That, in turn, presses us back to that liberty itself (both epistemologically and ontologically): How do we know that this is the ultimate human good? Here we find two bases that, in Locke’s theory, seem to complement each other.

The first basis is God, and a distinctly sovereign, and Christian, God. How do we know that each person’s life and liberty and labor are inalienably their own? Because God set things up that way. How do we know that the world is a commons, open to all for unilateral acquisition as private property? Because God said so, in the first chapter of Genesis. To Locke’s credit, we are inclined to think, he generally shows how God’s otherwise inscrutable arrangements make eminent human sense. Perhaps, for all we know, Locke’s theological arguments were more rhetorical than real; in any case, we do know that Locke’s current fans tend to claim that his system, with a minimum of adjustment, can rest on a thoroughly secular foundation.

This second, secular foundation is a special kind of reasoning, which Robert Nozick describes as “knock-down” arguments; as he notes, this kind of argument, on this kind of issue, has come into distinct disfavor. This is, no doubt, the kind of disfavor that R. H. Tawney alluded to when he said in the passage with which we began: “To-day that doctrine, if intellectually discredited, is still the practical foundation of social organization.” You yourself may have independently concluded the same; I must say—with neither shame nor pride—that I have.

47. See, e.g., Epstein, supra note 25, passim.
48. See Jürgen Habermas, Between Facts and Norms: An Author’s Reflections, 76 DENV. U. L. REV. 937, 938 (1999) (“Proponents of natural right theories, on the other side, derive the legitimacy of positive law immediately from a higher moral law. . . . [N]atural law, which is explained in metaphysical or religious terms.”).
49. See Atiyah, supra note 23, at 48 ("Locke is none too specific about the source of Natural Law, but it is clearly associated with the laws of God.").
50. Locke, supra note 32, at 14–16.
51. See, e.g., Epstein, supra note 25, at 11.
53. Tawney, supra note 2, at 24–25.
What matters, at this point in our analysis, is that a profoundly important line of thinking turned away from Locke on this fundamental point and tried to build a normative vision of our modern liberal society on different foundations. What is more, this new vision tried to redress the unacceptable results that Locke derived from his foundation. We need to examine that vision not only because it is a sensible response to Locke but also because it is well ensconced in all three public sectors of our modern liberal society. That model, like Locke’s, has important implications for the scope and content of for-profit managers’ duties.

**B. Modern Liberal Society: What’s Good for the Bees Is Good for the Hive (And What’s Good Is an Aggregation of Individual Desires)**

Modern impatience with the metaphysics of traditional natural law theories like Locke’s is nowhere better captured than in Bentham’s famous fulmination: “Natural rights is simple nonsense; natural and imprescriptible rights, rhetorical nonsense[]—nonsense upon stilts.” Bentham, of course, offered his alternative, hedonistic utilitarianism as a universal solvent for all the problems he associated with the likes of Locke. As we will need to remind ourselves, this raised at least as many questions as it answered; it might fairly be argued that it begged the very basic “natural law” questions it intended to avoid. But, in its effort to avoid those questions, if not answer them, it gave a radically new, and profoundly useful, way of looking at all three public sectors of liberal society. The implications of Bentham’s liberalism for the economic sector are both the most relevant to our analysis and the most different from Locke’s theory. We will look at that sector first, then turn to the legal sector, and, finally, to the cultural.

1. The Economic Sector: The Sovereignty of Aggregate Consumer Satisfaction

We need to look, first, at Bentham’s critique of Locke’s economics, then at modern economists’ modification of Bentham, and, finally, at the implications of modern economics for the fiduciary duties of for-profit managers.

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a. Bentham’s Shifting of Locke’s Foundations (and Foundationalism)

To better appreciate Bentham’s revolutionary effect on Lockean economics, we must step back a generation, to Adam Smith’s The Wealth of Nations\(^55\) (not coincidentally, the go-to text for much of modern laissez-faire opposition to expanding both government regulation generally and for-profit managers’ fiduciary duties in particular).\(^56\) Smith offers two insights critical to our analysis. First, Smith makes explicit what Locke only implies: Capitalist producers supply our wants out of concern, not for our welfare, but for their own.\(^57\) Second, and more important, Smith implicitly refocuses the functionalist analysis of capitalism itself. From Smith on, economics focuses on the satisfaction of our desires, not the property rights of the capitalist. His very title tips his hand: What concerns us is the wealth of nations, not the private property rights, much less the individual profits, of capitalists themselves.

In Bentham’s hands, this shift of focus is radicalized: Both private property and capitalist enterprise are to be justified only in turns of their social function. More famously, Bentham radicalized the function of society itself. For Locke, it was to protect individual “natural” rights; for Bentham, it was to promote the greatest good of the greatest number. Reduced to its essence, Bentham’s argument comes to this: Everyone desires his own happiness, even as Locke’s theory acknowledges. The next step is a marvelous trick of legerdemain at least as old as sophism itself: Happiness is what all people desire, therefore happiness is desirable. Bentham famously, if unfortunately, tried to equate happiness with pleasure, and to make all pleasures equal: “Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry.”\(^58\) That leveling is a serious problem, to which we’ll return. But that leveling hugely simplifies economic analysis, to which we now turn. All measurements will be quantitative, not


\(^{56}\) MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 1–2 (1980).

\(^{57}\) SMITH, supra note 55, passim.

