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From Dodge to eBay: The Elusive Corporate Purpose

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FROM *DODGE* TO *EBAY*: THE ELUSIVE CORPORATE PURPOSE

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ABSTRACT

This article examines the history of the law of corporate purpose. I argue that the seemingly conflicting visions of corporate social responsibility and shareholder wealth maximization, which characterize contemporary debates about the subject, are grounded in two different paradigms for corporate law—a socio-political paradigm and an economic-financial one. Advocates of the socio-political paradigm have historically focused on the power that corporations could exercise in society, while those embracing the economic-financial paradigm expressed concerns about the power that the control group could exercise over the corporation's shareholders. Over the course of the twentieth century, scholars have debated the merits of each of these paradigms and the concerns associated with them, while judges drew upon the academic and, more importantly, the managerial sentiments and concerns of the era to attach a purpose to corporate law's doctrine, that is, the ultra vires doctrine in the early twentieth century, the enabling business judgment rule by midcentury, and the laws applicable to evaluating managerial responses to hostile takeovers at the century's end. Ultimately, the cases seemingly addressing corporate purpose did not endorse wealth maximization or social responsibility as objectives. Rather, they empowered corporate

† Professor of Law, The George Washington University. This article is part of a larger book project, tentatively titled *The Making of U.S. Corporate Law*, in which I explore the development of corporate law and theory in the twentieth century. An earlier draft of this article was presented at the Works in Progress series at the George Washington University Law School. I am grateful to the participants for their comments and to Ernie Englander for ongoing conversations about corporate governance. The George Washington University Summer Research Fund provided financial support. Members of the Virginia Law and Business Review, especially Charles Condro and Jane O'Connor, provided excellent editorial assistance. All errors are mine. This Article will appear in Volume 13, Issue 2 of the *Virginia Law & Business Review*, forthcoming Summer 2019.

managers to set corporate goals without interference from shareholders or the courts.

"[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits . . . ."
Milton Friedman, Capitalism and Freedom (1962)[1]

INTRODUCTION

IN 2004, eBay had purchased 28.4% of Craigslist's stock from Phillip Knowlton, one of Craigslist's three shareholders.[2] Adding insult to injury, eBay created Kijiji, a competitor site.[3] Craig Newmark, Craigslist's founder, and Jim Buckmaster, Craigslist's third shareholder, were concerned that eBay would gain control of Craigslist and alter its purpose, which, as they envisioned, was to serve the community.[4] In an attempt to prevent eBay from so doing, Craigslist's board adopted several defensive measures including a poison pill, which "restricted eBay from purchasing additional craigslist shares

1 MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962).
2 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 6, 9–11 (Del. Ch. 2010).
3 *See id.* at 6, 17–18.
4 *Id.* at 7, 8, 32.

and hampered eBay's ability to freely sell the craigslist shares it owned to third parties."[5] eBay sued, claiming that, as directors and controlling shareholders, Craig and Jim breached their fiduciary obligations to eBay, the minority shareholder.[6] According to eBay, Craig and Jim could not pursue their proclaimed corporate purpose at the expense of maximizing profits for their shareholders, including eBay.[7]

Chancellor Chandler of the Chancery Court of Delaware acknowledged Craigslist's unique "community-service approach to doing business," adding that "perhaps the most mysterious thing about Craigslist's continued success is the fact that craigslist does not expend any great effort seeking to maximize its profits or to monitor its competition or its market share."[8] But Delaware law does not allow for unique approaches. Preventing Craigslist from using the poison pill, Chandler wrote:

> The corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. . . . Directors of a for-profit Delaware corporation cannot deploy a [policy] to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.[9]

Proponents of the shareholder primacy vision of corporate law, of the notion that corporations are stewards of their shareholders and, more accurately, their shareholders' investment portfolios, were quick to celebrate Chandler's opinion. In contrast, those who maintain that corporations should be socially responsible have argued that the decision was at odds with the Delaware courts' typical deference to the board's business judgment.[10] Lyman

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5 *Id.* at 6. The other defensive tactics included:

> (2) implementing a staggered board that made it impossible for eBay to unilaterally elect a director to the craigslist board, and (3) seeking to obtain a right of first refusal in craigslist's favor over the craigslist shares eBay owns by offering to issue one new share of craigslist stock in exchange for every five shares over which any craigslist stockholder granted a right of first refusal in craigslist's favor.

Id.; *see also id.* at 21–24.

6 *Id.* at 7.

7 *Id.* at 25–27.

8 *Id.* at 8.

9 *Id.* at 34–35. On Chandler's treatment of the two additional defensive tactics, see discussion *infra* Epilogue.

10 For an examination of these different opinions, see, for example, David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181, 183–84 (2013).

Johnson most forcefully wrote, "[n]o corporate statute in the United States . . . requires a corporation to advance a particular purpose, such as profit or share price maximization;"[11] case law has rarely addressed it and clearly has not mandated a particular purpose.[12]

These conflicting visions of the permissible corporate purpose are not novel, reaching back to the early twentieth-century debates about the nature and scope of directors' fiduciary obligations, most memorably the early 1930s debate between Adolf A. Berle, Jr. of Columbia Law School and E. Merrick Dodd of Harvard Law School.[13] Proponents of both visions can also find supporting precedent in different cases throughout the past century. *Dodge v. Ford Motor Co.*, for example, proclaimed that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[14] Yet, *Steinway v. Steinway & Sons* held that "moderate expenditures or contributions" by a corporation toward building a "church, school, library, and baths" for its employees "[were] directly related to the legitimate objects of the corporation,"[15] and *A. P. Smith Mfg. v. Barlow* suggested that "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."[16] More recently, *Unocal Corp. v. Mesa Petroleum Co.* declared that, when faced with a hostile takeover bid, directors could assess, among other factors, the bid's potential "impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally),"[17] but, shortly thereafter, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* concluded that when a "break-up" or "sale" of a company "was inevitable," "the duty of the board . . . [was] . . . the maximization of the company's value at a sale for the stockholders' benefits."[18]

How, if at all, can these cases (and goals) be reconciled or understood? Rather than assessing the merits of these seemingly inconsistent visions and

11 Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose,* 38 DEL. J. CORP. L. 405, 432 (2013).

12 *Id.*

13 *See* Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) [hereinafter Berle, *Corporate Powers*]; Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) [hereinafter Berle, *For Whom Corporate Managers Are Trustees*]; E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

14 Dodge v. Ford Motor Co., 204 Mich. 459, 507 (1919).

15 Steinway v. Steinway & Sons, 40 N.Y.S. 718, 721 (N.Y. Sup. Ct. 1896).

16 A. P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 154 (1953).

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

18 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

cases, this article seeks to provide a new framework to examine the jurisprudential debates about corporate purpose. I argue that these debates are best described as ongoing scholarly attempts throughout the past century to fit corporations (and corporate law) in the broader narrative of the modern American state. Corporations have traditionally represented an anomaly to liberal legal thinkers who envisioned the world as sharply divided between state power and individual right holders, the ruler and the ruled. A corporation was both—an association of individual right holders, on the one hand, but an entity with state-like powers, on the other hand. For eighteenth-century thinkers, the continued existence of corporations demonstrated the failure of liberal efforts to destroy the intermediate forms associated with medieval life. Early nineteenth-century legal doctrine eased the tension by dividing corporations into two different groups—public corporations that "assimilated to the role of the state," such as municipal associations, and private corporations that "assimilated to the role of an individual in society," such as business organizations.[19] At the turn of the twentieth century, the emerging large publicly held business corporation undermined not only classical liberalism but also assumptions about self-interest and efficiency supporting classical economics.[20] The scholarly debates over corporate purpose in the past century reflect attempts to fit this anomalous creature (and its management) within the narrative of the modern liberal, capitalist state.[21]

The twentieth-century scholarly debates over the role of corporations in society gave rise to two paradigms for corporate law—a socio-political paradigm and an economic-financial one. Proponents of the socio-political paradigm have historically focused on the power that corporations could exercise in society, including over their divergent stakeholders. In turn, those embracing the economic-financial paradigm expressed concerns about the power that the control group (including but not limited to management) could exercise over the corporation's shareholders, typically viewed as owners.

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19 Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1099 (1980).

20 *See, e.g.*, KAREN HO, LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET 189 (2009).

21 *See, e.g.*, ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 1 (1933):

> The corporation has, in fact, become both a method of property tenure and a means of organizing economic life. Grown to tremendous proportions, there may be said to have evolved a "corporate system"—as there was once a feudal system—which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution.

As this article explores, over the course of the twentieth century, as scholars debated the merits of each of these paradigms and the concerns associated with them, judges used both paradigms to develop the law of corporate purpose. It rested on the twin assumptions that the modern American state faced internal and external threats and that corporations were best situated to help defend against such threats. Shareholders and other stakeholders' interests were promoted only when they fit with the larger goal of promoting the survival of the modern American state. At the turn of the twentieth century, courts justified using corporate funds to benefit employees as a means of fighting the advance of socialism among working men and women. At the same time, corporations were instructed to maximize profit for their shareholders as a means of fighting potential manipulation of the stock market and the economy by the few who controlled corporations.[22] In the midcentury years, concerns about the spread of socialism among workers or the power of the control group dissipated. With the rise of totalitarian regimes in Europe, the corporation's purpose was to support the survival of American democracy by making charitable contributions to democratic institutions. Shareholders' (and other stakeholders') interests were, for the most part, subordinated to this end.[23] In the later part of the twentieth century, with no real external threats to the modern American state, scholarly and judicial attention shifted to the market—that is, the stock market. Economic threats—specifically, the conglomerates that came to dominate corporate America and the hostile takeovers that sought to break these conglomerates—replaced the political threats of socialism and communism. Amidst rapid market growth and despite mounting demands for corporate action on a variety of social matters (including, among others, consumer safety, environmental protection, and racial equality), the courts became fixated on the limited goal of shareholder wealth maximization—the classical capitalist profit motive—as a means of ensuring the credence of the stock market in our global society.[24]

While *Dodge, Steinway, A. P. Smith, Unocal, and Revlon* (which will be discussed in this article) made the law of corporate purpose the thread that wove corporations into the fabric of American society, it is important to stress that these cases were among the very few in which state courts explicitly addressed corporate purpose. As this article suggests, these cases represent occasions where the courts found ways to bring the academic,

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22 *See* discussion *infra* Part I.
23 *See* discussion *infra* Part II.
24 *See* discussion *infra* Part III.

social, and cultural sentiments of the era within the boundaries of corporate law. Corporate purpose was not a separate doctrine but rather one tied to (or incorporated within) others, be it the *ultra vires* doctrine in the early twentieth century, the enabling business judgment rule by midcentury, or the laws applicable to evaluating managerial responses to hostile takeovers at the century's end. The want of more frequent discussions in the courts about the corporation's purpose is perhaps a reflection of the state courts' reluctance to critically examine the role of corporations and their managements in modern American society. Indeed, despite their differing rhetoric, all of these cases empowered management to set the corporation's (and society's) goals without interference from shareholders, other stakeholders, or the courts.

This article is divided into three parts. The first part, *Progressive Grounds, 1900s–1930s*, explores the discourse of corporate purpose in the early decades of the twentieth century. As large publicly held corporations came to dominate American markets and society, scholars expressed grave concerns about corporate power and viewed corporate law as a means of taming and restraining corporate power. Progressive scholars, especially those who emphasized the social and political role of the corporation, wanted corporate power to be exercised in trust for the community. In *Steinway*, the Supreme Court of New York, Special Term, interpreted the traditional doctrine of *ultra vires* to allow corporate managers to exercise corporate power so as to benefit the public good, specifically to use corporate assets to create programs that benefited the company's employees so as to negate the allure of unionization and socialism.[25] At the same time, the growing separation of ownership from control in the large publicly held corporation triggered concerns about potential market manipulation by the control group. Scholars such as Adolf A. Berle argued that, when conflicts between controlling and minority shareholders arise, corporate law should aim to protect the latter against the control group's potential abuse of its market power.[26] In *Dodge*, the Supreme Court of Michigan, concerned about concentration of wealth and control, embraced this argument as an exception to *Steinway*.[27] Accordingly, controlling shareholders could not use their power of control to benefit themselves or other stakeholders' interests at the expense of minority shareholders.

As the second part of this article, *From Ultra Vires to Business Judgment, 1940s–1970s*, explores, concerns about corporate power and market

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25 *See* discussion *infra* Part I.A.
26 *See* discussion *infra* Part I.C.
27 *See* discussion *infra* Part I.B.

manipulation by the control group as well as socialism decreased by the 1940s as corporations' war efforts and public relations campaigns helped improve their public image. Gradually, the goal of corporate law shifted from taming corporate power in the interest of the vulnerable employees or minority shareholders so as to ensure the success of American capitalism to channeling corporate power to promote the survival of American democracy. In *A. P. Smith*, the Supreme Court of New Jersey endorsed this idea by allowing management, even against the objection of the corporation's shareholders, to make charitable contributions on behalf of the corporation. Like the Supreme Court of New York in *Steinway*, the Supreme Court of New Jersey in *A. P. Smith* found that the company's actions were *intra vires*.[28] However, with federal regulation focusing on the corporation's impact on the community, the power of corporate management, rather than the power of the corporation, quickly became the focus of analysis. Courts moved away from the question of whether or not the actions of the corporation were *ultra vires*, asking instead whether or not corporate managers acted in the best interest of the corporation. For the most part, the interests of the shareholders (and other stakeholders) were subsumed under the corporate whole.[29]

As the third part of this article, *Hostile Takeovers and the Shareholder Wealth Maximization Norm, 1970s to 2000s*, explains, by the 1970s and 1980s, the stock market, a symbol of U.S. economic power, became the focal point for analysis. Mainstream legal scholars and economists came to believe that the stock market was the most effective institution to constrain corporate activities. If policymakers and legal scholars in the early twentieth century focused on the role of the corporation in fighting socialism, and midcentury scholars wanted corporate managers to exercise their power for the benefit of American democracy, jurists in the later part of the twentieth century sought to ensure the survival of our market economy by focusing on the stockholders. With no real threats to the modern American state, the only perceived threat was the threat that corporations themselves could pose to the market economy. In the 1980s, criticism of conglomerates and fears about growing numbers of hostile takeovers, presumably intent on breaking down these large corporations, led the courts to embrace the maximization of wealth for the shareholders as the ultimate corporate purpose.[30]

As the article concludes, throughout the twentieth century, the discourse of corporate purpose has served as a rhetorical tool. Courts turned to the

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28 *See* discussion *infra* Parts I.A. and II.A.
29 *See* discussion *infra* Part II.B.
30 *See* discussion *infra* Part III.B.

corporation's purpose to address concerns about socialism in the early twentieth century, communism in the midcentury years, and the success of the stock market at its end. In so doing, they helped make the corporation—itself a potential challenge to classical liberalism and capitalism—these two ideologies' representative institution. The early twentieth-century emphasis on employee benefits, the midcentury focus on charitable contributions, and the shareholder wealth maximization goal of the late twentieth century have further served to allow corporate managers to freely exercise their corporate power, provided that they justified their actions with reference to the ideals or concerns of the era. Using the rhetoric of corporate purpose, the courts enabled the exercise of corporate power without interference by corporate constituencies or the courts.

