Corporate Governance Reform and the 'New' Corporate Social Responsibility

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CORPORATE GOVERNANCE "REFORM" AND THE NEW CORPORATE SOCIAL RESPONSIBILITY

Douglas M. Branson*

The history of corporate governance "reform" begins with Adolf Berle and Gardiner Means's "The Modern Corporation and Private Property," first published in 1932.¹ That book posited the "separation of ownership from control," discussed in the first section of this essay.

The subsequent history of corporate governance reform has been the postulation, by academics and others, of solutions to problems posed by the separation of ownership from control.

One subset of proposed reforms, those of the 1970s, formed the "corporate social responsibility movement." During that era, reformers urged governmental intervention which, as a matter of general corporate law, would expand corporate responsibility from primarily shareholders, to workers, consumers, suppliers, communities in which the corporation had a significant presence, clean air, clean water, and other constituencies.

At times, most particularly during the heyday of the law and economics movement, scholars posited that the separation of ownership from control posed no problem at all. Instead it was an efficient allocation of investor and managerial resources. Thus, law and economics eclipsed the corporate social responsibility movement. Seldom in the annals of jurisprudence has one jurisprudence ascended so quickly, while the one it supplanted simultaneously faded into oblivion.

This essay explores whether, as the new century begins, the beginnings of a new corporate social responsibility movement are under foot. These beginnings are to be found in the "good governance" movement; the stakeholder versus stockholder debate; renewed calls for corporate social accounting and disclosure; the "green" movement in manufacture and advertisement of products; advocacy of communitarian models of the

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Mr. Justice Holmes found that a "page of history is worth a volume of logic." Before this essay discusses the new corporate social responsibility movement, history the equivalent of more than volume of logic must be recounted.

THE SEPARATION OF OWNERSHIP FROM CONTROL

Through the decades, every proposal for corporate governance reform, and there have been many, has been a response to the perception that the separation of ownership from control posed problems that needed solutions. Means and Berle theorized that, with public offering of shares on a widespread basis, many industrial and mercantile corporations were widely held. Because of modern communications and other mechanisms such as stock exchanges the holders of shares in these corporations were dispersed, perhaps from Maine to California, and their holdings were atomized into 100, 500 or perhaps 1000 share lots. Thus, the shareholders who owned the corporations which, in turn, owned vast amounts of property, no longer controlled the property. Those corporations' assets represented a new form of property in that the persons who owned it no longer controlled it. There had come to exist a "separation of ownership from control."

If the shareholders thought that the corporation was headed in the wrong direction, or its assets being mismanaged, what today are known as "collective action" problems would prevent shareholders from coming together again to assert, or re-assert, themselves. Collective action problems include the simple difficulty of shareholders knowing who else owns shares in a particular corporation; the costs of communicating with them whether by mail or telephone; and costs posed by regulatory compliance. Those costs include the Securities and Exchange Commission (SEC)'s rules prohibiting solicitation of any form of consent, such as a proxy to vote shares, unless the person communicating with other shareholders complies with the SEC's proxy solicitation rules.

Compliance with those rules may impose large direct (hiring a fancy, or at least sophisticated, lawyer, paper and printing, mailing and postage) costs as well as indirect costs (formal filings give the corporation's attorneys a stationary target and they can, and will, sue an activist shareholder for a mere

slip of the pen, because the SEC’s rules\(^3\) permit suit for omissions or misleading statements that are the product merely of a lack of reasonable care).\(^4\)

A collective action problem susceptible of no ready solution is the “free rider” problem. Often fellow shareholders share the view that the corporation’s managers are not managing the corporation’s assets or affairs properly. Rather than joining the shareholder activist who wishes to do something about mismanagement, the other shareholders, even the sympathetic ones, may lie back, not expending their own resources in the activist effort. In other words, those other shareholders are willing to “free ride” on the efforts of their pro-active brethren. Too many free riders will doom any collective effort, whether it be in a homeowners’ association, parent-teacher group, or shareholder group in a publicly held corporation.

The separation of ownership from control in the modern corporation thus creates a vacuum between those who own property (the corporation’s assets) and the property itself. Beset by collective action problems, shareholders, as the ultimate owners of the property, are dispersed and atomized in their holdings. Due to collective action problems, shareholders are unable to recombine to call for action, or otherwise to assert themselves. What then moves in to fill the void created by the separation of ownership from control?

Berle and Means did not just theorize. They tested their hypotheses empirically. They demonstrated the existence of the separation of ownership from control in a great number of large United States corporations. They also tested their theory as to what fills the void created by the separation of ownership from control.

What filled the void was a self-perpetuating, insider dominated board of directors. The president of a 1930s publicly held corporation (the title “chief executive” was not in vogue then) would pack the board with corporate officers subservient to him (needless to say, no women occupied the post). The executive vice president, one or more additional vice presidents, the presidents of principal subsidiaries, and the corporate treasurer (today’s CFO) all might be on the typical board. The president might also appoint his brother-in-law, the outside corporate counsel from one of headquarter city’s largest law firms, the regular investment banker, and perhaps the CEO of another corporation with large cross holdings in his own corporation, a “white

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4. Under the proxy rules, because the SEC’s mandate is very broad, a number of courts have held that a rule 14a-9 claim may be grounded on mere negligence. See, e.g., Herskowitz v. Nutri/Sys., Inc., 857 F.2d 179, 189-90 (3d Cir. 1988); Wilson v. Great Am. Indus., Inc., 855 F.2d 987, 995 (2d Cir. 1988).
squire” in today’s parlance. Boards of directors were crony ridden, cozy, clubby organizations in which dissent of any kind seldom surfaced; no diversity existed or was even thought of, and the range of perspectives and viewpoints was extremely narrow.

Management habitually slated the same persons election to the board of directors. Thus, in the “old days,” very lengthy board service—25 or 30 years was not uncommon—was another feature of the landscape. Added to the mix then were a significant number of somnambulant directors, either aged, bored, or both.5

Adolf Berle and Gardiner Means had extraordinary longevity, as did their book. They published a revised edition of “The Modern Corporation and Private Property” in 1967. Their ideas have proven more durable still. The separation of ownership from control, problems it poses, whether indeed it poses any problems at all, and proposals to “reform” corporate governance by filling the void the separation of ownership from control creates, continue to monopolize corporate governance theorists’ discussion to the present day.

COUNTERVAILING POWER AND THE TECHNOSTRUCTURE

Early ruminations about the problems posed by the power of large corporations, including the separation of ownership from control, may be found in the popular writings of John Kenneth Galbraith, the Harvard economist and friend of the Kennedy family.

