

# **THE ROOTS OF CORPORATE MALFEASANCE: The Merchant as Body Politic in Early Modern England**

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## **ABSTRACT:**

Recent work on corporate constitutions has argued that various early modern forms of corporation constituted their own political communities and acted as nodes in the formation of global networks of commerce, culture, politics, and diplomacy. As such, this work has shown an intimate historical connection between the state and other forms of corporate body. This paper furthers this argument but also introduces an important caveat by noting the growing consensus around some corporate bodies as legitimate and others as illegitimate in the early modern period. Drawing on English legal and mercantile history, I argue that political legitimacy was situated in the corporate body of the state for the same reasons of legal lineage that others have pointed to when placing states and other corporate bodies into a set of similarly constituted organizations. This paper provides evidence for the argument through a detailed look at the history of the corporate body and then turns to analysis of debates in early modern England surrounding the rights and privileges of joint stock companies, especially the East India Company.

## **Dear Workshop Participants,**

Thank you in advance for your time and consideration of this draft. This paper grows out of my dissertation project, which looks at Indian states that were also merchants and their varying capacity as governors due to particularities of their organizations. Because this paper does not fit with the overall project's current direction, I have excised it and attempted to turn it into a standalone article draft. I am particularly concerned with the organization of the paper and the clarity and coherence of the argument. Have I identified the right interlocutors? How might I make the distinction I draw between governing body and legitimate governing body clearer? Have historians moved past the East India companies and questions that Stern, Pettigrew, and others raise? I look forward to your comments and suggestions for how this draft can be improved and where it might eventually find a home.

## Introduction: A Family of Corporate Bodies

Recent work on the history of the corporation has begun to examine the governing possibilities of the early modern corporation.<sup>1</sup> Some have referred to this as the “constitutional turn” in the study of corporations.<sup>2</sup> Scholars in this group note that multiple corporate bodies existed in the early modern world and that the state was simply one of many. As historian Philip Stern has described, such an approach implies something akin to an “evolutionary biology” of the corporation, considering like and unlike “species” within the same “genus,” species which receive their unique characteristics and compositions from their differing social contexts rather than from their “DNA,” so to speak.<sup>3</sup> This approach holds great promise for the study of political development by de-centering the state and making room for other forms of political organization, like joint stock companies, townships, and proprietorships, which were just as, if not more, important than the state in their impact on global history and politics.

I follow this line of inquiry by further exploring the idea of the “genus” from which the various species of corporation are thought to descend. But in doing so, I also question to what extent contemporary observers of the varieties of the corporate body were comfortable with the close overlap in functions and form between non-state corporations and the state. Even in the centuries when the corporation most explicitly promised an alternative political community to the state, it received resistance and skepticism at every turn. This is especially true of the overseas trading companies

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<sup>1</sup> Philip Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India*, (New York: Oxford University Press, 2011); Arthur Weststeijn, "The VOC as a Company-State: Debating Seventeenth-Century Dutch Colonial Expansion," *Itinerario* 38 (2014): 13-34.

<sup>2</sup> William Pettigrew, “Corporate Constitutionalism and Seventeenth Century English History,” *Itinerario* 39 (2016): 487-501.

<sup>3</sup> Philip Stern, “Parasites, Persons, and Princes: Evolutionary Biology of the Corporate Constitution,” *Itinerario* 39 (2016): 512-525. This point was first made by English legal theorist Frederic Maitland, when he wrote: “For, when all is said, there seems to be a genus of which State and Corporation are species. Let it be allowed that the State is a highly peculiar group unit; still it may be asked whether we ourselves are not the slaves of a jurist’s theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf and ask ourselves no questions about the origin of species.” “Preface,” in Otto von Gierke, *Political Theories of the Middle Age*, trans. Frederic W. Maitland (Cambridge: Cambridge University Press, 1900), ix.

organized around the joint stock format that expanded European trading networks and built colonial empires. While some critiques of the joint stock company emerged from personal interest, others were a response to actual malfeasance on the part of the companies that conducted overseas trade and therefore came into contact with non-European peoples and polities. Within these critiques, discourses of legitimacy and national interest predominated, showing that contemporaries understood there to be an unpassable gulf between the state and other corporate bodies. Even though the distinction between public and private spheres of activity did not yet exist in the modern sense, a nascent understanding of political legitimacy as inhering in some bodies and not others was nevertheless developing.

This observation should lead us to question the limits of the idea that the joint stock company and other forms of corporate body were alternative political organizations to the state that were simply discarded over time (or “selected” against, to continue the metaphor.)<sup>4</sup> Instead, I argue that it may be more historically accurate and illuminating to emphasize the distinct “species” of Maitland’s metaphor and explore important differences in organization, function, and ideology that set states apart from other corporate bodies. In short, the differences may have indeed lain in the “DNA” rather than the social environment in which corporate bodies found themselves.

This paper develops the argument in three parts. First, I explore the legal and social history of the concept of the corporation. In doing so, I answer lines of inquiry pointed to but not developed by David Armitage and Philip Stern in recent essays.<sup>5</sup> Second, I consider the observations of political theorists like Thomas Hobbes, Adam Smith, and Edmund Burke on corporations, especially the East India Company. While the EIC is perhaps an overused example, it is also a clear and strong example of corporate power outside the state and the potentialities it held for political community. Since much

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<sup>4</sup> This is Stern’s argument in *The Company-State*. See pp. 6-8.

<sup>5</sup> David Armitage, “Wider Still and Wider: Corporate Constitutionalism Unbounded,” *Itinerario* 39 (2016): 501-503.

historical and theoretical work has relied on the EIC as an example, it is perhaps fruitful to begin there. In the third section, I turn to analysis of the pamphlet debate that ensued upon the charges that the “interlopers” laid on the EIC in Parliament in the late 1680’s as evidence of the argument that the state was seen as a more legitimate form of association than its corporate cousins. Throughout, I consider the points at which social and legal developments implicitly or explicitly split the joint stock company away from the state, deemphasizing the former’s sovereignty while emphasizing the latter’s legitimate claim to authority.

### **Legal and Social History of the Corporate Body**

Even though in modern parlance the corporation usually only refers to for-profit companies, its historical meaning was much more expansive and initially had nothing to do with commercial activity. I demonstrate in this section that understanding the historical origins of the concept of the corporation in Western thought is crucial for connecting states and joint stock companies as early modern actors with similar institutional inheritances and therefore similar powers. Nevertheless, this early legal history also demonstrates points of incommensurability of the two corporate forms.

The word “corporation” derives from the Latin *corporare*, a verb meaning to combine in one body. The Oxford English Dictionary defines the corporation as “a company or group of people authorized to act as a single entity (legally a person) and recognized as such in law.” Maitland, in posing his question about the “origin of [corporate] species,” noted that the state and corporation “seem to be permanently organised groups of men; they seem to be group-units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units.”<sup>6</sup> David Runciman has defined the corporation as a form of political association “which stands apart from its individual members, with

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<sup>6</sup> Maitland, “Preface,” ix.

a distinct identity of its own. It is an association capable of action in its own right, or at least of having action undertaken in its own name. To put it another way, a corporation is that form of human association which is not constituted by its component parts – by its members, its officers, its property, its rules – but is separate from all these.”<sup>7</sup> Runciman notes that the corporation as a concept is particularly salient in the legal realm. Henry Turner, in his work on the history of the corporate form, moves beyond the mere legal person of the corporation and has defined it as “any enduring form of activity that is undertaken collectively and in which the whole is perceived to be distinct from and even prior to its parts.”<sup>8</sup>

All three definitions indicate some common characteristics of the corporation as a form of organization. First, it is a single body with a personality distinct from its members. Second, the group of individuals that form the corporation become *one* person in the pursuit of their collective goal. Third, this personality, or persona, is recognizable by law, even if, as Turner argues, the law is not the only basis for recognition of such actors.<sup>9</sup> As these definitions clarify, the corporation is a *type* of organization, a conceptual category for understanding certain types of collectives. A consequence of these three characteristics is that corporations are perpetually lived – the legal personality of the body does not change even if its constituent members do and can therefore only be ended through the law. This trait was important for underpinning the sovereign obligations of companies as well as states.

The corporation as a conceptual category had its roots in both Roman law and medieval Christian categories of thought. The first corporation in this tradition was the Catholic Church, which used the

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<sup>7</sup> David Runciman, “Is the State a Corporation?” *Government and Opposition* 35 (2000): 91.

<sup>8</sup> Turner, *Corporate Commonwealth*, 26.

