

## Corporations and the Constitution

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What is the proper role of incorporated business in our constitutional order? To properly answer this question requires an understanding of the nature of both Constitution and corporation. The Constitution, I will argue, creates a liberal republican democracy, to which we have appended a largely bureaucratic economy constrained by both politics and market. The ground rules of our markets are hard-fought in the political sphere, although we usually prefer to keep the political branches out of the detailed workings of markets. Corporations – our primary economic tools for organizing labor and capital, planning and generally escaping the instability and unpredictability of markets – are powerful governance tools, essential – like the state itself—for the pursuit of happiness. But as heirs to the liberal tradition, we should be suspicious of all power centers, public or private, regardless of how vital they are. Our challenge today is to apply lessons we learned long ago about taming the state and making it into our servant to our multinational corporations. If we succeed, we will fulfill the great project of a government by the people, for the people and of the people. If we fail, we may become the next exemplar for the next edition of Robinson & Acemoglu's *Why Nations Fail*, with a powerful elite more interested in rent seeking than production and fearful, above all else, of the creative destruction of capitalist democracy.

### I. No Text Here.

Before ascending to high constitutional theory, perhaps we should first attempt a more narrowly legal analysis of the Constitution. Perhaps, as Justice Scalia contends, interpretation is easy. Perhaps the text itself will resolve our question without requiring any more elevated understanding of its – or our – purposes and understandings. Unfortunately, such an approach is doomed to failure twice over.

First, because a narrow textual approach creates insuperable political problems. We, as democrats and republicans, believe in self-governance. The Constitution is in any event a puzzle: why should we view ourselves as bound by an arbitrary set of words, most of them two hundred years old and reflecting a very different world indeed? Is it not a form of idolatry to treat a human text, written by men long dead in a world long vanished, as if it were the eternal Word of God, binding without understanding? Worse still, even if we are inclined to be idolators in this sense, to abandon republican democracy for the rule by the dead (necrocacy?), the dead men in question wrote a document which rejects this view, so we'd have to impose a quite radical reinterpretation on the text to make sense of it. Much of the Constitution we have uses broad and general terms, invoking general principles of morality and political theory that necessarily reflect changing social norms. Indeed, the looseness of its language

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<sup>1</sup> This is an early draft not suitable for publication or quoting. Please excuse the verbosity; I didn't have time to write less. Footnotes and references to follow. My apologies to the many scholars from whom I have learned and who I do not cite by name; if it looks like I am parroting someone else's analysis, it is probably because I am. See Kohelet 1:9 (וְאֵין כָּל-חֵדֶשׁ תַּחַת הַשָּׁמַיִם)

and the broad standards of Free Speech, privacy, due process, equal protection and the like which it invokes are a large part of why we have not discarded it entirely; the specific rules it sets out have either been ignored (as in the case of the bar on a standing army), rejected (as in the original selection of the President and Senate) or, despite attempts at subversion continue to cause problems (the electoral college). I will ignore this fundamental problem, which has been persuasively illuminated by others.

Second, because the Constitution does not mention the word corporation. Corporations exist only by legislative grace and, in the absence of explicit Constitutional provisions to the contrary, surely they can have only the rights and responsibilities given to them by legislatures. Textually, that is, the only reasonable reading of the Constitution is that corporations do not have constitutional rights. They are products of the political branches entirely subject to the whims and fashions of politics.

At first glance, it may not be obvious that the fact that the text is clear is a sound reason for ignoring textual analysis. After all, most lawyers and judges contend that the role of the judiciary is to declare, not create, the law – to interpret existing standards rather than legislate new ones. On this view, and particularly given the contemporary judicial right wing's insistence that it must interpret in a manner subservient to the intent of the text's original authors, the text's silence would seem to end the discussion. The Constitutional text does not refer to corporations; ergo, they have no constitutional rights.

Nonetheless, any textually based analysis of corporate constitutional rights is fatally flawed. Since the earliest years of the Republic, the Supreme Court has consistently and repeatedly held that corporations have rights against the People and their government. In 1819, the Court declared that the Constitution's Contracts clause prevented New Hampshire from changing Dartmouth College's royal charter. Shortly thereafter, it declared that corporations are entitled to bring diversity actions in the Federal courts, notwithstanding the clear text of Article III, which specifies the parties that may bring diversity actions without including corporations. While it had some difficulty in deciding why the text was not binding, wavering between inconsistent theories in the early years, in two centuries it has never questioned the result.

By the middle of the nineteenth century, corporate law began the first of a series of convulsions that would radically transform it three times before the end of the Great Depression. The Jacksonian battle against monopoly culminated, in corporate law, in general incorporation laws. Traditionally, corporate status had been viewed as a derogation of sovereignty, to be granted only for public purposes and, usually, associated with special privileges. To protect the public and defend the state from encroachments on its domination of collective decisionmaking, incorporated businesses were highly restricted and the legislatures normally specified both internal lines of authority and narrow limits on the corporation's scope of activity. To protect the public and corporate creditors, corporations were usually required to have relative significant minimum capitalization. To protect markets, corporations were seen as exceptional and authorized only for important public purposes – most prominently, banks and transportation (turnpikes, bridges, canals and railroads) – that were thought beyond the reach of

private enterprise without corporate privilege. But corporate privilege was valuable, and the process of granting corporate charters became extremely corrupt: would-be company organizers found that bribery was more effective than persuasion in convincing legislatures that their enterprise would promote the public interest.

Jacksonian reformers eliminated the problem of bribery by routinizing corporate status. The new General Incorporation laws, which spread rapidly in the ante-bellum period, allowed any enterprising business to incorporate by filling out a form, without special legislation. Reflecting the traditional suspicion of corporations, the statutes remained highly prescriptive, requiring (for example) specified purposes and requiring corporations to maintain sharp distinctions between capital, which was to be preserved for creditors, and profits available for the shareholders.

The new corporations did, however, differ from the older ones in several important ways that presaged modern corporate law. First, the notion of public interest began its long decline. Under general incorporation, any promoter could form a corporation without convincing anyone of a public need for the firm. Entity liability – the rule that the shareholders are not liable for corporate debts – began to be more routine if still not yet universal. Governance began to shift from the “membership” – indeed, most of the new business corporations statutes abandoned the membership concept altogether – to the directors. In turn, the directors, who were no longer seen as the corporation itself (an older view still formally maintained by Harvard University, which calls its board the “Harvard Corporation), trustees or elected representatives of a membership, began to become the primary governors of the corporation, deciding in their own right and under their own authority. In the earlier period, voting had often been democratic -- per member – or quasi-democratic – proportional to investment but with a cap on the number of votes per member. Together with the shift from members to shareholders, the new statutes began the long transition to the modern norm of voting per share, based on the plutocratic principle of equality of investment dollars rather than equality of membership.

This transformation of corporation law, like the later ones, left no traces in constitutional jurisprudence. Doctrines created at a time when the business corporation was an anomaly – as late as the 1870s, corporate law treatises were still overwhelmingly devoted to municipal law (municipal corporations) and charities, with railroads and other business corporations seen as a special case important primarily for their monopoly privileges – were carried over unchanged into the new era. The changes in business itself, as the railroads pioneered the first business use of large bureaucracies and growth in markets spawned the first continental enterprises, generated no more discussion in the case reports.

After the Civil War, the Court had some trouble in determining whether and to what extent the Fourteenth Amendment’s guarantees of the privileges and immunities of citizenship, equal protection, and due process protected African Americans. It invented a public/private distinction to exclude most publicly sanctioned and enforced discrimination from the purview of the Amendment. As Reconstruction ended, it quickly concluded that whatever the privileges and immunities of citizenship

were, they were not offended by Jim Crow segregation, sharecropping, exclusion from voting, jury service, public and private services, or other forms of blatant discrimination.

In contrast, the Court had no trouble concluding that the Fourteenth Amendment's reference to "persons" includes corporations. Any simple reading of the Amendment, even leaving aside its history, makes clear that the word refers only to natural persons: corporations are not "born or naturalized" and (so far) no one has ever claimed that they ought to count for apportionment. Nonetheless, the Court used the Amendment to grant corporations the kind of consideration it entirely refused to African American citizens. At the beginning of the *Lochner* era, the *Santa Clara* case announced that railroad corporations would be treated as "persons" for purposes of the due process and equal protection clause. Seeing no need to explain how this reading comported with the text, history, structure or purpose of the Amendment, it instead focused on elaborating substantive rights, barring states and localities in that and subsequent cases from taxing or otherwise regulating the railroads in ways that the Court deemed discriminatory or detrimental to the interests of investors.

