

The Semi-Sovereign Corporation
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Introduction

This talk is part of a larger project on the status of our public corporations in the great liberal public/private divide. We have classified corporations as private – civil society, not government; entities that need to be protected from government, not government-like entities from which we need to be protected. So, corporations have rights, for example, of speech and privacy, but we do not have a structure of fundamental rights against them.

Classic liberal thought centered around the state: the state, after all, had a monopoly on the legitimate use of force. I don't know if that was ever correct; the Pinkertons were an entirely private army of union busters. But certainly in an age

- where the US army outsources torture in Iraqi prisons,
- where public social security systems may be dismantled, where health insurance depends on your job far more than on your citizenship,
- where executives at the right firms can work anywhere in the world, and the firms themselves are increasingly difficult to associate with a particular jurisdiction --

As the state diminishes and our largest economic entities expand, this dichotomy is increasingly dysfunctional, concealing potentially unjust power relations and distracting us from needed reform.

My own expertise is mainly domestic. The privacy of the corporation is why it makes sense

- that we have speech and privacy rights against the government, but employers have an unquestioned automatic right to probe the contents of our desks and email accounts;
- that we have freedom of information rights to a transparent government, but Microsoft has privacy rights that prevent us from knowing how it plans to change our lives;
- that the City Assessor needs to have a reason and a process before raising my taxes, but my medical insurance is dependent solely on the whims and market power of my employer.

But the issue is equally critical to international law and particularly human rights law. International law has long struggled with the issue of legal personality – which entities are recognized as actors in and subjects of international law. Indeed, the British East India Company claimed aspects of sovereignty – the right to have its contracts treated as

international treaties, the right to make war – even before it became clear that the Indian princedoms it was colonizing would be denied that status. If our major corporations share many of the characteristics of sovereigns, they should share the responsibilities as well.

I. Quasi-sovereigns: Worms in the entrayles of the state.

In the beginning, everyone understood that corporations were somewhat sovereign. The ancient corporations – the Church, the Universities, the City of London, later the British East India Company and the Massachusetts Bay Company – were corporations precisely because they had the authority to make law for their members. Right of clergy, the students’ right to be tried by the law of the University (and to carry their national student law with them even as they studied abroad), the City’s right to self-regulate were the essence of the beast.

As Hobbes put it, each corporation was a threat to the state:

as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man.¹

The early corporations did not distinguish clearly between business and politics.² So, while some of the American colonies are founded with land grants,³ others famously begin with charters creating “**bodies corporate and politic**”:

- the Plymouth Council,⁴
- the Massachusetts Bay Company,⁵

¹Hobbes, Leviathan. “Another infirmity of a Common-wealth, is the immoderate greatnesse of a Town, when it is able to furnish out of its own Circuit, the number, and expence of a great Army: As also the great number of Corporations; which are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man.”

²As late as 1801, there were only 8 manufacturing corporations in America. R. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATE LAW 6.

³For land grants, see e.g., Charter to Sir Walter Raleigh, 1584; Charter of Carolina 1665. These charters take the form of deeds of land to an owner.

⁴Charter of the Plymouth Council (1620). Cf. William Bradford, &c. Surrender of the Patent of Plymouth Colony to the Freeman, March 2d, 1640 (original patentees transfer to the “Freemen of this Corporacon of New Plymouth all that ther right and title power authoritye priviledges immunities and freedoms graunted in the said Letters Patents”).

⁵“And them by the name of the Governor and Company of the Mattachusetts Bay in Newe England, one bodie politique and corporate in deede, fact, and name, Wee doe for vs, our heires and successors, make, ordeyne, constitute, and confrime by theis presents, and that by that name they shall have perpetuall succession: And that by the same name they and their successor shall, and maie be capeable and enabled, as well to implead and be impleaded, and to prosecute, demaund, and aunswere, and be anusweared vnto, in all and singular suites, causes, quarrells and accions of what kinde or nature soever...”