In his early writings, Galbraith was more directly concerned with the manifestation of corporate power posed by the specter of oligopoly in many United States industries, a condition in which two or three large producers control the market and, through conscious parallelism, reap what amounts to monopoly profits, at the expense of consumers and the society. But Galbraith knew about and cited the work of Berle and Means in his very first discourse on the problems of corporate power.

His first work, American Capitalism: The Concept of Countervailing Power, appeared in 1952.6 Galbraith theorized the rise of new forces which

5. In fact, with such a passive, rubber stamp board of directors why have meetings at all? A device that gained currency and stayed in vogue well into the 1960s was the “executive committee” of the board of directors. For the lengthy intervals between meetings, the full board delegated the full range of its powers, subject to a few statutory limits on delegations, to a committee of three or so insiders. Thus, the corporate president, the executive vice-president and, perhaps, the treasurer would have the power of the full board of directors, save perhaps the power to declare dividends, recommend a merger, or set before the shareholders amendments to the corporate charter.

6. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING
would be as effective as checks on raw corporate power as the absent ones. The traditional checks were competition in the case of oligopoly, or monitoring by responsible owners, in the case of the separation of ownership from control. Unlike the traditional checks, which are on the same side of the market (buy or sell) as the corporation, the new checks would be on the opposite side of the market. Galbraith termed the concept "countervailing power."

Organized labor thus rose up, acting as an important check on corporate power in the "large automobile, steel, electrical, rubber, farm-machinery, and non-ferrous metal-mining and smelting companies." Galbraith felt that as an answer to corporate power "[r]etailers are required by their situation to develop countervailing power on the consumer's behalf." "If the large retail buying organizations had not developed the countervailing power which they have used, by proxy, on behalf of the individual consumer, consumers would have been faced with the need to organize the equivalent of the retailer's power." They did so in some other parts of the world, such as Scandinavia and Great Britain, but also in parts of the United States, through organization of consumer cooperatives, another source or potential source of countervailing power.

Through direct regulation, and central economic planning, government could exercise the supreme form countervailing power but that would be the antithesis of capitalism. Instead "the support of countervailing power has become perhaps the major domestic peacetime function of the federal government." In the 1950s, Galbraith felt that, "a large part of the state's new activity—the farm legislation, labor legislation, minimum wage legislation—is associated with the development of countervailing power. As such it is neither adventitious nor abnormal; the government action supports or supplements a normal economic process."

In 1967 Galbraith authored *The New Industrial State*. In this book, Galbraith recognized that large retailers did not act on behalf of consumers. They maximized profits, sometimes gauging consumers along the way. Organized labor's agenda differed from that hypothesized in *Countervailing Power* (1952).

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7. *Id.* at 131.
8. *Id.* at 115.
9. *Id.* at 117.
10. *Id.* at 126.
11. *Id.* at 136.
Power. Beyond a certain level of wages and working conditions, labor leaders tended to identify with and take on the coloration of management. Labor was not the countervailing force Galbraith thought it would be.

Instead, the heart and soul of a large corporation, which replaced owners after the separation of ownership from control, consisted of an amorphous group of middle and senior managers, engineers, and scientists who participated in the group decision making prevalent in large entities. “This latter group is very large.... It embraces all who bring specialized knowledge, talent or experience to group decision-making. This, not the management, is the guiding intelligence—the brain—of the enterprise. There is no name for all who participate in group decision-making or the organization which they form. I propose to call this organization the Technostructure.”

The goals of the technostructure are “no longer confined to profit maximization,” posited Galbraith. Members of the technostructure value highly the personal security of themselves and their families. Beyond that goal, members of the technostructure mirror the values and aspirations of the society of which they are a part. “Like the educational and scientific estate, the technostructure is no longer exclusively responsive to pecuniary motivation. Both see themselves as identified with social goals, or with the organizations serving social purposes.”

Galbraith’s theory suggested that we were not to worry about the aggregation of raw economic power that the modern corporation represents. Nor were we to worry about the separation of ownership from control. The technostructure, and the traits its members share with all of us in the society, supplied the check or balance missing since the separation of ownership from control.

John Kenneth Galbraith’s third bite at the apple came in 1973, with Economics and the Public Purpose. Earth Day in 1970, and the attention it called to the despoliation of the environment, as well as the rising consumer movement, cast doubt on how much the technostructure shared the values of others in the society. The image of the company woman or man, John P. Marquand’s Man in the Gray Flannel Suit, who over identified with the profit maximization goal of the firm, more accurately portrayed reality than did the image of some noble, enlightened member of the technostructure.

13. Id. at 70-71.
14. Id. at 111.
15. Id. at 289-90.
Economics and the Public Purpose attempts to describe the world in which we live, including the power of large corporations and the separation of ownership from control in those organizations. In great detail, Galbraith contrasted neo-classical economics and the market system with the planned system of socialist economies. He then seemed to throw up his hands, ending the book with a veiled prescription that the best means to control unchecked power in large corporations may be a knowledgeable president and a proactive legislature. That prescription, of course, portends a larger role for government: new agencies, environmental, product safety, worker safety, and other forms of regulation, and a vastly increased governmental presence in corporate life. His prescription mirrored exactly what occurred in the 1970s.

Thereafter, John Kenneth Galbraith really did throw up his hands. He wrote novels, travel books and autobiographical accounts of his experiences as U.S. ambassador to India. It was for legal academics, and not liberal economist ones, to suggest methods for governmental intrusion in response to the problems posed by the separation of ownership from control, in the "corporate social responsibility movement" of the 1970s.

THE CORPORATE SOCIAL RESPONSIBILITY MOVEMENT

Roughly coinciding with Earth Day, in April, 1970, were the beginnings of a phenomenon played out throughout that decade—the corporate social responsibility movement. The movement's thesis was that, in order to solve the ills of society thought in large part to be the product of corporate behavior (in turn thought to be the result of the separation of ownership from control), some sort of government intervention was necessary to make large corporations and their managers again accountable, if not to the owners of such corporations, then to the society as a whole. Corporate social responsibility activists buttressed their demands for governmental intervention with the policy justification that large corporations no longer were merely aggregations of private property. Corporations were so large, and their behavior affected so many in society, that the law should regard them as public, or quasi-public, institutions and regulate them as such.

Some proposals for corporate law reform were simple and not too intrusive. One argued for replacement of the principle “one share, one vote” with a weighted voting scheme that tended toward, but did not reach, “one shareholder, one vote.”8 Thus, an individual owner with 100 or 200 shares would have 100 or 200 votes, but an institutional investor with 10,000 shares might have only 1,000 or 1,500 votes. The thought was that individual shareholders had the concerns of society more at heart than did institutions, who tended to follow, the “Wall Street Rule” (if you cannot vote with management only one choice exists—to sell). The weighted voting proposal was the corporate reform analog to the slogan popular at the time: “Power to the people.”

