Law and the History of Corporate Responsibility

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HISTORY OF CORPORATE RESPONSIBILITY PROJECT

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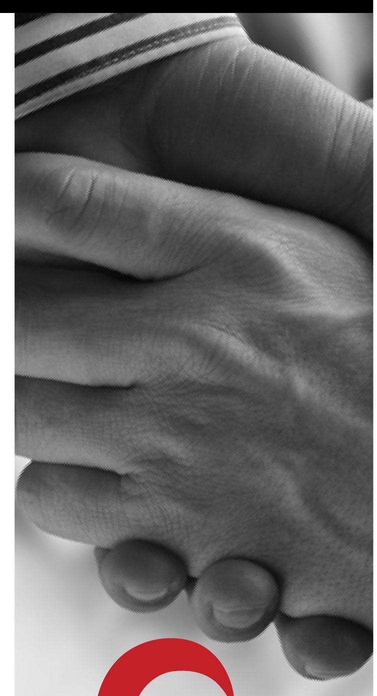

Center for Ethical Business Cultures®

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The CEBC History of Corporate Responsibility Project

In mid-2008, the Center for Ethical Business Cultures (CEBC) launched a multi-year project to research and write U.S. and global histories of corporate responsibility. Funding for the project flows from a major gift by Philadelphia entrepreneur Harry R. Halloran, Jr. to the University of St. Thomas. This grant followed earlier gifts by Mr. Halloran to CEBC to conduct preliminary research and feasibility studies beginning in 2004 and convene a national consultation among scholars and practitioner in November 2007.

OUR APPROACH

The idea of corporate responsibility is not new; antecedents lie in the 18th and 19th centuries. The 20th century, and particularly the last 60 years have witnessed dramatic social, economic, environmental and regulatory challenges to business. Two volumes are envisioned: an initial volume focused on the U.S. experience; a subsequent volume focused on the emergence of corporate responsibility in countries and regions around the globe. Pursuing a "double helix" approach, the project explores the interweaving of the history of thinking about business responsibilities and the history of business practices. The interplay of societal change and the emergence of the modern business corporation provide the stage for exploring questions of purpose and responsibilities of business.

To tackle the U.S. history, CEBC engaged a team of distinguished scholars and supports their work with a series of working papers and interviews with experienced business practitioners.

THE HALLORAN PHILANTHROPIES

The Halloran Philanthropies, founded by Philadelphia entrepreneur Harry R. Halloran, Jr., is guided by Halloran's belief that business is one of the most powerful drivers for positive social change. Halloran is the Chairman and CEO of American Refining Group, Inc., and founder and CEO of Energy Unlimited, Inc., both headquartered in Pennsylvania.

THE CENTER FOR ETHICAL BUSINESS CULTURES (CEBC)

The Center for Ethical Business Cultures (CEBC) at the University of St. Thomas is a 501(c)3 nonprofit organization situated in the university's Opus College of Business. Working at the intersection of the business and academic communities, CEBC assists business leaders in creating ethical and profitable business cultures at the enterprise, community and global levels. The center was founded by Minnesota business leaders in 1978. Please visit www.cebcglobal.org for more information.

About the Author

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Overview

This working paper focuses on the role of law in the history of corporate responsibility in the U.S. Recourse to the law for setting standards related to corporate conduct and processes has been a frequent dimension in debates about corporate responsibilities. The paper examines ideas and developments in four areas: corporate personhood; corporate purpose; corporate regulation; and corporate governance. Within this framework, the paper explores ways in which the law both reflects and shapes the cultural context in which corporations have evolved and the debates about the responsibilities of the corporation.

Law and the History of Corporate Responsibility

Introduction

This paper addresses how law has played a central role in the history of corporate responsibility in the United States. The treatment will be illustrative, not exhaustive, and serves to make the simple but important point that a full historical understanding of corporate responsibility requires an appreciation of the law's significant contribution to the longstanding quest for responsible corporate conduct. In one respect, the spheres of law and corporate responsibility, although clearly complementary, might be seen as distinct, in both theory and practice. Law, after all, mandates – with the full sanctioning power of the state behind it – compliance with specified standards of behavior. Apart from a decision to comply or disobey, there is no real exercise of discretion in abiding by the law. "Responsible" conduct, on the other hand, presupposes the freedom to engage in or refrain from certain conduct. Viewed this way, corporate responsibility concerns can be seen as picking up precisely where legal strictures leave off. Consequently, just as substantive normative debates about legal policy, on the one hand, and corporate responsibility, on the other hand, might be thought to occupy separate if related spheres, so too it might be thought that a history of the latter could be written while being largely unmindful of the former.

Scholarly discourse itself suggests a certain academic "siloing" of law and non-law treatments of corporate responsibility and its history. Both legal and other scholars have written quite extensively on corporate responsibility, and although the literatures occasionally overlap, in recent years the academic discourses seem to be carried out more in parallel than continually and fruitfully interwoven.

The history of corporate responsibility in the United States itself, however, reveals no such neat cabining. The legal vein runs conspicuously throughout historical concerns about corporate behavior, especially in the 20th and 21st centuries with the full emergence of the large, multifunctional, and now global, public corporation. The legal thread, moreover, has two dimensions. First, there is that aspect seen in developments in positive law, whether legislative or judge-made in origin, as more and more of American social life – including the corporate institution – has been subjected to regulation. Second, there is that aspect reflected in the larger legal culture of intellectual discourse about corporate power and appropriate mechanisms for social control of that power and those who wield it. In addition to the importance of taking account of both strands of this legal history in their own right for a full telling of the corporate responsibility story, changes in positive law mandating (or prohibiting) certain corporate conduct reflect a broader public consensus, a consensus in turn influenced by evolving social beliefs about what comprises "responsible" corporate conduct under changing conditions. Corporations, long deeply embedded in U.S. culture, pervasively affect consumers, employees, investors, creditors, media, philanthropy, scientific research, the environment, communities, and public policy, thereby powerfully influencing the overall quality of life and creating understandable expectations of appropriate conduct. Conversely, by establishing new regulatory standards, legal change periodically ratchets up the level from which ensuing discussions about additional responsible behavior will begin. The law, in short, dynamically reflects, but also shapes, the larger social and ethical terrain in which corporations function and in which discussions about "responsible" corporate conduct take place.

This paper will treat four areas where law historically has both influenced and mirrored cultural expectations concerning corporate responsibility: corporate personhood; corporate purpose; corporate regulation; and corporate governance. Within each of these areas the paper will highlight certain key developments in positive law as well as critical issues in the legal culture's larger grappling with the phenomena of corporate power and corporate control in a democratic society with a strong private business sector heritage.[3] Part II addresses the subject of corporate personhood, a longstanding and recurring topic that continues to vex, and excite, as seen in the U. S. Supreme Court's splintered 5-4 decision in the 2010 case of *Citizens United v. Federal Election Commission*.[4] Part III treats the reliably controversial but unremittingly pivotal subject of corporate purpose, a topic that periodically resurfaces following periods of ambivalent dormancy, while it remains a highly contested debate ever lacking in full resolution. Part IV traces briefly, and necessarily selectively, the quite vast subject of the rise of explicit legal regulation as a customary mechanism of social control over corporate conduct, a process that began in the late 19th century and accelerated dramatically in the latter part of the 20th century and the early 21st century. Part V describes various facets of the all-important connection between corporate governance – i.e., the corporate power structure – and corporate responsibility.

Corporate governance is vital to the subject of corporate responsibility because governance involves the law-ordained structure and process by which high-level corporate decisions are made and corporate power and influence are exercised. Where explicit regulatory mandates of the kind described in Part IV are absent and market forces do not tightly constrain, corporate directors and managers have, to varying degrees and by deliberate institutional design, a fair measure of discretion in deciding how they will govern corporations and whose interests corporations will serve. It is the manner in which this legally-sanctioned and highly desirable running room is deployed (and sometimes abused) that, at moments of social stress and turmoil, reopens with some regularity all the subjects that occupy the heart of the debate about corporate responsibility – i.e., corporate purpose (Part III), corporate personhood (Part II), and occasionally, the need for yet additional legal regulation (Part IV). But any apparent accord on these core debates always is, historically speaking, ultimately inconclusive and maddeningly provisional. History readily reveals, therefore, law's recurrent role in co-producing the story of corporate responsibility.

Corporate Personhood

The Relationship of Personhood and Responsibility

In 1886, the United States Supreme Court famously and tersely stated that a corporation was a legal "person for purposes of the 14th Amendment."[5] Although a seemingly clear and authoritative pronouncement, the legal nature of a corporation, Professor Morton Horowitz has argued,[6] was not settled by the *Santa Clara* decision, but remained as hotly contested after, as well as before, 1886. In fact, the issue of what exactly is entailed within the notion of corporate personhood continues to be pertinent to corporate responsibility in 2011, one hundred twenty-five years after *Santa Clara*. This was seen perhaps most vividly in the remarkable outcry over the *Citizens United* decision striking down federal campaign finance laws and holding that corporations (and unions) enjoyed a First Amendment right to freedom of speech, including political speech.[7] If the issue of corporate personhood had truly been settled in *Santa Clara*, or at some point thereafter, such a ruling should not have been unexpected or precipitated such controversy.

The majority of the Court in *Citizens United,* in seeking to reconcile conflicting lines of precedent, ruled that the identity of the speaker – i.e., whether an individual person or a corporate body – did not constitutionally matter for freedom of speech. The concern in some quarters, however, notably Justice Stevens' lengthy dissenting opinion,[8] was that such a corporate right might enable wealthy business organizations to excessively influence and distort the outcome of U.S. political campaigns, a crucial element in the healthy functioning of a democratic society. In support of his position that corporations could constitutionally be distinguished from humans, Justice Stevens identified a few obvious ways in which a corporation differs from a "natural person:" limited shareholder liability for corporate debts; perpetual life; separation of ownership of property and its control; and the fact that corporations have no consciences, no beliefs, no feelings, no thoughts, and no desires.[9] These undeniable attributes of corporateness simply made no difference to the First Amendment analysis of the majority, of course. Thus, pointed disagreement continues today over what rights, legally, should go along with modern understandings of corporate personhood.

More basically, the justices in the majority and those in the minority seem to hold competing theoretical conceptions of corporateness, even though neither group elaborated at length on this fundamental point. The majority described a corporation as an "association of citizens,"[10] thereby suggesting that a corporation is best understood as a group of otherwise disaggregated natural persons joining together by agreement to mutually pursue a private endeavor. Such an "association" vision of corporateness does not by itself, of course, specifically distinguish a corporation from a partnership, a limited liability company, or any other non-corporate voluntary association, but is instead a somewhat generic notion. Moreover, it does not give an especially good account of how or why a corporation so viewed – with a range of constituencies likely eager to express diverse views – will easily "speak" with a singularity of voice. This is not expected of other "associations" of humans, or even of an individual human, where a range of "voices" – sometimes honest, sometimes dissembling, sometimes generous, sometimes selfish, and so on – are typically used. The dissent, by contrast, asserted that corporations had been "delegated responsibility for ensuring society's economic welfare."[11] This emphasis suggests a public, not merely private, dimension to corporate personhood of a kind permitting retained government limits on political speech. Thus, the two sets of justices openly sparred over the First Amendment rights of corporations but they also seem to be animated by markedly different – if largely unarticulated – visions of corporate personhood and its public or private character.

The significance of corporate personhood for the subject of corporate responsibility goes far beyond the issue of corporate *rights,* however, whether such rights are constitutional in nature or otherwise, such as the right to own and transfer property, enter contracts, initiate and defend lawsuits, and so on. Recognition of a distinctive corporate personhood also, in the public corporation at least, represented a tacit but historically critical acknowledgment that *control* over the enterprise had solidified in the hands of directors and managers, not stockholders or other participants, and that the interests of the business enterprise itself could not simplistically be equated with those of either investors or managers. Concerns about the appropriate exercise of this control eventually led, therefore, to far-ranging and ongoing debates about corporate *duties*, both by corporations themselves and by those business elites who control them. Concerns over fiduciary duties of directors and managers inevitably raised, in turn, the baseline question of corporate *purpose*, while a conception of corporations as distinct persons facilitated wide-ranging legal *regulation* of corporations themselves, as distinct from their managers or other participants. Thus, the emergence of, and continued grappling with, a separate corporate personality, historically has been, and still is, a significant issue for corporate responsibility, legal and otherwise. This is true even as the full contours of corporate personhood were being fleshed out – and disputed – over the many decades leading up to, and now continuing after, *Citizens United.*

The Apparent Decline of Public-Serving Corporateness

The early, pre-*Santa Clara* phase of the U.S. corporate personhood issue reflected an ostensible dramatic shift in how society perceived the basic character of the corporation. Specifically, the early 19th century saw a turn toward the growing use of the corporate form to conduct business for private gain, a movement that continued and grew throughout the 19th century. Prior to that time, many corporations were charged with carrying out public-serving functions.[12] This public service aspect seems not to have been an explicit legal prerequisite to corporate formation but, instead, reflected in practice a shared belief. Thus, colleges, guilds, and municipalities were often organized as corporations, as were such transportation ventures as canals or turnpikes.[13] As of 1780, by contrast, colonial legislatures had chartered only seven business corporations.[14] By 1800, only about three hundred thirty-five business corporations had been chartered, with most of those being organized just in the last few years of the 18th century.[15] The business corporation as we know it today was not a predominant figure in this country's early social landscape.