I. PROGRESSIVE GROUNDS, 1900S–1930S

A. Corporate Power and the Ultra Vires Doctrine

A remarkable growth in the scale of private business organizations took place at the end of the nineteenth century. Growing consumer demand, increasing numbers of workers, an expanding pool of capital, and the quickly developing national railroads and telegraph networks enabled the creation of large enterprises, while corporate lawyers devised different legal tools to allow their clients to increase the scope of their operations so as to avoid destructive competition among large businesses.[31] Beginning with New Jersey in 1888, states changed their corporate laws to "eliminate[] restrictions on . . . capitalization and assets, mergers and consolidation, the issuance of voting stock, the purpose(s) of incorporation, and the duration and locale of business."[32] By the late 1890s, gone were the nineteenth-century legislative constraints on corporations' powers, as well as limitations on their capital structure. Trusts, holding companies, and mergers became common, even if often contested in state courts.[33]

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31 Dalia T. Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1514–15 (2006).

32 SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY 60 (1996).

33 On the development of the large publicly held corporation, and the legal changes that accommodated it, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 65–107 (1992); *see also* DOUGLAS M. EICHAR, THE RISE AND FALL OF CORPORATE SOCIAL RESPONSIBILITY 20 (2017) (discussing the effects of competition on the development of the modern corporation);

Efforts to control the growing corporations, especially those attempting to limit corporations' ability to consolidate, were of little consequence. A number of states had passed antitrust laws; in 1890, Congress passed the Sherman Anti-Trust Act, and in 1898, President McKinley appointed nine people to the Industrial Commission to study, and hopefully solve, the trust problem.[34] But state corporate laws aimed to fulfill the demands of industrial corporations, undermining state and federal antitrust regulation.[35] As Lyman Johnson pointedly put it, "legal restrictions were curtailed and corporate powers were enhanced."[36]

Social scientists expressed deep concerns about the power of large corporations. In 1871, Thomas Cooley cautioned that state enabling laws allowed "the most enormous and threatening powers in our country" to flourish.[37] Corporations, Cooley warned, were rapidly obtaining "greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence."[38] Similarly, in 1913, an article in the *Yale Law Journal* began by noting that "[t]he dominion of corporate power is greater than the general public comprehend, also the evils which infest these creatures of the law are skillfully and secretly destroying the inalienable rights of personal liberty while the people are lingering."[39] Economists and lawyers joined in calling for national regulation, and several federal incorporation bills attempting to constrain the growing corporation were introduced in Congress during the early decades of the twentieth

JULIA C. OTT, WHEN WALL STREET MET MAIN STREET: THE QUEST FOR AN INVESTORS' DEMOCRACY 21 (2011) (discussing the growth of the trusts).

34 OTT, supra note 33, at 21–27.

35 *See* EICHAR, *supra* note 33, at 22–23 (discussing antimonopoly and anti-consolidation sentiments in the late 1800s); *see also* HORWITZ, *supra* note 33, at 80–90 (examining how the law developed to support consolidation).

36 Lyman Johnson, *Corporate Law and the History of Corporate Social Responsibility*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 570, 581 (Harwell Wells ed., 2018); *see also* EICHAR, *supra* note 33, at 32 ("B]y the 1870s, the large corporation was poised to take off. Government, however, was poorly positioned to grow in a corresponding fashion to mandate social responsibility.").

37 Theodore H. Davis, Jr., *Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State*, 77 VA. L. REV. 603, 619 (1991) (quoting THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 279 n.2 (3d ed. 1874)).

38 *Id.*

39 J. Newton Baker, *The Evil of Special Privilege*, 22 YALE L.J. 220 (1913).

century; however, none were successful, leaving the regulation of corporate power, for the most part, in the hands of the states.[40]

Before the 1880s, states regulated the activities of large corporations, such as banks, by narrowly describing their powers in their charters of incorporation.[41] Private corporations were viewed as artificial entities, created by a charter or a grant of the state, with the charter being a privilege selectively conferred by the sovereign on those seeking incorporation. If the corporation acted outside its prescribed powers, its action was *ultra vires* and void.[42] By the turn of the twentieth century, the grant or privilege paradigm lost much of its credibility as states encouraged incorporation in their territories by reducing the requirement for a state charter into a mere formality.[43] State corporate laws no longer limited the large corporation's power but rather enabled its exercise. Corporations were viewed as natural or real entities, separate from their members (the shareholders), their power almost unlimited, and their regulation, either by the states or by the federal government, minimal.[44]

But the *ultra vires* doctrine did not disappear. Rather, it lived at least through the middle of the twentieth century, offering state courts a unique tool to attempt to channel corporate power toward socially beneficial goals, while simultaneously determining the purpose of the rapidly growing publicly held corporation and the power of its managers.[45] Critically important at the end of the nineteenth century, amidst growing labor agitation, were the corporations' obligations toward their employees. For one thing, the historic

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[40] Davis, *supra* note 37, at 621–24; *see also* Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160 (1982).

[41] *See, e.g.*, Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987).

[42] *See, e.g.*, George Wharton Pepper, *The Unauthorized or Prohibited Exercise of Corporate Power*, 9 HARV. L. REV. 255, 256 (1895).

[43] *See, e.g.*, Mark, *supra* note 41, at 1453–54 (describing the nineteenth-century free incorporation movement that helped erode the idea that corporate charters were a privilege granted by the state); Charles W. McCurdy, *The* Knight *Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304, 307–08 (1979) (discussing the demise of the charter as a means of controlling corporations).

[44] On the different paradigms or visions of the corporation, see Dalia T. Mitchell, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1870–74 (2003); *see also* Johnson, *supra* note 36, at 582 (noting that "at the start of the twentieth century, corporations . . . were economically powerful and regarded as legally distinct from their associated persons" and "they were not closely regulated (as before) by state corporation statutes").

[45] For more information on the rights of shareholders to bring *ultra vires* suits, see Owen J. Roberts, *The Rights of Stockholders with Reference to the Management of a Corporation, Part III*, 37 AM. L. REG. 484 (1898).

railroad strike of 1877—the disruption of transportation, the financial losses suffered by railroads across the United States, and the violent outbreaks—exacerbated concerns about the relationship between labor and management. As an 1884 article entitled "Corporations, their Employees, and the Public" explained, as private corporations were taking on important public functions, the role and plight of these corporations' wage workers, who labored to accomplish these functions, became highly visible.[46]

Corporate leaders were keen on demonstrating their concern for their workers, and their commitment to improving their conditions. "The business corporation . . . takes millions of dollars each year and spends the money for the benefit of its workmen" wrote Raynal Bolling on behalf of United States Steel Corporation, counting among such benefits employee stock subscription plans, accident prevention and relief, medical care, pensions, as well as general community welfare.[47] In his study of corporations' public relations, Roland Marchand has explained that large corporations exhibited "compassionate concern for [their] employees" as a means of demonstrating that they "possessed human feeling."[48] It was also a means of fighting unionization.[49]

Given that the control group and management sought to pacify the corporation's employees, if only to avoid ruinous strikes, it is perhaps not surprising that the courts protected programs for employee benefits against challenges from shareholders, who could easily be described as selfishly motivated. In *Steinway*, for example, the Steinway corporation—a family business located in Manhattan—opened a plant in Astoria, Queens so that it could expand its operations and, as William Steinway, the corporation's president and sole controlling shareholder, explained, "escape the machinations of the anarchists and socialists . . . [who] were continually breeding discontent among [Steinway's] workmen, and inciting them to strike."[50] In order to retain its skilled labor force and circumvent potential strikes, "some houses had been constructed in which employees of the company resided . . . . [T]he company ha[d] also, at a very moderate expenditure, contributed specific property and money towards the

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[46] Carl Schurz, *Corporations, Their Employees, and the Public*, 138 N. AM. REV. 101 (1884).

[47] Raynal C. Bolling, *The United States Steel Corporation and Labor Conditions*, 42 ANNALS AM. ACAD. POL. & SOC. SCI. 38, 38, 39–43 (1912); *see also* EICHAR, *supra* note 33, at 43–49 (describing employee benefits programs at the end of the nineteenth century as "voluntary practices of CSR," or corporate social responsibility).

[48] ROLAND MARCHAND, CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS 15 (2000).

[49] *See* EICHAR, *supra* note 33, at 83.

[50] RICHARD K. LIEBERMAN, STEINWAY & SONS 77 (1995) (quoting William Steinway's testimony before a Senate Committee on the relations between labor and capital in 1883).

establishment of a church, a school, a free library, and a free bath . . . ."[51] An ongoing family feud between William Steinway and his nephew, Henry, a minority shareholder, resulted in several suits, including a shareholder's suit to declare Steinway's expenditures in Astoria wasteful and thus *ultra vires*. The Supreme Court of New York dismissed the suit, stating that "[t]he transfer of their manufactory to the Astoria site was a reasonable exercise of a conceded discretionary power."[52] As Judge Beekman explained:

> As . . . it involved also the transfer of a large number of operatives, whose well-being was essential to the proper and efficient performance of their work, and thus to the success of the corporation, a close and practical business relation subsisted between the provision made by the defendants for their employees and the object for which the corporation was organized . . . . It was also desirable (it may, I think, be said to have been necessary) to the success of the scheme that some provision should be made for the moral as well as the material needs of this new and isolated community, thus brought, by the exigencies of their employment, into a measure of social dependence upon their employer.[53]

Having successfully used the rhetoric of anti-socialism, William Steinway was free to determine his corporation's purpose while *Steinway* became a leading case on corporate expenditures that benefited employees. Following *Steinway*, "[e]xpenditures resulting in stimulating the employees to better work, and promoting faithfulness and loyalty to the employer," were rendered "tributary to the promotion of corporate objects."[54] Corporations could maintain "relief funds" to support employees injured at work before Workmen's Compensation legislation was enacted, as well as pay bonuses to keep up employee "morale" and encourage more "energetic efforts."[55] In 1909, the Supreme Court of New York, Appellate Division, announced that "[t]he enlightened spirit of the age, based upon the experience of the past, has thrown upon the employer other duties, which involve a proper regard for

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51 Steinway v. Steinway & Sons, 40 N.Y.S. 718, 719 (N.Y. Sup. Ct. 1896). *But see* LIEBERMAN, *supra* note 50, at 79–80 (noting that, at least in part, William Steinway, the corporation's president, built "Steinway Village" so that the corporation could sell and rent homes on the land it owned in Queens).

52 *Steinway*, 40 N.Y.S. at 721.

53 *Id.*

54 *Donations by a Business Corporation as* Intra Vires, 31 COLUM. L. REV. 136 (1931).

55 *Id.* at 137–38.

the comfort, health, safety and well-being of the employee."[56] And in 1922, in *Armstrong Cork Co. v. H. A. Meldrum Co.*, contributions by a corporation doing business in Buffalo, New York, to the endowment funds of a college and a university in Buffalo were deemed *intra vires* because they would allow for the creation of opportunities for business training.[57] In 1931, an article in the *Columbia Law Review* concluded that courts were "more ready to adjudge gratuitous corporate contributions *intra vires* where the immediate benefit is received by employees than in any other situation."[58]

Also in line with *Steinway*, courts and state legislatures extended the reasoning applicable to employee benefits to "contributions to civic enterprises of a community dominated by the corporation," including the moral needs of the community.[59] Often, such expenditures also benefited the corporation, but, as the court stated in *Steinway*, they were rendered *intra vires* at least in part because "as industrial conditions change, business methods must change with them, and acts become permissible which, at an earlier period, would not have been considered to be within corporate power."[60] Corporate law could allow corporate managers to take actions to benefit community goals, even if doing so was at some expense to the shareholders.

Steinway, as the court described the facts, pitted one of the corporation's shareholders against the corporation's employees—a battle most Progressives (and Populists) were likely to settle in favor of the latter. Progressives were rather keen on ensuring that shareholders were held accountable to the corporation's different stakeholders, including creditors, consumers and workers. At the same time, Progressives were also concerned about protecting individual shareholders against abuses by financiers and those in control of the large publicly held corporations. As the following section elaborates, when courts viewed the situation as involving a conflict between controlling and minority shareholders, they were more inclined to protect the latter and restrict the exercise of corporate power by the control group.

56 People *ex. rel.* Metro. Life Ins. Co. v. Hotchkiss, 120 N.Y.S. 649, 651 (N.Y. App. Div. 1909).

57 Armstrong Cork Co. v. H. A. Meldrum Co., 285 F. 58 (W.D.N.Y. 1922).

58 *Donations by a Business Corporation as* Intra Vires, *supra* note 54, at 136.

59 *Corporations – Charities – Statute Making Contributions to Charity by Corporations Intra Vires*, 52 HARV. L. REV. 538, 538 (1939); *see also Donations by a Business Corporation as* Intra Vires, *supra* note 54; Am. Rolling Mill Co. v. Comm'r, 41 F.2d 314, 315–16 (6th Cir. 1930) (holding that a large community chest contribution to a community where about 50% of the corporation's workers lived was *intra vires*).

60 Steinway v. Steinway & Sons, 40 N.Y.S. 718, 719 (N.Y. App. Div. 1896); *see also* Theodore W. Cousens, *How Far Corporations May Contribute to Charity*, 35 VA. L. REV. 401 (1949) (explaining the rules applicable to charitable contributions).

B. Protecting Minority Shareholders

The modern stock market developed in sync with the giant corporation. Beginning in the merger wave of the 1890s, corporations found ways to convince investors, typically of middle-class background, to invest—first, in bonds, and then, by the second decade of the twentieth century, in corporate stock.[61] In the process, "the practice of investment [was linked] with national citizenship, democracy and the public interest."[62] As James B. Dill, the lawyer who drafted New Jersey's first enabling corporate law, noted, selling shares to the public went "a long way to winning the loyalty of the middle classes to a new incorporated system of private property."[63]

These new investors had little effect on corporate affairs. Doctrinal changes, including the gradual erosion of the *ultra vires* doctrine, the reintroduction of the idea that the board's power was original rather than delegated from the shareholders, and the elimination of the shareholders' right to remove directors at will, helped minimize shareholder control.[64] Proxy voting became the norm, and states enacted laws allowing a majority of the shareholders to approve a sale of corporate assets, abolishing the nineteenth century rule requiring a unanimous vote to effect fundamental transactions.[65] The newly legalized holding company further undermined shareholders' power by allowing one corporation to control the majority of stock of many direct and indirect subsidiaries through pyramiding.[66] Limitations on the voting rights of certain classes of shareholders, including non-voting stock and conditional voting stock, also became common in the first decades of the twentieth century.[67] As early as 1904, Thorstein Veblen

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61 Mitchell, *supra* note 31, at 1519–20.