\(^{58}\) JEREMY BENTHAM, THE RATIONALE OF REWARD (1825), reprinted in 2 THE WORKS OF JEREMY BENTHAM, supra note 54, at 189, 253; see also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford Univ. Press 1907) (1789).
All that Bentham's analysis required was a "felicific calculus." That, alas, proved as elusive as the Philosopher's Stone.

b. From Bentham's Utilitarianism to Orthodox Modern Economics

What Bentham, alas, failed to find, classical economics provided: another simplifying assumption. People's satisfaction, damned difficult to measure directly, might be equated with what they are both willing and able to pay for. Human desires could thus be measured in dollars (or, if less alliteratively, any other standard currency unit). This simplifying move itself raises as many problems as the Benthamite assumptions on which it rests. We will have to examine some of them shortly. But what we need to remember is that this is the foundation of modern economic analysis, and that modern economic analysis, with Bentham, stands Lockean economics on its head: Private property fundamentally, and capitalist's profits derivatively, are not ends in themselves but merely means to satisfying aggregate consumer demand.

Modern economic analysis essentially re-writes the social contract between capitalists and society. With respect to property itself, capitalists no longer come to the table with pre-existing ownership of the means of production; instead, society recognizes private property interests in the means of production only insofar as it suits society's primary economic end, maximum aggregate consumer satisfaction. With respect to the profits from capitalist property, capitalists are no longer entitled to all but their pro rata share in the cost of government; instead, they are entitled to only so much as is necessary to get them to engage in producing the goods and services consumers want. On Lockean principles, property is a right, and its fruits belong to its owners; on modern economic principles, property is a trust, and profits no more than the price paid for its management.


60. See Leff, supra note 59, at 478.

61. This insight offers the prospect of expanding Criddle's modern republican theory to include a much larger range of fiduciary duties. See Criddle, supra note 7, at 1032 (arguing that "[a] defining feature of any fiduciary relationship is entrusted power" and noting that "[p]ower may be entrusted . . . by the independent operation of law").
c. Modern Economics’ Implications for Manager’s Duties

This inversion of Locke’s theory of private property, and with it the economic system that libertarians try to derive from that theory, has huge implications for our analysis of the duties of for-profit managers. We have time and space only to look at these implications in broadest outline.62 We begin with the areas of agreement between Locke and modern economists. Even here we see that the new foundations alter the arrangement, generally pressing toward expansion of duties that Locke recognized. Then we turn to the areas of disagreement, focusing on a few of the problems we have identified with those duties as derived from Locke’s theory.

The areas of overlap are both large and significant. Modern economics, like Lockean ethics, nicely under-pins the basic managerial duties to enterprise owners: loyalty and care. And modern economics, like Locke, implies a general duty on both owners and managers not to harm others. Beyond that, modern economics offers useful insights into how harm might be understood. Locke’s theory of property, for example, required individuals to take from the common, but only so long as good enough is left for all; modern economics explains why rational self-maximizing individuals, acting independently, tend to over-use common resources to the tragic detriment of all, including themselves.63 And this, in turn, implies additional legitimate functions of the state, which, again, business owners and managers cannot legitimately resist.

So, too, with taxation. Modern economics sees the state’s legitimate “take” not only as the business owner’s fair share of a “night-watchman” state but also as any profit beyond the minimum necessary to encourage optimal production.64 This, you


will notice, is nothing more than the Laffer curve from a different direction. Even as this larger tax bill is legitimate, so owners' and managers' efforts to reduce that bill below this new, higher level is illegitimate.

And so, finally, with the professionalism of managers. The duties that Locke's system imposed on managers, as we have seen, implied that they would have to know and serve the common good, as do all proper functionalist professions. What distinguishes each is their serving the public good through the application of their particular area of expert knowledge. The modern economists' perspective requires not only that the manager learn and serve a very different view of the common good but also that they have a much more elaborate set of technical tools specific to their managerial task.

Here modern economic theory both requires and explains a basic institution of modern liberal society, the university. For reasons that modern economic theory also explains, the university is essentially an institution of the cultural sector, where we will consider it in more detail.

In all these areas of agreement with Lockean theory as to proper imposition of fiduciary duties on owners and managers, modern economic theory tends to produce duties that are "bigger" than their Lockean counterparts. Even where Locke checks the same "boxes" as modern economic theory, that theory builds much bigger "cubes."

The more dramatic differences from Locke's liberalism, though, lie in the new duties that modern economics would impose on owners and managers. All these differences derive, we need to remember, from modern economics' radical reversal of Locke's theory of property. For Locke, private property is an irreducible, pre-political natural right; for modern economics, it is a social institution to be shaped to fit social functions.

To begin with the starkest difference, recall the Lockean position on price-raising agreements among capitalist producers. For Locke, they are implicitly permitted, because capitalists are free to sell at whatever prices they like. For modern economists,

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66. See text supra p. 20 (explaining why managers in Lockean theory would need to know, for example, why not to oppose appropriate levels of taxation even if lower levels would mean higher profits).

they are implicitly forbidden, because their manifest purpose is to
decrease consumer satisfaction by raising prices above the
minimum required to cover production costs and keep capitalists
in business. Owners are forbidden to engage in price-fixing
agreements, and their managers are forbidden to help them.