Corporate managers spoke out against any such proposal. Weighted voting would violate a bedrock principle of United States corporate culture, namely, equal treatment of all shares of the same class. Moreover, the sole objective of corporate managers was to increase profits for shareholders. According to corporate America any scheme to divert corporate managers from profit maximization, such as weighted voting schemes, was fundamentally misguided.19

Frequently surfacing during the corporate social responsibility era were proposals for public interest directors.20 Federal law would require major corporations to name to their boards a certain number of directors from among a cadre of experienced public interest regarding directors. When critics suggested the possibility that managers and perhaps fellow board members would treat such directors as spies and antagonists, denying them access to

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19. Ironically, fifteen years later, at the height of the takeover boom, and never much concerned with being disingenuous, corporate America sang exactly the opposite tune. To defend against hostile takeovers, and often to protect their jobs, salaries and perks, corporate managers caused their companies to authorize “super voting stock,” shares with heavily weighted voting power (five or ten votes rather than one vote per share). The managers then caused the issuance of those shares to friendly sets of hands, such as founding family members, loyal employees, or loyal shareholders (say, those who had held shares for five or more years). The SEC tried to rule against dual class capitalization, but the Business Roundtable took the SEC to court and won. A federal appeals court held that, under its mandate to regulate principally by requiring disclosure, the SEC had no power to outlaw certain classes or features of corporate stock, a matter principally of state law in the United States corporate law scheme.

information and use of other corporate resources, reformers tacked onto such proposals the added requirement that corporations provide staff exclusively to serve the public interest directors.

Public interest director proposals received a boost when Arthur Goldberg, former Associate Justice of the U.S. Supreme Court and former U.S. Ambassador of the United Nations, resigned simultaneously from the boards of eight major corporations. He complained of the inability of independent directors, let alone public interest directors, to receive the support they needed to do their jobs. Independent directors needed plenary access to corporate information, professional assistance, and other legally mandated aids in order to accomplish what was expected of them.21

The U.S. has had prior experience with public interest directors. In the 1870s, the reorganization of the Union Pacific Railroad, following the Credit Mobilier scandal, required the Union Pacific to have public interest directors. Nearly one hundred years later, the board of the Communications Satellite Corporation (Comsat) had as one of its organizing principles appointment of public interest directors.22

Scholars who examined those and other instances noted that one of two outcomes usually occurred. One was that after a period of time the public interest directors became co-opted, signed completely on to the corporate mission and perhaps ruthless profit maximization as well. The other was that corporations tended to treat public interest directors as “spies” or as “mushroom directors.” Mushroom directors are kept in the dark. If they begin to grow in the job, corporations pile a lot of manure on top of them. Finally, if mushroom directors mature in the position, they are “canned.”

Another less intrusive proposal was for corporate social accounting and SEC mandated disclosure of annual corporate social audit results.23 More than a handful of large corporations (Bank of America was a leader) actually engaged in some form of social accounting. Some corporations merely did “process audits,” in which the directors or managers chose two or three areas of concern (clean water and inner city education in cities in which the corporation has plants, for instance). In the annual report, the corporation would describe the efforts expended, including human and financial resources, and attempt to quantify the results they thought they had achieved.

Other corporate social accounting proposals amounted to calls for major corporations to do "super social audits." In a super social audit, a corporation would attempt to quantify every adverse impact the corporation had on environments in which the corporation operated, along with corporate efforts to ameliorate them. Thus, a super social audit might attempt to quantify the effect on clean air of the corporation's employees commuting to work singly rather than in van pools. The audit would then quantify the corporation's efforts to compel car pooling by workers, finally, then netting out the cost to society less the corporation's expenditures. A super social audit could attempt to quantify the loss for society of insufficient racial diversity in the workplace, or the loss due to failure to have on-premises day care for workers' young children.

Social accounting, at least in the form of process audits, had the virtue of enabling corporations to decide for themselves what, beyond profit maximization, was important to them, followed by expenditure of some corporate resources in the directions identified. Over time, as employees, managers, and shareholders reacted to annual social audit results, the mix of corporate social responsibility activities might change, with some sort of equilibrium being reached.

That was the core of what the entire social responsibility movement involved. Corporate social responsibility advocates may not have been able to articulate it, but what they really wanted was for corporate law to evolve, as a matter of corporate law marking out new responsibilities for corporations, their managers, and their boards of directors. Those responsibilities would run not only to shareholders but to employees, suppliers, consumers, communities in which the corporation had facilities, and even clean air and water.

Expanded use of the SEC's shareholder proposal rule, Rule 14a-8 would have given shareholders a leading role in defining new responsibilities for large corporations. In two successive years, law students at Georgetown University, aided by their corporate law professor, the late Donald Schwartz, submitted extensive lists of shareholder proposals to General Motors. In Campaign GM I and Campaign GM II, the law student shareholders lost the battle but won the war. General Motors published two lengthy booklets on its record of progress in achieving automobile safety even though the student

proposals garnered little shareholder support at the General Motors annual shareholders’ meetings.\textsuperscript{25}

\textbf{THE FEDERAL CHARTERING MOVEMENT}

In the 1970s corporate social responsibility movement, two reforms worked their way to the top of the list. They were federal minimum standards for corporations, championed by a legal academic, and federal chartering of large U.S. corporations, championed by the consumer advocate, Ralph Nader.

Ralph Nader teamed with Mark Green, today New York City consumer advocate and mayoral candidate, and law professor and now dean Joel Seligman, to author a heavily footnoted tome entitled “Constitutionalizing the Corporation.”\textsuperscript{26} The work also appeared in a popular press version—“Taming the Giant Corporation.”\textsuperscript{27}

Today corporations have perpetual existence. The last “limited life” charters were granted early in the 20th century by western states such as Arizona and Washington. Modern incorporation processes do not even require an incorporator to specify the life of the corporation. Unless stated otherwise, the duration of the corporation is assumed to be “perpetual.”\textsuperscript{28}

Nader proposed a return to limited life charters. Large corporations would have to re-incorporate with a new federal bureaucracy, the Federal Chartering Agency. That agency would condition grant of the new charter on compliance with all applicable federal laws and regulations. Thus, a large corporation would have to demonstrate compliance with the Occupational Health and Safety Act (OSHA), the Clean Water Act, the Comprehensive Environmental Response and Cleanup Liability Act (CERCLA), and so on. The Agency would review the corporation’s compliance with worker safety, product safety, food and drug labeling, environmental and a score of other laws. Overlaid on existing laws, the Federal Chartering Agency would administer a set of anti-concentration guidelines, ordering divestitures or other remedies if corporations had grown too large or had, as Microsoft is alleged to have done, abused monopoly power in a particular market.

