

Title: Making McCloskey's *Rhetoric* Empirical: Company Law and Tragedies of the Commons
in Nineteenth-Century Britain

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Were I Deirdre McCloskey, I would be rather angry. For over twenty years she has been reminding us of an idea that we who claim to be the intellectual descendants of Adam Smith should never have forgotten: economics, both the intellectual discipline and the human history it seeks to understand, is rhetorical. If we want to understand man's "natural propensity to truck, barter, and exchange," we must recognize that trucking and bartering and exchanging are all rhetorical in character (McCloskey, 1985, 1990, and 1994; Smith, 1976b [1776] and 1978 [1762-63, 1766]). Economic life is rhetorical, all the way down.

Why have economists been such poor listeners? Perhaps we do not want to admit how far we have failed to progress. Perhaps we have become addicted to our existence theorems, our meaningless t-statistics, and our constrained optimization problems. Perhaps, like Paul before he set out for Damascus we have simply fallen so far that we cannot see how far we have fallen. Whatever the ultimate explanation, however, we have managed to misplace basic techniques of measuring and accounting for and dealing with the rhetorical character of economic choice. To use a technical McCloskeyism, we have somehow forgotten how to give the rhetoric of economics empirical "oomph."

This essay is one attempt to recover some of that oomph. Rhetorical analysis of the historical puzzle that is Victorian innovation in company law helps answer a larger question for anyone interested in the connection between matters legal and matters economic: How does the law work, anyway? Why does it not always work the way we want or expect it to? The answer, it turns out, takes more than a rounding up of the usual suspects of ideology, interest, and power. The answer, it turns out, is that we have been looking at the wrong questions. The answer, it turns out, has much less to do with the problems of inept legislators or venal capitalists and much more to do with the rhetorical costs of law and its use.

The puzzle of the law's delay

Start with that Victorian puzzle. In Britain, as for much of Europe and America, the

legal foundation for what has become the dominant economic institution of our own time, the business corporation was provided by the twin innovations of the general incorporation statute and the principle of “limited liability.” Following a series of statutes passed between 1825 and 1862 (see reference list), no longer would the benefits of incorporation be contingent upon having thousands of pounds for a private Act of Parliament. By paying a nominal fee (just £28 15s for an enterprise with capital of £100,000), any enterprise could exist separate from its owners, and its owners could transfer their interest without ending the corporate existence (Companies Act of 1862, First Schedule, Table B).¹ Most importantly, owners of the enterprise could enjoy the protections of “limited liability”: if an incorporated company could not meet its obligations, shareholders might lose their investment, but they would not lose their entire wealth.

Yet, surprisingly, the new statutes went underused, and substantial economic gains went unrealized, for half a century. They went unrealized despite the apparent “plain English” of the new statutes, statutes which by both contemporary and present-day standards would appear to have established clear and predictable rules for the enterprising game. And they went unrealized despite offering a potential reduction in portfolio risk on the order of forty percent (Shilts, 1999, chaps. 1-2).

Thus exists a puzzle in two parts. First, how did Parliament end up adopting the new approach to enterprise law when they did, if those who would benefit from the change were not going to use it for a couple generations? Why do lawmakers pass the laws they do when they do? Second, how could the beneficiaries of Parliament’s action, entrepreneurs and their investors, fail to use the new statutes? Why do users of laws not use them as lawmakers expect? On one hand, why bother? On the other, if bother is taken, why delay in taking economic advantage?

¹ Compare this with the cost circa 1825 of the London and Westminster Oil and Gas Company Bill, estimated at 30,000 pounds (Hansard, 2nd series, 1825, vol. 13, col. 1013.)

The Solution, Part I: Parliament Seeks a Commons

Solving the puzzle starts in the world of those who would make the rules. When the law has not worked as we would have hoped or expected, our explanations tend to focus upon matters of ideology, interest, and power. The law reflected the wrong ideology. The wrong legislators were elected or the wrong party was in power. The legislators were corrupt or incompetent. And so forth.

However, even if all these problems of power could be magically assumed away, it turns out that the law will still not work in a simple, deterministic way. To see why, start with two simplifying (and utterly unrealistic) assumptions:

1. All lawmakers are Mother Theresa. When in lawmaking mode, each Member of Parliament is wholly altruistic, guided only by his benevolence toward future users of the law. The lawmaker's self-interest never gets in the way, and none of the problems of public choice or regulatory capture need to be worried about.
2. All lawmakers are Solomon. When in lawmaking mode, the Member of Parliament sees the future law user's interest at least as well as the user himself sees it, perhaps better. Legislative incompetence is never a problem.

Now reduce Parliament to two members, the proponent (P) of the legal change and his opponent (O). Prior to the new rule's adoption, at times t_i , $i = 1, 2, \dots, m$, P and O will view the expected net marginal benefits of a new rule (R^*) as, respectively, B_P and B_O . By definition, $B_P > 0$ always, but only after O has been persuaded, when $B_O \geq 0$ as well, will any legislation incorporating R^* be passed. Thus, before O is to be persuaded at time t_m (the moment of legislative passage), three conditions must hold, and these conditions can only happen sequentially: First, P must be willing each period to incur speaking costs $S_i > 0$. If $S_i > B_P$, then P will stay silent. Second, O must be willing to incur listening costs $L_i > 0$. If $L_i > \text{expected}$

benefits of listening, then O will not listen and B_O will remain negative. Third, O must be persuaded that $B_O \geq 0$.

Power stories have great value. Because they typically focus only upon the dynamic of the third condition, however, they miss a key economic requirement for any legal change, a component that remains necessary however one might stand on particular debates about ideology or interest. They miss the fact that the change necessarily involves persuasion, and persuasion is costly. Legislators must be persuaded to make new rules of the game, and enterprisers must be persuaded to make use of the new rules. If persuasion costs S_i and L_i are too high, the law will not “work.” Ideology and interest can make a difference, but only when persuasion costs are low enough.

The legislative commons

So when are they low enough? The key to finding places of cheap persuasion is to think not in terms of the triumph of one ideology or another, but in terms of rhetorical commonplaces shared across ideologies. One needs to focus on what the ancient teachers of rhetoric called by a variety of names (koinoi topoi, idia, loci communes, status), and what I call the commons. One must look for the common ground upon which all contesting parties must stand if they are to contest, the common ground upon which vote getting and coalition-building and ideology and interest all interact. One could not make speeches, one could not debate, one could not divide the House, unless that members of that House had the physical ground of Westminster upon which to speak, dispute, and divide. And what was necessarily true for physical ground was, however abstract the notion might seem, also true of the rhetorical ground, the words, phrases, and turns of phrases that make up the language of debating and dividing. Only when Whig and Tory, Lords and Commons, free traders and paternalists, those winning legislative battles and those losing them, all shared certain kinds of beliefs about language, certain rhetorical “common ground,” could

legislation happen.

The essence of the commons is what happens inside the minds of word-users. What happens is agreement, a place where marginal costs of persuasion are zero: each user takes the word as meaning a certain thing, and to mean the same certain thing as other users take it to mean. And it is agreement about meaning within context. Word users share what Quintilian (1949) , called a “special link” between the word and its (specific) subject. Each agreed-upon word-in-its-context, each “commonplace,” provides ground upon which debated questions and argued-about principles rest (II.iv.30, III.vi.1-5 and note 4 thereto). The commons thus is not the conflicts among arguers but the questions which enable those conflicts. It is not the disagreement, but agreement behind that disagreement. A commonplace about company law is not a rhetorical place where one member of Parliament says, “Joint stock companies do X” or another says, “Joint stock companies do not do X”; it is the place where both agree that “Do joint stock companies do X?” is the important question to ask.

Table 1 illustrates how the commons evolved in Victorian Britain. By 1856, debate about speculation had become grounded in commonplaces like “Will limited liability mean more good speculation or more bad speculation?” rather than questions like “Will limited liability mean speculation?” Debate about freedom of contract had become grounded upon “Does limited liability increase certainty for those who would contract?” Debate about the need for limited liability was no longer grounded in a question like “Would people choose to contract in good ways if given limited liability?” but instead in a question like “Does general limited liability, as drafted, give people enough information to make good choices?”

