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THE CORPORATION AS SOVEREIGN

Allison D. Garrett

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THE CORPORATION AS SOVEREIGN

Allison D. Garrett*

I. INTRODUCTION

In the past two hundred years, sovereignty devolved from the monarch to the people in many countries; in our lifetimes, it has devolved in several significant ways from the people to the corporation. We are witnesses to the erosion of traditional Westphalian concepts of sovereignty,¹ where the chess game of international politics is played out by nation-states, each governing a certain geographic area and group of people. Eulogies for the nation-state often cite globalization as the cause of death.² The *causa mortis* is characterized by the increase in the power and normative influence of supranational organizations, such as the United Nations, World Bank, European Union, International Monetary Fund, and non-governmental organizations. Today, geography lacks the political significance it once had, as valuable commodities instantly pass over, through, and under geographic borders in the world's most

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1. Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies (Treaty of Westphalia), Oct. 24, 1648, available at <http://www.yale.edu/lawweb/avalon/westphal.htm>. The treaty ended the Thirty Years' War in Europe and established self-determination as the basis for the forming of nations. This basis for the establishment of a sovereign nation is acknowledged in the Charter of the United Nations. U.N. Charter art. 1, para. 2. It was also acknowledged in Article 10 of the League of Nations Covenant, the precursor to the United Nations. League of Nations Covenant art. 10; see also R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 148 (7th ed. 1992) (explaining the influence of the Treaty of Westphalia on international law and the modern system of sovereign states).

2. Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 7 (1997) ("The state, long seen as steadily amassing power, is now being viewed as increasingly vulnerable, even on its way out."); JEAN-MARIE GUÉHENNO, THE END OF THE NATION-STATE (Victoria Elliot trans., 1995); Vivien A. Schmidt, *The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State*, DAEDALUS, Spring 1995, at 75; *The Shape of the World—The Nation-State is Dead. Long Live the Nation-State*, ECONOMIST, Jan. 5, 1996, at 15-18; see also LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10 (1995) ("We might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era."); Richard B. Lillich, *Sovereignty and Humanity: Can They Converge?*, in THE SPIRIT OF UPPSALA: PROCEEDINGS OF THE JOINT UNITAR-UPPSALA UNIVERSITY SEMINAR ON INTERNATIONAL LAW AND ORGANIZATION FOR A NEW WORLD ORDER 406 (Atle Grahl-Madsen & Jiri Toman eds., 1984) ("[T]he concept of sovereignty in international law is an idea whose time has come and gone."). Sub-nationalism has also been examined as a contributing factor to the death of the nation-state. See Stephen Tierney, *Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State*, 54 INT'L & COMP. L.Q. 161, 161 (2005). In addition, the influence of new actors, such as non-governmental human rights organizations, has played a role in the nation-state's demise. See LOUIS HENKIN ET AL., HUMAN RIGHTS 737-45 (1999). Others have argued that rumors of the death of the nation-state are greatly exaggerated. See Martin Wolf, *Will the Nation-State Survive Globalization?*, 80 FOREIGN AFF. 178, 179 (2001).

common language, binary code.³ Telecommunications, when combined with mobile capital and technology, “is viewed as obliterating spatial lines.”⁴ All of these changes have made the nation-state, as a geopolitical entity, far less significant than it has been in the past several decades.

Corporations have stepped into this power vacuum with a reach and economic influence so broad that some of the duties of sovereign nations have fallen under their aegis.⁵ The power and influence of the world’s major corporations continue to grow, and with this growth their similarities to sovereign states increase. As the nation-state is prematurely eulogized, scholars are writing about the privatization of governance and commerce.⁶ Many scholars tend to focus on international relations and the extent

3. See WALTER B. WRISTON, *THE TWILIGHT OF SOVEREIGNTY: HOW THE INFORMATION REVOLUTION IS TRANSFORMING OUR WORLD* 61-62 (1992). Likewise, distances have lost meaning. Ben Bernanke, Chairman of the Federal Reserve System, noted recently:

Economically relevant distances . . . may also depend on what trade economists refer to as the width of the border, which reflects the extra costs of economic exchange imposed by factors such as tariff and nontariff barriers, as well as costs arising from differences in language, culture, legal traditions, and political systems.

. . . [B]y most economically relevant measures, distances are shrinking rapidly. The shrinking globe has been a major source of the powerful wave of worldwide economic integration and increased economic interdependence that we are currently experiencing. The causes and implications of declining economic distances and increased economic integration are, of course, the subject of this conference.

Ben Bernanke, Remarks at the Federal Reserve Bank of Kansas City’s Thirtieth Annual Economic Symposium: Global Economic Integration: What’s New and What’s Not? (Aug. 25, 2006), available at <http://www.federalreserve.gov/boarddocs/speeches/2006/20060825/default.htm>. See also David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367, 1367 (1996).

4. Schachter, *supra* note 2, at 8.

5. See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 25 (2004) (“Corporations now govern society, perhaps more than governments themselves do; yet ironically, it is their very power, much of which they have gained through economic globalization, that makes them vulnerable.”). While corporations have gained power, it does not follow that if one state loses some measure of sovereignty, another state, supranational organization, or corporation necessarily gains it. See Neil MacCormick, *Beyond the Sovereign State*, 56 *MODERN L. REV.* 1, 16 (1993) (arguing that sovereignty is not the object of a “zero sum game, such that the moment X loses it Y necessarily has it”).

6. See Jack M. Beermann, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507 (2001) (drawing general connections between privatization and political accountability); Jack M. Beermann, *Administrative-Law-Like Obligations on Private[ized] Entities*, 49 *UCLA L. REV.* 1717 (2002) (arguing that the effect of privatization is likely to be muted by the recent phenomenon of a reduction in the differences between the government and private sector); Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 *MARQ. L. REV.* 449, 450-56 (1988) (discussing the theory of privatization and explaining how the law may affect privatization efforts); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 *WM. & MARY L. REV.* 135, 141-42 (2005) (arguing that accountability and public values may be increased by “an era of privatization”); Jody Freeman, *Private Parties, Public Functions, and the New Administrative Law*, 52 *ADMIN. L. REV.* 813 (2000) (arguing that contemporary administrative regulation is “best described as a regime of ‘mixed administration’ in which private actors and government share regulatory roles”); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *HARV. L. REV.* 1285, 1285 (2003) (arguing that privatization may be a means of “publicization,” where private actors may be convinced to commit themselves to traditionally public goals in return for lucrative opportunities to provide goods and services historically provided by the state); Louis Jaffe, *Law Making by Private Groups*, 51 *HARV. L. REV.* 201 (1937) (noting that the most significant and powerful components of the political and social structure of the United States are economic interests groups); George Liebman, *Delegation to Private Parties in American Constitutional Law*, 50 *IND. L.J.* 650 (1975); Gary Peller, *Public Imperialism and Private*

to which relationships among nations have been transcended or superseded by private actors. For example, the concept of nations acting as private entities has been recognized in the Foreign Sovereign Immunities Act,⁷ which provides that “a foreign state shall not be immune . . . in any case in which the action is based upon a commercial activity carried on in the United States by a foreign state.”⁸ This Article focuses, instead, on how the distinction between corporations and the state is blurring, not only internationally, but also domestically, as corporations act in ways that make them similar to nation-states.

The nation-state is not dead, but it is evolving. A pivotal factor in this evolution is the power of the world’s largest corporations. Like the vassal whose power overshadows the king’s, these companies act similarly to traditional nation-states in some ways. They have tremendous economic power, establish security forces, engage in diplomatic, adjudicatory and “legislative” activities, and influence monetary policy.

However, it is important to recognize that corporations are not mini-nations, and nations are not overgrown corporations; it would be dangerous to conflate the two. Like any theory about the nature of corporations, this analogy between nations and corporations can be taken to an extreme. Although corporations seem to be amassing new powers and taking on new roles, there will always be limits placed on them by governments. Governments conduct investigations and inspections and pass laws and regulations to keep corporations in line. The court system can be used both by the government and by private actors to constrain the activities of corporations. The Fourth Estate also scrutinizes the actions of corporations. Indeed, the press can serve as a powerful check on corporate power, as the “name and shame” process can cause consumers to vote with their wallets, which in turn can affect the actions of the corporation and, ultimately, its survival.

This Article begins in Part II by examining the historical and theoretical advent of the corporation as a legal, social, and political entity, by exploring the various theories regarding the nature of the corporation. Furthermore, Part II surveys the theoretical underpinnings of the social construct known as the nation-state. Part III considers the similarities between modern multinational corporations and nation-states, including the characteristics of permanent population and defined territory, economic power, foreign relations, protection of society, administration of justice, monetary policy, and public welfare. This Article concludes by positing that a comparison between the often analogous social, political, and economic characteristics of nation-states and corporations can provide a new and useful way for scholars to analyze the activities and powers of modern-day corporations.

Resistance: Progressive Possibilities of the New Private Law, 73 DENV. U. L. REV. 1001 (1996) (reflecting upon the emergence of the “New Private Law Phenomenon”); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 539 (1989) (presenting a comprehensive legal discussion of private action); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999) (advocating for future research and doctrinal development of legal research on the private security industry); Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 UCLA L. REV. 1687 (2002); Note, *Delegation of Governmental Power to Private Groups*, 32 COLUM. L. REV. 80 (1932).

7. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C.).

8. 28 U.S.C. § 1605(a)(2) (2000). It is the nature of the activity, rather than its purpose, that controls whether the foreign state or its agencies or instrumentalities have immunity for their actions. *Id.* § 1603(d) (defining “commercial activity”).

II. THEORIES ON THE CORPORATION AND THE NATION-STATE

A. *Theories of the Corporation*

Many of the earliest corporations were granted charters from the Crown that made them both corporations and political entities.⁹ The corporate form was not widely available and these charters were granted on an ad hoc basis, often in accord with the ebb and flow of political expediency. When Parliament passed the Joint Companies Act¹⁰ in 1844, Robert Lowe, then Vice President of Great Britain's Board of Trade, referred to corporations as "little republics."¹¹ Specifically, Lowe noted that, "[h]aving given [corporations] a pattern the State leaves them to manage their own affairs and has no desire to force on these little republics any particular constitution."¹²

Professor Daniel J.H. Greenwood has explored in detail the rights of early corporations, particularly those rights that are similar to the rights of the sovereign. Professor Greenwood notes that, "in the beginning, everyone understood that corporations were somewhat sovereign" and that "[i]ndeed, the British East India Company claimed aspects of sovereignty—the right to have its contracts treated as international treaties and the right to make war."¹³ These early corporations even minted money.¹⁴ Some of these companies governed expansive territories¹⁵ and maintained standing armies that, at times, engaged in military action.¹⁶ Today's corporations may never gain the measure of power held by the earliest companies at their apogee, but they seem to be trying.

The ontology of the corporation encompasses a number of theories regarding the nature of corporations. Corporations have been described as a person,¹⁷ private

9. Examples of charters creating "bodies corporate and politic," collected by Professor Greenwood, include the Plymouth Council, the Massachusetts Bay Company, Connecticut, The Treasurer and Company of Adventurers of the City of London for the First Colony in Virginia, and The Hudson Bay Company. Daniel J.H. Greenwood, *The Semi-Sovereign Corporation* 2-3 (University of Utah Legal Studies Research Paper Series, Paper No. 05-04, 2005), available at <http://ssrn.com/abstracts=757315>.

Professor Greenwood notes that the same phrase "is used in the Charter of Dartmouth College, the Incorporation of Harvard College, and in the charter of the College of William and Mary." *Id.* at 4. See also Samuel Williston, *History of the Law of the Business Corporations Before 1800*, 2 HARV. L. REV. 105, 105 (1888) (noting that "the most striking peculiarity found on first examination of the history of the law of business corporations is the fact that different kinds of corporations are treated without distinction").

Currently, it is generally the states that charter corporations, although federal law may determine whether a corporation exists for certain purposes, such as federal taxation. *Kurzner v. United States*, 413 F.2d 97, 100 (5th Cir. 1969); cf. I.R.C. § 7701(a)(4) (West 2007) (recognizing, for the purposes of the Internal Revenue Code, corporations organized "under the law of any state").

10. 1844, 7 & 8 Vict., c.110 (U.K.).

11. 140 PARL. DEB., H.C. (3rd ser.) (1856) 134.

12. *Id.*

13. Greenwood, *supra* note 9, at 2.

14. See GlobalFinancialData.com, The Global History of Currencies, https://www.globalfindata.com/index.php3?action=showghoc&country_name=UGANDA (last visited Nov. 26, 2007) [hereinafter Global Financial Data] ("Beginning in 1895, the Imperial British East Africa Company minted coins denominated in Rupees, Annas and Pice, following the British Indian monetary system.")

15. The British East India Company, although established as a trading company, assumed governing authority for India. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 21-26 (2003).

16. *Id.*

17. John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

property of the shareholders,¹⁸ a nexus of contracts,¹⁹ an agent for the owners,²⁰ a representative democracy,²¹ and even a religious entity.²²

Currently, corporations are viewed as legal persons, and have been regarded as such for almost 200 years.²³ As legal persons, corporations are entitled to some constitutional protections.²⁴ They have the right to hold property,²⁵ to contract,²⁶ and to sue and be sued as a juridical entity distinct from their shareholders, directors and employees.²⁷ Corporate law theorists have more recently come to view the corporation

18. See Milton Friedman, *The Social Responsibility of Business is to Increase Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 32.

19. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structures*, 3 J. FIN. ECON. 305 (1976) (based on work by Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972)); see also STEPHEN BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 27-33 (2002) (describing the corporation as nexus of contracts); FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATION LAW* 17 (1991) (“All the terms in corporate governance are contractual in the sense that they are fully priced in transactions among the interested parties.”); William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1400 (1993) (“[T]he corporation is seen as the market writ small, a web of ongoing contracts (explicit or implicit) between various real persons . . . designed to reduce the costs necessary to plan, coordinate and accomplish the complex contracts that large-scale ongoing projects would require.”); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 770 (1989); Henry N. Butler, *The Contractual Theory of the Corporation*, GEO. MASON U. L. REV., Summer 1989, at 99; William J. Carney, *Controlling Management Opportunism in the Market for Corporate Control: An Agency Cost Model*, 1988 WIS. L. REV. 385 (1988); Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE L.J. 456, 484 (2004). But see John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 923 (1988) (suggesting a more rigorous review of the “corporation as contract” theory).

20. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 221 (1933); Jensen & Meckling, *supra* note 19, at 308-09.

21. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) (“If the stockholders are displeased with the actions of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.”). But see Lucian Ayre Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43, 45-46 (2003) (arguing that corporations are undemocratic because managements’ board nominees are usually unopposed); Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 849-50 (2004) (arguing that the United States should eschew the view of the “modern corporation as a ‘purely representative democracy’”); Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41, 41 (2005) (“Corporate law is chosen by the very corporate managers who ought to be controlled by it, and created by lawyers, legislatures and judges unanswerable to the people whose lives are affected by it.”).

22. Douglas Litowitz, *The Corporation as God*, 30 J. CORP. L. 501 (2005).

23. See *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 569 (1819); FREDERIC W. MAITLAND, *Moral Personality and Legal Personality*, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 304, 305-06 (H.A.L. Fisher ed., Logos & Co. 1975) (1911).

24. See, e.g., *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886); *San Mateo v. S. Pac. R.R.* (Railroad Tax Cases), 13 F. 722, 740 (C.C.D. Cal. 1882); Natasha N. Aljalilian, Note, *Fourteenth Amendment Personhood: Fact or Fiction?*, 73 ST. JOHN’S L. REV. 495, 497-98 (1999). Corporations do not, however, have the privilege against self-incrimination. *Bellis v. United States*, 417 U.S. 85, 89-90 (1974); *United States v. Kordel*, 397 U.S. 1, 7 (1970).

25. MODEL BUS. CORP. ACT § 3.02(4) (2002).

26. *Id.* § 3.02(7).

27. *Id.* § 3.02(1); EASTERBROOK & FISCHER, *supra* note 19, at 11.

as a special type of legal entity that has been and should be regulated²⁸ and accommodated in unique ways.²⁹

Delaware Chancellor William T. Allen has described the two general schools of thought about the nature of corporations as the “property conception” and the “social entity conception.”³⁰ Under the property conception, the corporation is viewed as the private property of its shareholders, with the ultimate goal of profit maximization on behalf of the shareholders.³¹ Under the social entity conception, the corporation’s purpose “includ[es] advancement of the general welfare.”³²

The view of the corporation as a profit maximization vehicle for the corporation’s shareholders is closely related to two other concepts: agency theory and shareholder primacy. The corporation was first analyzed using agency theory in the 1930s. The bifurcation of ownership and management was identified by Adolph Berle and Gardiner Means³³ and then expanded by Ronald Coase.³⁴ The agency theory of the corporation has become one of the most-widely accepted theories of the firm.³⁵ The

28. Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 396-97 (1993) (arguing that corporations are subject to public regulation because they are public entities).

29. Liam Séamus O’Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201 (2006). Professor O’Melinn notes that:

The corporation is a special kind of moral personality for which the law has made extensive accommodation. . . . First, although many of the most important developments in corporate law have resulted from the efforts of the nonprofit institution, the business corporation has undeservedly received the exclusive attention of corporate law theorists. Corporate law is the result of a common course of development shared by the profit and the nonprofit organizations, but the business corporation, by achieving pride of place as the corporation, has become divorced from its heritage and has been allowed to masquerade as a purely private institution. Second, given the important role that the nonprofit institution has played in the growth of corporate law, it is clear that shareholder primacy cannot be the ultimate goal of corporate law. Third, the public character of the corporation justifies greater regulation of corporate activity in the public interest.

Id. at 201.

30. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

31. Friedman, *supra* note 18, at 32-33. A number of leading corporate law cases strongly support the property conception of the corporation. *See, e.g.,* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 181-82 (Del. 1986) (recognizing the duty of the board of directors to maximize the financial interest of shareholders in the face of a hostile takeover); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business organization is organized and carried on primarily for the profit of the shareholders.”). *See also* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (1994) (“[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190 (2002) (“Does the firm exist only to increase shareholder wealth (the ‘property’ theory)? Or, should managers also seek to serve the interests of employees, creditors, customers, and the broader society (the ‘entity’ view)?”).

32. Allen, *supra* note 30, at 265.

33. ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-125 (1932) (discussing the separate identity and function of ownership and control groups within the corporate system and the potential conflicting interests of the two).

34. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (arguing that financial efficiencies are created by concentrating authority within a firm in a manager who directs production).

35. *See* Alchian & Demsetz, *supra* note 19 (describing the firm as a set of structured relationships between a group of individuals and a “central agent” or “employer”); Eugene F. Fama, *Agency Problems*

theory holds that markets and contracts limit the discretion that can be exercised by corporate managers.³⁶ These agents, who are linked by contracts to the firm, influence its actions. A central feature of the agency theory is that agents of corporations, as rational economic actors, will take steps to minimize agency costs.³⁷ However, this view has been criticized.³⁸ Professors Jensen and Meckling argued that “there is good reason to believe that the agent will not always act in the best interests of the principal” and that, consequently, there is an agency loss because a corporation will not be managed as well by an agent for the owners as it would be if the owners themselves managed the corporation.³⁹ For this reason, compensation schemes often attempt to align more closely the interests of executives with those of shareholders.⁴⁰

More recently, the idea that corporations exist solely to maximize the wealth of their shareholders and the agency theory have evolved into the “shareholder primacy theory” of the corporation, which holds that corporations operate in the interest of the shareholders and that directors owe to them a fiduciary duty.⁴¹ Furthermore, the theory stresses that corporations are subject to shareholder control “by electing directors, approving fundamental transactions, and bringing derivative suits.”⁴² In contrast, some have espoused the “director primacy” theory, articulated by Professor Stephen Bainbridge,⁴³ which assumes that the board of directors wields the power within a corporation.⁴⁴

The social entity theory posits that successful corporations have a moral imperative, not only to make money for their shareholders, but also to improve the general welfare of society in some significant way.⁴⁵ Arguably, it is a corporation’s ability to enhance society’s welfare that makes it so successful, whether it is providing lower cost goods to families with limited disposable incomes or creating ways for communities with similar interests to communicate with each other. The social entity theory is compatible with the legal entity approach because, under this view, the corporation is “capable of bearing legal *and* moral obligations.”⁴⁶

and the Theory of the Firm, 88 J. POL. ECON. 288 (1980) (discussing the efficiency of separating security ownership and control within a corporation); Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327 (1983); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983) (discussing the benefits of allocating the duty of initiating and implementing decisions to one group within an organization and the ratification and monitoring of decisions to another); Jensen & Meckling, *supra* note 19.

36. See Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 550-69 (1995).

37. *Id.* at 552-53.

38. See, e.g., Reza Dibadj, *Reconceiving the Firm*, 26 CARDOZOL. REV. 1459, 1462 (2005). Professor Dibadj notes that the flawed premise that corporations are “utility-maximizing actors” has led to poor public policy decisions. *Id.*

39. Jensen & Meckling, *supra* note 19, at 308-09.

40. Attempts to align interests of the executives with the interests of the shareholders can be most closely seen in stock option plans and restricted stock grants. Paying bonuses for good performance also helps align interests.

41. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278-79 (1998).

42. *Id.*

43. Stephen Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1 (2002).

44. *Id.* at 6-7.

45. Allen, *supra* note 30, at 265.

46. *Id.*

Additionally, many modern courts and corporate law theorists have come to view the corporation as a nexus of contracts.⁴⁷ Under this theory, the corporation is really just “an agreement, or a series of agreements, among private parties.”⁴⁸ The nexus of contracts theory provides a basis for the director primacy theory and the shareholder primacy theory, both of which explain the balance of power within the corporation, rather than the role of corporations as participants in broader governance processes such as foreign relations, adjudication, and law making. A further variation on the contractarian approach abandons the idea that the corporation itself is the nexus.⁴⁹ The “connected contracts” metaphor “emphasizes the complex interactions among all of the participants in an economic venture.”⁵⁰ Under this approach, although the term “contract” is used, it is used simply as a way to describe the rights and obligations of these participants, whether they are legally enforceable or not.⁵¹

Some commentators have gone so far as to analogize the corporation to a religious entity. Professor Douglas Litowitz argued in a recent article that the corporation is “fundamentally a religious and mythological entity” and “a secular god.”⁵² He argues that we worship business leaders⁵³ and that the Model Business Corporation Act’s definition of a corporation, which uses the term “corporation,” is not unlike God’s statement to Moses, “I am who I am.”⁵⁴ Further, he argues, a mythology has developed concerning corporations that can assist in resolving issues of corporate law.⁵⁵ Professor Litowitz states:

The pressing issues of corporate law [such as] whether a corporation should resemble a functioning democracy, whether it has duties to a community, whether it should be allowed to move offshore, whether it has a race or gender, whether it has rights to free

47. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 560 (2003) (explaining that a corporation’s powers “flow not from shareholders alone, but from the complete set of contracts constituting the firm”); Allen, *supra* note 30, at 264-65; Allen, *supra* note 19, at 1400; Butler & Ribstein, *supra* note 19, at 770; Jensen & Meckling, *supra* note 19, at 306-07 (arguing that the corporation is the nexus of principal-agent contracts); Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 878-93 (2000). *Contra* Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449 (1989) (arguing that the contract metaphor, like other metaphors for the corporation, is an imperfect fit).

48. *Ind. Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990) (“A corporation is not a living person but a set of contracts the terms of which determine who will bear the brunt of liability.”); *see also* REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* § 1.2.1 (2004) (“As an economic entity, a firm fundamentally serves as a nexus of contracts: a single contracting party that coordinates the activities of suppliers of inputs and of consumers of products and services.”); Bainbridge, *supra* note 43, at 16 (giving as examples of the contracts to which the corporation is a party a bond indenture, an employment agreement and a collective bargaining agreement); O’Melinn, *supra* note 29, at 202.

49. G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA L. REV. 887, 895 (2000).

50. *Id.* at 894.

51. *Id.*

52. Litowitz, *supra* note 22, at 501.

53. *Id.* at 502.

54. *Id.* at 503-04 (citing MODEL BUS. CORP. ACT § 1.40(4) (2002)).

55. *Id.* at 509-13.

speech, [and] whether it must favor shareholders over employees . . . [are] questions about the *meaning* of the modern corporation.⁵⁶

One way to answer these fundamental questions, Litowitz argues, is to view the corporation as a “modern deity.”⁵⁷

Professors Margaret Blair and Lynn Stout have proposed a “team production” theory of the corporation.⁵⁸ They examine the agency theory, but note that common law agency should be supplemented with the team production theory drawn from economic literature.⁵⁹ The team production theory posits that in certain situations, “productive activity requires the combined investment and coordinated effort of two or more individuals or groups.”⁶⁰

Other scholars have discussed whether corporations are moral persons,⁶¹ with many rejecting the notion.⁶² The moral imperative for corporations is to make money.⁶³ Under this view of the *raison d’être* for corporations, choosing socially responsible action over profit maximizing action is immoral.⁶⁴

B. *Theories of the Nation-State*

Philosophers and political theorists have offered many definitions of the nation. French historian Ernest Renan argued that the nation is a fusion of the various populations that compose them, but rejected strict definitions based on ethnography, language, geography, commerce, or interests.⁶⁵ Conversely, Joseph Stalin opined that

56. *Id.* at 536.

57. *Id.*

58. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

59. *Id.* at 249 (citing Alchian & Demsetz, *supra* note 19; Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324 (1982)).

60. *Id.*

61. See, e.g., Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 794 (“Because a corporation has the capacity to be an intentional actor and to modify its actions after learning of unintended harmful consequences, it may be regarded as a morally responsible being.”).

62. See Michael Keeley, *Organizations as Non Persons*, 15 J. OF VALUE INQUIRY 149, 149 (1981) (rejecting the idea that a corporation is a moral person because it has no “goals or intentions”); Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 493 (1996) (“Whatever organizations may be, they are *not* people.”); Manuel Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 111, 120 (Larry May & Stacey Hoffman eds., 1991) (arguing that corporations are not moral persons because they are not capable of acting intentionally).