As the *Lochner* era developed, the Court expanded this elevation of the rights of railroads above the ordinary political process into a generalized attack on attempts of the political branches to use law to define property or market rules in ways that would empower ordinary Americans. Unions, it determined, were conspiracies in restraint of trade, while corporations were not conspiracies at all but individuals endowed by the Court with inalienable rights to strike hard bargains at the expense of employees. The Court repeatedly struck down basic laws attempting to structure market forces in socially useful ways -- from laws banning child labor, to the income tax, to minimal workplace safety regulations, to, in its final explosion of Social Darwinist activism, most of the first New Deal. Enough of these cases invoked the Fourteenth Amendment's Due Process clause to give that clause a long-lasting bad reputation, but the impetus was not procedural at all: the Court concluded that its ideological commitment to a Social Darwinist view that the function of law is to promote the interests of capital at the expense of both labor and systemic stability was part of the natural order, and then discovered it in legal texts or simply in the essence of being.

Corporate status -- and legal personhood -- played virtually no role in this analysis: in the last quarter of the nineteenth century many large businesses were still organized as partnerships, and the largest monopolies were nominally trusts. I am aware of no case in which the legal form of a business affected the Court's analysis. Having decided that its role was to enhance the power of capital against unions, unorganized labor and popular legislation alike, the Court extended the same rights to incorporated and unincorporated business. Even after the Uniform Partnership Act, carefully written to avoid any suggestion that partnerships might be "legal persons" subject to the new income tax, no case suggests that partnerships have fewer rights than corporations. Corporations were treated as individual persons in themselves, while partnerships were seen as associations of individuals, but the distinction appeared to make no difference. Surprisingly, in a country founded in the liberal tradition that groups are fundamentally different from the people who make them up, that faction and corruption are fundamental to understanding the workings of collective decisionmaking, and that governance institutions can often develop interests contrary to those of the governed, the U.S. Reports are bereft of

any discussion at all of whether corporate, partnership, trust law, or the contract and property law that define markets themselves, ever mean that the collective decisions of business enterprises may not reflect the interests of the enterprise's participants.

At the end of the nineteenth century, the modern bureaucratic business organization emerged out of the railroads and began to dominate the economy in a great wave of mass production and the industrial consolidation that inspired our anti-monopolies legislation. Then, in the last years of the century and the beginning of the new one, corporate law underwent its second great transformation. This time, N.J., the "traitor state" in Lincoln Steffens evocative phrase, radically reduced the regulatory aspects of state corporate law, allowing – for example – corporations to form with no minimum capital and to freely hold the securities of, and merge with, other corporations. Most importantly, New Jersey volunteered to provide corporate form for businesses operating extra-territorially: a New York company could become a New Jersey corporation by simply moving its books across the Hudson. The rest of the company could remain in New York.

Perhaps surprisingly, New York and similarly affected states did not resist this abrogation of the fundamental principle of self-rule. Under the guise of the "internal affairs doctrine," which evolved out of older views that courts ought not to inspect the workings of a corporation that was a part of a foreign sovereign, the states generally accepted the notion that a state's courts should apply foreign law to businesses operating in the state, so long as the business's leaders chose to incorporate out-of-state. This doctrinal foundation effectively allowed first New Jersey and then Delaware to define American corporate law (after Governor Woodrow Wilson sought to reform some of the most pandering aspects of New Jersey corporate law).

On its face, the internal affairs doctrine is an abdication of one of the most important aspects of state sovereignty: state legislatures defer to Delaware to regulate their most important economic enterprises. The state, that is, is outsourcing one of its most important legislative duties, while Delaware, in contrast, is legislating extra-territorially (and, since it taxes the corporations it incorporates, taxing without representation). One might have imagined that the Supreme Court would conclude that delegating essential lawmaking to a foreign legislature, not elected by the people of the state, is a violation of the Republican Form of Government clause, while Delaware's behavior is a form of colonialism. So far as I am aware, however, the argument has never even been raised.

The new corporations, now including powerful economic enterprises with (due to the internal affairs doctrine) the legal right to choose the law that determines the power and rights of their internal elites, could have been seen as threats to self-government or personal liberties even aside from the problem of Delaware's extra-territorial law. That, however, was not the Court's approach.

Instead, the Court was unperturbed by the radical transformation in corporate law or the nature and function of the organizations it defined. It simply continued the process begun at the beginning. Without any discussion of textual niceties, it granted corporations First, Fourth and Fifth Amendment

rights, adding to the rights it had already created under the due process and equal protection clauses of the Fourteenth Amendment.

To my knowledge, the Court never considered a corporate claim of an “individual” right to bear arms or to vote; however, it did grant corporations rights against takings and to due process, the right to speak, rights to jury trial, against warrant-less searches and seizures and double-jeopardy protection. As it enlarged its Commerce Clause jurisprudence, it extended the new-found limits on state regulation to corporate and unincorporated business indiscriminately. It has created vast corporate rights under the Commerce Clause. The only important individual constitutional right it explicitly withheld from corporations is the right against self-incrimination, where it held that prosecutors may subpoena an individual corporate agent while offering only the agent immunity.

Under pressure from the Muckrackers and other opponents of exploitative and destructive corporate practices, governments at different level began to regulate various industries and, in the Sherman and Clayton Acts, even largeness itself. The Court resisted, for example, by limiting regulators’ access to company books and records.

Moreover, the Court expanded upon its earlier public private distinction, placing corporations on the private side. That is, the Court decided, without explanation, that even though corporations can exist only by state grant of right and state definition of their governance structures, business corporations are treated radically differently from municipal corporations for Constitutional purposes. They are not obligated to grant their participants due process, equal protection or even minimum protection of settled expectations. They are not bound by the Constitution’s bars on racial or religious discrimination or its protection of free speech.

On the contrary. While legislatures are free to impose auditing and related regulatory requirements on governmental agencies, the Court had no trouble determining that business corporations, no matter how bureaucratic in form or essential to the public welfare in function, are governed by the rules that regulate government intrusions into citizens’ private homes. The state may create a General Accounting Office or Ombudsman to control municipal agencies; to do the same thing to Standard Oil or General Motors is constitutionally suspect. Searches of corporate offices require a search warrant.

The Great Depression and the New Deal response to it put great pressure on the doctrinal structure of Lochner-era constitutional law. The Court retreated from its Lochner-era doctrines protecting incumbent wealth against the claims of labor, elementary decency and the economic stability essential to the middle class. Ultimately, with the famous Switch in Time, it gave up the effort to stop the emergence of the regulatory state. Not only did it reverse its prior precedents reading primitive Social Darwinism into the due process clause, it ceased to consider even textually based limits on explicit government regulation of the economy. Most dramatically, it was entirely silent as a standing army, permanent Defense Department and the military-industrial complex made a mockery of the Constitution’s no standing army clause.

At the same time, corporate law underwent its third great transformation. In the aftermath of the '29 Stock Market Crash, the Congress passed two revolutionary Acts regulating the securities markets – the 1933 Securities Act and the 1934 Securities Exchange Act. In sharp contrast to the now-Delaware dominated state corporate law, these acts do not treat shareholders as voters for an all-powerful board, while creating a zone of near total privacy and autonomy for board operations. Instead, the Federal acts analogize shareholders to consumers: poorly informed purchasers of an especially opaque product – investment securities – and in need of an elaborate truth-in-labeling law unrivaled in other areas. In their role as consumers, investors in publicly traded securities would now receive extensive Federal protection, in strong contrast to their ongoing disempowerment under Delaware corporate law.

In form, the Federal securities laws are disclosure statutes, requiring company management to create and disclose standardized financial information thought to be important to stock and bond traders and, to a lesser extent, holders. Information, however, is – or can be – power; the new statutes allowed the general public a peek into previously secret inner sanctums. Moreover, the line between disclosure and substantive regulation is never clear and not always observed.

For example, the Federal system has become the primary regulator of board elections (proxy fights), tender offers for large or controlling blocks of stock, and mergers. Collectively known as the “market for corporate control,” these transactions are often in the form of an election: Shareholders elect board members and are entitled to approve or disapprove merger agreements, and tender offers to purchase a control block of stock are normally followed by either an election of a new board or a merger agreement or both. However, since shares and their votes are freely bought and sold, the “market” metaphor is entirely correct: these elections are for sale in a quite literal sense. The Federal regulation is largely in the form of rules for fair elections or informed decisionmaking by shareholders, specifying the information that must be made public before the decision, the time that shareholders must be given to vote or sell, restricting misleading statements and other forms of deception that would be viewed as false advertising in sales contexts but routine in democratic electoral contexts, and so on.

