

## Corporations and the Constitution (talk)

Thank you for inviting me and, for those of you who read my draft, for your time and effort. I hope I'm not about to make your regret the investment,

My mission today is to make a simple claim in a complicated way. So bear with me, please.

My normative claim can be summarized simply: Business corporations as we know them belong on the State side of the great State-Citizen divide and the public side of the public/private distinction.

But it's maybe a bit more complicated to explicate.

Corporations are instituted among men to aid them in the pursuit of life, liberty, happiness, and, especially, decent jobs and useful products and services. They are highly useful aggregations of power, with much the same benefits and problems as any other state agency.

It is time for corporate law to begin to take seriously the lessons of liberal social contract theory – Montesquieu, Locke and their modern successors – about creating limited government responsive to the needs of its constituents, and the dangers of not doing so.

Similarly, as we think about the rules that structure our markets, we need to take seriously Adam Smith and Coase alike: corporations are escapes from the market, which succeed when they solve market problems or exploit them.

That means that our economy depends on the ability of the political and legal systems to push corporations towards the former instead of the latter – to defend the price system and market competition from the problem Smith identified: "People of the same trade seldom meet together,... , but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

Corporations **work** precisely because they facilitate such conversations – and because a corporation, deemed a single entity by the law, cannot conspire with itself.

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If we take corporate governance seriously as *governance*, rather than a moment in a perfect market, the problem with the status quo becomes obvious, as does the reason why we are entering our third decade with next to no income growth for ordinary Americans. We have

structured corporate law as a form of self-colonization: we tell corporate office-holders to treat us (and, indeed, themselves) as nothing more than means to an end that is not our good but, instead, the good of the corporation itself.

To make matters worse, in the last several decades, the business world has reached a strange consensus that the good of the corporation means little more than increasing returns to an imaginary shareholder that is a pure legal fiction: an investor interested only in returns from this particular stock – that is, undiversified, unemployed, neither a citizen nor a parent or child – with no interest in any aspect of the corporate project other than its ability to generate dividends or an expectation of them, and entirely devoid of political, moral or aesthetic values, let alone any solidarity with Americans, other people, or the ecosphere, cultural and legal worlds and markets on which we depend.

We have, that is, given our most important economic institutions **instructions** to treat us as **helots** or colonized natives, to be exploited or manipulated as seems best calculated to maximize returns to someone else, not a colonizing state in Europe somewhere, but an imaginary, empathy-less share.

Profit is important, and in a properly functioning stock market, stock valuation often at least roughly indicates social utility.

But the governance structure we have created -- harnessing all the flexibility and effectiveness of private sector incentives to exploit ourselves -- places a weight on the finance markets, the pricing system and the regulatory system that they cannot bear.

This is unfortunate.

The Supreme Court's First Amendment jurisprudence makes it worse. The rule that corporate electioneering is constitutionally protected authorizes -- and therefore requires -- this automaton to use any of the extensive resources at its command to mold our legal system to enable it to pursue its monomaniacal goals. If our businesses pursue profit by all cost-efficient means, and our politicians are cheap, the most efficient route to profit will be to subvert the very rules that ensure that the invisible hand works for us instead of against us.

Acemoglu and Robinson's *Why Nations Fail*, contrary to their own politics, reads as a portrait of a future that looms, like Burke's gallows, at the end of the vista we are creating – right down to their ironic and iconic photographs of abandoned railroad stations. We too have reached the stage where inequality is threatening growth – and our economic elites may take the ecological underpinnings down as well as the economic ones.

Thus far, the normative claim. Instead of granting corporations constitutional rights against us and our legislatures, we should be creating basic rights against them – separation of powers, freedom of dissent, protection against exile, and, most important, citizenship, having OUR good deemed the institution’s good as well.

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The other part of the paper is a quasi-descriptive claim. The Supreme Court, I contend, has reached its current jurisprudence by a process of creative, living constitutionalism based largely on two, quite old, metaphors that have outlived their normative usefulness.

The **first** is the ancient medieval understanding of corporations as derogations of the king’s sovereignty to create a new governmental unit – cities, universities, the Church, the aristocracy.