This prohibition, in turn, is but a corollary of a more basic, and
more positive, obligation: Owners directly, and managers by
derivation as their agents, have a duty to consumers to supply
goods and services at market prices (because market prices tend to
be the lowest possible cost-covering prices). Other corollaries are
less obvious but equally important. One is a dramatic limit on
discrimination toward employees and consumers. Replacing the
basis of Lockean economics, protecting the owner’s right to
freedom of contract, with the basis of modern economics,
maximizing aggregate consumer satisfaction, directly undermines
the basis for owners’ discriminating against consumers. And it
undermines owners’ discrimination against employers only a little
less directly. Owners’ indulgence of any private preferences at the
expense of cost-effective production tends to mean costlier products
and thus less consumer satisfaction. Owners of business, under
modern economic theory, are no longer lord and ladies of their
Lockean manors; now they themselves are but managers of the
estate—more precisely, the public’s estate.

In light of this expansion of the duties of owners and managers,
we need to underscore two important points. The first is that this
entire set of rights and duties is based on modern liberal
economics, market capitalism. They derive, not from the rights of
either owners or managers, whatever the source of those rights
might be, but from the rights of consumers, grounded in economic
theory. We will see, in the next section, that consumers’ rights, in
modern liberalism, rest on a legal foundation of democratic
politics. What we need to see here is that consumers’ rights are
derived, as a functional matter, from entirely orthodox economics.

This is the second point: The economic system that implies
these rights is a capitalism market system, understood in its own
terms. This view of capitalism is the prevailing capitalist view of
capitalism. In the United States it is called the Chicago School;68
nowhere is it called the school of Athens or Jerusalem, much less
Leningrad or even Geneva. This is not Marx’s dialectical
materialism, or Tawney’s “democratic socialism.” It is, rather, a
thoroughly orthodox neo-classical account of the (merely

68. See generally POSNER, supra note 59.
instrumental) virtues of (properly regulated and supplemented) capitalism.

Capitalism, on this view, is a goose that has reliably laid golden eggs. It is a domestic animal; it is neither a sacred cow nor a lapdog, and it needn’t be a tribal totem. Take it on the testimony of a rural veterinarian’s son and sometime assistant: Geese are always messy and sometimes mean, especially when you go to collect “their” eggs.

d. The Floating Foundation of Modern Economics

Modern economic analysis has built, on Benthamite foundations, a liberal theory of capitalist property and profit radically at odds with Lockean liberal theory. And modern economic theory, in turn, produces a set of managerial duties that is much more robust than that of Lockean theory. Even as it recognizes the need for a duty of care and loyalty to managers, it insists that these duties are subordinate to owners’ own expanded duty to consumers—not only a negative duty not to cheat or physically hurt them but also an affirmative duty to give them maximum possible return on their consumer dollars (at minimum, necessary return to the capitalist’s own private investment).

But this impressive edifice, for better or worse, rests on a most peculiar foundation. Even as modern economic analysis jettisons the a priori natural rights foundation of Locke’s theory, it substitutes a doubly questionable foundation of its own. It is questionable, in one sense, from “outside” the theory; we can call into question Bentham’s hedonistic utilitarianism as easily as we can call into question Locke’s natural law foundations. And so we will, a little later. But, we need to notice now, the foundations of economic analysis are questionable in another way, and this way is “inside” the theory itself.

In modern economic theory, as we have seen, the purpose of capitalist markets is to satisfy aggregate consumer demand (at lowest possible cost). But, we need to notice, this purpose itself is conditional, not absolute. In Kantian terms, the basic structure of the economic theory of capitalism is a hypothetical, not a categorical, imperative\(^69\): If you want to maximize aggregate consumer satisfaction, and if you find that capitalist production more or less often performs that function best (as compared with

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production in any one of the other social sectors), then you should establish and maintain capitalism.

The conditional nature of this imperative takes us to the basic problem of modern liberal political theory: Who is to say whether we should build an economy on the basis of aggregate consumer satisfaction? The answer, in the law of modern liberal democratic states, is “We, the People” (in the aggregate).

2. The Legal Sector: The Sovereignty of Majority Voter Preference

The relationship among the members may be less than they intended. Like its economic system, modern liberalism’s legal system reflects a major inversion of Locke. For him, liberal political regimes exist to protect pre-existing individual rights, which Locke conveniently subsumed under the heading “property.” Political majoritarianism is nothing more than a balance wheel in that system, a necessary means to avoid electoral and legislative deadlocks. Political majorities cannot override natural, pre-political rights, which include private property rights as well as rights to life and liberty. In Locke’s version of liberal democracy, then, democracy is the handmaid of liberalism, in both economics and law.

For modern liberal economists, as we have seen, the entire edifice of capitalism exists only to maximize aggregate consumer satisfaction. The decision to have an economy with the goal of consumer satisfaction is left, in modern liberal political systems, to the will of political majorities. Rights to capitalist property and profit are limited, then, by majoritarian politics. But so, too, are the rights of life and liberty as well. In modern liberal legal systems, in other words, liberalism itself is the handmaid of democracy, in law as well as in economics.

Unlike modern liberal economic theory, which has a principled way of coordinating its two key elements, “capitalist” and “market,” modern liberal legal theory has no generally accepted theory for accommodating its two key elements, “liberal” and “democratic.” No liberal politics, it is safe to say, has satisfactorily “squared the circle” of liberal democracy. What we need to notice

70. This is a foundation that at least some modern libertarians are themselves willing both to concede and to question. See, e.g., FRIED, supra note 35, at 79–80 (conceding Locke’s reliance on pre-political, natural rights to property); id. at 183 (conceding that conflicts between other basic commitments “and individual liberty cannot be definitively resolved by any formula or deduction from first principles”).