[INSERT TABLE 1 NEAR HERE]

Describing the nature of the commons is straightforward. Finding and describing a particular commons like that summarized in Table 1, unfortunately, is not. Because the

commons lies underneath the contesting of ideology and interest, because it is comprised of unspoken agreement beneath spoken (and often spoken vociferously) disagreement, one is limited to a great deal of what Northrop Frye (1957, p.13, 15) in another context disparaged as “naive induction” and the “psychology of rumor.” Worse, one has to practice that naive induction via the same language reflecting both ideology and interest. One must look at the same Parliamentary debates, but one must -- somehow -- see them differently.

Key to seeing differently is remembering that commonplaces are places of cheap audience. Commonplaces are where proponents and opponents can find at relatively low cost the audience(s) for Parliamentary debate and decision. To say it another way, the key to understanding what was going on in Parliament vis-à-vis company law reform is to think of Lowe (Vice President of the Board of Trade under Palmerston and prime mover of the Joint Stock Companies Act of 1856) and those debating with him as listeners as well as speakers. In the commonplaces were economical opportunities for listening. What did Lowe hear when he listened to Malins, member from Wallingford and a lawyer, say, “With regard to some of its details, there may be some differences of opinion,” that “there were two or three points open to considerable doubt”? What did Malins hear when he heard Henley from Oxfordshire propose that the memorandum of association state the amount proposed to be paid up on shares? What did Henley hear when Palmerston asked, “What could be easier than to state in the memorandum of association what proportion of the shares was to be paid up?” (Hansard, 3rd series, 1856, vol. 140, col. 141; vol. 142, cols. 635-636. All four, the three who supported the bill and the one (Henley) who opposed it, heard the same underlying grounds: Is this provision or that provision in the bill more consonant with the principle of freedom of contract? Does this provision or that one give more certainty?

The literary critic, Kenneth Burke, wrote of how a form of expression could “awaken an

attitude of collaborative expectancy,” on how persuasion happens through “identification,” through demonstrating to the audience that “you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his” (1969, pp. 55 [italics in original], 57). The collaborative expectancy that is evoked by a commons of limited liability and freedom of contract, provides the means whereby legislators can trade:

Legislator #1: I agree with the principle of limited liability.

Legislator #2: So do I.

Both legislators: Then let us get down to the details of drafting.

Freedom of contract and the rhetoric(s) of ‘limited liability.’

I focus here on debates involving freedom of contract, but it is important to recognize that Parliamentary debate accompanying the transformation of company law was a complex weaving in multiple shades of three colors. One color, or rather one set of colors, was that of free trade, laissez-faire, and freedom of contract. A second color, following Adam Smith (1976b [1776], I.viii.26-28, I.xi.b.5, IV.viii.c.89-98, V.i.e.30), was fear of monopoly. For Smith, the social cost of any incorporation was the grant of monopoly power to the incorporated entity; for he and certain of his Victorian descendants, the incidents of incorporation in general (and the protection of limited liability in general) could be justified only when large sums of capital were necessary for an important public enterprise. A final color was a paternalistic need for investor “protection.” Politicians who saw the speculative manias of the mid-twenties or the lesser ones of the mid-forties, wove the concern with monopoly power with a concern for protecting the savings of legitimate investors from speculators and other confidence men. (An entire 1850 Parliamentary committee would concern itself with the “Investments for the Savings of the Middle and Working Classes.”)

Much has already been written about the evolution of modern legal notions of contract. (See, e.g., Atiyah, 1979, Harris, 2000, Simpson, 1975.) It is tempting to piggyback on the

voluminous work in this area and tell the story of Victorian company law as a story of the “rise” of freedom of contract. Preliminary examination of Parliamentary documents does suggest a radical shift in debate in 1855 and 1856: Limited liability had become an issue separate from incorporation with repeal of the Bubble Act in 1825; and during the first half of the nineteenth century opposition to it had always stressed the evils of unbridled speculation. In 1855 and 1856, however, the fashion was freedom of contract.

The temptation must be resisted, however. For one thing, there are simply too many counterexamples. To be sure, Parliament talked more about speculation in 1825 than in 1856, and more about freedom of contract in 1856 than in 1825, to be sure, but they talked a lot about both at both times. Arguments about how the “great principle distinguishing this country from others was, the non-interference with trade” can be found in debate on the Registration Act in 1844 and earlier. And in 1855 and 1856 one finds no shortage of polemics like that from the radical merchant and member from Birmingham, George Frederick Muntz, on how the “only effect” of the Limited Liability Bill “would be to induce ignorant persons to enter into the most delusive and disastrous undertakings,” on how “if a law of limited liability had existed, Watt would have come under the control of a few ignorant donkeys, who knew nothing about his works, and ... all the inventions of that great man would have come to nothing” (Hansard, 3rd series, 1844, vol. 76, col. 278; 1855, vol. 139, cols. 1379, 1391). As the top part of the triangle in Figure 1 suggests, all three colors remained present in the weaving.

[INSERT FIGURE 1 NEAR HERE]

More importantly, while the debate over limited liability in 1855 and 1856 was a debate over freedom of contract, it was a debate over a freedom of contract. It was not a debate over whether the freedom of contract ideology would triumph over some other ideology; it was a debate over which ideas of freedom of contract ought to prevail. Freedom of contract mattered,

to be sure, but it mattered not in the way scholars are used to talking about the history of ideas. It did not matter because it was an ideology of laissez faire. It mattered because it was something shared by those holding a laissez faire ideology and by those who did not. It mattered differently in 1856 than it had in 1825 because in 1856 all agreed that “Do joint stock companies do X?” was the appropriate kind of question to be asking.

Freedom of contract mattered differently in 1856 than it had in 1825 not because it had defeated ideologies standing against speculation and monopoly; it mattered because its place in the legislators’ commons had changed. As the century progressed, phrases like “freedom of mankind,” “the right of association,” and “liberty of incorporation” were being seen more and more often, and being spoken by adherents to more and more ideologies. Limited liability, no longer a monopoly, no longer an exception to the rule of full responsibility for one’s own actions, was instead a way of ensuring the free exercise of that responsibility. “Fraud and wickedness” were still possibilities but, in the words of Robert Lowe, Vice-President of the Board of Trade under Palmerston and prime mover of the 1856 Joint Stock Companies Act, they were “not to be presumed in individuals” (Hansard, 3rd series, 1855, vol. 139, cols. 326-327; 1856, vol. 140, col. 124; vol. 142, cols. 635-636).

Showing the evolving commons were changes in the very legal context within which debates about limited liability took place. Between 1825 and 1855 most talk had been not of general limited liability under company law, but of the law of partnership. An 1854 Royal Commission voted not on whether general limited liability should be available for investors in joint stock companies, but on whether enterprises ought to be allowed to adopt the limited partnership (en commandité) form. Since in any partnership some partners do remain fully liable for enterprise debts, the limited partnership was easier to justify in the face of “protection” objections. It only required argument that the ones who ought to be kept liable -- the general

partners -- would be kept liable. Not involved in company operations limited partners could not abscond with the funds, mismanage company assets, or otherwise contribute to “dangerous speculations” and “panics.” If general limited liability was mentioned in the years before 1855, as in the testimony of prominent solicitor Edwin Wilkins Field before the 1851 Select Committee on the Law of Partnership (pp. 939, *et. seq.*), the discussion was always with reference to questions of protection and special privilege.

By 1856, however, despite lengthy debates still ostensibly devoted to the law of partnership the issue had become general limited liability. A bill to amend the law of partnership introduced at the same time as the Limited Liability Act died; two attempts to revive it in 1856 were both withdrawn. By the time the Joint Stock Companies Act of 1856 had been passed, the proper weights for the benefits and costs of the limited partnership had been determined, and the costs found greater. (Indeed, only in 1867 would Parliament make the limited partnership form available without special petition.) Leaving matters in the law of partnership would keep matters uncertain. Creditors would always struggle to impose individual liability, and individual partners always struggle to avoid it. What mattered was only the avoidance of uncertainty. Uncertainty was to be avoided. (Hansard, 3rd series, 1855, vol. 139, cols. 310-358, 636-645, 1348-1353; 1856, vol. 140, cols. 110-147; vol. 141, cols. 259-262, 473-493, 2200-2201; vol. 142, cols. 338-372, 652-668, 801-809.