In the Footnote Four era, corporate rights diminished in importance, as the Court recognized that it is poorly equipped to regulate the economy and began to reframe its primary role as procedural: defining and defending the underpinnings of democracy through fair apportionment, equal voting and, later, ending Jim Crow and the American Apartheid system. But if the substantive constitutional rights of business diminished with the demise of *Lochner*, the status of corporations remained unchanged. Two dissents suggested that perhaps *Santa Clara* needed to be rethought: at least in the context of highly regulated industries, they contended, corporations seemed more like government than citizenry. However, the dissents attracted no following and the Constitutional status of corporations remained, as before, virtually indistinguishable from that of American citizens.

Following the general understanding of the Securities regime as economic rather than electoral regulation, the Court did not subject it to constitutional scrutiny. For example, Federal regulation of

corporate elections requires prior regulatory approval of all electoral materials. As a consumer protection regime, this is more protection than consumers normally get, although not radically different from, for example, pharmaceutical regulation. However, had this regulatory scheme been characterized as election regulation, it would have been in obvious and fatal conflict with the most fundamental principle of First Amendment jurisprudence, the bar on prior restraints and explicit censorship. The SEC mandates the form and substance of disclosures, precisely regulates access to the corporate treasury for campaign purposes, and pre-approves all campaign materials – none of which could possibly be permissible under the First Amendment in a real election. This conceptualization of corporations as economic actors, subject to regulation on more or less the same terms as markets themselves, continues to dominate securities regulation to this day – with virtually no influence from or on the continuing view of corporations as citizens rather than markets in other contexts.

With the 1970s, the economy suffered major shocks, from the rise of Japan and Europe as viable competitors and the oil producing countries successful demands to share in oil wealth. At the same time, the growth of unions in the post-War era led to a tremendous increase in the share of corporate wealth going to employees; in the mid-1970s, John Kenneth Galbraith described American corporations as run by a coalition of managers and unionized employees for their own benefit, with relatively little regard for consumers and virtually none for investors, which were seen as both pointless and powerless. Successful companies were largely self-financed; the stock market was a mere side show.

Almost as Galbraith was publishing, however, his analysis became obsolete, in yet another transformation of the corporate landscape, which we might call the Revolt of the Financiers, or the Junk Bond Revolution. Michael Milken built on academic work from the 1950s to show lenders that they could buy bonds they had previously considered far too risky for sound investment, managing the risks by diversification. As he created a secondary market for so-called junk bonds, he and others also realized that this vast new pool of debt financing could transform the equity markets as well. A market player could borrow large sums from Milken's lenders and use them to buy publicly traded stock, using the stock itself as security. Stock was trading at relatively low prices at the time, reflecting not only the general crisis in competitiveness but more specifically the fact, noted by Galbraith, that companies were paying their economic profits to employees rather than investors.

[Rise and fall of the hostile takeover, including the re-empowerment of management through poison pills and MITE's discovery that the internal affairs doctrine is constitutionalized by the commerce clause. Replacement of the Galbraith alliance by managers first unwillingly dominated by the demands of the stock market and then exploiting it, if less mercilessly than employees, to "harvest" corporate economic profits for short-term gain. Growth of the mining v. farming/stewardship management mentality, embedded in private equity. And no change in constitutional doctrine.

But see, the revived Due Process clause restricting state tort law (State Farm). Just as States Rights in the Jim Crow era were marshaled to preserve segregation but disappeared when Federal power was important to attack unions, protect railroads, or overturn workplace safety and wage

regulation, today as well the new states rights doctrines do not allow states to protect their citizens' livelihoods (MITE) or structure local markets to align private interest with public good (State Farm) ]

The pattern has continued into the modern Neo-Lochner era. As the Court has abandoned its post New Deal commitment to Footnote Four Abstention, it has greatly expanded its intervention into economic regulation, often under the banner of the First Amendment but also under a revived Due Process clause, the Commerce Clause and sometimes even Federalism doctrines with no obvious textual locus. As in every period before, it continues to apply its constitutional right doctrines indiscriminately to individuals and corporations.

Today, the Court's basic corporate doctrines have as little to do with the text of the Constitution as they ever have. As participants in real electoral politics and lobbying, corporations have Free Speech rights as if they were citizens. I say "citizens" and not "persons" advisedly: non-citizens have no constitutional right to influence our elections or lobby our public servants, and foreign money is heavily regulated. In the real world, the nationality of corporations is a mystery: our important corporations operate internationally, have employees and top managers located all over the world many of whom are foreigners, derive large parts of their funds from sales to foreigners, raise investment capital in international bond and stock markets which, in turn, assiduously seek to attract investors from all over the world. There is no reason to label a company that has stock listed on an American stock exchange "American" – the participants on the exchange are highly likely to be international and, indeed, in this era of electronic trading, even the location of the exchange itself is somewhat arbitrary.

In practice, the usual test for whether a company is "American" appears to be whether it is incorporated in an American jurisdiction. But Delaware allows out-of-state companies to incorporate in Delaware with no more than a purely formal presence in the state – just a mail drop to receive service of process. It does not ask where the organization is headquartered or where its board sits, where it operates, where its customers, employees or investors are or what their citizenship is, or where its assets are kept.

Accordingly, unlike real citizens, any business organization has the option of becoming "American" and obtaining Supreme Court protection for its "speech" expenditures to influence American politics or government without birth or naturalization. All it needs to do is to incorporate – or incorporate a wholly owned and wholly controlled subsidiary --in an American state. This purely formal act appears to be all that is necessary to win the Citizens United right to spend unlimited sums to influence our election. (A footnote in the CU majority opinion appears to leave open a door for regulation of foreign money. But all publicly traded American corporations are in large part foreign. Any security listed on an American stock exchange will have a significant number of foreign owners, direct and indirect. And any company large enough to be listed is likely to have foreign assets, foreign sales, foreign borrowings, foreign profits, foreign customers, foreign agents, suppliers and contractors, foreign operations operated by foreign nationals, and foreigners employed domestically. This exception, if taken seriously, would swallow the rule. There is no evidence in the opinion that the Court took or intends to take it seriously).

As the Court has re-expanded its constitutionalization of economic regulation, it has not distinguished between incorporated and unincorporated businesses. Each has the First Amendment right to advertise prices and free-ride on legislative attempts to regulate competition in order to lessen perceived races to the bottom or protect favored incumbents or vulnerable consumers (drug prices, agricultural boards, lawyer advertising, alcohol content advertising, etc). The unpredictable “coerced speech” doctrine which courts use to prevent governments from mandating accurate disclosures (milk) or creating public forums in quasi-public spaces (utility bills) is applied without discussion of whether the “speaker” is incorporated.

The earlier rules restricting government regulation remain: it continues to be constitutionally problematic, if not quite inconceivable, to extend the GAO’s authority to large multinational corporations. While the legislatures may experiment with various means of regulating bureaucratic agencies to assure that they act in the intended way when the agencies are labeled governmental, when similar organizations are organized as business or non-profit corporations, the bureaucracies suddenly obtain autonomy rights based on eighteenth century notions of the rights of citizens against an often exploitative state.

And the anomaly of the securities regime remains – although the First Amendment has grown to threaten many forms of customary and essential regulation of commercial markets, it has not yet threatened our only actual system of prior restraint, forced speech and censorship. With any luck, common sense will continue to overpower doctrinal consistency: the day First Amendment analysis is applied to the SEC will be the beginning of the end of the American system of capital formation.

The lesson of this quick march through the constitutional doctrines applying to corporations is simple. The form and content of corporate law and the underlying enterprises have repeatedly changed as we have moved from an agrarian and trade based economy where the only large organizations were slave plantations, through industrialization and the rise and fall of the railroads, to an economy dominated by multi-national business enterprises often able to transcend the territorial restrictions that still define most legal regulation. The text and meaning of the Constitution have changed equally radically, from protecting to abolishing slavery, from harnessing government power to shift wealth and power to a productive and exploitative elite, from state-based regulation to a largely centralized Federal system, from no standing army to the largest military in the world with an enormous dependent “private” sector, and on to the New Deal vision of public organizations competing with and controlling large stable private ones, to the instability of creative destruction and the modern conflicts over the rise of a new elite dependant on direct subsidies, state granted monopolies, and exemptions from social responsibilities, norms binding on others, and essential protections of the ecological and social commons. The Supreme Court has repeatedly revised and changed the theories and explanations of its regulation of the corporate sphere.

