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The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations

Philip J. Stern\*

CONTENTS

INTRODUCTION .....423

I. COMPANY AS MERCHANT.....425

II. COMPANY AS SOVEREIGN .....433

III. COMPANY AS INTERNATIONAL ACTOR.....440

CONCLUSIONS? .....444

INTRODUCTION

The English East India Company was first chartered in 1600, endured until the late nineteenth century, and, in a clever act of corporate resurrection, has even recently returned as a global, upmarket retail outlet selling fine foods and commemorative coins.<sup>1</sup> It has also endured in the popular imagination and culture, churning out heroes and villains alike in film, television, and video games.<sup>2</sup> The script writer for a forthcoming BBC miniseries, in which the East India Company stars as the prime antagonist, even noted recently that the Company was like “the CIA, the

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1. *East India Company Returns After 135-Year Absence*, BBC (Aug. 13, 2010), <http://www.bbc.com/news/world-south-asia-10971109>; see also THE EAST INDIA COMPANY, <http://www.theeastindiacompany.com> (last visited Dec. 23, 2015).

2. *E.g.*, BEYOND THE MASK (Burns Family Studios 2015); PIRATES OF THE CARIBBEAN: AT WORLD’S END (Walt Disney Pictures 2007); EAST INDIA COMPANY (Nitro Games 2009).

NSA, and the biggest, baddest multinational corporation on earth” wrapped into one corporation.<sup>3</sup>

All of this attention of late to one of the largest and most enduring corporations of its time, which managed a commercial and political system separated by half a world at upwards of a year and half’s distance, is perhaps unsurprising given the great legal, political, and economic conundrums surrounding the modern multinational corporation, from questions about global management to controversial issues such as tax inversions, monopoly, state-owned corporations, as well as the corporate person’s rights to free speech, religion, and so on.<sup>4</sup> However, from outlandish film productions to the most sober of scholarship, the connections between the Company’s past and our present seem to have become all things to all people, stretched almost to the point of breaking.

Though it would be impossible to be exhaustive, this Article nonetheless seeks to outline the various ways in which the East India Company’s legacy has been drawn upon in a range of fields, but especially legal and business scholarship, for a wide range of purposes. In so doing, it proposes that the sheer diversity of uses to which the Company’s history has been put, as well as the lack of any agreement about the meaning and nature of such comparisons, might suggest that the lessons the East India Company can offer to the financial, commercial, and organizational history of the modern corporation, while inherently interesting and heuristically instructive, must necessarily be limited, cautionary, and entertained at one’s own risk. It is not that situating the East India Company either as part of a genealogy of the present or as a comparative model for contemporary business organization or practice is in itself problematic. Instead, the issues arise from the central premise upon which many such perspectives have been based: namely, that the East India Company was, fundamentally and primarily, a commercial body. Attempts to situate the “lessons” of the early Company squarely within the realm of business history and the history of capitalism may thus miss the larger significance of the Company, both in its time and for contemporary concerns. Like other corporations engaged in trade and colonization, the East India Company was a corporate body that ideologically and institutionally merged the concerns of commerce with the prerogatives of governance. As such, it

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3. Anita Singh & Jasper Copping, *BBC to Break ‘Taboo’ with ‘Inaccurate’ Portrayal of East India Company*, TELEGRAPH (Apr. 4, 2014), <http://www.telegraph.co.uk/culture/tvandradio/bbc/10743407/BBC-to-break-Taboo-with-inaccurate-portrayal-of-East-India-Company.html>.

4. For just a few media treatments, see, for example, *The Company That Ruled the Waves*, ECONOMIST, Dec. 17, 2011, at 109; William Dalrymple, *The East India Company: The Original Corporate Raiders*, GUARDIAN (Mar. 4, 2015, 12:59 AM), [http://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders?CMP=share\\_btn\\_link](http://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders?CMP=share_btn_link).

was no “mere merchant,” but rather blurred the lines between private and public and challenged the reach of municipal law and the spatial dimensions of claims to jurisdiction and sovereignty.<sup>5</sup>

With this premise in mind, after examining the various ways in which the East India Company has been regarded within the realm of business history, this Article proceeds by reflecting on scholarship that instead suggests the East India Company might better serve our contemporary concerns if we consider the assorted and interchangeable roles that multinational corporations played in the early modern period as well as in the world today: as mercantile firms, as political agents, as sovereign bodies, and as international actors. It then concludes, prospectively and with some hesitation, that the Company’s role as a transnational legal actor may be the best way to “think with” its history, illuminating the long historical tradition of corporations that possessed legal and moral personalities that transcended their relationships to national and territorial states. In other words, if the East India Company offers us a plausible argument for our present, it seems more likely to be found not in the realm of commerce but in the world of politics, and in particular, in international law.

#### I. COMPANY AS MERCHANT

Chartered on New Year’s Eve, 1600, the English East India Company was neither the first nor the last of the corporate bodies that would shepherd the expansion of Elizabethan and Jacobean English trade and plantation. However, its subsequent history has garnered it to some extent an outsized reputation as an institutional innovation. Having become remarkably profitable in the seventeenth century, it was also remarkably controversial, standing across the century at the center of major debates regarding overseas trade and commerce.<sup>6</sup> After 1709, the Company was a pillar of public finance, its stock permanently grafted onto the national debt of the newly formed British military-fiscal state.<sup>7</sup> Following the Battle of Plassey in 1757 and the assumption of the Mughal office of *diwan*, revenue collector, in 1765, until the mid-nineteenth century, the Compa-

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5. I have explored this argument much more extensively elsewhere. See generally PHILIP J. STERN, *THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA* (2011).

6. WILLIAM J. BARBER, *BRITISH ECONOMIC THOUGHT AND INDIA, 1600–1858: A STUDY IN THE HISTORY OF DEVELOPMENT ECONOMICS* ch. 3 (1975).

7. See RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844*, at 39–59 (2000). See generally JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783* (1989); BRUCE G. CARRUTHERS, *CITY OF CAPITAL: POLITICS AND MARKETS IN THE ENGLISH FINANCIAL REVOLUTION* (1999).

ny expanded outside of its city-colonies of Madras, Bombay, and Calcutta into a territorial power that formed the foundations for the British Empire in India.<sup>8</sup>

In many ways, this teleology as an imperial power has done a great deal over the past few centuries to interest historians, particularly because against the backdrop of the rise of the modern state in the nineteenth and twentieth centuries, it appeared to be such a curiosity: a company that had become an empire. At the same time, interest in its early development if anything has surged over the last several years, as scholarship, politics, and public debate try to make sense of the difficult-to-categorize role of multinational corporations in an increasingly globalized world.<sup>9</sup> While the lion's share of the historiography on the East India Company painstakingly treats its past in its own context and on its own terms, there have been many who have turned to it—with varying degrees of nuance and specificity—either as exemplar or origin story of the modern corporation and harbinger of something to come. Its larger-than-life reputation leads to it being frequently cited in superlative: for example, as the “first commercial corporation,”<sup>10</sup> the “first UK Corporation to operate for a profit”<sup>11</sup> or the “original too-big-to-fail”<sup>12</sup> which was “saved by history’s first mega-bailout.”<sup>13</sup> For some, the East India Company reflects the triumphs of innovation, global management, and economies of scale represented by modern multinational capitalism: “the Google of its time,” according to Sanjiv Mehta, the owner of the newly resuscitated East India Company luxury goods store, “[a] great pioneering spirit . . . [with] impeccable pedigree and enviable heritage.”<sup>14</sup>