As should be obvious from my account above, I have no objection to the metaphor of corporations as “bodies politic”, as the old cases call them. Indeed, I think we need to revive the old language, to remember that we used to call Articles “constitutions” and bylaws “laws” and speak of the corporate directors’ power to legislate, adjudicate and punish.

My problem, instead, is that the conception of government and politics here is medieval, and contrary to the basic American principles. We have abandoned, I hope, the idea that sovereigns, or corporate boards, rule by the grace of God or that the state is the king’s property. We spend several centuries reclaiming the autonomy the Church and the cities and the universities had won, and today we keep them solidly under collective, legislative, control. Decentralized decision-making, homerule, quasi-independent agencies are often useful and desirable, but always as a matter of pragmatic statesmanship, not fundamental right.

For entirely practical reasons – to avoid wars -- we still grant comity to foreign sovereigns that do not respect basic democratic norms. But our corporations are not, yet, independent Noblemen who can be restrained only by force of arms. Our courts should not be importing comity notions into corporate law.

Instead, our legislatures should be allowed to use whatever knowledge we have acquired about bending bureaucracies to our will. It is time to remind corporate officeholders that they too, like public officeholders, are our **servants not our masters**. And that major governmental institutions are never private property of those who happen to control them. Corporations, like other bureaucratic government agencies, are tools for human happiness, not parts of God’s plan or powers before which we must cower or battle.

The **second** is the equally ancient concept of the corporation as an individual. Corporate personality is a core of corporate law: it is our willingness to see an organization as a single body even as the people associated with it shift that makes corporations corporeal. And, as I argue at length, the **word** “person” is doing no work here. But the metaphor of individuality – and a rather primitive, pre-Augustinian, pre-Freudian, pre-behaviorist or behavioral, individual at that, lacking even the change and conflict that troubles real contract law – too often substitutes for actual analysis.

Corporations are not individuals. Even individuals are not individuals. They are complicated mechanisms for making decisions, highly dependent on the particulars of the processes they employ to generate apparent unity out of actual diversity and dysfunction. When the Court assumes that a corporation “is” its members – without even stopping to consider which of the many constituencies might be members (modern business corporation statutes don’t use that category) -- it repeats a mistake that we usually associate with Rousseau or, in its extreme forms, the theorists of democratic centralism. The General Will exists only if the parts have been forcibly remade into clones. No one but apologists for particularly unpleasant dictators believes, after the Second World War, that protecting sovereign rights automatically protects the rights of the sovereign’s subjects.

The point is, to determine whether “corporate” rights benefit or harm corporate participants, let alone the rest of us, requires analysis, not slogans. Citizens must have privacy rights, speech rights, religious rights and even property rights to have a sphere in which they can act as they wish and according to their own values and conscience, without too much decent respect for the opinions of mankind. That is why we have contract law and not just tort.

But our struggle has been to remove those rights from government: officials no longer have property rights in their office. As officials, they get no religious rights, so that we may have them in our private capacities. We use sunshine laws to limit their use of privacy to accumulate power.

There is no reason to think that granting corporations privacy rights automatically protects anyone’s autonomy. It may well simply conceal abuse of power. It is clear that giving corporations “free speech” simply compels corporate officers to coerce other corporate participants and spend corporate money: it is not free in either sense of the word.

Not all of the insights of eighteenth century limited government liberal republican theories or twentieth century democratic and human rights theories transfer directly to the corporate sector. But many do. It is the sin of idolatry to set our instruments up as our masters – treating

corporations as if they were endowed by our Creator with inalienable rights, instead of being our own imperfect tools to our ends, to be reformed when they cease to meet our needs.

And today, as we enter the fifth year of the second job-less recovery in a row, the richest country in the world yet unable to afford decent medical care, modern transportation, or even to assure that our children have enough food to eat, as we seem helpless to respond to slow-moving ecological catastrophe or the waste of a generation of our youngsters – it is time to acknowledge that our tools are not working. Too many of our great corporations have chosen to rest on their laurels, or their intellectual property (on your side of the country) or to teach others how to evade taxes and shift risk to the unwary (at my end).