63. Friedman, *supra* note 18, at 32.

64. BAKAN, *supra* note 5, at 34. Professor Bakan notes “the corporation can neither recognize nor act upon moral reasons to refrain from harming others. Nothing in its legal makeup limits what it can do to others in pursuit of its selfish ends, and it is compelled to cause harm when the benefits of doing so outweigh the costs.” *Id.* at 60.

65. Ernest Renan, *What Is a Nation?* in NATIONALISM IN EUROPE, 1815 TO THE PRESENT: A READER 49 (Stuart Woolf ed., 1996). Renan defined a nation as follows:

A nation is a soul, a spiritual principle. Two things, which, strictly speaking, are just one, constitute this soul, this spiritual principle. One is in the past, the other in the present. One is the common possession of a rich legacy of memories; the other is the actual consent, the

a “nation is a historically evolved, stable community of language, territory, economic life, and psychological make-up manifested in a community of culture.”⁶⁶ The Italian jurist Pasquale Mancini similarly argued that nations were comprised of groups of people united by several factors, such as language, history and territory.⁶⁷ John Stuart Mill defined sovereignty more esoterically as the “supreme controlling power.”⁶⁸ Political theorist Max Weber viewed a nation as “a relation of men dominating men,” a relation supported by means of “legitimate use of physical force within a given territory.”⁶⁹ According to Rousseau, sovereignty rests in a united people rationally considering and deciding its own fate.⁷⁰ Still others view ethnicity as the key determinant for the existence of a nation-state.⁷¹

The United Nations Charter recognizes self-determination as a primary test for nationhood.⁷² Kofi Annan, in his annual speech to the United Nations General Assembly in 1999, said:

State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty—and by this I mean the human rights and fundamental freedoms of each

desire to live together, the will to continue to value the heritage that has been received in common To have the common glories in the past, and will in the present; to have done great things together, and to do more of them again: these are the essential conditions to being a people.

Id. at 57-58. Renan also called the nation “a soul . . . the outcome of a long and strenuous past of sacrifice and devotion . . . a heritage of glory and regrets to share in the past; one and the same programme to be realized in the future.” *Id.* at 58.

66. JOSEPH STALIN, *MARXISM AND THE NATIONAL QUESTION: SELECTED WRITINGS AND SPEECHES* 12 (1942).

67. J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 346 (1992).

68. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 42 (Curran V. Shields ed., Bobbs-Merrill 1958) (1861) (“[T]he ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community . . .”).

69. MURRAY KNUITILA & WENDEE KUBIK, *STATE THEORIES: CLASSICAL, GLOBAL AND FEMINIST PERSPECTIVES* 50 (Robert Clarke ed., 3d ed. 2000) (1987) (quoting FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 78 (H.H. Gerth & C. Wright Mills eds., 1958)). Weber’s thoughts were originally put forth in a speech given in 1918 in Munich.

70. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT & DISCOURSES* 16-18 (6th prtq. 1930).

71. ERIC J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAM, MYTH, REALITY* 14-18 (2d ed. 1992) (noting that the old meaning of the word nation “envisaged mainly the ethnic unit,” while recent usage stresses “political unity and independence”); *see also* BENJAMIN AKZIN, *STATE AND NATION* 8-10 (W.A. Robson ed., 1964) (noting that the term “nation” usually refers to common ethnicity). *But see* JOHN A. ARMSTRONG, *NATIONS BEFORE NATIONALISM* 3-9 (1982) (noting that the concepts of a nation and an ethnic group have often been conflated).

72. The United Nations Charter states that one purpose of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace. U.N. Charter art. 1, para. 2. For more information on the principle of self-determination, see ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION* (2004); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* (1990); *NOMOS XLV, YEARBOOK OF THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY, SECESSION AND SELF-DETERMINATION* (Stephen Macedo & Allen Buchanan eds., 2003); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990); Yael Tamir, *The Right to National Self-Determination*, 58 SOC. RES. 565 (1991).

and every individual as enshrined in our Charter—has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny. . . . Nothing in the Charter precludes recognition that there are rights beyond borders.⁷³

Today, a generally accepted view of what constitutes a state is found in the 1933 Montevideo Convention on the Rights and Duties of States.⁷⁴ That document provides that “[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”⁷⁵

In *The Wealth of Nations* Adam Smith defined a state by its obligations to society, and specifically identified three such obligations of the sovereign.⁷⁶ These obligations are “protecting the society from the violence and invasion of other independent societies,”⁷⁷ the “administration of justice,”⁷⁸ and the duty of “erecting and maintaining those public institutions and public works, which though they may be in the highest degree advantageous to a great society, are, however, of such a nature, that the profit could never repay the expense to any individual or small number of individuals.”⁷⁹ Later scholars have built on these duties identified by Smith. Ellen Grigsby, for example, noted that

[a] state is an organization that has a number of political functions and tasks, including providing security, extracting revenues, and forming rules for resolving disputes and allocating resources within the boundaries of the territory in which it exercises jurisdiction. That is, states consist of government offices, which have the tasks of providing the ultimate, or primary, security, extraction processes, and rule making within a territory.⁸⁰

73. Press Release, Secretary General, Secretary-General Presents His Annual Report to General Assembly, U.N. Doc. SG/SM/7136, GA/9596 (Sept. 20, 1999), available at <http://www.un.org/News/Press/docs/1999/19990920.sgs7136.html>. The United Nations has taken measures to regulate multinationals. See U.N. Econ. & Soc. Council (ESOCOC), Sub-Comm’n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>; see also Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations As a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006) (discussing the impact that the United Nations’ Norms will have on corporate responsibility).

74. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

75. *Id.*; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986) (“Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government . . .”).

76. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 213-44 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1776); see also Greenwood, *supra* note 9 (“If our major corporations share many of the characteristics of sovereigns, they should share the responsibilities as well.”).

77. SMITH, *supra* note 76, at 213.

78. *Id.* at 231. Similarly, John Locke noted that the sovereign possesses “a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property.” JOHN LOCKE, TWO TREATISES ON GOVERNMENT 268 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

79. SMITH, *supra* note 76, at 244.

80. ELLEN GRIGSBY, ANALYZING POLITICS: AN INTRODUCTION TO POLITICAL SCIENCE 50 (Wadsworth/Thomson Learning 2002) (1999).

Steven Spiegel describes the nation-state as “[a] state structure in which a nation resides and exists (ideally) to protect and promote the interests of that nation.”⁸¹

Some scholars have noted a technical difference in the terms “state” and “nation.”⁸² These scholars contend that a state is a legal person capable of passing laws and entering into treaties.⁸³ A nation, on the other hand, can be more broadly defined as a community bound by common factors such as culture, ethnicity, religion, and history.⁸⁴ Although all of these distinctions may be useful to international law scholars, I do not draw such fine distinctions in this Article. Rather, I look to a variety of characteristics that philosophers, economists, and international law scholars have ascribed to the nation-state. Whether these are immutable characteristics of statehood and whether they still apply with the same force today are important questions, but this Article is limited to reviewing the strong parallels between the state and modern multinational corporations.

The nature of the corporation and its relationship to the state has been explored in literature, as well as in legal and economic scholarship. Aldous Huxley’s *Brave New World* seemed to anticipate this evolution of the corporation: the “T” for the Model T car replaced the cross as a religious symbol, the “Ford” was worshipped and dates were expressed as “A.F.” meaning “after Ford.”⁸⁵ Similarly, Kurt Vonnegut’s *Player Piano* depicts a dystopia controlled by technology and corporations.⁸⁶ Edward Bellamy pictured the state as a national corporation in his book *Looking Backward*, published in 1888, about a young man who falls asleep only to awaken in the year 2000.⁸⁷

Each metaphor or theory regarding the nature of corporations has some merit, and multiple views can and do coexist. Professor Litowitz, in setting forth his view of the modern corporation as a “modern deity,” wrote that “[h]opefully others will view the corporation through the lens of cultural studies, history, literary criticism, [and] sociology” as a means of “balanc[ing] out the economic approach that so dominates corporate scholarship.”⁸⁸ In this Article I respond, in part, to that call, and add the following theory: that multinational corporations increasingly operate in many ways like sovereign nations.

III. SIMILARITIES BETWEEN THE CORPORATION AND SOVEREIGN STATES

The remainder of this Article discusses the devolution of sovereign powers to private enterprise and the various forms of this devolution. Specifically, the following sections review the traditional characteristics and duties of sovereign nations

81. STEVEN L. SPIEGEL ET AL., *WORLD POLITICS IN A NEW ERA* 700 (3d ed., Wadsworth/Thomson Learning 2004).

82. Olli Lagerspetz, *National Self-Determination and Ethnic Minorities*, 25 MICH. J. INT’L L. 1299, 1299 (2004); ERNEST GELLNER, *NATIONS AND NATIONALISM* 1 (R.I. Moore et al. eds., 1983) (defining “nationalism” as “primarily a political principle, which holds that the political and the national unit should be congruent”).

83. Lagerspetz, *supra* note 82, at 1299.

84. *Id.*

85. ALDOUS HUXLEY, *BRAVE NEW WORLD* (Harper & Row 1946) (1932).

86. KURT VONNEGUT, JR., *PLAYER PIANO* (Holt, Rinehart & Winston 1966) (1952).

87. EDWARD BELLAMY, *LOOKING BACKWARD* (Daniel H. Borus ed., St. Martin’s Press 1995) (1888).

88. Litowitz, *supra* note 22, at 536.

articulated above and discuss the ways in which corporations have come to embody these characteristics and assume the duties of nations. These sections deal with the characteristics of a permanent population and defined territory, economic power, participation in foreign relations, the protection of society from violence and invasion, the administration of justice, and the creation of public works and public institutions.

A. Permanent Population & Defined Territory

Oppenheim describes one characteristic of the state as a permanent population, that is, as a people who live together as a community.⁸⁹ Yet, the view that a state has a permanent population has waned in recent decades as populations have become more transient.⁹⁰ Further, even within the borders of a state, there are often disparate groups of people who cannot be said to comprise a single community. This would be true, for example, of Kurdistan or Cyprus, where groups of people living under a single national flag operate largely autonomously from the national government. There is also the related question of what size population is necessary to qualify a group of people as a state. According to the *Restatement (Third) of Foreign Relations Law of the United States*, “significant” size is necessary.⁹¹ Yet Vatican City has a permanent population of only 840,⁹² while the world’s largest corporations have “populations” of several hundred thousand. Wal-Mart, the world’s largest private employer with almost two million employees around the world, may be the best example of a large corporate population.⁹³

Notions of citizenship are changing rapidly. Fordham Law School sponsored a two-day conference in September of 2006 entitled “New Dimensions of Citizenship.”⁹⁴ Conference organizers noted that while citizenship theory has relied on the disciplines of law, history, political science, and anthropology, theories of citizenship are evolving to take into account the increasingly transnational nature of citizenship.⁹⁵ These theories have necessarily moved beyond economic globalization and the convergence of financial markets; international capital may be mobile, but asymmetry exists when the movement of capital is compared to the movement of individuals.⁹⁶

89. 1 OPPENHEIM’S INTERNATIONAL LAW § 34, at 121 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

90. Aristide R. Zolberg, *The Dawn of Cosmopolitan Denizenship*, 7 IND. J. GLOBAL LEGAL STUD. 511, 511 (2000) (citing Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000)) (discussing the devolution of the concept of citizenship away from the nation-state to a “hypernationalist version of citizenship”).

91. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. c (1986).

92. Catholic-pages.com, Vatican City: Population, http://www.catholic-pages.com/vatican/vatican_city.asp (last visited Nov. 26, 2007).

93. See Wal-MartFacts.com, Employment and Diversity, <http://www.walmartfacts.com/featuredtopics/?id=3> (last visited Nov. 26, 2007).

94. Fordham Law School, Event Details, <http://law.fordham.edu/ihhtml/eventitemPP.ihhtml?id=37&ide=6763&template=cle> (last visited Sept. 14, 2006).

95. *Id.*

96. Micheline Labelle & Franklin Midy, *Re-Reading Citizenship and the Transnational Practice of Immigrants*, 25 J. OF ETHNIC & MIGRATION STUD. 213, 217 (1999).

As these modern notions of citizenship emphasize the decreasing importance of national borders, theories of corporate citizenship have taken root. Individuals today often self-identify more closely with their employer than with their country of birth. In other words, a person's work identity may transcend his or her national identity. The corporation, like a nation, has its own unique culture. Like immigrants to a new country, new corporate employees go through a process of acculturation. Similar to a capitalist nation in which the strongest entrepreneurs succeed, the corporation is often a meritocracy, allowing deserving employees to climb the corporate ladder and participate in the corporation's internal governance.