Moreover, corporations during this early period were created by the conferring of a special legislative charter, not via the general incorporation statutes we know today. One reason for this, emphasized recently by Justice Stevens in *Citizens United*, was that many believed that corporations needed close scrutiny precisely because, as noted above, they were supposed to act consistent with public welfare.[16] Thus it was in the legal process for granting a corporate charter, not in the substantive requirements of the law itself, that the public-serving character of corporateness was, in theory, to be assured. The general incorporation statutes, now familiar in every state, did not arise and spread until the early and middle decades of the 19th century,[17] but then took hold very quickly. Special corporate charters, even if purportedly doled out to assure consistency with public welfare broadly speaking, fostered perceptions of political cronyism in gaining corporate status, a perception that led to their decline. Thereafter, with special legislative action being unnecessary to *obtain* a corporate charter, corporate status became widely available and there remained no legal mechanism to ensure that corporations, once formed, must actually *serve* some "public purpose." This change in legal procedure for corporate formation, therefore, had profound negative implications for the public-serving character of corporations even though it was not disavowal of that character of corporateness, but concerns about cronyism, that ended special chartering.

An illustrative statement of the early "public-serving" belief about corporateness can be seen in a 1809 Virginia Supreme Court opinion affirming the legislative chartering of an insurance company: "[t]hey ought never to be passed, but in consideration of services to be rendered to the public…. It may be often convenient for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely *private* or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privileges."[18] The Court twice referred to the "privileges" of corporate status. This judicial opinion exemplifies the belief that there was, in the early 19th century, no inherent legal right to carry on private business in the corporate form.

By the time of the 1819 Supreme Court decision in *Dartmouth College v. Woodward*,[19] this express "public body" conception of corporateness was in apparent decline. An abiding societal concern with responsible corporate behavior did not by any means disappear during this period, however, but found fuller expression in strict regulation of corporations – both within corporate law, initially, and later, when corporate law ceased being regulatory,[20] through other laws[21] – and later, through protracted debates about corporate purpose.[22] Moreover, the *Dartmouth College* case itself still emphasized the legally-constructed and "unnatural" character of a corporation, preserving in this manner a powerful mechanism of social control over corporations even if corporations could now serve private interests. The Court stated as follows: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."[23] Although the Court acknowledged a state's power to grant or withhold attributes upon formation of a corporation, it did not permit a state to later alter those attributes. The *Dartmouth College* decision itself followed an 1804 Supreme Court decision – *Head & Armory v. Provident Insurance Co.*[24] – likewise emphasizing that corporations had limited powers and must strictly conform to legally prescribed modes of acting. In other words, corporations – unlike natural persons – possessed only those traits conferred by law, whether they served private or public interests.[25]

It is important to modern understandings of corporate personhood to remember that the "artificial being" language from the 1819 decision in *Dartmouth College* was expressly invoked about one hundred seventy years later in a landmark 1987 Supreme Court decision – *CTS Corp. v. Dynamics Corp. of America* – upholding Indiana's anti-takeover statute against constitutional attack.[26] That statute – like many of that era – originated in legislative disdain for the rampant takeover activity of the 1980s that was widely thought to be socially harmful.[27] The Supreme Court's 1987 pointed use of the *Dartmouth College* language suggests that Professor Horowitz was wrong in asserting in 1992 that the "grant" theory of corporateness – i.e., that the corporation was an artificial being, created by the state with limited, legally-endowed powers – had eroded by the late 19th century.[28] If it had eroded at that time, as Horowitz contends, then it sprang to life again in 1987 as the Supreme Court upheld state efforts to curb investor hopes of receiving premium-carrying takeover bids[29] by relying, in part, on just that basis. The Supreme Court may not today have a fully settled conception of corporate personhood – as evidenced by the dueling opinions in *Citizens United* – but it apparently has not altogether jettisoned the position that corporations possess only those features with which they are endowed by law and that legislatures may advance the public welfare through corporate statutes.

This vein of legal thought, that corporations, even if eventually gaining a fuller measure of *legal* personhood in the one hundred twenty-five years from *Santa Clara* to *Citizens United*, still were not wholly "natural," but were legislatively endowed with – rather than inherently possessing – certain traits, has never entirely disappeared, Professor Horowitz notwithstanding. This is true even as modern corporate statutes – such as the influential Model Business Corporation Act – broadly liken corporate powers to those of individuals, in conferring on corporations the "same powers as an individual to do all things necessary or convenient to carry out its business and affairs."[30] Apart from such express legislative grants of corporate powers, moreover, one wonders how else such powers – or such "unnatural" features as limited liability and perpetual duration – would arise. The attributes of limited liability and perpetual duration do not arise simply by agreement of those private parties to form a corporation. Rather, such agreement is a necessary condition to forming a corporation but it is not itself a sufficient condition to endow corporations with those unusual traits. Moreover, under the reserved power to amend corporate statutes,[31] states can and do amend corporate statutes in ways corporate participants themselves might find objectionable.

Modern legislatures may, as a matter of practice, therefore, confer broad powers and other attributes on corporations, but, under the never-renounced reasoning of *Dartmouth College* and *CTS*, it is not clear that they *must* do so, *Citizens United* notwithstanding. *Citizens United* simply presupposes a corporation with typically broad modern powers ordained by state law and holds that such a full-formed corporation enjoys First Amendment rights. It does not hold – or even address – whether states must in fact confer broad powers on corporations in the first place. The text of the First Amendment, after all, prohibits government actors from making a law "abridging" freedom of speech. It does not, however, affirmatively create or confer such a right on a corporation where a state chooses not to do so by refraining from even granting that power, and a corporation never having a capacity to speak cannot be said to have had such a non-existent right "abridged" by government action. *Citizens United* does not hold to the contrary. If it did, it would clash squarely with the enduring teachings of *Dartmouth College* and *CTS*. Perhaps it is for this reason that the majority in *Citizens United* sidestepped the fundamental issue of corporateness in favor of its more amorphous "association of citizens" conception. This notion permits a full-voiced corporation to engage in political speech because such a corporation is, in the majority's eyes, just an "association of [natural] citizens."[32] This resolution permits the typical, broadly-empowered modern corporation to speak while avoiding the issue – not before it – of whether a state under *Dartmouth College* and *CTS* could, if it chose, constitutionally create politically "voiceless" corporations by electing not to endow them with that particular trait in the first place.

For corporate responsibility, the issue then is not simply what are, throughout history, the substantive contours of emergent corporate personhood but, more importantly, *who* in society determines those substantive contours. Having seemingly abandoned in the early 19th century an insistence that corporations serve public welfare in some fashion, states today could elect to reassert unique control over corporations to make them more socially responsible, under an artificial person theory of the kind last endorsed in *CTS*. That states do not often – the statute upheld in *CTS* being a notable exception – use their corporate statutes to control the activity of corporations formed for private gain so as to achieve public-serving outcomes, does not mean they lack power to do so. We should not confuse a longstanding custom – even one stretching back to the 19th century – with legal necessity. Thus, even today, corporate law could easily be used to modulate corporate conduct in a more responsible, public-serving manner by altering the core attributes of corporate personhood.

Corporate Personhood as Distinct Entity or Aggregation of Individuals

The second historical phase of the corporate personhood issue did not directly involve the earlier public versus private-serving character of the corporate function but, instead, raised more pointedly the legal-existential question of what a corporation really "is." Was it simply an aggregation of human individuals or was it a separate entity – whether "natural" or "artificial" - distinct unto itself?[33] This question, as Professor Horowitz observes,[34] was not settled by, but only intensified on the heels of, the 1886 decision in *Santa Clara*. Moreover, the legal and philosophical tussle over the "true" nature of corporate personhood became meaningful only in light of the dramatic growth in the number of corporations – and their rising socio-economic prominence – throughout the 19th century.

As described by business historian Alfred Chandler, the partnership form of business remained the standard vehicle of business enterprise until well after 1840.[35] The partnership form was used in a broad array of businesses, whether small merchants and storekeepers offering goods and services locally or wealthy merchant bankers engaged in more far-flung financial activity. Dramatic improvements in transportation technology – i.e., railroads – during the 1840s, and later development of communication technology – i.e., the telegraph and telephone – permitted the dependable inflow of raw materials into, and the outflow of finished goods from, U.S. factories on an unprecedented scale.[36] Both the production and the distribution of goods could, technologically, take place at much higher levels than before. This, in turn, necessitated large amounts of financial capital as well as skilled managers, and often mass production was combined with mass distribution within a single business firm with regional and national reach, whether that firm grew internally or by merger with other smaller enterprises.

Business historians attribute the rise of the corporation to its remarkable capacity to support these macro business trends.[37] The corporate form permitted accumulation of vast (and committed) capital due to the divisibility of investor equity into numerous "shares" of corporate stock. Eventually, unlike the case with partnerships, legal rights to a significant degree resided with (or at least were based on) the "stock" itself, not the "stockholder." Complex manufacturing enterprises also required people with specialized technical and managerial expertise, persons who very likely did not also provide most of the financial capital. Limited liability – which developed haltingly, even into the early 20th century[38] – largely immunized passive investors from corporate liabilities, unlike 19th century partnerships,[39] thereby inducing their participation in ventures they did not manage. Conversely, creditors of investors could not reach corporate assets, effectively partitioning such assets for access by business creditors only. These features made far greater legal and conceptual sense – not to mention linguistic simplicity – if a corporation were considered a person or entity distinguishable from both its investors and managers.[40] Nonetheless, around the turn of the 20th century an intense academic debate over corporate personhood ensued, with some advocating precisely such an "entity" theory of corporateness in which the corporation was viewed as legally distinct from its constituents, and others urging the "aggregation" theory in which corporations were simply viewed as aggregations of individuals.[41]

Eventually, proponents of the entity theory prevailed,[42] and corporations by and large were understood as legally and conceptually distinct from investors, managers, and other participants. Thought to be central to ending the decades-long wrangling over the nature of corporateness was a 1926 essay by philosopher John Dewey arguing that the competing theories were infinitely malleable, with each capable of limiting as well as enhancing corporate power,[43] a position Morton Horowitz famously set out to dispute.[44] The late 19th and early 20th century debate over the nature of corporateness had taken on such urgency in the first place only because of what Horowitz describes as the "crisis of legitimacy in liberal individualism arising from the recent emergence of powerful collective institutions."[45] It was widely noted that much of our nation's economic activity was conducted by large corporations and that those who controlled the governance of these mammoth organizations wielded vast social and economic power. Under corporate law rules as they ultimately developed, these control persons were not the stockholders, however, but were a handful of directors and managers. Here, and in other ways too, the legal rules governing corporations differed from those in partnerships, where the general partners combined the capital-providing and management functions. Thus, those large numbers of investors who provided financial capital to corporate enterprises did not themselves, at least in public corporations with dispersed investors, control or manage corporate affairs. As corporations grew in socio-economic significance, therefore, those who managed them grew correspondingly in power, both in relation to investors and other groups within the enterprise itself and in external relation to society at large.

The triumph of an entity theory of corporateness – a triumph that took many years after the 1886 *Santa Clara* decision – corresponded with an extensive endowing of corporations with various legal powers and rights, as partially chronicled in the several *Citizens United* opinions. But corporations even today still do not have all the constitutional powers accorded to individuals, as, for example, they lack the Fifth Amendment protection against self-incrimination.[46] Horowitz' extended argument on the historical emergence of corporate personhood sought to demonstrate that an entity theory was far more compatible with the reality of centralized power in the corporate institution than was the competing aggregation theory, and that it better legitimated such power. In this way, Horowitz seeks to provide an historical account of the ascendant reality of the corporate "group," not just the individual, as central to the growing organizational complexity of American law and society. He insists, however, that it was not just any entity theory that prevailed but that it was a "natural entity" theory in particular. Under this conception, a corporation is "a real and natural entity whose existence is prior to and separate from the state."[47] That position, however, is extremely hard to reconcile with the artificial entity language of *CTS*,[48] and Horowitz does not convincingly demonstrate how the success of the entity theory over an aggregation theory meant as well the success of the "natural" entity conception over the earlier "artificial" entity theory. Each entity theory adequately accounts for the legal distinctiveness of the corporation and the historical development of corporate personhood. Perhaps Horowitz means to say 19th century American society was gradually making an uneasy peace with corporations and accepting them "as if" they were natural. Recognizing the societal need to realistically account for the undoubted power and make-up of the emergent corporate institution is one thing, however. It is quite another to argue that society essentially abandoned one traditional approach to exercising social control over that institution – through an artificial entity conception – in favor of accepting that corporate contours at any specified time and place somehow are pre-existent, "natural," and unalterable. In both the early 19th century *Dartmouth College* case and the late 20th century *CTS* case, corporate attributes clearly were regarded as "artificial" or "social" in character, not "natural," and therefore they remained amenable to state modification thought necessary to advance public well-being.