62 HO, *supra* note 20, at 180.

63 *Id.* at 181. For more information on the history of the stock market, see CHARLES R. GEISST, WALL STREET: A HISTORY (1997).

64 *See* HORWITZ, *supra* note 33, at 77–78, 99.

65 Mitchell, *supra* note 31, at 1522; *see also* Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 907–09 (2004) (noting how changes in corporate voting rules during the late nineteenth century weakened shareholder control).

66 Mitchell, *supra* note 31, at 1526; Winkler*, supra* note 65, at 907. The classic treatise on the holding company remains JAMES C. BONBRIGHT & GARDINER C. MEANS, THE HOLDING COMPANY: ITS PUBLIC SIGNIFICANCE AND ITS REGULATION (1932).

67 Mitchell, *supra* note 31, at 1526–27. For a detailed analysis of the changes described in this paragraph, see HORWITZ, *supra* note 33, at 77–90.

noted that "under corporate organization the owners of the industrial material have no voice in its management."[68]

Moreover, while share ownership became more dispersed and businesses grew in size, their control was concentrated. In 1913, the report of the Pujo (Banking and Currency) Committee announced the existence of a money trust, consisting of a small number of financiers sitting on multiple corporate boards. According to the report, these financiers controlled the economy with the assistance of the New York Stock Exchange, which allowed practices such as pooling and other stock price manipulation techniques to the detriment of working- and middle-class individual investors.[69] In 1932, in *The Modern Corporation and Private Property*—modern corporate law's foundational text—Adolf A. Berle, Jr. and Gardiner C. Means noted that "[o]wnership of wealth without appreciable control and control of wealth without appreciable ownership appear to be the logical outcome of corporate development."[70]

The separation of ownership from control exacerbated Progressive scholars' concerns about corporate power. The multiplicity of owners created "tremendous aggregations of property," which made possible such buildups of power (in the hands of the control group).[71] The possibility of mass concentration of power augmented the risk of inefficient uses of power and the potential adverse effect of corporations on the economy at large.[72]

The separation of ownership from control also rendered Progressive legal scholars deeply concerned about potential abuse of power by the control group. In 1911, an article titled *Evils of Corporate Control* declared that "[t]he facility with which capital passes under the control of strong groups of individuals creates one of the most serious problems of modern times."[73] In 1927, William Z. Ripley pointed out that "the larger the number of shareholders, the more easily may a small concentrated block of minority shares exercise sway over all the rest."[74] And in 1932, when Berle and Means called attention to the growing separation of ownership from control in large

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68 THORSTEIN VEBLEN, THE THEORY OF BUSINESS ENTERPRISE 146 (1904).

69 *See* OTT, *supra* note 33, at 32–33.

70 *See* BERLE & MEANS, *supra* note 21, at 69.

71 *Id.* at 5.

72 *Id.* Because Berle and Means's argument focused on publicly held corporations (which Berle labeled quasi-public), they viewed the consolidation of power and the separation of ownership from control as interrelated phenomena. *Id.* ("The Fords and the Mellons, whose personal wealth is sufficient to finance great enterprises, are so few, that they only emphasize the dependence of the large enterprise on the wealth of more than the individual or group of individuals who may be in control.").

73 William E. Harmon, *Evils of Corporate Control*, 2 PROC. ACAD. POL. SCI. N.Y.C. 48 (1911).

74 WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 95 (1927).

business corporations, they pointedly explained that individual shareholders lost control not only to management but also to larger investors who, even without owning a majority of the shares, were able to elect the board of directors.[75] That same year, the Pecora Hearings in Congress found "irrefutable evidence of market manipulation by corporate officers and investment bankers."[76]

Calls for state and federal legislation to protect minority investors were heard at least since the turn of the twentieth century, becoming more vocal by the end of the First World War as corporations were trying to lure "citizen-investors holding excess cash from Liberty bond, War Savings, or Government Savings redemptions and interest payments."[77] Courts supplemented such calls by holding those in control to a strict fiduciary obligation toward minority shareholders.[78] The issue was not whether the exercise of corporate power was *ultra vires*, but rather whether the control group fulfilled its duties toward minority shareholders. For example, in *Southern Pac. Co. v. Bogert*, Justice Brandeis wrote:

> The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation in the fruits of the sale.[79]

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75 *See* BERLE & MEANS, *supra* note 21, at 69–111 (detailing the changing composition of the control group).

76 Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 109, 113 (2004). A few years later, William O. Douglas would label the interests of investment banking houses "high finance," charging that they were "interested solely in the immediate profit." WILLIAM O. DOUGLAS, *The Forces of Disorder*, *in* DEMOCRACY AND FINANCE: THE ADDRESSES AND PUBLIC STATEMENTS OF WILLIAM O. DOUGLAS 7 (James Allen ed., 1940). According to Douglas, the interests of high finance were different from those of small individual shareholders, or even the corporation. *Id.* at 9. With the power of control, high finance was able to profit by siphoning money from other investors. *Id.*

77 OTT, *supra* note 33, at 127.

78 *See* Douglas K. Moll, *Of Donahue and Fiduciary Duty: Much Ado About . . . ?*, 33 W. NEW ENG. L. REV. 471, 471–72 (2011).

79 S. Pac. Co. v. Bogert, 250 U.S. 483, 487–88 (1919).

Dodge, "[o]ne of the most famous corporate cases of all time,"[80] conveyed a similar sentiment. In 1903, the Dodge brothers, then owners of an auto-parts making business, entered an exclusive agreement to supply parts to the Ford Motor Company. At the time, Ford could not pay for the initial parts, and instead offered the Dodge brothers fifty shares each of the Ford Motor Company's stock in exchange for their notes of $5,000 each.[81] The Ford Motor Company was extremely successful in the following decade, and the Dodge brothers, as shareholders, received large amounts of special dividends.[82] Over time, the company also reduced the price of its Model T car, "from $900 at the outset to $440 in 1916, each year selling more automobiles than the year before."[83] But in 1916, Ford had decided to stop paying special dividends, announcing that he intended to put the profits back into the company, hire more employees, and further reduce the price of Ford cars.[84] "'My ambition,' said Mr. Ford, 'is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business.'"[85] The Dodge brothers, who by 1913 stopped making parts for the Ford Motor Company and began manufacturing their cars, sued, claiming that Ford's actions turned the company into a semi-eleemosynary institution in violation of its charter.[86] Chief Justice Ostrander held for the Dodge brothers stating:

> A business corporation is organized and carried on primarily for the profit of the 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.[87]

Why weren't the expenditures planned by Ford in *Dodge* treated similarly to the ones in *Steinway*? Was the corporation not benefiting from higher

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80 Geoffrey Miller, *Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases*, 2009 MICH. ST. L. REV. 831, 833.

81 M. Todd Henderson, *The Story of* Dodge v. Ford Motor Company*: Everything Old is New Again*, *in* CORPORATE LAW STORIES 37, 47–48 (J. Mark Ramseyer ed., 2009).

82 Miller, *supra* note 80, at 833.

83 *Id.*

84 Dodge v. Ford Motor Co., 204 Mich. 459, 465, 490, 505 (1919).

85 *Id.* at 505.

86 *Id.* at 504; Miller, *supra* note 80, at 835.

87 *Dodge*, 204 Mich. at 507.

morale (and less agitation) among employees? Were sales not up due to the reduction in car prices? Proponents of the shareholder wealth maximization vision of the corporation have argued that *Dodge* clearly stated that the corporation's sole purpose was to maximize profit for the shareholders.[88] Others, however, have pointed out that the decision did not require directors to maximize profits for the shareholders but only limited directors' discretion to share corporate profits with stakeholders other than the shareholders.[89] Most pointedly, Lynn Stout has suggested that law professors stop teaching the decision because it was a "mistake."[90]

Geoffrey Miller has written that "[t]he back-story, which is dimly apparent in the opinion itself, is that the fight between Ford and the Dodges had little to do with the fiduciary duties of managers and much to do with competition between commercial rivals."[91] A closer look at the paragraph including the famous quote mentioned above suggests more. The paragraph began with a nod to cases such as *Steinway* which, according to the Supreme Court of Michigan, raised the question as to whether "the directors were not acting for the best interests of the corporation."[92] "We do not draw in question . . . the soundness of the opinions delivered in the cases cited," Chief Justice Ostrander wrote, because "[t]he case presented here [was] not like any of them."[93] While, according to the court, *Steinway* and similar cases addressed the duties of directors (and the corporation) toward the general public, *Dodge* focused on the relationship between controlling and minority shareholders.[94] "There should be no confusion (of which there is evidence)," Ostrander stressed, "of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders."[95] The duty to

88 *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993).

89 *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 772–75 (2005).

90 Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 166 (2008) (noting not only that the case does not stand for the proposition that "the corporate purpose is, or should be, maximizing shareholder wealth," but also that it is "a doctrinal oddity largely irrelevant to corporate law and corporate practice").

91 Miller*, supra* note 80, at 835.

92 *Dodge*, 204 Mich. at 506.

93 *Id.*

94 *Id.* at 506–07; *see also* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 315–20 (1998).

95 *Dodge*, 204 Mich. at 507.

maximize profit to the shareholders applied only in the latter context.[96] As Ostrander was quick to emphasize:

> There is committed to the discretion of directors, a discretion to be exercised in good faith, the infinite details of business, including the wages which shall be paid to employees, the number of hours they shall work, the conditions under which labor shall be carried on, and the price for which products shall be offered to the public.[97]

In short, *Dodge*'s focus on the protection of shareholders, specifically minority shareholders, against abuses by the control group reflected the common early twentieth-century concern about the power that the control group could exercise over the vulnerable minority shareholders (and the market more broadly). It was this concern that led the court to emphasize that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[98] As the court saw it, Ford's rhetoric of corporate social responsibility masked an attempt to harm the Dodge brothers, the minority shareholders. Unlike William Steinway's attempt to ensure peaceful working conditions and fight the appeal of socialism, Ford's rhetoric seemed to reject one of the most important tenets of capitalism—the profit motive.[99] Fears about the power of concentrated control led the court to carve out an exception to the rule that management held the power to determine the corporation's (and corporate law's) purpose. Together, *Steinway* and *Dodge* are emblematic of the early twentieth-century unease with the dual problems of corporate power and market manipulation by the control group. Both cases also empowered corporate managers to determine corporate purpose provided that their justification did not conflict with the corporation's perceived role in the modern American state.

The decade that followed *Dodge* witnessed an "unprecedented influx of new investors into the stock market."[100] In the early part of the 1920s, corporations marketed their shares directly, especially to their employees and customers, "in the hopes of repelling unionization and federal intrusions into labor relations" as well as deflecting antitrust suits.[101] By the second part of

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96 *Id.*

97 *Id.*

98 *Id.*

99 *See* WILLIAM PELFREY, BILLY, ALFRED, AND GENERAL MOTORS: THE STORY OF TWO UNIQUE MEN, A LEGENDARY COMPANY, AND A REMARKABLE TIME IN AMERICAN HISTORY 121 (2006).

100 OTT, *supra* note 33, at 169.

101 *Id.* at 152.

the 1920s, financial firms began to encourage investment in stock "as a mechanism for subjecting corporate capitalism to democratic discipline."[102] The growing numbers of individual investors exacerbated the tensions between the corporation's duties to its minority shareholders and its social obligations.

As the following section elaborates, in the early 1930s, the problems of corporate power and corporate control animated the famous debate between Adolf Berle and E. Merrick Dodd. Influenced by corporate managers' own assertions about their role, Dodd emphasized the corporation's obligations toward the community at large. In turn, growing fears about potential abuses by the control group (and perhaps a more cynical view of corporate managers' proclamations) led Berle to call for extending fiduciary obligations only toward the shareholders. Yet, as I further argue, while Berle and Dodd advocated different visions of the corporation's purpose, both viewed the doctrine of fiduciary obligations (rather than *ultra vires*) as the site where corporate purpose was to be found. In so doing they, perhaps inadvertently, helped undermine fears about corporate power. In explicitly relying upon management's view of the law of corporate purpose, Dodd's argument also paved the path for the courts' midcentury endorsement of corporate management's absolute discretion to determine corporate ends.

C. Of Debates and Legacies

Adolf Berle fully recognized the conflicting pulls of taming corporate power and restraining the power of management and the control group, of the needs of the community and the needs of the shareholders.[103] As Scott Bowman explained, Berle saw two dimensions of corporate power: an internal one and an external one.[104] The internal dimension focused on the power of corporations over individuals within them, and more specifically, the corporations' power over employment decisions.[105] In contrast, the external dimension emphasized corporations' impact on society at large, particularly corporations' power to control markets.[106] In *The Modern Corporation and Private Property*, the book Berle co-authored with Gardiner

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102 *Id.* at 169; *see also* JONATHAN BARRON BASKIN & PAUL J. MIRANTI, JR., A HISTORY OF CORPORATE FINANCE 189–97 (1997).

103 *See* C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 77, 87 (2002).

104 BOWMAN, *supra* note 32, at 207; *see also* BERLE & MEANS, *supra* note 21, at 7.

105 BOWMAN, *supra* note 32, at 207.

106 *Id.* at 208.

Means, Berle was especially concerned about corporate power and the challenge that corporations presented to classical liberal thought.[107] The book concluded by proclaiming that shareholders, "by surrendering control and responsibility over the active property, have surrendered the right that the corporation should be operated in their sole interest,—they have released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights."[108] Accordingly:

> Should the corporate leaders, for example, set forth a program comprising *fair wages*, *security to employees*, reasonable service to their public, and stabilization of business, all of which would divert a portion of the profits from the owners of passive property, and should the community generally accept such a scheme as a logical and human solution of industrial difficulties, *the interests of passive property owners would have to give way*.[109]

A year earlier, however, in *Corporate Powers as Powers in Trust*, Berle announced that corporate powers should be exercised in trust for the shareholders.[110] Just as with *Steinway* and *Dodge*, Berle's seemingly contradicting positions were grounded in the dual concerns about corporate power and corporate control and their implication for the modern American state. It was Dodd's article, *For Whom Are Corporate Managers Trustees?*, the only public response to Berle's article, which polarized Berle's vision and the twentieth century's discourse of corporate purpose.[111]

Dodd's vision of corporate management was one of public service. Dodd wanted to validate corporate social policies that benefited different constituencies, including employees, consumers, investors and the community at large, even when such policies resulted in diminution of profits for the shareholders.[112] Announcing that he was "thoroughly in sympathy with Mr. Berle's efforts to establish a legal control which [would] more effectually prevent corporate managers from diverting profit into their own pockets from those of stockholders," Dodd stated that the corporation nonetheless had "social service as well as a profit-making function."[113]

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107 *See generally* BERLE & MEANS, *supra* note 21.
108 *Id.* at 355.
109 *Id.* at 356 (emphasis added).
110 *See* Berle, *Corporate Powers*, *supra* note 13.
111 *See* Dodd, *supra* note 13.
112 *Id.*
113 *Id.* at 1147–48.