Citizenship in a particular country is the serendipitous accident of birth,⁹⁷ while association with a corporation is generally an affirmative choice based on market factors. These market factors have begun to affect residence to a large extent, and citizenship to a lesser extent. Individuals employed by multinational corporations often have opportunities to work as expatriates in countries where the corporation has operations. Just as groups of people may, by virtue of these shared experiences or self-determination, coalesce into a nation-state, so, too, may groups of people employed by a corporation coalesce into some larger type of society. Professor Bruno Frey, in writing about citizenship in our global society, explained that:

[T]o be forced to have the exclusive citizenship of *one* particular nation only, is inadequate for internationally highly mobile persons such as is the case with many managers, artists, academics, sportsmen and sportswomen. Moreover, multiple identities going above and beyond nationality have become the rule. But the present system of citizenship in the *nation-state* also does not conform to the preferences of the "average" persons, who often identify more with a lower level of government (for example, their particular region) or a higher level of government (for example, Europe as a whole) rather than with the national level. Even more fundamentally, people often identify more with other organizations such as NGOs or even with particular firms rather than with the nation of which they happen to be citizens.⁹⁸

The concepts of organizational or corporate citizenship originated in the 1990s.⁹⁹ Much has been written in the last several years about corporate cultures.¹⁰⁰ One

97. Political Scientist Ellen Grigsby notes that "the very origins of the word nation attest to such foundations, because nation is based on the older Latin word *natus* (birth), and nations generally consist of people whose sense of unity is based on something shared by virtue of the group into which they are born." GRIGSBY, *supra* note 80, at 58. See also WALTER BERNS, MAKING PATRIOTS 11 (2001) (arguing that patriotism must "be cultivated because no one is born loving his country; such love is not natural, but has to be somehow taught or acquired").

98. Bruno S. Frey, *Flexible Citizenship for a Global Society*, 2 POL. PHIL. & ECON. 93, 94-95 (2003). Frey proposes to transfer the citizenship relationship from the governmental realm "to a more general social setting" and to conceptualize citizenship as temporary, multiple, partial, or organizational. *Id.*

99. *Id.* (citing Linn Van Dyne et al., *Organizational Citizenship Behavior: Construct, Redefinition, Measurement and Validation*, 37 J. OF MGMT. 765 (1994); Dennis W. Organ, *The Motivational Basis of Organizational Citizenship Behavior*, in 12 RESEARCH IN ORGANIZATIONAL BEHAVIOR: AN ANNUAL SERIES OF ANALYTICAL ESSAYS AND CRITICAL REVIEWS 43 (Barry M. Staw & L.L. Cummings eds., 1990)).

100. See, e.g., KIM S. CAMERON & ROBERT E. QUINN, DIAGNOSING AND CHANGING ORGANIZATIONAL CULTURE (1999); Bill Munck, *Changing a Culture of Face Time*, in HARVARD BUSINESS REVIEW ON CULTURE AND CHANGE (2002); E.H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP (2d ed. 1992); R. Charan, *Conquering a Culture of Indecision*, 79 HARV. BUS. REV. 75 (2001).

scholar noted that there now exists “a new breed of men and women for whom religion, culture, and ethnic nationality are marginal elements in a working identity.”¹⁰¹

While groups of people within a nation are linked geographically, within a corporation, employees are linked by a common purpose and by information. Large companies, like Coca-Cola, McDonald’s, Shell, and Wal-Mart, export their corporate cultures as they establish operations abroad. Companies with cultures ranging from laid-back to highly formal will retain some aspects of their respective cultures abroad. Companies hire local executive talent and instill the companies’ cultural values in these new executives. The executives will then spread these values to other entities when they deal with suppliers and customers or if they transfer to different companies.

Not surprisingly, one of the most challenging aspects of merging two corporations is integrating disparate cultures after the closing date of the merger.¹⁰² Corporations can prosper when a merger enhances the surviving corporation’s culture by incorporating the best aspects of the target’s culture. Sometimes, however, the worst aspects of both corporations’ culture survive in the new entity and the corporation is weakened. Another important issue that arises during many mergers, according to organizational psychologists, is the acculturation of new employees.¹⁰³ This is especially true for multinational corporations; the issue for these companies is how best to form a common culture across varying geographic, ethnic, and religious areas and time zones.¹⁰⁴

Another characteristic of the permanent population of a nation-state is that citizens of the state have the right of suffrage and may vote on significant issues and for political candidates. As the global business population becomes more transient, this

101. BENJAMIN R. BARBER, *JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* 17 (1996); see also Azizah Y. al-Hibri, *The American Corporation in the Twenty-First Century: Future Forms of Structure and Governance*, 31 U. RICH. L. REV. 1399 (1997). Professor al-Hibri states that

the corporation is not just a production unit, a “cash cow,” or a profit center; it has become a community for all those in it. People spend most of their waking hours at work in the corporation; they make friends there, have meals there, and derive much of their self-esteem from work. A corporation is therefore an important community for those who work in it, and it significantly impacts on the society in which it is imbedded.

Id. at 1451-52.

102. See Miriam Erez, *Make Management Practice Fit the National Culture*, in *THE BLACKWELL HANDBOOK OF PRINCIPLES OF ORGANIZATIONAL BEHAVIOR* 419, 431 (E.A. Locke ed., Blackwell Pub. 2000). Erez stresses that

[m]anagers should . . . take into consideration the cultural characteristics of both the acquiring company and the acquired company. For example, when an American company acquires a Mexican company, it is not enough to know that the characteristics of the American company facilitate the acculturation process. One should also take into consideration that the cultural gap between the two companies is quite high, and that it is not easy to change the Mexican company’s culture.

Id.

103. See generally Uzoamaka P. Anakwe & Jeffrey H. Greenhaus, *Effective Socialization of Employees: Socialization Content Perspective*, 11 J. OF MANAGERIAL ISSUES 315 (1999) (examining the effectiveness of corporate socialization measures); C.A. O’Reilly III, J. Chatman & D.F. Caldwell, *People and Organizational Culture: A Profile Comparison Approach to Assessing Person-Organization Fit*, 34 ACAD. OF MGMT. J. 487 (1991) (developing and validating a test for assessing person-organization fit, which predicts job satisfaction and organizational commitment to an employee).

104. Erez, *supra* note 102, at 431.

may mean that individuals vote on issues and candidates in states other than the one in which they reside. Some nation-states are inclusionary, giving residents or other groups of non-citizens the right to vote.¹⁰⁵ Other nation-states are exclusionary, limiting suffrage to those who are citizens. In the European Union, for example, suffrage is based on residence rather than citizenship. Residents, regardless of citizenship, have the right to vote and to stand for political office.¹⁰⁶

As corporations take on more of the attributes of government, the impact on the voting rights of citizens must be considered. The franchise rights of corporate shareholders become ever more important as the corporations in which they have purchased shares become more powerful actors on the global stage.¹⁰⁷ Similarly, as corporate powers increase, the right to run for public office may become less important than the right to climb the corporate ladder or otherwise influence the activities of corporations.

Ideally, corporations engage in succession planning for all of the senior positions within the organization. But like the political climate within a particular country, a political climate can develop within a corporation. Executives align themselves with managers or directors, whom they believe may someday manage the entire organization, in an effort to rise to power on the manager or director's coattails. Sometimes, just as in countries, coups occur within a corporation. When a CEO or senior executive is fired and another is appointed, jockeying for position and lobbying for board member votes becomes common.

Control over a defined territory, usually to the exclusion of all other states, is another typical attribute of sovereignty.¹⁰⁸ According to the *Restatement (Third) of*

105. The approach to suffrage as one of inclusion or exclusion of resident non-citizens often depends on the nation's view of voting either as a fundamental human right or merely as a citizen's right. See generally Harald Waldrauch, *Electoral Rights for Foreign Nationals: A Comparative Overview of Regulations in 36 Countries* (European Ctr. for Soc. Welfare Policy, Paper No. 73, 2003), available at http://www.anu.edu.au/NEC/Archive/waldrauch_paper.pdf (explaining the criteria used by several nations in decisions to either grant or deny voting rights).

106. Treaty on European Union tit. II, art. 86 (Maastricht Treaty), Feb. 7, 1992, 31 I.L.M. 247, 1992 O.J. (C 191) (amended at 2002 O.J. (C 325)). Article 8b of Title II of the Maastricht Treaty states: "Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State." *Id.* at art. 8b.

107. See al-Hibri, *supra* note 101, at 1451. Professor al-Hibri notes that the term "corporate democracy" usually refers to shareholder rights, which reflects a view of the corporation as a *polis* where only the "owners of shares" count as citizens. In political terms, shareholders of a corporation are the only citizens of the corporate *polis*, and only citizens vote. Put in this way, we now recognize that our legal system does not view non-shareholders as "citizens." This is analogous to a familiar political situation in our past where only landowners had the right to vote in an election and the non-landed, non-owners had no voting rights. We have since recognized in the political arena that those who do not own land are nevertheless an integral part of the citizenship of our country. The same recognition seems to be overdue in corporate law and practice. Getting to it, however, will require a major ideological/conceptual shift not only in the concept of "corporate citizenship," but also in the concept of the "corporation" itself.

Id.

108. See *Corfu Channel (U.K. v. Alb.)* 1949 I.C.J. 4, 43 (Apr. 9) (separate opinion of Judge Alvarez) ("By sovereignty, we understand the whole body of rights and attributes which a State possesses in its

Foreign Relations Law of the United States, a state has “jurisdiction to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory; . . . the status of persons, or interests in things, present within its territory; . . . [and] conduct outside its territory that has or is intended to have substantial effect within its territory.”¹⁰⁹

Although territory is viewed as a characteristic of the state, land, as one of the means of production, is less significant now than ever before. This decrease in significance is the result of information, which has taken its place with land, labor, and capital as a means of production. With respect to territory, size is largely irrelevant to the issue of statehood and can range from as little as 100 acres to an entire continent.¹¹⁰ Geographic borders may be disputed between neighboring states, making the territory of a state murkily defined. Similarly, even geographic borders lack the political significance that they once had as capital, people, and information cross borders with ease.¹¹¹

B. Economic Power

Today’s Brobdingnagian corporations may never gain the measure of power held by the earliest companies during their peak, but the largest corporations still economically dwarf many developing nations. The tremendous power of multinational corporations can be partially explained by their sheer size. A few of the very largest companies have the power to make—or destroy—markets of particular products or in particular places.

The largest corporations have annual revenues that are multiples of the gross domestic products of many nations. For example, the gross domestic product (on a purchasing power parity basis) for three developing countries in different regions in 2006 was as follows: Sri Lanka, \$95.46 billion;¹¹² Ghana, \$60 billion,¹¹³ and Honduras, \$22.54 billion.¹¹⁴ In contrast, the world’s largest corporations had revenues in 2006

territory, to the exclusion of all other States, and also in its relations with other States.”). *But see* 2 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 51 (5th ed. 1966) (“[T]he political demand that the territory of every state should coincide with the territory inhabited by one nation, is by no means so self-evident as it seems to appear to many people to-day.”).

109. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986).

110. OPPENHEIM’S *INTERNATIONAL LAW*, *supra* note 89, § 102, at 327 (noting that Vatican City is generally viewed as a nation-state, despite its small size).

111. Schachter, *supra* note 2, at 8 (“The mobility of capital and technology—plus the global communications networks—is viewed as obliterating spatial lines, making nonsense of geographic demarcations.”). For additional articles on the topics of sub-state nationalism and indigenous peoples, see S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 *ARIZ. J. INT’L & COMP. L.* 13 (2004); Erica-Irene Daes, *The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples*, 14 *ST. THOMAS L. REV.* 259 (2002); Hurst Hannun, *New Developments in Indigenous Rights*, 28 *VA. J. INT’L L.* 649 (1988); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *HARV. HUM. RTS. J.* 57 (1999).

112. CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html> (last visited Nov. 26, 2007).

113. CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html> (last visited Nov. 26, 2007).

114. CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/ho.html> (last visited Nov. 26, 2007).

of several times these amounts. Wal-Mart's revenues were \$315.6 billion,¹¹⁵ British Petroleum's revenues were \$265.9 billion,¹¹⁶ Exxon Mobil's revenues were \$377.64 billion,¹¹⁷ and Royal Dutch/Shell Group's revenues were \$306.7 billion.¹¹⁸ In fact, of the three countries just mentioned, Sri Lanka's \$95.46 billion is closest to the 2006 revenues of Nippon Telegraph & Telephone, which ranked number 24 on the 2006 Fortune Global 500 list.¹¹⁹ Wal-Mart's revenue in 2006 was approximately fourteen times the GDP of Honduras, with Honduras bested by 281 of the Fortune 500 companies in 2006.¹²⁰

These staggering discrepancies in the GDPs of some developing countries and the revenues of the largest corporations mean that foreign corporations have the capacity to exert tremendous influence over the economic stability of developing nations. If one or more large companies divests or sources product elsewhere, the impact could be devastating to a developing nation. Similarly, a decision to source products in a developing nation could have a tremendously positive economic impact by creating jobs and providing a tax base.

It is important to note, however, that although corporations have grown tremendously in size over the past few decades, some authors have downplayed the importance of this growth. John Micklethwait and Adrian Wooldridge note that the growth of corporations has not kept pace with the economic growth of nations and that "wealth is not the same as power."¹²¹ The authors explain:

The idea that companies are getting too big is a gross abuse of statistics. Far from gaining economic clout, the biggest multinationals have been losing it. Over the past twenty years, the world's biggest fifty firms have grown more slowly than the world economy as a whole. In most countries the average size of companies is going down not up.