Yet amidst this factual, textual and doctrinal change, several results have remained constant. Corporations have access to the Federal courts regardless of the language of Article III. Corporations may assert virtually every individual right as if they were individuals. Corporate elites may choose the

corporate law that defines their own power with virtually no restrictions from the political process. Even as the contract clause, Lochner's due process clause, New Deal footnote 4 deference rose and fell, and amid the rise of new laissez faire First Amendment and Commerce Clause, the Court has nearly always seen its role as protecting economic elites from popular control. The textual and doctrinal handles change, but the results remain the same. [Beyond the current scope, but a similar story could be told – with no constitutional doctrine at all – about the Court's consistent attitude towards unions, which has remained hostile through a century of legislative change.]

## **II. A Non-Textual Story.**

### **A. An unwritten constitution.**

We live in a democratic republic with several competing collective decisionmaking procedures: democratic representation epitomized by the Congress, backward looking legal interpretation as practiced by the courts, price-based market allocations regulated largely by contract, tort and property law, and bureaucratic proceduralism exemplified by executive agencies and corporate hierarchy.

Liberal states are defined by their rejection of the view that unity requires uniformity. Instead, we believe that a society should create spaces for individual conscience, dissent and deviant taste, minorities and subcultures with commitments that differ from the majority's. Our own variant on this liberal theme is deeply influenced by its origins as an attempt to end a millennium of religious wars – and an (ultimately unsuccessful) attempt to paper over the differences between slaveholders and free men. Our Constitution, above all else, reflects an agreement to disagree on the most important issues of the day: the Founders sought to find a way for people of profoundly conflicting religious and moral commitments would live together in a single state without civil war. Their solution was disestablishment. The Federal government, at least, would take no position on religion, leaving the worship of God to individuals and communities. It would avoid censorship, allowing an efflorescence of diverse tastes in speech, art, science, politics, culture and, of course, religion. On the most important issue of the day, slavery, the government was designed to be unable to act – the minority would always have enough power to veto any attempt to impose a uniform national view. Only a civil war changed that, although we still live with the Founders' commitment to (elite) peace over justice.

The Constitution's liberal commitment to limited government – to peace through tolerance rather than unity or justice – drives the fundamentally anti-political nature of our system. It rejects the idea that a majority is entitled to impose its will on the minority. Instead, majoritarian decisionmaking is reserved primarily for area where it can yield a rough proportionality – logrolling to spread the economic gains from cooperation and collective action. In these issues, where all can win, we try, not always successfully, to avoid majority domination by Montesquieu and Madison's method of multiplying and dividing decisionmakers. Compromise, we hope, will lead to a rough proportionality; disputes between countervailing powers – multiple legislatures, executives, public and private agencies and bureaucracies, courts and markets – will prevent any "faction" (in Madison's term) from accumulating sufficient power to take an unreasonable share of the benefits.

Where proportionality is impossible, as on issues of principle, we tend to retreat into the courts and the Constitution. Sometimes, we take the religion clauses as a paradigm, agreeing to make no collective decision at all. In a free country, people are allowed to join religious communities, or participate in the arts, without collective approval. Markets often allow citizens acting as employees (at least if they have saleable skills) or consumers (at least if they have sufficient buying power) to pursue many and diverse interests and commitments without any obvious collective decision at all. Or we dump the issue on the courts, pretending – as with slavery – that a compromise was once made and can forever serve as the basis for future behavior.

Our multiple decisionmaking processes will give different results depending on which system we use. Even majority voting is entirely indeterminate when the majority at the national level disagrees with the majority at the state level and, yet again, from majorities at variously defined local levels. The national view on equal rights for gays and minorities, for example, differs from Georgia's, which, in turn, differs from Atlanta's. And Atlanta's view will change radically if the lines defining it are changed to include or exclude particular neighborhoods or suburbs. In most cases, we have no clear norms determining which majority should govern (and locally, we lack any theory of how localities should be defined).

Even if all majorities agree, the market may generate a different resolution. But markets suffer from a similar indeterminacy as majorities: changing the background property or contract rules, or the initial distribution of wealth or power, will lead to radically different results, difference that are more likely to multiply than disappear over time. A market in which ranchers must pay farmers for the right to run their cattle will, *pace* Coase, lead to far richer farmers and a radically different landscape than one in which the rule is reversed; the internet would look quite different if consumers could charge for access to their personal information and hard-drives but software producers had only self-help to protect themselves against strangers using their information.

The principle of majority rule is trumped by the larger principle that the majority is determined by the boundaries; ultimately, the boundaries, not the majority, determines the results. Markets have the same problem. The details of the underlying property, tort, zoning, pollution, safety, competition and contract rights, determine the results in a far more fundamental way than bargaining. We have no agreed-upon principles of boundary drawing or nationalism v. localism, so the principle of majority rule, in practice must bow down to utterly unprincipled conflicts over which majority counts. So in markets. Despite the valiant efforts of the *Lochner*-era Supreme Court and its modern successors, we have no clear or agreed upon norms regarding the background rules for markets. The lines between externalities and internalized costs, theft and the commons, or even your property and my rights, are pure social constructs that can be varied enormously within the confines of a capitalist economy.

Much of our political struggle, then, is over the background rules: whether a given decision will be made by courts, legislatures (and which ones), or markets (and under which set of background rules). We agree that we must tolerate and accommodate differences, but everyone prefers to tolerate than be tolerated; it is far easier to be the norm than the exception. That is why the "culture wars" so often

take on a vehemence that belies the underlying (largely) shared commitment to creating a common state with people very different from ourselves.

For present purposes, however, there is one rule that is nearly universally accepted and, in my view, ought to be seen as foundational. The line between market and majoritarian rule is always controversial. Democratic majorities, if they are half-way sensible, will understand that they must restrain themselves. Few of us would want to select our breakfast cereals by majority vote, even if we were confident of consistently being in the majority.

But markets have a different logic. Markets auction rights to the highest bidder. If the right to set the rules is put up for auction, the high bidder will quickly, and necessarily, use the purchased right to set rules that ensure that the incumbents will always win – the rich will get richer and the poor poorer. As the Genesis story of Joseph in ancient Egypt illustrates, a property holder who can charge for food will, in the end, be able to force everyone else to sell cattle, their land, and ultimately, their bodies. Once Joseph set the background rule that the state could sell “its” stored grain, a free market and free transactions led ineluctably to Pharaoh’s enslavement and serfdom of the Egyptian people.

Our oldest works of political theory already recognize the problem of corruption. If markets can buy law, or officials, then economic incumbents can use economic power to buy law that gives them economic power. This is, say Robinson & Acemoglu, *Why Nations Fail*. If economic power can buy political power, it will nearly always be easier for elites to take instead of make – to buy the laws they need to extract rents and protect themselves from the threat of creative destruction always present in competition. The inevitable result is slowing growth and eventual economic collapse. Any society that wishes to avoid the path of the former Soviet Union, must restrain its economic incumbents and keep them far away from political power and legal influence.

In other words, democracy must set the boundaries between itself and market, even though most democracies (and certainly ours) will ordinarily leave much decisionmaking to the market. The political – that is democratic – process must be the meta-decisionmaker, deciding which process is to make decisions. When we need to decide where markets end and politics begin, or vice versa, we must put it up for a vote, not for auction. Or even to Supreme Court fiat.

#### **B. Comity, or deference to semi-sovereigns.**

Supreme Court doctrine cannot be understood, as we have seen, as a consequence of reading the text of the Constitution, “literally” or otherwise. But the decisions are not purely the result of class bias or political ideology trumping law. Instead, they are best understood as stemming from a deep, probably unconscious classification of business corporations in our constitutional order.

On their face, the decisions generally seem to flow from a very poor metaphor: treating corporations as if they were single individuals rather than associations or conspiracies. The courts, historically, have been quite skeptical of unions, which tended to be viewed as conspiracies in restraint of trade; even after the NLRA made them clearly legal, the Supreme Court’s approach to the statute has

been strikingly suspicious, often infected with an older hostility to guilds and similar forms of self-organizing entities viewed as derogations from market norms. In contrast, parallel hostility to the unions of capital we call business corporations is hard to find; even in the depths of Jacksonian hostility to corporations and monopoly, the Supreme Court showed no signs that, as Mr Dooley contended, it 'follows the election returns.'