To support his argument, Dodd relied upon statements made by corporate managers, particularly Owen D. Young, chairman of the board and president of General Electric. Young, who believed that "life insurance, company health care, mortgage assistance, and worker grievance boards," could "nurture employee loyalty, and most importantly, avoid unions,"[114] argued that the corporation should recognize its "public obligations and perform its public duties—in a word, vast as it is, that it should be a good citizen."[115] Similarly, Dodd noted that, in giving charters to corporations, the state had created "*e pluribus unum*"—"[i]f the unity of the corporate body is real, then there is reality and not simply legal fiction in the proposition that the managers of the unit are fiduciaries for it and not merely for its individual members, that they are . . . trustees for an institution rather than attorneys for the stockholders."[116]

As the above quote from *The Modern Corporation and Private Property* indicates, Berle did not disagree. Yet, his argument in *Corporate Powers as Powers in Trust* focused elsewhere, drawing upon Berle's earlier work on the relationship between directors, officers and individual shareholders and the need to eliminate the potential for market manipulation by the control group.[117] In 1925, Berle called attention to the fact that because management stock would likely be controlled by the investment banking house that served as a promoter for the corporation, "it [was] possible, if not probable, that there [would] be attractive opportunities for manipulation of securities, for negotiating favorable contracts with allied interests, or even for giving value to stock which represent[ed] no real investment."[118] According to Berle, given the "web of economic interests" that the investment banking house served and from which it made its profits, it was likely that management stock would be voted for transactions that benefited the investment banking house, or even the controlling groups, but not the controlled corporation.[119]

In 1931, wishing himself to be the "Marx of the shareholder class,"[120] Berle wanted to protect those not in control of the corporate machinery from

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114 EICHAR, *supra* note 33, at 1.

115 Dodd, *supra* note 13, at 1154 (citation omitted).

116 *Id.* at 1160; *see also* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 216–18 (1990).

117 *See* Adolf A. Berle, Jr., *Non-Voting Stock and "Bankers' Control,"* 39 HARV. L. REV. 673 (1926); *see also* Wells, *supra* note 103, at 87–88.

118 Berle, *supra* note 117, at 676.

119 *Id.*

120 JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 62 (1987); *see also* NAVIGATING THE RAPIDS, 1918–1971: FROM THE PAPERS OF ADOLF A. BERLE 26 (Beatrice Bishop Berle & Travis Beal Jacobs eds., 1973).

fraud and manipulative practices that seemed to plague the securities markets. He wanted to rein in the power of the control group. The article *Corporate Powers as Powers in Trust* focused on the power to issue stock, the power to declare dividends, the power to amend the charter, and the power to engage in fundamental transactions.[121] While the courts had previously considered each of these powers a matter of contract law and thus susceptible to statutory changes (and the possibility of opting out), Berle wanted to make these powers a matter of the control group's trusteeship duties.[122]

In *The Modern Corporation and Private Property*, Berle's analysis focused on corporate power, and his conclusions were similar to Dodd's. However, Berle was concerned about "the apparently unlimited powers conferred on corporate management by recently enacted corporation statutes and charter provisions."[123] He also had little faith in the assertions made by corporate managers regarding their role. Young, whose ideas influenced Dodd's writings, developed the rhetoric of trust to convey that management was a profession that could mediate the different interests involved in the corporate endeavor.[124] Yet, while Young described business managers as trustees for society, he also argued that, as a result, they required little if any supervision from the states or the federal government.[125] As Allen Kaufman and Lawrence Zacharias have noted, "[t]he business community would not fully live up to Young's expectations; but it did take advantage of Young's trustee argument," with "managers represent[ing] themselves through Young's model."[126]

Recognizing the limits of the business community's trustee argument, Berle pointed out that "[t]he industrial 'control' does *not* now think of himself as a prince; he does *not* now assume responsibilities to the community; his bankers do *not* now undertake to recognize social claims; his lawyers do *not* advise him in terms of social responsibility."[127] Lessening the control group's obligations toward the shareholders would thus make the power of control absolute. As Berle put it, "[y]ou can not abandon the emphasis on 'the view that business corporations exist for the sole purpose of making profits for

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121 *See* Berle, *Corporate Powers*, *supra* note 13.
122 *Id.* at 1050–72.
123 Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM L. REV. 1458, 1458 (1969).
124 *See* Allen Kaufman & Lawrence Zacharias, *From Trust to Contract: The Legal Language of Managerial Ideology, 1920–1980*, 66 BUS. HIST. REV. 523, 527 (1992).
125 *Id.*
126 *Id.*; *see also* EICHAR, *supra* note 33, at 125–26.
127 Berle, *For Whom Corporate Managers Are Trustees*, *supra* note 13, at 1367.

their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."[128]

Given that the Berle-Dodd debate has since been viewed as the beginning point for discussions of corporate purpose, it is easy to lose track of the definition of corporate purpose as it was in the early 1930s, shortly after the stock market crash. The differences between Berle's and Dodd's positions are significant, but the similarities are also important. Both were concerned about corporate power and the means to discipline it.[129] Both also placed trust, not *ultra vires*, at the center of the law of corporate purpose. Stringent fiduciary obligations were to supplement federal regulation and state legislation to ensure that corporate power was exercised to achieve socially acceptable goals, be it community welfare or minority shareholder protection.[130] The doctrine of *ultra vires* had allowed Progressive legal scholars and judges in the early decades of the twentieth century to embrace the duties of corporations toward their employees and the duties of corporate managers toward the shareholders as complementary. Both Berle and Dodd began to alter this framework by shifting the debates away from *ultra vires* toward fiduciary obligations.

In the end, the idea that corporate law's purpose was to enforce trusteeship duties was very short-lived. Partially because scholars offered different visions as to whom directors were trustees and provided no concrete plan as to how the idea of trust would be implemented, partially because the business community used the concept of trust to promote its own agenda, and partially because the courts have struggled at least since the mid-nineteenth century to define the role of the board of directors, the idea did not take hold in state courts.[131]

The early twentieth-century concerns about corporate power and control also dissipated shortly after the Berle-Dodd debate. As the following part explores, by the late 1930s, concerns about socialism and unionization waned, and the law of corporate purpose became entangled with a new discourse of democracy that came to dominate the social sciences beginning in the 1940s. A vision of corporations as quintessentially American substantiated this

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128 *Id.*

129 *See* Mitchell, *supra* note 44, at 1891–96. Reflecting the early twentieth-century concerns about socialism, both Berle and Dodd also sought alternatives to the concept of a permanent wage-labor working class as a means of taming corporate power (be it Dodd's managerial class or Berle's shareholder class). *Id.*

130 Kaufman & Zacharias, *supra* note 124, at 532–33.

131 *See generally* Dalia T. Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J.L. & BUS. 63, 103–08 (2009).

discourse. In this context, the courts not only relied upon management's own vision of its obligations to develop a purpose for corporate law and corporations but also used the developing business judgment rule to make management's (almost) absolute discretion the foundation of corporate law.

II. FROM *ULTRA VIRES* TO BUSINESS JUDGMENT, 1940S–1970S

A. The Charitable Corporation

The programs adopted during the first phase of the New Deal aimed to bring relief and recovery through government planning and coordination.[132] These programs were grounded in the realization, as Louis Jaffe put it, that "the most significant and powerful components of the social structure [were] economic groups, competing and complementary in varying degrees;"[133] their thrust was to curb ruinous competition among business and instead achieve cooperation through governmental coordination.[134] As Means put it, the goal was not to "make the market effective as a coordinator," which would have required "revers[ing] the trend of a century and break[ing] the large units into a multitude of smaller enterprises."[135] Rather, the early New Deal programs were designed to keep in place the large units and increase "the element of administrative coordination of economic activity rather than its elimination."[136]

Neither the business community nor advocates of broader corporate reforms celebrated the early New Deal programs, be it the Securities Acts of 1933 and 1934 or the National Labor Relations Act of 1935. Progressive reformers believed these programs were insufficient solutions to the problems that plagued the economy, while the business community feared potential liability, especially under the Securities Acts.[137] Within a few years, however, these programs helped alleviate the fears about corporate power and the power of control that characterized the early decades of the twentieth

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132 Joseph L. Weiner, *The New Deal and the Corporation*, 19 U. CHI. L. REV. 724, 724–25 (1952).
133 Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).
134 EICHAR, *supra* note 33, at 139.
135 Gardiner C. Means, *The Distribution of Control and Responsibility in a Modern Economy*, 50 POL. SCI. Q. 59, 63 (1935).
136 *Id.*; *see also* EICHAR, *supra* note 33, at 139–41.
137 RALPH F. DE BEDTS, THE NEW DEAL'S SEC: THE FORMATIVE YEARS 49–51 (1964).

century.[138] In regulating the corporation's dealings with its shareholders and its creditors, the Securities Acts alleviated earlier concerns about market manipulation by the control group.[139] At the same time, the Federal Trade Commission guaranteed consumers "fair" competition, while the National Labor Relations Act ensured that workers had the power to bargain collectively.[140]

After the unexpected economic recession of 1937, New Dealers abandoned their regulatory vision of the modern state and instead adopted a compensatory vision. They no longer wanted the federal government to coordinate economic activity, but rather envisioned the government as redressing the "weaknesses and imbalances in the private economy without directly confronting the internal workings of capitalism."[141] The state was to "manage the economy without managing the institutions of the economy."[142] As President Roosevelt put it, the government's role was to spend capital "to increase [the] public wealth and to build up the health and strength of the people," in order "to help [the] system of private enterprise to function."[143] A vision of a free market, compensated by the state's fiscal hand on rare occasions, began to dominate economic thought.[144]

At the same time, the public image of corporations and their managements was changing. War production and the development of new industries (particularly electronics and communications) helped eliminate corporate debt, allowed corporations to cut prices, introduced new management techniques, and made corporations more likely to assume public responsibilities.[145] Corporations were embraced as dominant economic, social and political institutions. The concerns of earlier decades were forgotten, and

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138 *See* E. Merrick Dodd, Jr., *The Modern Corporation, Private Property, and Recent Federal Legislation*, 54 HARV. L. REV. 917 (1941) (discussing the impact of the New Deal legislation on the relationship between management and security holders); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1688 (1988) (discussing how the New Deal programs regulated corporate power).

139 DE BEDTS, *supra* note 137, at 76–77; JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 99–100; EICHAR, *supra* note 33, at 149.

140 Winkler, *supra* note 76, at 114.

141 Alan Brinkley, *The New Deal and the Idea of the State*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980, 85, 94 (Steve Fraser & Gary Gerstle eds., 1989).

142 *Id.*

143 *Id.* at 97.

144 *Id.* at 87–121; *See also* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 154–65 (1995); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 250–73 (1998).

145 *See* COLOSSUS: HOW THE CORPORATION CHANGED AMERICA 265–66 (Jack Beatty ed. 2001).

the alliance between business and the federal government was strengthened.[146] No longer a potential threat to the modern American state, the publicly held corporation became its quintessential institution. In 1946, Peter Drucker wrote that the corporation was not merely an economic organization, but "[America's] representative social institution."[147] As such, it strove to fulfill "the aspirations and beliefs of the American people."[148] For one thing, General Motors, the focus of Drucker's study of the corporation, proclaimed its intent to spend $500 million on products and facilities to meet the needs of the American public after the war.[149] The corporation, Drucker wrote, was "the institution which sets the standard for the way of life and the mode of living of our citizens; which leads, molds and directs; which determines our perspective on our own society; around which crystallize our social problems and to which we look for their solution."[150]

Social demands on corporations changed, too. In the early decades of the twentieth century, courts used the doctrine of the implied powers of the corporation to help channel corporate power toward socially beneficial goals, specifically to justify corporations' contributions to the needs and morale of their employees even when the benefits to the corporation were indirect.[151] But in the postwar years, with federal programs to protect employees and no real fears about labor unrest, the discourse of corporate purpose was no longer focused on the needs and morale of the corporation's employees. Instead, attention shifted to charitable contributions.

At the turn of the twentieth century, there were few, if any, statutes authorizing corporate charitable contributions.[152] Such contributions were deemed *ultra vires* unless the corporation received a benefit.[153] *Dodge*, discussed in the previous part, has indeed been described as a case in which charitable contributions were rejected because the corporation did not receive such a benefit.[154]

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146 *Id.*

147 PETER F. DRUCKER, CONCEPT OF THE CORPORATION 5 (1946).

148 *Id.* at 14.

149 WYATT WELLS, AMERICAN CAPITALISM, 1945–2000: CONTINUITY AND CHANGE FROM MASS PRODUCTION TO THE INFORMATION SOCIETY 10 (2003).

150 DRUCKER, *supra* note 147, at 6–7.

151 Albert E. Harum, *The Emergence of the "Economic Overdog,"* 47 A.B.A. J. 286, 287 (1961).

152 R. Franklin Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965, 966, 968–69 (1999).

153 *Id.*

154 Carroll R. Wetzel & James L. Winokur, *Corporations and the Public Interest—A Review of the Corporate Purpose and Business Judgment Rules*, 27 BUS. LAW. 235, 235 (1971).

In the 1920s, state corporation laws began to allow corporations to make charitable contributions while Congress extended to corporations "the right to deduct charitable contributions from gross income."[155] By 1949, thirteen states had passed legislation sanctioning corporate charitable contributions, albeit with specific restrictions, including limits on the allowed annual amounts of such contributions.[156] By 1950, a provision allowing corporate philanthropy was included in the Model Business Corporation Act; it permitted "donations for the public welfare or for charitable, scientific or educational purposes; and in time of war."[157] Many states adopted similar provisions in their corporation laws.[158]

It was not long before state courts were called upon to evaluate the merit and legal propriety of these statutes and of corporate charitable contributions and corporate purpose more broadly. In 1951, the National Association of Manufacturers, seeking a court resolution on the propriety of corporate contributions to higher education, brought a test case before the New Jersey Supreme Court in which A. P. Smith Manufacturing Company ("A. P. Smith") sought a judgment declaring such contributions *intra vires*.[159]

A. P. Smith was incorporated in 1896 for the "manufacture and sale of valves, fire hydrants and special equipment, mainly for water and gas industries."[160] "Over the years the company has contributed regularly to the local community chest and on occasions to Upsala College in East Orange and Newark University, now part of Rutgers, the State University."[161] Then, in July of 1951, the board of directors of A. P. Smith determined that it was "in the corporation's best interests to join with others in the 1951 Annual Giving to Princeton University," and authorized the transfer of 1,500 dollars to the university "as a contribution towards its maintenance."[162] Mr. Hubert F. O'Brien, the company's president, asserted that "he considered the contribution to be a sound investment, that the public expects corporations to aid philanthropic and benevolent institutions, that they obtain good will in the community by so doing, and that their charitable donations create

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155 *Corporations – Charities – Statute Making Contributions to Charity by Corporations Intra Vires*, *supra* note 59, at 538.