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8. The literature on the Company's expansion in the late eighteenth century, both in India and Britain, is extensive. See, e.g., H. V. BOWEN, *THE BUSINESS OF EMPIRE: THE EAST INDIA COMPANY AND IMPERIAL BRITAIN, 1756–1833* (2005); P.J. MARSHALL, *THE MAKING AND UNMAKING OF EMPIRES: BRITAIN, INDIA, AND AMERICA C. 1750–1783* (2005); ROBERT TRAVERS, *IDEOLOGY AND EMPIRE IN EIGHTEENTH-CENTURY INDIA: THE BRITISH IN BENGAL* (2007); JON E. WILSON, *THE DOMINATION OF STRANGERS: MODERN GOVERNANCE IN EASTERN INDIA, 1780–1835* (2008).

9. Philip J. Stern, *History and Historiography of the English East India Company: Past, Present, and Future!*, 7 *HIST. COMPASS* 1146, 1147–48 (2009).

10. REBECCA SPENCER, CORP. WATCH, *CORPORATE LAW AND STRUCTURES: EXPOSING THE ROOTS OF THE PROBLEM* 3, 6 (2004), available at [https://corporatewatch.org/sites/default/files/corporate\\_structures.pdf](https://corporatewatch.org/sites/default/files/corporate_structures.pdf).

11. Tony Lawson, *The Modern Corporation: The Site of a Mechanism (of Global Social Change) that Is Out-of-Control?*, in *GENERATIVE MECHANISMS TRANSFORMING THE SOCIAL ORDER* 205, 221 (Margaret S. Archer ed., 2015).

12. Nick Robins, *East India Company: The Original Too-Big-to-Fail Firm*, *BLOOMBERG VIEW* (Mar. 12, 2013, 11:48 AM), <http://www.bloombergvew.com/articles/2013-03-12/east-india-company-the-original-too-big-to-fail-firm>.

13. Dalrymple, *supra* note 4.

14. Rachel Rickard Straus, *East India Co Is Back, with Indian Owner*, *ECON. TIMES* (Aug. 16, 2010, 6:15 AM), [http://articles.economictimes.indiatimes.com/2010-08-16/news/27606204\\_1\\_](http://articles.economictimes.indiatimes.com/2010-08-16/news/27606204_1_)

Such sentiments are not merely confined to corporate branding. Even one of the most prolific of the early Company's historians suggested that,

In many ways, the East India Company was the direct ancestor of the modern giant business firm, handling a multitude of trading products and operating in an international setting. . . . The type of problems which the Company encountered in the routine organisation of its trade, as for example in maintaining an operational schedule, in decision-making under uncertainty, and in resolving conflict among its members and servants, bear a striking resemblance to the theoretical problems posed by the present-day large organisations.<sup>15</sup>

Indeed, the notion that the East India Company is somehow genetically related to the modern multinational is fairly common. To one interpreter, it was "the mother of the modern corporation, pioneering the modern joint stock model of financing, as well as the trans-national systems of business administration and governance."<sup>16</sup> To another, "[t]he modern corporation is . . . a child of the East India Company."<sup>17</sup> To another still, it was, along with others of its time, not the modern corporation's parent so much as its "embryo."<sup>18</sup>

The East India Company and its ilk have been identified as progenitors of everything from modern private military companies<sup>19</sup> to companies operating across borders in the European Union.<sup>20</sup> Indeed, the one feature that continues to stand out for modern interpreters about the East India Company is of course its supposedly international or transnational character. "The Hudson Bay and East India trading companies of Elizabethan and Georgian times," it appeared to the antitrust lawyer Sigmund

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brand-new-avatar-e-commerce.

15. K. N. CHAUDHURI, *THE TRADING WORLD OF ASIA AND THE ENGLISH EAST INDIA COMPANY: 1660–1760*, at 21 (1978).

16. Nick Robins, Lecture at the City of London Festival: This Imperious Company—The East India Company and the Modern Multinational (June 27, 2008), *available at* <http://www.gresham.ac.uk/lectures-and-events/this-imperious-company-the-east-india-company-and-the-modern-multinational>; *see also* NICK ROBINS, *THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL* (2006) [hereinafter ROBINS, CORPORATION].

17. Gurcharan Das, *Foreword* to TIRTHANKAR ROY, *THE EAST INDIA COMPANY: THE WORLD'S MOST POWERFUL CORPORATION*, at x–xi (2012).

18. LESLIE A. WHITE, *MODERN CAPITALIST CULTURE* 69 (Robert L. Carneiro et al. eds., 2008).

19. CHRISTOPHER KINSEY, *CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE MILITARY COMPANIES* 38–40 (2006).

20. Philippe Pellé, *Companies Crossing Borders Within Europe*, *UTRECHT L. REV.*, Mar. 2008, at 6.

Timberg in 1952, “have been replaced by modern international combines such as N.V. Phillips, Unilever, and International Telephone and Telegraph.”<sup>21</sup> The transhemispheric ambit of the East India Company seems to offer a starting point for understanding the globalization not only of capitalism, but also of the origins of global corporate law in a global context.<sup>22</sup>

Though often such observations remain broad and generic, and usually simply passing preludes to more modern-focused studies, there are a number of historians who point quite specifically to features of the Company that, as with its Dutch counterpart, experimented with and greatly resembled the core features of modern corporate organization: status as legal persons, transferable shares, forms of limited liability, and especially, the institutional separation of managers (directors) from owners (shareholders).<sup>23</sup> Indeed, at least one team of scholars has suggested it was the very conditions of commerce and colonization in Asia that produced the demand, over time, for innovations such as limited liability and legal personhood.<sup>24</sup> Others have emphasized less the structural similarity between early chartered companies and modern multinationals and focused more on a comparison of the complexity, volume, and management of transactions involved in coordinating the early modern Eurasian trade.<sup>25</sup> The Company has also been credited with laying the groundwork for modern global investment practices and law,<sup>26</sup> and even, by one literary critic, with the modern usage of the concept and language of “investment” itself.<sup>27</sup>

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21. Sigmund Timberg, *The Corporation as a Technique of International Administration*, 19 U. CHI. L. REV. 739, 740 (1952).

22. Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History or a Never-Ending Story?*, 86 WASH. L. REV. 475, 481–82 (2011).

23. See, e.g., ROBERT B. MARKS, *THE ORIGINS OF THE MODERN WORLD: FATE AND FORTUNE IN THE RISE OF THE WEST* 98 (2007); K. N. Chaudhuri, *The English East India Company in the 17th and 18th Centuries: A Pre-Modern Multinational Organization*, in COMPANIES AND TRADE: ESSAYS ON OVERSEAS TRADING COMPANIES DURING THE *ANCIEN RÉGIME* 29, 29–30, 41 (Leonard Blussé & Femme Gaastra eds., 1981); Winfried van den Muijsenbergh, *Corporate Governance: The Dutch Experience*, 16 TRANSNAT'L LAW. 63, 63–64 (2002). See generally Oscar Gelderblom, Abe de Jong & Joost Jonker, *The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602–1623*, 73 J. ECON. HIST. 1050 (2013).

24. Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form* 4–6, 9–24 (Amsterdam Ctr. for Law & Econ., Working Paper No. 2013-02, 2013).

25. See, e.g., Ann M. Carlos & Stephen Nicholas, “Giants of an Earlier Capitalism”: *The Chartered Companies as Modern Multinationals*, 62 BUS. HIST. REV. 398, 400–02 (1988).

26. KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* 30–41 (2013).

27. VALERIE FORMAN, *TRAGICOMIC REDEMPTIONS: GLOBAL ECONOMICS AND THE EARLY MODERN ENGLISH STAGE* 5 (2008). Forman refers to the immediate “loss” of making an investment followed by the “future accumulation” of that investment paying out eventually.

In some cases, the early modern East India Company has served as a convenient starting point for challenging modernist and American-centered narratives of the rise of the joint-stock corporation, and in particular the influential arguments associated with Alfred Chandler.<sup>28</sup> For example, Anderson, McCormick, and Tollison have argued that the East India Company was originally conceived as a prototypical multidivisional firm of the sort Chandler insisted emerged three centuries later in the U.S. in the 1920s; to them, it was only against a dysfunction of political economy—namely, monopoly—that such an organizational scheme was abandoned and somewhat forgotten.<sup>29</sup> Conversely, another business historian has suggested that it was not until the East India Company's later years, as it expanded in the early nineteenth century, that it came to reflect the schema set out by Chandler for defining the modern corporation, well after Anderson et al., but equally well before the technological and legal transformations of the “visible hand” that supposedly made the emergence of Chandler's modern corporation possible.<sup>30</sup>

Yet, just as the East India Company has served as evidence to pre-date Chandler's modern corporation, it has also allowed other historians to propose an entirely different genealogy of the Anglo-American corporation, one that bypasses the common explanation of its origin in the business practices of Italian city-states, such as double-entry bookkeeping. In this case, one finds a gradual evolutionary theory of the corporation in which the East India Company serves as a critical transition—even the “turning point”—between medieval forms like the guild and the regulated company, and the modern joint-stock company.<sup>31</sup> Indeed, both the English and Dutch Companies have been credited, subject to some disagreement, with the accounting practices (also elsewhere said to have originated in Renaissance Italy) that supposedly gave rise to modern bourgeois capitalism itself.<sup>32</sup>

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28. Carlos & Nicholas, *supra* note 25, at 402–03. On Chandler, see, among many other works, ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

29. Gary M. Anderson, Robert E. McCormick & Robert D. Tollison, *The Economic Organization of the English East India Company*, 4 J. ECON. BEHAV. & ORG. 221, 227–37 (1983).

30. See generally P. Bruce Buchan, *A Variation on the Origin and Characteristics of the Modern Corporation*, 12 CAN. J. ADMIN. SCI. 1 (1995).

31. M. Schmitthoff, *The Origin of the Joint-Stock Company*, 3 U. TORONTO L.J. 74, 88–96 (1939); CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 82 (2d ed. 2001).

32. WARWICK FUNNELL & JEFFREY ROBERTSON, *ACCOUNTING BY THE FIRST PUBLIC COMPANY: THE PURSUIT OF SUPREMACY* 6–11 (2014); Ciarán Ó hÓgartaigh, *Financial Accounting Practice*, in *THE ROUTLEDGE COMPANION TO ACCOUNTING HISTORY* 162, 164 (John Richard Edwards & Stephen P. Walker eds., 2008); R.A. Bryer, *The History of Accounting and the Transition to Capitalism in England. Part Two: Evidence*, 25 ACCT. ORGS. & SOC'Y 327, 347–69 (2000); Jeffrey Robert-



The assumption that the East India Company sired the modern corporation has opened it up to any number of examinations that suggest that it can and should be studied as an example to better understand modern business practices and structure. There are studies that look to the East India Company to better understand both the origin and structure of corporate management, such as boards of directors,<sup>33</sup> and others that use the Company to test modern theories of the firm, for example, by suggesting the East India Company was a modern joint-stock corporation that nonetheless emerged without a fully functioning and free secondary stock market.<sup>34</sup> Most common though seems to be the understanding of the Company as a case study in how multinational corporations might effectively reduce transaction costs or help find the Holy Grail of management studies, that is, a solution to the challenges hierarchical organizations face in overcoming the principal-agent problem especially in complex long-distance trade.<sup>35</sup> Yet, more recently, sociologist Emily Erikson has argued that the early Company's commercial networks reveal the converse lesson for modern organizations, suggesting instead that the East India Company's longevity and institutional efficiency came not from a strong top-down structure but rather a decentralized system that permitted, rather than restrained, independent action on the part of its "agents": ship captains, employees engaged in private trade, and others. Activity outside the Company's formal trade was, in this sense, not "a problem to be solved" but integral to the organization writ large.<sup>36</sup>

If the East India Company's successes have made it a model for some looking at contemporary business practices, its failures and excesses have also seemed to others to offer certain cautionary tales for today's modern multinationals or for modern capitalism itself.<sup>37</sup> In its most blunt form, such an argument proposes that the Company's supposed trans-

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son & Warwick Funnell, *The Dutch East-India Company and Accounting for Social Capital at the Dawn of Modern Capitalism 1602–1623*, 37 ACCT. ORGS. & SOC'Y 342, 343 (2012).

33. P. Bruce Buchan, *The Emergence of the Technostructure: Lessons from the East India Company, 1713–1836*, 41 J. MGMT. HIST. 105, 115 (2003); Franklin A. Gevurtz, *The European Origins and the Spread of the Corporate Board of Directors*, 33 STETSON L. REV. 925, 929–30 (2004).

34. Ron Harris, *Law, Finance and the First Corporations*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW 145, 159–62 (James J. Heckman et al. eds., 2010).

35. Carlos & Nicholas, *supra* note 25, at 406; Ann M. Carlos & Stephen Nicholas, *Theory and History: Seventeenth-Century Joint-Stock Chartered Trading Companies*, 56 J. ECON. HIST. 916, 921–23 (1996).