71. See LOCKE, supra note 32, at 66–71.

72. See Habermas, supra note 48, at 939–40 (noting the difficulty of reconciling popular sovereignty with liberal versions of human rights).
is that, as a strictly legal matter, all actual democracies tend, in their very foundational laws, to subordinate liberalism to democracy. This has, of course, huge implications for the liberalism of our law, particularly in an era of resurgent populist nationalism. What we need to examine now, admittedly more modestly, are its implications for the duties of for-profit managers.

We have just noted the most basic economic implication of democracy for modern liberal law: The people could, by entirely legal means, abolish the entire system of private property and capitalist production. That, of course, is not in the cards. But a kind of lesser included prospect is far more likely, if not actually in evidence: The people could accept the premise of modern economics—"Yes, we want maximum consumer satisfaction"—without heeding the mandate that follows from that premise—"Then you should establish and maintain a capitalist system of production." The people and their legislative representatives, most basically, could fail to enact and maintain the kind of legal infrastructure that the optimal, or even minimal, functioning of capitalism requires. This would, of course, be irrational. But it would not, notice, be undemocratic. And, not to put too fine a point on it, this seems to be what electorates in liberal democracies around the world are actually doing.

Remember, in this connection, that the traditional source of both basic property law and basic business law is common-law adjudication. There is good, if disputed, evidence that common law judges "made" much of this law with an eye, however theoretically unenlightened, toward the goal of modern liberal economics: the maximization of aggregate consumer satisfaction.73 There is also good, if disputed, evidence that at least some of the legal infrastructure of capitalism would better be made wholesale, by legislation or agency rule-making, rather than retail, by the case-by-case adjudications of the common law.74

But notice that this latter argument contains an important, but only implicit, premise: Law made by legislatures and administrative bodies can only improve over judge-made law if legislators and administrators both know how to run a capitalist system properly and are committed to that function. And remember that, even as modern liberalism subordinates liberalism, both economic and legal, to democracy, so it also subordinates judge-made common law to statutes and rules made

73. See, e.g., Posner, supra note 59.
74. See, e.g., Jesse Dukeminier et al., Property (9th ed. 2017), for a discussion on nuisance law and environmental controls.
by legislators and administrators. And remember, finally, that the liberal legal protection of free speech permits capitalists to fund campaigns for political office in both the legislative and executive (and, in some places, even the judicial) branches of government.\textsuperscript{75}

This, of course, poses a huge problem for modern liberalism, both in practice and in theory: Capitalists can as a matter of law secure, and have as a matter of fact secured, legislation and regulation that undercuts the function of capitalism as defined by economists. They could attack, and have attacked, a host of regulatory arrangements that were designed, in a more “progressive” era, to limit many of the whimsical prerogatives for-profit owners and managers and to internalize many of the costs of capitalist production and. Pollution is the most salient example of this latter trend, not least because, if unabated, it may destroy the very possibility of life on earth. And they, have, of course, restructured tax regimes to ensure that their after-tax returns on investments are far above what economists say is an appropriate minimum, the level that achieves an optimal level of production.\textsuperscript{76}

3. The Cultural Sector

The cultural sector of modern liberalism, like that of Lockean liberalism, is both voluntary and pluralistic. Basically, the state cannot forbid individuals to hold any set of beliefs, and the state cannot promote any of its own beliefs as ultimately true or good. But it does, and in theory it legitimately could, point out that certain beliefs underlie its own proper function. This, too, is subject to democratic law-making. Just as democracy might fail to provide the legal infrastructure for capitalism, so it might fail to provide the cultural infrastructure.

This latter prospect is especially important in light of the importance of universities in liberal societies, even, as we have seen, in strictly economic terms. Locke’s system implied a very limited kind of professionalism; modern liberalism implies a very much broader professionalism. And that broader professionalism

\textsuperscript{75} See, e.g., Weaver v. Bonner, 309 F.3d 1312, 1320–25 (11th Cir. 2002) (declaring unconstitutional state limits on judicial campaign activities).

\textsuperscript{76} The most obvious, if not the most egregious, example is the Trump-inspired round of tax relief to the rich in the United States, grounded (to the extent that it can be said to be grounded at all) on a “trickle-down” theory of economics that virtually no serious economists actually believe. See Krugman, supra note 64; see also Will Kenton, Trickle-Down Theory, INVESTOPEDIA, https://www.investopedia.com/terms/t/trickledowntheory.asp (last updated July 14, 2019) (defining “trickle-down theory”).
implies a very much more significant academy. It is, after all, the academy that has given us the theory of capitalism with which we are now working. As we have seen, this theory is a sort of “owners’ guide” to capitalism: If you want a thriving capitalist economy, then here’s what you should do. Similarly, academic lawyers who specialize in the legal infrastructure of capitalism must explain the relative advantages and disadvantages, the costs and benefits, of various technical alternatives: when, for example, bright line “rules” produce better, more efficient results than flexible “standards.” And this particular institution thus implies a very significant value: the truth.\footnote{See generally FREIDSON, supra note 36, for a discussion on truth as a core value of the professionalism of scientists, both “physical” and “social.”}

If academics are to do their job well, they must explain the economy as it best functions. (This functionally true importance of truth is perhaps self-evident; in an era of “alternative truths,” you will pardon the emphasis.)