- Connecticut⁶
- The Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia.⁷

Charter of the Colony of The Massachusetts Bay in New England [1628], reprinted in 1 Nathaniel B. Shurtleff, Records of the Governor and Company of the Massachusetts Bay in New England 10 (1853 reprinted 1968).

“we have thought fit, and at the humble Petition of the Persons aforesaid, and are graciously Pleased to create and make them a Body Politicly and Corporate, with the Powers and Privileges herein after mentioned; and accordingly Our Will and Pleasure is, and of our especial Grace, certain Knowledge, and meer Motion, We have ordained, constituted and declared, and by these presents, for Us, Our Heirs and Successors, Do ordain, constitute and declare, that they the said John Winthrop, John Mason, Samuel Wyllys, Henry Clarke, Matthew Allyn, John Tapping, Nathan Gold, Richard Treat, Richard lord, Henry Wolcott, John Talcott, Daniel Clarke, John Ogden, Thomas Wells, Obadiah Bowed, John Clerke, Anthony Hawkins, John Deming, and Matthew Camfeild, and all such others as now are, or hereafter shall be admitted and made free of the Company and Society of Our Colony of Connecticut, in America, shall from Time to Time, and for ever hereafter, be One Body Corporate and politique, in Fact and Name, by the Name of, Governor and Company of the English colony of Connecticut in New-England, in America;

“And that by the same Name they and their Successors shall and may have perpetual Succession, and shall and may be Persons able and capable in the Law, to plead and be impleaded, to answer and to be answered unto, to defend and be defended in all and singular Suits, Causes, Quarrels, Matters, Actions, and Things, of what Kind or Nature soever; and also to have, take, possess, acquire, and purchase Lands, Tenements, or Hereditaments, or any Goods or Chattels, and the same to lease, grant, demise, alien, bargain, sell, and dispose of, as other Our liege People of this Our Realm of England, or any other Corporation or Body Politique within the same may lawfully do. And further, That the said Governor and Company, and their Successors shall and may forever hereafter have a common Seal, to serve and use for all Causes, Matters, Things, and affairs whatsoever, of them and their Successors, and the same Seal, to alter, change, break and make new from Time to Time, at their Wills and Pleasures, as they shall think fit.” Charter of Connecticut 1662.

⁷See, JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 32 (1917) (“This company was frankly a business corporation... organized on the model of the East India Company.”)

The same phrase is used in the Charter of Dartmouth College,⁸ and the Incorporation of Harvard College⁹ (1650), and in the charter of the College of William and Mary (1693)¹⁰: each is created a “body politic and corporate.”¹¹

⁸ And the trustees of said college may and shall be **one body corporate and politic**, in deed, action and name, and shall be called, named and distinguished by the name of the Trustees of Dartmouth College.

And further, we have willed, given, granted, constituted and ordained, and by this our present charter, of our special grace, certain knowledge and mere motion, with the advice aforesaid, do, for us, our heirs and successors forever, will, give, grant, constitute and ordain that there shall be in the said Dartmouth College, from henceforth and forever, a **body politic** consisting of trustees of said Dartmouth College. ...

And we do further, of our special grace, certain knowledge and mere motion, for us, our heirs and successors, will, give, grant and appoint that the said trustees and their successors shall forever hereafter be, in deed, act and name, a **body corporate and politic**, and that they, the said **body corporate and politic**, shall be known and distinguished, in all deeds, grants, bargains, sales, writings, evidences or otherwise howsoever, and in all courts forever hereafter, plea and be impleaded by the name of the Trustees of Dartmouth College; and that the **said corporation, by the name aforesaid**, shall be able, and in law capable, for the use of said Dartmouth College, to **have, get, acquire, purchase, receive, hold, possess and enjoy**, tenements, hereditaments, jurisdictions and franchises, for themselves and their successors, in fee-simple, or otherwise howsoever, and to purchase, receive or build any house or houses, or any other buildings, as they shall think needful and convenient, for the use of said Dartmouth College, ... and **also to receive and dispose** of any lands, goods, chattels and other things, of what nature soever, for the use aforesaid; and also to **have, accept and receive** any rents, profits, annuities, gifts, legacies, donations or bequests of any kind whatsoever, for the use aforesaid; so, nevertheless that the yearly value of the premises do not exceed the sum of 6000 sterling; and therewith, or otherwise, to **support and pay**, as the said trustees, or the major part of such of them as are regularly convened for the purpose, shall agree, the president, tutors and other officers and ministers of said Dartmouth College; and also to pay all such missionaries and schoolmasters as shall be authorized, appointed and employed by them, for civilizing and christianizing, and instructing the Indian natives of this land, their several allowances; and also their respective annual salaries ... Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 524-6 (1819).

