Corporations are commonly called "property," as if they were things that can be owned, bought, sold and controlled under the ordinary laws of property. This metaphor is false. Certainly, corporations own property. That is one of the most ancient prerogatives of the legal form. But the right to own property does not make the organization itself property. This is manifestly false. Undoubtedly, property law can usefully be thought of as conveying a limited form of sovereignty. Corporate law even more clearly creates a form of sovereignty. But viewing the organizational law of corporations as a branch of property law serves only to obfuscate (the leading alternative, pretending that directors are agents of shareholders, is even less revealing). Corporations are the legal manifestations of organizations: firms, cities, or non-profits. Thus, even more than ordinary property law, corporate law is about relationships of power between people. Moreover, the largest of our corporations are inherently public, influencing the lives of employees, customers, suppliers and investors across the world. Our most important institutions should no more be governed by property law than the state itself.

More prosaically, corporate law as we know it simply does not grant corporate participants anything resembling the standard bundle of property rights to exclude, control, sell, and destroy. Nor does it hold them to the associated responsibilities of owners for the consequences of their actions: the most famous incident of corporate privilege is the shield of so-called "limited liability," which relieves shareholders of any liability for corporate obligations.

On the contrary, corporate law carefully excludes investors and employees alike from the rights of ownership. Instead, it creates a decision-making body—

1 Similarly, transferable shares of for-profit corporations clearly are property: shareholders may buy, sell, or destroy their shares at will with little consideration of the interests of others. But shareholders do not own corporate property. A shareholder of Microsoft, for example, who sought to exclude non-shareholder employees from the Microsoft headquarters would be quickly led away by forces of the state, men in blue, if not white coats.


3 The law insists that the shareholder maintain a formal separation between personal and corporate assets: the core of "piercing the veil" doctrine is that shareholders that treat the corporation's property as their own will be held personally liable for corporate obligations, as if the corporation really were shareholder property or its decision-makers mere agents of the shareholders. See, e.g., Berkey v. Third Ave. Ry. Co., 244 N.Y. 84 (1926).
the board of directors or trustees—that is explicitly barred from acting as the firm’s owner. Far from owners, board members are legally required to act as fiduciaries for the entity itself, exercising independent judgment to act in the interests of the firm as they perceive it, regardless of their own interests or desires. Meanwhile, other corporate participants, even if they have the right to buy and sell their interests in the firm (as do share and bond owners of a publicly traded business corporation), have only the most limited rights to determine firm policies or control firm assets.5

The corporation-as-property metaphor suggests that even the largest multinational business corporations, however critical to social welfare, are somehow analogous to a private home—the sanctuary of an individual owner, protecting him or her from the pressing obligations of social life. But corporations are not private homes. Neither shareholders nor managers of publicly traded corporations have anything resembling full ownership rights, and shareholders—which are mainly institutions themselves—have little claim to the protected sphere of autonomous action that is so crucial to the standard defences of private property.

Liberal democracies successfully eliminated the claims of kings that the state ought to be seen as a sort of property owned by its elite (even Locke contended that only the “investors”—real estate taxpayers—had a claim to the vote). Some of our corporate theorists, in contrast, seem to be working to replace the liberal project with the political theory of the Sun King.

Self-Governing Institutions

Corporations ought to be understood as semi-sovereigns: self-governing institutions to which we have granted a high degree of autonomy from ordinary democratic processes. Corporate law is primarily constitutional law, determining how internal decision-making will be organized and decision-makers appointed. The fiduciary duties of directors and their agents serve (with varying degrees of success) to restrain corporate officers from treating their offices as personal property, while the limitations on judicial review of the business judgment rule function as a direct parallel to comity, protecting internal corporate processes from review by other sovereigns.

Recognizing the public nature of our multi-national corporations will clarify the enormous democratic and republican deficits in their governance. We ought to view them with the same awe and skepticism with which we see the state itself:

4 Employees of government institutions often do have property-like rights to their offices, structured by civil service laws or the due process clause under influence of Charles Reich’s New Property principles. See Charles A. Reich, The New Property, 73 Yale L.J. 733, 767 (1964).

as institutions vital to civilization and prosperity, but always threatening to depart from their appropriate role as our servants to, instead, pursue power and mastery.

Nonetheless, American law usually classifies corporations as private—entities that need to be protected from government, not government-like power structures from which we need to be protected. Accordingly, the Supreme Court and legislatures grant our publicly traded transnational corporations personal rights such as speech and privacy, but we do not have a structure of fundamental rights against them.

Corporate law has no equivalent to the public doctrine of settled expectations—within the corporation, paradoxically, property rights are few and far between. In particular, employees usually have little or no enforceable claim to the product of their labor, the perquisites of office or status, due process or even equality under law. On the contrary, they may be terminated at any time for no reason or any reason not barred by the anti-discrimination laws. As agents, they must obey the orders of their superiors and lack the basic right protected by property, that of a sphere of privacy in which an individual’s will is supreme, or the fundamental liberal right of freedom of thought and speech. To say what you believe at work, if you believe something different from what your corporate superiors wish, will get you fired—and not only will the state not enforce a right of freedom of thought, but it will deem the firing “for cause” and deny you unemployment insurance. Employee workspaces—including private spaces such as desk drawers or email accounts—are subject to employer monitoring without notice, consent or process.

In short, our corporate law fails to reflect the liberal rights associated with limited government.

Moreover, we have yet to achieve basic republican principles in corporate governance. Corporate power is routinely centralized with no countervailing powers or checks and balances. Montesquieu’s theory of power checking power

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7 See, e.g., *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (limiting the majority’s right to supervise corporations by creating a corporate right to freedom from inspection under the Fourth Amendment).

8 *The Civil Rights Cases*, 109 U.S. 3 (1883) (inventing the State Action Doctrine to hold that the Fourteenth Amendment protects citizens against violations of equal protection and due process only if the invader is the “state,” not a corporation created by the state).
has no corporate law equivalent. Indeed, the chief executive is usually also the chairman of the legislative-like board, in a sort of parliamentary system without parties, citizen voting or judiciary. Unlike citizens, corporate customers and employees lack any governance rights, rights to dissent or criticize, and even any right to avoid expulsion from the community. Ordinary civil service norms, from neutral decision-making to Freedom of Information sunshine provisions, do not apply even to the largest and most bureaucratic firms, while the rule of law, in the sense of ordered regularity, applies only until the board or its delegates decide that it should not.

Indeed, contemporary corporate governance law ignores not only the basic claims of liberal political theory but even the most limited demands of pre-modern political theory. Every medieval theorist understood that the difference between a king and a tyrant is that a legitimate king acts in the public interest for the public good. Corporate law, in contrast, is clear that corporations are free to determine collective policies entirely without regard to the interests or values of their employees, customers and the citizens of the nations that create them. Those corporate participants and dependants have no more voice in the corporate “legislature” than medieval serfs had in theirs; the courts, meanwhile, generally cloak corporate board decisions in the protection of the business judgment rule. Pointedly, in the one circumstance where courts limit board discretion—when the company is up for sale—the judicial rule is that the board may not respond to the needs of such corporate participant at all. Instead, once the company is in so-called “Reynolds Mode,” its officeholders must ignore all interests and voices in the corporate entity, acting solely to maximize share price.9

Since Aristotle, we have recognized that the core of justice is treating equals equally. Our large corporations, however, institutionalize a very different principle: to those who have much, much will be given. They routinely favor the powerful or connected, interpreting competitive principles to allow treating people according to their usefulness to the firm. In corporate law, the law of one price has no place; firms routinely offer discounts to favored customers, pay employees different rates for similar work; and hire or promote officers or appoint directors because of their personal connections. In the public sphere, we’d generally consider this egregious corruption; in the corporate world it is simply “the moral[ity] of the marketplace.”10

Moreover, within the limits of the punitive sanctions granted them—expulsion, defaming, and ostracizing—corporations are free to discipline customers and employees with no semblance of due process. The elaborate networks of anonymous informers and files of inaccurate information in our credit reporting