And what exactly do we mean by companies being the same size as states? By some measures, Wal-Mart, the biggest company in 2000, is as rich as Peru. But is it as powerful? Think what the government of Peru can do. It has powers beyond Wal-Mart's belief. It can coerce you to join the army, force you to pay taxes, arrest and imprison security chiefs and terrorists. Wal-Mart has no equivalent powers. Yes, it makes profits round the world but in many ways it is far more hemmed in than the

115. CNN.com, Fortune Global 500, <http://money.cnn.com/magazines/fortune/global500/2006/snapshots/1551.html> (last visited Nov. 4, 2007).

116. Opesc.org, BP, <http://www.opesc.org/fiche-societe/fiche-societe.php?entreprise=BP> (last visited Nov. 4, 2007).

117. John Porretto, *Exxon Mobil Posts Record Annual Profit*, ASSOCIATED PRESS, Feb. 1, 2007, available at http://www.breitbart.com/article.php?id=D8N0VRD80&show_article=1.

118. CNNMoney.com, Fortune Global 500, <http://money.cnn.com/magazines/fortune/global500/2006/> (last visited Nov. 4, 2007). Comparing the economic power of a nation with that of a company is difficult; GDP and revenues are different measures and the conclusions that can be drawn from comparing them are, admittedly, limited.

119. CNNMoney.com, Fortune Global 500, http://money.cnn.com/magazines/fortune/global500/2006/full_list/index.html (last visited Nov. 4, 2007).

120. *Id.*

121. MICKLETHWAIT & WOOLDRIDGE, *supra* note 15, at 176.

giants of yesteryear. The East India Company had an army of 200,000 people. Wal-Mart is simply rather good at retailing.¹²²

Micklethwait and Wooldridge also stress that globalization has, as a rule, tended to help small companies rather than large ones, and that governments may still exercise their powers to curtail the power of these large multinational corporations, as the Department of Justice did by filing an antitrust suit against Microsoft.¹²³

C. Capacity to Engage in Foreign Relations

As noted previously, the 1933 Montevideo Convention on the Rights and Duties of States lists as a characteristic of states the “capacity to enter into relations with other States.”¹²⁴ Recognition by other countries is also viewed as a test, even though some nations may dispute the right to exist or the territory of a particular state.¹²⁵

Modern corporations, particularly those with international operations, do enter into relations with nations other than their home country. In fact, corporations engage in foreign relations in a variety of ways, many of them very similar to the ways in which nations deal with each other. For example, corporations engage in diplomacy, establish outposts in other nations, engage in trade negotiations, and often serve as proxies for their home country’s government.

Under the agency theory of corporations, the executives of a company are the agents of the corporation’s shareholders.¹²⁶ As such, these agents are charged with making money for the shareholders, not with formulating international policy. Yet in the course of pursuing profits, that is precisely what executives in multinational corporations do. The CEO and other senior executives often meet with trade ministers and heads of state. During and following World War II, the United States engaged in foreign relations with Saudi Arabia primarily through ARAMCO.¹²⁷ There are several more recent examples, as well. In late 2004, Microsoft’s Steve Ballmer met with India’s Prime Minister Manmohan Singh.¹²⁸ In April of 2006, in his first official visit to the United States, Chinese President Hu Jintao visited with Microsoft and Boeing executives *before* visiting the White House.¹²⁹ By visiting with the CEOs of these companies first, China sent the message that relations between the Chinese government and industry have priority over relations between the two governments.¹³⁰

122. *Id.*

123. *Id.*

124. Montevideo Convention on Rights and Duties of States, *supra* note 74, 49 Stat. at 3097, 165 L.N.T.S. at 19; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986).

125. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 89, § 33, at 120.

126. *See supra* notes 33-40 and accompanying text.

127. MADAWI AL-RASHEED, A HISTORY OF SAUDI ARABIA 117 (2002) (“During the war, as far as Saudi Arabia was concerned, ARAMCO was the ‘United States’ . . . ARAMCO was responsible for facilitating contact between the USA and Saudi Arabia.”).

128. *Windows to be Localized in 14 Indian Languages*, THE TRIBUNE ONLINE EDITION (Chandigarh, India), Nov. 16, 2004, available at <http://www.tribuneindia.com/2004/20041117/biz.htm>.

129. Thomas Friedman, *Go West, Old Men*, N.Y. TIMES, Apr. 26, 2006, at A19.

130. *Id.*

In addition, companies will occasionally hold board meetings in the countries where they have operations. This gives the non-executive directors an opportunity to review the company's foreign operations. When a foreign company holds a board meeting, the prime minister and other government officials may attend a portion of the meeting or a reception or dinner in connection with the meeting. Credit Suisse, BHP Billiton, and Sony Ericsson Mobile Communications AB have all held board meetings in China.¹³¹ Wal-Mart has held board meetings in Canada, China, and Mexico. Perot Systems met in India.¹³² Meeting in countries where these mega-corporations have operations shows a commitment to future development in the country.¹³³ Directors who may be asked to vote on significant capital expenditures are more comfortable doing so if they have seen first hand the company's operations in a particular country. The presence of the head of state or cabinet ministers at the board meeting gives the directors further assurance that the company is welcome in the country and signals the value that the country's leaders place on the corporation's presence in their country.

Furthermore, large multinational corporations understand the importance of effective government relations and often establish offices in capital cities throughout the world. The need for an office in a particular capital has somewhat diminished in recent years as technology has advanced, giving executives easier ways to arrange for meeting with foreign diplomats.¹³⁴ Even if the company has not yet entered a particular market, it may establish an office to monitor legislative developments, engage in government relations, identify local executive talent, and assess potential joint venture partners.¹³⁵ Establishing an office and engaging in various forms of foreign relations also allows a company to transcend uncomfortable relations between its host country and its home country.¹³⁶ In the past few years, for companies based in the United States or Great Britain, this has meant overcoming the unpopularity of their home countries' foreign policies. Where the head of state is unpopular abroad, companies that seek to engage in business internationally must take additional steps to build constructive relationships and to distance themselves from politicians at home.¹³⁷ Former diplomat Shaun Riordan wrote in his book *The New Diplomacy* that multinational corporations' "economic strength, combined with international networks

131. Francesco Guerrera, *Stepping into the Breach at CSFB: Brady Dougan, Credit Suisse First Boston's Newly Installed Chief Executive, Takes Over From John Mack*, THE CHIEF EXECUTIVE, Nov. 2004, available at http://findarticles.com/p/articles/mi_m4070/is_203/ai_n7586517; BusinessWeek.com, Leaders of Europe's BW 50:1 BHP Billiton, available at http://images.businessweek.com/ss/05/06/0526eubw50/index_01.htm; Press Release, Sony Ericsson, Beijing Board Meeting Confirms Sony Ericsson's Commitment to China (Dec. 8, 2004) (on file with Sony Ericsson).

132. Press Release, Perot Systems, Importance of India Underscored by Historic Perot Systems Board Meeting (Mar. 14, 2005) (on file with Perot Systems).

133. See, e.g., Guerrera, *supra* note 131.

134. SHAUN RIORDAN, THE NEW DIPLOMACY 4 (2003) ("[M]inisters will often know their opposite numbers far better than any diplomat can. The same is true of business executives, whose dependence on embassies for advice or to arrange meetings has accordingly diminished.")

135. Where the market entry will be through acquisition, companies are less likely to establish offices prior to market entry, as this sends a strong signal of interest in a particular market, and can artificially inflate the share prices of likely targets.

136. RIORDAN, *supra* note 134, at 4 (arguing that traditional diplomatic approaches are lacking and that the private sector must play a role in diplomacy).

137. *Id.* at 9 (asserting that, at the multinational level, many firms shun overt national identification).

that frequently outstrip (and outperform) those of traditional diplomatic services, make them more influential than many states. Their interventions are no longer limited to narrowly defined commercial interests. The more forward-thinking corporations are already carving out a role in the design of any future global governance.”¹³⁸

One important way that multinational corporations establish their “role in the design of any future global governance”¹³⁹ is by engaging in trade negotiations, either directly or indirectly, through their chartering nations’ trade representatives. Adam Smith wrote in 1783 that trade regulations “may, I think, be demonstrated to be in every case a complete piece of dupery, by which the interest of the State and the nation is constantly sacrificed to that of some particular class of traders.”¹⁴⁰ While trade policies may be motivated in part by the desires of a “particular class of traders,” they are also affected by the desires of the nations to court foreign investment. This competition has been characterized by some as a “race to the bottom,” in which countries offer cheap labor and substandard health and environmental standards in order to attract corporate investment.¹⁴¹

Trade policy remains in many ways a mechanism for enrichment and protection of companies.¹⁴² Corporations are stakeholders in trade policy decisions and also engage in commercial diplomacy, negotiating their own trade deals in countries where they wish to conduct or expand their business. Corporate executives often deal extensively with politicians, regulators, and policy makers on trade and investment issues that affect their organization. As explained above, these issues implicate not only traditional trade matters, but also environmental, labor, consumer protection, and other concerns.¹⁴³

Beyond negotiating trade conditions between a corporation and a host country, a corporation often negotiates taxation as well. Unlike individuals, corporations have some ability to set their own rates of taxation, and often negotiate inducement agreements with various levels of government.¹⁴⁴ Switzerland, for example, has been successful in attracting intellectual property holding companies largely because it offers generally low taxes and no up-front taxes on royalties.¹⁴⁵ Companies often arbitrage tax treatment by taking advantage of the price differential between countries.¹⁴⁶ All other things being equal, a corporation will locate its business in the

138. *Id.* at 7.

139. *Id.*

140. Letter from Adam Smith to William Eden (Dec. 15, 1783), in *THE CORRESPONDENCE OF ADAM SMITH* 271-72 (Ernest Campbell Mossner & Ian Simpson Ross eds., 1987).

141. Schachter, *supra* note 2, at 9 (citing David C. Korten, *Sustainable Development*, 9 *WORLD POL’Y J.* 157, 173 (1992)).

142. *See generally* Richard Sherman & Johan Eliasson, *Trade Disputes and Non-State Actors: New Institutional Arrangements and the Privatization of Commercial Diplomacy*, 29 *WORLD ECON.* 473 (2006) (examining the gradual process and international phenomenon of the privatization of commercial diplomacy).

143. *See* Schachter, *supra* note 2, at 9.

144. *See* Korten, *supra* note 141, at 173; David Hryck & Brian Andreoli, *Foreign Tax Strategies Can Be Boon to Multinationals*, *FIN. EXECUTIVE*, Sept. 1, 2005, at 56.

145. Hryck & Andreoli, *supra* note 144, at 57.

146. *See id.*

country that gives it the best “deal” on taxes—and, as previously noted, this “deal” is often the subject of negotiation.

Furthermore, corporations can be viewed by the people of other nations as representatives of the entity’s home country. We saw this recently as Gulf retailers boycotted Danish companies after Jyllands-Posten printed offensive cartoons ridiculing the Prophet Mohammed.¹⁴⁷ In Europe, some restaurants boycotted American products, such as Coca-Cola and Budweiser, and refused to accept American Express cards in protest of the war in Iraq.¹⁴⁸ These companies were targeted, not because of their own actions, but as proxies for the American government.

The home governments of multinational corporations also use these companies as diplomatic tools.¹⁴⁹ Governments sometimes request that corporations conduct business in a certain way or in a certain place to facilitate foreign relations. In addition, a number of functions that have historically been within the purview of the state are now being privatized. One result of such privatization is that it allows states to distance themselves from treaty obligations. Legitimate concerns have been raised by some authors about the extent to which privatizing certain activities may lead to circumvention of treaties and international norms of human rights.¹⁵⁰

D. Protection of Society

The International Committee of Jurists, appointed by the Council of the League of Nations, took the view that statehood cannot co-exist with anarchy. Rather, a state does not exist until a situation “is of a definite and normal character.”¹⁵¹ Sovereignty does not exist in some situations, “either because the state is not yet fully formed or because it is undergoing transformation or dissolution [and in such cases], the situation is obscure and uncertain from a legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.”¹⁵² Once created, one attribute of the state becomes the protection of minorities, which is often codified in the states’ constitutions.¹⁵³ In order to maintain security and stability, governments establish armies to protect themselves from other nations and police forces to keep order internally. The pendulum seems to have swung back somewhat to the days of Henry Fielding’s Bow Street Runners.

147. Arthur Bright, *Firestorm over Danish Muhammad Cartoons Continues*, CHRISTIAN SCIENCE MONITOR, Feb. 1, 2006.

148. Erik Kirschbaum, *Boycott of American Goods Over Iraq War Gains Pace*, REUTERS, Mar. 25, 2003, available at <http://www.commondreams.org/cgi-bin/print.cgi?file=/headlines03/0325-10.htm>.

149. The trend of corporations taking on the attributes of the sovereign is not unidirectional. Governments occasionally find it advantageous to form corporations to act as quasi-governmental agencies. Two good examples of this are the Federal Deposit Insurance Corporation in the United States and China’s Ministry of Foreign Trade and Cooperation.