\textsuperscript{25} See \textit{GENERAL MOTORS CORP., PROGRESS IN AREAS OF PUBLIC CONCERN} (1971); \textit{GENERAL MOTORS CORP., RECORD OF PROGRESS} (1970).


\textsuperscript{27} RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION (1976).

\textsuperscript{28} See, e.g., \textit{REVISED MODEL BUS. CORP. ACT} § 2.02(a) (1983) (no requirement that articles of incorporation set forth duration).
Federal chartering also mixed and matched from other corporate social responsibility proposals of the 1970s. The Nader-Green-Seligman proposals required corporations to conduct a certain amount of social accounting, with mandated disclosure of annual social audit results. In its various forms, federal chartering also required large corporations to have public interest directors, along with staff support and informational access for those directors.

Nader, Greene and Seligman wanted to bring this ferocious regulatory engine to bear not just at the point at which corporations were required to re-incorporate at the federal level. Their proposal was that corporations would have to run the federal regulatory gauntlet every twenty or twenty-five years. In this respect, the federal charter would resemble the historic limited life charter.

They first wanted to mandate federal chartering for only the 200 or so largest corporations. Emboldened by the initial liberal response to their proposal, the federal chartering trio began to grow it like topsy. The 1500 largest United States corporations, as well as any corporation that did significant amounts of business with the federal government, or any corporation whose business had an alleged impact on national security, would also have to obtain federal charters and run the proposed gauntlet to do so.

Federal chartering represented a governmental intrusion into American business the likes of which have never been proposed, before or since. Nonetheless, beginning in mid 1970s three successive United States Congresses held hearings on the Nader proposal, in the form of a bill entitled “Federal Chartering Act.” Senators Howard Metzenbaum of Ohio and Warren Magnuson of Washington, who also was chair of the powerful Senate Commerce Committee, championed the proposed legislation, although another view is that the senators were appeasing Ralph Nader, who has always had more star power and press following than any individual senator on Capitol Hill.

**FEDERAL MINIMUM CORPORATE LAW STANDARDS**

In the 1920s Mr. Justice Brandeis of the Supreme Court of the United States had observed that, in competition for corporations to incorporate in their state, state legislatures engaged in a race “not of diligence but of

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laxity."\textsuperscript{30} They could do so because of a peculiarity of the American federal system. A corporation may have no contact with a jurisdiction but its incorporation there. Its headquarters, its plants and other facilities, all of its employees, and the vast majority of its shareholders may be located far away. Yet the law of the state of incorporation will dictate what duties corporate officers and directors may have, what those duties require in certain instances, the conduct of meetings of shareholders or of directors, the voting of shares, litigation against allegedly wrongdoing corporate officials, issuance of shares, and more.\textsuperscript{31}

Professor Cary of Columbia University School of Law, former chairman of the SEC under President Kennedy and a respected legal scholar, wanted to oust, the "internal affairs rule," that the law of the state of incorporation governs, at least for larger United States corporations. He excoriated the situation in which a "pygmy" among the states, Delaware, controls the legal regime for what today constitutes over fifty percent of the \textit{Fortune 500} or \textit{Fortune 1000}. He termed Delaware's activity in the "incorporation business," and the activity of states that attempt to compete with Delaware, the "race to the bottom."\textsuperscript{32} Delaware adopted pro-management and anti-shareholder legal rules, Cary thought, in part to retain the tax revenues from its incorporation business. This "business" amounted to twenty-five percent of the state's revenues, supplemented by the multiplier effect of the incorporation business represented by the large law firms and others businesses located in Delaware to service the companies incorporated there.

Professor Cary proposed that, in any area in which state law fell below a certain standard federal law, federal minimum standards would apply to that corporation's internal affairs. Stringent federal standards would displace lax state fiduciary standards, anti-shareholder voting rules, procedural restrictions on derivative actions (shareholders' suits in the name of the corporation), and the like.

The federal minimum standards Professor Cary envisioned for large corporations had the virtue of not needing a new federal agency. This was particularly timely in an era when many, including liberals, were coming to

\textsuperscript{30} Liggett v. Lee, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting).

\textsuperscript{31} But see \textit{DOUGLAS M. BRANSON, CORPORATE GOVERNANCE} § 1.12, at 34-37 (1993) (discussion of California statute which attempted to mandate cumulative voting for directors and other features of California law on California corporations which had "run away" to another incorporating jurisdiction such as Delaware or Nevada).

the realization that the New Deal could not be re-created. Fiscal restraint dictated that reformers could no longer advocate creation of a new federal agency for every significant societal ill they detected. Through a civil liability regime, federal courts would enforce the new minimum standards as they did several score of other federal statutes.

Professor Cary's idea was not sufficiently innovative from the standpoint of many putative reformers. Minimum standards merely reinforced existing notions of responsibilities of corporations and their managers to shareholders. The more ardent corporate social responsibility reformers wanted to create as a matter of general corporate law, and not merely discrete federal laws on various subjects, direct corporate responsibility to workers, consumers, communities, regions, and clean air and water. The Nader federal chartering idea went far in that direction.

The appeal to the most ardent and vocal reform supporters, coupled with Ralph Nader's star quality and the attention it drew on Capitol Hill, caused federal chartering of large U.S. corporations to eclipse all other proposed social responsibility reforms of the 1970s. Even federal chartering, though, was itself a shooting star. It was soon eclipsed by a powerful, and conservative new jurisprudence known as "law and economics," which seemed to sweep the land almost simultaneously with the "Reagan Revolution" and a return to libertarian and conservative values.

**THE LAW AND ECONOMICS MOVEMENT AND CORPORATE GOVERNANCE**

Legal academics who delved into economics developed a minimalist jurisprudence in the late 1970s. They stated that market forces governed human behavior far more effectively than laws or lawsuits ever could. Legislatures and courts should intervene only in cases of market failures which, in the opinion of economist lawyers, were rare. When courts did have to act, to fill in the gaps in an existing law or to construe a term that was ambiguous, the talisman for the court should be efficiency. Efficiency—what result would make the greatest use of scarce resources—was the preferred gap filler. Efficiency was to be ascendent over other values that could drive judicial decision making, such as equality, diversity, fairness, due process, or justice.33

33. See, e.g., Daniel R. Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 NW. U. L. REV. 913, 944 (1982) ("Apart from minimizing transaction costs and possibly facilitating the operation of market forces that discipline management, corporation law has little role to play.").
Particularly in the corporate field, law and economics came to primacy. The corporate social responsibility and federal chartering movements did not merely slip but fell like a rock beneath the horizon, not to be even mentioned in the ensuing decade. Every book and journal article in the corporate law field had to take an economics of law perspective if they were to succeed in the marketplace of ideas. In its more extreme forms, law and economics solutions to problems of human behavior were paraded as "science" (not as social science but as "science"), the findings of which were unassailable. Those who questioned were made to appear ignorant or foolish.