The decisions, that is, simply ignore the fact that corporations are not individuals. We have long traditions explaining why citizens need protection from intrusive government regulation and majority views, even when those rules might be better for the common good. Those rationales, by and large, do not translate in any simple fashion to business corporations. A man's home is his castle, and should be; people need a space where they can act without (much) regard for social niceties or collective norms. But there is no obvious reason why this should be true for corporations as well. Citizens need to be able to criticize the government without fear of the Gulag. But it isn't obvious that corporations need the same protections; indeed, it isn't even completely obvious what it means for a corporation – as opposed to its leaders or its investors or its employees – to criticize.

In too many cases, the Supreme Court has simply ignored the differences between people and the institutions we create to support ourselves. Granting rights to an organization may empower its participants – or it may simply allow its leaders to exploit them further; *San Mateo v. S. Pac. RR's* claim that corporate rights are the rights of corporate shareholders is simply false. Pretending that the organization is an individual simply ignores the key issue.

The Supreme Court decisions granting corporations constitutional (not statutory) rights to diversity jurisdiction, equal protection, due process, trial by jury (but who or what are a multinational's peers?), rights against warrantless search and seizure, takings and to resist subpoena, speech rights (including the right to teach foreign languages in *Pierce*), commercial speech rights, rights to spend money to influence elections, uniformly fail to even discuss whether corporate rights are the same as individual rights. Either they pretend, as *Citizens United* does, that the corporation is a rights bearing individual in its own right. Or, more commonly, they assume that rights pass through the firm in some simple way to shareholders, which, in turn, are assumed to be human citizens (*Gulf, Colo. & S.F. Ry. v. Ellis*, 165 U.S. 150, 154 (1897); *Bellotti*). Scandalously, in 1964 Justice Black argued – apparently seriously – that a corporation had a constitutionally protected right (absent statutory bar) to discriminate against African Americans, because a man must have the right to choose who he admits to his living room. He was following a tradition set down in *Dred Scott*, which similarly contended state mandated discrimination was private and a corporation's "right" of freedom of association – the right of a business and a common carrier to not be open to all comers in defiance of all capitalist norms -- must trump the real rights of real people.

This line of reasoning is so poor that it is hard to take it seriously. In a liberal state, at least, we should know that collective rights are not the same as individual rights. No one contends that corporations are "persons" in the most basic sense: they are not counted for apportionment purposes under the Fourteenth Amendment. Nor does anyone think they have the most basic individual rights –

the rights to life and freedom. A corporation can be dissolved and sold by its leadership at any time for any reason or no reason at all, without the consent of most of its human participants (although the board of directors must vote affirmatively and a majority of shares – but not shareholders – must concur). There have been many objections to hostile takeovers, but none, to my knowledge, on XIII Amendment anti-slavery grounds: corporations are neither people nor individuals. Similarly, not even the most fringe gun nuts have yet claimed that corporations have a right to form militias or private armies; several of the State constitutions (including some that enshrine an individual right to bear arms) specifically bar (or barred) corporate private armies of the Pinkerton variety (e.g., UT, copying WI). To treat corporations seriously as individuals, now that the Second Amendment apparently includes an individual right to carry modern weapons, would threaten a second Civil War: if the right to “bear arms” in this sense were extended to corporations, the martial language of mergers and acquisitions, with its White Knights and Scorched Earth Tactics would become terrifyingly literal. We would find ourselves in a medieval era of private armies, aristocratic invaders, and mutual terror – perhaps a libertarian fantasy to followers of Nozick, but a nightmare to the rest of us. Corporate rights can never be personal rights.

General corporate law, however, reaches a similar conclusion by a more sensible route. Courts have long been extraordinarily deferential to corporate elites. Before the great reforms of the early 20<sup>th</sup> century, this deference was expressed in the predecessor to today’s “internal affairs doctrine” -- the “inspection” and supervision doctrines, invoked for example by the US Supreme Court – back when it had some expertise in corporate law – in Dartmouth College.

Corporations, on this view, are created by a sovereign for sovereign purposes and partake of sovereign attributes, such as the power to create (by)laws that bind those associated with them, the power to spend common funds without individual consent, and similar rights to act collectively without regard to the ordinary rules of contract. In the modern era, one might add the extraordinary privilege of entity (so-called “limited”) liability, which allows corporate investors to avoid any responsibility for the negative consequences of their actions. If the corporation is a part of the sovereign that created it, however, invading its inner workings is a grave affront to a coordinate power.

The doctrine of comity holds that a court should respect the sovereign acts of other sovereigns, whether they are US jurisdictions or foreign. Foreign court decisions are final, even if the domestic court might have ruled differently. Courts routinely fuse to inspect and supervise the internal functioning of a foreign executive agency – a US court would not hear a case regarding whether the French environmental protection agency followed French administrative process or civil service norms, even if it clearly had personal jurisdiction over the parties. For the same reason, the courts refused to intervene in the internal affairs of foreign corporations.

Today, the deference to foreign sovereigns continues: every state accepts the Internal Affairs Doctrine as a matter of common law and, usually, statute (although the larger states often reject it in particular areas where outsourcing to Delaware does not lead to the results they seek). Indeed, the Supreme Court once suggested, in *MITE*, that the internal affairs doctrine is required by the US Constitution’s commerce clause. This conclusion seems clearly wrong – the internal affairs doctrine, in

its modern form, is an obvious violation of the most fundamental principle of self-government. Delaware, today, has primary responsibility for regulating the most important economic institutions of the entire country, but most of us do not have the vote in Delaware. Worse still, if the internal affairs doctrine somehow appears in a constitution written long before modern corporations existed, we have no possibility of ever reclaiming our sovereign authority from Delaware: corporate elites will be permitted to choose to be subject to the law of whatever jurisdiction can be convinced, or bribed, into allowing them free rein.

Moreover, modern courts extend extraordinary deference even to domestic corporations. The Business Judgment Rule extends something like Chevron Deference to corporate managers. Their decisions are presumed to be reasonable exercises of their discretion, and thus beyond judicial review, except in the most egregious cases of self-dealing. And even then, the burden on plaintiffs is near impossible (Disney—grossly overpaid CEO; Kamin—large contribution to the national debt justified as attempt to deceive shareholders).

The Business Judgment Rule, like the Internal Affairs Doctrine, is best understood as an example of the deference that courts routinely grant to coordinate branches of our government and foreign sovereigns. The Supreme Court's long history of granting corporations' constitutional rights without regard to text is, in my opinion, an outgrowth of this attitude. It is a form of comity.

While the rhetoric treats corporations as individuals and private – on the civil society side of the great public-private divide – the results are better explained as a recognition that we have made business corporations into semi-sovereign, self-governing entities in their own right. State law courts defer to corporate decisionmakers as much, or perhaps more than they would to their own legislatures, executive agencies, subordinate courts, sister states or foreign governments.

Doctrinally, of course, the Supreme Court has granted business corporations rights it has never granted Federal or state agencies. No executive branch official, even in the heyday of the Unitary Executive theory, had the right to spend his agency's budget to lobby Congress or the voters to change the terms by which it was entrusted to them in violation of explicit congressional prohibitions. Under *Bellotti* and *Citizens United*, corporate executives do. No executive branch official may demand that the GAO or a similar regulator obtain a warrant or other court order before investigating, as corporate executives may. No executive branch official can contend, as Dartmouth College did, that the statute creating his office was akin to a feudal grant that can never be rescinded (even if the Court used the then-modern terminology of contract to describe it). Indeed, executive branch officials have no right to express their own personal opinions on issues of particular Congressional concern and may be required to make statements that contradict their professional judgment on issues of profound national and personal concern, such as abortion. While corporate officials may coerce their subordinates to speak in this fashion, the Congress and the legislatures that created their office may not.

But the spirit of these rights is the spirit of comity.

The Court's general refusal to consider how corporations actually work is closely related to the comity doctrine. We recognize the decisions of Saudi Arabia as a sovereign state even if, on slightly closer examination, it appears to be a medieval fiefdom violating most of the fundamental principles of American law and democratic commitments. The fact that Saudi law is likely to reflect the will or interests of the Saudi people only by accident or to the extent that those interests align with the interest of the Saud family is no more relevant than the fact that the Saudi state does not recognize most of its subjects as citizens or that it enforces slavery or similar institutions that we clearly violate American norms.

It extends the same privilege to corporations. They too defy ordinary democratic norms. Most corporate participants, including the employees (who bear the primary risk of its decisions) have no formal voice in its decisions. Indeed, much like the non-ethnic Saudi inhabitants of Saudi Arabia, the elite does not even consider them citizens, in the sense that their good is the good of the whole. In a partnership (or a democratic state) when the partners (or citizens) do well, that is counted as the whole doing well. In contrast, corporate law and most corporations treat employees as cost centers: the more they get, the lower profits – the measure of collective success – are. Instead of treating their good as the goal of the institution, elites are taught to give employees only what is necessary to induce them to give back more, as if they were subjects to be exploited for someone else's gain like a colonized people. The elite debates, to be sure, whether exploitation is more effective in the harsh model of the Belgian Congo or the more pleasant *Mission civilisatrice*, but in either case the employees are no more allowed self-government than any colonized people.