156 Balotti & Hanks, *supra* note 152, at 969.

157 *Id.* at 969 n.21 (quoting MODEL BUS. CORP. ACT § 3.02(13) (1950) (AM. BAR ASS'N, amended)).

158 *Id.* at 969–70.

159 *See* A. P. Smith Mfg. Co. v. Barlow, 13 N.J. 145 (1953); *see also* EICHAR, *supra* note 33, at 204; WELLS, *supra* note 149, at 333.

160 *A. P. Smith*, 13 N.J. at 147.

161 *Id.*

162 *Id.*

favorable environment for their business operations."[163] O'Brien further testified that "in contributing to liberal arts institutions, corporations were furthering their self-interest in assuring the free flow of properly trained personnel for administrative and other corporate employment."[164]

O'Brien's testimony echoed the sentiment of the business community. In 1947, a report by the Commission on Higher Education noted the importance of institutions of higher education "for economic opportunity and political freedom," and stressed the need for private giving as well as federal aid to sustain these institutions.[165] Concerned about growing federal (administrative) involvement, business "heavyweights" actively promoted "business support of higher education [as] infinitely preferable to federal aid."[166] Corporations were "urged to displace the Federal Government" in "meeting the financial needs of higher education."[167] Other corporate leaders chimed in to support O'Brien's testimony:

> Mr. Frank W. Abrams, chairman of the board of the Standard Oil Company of New Jersey, testified that corporations are expected to acknowledge their public responsibilities in support of the essential elements of our free enterprise system. . . . Mr. Irving S. Olds, former chairman of the board of the United States Steel Corporation, pointed out that corporations have a self-interest in the maintenance of liberal education as the bulwark of good government. . . . Similarly, Dr. Harold W. Dodds, President of Princeton University . . . stated that "democratic society will not long endure if it does not nourish within itself strong centers of non-governmental fountains of knowledge, opinions of all sorts not governmentally or politically originated."[168]

The New Jersey Supreme Court could have resolved the matter without reference to this testimony. A 1930 statutory provision permitted New Jersey corporations to make charitable contributions.[169] A. P. Smith was formed in 1896, more than three decades before the provision was enacted. Yet, as the Court noted, "[f]ifty years before the incorporation of The A. P. Smith

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163 *Id.*
164 *Id.*
165 EICHAR, *supra* note 33, at 204.
166 *Id.*
167 Harum, *supra* note 151, at 288.
168 *A. P. Smith*, 13 N.J. at 147–48.
169 *Id.* at 155.

Manufacturing Company [the New Jersey] Legislature provided that every corporate charter thereafter granted 'shall be subject to alteration, suspension and repeal, in the discretion of the legislature.' . . . A similar reserved power was placed into [the New Jersey] Constitution in 1875."[170] Due to this reservation of power provision, the 1930 legislation could apply, retroactively, to A. P. Smith.[171]

Justice Jacobs preferred to make a broader statement, one that reached beyond statutory interpretation. While referencing the statutory provisions toward the end of his decision, Justice Jacobs, in deference to business leaders and university officials, chose to offer an exposé of the corporation's role (and corporate purpose) in midcentury American society. Relying on testimony of O'Brien and other business leaders, the court noted the important role corporations played in American history:

> During the first world war corporations loaned their personnel and contributed substantial corporate funds in order to insure survival; during the depression of the '30s they made contributions to alleviate the desperate hardships of the millions of unemployed; and during the second world war they again contributed to insure survival. They now recognize that we are faced with other, though nonetheless vicious, threats from abroad which must be withstood without impairing the vigor of our democratic institutions at home and that otherwise victory will be pyrrhic indeed. More and more they have come to recognize that their salvation rests upon sound economic and social environment which in turn rests in no insignificant part upon free and vigorous nongovernmental institutions of learning.[172]

Justice Jacobs' reference to "our democratic institutions at home" and his insistence that corporations were the foundation upon which American democracy could thrive[173] reflected the midcentury obsession with democratic theory. As Morton Horwitz has explained, in the 1940s, democracy emerged "as a basic concept in American constitutional law" as American social scientists wondered why and how "America had managed to avoid

170 *Id.* at 156 (citation omitted).

171 *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 674–75 (1819) (Story, J., concurring) (holding that states can reserve their power to amend charters).

172 *A. P. Smith*, 13 N.J. at 153–54.

173 *Id.* at 160.

succumbing to European totalitarianism."[174] In 1953, when *A. P. Smith* was decided, the Korean War and the Cold War, more broadly, were vicious "threats from abroad which must be withstood without impairing the vigor of our democratic institutions at home."[175] Just as political and legal theorists struggled to explain the contrast between democratic and non-democratic societies, corporations (and their managers) were quick to claim their unique role in ensuring the survival of the former. As two members of the Pennsylvania Bar succinctly put it two decades later: "As money and power have become concentrated in corporate enterprises, those enterprises have become an increasingly critical source of funds for public works, and corporate decisions have come increasingly to determine the quality of American life. This has not been overlooked by the managers or by the courts."[176]

A. P. Smith examined the question of charitable contributions using the rapidly disappearing nineteenth-century doctrine of *ultra vires*, a doctrine focused on corporate power. Viewed as critical for ensuring the survival of American democracy, charitable contributions were not only *intra vires* but also best left to managerial discretion. Management could choose to make certain contributions, despite shareholders' disapproval, but it was not required to do so, even if the shareholders so wished. Corporations and their managements were free to exercise their power, with or without their shareholders' consent. In 1954, two decades after his public deliberation with Dodd, Berle asserted that Dodd had won the debate.[177] As Berle, perhaps cynically, put it, corporations had developed a conscience; "modern directors [were] not limited to running business enterprise for maximum profit, but [were] in fact and recognized in law as administrators of a community

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174 Morton J. Horwitz & Orlando do Campo, *When and How the Supreme Court Found Democracy-A Computer Study*, 14 QUINNIPIAC L. REV. 1, 28 (1994); *see also* Morton J. Horwitz, *The Supreme Court, 1992 Term*, 107 HARV. L. REV. 32, 58–65 (1993) (discussing the emergence of democracy as a fundamental constitutional principle during the war years).

175 *A. P. Smith*, 13 N.J. at 154.

176 Wetzel & Winokur, *supra* note 154, at 237; *see also* Henry G. Manne, *First Lecture*, *in* THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY 1, 2 (1972) (noting that "[i]n the postwar era . . . scholarships for the needy, support of private universities, sponsorship of art museums and symphony orchestras, and old stand-bys like the Community Chest, Boy Scouts and local hospitals headed the corporate popularity list.").

177 *See* ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954).

system."[178] Corporate managers' authority to run the corporation could not be challenged.

Corporations were not equipped to determine social priorities and lacked any democratic authority to do so,[179] but the statements of corporate leaders insinuated that responsible corporate management could reconcile the corporation's interest with the public good and help the nation.[180] The endorsement of such statements by the judiciary helped consolidate and legitimate corporate power against internal and external challenges. As the following section elaborates, in endorsing the vision that corporate leaders articulated for corporations, the courts also helped substantiate the ideology of managerialism that came to characterize corporate law in the midcentury years. With managerialism, questions involving corporate purpose were no longer examined using the *ultra vires* framework; rather, they were subsumed within the doctrines of management's fiduciary obligations and business judgment. Concerns about the power of the control group or management disappeared. Corporate managers' decisions regarding the corporation's goals were almost guaranteed to be upheld, provided that they did not constitute a waste of corporate assets.

B. The Socially Responsible Managerial Class

By the 1940s and 1950s, expert management became the "strategic center" of the large publicly held corporation.[181] While shareholders grew numerous (and passive), management took center stage. As Richard Hofstadter pointed out, "business structure has brought into being a managerial class of immense social and political as well as market power."[182] Management dominated the corporate bureaucracy, organized production, and exercised power over individual lives within the corporation and market transactions outside it.[183] The term "free enterprise," in use since the 1930s, became associated with the free reign of managers who, in the cultural

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178 Adolf A. Berle, Jr., *Foreword*, *in* THE CORPORATION IN MODERN SOCIETY ix, xii (Edward S. Mason ed., 1960); *see also* Wolfgang G. Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 171 (1957).

179 MARCHAND, *supra* note 48, at 363.

180 Kaufman & Zacharias, *supra* note 130, at 528.

181 William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989).

182 RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS 188, 236 (2008).

183 *See* BOWMAN, *supra* note 32, at 197–98.

imagination, replaced the small produces and entrepreneurs of the nineteenth century.[184]

Business experts asserted that corporations were to be managed by multiple loyal leaders, "men of ability and initiative" capable of fighting or evading "bureaucratic ossification and bureaucratic timidity" and pursuing corporate policy.[185] Drawing on his study of General Motors, Peter Drucker concluded that corporations should combine "corporate unity" with "divisional autonomy and responsibility," and aim to realize "unity through local self-government and vice versa."[186] Senior managers were viewed as capable of balancing the different needs of the corporation's various divisions and constituencies, and Drucker stressed the need to free management from "legal subservience to both shareholders and directors."[187]

According to Drucker, General Motors was a successful model of genuine federalism. General Motors did not have "a clear division of powers," but what the corporation lacked in centralized authority, efficient markets corrected.[188] The freedom and flexibility exercised by divisional management was constrained by the objective framework of "modern methods of cost accounting and market analysis as an impersonal yardstick to measure achievement of both policy-makers and production men."[189] Departments such as consumer relations, dealer relations, and community relations were instrumental in keeping corporate executives in touch with their communities and the corporation's broader social and economic role.[190] Still, the most important characteristic of a successful organization was its leadership. Drucker believed that "[t]he ability of an institution to produce leaders is more important than its ability to produce efficiently and cheaply."[191] As he explained, "without an able, responsible and enterprising

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184 *See, e.g.*, Daniel Bell, *The Power Elite—Reconsidered*, 64 AM. J. SOC. 238, 247 (1958) (discussing the shift from "'private property' to 'enterprise'" as the "justification of power"); Peter F. Drucker, *The Employee Society*, 58 AM. J. SOC. 358, 359 (1953) (discussing emergence of a "new ruling group" in our society called "management" whose power rests on its "indispensable function"); Davita Silfen Glasberg & Michael Schwartz, *Ownership and Control of Corporations*, 9 ANN. REV. SOC. 311, 313 (1983) (discussing "managerial theory['s]" description of a class of corporate leaders free from "outside pressures" with "unconstrained power" and without the incentive to "misuse" it).

185 DRUCKER, *supra* note 147, at 33.

186 *Id.* at 46.

187 Wells, *supra* note 103, at 105.

188 DRUCKER, *supra* note 147, at 64.

189 *Id.* at 65.

190 *Id.* at 93–95.

191 *Id.* at 128.

leadership, willing and capable of taking the initiative, the most efficient institution cannot maintain its efficiency, let alone increase it."[192]

Social and political critics pointed to the power inequities that permeated American corporations in the postwar years and that were reinforced by the celebration of managerialism. C. Wright Mills decried "the rise of an elite of power" whose "decisions . . . carry more consequences for more people than has ever been the case in the world history of mankind."[193] According to Mills, the postwar years witnessed "[t]he top of the American system of power . . . [becoming] much more unified and much more powerful, the bottom . . . much more fragmented, and in truth, impotent."[194] And Gabriel Kolko described the regulatory laws of the Progressive era as reflecting the efforts of conservative corporate leaders to maintain the social and political status quo amidst changing economic conditions.[195] The modern American state was accordingly the result of business efforts to explain capitalism in a way that allowed the corporate elite to maximize their profits.[196]

But even staunch critics were not able to undermine the general acceptance of managerialism. Worried about totalitarianism, and later, the Cold War, the majority of midcentury scholars discounted concerns about business and its potential threat to democracy and instead assumed a harmonious relationship between corporations, corporate managers, and society.[197] At the 1956 meeting of the American Economic Association, economist Carl Kaysen noted that "[t]he modern corporation is a soulful corporation"[198]:

> No longer the agent of proprietorship seeking to maximize return on investment, management sees itself as responsible to stockholders, employees, customers, the general public, and, perhaps most important, the firm itself as an institution. . . . [Moreover, its] responsibilities to the general public are widespread: leadership in local charitable enterprises, concern with factory architecture and landscaping, provision

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192 *Id.*

193 C. WRIGHT MILLS, THE POWER ELITE 28 (1956).

194 *Id.* at 29.

195 GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916, at 3 (1963).

196 *Id.* at 3, 8, 286.

197 HO, *supra* note 20, at 195; Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1125 (2011).

198 Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 314 (1957).

> of support for higher education, and even research in pure science, to name a few.[199]

Business leaders were quick to pronounce their commitment to fulfilling their managerial role. In 1927, Owen Young told his audience that managers had a special obligation to serve the public interest.[200] In the postwar years, managers saw themselves as the "neutral, honest brokers in distributional battles among the firm's various contractual stakeholders" and viewed corporate internal hierarchies as "sustain[ing] their neutrality and ensur[ing] their expertise."[201] The Harvard Business School's alumni association proclaimed that management acted as trustees to the "employees, investors, consumers, and government," while *Fortune* magazine reported that managers were "conducting the 'affairs of the enterprise in such a way as to maintain an *equitable and working balance* among the claims of the various directly interested groups—stockholders, employees, customers, and the public at large.'"[202]

State courts fully embraced the managerial class as the promoter of socially beneficial goals. The scholarly obsession with democracy, mentioned above, not only helped legitimate the large publicly held corporation; it also helped secure the position of corporate management. For one thing, courts rejected the idea of direct shareholder participation in corporate affairs, and in its place embraced an ideal of representative democracy.[203] Shareholders were expected to elect directors, who would choose managers to "execute the general policies laid down by the directors."[204] However, shareholders could not order or command the directors or managers. So that corporations could continue to play their social role, management's discretion, including its prerogative to determine the corporation's social responsibilities, could not be limited by reference to the shareholders' wishes (or objections).[205]

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199 *Id.* at 313.

200 *See* discussion *supra* Part I.C.

201 Ernie Englander & Allen Kaufman, *The End of Managerial Ideology: From Corporate Social Responsibility to Corporate Social Indifference*, 5 ENTERPRISE & SOC. 404, 410 (2004).

202 Harwell Wells, *"Corporation Law is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. L. REV. 305, 328 (2013) (emphasis added).