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10 Quoting, slightly out of context, Justice Cardozo’s opinion in Meinhard v. Salomon, 164 N.E. 545, 546 (N.Y. 1928), which holds fiduciaries to a higher standard. Corporate decision-makers owe no fiduciary duty to citizens of the countries in which they operate, nor to corporate employees nor, ordinarily, customers.
system would put any police state to shame.\textsuperscript{11} Even the oldest commandment of
good government—that judges should accept no payments from the litigants\textsuperscript{12}—
does not apply to corporate adjudicators, who routinely view themselves as
having no duty at all towards either truth, social norms or those whose fates they
determine.\textsuperscript{13}

Finally, in a democratic age, corporate law defies the most fundamental
principles of democracy.\textsuperscript{14} First, of course, those most affected by corporate
governance are excluded entirely: in ordinary business corporations, employees
are routinely denied the vote, and even when their pension funds own voting
shares, Federal pension law often requires fund fiduciaries to act in the hypothetical
interests of imaginary future pensioners even if those conflict with the actual
opinions, values, or interests of the living employees.\textsuperscript{15}

\textsuperscript{11} See Scott Thurm, Next Frontier in Credit Scores: Predicting Personal Behavior,
6655182086300912.html (reporting on credit bureau attempts to find new users for their
predictions).

\textsuperscript{12} See, e.g., Exodus 23:8; Deuteronomy 16:18–19. Plato is similarly clear on this
basic point. Plato, Laws XII (R.G. Bury trans. 1926) (360 B.C.E.) (proposing death penalty
for anyone who accepts a gift for serving the country). Hammurabi, in contrast, provides
Draconian punishments for bribing witnesses and for judges who change their verdict, but
does not mention bribing the judge in advance. Code of Hammurabi 4–5 (L.W. King ed.
2004)(1780 B.C.E.).

\textsuperscript{13} See, e.g., Kamin v. Am. Express Co., 383 N.Y.S.2d 807 (Sup. Ct. 1976), aff’d, 387
N.Y.S.2d 993 (App. Div. 1976) (holding that failing to collect amounts due from DNC was
not a violation of fiduciary duty); Richard White, Railroaded: The Transcontinentals and
the Making of Modern America 353 (2011) (describing Charles Francis Adams’ view, as
President of Union Pacific, that his “duty to his stockholders” required bribery of Federal
officials).

\textsuperscript{14} It is perfectly legal to organize a democratic corporation, which we would call
an “employee coop.” However, employee coops are rare, in part because existing law
creates enormous financial incentives for incumbents to, instead, allocate future gains to
themselves. See also, Henry Hansmann, Ownership of the Firm, 4 J.L. Econ. & Org. 267
(1988) (describing reasons why capital ordinarily hires labor rather than the other way
around). Some corporations appear to be operated in the interests of elite employees even
when the formal organizational rules suggest otherwise: consider, for example, investment
banks such as JP MorganChase or Goldman Sachs that pay out most of their economic profit
as salary, or high-tech firms like Microsoft that give executives huge stock distributions.
Under current corporate law, these issues are delegated to the corporation’s incumbent
decision-makers with no equivalent to the limits constitutional principles place on political
office-holders.

\textsuperscript{15} See ERISA, 29 U.S.C. § 1104(a)(1)(A)(i) (providing that ERISA trustee must
manage fund solely for the purpose of providing retirement benefits). For further discussion,
see Daniel J.H. Greenwood, Fictional Shareholders: For Whom Are Corporate Managers
In the for-profit sector, corporations usually have elected boards. Corporate elections, however, bear little resemblance to democracy. Generally, corporations allocate votes on the distinctly anti-democratic rule of one share one vote, as if shares rather than human beings were the citizens of the community. Worse still, shares (and therefore the votes they command) are routinely salable, with no imputation of corruption to those who simply buy elections. Thus, rule is not by the people but by economic incumbents: past economic success or luck gives wealth-holders the ability to translate money into power, and, therefore, into more money.

Moreover, in practice, plutocracy usually takes a back seat to bureaucracy. Publicly traded shares are largely voted by institutional investors that are themselves corporations or similar institutions. As a result, share voting often functions quite similarly to the bureaucratic hierarchy within the firm: professionals or fiduciaries supervise other other professionals or fiduciaries.

Even this limited legislative answerability is far from universal or expected. Most corporate boards are self-perpetuating in all but crisis circumstances. First, most corporate elections are uncontested, so the board's incumbents, via its nomination committee, in effect appoint their own successors. Even should an outsider contest an election, incumbents are permitted to use corporate funds to wage their campaign, while insurgents must fund themselves. As a result, contested share elections occur, in practice, only when an outsider buys up a majority or close to a majority of the votes. But since the judicial approval of the "poison pill" (which creates enormous financial penalties for such purchases without prior board approval), even this tactic requires the consent of the incumbent directors.16

Moreover, it is not uncommon to find Articles of Incorporation designed to ensure that outside shareholders have no authority even in extremis. It is perfectly legal (and routine) to allocate a block of shares controlling a majority of votes to a particular shareholder, which may itself be a corporation, trust or other entity, and thus ensure that control is perpetually exercised by the incumbents and their chosen successors. Alternatively, corporations may allocate votes differently than dividend rights, making it easier for incumbents to retain control while attracting outside funds. Google's two founders, for example, have extra voting rights for

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16 Only once has an outsider dared to trigger a poison pill without prior consent of the incumbent board or a court order. See, e.g., Moran v. Household Int'l, Inc., 500 A.2d 1346, 1352 (Del. 1985); Arthur Fleischer, Jr. & Alexander R. Sussman, Takeover Defense § 5.04[D][2], at 5-58 to -59 (6th ed. 2002). While the Delaware courts have ordered boards to lift the barrier created by the poison pill when they deemed the pill's use inappropriate, see, e.g., City Capital Assoc. v. Intercr Inc., 551 A.2d 787 (Del. Ch. 1988), since Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1367 (Del. 1995), the bar for judicial intervention has been set quite high. On the effectiveness of the pill, see, e.g., Gahan Subramanian, Bargaining in the Shadow of Takeover Defenses, 113 Yale L.J. 621, 627 (2003).
their shares that guarantee that they can always outvote all other shares.\footnote{17} Moreover, it is perfectly permissible, and common in the not-for-profit sector, to create a corporation in which the board—the legislative body—is entirely and permanently self-perpetuating (without regard even to the rule against perpetuities).

Classical liberal thought sharply distinguishes between private and public, civil society and the state. The state exists to restrain citizens from a Hobbesian war of all against all and, more generally, to limit the violence and coercion of private power. However, as Hobbes' own work exemplifies, a state powerful enough to restrain private violence and bullying is itself a frightening concentration of potentially dangerous power. Thus, liberty requires a careful balance: a state powerful enough to restrain private power, yet restrained enough to prevent it from becoming itself a tool of oppression. Hobbes proposed the core of the liberal solution: the laws should be "as Hedges are set, not to stop Travellers, but to keep them in the way," that is, preventing overarching and abusive behavior—but not restricting people to particular roads or, especially, particular destinations.\footnote{18}

Without a doubt, the distinction between state and private coercion is generally problematic.\footnote{19} State violence stands behind the corporate, property, contract and criminal law that define private hierarchy and enforce private power relations. Illegitimate private coercion is not always distinguishable from (and rarely preferable to) state oppression. Indeed, as the article that inspires this collection makes clear, significant property owners are at least as much public officials as most constitutionally recognized state actors.\footnote{20}

Nonetheless, our political rhetoric tends to sharply distinguish between public and private coercion (and the Supreme Court's constitutional jurisprudence is defined by this distinction, restricting itself only exclusively to state action, with only the undeveloped exceptions of the Thirteenth Amendment bar on badges of slavery and the Article I, Section 9 ban on titles of nobility). In both law and politics, contemporary Americans are far more likely to claim rights against the state than against purportedly private persons such as oppressive corporate property owners, monopolists, rentiers, polluters, corrupters of public officials or other villains of the rhetoric of other places and other eras.