The rise of modern economics and its displacement of both Bentham and Locke points to a second critical function of academics in modern society. Modern academics not only showed us practical problems with Bentham and how to get ‘round them. They also showed us fundamental theoretical problems with both Bentham and Locke. Nor, of course, was theirs the first example of that second academic function. Locke, himself an academic, had displaced an earlier political theory of absolute monarchy with his own liberal theory. The volume of Locke we focus on is the second;\footnote{See discussion supra Section II.A.} we are able to focus on it because no one now sees the need to revisit the first volume’s task, theoretically de-throning absolute monarchism.\footnote{See GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 289 (3d ed. 2008).} (This points to the paradox Clinton Rossiter long ago observed about American conservatives: To the extent that are conserving the likes of Locke, they are conserving a radical tradition.)\footnote{CLINTON ROSSITER, CONSERVATISM IN AMERICA 67–70 (1955).} Ultimately, of course, that process of critical social analysis goes back at least to Plato’s own academy, where he wrote the original integrated study of ethics and politics.

And, of course, that process of critical social analysis goes forward as well as backward. Modern economists did not just show us the flaws in Bentham and Locke, nor did they merely give us, as a technical matter, the owners’ manual of their refurbished capitalism. They and other scholars also remind us that the basic premise of capitalism, satisfying aggregate consumer demand, is
open to question. And that, of course, poses our own question: What are the alternatives?

Those alternatives are the “products” on which Socrates worked, ethics and politics. That work was the crime for which Athenian democrats executed him. Both the theory and the history of modern liberal economics strongly suggests that they would have done better to impose the sentence Socrates himself suggested: a lifetime meal-ticket.

4. Modern Liberalism’s Ethics

Within the limits of liberal politics, including the obligations imposed by liberal law and the functional requirements of for-profit management, individual managers are free, in modern liberal society as in Locke’s, to do as they like. The modern liberal cultural sector gives many ethical options, but few are well-integrated with liberal politics. In particular, liberal professional ethics tends to treat ethics and politics as ultimately incommensurate; this means that managers and other professionals must choose to elevate either their ethics or their politics over the other. The basic problem is that liberal professional ethicists tend to accept a modern view of economics and law, in which clients are entitled to do what is unethical but legal and profitable, and try to reconcile it with the professional’s obligation to be ethical. Beyond that, modern liberalism offers professionals little guidance on how to live their lives outside the requirements of their work or how to choose that work itself. Republicanism is fairly seen as an offer to fill these twin gaps.

C. Neo-Classical Republican Society: What’s Good for the Bee and Good for the Hive Is Good (Which Is—No Spoiler Alert Necessary!—Socrates, Satisfied)

Even as reservations with Locke’s liberalism led us to examine the alternative of modern liberalism, so reservations about modern liberalism press us on to our third and final liberal alternative, neo-classical republicanism. As in our two earlier analyses, we

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81. See PLATO, APOLOGY, reprinted in 2 THE DIALOGUES OF PLATO 109, 112 (Benjamin Jowett trans., Oxford Univ. Press 3d ed. 1892) (“Is there any one who understands human and political virtue?”).
82. Id. at 129–30.
83. This is, admittedly, a very tight summary of a huge, and hugely helpful, literature; the fault, as it tries to show, lies not in the scholars, but in the system.
begin with its politics, its view on how to organize the best society, looking at what that politics implies for all three public sectors, the economic, the legal, and the cultural. We then turn to its ethics, its view on how to be the best possible person. All through we will be looking particularly for the light that republicanism sheds on the proper fiduciary duties of for-profit managers.

1. The Economic Sector

Our analysis of republican economics must focus on its points of agreement and disagreement with modern liberal economics. The basic division is this: On the one hand, republicanism takes the economic theory that modern liberalism built on Bentham's foundations as essentially sound; if you want to satisfy aggregate consumer preferences, market capitalism is a fine means to that end. Republicanism admits, with modern liberals, that modern economic theory may be flawed in its details, but republicanism nonetheless holds, like modern liberalism, that those can be corrected within the general framework of neo-classical economists. On the other hand, republicanism radically questions the basic economic premise of both Bentham and modern liberal economics: that all consumer preferences are to be treated as equal. We discuss, first, republicanism's areas of agreement with modern liberalism, then its differences.

a. Areas of Agreement

This topic deserves a separate heading for the same reason that some sentences deserve a separate paragraph: Republicanism accepts all the working principles of neo-classical economics, and all that these principles imply for both the fiduciary duties of for-profit managers and the functions of the liberal state.

b. Areas of Disagreement

As the areas of agreement between republicans and modern liberals are extremely wide, so the area of their disagreement is very narrow. But, alas, it is also very deep. To understand that depth, and the difference it makes for managerial duties, we must look briefly back at the foundations of modern liberal economics. As you recall, both Bentham and the modern economists who modified his system decline to rank different pleasures, though
they come to this position from very different directions. Bentham refused to distinguish among pleasures because he believed he had proved them all equal. He, again, famously pronounced that the pleasures of poetry are ultimately no better than those of push-pin. Modern economists, on the other hand, refuse to distinguish among pleasures not because they believe they are all equal but because that refusal avoids the problem of finding an accepted, or acceptable, standard. By different paths, then, and for somewhat different reasons, Bentham and the founders of modern liberal economics came to the same basic conclusion, which they make the basic premise of their entire economic system: All consumer satisfaction counts the same.