203 *See* Mitchell, *supra* note 131, at 113–14.

204 Thomas F. Woodlock, *Careless Owners: How Shall the Supreme Inertia of the American Stockholder Be Overcome?*, WALL ST. J., April 22, 1931, at 1.

205 Mitchell, *supra* note 131, at 113–14; *see also* Mark S. Mizruchi, *Berle and Means Revisited: The Governance and Power of Large U.S. Corporations*, 33 THEORY & SOC. 579, 583 (2004) (stating that "the pursuit of profit was deemed no longer necessary, as great size, market power, and . . . disorganized stockholders allowed corporate managers to pursue goals other than profits . . .").

As Gerald Frug explained, managers were seen as the shareholders' representatives who, while "not amenable to direct shareholder control, nevertheless serve[d] shareholder interests."[206] The "shareholder interest" was not determined by reference to shareholders' subjective, and potentially conflicting, desires; rather, it was an "objectified abstraction," determined by the fiduciaries, "the bureaucratic managers," and "attributed to all shareholders of all corporations whether they want it or not."[207] Fears about potential abuse of power by management dissipated. Management had full discretion to determine the "shareholder interest" while "shareholder interest" presumably constrained management's power. By relying on this circularity of power and restraint, courts helped legitimate corporate and management power in the second part of the twentieth century.[208]

With this understanding of the appropriate roles for shareholders and managers, the courts stopped using the *ultra vires* doctrine to analyze cases involving the exercise of corporate power to achieve goals other than profit maximization for the shareholders. Accepting, as *A. P. Smith* did, that corporate power included the power to engage in actions that were beneficial to society,[209] the courts examined only whether, in exercising their power, corporate managers fulfilled their fiduciary obligations. In so doing, the courts ensured that decisions regarding corporate purpose would fall under the protective presumption of the business judgment rule.

Take, for example, *Shlensky v. Wrigley*, a derivative suit brought by a minority stockholder of the Chicago National League Ball Club, Inc. (a Delaware corporation that owned and operated the Chicago Cubs) against the corporation's directors as well as its controlling shareholder and president, Philip K. Wrigley.[210] The plaintiff claimed that the Chicago Cubs were suffering losses, in part, because the directors had consistently refused to install lights at Wrigley Field and schedule night baseball games.[211] (Wrigley Field, the Cubs' home park, was also owned by the corporation.) As the plaintiff saw it:

> Wrigley has refused to install lights, not because of interest in the welfare of the corporation but because of his personal opinions "that baseball is a 'daytime sport' and that the

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206 Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1307 (1984).

207 *Id.* at 1307–08.

208 *Id.* at 1309.

209 *See* discussion *supra* Part II.A.

210 Shlensky v. Wrigley, 237 N.E.2d 776 (Ill App. Ct. 1968).

211 *Id.* at 777–78.

> installation of lights and night baseball games will have a deteriorating effect upon the surrounding neighborhood."[212]

The Illinois Supreme Court saw matters differently. Referencing *Dodge*, upon which the plaintiff relied, the court concluded that it was "not satisfied that the motives assigned to Philip K. Wrigley, and through him to the other directors, are contrary to the best interests of the corporation and the stockholders."[213] The issue was simply one of business judgment, and the court would not intervene without a show of "fraud, illegality or conflict of interest."[214]

With respect to charitable contributions, the shift toward business judgment began with the Chancery Court of Delaware's decision in *Theodora Holding Company v. Henderson*.[215] The case involved a corporation seeking to make a gift of about two percent of its total income to a charitable trust "authorized to operate exclusively in the fields of 'religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.'"[216] Despite the fact that the trust was controlled by the controlling shareholder (and director) of the contributing corporation, the court declared it to be valid because it was reasonable.[217] Vice-Chancellor Marvel stated that "the test to be applied in passing on the validity of a gift such as the one here in issue is that of reasonableness, a test in which the provisions of the Internal Revenue Code pertaining to charitable gifts by corporations furnish a helpful guide."[218]

Beyond reasonableness, the decision to allow corporate management to pursue such charitable contributions was grounded in the court's understanding of the law of corporate purpose. As Vice-Chancellor Marvel put it:

> It is . . . obvious, in my opinion, that the relatively small loss of immediate income otherwise payable to . . . the corporate defendant's . . . stockholders, had it not been for the gift in question, is far out-weighed by the overall benefits flowing from the placing of such gift in channels where it serves to benefit those in need of philanthropic or educational

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212 *Id.* at 778.
213 *Id.* at 779–80.
214 *Id.* at 780.
215 Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404–05 (Del. Ch.1969).
216 *Id.* at 404.
217 *Id.* at 406.
218 *Id.* at 405.

> support, thus providing justification for large private holdings, thereby benefiting plaintiff in the long run.[219]

Of particular importance, according to Marvel, was the fact that the charitable foundation that received the contribution was working "towards the rehabilitation and education of deprived but deserving young people."[220] Such work, Marvel noted, was "peculiarly appropriate in an age when a large segment of youth is alienated even from parents who are not entirely satisfied with our present social and economic system."[221]

In 1971, reviewing *Shlensky* and *Theodora* among other cases, Carroll Wetzel and James Winokur concluded that management was free to pursue social goals, reaching further than charitable contributions. As they noted:

> [T]o the extent that corporate executives wish, for example, to meet social responsibilities by extra recruitment in minority communities, or development of safer, less polluting manufacturing techniques and final products, such decisions will probably enjoy the same judicial sympathy as have corporate gifts. This is not to say that the profit motive has been expunged from the law books but that, if history is any guide, the courts can be expected to take a broad and sympathetic view of new efforts by corporate managers to solve new problems.[222]

Wetzel and Winokur's analysis reached further. Recognizing the growing trend in state courts (especially in Delaware) to uphold decisions of corporate managers,[223] they noted that "to the extent that corporate managers are responsive to the needs of the time as those needs become apparent, the 'business judgment' rule will grow in corresponding vigor for their protection."[224] When, in *Kahn v. Sullivan*, the Supreme Court of Delaware finally found an opportunity to opine on the matter, it too embraced the

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219 *Id.*

220 *Id.*

221 *Id.*

222 Wetzel & Winokur, *supra* note 154, at 241; *see also* Friedmann, *supra* note 178, at 162 (noting that "[w]hether we attribute it to an increased sense of social responsibility, to a good sense of public relations, or even just to an enlightened consideration of the future needs of the corporations themselves, the fact is that the giant industrial corporations of today can no longer afford to put their profits entirely into dividends or increased salaries") (footnote omitted).

223 Wetzel & Winokur, *supra* note 154, at 241.

224 *Id.*

reasonableness test, adding that the business judgment rule would likely protect a board's decision to make a charitable contribution.[225]

As the following part explores, by the time *Kahn* was decided, several forces had already converged diametrically to alter the midcentury understanding of corporate purpose. Rising numbers of shareholders, increasing demands on corporations to act in socially responsible ways, and growing criticisms of the ideology of managerialism coupled with a fresh interest in the role of the board of directors changed the contours of corporate law. Yet, perhaps the most significant development affecting the law of corporate purpose was the rising number of hostile takeovers during the 1980s. Amidst mounting calls for imposing social duties on corporations, the hostile takeovers helped focus corporate law on the maximization of profit for the shareholders. Still, as *Kahn* itself illustrates, the rhetoric of wealth maximization was typically used not to enrich the shareholders but to empower corporate managers to determine their corporation's ends without limitation or interference by the courts.

III. HOSTILE TAKEOVERS AND THE SHAREHOLDER WEALTH MAXIMIZATION NORM, 1970S TO 2000S

A. Changing Tides

Through the 1950s, stock ownership was not widespread—less than 5% of the population owned stock—and corporations relied upon earnings and, to a more limited extent, external financing from banks to fund their operations.[226] Trading volume was also low, indicating that these shareholders preferred long-term investment for appreciation and income.[227] In 1954, riding the waves of "patriotism and renewed appreciation of capitalism" that characterized the 1950s, the NYSE embarked upon a campaign for mass

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225 Kahn v. Sullivan, 594 A.2d 48 (Del. 1991) (approving a settlement of a shareholders' challenge to a donation of millions of dollars made by the Occidental Petroleum Corporation to the Armand Hammer Museum of Art and Cultural Center, which housed the art collection of Occidental's chief executive officer and chairman of the board, Armand Hammer).

226 Lawrence E. Mitchell, Who Needs the Stock Market? Part I: The Empirical Evidence 12–15 (Oct. 30, 2008) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292403. As Mitchell notes, "external financing in general only began to grow from the turn of the twentieth century on, but almost all of that growth was in various forms of debt." *Id.* at 7 (footnote omitted).

227 HO, *supra* note 20, at 200–01.

marketing stock as a means, among others, to fight communism, socialism and fascism.[228] As NYSE President G. Keith Funston explained:

> We have learned that capitalism functions best when ownership of the means of production is not confined to the wealthy few but is spread through the land. The idea of public ownership of industry is not an endorsement of socialism or nationalization but the hope that all the people—factory workers, housewives, farmers, lawyers—can own a share in a business enterprise. That is democratic capitalism. It is our job to help make it work.[229]

Titled "Own Your Share of American Business," the campaign used sophisticated advertising tools that did not focus on political ideologies but rather on associating investment in stock with steady income, gradually "transforming many citizens' image of equity investing from a sinful, foolish pursuit akin to gambling to a wholesome activity as quintessentially American as . . . apple pie."[230] The bullish market growth in the succeeding decade confirmed the success of the NYSE's campaign.[231]

The development of modern finance theory coincided with the NYSE efforts. In the first part of the twentieth century, as corporations sought to create a market for their stock, economists justified investment by reference to the intrinsic value of corporations. Beginning in the 1950s, however, the newly developed modern portfolio theory suggested that investors could create "an efficient portfolio," that is, a portfolio that would achieve maximum return by diversifying non-systematic risk, and that the portfolio, rather than individual corporations, should be the focus of investment analysis.[232] The Capital Asset Pricing Model, which was developed in the 1960s, offered a regression analysis of a stock's historical movement in relation to the market to help investors diversify even the systematic risk inherent in the market. Rather than study the fundamentals of companies in which they were interested, investors were advised to study the historical performance of their companies' stock price.[233] As Ronald Gilson

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228 Janice Traflet, *"Own Your Share of American Business": Public Relations at the NYSE During the Cold War*, 1 BUS. & ECON. HIST. 1, 3–4 (2003), http://www.thebhc.org/sites/default/files/Traflet_0.pdf.

229 *Id.* at 4 (citation omitted).

230 *Id.* at 20–21.

231 *Id.*

232 Lawrence E. Mitchell, *The Morals of the Marketplace: A Cautionary Essay for Our Time*, 20 STAN. L. & POL'Y REV. 171, 176–78 (2009).

233 *See id.* at 178–79; Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 345 (2005).

and Jeffrey Gordon have demonstrated, the need to ensure ample diversification of both systematic and non-systematic risks led investors to choose mutual funds over direct investment in corporate stock; within a few decades, the percentage of households that owned equities through mutual funds dramatically increased.[234]

The bull market through the late 1960s helped keep the growing numbers of investors satisfied. In the 1970s, however, for the first time since the early New Deal, the publicly held corporation came under "searching public scrutiny" with "widespread complaint that corporations have become cavalier about consumer interests . . . largely indifferent to social deterioration around them, and . . . dangerous polluters of the environment."[235] Demands on corporations to fulfill social and political goals widely intensified. Corporations were expected to help eliminate poverty, provide health care, promote ethnic and racial equality, offer educational opportunities, ensure safer products and safer work places, and protect the environment, even if such actions lowered profits.[236] When inflation and "unfavorable balance of trade" affected the nation, corporations were called upon to adopt "voluntary restraints on prices, on imports of goods and on the export of capital."[237]

The new investors, especially the growing number of institutional investors, found a new role. Public interest shareholder groups used the SEC's proxy and shareholder proposal rules to address corporate practices related to the Vietnam War, environmental protection, occupational safety, and equal employment.[238] The Project on Corporate Responsibility (the "Project"), which owned twelve shares of stock of General Motors ("GM"),

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234 Ronald Gilson and Jeffrey Gordon note that, while the percentage of households that directly own equities has remained about 20% since the late 1970s, mutual funds investment (including but not limited to retirement investment) "has increased the percentage of households that own equities directly or through mutual funds by 30% to a total of 50%" by the middle of the first decade of the twenty-first century. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights*, 113 COLUM. L. REV. 863, 884 (2013). Moreover, while in the 1950s, "[e]quities were still held predominantly by households" with institutional investors holding "only approximately 6.1% of U.S. equities," by the 1980s, "institutional investors held 28.4% of U.S. equities." *Id.* at 874. By the end of the first decade of the twenty-first century, "institutional investors held 50.6% of all U.S. public equities, and 73% of the equity of the thousand largest U.S. corporations." *Id.*

235 COMM. FOR ECON. DEV., SOCIAL RESPONSIBILITIES OF BUSINESS CORPORATIONS 14 (1971).

236 *See id.* at 13; *see also* EICHAR, *supra* note 33, at 243.

237 Manne, *supra* note 176, at 2.

238 Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 328 (1987).

was the first among many such attempts.[239] The Project was formed by four lawyers, who, with Ralph Nader's support, asked GM's management to include nine proposals in the company's proxy solicitation.[240] These proposals addressed product quality and safety, working conditions, environmental protection, and affirmative action.[241] Other organizations followed the Project's example. Church groups and institutional investors mounted campaigns to ensure equal employment opportunities, stop plant closing, prevent environmental pollution, and divest from "countries with controversial human rights records, energy conservation, nuclear power and nuclear weapons."[242] The Investor Responsibility Research Center (IRRC), which was established in 1972 by a group of institutional investors who were trying to assess how to vote on these new resolutions, "counted 38 social responsibility resolutions coming to votes in 1973, 72 in 1974, 83 in 1975 and 133 in 1976."[243]

The demands on corporations and their management were many, but their unifying theme was simple and familiar. The corporation was seen as affecting different segments of society, not only its investors. Its power was deemed public rather than private. Social, cultural and economic groups affected by the corporation wanted a say in its direction.[244] According to proponents of corporate social responsibility, so that the corporation could maintain its legitimacy in American society, "the social and economic groups affected by the corporation" had to "participate in the corporate decision-making process."[245]

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239 Phillip A. Nicholas, Jr., The Securities and Exchange Commission and the Shareholder Proposal Rule: Agency, Administration, Corporate Influence, and Shareholder Power, 1942–1988, at 281, 295 (2002) (unpublished Ph.D. Dissertation, State University of New York at Albany) (on file with Dissertations & Theses Global).

240 *Id.* at 285.