⁹ Nathaniel B. Shurtleff, Records of the Governor and Company of the Massachusetts Bay in New England 195 (1853 reprinted 1968). The articles create a corporation consisting of the President, five fellows and a treasurer, and declare that “said president & fellows, for the time being, shall for euer hereafter in name & fact be **one body politticke & corporate** in law, to all intents & purposes, and shall haue ppetuall succession, & shalbe called by the name of President & Fellowes of Harvard Colledge... and by that name they ... may purchase & acquire to themselves...” [1650]. The 1672 charter repeats the “body politticke & corporate in lawe” language, if with slightly different spelling. Id., vol 4, pt 2, p 536.

¹⁰See, <http://www.swem.wm.edu/spcoll/exhibits/exhibits/charter/charter/> (text of charter) at para V. Cf. Para IX: “And we give and grant to them, or the major part of them, by these our letters patents, a continual succession, to be continued in the way and manner hereafter specified; as also full and absolute liberty, power and authority, of making, enacting, framing and establishing such and so many rules, laws, statutes, orders and injunctions, for the good and wholesome government of the said college, as to them the said Francis Nicholson, William Cole, &c., and their successors, shall from time to time, according to their various occasions and circumstances, seem most fit and expedient: All which rules, laws, statutes and injunctions so to be made, as aforesaid, we will have to be observed, under the penalty therein contained: Provided notwithstanding that the said rules, laws, statutes, orders and injunctions, be no way contrary to our prerogative royal, nor to the laws and statutes of our kingdom of England or our colony of Virginia, aforesaid, or to the canons and constitutions of the church of England, by law established.”

¹¹Other early corporations lack that phrase but have an equivalent understanding of what it is to be a corporation. In 1648, the General Court of Massachusetts Bay authorized the “shewmakers” and the “cowpers” (coopers) to incorporate for 3 years, to control quality. The two grants are almost word for word identical. The assembled shoemakers or coopers and their elected officers “shall have the power to **make orders** for the well ordering of their company, in the managing of their trade, & all the affaires thereunto belonging, & to annex reasonable **poenantyes** for breach of the same; [the orders to be confirmed by a county court]... And for the better executing of such orders, the said [officers] shall have power to heare &

Indeed, I think it is fair to say that those words are the operative language, the way that courts determined, before the general incorporation acts, whether a corporation had been formed.¹²

Conversely, even obviously non-political charters, such as Dartmouth College's explicitly provide for "law making", much the same as a municipality would:

& they are hereby fully impowered from time to time fully & lawfully to make and establish such **Ordinances Orders & Laws** as may tend to the good & wholesome government of the said College & all the Students & the several Officers & Ministers thereof & to the publick benefit of the same not repugnant to the & Statutes of our Realm of GREAT BRITAIN or of this our Province of NEW HAMPSHIRE (emph. supplied)¹³

In 1793, the early British corporations treatise author Kyd defines the corporation as

determine all offences agasint any of their said orders, & may inflict the **poenalties** prescribed as aforesaid ... and all the said fines & forfeitures shall be implied to the benefit of the said company of cowpers ..." 2 Nathaniel B. Shurtleff, Records of the Governor and Company of the Massachusetts Bay in New England 249-51(1853 reprinted 1968)