<sup>9</sup> *Ibid.*, 20. “For as important as the law may be as a mode of making real, even the jurist recognized that corporations are never simply legal in nature: they derive from the practical activity and self-expression of groups who associate for many different purposes and at many different scales, and they assume their identities, their continuity, and even their powers from ideas that may have little to do with legal categories. To put the claim somewhat more broadly, I will say that the ontological question of the corporation – the question of what kind of being corporations may be said to have, of what identity, rights, capacities for action, or affective presence define this being and from whence it can be said to arise – can never be answered *only* with reference to legal definitions and legal arguments.”

metaphor of Christ's two bodies, his natural body and the body of the Church of which he was the head, to convey the unity of Christendom. The Church's involvement in temporal matters, however, meant that corporate metaphors were widely accessible in Europe throughout the medieval period. For example, in his work on merchants in Dugento, Tuscany, John Padgett has shown that corporate forms existed there as early as the mid-1200's. The merchant corporation as an organizational invention "developed a temporal permanence and a continuity transcending its partners," and this continuity meant "a move from a temporary alliance of companions or *compagnie*, with fluid partners, to the corporate body of a *societa*, with stationary branches or *filiali*."<sup>10</sup> Padgett argues that this invention of the corporation was only possible because of the Church "imprinting" its organizational form onto economic actors. This would also have consequences for social relations, as the Tuscan merchant companies reproduced themselves in both organizational and natural terms through the transfer of partnership in the companies through familial generations, creating large, influential noble lineages.

The early emergence of the corporation in places like Tuscany was not long lived, however, and it would have to wait a while longer to gain a strong foothold in secular politics. Over time, the notion of the *corpus mysticum*, or the collective body, had also become available as a metaphor to the princes and kings of Europe: "The noble concept of the *corpus mysticum*, after having lost much of its transcendental meaning and having been politicized and, in many respects, secularized by the Church itself, easily fell prey to the world of thought of statesmen, jurists, and scholars who were developing new ideologies for the nascent territorial and secular states."<sup>11</sup> Through this process, the state itself became the most important corporation in Western thought, sometimes rivaling the Church and then coming to replace it. As Kantorowicz describes:

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<sup>10</sup> John F. Padgett, "The Emergence of Corporate Merchant-Banks in Dugento Tuscany," in John F. Padgett and Walter W. Powell, *The Emergence of Organizations and Markets*, (Princeton: Princeton University Press, 2012), 121-122, 125, 132, 140.

<sup>11</sup> Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, (Princeton: Princeton University Press, 1997), 207.

The notion of *corpus mysticum* signified, in the first place, the totality of Christian society in its organological aspects: a body composed of head and members. This interpretation remained valid throughout the late Middle Ages until early modern times, even after the notion had been applied, by transference, to smaller groups of society. In addition, however, *corpus mysticum* acquired certain legal connotations; it acquired a corporational character signifying a ‘fictitious’ or ‘juristic’ person...

In fact, it was chiefly among the lawyers, though not lawyers alone, that the organological interpretation was sided by or amalgamated with corporational contents, and that accordingly the notion of *corpus mysticum* was used synonymously with *corpus fictum*, *corpus imaginatum*, *corpus repraesentatum*, and the like – that is as a description of the juristic person or corporation. The jurists, thereby, arrived, like the theologians, at a distinction between *corpus verum* – the tangible body of an individual person – and *corpus fictum*, the corporate collective which was intangible and existed only as a fiction of jurisprudence.<sup>12</sup>

The secularization of the concept of the *corpus mysticum* provided an ideological foundation for understanding other secular groups operating as units, such as cities or the commonwealth, in the language of the corporation. This further enabled the notion of the *body politic*, a body that had moral or ethical ends in a fashion analogous to the *corpus mysticum* of the Church, allowing medieval jurists to compare Church and state as sources of political authority.<sup>13</sup>

Stemming from this theological tradition, the first recognized corporation was named the *corporation sole*, because the idea of an incorporated collective was imagined around the body of a single person – most importantly the king. But the king could not be only a corporation sole, since he

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<sup>12</sup> Kantorowicz, *King's Two Bodies*, 209.

<sup>13</sup> *Ibid.*, 210-211, footnote 51. This discussion in Kantorowicz is connected to a larger question of how to trace the origins of the notion of a body politic. It is argued that early modern jurists and theologians, up to and including Thomas Hobbes, owed a debt to Aristotle's discussion in *Politics* when he says: “The city-state is prior in nature to the household and to each of us individually. For the whole must necessarily be prior to the part; since when the whole body is destroyed, foot or hand will not exist except in an equivocal sense...and all things are defined by their function and capacity, so that when they are no longer such as to perform their function they must not be said to be the same things, but to bear their names in an equivocal sense. It is clear therefore that the state is also prior by nature to the individual” in *Politics*, trans. H. Rackham, (Cambridge: Harvard University Press, 1944), 21. For a recent articulation of this argument see, Sophie Smith, “Democracy and the Body Politic from Aristotle to Hobbes,” in *Political Theory* (2016): 1-30, DOI: 10.1177/0090591716649984.

represented a collective – the commonwealth – that persisted beyond the death of his own natural body.<sup>14</sup>

Writing in the early twentieth century about the historic development of the corporation, English legal historian Frederic W. Maitland found the concept of the *corporation sole* untenable in law precisely because it ceased to exist when the natural body of the person who formed the corporation died. He argued that while the ruler had initially been considered a *corporation sole* it was only, in fact, by understanding the ruler as the head of a *corporation aggregate* that it was possible to understand the existence of the Crown in perpetuity: “The suggestion that ‘the Crown’ is very often a suppressed or partially recognised corporation aggregate is forced upon us so soon as we begin to attend with care to the language which is used by judges when they are freely reasoning about modern matters and are not feeling the pressure of old theories... The way out of this mess, for mess it is, lies in a perception of the fact, for fact it is, that our sovereign lord is not a ‘corporation sole’, but is the head of a complex and highly organized ‘corporation aggregate of many’ – of very many. I see no great harm in calling this corporation a Crown. But a better word has lately returned to the statute book. That word is Commonwealth.” Maitland’s analogy between the corporation aggregate and the commonwealth suggests one important way in which the state would slowly supersede other corporate bodies was not only through its close association with the king’s body but also with the body of the people.

By the seventeenth and eighteenth centuries, a new vocabulary was needed to understand what inhered in the body of the king, especially in the Crown’s role as the head of a body politic. The new understanding was the notion of the *corporation aggregate*, an ancient concept in its own right, with roots in Roman law, which signified any united body composed of an aggregate of natural persons. During the Roman period, the law had recognized many entities, including cities, colonies, and guilds, as this

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<sup>14</sup> Frederic W. Maitland, “The Crown as Corporation,” in *State, Trust, and Corporation*, eds. David Runciman and Magnus Ryan, (New York: Cambridge University Press, 2003), 41. Many of the ideas that Maitland sketches in his essays can be traced to his reading of German scholar Otto von Gierke.

sort of corporation.<sup>15</sup> In the English common law tradition, the history of the corporation aggregate dates to the *Sutton's Hospital* trial of 1612, in which the courts had to decide whether a hospital and charitable trust could be the legitimate heirs to their founder Thomas Sutton, who had received a charter of incorporation for the hospital from the Crown. The right of the hospital to inherit was challenged by Sutton's closest living relative, a Simon Baxter, foregrounding the question of whether a corporation could be treated as a person for the purposes of the law.<sup>16</sup>

The case was eventually decided against Baxter and the hospital was declared a legitimate heir. In his reports on the case, Sir Edward Coke, chief justice under James I, wrote: "A Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the Law... They may not commit treason, nor be outlawed, nor excommunicate for they have no souls, neither can they appear in person, but by Attorney... it is not subject to imbecilities, or death of the natural body, and divers other cases."<sup>17</sup> Coke's definition makes clear many of our own intuitions about the corporation – that it is recognized and regulated by the law but is not subject to the same sorts of punishments and deaths as a natural person. The *Sutton's Hospital* case was one important instance of the early recognition of the corporation aggregate as a body politic and as a legal person, underscoring that aside from the Church, or the state, a number of other early modern corporations aggregate were also considered bodies politic and legal persons, including companies, towns, Parliament, hospitals, and universities.<sup>18</sup>

As the transition from corporation sole to corporation aggregate occurred, it also clarified in what way the state was a corporation aggregate. We have only to think of Thomas Hobbes, who provided the clearest visual image of the corporation aggregate in the frontispiece of *Leviathan*, which is perhaps

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<sup>15</sup> Turner, *Corporate Commonwealth*, 13.