Law and economics corporate law scholars started from the premise that the fabled "separation of ownership from control" was not a problem in search of a solution, as it had been viewed for decades. The separation of control from ownership represented a division of labor that was efficient. Owners of shares in large corporations could not, and would not want to, manage their property. They bought shares in large corporations, rather than investing in a small business or an apartment house, because large corporations had professional managers who would manage for the owners. Shareholders in large corporations were not just apathetic, they were "rationally apathetic."

The questions early generations had asked still existed. What prevented managers from lying down on the job, playing golf three times a week and neglecting their management duties? What prevented managers from "ripping off" the owners, by misuse or embezzlement of corporate funds or property or by other forms of purposeful venality? The answer law and economics gave was not "more regulation" or "public interest directors," or "intervention by the federal government," but "market forces."

Market forces constrain managers in way a laws, vague notions such as fiduciary duties, and lawsuits based on the foregoing never could. The product market will give neglectful or mismanaging corporate officials a wake up call far sooner and far more resoundingly than would a shareholder lawsuit for breach of fiduciary duty. For example, the cases of CEOs Roger Smith and Robert Stempel at General Motors, who were removed from office by the GM board in the early 1990s, after the failure in the market of GM's redesigned models, and GM's great loss of market share, illustrate the product market and its disciplining effect on corporate managers.

The market for capital also plays a role. Managers who misbehave or underperform will not be able to raise funds needed for modernization or expansion of their corporation's facilities and product line. They will not be able to sell shares in the market or borrow upon anything resembling advantageous terms. When Moodys and Standard and Poors put General
Motors on the "credit watch" list and downgraded GM's commercial paper, the increase in borrowing costs for GM ran into the billions.

Capital markets such as stock exchanges are efficient. With modern communications and the interplay of millions of buyers, sellers, brokers, and analysts, market prices reflect nearly instantaneously the present state of affairs in a company, because the market price encapsulates all information about a company, except perhaps for truly nonpublic, or "inside," information. If corporate managers are neglectful, make bad choices, or rip the company off, the share price will reflect those developments.

Forces in the "market for corporate control," as Dean Henry Manne pointed out in a seminal article, discipline corporate managers in a very real sense. When share prices fall, takeover players will notice. As prices fall further, takeover players will begin to accumulate shares. Finally, when market conditions suggest it, the takeover player will launch a public bid (a "takeover bid" or "tender offer") for shares, seeking control of the target company. Control means control of the board of directors. Once the takeover player has installed her own people on the board those new directors will boot out the previous managers.

Before the fact, corporate managers know how such a scenario may unfold. Their desire to retain salaries, perquisites and prestige of office leads them to abhor the prospect of a forced change in control. The best way to avert such a change in control is to perform well as managers. The efficient market will reflect that performance by keeping the share price high. The market for corporate control and the takeover bid represent market forces that constrain managers.

A fourth market dynamic is the "market for managers." Managers have a stake in their reputation. If they underperform or misbehave, the value of their human capital will fall. They will not be able to obtain equivalent, or better, employment elsewhere. They will not be promoted.

THE CONTRACTARIANS

At its zenith the law and economics movement spawned a splinter movement. This movement thought not only that corporate law should be minimalist, it should have no mandatory content at all. "Contractarians" argued that the only function of corporate law should be to provide an "off the
rack” standard form contract which approximated the result the parties to an incorporated venture would negotiate, absent transaction costs (legal fees, information costs, and so on). If the parties were able to, or wished to, negotiate, they were free to vary the terms of that contract in any way they wanted. According to the contractarians, even core concepts such as the fiduciary duty of loyalty (that corporate officers must serve the best interests of the corporation, including its shareholders, rather than their own selfish interests or those of their friends, family or associates) could be varied or eliminated by a majority vote of the shareholders.35

The contractarian movement was misguided and, after a bit of thought, most scholars and judges saw that that was so.36 Corporate law is like constitutional law with a small “c.” That is, corporate law provides the organizing principles for governance of the corporation, allocates powers and responsibilities among its organs (shareholders, directors, and officers), and protects minorities. Just as the Bill of Rights protects minorities from the tyranny of the majority, corporate law sets limits upon how far a majority may impose its will upon the minority. And it is essential that corporate law do so. Some level of protection is necessary to encourage persons to pool their capital in an incorporated venture. Empirical studies have shown that the capital markets in the United States and England are the world’s most successful because of the historical record of protection of minority shareholdings under those nation’s corporate laws.37 The contractarians, who were zealous advocates of their point of view, were misguided. They seemed to have no clue as to the large role corporate law plays in a society.

The last core teaching of the law and economics movement was that, just as corporations compete in the product market or in the capital market for the investor’s dollar, jurisdictions compete for incorporations. The winner in that competition is not necessarily the state that offers the most pro-management, lax legal rules. The winner is the incorporating jurisdiction that offers the


most efficient mix of laws, courts, and other legal institutions. Thus states such as Delaware and Nevada, who ardently seek incorporations within their borders, are engaged in a “race to the top” rather than in the “race to the bottom” that Professor Cary had postulated in arguing for adopting minimum corporate legal standards as a matter of federal law. Economists did “event studies” which demonstrated no decrease in shareholder value when corporation re-incorporated in Delaware. 38 Of course, evaluating a profound change such as a change in corporate citizenship, whose effect may not be felt for ten or fifteen years, upon an examination of share price performance over a sixty- or ninety-day period is somewhat disquieting.

But through the 1980s you could not say so. You would be questioning science. You would be asked “where is your data,” and, of course, you would not have any. In that domineering way, as well as in the evident merit of some of its ideas, arguments, and analysis, the law and economics movement came to dominate a decade (the 1980s) in a way no other jurisprudential movement ever has. In addition, the movement had some very important real world implications that were felt throughout that decade.