241 *Id.* at 286–88, 304. The Project was able to bring two of the proposals before the shareholders: one seeking an increase in the size of the board, and the other seeking to "improve the company's social impact" by creating a "General Motors Shareholders Committee for Corporate Responsibility," "comprised of . . . persons appointed by General Motors, the United Auto Workers, and Campaign GM." *Id.* Although neither proposal gained sufficient votes (not even the 3% required for reintroduction on the proxy in subsequent years), their inclusion in the company's proxy constituted a major victory for advocates of social cause proposals. *Id.* at 288–90.

242 LAUREN TALNER, THE ORIGINS OF SHAREHOLDER ACTIVISM 47 (1983).

243 HELEN E. BOOTH, THE SHAREHOLDER PROPOSAL RULE: SEC INTERPRETATIONS AND LAWSUITS 3 (1987).

244 Phillip I. Blumberg, *Corporate Social Responsibility Panel: The Constituencies of the Corporation and the Role of the Institutional Investor*, 28 BUS. L. 177, 179 (1973).

245 *Id.*

In 1971, a report by the Committee for Economic Development pointed out that, in the first half of the twentieth century, workers, consumers and investors were seen as the corporations' constituencies.[246] Corporations could thus meet their perceived social responsibilities simply by "generating . . . economic growth,"[247] which led to "increasing employment, rising wages and salaries, employee benefits plans, and expanding career opportunities" and contributed to "the rising standard of living of the average American family."[248] For the most part, generating growth did not conflict with the business goal of making profit. As the report further noted, the "profit-and-loss discipline" led corporations to "improve goods and services, to reduce costs, and to attract more customers."[249] Profits also allowed corporations to "contribute importantly—through taxes and donations—to the financial support of public and private organizations working to improve the quality of life."[250]

By the 1970s, however, the number of perceived corporate constituencies expanded to include not only investors, consumers, and workers, but also "suppliers, the community, and perhaps even the larger society, governments, and future generations."[251] The demands on corporations dramatically increased. As the Committee for Economic Development report noted:

> [T]he expectations of American society have now begun to rise at a faster pace than the nation's economic and social performance. Concentrated attention is being focused on the ill-being of sectors of the population and on ways to bring them up to the general well-being of most of the citizenry. Fundamental changes are also taking place in attitudes, with greater emphasis being put on human values—on individual worth and the qualitative aspects of life and community affairs.[252]

With growing and diverse demands on corporations, the ideology of managerialism itself came under direct attack. For one thing, studies indicated that management-controlled firms were just as profitable as owner-controlled firms.[253] Corporate managements were also seen as responsible, at least in

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246 *See* COMM. FOR ECON. DEV., *supra* note 235, at 11–12.
247 *Id.* at 11.
248 *Id.* at 11–12.
249 *Id.* at 12.
250 *Id.*; *see also* Howard F. Sohn, *Prevailing Rationales in the Corporate Social Responsibility Debate*, 1 J. BUS. ETHICS 139, 139–41 (1982).
251 Sohn, *supra* note 250, at 140–41.
252 COMM. FOR ECON. DEV., *supra* note 235, at 12.
253 Mizruchi, *supra* note 205, at 585–86.

part, for the "economic distress" that characterized the 1970s.[254] "[E]xternal economic shocks, compounded by a drop in productivity growth, cost-of-living adjustments built into union contracts, and an economy shifting toward services" led to dramatic wage and profitability drop.[255] Industrial corporations began a rapid "drift from the center toward the periphery of the economy," and were replaced by newcomers from the technology and service sectors.[256] Americans lost faith in their federal and state governments as well as in industrial corporations and their ability to improve the economy.[257]

Seeking to understand and address the weaknesses of managerialism, corporate law scholars and policymakers turned to the independent directors to actively monitor corporate managers.[258] The independent directors became the epicenter of the monitoring model of the board that was endorsed by the business and legal communities as well as the Delaware courts.[259] It described directors as responsible for monitoring top executives and recommended that boards include a significant number of outside, independent directors.[260] Yet, while progressive scholars sought to use the monitoring model of the board to impose duties on directors toward corporate constituencies other than the shareholders, the Delaware courts embraced a different vision, using the independent directors to justify Delaware's embrace of the narrow goal of shareholder wealth maximization as corporate law's purpose.[261]

How could the Delaware courts be so oblivious to the demands of the community, especially given the prominence of such demands in the 1970s? One might suggest that the Delaware courts found the expanding concept of social responsibility difficult to address and feared that directors and executives simply would not be able to meet all the demands that the proposals discussed above made.[262] The following section offers a different

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254 RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 297 (2007).

255 *Id.* at 297–98.

256 *Id.* at 298 (citation omitted).

257 *Id.* at 298–99.

258 Mitchell, *supra* note 131, at 132, 136.

259 *Id.* at 132–40.

260 *Id.* at 132–38.

261 *Id.* at 137–38; *see also* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1510–27 (2007) (examining the interdependence of the rise of independent directors and the ascent of the shareholder wealth maximization norm).

262 *See* Thomas J. Zenisek, *Corporate Social Responsibility: A Conceptualization Based on Organizational Literature*, 4 ACAD. MGMT. REV. 359 (1979) (arguing that corporate social responsibility is difficult to define).

reason. It explores how the shareholder value maximization became the Delaware courts' response to the takeover movement of the 1980s. Described by Wall Street investment bankers as a natural response to inefficient conglomerates (and the managers who ran them), the takeover movement was seen by the Delaware courts as a threat to corporations and society, not unlike the threats of socialism in the early twentieth century or communism in the midcentury. In earlier decades the courts drew upon progressive and democratic ideologies to offer a purpose for corporations and corporate law so as to withstand the threats of socialism and communism. In the 1980s, the courts turned to shareholder wealth maximization to weather the threat of hostile takeovers. Just as Wall Street embraced this norm as a justification for hostile takeovers, the Delaware courts used it to empower corporate managers and directors to defend against unwanted bids. In so doing, the courts made shareholder wealth maximization the ultimate corporate purpose.[263]

B. Economics and the Ethics of the Market Place

In 1959, political theorist Robert Dahl commented that in the postwar years, political scientists, while remaining interested in "the relatively well established field of government regulation in the broad sense," had left the study of the internal order of the corporation to economists.[264] As I elaborate below, in so doing, political theorists opened a door for the removal of "questions of power, influence, sanctions, [and] legitimacy" that is, questions of government and political order—from the study of the firm.[265]

Neoclassical economics stepped in to fill the gap. Until the 1960s, neoclassical economists focused their attention on pricing and paid little attention to the organization of industry. Then, in a series of works, beginning with Ronald Coase's Nobel prize winning *The Problem of Social Cost*,[266] economists brought market analysis to bear upon the theory of the firm. *The Problem of Social Cost* emphasized the benefits of markets, arguing that, so long as transaction costs were zero (or minimal), individuals would enter

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263 On Wall Street's embrace of the shareholder value maximizing norm, see HO, *supra* note 20, at 122–212.

264 Robert A. Dahl, *Business and Politics: A Critical Appraisal of Political Science*, 53 AM. POL. SCI. REV. 1, 1–3 (1959).

265 *Id.* at 3; *see also* Dalia T. Mitchell, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 L. & SOC. INQUIRY 179 (2005) (explaining political scientists' focus on corporate power in the early decades of the twentieth century and neoclassical economists' fixation with the market in the second half of the century).

266 Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

"transaction creating markets" both to avoid the costs of inefficient hierarchies and to "fill the vacuum left by the absence of preexisting market or command relationships."[267] Questions of welfare economics were left for philosophical discussions, and the science of economics became fixated upon the problem of transaction costs.[268]

Economists and lawyers associated with the burgeoning law and economics movement welcomed *The Problem of Social Cost*, linking it with their own growing faith in the power of economic markets to produce the common good.[269] Their new economic theory of the firm offered a picture of the corporation that fit the market-centered economic policies of the postwar years.[270] Rather than putting management hierarchies and the need to constrain corporate power at the center of the corporate paradigm, the new economic theory of the firm found a way around hierarchy and regulation by drawing on microeconomics to describe corporate entities as nexuses of private, contractual relationships. The corporation was a collection of "disaggregated but interrelated transactions" among individuals or the convenient fiction of corporate entity in free and efficient markets.[271]

Investors, managers, workers, and all other corporate constituencies were presumed to be self-interested wealth-maximizers operating in formally free markets. Concerns about managerial expertise were translated into questions about economic efficiency, and managers described corporate activities in the social sphere as "the pursuit of profit."[272] Public problems such as

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267 Guido Calabresi, *The Pointless of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991); *see also* Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L.J. 499, 538–41 (2011) (exploring the influence of Coase's works on the development of neoclassical economics).

268 JAMES R. HACKNEY JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY 106–07 (2006).

269 Bratton, *supra* note 181, at 1476–80.

270 Patrick J. Akard, *Corporate Mobilization and Political Power: The Transformation of U.S. Economic Policy in the 1970s*, 57 AM. SOC. REV. 597, 597 (1992) (noting that despite "record inflation," "the worst recession since the 1930s," and multiple proposals for economic planning at the state and federal levels, by the early 1980s, U.S. economic policy heavily relied on market allocation of resources).

271 William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 416–20 (1989); Bratton, *supra* note 181, at 1498; Oliver E. Williamson, *Organization Form, Residual Claimants, and Corporate Control*, 26 J. L. & ECON. 351, 365 (1983).

272 PHILLIP I. BLUMBERG, CORPORATE RESPONSIBILITY IN A CHANGING SOCIETY: ESSAYS ON CORPORATE SOCIAL RESPONSIBILITY 5 (1972); Maurice Zeitlin, *Corporate Ownership and Control: The Large Corporation and the Capitalist Class*, 79 AM. J. SOC. 1073, 1094–97 (1974) (reporting studies demonstrating that both "management-controlled and owner-controlled corporations are similarly profit oriented").

discrimination and growing disparities of wealth were depicted as providing industries with "opportunities for growth and profit."[273] The corporation was a means of achieving both; other goals were allowed only if incidental to profit and growth.

As to the managers and directors' accountability—law and economics scholars put their trust in the disciplinary power of the market for control. But such trust also ensured that corporate purpose would be evaluated merely by reference to profitability. Pursuing any other end, Henry Manne explained in 1972, would be devastating to corporations.[274] Since shareholders expect profit, they would treat "any corporate expenditure that reduces their wealth position with disfavor regardless of the purpose for which the expenditure was made."[275] Stock price will adjust accordingly, making the corporation more susceptible to discipline by the market for control. As Manne explained, "[i]n such companies the incentive to purchase control will be measured by the difference between the current price of shares and the price that can be anticipated with more efficient or less 'charitable' managers."[276]

The election of Ronald Reagan in 1980 helped turn this market rhetoric into a political and economic reality. Reagan's policies of deregulation helped create "the active market for corporate control" that Manne and other law and economics scholars celebrated.[277] According to one report, "of the 150 largest public corporations in the United States in 1980, 22 percent had been merged with or acquired by other public companies by 1988, while another 5 percent had been taken private."[278]

In her ethnography of Wall Street, Karen Ho has explained how, at the time, investment bankers defended the takeover movement by retelling the postwar history of the publicly held corporation as a narrative about "self-serving managerial class" that "squandered corporate resources extravagantly on themselves . . . and allowed foreign competitors to overtake the United States in productivity, innovation, and strategy."[279] Amidst the Reagan administration's "dismantling of antitrust enforcement," the conglomerates of the 1960s were seen as the prime example of managerial self-interest—a "fad" that was described as hindering corporate America's competitiveness in global

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273 BLUMBERG, *supra* note 272, at 5 (citation omitted).
274 *See* Manne, *supra* note 176
275 *Id.* at 14.
276 *Id.* at 15; *see also* Henry G. Manne, *Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle*, 64 COLUM. L. REV. 1427, 1430–34 (1964) (discussing the role of the market for control).
277 Khurana, *supra* note 254, at 302.
278 *Id.*
279 HO, *supra* note 20, at 130.

markets.[280] Accordingly, a primary goal of the takeover movement was "'unlocking' the value of 'underperforming' stock prices" to the benefit of the victims in this narrative—the shareholders.[281]

In a very short time, Wall Street investment bankers, focused on increasing the value of their portfolios, and institutional investors, keen on achieving the same, were able to use the hostile takeovers of the 1980s to force corporations:

> to choose between shareholder value and other alternatives of corporate governance . . . By putting corporations "in play," proponents of shareholder value created a historically unprecedented environment where all the largest corporations were up for grabs to the highest stock-price bidder, thus forcing them to be immediately responsive to the exigencies of the stock market.[282]

Corporations began using their retained earnings and debt to return value to shareholders, defend against hostile tender offers, and finance successful takeovers.[283] "'[L]oyalty to workers, products, corporate structures, businesses, factories, communities, [and] even the nation' . . . [were] viewed as expendable."[284] Institutional investors, investment bankers, and hostile bidders replaced corporate managers as custodians of corporate policy.[285]

Stock price was rapidly becoming the medium for evaluating corporate performance and the ultimate corporate goal. Indeed, as I elaborate below, when the Supreme Court of Delaware was called upon to evaluate these changes and the potential threat they posed to corporations and society, it, too, ended up endorsing the rhetoric of stock price maximization.

Unocal Corporation v. Mesa Petroleum Co., the seminal takeover case to reach the Supreme Court of Delaware, involved an attempt by Mesa Petroleum Corporation to gain control of Unocal Corporation, most likely in the hopes of being paid (by Unocal) to stop its takeover bid.[286] Mesa's tender offer provided the shareholders of Unocal with a premium over the market price of

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280 *Id.* at 130, 136.
281 *Id.* at 130.
282 *Id.* at 129.
283 Mitchell, *supra* note 226 (providing and examining the empirical evidence supporting this argument).
284 Khurana, *supra* note 254, at 303 (quoting Steven Prokesch, *Remaking the American C.E.O.*, N.Y. TIMES (Jan. 25, 1987), https://www.nytimes.com/1987/01/25/business/remaking-the-american-ceo.html).
285 *Id.* at 302.
286 Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

their shares, but Unocal directors determined that the offer was inadequate.[287] Assessing whether or not the directors could adopt measures to defend against Mesa's hostile bid, the court concluded that "the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source."[288] While Unocal's directors only pointed to the fact that the price Mesa offered was inadequate and thus potentially harmful to the shareholders, the court added that, in deciding whether or not to adopt a defensive measure, the board could evaluate "the impact [of the takeover bid] on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)."[289]

As the above quote suggests, *Unocal* seemed to have embraced a corporate purpose that reached beyond the maximization of profit for the shareholders, at least in the context of hostile takeovers. Recognizing that the takeover movement could destroy corporations and damage the economy, the Supreme Court of Delaware wanted to empower corporate managers to defend against them, even if the Delaware General Corporation Law did not explicitly authorize them to do so.