<sup>16</sup> *Ibid.*, 14.

<sup>17</sup> Quoted in *ibid.*, 15.

<sup>18</sup> *Ibid.*

the most enduring image of the corporate body. While the state was itself a corporation, over the eighteenth century it slowly became ascendant over all other forms of corporate body, since other bodies received their rights to incorporation from the state itself. No such legal right existed for the state, necessitating a metaphor like the covenant in Hobbes' theory of the formation of the Leviathan or requiring that the state derive its corporate form from something outside the law, in order to make sense of how the state came to be incorporated in the first place.<sup>19</sup> Runciman notes that Maitland proposed a solution to this problem by understanding the state as a moral entity that existed prior to and outside of the law.<sup>20</sup> It is worth noting, in addition, that the history that gave corporations legal standing as persons contained within its tradition a separate origin for the state as person through its association with king and commonwealth that was quite distinct from the notions of membership that were associated with other bodies politic.

One more commonality of corporate bodies, their existence in perpetuity and therefore their ability to hold obligations as sovereigns, remains to be explored. As the discussion has indicated, the corporation's perpetual life was a consequence of its structure and legal personhood. Hobbes recognized this explicitly when he wrote of the distinction between the artificial and natural man that enabled his theory of the state. In the introduction to *Leviathan*, Hobbes writes: "For by Art is created

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<sup>19</sup> On this point, see Runciman, "Is the State a Corporation?" In one passage, he notes that "A corporation can only be created in law in one of two ways. Either it is by what is traditionally called 'charter' – i.e. the grant of some sovereign power – or it is by general 'rules' – i.e. by complying with certain formal procedures. The idea that the state is not merely constrained by international law but is dependent on the charter of some outside sovereign body for its existence is hard to reconcile with most of the convenient assumptions of political theory. But so is the idea that states are no different from any other group which wishes to transform itself into a corporation...If the state is to be distinguished from other corporations, it would seem to require a special charter that says so. Without a charter, it ends up looking like just another body within some legal framework greater than its own. With that charter, it can end up looking not just like the creation but the creature of another sovereign power" (99).

<sup>20</sup> Runciman 99-100. Maitland's solution had its roots in early modern thought as well. For example, legal theorist Emer de Vattel notes that "Nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests; she deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights." Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Eds. Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund, 2008). 1/29/2018. [http://oll.libertyfund.org/titles/2246#Vattel\\_1519\\_100](http://oll.libertyfund.org/titles/2246#Vattel_1519_100).

that great LEVIATHAN called a COMMON-WEALTH, or STATE, (in latine CIVITAS) which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the *Sovereignty* is an Artificiall *Soul*, as giving life and motion to the whole body.”<sup>21</sup>

Then, in Chapter Nineteen, after having described the creation of the state, the artificial man of his introduction, and its rights, Hobbes turns to the problem of succession, since it is a natural man, the sovereign, who represents the artificial one and such a natural person is subject to death. He writes: “Of all these Formes of Government, the matter being mortall, so that not onely Monarchs, but also whole Assemblies dy, it is necessary for the conservation of the peace of men, that as there was order taken for an Artificiall Man, so there be order also taken, for an Artificiall Eternity of life; without which, men that are governed by an Assembly, should return into the condition of Warre in every age; and they that are governed by One man, as soon as their Governour dyeth. This Artificiall Eternity, is that which men call the Right of Succession.”<sup>22</sup>

In these passages, Hobbes relies on a juxtaposition of the artificial man and natural man and the idea of an “artificial eternity of life,” which is necessary for the endurance of the artificial man. Of course, when Hobbes uses the word “artificial,” he does not mean to suggest that there is something not concrete or real about the actions of the artificial man. The artificial man is the corporate body, or the Leviathan, of which the ruler, whether a monarch or an assembly as he notes, is the natural man who acts as its representative. By giving this artificial person an eternal life, it allows not only for stability, as Hobbes notes, but also for a corporate body to take on duties that do not end with the death of a ruler or the persons who comprise the body.

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<sup>21</sup> Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson, (London: Penguin Books, 1985 [1651]), 81.

<sup>22</sup> *Ibid.*, 247

As a result, the abstraction of the perpetual life of the corporation had very practical consequences. In a particularly helpful explanation of this point, noted theorist of the state and Hobbes scholar, Quentin Skinner, writes:

As a number of legal and political theorists have begun to urge, we can scarcely hope to talk coherently about the nature of public power without making some reference to the idea of the state as a fictional or moral person distinct from both rulers and ruled...If there is a genuine national crisis, there must be a strong case for saying that the person whose life most urgently needs to be saved is the person of the state...We need to be able to make sense of the claim that some government actions have the effect of binding not merely the body of the people but their remote posterity.

Consider, for example, the case that Maitland took to be of exemplary significance: the decision of a government to incur a public debt. Who becomes the debtor? ...it seems a decisive reason for accepting the fictional theory of the state that it offers a coherent solution to this and several related puzzles. It does so by declaring that the only person sufficiently enduring to be capable of owning and eventually repaying such debts must be the person of the state. As a *persona ficta*, the state is able to incur obligations that no government and no single generation of citizens could ever hope to discharge...in the present state of contract law, there is no other way of making sense of such obligations than by invoking the idea of the state as a person possessed, in Hobbes' phrase, with an artificial eternity of life.<sup>23</sup>

Skinner's analysis helps clarify why the fictional theory of the body politic has had material consequences for the practical business of governing. The person of the corporation, rather than individual citizens or subjects, is able to live in perpetuity and therefore to undertake tasks and obligations that outlast the natural lives of those who comprise the organization. The corporate form, therefore, ensures that essential tasks of governing are carried out over time and do not cease to be performed when the natural people composing the organization pass away or fall out of power.

This brief discussion of the origins of the corporation, especially the corporation aggregate, has demonstrated how the language, image, and concept of the corporate body or body politic was not only the basis for theories of the state but also for the practical existence of other corporate bodies.

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<sup>23</sup> Skinner, "The Sovereign State: A Genealogy," 46.

While the university, hospital, city, or joint stock company were all real entities, their rights and obligations were delineated by the legal move from the corporation sole to the corporation aggregate. This conceptual language allowed such entities to have a legal existence, an important pre-condition for their ability to take on perpetual obligations, which was and continues to be seen as an important feature of the organizations that claim to rule territory and people.

When the first joint stock companies were chartered in the early years of the seventeenth century, they too were recognized as corporations and bodies politic. The overlap between the powers of the state and the joint stock company that emerged in this period was itself a product of corporate modes of thought in a time when the state did not yet have the monopolies on legitimacy and violence that are now presumed.<sup>24</sup> Joint stock companies, like other corporate bodies, were granted powers akin to the state. For example, the second charter of the Virginia Company (1609) described it as “one Body or Commonalty perpetual...[with] perpetual Succession and one common Seal to serve for the said Body or Commonalty” and allowed it to make laws, perform rituals and ceremonies of government, to rule the subjects of its colonies in America, and to sustain and use a militia to enforce order and laws.<sup>25</sup> Similarly, the East India Company’s charter, which gave it monopoly trading privileges from the Cape of Good Hope to the Straits of Magellan, was further bolstered by rights to “establish fortifications, make law, erect courts, issue punishment, coin money, conduct diplomacy, wage war, arrest English subjects, and plant colonies.”<sup>26</sup> Therefore, even as critiques of the joint stock companies’ behavior emerged, it was not for a long time yet considered problematic that they behaved as states might behave. The eventual distinction that would occur between joint stock companies and states

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<sup>24</sup> Stern, *Company-State*, 9: “The sorts of ‘absolutism’ described by thinkers like Hobbes and the French theorist Jean Bodin, so often taken to represent a norm of early modern politics, were more prescription than description. They were indeed anxious responses to the practice and theory of an early modern sovereignty, which was divisible, uneven, and exemplified by competing claims over people and the corridors, passageways, and spaces in which they lived and on which they traveled.”

<sup>25</sup> Quoted in Turner, *Corporate Commonwealth*, 112.

<sup>26</sup> Stern, *The Company-State*, 12.

largely grew out of a process of deliberation in courts, treatises, and public debates that was itself a consequence of the activities of these companies at home and abroad. As the joint stock companies came under the regulation of the state, their own parallel governing abilities would eventually be eclipsed and delegitimized, but not before their behavior had been analyzed through the lens of political legitimacy.