Since the great corporate law transformation at the beginning of the twentieth century, for-profit business corporations have grown to dominate large sectors of the economy and our culture. Today, neither violence nor unjust overweening power is a state monopoly (if they ever were). Prisons have been privatized, corporate police forces are larger than municipal ones, cities offer "rent-a-cop" programs to large firms, and the military itself has largely been outsourced to Halliburton and

\footnote{17} Google is by no means unique. For example, The New York Times, Hershey's and Campbell's Soup each have had provisions designed to assure that the founding family or its designees can always outvote publicly traded shares.
\footnote{20} Cohen, supra note 2, at 26.
other “private” actors. Private prisons, a judicial system increasingly delegated to arbitration, ever increasing corporate tracking of our purchasing, entertainment and political activities and preferences,24 entirely private credit rating services and internal company discipline and security make a mockery of any claim that the state retains a monopoly on the legitimate use of violence or social control.

Instead, we are reverting to a system of feudal poly nomoi, in which the democratically elected government is only a small part of the regulatory and coercive apparatus. As the state diminishes and our largest economic entities expand, the public-private dichotomy is increasingly dysfunctional, concealing potentially unjust power relations and distracting us from needed reform.

Public corporations are, under current law, private. Government agencies, however limited their scope or goals, are public, even when, as in the case of the Federal Reserve, they are controlled by private actors themselves beholden to the profit motive. Two sets of bureaucratic power structures barely distinguishable in their processes or influence are treated as if they were radically different. The result is that we have speech and privacy rights against a local school board, but US law grants our employers an unquestioned right to probe the contents of our desks and email accounts. Our freedom of information rights to a transparent government are so much stronger than the autonomy or privacy or academic freedom rights of government employee that political operatives can use them to examine the emails of a state university professor who has criticized them,22 but Google and Koch Industries have privacy rights that prevent us from knowing how they plan to change, or endanger, our lives or political system. The City Assessor needs to have a reason and a process before raising my taxes, but my access to medical care is dependent solely on the whims and market power of my employer.

Our major corporations share many of the characteristics of sovereigns. They should share the responsibilities as well.


22 For descriptions of politically motivated demands for disclosure of faculty emails, see Outside Legal Counsel, Filing FOIA Requests for Professors’ Emails (March 30, 2011), http://www.olecplc.com/public/media/130140262 and Professional Staff Congress, City University of New York, FOIA, Academic Freedom and the Use of University Email and Computer Resources (Apr. 12, 2011), http://www.psc-cuny.org/our-rights/foia-academic-freedom-and-use-university-email-and-computer-resources. This kind of invasion of the professor’s work product violates the spirit, if not necessarily the rules, of tenure and academic freedom meant to protect individual academics from exactly this type of political pressure.
Quasi-Sovereigns: “Worms in the entrayles of the state”

Cohen points out that property law always conveys a form of sovereignty—control over other people and not just things. Corporate law is even explicitly a branch of public, political, law. Property still retains aspects of its origins in medieval status law. Corporate law remains centrally the law organizing a coercive governance structure. The central right of a corporate board is the right—normally absent from contractual, private, relationships—to bind dissidents without their actual consent. The entire corporation must follow the rules set down by the accredited governing powers. (Locke, following Socrates, attempted to justify coercive governmental powers by a theory of tacit consent—subjects may be said to have consented to the law if they do not emigrate. But tacit consent is not actual consent as it is understood in private law, which always requires more than merely failing to flee. Corporate law, like public law, has theories of tacit consent but does not depend on actual consent. In a modern corporation, many participants may exit freely—although not shareholders, which may only transfer their rights and obligations, not abandon them. But this is at most a right of emigration, which does not vitiate the general principle: corporate boards bind all corporate participants regardless of consent. Corporate law is, thus, fundamentally non-contractual, public rather than private.)

In the beginning, everyone understood that corporations were somewhat sovereign. The ancient corporations—the Church, the Knights Templar and the Knights Hospitallers of St. John (which at various times from the First Crusade to the French Revolution controlled Jerusalem, Acre, Tripoli, Rhodes, and Malta as well as many fortresses elsewhere), the Universities, the City of London, later the British East India Company and the Massachusetts Bay Company—were “corporations” precisely because they were corporate and corporeal. A corporation acted as a single body, by making law for their members.

Right of clergy, the students’ right to be tried by the law of the University (and to carry their national student law with them even as they studied abroad), the City’s right to self-regulate: these law-making governance rights were the essence of the beast. Hobbes famously contended that corporations are a threat to the state’s monopoly on lawmaking, “as it were many lesser Common-wealths in the bowels of a greater, like worms in the entrayles of a naturall man.”

23 Hobbes, supra note 18, at 230. “Another infirmity of a Common-wealth, is the immoderate greatness of a Town, when it is able to furnish out of its own Circuit, the number, and expence of a great Army: As also the great number of Corporations; which are as it were many lesser Common-wealths in the bowels of a greater, like worms in the entrayles of a naturall man.” Id. Compare Mark J. Roe, Strong Managers, Weak Owners: The Political Roots of American Corporate Finance (1994) (describing early anti-trust and banking law as motivated by fear of corporate political power), with Howard Zinn, A People’s History of the United States: 1492–Present 261, 264–85 (Harper Perennial 1995) (1980) (describing anti-monopoly popular movements), and Herbert Hovenkamp,
view was not unusual—not only was it a common view in the centralizing states of the early modern period, it continued to be a mainstream American rhetorical trope into the twentieth century.

These early corporations did not distinguish clearly between business and politics.24 Between the beginning of the seventeenth century and the Revolution, France created seventy-five “Colonization Companies,” with charters granting not only monopoly trading rights but also “political powers.”25 Similarly, while some of the American colonies were founded with land grants,26 others famously begin with charters creating bodies “corporate and politic”: the Plymouth Council,27 the Massachusetts Bay Company,28 Connecticut,29 the Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia30 and the Hudson Bay Company (in Canada).31

The original charters for both the London Company (to settle Virginia) and the Plymouth Company (to settle New England) made these corporations more state-like than today’s American states: each gave the respective company the right to control immigration, issue coins, fortify and defend the territory and impose

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24 As late as 1801, there were only eight manufacturing corporations in America. Philip Blumberg, *The Multinational Challenge To Corporation Law* 6 (1993).


26 For land grants, see, for example, Charter to Sir Walter Raleigh (1584) and Charter of Carolina (1665). These charters take the form of deeds of land to an owner.

27 Charter of the Plymouth Council (1620). Cf. William Bradford, &c. Surrender of the Patent of Plymouth Colony to the Freeman, March 2d, 1640, available at http://avalon.law.yale.edu/17th_century/mass05.asp (original patentees transfer to the “Freemen of this Corporacon of New Plymouth all that their right and title power authoritie priviledges immunities and freedoms granted in the said Letters Patents.”).


29 “We have thought fit, and at the humble Petition of the Persons aforesaid, and are graciously Pleased to create and make them a Body Politically and Corporate, with the Powers and Privileges herein after mentioned.” Charter of Connecticut (1662).

30 See Joseph S. Davis, *Essays in the Earlier History of American Corporations Numbers I-III*, at 32 (1917) (“This company was frankly a business corporation ... organized on the model of the East India Company.”)

31 Lindley, *supra* note 25, at 95–6, states that the 1670 Hudson Bay Company charter explicitly granted it “legislative and judicial powers over all the inhabitants of the lands ceded it” as well as the right to have an army and a navy, make war and peace, and so on, all under the sovereignty of the King “as of our Maner of East Greenwich in our county of Kent in free and common Socceage.” The Company sold its territories to the Crown in 1869.
customs duties—rights of sovereignty that American states gave up no later than 1789. But these seem to have been less extraordinary derogations of the King's authority than simple consequences of the basic conceptualization of the new colonies as business corporations sharing characteristics with that other corporate estate, the aristocracy.