Certainly, a natural entity theory comports with expectations of responsible corporate behavior – just as society expects such behavior from humans. But, this expectation is given legal expression through various forms of regulation *of* already existent corporations, whereas an artificial entity theory emphasizes the antecedent power of the state to add features to, or remove features from, the very legal make-up of a corporation. The latter insists on continuing social control over the legal DNA of the corporation, not simply its subsequent conduct. Thus, both theories can be conducive to a public-serving conception of responsible corporate behavior even though they do so in different ways.

Writing in the early 1990s and ending his history of corporate theory at 1960, moreover, Horowitz likewise did not address the stunning re-emergence of an aggregation-like theory of corporations in the 1980s. Influenced by financial economics work in the 1970s, many corporate law theorists in the 1980s conceived of the corporation in decidedly contractarian terms.[49] The corporation, in this view and like its 19th century forerunner supposedly vanquished by an entity conception, essentially was a "nexus of contracts" among various private constituents. Much like the natural entity theory, this conception had a strong de-regulatory and market-oriented thrust, but, unlike that entity theory, it also served to boldly reassert the primacy of the individual over the group as the key analytical and normative focus in corporate activity. The recent resurrection of this contractarian theory suggests that, although corporate legal personhood clearly had emerged in the early 20th century, as Horowitz argued – but with the full ramifications of that still unfolding in 2011, after *Citizens United* – theoretical accounts of the corporation are not any more enduring or solidly established today than they were one hundred years ago.[50]

The key point for the history of corporate responsibility is that these corporation-centered technological, legal, and intellectual currents flowing into the 20th century set the stage for ensuing corporate social responsibility discussions. These discussions, building on a conception of the corporation as a distinct social-legal actor, focused on the questions of corporate purpose and the appropriate role of government regulation in controlling corporate conduct. These decades-long debates – continuing today – necessarily drew on and pre-supposed the clear emergence of a distinct corporate person prominently featuring centralized control as a critical element of corporate governance. After all, it is *corporate* responsibility that has emerged as a topic of ongoing social concern and scholarly study. This required that the corporation be recognized as a meaningful social and legal actor, distinguishable from its constituents. Vigorous debate may continue today over how best to understand the nature of corporateness, but recognition of the corporation as a distinct legal person was not in doubt throughout most of the 20th century.

Corporate Purpose

The question of what should be the proper purpose of corporate endeavor – shareholder wealth maximization only or some broader purpose – has received enormous scholarly commentary in the legal world over the past eighty years. The issue is the modern, belated offspring of a much earlier era when many corporations performed public-serving functions, not just commercial functions, as noted in Part II. It took on special urgency in the socially and economically stressful 1930s when it was abundantly clear that managers, not stockholders, controlled public corporations, and that such corporations greatly affected many regions of American socio-economic well-being. The key social policy question became whether that control should be singularly deployed to maximize investor wealth or should serve a broader array of interests. In the well-known early 1930s exchange between Adolph Berle and Merrick Dodd,[51] Berle ostensibly took the pro-stockholder position while Dodd advocated that managers should serve multiple constituencies by advancing the interests of the distinct (but all-encompassing) corporate "enterprise."[52] Eventually, each seemed to switch positions, although as noted by various commentators,[53] Berle's thinking about corporate purpose generally was much broader from the outset, as seen in the following passage:

> Just as there is a continuous desire for power, so also there is a continuous desire to make that power the servant of the bulk of the individuals it affects. Absolute power is useful…. More slow, but equally sure is the development of social pressure demanding that the power shall be used for the benefit of all concerned. This pressure, constant in ecclesiastical and political history is already making its appearance in many guises in the economic field….
>
> [D]emands are constantly put forward that the men controlling the great economic organisms be made to accept responsibility for the well being of those who are subject to the organization, whether workers, investors or consumers…. In proportion as an economic organism grows in strength and its power is concentrated in a few hands, the possessor of power is more easily located and the demand for responsible power becomes increasingly direct.[54]

The debate over the proper focal point of corporate activity periodically flares up with special vehemence,[55] but at all times it simmers just beneath the surface of public sentiment about large corporations. The perennial debate has a decided and well-recognized normative thrust but, regrettably, there is too little attention paid to the actual state of the law, which is not, as often is pre-supposed, nearly as pro-investor primacy as many believe, both within and without the legal world. The longstanding inconclusiveness in the legal realm reflects ongoing cultural ambivalence about appropriate societal expectations of corporate behavior.[56]

The idea that corporations in the United States are legally obligated to maximize shareholder wealth often is assumed rather than established.[57] Yet, no state has enacted any legislation imposing on business managers a duty to maximize investor wealth or business profits.[58] In fact, approximately thirty states have adopted provisions in their corporate statutes that expressly permit corporate directors to consider the interests of various non-shareholder constituencies, such as employees, customers, suppliers, and local communities, when making business decisions,[59] much as Professor Dodd urged in 1932. One state – Connecticut – goes further and requires directors to consider various stakeholder interests.[60] These so-called constituency statutes were first enacted in the mid-1980s in response to the upsurge in corporate takeover activity, such high levels of takeovers being thought – rightly or wrongly – to be antithetical to the interests of various non-shareholder interests.[61] All states but one, however, have retained these statutes even though hostile takeover levels have significantly declined over the past twenty years.[62] Even strong proponents of investor wealth maximization as the proper aim of corporate endeavor begrudgingly concede that such constituency statutes legally "qualify" the goal of wealth maximization.[63] Moreover, these statutes are an example of how states can deploy their corporate statutes to achieve social goals, in this instance by legally permitting directors to resist takeovers thought to be harmful to non-shareholder constituencies. These statutes – like other anti-takeover statutes enacted in the 1980s – display the "artificial entity" nature of corporations described in Part II.

When one moves from legislation to judge-made law, the picture does not dramatically change, although it is a bit more mixed. In Delaware, the leading corporate law state, the Delaware Supreme Court has made clear that "a board of directors … is not under any *per se* duty to maximize shareholder value in the short term."[64] That same court, moreover, has differentiated the interests of the business enterprise itself (the "corporation") from the narrower interests of its shareholders,[65] and, with respect to the former, has expressly permitted directors to consider the impact of their decisions on non-shareholder interests.[66] The Delaware law on corporate purpose became a bit more muddled in September 2010 when Chancellor William Chandler seemed to endorse the position that there is a fiduciary duty to maximize profits under Delaware law. In *eBay Domestic Holdings, Inc. v. Newmark*, the Chancellor stated that the fiduciary duties of Delaware directors "include acting to promote the value of the corporation for the benefit of its stockholders… [I] cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders…"[67] There are notable problems with the Chancellor's terse assertion, including his lack of citation of authority or reasoning to support his statements, his abrupt shifting in language and emphasis from maximizing "corporation" value to "stockholder" benefit, and his failure to address Supreme Court authority at odds with his assertion.

The strongest judicial support for a shareholder-centered conception of corporate purpose derives from two sources. The first involves the very special situation where a corporation's board of directors has acknowledged that a company will be broken up or sold in a transaction involving a shift of control. In this setting – which does not extend to a merger of equals not involving a change of control – directors in Delaware must act reasonably to maximize the sales price for the holders of the common stock and may not advance other non-investor interests that impede that goal.[68] Outside this narrow context, however, and subject to Chancellor Chandler's recent dictum in the *eBay* case, directors of Delaware corporations may factor in noninvestor interests in assessing the "corporation's" best interests. This legal discretion affords directors and managers with sufficient latitude to engage in what they consider to be socially responsible corporate conduct.

The second supposed source for a shareholder-oriented vision of corporate purpose is the iconic case of *Dodge v. Ford Motor Co.*[69] This case, decided in 1919 by a court – the Michigan Supreme Court – not especially known for expertise in corporate law matters, is widely read in law school corporate law classes.[70] Of course, what is taught in law school likely shapes the mindset and outlook of future lawyers, lawyers who will counsel business managers as to their own responsibilities. Lawyers who wrongly understand legal doctrine will, unless otherwise corrected, provide faulty counsel. Consequently, a proper understanding of what the law has to say (or not say) about corporate purpose should be taught in both law schools and business schools, in the former so that sound advice is offered to others and in the latter as an independent basis for management's understanding of their own obligations.

In ruling that Henry Ford's decision to withhold additional dividends in order to sell automobiles at a lower price and to employ more workers was a breach of his fiduciary duty to minority shareholders, the *Dodge* court famously stated:

> A business corporation is organized and carried on primarily for the profit of its stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[71]

Professors Lynn Stout and Einer Elhauge, and others, have noted significant problems in relying on *Dodge* as supporting shareholder wealth maximization as the mandatory sole end of corporate endeavor.[72] First, the court itself does not say the "sole" purpose of corporate endeavor is investor wealth, only that such is the "primary" purpose.[73] Second, the court cited no authority for its own assertion on corporate purpose. Given that up until the early 19th century corporations in the U. S. often were chartered to serve, in concept, some quasi-public purpose,[74] maximizing investor wealth is not a historically or inherently preordained corporate goal. Even today, it is not regarded as the preeminent goal in countries such as Japan or Germany. Third, the court's language may be regarded as nonbinding dicta, rather than a holding, given Henry Ford's arguable effort to oppress the minority shareholders (the Dodge brothers) by withholding dividends at a time when they were planning to start a rival automobile company.[75] Fourth, of course the *Dodge* decision has no binding effect outside Michigan. Differences in law from state to state are legion in our system of federalism.

Fifth, the *Dodge* decision must be understood in historical context. In 1919, there was a widespread view that shareholders "owned" the corporation.[76] Under today's theories of corporateness, shareholders are more accurately regarded as neither "owning" the company's assets nor directly controlling them. Rather, they own equity interests *in* the company (which they can transfer), along with important but limited voting, information and distribution rights accorded them under modern corporate statutes.[77] Finally, as a common law decision, *Dodge,* like other judge-made doctrine, must be congruent with underlying, widely-shared social norms from which such decisions derive their legitimacy.[78] As with other such bodies of law, "corporation law exists, not as an isolated body of rules and principles, but rather in a historical setting and as part of a larger body of law premised on shared values."[79] Just as there are other legal principles from 1919 we would reject today – *de jure* racial segregation and the absence of zoning laws spring to mind as examples of how property could be used in 1919 – we cannot be unwilling to reexamine the continuing soundness of common law pronouncements from almost ninety years ago.

Perhaps what is most striking about the *Dodge* decision is that it stands virtually alone, like a one-of-a kind species, which is no doubt one reason it is so widely (if uncritically) cited in professional education – there simply is little other positive law authority to which one can point in support of a robust investor-centered conception of corporate purpose. One additional case seemingly taking a stridently pro-economic view of corporate activity was decided by the Minnesota Supreme Court in 1971, during the Vietnam War era.[80] The plaintiff, Mr. Pillsbury, was a wealthy man with an anti-Vietnam War viewpoint who purchased a small amount of Honeywell stock so he could obtain a shareholder list and communicate his views to other Honeywell investors in hopes of unseating incumbent directors and halting Honeywell's production of munitions used in the war effort. In a highly questionable decision, the Court denied Pillsbury access to the list because he admitted that his reasons for seeking a change in corporate policy at Honeywell were grounded in his views on the immorality and wastefulness of the war effort, not on his short-term or long-term investment goals. The Court utterly failed to address why a stockholder must be motivated by personal economic gain in order to seek a change in corporate policy.

The suspect *Pillsbury* case, like *Dodge* and the recent *eBay* decision, is one of only a few court cases taking an overwhelmingly investor-oriented vision of corporate purpose. To be sure, a Delaware court itself has spoken of an obligation to "maximize the long-run interests of the corporation's stockholders."[81] But, critically, exhorting "long run" wealth maximization behavior is, for two reasons, quite different than demanding a flinty allegiance to more immediate investor welfare, and that difference permits a "long term" focus to properly factor in concerns about social responsibility.

First, in reviewing director or officer conduct, courts simply do not evaluate the substantive merits of what was decided.[82] This reflects both that the duty of care deals only with process, not substance,[83] and that the business judgment rule precludes substantive evaluation of director or officer decisions except for irrationality.[84] Moreover, although little commented on, courts do not regularly review *ex post* the myriad actions *not* taken by managers that, arguably, may have increased investor wealth more than the path actually chosen. There is no periodic legal "audit" process in which managers must retrospectively account for, on wealth maximization grounds, what they chose not to do. The lack of a legal mechanism for recourse on this point further demonstrates the inability of law to pervasively enforce a maximization standard. It also reveals that an aggregate theory of the corporation as a compact among investors has less explanatory power than an entity conception in which managers balance a range of interests in advancing the enterprise's best interests.