Republican economics emphatically rejects that premise, over against both Bentham and modern economists. In this we are not alone; indeed, I believe, we are in better company: Bentham’s heretical disciple, John Stuart Mill (who was no mean modern economist himself). According to Mill:

It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question.

Mill could, alas, have made his point more charitably; greater charity must, perforce, be part of the mandate of republicanism. But he could not have put his point more accurately, and on that point republican economics rests (as, we will see, does the rest of its politics, its law and its culture, and all of its ethics).

We who know both sides of the question know that some pleasures are better than others, and we know why. We moderns mock Milton’s party on many points, not least because, we say, they banned bear-baiting, not because it gave pain to the bears, but because it gave pleasure to the spectators. A mere moment’s reflection reveals the truth: It must have been both, the bear’s pain and the spectator’s pleasure. This is no way for humans to treat an animal, because it is worse than beastly, because it lowers humans below animals.

85. Id.
c. Implications for the Duties of For-Profit Managers

From the perspective of republican economics, the mandate of liberal economics cannot get us where we need to go, because it heads us in the wrong direction. Owners and managers merely pursuing maximum profits, even under the consumer-regarding constraints that modern liberalism imposes, will not ensure that they produce the socially optimal mix of goods and services. To approach that optimal mix, owners and managers must seek to produce not those goods and services that most satisfy consumers (at a sustainable rate of return on investment) but instead those goods and services that, at the minimum, harm consumers least and, at the optimum, benefit consumers the most.

Lest this basic republican economic goal seem utopian, we must focus first on its minimum, doing the least harm. Although this standard is emphatically not a part of our current economic theory, it is deeply rooted in widely shared social norms. That, presumably, is why we tend to look askant at pornographers, cigarette manufacturers, and venders of cheap intoxicants. It is not because selling these products is not profitable; it is because these profits come, by our best lights, at real harm to consumers themselves.

Nor is it hard to find evidence of the optimal end of the republican goal, doing consumers the most good. Henry Ford seemed less interested in increasing his personal wealth than in making automobiles affordable to people of modest means, the better to enhance their lives. (The suit against him by his co-investors, the founders of a competing motor company, reminds us that you can do that sort of thing with your own money, but not with the money of nonconsenting investors.) And, even in our own post-industrial age, we still hear echoes of Ford's sentiment: Mark Zuckerberg says the real point of Facebook is to connect people in a radically new, and better, way; Apple announces every new i-thing as the key to opening bright new avenues of human achievement. Quite likely, of course, these great humanitarian goals are exaggerated, if not fabricated. The point here is not that the entrepreneurs are virtuous, but rather that, even at their most hyperbolic and hypocritical, they are paying homage to what we ourselves recognize as a virtuous motive: doing good, as they say, while doing well.

88. See Dodge v. Ford Motor Co., 170 N.W. 668, 684–85 (Mich. 1919) (holding in Ford's favor, on the thoroughly republican principle that what was good for Ford's consumers, at least in this case, was also good for Ford's investors).
This is not to say, of course, that virtuous motive is enough under the republican economic norm. Henry Ford had some notoriously obnoxious ideas, antisemitism most salient among them, and the more we see of Mark Zuckerberg, the scarier he seems. But this cuts for, rather than against, the basic republican model: We have shared standards by which we can measure the good that capitalists purport to do. By their fruits, we can judge them—and, on republican principles, so we should. And our judgment, we need to note, is not idiosyncratic; we are not acting arbitrarily, like Locke’s lords of the manor. It is principled, and that principle is a corollary of the basic mandate of republican economics: Do not just satisfy consumer preferences, agnostic to the good of those preferences; do consumers as much good (including as little harm) as you can, by shared standards of human need and human excellence.

But who, in the last analysis, is to say what those standards are? That question is best answered under the heading of republican culture. But, even as we defer that question, we need to note that, if republican managers are to function properly under republican economic principles, they must know what that answer is. Learning it, accordingly, must be a part of their basic professional training. As modern liberalism requires of managers more training than Locke, so neo-classical republicanism requires yet more again. Here, though, we come to a limit, because neo-classical republicanism requires the broadest and deepest education we have yet imagined, the “classical” ideal of liberal education.

This Millean position on the economic sector has profound consequences for the republic’s legal sector, its balancing of democracy and liberalism, which in turn has profound effects on its cultural sector.

2. The Legal Sector

Republicanism is famous, of course, not for its position on the economic system, but for its prescription for the legal system: in the just state, the wise rule for the good of all. In the latter half of the last century, alas, the republican tradition came to be associated, paradoxically more in the academic than in the popular mind,\(^\text{89}\) with totalitarianism rather than with either liberalism or

\(^{89}\) The standard citation here is K. R. Popper, The Open Society and Its Enemies (Princeton Univ. Press 4th ed. 1963) (1945), wherein Plato is made the father of totalitarianism in both its fascist and its communist forms. Id. at 86.
democracy. Even if I were the person, this would still not be the place to rehabilitate republicanism tout court.\textsuperscript{90} But we must, within the limits of our task, notice that republicanism is, in fact, consistent with both liberalism and democracy in their modern forms. And we must notice that the form of republican law is just the form of the managerial professionalism we have already identified in modern liberalism's economic sector.