**THE GOOD GOVERNANCE MOVEMENT**

While law and economics advocates loudly proclaimed that corporate law has a minimalist role to play, if any, and that, far from being a worry, the separation of ownership from control was an efficient solution to the needs of large enterprises, another group persisted in its belief that corporate law indeed had several important roles to play. “Constitutionalists” believed that corporate law had a role to play in allocating powers and responsibilities among the various organs of a company (shareholders, directors and executives), deterring mismanagement and self dealing by those in control of a corporation, and protecting minority shareholders against the depredations of the majority, much as a constitution performs those functions in a democracy. 39

In the late 1970s, those with such beliefs convened a series of meetings at Arden House, and later at Colonial Williamsburg, Virginia. There the

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conferees conceived of the idea of a “restatement of corporate law,” or at least a “restatement” of the considerable body of corporate law left in the U.S. to judge-made law rather than to statutes enacted by legislatures.

“Restatement” brings to mind the American Law Institute (ALI), the leading law reform organization in the United States. Organized in 1928, the ALI is a Brahmin type organization headquartered in Philadelphia, Pennsylvania. The ALI’s membership is comprised of the 2200 leading lawyers, judges and professors of law in the U.S. Its director is always a legal academic from one of the elite American Ivy League Institutions (the last three have been from Columbia University, Yale University and the University of Pennsylvania, and Columbia University). Most years the Chief Justice of the United States opens the annual week-long ALI meeting.

The real work of the ALI is done by a select inner circle of forty or so “elites” in law, denominated the Council, who react to draft documents prepared by legal academics, the reporters, again for the most part drawn from elite institutions. Only after those documents have been thoroughly vetted by reporters and Council are they presented to the membership at large.

Those documents restate the law, that is, they attempt systematically to organize, codify, and perhaps make incremental improvements in areas of law that, under our common law system, have by and large been left to case-by-case development in appellate court opinions. The Restatement of Torts, Restatement of Contracts, Restatement of Restitution, Restatement of Judgments, Restatement of Donative Transfers, and so on, vary in how much influence they garner but overall are very influential in U.S. law and sometimes are cited by courts in other nations. The restatements have great influence in less sparsely populated or noncommercial U.S. jurisdictions in which judges often consider or adopt the restatement position to fill in gaps that may exist in the local law. For example, states such as Oregon and Washington in the U.S. Pacific Northwest have a very high rate of citation to ALI Restatements, as born out by statistics the ALI keeps and publishes each year.40

Given its prestige, the ALI’s decision to make its first foray into corporate law proved highly controversial from the beginning. To corporate America, the need to “restate” the law of corporate governance implied that something was broken in the U.S. scheme, which U.S. CEOs and their lawyers felt was

40. Washington and Oregon rank fifth and seventh, respectively, in historical frequency of citation to the restatements, trailing only the much more populous states of Pennsylvania, New York, California, Massachusetts, and Texas. See, e.g., American Law Institute, 2000 Annual Reports, Annex, “Published Case Citations to Restatements of the Law as of March 15, 2000,” at http://www.ali.org/annualreport.
decidedly not the case. The Business Roundtable, the American Enterprise Institute, and half a dozen rump groups published position papers, lobbied institute members, and generally created a circus like atmosphere.

After the ALI’s first tentative draft in 1980, on the purpose and structure of the corporation, the Chief Reporter, the late Professor Stanley Kaplan of the University of Chicago, weathered a firestorm of vituperation. Finally, in 1982, he succumbed to the attacks, some of which were ad hominem, and resigned.41

Under heavy pressure, the ALI Council removed the word “Restatement” from the title; the document becoming “Principles of Corporate Governance and Structure: Analysis and Recommendations.” Critics ranged from those who said there was no support in existing law for certain positions set out in the ALI drafts, to those who said the ALI reporters were making up the whole thing as they went along.

Heavy pressure forced the reporters to relegate proposals such as those that a majority of the directors in large publicly held corporations, and at least three directors in other publicly held corporations, be independent to a supplemental section not part of the main body of the “ALI Corporate Governance Project,” as the two volume final document is now generally known.

The ALI project implied that something was broken and needed to be fixed with the structure and practices of large U.S. Corporations. The Business Roundtable, comprised of the chief executive officers of 200 of the largest American corporations and said to be the single most influential U.S. organization in the eight years of Ronald Reagan’s presidency, lead a protracted and well-financed challenge to the ALI corporate governance endeavor.

One element of that challenge was to “pack the house.” Traditionally, the ALI has been comprised of 1,800 of the leading legal practitioners, academics, and judges in the United States. The Business Roundtable and other ALI opponents urged corporate house counsel, and large outside law firm lawyers similarly dependent on large corporations, to join the ALI. To its credit, the ALI raised the numerical ceiling on elected membership, admitting all house counsel and large law firm corporate lawyers who met the ALI membership standards.

41. I was elected to the American Law Institute in 1979. I attended every minute of the corporate governance debate except for the debate at the 1991 meeting held in San Francisco, when I was a visiting professor in New Zealand. I recount many of these events based upon personal experience.
These corporate counsel filed countless motions and attempted to monopolize the floor debate on every issue of corporate governance. Attorneys from Fortune 500 corporations constantly advocated and expounded a lowest, or lower, common denominator legal standard for director behavior. On the floor of the ALI meeting, they caucused and curried the favor of outside lawyers, corporate partners in large regional or New York law firms. The result of packing the membership roster and the ensuing political activity was to bestow upon the meeting of a learned society the flavor and atmosphere of a second rate (no, a third rate) state legislature.

Another result was to cause the ALI Reporters, those legal academics charged with crafting the ALI recommendations, to "pull their punches." The ALI "Principles of Corporate Governance and Structure: Analysis and Recommendations" that emerged fifteen years later was a watered down version of what had been proposed beginning in 1979. And the house had been successfully packed. In the later 1980s and 1990s, on every crucial vote at the ALI annual meetings, the large law firm corporate lawyers and their clients house counsel at major U.S. corporations, could carry the day.

AFTERMATH OF THE ALI CORPORATE GOVERNANCE PROJECT

Most critics of the "dumbing down" of the ALI Corporate Governance Project view the cup as half empty. Viewing the cup as half full, what occurred at those endless ALI debates and afterwards was that, upon their return to their corporate and law firm offices, the new ALI pro-corporate membership advised boards and CEOs that "this is the future." In discussions with one another, in their literature, and at their meetings, the best practices, governance structures, and proposed rules of conduct for director behavior percolated downward and filtered outward from the ALI and to other corporate counsel, advisors and to boards of directors.