150. Michael K. Addo, *Human Rights Perspectives of Corporate Groups*, 37 CONN. L. REV. 667, 670-73 (2005).

151. *Report of the International Committee of Jurists on the Legal Aspects of the Aaland Islands Question*, 1 LEAGUE OF NATIONS OFFICIAL JOURNAL, Special Supp. No. 3, 7 (1920).

152. *Id.* at 6.

153. *Id.*

Within this climate, corporations routinely exercise police powers, in some cases displacing traditional state functions. For instance, while it is unlikely that we will ever see corporate armies comparable in size to that of the East India Company,¹⁵⁴ companies in many industries continue to establish private security forces.¹⁵⁵ This practice is particularly prevalent where states are unable or unwilling to provide necessary police functions, such as guarding corporate facilities, investigating crimes, or protecting employees.¹⁵⁶ Corporations have even funded other nations' armies or police forces in certain circumstances. For example, western oil companies—Shell, in particular—have been charged with arming and employing security forces to quell opposition to oil exploration and production in the Niger Delta.¹⁵⁷ Some governments have also contracted away the police function by bidding out the building and running of prisons to private enterprises. Privatizing prisons has become more common in recent years.¹⁵⁸

The police function has also been partially replaced in recent years by the increase in the size and power of internal audit groups within most large corporations. While

154. The Dutch East India Company had broad powers, including the “the right to wage war and the right to make treaties with foreign powers.” Tonio Andrade, *The Company's Chinese Pirates: How the Dutch East India Company Tried to Lead a Coalition of Pirates to War Against China, 1621-1662*, 15 J. OF WORLD HIST. 415, 423 (2004).

155. See David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89 (2006); Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573 (2005); Sklansky, *supra* note 6, at 1166-67. Sklansky notes that little has been written about private policing and that what little has been written often deals with legal issues relating to security personnel. *Id.*

156. P. W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 210 (2003) (noting that private forces are sometimes used where the government opts not to use force); see also Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); P. W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004); Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75 (1998). General Paul Kern, then Commanding General of the U.S. Army Material Command, noted before Congress that the United States military has seen an unprecedented level of contractors on the battlefield, with more than a division's worth of contractors working side-by-side with U.S. soldiers. *Contracting in Iraq, Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. (2004) (statement of Paul J. Kern, Commanding General, U.S. Army Material Command), available at <http://search.ebscohost.com/login.aspx?direct=true&db=mth&AN=32Y1364275198&site=ehost-live>. Kern stated, “They too are our troops and we need to ensure that the policies and systems are in place to support and take care of our total force, including our contractors.” *Id.*

157. Ken Wiwa, *Nigeria Can Help Create A More Global Economy*, FINANCIAL TIMES, Nov. 9, 2005, at 19; see also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000) (plaintiffs alleged that a Shell subsidiary “recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity”).

158. See Mark Babineck, *Private Prisons Filling Up Fast, Too: Demand Forces Governments to Take a Gamble On Some Facilities*, HOUSTON CHRON., Aug. 25, 2007, at A1 (“Private facilities, either owned by for-profit companies or governments that contract out their management, for years have become an increasingly important relief valve for public systems at or near capacity.”); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531 (1989) (noting that, during the 1980s, the government began looking seriously into privatizing the running of America's prisons and jails in order to reduce some of the stress on state and federal government, and explaining the legal issues associated therewith).

internal audit groups exist to help “an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes,”¹⁵⁹ the internal audit group will also investigate suspected criminal activity as a part of these functions. Internal auditors seek evidence of violation of the laws or of internal controls by employees.¹⁶⁰ To find these violations, they engage in investigatory work, such as interviewing witnesses and forensic accounting. If evidence of criminal activity is identified, internal audit groups may turn over the results of their investigation to local law enforcement authorities.¹⁶¹ The internal audit departments of large multinational corporations can complement understaffed or poorly trained law enforcement within the host country by uncovering and documenting evidence of criminal activity.

Corporations also engage outside law firms to assist in-house counsel with investigations into possible violations of the law. This process can in some ways be analogized to investigations conducted by law enforcement agencies, although there can be problems associated with the investigation that would not necessarily exist if a law enforcement agency were conducting the investigation. As recent press about Hewlett-Packard indicated, there can be questions about whether the investigation itself is conducted in a legal manner.¹⁶² Furthermore, the outside law firm may in effect be investigating its own actions, as was alleged when Enron engaged its outside firm to investigate complaints made by Sherron Watkins about transactions in which the firm participated as counsel to the company.¹⁶³

E. Administration of Justice

A nation regulates its citizens by enacting laws and establishing a police force and a court system to assure compliance with those laws. While corporations have been long recognized as possessing authority to quasi-legislate regarding *internal* matters,¹⁶⁴

159. Theiia.org, International Standards for the Professional Practice of Internal Auditing, Introduction, <http://www.theiia.org/guidance/standards-and-practices/professional-practices-framework/standards/standards-for-the-professional-practice-of-internal-auditing/> (last visited Nov. 26, 2007).

160. See THE INSTITUTE OF INTERNAL AUDITORS, PRACTICE ADVISORY 1210.A2-2, AUDITOR’S RESPONSIBILITIES RELATING TO FRAUD INVESTIGATION, REPORTING, RESOLUTION AND COMMUNICATION (“Investigations should be designed to discover the full nature and extent of the fraudulent activity, not just the event that may have initiated the investigation.”).

161. *Id.* (“Management should consider whether the investigator or management reaches a conclusion of fraud, or whether the company refers the facts to outside authorities for their conclusion. A judgment that fraud has occurred may, in some jurisdictions, only be made by law enforcement or judicial authorities.”); see also THE INSTITUTE OF INTERNAL AUDITORS, PRACTICE ADVISORY 2440-3, COMMUNICATING SENSITIVE INFORMATION WITHIN AND OUTSIDE THE CHAIN OF COMMAND (providing guidance to internal auditors regarding when to share information with law enforcement authorities).

162. Damon Darlin, *Report Shows H.P. Sought Expert to Help Find Leak*, N.Y. TIMES, Oct. 3, 2006, at C2.

163. Kristen Hays, *Vinson & Elkins Lawyer Says Firm Investigated Enron Complaints*, ASSOCIATED PRESS, Apr. 6, 2006, available at <http://www.law.com/jsp/article.jsp?id=1144228261326>.

164. See, e.g., *Republican Mountain Silver Mines v. Brown*, 58 F. 644 (8th Cir. 1893). The *Brown* court noted that:

[A] court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in case of a similar

in recent decades, corporations have also partially supplanted legislative bodies, the police function, and the courts.¹⁶⁵

Corporations have gradually supplanted court systems in several respects. They use arbitration and mediation clauses in contracts that require parties to place their disputes before third parties rather than the court system. Studies found that between 1993 and 2003, international arbitration proceedings more than doubled.¹⁶⁶ A 2006 study by Price Waterhouse Coopers, in conjunction with the Queen Mary University of London School of International Arbitration, found that 73% of surveyed corporations prefer to use international arbitration to resolve cross-border disputes.¹⁶⁷ The use of arbitration “is a factor in transforming private contract practices into authoritative law for the business community.”¹⁶⁸

Corporations also use grievance clauses in employee contracts to control internal disputes, requiring employees to file and pursue their complaints through internal corporate processes, rather than seek redress from the courts.¹⁶⁹ Thus, while we typically think of resolution of disputes as a core function of the judiciary, it is certainly not the exclusive province of government.¹⁷⁰ Corporations tend to favor

controversy arising between the members of an ordinary partnership. 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

Id. at 647.

165. See generally David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 L. & SOC'Y REV. 585 (1996) (examining the restructuring of policing in developed democracies); PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR (Gary W. Bowman et al. eds., 1992) (collecting and publishing essays on the partnership between the justice system and the private sector).

166. TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH app. 1, at 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

167. *Executive Summary*, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICE 2006 (Price Waterhouse Coopers/Univ. of London Sch. of Int'l Arbitration, London), May 2006, at 2, available at [http://www.pwc.com/extweb/pwcpublishings.nsf/docid/B6C01BC8008DD57680257171003177F0/\\$file/pwc_IA_Study.pdf](http://www.pwc.com/extweb/pwcpublishings.nsf/docid/B6C01BC8008DD57680257171003177F0/$file/pwc_IA_Study.pdf).

168. Schachter, *supra* note 2, at 12.

169. See generally Cecilia H. Morgan, *Employment Dispute Resolution Processes 2004*, 11 TEX. WESLEYAN L. REV. 31 (2004); CPR INSTITUTE FOR DISPUTE RESOLUTION, INC., HOW COMPANIES MANAGE EMPLOYMENT DISPUTES: A COMPENDIUM OF LEADING CORPORATE EMPLOYMENT PROGRAMS 43 (2002). Following the United States Supreme Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), employers have been requiring that employees agree to arbitrate employment disputes as a condition of employment. The Supreme Court stated in *Gilmer* that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” *Id.* at 33; see also Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 222 (2006) (noting that although employees may be bound to arbitrate, the federal government is likely exempt from those arbitration provisions); Kenneth F. Dunham, *Great Gilmer's Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases*, 29 AM. J. TRIAL ADVOC. 303, 324-25 (2005) (discussing how businesses profit from the fact that statutory rights are poorly protected in employment discrimination cases).

170. See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149, 161-62 (1978) (noting that the settlement of disputes between private parties is not an exclusive governmental function).

arbitration of employee grievances because, as a rule, both costs of litigation and size of judgments are lower.¹⁷¹

Additionally, companies are increasingly utilizing “machine rule” as a means of partially replacing enforcement of contracts by the courts. For example, software code can automatically enforce termination provisions in license agreements, without the need for lawyers and judges to become involved.¹⁷² Machine rule is arguably a perfected replacement for the court systems because alternative dispute provisions are inchoate enforcement mechanisms in that they are not self-enforcing. Thus, if one party does not comply with the alternative dispute resolution provision, the other party must seek an injunction to force compliance with the provision. Where machine rule supplants court enforcement, it is unnecessary for the party seeking enforcement of the termination provision in an agreement to seek the assistance of the courts.

Despite these perceived efficiencies, the devolution of contract enforcement mechanisms to private enterprise raises important questions about the nature of contracts themselves. The *Restatement (Second) of Contracts* defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which *the law in some way recognizes as a duty.*”¹⁷³ Professor Farnsworth describes a contract as “a *promise*, or a set of promises, that the law will *enforce* or at least recognize in some way.”¹⁷⁴ The natural question, then, is whether private agreements are themselves law. If an agreement is not a contract unless the law will enforce it, are self-enforcing private agreements even contracts?

In a similar vein, the easy transfer of global capital across national boundaries has facilitated the international development of a body of business law known as the *lex mercatoria*. In a symposium at Tulane Law School in 1999, Keith Highet posed the question, “Has the *lex mercatoria* replaced national laws in the interpretation of transnational or international mixed contracts?”¹⁷⁵ Highet posited that “[t]he only way in which a contract can exist independently of a legal system is to consider it as a voluntary compact operating by virtue of the collective will of the parties The force of the obligation in a contract comes from the force of the legal system that creates the obligation.”¹⁷⁶ Others have viewed the *lex mercatoria* as the “lawyers’ law” that may not originate from legislative or judicial act, but that still operates to “transform[] private contract practices into authoritative law for the business community.”¹⁷⁷

171. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 E.M.P.L. RTS. & E.M.P.L. POL’Y J. 189 (1997).

172. See generally Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002); Margaret Jane Radin, *Regime Change in Intellectual Property: Superseding the Law of the State with the “Law” of the Firm*, 1 U. OTTAWA L. & TECH. J. 173 (2003).

173. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) (emphasis added).

174. E. ALLAN FARNSWORTH, CONTRACTS 3 (1982).

175. Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 613 (1989) (citing Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 577 (1988)).

176. *Id.* at 614.

177. Schachter, *supra* note 2, at 12.

A recent article by Larry Catá Backer explores Wal-Mart's role as a global legislator.¹⁷⁸ Professor Backer argues that "old rule-making monopolies have been weakened and powerful non-state actors [have] become free to order their relations, subject ultimately only to their stakeholders."¹⁷⁹ Wal-Mart's impact on other companies, through its power in the global supply chain, has enabled it to create private international law through its standardized vendor agreements and other activities. According to Professor Backer, "one company, even one very large and influential company, does not a system [of private laws] make. But Wal-Mart is pointing the way to the establishment of a new reality, a reality that is not waiting for theory for justification, or permission for implementation."¹⁸⁰

A corporation may "legislate" in other nations by importing its chartering nation's laws, which often have extraterritorial effect. For example, both the Foreign Corrupt Practices Act¹⁸¹ and the Sarbanes-Oxley Act,¹⁸² passed by the United States Congress, have extraterritorial application.¹⁸³ As companies establish operations in other countries, they export the laws of their chartering nations to the host country. While the laws from a company's chartering country apply only to the subsidiary, application of these laws to foreign companies can have a normative influence within the host country as employees transition into and out of the subsidiary and as local companies emulate business practices of the multinational.