The most dramatic example, perhaps, is the British East India Company. Organized as a for-profit corporation paying dividends to its shareholders, the East India Company made its profits from the tea and opium trade with China and trade with and tax revenues from India. Early on, it claimed the right to build forts and cities, to make peace and war, enter into treaties and govern and tax the inhabitants of regions it conquered—all independent of Parliament (as its charter stemmed from the Crown) and on equal terms with the non-European governments (and rival European trading companies).20

Indeed, its attorneys went so far as to assert sovereign immunity. In the case of *Nabob of Arcot v. East India Company*, stemming from a demand by the Nabob for an accounting of his revenues, the Company argued:

> A bill on this subject cannot be entertained by this court; transactions between sovereign princes ... cannot be liable to any municipal jurisdiction. No law can apply between them, but the law of nations. These are such transactions: for, by the charters and acts of parliament, the East India Company are constituted a sovereign power, or at least are the delegates of the sovereign power of this country ... Your Lordship will not entertain a suit that cannot be executed by common means. ... [T]he East India Company ... are under the absolute authority of the Board of Control, and cannot act but under their direction. Suppose their orders and those of the Court should be contradictory, what a situation the Company would be in!35

32 Lindley, *supra* note 25, at 93

33 The East India Company obtained the right to make war in 1661 and 1683, the right to coin money in 1677, conquered Bengal in 1757 and after 1763 directly controlled the taxation of Bengal, Behar and Orissa as a nominal subordinate of the Moghul Emperor. From 1767, the charters also expressly note that the Company exercised these seemingly sovereign powers “for the Crown.” *Id.* at 94–5.

34 *Nabob of Arcot v. East India Co.*, 29 Eng. Rep. 544 (Ch. 1791), discussed in Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int'l L.J. 1, 37 (1999). According to the case report, the Nabob had assigned these revenues to the Company in payment of debts, but contended that the Company had taken more than it was entitled to. Burke has an elaborate discussion of the origins of the debt, which he sees as part of the deep corruption of the Company. Edmund Burke, *Speech on the Nabob of Arcot's Debts*, in 3 The Writings and Speeches of the Right Honourable Edmund Burke 26–35 (J.F. Taylor ed., 1901).

The argument is ambivalent regarding whether the Company is itself a sovereign or rather a delegate of the sovereign of England, reflecting the confused effects of Pitt's India Act of 1785. For the first 185 years of its history, the East India Company had been a private, profit-maximizing monopolistic corporation; Pitt's act put the Company under the control of a quango-style “superintending” board including governmental officials, transforming it into a sort of regulated industry.36

But the Company’s argument is crystal clear in its insistence on radical autonomy. Its lawyers insist without hesitation that the Company makes its own rules, using its own internal mechanisms, and no one outside—not even a British court—is entitled to restrain it (except by the law of nations, here meaning mainly force of arms). Only its own “Board of Control,” not a court, may tell it how to behave.

To be sure, the other side contests the claim that the East India Company is a sovereign state (on the ground that its existence depends on an Act of Parliament, which could have been said of the Canadian state as well). Nonetheless, it too accepts the basic view of corporations as quasi-sovereign by their nature—referring to Lord Baltimore as a “dependent sovereign.”37 In reply, the Company makes the ambiguity more explicit:

They do not refer to the mixed nature of the Company, which though, here, considered as a trading Company, is, there, in the character of a sovereign power.

... No instance is produced of one sovereign power bringing an action against another sovereign power.38

The duality of the great trading corporations as business enterprises and semisovereigns continued to be recognized for centuries. Even as late as 1901, a British treatise considers them sufficiently sovereign to be subjects of international law, largely because of their treaty making power.39 Of course, it would be another half century before most countries received that status.40

Nor was the official governing role of the trading corporation a brief moment in corporate history. The Hudson Bay Company governed much of what is now Canada from 1670 to 1869, when it sold its colonies to the crown.41 The British South Africa Company did not turn over its most explicitly governmental

37 Id., referring to Penn v. Lord Baltimore, 1 Vesey Sr. 444 (Eng. 1750).
39 Harris Taylor, A Treatise on International Public Law § 222 (1901).
40 Anghie, supra note 34, at 76–7 (noting that colonies and most non-European indigenous governments were not considered sufficiently sovereign to be deemed legal persons in international law).
41 Lindley, supra note 25, at 95–6.
functions until 1923; the British North Borneo Company, formed in 1881 to be a sort of vassal state nominally under the Sultan of Borneo, continued under its original charter even later. Moreover, the combination of business and politics is not restricted to these clearly political corporations. All corporations were viewed as quasi-sovereigns.

As the early British corporations treatise author Kyd put it in 1793, a corporation is a "body politic" or a "political person" created "for the maintenance and regulation of some particular object of public policy." In the special charter era, the right to be a "body politic" was a key part of the grant of corporate status, even for corporations that later Americans would classify as private, as in, for example, the Charter of Dartmouth College, the Incorporation of Harvard College (1650), and the charter of the College of William and Mary (1693). Indeed, the courts held that the words "body politic" were essential for a statutory grant to create the basic corporate right of legal personality (that is, the right to deemed a single actor regardless of changes in the affiliated human beings).

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42 Id. at 100, 103, 106.
44 The Dartmouth College charter uses language that echoes a grant of property right: "we have willed, given, granted, constituted and ordained, and by this our present charter, of our special grace, certain knowledge and mere motion, with the advice aforesaid, do, for us, our heirs and successors for ever, will, give, grant, constitute and ordain." But the right the King grants and ordains is political existence, not possession of property: "that there shall be in the said Dartmouth College, from henceforth and for ever, a body politic consisting of trustees of said Dartmouth College." Tr. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 534–6 (1819) (emphasis added).
45 3 Records of Massachusetts, supra note 28, at 195. The articles create a corporation consisting of the President, five fellows and a treasurer, and declare that "said president & fellows, for the time beinge, shall for ever hereafter in name & fact be one body politicke & corporate in law, to all intents & purposes, and shall have perpetuall succession, & shalbe called by the name of President & Fellowes of Harvard Collidge ... and by that name they ... may purchase & acquire to themselves ..." The 1672 charter repeats the "body politicke & corporate in lawe" language, if with slightly different spelling. 4 id. at 536.
"And we give and grant to them, or the major part of them, by these our letters patents, a continual succession, to be continued in the way and manner hereafter specified; as also full and absolute liberty, power and authority, of making, enacting, framing and establishing such and so many rules, laws, statutes, orders and injunctions, for the good and wholesome government of the said college." Id. para. IX.
47 See Davis, supra note 30, at 23. Legal personality is a set of rights to act as a single body. In the earliest charters, the package always includes the right to have a corporate seal, to hold property, enter into contracts, and sue and be sued in the corporate name, and to have corporate decision-making processes bind the entire firm including dissenters. Each of the rights, of course, has always been subject to restrictions; in the earlier charters, the
Kyd and his contemporaries meant “body politic” quite seriously: a corporation was an institution entitled to make “orders,” adjudicate violations and impose “penalties” and “fines” on dissident or disobedient members. Thus, even charters for obviously non-political institutions, such as Dartmouth College, explicitly provided for “law making,” much the same as a municipality’s would.

In short, a corporation was a derogation of sovereignty, an authorization for a group of people to form a mini-government. The William and Mary Charter recognizes the potential conflict quite clearly, explicitly subordinating the college’s “laws, statutes and injunctions” to the king’s and the colony’s, as if it were a subordinate state agency.

Now we can see why corporate charters caused such anxiety to Hobbes, the great advocate for a unified state and abolition of the medieval corporations. Corporations were a sort of commonwealth, just as the Hobbesian commonwealth itself is a corporation to pursue the common interests of its members. The same anxiety explains why the early United States restricted them to clearly public purposes: education, banks, transportation and large manufacturing enterprises.