The importance of certainty was evident throughout debate as members discussed the 1856 company bill clause-by-clause in committee. Whether requiring any correspondence of the company to carry the word “limited,” or requiring seven members for incorporation (, or allowing the winding-up of companies to take place only in the Court of Chancery, certainty of the legislative rule was emphasized. The list of shareholders required by the bill needed to be “conclusive” evidence of shareholding. Whether investors enjoyed limited liability or not needed

the “fullest publicity” (Hansard, 3rd series, 1856, vol. 142, cols. 638-642, 644, 646-651).

Certainty mattered, because all agreed that it shaped the ability of enterprisers to exercise freedom of contract. Be they potential shareholders, potential managers, or potential creditors of a firm, certainty about what the law meant was needed if all parties were going to make the correct, non-mischievous choices. Some seemingly made more general cries for freedom of contract, but these, too, implicitly called for utilitarian-type calculation of the certainties. Lord Stanley of Alderley, President of the Board of Trade and the primary advocate for the 1856 bill in the Lords, e.g., spoke of a person’s “natural right to employ his capital as he might think fit” but a closer look at his argument, however, shows his opposition to various proposed “restrictions” was based on a calculation that those restrictions “only tended to prevent persons from exercising due caution” (Hansard, 3rd series, 1856, vol. 142, cols. 1479-1480. Safeguards were all right, but not if they made things more uncertain and less safe. The key: draft the statute in a way that told people what they were free to do. Then they would do what was right.

Passage of the Joint Stock Companies Act of 1856 was thus more than the triumph of an ideology of freedom of contract. It showed a shift in the meaning of “freedom of contract.” Parliament had adopted of a particular way of talking about law and legislation, a way of talking that included not only notions about freedom of contract, but notions about drafting legislation and notions about balancing economic interests.

Searching for the commons -- matters of character

Smith v. Bentham. When one compares the location of words like “liberty” and “company” and “legislation” and “sympathy” and “practical” within the ideas of Jeremy Bentham and within the commonplaces of Victorians who circa 1856 would legislate, one cannot but be struck by similarities; and when one compares either Bentham or Victorian to Adam Smith, one cannot but be struck by stark differences. From Lowe (leading proponent in the

Commons) to Overstone (leading opponent in the Lords), debate on the changes in company law were so “like” the places of Bentham that it can only be labelled “Benthamite.” Unlike Smith -- but like Bentham -- the Victorians who debated company law reform separated the calculation of social benefit from the development of private virtues such as sympathy. Unlike Smith, but like Bentham, they added the interests of individuals to get the social interest. Unlike Smith, but like Bentham, they had a great faith in the ability to legislate useful results with certainty.

“Legislation,” for Bentham and for the Victorians, was the science of statute, a science which would bring certainty and security. “Freedom of contract” meant individual freedom and choice, but it also meant choice constrained by notions of social utility. One had to look at it as a matter of individual choice, because it was individuals who made choices, but the choices that mattered were those that maximized social utility (greatest good for the greatest number), and those choices were determined by way of proper legislative drafting. Human nature was involved in the exercise of freedom of contract, but it was human nature shaped by legislative action.

Any “triumph of Benthamism” story must be told with great care, however. The story of Victorian company law is not a variation on the old theme of Leslie Stephen (1950 [1900]), Albert Venn Dicey (1914), or Elie Halevy (1928). The Joint Stock Companies Act was not the triumph of an ideology of “utilitarianism” or “collectivism” or “philosophical radicalism.” Ism-ing is the temptation to revert to idealism as explanatory variable, a temptation that again plays one false.

One need only consider the Christian Socialists to see why. A working class movement that encouraged organization of workers into cooperative enterprises, the Christian Socialists pressed hard in the early fifties for liberalization of company law. Theirs was the dominant testimony before a key 1850 Select Committee (Saville, 1955; see also, Norman, 1987). Their

rhetoric resembled that other mid-Victorian advocates. Working class savings needed protection, but the protection came through freedom of association by way of limited liability (“one invention which all those who have seen it consider would be very advantageous”). Unlimited liability meant “insecurity and fraud as soon as you come to large partnerships.” Fraud could be checked by “a simple mode of registration”. While the limited partnership had “some” advantages, “with reference to any numerous partnership it is exceedingly dangerous . . . you want absolutely limited liability.” (1850 Select Committee, pp. 522, 524 [italics in report]).

But the Christian Socialists were not Benthamites. John Malcolm Ludlow may have testified before a Parliamentary Committee and spent seventeen years as Chief Registrar of Friendly Societies, but most Christian Socialists sought improvement through education and cooperation, not through social engineering. They were Christians. Frederick Denison Maurice objected, strongly, to basing decisions on utilitarian calculation or “systems.” Even the lawyer Ludlow was fundamentally shaped by his religious beliefs: all human society was “the work of God and not of man. ...[A]ll we have to do, every one of us, is, having once learned of such things, to endeavour to understand them; having understood them, to endeavour to remedy them; and Good will help us in so doing, if to Him we look for help” (Norman, 1987, quoting “Labour and the Poor,” Fraser’s Magazine, 41, pp.182-184. Benthamite ideology, this? Hardly.

Bentham (by his growing presence) and Smith (by his growing absence) matter here because their ideas can be seen within Victorian rhetoric regardless of whether the speaker is ideologically Smithian or Benthamite. In particular, as Table 2 shows, they show the places in the legislative commons occupied by the virtues of economic enterprise.

For Bentham, legislation deterministically shaped behavior. The goal of law remains virtuous behavior by its users, but what constitutes virtuous behavior is exogenous to the legislator’s calculation. Since all individual decisions are based upon what the individual

considers prudent, the legislator need only be given goals and he can shape a statute so that its users make the appropriately prudent decision. To the extent other virtues (benevolence, temperance) are involved, they are simply part of the prudential calculation (Bentham, 1789, e.g. at VI.xx, VI.xxvi, X.xxv, X.xxxvi-xxxvii.).

Smith, by contrast, did not separate questions of legislation from questions of virtue. Questions of virtue were inextricably linked with the questions of “political economy”. “Parsimony, and not industry,” stated Smith, “is the immediate cause of the increase of capital. Industry provides the subject which parsimony accumulates; but whatever industry might acquire, if parsimony did not save and store up, the capital would never be the greater (1976b, II.iii.15). Potentially separate questions of political economy (“What increases capital?”) and virtue (“Which virtue, parsimony or industry, is more important?”) were thus combined into a single question: The pursuit of which virtue leads to an increase in capital?

Bentham calculated the “social” utility of legislation by adding matters that were separate. Sympathy would be counted when (and only when) it was part of an utility addition. The legislator was to be sympathetic, to take account of another’s point of view, only when prudent to do so. Smith, on the other hand, explored ties that bind: “I think, I have made it sufficiently plain that our judgements concerning the conduct of others are founded in Sympathy. But it would seem very odd if we judged of our own conduct by one principle and of that of other men by another.” For Smith, a utility calculation could not not be shaped by sympathy, and so value depends not just on the behavior’s prudence but its temperance (what he calls “self-command”). More, he did not just add temperance and prudence, but looked at how both, intertwined, help individuals connect. The “connection” was what allowed the “invisible hand” to work (Bentham, 1789, II.xii; Smith, 1978, VI.iii; Smith, 1977, letter 40).

[INSERT TABLE 2 NEAR HERE]

Smith objected to charters for joint stock companies as grants of monopoly power. He objected because monopoly was uneconomic and because it was disagreeable and unjust. It was not only imprudent, but unsympathetic. Not only was a monopoly price “upon every occasion the highest which can be got,” it was “the highest which can be squeezed out of buyers.” Trading by definition required two parties, and monopoly enabled the “dealer” to “narrow the competition” and thereby “to levy, for their own benefit, an absurd tax upon the rest of their fellow-citizens” (Smith, 1976b, I.vii.27; I.xi.p.10).

With their differing views of character came different rhetorics of “liberty” and “contract.” For Smith, growth came from “the private frugality and good conduct of individuals” who make “universal, continual, and uninterrupted effort to better their own condition.” Frugality and good conduct outweighed not only private waste and misconduct, but also the “publick extravagance of government,” extravagance that takes the form in times of peace of “the slothful and negligent profusion . . . natural to monarchies” and in times of war “the thoughtless extravagance that democracies are apt to fall into” (Smith, 1976b, II.iii.31; V.ii.a.4). Bentham, however, set aside “natural liberty” and the virtues. The decision for state action was merely one more adding of costs and benefits. Words like “power,” “right,” obligation,” and “liberty” had universally agreed-upon meanings whose mere use (“appropriated to the subject of law”) in an utilitarian calculation chose that agreed-upon meaning (Bentham, 1789, XVII.xxiv).