The discussion in this section suggests one central reason why theorists and observers of corporations in the early modern period may have begun to question the legitimacy of such actors. Scholarship thus far has tended to place weight on the state's granting of charters and rights *to* corporations, rather than corporations independently claiming this authority for themselves, as a reason for the subordinate position that other corporate entities occupied vis-à-vis the state. This is undoubtedly true but cannot be the complete story. While trading companies did indeed receive their powers from the state, their home states were often powerless to regulate them for activities they engaged in halfway across the world. This was also true in the case of proprietorships, like the American colonies, which engaged in rebellion against the English state, ultimately gaining their independence.

Instead of focusing on the direction in which authority flows, it is more fruitful to pay attention to the origins of the corporate metaphor. While theories of the state that developed through early modern jurisprudence recognized various corporate bodies, it was the state's connection to the physical body of the monarch, and later the body of the commonwealth, that gave it legitimacy that other corporate bodies could not claim. This claim is further explicated in the next section through an analysis of political theorists and other thinkers who prosecuted or otherwise criticized corporations, and specifically joint stock companies.

## **Non-State Corporations and their Detractors**

An early observer who had reservations about corporate bodies outside the state was Hobbes. Given that for Hobbes, the sovereign derives his authority from the incorporation of all the people, the existence of separate non-state corporate bodies was seen as problematic. It is perhaps unsurprising that Hobbes, who was clearly invested in the project of developing an unassailable theory of sovereign authority, would have used the metaphor of the body in ways that signaled the legitimacy of the monarch's body and the illegitimacy of any other corporate entity that preyed upon that body.

For example, in Chapter 22 of *Leviathan*, Hobbes writes that if a group of merchants decides to become incorporated, they do so for their own personal gain: "So that to grant to a Company of Merchants to be a Corporation, or Body Politique, is to grant them a double Monopoly...Of this double Monopoly one part is disadvantageous to the people at home, the other to forraigners."<sup>27</sup> Then, in Chapter 29, when writing of the things that tend to the dissolution of commonwealths, Hobbes notes more generally: "Another infirmity of a Common-wealth, is the immoderate greatnesse of a Town, when it is able to furnish out of its own Circuit, the number, and expense of a great Army: As also the great number of Corporations; which are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man."<sup>28</sup> These passages make clear his distrust of the variety of corporate actors that existed within the state – within Hobbes' general gesture towards corporations, a contemporary would have understood all those bodies, such as towns and incorporated municipalities, that were largely independent, sub-state actors while being structurally similar to the state itself.

In the eighteenth and early nineteenth centuries, as the line between the state and other corporate bodies became clearer, other influential thinkers and writers would launch scathing critiques of corporations that pretended to the authority of the state. A favorite target was the East India Company

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<sup>27</sup> Hobbes, *Leviathan*, 282.

<sup>28</sup> *Ibid.*, 375.

and its leadership, whose members had amassed large fortunes in India and Southeast Asia, enabling them to have a substantial effect on politics at home. The fact that these merchants operated halfway across the world, outside of the norms of accountability that structured English political life, created anxieties for the public as well as Parliament. And as has been noted above, the Company's charter included not only a monopoly on the trade with India but also allowed a number of privileges that are now only associated with states.

What is curious about the response from critics of the joint stock companies during the eighteenth century is that they did not challenge organizations like the Company on the grounds that it behaved like a government and expanded on the rights and privileges in its charter in problematic ways. Instead, their critiques focused on the Company being a *bad* governor and questioned its legitimacy on the grounds of its fitness to rule people. Often this was due to the mix of functions it undertook as both merchant and governor.

For example, Adam Smith argued that the East India Company's interests as a merchant were diametrically opposed to its interests as a governor. He explained that the Company was in the habit of purposely destroying certain goods in India, or limiting how much was made available, in order to drive up the prices of those same goods when sold in Europe. As a consequence: "Their mercantile habits draw them in this manner, almost necessarily, though perhaps insensibly, to prefer upon all ordinary occasions the little and transitory profit of the monopolist to the great and permanent revenue of the sovereign...As sovereigns, their interest is exactly the same with that of the country which they govern. As merchants their interest is directly opposite to that interest." He emphasized that any government composed of merchants was bound to take on certain undesirable characteristics, especially military despotism, for they did not have the same legitimacy as a government that had the assent of its people to rule.<sup>29</sup>

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<sup>29</sup> Adam Smith, *The Wealth of Nations: Books IV-V*, (New York: Penguin, 1999 [1776]), 223.

In his analysis of the Regulating Act of 1773, Smith writes that “during a momentary fit of good conduct, they [the EIC] had at one time collected into the treasury of Calcutta more than three millions sterling; notwithstanding that they had afterwards extended, either their dominion, or their depredations, over a vast accession of some of the richest and most fertile countries in India, all was wasted and destroyed.” Later in the same discussion, he notes that while monopolies can be temporarily helpful to joint stock companies that take on the risks of an unknown and uncertain trade across such vast distances, these monopolies must then also be brought to an end, not only for the sake of private traders but also in the interests of English consumers. An end to the monopoly, he argued must be accompanied by the government absorbing into its national assets any forts or garrisons built to protect the trade of the company abroad.<sup>30</sup>

Smith’s critique is notable for many reasons, one being that while he condemns the East India Company for being a poor governor, he does not seem to think it controversial that the Company was a governor in the first place. While he questions the legitimacy of the Company, emphasizing that it was not the same as a true government, he does not question the rights of the Company to conduct war, settle the peace, or govern people in a foreign country. These he presumes to be part of the requirements of conducting a hazardous trade in any “remote and barbarous nation.” His analysis, even though deeply critical, underlines how a set of privileges was deemed common to the state and the joint stock company yet simultaneously highlights why and how one actor could be legitimate while the other was not.

Another example can be found in Edmund Burke, a contemporary of Adam Smith’s who was responsible for prosecuting the trial of Warren Hastings, perhaps the most infamous governor of the early East India Company aside from Robert Clive, architect of the victory at Plassey. Hastings was accused of various crimes and mismanagement in India, the chief sentiment among his contemporaries

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<sup>30</sup> Smith, *Wealth of Nations*, 343-344

being that he had enriched himself at the expense of the nation and the people of India. But Burke's interest in Indian affairs long preceded Hastings' impeachment, not least because he himself had been a shareholder in the Company. In 1783, an unlikely pairing of the Whig Lord North, who had authored the regulations of 1773, and Tory MP Charles James Fox, brought forward a bill largely written by Burke to bring the East India Company under greater Parliamentary supervision.

In his speech in the House of Commons prior to the India Bill being voted on, Burke did not deny the right of the Company to exercise the powers granted to it by charter and in fact explicitly defended its rights to have such powers. His objection, like Smith's, was that the Company had not proved itself to be a benevolent or responsible governor. He describes that the political powers granted to the Company could be justified only if they were understood as a trust, which by its very nature had to be held accountable by the representatives of the nation or even revoked if the powers were abused.<sup>31</sup> He argues that the trust placed in Parliament as an institution regulated its interaction with the Company, and if the Company was seen to have betrayed the trust placed in it, then it became incumbent on Parliament to step in to correct the abuse.<sup>32</sup> In one passage, Burke excoriates the Company for not having kept any of its treaties to Indian rulers: "This position is so connected with that of the sales of provinces and kingdoms, with the negotiation of universal distraction in every part of India, that a very minute detail may well be spared on this point. It has not yet been contended, by any enemy to the reform, that they [the Company] have observed any publick agreement."<sup>33</sup> During

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<sup>31</sup> Edmund Burke, *On Empire, Liberty, and Reform: Speeches and Letters*, ed. David Bromwich (New Haven: Yale University Press, 2000), 291.

<sup>32</sup> Burke, *On Empire*, 292. It might not be a coincidence that Burke uses the word "trust." In his time, corporate concepts and the idea of the trust were likely being developed concurrently in legal discourse. Maitland's series of essays on the concept of the trust are paired with those on the legal history of the corporation and the state. In his writing on the trust, Maitland notes the origins of the trust in the regulation of private religious bodies outside the Church of England, which could not be given official imprimatur and thus made into legitimate corporations but instead were recognized as legal trusts: "Doubtless a corporation is, because of its permanence, a convenient trustee. But it is a matter of convenience... And here it should be observed that many reformers of our 'charities' have deliberately preferred that 'charitable trusts' should be confided, not to corporations, but to 'natural persons.' It is said – and appeal is made to long experience – that men are more conscientious when they are doing acts in their own names than when they are using the name of a corporation" *State, Trust, and Corporation*, 101-102.