A century later, the economy had radically changed. In the mid-nineteenth century, our important corporations were railroads, and while they were commonly viewed as part of a great national enterprise, they were unquestionably operated for the private enrichment of a handful of insiders as much as to promote the national interest. Nonetheless, even as corporate lawyers began their great

restrictions were far stricter than is the current norm. Thus, for example, corporate charters normally set a maximum and sometimes a minimum capitalization to limit the degree to which an immortal organization could accumulate property. Charters routinely limited the scope of the firm’s activities and thus the contracts it could enter into. Moreover, before the second half of the nineteenth century, investors and firm “members” were nearly always deemed guarantors of firm obligations—while the firm was primarily liable for its contracts (and, after some controversy, torts), if it was unable to meet its obligations, investors or members could be compelled to add capital (with varying limits) to the firm.

48 Thus, for example, in 1648, the General Court of Massachusetts Bay authorized the “shewmakers” and the “cowpers” (coopers) to incorporate for three years, to control quality. The two grants are almost word for word identical. The assembled shoemakers or coopers and their elected officers “shall have power to make orders for the well governing of their company,” and “shall have power to hear & determine all offences against any of their said orders.” 2 Records of Massachusetts, supra note 28, at 249–51.

49 Harvard’s charter similarly authorizes “the president & fellows, or major part of them, ... to make from time to time such orders and bylawa for the better ordring & caring on the worke of the colladge as they shall thinke fit; provided they, the said orders, be allowed by the overseers.” Id. (The requirement of prior approval by the overseers was removed in 1657, 4 Id. at 316.). The 1672 charter refers not to bylaws, but “orders and laws”. 4 Id. at 336.

50 See supra note 21 and accompanying text.

51 Compare White, supra note 13 (describing how insiders became fabulously wealthy while railroads failed to generate economic returns or provide an effective or useful service) with Burke, supra note 34 (describing how insiders of the East India Company
campaign to win private status and private rights for their patrons, the metaphor analogizing corporations to commonwealths remained strong. Angell and Ames, in the standard mid-nineteenth-century hornbook, refer to the power to make by-laws as "legislative": by-laws must be "considered as private statutes for the government of the corporate body." 53

Similarly, mid-century courts were clearly aware that the right to make rules binding on the entire corporation contravenes ordinary private law norms. Then, as now, corporate law allowed a board to impose rules on all "members," 53—shareholders, employees and others subject to its jurisdiction—without individual consent or, in most cases, even voting rights. 54 In sharp contrast, ordinary contract and property norms bind only those who have individually consented to the specific norm, while tort law binds because the norms are traditional or legislatively imposed by the sovereign authority of the people as a whole. Accordingly, the core board right to bind without actual consent is, as the nineteenth century courts regularly note, a "limited legislative power" or "a power of qualified legislation." 55

Because corporations were viewed as fundamentally delegations of sovereign power, the issue of the competence of municipal courts to resolve issues involving corporations remained controversial through the nineteenth century. After all, comity generally precludes a court in one jurisdiction from judging the sovereign acts of another government. Corporations, as expressions of sovereignty, seemed to be entitled to similar deference. Thus, in 1843, Angell and Ames devote six pages to establishing the apparently controversial position that a foreign corporation may be sued if jurisdiction can be obtained by seizing its property. 56

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53 The early term "members" has no precise analogue in modern business corporations, which are not membership organizations.
54 In modern business corporation law, the board's power to make rules binding on employees is derived from general principles of agency law (principals have inherent power to direct their agents). The board has little formal power to bind shareholder or other investors, but it does have plenary, undelegated power to operate the corporation, commit corporate assets, and initiate changes in corporate governance, including, in most states, enacting corporate bylaws. See, e.g., Del. Code Ann. tit. 8, § 101 (West 2012). Other corporate actions, including mergers and amendments to the articles of incorporation, may be initiated only by the board but require consent of a majority of the voting shares. See, e.g., Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985), overruled by Gantler v. Stephens, 965 A.2d 695 (Del. 2009) (declaring board's duty to determine whether to enter into merger non-delegable).
55 See, e.g., Tuttle v. Walton, 1 Ga. 43, 45, 51 (1849).
56 Angell & Ames, supra note 52, at 336–42. Cf. Howell v. Chicago & N.W. R.R., 51 Barb. 378, 379 (N.Y. Gen. Term 1868) ("Previous to the Code [noted in next footnote], foreign corporations were not the subject of litigation in the courts of this state, except
It went without saying that mere in personam jurisdiction was impossible—to the courts, corporations looked too much like the sovereigns that created them. In the end, legislative intervention was required. In New York, an 1849 act of the legislature finally reversed the common law rule and allowed foreign corporations to be sued. 57

But even after that statutory innovation, courts worried whether exercising jurisdiction over a corporation created by another state for “visitation”—that is to “examin[e] into the affairs of a corporation” 58—might be an infringement of comity, an invasion of the respect due to a fellow sovereign, and beyond the domestic court’s subject matter jurisdiction. 59

As a 1904 New York court put it:

If the illegal acts of the directors or of the corporation offended solely against the majesty of the state to which it owed its life—in other words, constituted only public wrongs—the proposition is probably correct, for we are not compelled to, nor should we, entertain actions simply to redress the outraged dignity of foreign governments. 60

But I am not concerned here with the niceties of jurisdiction, but rather with a way of thinking about the corporation. The jurisdictional problem—the doctrinal origin of the modern choice of law rule known as the “internal affairs doctrine”—arises only because even ordinary business corporations seemed, like the British East India Company, to be sort of sovereign.

when proceeded against by the attachment of their property for the collection of a debt or the redress of a wrong.”).

57 N.Y. Bus. Corp. Law § 1314 (McKinney 2013), derived from a 1920 amendment to the Gen. Corp. Law in turn derived from Code Civ. Proc. 1780, enacted in 1849 and amended in 1880. The original text appears in N.Y. Laws 1849, ch. 107 (authorizing suits “against any corporations created by or under the laws of any state, government or country, for the recovery of any debt or damages”).

58 State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware, 2 N.W.2d 372, 388 (Iowa 1942) (exercising jurisdiction over and applying Iowa law to Delaware corporation).

59 These early concerns about comity and jurisdiction eventually evolved into the modern common law choice of law doctrine known as the “internal affairs doctrine.” In the modern version, courts assume jurisdiction over foreign corporations, even for matters that nineteenth century lawyers would have considered “visitation,” but they apply the law of the incorporating state even when ordinary choice of law principles would counsel otherwise. This doctrine, which allows American corporations to evade any state-level attempts to reform corporate law by simply changing allegiance, is hard to justify on policy or democratic terms. However, it has a certain internal logic as a historical remnant of deference to the state that created the corporation, even if the incorporating state’s involvement and interest is, today, basically a fiction.

60 Miller v. Quincy, 72 N.E. 116, 118 (N.Y. 1904).
Sovereignty and the deference due a sovereign continued to permeate corporate law even at the end of the nineteenth century. The Eighth Circuit in 1893 justified judicial deference to corporate boards (the doctrine that today is called the business judgment rule). Today, this doctrine is considered completely independent of the internal affairs doctrine, but the court’s language suggests that both originated in the same sense of comity:

Corporations are in a certain sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief.61

Modern courts have offered various explanations of the business judgment rule: shareholders seek risk-taking boards and therefore should be happy to accept the risk of breach of fiduciary duty by directors (although not employees),62 or judicial review will drive directors and officers (D&O) insurance rates up, presumably because directors routinely violate the law, or it is unfair for some unexplained reason to hold directors to the ordinary standards of care that apply to all other professionals. The turn-of-the-century court had a justification explanation far more tightly connected to the actual doctrine and not dependent on finding some reason why directors are different from all other corporate actors or professional fiduciaries. In the older view, courts should decline to review board decisions or should be extremely deferential to them—the essence of the modern business judgment rule—for a simple, clear, rationale dating back to Montesquieu’s division of powers or the international law system’s notion of sovereignty. Coordinate branches must defer to one another. Courts should not be overly quick to reverse decisions of foreign states, or legislatures, or administrative agencies, or juries—or corporate boards. The board is given a constitutional stature of an independent state.