But the Supreme Court ignores the contrast of corporate governance to American norms – the complete absence of basic rights of dissent, privacy, voice and even the basic right not to be stripped of nationality. This is the tradition of comity. A sovereign is still entitled to legal respect, even if it is not worthy of respect on any other ground. We inquire as to what its rules and rulings are, not how they came to be. And, in the interests of international peace if not justice, we restrain ourselves from the temptation to intervene in its internal affairs, deferring to the judgments of its accredited leaders – however outrageous the methods by which they obtained their power or, except in the most extreme cases, the uses to which they have put it.

The tradition of extending comity to corporations is, also, ancient. Not only far older than modern business corporations, but older than our legal system itself. The earliest corporations – the Church, the Knights of Malta, the Universities at Padua, Oxford and Cambridge, London and the other ancient cities – derived their authority from their own sovereign claims to self-government, not from any grant. Even as the centralizing English state began to claim that all authority must derive from the King or King in Parliament, it was forced to recognize that London's self-government rights derived only from ancient usage, mythologized into a "lost charter."

The original grant of diversity jurisdiction would have been more intelligible if it had by analogy to states than citizens. So too the refusal to allow the people, and their governmental representatives, ordinary rights to supervise their servants. These rights are not because corporations are their

“members,” even with respect to corporations that have members, nor are they because corporations are property, even in the unusual case when they can plausibly be characterized that way. They are a medieval relic, a remnant of a pre-modern era that has resisted liberal assault. We abolished the aristocracy, but the corporate estate remains – islands of independent power that have resisted absolute monarchs and liberal republicans alike.

### **III. Understanding Corporations: A post-medieval account**

Modern economies use markets only in the interstices between bureaucracies. Markets are simply too unstable and too inefficient for complex operations. Natural selection and its economic equivalent are powerful, but quite wasteful: in a pure market, few people would be willing to commit themselves to producing a specialized part or skill that is useless without other associated parts and skills. Imagine, for example, students and teachers attempting to gather together on a spot market – by the time they had negotiated a class topic, let alone an appropriate payment structure and a place to meet, and verified credentials, the time for learning would have come and gone.

Most modern economic enterprises need, instead, the stability and predictability of planning and centralized “command and control” structures. (Coase) Most decisions are made within hierarchal organizations in which information passes (more or less accurately) upward and orders proceed (more or less relevantly) downward. (Tolstoy on armies). Our bureaucracies are, of course, no panacea to the problems of markets; that is one reason why successful modern economies usually maintain markets to discipline the least successful organizations and enhance the growth of others.

Corporations are the legal form of most of our great bureaucracies. Oddly, we use the same term for entities as disparate as municipal governments (nearly all cities are organized as corporations), large educational institutions (our oldest non-governmental corporation is Harvard University), major multinational business enterprises employing hundreds of thousands of people over many countries, and small businesses that may not be institutionalized at all but simply use corporate law to avoid ordinary tort or contract liability. This poverty of our vocabulary obfuscates: an analysis applicable to one form of corporation is unlikely to apply to all.

Writers about corporations (and I include myself in this) usually are thinking of business corporations with boards nominally elected by broadly dispersed shares which are, in turn, traded on a public exchange and held, in large part, by other institutions. But it is critical to recall that many of our large corporations have no shareholders at all, that non-profit and governmental corporations are significant employers and producers of critical goods and services, and that non-institutionalized businesses may have controlling shareholders who function like owners despite corporate law’s mandatory separation of shareholding from control.

Large publicly traded business corporations (like the large non-profits and, indeed, the incorporated cities with which the form originated) have no owners. By that I mean that no individual or group has the basic rights of ownership – to control, to destroy, to transfer – that make property the basic tool by which we protect individual freedom and minority autonomy from the majority. Owners

have the right, within the scope of their property rights, to make decisions that conventional wisdom may see as foolish, and to use their property in order express personal idiosyncrasies or pursue values not shared by the majority. A home owner may paint the interior of her house purple with pink polkadots and refuse to sell to someone who, quite correctly, believes that an alternative use would have higher economic value. Business owners may take the proceeds of the business and use it, for personal or business uses, without regard to any social view of sound investment or utility.

In public traded corporations and non-profits, no one has these rights. Our corporate law gives directors the sole original right to make corporate decisions; all other corporate actors derive their rights to bind the corporation from the directors. Directors, that is, have the rights of control that are central to ownership.

But directors are explicitly and emphatically not owners and may not use their control rights as owners – to do so would be just as wrong, and for exactly the same reason, as for an elected official to treat the government as his or her property. Directors are fiduciaries, responsible for managing property that is not their own. They must set aside their own personal interests (and personal commitments) and act in the interests of the entity itself, as best as they can determine them. Directors, for this reason, are forbidden to give away (“waste”) corporate assets or use them in a way that an outsider would view as non-productive – the most basic right of a property holder.

Moreover, directors are forbidden even from acting in the interests of their electors: in corporate law, the Burkean concept of a representative – elected to exercise his own judgment as to the collective interest, not to listen to his electors’ views – is supreme. There is no legitimate corporate law equivalent to Clintonian triangulation or Nixonian divide-to-conquer. Instead, corporate directors, regardless of who elected them, have a clear duty to represent the whole. This is most obvious, of course, in non-profit corporations with self-perpetuating boards; a board that acted in the interests of its electors (i.e., the board itself) would be in clear and possibly even enforceable violation of the law. In ordinary business corporations, the law is confused by the extreme deference courts give to internal corporate decision processes; the business judgment rule doctrine assures that only in the most extraordinary circumstances will courts intervene.

In short, the archetype of the situation where courts will intervene is a board that acts like an owner, treating corporate assets as if they were the directors’, to be used for a director’s purposes and in the director’s interests without regard to the corporate interests.

Shareholders are no more owners than directors. To be sure, shareholders owe no fiduciary duty to the firm or anyone else (unless they own enough shares to “dominate” the firm). And they do own their shares, so they may sell, use or give away their shares without significant regard to social interests or collective understandings of propriety. But they lack any decisionmaking power over the firm. Shareholders may not make firm decisions; they have neither the rights of a principal nor an agent. Shareholders may not direct the directors; directors are obligated to exercise independent judgment without regard to the desires of the shareholders, and there is no corporate law equivalent to

a California referendum or a Norquist pledge. Shareholders have no right to use corporate assets – a Microsoft shareholder who shows up at Microsoft headquarters looking for his property will be arrested for trespass. Shareholders may not sell the firm, close it down, change its purposes, remove the capital they (or, more likely, their predecessors in interest) contributed or even enforce their expectation of a return – all those functions are reserved to the board. Basically, they have only three rights: to vote for the board and on those board proposals that require shareholder approval; to receive a pro-rata share of any distribution the board may authorize; and to bring suit on behalf of the corporation for breaches of duty to it. These are, at most, political – not property – rights.

In closely held corporations, in which the shareholder electors are few in number and effectively control the board because they can call elections to remove incumbent directors at any time, this separation of investors from ownership may become a legal fiction. The purpose of the fiction, in turn, is to relieve the shareholder/investor of responsibility for corporate obligations. If the firm does well, the shareholder may extract profits from it, providing it follows standard corporate law forms, almost as if the corporate property were the shareholders. In contrast, if the firm does poorly, the shareholder may insist that corporate debts (contract or tort) are the corporation's alone and not the shareholder's.

But even in the most tightly controlled corporation, the law remains insistent that shareholders play along with the fiction. If courts determine that a shareholder has treated the corporation as property (treating it as an “agent” or a “puppet” or using it for “personal purposes” or “neglecting corporate formalities” in the odd language of corporate law), they will treat the shareholder's property as available for corporate creditors. In effect, they declare that a corporate shareholder that treats the corporation as property is then estopped from claiming that it an owner responsible for the uses to which it has put its property.

This basic distinction leads to a basic distinction in the way corporations should be treated in constitutional law and political consideration generally. The closely controlled corporation is, in most instances, in reality a creature of its shareholder, despite the demands of corporate law. The primary purpose of corporate law in these firms is, on the one hand, to allow shareholders to evade ordinary legal liability for contract and tort obligations, and on the other hand, to limit the ability of shareholders to abuse that privilege by moving corporate assets out of the reach of corporate creditors.