Several points may be made about what eventually came to be. First, despite all the controversy, much of what those first ALI drafts contained is noncontroversial and, indeed, the accepted wisdom today. A majority of independent directors now is the minimum acceptable. More often, a board will come under criticism if more than one, two or perhaps three directors have significant ties with the senior executives of a corporation.42

42. See, e.g., BRANSON, supra note 31, § 5.03, at 233 (Delaware business judgment rule and takeover decisions always sort independent directors from others and constitute a de facto requirement that a majority or super majority be independent).
Second, as much as any other event, as we look back, commencement of the ALI Corporate Governance Project marks the beginning of the "Good Governance Movement," heralding intense scrutiny of governance in large corporations and more than just a cottage industry of academics, consultants, trade groups, and others whose focus is on good corporate governance.

Third is that, again in hindsight, the ALI Project marked a sea change in the way in which governance of corporations has come to be regarded. Now we regard governance as a matter of structure and focus or mission rather than as of old when corporate law was a hodgepodge of distinct legal rules designed to curb corporate directors and senior executives behavior in this or that respect.

In some mythical kingdom, a despot could proclaim "sumptuary laws" that governed how large the silver buckles on commoners' shoes could be, or how colorful could be the costume of various levels of the nobility. Older corporate laws were a bit like that. They contained an affirmative command that the board of directors "shall manage the business and affairs of the corporation." Discrete rules prohibited issuance of shares for future services promised by an officer or employee. Laws flatly prohibited the loan of corporate funds to officers or directors, or permitted loans only after a shareholder vote.

A hodgepodge of "sumptuary" laws had very little to do with good governance. It protected minority shareholders only on a hit-or-miss basis. Recognizing that, the ALI Project changed direction. In part the ALI did so on the basis of the work of the new Chief Reporter who had replaced Stan Kaplan, Professor Melvin Eisenberg of the University of California-Berkeley, who had written an influential book entitled "The Structure of the Corporation."43

The reality is that the senior executive officers manage the business and affairs of the corporations, and the ALI draft codifies that.44 In turn, the board of directors' principal role is not to manage but to hire, evaluate, fix the compensation of, and, if necessary remove and replace the senior executive officers, principally the CEO.45 To do that job adequately, the board must be

44. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.01 (1994) ("The management of the business of a publicly held corporation should be conducted by or under the supervision of such principal senior executives as are designated by the board of directors . . .") (citations omitted) [hereinafter ALI CORP. GOV. PROJ.].
45. ALI CORP. GOV. PROJ. § 3.02(a)(1) ("The board of directors of a publicly held corporation should . . . [s]elect, regularly evaluate, fix the compensation of, and, where appropriate, replace the principal senior executives.") (citations omitted).
comprised mainly of directors who are not beholden to the chief executive officer, for legal fees, banking business, a paycheck, or in any other significant way. The ALI drafts made that recommendation as well.46

A central point of this essay is that the theory of the 80s has become the reality of the 90s and of the new century. Today boards of directors are independent. They highly compensate CEOs but also closely monitor CEO performance. In record numbers, independent directors have brought about the resignation or early retirement of badly performing CEO’s in corporations such as IBM, General Motors, Mattel, Aetna Insurance, Citicorp, Lockheed Martin, Apple Computer (four times), United Airlines, and more.

CONVERGENCE IN CORPORATE GOVERNANCE

In other eras, such as the corporate social responsibility movement, or the push for federal chartering of large corporations, the theorists were at one antipode and corporate America was at the other. Now, for the first time, we are witnessing an era in which the theory and the reality are clicking. Life is imitating art, in the sense that a blueprint for good governance crafted by academics and theorists has become the template for actual governance and evaluation of it.

Independent directors must be assured that they have good data on which to evaluate the performance of senior executive officers. Another fundamental plank in the good governance platform is the audit committee.47 Comprised of independent directors who have some expertise in accounting or finance, the audit committee meets once or twice in executive session each year and also conducts a “pre flight briefing” and an “exit interview” with the firm’s independent accountants before and after those accountants do the annual audit. Subsidiary tasks of the audit committee are to aid the outside accountants in maintaining their independence and to evaluate the corporation’s internal accounting controls and accounting personnel. It is the latter, of course, who actually prepare the financial statements upon which, after an audit, the outside accountant expresses an opinion.

Other components of the monitoring model of corporate governance, which the ALI Project adopts, include a compensation committee of independent directors, which evaluates and makes recommendations to the full board of directors on compensation packages for the corporation’s senior

46. See id. at § 3A.01.
47. See, e.g., id. at § 3A.02.
executives.\textsuperscript{48} The nominating committee takes the identification and nomination of potential directors out of the hands of a CEO, moving it from where it has traditionally lodged to a committee of independent directors.\textsuperscript{49} In that manner the diversity and independence of the board are preserved or even enhanced.

It is important to note that the ALI Project is not law. In some instances, the ALI black letter provisions are set out as a recommendation of what the law should be. \textbf{In other instances, however, what the ALI espouses it does so as a recommendation of good practice or as part of a de facto code of “best practices” in corporate governance.}

It is also important not to attempt to portray American ideas as universal ideas. U.S. scholars and statesmen’s proclivity to foist U.S.-style institutions, laws, and ideas on the rest of the world often produce a backlash that is inimical to the very spread of U.S. ideas or institutions they seek to accomplish.

That said, the U.S. ALI Corporate Governance Project, or at least the monitoring model of corporate governance contained in it, constitutes the core of a “good corporate governance” revolution that, although far from global, is going on in a number of industrialized and developed nations. There is no “global convergence” in corporate governance, and there are good reasons for postulating why there never will be, but that would have to be the subject of a separate, and lengthy, law review article.\textsuperscript{50}

\textbf{THE INTERNATIONAL “GOOD” GOVERNANCE MOVEMENT}

What convergence does exist is a partial trans Atlantic convergence with an outlier here and there. One outlier is Australia. The Bosch Report,\textsuperscript{51} authored by a committee chaired by Sir Henry Bosch, promulgates a code of best practices for Australian companies that parallels many of the ALI innovations. In the 1980s, Australia had an era of wild west capitalism that equaled or exceeded what we saw in the U.S., as Trevor Sykes chronicled in his brilliant book, “The Bold Riders.”\textsuperscript{52} The Bosch Report was a response to

\begin{footnotes}
\footnotetext{48}{See id. at § 3A.05.}
\footnotetext{49}{See id. at § 3A.04.}
\footnotetext{50}{See, e.g., Douglas M. Branson, The Very Uncertain Prospect of “Global” Convergence in Corporate Governance, 34 CORNELL INT’L L.J. ___ (forthcoming 2001) (manuscript on file with the editors of University of Pittsburgh Law Review).}
\footnotetext{51}{Australian Institute of Company Directors, Corporate Practices and Conduct (2d ed. 1993) (Henry Bosch, AO, Committee Chair).}
\footnotetext{52}{TREVOR SYKES, THE BOLD RIDERS (1994).}
\end{footnotes}
the excesses of that era, as is the work of the Institute of Company Directors and the requirement of the Australian Stock Exchange that listed companies disclose which of a list of good corporate governance measures a listed company has instituted.