Somewhat less clearly, in 1652, the same Court created the Conduite Streete (Boston) Water Works Corporation in these terms: "sajd inhabitants above mentioned shallbe a corporation, and incorporated into one body or company ... [call annual meeting, elect officers, hire and perform work,] and that it shall be lafull for the sajd wardens for the tyme being to distrajne the goods of any person or persons, refjusing to pay his due proportjon,... [and if anyone "spoyling" the water, the wardens are authorized] to impleade such persons for and in the name of the whole company... and for such as shall take water there without license, it shallbe lawfull for the wardens for the tyme being, or whom they shall appointe, after warning given them, to take away and withhold such vessells from them as they shall bring to carry away such water with..." id. Vol 4, p. 100. Note that the wardens are given the unilateral right to enforce some Company rules against both insiders and outsiders apparently without going to state authorities (but with respect to "corrupting" or "spoyling" the water, they appear to be required to go to court, perhaps because the issue is likely to more difficult. The Shoemakers and Coopers corporations were also required to refer "cases of difficulty" to the "judges of the county."

¹²See, JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 23 (1917)

¹³Harvard's charter similarly authorizes "the president & fellowes, or major part of them, ... to make from time to time such orders and by lawes for the better ordning & cariing on the worke of the colledge as they shall thinke fitt; provided they, the said orders, be allowed by the overseers." Id. (The requirement of prior approval by the overseers was removed in 1657, Vol 4 at 316.) The 1672 charter refers not to bylaws, but "orders and lawes". Id. Vol 4, pt 2, at 536.

Nonetheless, Harvard's original powers were somewhat less than those traditionally given to universities, since it required another act of the Massachusetts general court to declare that "the president & fellowes of Harvard Colledge... are hereby empowred, accordinge to their best discretion, to punish all misdemenors of the youth in their societie, either by fine or whippinge in the hall, openly, as the nature of the offense shall require, not exceedinge ten shillinges or ten stripes for one offense". Id at Vol 3 at 417 [1656]. In the 1672 charter, the Corporation's power to punish is expanded yet again: "the sajd corporation, or any three of them ... in all crimes by the lawes of this country punishable by one magistrate, shall haue the ffull power of sconsing, fineing, or otherwise correcting all inferiour officers or members to the sajd society belonging, as the lawes of the country provide in such cases, or **the lawes of the colledge not repugnant vnto them; and for that end any of the sajd corporation shall and heereby haue power personally, with such ayde of the society as they shall think meete, taking the constable along with them, to enter into any houses licensed for publicke entertejment where tehy shall be informed, or may be suspitious, of any enormitjes to be plotting or acting by any members of their society...**"

- a “body politic” or
- a “political person”
- created “for the maintenance and regulation of some particular object of public policy”.¹⁴

These are just the terms we saw in the charters themselves.

A century later, the metaphor remained strong. Angel and Ames, mid-century, similarly refer to the power to make by-laws as “legislative”

considered as private statutes for the governance of the corporate body.¹⁵

Other courts refer to it as

stemming from a limited legislative power

or a power of qualified legislation¹⁶

The best example, perhaps, is the British East India Company. Organized as a for profit corporation paying dividends to its shareholders, earned its profits by trade, and later, tax revenues from India and the tea and opium trade with China. It early on claimed the right to build forts and cities, to make peace and war, enter into treaties and govern - all independent of Parliament (as its charter stemmed from the Crown) and on equal terms with the non-European governments (and rival European trading companies).

Listen to its attorneys in the case of *Nabob of Arcot v. East India Company*.¹⁷ The case stemmed from a demand by the Nabob for an accounting of his revenues which, according to the case report, he had assigned to the Company for a period of time in payment of some debts. He contended that the Company had taken more than it was entitled to. Burke has a far more complicated explanation of what was happening. This is part of the argument for the Company:

A bill on this subject cannot be entertained by this court; transactions between sovereign princes... cannot be liable to any municipal jurisdiction. No law can apply between them, but the law of nations. These are such transactions: for, by the charters and acts of parliament, the East India Company **are constituted a**

¹⁴1 STEWARD KYD, A TREATISE ON CORPORATIONS 13, 14, 28 (1793, facsimile edition 1978).