Second, courts are exceedingly generous in finding some plausible connection between director conduct aimed at helping nonshareholders and the supposed advancement of shareholder wealth over the vague and unknowable "long run."[85] This generalized judicial reluctance to overturn managerial conduct appearing not to be in investor interests – except, allegedly, in the "long run" – mirrors, and likely is influenced by, a longstanding judicial pattern of upholding charitable donations by corporations as supposedly consistent with "long run" investor interests.[86]

A recent analysis of one hundred sixty-seven studies conducted over thirty-five years on the linkage between corporate social responsibility and corporate financial performance found no correlation between "doing well" and "doing good."[87] In other words, deliberately seeking to be socially responsible did not enhance profitability. On the other hand, dedicating company resources to social considerations does not appear to hurt investors. This leads the authors to conclude that companies "can do good *and* do well even if they don't do well *by* doing good."[88] Current legal doctrine on corporate purpose aligns with these empirical findings. The findings suggest that factoring noninvestor interests into business decisions is consistent with investor interests – or at least it is not inconsistent with investor interests –

even if doing so does not affirmatively advance investor wealth. In the aggregate – and it will be hard to show otherwise even in individual cases – current judicial reluctance to overturn managerial decisions motivated by social responsibility considerations is likely to be buttressed by the findings of this study.

The views of the prestigious American Law Institute reflect the persistent ambivalence of corporate law toward the goal of maximizing shareholder wealth.[89] Addressing the objective of the corporation, the first comment to § 2.01 of the Principles of Corporate Governance states: "Present law on the matters within the scope of § 2.01 cannot be stated with precision, because the case law is evolving and not entirely harmonious."[90] Section 2.01 itself, adopted in 1992, provides as follows:

> § 2.01 **The Objective and Conduct of the Corporation**
>
> (a) Subject to the provisions of Subsection (b) and § 6.02 (Action of Directors That Has the Foreseeable Effect of Blocking Unsolicited Tender Offers), a corporation [§ 1.12] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.
>
> (b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:
>
> > (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law;
> >
> > (2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and
> >
> > (3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

Subsection (a) states that a corporation "should" – not that it "must" – conduct business "with a view to enhancing" – not "maximizing" – corporate profit and shareholder gain. This general proposition is then qualified in three important ways in subsection (b), which pointedly states that the conduct therein described may be engaged in even if company profit and shareholder gain are not thereby enhanced. Most striking is (b)(2), which permits a company to take into account ethical considerations "reasonably regarded as appropriate to the responsible conduct of business." An explanatory comment observes that this encompasses "emerging" ethical principles that have "significant support although less-than-universal acceptance."[91]

The key conceptual underpinning to § 2.01(b) is the recognition that, although businesses generally do seek, customarily, to enhance profit and shareholder well-being, the "corporation is a social as well as an economic institution, and accordingly … its pursuit of the economic objective must be constrained by social imperatives and may be qualified by special needs."[92] From this social conception of corporateness, it follows that "[c]orporate officials are not less morally obliged than any other citizens to take ethical considerations into account, and it would be unwise social policy to preclude them from doing so."[93] Specifically, the commentary to § 2.01 acknowledges that a modern corporation "by its very nature creates interdependencies with a variety of groups with whom the corporation has a legitimate concern, such as employees, customers, suppliers, and members of the communities in which the corporation operates … Short-term profits may properly be subordinated to recognition that responsible maintenance of these interdependencies is likely to contribute to long-term corporate profit and shareholder gain."[94] The comment's recognition of stakeholder interests as legitimately influencing managerial decisions comports with the thrust of constituency statutes adopted by thirty states,[95] noted above. At the same time, the comment seeks to dissipate any conflict between investor and non-investor interests by invoking the usual solvent of the "long run," even though subsection (b) of § 2.01 – apparently like the constituency statutes[96] – permits noninvestor interests to take precedence.

Subsection (b)(3) of ALI § 2.01 is consistent with all corporate statutes in the United States in permitting contributions to various humanitarian and philanthropic causes. For example, the influential Model Business Corporation Act, in Section 3.02 (13), permits corporations – like natural persons[97] – to make "donations for the public welfare or for charitable, scientific, or educational purposes.[98] A comparable section has appeared in the Model Act since 1950.[99] Thus, as a matter of state corporate law, legislatures have for many decades authorized corporations to donate corporate resources with no obligation to show that investor interests are thereby advanced. The federal Internal Revenue Code, moreover, first expressly permitted corporations to deduct charitable donations for income tax purposes in 1935,[100] and all subsequent revisions to the Code have retained such a provision, although the maximum deductible amount has varied over the years. Individuals have been permitted to deduct such contributions since 1917. Again, we see in the 1935 tax law amendment a clear likening of corporate powers to those of an individual "person."

Even with the federal tax law change in 1935 and the enactment of the Model Act in 1950 expressly empowering corporations to make charitable donations, some shareholders (and commentators) continued to forcefully object to corporation donations even in the 1950s and 1960s. This too was a legal manifestation of a deeper clash in beliefs about corporate purpose. A famous 1953 decision by the New Jersey Supreme Court essentially settled the issue by upholding the propriety of a relatively modest $1,500 contribution to Princeton University,[101] to which a stockholder had objected by bringing suit. The court's reasoning was partially grounded on how the corporation itself might economically benefit from such a contribution over the amorphous "long term," but it also rested on a recognition that, quite apart from enlightened self-interest, a mid-20th century corporation had certain social obligations that supported reasonable amounts of contributions. The Court stated that "just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern conditions require that corporations acknowledge and discharge social as well as private responsibilities."[102] In fact, in support of its highly modern conception of corporate responsibility the New Jersey court cited the earlier-noted 1809 Virginia case observing that corporations should promote the public good.[103] Separated by almost one hundred fifty years, both of these decisions were rooted in the shared belief that corporations can and should expressly serve societal interests extending beyond those of investors. In 1969, the leading corporate law state of Delaware likewise joined other states and expressly ruled that corporations could lawfully make "reasonable" charitable contributions.[104]

Despite an enduring and puzzling mythology about the point, in 2011 the law broadly permits corporations and their directors and managers to take a broader view of corporate purpose and responsibility than pure wealth maximization. This position is not consistent with an aggregate theory of corporations, but fully comports with an entity view in which the corporate enterprise is regarded as conceptually distinct from its investors, as described in Part II. Directors and managers are not required to take a broad view of corporate purpose, however, if they choose not to do so. This means that, subject to market constraints, whether a particular corporation does or does not pursue a broader socially responsible direction does not depend on corporate law, which is exceedingly tolerant of such conduct, but on other factors – such as social customs and norms, business lore, professional training, and corporate culture. Nonetheless, misunderstandings about law can inhibit directors and managers who wrongly believe that law somehow forbids a broader-gauged view of corporate activity. It is, however, the very discretion afforded by law that makes discussions of corporate responsibility possible and meaningful. Without such discretion – as, for example, if managers really were legally required to maximize profits – advocacy of socially responsible behavior would truly be academic because managers would be prohibited from engaging in such conduct. Conversely, this very legal discretion leads many to doubt that such freedom will be used responsibly. It is to constrain corporate conduct – not unleash it – that historically has led these persons to advocate corporate regulation of various kinds.

Corporate Regulation

For those favoring various forms and degrees of corporate social responsibility, it is partially re-assuring that corporations are not legally required to focus singularly on investor economic interests. Nonetheless, often the problem is the exact opposite. The state of the law notwithstanding, numerous companies can and often do focus solely on profits and shareholders, `sometimes with a zeal that results in improper efforts to make ever greater profits, or at least to *appear* to be more profitable than is true in reality. Financial statement fraud or dubious accounting practices designed to seemingly strengthen income statements and balance sheets are one example of a strong profit-maximizing norm carried to unhealthy excess. Relying on a wholly voluntary re-orientation of such a financial-centered managerial mindset is one possibility. This requires a wholesale combating of the deeply-embedded norms, lore, and professional training that contribute to such a strident and skewed pro-investor purpose. That is always a worthy longer-term enterprise but leaves open the present and near future. Moreover, a strategy relying solely on volunteerism or market forces is unlikely to succeed. Therefore, another approach to corporate responsibility is, and always has been, to use overt regulation to inhibit or induce certain corporate conduct. Since the full emergence of the public corporation in the early 20th century, running through the Progressive movement, the New Deal, and numerous other examples up to and including the sprawling Dodd-Frank Act adopted in July 2010,[105] the United States has witnessed extensive efforts to forthrightly use law to control socially irresponsible corporate conduct.

Advocates of corporate regulation not only do not trust corporate volunteerism to ensure a certain standard of responsible conduct - or to serve broadly a range of constituents - they likewise do not rely on the lax "internal" constraints of corporate law itself, which, as elaborated in Part V below, is essentially enabling, not regulatory, in overall philosophy.[106] Thus, a remarkably dense patchwork of laws "external" to the corporation has developed over the decades because it is widely believed that the decisionmaking mechanisms internal to corporations will not, left unchecked, dependably produce responsible conduct. The aim, in short, is to achieve at least a minimal substantive level of corporate responsibility by legal fiat. Sometimes the conduct of both individual officers (or employees) and the corporation itself is regulated by a particular set of laws. Frequently, however, only the corporation itself is regulated, given the distinct personhood of corporations and given that modern statutes typically define "person" to include corporations and other business entities. An additional effect of such regulation is to express the view that business must be carried on in a way that is congruent with social expectations of responsible behavior. Social control today may be minimal at the time of a company's formation – unlike the era when some public-serving function typically was required to obtain a charter – and it may be ambivalent as to ultimate corporate purpose, but extensive social control over actual behavior is a continuing modern reality for business.

An early example of regulatory policy aimed at large enterprises was the Sherman Antitrust Act of 1890,[107] enacted out of growing concern about various anti-competitive business practices designed to monopolize or restrain trade. Ever since the Sherman Act, according to Professor Chayes writing in 1959, "antitrust and public regulation have, broadly speaking, been the characteristic response of American politics, government, and law to the problems posed by the modern corporation."[108] The Supreme Court went on to use the Sherman Act to dissolve the conglomerate Standard Oil Company in 1911 – a company controlled by oil titan John D. Rockefeller – on the grounds that the dozens of companies comprising that conglomerate had acted to restrain trade and to monopolize (and to attempt to monopolize) trade.[109] Also during the Progressive and New Deal eras, various laws protecting laborers, a particularly vulnerable corporate constituency – such laws being modest by today's standards, to be sure – were enacted.[110]

At the very outset of FDR's New Deal administration, during the pit of the Great Depression, attention was turned to better protecting dispersed and uninformed investors in public corporations from the misdeeds of corporate insiders. Remarkably, to that point in our nation's history, federal law had done nothing on that front. Only state "blue sky" laws and certain listing requirements of the New York Stock Exchange afforded any protection at all to investors.[111] Over the course of several years, beginning in the early 1930s, numerous landmark laws aimed at protecting investors and fostering healthier capital markets were enacted. These included, among others, the Securities Act of 1933,[112] the Securities Exchange Act of 1934,[113] the Public Utility Holding Company Act,[114] and the Investment Company Act of 1940.[115]

These investor protection laws did – and still do – proceed on the premise that much irresponsible behavior by corporate insiders serves to victimize investors. In this respect, they are single constituency statutes, notwithstanding the customary recitation that they are enacted to advance the "public" interest. Moreover, historically they have not even purported to come to grips with how a too-zealous focus on investor welfare – real or apparent - can contribute to untoward managerial behavior. If such behavior harms other non-investor interests, the reasoning goes, those interests should be protected by yet additional regulatory schemes but are of no concern of federal securities laws.

Indeed, the latter half of the 20th century brought a great deal of regulation on a far wider range of fronts. Although much of the new regulation was of general application, much of it was specifically directed at businesses. Product safety regulations aimed at protecting consumers.[116] Various employee relations laws targeted discrimination and harassment to protect employees and prospective employees, as did new health and safety laws.[117] Environmental laws sought to curb corporate damage to the air, water, and soil.[118] Periodic amendments to the securities laws sought further protections for investors.[119] These laws together embodied the political consensus that regulation originating outside the corporation was essential to provide certain protections to various constituencies that businesses themselves likely would not voluntarily afford. This view was grounded in the belief that the vast bulk of economic activity in the U. S. may have devolved to the private business sector, but such activity must, nonetheless, be carried out in a way that does not harm important interests. When it does, social control over that activity by means of legal regulation becomes appropriate.