36. EMILY ERIKSON, BETWEEN MONOPOLY AND FREE TRADE: THE ENGLISH EAST INDIA COMPANY 1600–1757, at 18 (2014).

37. Amy Kazmin, *Empires Taken to Excess*, FIN. TIMES (Nov. 10, 2015, 5:04 AM), <http://www.ft.com/cms/s/2/14b0ff00-7d77-11e5-98fb-5a6d4728f74e.html#axzz3tW6Yadgc>.

formation from a commercial body into a territorial empire illuminates the natural consequences of the unchecked power of private enterprise and the importance of regulation.<sup>38</sup> Such warnings are not only in hindsight. Erika George, for example, has drawn comparisons between the “age of empire” and the “age of globalization,” seeing parallels in the sorts of critiques leveled by contemporaries at the East India Company—abuse of power, exploitation, corruption, ambiguities of public–private relationships—that resemble those aimed at transnational conglomerates like Wal-Mart.<sup>39</sup> Other historians suggest that its monopoly and participation in other commercial practices produced the first “consumer boycott” in the form of both anti-slave trade and anti-tea protests in the late eighteenth century.<sup>40</sup> Looser connections have been drawn between the critiques of the Company in both the late seventeenth and eighteenth centuries and the modern history of fraudulent financial reporting.<sup>41</sup>

Before one invests too much in this seemingly bull market—or perhaps bubble—in lessons to be learned from the East India Company for the modern corporation, it is worth acknowledging that for every such claim of origin or parallel, there is a counterargument or caution to be heard about taking such connections too far. Indeed, there is hardly any consensus on these supposed lessons. For some, the problem is that such an origin story does not go back far enough, instead locating the beginnings of the modern corporation as early as the Roman Empire.<sup>42</sup> For most critics, though, the problem is that any straightforward comparison ignores both the distinct nature of the early modern East India Company and the very specific historical context in which it was created and operated. More than three decades ago, Niels Steensgaard admonished those who indulged in the habit of seeing the English and Dutch East India Companies as ancestors of the modern corporation—indeed even as part of an evolutionary history of the corporation at all:

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38. See generally ROBINS, CORPORATION, *supra* note 16.

39. Erika R. George, *The Enterprise of Empire: Evolving Understandings of Corporate Identity and Responsibility*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 19, 44, 48 (Jena Martin & Karen E. Bravo eds., 2015); Erika R. George, *Incorporating Rights: Empire, Global Enterprise, and Global Justice*, 10 U. ST. THOMAS L.J. 917, 944–45 (2013).

40. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 27 (2003); Beth Stephens, *The Amoral of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 49 (2002).

41. ZABIHOLLAH REZAEI & RICHARD RILEY, FINANCIAL STATEMENT FRAUD: PREVENTION AND DETECTION 16 (2d ed. 2010).

42. Ulrike Malmendier, *Law and Finance “at the Origin,”* 47 J. ECON. LITERATURE 1076, 1076 (2009).

The purpose and function of [early modern chartered] companies may vary so widely that they sometimes seem to have nothing in common but the name. The assumption that the chartered companies may be placed in a chain of evolution linking the medieval forms of enterprise to the modern business corporation has further confused the issue. It should be stated emphatically that the chartered trading companies do not fit into such a linear concept, on the contrary the history of the company institution is rich in mutations and regressions. The companies were created in a unique encounter between political power and market oriented entrepreneurship; they were the result of dynamic improvisations and experiments, not the experience of generations.<sup>43</sup>

From this perspective, it is hardly clear that the East India Company in fact possessed the markers of modern corporateness that seem to link it to its successors, such as limited liability, freely tradable shares, and, most importantly, the somewhat open administrative process of incorporation that came only in the nineteenth century.<sup>44</sup> Furthermore, whether one sees the East India Company either as a shining exemplar of sophisticated global multinational management in the pre-electricity (let alone pre-internet) age or as harbinger of the fate of neoliberalism unbounded, the greatest conceptual difficulty is to reconcile this legacy as the first “modern” multinational with its equally powerful reputation as an emblem of a bygone age of state-sponsored monopolism and “mercantilist” policy.<sup>45</sup> Indeed, the East India Company, and the joint-stock company more generally, was Adam Smith’s prime example of precisely the sort of anachronistic and misguided forms of *ancien régime* capital organization that prevented economic growth and produced mismanagement and abuse, ranging from financial corruption to territorial conquest.<sup>46</sup> Thus, there emerges a great chasm between the East India Company and its later heirs if one considers that the Company’s most salient feature—a monopoly backed by a politically issued charter—no longer remains a

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43. Niels Steensgaard, *The Companies as a Specific Institution in the History of European Expansion*, in COMPANIES AND TRADE, *supra* note 23, at 245, 246–47.

44. Kenneth W. Dam, *Equity Markets, the Corporation, and Economic Development* 2–4 (John M. Olin Program in Law & Econ., Paper No. 280, 2006).

45. See, e.g., ROBERT B. EKELUND, JR. & ROBERT D. TOLLISON, *POLITICIZED ECONOMIES: MONARCHY, MONOPOLY, AND MERCANTILISM* (1997).

46. Sankar Muthu, *Adam Smith’s Critique of International Trading Companies: Theorizing “Globalization” in the Age of Enlightenment*, 36 POL. THEORY 185, 199 (2008); Gary M. Anderson & Robert D. Tollison, *Adam Smith’s Analysis of Joint-Stock Companies*, 90 J. POL. ECON. 1237, 1243–54 (1982).

normative feature of the modern corporation.<sup>47</sup> As Ron Harris has argued, it was in fact only the severing of the connection between monopoly and incorporation, not least through debates over the East India Company's trade between 1813 and 1833, which permitted the emergence of the modern form of joint-stock corporations.<sup>48</sup>

## II. COMPANY AS SOVEREIGN

The confusion and disagreement over the question of how and whether the English East India Company represented a development in the history of the corporation is instructive. It suggests not simply scholarly disagreement over the potential answers but perhaps the need to fundamentally reassess the premises of such a query: that is, the assumption that the English East India Company was solely or even primarily a commercial body in the first place. As John Micklethwait and Adrian Wooldridge point out in their breezy survey of the history of the modern company: "The East India Company was more than just a modern company in embryo," since it also maintained an army, territory, and a massive bureaucracy of "civil servants."<sup>49</sup> The Company combined the rights of private persons, such as to sue and be sued or contract debts, with features of public sovereign power, such as the prerogative to wage war and conduct diplomacy, govern over people and places, coin money, and so on. Perhaps most importantly, it maintained the rights to own and dispose of private property while also acting as a form of public government, especially abroad.<sup>50</sup> These two features became particularly intertwined through the seventeenth century; some among the East India Company leadership even regarded its English charters, as well as Mughal *farmans* and other Asian grants, as forms of property in themselves—thus enshrining public responsibility in a form of private right.<sup>51</sup>

This ambiguity in the nature and purpose of the Company also meant that its relationship with various juridical bodies was complex and inherently pluralistic. As a chartered body politic endowed with capacities of governance, the English East India Company was subject at various times to common law and equity courts, civil law courts, or the prerogatives and obligations of the law of nations. In its capacity as a company resident in London, an employer of English people, exporter of

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47. PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 6 (1993).