<sup>33</sup> Burke, *On Empire*, 301.

the course of the speech, Burke provides a detailed assessment of the various injustices that the Company agents had committed in their dealings with Indian rulers, before he turns to their failures as merchants. He summarizes:

Indeed, no trace of equitable government is found in their politicks; not one trace of commercial principle in their mercantile dealing; and hence is the deepest and maturest wisdom of parliament demanded, and the best resources of this kingdom must be strained, to restore them; that is, to restore the countries destroyed by the misconduct of the company, and to restore the company itself, ruined by the consequences of their plans for destroying what they were bound to preserve.<sup>34</sup>

Burke's speeches concerning the East India Company are also remarkable for his clear-eyed defense of the rights of Indians and his objection to the unjustified disruption of Indian politics by a mismanaged and corrupt company. Like Smith, however, he does not question that a merchant company should have the prerogatives of a government. He only goes as far to say that these interests, that of a mercantile company and that of a responsible government, might be opposed to one another and lead to the Company not fulfilling either role properly. This was an important and necessary critique, but it did not sever the corporate links that bound the state and the joint stock company together as similar sorts of organizations.

In the eighteenth century, criticism of the Company centered on its illegitimacy as a governor. It wasn't until the nineteenth century that the idea of the company being a governor at all was brought into question and the very combination of commercial and governing powers in the same body was seen as an aberration in the history of government. Nevertheless, this brief review of just a few leading thinkers that were contemporaries of the Company draws our attention to the growing tension that existed between the state and the joint stock companies. Nowhere was this clearer than in the privileges and rights of the joint stock companies that traded abroad. Recognizing that corporate

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<sup>34</sup> Ibid., 348.

bodies shared a common institutional heritage, albeit one specific to post-Roman, Christian Europe, should make the extraordinary powers and behaviors of the joint stock company less puzzling, but it should also remind us of why colonial governments did not necessarily reflect the values of the societies and governing traditions of their metropolises.

The preceding discussion has shown that even though states and corporations can be viewed as cousins of a sort, this says nothing about what is considered legitimate activity on the parts of these distinct bodies. On some dimensions, especially in the functions they possessed, contemporaries found it relatively unproblematic that the East India Company exercised violent force and political authority. However, the manner in which it did so was suspect because in the minds of jurists and political theorists, the Company was not only subordinate to the state (represented by the Crown and Parliament), but it was also in its constitution and origins incapable of claiming legitimacy as a governor. The next section presents evidence for this claim by examining the ongoing legal issues surrounding the “interlopers,” or private traders to India.

### **Interlopers in the East India Trade**

In the 1680’s and 90’s, the Company was embroiled in a set of debates concerning the renewal of its charter, since its monopoly privileges prevented the entry of private traders to the India trade. Those opposed to the Company’s monopoly on trade to India eventually won the Parliamentary battle, but this led only to the chartering of a rival company. A New East India Company was chartered in 1698, but it was eventually merged with the old Company, becoming the United East India Company in 1709, a body that retained the monopoly privileges of its predecessor.

Those that opposed renewal of the charter with monopoly privileges intact accused the EIC of not only of enriching itself at the expense of the nation, by excluding private trade to India, but also of endangering the precarious position of English trade through rash and violent behavior against

Indians. One pamphleteer, detailing the depths of their perfidy in a typical example, described that the Company had borrowed £400,000 from Indian merchants in the city of Surat, only to forego repaying their debt. Then, once having docked in Bombay, the general of the Company's ships, Sir John Child, in the name of grievances suffered by the Company, "employ'd the English Ships under his Command to make further spoil on the *Mogul's* Subjects, by *seizing* all their Ships and Goods they could meet with; which violence they committed under the *Royal Ensigns* of our Nation...Nor did they make due Applications to the *Great Mogull*, for Redress of their pretended Grievances before they acted the foresaid *Depredations* upon his Subjects."<sup>35</sup> The language of those opposed to the Company's monopoly relied on similar appeals to nation and king, with the aim of demonstrating how the Company's various claims to political authority were flimsy at best, not only because such claims flouted English law and national pride *but also* because they ran up against what was perceived as the true authority in India – the Mughal Empire.

The Glorious Revolution of 1688, which occurred as the debates surrounding the Company were ongoing, strengthened Parliament at the expense of the monarchy. This shifted political discourse about the Company by casting doubts on the Company's loyalty to the new representatives of the nation. In addition, the Company fought a series of battles in the late 1680's with Mughal governors off the west coast of India and with the King of Siam. The battles in India ended with the Company's defeat and revocation of their trading privileges. The process of supplication to Mughal Emperor Aurangzeb that the Company had to go through to regain their privileges was seen as a blow to English national pride. During this era, the long-established practices of the Company in what amounted to its independent fiefdoms in India clashed with the social and political changes occurring in England that demanded greater transparency and accountability from the Company to the English people, and

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<sup>35</sup> *A Brief abstract of the great oppressions and injuries which the late managers of the East-India-Company have acted on the lives, liberties and estates of their fellow-subjects* (1698), 3, Gale CENGAGE Learning: *The Making Of The Modern World*.

not to the Crown alone. Other criticisms of the Company noted its duties to the people it governed abroad.

Company officials, for their part, argued that as merchants, their only obligation was to protect the trade of the English nation. In order to do this they had to take on “despotic” powers, meaning absolute sovereign authority, in their dealings with foreigners because this was how they demonstrated their strength not only to Indians, Malaysians, Chinese, and others but also to other Europeans in the Indian Ocean.<sup>36</sup> Josiah Child, the governor of the East India Company between 1681 and 1699, argued that the Company not only had the right but the obligation, on behalf of the nation, to maintain armies, arms of government, like courts, and a monopoly on trade. He viewed the sovereign privileges and status of the East India Company as necessary measures against the encroachment of other Europeans, especially the Dutch, into the trade in India. To this necessity to defend English trade, he attached the idea that the joint-stock form of the Company was the only true way of maintaining England’s advantage. He recognized that many of the capabilities of the Company came from the superiority in resources that the joint-stock form enabled.

In the debates of the late 1600’s concerning dissolving the East India Company and re-establishing the Company under the authority of Parliament, Child had to prove to his critics why the activities of the Company were legal and necessary as well as why the joint stock would prove the most advantageous to the successful continuation of trade. Another way of looking at this debate is that the Company members were in favor of joint-stock form, which was a true corporate body and gave them the ability to set their own laws and govern themselves. This was crucial for establishing the apparatus through which the Company could take on state-like functions. As such, it was the joint-stock format of the Company as a type of body politic that worried contemporary observers, who saw in it the potential for exercising illegitimate authority. In order to show the Company’s desire to maintain the

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<sup>36</sup> Stern 146.

joint-stock corporation, I will briefly look at their arguments with regards to three areas in which the Company asserted its right to autonomy: trade, warfare, and government.

Many of Josiah Child's contributions to political thought of the time, as well as his arguments in support of the East India Company, were economic in nature. He and other supporters of the Company claimed that the trade was the "most national of all foreign trades" because of its immense contribution to the prosperity of the English nation: "Above four fifth parts of the Commodities Imported by this Trade, are again Exported into Foreign parts; by which the Navigation and Trade of this Kingdom is vastly increased into *Turkey, Italy, Spain, France, Holland,* and other parts of Christendom; by the Returns of which, more than treble the Bullion is imported, that was first Exported to India; and the Wealth of this Kingdom is as greatly increased, as by the direct Trade to and from the *East-Indies.*"<sup>37</sup>

In another passage, Child argues that the preservation of this trade depends on excluding private traders who increase the costs of preserving the profitable Company trade without contributing to it. He alleges that the Company is already generous in allowing free, private traders to trade as they please within the Indian Ocean, while excluding specifically the trade between Europe and Asia: "Now let any indifferent man judge...whether it be not highly reasonable, that seeing the Company are at above 100000 *l.* yearly charge in *East-India* and *England*, that whoever participates of that Trade, should proportionably contribute to the expences that necessarily attend the preservation of it."

An anonymous sympathizer of the Company supports this point in his defense, writing that the interlopers had destroyed the trade in India in an earlier period through the liberality of the Company's policies, which "drove on their Trade to a considerable loss, besides many indignities, affronts, and injuries, which were by several Princes in India where they traded put upon them; even to the forcing them to sell their Goods, and to take others at such Rates, and Price as they pleased; which could not

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<sup>37</sup> Sir Josiah Child, *A Treatise Concerning the East-India Trade*, (London: 1681), 36-38.

have been put upon a Company in a Joynt Stock.”<sup>38</sup> In these varied arguments, preservation of the monopoly on trade, through the joint-stock, emerges as a common theme. Child and other Company supporters felt that the joint-stock form was necessary to maintain a national trade in which the dignity and authority of the Company abroad was not questioned.