Certain laws more pointedly targeted irresponsible corporate conduct. The Foreign Corrupt Practices Act of 1977, for example, prohibited corporate bribery of foreign officials and mandated internal compliance systems – through amending federal securities law – so that firms would be required to more closely track, record, and report use of corporate assets.[120] This law followed on the heels of more than four hundred companies admitting they had made "questionable" political contributions and bribes.[121] The legislation, according to Professors Bratton and Wachter, was the most extensive application of federal law to corporations since 1934.[122] The law continues to snare companies in 2010, as seen in Royal Dutch Shell's November 2010 agreement to pay a $236 million fine to settle charges that it violated the Act. Later legislation – the Bank Secrecy Act – was specifically aimed at concerns about "money laundering."[123] Banks under that Act must file "Suspicions Activity Reports" with the Financial Crimes Enforcement Network of the Treasury Department when transactions of $5,000 or more raise suspicion of illegal activity.[124]

A different approach to federal regulation of corporate conduct is found in the Federal Sentencing Guidelines of Organizations. The Guidelines create an inducement for corporations to establish in advance an effective law compliance program by giving points for such a program in a company's "culpability score," which is used to determine a sanction for any later misconduct. To have an effective compliance and ethics program for purposes of a corporation's culpability score, an organization must, under the Guidelines, "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[125] Here the regulatory approach is to create an incentive for a corporation to be law-abiding *ex ante* by meting out a lighter sanction *ex post*.

The two most extensive corporate regulatory initiatives in the first decade of the 21st century were the Sarbanes-Oxley Act of 2002,[126] and the Dodd-Frank Wall Street Reform And Consumer Protection Act of 2010 ("Dodd-Frank").[127] The Sarbanes-Oxley Act ("SOX") grew out of the widespread corporate frauds revealed at such brand name companies as Enron, Tyco, WorldCom, HealthSouth, and many others.[128] SOX took a smorgasbord-like approach to regulation, touching on a number of areas. For example, SOX created the Public Company Accounting Oversight Board to oversee auditing firms; enhanced the independence of public company auditors; increased financial disclosures by corporations; regulated securities analyst conflicts of interests; and added new crimes under the securities laws and boosted penalties for violations.[129] SOX also addressed in unprecedented fashion certain subjects associated with corporate governance, which historically had been left to state corporate law. For example, SOX imposed new responsibilities on the audit committee and required greater independence of committee members; prohibited corporate loans to officers; enhanced requirements associated with officer certifications of periodic reports; provided for forfeiture of certain bonuses and profits in connection with restatements of financial statements; and required management to assess and report on the quality of internal controls.[130]

Implementation of SOX also corresponded with growth in the promulgation of "soft law" associated with corporate activity. Corporations increasingly adopted internal codes of conduct and sought to voluntarily conform to various "best practices." In addition, diverse guidelines and principles were elaborated to guide corporate behavior, and different indexes and ratings were developed to assess the soundness of various corporate practices. These nonbinding efforts did not have the legal "bite" of positive law, but they served to alter the evolving normative expectations as to what responsible corporate conduct should look like in the 21st century. Moreover, by voluntarily adopting them, corporate directors and managers likely sought to ward off yet additional legal regulation.

The Dodd-Frank Act, signed into law by President Obama on July 21, 2010, arose out of congressional concerns about the near collapse of U.S. financial markets in the autumn of 2008, the greatest economic crisis since the Great Depression, which itself spawned extensive regulation. During this period in 2008, officials at the Federal Reserve Bank and U.S. Treasury Department essentially *de facto* directed activities by large financial firms. Whether correct decisions were made or not, their very intervention again demonstrates the profound social stakes associated with large businesses as government elites navigated uncharted financial water rather than simply defer to private sector business elites. Consisting of sixteen separate titles, each addressing a discrete area of financial reform, the Dodd-Frank Act establishes a 10-member Financial Stability Oversight Council to oversee systemic risk and strengthen regulation of large financial holding companies and other entities considered to be "systemically important";[131] creates an independent Bureau of Consumer Financial Protection to ensure better information for consumers purchasing financial products and services, and ensure that those markets function more transparently and fairly;[132] introduces a new "Volcker rule" limiting bank investment in hedge funds, which will be fleshed out through regulations formulated by the Federal Reserve Board, the Treasury Department, and the Securities and Exchange Commission;[133] regulates investment advisers more extensively;[134] imposes stricter oversight of the derivatives market;[135] heightens regulation of credit rating agencies;[136] and ramps up government (SEC) enforcement powers.[137] The reach of Dodd-Frank into diverse areas of the business sphere is unprecedented in scope.

Like SOX, the Dodd-Frank Act continues to extend federal law into what is traditionally considered the province of state corporate law. For example, under the Act public companies must give shareholders a nonbinding advisory vote on executive compensation ("say on pay");[138] all the members of a company's compensation committee must be independent;[139] disclosure of the relationship between executive compensation and financial performance ("pay for performance") must be made;[140] the SEC is authorized to craft rules giving shareholders greater access to the company's proxy statement to advance shareholder nominees for membership on the board;[141] disclosure is required as to whether, and why if so, a company has selected the same person to serve as chair of the board of directors and chief executive officer.[142] Also, in an effort to encourage the reporting of corporate wrongdoing, Dodd-Frank strengthens whistleblower incentives. Under this provision, from 10-30% of a monetary recovery may be paid to someone who provides "original information" leading to successful prosecution of an SEC enforcement action that results in a sanction exceeding $1 million.[143]

Much of the regulatory edifice created by Dodd-Frank will be implemented through SEC and other agency rulemaking, expected to generate hundreds of new rules the effect of which on corporate behavior remains to be seen. The key overall point here for the history of corporate responsibility is two-fold. First, external regulation of significant corporations to protect various constituencies has been extensive for many decades and has accelerated markedly in scope in recent years. Second, the two most recent regulatory initiatives – SOX and Dodd-Frank – included provisions that penetrated much closer to the "internal" heart of corporate governance, thereby evincing a belief that the corporate governance system itself – the subject of Part V below – needed regulatory reform from outside.

Corporate Governance

Concerns associated with corporate personhood, corporate purpose, and corporate regulation all ultimately relate to a far more basic issue: corporate governance. As the commercial demands of 19th century industrialization led to substantial displacement of the partnership form of business enterprise by large corporations with dispersed shareholders, control of these enterprises – i.e., their governance – centered in the hands of senior managers, not investors themselves. This phenomenon of "separation of ownership from control" was seminally described by Adolf Berle and Gardiner Means in their 1932 book, The Modern Corporation And Private Property. It has continued to occupy center stage in corporate law for the past eighty years.[144] From a legal history vantage point on corporate responsibility, the rise in commercial significance of the corporation in the 19th century corresponded to the stupendous decline of a regulatory approach to corporations under state corporate law and, instead, the 20th century "outsourcing" of such regulation to an array of other legal regimes of the kind described in Part IV. This meant that corporate law itself developed in such a way as to loosen, not tighten, most constraints on those who govern public corporations. The most famous lamentation of this de-regulatory movement within corporate law is found in Justice Louis Brandeis' 1933 dissenting opinion in *Liggett v. Lee*.[145]

Justice Brandeis, writing one year after publication of The Modern Corporation and Private Property – to which he refers – chronicles in detail how a largely suspicious regulatory stance toward corporations gradually yielded throughout the 19th and early 20th centuries.[146] Formerly, states had strictly controlled corporate attributes and powers in numerous ways. For example, states typically limited the amount of capital a single corporation could assemble; restricted the scope of corporate powers; limited the duration of a corporation to a period ranging, generally, from twenty to fifty years; placed limits on company indebtedness; prohibited the holding of stock in another corporation; and gave stockholders broad veto powers over proposed transactions.[147] These strictures, Brandeis noted, fell away as several states earnestly competed for new charters – an important source of state revenue– by adopting a low cost and deregulatory philosophy of corporate law in which restrictions were curtailed and powers were enhanced. This so-called "race" was famously, and distressingly, described by Brandeis as being one "not of diligence but of laxity." [148]

The upshot of the simultaneous rise of the commercial and socio-economic significance of the corporation and the substantial slackening of corporate regulation by states meant that those who controlled corporations possessed enormous power. This had several important consequences for developments pertinent to corporate responsibility. First, the growth of concentrated power was of course directly germane to the subject of corporate personhood. Neither passive stockholders nor professional managers of gargantuan enterprises could sensibly be equated to the "corporation" itself. After a failed but valiant effort during the late 19th and early 20th centuries to conceive of the corporation as simply an "aggregation of individuals,"[149] eventually the corporation was recognized as an institution in its own right, and legal personhood was simply the inevitable conceptual and linguistic acknowledgement of that phenomenon.[150] Second, as to corporate purpose, it was centralized managerial control as well that spurred the debate – ongoing today – over whether managerial duties should run singularly to stockholders – to ensure strict accountability to them – or should extend to a broader group of stakeholders, to ensure more socially responsible corporate conduct. Third, as to corporate regulation, it too, as noted earlier, was designed to constrain the manner in which powerful managers deployed the vast corporate resources under their control. In light of such control, certain regulation, such as federal securities law, was pointedly designed to protect stockholders, while other laws were designed to protect various other vulnerable constituencies. Finally, as to genuine reform of the deep decisionmaking architecture of corporate governance itself as a possible pathway to more responsible corporate conduct, little truly innovative thinking – beyond the occasional boosting of stockholder protection via federal securities law[151] – ever was seriously advanced until the 1960s and 1970s, when new ideas were at least proposed even though they went nowhere. In short, once states had essentially abandoned corporate law itself as a way to regulate corporate activity, they never turned back.[152]

A glimmer of truly innovative, if fairly vague, governance reform can be seen in Professor Abram Chayes' 1959 essay in which he hints that non-investor groups need greater "say" in corporate affairs while also recognizing that this would not be easy to do:

> A more spacious conception of "membership," and one closer to the facts of corporate life, would include all those having a relation of sufficient intimacy with the corporation or subject to its power in a sufficiently specialized way. Their rightful share in decisions on the exercise of corporate power would be exercised through an institutional arrangement appropriately designed to represent the interests of a constituency of members having a significant common relation to the corporation and its power.
>
> It is not always easy to identify such constituencies nor is it always clear what institutional forms are appropriate for recognizing their interests. The effort to answer those questions is among the most meaningful tasks of the American legal system…

> The trail is not without its blazes, however. Among the groups now conceived as outside the charmed circle of corporate membership, but which ought to be brought within it, the most important and readily identifiable is its work-force….
>
> Direct worker representation on the managing board, however, has not proved fruitful in this country, although it is being experimented with in a variety of forms by different European nations.[153]

One proposed governance reform that surfaced periodically – and that would serve to flesh out Professor Chayes' suggestion – was the suggested use of "public interest" directors on corporate boards. These persons, in theory, would take a broader-gauged view of how a corporation's activities affected groups other than investors.[154] As noted by Professor Branson,[155] the 1870s reorganization of the Union Pacific Railroad board and the board of the Communications Satellite Corporation (Comsat) included public interest directors. Justice Douglas in 1940,[156] and other commentators since then,[157] also have advocated for public interest directors. Unlike certain European nations providing for employee representation on supervisory boards,[158] however, changing the composition of the board of directors from a completely stockholder-elected body to one more broadly representative of other groups never took hold in the U.S. Today, only stockholders enjoy statutory suffrage under American corporate law.

Other proposed reforms of corporate governance during the 1970s involved Professor William Cary's advocacy of federal minimum standards for large corporations, and Ralph Nader's (and his co-authors') proposal for outright federal chartering of corporations.[159] Concerned about what Justice Brandeis had called a "race of laxity,[160] and that he branded a "race to the bottom,"[161] Professor Cary believed that Delaware corporate law had degenerated so as to have become far too pro-management and anti-shareholder in orientation. The solution proposed by Cary was to establish mandatory federal "minimum standards" that would preempt more lax state law rules on certain key subjects.[162] Cary's proposal did not alter fundamentally the board-centered model of corporate governance, however. It sought only to ensure that such a model adhered to certain standards imposed by federal law where inter-jurisdictional competition among states threatened to produce intolerably low legal standards. Beyond generating scholarly comment, the proposal at the time went nowhere, though the Sarbanes-Oxley Act and the Dodd-Frank Act, described in Part IV, certainly embody the principle of federal standards sought by Cary.

More ambitious was the federal chartering proposal. Nader and his co-authors believed that the largest U.S. corporations should be chartered by the federal government, not states,[163] because, they reasoned, under dissolute state law managers were not sufficiently attentive either to investor interests or those of other constituencies. Moreover, Nader and his co-authors believed that such a federal corporate law should be more overtly regulatory and should mandate public interest directors who would advance employee, consumer, and community welfare, as well as responsibility to stockholders. Their proposal also would require a certain amount of periodic social auditing and reporting.[164] Corporations also would, under this proposal, have only limited duration, not perpetual, and they would have to renew their charters every twenty or twenty-five years.[165] Like Cary's proposal, Nader's idea generated scholarly commentary. Unlike Cary's proposal, it also resulted in several congressional hearings.[166] It never went beyond that, however.