Yet, the Court was also keen on assuring investors, bankers and lawyers, that shareholders' interests were sufficiently protected under Delaware law. Less than a year after *Unocal*, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Court endorsed the norm of shareholder wealth maximization used by hostile bidders, asserting:

> [W]e address for the first time the extent to which a corporation may consider the impact of a takeover threat on constituencies other than shareholders. . . . [W]hile concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders.[290]

Jurists have debated the significance of *Revlon* to the law of corporate purpose.[291] Whether or not *Revlon* supports the proposition that, even outside

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287 *Id.* It is worth noting that the offer was also deemed coercive as it was a two-tier front-end loaded offer. *Id.* at 949, 956.

288 *Id.* at 954.

289 *Id.* at 955.

290 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986).

291 *See, e.g.*, Lyman P. Q. Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew Gold eds., 2016).

the takeovers and acquisitions context, directors must focus only on the interests of the shareholders, other cases, especially those dealing with other financial constituencies, favored the limited purpose of maximizing value for the shareholders.

For example, in *Katz v. Oak Industries, Inc.*, as part of a planned restructuring and recapitalization negotiated with Allied-Signal, Oak Industries, a company "in deep trouble," extended cash and common stock exchange offers to its six classes of long-term debt securities.[292] Tendering noteholders had to "consent to amendments in the indentures governing the securities," amendments that would remove "significant negotiated protections to holders of the Company's long-term debt including the deletion of all financial covenants."[293] These modifications would affect noteholders who chose not to tender into the exchange offers, but not those who tendered and received cash or stock.[294] Failure to obtain the required consents from the noteholders would have allowed Allied-Signal to decline to complete the planned acquisition.[295] An owner of long-term debt securities sought to enjoin consummation of Oak Industries' exchange offers.[296]

Acknowledging that the "purpose and effect" of Oak Industries' exchange offers were to "benefit Oak's common stockholders at the expense of the holders of its debt," Chancellor Allen did not find the plaintiff's claims to "allege any cognizable wrong."[297] As Allen put it, "[i]t is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders."[298] If they do so "at the expense" of others, here the debt holders, it "does not for that reason constitute a breach of duty."[299] Reducing the plaintiff's rights to contractual rather than fiduciary claims, Allen held that Oak Industries did not breach the implied covenant of good faith in its dealing with its debt holders.[300]

Two years later, in *Simons v. Cogan*, the Supreme Court of Delaware similarly treated an attempt by a holder of convertible subordinated debentures to hold directors liable for breach of fiduciary duties associated with a cash-out merger.[301] Declining to extend the fiduciary obligations of

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292 Katz v. Oak Indus., Inc., 508 A.2d 873, 875–76 (1986).
293 *Id.* at 877.
294 *Id.*
295 *Id.*
296 *Id.* at 875.
297 *Id.* at 879.
298 *Id.*
299 *Id.*
300 *Id.* at 879–81.
301 Simons v. Cogan, 549 A.2d 300 (Del. 1988).

corporate management to holders of convertible debentures, Justice Walsh reasoned: "A debenture is a credit instrument which does not devolve upon its holder an equity interest in the issuing corporation."[302] A convertible debenture was not different, representing "a contractual entitlement to the repayment of a debt and . . . not . . . an equitable interest in the issuing corporation necessary for the imposition of a trust relationship with concomitant fiduciary duties."[303] To trigger a fiduciary duty, Walsh concluded, "an existing property right or equitable interest supporting such a duty must exist."[304]

Even preferences and limitations associated with preferred stock were deemed contractual. In *Jedwab v. MGM Grand Hotels, Inc.*, Chancellor Allen held that "with respect to matters relating to preferences or limitations that distinguish preferred stock from common, the duty of the corporation and its directors is essentially contractual and the scope of the duty is appropriately defined by reference to the specific words evidencing that contract."[305] More recently, in *In re Trados Inc. Shareholder Litigation*, which addressed potential conflicting interests between the common and preferred stock during a merger, Vice Chancellor Laster made clear the implications of characterizing certain rights of the preferred stock as contractual.[306] Directors, Laster reiterated, are required to "strive in good faith and on an informed basis to maximize the value of the corporation for the benefit of its residual claimants, the ultimate beneficiaries of the firm's value, not for the benefit of its contractual claimants."[307]

Why did the Delaware courts, faced with the threats of hostile takeovers, adopt the rhetoric of shareholder wealth maximization, which investment bankers used to promote such transactions? Just as courts earlier in the twentieth century turned to corporate purpose to empower management, so did the Delaware courts in the 1980s. The courts' refusal to extend fiduciary obligations to holders of debt securities, convertible debt, and preferred stock not only indicated that these constituencies would have to find ways contractually to protect their interests, but it also assured shareholders that corporations were run for their benefit. More importantly, it provided corporate managers with a tool, both practical and rhetorical, with which to thwart challenges to their power (including the threat of hostile takeovers).

302 *Id.* at 303.
303 *Id.*
304 *Id.* at 304.
305 Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 594 (Del. Ch. 1986).
306 *In re* Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013).
307 *Id.* at 20, 40–41.

Like courts throughout the twentieth century, the Delaware courts in the 1980s offered managers a corporate purpose with which they could justify their actions; so long as corporate managers explained their decisions as maximizing wealth for their shareholders, the Delaware courts were not likely to intervene or evaluate their actions. Subsumed under the doctrine of fiduciary obligations, the maximization of profit for the shareholders became corporate law's single purpose.[308]

Directors were no longer entrusted with the task of making business decisions with the community—or even the corporation's other constituencies—in mind. Rather, they were responsible for maximizing value for their shareholders, irrespective of the potential harm to other constituencies and the corporation as a whole. In turn, shareholders learned not only to expect but also to demand appreciation on their stock price.[309] As the Introduction to this article explored, two decades after the wave of hostile takeovers led the Delaware courts to endorse the shareholder wealth maximization norm, eBay Domestic Holdings, Inc. brought suit suggesting that Craiglist could not pursue its corporate purpose at the expense of maximizing profit for its shareholders, including eBay.[310]

EPILOGUE

Corporate America has changed dramatically since the 1980s—the number of hostile takeovers subsided considerably after the Delaware courts allowed managements to adopt measures such as poison pills to defend against hostile bids and effectively foil the market for control. The Enron and WorldCom scandals in the early 2000s and the financial crisis of 2008 illustrated, among other things, the dangers associated with the exclusive pursuit of stock price maximization.

In 2005, a survey of senior financial officers of the 400 largest U.S. corporations revealed that close to eighty percent would sacrifice a firm's long-term economic value to meet analysts' quarterly earnings expectations.[311] On the other hand, in 2016, a survey of 275 CEOs revealed the importance

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308 For a different interpretation of this line of cases, see Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987 (2009).

309 *See* Mitchell, *supra* note 227, at 24.

310 *See* discussion *supra* Introduction.

311 John R. Graham, Campbell R. Harvey & Shiva Rajgopal, *The Economic Implications of Corporate Financial Reporting*, (Nat'l Bureau of Econ. Research, Working Paper No. 10550, 2004).

they ascribe to corporate purpose (and not merely maximization of shareholder wealth).[312] At least ninety percent of the CEOs indicated that "their company has a clearly stated and defined purpose," and that such purpose helped shape "both their strategic framework and their corporate culture."[313] Sixty three percent of the CEOs indicated that having and "emphasizing purpose within their business" not only "contributed positively to revenue growth" but also "help[ed] build better employee engagement, brand reputation and customer loyalty, as well as attracting new business partners."[314] At the same time, a majority of the CEOs admitted that it was difficult to translate purpose "into action, operations and business as usual."[315]

In February 2017, the Washington Post reported that in recent years, American corporations have become "a force for social change,"[316] eagerly jumping into the social and political arena to advocate causes such as gay rights, racial equality and, more recently, opposition to President Trump.[317] "Business leaders have taken political stances in the past," Jena McGregor and Elizabeth Dwoskin wrote, "but usually behind the scenes."[318] With growing pressures from consumers and employees, as well as the easily accessible social media, speaking out about American politics, culture, and society is rapidly becoming the norm for corporate America.[319]

Despite these changes, and despite recent decisions by the U.S. Supreme Court that suggest that at least closely held corporations could pursue ends other than profit maximization,[320] the Delaware courts have

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312 *Connecting the Dots: How Purpose Can Join up Your Business*, PWC, https://www.pwc.com/gx/en/ceo-agenda/pulse/purpose.html (last visited Apr. 18, 2018); *see also* Dov Seidman, *The Real Purpose of Corporate Purpose*, FORBES, Nov. 14, 2016, https://www.forbes.com/sites/dovseidman/2016/11/14/business-purpose-leadership-ford-ge/#46e5dfe041ae.

313 *Connecting the Dots*, *supra* note 312.

314 *Id.*

315 *Id.* For earlier studies suggesting that corporate "managers often make decisions that do not maximize value for the shareholders," see Smith, *supra* note 94, at 290–91.

316 Jena McGregor & Elizabeth Dwoskin, *The Cost of Silence: Why More CEOs are Speaking Out in the Trump Era*, WASH. POST, (Feb. 17, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/02/17/the-cost-of-silence-why-more-ceos-are-speaking-out-in-the-trump-era.

317 *See id.*

318 *Id.*

319 *Id.*

320 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that a closely held corporation cannot be compelled by the government to act against its religious beliefs); *see also* Adam Winkler, *Masterpiece Cakeshop's Surprising Breadth*, SLATE (June 6, 2018), https://slate.com/news-and-politics/2018/06/masterpiece-cakeshop-

remained unyielding in their apparent commitment to shareholder wealth maximization as the only corporate purpose. In different essays on the subject Chief Justice Strine has not only stressed Delaware corporate law's commitment to profit maximization but also cautioned scholars arguing for broader corporate purpose, stating that "the continued failure . . . to be clear-eyed about the role of the for-profit corporation endangers the public interest."[321] According to Strine, by ignoring the realities of for-profit corporations and assuming that "they are moral beings capable of being 'better' in the long-run than the lowest common denominator," scholars and jurists neglect to push for much needed regulatory change.[322]

Yet, while committed to the rhetoric of shareholder wealth maximization, the Delaware courts have, for the most part, focused on empowering managers, not on ensuring that shareholders profit. If Wall Street investment bankers in the 1980s fought for shareholder wealth maximization to rein in corporate managers and ensure the profitability of their portfolios, the Delaware courts embraced the norm as a means of ensuring that corporate managers remained in control. Take, for example, *eBay Domestic Holding, Inc. v. Newmark*, the case with which this article began. Chancellor Chandler's decision in *eBay* prevented Craigslist from diluting eBay's 28.4% ownership stake. At the same time, however, Chandler allowed Craigslist to institute a staggered board that prevented eBay from ever gaining control of Craigslist. As Chandler explained, "[b]y challenging the Staggered Board Amendments . . . eBay . . . seeks to obtain a benefit it was not able to obtain under the Shareholders' Agreement. In trying to undo the staggered board, and thereby protect its mathematical ability to fill a board seat, eBay is doing exactly what it accuses Jim and Craig of doing."[323] Without a seat on the board, eBay, despite its 28.4% stake, did not have the "knowledge of and the ability to influence Craigslist's strategic decisions."[324] Five years after it presumably won its corporate purpose argument, eBay gave in. On June 19,

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grants-constitutional-religious-liberty-rights-to-corporations.html (pointing out that *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* implicitly granted religious liberty rights to a corporation).

321 Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Firms Seek Profit*, 47 WAKE FOREST L. REV. 135, 135–36 (2012).

322 *Id.*

323 eBay Domestic Holdings, Inc. v. Newmark,16 A.3d 1, 39 (Del. Ch. 2010).

324 Ina Steiner, *eBay Wins Craigslist Lawsuit? Not So Fast*, ECOMMERCEBYTES (Sept. 10, 2010), https://www.ecommercebytes.com/C/abblog/blog.pl?/pl/2010/9/1284140601.html; *see also* Tom Hals & Alexandria Sage, *eBay Stake in Craigslist Restored but No Board Seat*, REUTERS (Sept. 9, 2010), https://www.reuters.com/article/us-ebay-craigslist-idUSTRE68851O20100909.

2015, eBay confirmed that "it sold its 28.4 percent stake in Craigslist back to the San Francisco-based online classified company," indicating that "the deal also came with an agreement that all litigation between the companies will be dismissed."[325]

In the end, the discourse of corporate purpose cannot be separated from the history of corporate power, specifically the power of corporate management. While the law of corporate purpose shifted from channeling corporate power and the power of those in control in the early twentieth century to promoting American democracy in the midcentury years to maximizing value for the shareholders at the century's end, throughout the twentieth century, cases addressing the question of purpose, including the ones discussed in this article, have almost always upheld the decisions of corporate managers. Within a few years of Milton Friedman's famous equation of corporate social responsibility with the maximization of profit, J.A.C. Hetherington commented:

> [I]t is questionable whether the affirmative duty to maximize profits can be effectively enforced because of the practical impossibility of defining precise standards to measure degrees of adequacy of managerial performance where no self-dealing or negligence is involved . . . . In effect, therefore, only the prohibitory aspects of fiduciary responsibility lend themselves to judicial enforcement; the affirmative mandate to maximize profits to benefit the owners is policed only by management itself or through outside institutions, such as the stock market.[326]

Once the courts have begun to examine the corporation's purpose as an aspect of directors' and managers' fiduciary obligations, the presumption of the business judgment rule has guaranteed that the shareholders would not be able to force directors to fulfill the goal of wealth maximization. As Stephen Bainbridge writes, "the business judgment rule effectively precludes courts from reviewing corporate decisions that allegedly further interests other than that of shareholder wealth maximization."[327] The very few exceptions—perhaps *Dodge,* maybe *Revlon* or *eBay*—are interesting cases but they do not, in

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325 Ryan Mac, *eBay Ends Ties with Craigslist, Sells Minority Stake Back to Craigslist*, FORBES (June 19, 2015), https://www.forbes.com/sites/ryanmac/2015/06/19/ebay-ends-ties-with-craigslist-sells-minority-stake-back-to-craigslist/#61a813686c1d.

326 J. A. C. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 258 (1969).

327 Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 778 (2006).

fact they cannot, alter the rule, that is, the business judgment rule. Under Delaware corporate law, decisions about a corporation's purpose, like any other business matter, are in the discretion of corporate directors and executives. The latter have defined and will continue to define the role and purpose of corporations in our society.[328]

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328 On August 19, 2019, the Business Roundtable issued a new "Statement on the Purpose of a Corporation." *Our Commitment*, BUSINESS ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment/ (last visited Sept. 7, 2019). The statement (which was released too late to be addressed in this article) was signed by more than 180 CEOs, who committed to "[d]elivering value to [their] customers," "[i]nvesting in [their] employees," "[d]ealing fairly and ethically with [their] suppliers," "[s]upporting the communities in which [they] work," and "[g]enerating long-term value for shareholders." *Id.* The statement concluded by noting: "Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country." *Id.*