¹⁵JOSEPH ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 2d Edition (1843) at 65, 267, 271

¹⁶Tuttle v. Walton, 1 Ga. 43 (1849), at *2 (argument of counsel) and *8 (opinion of court).

¹⁷*Nabob of Arcot v. East India Company*, 3 Bro. C.C. 292 [1791], discussed in Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT'L L. J. 1, 37 (1999). Burke has an elaborate discussion of the origins of the debt, which he sees as part of the deep corruption of the Company.

sovereign power, or at least are the delegates of the sovereign power of this country, for the purposes of making peace and war. ... Can the Court enjoin a war between the parties? Your Lordship will not entertain a suit that cannot be executed by common means. ... [T]he East India Company are prevented from giving this discovery. They are under the absolute authority of the Board of Controul, and cannot act but under their direction. Suppose their orders and those of the Court should be contradictory, what a situation the Company would be in!

The argument is ambivalent regarding whether the Company is itself a sovereign or rather a delegate of the sovereign of England, reflecting the effects of Pitt's India Act of 1785, which put the Company under the control of a quango-style "superintending" board including governmental officials for the first time.¹⁸ After 185 years as a private, profit-maximizing, monopolistic, corporation, Parliament had determined to make it a regulated industry.

Those who know more about the history of the E. India Company than I will no doubt be able to tell you that that ambivalence was a key part of its history. But even at this late date, it is crystal clear on the key points: The Company makes its own rules, using its own internal mechanisms, and no one outside – not even a British court – is entitled to restrain it (except by the law of nations, here meaning mainly force of arms). Only the Board of Controul, not a court, may tell it how to behave.

To be sure, the other side contests that the East India Co is a sovereign state, on the ground that its existence depends on an act of Parliament, but then refers to Lord Baltimore as a "dependent sovereign" (referring to a case at 1 Vesey 444). In reply, the Company makes the ambiguity more explicit:

They do not refer to the mixed nature of the Company, which though, here, considered as a trading Company, is, there, in the character of a sovereign power. ... no instance is produced of one sovereign power bringing an action against another sovereign power.

The issue of the competence of municipal courts to resolve issues involving corporations remained controversial through the nineteenth century. In 1843, Angell and Ames devote six pages to establishing the apparently controversial position that a foreign corporation may be sued if jurisdiction can be obtained by seizing its property.¹⁹ It was only by an 1849 act

¹⁸JOHN KEAY, *THE HONOURABLE COMPANY* 390-1 (1991)

¹⁹Angell & Ames 336-342. Cf. *Howell v. Chicago & N.W.*, 51 Barb. 378 (N.Y. Sup. 1868) ("Previous to the Code [noted in next footnote], foreign corporations were not the subject of litigation in the courts of this state, except when proceeded against by the attachment of their property for the collection of a debt or the redress of a wrong...").

of the legislature that New York determined that a foreign corporation could even be sued at all in its courts – corporations looked to the courts too much like the sovereigns that created them.²⁰

Even after the statutory innovation, courts worried whether exercising jurisdiction over a corporation created by another state for “visitation” – that is to “examine into the affairs of a corporation”²¹ – might be an infringement of comity, an invasion of the respect due to a fellow sovereign, and beyond the domestic court’s subject matter jurisdiction.

As a 1904 New York court put it:

If the illegal acts of the directors of the corporation offended solely against the majesty of the state to which it owed its life—in other words, constituted only public wrongs—the proposition is probably correct, for we are not compelled to, nor should we, entertain actions simply to redress the outraged dignity of foreign governments.²²

But I am not concerned here with the niceties of jurisdiction, but rather with a way of thinking about the corporation.