In most cases, thus, the closely held corporation is effectively its shareholder, even if they are legally separate. It may be convenient to grant rights to the firm in order to protect the rights of the shareholder: for example, giving the firm the right to compensation in the event of a governmental taking is simply a more convenient way to allow the shareholder to contest a taking of what is, in substance if not law, the shareholder's property for most purposes. Other rights, however, may amount to creditor or tax evasion. Allowing the corporation, for example, to spend money to lobby or electioneer, is simply inviting difficult to police fraud. If the corporation had no right to lobby or electioneer, the shareholder could cause it to pay a dividend to the shareholder, who would then be free to spend personal money in support of personal causes. There are, however, limits on dividends

designed to ensure that the shareholder does not take corporate money that is due to creditors. If the right to spend is given to corporation, in contrast, the shareholder can cause it not only to spend money that could have been paid out in dividends, but also money that otherwise would have gone to creditors or minority shareholders, without the consent or approval of those claimants. Similarly, our tax law holds that most corporate expenditures are deductible, but personal expenditures (including political expenditures) are not. If a shareholder is permitted to cause the corporation to spend treasury funds directly, rather than paying them out to the shareholder as dividends first, it may be easier to (legally or illegally) deduct payments that, in fact, are non-deductible personal or political expenses. Encouraging tax avoidance or evasion should never be a constitutional value.

In contrast, publicly traded corporations and corporations without voting shareholders are never creatures of their shareholders and should never be automatically assimilated to the shareholder body for purposes of analysis. Protecting entity rights may protect the rights of shareholders – but more likely, it will protect the autonomous decisionmaking authority of the internal corporate elite. These two are never the same, just as protecting the rights of an elected official or a government bureaucrat is never automatically the same as protecting the rights of the people.

In a liberal state that has rejected the medieval notion that the government owns the population, Hegelian notions of an objective collective interest which officials can be counted on to pursue or Rousseau's General Will that dissenters agree to even if they do not understand that they do, we must always consider the possibility that giving additional rights to government officials reduces the rights of those the officials are meant to serve. The same is true in the corporate sphere. But in the corporate sphere the problem is even more complicated, because we have no clear and consistent understanding of either the membership of the firm or the common good. Nation states have citizens, and the common good is, at least approximately, the good of the citizens (although it will always be controversial whether taken individually or collectively, or how to deal with dissensus). Business corporations and many non-profit corporations, in contrast, have no members. And no one (or almost no one) believes that the organization itself is an end-in-itself, as some people think of nations and states.

So in publicly traded and non-profit corporations, the corporate interest will always be disputed, as different corporate participants seek to characterize it in ways that reflect their own interests or values. Those who value production may see the corporate purpose as creating good jobs, or enabling employees, suppliers and customers to live useful and productive lives. Those who are more concerned with consumption may prefer to emphasize the product or service itself, or the profit that is generated by selling it for more than the corporation must pay its various inputs. Corporate participants may seek to maximize the size of the corporate pie or the share (absolute or relative) that is paid out to customers (as lower price or higher quality), to employees (as wages or working conditions), to suppliers of raw materials (as rent or price) or capital (as dividends or interest), or to society at large (as taxes, contributions to art, science, technology or knowledge, or ecological enrichment or destruction). Some people may seem growth of the organization itself (its bureaucracy or the areas it serves) as a corporate end, while others may view this as a distraction from more important matters.

We can be confident, then, that corporate decisions will never reflect the interests, values or will of all those involved. Indeed, pace Hegel, bureaucratic decisions rarely reflect rationality – as anyone who has ever served on a committee or attempted to implement a policy created by a boss who seems uncomprehending of the basic reality in the field, bureaucratic decisions are often perversely far from the intentions or needs of anyone involved. There is no General Will and the firm will not embody it.

In short, the same concerns that lead us to avoid absolute government – the fear that our servants, vital as they are, may be tempted to become our masters, the fear that power corrupts, the fear that efficiency may simply lead to more forceful wrongheadedness, the need to protect spaces for individuality and minority views from the pressures to conformity, and the omnipresent twin specters of corruption and organizational incompetence – should lead us to a similar love-hate relationship with our large corporations. We can no more live a modern affluent life without large corporations than we can live a civilized life of any kind without powerful governments. But our saviors are also, always, threats.

#### **IV. The Place of Corporations in Our Political and Legal Order.**

At this point, the proper place of corporations in our political system should be fairly clear. On first principles, independent of the language of the Constitution, corporations are one of several decisionmaking systems we use to govern ourselves. In a democratic age, they must, therefore, remain ultimately under the control of the People – both subservient to democratic majorities and respectful of our tradition of limited government.

Moreover, our major corporations (and, collectively, the smaller ones) are key economic players in a dynamic economy. As the economy changes, corporate law must change as well. The basic functioning of business corporations was radically changed three times in the last century. More change is surely on the way, if only because of the instability demonstrated by the dot-com bubble and associated Enron and other governance scandals, the real estate bubble and the global finance crisis it precipitated, and, most importantly, the reality that our current institutions have taken all the productivity gains of the last generation and given them to a tiny and undeserving minority.

When elites fail to deliver general prosperity, democratic societies replace them and the structures that empower them. Either we will reform our corporate law and corporate elites, or those elites will destroy our democracy resisting challenges to their power. In neither case, however, is there much reason to expect to find the correct resolution of our twenty-first century conflicts by careful reading – literal or not – of eighteenth century documents. Corporate law simply does not belong in the Constitution.

It will often be appropriate to grant corporations and similar organizations significant spheres of autonomy, much as we do to government agencies and markets, so long as the results are conducive to the General Welfare and the common good. The business judgment rule and the judicial deference to internal corporate processes that it reflects is an example of this.

However, both the fact and extent of this autonomy are matters of expediency, not principle. There is no reason to imagine that the legal rights of corporations should remain forever fixed even as corporate law and the role of corporations in our economy change. On the contrary, in a dynamic economy, the only constant is likely to be the need for vigilance lest economic incumbents use their past economic success, luck or inherited wealth to subvert the creative processes of new wealth production. Corruption will take on new forms as economic power changes. The guardians of liberty, political freedom, economic justice and simple productivity must remain ever vigilant against the potential for rent-seeking – seizing existing wealth rather than producing something new.

Applying this general framework to the existing Supreme Court precedent leads to two broad conclusions: First, nearly every decision granting corporations constitutional rights against the population and its elected representatives is wrong. Corporations are not individuals and, in general, should not receive individual rights.

Second, the struggle to restrain government – to define officials as public servants rather than masters – that is the core of liberalism must also reach corporate governance. State bureaucracies are power structures that must be restrained and guided so that they do good rather than evil; the same is true of business bureaucracies that are more independent of the political branches. In some corporations, we have (or have had) institutional commitments to principles of free speech, limited government and spheres of privacy, internal democracy, Montesquieu's balance of powers, tolerance of dissent, and other fundamental liberal principles. The reputable news media and universities, for example, have elaborate institutional structures to protect the autonomy of individual writers and thinkers from commercial pressure or the top-down hierarchy and its drive to conformity. Some firms have experimented with ombudsmen or other techniques to avoid the typical problems of dictatorship – group think and fear to speak the truth to authority – that plague corporate monarchies as well. The time has come to bring our leading economic institutions into the eighteenth century.

#### **A. Rights of corporations.**

As detailed above, the Supreme Court has a long tradition of creating constitutional rights for corporations with little or no textual basis. We can now see that the text, not the precedents, properly reflects American political and legal commitments.

Diversity jurisdiction may be the issue most likely to be interesting only to lawyers. Diversity jurisdiction, after all, is only the right to be heard on state law issues in Federal court – even if corporations were denied it entirely, the only consequence would be that they'd have to litigate their state law claims before state courts. Now, to be sure, the Federal courts are nicer places to litigate. Judges tend to be both more qualified and less burdened: the caseload of the entire Federal judiciary is roughly the same as that of any single judge in the New York Supreme Court trial division, NYC. While Federal district judges (unlike many of their state court counterparts) hear both criminal and civil cases and therefore find their dockets crowded with the detritus of the "war on drugs," still, they have time, clerks and resources rarely found in the state courts. The facilities are better and the staff is more

professional, perhaps because they are better paid. So it is not hard to see why corporate counsel would prefer to be in Federal court. But these concerns do not rise to Constitutional levels.