1825: Smith and paternalism. There is no small irony here: the very words Bentham considered as commonplace, the meanings he believed to be universal, were the ones not yet in the commons as the British moved toward new company law. Notwithstanding a general act repealing the Bubble Act, most company legislation in the 1820s was done through private bill. This itself reveals Smith in the commons: a private bill was a grant of “exclusive privilege,” something to be granted only in exceptional circumstances, not an implementation of a “general

principle.” “[M]arked by much peculiarity,” it was “for the particular interest or benefit of any person or persons.” It had to be brought in by petition, and thus came from the “solicitation of the parties themselves.” Public bills, on the other hand, were measures of “national import, in which the whole community are interested” (Erskine May, 1971 [1844], pp. 383-385).²

Smith likely would have objected to many particulars expressed during private bill debates, but it is clear that the debaters stood on significantly Smithian ground. Mining in Peru, for example, had been used often by Smith to point out uneconomical ideas, and thus it is unlikely Smith would have agreed with Fowell Buxton when the latter argued for a grant of corporate powers to the Peruvian Mining Company; yet Buxton’s talk about the ability to extract “more than 5,000,000 marks of silver” is at least partly the inquiry demanded by Smith into whether a “company might be capable of managing” successfully. While it is impossible to tell whether Smith would have agreed with the particular sentiments expressed by Calcraft against a bill for a metropolitan fish company (Calcraft had argued that the “poor were [too] dainty with respect to fish”), he would have accepted that the poor had a different character, and he certainly would have supported inquiry into matters of virtue and character. Smith would have objected to instances of paternalism during discussion of particular enterprises, but he would have agreed about focusing on instances. (Hansard, 2nd series, 1825, vol. 12, cols. 965, 1020-1022, 1057; Smith, 1976b, I.xi.c.21-34, I.xi.g.21-26, IV.i.33; Smith, 1978, Report of 1762-63, vi.156, Report of 1766, p. 258-260).

Comparison of a Radical speech in 1825 with another thirty years later, highlights the evolution of Smith in the commons. At first glance the rhetoric of Hobhouse’s comment on the Peruvian Mining Company bill in 1825 (“framers of that prospectus evidently proceeded upon the supposition, that there was an infinite fund of gullibility in the dupes to whom they

² “Erskine May” is Parliament’s equivalent of Robert’s Rules of Order; its Book III (p. 383-460) provides extended discussion of private bill practice and procedure.

addressed themselves”) and Muntz on the Limited Liability bill (“if a law of limited liability had existed, Watt would have come under the control of a few ignorant donkeys”), seems to be the same. The “obvious” similarity only illustrates the peril of reading a quotation too quickly when seeking the commons. Where Muntz in 1855 would use the specific donkey metaphor to illustrate a general principle (that “men having small capital would invest it in undertakings of the nature of which they would be totally ignorant”, Hobhouse used the general “infinite fund of gullibility” to illustrate the specific argument about “that prospectus.” Muntz painted with a spray can for four pages of Hansard, but Hobhouse colored with a fine detail brush about “Pasco miners,” “Don Juan Vivez,” and the “Lima Gazette” for almost nine. (Hansard, 2nd series, 1825, vol. 12, cols. 1048-1056; 3rd series, 1855, vol. 139, cols. 1378-1382 [emphasis added]).

1844: Respectability and prudence. By 1844 some issues in *Smith v. Bentham* may have been resolved in Bentham’s favor. (See Shilts, 1999, chaps. 4-5.) The commonplaces of virtue and character had not been. This is seen most clearly in the commonplaces of “respectability.” Rare will a page of 1841-1843 testimony before the Select Committee on the Law of Companies not reveal use (and, usually, repeated use) of the word. Early Victorians disagreed about whether particular enterprises or promoters were respectable, but they agreed on a whole set of questions reflecting the importance of respectability, questions like “Is the respectability of the enterprise critical?” “Is a ‘bubble company’ respectable?” and “Are traits of moral character correlated with social class?” It may have been unsettled whether the evil associated with “fraud” was measured by the circumstances of its victims or by the amounts involved, but it was settled that old people were gullible to the unrespectable. If members disagreed about actual precautions mercantile men tended to take, they agreed on what respectable mercantile men would fear, and they agreed that mercantile men feared being thought unrespectable.

Yet the commonplaces of respectability were evolving. Treatment of witnesses by the

committee, as with treatment of the people who were the subject of the committee's inquiry, followed the extent of the witness's perceived respectability. Part of it was prudence: actuaries like Charles Ansell and Arthur Morgan, barristers like Peter Laurie and Henry Bellenden Ker, were all examined differently than Edward Taylor, the "journeyman locksmith and bellhanger." The more someone was perceived as respectable, the more important that person's expertise and the greater his ability to give evidence on the needs of general practice. A nonprofessional, on the other hand, could not analyze the law, but only provide factual evidence on "how they were going to make a gentleman of me" (1844 Select Committee, Minutes of Evidence, questions 961-1116, 1164-1169, 1246-1350).

Significantly, the voice of the merchant was being replaced by the voice of the prudent professional. For Smith, respectability had been about multiple virtues; a shopkeeper was valued for his temperance as well as for his prudence. Yet in 1843, "C.D." is important, not because he is a temperate "merchant," but because he is a professional who knows the prudence inherent in accurate balance sheets. "A.B.," the other merchant examined by the Gladstone committee is examined not because he is a "retired merchant," but because of expertise he derived from being "a director of several companies, and a shareholder in some of them" (1844 Select Committee, questions 864-960).

1844 continued to see commonplaces of paternalism. Concern with respectability in 1844 included a desire to protect the poor, the gullible, the ignorant, the stupid. Yet it was a new paternalism. It was not just to ensure the gullible person's individual welfare, it was to provide for the commonweal. More important were rules that increased the "efficiency" of the rule-making process. Speaking of the "control" provided by making company directors directly liable as if they were partners, the barrister Peter Laurie argued that it would make shareholders "less careful." Even though shareholders

currently failed to exercise “any thing like an efficient control,” carrying out the “principle” of confidence in directors to an “injurious extent,” they still “have the power of exercising a very efficient control if they choose to do so” (1844 Select Committee, questions 333-337). Vigilance led to efficiency; and shareholder vigilance would be determined by their incentives for vigilance, by the potential pleasures and pains they had to worry about.

Efficiency was prudence, and prudence was good. Were liability attached to a directorship, prudent people would not be “honorary directors.” The difference between paid-up and nominal capital was “perfectly understood by the public,” and so requiring a set (but small) percentage of nominal capital to be paid up would impose on the public only a “mere matter of calculation.” Requiring a public officer as a trustee for each assurance company might mean “inconvenience,” but it was inconvenience “countervailed” by the “security given to the public” and by “a check on the injudicious” (1844 Select Committee, questions 212, 278-279).

Providing adequate “disclosure” was central to the move toward prudence and efficiency. Registry of the full deed of settlement would provide better information than an abridgment or an abstract; “common clauses” would make it easier to draw information from a deed, and all it took was a “merely” ministerial role from the public registrar. Actuaries Angell, Kirkpatrick, Davies, and Morgan considered annual reporting by companies “much more productive” than periodic “careful inquiry by Select Committees of the Houses of Legislature.” Concerns about “stock jobbery” still expressed both a fear for the susceptibilities of the gullible and a need to discourage unrespectable conduct; at the same time, however, the frauds of jobbery were ones for which “the remedy is easy publication.” Lawmakers still worried about making it too easy to transfer “shares to persons of less responsibility,” but the solution was no longer prohibition but only assuring that transacting parties could (if conscientious enough) cheaply, “efficiently,” find out

the true value of shares (1844 Select Committee, questions 117, 241, 249, 317.)