48. HARRIS, *supra* note 7, at 287.

49. MICKLETHWAIT & WOOLDRIDGE, *supra* note 40, at 21.

50. Steensgaard, *supra* note 43, at 247.

51. STERN, *supra* note 5, at 204.

English goods, and even representative of English interests, the East India Company was on any number of occasions judged by English courts to be a legal person subject to both English common and civil law. Its activities were thus encompassed within the jurisdictional claims of a range of English courts such as Chancery, King's Bench, and the Admiralty. As a great political figure in early modern England, it also found itself occasionally tried in Parliament as well, such as when the interloper Thomas Skinner sued the Company in the House of Lords in 1668 for offenses against his property and person in the East Indies.<sup>52</sup> There were also an increasing number of laws promulgated by Parliament in the eighteenth and nineteenth century that specifically and aggressively expanded the reach of English law to India, and over the East India Company.<sup>53</sup>

Yet, even after the promulgation of new forms of legal oversight of the Company from home, the East India Company in Asia nonetheless continued to operate its own courts and establish its own law, which were not fully encompassed under the ambit of English courts.<sup>54</sup> In particular, the treaty-making capacities of the East India Company highlighted the uncertain and situational nature of its legal personhood, especially after its expansion as a territorial power in the late eighteenth century. This principle was tested in a 1791 suit against the Company brought in Chancery by the *nawab* of Arcot, the ruler of a state in southern India, seeking settlement of an outstanding debt. The court found it could not rule, since, as the Company argued, the matter depended upon a treaty between two powers—the *nawab* and the Company—acting as independent sovereigns. As such, an English court had no jurisdiction, as “[t]he power, which the Company exercise upon these occasions, is in fact that of a state.”<sup>55</sup> As the court observed, the issue related to:

[A] treaty between sovereigns concerning the public business of each sovereignty; and it is insisted generally, that upon such treaty so described . . . a treaty between sovereigns respecting the public

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52. See *The Case of the Jurisdiction of the House of Peers, between Thomas Skinner, Merchant, and the East-India Company*, (1668) (H.L.) 6 Cobb. St. Tr. 710.

53. See generally *THE LAW RELATING TO INDIA AND THE EAST-INDIA COMPANY WITH NOTES AND AN APPENDIX* (4th ed. 1842).

54. On early Company courts, see generally SIR CHARLES FAWCETT, *THE FIRST CENTURY OF JUSTICE IN BRITISH INDIA* (1934); Arthur Mitchell Fraas, “They Have Travailed Into a Wrong Latitude:” *The Laws of England, Indian Settlements, and the British Imperial Constitution 1726–1773* (2011) (unpublished Ph.D. dissertation, Duke University).

55. 1 FRANCIS VESEY, *REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY FROM THE YEAR MDCCCLXXXIX TO MDCCCXVII*, at 372 (Little & Brown 1844) (citing *Nabob of the Carnatic v. East India Company*, (1791) 30 Eng. Rep. 391, (H.L.)).

business of their respective sovereignties *actio non oritur* . . . . [T]hat by the law and municipal constitution of this country the Company having a right to make war for the defence and melioration of their trade, are advised, that they being armed by the charters and municipal authority of this country with that power, stand in all respects relating to the exercise of it in the same condition as if sovereigns.<sup>56</sup>

Though “whether they are independent sovereigns, or whether they exercise a delegated sovereignty, neither of which can possibly be true, for they are neither the one nor the other, but mere subjects in that respect, and remain so in consideration of law to all purposes,” the court pointed out that the Company in this capacity acted not as “mere subjects” but as a public body.<sup>57</sup> A similar principle—that certain pleas against the company had to be comprehended as “acts of state”—was cited in *Moodalay v. East India Company* (1785), *East India Company v. Syed Ally* (1827), *Bedreechund v. Elphinstone* (1830), and *Gibson v. East India Company* (1839).<sup>58</sup> In each of these cases, either the treaty (i.e., peace) or war-making capacity of the East India Company seemed to render unto it the status of an act of state. That such diplomacy was often conducted in its own name rather than the name of England or the Crown only further suggested limitations on the ability to seek redress in court for the Company’s actions in its political capacity.<sup>59</sup> As John Hovenden glossed, in his annotations to Vesey’s *Reports*: “That a political treaty, between sovereigns, or parties exercising sovereign authority, cannot be the subject of municipal jurisdiction; but that its observance, or neglect, must depend on that respect which the parties bound thereby can be made to feel for the *jus gentium*, is established by the final result of this case.”<sup>60</sup>

While the case law cited above followed the Company’s assumption of territorial power after the mid-eighteenth century, the ambiguous and flexible relationship between the Company’s status as a public and a private actor was in many ways part of its constitution from the very beginning. In the early modern period, such distinctions were difficult to

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56. *Id.* at 389.

57. *Id.*

58. SIR COURTENAY ILBERT, *THE GOVERNMENT OF INDIA: BEING A DIGEST OF THE STATUTE LAW RELATING THERETO WITH HISTORICAL INTRODUCTION AND EXPLANATORY MATTER* 198 (1915); THOMAS POOLE, *REASON OF STATE: LAW, PREROGATIVE AND EMPIRE* 188 (2015).

59. STERN, *supra* note 5, at 52; Peter Fischer, *Historic Aspects of Concession Agreements*, in *GROTIAN SOCIETY PAPERS: STUDIES IN THE HISTORY OF THE LAW OF NATIONS* 222, 255 (C. H. Alexandrowicz ed., 1972).

60. VESEY, *supra* note 55, at 393 n.2.

make for various corporate bodies, from cities to universities.<sup>61</sup> Those lines were only more blurry in the case of the overseas company that was both subject and sovereign at the same time, a problem engaged perhaps most famously by Dutch legal theorist Hugo Grotius. As a small cottage industry of legal historical scholarship has recently shown, Grotius—though frequently cited as an architect of the so-called Westphalian system of state sovereignty—forged his ideas directly in response to his work and advocacy for the early seventeenth-century Dutch East India Company's claims against Portuguese sovereignty in the East Indies.<sup>62</sup> His arguments on the subject are most pronounced in his manuscript treatise, *De Jure Praedae Commentarius* (Commentary on the Law of Prize and Booty), which he himself understood as *De Indis* (On the Indies); though not printed in full until the nineteenth century, one chapter was published in 1609 anonymously as *Mare Liberum*, a short book which was almost immediately translated into English by the colonial promoter Richard Hakluyt, not unlikely on a commission from the English East India Company.<sup>63</sup>

Grotius' perspective was informed deeply by intelligence and information provided by the Dutch East India Company. In turn, his work was oriented towards legitimating not only the rights of the Dutch to engage in the East Indies trade—in apparent violation of Portuguese claims to exclusive rights in the entirety of the eastern hemisphere—but also towards justifying the Dutch Company's violence against the Portuguese in making those incursions, in particular the seizure of the Portuguese carrack *Santa Catarina* in 1603.<sup>64</sup> As he wrote,

[E]ven though people grouped as a whole and people as private individuals do not differ in the natural order, a distinction has arisen from a man-made fiction and from the consent of citizens. The law of nations, however, does not recognize such distinctions; it places public bodies and private companies in the same category. Now, it

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61. On early modern English corporations, see generally PHIL WITHINGTON, *THE POLITICS OF COMMONWEALTH: CITIZENS AND FREEMEN IN EARLY MODERN ENGLAND* (2005).

62. See e.g., Peter Borschberg, *Hugo Grotius, East India Trade and the King of Johor*, 30 J. SOUTHEAST ASIAN STUD. 225 (1999); MARTINE JULIA VAN ITTERSUM, *PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES 1595–1615* (2006).

63. RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 81 (1999); David Armitage, *Introduction* to HUGO GROTIUS, *THE FREE SEA WITH WILLIAM WELWOD'S CRITIQUE AND GROTIUS'S REPLY* xxii (David Armitage ed., Richard Hakluyt trans., 2004) (1609).