Corporations regulate their employees abroad by establishing policies to govern employees' behavior. These corporate policies include ethics, operating, and social responsibility guidelines.¹⁸⁴ When multinational corporations impose their home country's moral and legal concepts on their foreign subsidiaries, these concepts do not always translate well across cultures. For example, as U.S. companies invested in Germany, it became clear that hotlines to facilitate anonymous reporting of policy violations were eschewed in Germany.¹⁸⁵ In contrast, in many instances, the multinational corporation's policies and guidelines could potentially complement the host

178. Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2007).

179. *Id.* at 1748.

180. *Id.* at 1750.

181. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.).

182. Pub. L. No. 107-204, 116 Stat. 745 (2002).

183. See Clyde Stoltenberg et al., *A Comparative Analysis of Post-Sarbanes-Oxley Corporate Governance Developments in the U.S. and European Union: The Impact of Tensions Created by Extraterritorial Application of Section 404*, 53 AM. J. COMP. L. 457, 458-74 (2005). The extraterritorial application of Sarbanes-Oxley is limited, however. Certain provisions apply abroad, while others do not. See *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 16 (1st Cir. 2006) (holding that the civil whistleblower protection provision of the Sarbanes-Oxley Act does not have extraterritorial application). Some extraterritorial application of U.S. securities laws is appropriate and necessary to protect U.S. investors. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 416, cmt. a (1987) (the reach and application of federal securities laws depends upon their reasonableness and linkage to the protection of American investors and capital markets).

184. See generally Backer, *supra* note 73 (considering the ramifications of current efforts to internationalize regulation of corporate social responsibility).

185. Jose A. Tabuena & Chris Mondini, *Internal Reporting and Whistleblowing*, in BUSINESS AGAINST CORRUPTION, IMPLEMENTATION OF THE 10TH UNITED NATIONS GLOBAL COMPACT PRINCIPLE AGAINST CORRUPTION 92 (2006) (noting both that recent legal decisions and cultural differences have made the establishment of anonymous employee whistle-blowing in Germany difficult).

country's laws.¹⁸⁶ This "importation" of policies and guidelines can be important to developing countries, whose regulatory agencies lack expertise or financial resources.

Admittedly, however, despite these activities by corporations, the discipline that a corporation can impose on an employee differs greatly from the discipline that a state can impose on its citizens. Corporations are constrained from regulating their employees in ways that nations are not. While a corporation typically communicates that a violation of company policy may result in disciplinary action up to and including termination, the ultimate sanction is limited to firing the employee. A state, however, can discipline a citizen through its penal system, using fines, incarceration and even, in some instances, capital punishment.

Allowing private companies to engage in regulatory actions is yet another way in which the police function of states has been transferred to private enterprise.¹⁸⁷ Often, we see examples of self-regulation used to preempt governmental regulation in certain areas.¹⁸⁸ In other instances, we see the government ceding regulatory rights to private entities.¹⁸⁹ Of course, these private entities have no obligation to engage in the type of "notice-and-comment" rulemaking expected of true regulatory agencies.¹⁹⁰

F. Monetary Policy

Corporations often participate in—and sometimes make—policies at the national level. This is true in many areas, including monetary policy. Private corporations

186. See Erik Berglof & Stijn Claessens, *Enforcement and Corporate Governance* 19-24 (World Bank Policy Research, Working Paper No. 3409, 2004), available at http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityD=000012009_20041006152130.

187. See generally Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L. Q. 165 (1989) (discussing the constitutionality of regulation by "private agencies"); Robert W. Hamilton, *Prospects for the Nongovernmental Development of Regulatory Standards*, 32 AM. U. L. REV. 455 (1983) (examining "the extent to which the social value judgments reflected in regulatory standards may be made by non-governmental agencies and accepted by the governmental agency rather than be created by the governmental agency through its own internal processes"); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990) (examining the constitutional questions posed by congressional delegation of administrative power to state officials, private officials, and private groups). So long as the regulatory work is not exclusively reserved to the state, private entities have been allowed to act. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 992 (1982) (private nursing home could decide whether to discharge or transfer Medicaid patients to a lower level of care without violating due process).

188. Common examples of self-regulation include the American Bar Association's accreditation of law schools in the United States, *The American Bar Association's Role in the Law School Accreditation Process: A Report of the ABA Section of Legal Education and Admissions to the Bar*, 32 J. LEGAL EDUC. 195 (1982), the Financial Accounting Standards Board's setting of "Generally Accepted Accounting Principles" and "Generally Accepted Auditing Standards," James F. Strother, *The Establishment of Generally Accepted Auditing Standards*, 28 VAND. L. REV. 201 (1975), and the Better Business Bureau, Abramson, *supra* note 187, at n.6. See also Douglas H. Ginsburg, *Administration Efforts to Enhance the Opportunities for Self-Regulation*, 35 LAB. L.J. 731 (1984).

189. See Berglof & Claessens, *supra* note 186, at 22-23.

190. E.g., 5 U.S.C. § 553 (2000) (providing that general notice of a proposed rule must be published in the Federal Register and the agency must give the interested parties opportunity to participate in the rule-making).

influence monetary policy in significant ways, both in their home nations and in host countries abroad.¹⁹¹ In some instances, even today, private corporations may even be viewed as creating currency, a function normally reserved to states. Originally, the only involvement of the state with respect to money was the minting of coins.¹⁹² The state theory of money gained traction in the early part of the twentieth century with Georg Knapp's book on the subject.¹⁹³ Knapp, who greatly influenced John Maynard Keynes,¹⁹⁴ viewed the state as "the sole creator and guarantor of money."¹⁹⁵

Glyn Davies wrote that Knapp's view "carries the state theory of money to an absurd extreme."¹⁹⁶ In fact, the limitations of the state's role can be seen from the fact that some of the earliest corporations minted coins.¹⁹⁷ Davies noted, "right from the inception of money, from ancient down to modern times, the state has a powerful, though not omnipotent, role to play in the development of money. Yet neither ancient money nor . . . even the Bank of England, is a mere creature of the state."¹⁹⁸ The modern view of monetary policy views the market, rather than the state, as the supreme authority, although there are limits to this view.¹⁹⁹ Professor Ludwig von Mises explained that "[t]he concept of money as a creature of law and the state is clearly untenable. It is not justified by a single market phenomenon of the market. To ascribe to the state the power of dictating the laws of exchange, is to ignore the fundamental principles of money-using society."²⁰⁰

Because of the state's role in the creation of money, currency is useful only where a state's law applies.²⁰¹ Yet the easy transferability of capital in today's markets makes

191. Schachter, *supra* note 2, at 8-9 (citing Vincent Cable, *The Diminished Nation-State: A Study in the Loss of Economic Power*, 124(2) DAEDALUS 23, 27 (1995) ("The sheer scale of profit-seeking finance capital that can be mobilized in currency markets far exceeds what any government, or even governments acting in concert can put against it.")).

192. LUDWIG VON MISES, *THE THEORY OF MONEY AND CREDIT* 43 (H.E. Batson trans., Liberty Fund 1981) (1912).

193. GEORG FRIEDRICH KNAPP, *THE STATE THEORY OF MONEY* (Simon Publications 2003) (1905).

194. GLYN DAVIES, *A HISTORY OF MONEY FROM ANCIENT TIMES TO THE PRESENT DAY* 26 (3d ed. Univ. of Wales Press 2002) (1994) (noting that Knapp's work was translated into English through the efforts of Keynes); *see also* JOHN MAYNARD KEYNES, *MONETARY REFORM* (1923).

195. DAVIES, *supra* note 194, at 26. Knapp's explanation of the state's role in the creation of money is as follows:

The State as guardian of the law declares that the property of being the means of payment should be inherent in certain stamped pieces as such, and not in the material of the pieces The State, not the jurist, creates [money].

In all these cases the impulse comes from the political action of the State, jurisprudence only drawing its conclusions from the State's action as it needs them.

KNAPP, *supra* note 193, at 40.

196. DAVIES, *supra* note 194, at 26.

197. *See* Global Financial Data, *supra* note 14; Greenwood, *supra* note 9, at 3 (citing M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 95-96 (1926)); *see generally* DAVIES, *supra* note 194. Privately minted coins whose primary purpose is the collectibles market are distinguishable from privately minted coins that were actually used as currency. For the purposes of this Article, only privately minted coins used as currency are referenced.

198. DAVIES, *supra* note 194, at 26.

199. *Id.*

200. VON MISES, *supra* note 192, at 41.

201. KNAPP, *supra* note 193, at 40-41.

it difficult for nations to apply exchange controls.²⁰² Further, as governments court foreign investment, they often do so by deregulating, creating a “race to the bottom.”²⁰³

Establishment of a currency and payment system is often recognized as a characteristic of a sovereign nation. While the earliest forms of currency moaned and brayed, today, most of us carry several denominations of government-issued paper money in our wallets. We also use debit cards, credit cards, and gift cards to engage in consumer transactions. Futurists have been predicting for the past decade or more that a cashless society is in the offing. This cashless society will be the result of the privatization of the issuance of currency. This privatization of currency has several effects.

Economists define “seignorage” as “[t]he amount of real purchasing power that [a] government can extract from the public by printing money.”²⁰⁴ Seignorage can include the interest-free use of the money by a government, because it may immediately exchange the currency for goods or services.²⁰⁵ When a country replaces its domestic currency with the U.S. dollar, a process known as “dollarization,”²⁰⁶ it in essence transfers its stream of seignorage revenue to the U.S. central bank.²⁰⁷ When the Euro was created, a seignorage sharing agreement was necessary among the countries comprising the European Union to replace the seignorage revenue associated with fiat money.²⁰⁸

Just as dollarization affects seignorage revenue, so too does electronic money.²⁰⁹ Electronic money can take several forms, including stored value cards, more commonly referred to as gift cards. Many businesses that deal directly with consumers

202. Schachter, *supra* note 2, at 8-9.

203. *Id.* at 9 (citing Korten, *supra* note 141, at 173).

204. ALEX CUKIERMAN, CENTRAL BANK STRATEGY, CREDIBILITY, AND INDEPENDENCE: THEORY AND EVIDENCE 18 (4th ed. 1998).

205. Joydeep Bhattacharya & Joseph H. Haslag, *Central Bank Responsibility, Seigniorage, and Welfare* 1-2 (Fed. Reserve Bank of Dallas, Working Paper No. 9909, 1999), available at <http://www.dallasfed.org/research/papers/1999/wp9909.pdf> (discussing the average reliance on seignorage income by sixty-nine countries from 1965 through 1994, as measured by the ratio of seignorage income to federal expenditures over the same period).

206. See Neil Reynolds, *Dollar Woes? A Monetary Union Solution*, GLOBE AND MAIL, Nov. 16, 2007, at B2 (noting that countries such as Ecuador, El Salvador, Panama, East Timor, and Turks and Caicos have all undertaken “dollarization” and adopted U.S. currency as their national currency).

207. Stephanie Schmitt-Grohé & Martin Uribe, *Dollarization and Seignorage: How Much is at Stake?* 1 (Univ. of Pa. Dep’t of Econ. Working Paper, 1999), available at <http://www.econ.upenn.edu/~uribe/seignorage.pdf#search=%22%22replace%20its%20domestic%20currency%22%22> (discussing the loss of seignorage revenue from dollarization and the lack of seignorage sharing arrangements between central banks).

208. For a discussion of the Euro’s impact on capital markets and the various European Union documents affecting the Euro, see Rosa Giovanna Barresi, *The Impact of Monetary Union and the Euro on European Capital Markets: What May Be Achieved in Capital Market Integration*, 28 FORDHAM INT’L L. J. 1257 (2005). Other types of monetary agreements among nations are created for other purposes. See David Stasavage & Dominique Guillaume, *When are Monetary Commitments Credible? Parallel Agreements and the Sustainability of Currency Unions*, 32 B.J. POL. S. 119, 125 (2002) (“Governments which enter into monetary agreements often have agreements with other member states in the domains of trade, finance, aid or security.”); see generally Lisa L. Martin, *Heterogeneity, Linkage and Commons Problems*, 6 J. THEORETICAL POL. 473 (1994) (providing theoretical framework for, and examples of, multi-state collaborative agreements).