1855-1856: Prudence and class interest. By 1855 debate on the Limited Liability Bill, however, all was shaped by prudence and utility. All speakers now paid homage to the “principle” of limited liability. Each speaker against made it clear that his objection was not to the principle, only to the manner of its implementation. Many disagreed, and disagreed strongly, with Palmerston’s assertion that the bill would lead to “the general advantage of the public,” but only one -- Muntz from Birmingham -- can be found definitively objecting to the principle itself. All other objectors -- Glyn, Spooner, and Hastie in the Commons; St. Leonards, Campbell, Grey, and Monteagle in the Lords -- objected only to how the principle was to be made into law. (Hansard, 3rd series, 1855, vol. 139, cols. 1378-1383, 1390, 1393, 2027, 2031, 2035, 2039.)

The commons of character was Bentham’s. Virtue for 1855 debaters had been reduced to the prudential calculation. Enterprises that limited liability would encourage were prudent (or imprudent). Successful commercial men were honest, industrious, and persevering because it was prudent to have an honest, industrious, and persevering character. Enterprises that failed were imprudent. Speculation was imprudent (or not). Working people needed protection (or not) because they would (or would not) be imprudent otherwise. Allowing monopoly was imprudent. (See, e.g., Hansard, 3rd series, 1855, vol. 139, cols. 1379, 1387, 1452, 1453, 1454, 1521).

Yes, 1855 still had talk about fraud and otherwise-“delusive” undertakings, but it was talk clearly grounded in places of prudence. Opponents of the bill noted the imprudence of the people who tended to be deluded (and who thus needed protection). Proponents argued that people should not be protected from imprudence: “If a man were prudent he would inquire into the character of the Company before investing his money in it, and if he were not a prudent man an Act of Parliament would not make him one.” Interest got in the way of efficiency: partnership

law “left the granting or withholding of charters entirely to a department of the Government that was liable to be influenced, or to be suspected of being influenced, by the representations of person already in the trade, and who were naturally opposed to competition.” (Hansard, 3rd series, 1855, cols. 1521, 1919.)

All sides claimed the authority of “commercial men” for their position. More significantly, they claimed that authority via snide attack ad hominem on the “interest” of one’s debating opponent, only to be met with an equally ad hominem sneer: “[A] more vulgar and unfounded accusation could not have been made, or one which betrayed greater ignorance of economical science,” went one, “than that the capitalists were opposed to the industry of the country” (Hansard, 3rd series, 1855, cols. 1916-1917). Attacks ad hominem reveal the commons, and these were attacks all on Bentham’s ground. Even the Radical Muntz, usually less Bentham-like than any other member of the lower House, stood on it here. He mocked proponents as “members of the Board of Trade, who were not at all conversant with trade,” and his opponents responded in kind: “so well known was the pertinacity of the hon. Gentleman to his own preconceived opinions, that to argue the matter with him would have been perfectly useless” (cols. 1379, 1383). Interest meant unreasoning stubbornness, a mule resisting effective governance.

What of “class”? While perhaps not wholly located on Bentham’s ground, even in 1855, debates on the Joint Stock Companies Bill of 1856 resolved any lingering ambiguity. Even those farthest away from Bentham ideologically, like the paternalist Lord Monteagle, were significantly prudence-shaped: his argument that limited liability could be available when “the enterprise was in its nature useful,” echoed an earlier calculus in the Commons when he argued against “over-estimating the prudence of the country.” Though Lords Overstone and Monteagle protested the 1856 bill, their protest was one liberally sprinkled with words like “principle,” “expedient,” and

“efficient. Just as the proponent Stanley argued “that all those conditions and restrictions which were imposed upon companies ... did more harm than good,” opponents Overstone and Monteagle emphasized how particular protections did more good than harm; and they applied the efficiency standard whether or not they happened to be emphasizing a class they considered particularly needy. (Hansard, 3rd series, 1855, vol. 139 (2028); 1856, vol. 141, cols. 137-139; vol. 142, cols. 1480, 1483-84, 1489-1493.)

By no stretch can either Overstone or Monteagle be accused of being ideologically Benthamite. Both focused on the paternalist’s argument about a Bill to “call into existence every species of fraud and trickery, and ultimately to destroy the high commercial character of this country.” Yet notwithstanding their ideology, they stood on the land of Bentham’s Principle: Overstone asked why banks and insurance companies were excepted “if the principles of this measure were of such value and were worthy of universal application”; Monteagle, digging at the Commons, was thankful that the Lords had not denied the “principle of free trade.” Objections regularly stressed the “principle” of limited liability. Bentham was obsessed with the proportionality of rules; the Overstone/Monteagle protest spoke of the “due equipoise between the restraints and the stimulants to enterprise and speculation” (Hansard, 3rd series, 1856, vol. 142, cols. 1474-1476, 1482-1485, 1490-1493; for Bentham on proportionality, see 1789, chapter XIV.)

“Is it prudent?” had become the ruling commons.

PART TWO: Economic Enterprise Seeks a Commons

Or, rather, it had become a ruling commons. Prudence ruled the Commons (and the Lords), but it was not yet the commons of British economic enterprise. But what of the other side of the puzzle of delay: why did the new statutes go underused. Yes, as Shannon and others

have noted, thousands of enterprises did incorporate. (Shannon, 1931, 1932, 1933; see also, Hunt, 1936 and Jefferys, 1977[1938]). But even more did not: total paid-up capital for the 2488 limited liability companies formed between July 1856 and November 1862 was £34 million, only a fifth of the approximately £170 million added to the nation's capital stock over the same period. (Registrar of Joint Stock Companies, 1864; Feinstein, 1988).

The delay is especially puzzling when one considers what limited liability implied for capital formation beyond the £170 million, the potential benefits foregone because investors had too few limited companies in which to invest, benefits such as the reduction in risk through portfolio diversification. (Limited liability makes it possible to diversify away supply and demand risks particular to an enterprise; unlike a rule of unlimited liability, where the investor would put all his wealth at risk *each time* he added a new asset to his portfolio, the addition of a new asset becomes insurance against and the reduction of risk. And for the Victorians, the gain to be had would have been substantial: a reduction of portfolio risk on the order of 40 percent (Shilts, 1999, chap. 1).³ Yet the gain went unrealized.

Paths of interpretation

People disagree greatly about the proper criteria for “the greatest good for the greatest number” (or, to put it today's idiom, the criteria for “There oughta be a law!”), but most share one tenet of Bentham's belief: carefully drafted legislation will work. If rules are drafted in plain English to provide the appropriate rewards and punishments, potential law users will behave

³The point about diversification was first made by Markowitz (1959). Here, the gain was simulated by randomly forming portfolios of 1, 2, ..., 15 securities using the share prices for 121 securities listed in the Times (London) on April 9, 1845, 371 securities listed on July 5, 1853, and 388 securities listed on July 30, 1856. The return of the Registrar of Joint Stock Companies (1864) provided an estimate of the distribution of shareholding size. Combining the price data and the simulated shareholding size, together with Feinstein's (1972) figures for population and gross national wealth, lead to an estimate of the potential gain.

The approximation is very rough. To the extent an investor's wealth exceeded the national average, the gain can be understated: sometimes because of the denomination of shares, sometimes because of the demographic of the people who were interested in particular companies, investment in one enterprise would be sufficient to preclude diversification, but such was unlikely to be the case for 953 of the 2264 companies reported in the Registrar's Return. On the other hand, if an investor already had multiple assets in his portfolio, the gain is overstated: most of the simulated gain comes from moving from a portfolio with only one asset in it to a portfolio with two or three.

accordingly. (Bentham, 1789).

And if any legislative rules met this criterion, the Joint Stock Companies Act of 1856 and the Companies Act of 1862 did. Its rules were organized systematically. It provided rules of liability that seem certain and determinable by any who might be involved with a corporate enterprise, be they owner, manager, or creditor. Moreover, though there had been thirty years of political and ideological debate along the way, some of which is noted above, Britain's legislative history had by comparison to American and Continental experience been one of steady removal of the barriers to incorporation. Prussia in 1870 allowed easy incorporation, but then in 1884 required substantial minimum capital. France regularly varied both paid-in capital requirements and the size of firms that could obtain the benefits. America's path, had the same back-and-forward movement as France, and varied from state to state. In Britain, however, prospective users of company law would from repeal of the Bubble Act in 1825 to passage of the Joint Stock Companies Act of 1856 have seen a consistent trend of Parliament making incorporation easier. (On the Continental experience, see Cottrell (1980); on France, Freedman (1979); on the United States, Horwitz (1977), pp. 109-139, and Hovenkamp (1991), pp. 11-55).