Other proponents of corporate social responsibility sought less to change the core mechanisms of corporate governance – or the source of laws comprising them – than to work innovatively within them. At the board level, many have called for greater racial, ethnic, and gender diversity on corporate boards to broaden the perspectives brought to bear on strategic challenges.[167] At the shareholder level, a key legal tool for reform was SEC Rule 14a-8,[168] which permitted qualified shareholders of public reporting companies to place proposals for the annual shareholder meeting in the company's own proxy statement. Two key proxy initiatives taking place around 1970 used this tool of shareholder democracy in a surprising way: not to advocate that managers pay greater heed to shareholder wealth, but to advocate for a broadened focus on social responsibility.

Following community activist Saul Alinsky's efforts to use share ownership in Eastman Kodak as a basis to attend Kodak's annual meeting and protest its racial hiring practices,[169] anti-Vietnam War activists used Rule 14a-8 to place before Dow Chemical's shareholders a proposal that the company should no longer manufacture napalm.[170] It garnered less than 3% of the actual vote, but it achieved the larger strategic goal of gaining extraordinary publicity for the anti-war effort.[171] Campaign GM, another movement involving Ralph Nader, sought to transform GM from a purely profit-seeking firm into a firm serving the general social welfare.[172] Thus, it would remain board-governed but public interest directors would be added to the GM board who would seek to balance the interests of various stakeholders such as investors, employees, consumers, and the general public. The two Campaign GM proposals appearing on GM's proxy statement were fiercely opposed by the company and received less than 3% of the stockholder vote but, as with the Dow Chemical campaign, succeeded in obtaining an extraordinary amount of publicity,[173] the overall strategic aim.

Efforts to use the federal proxy machinery to advance shareholder proposals seeking more socially responsible corporate conduct continue today,[174] with mixed success. These proposals are sponsored by various religious, environmental, labor, and consumer groups, among others, and deal with a wide range of subjects.[175] At the same time, a very different "shareholder democracy" movement – with a strong pro-investor emphasis – emerged in the 1990s and early 21st century to turn again to the rights of voice and vote accorded shareholders under state corporate law. In brief, investor activists reverted to creative uses of shareholder suffrage after the initially promising and robust market-centered hostile takeover period of the 1980s had come to a decidedly anti-shareholder end. Takeovers were widely touted during the 1980s as an efficient, shareholder-friendly, market solution to the governance problem of entrenched and complacent corporate management.[176] Hostile bidders could use tender offers, the thinking ran, to directly acquire a majority of a company's stock by offering stockholders a generous premium and then, using their new found voting power, replace incumbent directors and management with more savvy candidates. This proposed solution to traditional corporate governance ills was itself part of the larger "law and economics" movement that took deep ideological hold of corporate law scholarship during the 1980s.[177] The steely focus on investor well-being via hostile takeovers was congruent with a renewed theoretical conception of the corporation, as noted in Part IV, seeking to disaggregate the corporation into a mere "nexus" of contracting parties in which investor interests were paramount.

Various factors combined to abruptly halt rampant hostile acquisition activity around 1990. These included, besides economic recession, the demise of Drexel Burnham Lambert, Inc. – the investment banking firm most associated with arranging infamous "junk bond" financing of hostile bids – and the jailing of Michael Milken, the chief financial architect at Drexel.[178] On the law front, the passage of antitakeover legislation by numerous states[179] – including constituency statutes[180] – received strong judicial approval from both the Supreme Court in the *CTS* case in 1987 and the estimable Seventh Circuit Court of Appeals in 1989.[181] Moreover, the influential Delaware Supreme Court also closed out the 1980s with a very high-profile decision – involving a battle for Time, Inc. – strongly endorsing management defensive measures in response to hostile bids.[182] That decision, moreover, emphasized that corporate directors were legally responsible for directing the "corporation's" interests and that company interests were not necessarily the same as those of investors seeking a near-term premium for their stock.[183] This entity conception of the corporation stood in stark contrast to – and in repudiation of – the newly revived "aggregate" theory advanced by economics-oriented corporate law scholars.

With both legislation and judicial decisions strongly favoring incumbent management, pro-investor activists in the 1990s necessarily shifted their focus from pure capital market-centered approaches to more traditional voice/vote methods. This required an overcoming of traditional shareholder passivity but was thought to carry a greater likelihood of success than in the past given the growing concentration of corporate stock in the hands of institutional investors during the late 20th century, a trend that continues today. As recently noted by professors Marcel Kahan and Edward Rock,[184] traditional institutional investors such as mutual funds and pension funds have become even more active in the 21st century and have been joined by (or are led by) activist hedge funds, which hedge funds benefit greatly from partnering with more traditional and permanent investors. This heightened activism was legally facilitated by 1992 amendments to federal proxy rules that freed institutional investors to more easily (and economically) share their views with one another on incumbent directors up for re-election and on strategic structural issues.[185] Moreover, by 2008, activist investors using SEC Rule 14a-8 to advance pro-shareholder proposals saw a marked increase both in the number of such proposals receiving a majority of shareholder support and in the number actually adopted.[186] This proxy success has accompanied a significant decline in the number of staggered ("classified") boards and the dramatic rise of majority voting for directors in the first decade of the 21st century, both developments making corporate boards far more sensitive to shareholder concerns.[187]

These and other "pro-investor" developments such as tougher NYSE listing standards and the end of discretionary voting by brokers,[188] combine with the governance changes in Dodd-Frank[189] – and recent SEC proxy access initiatives thereunder[190] – to substantially bolster modern investor voice/vote in corporate governance. This raises a host of important issues for modern corporate governance such as the optimal balance of power among investors, directors and managers, and the appropriate relationship between federal and state law in producing corporate governance rules. Only one issue in particular will be noted here, however, as it directly pertains to the subject of corporate responsibility.

Today, boards of public companies, for the reasons noted, seem far more receptive to shareholder concerns than was true for much of the 20th century. In fact, it was the perceived lack of director responsiveness to investor interests that sustained corporate law scholarship as a field of inquiry during most of the 20th century. To be sure, much corporate misconduct over the past several years – as in periods before – greatly harmed investors. Moreover, the reputations of corporate elites have taken a dramatic social beating in the 21st century due to repeated scandals and costly market miscues, coupled with lavish compensation packages. Thus, in 2011, directors and managers do not enjoy broad popularity or have wide societal support and understanding. Consequently, utterly unlike the 1980s when managers successfully resisted hostile takeovers by rhetorically championing non-investor interests,[191] managers today have largely been unable to muster strong credible resistance to various measures heralded as "good for investors" and as a necessary countervailing force to powerful managers. Perhaps this is because more managers actually have come to agree with those investors who want corporations to mainly focus on investor well-being. Or, even if many managers disagree with such a narrow focus – and would prefer a broader, more responsible vision of corporate endeavor – perhaps they believe it is often futile (and against self-interest) to resist a share price-maximizing strategy pushed by a determined group of activists. Whatever the explanation, as the investor voice is being amplified within the modern corporation in relation to managers, this corporate governance triumph (long sought by many) simply opens a new chapter in the longstanding and broader saga of corporate responsibility: is this re-empowerment of investors, vis á vis managers, a socially desirable outcome?

As noted recently by Professors Bratton and Wachter,[192] shareholder empowerment was not one of the political outcomes envisioned by Berle and Means' iconic 1932 depiction of relationships within the modern corporation. That book certainly began with the well-known description of how stock ownership had become separated from control, the very separation recent shareholder empowerment developments are working to overcome. Berle and Means saw tighter allegiance to shareholder interests as undoubtedly superior to unfettered managerial power, but not automatically equivalent to the most socially desirable outcome.[193] They considered the de facto shareholder surrender of control and responsibility as meaning shareholders also had surrendered the right to have the corporation operated in their sole interest.[194] It is highly unlikely they envisioned a 21st century world of dramatically heightened shareholder power. Bratton and Wachter believe that Berle in particular would not fundamentally alter his belief that a public corporation should broadly serve societal goals, since powerful institutional investors simply represent one set of oligarchs replacing another – corporate managers.[195] The more basic question of corporate purpose, in other words, resurfaces yet again – in new guise – in the 21st century. Moreover, it has become even more acute than in the doldrums of the 1930s or during the 1980s takeover frenzy precisely because the shareholder voice now – unlike then – is so much more prominent within contemporary corporate governance. In apparently "solving" an internal corporate governance problem – i.e., accountability to shareholders – the rise of shareholder power unavoidably reinvites attention to broader social concerns largely neglected by corporate law's traditionally narrow ambit of concern.

Professor Chayes, writing in 1959, likewise wrote critically – more than 50 years before the latest developments – about what he considered to be the SEC's misguided efforts to revitalize shareholder democracy.[196] Acknowledging that investors, of course, should be assured of full information and be protected against fraud and manipulation by those in control, Chayes was dismissive of the idea that shareholders were the best social mechanism for keeping corporate power responsible:

> Of all those standing in relation to the large corporation, the shareholder is least subject to its power. Through the mechanism of the security markets, his relation to the corporation is rendered highly abstract and formal, quite limited in scope, and readily reducible to monetary terms. The market affords him a way of breaking this relation that is simple and effective. He can sell his stock, and remove himself, qua shareholder, at least from the power of the corporation.
>
> Shareholder democracy, so-called, is misconceived because the shareholders are not the governed of the corporation whose consent must be sought. If they are, it is only in the most limited sense. Their interests are protected if financial information is made available, fraud and overreaching are prevented, and a market is maintained in which their shares may be sold. A priori, there is no reason for them to have any voice, direct or representational, in the catalogue of corporate decisions with which this paper began, decisions on prices, wages, and investment. They are no more affected than nonshareholding neighbors by these decisions.[197]

Thus, in the second decade of the 21st century, unfolding developments in the law of corporate governance still take no direct heed of corporate responsibility concerns because corporate governance remains a closed system of just three groups – investors, directors, and managers. 20th century calls for directors and managers to be more socially responsible took place against an assumed backdrop of relative shareholder impotence, with the contested issue being how powerful corporate elites should best reconcile – in theory and practice – investor and non-investor interests to assure both financial success and societal approval. Rising shareholder power, and director-manager efforts to accommodate it, mean the historical corporate responsibility approach of focusing solely on director-manager volunteerism or external legal regulation of the corporation needs rethinking. Perhaps calls for broadly responsible conduct will work better for private companies than those having publicly traded securities because private companies do not face such intense capital market pressures.. Perhaps too the corporate responsibility focus in the public corporation will migrate (or broaden) to include calls for more fully exploring – culturally and legally – the "social responsibility" aspects of share ownership. Just as ownership of real property is far more extensively regulated than one hundred years ago, perhaps share ownership in the future will not carry unfettered rights.

In short, heightened shareholder activism of the kind witnessed today may reduce agency costs and tighten accountability of directors and managers to investors but it may also usher in new concerns.[198] Shareholders are heterogeneous in their preferences, and empowered minority shareholders might seek special preferences for themselves, at the expense of other shareholders or stakeholders.[199] If so, then, as has repeatedly happened before with respect to strong corporate managers, the debate will center on whether voluntary self-restraint by muscle-flexing hedge funds and other investors will suffice, or whether novel legal regulation will be called for, such as an imposition of newly-contoured fiduciary duties on active shareholders, tougher disclosure requirements, or yet other measures.[200] If the skimpy existent mechanisms of corporate governance cannot themselves accommodate a modern society's evolving expectations of corporate power – whether control lies in investor or manager hands, or is held jointly – then it is to be expected that renewed efforts to bring non-investor voices (and concerns) into corporate governance will begin again, or that even more extensive legal regulation addressing various kinds of such interests will be forthcoming. Nowhere is it clearer than in the very heart of the corporation – i.e., the corporate governance realm – that law plays a central role in the story of corporate responsibility.

ENDNOTES

1. There is a vast literature on law and corporate social responsibility. No effort is made in this paper to cite to all of it. There are, however, a few works of scholarship that, in addition to making outstanding contributions of their own, collect a great deal of the pertinent literature. These include, THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnet & Aurora Voiculescu & Tom Campbell, eds., 2007) ; C. A. Harwell Wells, The Cycles of Corporate Responsibility: An Historical Retrospective For The Twenty-First Century, 51 U. KAN. L. REV. 77 (2002); Douglas M. Branson, Corporate Governance "Reform" And The New Corporate Social Responsibility, 62 U. PITT. L. REV. 605 (2001); Susanna K. Ripken, Corporations Are People Too: A Multi-Dimensional Approach To The Corporate Personhood Puzzle, XV FORDHAM J. CORP. & FIN. L. 97 (2009); Symposium: In Berle's Footsteps – A Symposium Celebrating The Launch Of The Adolf A. Berle, Jr. Center On Corporations, Law & Society, 33 SEATTLE U. L. REV. 777 ff. (2010) (several articles); Reuven S. Avi-Yonah, The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility,30 DEL. J. CORP. L. 767 (2005); Amiram Gill, Corporate Governance As Social Responsibility: A Research Agenda, 26 BERKELEY J. INT'L. L. 452 (2008); Lyman Johnson, Individual And Collective Sovereignty In The Corporate Enterprise, 92 COLUM. L. REV. -2215 (1992); William T. Allen, Our Schizophrenic Conception of the Business Corporation, 14 CARDOZO L. REV. 26 (1992); David L. Engle, An Approach To Corporate Responsibility, 32 STAN. L. REV. 1 (1979).