The notion that a corporation was a mini-state was once as commonplace as Hobbes’ metaphor of the state as an artificial person, a body-corporate, remains today. Hobbes himself, for all his emphasis on the unlimited power of the single sovereign in his system, notes that subordinate “bodies politique” are quite common and that they have the power to make law over their subjects.63

61 Republican Mountain Silver Mines v. Brown, 58 F. 644 (8th Cir. 1893).
63 "And that which is said here, of the Rights of an Assembly, for the government of a Province, or a Colony, is applicable also to an Assembly for the Government of a Town, an University, or a College, or a Church, or for any other Government over the persons of men." Hobbes, supra note 18, at 159–60.
Death of Self-Government

This way of thinking—the corporation as a mini-state, either delegated from the supreme sovereign or coexisting with it in a semi-feudal or federal balance of powers—has disappeared from the academic discussion of corporations and almost as completely from the cases.

Modern metaphors overwhelmingly describe corporate purposes and actions as private, not public. The terms we use describe the corporation not as political governance but a form of property or contract or agency or trust—a series of metaphors inconsistent in almost every respect but their mutual emphasis on privacy and market and their de-emphasis of the necessarily coercive nature of powerful bureaucracies.64 Scholars describe shareholders as “owners” or “principals” rather than “voters” or “investors” and then puzzle about why shareholders have none of the rights or responsibilities of ownership or principals and directors aren’t trustees for them.

The drive to see corporations as private and consensual is so powerful that even the corporation’s relationship with its shareholders is often characterized by agency or property metaphors—although either, if taken seriously, would threaten entity (limited) liability and, indeed, corporate personality. After all, if shareholders were either owners or principals of the firm, ordinary property and agency rules would make them fully liable for its obligations. Indeed, ordinary property and agency doctrines would make the firm itself a common law conspiracy in restraint of trade: a corporation, after all, is above all else a convenient way for a group of investors to negotiate collectively, even while other factors of production, such as employees or retail customers, are required to do so individually.

The ideological function of this shift in metaphor is clear: it resolves, or at least elides, a major problem in the democratic legitimacy of the corporation. As a self-governing entity, business corporations are a sort of cross between herren-democracy and straight out plutocracy—neither obviously legitimate in the modern age. Only a small part of the relevant electorate was given the vote: shareholders but not bondholders, investors of money but not investors of time or effort; freely transferable publicly traded shares with cheap risk spreading but not employees with genuine commitments and unavoidable exposure to the firm’s success or failure; potentially exploitable or locked-in shareholders, but not equally or more exploitable bond investors, long term employees, pension beneficiaries, customers or suppliers. In a generally democratic age, restricting the vote in this way is a problem for any political forum.

We have no satisfactory theory justifying disenfranchising all participants other than shares. Some economic theorists have suggested that shareholders

are more vulnerable than other corporate participants, but this is obviously false. Shareholders are highly mobile, fully diversified providers of a fungible commodity. If any corporate participant can rely on market forces for protection, this would be it. Employees, customers and suppliers, in contrast, are likely (as Oliver Williamson has emphasized) to have firm-specific investments subject to monopoly expropriation.

A related claim is that shareholders are the "residual risk bearers" in the firm and therefore most interested in its results at the margin; this claim seems to rely on a failure to understand the relevant law and willful disregard of the actual practices. The actual law is that, to the extent that a corporation generates economic gains—that is, its product could be sold for more than its inputs must be paid—directors are free to allocate those gains to any corporate participant. The business judgment rule precludes litigants from second-guessing corporate decisions to lower prices (thereby giving surplus to customers, as economic theory suggests will happen in competitive markets), to increase wages or employment or executive bonuses, or to reinvest in the business. On the upside, then, shareholders have little formal claim to corporate surplus. Conversely, on the downside, shareholders are entirely protected from sharing in corporate losses: the most fundamental rule of modern corporate law is that the corporation and its creditors may never demand additional funds from shareholders. Moreover, there is no empirical evidence that shareholders are the marginal recipients in fact: corporations are much more likely to vary employment than dividends, suggesting that the real residual risk bearers are employees.

Others have suggested that shareholders "deserve" the vote because they are most aligned with corporate interests. This also seems false. Although corporate interests are often casually assumed to mean shareholder interests, even the most casual student of the American economy can quickly identify instances where shareholders profited even as the company suffered, starting with the great railroad fortunes and ending with the last round of private equity "going-private" transactions. Sometimes advocates contend that corporate interests should be defined to mean shareholder interests, but that results in incoherence: shareholders, particular modern diversified portfolio investors that also hold derivatives and

66 See, e.g., The Anatomy of Corporate Law (Reinier Kraakman et al eds. 2004).
67 In an earlier age, John Kenneth Galbraith assumed that most corporate surplus went to unionized employees and middle managers. John Kenneth Galbraith, The New Industrial State (1967). After several decades in which shareholders took the bulk of the surplus, it is increasingly clear that top managers are becoming the chief beneficiaries. See, e.g., In re Walt Disney Co. Derivative Litigation, 906 A.2d 27 (Del. 2006).
68 See, e.g., Merton H. Miller & Franco Modigliani, Dividend Policy, Growth, and the Valuation of Shares, 34 J. Bus. 411 (1961) (justifying reinvestment on the ground that under narrow theoretical conditions, shareholders would be indifferent between reinvestment and dividend payouts).
related instruments, have no unified, a priori, interest. A shareholder that holds a competitor, has shorted the stock, or seeks to purchase the company on the cheap, may have a strong interest in the stock price dropping or the company doing poorly; shareholders that specialize in trading may care more about movements in the stock price rather than the underlying company. A portfolio shareholder that has diversified away all company specific risk is specifically avoiding any commitment to the company’s particular interests.

Even leaving aside the limitations on the voting population, corporate law defies basic democratic norms. The standard voting rule is not “one person one vote” but the wealth-based “one share one vote”—as if the corporate “citizens” were not the shareholders but the shares themselves—in defiance of the most elementary rule of democracy. Shares and their associated votes are freely saleable, so corporate governance is quite literally for sale, without any suspicion of corruption. Moreover, the issues on which voters may opine are sharply restricted. Indeed, the basic corporate law principle that the directors, not the shareholders, manage the company, is generally understood to require that directors ignore the will of the shareholders. They must, instead, exercise independent business judgment in the interests of the company, much as George III’s parliament “virtually represented” the American colonies or Burke asserted his obligation as a statesman to substitute his judgment for his constituents in the pre-democratic United Kingdom. This reduces even the voters to subjects rather than citizens: corporate governance may be “for” shares but it is definitely not “by” or “of” them.

At the beginning of the American era, these limited understandings of citizenship and voting might have been within the realm of republican theory. After all, most Americans had no vote and many were explicitly excluded from citizenship. Moreover, the business corporations of the day generally had “members” who were more than today’s algorithm-powered computerized rapid-fire stock traders profiting at the expense of other traders in a zero-sum game.


70 Del. Code Ann. tit. 8, § 101 (West 2012). See also Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985), overruled by Gantler v. Stephens, 965 A.2d 695 (Del. 2009) (finding directors personally liable for breach of duty where board allowed shareholders to vote on whether to accept a facially attractive buy-out offer). If the shareholders have any comparative advantage as decision-makers at all, it must be in deciding whether to hold or sell stock, which is, after all, the decision professional investors are paid to make. By refusing to allow a board of directors to refer this decision to the shareholders, the Delaware Supreme Court made the strongest possible statement of the limited role of shareholders in corporate decision-making.