No amount of care in drafting, however, can reduce to zero a user's cost of figuring out the law's meaning. The sequential character of persuasion and interpretation costs discussed above with respect to legislation applies a fortiori to attempts of lawmakers to persuade people to use the law. No matter how benevolent or wise the legislator is, and no matter how "plain" he makes the law's language, each law user still needs to be persuaded to behave correctly; and each law user's decision to be persuaded must be made at a moment when his understanding is imperfect. Listening is a costly activity. Limited liability may have offered a substantial gain, but realization of that gain depended on multiple enterprise participants – not only the incorporating entrepreneur, but also investors, promoters, solicitors, trade creditors, and bankers

– connecting the economics of diversification to the new legal rules of limited liability. Only after an individual user decides to interpret, only after he decides to incur the costs of listening, will he actually figure out whether limited liability offered benefits to him. And only when the user has figured out there are gains to be had, will he decide to make the choices that lead to that gain. The problem of the law’s delay was not that Parliament miscounted costs and benefits. The problem was that Parliament could not do all the counting. Figuring-out costs were nontransferable. Each user had to be persuaded, and getting persuaded was costly.

Indeed, even when the figuring-out costs could be figured out and reduced sufficiently so that persuasion occurs, there would have been no guarantee that matters will stay figured-out. Persuasion is temporary. Even when the meaning of a law can be made “plain,” it might not remain plain when a new situation arose for the law to be applied to. The flow of information between legislator and legislated-upon moves in both directions simultaneously. Interpretation is an iterative and reiterative process, and one which has no ex ante guarantee of ever stabilizing. (Fish, 1994, especially chapter 11.) Even the most close-minded person can die or change his opinion. The meaning of words is, to use Bruggeman’s (1993) phrase, almost always “under negotiation.”

The potential paths by which information about limited liability might make its way from Parliament to law user were complex, multiple, and nonlinear. The exact path followed for any particular user depended on that user and others perceived the benefits and risks of interpretation along several paths. A user who grew up with his M.P. might have found credible that M.P.'s speech in the Times. If he did not know the M.P. or trust the Times, he might have gone to a brother at Lincoln’s Inn. If he knew no one at Lincoln’s Inn, he might have asked a solicitor who had it via a lecture at Lincoln's Inn by a barrister who read Lindley on Companies (1902), as revised following the Lords' 1897 decision in Salomon v. Salomon and Co., [1897] A.C. 22,

reversing of Lord Justice Lindley's Court of Appeal decision in *Broderip v. Salomon*, [1895], 2 Ch. 323. If he believed solicitors unreliable, as many still did despite the profession's ongoing attempts to improve its reputation, he might have listened only to his family or the promoter's prospectus.⁴ Or he might simply have asked the merchant next door.

Judicial paths?

Which paths should be examined? Look to what the user cared about. And, whatever else he might have considered necessary, a law user always would have cared about how the law fits the facts of his particular situation. Each statutory abstraction – each of the “rules” that “limited liability” implicated – somehow had to become fact-tempered. The rules for formation (“registration”) of a company had to fit his facts; the rules for ongoing management of a company had to fit his facts; and the rules for winding up had fit his facts.

Paradoxically, much of the fact-tempering likely had to take place on the seemingly most expensive interpretive paths, the ones leading through appellate courtrooms. Contemporary treatises like Thring (1889) show hundreds of judicial annotations to the new statutes. The institutional and rhetorical structure of litigation required courts to be grounded in the facts of the case; whatever his ideological leaning, a Victorian judge had to speak through the facts of the particular dispute. For some law users, like the bootmaker Aron Salomon (*Broderip v. Salomon*) or the investors who lost money in the collapse of Overend Gurney and Company (e.g., in the 1873 case of *Peek v. Gurney*, L.R. 6 H. L.377), litigation would settle directly disputes about the meaning of the new statutes; more typically, an investor, creditor, competitor, or promoter needed litigation *by others* before his own non-litigating inquiry into the meaning of “limited liability” would become (relatively) cheap enough.

The history of judicial interpretation, though a necessary part of the story, however could

⁴On the nineteenth century transformation of the economic, political, and professional place of the solicitor, see Abel-Smith and Stevens (1967), Anderson (1992), Kirk (1976), Kostal (1994), Offer (1981), and Polden (1999). For a flavor of how Victorian solicitors viewed themselves, see Field (1840, 1856) and Orton Smith (1860).

not do it all. For one thing, justices could, and often would, worry primarily about the precedential value of their ruling or about other “needs of society”; and in so doing, they – and their ideology – could have actually delayed user interpretation. Ideology in the law reports is hard to miss, as in different ways Cooke (1951), Cornish and Clark (1989), Dicey (1914), Freyer (1992), Hunt (1936), and Robb (1992) have all noted.

So, when *is* interpretation cheap enough?

More important than the barrier of judicial ideology, however, were the necessities of the commons. Most use of the law of companies, then as now, did not take place via litigation. The law use that matters most is everyday use, and suing was not an everyday activity. Lawyers are, and were, expensive. Everyday law use is contracts made without lawyers. In daily activities, most borrowers, lenders, and investors would have listened to fellow users and relied on their own judgment. Finding cheap interpretation thus means looking to the rhetoric users used with each other. And when one looks closely at that rhetoric, a commons of limited liability is conspicuous primarily by its absence.

Consider the company prospectus, a document whereby interpretation of company law was regularly transmitted from user to user. Elsewhere (Shilts, 2004), I have reported on a sample of 1068 prospectuses found at the British Library (1800-1856, 1881.b.23; 1824-1826, 8223.e.10; 1825, 1255.c.21; 1845-1852, 717.m.19; 1898, 1887.c.19). These prospectuses, circulated in England between 1824 and 1898, suggest significant interpretation costs remaining among law users about the meaning of “incorporation with limited liability” at mid-century.⁵

The differences within the sample between 990 pre-1856 prospectuses and 78 from 1898

⁵ Before getting to further details of that prospectus rhetoric, however, it is important to note the significant limitations of the data set. While over a thousand prospectuses are in the sample, the chronological coverage is uneven. There are 295 prospectuses from the 1820s, 305 from the 1830s, 288 from the 1840s, 101 from between 1852 and 1855, and 78 from 1898. Almost all 1820s and 1840s prospectuses, however, are from the “mania” periods of 1825-26 and 1844-46. Worst of all, one finds only a single prospectus from between 1856 and 1898, the 1862 prospectus of the Absolute and Contingent Reversionary Interest and Investment Company, Ltd., found at 8227.a.47, folio 3.

is stark. A typical mid-century prospectus shows little hint of an existing consensus about what liability issues matter and to whom. Sometimes the mid-century prospectus is an accounting forecast of a company's financial possibilities, sometimes an engineering report, and sometimes pure advertising puffery. There is no predictable pattern to the denomination and kind of shares offered, or to the total capital involved. No clear correlation appears between the size of the enterprise and the type of information provided in the prospectus – “public” issues for large enterprises of a million pounds demonstrate the same range of rhetorical choices as prospectuses “for private circulation only” or for enterprises with projected capital needs of £10,000.

Regularity in how the prospectus opens matters for the user commons, and unlike its descendent in 1898 the opening of the pre-1856 prospectus varied a great deal. Shared practices with respect to openings are places of “small” interpretation costs; the more regularity one observes, the more probable that shared interpretation has taken place; the more variation, the more probable that significant interpretation has yet to occur. Between 1825 and 1856 the only significant regularities were company name and the the total capital of the firm. Not only was there no “Limited” in that name (which, after all, may have been illegal for at least part of the period), the prospectus user would have had to incur the costs of reading well into the body of the prospectus to find any information about the company and what it is offers to investors, or even to find out whether he was being solicited to buy shares. (See, e.g., the prospectuses at British Library, 8223.e.10, folios 1, 5, 61, 83, 86, 100, 121-123, 125, 128, 144, 161-163; 1881.b.23, vol. 2, folios 41-44. By 1898, however, the heading had its modern form: set apart by boldface was the full company name including “Limited,” together with the particular Company Act(s) under which the enterprise was incorporated, the company's size, and the size and terms of the offering made; main agents of the enterprise were also prominently displayed (1887.c.19).