64. See Peter Borschberg, *The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602–c.1616)*, 33 J. SOUTHEAST ASIAN STUD. 31 (2002).

is generally agreed that private societies are subject to the rule that whatever is owed by the companies themselves may be exacted from their individual partners. Furthermore, it is obvious that the state is constituted by individuals just as truly as the magistrate is constituted by the state, and that therefore the said individuals are liable in the same fashion as the state in so far as concerns reparation for losses, even when the claim in question is founded on wrongdoing.<sup>65</sup>

According to Grotius, there was no distinction to be made between the moral personality of individuals and collections of individuals, including their natural right to wage war. As he suggested further,

Nature—the mistress and sovereign authority in this matter—withholds from no human being the right to carry on private wars; and therefore, no one will maintain that the East India Company is excluded from the exercise of that privilege, since whatever is right for single individuals is likewise right for a number of individuals acting as a group.<sup>66</sup>

By developing a notion of just war that derived from the individual, as Richard Tuck has observed, Grotius was thus able to conclude that “private trading companies were as entitled to make war as were the traditional sovereigns of Europe.”<sup>67</sup> Likewise, a theory of sovereignty as divisible, articulated as well in his *Commentarius in Theses XI*, legitimated not only the Dutch revolt from Spain, as well as the republican structure of the Netherlands itself, but also Dutch practices of treaty-making with assorted powers in Asia, even when the claims to sovereign rights among them overlapped or were in competition with one another.<sup>68</sup> At the same time, the theory reflected back on Europe itself, suggesting an international legal personality for the corporation, in which sovereignty was not only divisible among Asian rulers but able to be parceled among European monarchs, republics, corporations, and even individuals, especially when acting in the extra-European world.<sup>69</sup>

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65. HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 158–59 (Martina Julia van Ittersum ed., 2006) (1950).

66. *Id.* at 302.

67. TUCK, *supra* note 63, at 85.

68. PETER BORSCHBERG, HUGO GROTIUS, THE PORTUGUESE AND FREE TRADE IN THE EAST INDIES 103, 153–62 (2011); RENÉE JEFFERY, HUGO GROTIUS IN INTERNATIONAL THOUGHT 6 (2006); EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 3–4, 44–48 (2002).

69. KEENE, *supra* note 68, at 51–52; ERIC WILSON, SAVAGE REPUBLIC: *DE INDIS* OF HUGO GROTIUS, REPUBLICANISM AND DUTCH HEGEMONY WITHIN THE EARLY MODERN WORLD-SYSTEM (c. 1600–1619) 213–35 (2008) [hereinafter WILSON, SAVAGE REPUBLIC]; see also Eric Wilson, *The*



Grotius was hardly alone in the early modern period in suggesting that sovereignty rested not solely in a singular state but rather a patchwork of individuals and corporate bodies acting in various public capacities. Indeed, such arguments echoed and exported to problems in the extra-European world an anti-absolutist tradition in early modern political thought, which made space for pluralistic notions of law and sovereignty. Such arguments were embodied particularly, as was the case for Johannes Althusius, another ideological advocate for the Dutch revolt, in associational life and thus varieties of corporate bodies politic.<sup>70</sup> As Martin van Gelderen has noted, according to Althusius, “As a civil and symbiotic animal, man is part of the web of associations that encompass the fullness of communal, social, and political life. . . . Politics is not confined to the level of the *civitas* and *respublica*; it covers all symbiotic associations.”<sup>71</sup>

Such a conception of the associational corporation as a foundation rather than a product of sovereign power was only amplified by the peculiar geospatial context in which bodies like the English East India Company operated. Rooted in Europe, in transit across several oceans and maritime spaces, and operating throughout a patchwork of jurisdictions in Asia, the corporation had to be juridically flexible.<sup>72</sup> It had a “*status mixtus*” as a chartered subject of the English Crown, a party to treaties with or even as a tributary vassal of Asian principalities (such as the Mughal Empire), and a power exercising sovereign prerogative, such as war-making or coinage, in its own right.<sup>73</sup> This meant that as a legal person, the Company was capable of being both sovereign and subject simultaneously, while also weaving itself through various different jurisdictional contexts and a myriad of legal regimes. Such divisible sovereignty rendered the Company susceptible to exactions and supervision by multiple forms of power at the same time.

Thus, for example, after 1689, with the ascendancy of Parliament following the English Glorious Revolution, the East India Company

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VOC, *Corporate Sovereignty and the Republican Sub-Text of De jure praedae*, in PROPERTY, PIRACY AND PUNISHMENT: HUGO GROTIIUS ON WAR AND BOOTY IN *DE JURE PRAEDAE*—CONCEPTS AND CONTEXTS 310–40 (2009).

70. Martin van Gelderen, *The State and Its Rivals in Early-Modern Europe*, in STATES AND CITIZENS: HISTORY, THEORY, PROSPECTS 86–87 (Quentin Skinner & Bo Stråth eds., 2003); Richard Ross and Philip J. Stern, *Reconstructing Early Modern Notions of Legal Pluralism*, in LEGAL PLURALISM AND EMPIRES: 1500–1850, at 115–16 (Lauren Benton & Richard J. Ross eds., 2013).

71. van Gelderen, *supra* note 70, at 87.

72. Fischer, *supra* note 59.

73. C. H. Alexandrowicz, *G.F. De Martens on Asian Treaty Practice*, 13 INDIAN YEAR BOOK ON INT’L AFF. 63 (1964); STERN, *supra* note 5, at 13–14.

came under increasing scrutiny, nearly to the point of its abolition.<sup>74</sup> This was fueled, at least in part, by concerns about the Company's commercial monopoly and the desire of rivals to either partake in or simply take over the English Indies trade. However, a good deal of the scrutiny focused on the Company's political practices, including a "bribery" scandal at home and criticism of the Company's use of martial law and capital punishment in its settlements abroad.<sup>75</sup> At the same time, the Company faced increasing exactions from officials in Asia, which led both to the Company's declaration of war against the Mughal Empire in 1686 and the invasion and occupation of English Bombay by a Mughal tributary force for sixteen months in 1689–1690.<sup>76</sup> In turn, reports of the Company's trials in Asia, especially its war with the Mughal Empire, fueled its opposition and governmental inquiry in England, as the reports were cited extensively both in the political press and as evidence before committees of the House of Commons.<sup>77</sup> Likewise, word of the Company's weakness in England made its way to the East Indies—via English and other European rivals—and undermined its authority with various officials there, especially at the powerful Mughal port city of Surat.

Yet, the corporation's subjection to multiple regulatory and sovereign regimes simultaneously was not only a source of vulnerability, but potentially a source of great power. The Company took recourse to its status as a chartered English corporation frequently in diplomatic and other exchanges with the Mughal, Safavid, and other powers, particularly in the cases made against interlopers—English subjects trading in Asia without the Company's license or permission. Likewise, one of the Company's chief strategies in the English debates in the 1690s was to cite to Parliament and King William III the grants it held from Asian powers, rents it collected in its settlements abroad, and the people over whom it governed and had authority. The very fact of the Company's responsibilities and obligations abroad required, they insisted, that "they shall have a Legall Existence" and be "continued a Corporation . . . in

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74. For more extensive discussion of issues raised in the next two paragraphs, see STERN, *supra* note 5, at chs. 6–7.