Another way to enforce this authority was through carrying arms and maintaining a menacing, state-like presence in Asia. On the issue of rights to arms and conducting warfare, Child writes: “Where-ever the English or any Europeans settle a Factory in *India*, they must presently build them large Houses, Ware-houses, etc. take many Servants, and maintain the appearance and splendour of a petty court: and in many places where the company have not fixt Garrisons, they are forced to fortifie their Houses, or else they will be despised and trampled upon by the Natives.” In the following section of the argument he notes that all the European trading companies have the right to fight Indian nations, a “power they must and ought to have for the well carrying on of their Trades...if it were not known in *India*, that they have such a power, they should be continually affronted and abused by the Natives. Now who shall this power be delegated unto, in a regulated Company? To all English men, or to a single Ambassador, or to many Ambassadors and Consuls?”<sup>39</sup>

Here, Child points out that the Company cannot effectively protect itself without a joint-stock, which provides the capital necessary to sustain grand military establishments and provides a means for making united decisions. The implication of the questions that Child poses to the reader is that the joint stock, with its unified, corporate financial and decision-making structure, was the only way to confront well organized political and military opponents. This also recalls Hobbes’ argument that unlike joint stocks, regulated companies were not truly a type of body politic because they had no representative structure through which to make decisions and carry out obligations.

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<sup>38</sup> *A Modest and Just Apology for; or Defence of the Present East India Company Against the Accusations of their Adversaries*, (London: 1690), *The Making Of The Modern World* Online, 9 June 2014, 8.

<sup>39</sup> Child, *Treatise Concerning East-India Trade*, 6.

The Company's claim to be able to govern itself was a bit more complicated than its claims to exclude interlopers from trade or carry arms. While the Company had little direct oversight for its activities in India, it still had to maintain its legal standing in England. For example, Josiah Child interrupts his section on the complaints of the company of traders in Turkey to make a strong statement of support for Parliament. He writes that he understands the importance of establishing a new joint-stock, but he notes that doing so is "a Matter of great difficulty, it being in Trade, as with Trees; great care is to be taken in removing an old one, least upon the removal it die, or at least suffer a shrewd stunt. Yet if the wisdom of our Nation in that august assembly of Parliament, now convened, shall incline to the alternation of the present Constitution, I think this time may be as opportune as any."<sup>40</sup>

In a later passage, he notes that reconstituting the Company would tend to the benefit of the kingdom: "If a New Stock were now establish'd, to please the Generality of the Kingdom, I should not despair but that such New Stock would have a Parliamentary Sanction...and which being obtained, I am perswaded would in less than an Age, render his Majesty as indubitably Sovereign of the Ocean, as he is now of *Great Britain, and Ireland*, and the Seas adjacent."<sup>41</sup> Child's motivation in making such statements becomes more clear when he concludes that trade is best secured in an "English Company" when its basis is not uncertain – in other words, not a regulated company. He recognizes that the continued autonomy of the Company depended on the official seal of the English government.

He also makes an interesting point about the English monarch becoming "sovereign of the ocean," an authority that would implicitly be exercised through the Company. Child's praise of Parliament and the nation's will is part of his larger project of reinstating the joint-stock, which he

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<sup>40</sup> Child 10.

<sup>41</sup> Child 11.

knows will have the ability to escape strict scrutiny in the Indian Ocean as well as the resources to work effectively with Indian princes. Another supporter of the Company makes this point more directly:

That it is very well known, how Moral soever the People of India are said to be, yet their forms of Government do not admit those open ways to Justice, practiced in Europe; and therefore the double Arguments, of Force, or Money to the Governours, must always be had ready; Otherwise, upon every little dispute, they will over-run, and seize the Persons and Effects, of any *Regulated or open Traders*, which will always be fomented, by the *Joint-Stocks* of other *European Nations*.

Whereas *Joint-Stocks* have at a very vast Expence obtained many great Priviledges, and Immunities from the *Indians*; As *Coining of Money, Trading Custom free*, and many others, too large to be here particularly inserted: If a *Regulated Company or open Trade* be introduced, the said Priviledges and Immunities will be utterly lost, and if ever reobtained, must be at a very great Charge.<sup>42</sup>

These two passages describe the Company's anxiety that it would not be reconstituted in joint-stock format and thereby lose the sovereign prerogatives it had obtained in its negotiations and long trading relationships with Indian princes and the Mughals. There is also concern that without a strong, armed presence in Asia, not just the Indian rulers but also the other European traders would take advantage of England's lack of organization and central authority. The joint-stock company is therefore seen as the remedy.

Stern notes that the fundamental principles of the Company involved "building population and prosperity through defense, maritime power, and security of trade, property, and civil society." The Company understood its responsibilities in India to include sovereign privileges within a tributary structure. The Company's philosophy of rule, which involved both legal and military functions, was a natural outgrowth of its mounting responsibilities in Asia, especially in combatting the threat of piracy, discouraging so-called interlopers from trading independently, and keeping Company colonies safe.

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<sup>42</sup> *The Arguments for a Regulated Company, or Open Trade to the East-Indies, answered; with Reasons why a Joynt-Stock will best Carry on, and Preserve that Trade*, [n.p.], [169-?]. *The Making Of The Modern World* Online, 9 June 2014.

As the government of the English in Asia, the Company had an obligation to engage in policing, war, and lawmaking.<sup>43</sup>

How far were these claims accepted by the Company's critics? In examining the perspectives of the critics, I consider the same three areas of Company claims to autonomy: trade, warfare, and government.

Critics of the East India Company, as noted earlier, were in the midst of a shift in English politics in which Parliament had become ascendant, and bodies that were closely associated with royal authority yet not constitutive of royal authority, like the Company, seemed increasingly suspect. In addition, the Company's rising expenses in India, due especially to its conflicts with the Mughal governors, was seen as unsustainable and the result of poor management. As opposed to the Company's view of itself as a corporate body with sovereign privileges, many critics saw the Company as a conglomeration of greedy, risk-taking individual adventurers.

Theoretically, the Company was responsible as a body for its misdeeds, but what critics pointed to was that in practice, Company leaders in Asia acted as petty kings and used the body of the Company to cloak their actions, thereby bringing them into direct conflict with the will of the English nation, as represented through king and Parliament. While the Company's leadership was in London, the activities it came under scrutiny for largely occurred abroad making accountability and responsibility even harder to ascertain. The idea that the joint-stock corporation could adequately address grievances through its representative structure was condemned as a fantasy that hid the true motivations of the individual members.

Many of the strongest objections to the Company were based on its monopoly on trade in Asia, which many critics saw as distinctly anti-national because it excluded free English traders. In contrast, the Company viewed its monopoly as crucial to the health of the nation's trade. Drawing on the history

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<sup>43</sup> Stern 128-129, 135, 146-147, 151.

of the trade to India, one critic noted that: “The *India* Trade hath been carried on better for the Nation without a Company in a Joynt-Stock than with one, and may be so again. From 1678 to 1689, may Ships were sent to *India*. . . and the Cargo’s that several of those Ships brought were better in Sortment and in Quality than the Companies.”<sup>44</sup> The same author argues also that: “Establishments of Trade in *England* are Monopolies at Common Law; for that they Give and Appropriate that to Some only which is the Common Right of All.”<sup>45</sup> In the same passage, the author argues, like Hobbes, that the Company exploits both sellers and buyers of its goods through its double monopoly on trade in England and Asia.

This acknowledgement of the Company’s double monopoly led to the conclusion that the trade was not national because it did not represent the interests of the English nation. The “*Miscarriages of the East-India Company*” were analogized to the “*Misfortunes of the Nation*.”<sup>46</sup> Part of the anti-national aspect of the Company’s dealings was the high barrier to entering the trade in the first place because of the cost required in purchasing stock, which made for an argument against reinstating even a new joint-stock: “And tho’ the Stock will change its Owners, as People Buy or Sell, yet Experience shews, that upon any Advance in the Trade, the great Sharers therein Accumulate more and more themselves.”<sup>47</sup> This passage points to another grievance against the Company – that the Company leadership was accumulating great wealth at the expense of other traders and the English nation. Arguments for reinstating the Company were viewed as abandoning the ordinary English citizen in favor of rich men like Josiah Child: “that should they be so fortunate as to have this great *Oriental Trade* settled on them and their Successors, exclusive of their Fellow-Subjects, without any Regulation,

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<sup>44</sup> *A Regulated company more national than a joint stock in the East-India-trade*, (London: 169-?), *The Making Of The Modern World* Online, 9 June 2014.