When one sees prospectus after prospectus in 1898 including in boldface the total shares

offered, the share denomination, and the amount of calls to be made, one knows that even though Victorian enterprisers may have disagreed about “How does the size of an enterprise change investment risk?” they agreed about the preliminary question, “Does the size of enterprise make a difference?” Though they may have disagreed about “What does ‘Limited’ mean under the ‘Companies Acts 1862 to 1893?’” they agreed on “Do the Companies Acts 1862 to 1893 provide the meaning of ‘Limited’?” In 1856 they agreed on “Does the fraction to be called matter?” but not “What is the risk involved when only calls of ten pounds on a fifty-pound share are contemplated?” In 1898, they agreed on both.

The regular use of less-than-fully-paid shares also reveals user unsettledness regarding the meaning of limited liability. While (unlike 1825) the beginning of each prospectus seen in 1838, 1844, or 1852 included the denomination and calls to be made, the actual amounts continued to vary a great deal. And they likely would have continued to do so in the early decades of general limited liability; of the companies formed after 1856 and still in existence in 1865, 84% of the shares ranged from £5 to £5000, with 52% between £10 and £100. While larger denomination shares declined in popularity after the crisis of 1866-67, the practice of trading less-than-fully-paid shares continued. Over the period 1856-1882, average paid-in capital as a fraction of the company’s stated of “nominal” capital varied from a low of 13.3% in 1869 to a high of 57.8% in 1859. Only in the eighties and nineties would prospectuses have taken the form of those seen in 1898, with shares typically between £1 and £5 and fully paid-up. (1881.b.23, vol.2, folio 47; vol. 3, folio 1B, vol. 5, folio 62; 1887.c.19, folios 21, 22, 52, 72, 77; see also, Cottrell, 1980, pp. 84-86; Jefferys, 1946, pp. 45-46, 50-52.)

Clearly, users in 1856 were far from sure about the functions a prospectus was to serve. Modern prospectuses speak in the voice of the lawyer and chartered accountant, the voice of 8-point font and the balance sheet. Even the paper used varies little. Not so for the mid-century

British prospectus. Some look like they were written by a City lawyer, others by a mining engineer. Still others are nothing but puffery. Some are filled with statements of projected profit; many others rely on elegant engravings or multiple-color maps. Some feature testimonials by prominent members of Parliament; others prominently list director M.P.s; still others seem almost defiant about their lack of M.P participation. Some are on fine vellum.

Where was the commons? Was the prospectus for advertising, or was it for providing objective information about the enterprise? Was it to inform its intended audience about engineering details of a mine, about the amount of ore that could be mined, or about the return on investment? Did investors care about the risk of the investment or about the respectability of the entrepreneur? Finding examples of each among prospectuses circulated during the manias of the period is unsurprising: one can imagine speculative fever leading potential promoters to try a various strategies in hopes that their prospectus would be the one read; as one late Victorian put it, “all householders and shareholders, as well as postmen, know the influx of prospectuses when a floating mania is on” (Cottrell, 1980, quoting Jaycee, Public Companies from the Cradle to the Grave (London, 1883), p. 19). What is surprising is that the same variation is found not only during the manias of 1825 and 1844, but also in 1838 and 1852.

Conspicuously absent, too, is boilerplate, the “legalese” of “small print.” Boilerplate shows meaning that is shared; more boilerplate means more has reached the commons. Because it can be ignored by the everyday investor, it can be skipped and less reading costs incurred. Only after 1856, however, would a company’s memorandum of association become a regular addition (typically on the back cover) and reveal, for example the interpretative power of broad “objects” clauses. By 1898 the language was, except for the company’s name and office, virtually identical: every objects clause in every memorandum of association in every 1898 prospectus in the sample combined a list of every activity the drafter might imagine the

enterprise being involved in, together with all-inclusive power “to execute and do generally all such other things as the Company may at any time consider incidental or conducive to the carrying out or attainment of the above objects or any of them” (British Library, 1887.c.19, folio 41). In addition to the memorandum, each prospectus typically had a section describing its existing contracts, a section explicitly mentioning section 38 of the Companies Act of 1867 and showing the writer responding to section 38's requirement to disclose material contracts as interpreted by highly contested cases like the 1877 *Twycross v. Grant* (2 C.P.D. 469) and the 1880 *Sullivan v. Mitcalfe* (5 C.P.D. 455); and each provided for inspection at a solicitor's office of memorandum, articles, and vendor contracts.

Finally, whether the enterprise was large or small, the 1898 prospectus invariably focused on what we would call balance sheet and income statement analysis to tell a story of a high return on investment with little risk. They provided auditor and valuation agent certificates. No asset and return ratios are provided, but the sufficiency of detail on assets, liabilities, expenses, and revenues meant a reader could have calculated them. They mention whether the purchase price included payment for goodwill. Where a prospectus for larger ventures might still supplement accounting information with testimonials or eye-catching graphics, puffery in small-company conversions was highly muted, limited to statements that an “old established business ... [that] has always had the highest reputation” (Hardebeck and Bornhardt), is “increasingly prosperous” (Reffells Bexley Brewery) or “well-known” (Hutchinson & Sons), or that its product has “gained a very high position” (Spear Brothers & Clark). (British Library, 1887.c.19, folios 37-38, 42, 62, 65.)

Nor can this prominence of accounting information in the 1898 prospectus be explained by statutory evolution between 1856 and 1898. Disclosure requirements were imposed by Parliament after, not before, these prospectuses in question were circulated. The Joint Stock

Companies Act of 1856 had made optional disclosure that had previously been required under private bills, general railway bills, and even the Limited Liability Act. An annual audit was made compulsory for limited liability banks by the Companies Act of 1879, but only with the Companies Act of 1900 would other companies be required to do so, and then only “public” companies. Long before 1900, however, the use of professional auditors had become commonplace, and 1898 prospectuses make clear that they were commonplace regardless of the size of the enterprise. Even the prospectus for an enterprise as small as the Bridlington Hydropathic Limited, a company with capital of only £11,000, has a chartered accountant listed as its auditor on the first page, and the interior of the prospectus contains a two-paragraph “Auditor’s Certificate” of expected profits. (Edey an Panitpakdi, 1978; British Library, 1887.c.19, folio 67.) If a cause-and-effect relationship existed between audit practice and legislation, it went from practice to statute, not from statute to practice.

CONCLUSION

A much larger percentage of economists probably “buys” McCloskey’s point than a reading of The American Economic Review or other mainstream economic journals would suggest. The problem, however, is that, with the exception of a few like McCloskey, we as a discipline have forgotten how to put the idea into practice, how to give it empirical oomph. In our love of deductive logic and material reducible to tables and graphs of numbers we appear to have lost the ability to pay attention to the rhetoric.

This essay has been one attempt to do just that. One way to follow McCloskey’s lead, one way to recover our epistemological memories, is to re-examine traditional stories in the economist’s book of tales, to reinvent a story like the tragedy of the commons. In its usual telling, the tragedy emphasizes the problem of “common property”: poorly specified property rights are a recipe for tragedy in our use of economic wealth. We combine cheap technological

access and rules of the game that name oceans as the common property of all mankind, with the result that valuable resources (cod, whales) get overused, even threatened with extinction. The tragedy is the story of “too much of a good thing.” Here, however, the commons is conceptualized differently, and so instead of being a barrier to effective use of resources its existence becomes a necessary condition therefor.

Legislation cannot get passed when all issues need to be taken back to first principles. Debate of “every” issue of importance is simply too expensive. When an issue makes its way into the commons, however, that issue no longer needs to be debated; and when issues no longer need to be debated, the costs of persuasion become sufficiently low to reduce the ideas into legal rules. So it was that the Joint Stock Companies Act of 1856, and the everyday corporate form that it enabled, came into being.

By no means can the revised story of the commons be considered complete. Even on the legislative side, for example, I have only provided a swatch of the cloth that is the Victorian commons, a swatch showing the participation of Adam Smith and Jeremy Bentham. My claim here is not that the commons between 1825 and 1856 was cloth woven solely with threads from the spinning machines of Smith and Bentham. My claim here is only that how weavers used Smith and Bentham as yarn evolved, with Bentham dominating both warp and weft in 1856 in a way that he did not in 1825. Neither Smithian nor other ideologies had been wholly banished from the weaving, but those questions had by the time of the Joint Stock Companies Act of 1856 become well and truly grounded upon a commons of utilitarianism. Bentham’s “ideology” did not own the questions being contested by the Victorians; his ideas, however, owned the questions underneath the questions.