Here the most basic point, and the point most easily made, is that many of the founders of modern liberal democracy built on explicitly republican foundations. The most prominent promoters of the United States Constitution were, for example, remarkably republican on this essential point:

The aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.\textsuperscript{91}

Here we have, in barest outline, a way to accommodate republicanism and democracy. The people's will is not the source of the good, as in popular sovereignty, but the people's voice is the means by which the rulers are both chosen and kept to their task: ruling for the good of all.

Here, too, we find a familiar pattern. Those who should rule, in the vision of the authors of one of the most durable modern liberal constitutions, are those with the most basic virtues of the kind of professionalism we have already identified: the highest virtue of the mind, knowledge of the common good, wedded to the highest virtue of the heart, commitment to that good. The Federalists' statesman, like our proper business managers, are thus cut from a common mold.

Noticing this common professional stamp points to an even deeper compatibility of republicanism and democracy, of which the Federalists were quite well aware. The actual drafting of their constitution, like the ideal development of our fiduciary duties, was in the hands of the wise, committed to ruling for the good of all. In the actual operation of their law, as we have seen, democracy was reduced to the best means to the best end, rule of

\textsuperscript{90} See Pettit, supra note 7, passim.

\textsuperscript{91} The Federalist No. 57, at 295 (James Madison) (George W. Carey & James McClellan eds., Liberty Fund Gideon ed. 2001).
the wise for the good of all. But, in the inauguration of their law, the Federalists gave not just democracy but something like popular sovereignty pride of place: their Constitution begins with the words “We the People of the United States”; their regime began when elected members of conventions in each of the states ratified their constitution.

When it was founded, the United States was something very like a neo-classical republic; that we have lapsed from that arrangement of late is rather, I think, to be lamented than celebrated. On the Federalist view, liberal democratic law, like capitalist market economics, works best in the hands of proper professionals. It is no insult, but rather the reverse, to believe that the people themselves, if properly led, will themselves see it that way. Republicanism is not merely compatible with modern, post-Enlightenment democracy; it is, rather, that very democracy in its most fully functioning form.

But what of liberalism, the other element of liberal democratic law? Does republicanism not pose a threat to liberalism analogous to the threat that democracy poses? A fuller theoretical answer will have to await our discussion of republican ethics, where we see the kind of person that the republic is not only to protect but also to foster. Here we can only point back to the regime of rights the Federalists established in the United States, and even further back to the fate of Socrates: In the Republic, those found to have criticized the very foundations of the state will not be punished with death, as the popular party in Athens successfully argued; they will be rewarded, even as Socrates suggested, with a life pension.

Republicanism is thus more liberal than modern liberalism’s fraternal twin, democracy. What is more surprising is that republicanism is more liberal than modern liberalism. Republicanism undertakes to teach the values and virtues of liberty to the people; republicanism trusts that, properly tutored, the people will not only respect liberal values and virtues but also make those values their own. But, if they reject them, republicans neither console themselves that the people’s will is nonetheless being done nor fumble with the Gordian knot of liberal rights and

92. U.S. CONST. pmbl.
93. See THE FEDERALIST NO. 57 (James Madison) (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”).
popular sovereignty. Republicanism cuts that knot. It places liberal values in the hands of those who will hold them most firmly, be they ever so few, not those who will let them lapse, be they urged on by ever so many. If the people take an illiberal path, republicanism condemns their turn as wrong and urges them to follow the better angels of their nature. To be a republican is to make that your job; more precisely, your job is to recognize yourself as a fiduciary of liberal values, even as you are fiduciary of fiduciary duties.

3. The Cultural Sector

Even as our neo-classical republican society must have a legal sector that is both liberal and democratic, so it must have a cultural sector that is both voluntary and pluralistic. Poets will not be banned, as Socrates is said to have insisted, and books will not be censored, even though Milton himself once wielded the stamp. But the state, as in modern liberalism, will be free to educate its citizens in its own values, which they must always be free to embrace or reject.

The main difference with modern liberalism will be this: The education of children will not be the state’s option; it will be the state’s most basic function. Even as Socrates says in The Republic, the primary task of the Guardians must be to educate the all of the Republic’s children equally.

In part, we can now see, this is because both of the Republic’s other two public sectors, the economic and the legal, cannot function properly unless staffed by professionals who know and serve the common good. But that is only half the story, because, as we said at the outset, politics, the norms of the ideal social order, is fully integrated with ethics, the norms of the ideal individual life.

4. Ethics

For present purposes, the ethics of neo-classical republicanism is best seen in comparison with the Lockean and modern liberal alternatives. Like Locke’s ethics, the ethics of neo-classical

94. See Plato, supra note 7, bk. X, at 282, 286.
96. See Plato, supra note 7, bk. III, at 62, 95 (“Therefore the first and weightiest command of God to the rulers is this – that more than aught else they be good guardians of and watch zealously over the offspring . . ..”).
republicanism is “structurally” integrated with its politics. In each system, the goal of politics is to guard the highest individual ethical value, and, conversely, the limit of the state’s power is interference with that individual value. But, when we examine what that value is, the difference could hardly be greater: For Locke, the highest individual good is “negative liberty,” freedom as non-constraint. From this it follows that the state’s primary function is defensive, protecting each individual’s freedom from other’s wrongful interference. For neo-classical republicans, the ultimate individual value is human excellence, being the best human being that one can possibly be; from this it follows that the state’s primary function is enabling, creating the conditions under which the excellence of each citizen can be most thoroughly realized. Here, on account of this difference, neo-classical republicanism is able to offer a level of ethical and political integration that Lockean liberalism cannot match. The highest individual excellence in the republican system is the willingness and ability to engage in the governance of the Republic itself (the “positive liberty” that Isaiah Berlin rather too quickly dismissed).