<sup>45</sup> Ibid.

<sup>46</sup> *Some remarks upon the present state of the East-India company's affairs: with reasons for the speedy establishing a new company, to regain that almost lost trade, which is computed to be in value and profit one full sixth part of the trade of the whole kingdom*, (London: 1690), *The Making Of The Modern World* Online, 9 June 2014, 3.

<sup>47</sup> *A Regulated company more national than a joint stock in the East-India-trade*.

there are Three Members of this Company, who...may value themselves at more than *half a Million of Money each Man.*” This in turn would “invest them with Estates greater than that of many Sovereign Princes, and in a word render them formidable Subjects.”<sup>48</sup> Clearly, a concern of the critics of the Company was that the Company leaders underestimated, or misrepresented, how powerful and wealthy their monopoly on the trade made them, giving them the ability to act like “sovereign princes” in private fiefdoms halfway across the world, far from the reach of Parliament or the King. This damaged their credibility as merchants engaged in trade for the benefit of the English people, drawing attention instead to the private gains they made at the expense of the nation.

War and conquest were perhaps the clearest ways in which the Company’s activities were seen as exceeding its authority. One of the most important events that hardened attitudes towards the Company was the prosecution of the war against the Mughal governor of Surat and his official, known to the British as the Sidi. Stern writes that the aims of the Company were explicitly not to remain mere merchants; instead Company leaders in India, like John Child (no relation to Josiah Child), recognized that their authority depended on their ability to defend themselves against the Mughals and other European powers, which required a strong display of force.<sup>49</sup> This posture drew heavy condemnation from critics at home. The Company portrayed its peace settlement with the Mughals as a victory, which led the public to expect that the new “Phirmaund” (*farman*), or letters securing the Company’s privileges from the Mughal government, would “appear for the Honour and Advantage of the *English Nation.*”<sup>50</sup>

Instead, the *farman* they received was seen as an “Instrument that stands upon Record in the Court of that Great Prince, to the Eternal Infamy of the *English Nation*; as the Effect of our most unjust and

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<sup>48</sup> *Controversy between the East-India company and the new subscribers, setting forth the extreme difficulty of making the present company the root for carrying on the future trade*, (169?), *The Making Of The Modern World* Online, 9 June 2014.

<sup>49</sup> Stern, *The Company-State*, 122.

<sup>50</sup> *News from the East-Indies*. (London: 1690), *The Making Of The Modern World* Online, 9 June 2014.

unaccountable War, whereby not only the Honour of the *English* (before in the highest Esteem,) but the Interest of the Company in particular, hath suffered an Immense, and irreparable Damage.”<sup>51</sup> The same news article goes on to accuse the Company men, “daring and arbitrary Men,” of increasing their own estates through the war “by the Ruin of their Fellow-Subjects.” The expense of the war, combined with the perceived humiliation it imposed on the English nation was deemed to be a consequence of the actions of a few greedy and power-hungry men, and the new settlement a meager compensation: “For, as to the Nation and Company, after the loss of six years Trade, and destruction of many considerable Ships, and the death of our best Seamen: The Condition on which we are now re-admitted to Trade, is, That full Restitution be made to the *Mogul’s* Subjects for all the Ships and Goods the Company have taken.”<sup>52</sup> In contrast, the Company viewed itself as having received the best possible settlement under the circumstances, choosing to portray the *farman* as a concession on the part of the powerful Mughals.<sup>53</sup>

But critics saw the wars as unnecessary in the first place, and the public resented the spreading of disease and death among young English men who were soldiers and sailors in these wars and sometimes had their stays in India and Southeast Asia extended without warning. Additionally, in order to prosecute the war, the Company had incurred large debts, which was seen as another instance of the Company’s callousness and lack of transparency: “For the obtaining, and support of this Unlimited, Arbitrary Power over their Fellow-Subjects, Those that manag’d the Affair, have presum’d to Issue out Great Sums of the *Company’s* Money under the Title of *Secret Services*.”<sup>54</sup> This criticism also notes the secretive nature of the Company’s finances. Others drew more attention to the injustice of the war against the Mughals, which occurred simultaneously with a war against the King of Siam:

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Stern, *The Company-State*, 126.

<sup>54</sup> *A Brief abstract of the great oppressions and injuries which the late managers of the East-India-Company have acted on the lives, liberties and estates of their fellow-subject*, etc.(1698), *The Making Of The Modern World* Online, 9 June 2014, 2.

“Besides these evil Practices on their Fellow-Subjects, whose *Lives* and *Estates* they have thus dispos’d of at their Pleasure; their late Dealings also with the Natives of *India*, have been most unjust and unaccountable.”<sup>55</sup> These “unjust and unaccountable” dealings included leaving debts unpaid at Surat and not making sufficient applications to Mughal Emperor Aurangzeb for the addressing of their grievances before resorting to force. Especially the lack of any formal declaration of war, made their exercise of authority seem more arbitrary: “This Storm thus falling upon the *Mogul* and the good King of Syam, our Ships were employ’d in *India* for the *taking and seizing of all their, and their Subjects, Ships and Estates*, even those in our Ports at *Bombay*, though they had our *Factors Passes for Security*, without either *Declaration of War, or Demand first made.*”<sup>56</sup>

This account also demonstrates that the Indian ships, which had complied with the Company’s requirement that all traders possess Company-issued passes, was not enough to shield them from violence, undermining the legitimacy of the English law in India. The use of force itself, some argued, was made more likely by the establishing of forts and castles in India, which provided poor defense against other Europeans and tempted the Company to use violence to settle their affairs as well as provoked anxiety in local princes.<sup>57</sup> In all these accounts of the East India Company’s affairs in India, critics press on the point that the Company is no more than a group of men, exercising arbitrary authority and resorting to force without any legitimate, legal basis. The image of the joint-stock corporation thus recedes into the background and prominence is given to the idea of the Company as a conglomeration of individual men possessed of no special authority or ability to prosecute wars, which, when conducted, resulted in the “infamy” of the English nation.<sup>58</sup>

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<sup>55</sup> *A Brief abstract of the great oppressions* 3.

<sup>56</sup> *Some remarks upon the present state of the East-India company's affairs* 4.

<sup>57</sup> *A Regulated company more national than a joint stock in the East-India-trade*: “Forts and Castles in *India*, if we have them, cannot defend us in case the *Dutch, or French, or Indians* be our Enemies; but may tempt us (as it did the Now Company) to offend them, or create a Jealousie in the *India* Princes of us, and by that means tempt them to offend us. In case the *French* and *Dutch* do injure us we may best bring them to Reason nearer Home.”

<sup>58</sup> Another example: “The unaccountable War made with the *Mogul*, was undertaken for *private base Ends and Purposes*, giving out, *That the Company should be enrich’d by taking many Millions from the Mogul and his Subjects, upon return of their Fleets*

This can also be seen in how critics perceived the Company's relationship to the English government. Many critics were for demolishing the joint-stock corporation and its replacement with a regulated company, which did not have high barriers to entry and could not be led into illegitimate wars or conduct legal affairs with foreign princes. One critic writes that the East India trade had begun with free trade under regulated groups, and he notes that now that the Company had established the security of English trade, it only made sense to return to an open trade, which would be more profitable to the nation.<sup>59</sup>

Other critics, who saw the best advantage to English trade under a corporation, desired the reconstitution of the Company under a new joint-stock with stricter limits for charters, bringing the Company under closer regulation by the English government. One notes that the present charter itself was to have expired in 1664, but at the time, such a fuss was made by the Company concerning opening its books to evaluation that nothing was done. As a result, the author writes: "Therefore to prevent all *Delays* and *Mischiefs* that will thereby ensue to the Nation, there's a necessity *that this Company be presently dissolved*, by which none can justly pretend that they suffer, there being nothing taken from them, and *all have a like liberty to come in and subscribe in the New stock*, as well as the present *Adventurers*."<sup>60</sup>

As is clear from these passages, critics of the Company, whether in favor of regulated trade or the joint-stock, viewed the regular evaluation and transparency of Company affairs to be absolutely necessary if the nation was to properly understand what business English sailors, soldiers, money, and arms were conducting in Asia. The Company viewed this frequent meddling in its affairs, or the outright dissolution of its body, as antithetical to maintaining its corporate body, an entity they saw as

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*from Mecha and other places, without ever so much as sending up to the Mogul's Court, with any Complaint or Demand of Justice, but falling upon and destroying those poor innocent Banians and other Merchants that had but even then lent the Company at Surrat Several Hundreds of Thousand Pounds."* (*Some remarks upon the present state of the East-India company's affairs* 6).