Here is the 8th Circuit in 1893 justifying what today would be called the business judgment rule:

Corporations are in a certain sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief.²³

²⁰NYBCL 1314, derived from a 1920 amendment to the Gen. Corp. Law in turn derived from Code Civ. Proc 1780, enacted in 1849 and amended in 1880. The original text appears in NY Law 1849, ch. 107 (authorizing suits “against any corporations created by or under the laws of any other state, government or country, for the recovery of any debt or damages”).

²¹State ex rel Weede v. Iowa Southern Utilities Co of Delaware, 2 N. W. 2d 372, 388, 395 (Iowa 1942) (exercising jurisdiction over and applying Iowa law to Delaware corporation).

²²Miller v. Quincy ,72 N.E. 116, 118 (N.Y. 1904).

²³Republican Mountain Silver Mines v Brown, 58 F. 644 (8th Cir 1893).

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

And that which is said here, of the Rights of an Assembly, for the government of a Province, or a Colony, is applicable also to an Assembly for the Government of a Town, or University, or a College, or a Church, or for any other Government over the persons of men.²⁴

²⁴He goes on to describe business corporations, which he views only as trading monopolies, in the following terms:
Bodies Politique For Ordering Of Trade

In a Bodie Politique, for the well ordering of forraigne Traffique, the most commodious Representative is an Assembly of all the members; that is to say, such a one, as every one that adventureth his mony, may be present at all the Deliberations, and Resolutions of the Body, if they will themselves. For proof whereof, we are to consider the end, for which men that are Merchants, and may buy and sell, export, and import their Merchandise, according to their own discretions, doe nevertheless bind themselves up in one Corporation.

It is true, there be few Merchants, that with the Merchandise they buy at home, can freight a Ship, to export it; or with that they buy abroad, to bring it home; and have therefore need to joyn together in one Society; where every man may either participate of the gaine, according to the proportion of his adventure; or take his own; and sell what he transports, or imports, at such prices as he thinks fit. **But this is no Body Politique, there being no Common Representative to oblige them to any other Law, than that which is common to all other subjects.**

The End of their Incorporating, is to make their gaine the greater; which is done two wayes; by sole buying, and sole selling, both at home, and abroad. So that to grant to a Company of Merchants to be a Corporation, or Body Politique, is to grant them a double Monopoly, whereof one is to be sole buyers; another to be sole sellers. For when there is a Company incorporate for any particular forraign Country, they only export the Commodities vendible in that Country; which is sole buying at home, and sole selling abroad. For at home there is but one buyer, and abroad but one that selleth: both which is gainfull to the Merchant, because thereby they buy at home at lower, and sell abroad at higher rates: And abroad there is but one buyer of forraign Merchandise, and but one that sels them at home; both which againe are gainfull to the adventurers.

Of this double Monopoly one part is disadvantageous to the people at home, the other to forraigners.
...

If a Body Politique of Merchants, contract a debt to a stranger by the act of their Representative Assembly, every Member is lyable by himself for the whole. For a stranger can take no notice of their private Lawes, but considereth them as so many particular men, obliged every one to the whole payment, till payment made by one dischargeth all the rest: But if the debt be to one of the Company, the creditor is debter for the whole to himself, and cannot therefore demand his debt, but only from the common stock, if there be any.

If the Common-wealth impose a Tax upon the Body, it is understood to be layd upon every member proportionably to his particular adventure in the Company. For there is in this case no other common stock, but what is made of their particular adventures.

II. Death of Self-Government

This way of thinking – the corporation as a mini-state, either delegated from the supreme sovereign or coexisting with it in a semi-feudal or Federal balance of powers – has disappeared from the academic discussion of corporations and almost as completely from the cases. Modern metaphors overwhelmingly emphasize the private nature of the corporation: it is governed not by legislation but agency–fiat tempered by the right to quit. Its purposes and actions are private, not public. When it regulates its employees, the regulation is pursuant to contract and protected from, not by, the Constitution .

The ideological function of this shift in metaphor is clear: it solves, or at least elides, a major problem in the democratic legitimacy of the corporation.