The purpose of diversity jurisdiction in the modern world is not entirely clear. The original notion may have been to protect out-of-staters from local patriots, or perhaps to protect slaveowners from state courts that might be more inclined than the Federal ones to consider the rights of slaves as people and not merely property (although claims under the Fugitive Slave Act could have been litigated in Federal court under Federal question jurisdiction). (See, e.g., *Nung v. Tarr* (a 1750 NH case in which a Black woman successfully sued her putative owner in replevin to obtain possession of herself)).

In its first attempt to establish a corporate right to assert diversity jurisdiction, the Supreme Court analogized the corporation to its “members” and asserted that denying jurisdiction to the organization would be taking away their individual rights just because they had joined together. However, as the corporate form became more widely used, this reasoning would ordinarily have defeated diversity, since corporate “members” were likely to come from many states. (Modern business corporations do not have members; in the older statutes, the term seems to have referred to voting members of a general meeting that had far more authority than today’s shareholder meeting, or to members of the board in corporations, such as the early colleges, that did not have shareholders). The Court switched, instead, to a pure fiction, deeming the corporation a “citizen” of the state in which it is organized and the one in which it is headquartered.

Corporations are not citizens and there is no reason why citizens who form a corporation should suddenly get rights they would not have as individuals in Federal court – even if modern business corporations had members or could be reduced to them. Indeed, a better analogy might have been to states: the Court could have taken seriously the legal rule that a corporation can exist only by grant from a sovereign and declared that a corporation is, for diversity purposes, an arm of the state that authorizes it, sets the rules that empower its leaders, and creates both its ability to enter into legal relations (contract, property, tort, etc) and the limits on the responsibility of the actual human actors for the organization’s acts.

The constitutional procedural rights of jury trial, double jeopardy, due process, equal protection and the like fare no better. We do not give such rights to the DMV or the leaders of FEMA: if a governmental bureaucracy ceases to serve the purposes for which we formed it, or if our elected representatives conclude that the purposes are no longer valid, we are entitled to change the organizations in any way that makes sense to the political branches. Although the DMV and FEMA are made up of people (and unlike most multinational business corporations, citizens rather than foreigners), the organization has no vested rights that allow its leaders to retain their power when their function is no longer needed.

Of course, in most instances, sensible legislatures exercise extreme caution before overturning existing agencies or upsetting settled expectations. Ordinarily, good government norms require that we respect the autonomy of agencies in a manner quite similar to the constitutional norms. But these are

not rights with which those organizations were endowed by our Creator. If we suspect that the current office holders of a governmental agency are corrupt or incompetent, we are free to send in the GAO or its equivalent to investigate without concern that we are violating basic principles of privacy or civil rights. The fact that these organizations are made up of citizens and that they exist to serve citizens does not make them citizens or entitle them to exemptions from supervision by the people's legislatures.

### **B. Rights against corporations.**

Business corporations are closely analogous to government agencies, far more than they resemble citizens. Our Constitution is far too rigid from rights against organizations that morph in form and function every few generations. Nonetheless, we need a constitutional culture that imposes restrictions on corporate managers closely analogous to the ones we impose on our legislatures, executive agencies, courts and governmental corporations. For specific proposals inspired by the classical liberal struggle against public sector autocracy, see **Part V: Reform** below.

### **C. Beyond rights.**

Individual rights against our corporate governors suffer from the same weakness as rights-based limits on political government: anarchy is the only thing worse than absolutism. Corporate elites must have the power and autonomy to function. They must be able to plan to avoid market instability. They must be able to suppress the tendency of men to "eat each other alive": to stop thieves and cheats, to require rule abidingness, to impose the degree of order and uniformity necessary to get the work done. They must be able to counteract the tendency of market actors to act in private self-interest even at enormous social cost, whether that means executives who manage to create the appearance (rather than the reality) of quality or profits, investors who seek to "harvest" without manuring for the future, slacker employees or rent-seeking strategic players. Taking is nearly always easier than making, especially for those who already have property, power and privilege: just as we need government to protect us from Viking invaders and to disarm warring feudal lords, so too we need Central Headquarters to avoid the ills of bureaucratic fiefdoms, autocratic bosses and fossilized norms that no longer serve our purposes.

The purpose of limits is not to cripple the corporate elites but to assure, as best as possible, that power is exercised for the common good.

However, what that good is, is necessarily controversial and necessarily dependant on who is included in the "common." The most important rights, thus, are not the eighteenth century rights against government, invented to protect powerful aristocrats against an even more powerful king. They are, instead, the nineteenth century rights of equal citizenship, rule of law and representative government, designed to press governments to consider the interests of all, not just an elite, in determining our collective course.

### **V. Reform: Beyond Neo Feudalism.**

[details to follow from <https://sites.google.com/site/generalwelfare1776/>]

A. Seventeenth Century – Office, not property (reasserting the fiduciary duty of public servants, including corporate executives, to work for the public good and not their private enrichment).

B. Eighteenth Century – Balance of powers (including unions or works councils as competing decision processes), rights of dissent and criticism (institutionalized alternatives to the chain of command, such as ombudsmen and whistleblowers; institutionalized separation of marketing from other functions as in Time’s “separation of church and state”; guarantees of professional autonomy as in university tenure, tradesmen’s control over working conditions), presumption of innocence (internal due process limiting ), search and seizure (limits on control over individuals, including rules against searching lockers, desks, computers and email); freedom of religion/conscience (some limits on mandatory conformity, including at least company; due process (rights to continued service as a customer)

C. Nineteenth Century – Representative government & extension of suffrage on a one person one vote basis; bureaucratic regularity; anti-nepotism principles; Civil rights (first generation civil rights and the principle of equality of dollars-controlling the tendency of aristocrats and other wealthy/powerful people to be offered more for less); transparent and uniform pricing (the RR struggles to end rebates, price based on costs rather than strategic advantage, etc. applied to modern internet based marketing, airlines, etc; bars on quasi-bribery in the form of discounts, kickbacks,etc)

D. Twentieth Century – Civil service neutrality (careers open to talents), the anti-Gulag principle (quasi-tenure on good behavior), large scale planning to permit individual autonomy, avoiding the Peter Principle and the Yes Men.

E. Twenty-first Century – The importance of scale: Ending too big to fail, reviving TR political anti-trust,

E. The Antitheses and the limits

-- Remembering the need for government inside the corporation too: protection from bullies, cheaters and the volatility of markets; the need for long term planning; the dependence of markets on regulation; the importance of evidence-based “best practices” (will doctors be able to prove that democratic Taylorism is not an oxymoron?), the dependence of corporations on community, mutual good will and team spirit/local patriotism/”altruistic” taking the group’s good as your own.

-- The Failures of Politics/Division of Labor: Corporations have been economically successful in part because we have given them a relatively simple task –pursuing wealth maximization without only minimal regard for other values. This is also their failure: why they disregard environmental consequences and work/life balance, for example. But it is important not to lose the advantages of division of labor. Inside and outside the corporation, we need to

allow someone to focus on engineering decisions while others argue about the inevitable value conflicts that any engineering plan generates – without allowing our value conflicts to entirely cripple our ability to do anything.

-- Markets and their discontents: Corporations exist to escape from markets (replacing the pricing signal and spot contracts with bureaucratic command and control), but they are always constrained by them. Markets can exist successfully only with elaborate rules and regulations to prevent dishonesty and cheating, races to the bottom and markets for lemons and depressed equilibria, oligopoly and monopoly distortions, winner-take-all cascades in which first mover advantage turns into permanent privilege, conversion of economic power into political power, attempts by corporations and other large actors to escape their constraints, limits on the natural (and wasteful) tendency to bubbles and crashes.

Background rules determine whether our markets produce socially useful results. Property and tort rules that allow businesses to expropriate other people's health or ecological viability without compensation lead to inefficient and detrimental growth, but over-compensation may deter viable investments. Zoning rules, subsidies for oil and gas (including low royalties and lack of environmental protections) and government infrastructure development (or lack) determine whether people live in dense and productive cities or must channel more of their resources into housing, transit and communication. Patent and copyright monopolies threaten to disrupt the processes of innovation and scientific and technological advance, as incumbents use property rights to privatize the commons and exclude newcomers. Communal support systems (schools, child care allowances, parks, museums & ball parks, retirement plans, medical care systems) may make it easier for employees with dependants to compete or may create strong competitive advantages for singles and disaffiliated adults

Most of this regulation must take place outside of corporate law; but corporate law must be designed so as to minimize the likelihood that corporate elites will use their past economic success or luck to capture the regulatory process or change the rules so as to consolidate their positions and end the market's tendency to disregard past success.