2. 130 S. Ct. 876 (2010).

3. Santa Clara County v. Southern Pac. R. R. Co., 118 U.S. 394 (1886). For the definitive treatment of the historical aftermath of Santa Clara, see Morton J. Horwitz, Santa Clara Revisited: The Development Of Corporate Theory, 88 W. VA. L. REV. 173 (1986). This article was revised for inclusion in Professor Horowitz's book. Morton J. Horowitz, THE TRANSFORMATION OF AMERICAN LAW _ 1870-1960, ch. 3 (1992) (hereafter Transformation).

4. Id.

5. For a description of the widespread negative response to the Citizens United ruling and nascent efforts to amend the U.S. Constitution to provide only humans, not corporations, with constitutional rights, see Susanna K. Ripken, Corporate First Amendment Rights After Citizens United: An Analysis Of The Popular Movement To End The Constitutional Personhood of Corporations, http://ssrn.com/abstract=1702520. For an article placing Citizens United in historical context, see Reuven S. Avi-Yonah, Citizens United and the Corporate Form, 2010 WIS. L. REV. 999.

6. 130 S. Ct. at 971 (Stevens, J., concurring in part and dissenting in part). See also, Ripken, supra note 5.

7. 130 S. Ct. at 971.

8. 130 S. Ct. at 906-07. This language is quite similar to that used in a 1906 Supreme Court decision holding that corporations have Fourth Amendment rights. Hale v. Henkel, 201 U.S. 43, 76 (1906) (a "corporation is, after all, but an association of individuals…").

9. 130 S. Ct. at 971 (Stevens, J., concurring in part and dissenting in part). Stevens expressly stated that his views did not specifically depend on a particular conception of corporateness. But his view that corporations possess a devolved economic authority makes his conception of corporateness more public oriented in character than the majority's.

10. Morton Horowitz, THE TRANSFORMATION OF AMERICAN LAW – 1780-1860 112 (1977); Justice Stevens emphasized this history in his opinion in Citizens United. 130 S. Ct. at 949 (Stevens, J., concurring in part and dissenting in part).

11. 130 S. Ct. at 926 (Scalia, J., concurring).

12. Horowitz, supra note 10 at 112.

13. 130 S. Ct. at 949 n. 53 (Stevens, J., concurring in part and dissenting in part).

14. Id. at 949 (citing authority).

15. Henry Hansmann & Ranier Kraakman, The End of History for Corporate Law, 89 GEO. L. J. 439, 440 (2001).

16. Currie's Admin. v. Mutual Ass. Soc., 4 H&M 315, 437-48 (Va. 1809) (emphasis in original). Interestingly, the court referred to "associated individuals" _ as did the majority in Citizens United, supra note 8 – yet the Virginia court still insisted that such a conception of corporateness supported a public serving function.

17. 17 U.S. (4 Wheat) 518 (1819).

18. See infra Part V.

19. See infra Part IV.

20. See infra Part III.

21. 17 U.S. at 636.

22. 6 U.S. (2 Cranch) 127, 169 (1804).

23. For a good, recent summary of this "artificial person" theory of corporateness, see Ripken, supra note 1 at 106-109.

24. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89 (1987).

25. Lyman Johnson and David Millon, Missing The Point About State Takeover Statutes, 87 MICH. L. REV. 846 (1989).

26. Horowitz, Transformation, supra note 3 at 72. Some other scholars, see Ripken, supra note 1 at 109 ("the artificial person theory of the corporation diminished in relevance over time.") do not consider the CTS decision in their assessment. But see Avi-Yonah, supra note 5 (discussing CTS).

27. Even the 1906 decision of Hale v. Henkel stated that the "corporation is a creature of the State." 201 U.S. at 74. In fact, Hale also used language suggesting a "public-serving" function of corporateness: A corporation "is presumed to be incorporated for the benefit of the public." Id.

28. MODEL BUS. CORP. ACT § 3.02 (2008).

29. See Justice Story's concurring opinion in Dartmouth College, supra note 17.

30. See supra note 8.

31. See David Millon, Theories Of The Corporation, 1990 DUKE L. J. 201 (1990); Gregory A. Mark, The Personification of the Business Corporation in American Law, 54 U. CHI. L. REV. 1441 (1987).

32. Horowitz, Transformation, supra note 3.

33. Alfred D. Chandler, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 36 (1977). Today, interestingly, another noncorporate form of business – the limited liability company – has once again surpassed the corporation in popularity for closely-held businesses.

34. Id. at 76-78, 82-86.

35. Margaret M. Blair, Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century, 51 UCLA L. REV. 387, 389-94 (2003).

36. Horowitz, Transformation, supra note 3 at n. 165 ("in most jurisdictions throughout the nineteenth century, the usual statutory provision made the shareholder liable for much more than – usually twice – the value of his shares.").

37. Today, partnerships also may elect to provide partners with limited liability, meaning they are not personally liable for partnership debts or obligations.

38. Blair, supra note 35.

39. Millon, supra note 31.

40. Id. at 214. See also, Kim supra note 1 at 112-18 (describing natural entity theory but asserting courts have used multiple theories).

41. John Dewey, The Historical Background of Corporate Legal Personality, 35 YALE L. J. 655 (1926). As of 1991, this article was described by one commentator as the most influential paper ever published by the Yale Law Journal. Fred R. Shapiro, The Most-Cited Articles from the Yale Law Journal, 100 YALE L. J. 1449 (1991).

42. Horowitz, Transformation, supra note 3 at 68.

43. Id. at 72.

44. Hale v. Henkel, 201 U.S. 43 (1906). Moreover, the Hale opinion itself includes elements of both an entity and aggregation theories. See supra notes 8, 27.

45. Horowitz, Transformation, supra note 3 at 101.

46. See supra note 24.

47. For a full description and critique of the contractarian theory, see Johnson, supra note 1.

48. It is for this reason, and others, that Professor Kim, supra note 1, advocates a "multi-dimensional" approach to corporate personhood.

49. See, e.g., A. A. Berle, Jr., Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049 (1931) (arguing that corporate managers should use control for shareholder benefit); E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 (1932) (arguing that corporate managers do not only owe a duty to their stockholders to make a profit but should advance a range of broader "corporate" interests); A. A. Berle, Jr., For Whom Corporate Managers Are Trustees: A Note, 45 HARV. L. REV. 1365 (1932) (arguing that corporate managers should largely serve stockholders).

50. See Dodd, supra note 49 at 1160-61. Professor Wells, supra note 1 at 93, underscores how emergence of the corporation as a distinct legal person facilitated a view that managers faithfully advancing "corporate" interests can and should serve interests in addition to those of investors.

51. See Marc T. Moore & Antoine Rebèrioux, Corporate Power In The Public Eye: Reassessing The Implications of Berle's Public Consensus Theory, 33 SEATTLE U. L. REV. 1109, 1113-1117 (2010); William W. Bratton & Michael L. Wachter, Tracking Berle's Footsteps: The Trail of The Modern Corporation's Last Chapter, 33 SEATTLE U. L. REV. 849 (2010).

52. Adolf A. Berle, Jr. & Gardiner Means, THE MODERN CORPORATION AND PRIVATE PROPERTY 353-54 (1932). Professor Erika George has very usefully highlighted these passages in this seminal work. Erika George, See No Evil? Revisiting Early Visions Of The Social Responsibility of Business: Adolf A. Berle's Contribution To Contemporary Conversations, 33 SEATTLE U. L. REV. 965, 979 (2010).

53. See Wells, supra note 1, describing the "cycles of social responsibility" during the period from the early 1930s into the early 21st century. There are historical "cycles" or "rounds" which become more prominent at times of acute social stress, as Wells notes, but the issue persistently permeates the modern corporate culture.

54. Lyman Johnson, The Delaware Judiciary And The Meaning of Corporate Life And Corporate Law, 68 TEXAS L. REV. 865, 934 (1990) (describing law's "expression of ambivalent social expectations of corporate behavior"); Christopher M. Bruner, The Enduring Ambivalence Of Corporate Law, 59 ALABAMA L. REV. 1385 (2008) (same).

55. Henry Hu, New Financial Products, The Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare, 69 TEXAS L. REV. 1273, 1282-83 (1991) ("Most academics now believe that shareholder wealth maximization is the basic pecuniary objective of the modern publicly held corporation.").

56. Einer Elhauge, Sacrificing Profits in the Public Interest, 80 N.Y. U. L. REV. 733, 738 (2005).

57. Id. at 763. Guhan Subramanian, The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching, 150 U. PA. L. REV. 1795, 1828 (2004) (collecting citations to constituency statutes). Five states make their statutes applicable to officers as well as directors. Jonathan D. Springer, Corporate Constituency Statutes: Hollow Hopes and False Fears, 1999 ANN. SURVEY AM. L. 85, 97, n. 56 (1999).

58. CONN. GEN. STAT. § 33-756 (d) (Lexis 2007).

59. Lyman Johnson and David Millon, Missing The Point About State Takeover Statutes, 87 MICH. L. REV. 846, 848 (1989) (chief purpose of statutes is not investor protection but safeguarding noninvestor interests).

60. Nebraska repealed its constituency statute in 1995. Springer, supra note 57 at 95, n. 47.

61. Stephen M. Bainbridge, Unocal at 20: Director Primacy in Corporate Takeovers, 31 DEL. J. CORP. L. 769, 778 & n. 43 (2006). Gordon Smith similarly acknowledges that "corporate law endows directors with tremendous discretion to serve the interests of all corporate stakeholders." D. Gordon Smith, The Dystopian Potential of Corporate Law, 57 EMORY L. J. 985, 1000 (2008).

62. Paramount Communications, Inc. v. Time, Inc., 571 A. 2d 1140, 1150 (Del. 1989).

63. Unocal Corp. v. Mesa Petroleum Co., 493 A. 2d 946, 955 (Del. 1985).

64. 493 A. 2d at 955.

65. 2010 WL 3516473 at *23 (Del. Ch. 2010).

66. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A. 2d 173, 182 (Del. 1986); Paramount Communications, Inc. v. QVC Network, Inc., 637 A. 2d 34, 43 (Del. 1994). Revlon also stated that, even outside the sale of control setting, under Unocal the board's regard for various constituencies must be accompanied by "rationally related benefits accruing to stockholders." Revlon, 506 A. 2d at 182. That is not a very demanding requirement, as elaborated in the text. Moreover, certain states, for example, Virginia, have rejected the Revlon decision even though lacking a constituency statute. Willard ex rel. Moneta Building Supply, Inc. v. Moneta Building Supply, Inc., 515 S. E. 2d 277 (Va. 1999) (no duty to maximize share price in sale context). Moreover, those thirty states with constituency statutes – see supra note 57 – likely would not follow Revlon's pro-investor ruling.

67. 170 N. W. 668 (Mich. 1919).

68. Lynn A. Stout, Why We Should Stop Teaching Dodge v. Ford, in THE ICONIC CASES IN CORPORATE LAW (ed. Jonathan R. Macey, 2008) (arguing that Dodge v. Ford is widely studied in law schools and that it is a doctrinal oddity).

69. 170 N. W. at 684.

70. Stout, supra note 68; Elhauge, supra note 56 at 773.

71. Elhauge, supra note 56 at 773.

72. See supra note 10 and accompanying text.

73. Stout, supra note 68.

74. See Ronald J. Colombo, Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership at 8-11, (2008 Working Paper), http://ssrn.com/abstract = 1103219.

75. For a specification of shareholder rights under modern law, see Julian Velasco, The Fundamental Rights of the Shareholder, 40 U. C. DAVIS L. REV. 407, 413-24 (2007).

76. Melvin Eisenberg, THE NATURE OF THE COMMON LAW 1, 14-16 (1988); Lyman Johnson, The Delaware Judiciary and The Meaning of Corporate Life and Corporate Law, 68 TEXAS L. REV. 865, 890 (1990).

77. City Capital Associates Limited Partnership v. Interco, Inc., 551 A. 2d 787, 800 (Del. Ch. 1988), appeal dismissed as moot, 556 A. 2d 1070 (Del. 1988). Interco on its facts was a pro-shareholder decision that represented the high water mark for shareholder rights in hostile takeovers, as management's ability to thwart high premium bids was later judicially underscored. See Johnson, supra note 76. In this author's view, the holding in Interco did not align with the Chancellor's recognition that corporate law must be congruent with underlying shared social values. This is true as well with Chancellor Chandler's recent statements in the eBay case. Supra note 65 and accompanying text.