As a self-governing entity the corporation was a sort of cross between herren-democracy and straight out plutocracy. Only a small part of the relevant electorate was given the vote: shareholders but not bondholders, investors of money but not investors of time or effort, publicly traded shares with easy exit (at least individually) but not employees with genuine commitments, potentially exploitable or locked in investors called shareholders, but not equally or more exploitable investors in roles such as bondholders, long term employees, pension beneficiaries, customers or suppliers. We have no theory justifying restricting the vote only to shareholders, and in a generally democratic age, that is a problem in a political forum.

Moreover, even within the voting population, votes are given not per person but per dollar – as if the members were not the shareholders but the shares themselves – and the issues on which voters may opine are sharply restricted.

Indeed, the basic corporate law principle that the directors, not the shareholders, manage the company, is generally understood to require that directors exercise their mandate in the manner of Burke’s stateman: in the interest but not according to the will of the citizenry (with all the ambiguity inherent in determining who should be considered a citizen of the corporation or the pre-democratic British empire).

If a Mulct be layd upon the Body for some unlawfull act, they only are lyable by whose votes the act was decreed, or by whose assistance it was executed; for in none of the rest is there any other crime but being of the Body; which if a crime, (because the Body was ordeyned by the authority of the Common-wealth,) is not his. If one of the Members be indebted to the Body, he may be sued by the Body; but his goods cannot be taken, nor his person imprisoned by the authority of the Body; but only by Authority of the Common-wealth: for if they can doe it by their own Authority, they can by their own Authority give judgement that the debt is due, which is as much as to be Judge in their own Cause.

All of this makes the corporation as polity pretty indefensible. Were we to return to metaphors of the corporation as state, the state it would bring to mind would be Saudi Arabia, or perhaps Eastern Europe under the communists or the Former Soviet Union under the kleptocrats. If this is a government, it is one that treats most of its subjects as helots to be exploited, not part of the common good. Its pretenses to consent are at best Lockean “tacit consent”, with all the usual limitations to that argument, and specifically, lock-in. Employees with firm specific investments in skills, relationships, family location, insurance or seniority, retirees with firm specific pensions or medical care, suppliers or customers in bilateral monopolies or otherwise tied to the particular firm – all these persons in relationship with the firm have only limited “exit” options and their “tacit consent” is similarly atrophied.

III. Corporation as Semi-Sovereign

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

Hannah Arendt famously criticized the rights of man by pointing out that when as soon as men and women were stripped of their rights as citizens and members of a national people – they turned out to have no rights at all. The rights of men were meaningful only as rights of citizens. The

“eternal Rights of Man, which by themselves were supposed to be independent of citizenship and nationality ...proved to be unenforceable ... whenever empire appeared who were no long citizens of any sovereign state.”²⁵

The stateless, she said, have

“no place which makes opinions effective and actions significant.”²⁶

“Whoever is no longer caught in it [the system of citizenship] finds himself out of legality altogether (thus during the last war stateless people were invariably in a worse position than enemy aliens). (Id. 174)

In the 50 years since Arendt wrote, human rights law has made some progress in putting some meaning into human rights for naked humans without sovereign protectors, and occasionally, although all too often to late, have put some teeth into “never again.”

²⁵HANNAH ARENDT, *IMPERIALISM* 173

²⁶HANNAH ARENDT, *IMPERIALISM* (1951, 1968) 176.

Still, Arendt's claim that the victims all wanted national states, not the Rights of Man, remains as true today as ever. And her claim that statelessness is worse than mere enemy status must ring true to the Guantanamo prisoners denied even the protection of the Geneva Convention on the grounds that they are not state actors.

But the current status of the stateless is well outside my core area here. I want to suggest, rather, that thinking of corporations as quasi-sovereign – to some degree taking on aspects of the states that create them, and to some degree as independent states or at least sub-state governmental entities themselves – helps frame a series of issues.

Arendt suggests the first: whether corporate affiliation isn't today approaching the importance of national affiliation.