209. See W.C. Boeschoten & G.E. Hebbink, *Electronic Money, Currency Demand and Seignorage Loss in the G10 Countries* (De Nederlandsche Bank, DNB Staff Reports No. 1, 1996), available at http://www.dnb.nl/dnb/home/file/sr001_tcm46-146796.pdf.

issue stored value cards that can be used by the holder to redeem goods or services from the issuer or from other businesses that have contracted with the issuer. During 2006, gift cards in the United States represented a total stored value of almost \$25 billion.²¹⁰ These stored value cards affect currency in circulation because they reduce the necessary circulation of notes and coins.²¹¹ Debit transactions are another form of electronic currency and have a similar effect. Debit transactions increased from 8.3 billion transactions in 2000 to 15.6 billion in 2003.²¹² According to the Federal Reserve, debit cards are “used for small-value payments more commonly than other payment instruments except electronic benefits transfers and, perhaps, cash.”²¹³ At some point, debit and credit cards may replace lower value denominations, and perhaps paper checks, all of which may eventually become obsolete.²¹⁴ Finally, other forms of electronic transactions, such as PayPal or similar Internet payment mechanisms may also have the effect of reducing seignorage revenue that has typically been available to governments.²¹⁵

As these types of electronic payments become more common, private enterprise is affecting monetary policy. It is issuing private money, which substitutes for

210. During the 2006 holiday season, the National Retail Federation reported that “[t]he fourth annual National Retail Federation (NRF) Gift Card Survey, conducted by BIGresearch, found that gift card sales will total \$24.81 billion this holiday season, an impressive \$6 billion increase over 2005 when gift card sales hit \$18.48 billion” and estimated that the average consumer would spend more than \$116 on gift cards during the 2006 holiday season. Press Release, National Retail Federation, Holiday Gift Card Sales Reach All-Time High, According to NRF (Nov. 17, 2006), available at <http://www.nrf.com/content/default.asp?folder=press/release2006&file=2006giftcards.htm>. In the 2005 holiday season, the National Retail Federation estimated that “gift card sales [would total] \$18.48 billion” and that the average consumer would spend more than \$88 on gift cards during the 2005 holiday season. Press Release, National Retail Federation, Gift Card Sales to Surge Again This Holiday as Popularity Increases, According to NRF (Nov. 17, 2005), available at <http://www.nrf.com/content/default.asp?folder=press/release2005&file=giftcards1105.htm>.

211. Boeschoten & Hebbink, *supra* note 209, at 2.

212. Geoffrey R. Gerdes et al., *Trends in the Use of Payment Instruments in the United States*, FED. RES. BULL. (Federal Reserve, Washington, D.C.), Spring 2005, at 180, 183.

213. *Id.*; see also Press Release, American Banking Association, Cards Gain Share in Payments Mix (Feb. 8, 2006), available at <http://www.aba.com/Press+Room/020806cardsgainshare.htm> (“Eighty-three percent of consumers report having a debit card . . .”).

214. Boeschoten & Hebbink, *supra* note 209, at 3; see generally Gerdes et al., *supra* note 212, at 180 (noting that use of paper money is decreasing). We may just now be seeing the first wave of the cashless society. Snap, a crepe and bubble tea restaurant in Washington, D.C., announced recently that it had become a plastic-only establishment: cash is no longer accepted. *Morning Edition: Plastic Only: Cafe Refuses to Accept Cash* (National Public Radio broadcast Oct. 11, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6246139> (audio transcript). When the leaders of a large church noticed that giving was down, they concluded that members no longer carried much cash. The church installed giving kiosks in its foyer to allow church members to give by swiping their credit cards. Richard Fausset, *At Church, an 'ATM for Jesus,'* L.A. TIMES, Sept. 28, 2006, available at http://www.securegive.com/news_latimes_092806.html. Visa recently aired a delightfully choreographed commercial set in a deli that shows everything coming to a halt when one customer pays with cash.

215. See Press Release, eBay Inc., eBay Inc. Announces Second Quarter 2006 Financial Results (July 19, 2006), available at <http://investor.ebay.com/news/EBAY0719-204302.pdf> (noting that in the second quarter of 2006, the Total Payment Volume (TPV), or the dollar volume of payments initiated through the PayPal system, excluding the payment gateway business, was \$9 billion in the second quarter of 2006, a 37% increase from the \$6 billion reported in the same quarter a year earlier).

government fiat currency. The government loses the seignorage revenue that would have been associated with these amounts. In addition, reserve balances at the central bank may be affected by this substitution of electronic, privately issued money for fiat currency.²¹⁶

The discussion above centers on monetary policy issues associated with the issuance of electronic currency within the parent company's home nation or within the countries in which the parent company's subsidiaries operate. Nations that host the subsidiaries of multinational corporations face additional issues regarding repatriation of funds to the company's home country. Multinational corporations may be required to negotiate with the central bank regarding processes for and constraints on repatriation of funds to their home country, or even to their subsidiary in another country that essentially serves as the "bank" for the operations of the corporation in various other countries.

In addition to issues of seignorage and repatriation, private corporations can dramatically affect the international currency markets.²¹⁷ While there is an obvious impact associated with the export and import activity of private corporations, this impact can be seen most dramatically in connection with merger and acquisition transactions. For example, a corporation based in the United States that is engaged in an acquisition of several billion dollars in another country will most likely have to acquire that country's currency to complete the transaction and pay the target company's shareholders. If the acquiring company enters the market for Mexican pesos with an appetite for such a large volume of pesos, this buy-side pressure could artificially inflate the value of the peso for a brief period of time and artificially increase the costs of the acquisition by the acquirer. The government of the target's home country will prefer a stable currency market. National banking regulators may, therefore, work with the acquiring company to assure that acquisitions of the currency occur in a measured manner that is unlikely to artificially inflate the price of the currency.

G. Public Welfare

Citizens have traditionally looked to the government to provide utilities, roads, bridges, airports, telecommunications, clean drinking water, and sewage treatment. Historically, however, corporations have played a role in the provision of such services as well. Indeed, almost from the inception of the corporate form, corporations have been viewed as serving a public function.²¹⁸ One scholar has noted that:

216. Boeschoten & Hebbink, *supra* note 209, at 11 ("[R]eserve holdings [of central banks] may be reduced if electronic money is issued outside the banking system or if banks reduce their required or free reserves due to a lower demand for deposit money.").

217. Keith Feiler & Tim Schilling, *Strong Dollar, Weak Dollar: Foreign Exchange Rates and the U.S. Economy*, http://www.chicagofed.org/consumer_information/strong_dollar_weak_dollar.cfm (noting that corporations purchase foreign currencies incidental to doing business in those countries); *see also* VON MISES, *supra* note 192, at 284 ("Foreign-exchange control is today primarily a device for the virtual expropriation of foreign investments. It has destroyed the international capital and money market.").

218. ROBERT L. HEILBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA: 1600 TO THE PRESENT* 183 (2d ed. 1984) (noting that corporations were created to engage in "certain activities, such as charity work and other activities that were associated with the public welfare").

Although many corporate charters granted after 1800 for canals, turnpikes, and banks went to private business entrepreneurs, these corporations did not operate as private businesses in the same sense as unincorporated businesses. To encourage much needed improvements, the early special charters normally granted privileges in the form of monopolies or franchises, causing these early corporations to resemble more closely towns' public bodies rather than private competitive businesses.²¹⁹

While the reference to public institutions includes obvious things such as buildings, roads, and schools, some have argued that it also encompasses the establishment of a system for the creation of other types of entities, such as joint stock companies.²²⁰

As discussed previously, many today view the primary purpose of corporations as that of making money for their owners.²²¹ However, corporate social responsibility has developed into an area of concern for corporations and an area of study by scholars in the last few decades.²²² Corporate social responsibility focuses on the ways that corporations can help to address various social issues that are not necessarily issues of immediate impact to the corporations' business.²²³ Cynics have observed that even socially responsible actions by corporations are geared toward the corporate imperative of profit-making.²²⁴

Private corporations can provide social services using various legal structures and arrangements with the local government. Increasingly, private companies engage in these enterprises, particularly in developing nations where the tax base needed to finance these projects is limited. Specifically, many developing countries now look to private corporations "to provide basic infrastructure or utility services, such as highways, railways, water, sanitation, electricity, gas, and telecommunications."²²⁵

219. Susan P. Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 93 n.51 (1999).

220. Valentin Petkantchin, *Is The Wealth of Nations' Third Duty of the Sovereign Compatible with Laissez Fair?*, 20 J. OF LIBERTARIAN STUDIES 3, 9 (2006).

221. Friedman, *supra* note 18, at 32.

222. See, e.g., WILLIAM B. WERTHER JR. & DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT 3-13 (2006).

223. Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 261 n.1 (2001) (citing CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 111-18 (1975)); see also Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195 (1999) (noting that the law allows, and shareholders often desire, some level of unprofitable corporate philanthropy).

224. Michael Lewis, *The Socially Irresponsible Investor*, N.Y. TIMES MAGAZINE, June 6, 2004, at 68 ("Corporate social responsibility, as taught in business schools, is apparently all about using your goodness to make more money."). Henry Ford is credited with stating, in an attempt to explain why he paid such high wages to employees, "I do not believe that we should make such awful profits on our cars. A reasonable profit is right, but not too much." Richard Eriksson, *Notes on Chapter Two of the Corporation by Joel Bakan: Business as Usual*, URBAN VANCOUVER, May 12, 2004, available at <http://www.urbanvancouver.com/node/269>; see also *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (determining director liability for corporate action to reduce profits). As laudable as Ford's statement sounds, Ford's motive in paying high wages may have been as much to avoid paying profits out in the form of dividends to investors like the Dodge brothers, who were also his competitors.

225. José A. Gómez-Ibáñez, Dominique Lorrain & Meg Osius, *The Future of Private Infrastructure 2* (Taubman Ctr. for State and Local Gov't, Kennedy Sch. of Gov't, Harvard Univ., Working Paper, 2004), available at http://www.ksg.harvard.edu/taubmancenter/pdfs/working_papers/gomezibanez_04_infrastructure.pdf#search=%22the%20future%20of%20private%20infrastructure%22%22.

Some private infrastructure projects have succeeded, but others have failed spectacularly.²²⁶ The models for these projects are varied, with private companies sometimes assuming management of a government-owned project or leasing the underlying assets. In other instances, the private company may finance the project and assume all risk, just as with other commercial enterprises.²²⁷

The U.S. government has also used corporations to assist in disaster relief and international public relations. For example, after the 2005 earthquake in Pakistan, several American CEOs traveled there with Karen Hughes, Bush's Under Secretary for Public Diplomacy and Public Affairs, to assist in raising funds for earthquake relief.²²⁸ Corporations have also engaged in disaster relief *sua sponte*. In connection with Hurricane Katrina, some commentators jokingly suggested that the United States Federal Emergency Management Agency could learn from Wal-Mart's logistical system.²²⁹ Home Depot and Federal Express were also lauded as examples of organizations with excellent disaster preparedness response plans.²³⁰ Recently, the Business Roundtable launched a new web site dedicated to the coordination of corporate disaster response.²³¹ These examples prove that corporations can provide assistance, such as logistical services and supplies, and coordination of economic resources, in ways that have historically been reserved to governments.

IV. CONCLUSION

The implications of the nation-state metaphor as a way of viewing corporations are significant. To the extent that the transformation continues, the power of the vote in a democratic society may be eroded by the power of votes purchased through share ownership and the roles that our elected officials play may become less important than the roles played by corporate executives. Our security will become ever more

226. *Id.* at 2-3.

227. To finance these public works, the state taxes its citizens. We often think of a primary characteristic of government as the right to tax citizens. Corporations certainly do not have rights to tax individuals, but they do act as agents for government in collecting taxes. When I receive my paycheck from my employer, it shows the amount of taxes withheld in several areas. My employer is acting as the agent for the government in withholding those taxes and paying them over to the government on my behalf. Similarly, corporations collect taxes at the cash register and remit those taxes to state and local authorities. In addition, the legal obligations of corporations to escheat to the state abandoned property can be viewed as a way in which corporations collect taxes on behalf of the government.

228. Neil King Jr., *Goodwill Hunting: Trying to Turn Its Image Around, U.S. Puts Top CEOs Out Front; State Department's Ms. Hughes Rallies Companies to Play Bigger Role in Diplomacy; Mr. Lane Surveys a Mud Slide*, WALL ST. J., Feb. 17, 2006, at A1 (noting that CEOs of Pfizer, UPS, and Xerox made the trip to Pakistan to burnish the U.S. image, and that "[p]artly at the behest of Ms. Hughes and the White House, but also prodded by their own worries, U.S. companies are jumping into the type of overseas public diplomacy long shouldered by the federal government").

229. After Hurricane Katrina, the cover of *Fortune* blared "Government Broke Down. Business Stepped Up." Wal-Mart, Home Depot, and FedEx were lauded as examples of good corporate citizens.

230. Bill Steigerwald, *Government Can Take Lesson from Wal-Mart*, PITTSBURGH TRIBUNE REVIEW, Oct. 14, 2005, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_383909.html.

231. Press Release, Business Roundtable, Business Roundtable Launches New Web Site Dedicated to Disaster Response (Oct. 12, 2006), available at <http://www.businessroundtable.org/newsroom/Document.aspx?q=5916BF807822B0F1ADD418622FB51711FCF50C8>. The goal of the Business Roundtable is to leverage "corporate resources to create a more effective response to natural disasters in the United States and abroad." *Id.*

dependent on the power and security of the world's largest corporations. Personal identity will continue its shift from national identity and regional identity to corporate identity. Our legal matters may be brought before private judges and arbitrators, or handled through machine rule. And even our wallets are affected, as we need to carry very little cash issued by state treasuries.

Although some transference of sovereign powers to corporations is occurring, the implications are not all negative. After all, corporations, with their profit-maximizing motives, use economic resources efficiently. Standards of living are high in countries with vibrant capital markets and laws promoting entrepreneurship.

The metaphor of the nation-state provides one more way for scholars to analyze the activities and powers of corporations. Rather than looking at the balance of power within corporations, as do the director-primacy and shareholder-primacy models, this metaphor provides a way to view corporations as participants in broader governance processes such as foreign relations, adjudication, and law making.