71 Dred Scott v. Sandford, 60 U.S. 393 (1856) (holding that no African-American was a citizen of the United States), superseded by constitutional amendment, U.S. Const. amend. XIV.
But we have long since abandoned the notions of virtual representation or restricting the franchise based on wealth. Today, in a generally democratic age, there is something deeply distasteful about restricting the vote in a political forum only to (some of) those who have invested hard cash rather than blood and sweat—and no possible justification for allocating votes on any important issue on the basis of dollars rather than head count. As a result, any description of the modern business corporation that seeks to legitimize current law must begin by deflecting attention from its fundamental form and original sin.

Moreover, the mid-nineteenth century rise of the all-powerful board gives a self-governing corporation aspects of Quesnay’s “legal despotism”: a unitary executive, lacking any balance of powers, with virtually unlimited power. Quesnay defended absolute monarchy on the ground that the monarch, as the sole owner of all the land in the country, would internalize all the proceeds of economic activity and therefore maximize it. The board nominally elected by timeless, diversified investment funds makes the same claim to universality: shares, as the purported recipient of the firm’s marginal product, have the strongest incentive to maximize the firm’s financial well-being; the board acts in their name as the legal despot.

All of this makes corporate governance hard to defend as compatible with modern democracy. Were we to return to metaphors of the corporation as polity or quasi-legislature, the state it would bring to mind would be Saudi Arabia, or perhaps the former Soviet Union under the kleptocrats, or various dictatorships of the right or left. If this is a government, it is one that treats most of its subjects as helots to be exploited, not part of the common good.

Its pretenses to consent of the governed are at best Lockean “tacit consent,” that is, that in a market economy, those who are sufficiently unhappy with the corporation’s leaders can sever ties with it, with all the usual limitations to that argument. But free exit does not exist. A core reason companies incorporate is precisely to avoid the free exit of partnership; institutional continuity is essential to induce people to commit to and trust the firm. Individual shareholders (and bondholders during the pendency of the bond) can transfer their rights to another, but have no right to withdraw capital from the corporation. Employees with firm-specific investments in skills, relationships, family location, insurance or seniority;

72 See Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order 94 (2011) (describing Quesnay’s defense of absolute monarchy as the only way to align the interests of the governed and the governors).

73 See, e.g., Greenwood, supra note 15, Williamson, supra note 65 (claiming, implausibly, that shareholders are the most vulnerable participants in the firm and therefore require the special protection of a vote). But see Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777 (1972) (claiming, implausibly and contrary to law, that no coercion or exercise of power can occur inside a firm because corporations are entirely contractual).

retirees with firm-specific pensions or medical care; suppliers or customers in bilateral monopolies or otherwise tied to the particular firm—all these persons in relationship with the firm have only limited "exit" options and their "tacit consent" is similarly atrophied. The right to exit is no more a guarantee of sound corporate governance than the right to emigrate makes for decent political governments, and for much the same reason.

Similarly, corporate law's rejection of the basic principle of division of power flies in the face of three centuries of political theory. The unitary executive, despite some recent attempts to rehabilitate it, remains as unappealing as the absolute monarchy from which it is descended. The claims of monarch and corporate autarchy are equally implausible: absolute power corrupts absolutely in the corporate as well as the political sector, and just as we know that dictators and monarchs regularly get rich while impoverishing their nations, it only takes the most casual glance at the modern world to understand that shareholders and CEOs often find ways to gain even as the firm, and its other participants—employees, bondholders, customers and suppliers—suffer. Indeed, the entire ecosystem of the leveraged buyout and private equity firms is based largely on this premise. Often it is far easier to transfer value than create it.

For these reasons, corporate spokesmen have long since abandoned the public metaphors of corporate law. Portraying your institution as standing in the proud tradition of Saudi Arabia monarchs, or even the English Parliament of the rotten borough era, lacks a certain public appeal. The modern alternative requires a good deal of sleight of hand to maintain a coherent façade. Still, Adam Smith made real, an amalgam of property, trust, contract and agency, in which shareholders are entitled to exploit because they own, even though they must be protected because they lack the normal attributes of ownership, and directors must serve them as agents even though they are not their agents, has at least some claim to legitimacy in a market democracy. We call shareholders owners of publicly traded corporations not because they are but because they are not.

Corporation as Semi-Sovereign

But the demise of the public metaphor does not mean that the underlying insights of the older view are less true. On the contrary, our public corporations are more state-like than ever.

75 See generally Williamson, supra note 65.
76 For a theoretical account, see Greenwood, supra note 15.
Hannah Arendt famously criticized the rights of man by pointing out that when men and women were stripped of their rights as citizens and members of a national people—they turned out to have no rights at all. The rights of men were meaningful only as rights of citizens. The eternal "Rights of Man, which by themselves were supposed to be independent of citizenship and nationality ... proved to be unenforceable ... whenever people appeared who were no longer citizens of any sovereign state."  

Thinking of corporations as quasi-sovereign—to some degree taking on aspects of the states that create them, and to some degree as independent states or at least sub-state governmental entities themselves—helps frame a series of issues. Arendt suggests the first: whether corporate affiliation isn't today taking on some of the importance of national affiliation. It is my job, not my citizenship, that gives me basic social security rights, including access to medical care, pension benefits, and parental support such as maternity leaves and assistance in financing increasingly unaffordable education for my children. Without a corporate affiliation, consumer-unfriendly computer systems might prove virtually un navigable. It's the right corporate affiliation, even more than the right passport, that allows you to work in the country you prefer. Corporate positions even allow people to bring some of their law with them, like the medieval university students—drinking in Saudi Arabia, for example, or taxation in the United States. Even for the classic liberal rights, corporate affiliation is as critical as citizenship. As an academic, my freedom to speak is made meaningful by my corporate affiliation—indep endent scholars are perhaps not as badly off as the stateless, but still, neither libraries nor Westlaw nor even serious reads of submissions to the journals are readily available without the correct institutional backing.  

One could multiply examples. The proposition that large private institutions have taken over many functions of the unified state, in a revised return to the feudal notion of multiple estates, is not likely to be controversial. But if corporate relations are this important, the mere right to exit is not enough. We must begin to assert the basic rights of citizenship against our corporate governors—the right not to be exiled, the right to criticize, basic privacy rights. Perhaps even property rights of the Charles Reich variety 79—rights to retain a position, to exclude the boss from private desk space or email, or to a personal sphere of opinion or practice protected from the corporate authority's claims to religion or political conformity.  

Most fundamentally, though, we need political rather than property rights. We must establish the political right to have our good considered a part of the common good. Benefits to citizens are not costs to the nation but its purpose; similarly, we

78  Hannah Arendt, 2 Origins of Totalitarianism 173 (1951). See also id. at 174, 176.  
79  See generally Charles Reich, supra note 4.
need to end the self-colonization of corporations, created by our law, that treat us as mere tools to advance the goals of the real oldest established permanent floating crap game in New York—a traveling pool of international capital mediated through layers of private profit-maximizers.

More controversial might be the extent to which these are privileges of affiliation with corporations, as opposed to large institutions generally; after all, Bechtel, large law partnerships and major universities provide these privileges as well as the exchange-traded firms. Business corporations remain our preeminent large corporations, so focus on them would be warranted even if other institutions posed essentially similar issues.

But more to the point, the peculiar governance of business corporations in fact makes them somewhat different than other large institutions: alone of all our governance structures they are directed to slavishly follow the market regardless of whether its directives make sense. They alone function as agents for a legal construct, with no internal moderating principle or countervailing force. They alone have no institutionalized mechanism for constituents, unbound by fiduciary duties to the institution itself, to restrain the institution when its goals conflict with more important ones: profit is good, but it can conflict with more important values as well. Thus, as power is devolved to these institutions, publicly traded corporations should cause us special worry. They distinctively lack the restraints and balances that mark intelligent government.

Let me nod towards a few other implications that must be held for future discussion.