Even a legislature standing in the commons of Jeremy Bentham is not sufficient, however. What mattered more in reducing interpretation costs and realizing the gains from general

incorporation with limited liability was not winning Parliamentary or judicial battles over limited liability, not even winning the battle for the legislative commons. What mattered was not whether this or that ideology of laissez-faire was in the ascendant. What mattered was the commons shared by lawmaker and law user; what mattered were the agreements about rhetorical rules of the game by which Victorian parliamentarians, entrepreneurs, investors, and creditors all agreed to play. “Limited liability” had to enter a rhetorical place where its meaning had become figured out and agreed upon. High costs to users of figuring out and reaching agreement had to be incurred before lawmakers could convince enterprisers to move to the new common ground. Drafters of the mid-century general incorporation statutes may have “known” what we now know about the meaning of “limited liability,” and they may have reduced that knowledge into rules epitomizing Bentham’s criteria for proper legislation, but until the real users of the law (entrepreneurs, investors, company creditors) also shared that meaning, interpretation – and therefore use – of the law would remain too expensive.

Understanding paths by which the user commons developed (or in this case, had not yet developed), one better understands when the economic costs and benefits of that new company law were realized (or not realized). We understand better why use of the law was uneconomical at mid-century, and we understand when with reduced interpretation costs use of the law could become economical. The transformed company prospectus shows the reduction of interpretation costs that had to happen before more of the benefits of “limited liability” could be realized. Rhetorical analysis shows how to look for low-cost user interpretation. It shows how to find places where a promoter no longer had to interpret, where an entrepreneur no longer had to figure out an investor’s interpretation, where an investor no longer had to figure out an entrepreneur’s interpretation of a promoter’s interpretation. It shows how to find convergence in understanding across law users. It points the way to places of cheap trucking, bartering, and exchanging.

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FIGURE 1: The commons

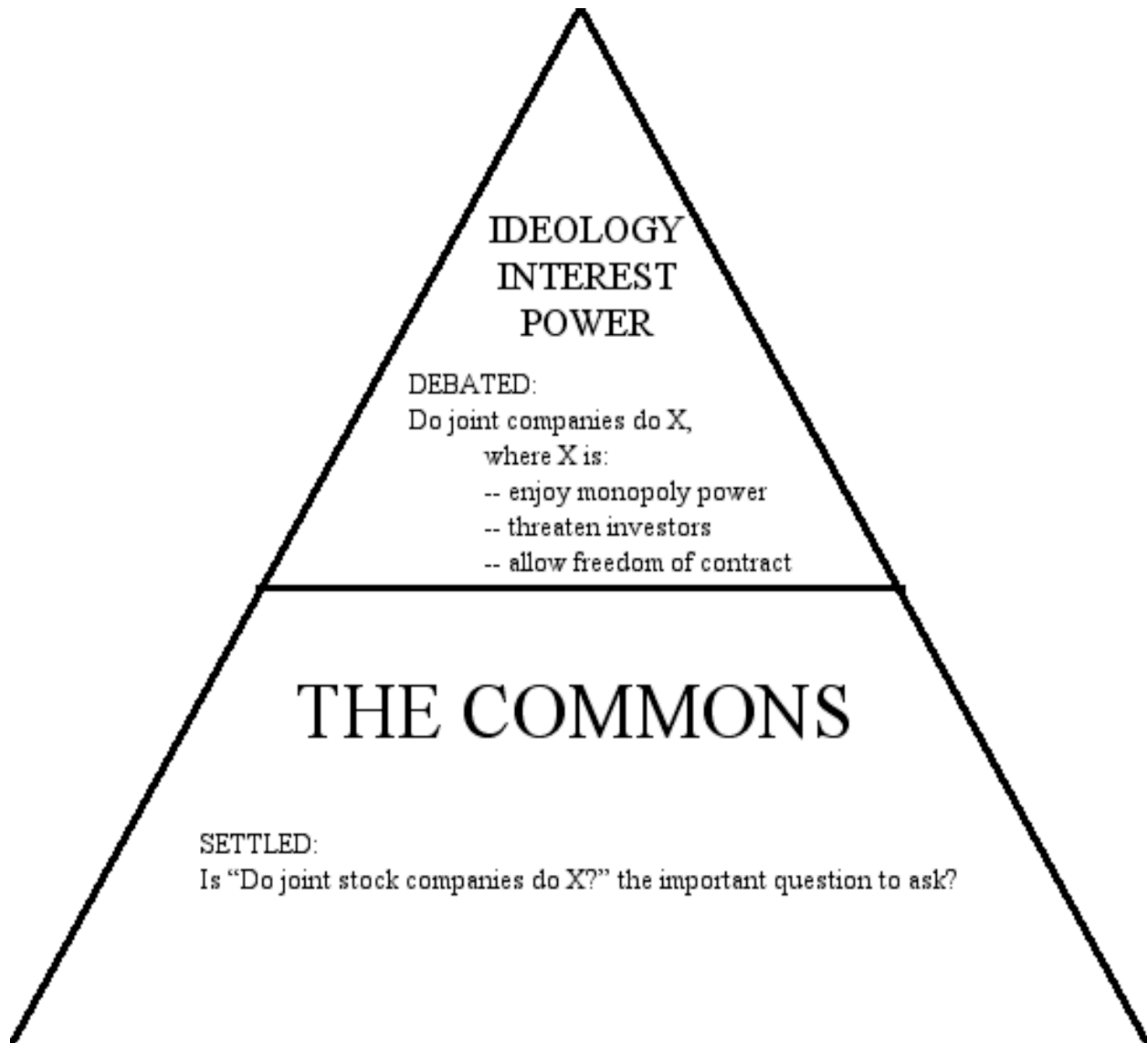


Table 1: The commons of ‘limited liability’: examples of its evolution

<u>The commons before 1856</u>	<u>The commons in 1856</u>
Does the joint stock company mean speculation?	Will limited liability mean more good speculation or more bad speculation?
Does freedom of contract matter?	Does limited liability increase certainty for those who would contract?
	Is this provision or that provision in the bill more consistent with the principle of freedom of contract?
Does ‘freedom of contract’ mean individual freedom and choice?	Is freedom of contract constrained by the need for social utility?
Would people choose to contract in good ways if given limited liability?	Does general limited liability, as drafted, give people enough information to make good choices?

Table 2: The commons of sympathy and the virtues

WHERE IS THE COMMONS?		
<u>With Smith?</u>	or	<u>With Bentham?</u>
<u>Is the law prudent and benevolent and temperate?</u>		<u>Is the law prudent?</u>
<u>The pursuit of which virtue(s) leads to an increase in capital?</u>		<u>What increases capital?</u>
<u>Is the legislation founded in sympathy?</u>		<u>Is sympathy on the part of the legislator prudent?</u>
<u>Debated questions (ideology and interest)</u>		<u>Inferred/settled questions (“the commons”)</u>

1841-1844: RESPECTABILITY AND PRUDENCE.

Were specific enterprises or promoters respectable?	Is the respectability of the enterprise critical? Settled answer: yes. Is a ‘bubble company’ respectable? Settled answer: no. Are traits of moral character correlated with social class? Settled answer: yes.
Was the evil of ‘fraud’ measured by the circumstances of its victims or by the amounts involved?	Are old people, governesses, and servants gullible to the blandishments of the unrespectable? Settled answer: yes.
Does a particular witness have expertise worth listening to?	Is expertise a function of respectability? Settled answer: yes. Is respectability a function of the witness’s profession? Settled answer: yes.
Will making company directors fully liable make shareholders less careful?	Is shareholder vigilance efficient and, being efficient, prudent? Settled answer: yes.

1855-1856: PRUDENCE AND CLASS INTEREST.

Does this Bill prudently implement the principle of limited liability?	Is the principle of ‘limited liability’ a prudent one? Settled answer: yes.
Do commercial men support the Bill?	Are successful commercial men prudent? Settled answer: yes. Are industriousness, honesty, perseverance all varieties of prudence? Settled answer: yes.
Should certain classes of people be protected from themselves?	Are certain classes of people more imprudent? Settled answer: yes.