This brings us to the most significant implication of neo-classical republicanism for the fiduciary duties of for-profit managers. Meeting the full range of their managerial obligations and being the best individuals they can be comes, ultimately, to the same thing: being, in their particular sphere, a committed servant of the common good, a proper Guardian, in their chosen work, of the Republic itself.

5. Summary

Locke’s system subordinates the common good to the individual good by defining the public good as the protection of individual rights, from both other individuals and the state. Modern liberal states subordinate the individual good to the common good by instituting popular sovereignty, even as modern liberal theorists try to reconcile the two. Neo-classical republicanism tries to coordinate the individual good and the public good, Ethics and Politics, respectively, by making each the complement of the other: the best person is the one best suited to rule for the good of all; the best state is the one best suited to produce just such individuals.

Each system, in turn, has a distinctive role for the business manager, with a distinctive set of duties. For Locke, managers are

97. See Pettit, supra note 7, at 17–18, 21.
98. See Berlin, supra note 7, passim.
the servants of businesses owners, and they, with business owners themselves, have only a negative duty not to harm. For modern liberals, managers are still the servants of business but with a mandate to produce what the people want. For republicans, managers are, in effect, subagents of the Republic itself, charged by its politics to produce what is best for its people, even as they are charged by its ethics to be, themselves, the best people that the Republic can produce.

III. THE META-ANALYSIS: THE DUTIES OF THE FIDUCIARIES OF FIDUCIARY DUTY

O wad some Power the giftie gie us
To see oursel's as ithers see us!

—Robert Burns

This final Part must be short, for we are already on borrowed time. And it can be short, for reasons its job is to give. We started out to find the proper fiduciary duties of for-profit managers in a liberal society; to that end, we examined three ideal-type liberal societies: Locke’s libertarianism, with its minimal duties; modern liberalism, somewhere in the middle, with duties derived from modern economic theory; and neo-classical liberalism, with its maximal duties derived from classical normative theory, both ethical and political.

We should now, it seems, be ready to choose between them. I would have to forgive you for thinking that that task will take a good deal longer, with me in the lead; I hope you will forgive me for thinking that, with your help, we have pretty much finished it already. When we put aside Locke’s “natural law” system, it was in large part because it rested on premises that not all of us could see. When we examined the next alternative, modern liberalism, we noticed that its premises were stipulated, rather than proved; its politics a matter of hypothetical, rather than categorical, imperatives. If you want your economy to satisfy aggregate consumer satisfaction, have the managers who run your firms and the officials who regulate them operate on the principles of modern economic science. Similarly, if you want your legal system to serve

the will of the people, make its liberal principles subject to the democratic rule.

But, in both cases, economic and political, we saw that, for the people to have their way, they would be better served by people who know what they are doing, technocrats who know how to make the complex machinery of the modern economies and modern states actually work. If the people want to get what they want, we noticed, they would do well to do as we say. What we say, it is worth noting, includes two paradoxical suggestions: Don’t do things merely because others tell you to, or even because you yourself want to, because the unexamined life leads to big problems, both personal and social.

But we also noticed—some of us, surely, more reluctantly than others—that the people sometimes want some pretty terrible things: bear-baiting in the marketplace, “blood and soil” in the voting booth (not to pick examples entirely at random). Some of us do not think we should deny the people their preferences; all of us, I trust, recognize that we could not, even if we would.

But all of us also recognize that the people will not know better if we do not teach them, that they will not buy better goods if our capitalists and our managers do not make and market them. We might differ on the particular products, even the particular teachings. But, I think, we do not differ on who the proper teachers are, or where our managers should go to learn not just what to make but also how—and not just what to make of the resources committed to their management but also of their very lives.

CONCLUSION(S): PROPER SOCIALISTS MAKE CAPITALISM’S BEST MANAGERS (BECAUSE NEO-CLASSICAL REPUBLICANS MAKE THE BEST LIBERALS)

Our first epigraph, the title of Milton Friedman’s famous essay, offered a decidedly individualistic view of the fiduciary duties of for-profit managers: The social responsibility of business is to increase its profits. But even there, in that effort to cash out the common good in terms of private profit, lay the seed of something very much larger. When we followed Tawney’s lead and traced business’s social responsibility back to its social function, we found a far wider range of options, all well within the meaning of liberalism. If we, capitalism’s ultimate managers, are to make it great again, we must keep it close to its entrusted task: serving the common weal as we understand it. Under our watchful eyes, business’s bounties can be everyone’s blessings. And not least
among those blessings will be liberty, the same liberty that Milton imagined when he was de facto foreign minister for the first English-speaking Republic:

I imagine myself to have set out upon my travels, and that I behold from on high tracts beyond the seas, and wide-extended regions; that I behold countenances strange and numberless... from the columns of Hercules to the farthest borders of India, that throughout this vast expanse, I am bringing back, bringing home to every nation, liberty, so long driven out, so long an exile...100