Shareholders as Fundamental Rights Beneficiaries

One of the more interesting aspects of the corporate metaphor is the ambiguity regarding the corporation's borders and subjects. In this chapter, I've mostly assumed that the corporation primarily affects its employees and that they are, therefore, the closest analogy to the subjects of a state. But corporate law often ignores employees, acting as if the investors, or at least the equity investors, were the key constituency of the firm. Corporate "democracy" as it is usually discussed in the literature refers not to human control over corporations seen as quasi-governments, but rather to the system of voting proportional to dollar investment in equity that is formally the ultimate control mechanism over our corporations. Whatever that is, it isn't democracy.

80 Thanks to Neil Cohen for urging me focus on this.
81 Directed at least by the Wall Street Journal and a handful of cases, such as Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919). Other cases are more reticent about demanding that corporations pursue profit at all costs. See, e.g., Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989).
82 See Greenwood, supra note 15, at 1023–5.
But considering the shares as corporate subjects does raise some interesting issues.

If we consider the shareholder role as a rough analogue to citizens in the quasi-sovereign corporation, we see that shares have a far more effective international rights regime than we’ve managed to create for real people.

And one that doesn’t depend on nationality in the classic sense at all.

First, shareholders, or more properly the role of shareholding (not the full people who invest) have achieved the stateless Rights of Man that Arendt saw as unenforceable and empty. The shares traded in the New York Stock Exchange are owned in large part by institutions. Pushing through the institutions to find the human ultimate beneficiaries is difficult, and sometimes conceptually unclear (who are the human beneficiaries of a university endowment?). But many estimates suggest (as the macro numbers do as well) that a large and growing portion of the investment is foreign, or, more interesting still, of hidden formal citizenship. Shares are not human, but they are stateless.

Shares, regardless of citizenship or locale of their ultimate human owners or beneficiaries (if any) do have effective legal protection of their rights inside the corporation. Without exaggerating the degree to which shares control the firm, the fact remains that corporations are generally run in their interest—and, most relevantly for the nationality point, shares held by foreigners (and even non-human institutions) are normally treated indistinguishably from those held by Americans.

Moreover corporate law and the stock market makes real the right to exit in a way that the refugees have never had. Arendt emphasizes that even the right to emigrate, when it existed, wasn’t worth much without a commensurate right to immigrate. In the world of share-citizenship, the situation is quite different. Not only may investors sell the stock of a company that mistreats them, but they are free to buy the stock of other companies. Stock investors need not remain stateless, unaffiliated with any corporation, unprotected by any system of internal lawmakering.

Corporations as Actors

The same, of course, is true of our corporations themselves. They too have rights today that are effectively protected without regard to nationality.

Indeed, it is increasingly difficult to intelligibly assign nationality to the largest corporations. Is Chrysler German or American? What would be the relevant test? Should those of us who long boycotted VW now add PT Cruisers to the list?

With hitherto unimaginable economic power and often physical power to match, corporations are independent players to a far greater extent than most of the members of the United Nations. They are not subordinate governmental units—if indeed they even have nationality. Nonetheless, modern law grants corporations rights of comity greater than the human rights of citizens.

Corporations may freely choose their own constitutive law under the “internal affairs doctrine,” thus disempowering most local attempts to control their
processes. Their decision-makers are largely free of judicial interference under the “business judgment doctrine.” Agency law creates a legal default rule that the corporation’s hierarchs have absolute control over all subordinates, who are supposed to set aside their own interests and views during the workday. Courts routinely hold that corporate employees forfeit ordinary rights of citizenship while at work, including freedom from searches or monitoring and freedom of conscience. Corporate bureaucrats are entitled to freedom from routine open government laws under judicial extensions of the Bill of Rights. They are allowed to spend corporate assets to influence the very regulators and lawmakers who are supposed to ensure that corporate assets are only used for socially useful purposes—and under Supreme Court doctrine, this corruption of the political and economic system is “free speech” entitled to Constitutional protection.

Since the earliest years of the Republic, the Supreme Court has consistently created fundamental rights for corporations even in the face of clear constitutional language to the contrary, and has done so with alacrity notably lacking with respect to actual Americans. Thus, even before it denied citizenship to African-Americans, the Court decided that corporations could invoke diversity jurisdiction to access the Federal courts despite the Constitution’s limitation of this privilege to “citizens.”


84 See Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809), overruled by Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844) (holding that corporation is “certainly not a citizen and, consequently, cannot sue or be sued in the courts of the United States” but then extending diversity jurisdiction nonetheless by ignoring the separate legal personality of corporation). This fiction, however, would have disallowed diversity jurisdiction for virtually all corporations (either they don’t have members or the members are likely to defeat diversity). Rather than apply the clear language of the Constitution, the Court instead created new legal fictions to reach the same result. See Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) (overruling Deveaux and holding that corporations will be fictionally “deemed” citizens for diversity purposes); Marshall v. Balr. & Ohio R.R., 57 U.S. (16 How.) 314 (1853) (overruling Letson and holding that a corporation’s shareholders will be deemed to be citizens of the corporation’s state of incorporation regardless of reality). The Congress has limited this fictional expansion of the Constitution slightly by statute. See 28 U.S.C.
Amendment's equal protection and due process clauses should apply to corporations with no support from language, history or structure, it had far more trouble finding that equal protection required treating women or African-Americans or Chinese-Americans or Japanese-Americans as full members of the polity.\textsuperscript{85}

In short, we've allowed business corporations to assert rights to protection from their own and other governments, protection against ombudsmen, protection against political decisions to reallocate the social resources they control, protection against investigations into how they operate their internal affairs, and protection against demands that they serve the interests of those they exploit.

\textit{Corporations as Nation States}

Travel as an executive of a major multinational and you bring with you an international regime of protection stronger, in many respects, than the national one that comes with your passport. American executives in trouble spots can expect security forces in their defense, quick evacuation, medical care not available to the locals, even exemption from petty local rules such as Saudi Arabian bans on liquor or sexual discrimination. Try that as a tourist.

Passports themselves are readily available to those with the right corporate connections. \textit{I} myself worked comfortably in London for six months as a representative of my employer, something simply unavailable to me as a naked bearer of the Rights of Man or even the rights of Americans. More prosaically, even for those not in the elite, and particularly for Americans, our health care, our

\textsuperscript{85} \textit{Santa Clara Cnty. v. S. Pac. R.R.}, 118 U.S. 394 (1886) (allowing, in an unreasoned opinion, railroad corporations to assert a right to equal protection to void state legislation). It is, of course, quite contrary to usual American legal interpretative methods to read one word as switching meanings twice in two paragraphs (only "naturalized" are counted for apportionment). Nor has anyone ever coherently claimed that the Civil War was fought to free business corporations. See, e.g., Morton J. Horwitz, \textit{Santa Clara Revisited: The Development of Corporate Theory}, 88 W. Va. L. Rev. 173 (1985). Extending Fourteenth Amendment rights to corporations, of course, limits the rights of the citizens and people whom the Amendment was meant to protect, since it reduces our ability to protect ourselves from corporate incompetence or overbearing. Cf. Ronald Dworkin, \textit{Life’s Dominion} (1993) (arguing that a state may not classify a fetus as a person without infringing on the competing rights of pregnant women).
ability to pay our mortgages and our credit cards, our pensions, all depend on our corporate affiliation.

Conversely, violations of our human rights are at least as likely from the corporations we work for as from our states. Corporations can dismiss us without a hearing; the state cannot. Corporations can search our desks without explanation or warning, or read our mail, or even prevent us from using our computers. As suppliers rather than employers, it is corporations, not our governments, that have decided that it is permissible to clog our computers with cookies.

Need I go on? If I could choose between being a lifetime employee of a major world corporation and having a passport, it seems clear to me that taking corporate protection would be more worthwhile. And if I had the choice of having protection against the City of Salt Lake’s possible future depredations and those of my health insurance company, I’d much prefer rights against the latter. In the last election, many of our states banned gay marriage. But the effects on real people’s real lives will be far greater if many of our major corporations decide to continue to give benefits.

Isn’t it time we began to see our largest and most powerful bureaucratic actors as the public entities they are?