75. *Id.* at 154–56.

76. On the Mughal invasion of Bombay, see, among others, THE ENGLISH EAST INDIA COMPANY AT THE HEIGHT OF MUGHAL EXPANSION: A SOLDIER'S DIARY OF THE 1689 SIEGE OF BOMBAY WITH RELATED DOCUMENTS (Margaret R. Hunt & Philip J. Stern eds., 2015).

77. See, e.g., A BRIEF ACCOUNT OF THE GREAT OPPRESSIONS AND INJURIES WHICH THE MANAGERS OF THE EAST INDIA COMPANY HAVE ACTED ON THE LIVES, LIBERTIES, AND ESTATES OF THEIR FELLOW-SUBJECTS, AS ALSO OF THEIR UNJUST DEALINGS, NOT ONLY WITH THE ADVENTURERS THEMSELVES, BUT WITH THE NATIVES IN SUNDRY PARTS OF INDIA (1695).

their Publick, as Private Capacities.”<sup>78</sup> Such jurisdictional fluidity of the East India Company was not simply a convenient practice but a legal pluralism inherent to the institutional structure of a corporation, especially a corporation that operated overseas and among and amidst various jurisdictional spaces.<sup>79</sup>

### III. COMPANY AS INTERNATIONAL ACTOR

Far from eliminated by more singular notions of state sovereignty, this early modern conception of political authority as divisible and fragmented has survived into the modern era in various forms. For example, eighteenth-century American debates over federalism were deeply connected to this debate, from Grotius to Pufendorf, over the degree to which, as Alison LaCroix has put it, “political authority might cross jurisdictional boundaries and, on occasion, be shared among multiple states tied into a single system.”<sup>80</sup> Moreover, nineteenth-century international legal writing, such as that of Henry Sumner Maine, continued to echo Grotian ideas about sovereignty as a “bundle or collection of powers . . . [that] may be separated one from another,” to which British India stood as prime evidence.<sup>81</sup> Such ideas also reverberated in ideological justifications for both settler and “informal” forms of empire well into the nineteenth and twentieth centuries.<sup>82</sup>

The persistence of these ideas, particularly in the form of empire, offers a serious challenge to normative conceptions of international legal order embodied solely in a system composed exclusively of territorially bounded states.<sup>83</sup> Moreover, the endurance of the theory and practice of divisible sovereignty suggests a powerful mutability between the corporation’s capacity to own and manage private property and its public functions as a form of jurisdiction and government, navigating in a unique way between the twin poles of *dominium* and *imperium*.<sup>84</sup> Thus, recognizing the degree to which bodies like the East India Company acted as

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78. STERN, *supra* note 5, at 158.

79. See Philip J. Stern, “Bundles of Hyphens”: Corporations as Legal Communities in the Early Modern British Empire, in LEGAL PLURALISM AND EMPIRES, 1500–1850, at 21 (Lauren Benton & Richard J. Ross eds., 2013).

80. ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 20 (2010).

81. HENRY SUMNER MAINE, INTERNATIONAL LAW: THE WHEWELL LECTURES OF 1887 58 (2d ed. 1915), *quoted in* KEENE, *supra* note 68, at 108.

82. ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE, 1500–2000, at 50 (2014).

83. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 68 (2005); KEENE, *supra* note 68, at 3.

84. Koen Stapelbroek, *Trade, Chartered Companies, and Mercantile Associations*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 338, 348–49 (Bardo Fassbender & Anne Peters eds., 2012).

sovereign bodies rather than purely commercial ones similarly suggests “a departure from a strictly state-centric approach to international law,” which continues to resonate today.<sup>85</sup> After all, as Eric Wilson has put it, “[i]n terms of Corporate Sovereignty, contemporary TNCs display a remarkable similarity to seventeenth-century joint-stock companies.”<sup>86</sup>

But why? Referring merely to the resemblance between the East India Company and the features—what early modern theorists might call “marks”—of sovereignty, such as military power or territorial control, runs the risk of leading one down the same path as those who see in the Company analogies to modern business practices. Instead, what the East India Company’s history shows us is how state and corporation are mutually constituted, and in fact, derive from similar and shared ideological and historical contexts. Thus, it is the complexities and contradictions in the corporation as both a private and public actor that raises questions that may be useful for upsetting our normative assumptions about precisely what, where, and how corporations operate in a global and transnational context. As Joshua Barkan has argued, the unique power of the corporation as an institution created by the state and constantly standing in opposition to and outside of it can be seen as an extension of the early modern corporate sovereignty exhibited by bodies like the East India Company which are only amplified in an age of modern globalization.<sup>87</sup>

As such, if the history of the colonial corporation cautions us not to regard the distinction of public and private as natural, or historically or legally fixed, the history of the East India Company may be rendered apposite as an example of the modern corporation not because it resembled modern forms of capital organization but because it, in somewhat exaggerated ways, blends the public and private and the commercial and political in ways many transnational corporations, from state-owned enterprises to “private” banks, do today.<sup>88</sup> Historians and theorists who propose such a perspective offer a middle way between imagining the East India Company as a direct antecedent to the multinational commercial corporation and envisioning it as a “deviation” from that development. Indeed, the very feature that made the Company seem to be anomalous—its blend of public and private legal personalities—may be precisely the lesson it offers for our contemporary world: “[I]ts unique com-

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85. MARKOS KARAVIAS, *CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW* 6 (2013).

86. WILSON, *SAVAGE REPUBLIC*, *supra* note 69, at 223.

87. JOSHUA BARKAN, *CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM* 6, 38 (2013).

88. Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 *IND. L.J.* 363, 374–75 (2004).

bination of the time perspectives of power with the time perspectives of profit, in other words the balance between the forces of the market and the power of government.”<sup>89</sup> Such a history recalls the corporation’s origins as something far more abstract, transcendent, and public.<sup>90</sup>

The recognition that the East India Company looked far more like an abstract person of the state than a natural person prompts a reconsideration, as Janet McLean has argued, of what a company’s rights, responsibilities, and personality before the law should be, especially in the international arena.<sup>91</sup> Jenny Martinez has similarly shown that precisely this history of the East India Companies and others reveals “both public and private international law have not adequately grappled with the problem of transnational regulation of large multinational corporations, and that part of the reason for this failure is the heavy reliance of both fields on concepts of territoriality and state-centric sovereignty.”<sup>92</sup> Here Martinez points to two cases in particular as representing the “new territorialism” that tests the bounds of this international law rooted in territoriality: *Boumediene v. Bush*,<sup>93</sup> which raised the question of the applicability of habeas corpus at the United States detention center at Guantánamo Bay, and *Kiobel v. Royal Dutch Petroleum Co.*,<sup>94</sup> in which the majority found that the Alien Torts Statute did not give U.S. courts jurisdiction over foreign corporations accused of committing human rights violations.<sup>95</sup>

Indeed, to only take this point a bit further, it is telling that in both these cases, legal historians filing amicus briefs with the court for the petitioners turned specifically to the history of the East India Company to make their case. In *Boumediene*, the extension of the writ of habeas corpus to Company-controlled Bengal in the 1770s suggested a deep foundation for imagining the writ ran in the English common law to extraterritorial jurisdictions and, though under conditions, to non-English aliens outside the formal jurisdiction of England.<sup>96</sup> This analogy—which was in fact cited in the D.C. Circuit Court opinion, but rejected as an imperfect analogy in Justice Kennedy’s opinion—to Company Bengal as an extra-

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89. Steensgaard, *supra* note 43, at 251, 264.

90. Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 791–92 (2013).

91. McLean, *supra* note 88, at 377.

92. Jenny S. Martinez, *New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387, 1412 (2014).

93. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

94. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013).

95. Martinez, *supra* note 92, at 1389–95.

96. Brief of Amici Curiae Professors of Legal History Michael J. Wishnie, Hope R. Metcalf, Jonathan Hafetz, and James Oldham As Amici Curiae in Support of Petitioners at 19, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195, 06-1196).

territorial power that was not, in essence, an easy extension of British formal sovereignty even led one blogger to proclaim that “GTMO is the British East India Company.”<sup>97</sup> It is worth noting as well that the East India Company vigilantly resisted the suggestion that habeas applied in its territories, maintaining that English common and municipal law could not be easily transplanted to India or to Company rule, the nature of both being in some measure distinct from English law.<sup>98</sup>

In *Kiobel*, the historians turned, again for the petitioners, to a much earlier and very different set of arguments: the seventeenth-century critique of the Company’s monopoly, and in particular the case, mentioned above, of *Skinner v. East India Co.* (1668). The argument ran that the finding of liability of the Company for seizing the goods and person in India of the English interloper Thomas Skinner suggested a long common law precedent for domestic courts adjudicating causes against corporations abroad; thus, there should be no corporate exception to liability under international law or extraterritorial U.S. tort law.<sup>99</sup>

Of course, here again, however, the precedent rests on the assumption that the East India Company was “a precursor to the modern business corporation.”<sup>100</sup> Yet, one only need turn to the rest of the story of the *Skinner* case to see the greater ambiguities of the English state’s jurisdiction over the Company’s activities abroad. The House of Lords found for Skinner against the Company, but almost immediately this decision prompted a multi-sided struggle among the Lords, the House of Commons, the King, and the Company. Dismissing Skinner’s claims as absurd—and even suggesting he was not English but Dutch—the Company managed to also rouse jealousies in the House of Commons over whether the Lords even had the right to try the case in the first place. Before long, the dispute became so heated that both Skinner and the Company’s governor ended up subject to imprisonment orders from the respective houses of Parliament. Seeking a resolution to the issue to no avail, by 1670, King Charles II had simply vacated all of the proceedings, giving a de

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97. Categorically Imperative, *Habeas History: GTMO is the British East India Company*, DAILY KOS (Feb. 27, 2007), <http://www.dailykos.com/story/2007/02/27/306379/-Habeas-History-GTMO-is-The-British-East-India-Company>.

98. Paul D. Halliday and G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 651–56 (2008); see also PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010).

99. Brief of Amici Curiae Professors of Legal History William R. Casto, Martin S. Flaherty, Robert W. Gordon, Nasser Hussain, and John V. Orth in Support of Petitioners at 13–16, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); see also, Brief of Amicus Curiae Thomas J. Schoenbaum, J.D., Ph.D. in Support of Petitioners at 7–9, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

100. Brief of Amici Curiae Professors at 10, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

facto victory to the Company and rendering the case into oblivion—as if it had never happened.<sup>101</sup> In the end, Skinner actually found no redress for his grievances; he was still looking for compensation as late as the 1690s, and his son continued to press his case into the first decade of the eighteenth century.<sup>102</sup> Far from offering a context for municipal jurisdiction over the human rights abuses of corporations abroad, this case, in many respects, reinforced the validity of the Company's jurisdiction and monopoly overseas and its immunity from prosecution for actions taken under its government. This position was only reinforced further in *East India Company v. Thomas Sandys*, a case tried before the Court of King's Bench, in 1683–1685, though this principle would again be called into question after the Glorious Revolution of 1688–1689 only to be reinforced again in the eighteenth century.<sup>103</sup>

### CONCLUSIONS?

In the end, there is no clear conclusion or answer to be drawn from this brief exploration of the historiography of the East India Company as an exemplar and originator of the nature of the modern corporation. My intention has simply been to show how difficult drawing easy and clear connections in this regard can be. That said, if the East India Company's history as a political actor offers any lessons for our present predicaments, it might be to offer some skepticism about expecting domestic or municipal law to be able to redress grievances against a corporation acting in negotiation, alliance, or conflict with other sovereign powers—be they companies, states, or empires. Not only do these corporations far exceed the territorial grasp of the state, the ambiguity of their activities as simultaneously public and private also renders them difficult to parse within the ambit of nationally sovereign courts. If in the East India Company's period it was the *jus gentium*—the law of nations—that ultimately needed to fully govern the actions of multinational corporations as much as states, it would suggest that one might need instead to turn to international law as the arena best suited to serve as a robust regulatory and

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101. ROBERT K. BATCHELOR, LONDON: THE SELDEN MAP AND THE MAKING OF A GLOBAL CITY 1549–1689, at 165–66 (2014).

102. See Minutes of the East India Company Court of Committees (June 3, 1687), archived in British Library, India Office Records B/39 fols. 11–12; Petition and Appeal of Thomas Skinner (Dec. 7, 1693), archived in U.K. Parliamentary Archives, HL/PO/JO/10/3/186/21; see also THE CASE OF BENJAMIN SKINNER, SON OF THOMAS SKINNER, MERCHANT, IN RELATION TO THE EAST-INDIA COMPANY (1710).

103. PHILIP LAWSON, THE EAST INDIA COMPANY: A HISTORY 45 (1993); STERN, *supra* note 5, at 46–61; William A. Pettigrew and George W. Van Cleve, *Parting Companies: The Glorious Revolution, Company Power, and Imperial Mercantilism*, 57 HIST. J. 617, 623–24 (2014).

governmental regime over the moral, ethical, and human rights behavior of transnational corporations. This is especially the case as more and more we see how ethereal and elusive corporations can be, shifting national allegiance and residence with ease.<sup>104</sup> To take one example, we need only to look to questions about the environmental regulation of corporations and corporate interest and involvement in ongoing global climate summits to recognize that states are not the only actors on this global stage.<sup>105</sup> What the solution in international law might be is beyond the scope of this Article, but if the East India Company's example suggests anything, it is that recognizing the distinct public character and personality of the corporation when acting as such, considering the ways in which global governance might need to include corporations not as subjects but as actors, and contending with these questions of rights and obligations as it does with states, would not be a new, but centuries-old place to start.

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104. Martinez, *supra* note 92, at 1414.

105. See e.g., Jennifer Clapp, *Global Environmental Governance for Corporate Responsibility and Accountability*, 5 GLOBAL ENVTL. POL. 23, 23 (2005); *Will the Outcome of the Paris Climate Summit Have Any Teeth?*, KNOWLEDGE@WHARTON (Dec. 1, 2015), <http://knowledge.wharton.upenn.edu/article/will-the-paris-climate-summit-outcome-have-any-teeth/>.