- It is my job, not my passport, that gives me basic social security rights, including access to medical care, pension benefits, and for you even schools.
- It's the right corporate affiliation, not the right passport, that allows you to work in the country you prefer.
- Corporate positions even allow people to bring some of their law with them, like the medieval university students – drinking in Saudi Arabia, for example, or taxation in the US
- Even for the classic liberal rights: my freedom to speak is made meaningful by my corporate affiliation; independent scholars are perhaps not as badly off as the stateless, but still, neither libraries nor westlaw nor even serious reads of submissions to the journals are readily available without the correct institutional backing.

One could multiply examples. The proposition that large private institutions have taken over many functions of the unified state, in a revised return to the feudal notion of multiple estates, is not likely to be controversial.

More controversial might be the extent to which these are privileges of affiliation with large institutions, as opposed to specifically publicly traded business corporations—after all Bechtel, large law partnerships and major universities provide these privileges as well as the exchange-traded firms.²⁷ Business corporations remain our preeminent large corporations, so focus on them would be warranted even if other institutions posed essentially similar risks. But more to the point, the peculiar governance of business corporations in fact makes them somewhat different than other large institutions: alone of all our governance structures they are directed to slavishly follow the market regardless of whether its directives make

²⁷Thanks to Neil Cohen for urging me focus on this.

sense. They alone function as agents for a legal construct, with no internal moderating principle or countervailing force. Thus, as power is devolved to these institutions, publicly traded corporations should cause us special worry. They distinctively lack the restraints and balances that mark intelligent government.

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

A. Shareholders as Human Rights beneficiaries.

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

But considering the shares as corporate subjects does raise some interesting issues.

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

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

First, shareholders, or more properly the role of shareholding (not the full people who invest) have achieved the stateless Rights of Man that Arendt saw as unenforceable and empty.

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

Moreover corporate law and the stock market makes real the right to exit in a way that the refugees have never had. Arendt emphasizes that even the right to emigrate, when it existed,

wasn't worth much without a commensurate right to immigrate. In the world of share-citizenship, the situation is quite different. Not only may investors sell the stock of a company that mistreats them, but they are free to buy the stock of other companies. Stock investors need not remain stateless, unaffiliated with any corporation, unprotected by any system of internal lawmaking.

The shares traded in the New York Stock Exchange are owned in large part by institutions. Pushing through the institutions to find the human ultimate beneficiaries is difficult, and sometimes conceptually unclear (who are the human beneficiaries of a University endowment?). But many estimates suggest (as the macro numbers do as well) that a large and growing portion of the investment is foreign, or, more interesting still, of hidden formal citizenship.

B. Corporations as Actors

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

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

With hitherto unimaginable economic power and often physical power to match, corporations are independent players to a far greater extent than most of the members of the United Nations. To be sure they act under constraints, but less so than most.

They are not subordinate governmental units – if indeed they even have nationality.

Indeed have protection from their own and other governments, protection against ombudsmen, against political decisions to reallocate the social resources they control, protections against investigations into how they operate their internal affairs, protections against demands that they serve the interests of those they exploit.

C. Corporations as Nation States.

As we've seen, corporate employment now offers many of the advantages once associated with Arendt's passport.

Travel as an executive of a major multinational and you bring with you an international regime of protection stronger, in many respects, than the national one that comes with your passport. American executives in trouble spots can expect security forces in their defense,

quick evacuation, medical care not available to the locals, even exemption from petty local rules such as Saudi Arabian bans on liquor or sexual discrimination. Try that as a tourist.

Passports themselves are readily available to those with the right corporate connections. I myself worked comfortably in London for six months as a representative of my employer, something simply unavailable to me as a naked bearer of the Rights of Man or even the rights of Americans.

More prosaically, even for those not in the elite, and particularly for Americans. Our health, our ability to pay our mortgages and our credit cards, our pensions, all depend on our corporate affiliation. 90% of bankruptcies are related to lost jobs, often from lost health.

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

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

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