<sup>59</sup> *A Regulated company more national.*

<sup>60</sup> *Some remarks upon the present state of the East-India company's affairs* 5.

crucially important for conducting Company business past the lifetimes of individual adventurers or governors.<sup>61</sup>

Others were more skeptical of the Company's ability to reform itself at all. One critic writes that the manner in which the Company had presented itself to Parliament was itself a lie, since they had valued their stock at an unverifiable amount, provoking the criticism that the accounts had been drawn up falsely and unaccountably at Wanstead, Josiah Child's estate, and they were made "to intrigue the World," but the writer stops the accusation short here, "being sensible that the Artifice and Imposture which has been practiced in this matter, will be represented to the *Parliament* in so clear a light, as will make it appear a great Aggravation of their other Miscarriages."<sup>62</sup> Finances weren't the only area of mismanagement by the Company, as some were concerned with the authorities the Company took in matters of the law: "They did also procure a Power from the Late *King*, to Erect *Courts of Judicature*, and exercise *Martial Law* within the Limits of their *Charter*, and to pass final Sentence in Cases Civil and Criminal without Appeal to *England*, which is humbly conceiv'd to be a most *Arbitrary Invasion* of the Fundamental *Rights and Liberties* of their *Fellow-Subjects*."<sup>63</sup> What emerges from these diverse accounts of the Company's misdeeds is that when the Company levied taxes, settled legal cases, conducted wars, erected forts and military establishments, ordered English subjects into war, entered into diplomatic relations with foreign powers, and made money from its various ventures, it was not a body politic, but a group of individuals, who had illegitimately taken on privileges that belonged to the English crown.

Underlying these strong criticisms, however, is the idea that there were ways in which the Company could have become more legitimate, especially by submitting itself to the authority of Parliament and the English people. Returning here to Skinner's conceptualization of legitimacy, the

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<sup>61</sup> See footnote 7.

<sup>62</sup> *Controversy between the East-India company and the new subscribers.*

<sup>63</sup> *A Brief abstract of the great oppressions 2.*

Company, it can be argued, was not acting in the best interests of the nation it purported to represent or in the interests of the subjects it governed abroad. By conducting business in such a way as to enrich a few men at the expense of many, it had also jeopardized the posterity of the English nation in its commercial and diplomatic relations with Asian rulers. Such arguments convey to us that the Company was a body politic and theoretically had the capacity to be a governor. However, whether it could be a *legitimate* governor was unclear. While the Crown had a long history as a corporate body, over the course of the seventeenth and eighteenth centuries, other corporate bodies, especially Parliament and its representation of another body politic, the nation, came to be seen as the sole repositories of the people's trust and the associations most capable of representing the commonwealth. As a result, the Company would come under increasing scrutiny and become characterized as an illegitimate representation of the English nation.

## Conclusion

The battle over whether corporations, especially the trading companies, exercised rights, possessed by virtue of their personhood before the law, or privileges, gained by virtue of delegation by a sovereign authority, was a long one that perhaps remains unsettled to this day.<sup>64</sup> The history of the corporate body shows that many non-state organizations, including joint stock companies, hospitals, proprietorships, and others, possessed similar functions and similar legal standing to the state, but they were not corporate entities in precisely the same ways. Arguments that we should think of the joint stock company as a political entity in its own right, a different sort of political community, with different notions of citizenship, rights, and duties, and therefore as an organization both parallel to and rival to the state, are therefore correct in part.<sup>65</sup> The concept of the corporate genus provides a

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<sup>64</sup> Turkuler Isiksel, "The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights," *Human Rights Quarterly* 38 (2016): 294-349.

<sup>65</sup> Stern, *Company-State*, 6. "In focusing on the Company as a form of early modern government, *The Company-State* proposes to move it – along with companies, corporations, and a variety of non-national political communities more

way to understand the joint stock company's claim to those powers that we associate now only with states as well as to explain why early colonial governors could ignore arguments about obligation and legitimacy that were products of an ongoing public dialogue between European citizens and their own governments since these debates did not necessarily have a counterpart outside Europe.

Nevertheless, those debates over legitimacy and the right to rule that occurred in Europe also arose out of a close association of the state as the representative of the king's, and then the commonwealth's, body, a lineage which other corporations did not share.<sup>66</sup> As a result, it was possible by the mid nineteenth century for politicians and jurists to arrive at a different conclusion concerning the activity of corporate bodies outside the state, especially the joint stock company.

Thomas Babington Macaulay's well-known speech in 1833 before the House of Commons, on the occasion of the passing of further regulations on the East India Company, is worth noting as a clear example. Macaulay argued that the confusion over how to sort out the Company's account books after the revocation of its monopoly privilege was based in a fundamental misunderstanding of what the Company was. He begins: "It is a mistake that the Company was a merely commercial body till the middle of the last century. Commerce was its chief object; but in order to enable it to pursue that object, it had been, like the other Companies that were its rivals, like the Dutch India Company, like the French India Company, invested from a very early period with political functions. More than a hundred and twenty years ago, the Company was in miniature precisely what it now is. It was intrusted with the very highest prerogatives of sovereignty."<sup>67</sup> He then says in a subsequent portion of the

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generally – from the margins to the center of its own political and intellectual history. It resists the tendency to envision the early Company as either merely a commercial body or, when exhibiting political behaviors, in conditional, metaphorical, and ultimately imperfect terms: state-like, semi-sovereign, quasi-governmental. Instead this book takes the early Company as a body politic on its own terms, neither tethered to supposedly broader national histories nor as an imitation, extension, or reflection of the national state, which was itself still in formation through this period."

<sup>66</sup> This argument is eloquently made in Eric Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, (Chicago: University of Chicago Press, 2012).

<sup>67</sup> Thomas Babington Macaulay, "Government of India, A Speech Delivered in the House of Commons on the 10<sup>th</sup> of July 1833," *Miscellaneous Writings and Speeches – Volume 4*, <http://www.gutenberg.org/etext/2170>.

speech: “It is not strange, therefore, that the mercantile and political transactions of this great corporation should be entangled together in inextricable complication. The commercial investments have been purchased out of the revenues of the empire. The expenses of war and government have been defrayed out of the profits of the trade...A chest of tea is not necessarily commercial property; it may have been bought out of the territorial revenue. A fort is not necessarily territorial property; it may stand on ground which the Company bought a hundred years ago out of their commercial profits.”<sup>68</sup>

Macaulay’s attention to the complications of discerning the Company’s commercial character from its political one points precisely to the fact that in his time such a distinction was possible and even perhaps desirable. That such a development coincided with increasing regulations of the Company and its final dissolution in 1874 signals a marked shift in how the British state related to other corporate bodies. Some, like the Bank of England and Parliament, became indispensable to British government. Others, like the East India Company, were regulated out of existence. This registers an increasing uncomfortable recognition of how certain corporations carried their institutional heritage into the modern era, setting them at odds with the omnipotent sovereign state that was now at the top of the hierarchy of corporate actors.

A secondary implication is that observers of multinational corporations and their behavior in neo-colonial ventures in Asia and Africa today should make qualified claims concerning the extent of political authority that such actors can wield. Importantly, the origins of associational concepts should point us to important differences between organizations. Just as medieval and theological foundations provided corporate concepts to European rulers and jurists, those foundations contained within them the seeds for eventually distinguishing between legitimate government on the part of corporate bodies (state, nation, Parliament) and illegitimate government (proprietorships, joint stock companies,

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<sup>68</sup> Macaulay, “Government of India.”

independent townships.) Different associational concepts in other cultures may therefore create their own set of problems and opportunities for commercial actors in those places.<sup>69</sup> Distinguishing between varieties of corporate malfeasance, therefore, requires close attention to origins of associational concepts as well as the evolution over time in understandings of the political and legal limits of such groups.

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<sup>69</sup> See, for example, Teemu Ruskola, "Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective," *Stanford Law Review* 52 (1999) in relation to contemporary fears of Chinese neo-colonial activity through state-linked concessionary companies in parts of East Africa and Central Asia.