78. Minnesota ex rel. Pillsbury v. Honeywell, Inc., 191 N.W. 2d 406 (Minn. 1971).

79. Katz v. Oak Indus., 508 A. 2d 873, 879 (Del. Ch. 1986).

80. Brehm v. Eisner, 746 A. 2d 244, 264 (Del. 2000) ("Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context.").

81. Id. ("Due care in the decisionmaking context is process due care only.").

82. Id. at 264 nn. 65 & 66. See generally, Lyman Johnson, The Modest Business Judgment Rule, 55 BUS. LAW. 625 (2000) (business judgment rule forecloses substantive review).

83. See, e.g., Shlensky v. Wrigley, 237 N. E. 2d 776 (Ill. App. 1968) (decision of directors not to install lights at Wrigley field out of consideration for the neighborhood might be in the long term interests of the corporation). See Margaret M. Blair and Lynn A. Stout, Director Accountability and the Mediating Role of the Corporate Board, 79 WASH. U. L. Q. 403, 429 (2003).

84. A. P. Smith Manufacturing Co. v. Barlow, 98 A. 2d 581, 584-86 (N. J. 1953).

85. Joshua D. Margolis and Hillary Anger Elfenbein, Do Well by Doing Good? Don't Count on It, HARVARD BUSINESS REVIEW 19 (January 2008).

86. Id. at 20 (emphasis in original).

87. AMERICAN LAW INSTITUTE PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, cmt a (1994). For a good, recent treatment on the continuing ambivalence of corporate purpose, see Christopher M. Bruner, The Enduring Ambivalence of Corporate Law, 59 ALABAMA L. REV. 1385 (2008).

88. PRINCIPLES, supra note 87, § 2.01, cmt. a.

89. Id. at cmt h.

90. Id. at cmt e. Vice-Chancellor Leo Strine also has noted that a corporation is a social institution, not just an economic vehicle. See Leo E. Strine, Jr., Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance, 33 J. CORP. L. 1, 2 (2007) (a business corporation is a "social institution that, albeit having the ultimate goal of producing profits for stockholders, also durably serves and exemplifies other societal values.").

91. Id. at cmt h.

92. Id. at cmt e.

93. See supra note 57 and accompanying text.

94. Although several constituency statutes state expressly that investor interests are not determinative in director decisionmaking, see Velasco supra note 75 at 464, many constituency statutes do not state how various noninvestor and investor interests are to be weighed. Presumably, that accords directors at least some reasonable degree of discretion in how they factor in noninvestor interests and probably accords them a great deal of discretion on this subject. § 2.01(b) is much clearer on this point.

95. See supra note 28 and accompanying text.

96. MODEL BUS. CORP. ACT ANN. § 3.02(13) (2008).

97. Id. at p. 3-17.

98. § 23(r) was added to the Revenue Act of 1934 in 1935, and permitted a deduction not to exceed 5% of adjusted gross income.

99. A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

100. Id. at 586.

101. Id. at 583. See supra note 16 and accompanying text.

102. Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969).

103. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. Law No. 111-203 (111th Cong.) (H. R. 4173).

104. Moreover, law's ambivalence about corporate purpose as detailed in Part III may offer scant comfort to those who believe directors and managers typically use the afforded discretion for irresponsible, not responsible, corporate ends. Thus, although discretion could be used laudably, many observers are skeptical that it usually is, and therefore they advocate regulation of various sorts.

105. 15 U.S.C.A. § 1 et seq.

106. Abram Chayes, The Modern Corporation And The Rule Of Law 25, 37 in THE CORPORATION IN MODERN SOCIETY (Edward S. Mason ed., 1959).

107. Standard Oil Company of New Jersey v. U.S., 221 U.S. 1 (1911).

108. During the Progressive era, waves of protective labor legislation swept across the nation, largely at the state level. During the New Deal era, the right of labor to organize in unions received greater attention, at the federal level. Many laws during the Progressive era were prompted by serious industrial calamities such as the 1907 Monongah mine disaster in West Virginia (362 deaths); the 1909 Cherry mine disaster in Illinois (259 deaths); the 1911 fires at the Triangle Shirtwaist Company in New York City (146 deaths); and a 1914 fire at an Edison lamp factory in West Orange, New Jersey (25 deaths). The result was a raft of employer liability laws; safety laws for factories, mines, workshops, and railroads; hour laws for men and women; laws regulating the terms and conditions of wage payment; convict labor and child labor laws; prohibition of the trucking (company store) system; and, passage of workmen's compensation acts, which by 1920 had been enacted by the federal government and all but six states.

109. In the 1930s, the Norris-LaGuardia Act outlawed yellow-dog contracts and banned federal injunctions in labor disputes, with certain exceptions. The National Labor Relations Act (Wagner Act) of 1935 guaranteed labor the right to form, join, and assist labor organizations, and to bargain collectively, while outlawing "unfair practices" by employers. In 1938, the Fair Labor Standards Act established a minimum wage and a maximum work week.

110. Joel Seligman, THE TRANSFORMATION OF WALL STREET 44-47 (2d ed., 1995).

111. 15 U.S.C. § 77a et seq.

112. 15 U.S.C. § 78a et seq.

113. 15 U.S.C. § 79 et seq.

114. 15 U.S.C. § 80a-1 et seq.

115. See, e.g., 15 U.S.C. §§ 1191-6004 (1995) (including inter alia Consumer Product Safety Act) (regulating flammable fabrics); 42 U.S.C. §§ 283-6601 (1995) (establishing National Institute of Health).

116. See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994) (prohibiting employers from paying unequal wages based on gender); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994) (prohibiting arbitrary age discrimination); Rehabilitation Act of 1973, 29 U.S.C. § 791 (1994) (encouraging employment of individuals with disabilities); Civil Rights Act, 42 U.S.C. § 2000(e) (1964) (setting out Title VII, dealing with discrimination); Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (1994) (prohibiting discrimination against individuals with disabilities); Equal Opportunity Commission Regulations, 29 C.F.R. §§ 1600 to 1691 (1998) (establishing employee ethical conduct standards). See, e.g., Occupational Health and Safety Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (1994); Occupational Health and Safety Administration Regulations, 29 C.F.R. §§ 1910-1990 (1998).

117. See, e.g., Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2692 (1994); Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (1994) (imposing liability for oil spills); Clean Water Act of 1977, Pub. L. No. 95-217 (codified as amended in scattered sections of 33 U.S.C.); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1994); Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994)

(establishing air quality regulations); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (1994) (establishing sanctions for release of hazardous substances); Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101-13102 (1994); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580 (codified as amended in scattered sections of 42 U.S.C.) (regulating treatment, storage, and disposal of hazardous waste).

118. For example, amendments in 1964 extended coverage of the Securities Exchange Act to companies with securities traded "over the counter" as well as on exchanges (Pub. L. No. 88-467), while amendments in 1975 significantly reformed many aspects of federal law (Pub. L. No. 94-29), and changes in 1984 (Pub. L. No. 98-376) and 1988 (Pub. L. No. 100-704) beefed up regulation of "insider trading."

119. Pub. L. No. 95-213, sec 102-04, 91 Stat. 1494 (amending the Securities Exchange Act of 1934 at §§ 13(b)(2), 30A, 32 (codified at 15 U.S.C. §§ 78ff, 78dd-2, 78m(b)(2)).

120. See Bratton & Wachter, supra note 51 at 871.

121. Id.

122. 31 U.S.C. § 5318.

123. Bratton & Wachter, supra note 51 at 873.

124. 18 U.S.C. § 8B2.1(a)(2).

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

126. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. Law No. 111-203 (111th Cong.) (H. R. 4173).

127. See generally, Lyman Johnson & Mark Sides, The Sarbanes Oxley Act and Fiduciary Duties, 30 WILLIAM MITCHELL LAW REVIEW 1149 (2004) (describing background and overview of Act).

128. Id. at 1154.

129. Id. at 1155-85.

130. Dodd-Frank, Title I.

131. Dodd-Frank, Title X.

132. Dodd-Frank, § 619.

133. Dodd-Frank, Title IV.
134. Dodd-Frank, Title VII.

135. Dodd-Frank, Title IX, Subtitle C.

136. Dodd-Frank, § 929P.

137. Dodd-Frank, § 951.

138. Dodd-Frank, § 952.

139. Dodd-Frank, § 953.

140. Dodd-Frank, § 971.

141. Dodd-Frank, § 972.

142. Dodd-Frank, § 922.

143. The seminal description of this phenomenon appears in the book by Adolf Berle & Gardiner Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

144. 288 U.S. 517, 542 (1933).

145. 288 U.S. at 542-60.

146. Id.

147. 288 U.S. at 560.

148. See supra notes 39-40 and accompanying text.

149. See supra notes 40-45 and accompanying text.

150. See supra notes 116-117.

151. The striking exception is the 1980s legislative effort to curb high levels of takeover activity through their corporate statutes. See supra notes 24 and 25 and accompanying text. These statutes had a clear pro-management thrust but the point is that states in the 1980s chose to "regulate" a widespread economic activity _ hostile corporate takeovers – by means of their corporate statutes, a legislative strategy that had long lain dormant but which succeeded in that era.

152. Chayes, supra note 106 at 41.

153. One problem with any "special constituency" directors – including "public interest" directors – is that all directors have fiduciary duties demanding that they place the interests of the beneficiary of those duties above all other considerations. If the duties run only to the "corporation," a "special interest" director must advance the corporation's interests. If the duties also run to stockholders, their interests must be paramount. Thus, either the special interest director argues that advancing the interests of his or her special constituency is consistent with corporate and/or stockholder well-being, or that constituency's interests must – unless the law of fiduciary duties is changed – remain subordinate.

154. Branson, supra note 1 at 612-12.

155. William O. Douglas, DEMOCRACY AND FINANCE 52-53 (1940).

156. Christopher Stone, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 157-73 (1976).

157. Detlav Vagts, Reforming the "Modern" Corporation: Perspectives From the German, 80 HARV. L. REV. 23, 50-53 (1966).

158. See, Branson, supra note 1 at 615-618.

159. 288 U.S. at 560.

160. William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L. J. 663, 665-66 (1974).

161. Branson, supra note 1 at 617-18.

162. Ralph Nader, Mark Green & Joel Seligman, TAMING THE GIANT CORPORATION (1976). Stone, supra note 155, also advocated federal incorporation for large corporations.

163. Branson, supra note 1 at 616.

164. Id.

165. Id.

166. See Lisa M. Fairfax, Some Reflections On The Diversity Of Corporate Boards: Women, People Of Color, And The Unique Issues Associated With Women Of Color, 79 ST. JOHN'S L. REV. 1105 (2006). Effective February 28, 2010, the SEC amended Item 407(c) of Regulation S-K to require public reporting companies to disclose whether, and if so how, nominating committees consider diversity in identifying nominees for directors and also to disclose how companies assess the effectiveness of diversity policies.

167. 17 CFR 204, 14a-8.

168. Wells, supra note 1 at 114.

169. Medical Comm. for Human Rights v. SEC, 432 F. 2d 659, 662-63 (D.C. Cir. 1970), 404 U.S. 403.

170. See Wells, supra note 1 at 114-15.

171. Id. at 115-17.

172. Id.; Branson, supra note 1 at 614.

173. Melvin A. Eisenberg, CORPORATIONS AND BUSINESS ASSOCIATIONS, 315 (2005).

174. Id.

175. See Johnson, supra note 1.

176. Id. These "law and econ" proponents also were the persons who renewed the long-slumbering aggregation theory of the corporation by means of their "nexus of contracts" conception. See supra notes 47-48 and accompanying text.

177. Victor F. Zonana, Milken to Pay $500 M, Serve 40 Months Under Settlement, LOS ANGELES TIMES, Feb. 28, 1992, http://tech.mit.edu/V112/N9/milken.09w.html.

178. See supra note 59.

179. See supra note 57.

180. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987); Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir. 1989), cert. denied, 493 U.S. 955 (1989).

181. Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989).

182. Id. at 1150, 1154.

183. Marcel Kahan & Edward Rock, Embattled CEOs, 88 TEXAS L. REV. 987 (2010).

184. Id. at 1013-15.

185. Id. at 1012.

186. Id. at 1049.

187. Id. at 1015-16, 1022-23.

188. See supra notes 136-41.

189. On August 25, 2010, the SEC amended the proxy rules to facilitate certain shareholders placing director nominees on the company's proxy statement. SEC Rel. No. 34-62764 (Aug. 25, 2010). The SEC voluntarily suspended the effectiveness of its rules pending the outcome of a lawsuit challenging the legality of the changes by the Business Roundtable and the Chamber of Commerce.

190. See supra note 59.

191. Bratton & Wachter, supra note 51.

192. Id. at 855.

193. George, supra note 52 at 976.

194. Bratton & Wachter, supra note 51 at 862-64.

195. Chayes, supra note 106 at 40.

196. Id. at 40-41.

197. See Paul Rose, Common Agency And The Public Corporation, 63 VAND. L. REV. 1355 (2010).

198. Id.

199. Id.

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