England and the United Kingdom had their own series of excesses, reaching a crescendo with the suicide of press baron Robert Maxwell and the financial disarray in the stable of public companies he left behind. In 1992, under the leadership of Sir Adrian Cadbury, the Cadbury Committee appended to its report a "Code of Best Practice" in corporate governance. In 1995 a committee chaired by Sir Richard Greenbury promulgated a set of recommendations regarding executive remuneration in U.K. public companies. Finally, Sir Ronald Hampel's committee's 1998 report reviewed and updated the first two reports. The London Stock Exchange has re-promulgated the work of all three committees in "Principles of Good Governance and Code of Best Practice," also known as the Yellow Book. Listed companies must annually disclose their compliance with the principles and code, which require a majority of independent directors, an audit committee, and a remuneration committee.

Other European nations do not exhibit the pattern of widespread share ownership that the U.S., the U.K., and Australia exhibit. In Germany, for instance, the big three banks control substantial portions of most large public companies. In France and Italy, family capitalism is still paramount, even in most large corporations. With the presence of banks, or of controlling families, monitoring the performance of senior executives, the need in those countries for a Cadbury Code or ALI Project type monitoring model of governance is less urgent. Nonetheless, in France, for example, the Vienot Report recommends adoption of monitoring model type reforms and in Italy scholars are examining closely the need for additional reforms.

56. The "Yellow Book" and compliance with its requirements are described in Brian R. Cheffins, Current Trends in Corporate Governance: Going From London to Milan via Toronto, 10 DUKE J. COMP. & INT'L L. 5 (1999).
While I cannot say, as many chauvinistic and insular U.S. scholars do, that any “global,” or even pan-European, convergence in corporate governance is occurring, I can say that the last decade especially has given birth to a significant “good corporate governance” movement in many countries around the world. How that movement plays out in various countries and what model of governance works best in various countries remains to be seen. But the emphasis on “good corporate governance” is there and will occupy center stage for some years to come. It forms one of the principal props of the “new” corporate social responsibility movement.

THE ACADEMICS’ PANACEA: INSTITUTIONAL INVESTOR ACTIVISM

As the takeover boom wound down in the later 1980s, a force for managerial and corporate accountability disappeared from the scene. The insider trading scandals of the 80s, the death of the junk bond market, and the passage by the states of draconian anti-takeover laws meant that the hostile takeover bid and the market for corporate control could no longer be relied on as effective regulators of corporate conduct. Academics looked around for some new development they could analyze and write about in their books and articles.

Institutional investor activism is born as much out of necessity as it is out of altruistic spirit. Institutions (pension funds, casualty insurers, mutual funds, university endowments) now own 53 percent of the New York Stock Exchange list. They do over 70 percent of the trading. Pension funds, in particular, exhibit growth which is inexorable. Twenty-five years ago institutional ownership stood at slightly over 30 percent of the NYSE list. In 1950 it stood at only 8 percent. Much of the growth in the interim is due to investments made by pension funds, year in and year out.

Large pension funds’ positions in individual stocks may be similarly large. Positions of a large pension fund such as TIAA-CREF, the pension fund for university faculty and staff across the entire United States, which has over $300 billion under management, may amount to 1, 2 or 3 percent of a corporation’s outstanding stock. Large pension funds may own four, five or six million shares of a particular company, even though they have a widely diversified portfolio. Such is their size that large positions in individual stocks are unavoidable.

As a group, institutions in the aggregate may own thirty, forty, fifty or even sixty percent of a popular company. For example, 1,593 institutional holders own 47.5 percent of The Walt Disney Company; 1,500 institutions own 62.3 percent of McDonalds; 974 institutions own 63.7 percent of Mellon
Financial (Mellon Bank); and 2,576 institutions own 50.6 percent of General Electric.

With such large positions in individual stocks comes a loss of liquidity. If pension fund managers believe that a portfolio company’s managers are under performing or acting in other undesirable ways, the pension managers can sell the stock, but they will have to do so at a price. Dumping 5 million shares on the market over a few days, or a few weeks means that the share price will spiral downward. If other institutions join the selling, the aggregate effect on share price may well be geometric rather than arithmetic. Institutions, including pension funds, then, are forced to remain investors in corporations in which they have large portfolio positions of necessity; they have to become “players” in the affairs of portfolio companies and on the “good” corporate governance scene.

The institutional investor poster children of every U.S. academic have been the huge California public employees’ pension fund, CALPERS, and its director, Dale Hansen. Hansen took to the practice of comprising a “hit list” of ten or so underperforming portfolio companies. Rather than closing out CALPERS’s positions in those companies’ shares, Hansen and his staff would analyze and make suggestions for improved financial performance and improved corporate governance, to avert disaster if not contribute also to improved financial performance. Hansen and his staff would meet with top executives of hit list companies. Few doors were closed to them.

In fact, CALPERS and Hansen were so successful that they announced that they would take the same approach abroad, identifying and meeting with laggard portfolio companies in Europe. Needless to say, in the more stratified cultural and class milieu of Europe, CALPERS announcement was perceived as brash in the extreme, causing more than a few raised eyebrows.

The early 1990s saw the appearance of academic articles with titles such as “The Institutional Investor As Corporate Monitor,” “Agents Watching Agents” or “Shareholder Passivity Reconsidered.” Managers of pension funds, themselves agents of the pension entity, would be watchdogs closely following the performance of senior corporate executives, themselves agents of the incorporated entities. In the shareholder universe, in which law and economics advocates maintained that apathy was “rational apathy” and

passivity in the face of poor corporate performance the norm, a subgroup of
shareholders, institutional and pension fund investors, had emerged which
would no longer be passive or apathetic.

To academics grinding away in disciplines such as finance and corporate
law, the promise of institutional activism replaced the takeover bid as the new
kid on the block. Institutional investor activism, in fact, improved upon the
takeover bid which, after all, involved nasty dislocations and uprooted
thousands of workers and entire communities. More importantly, the promise
of institutional investor activism gave academics something new to write
about, crucial for academics required to churn out articles in journals in order
to progress through various stages of tenure and promotion at their
universities, and to impress their departmental chairs when time for their
annual review came around.

SKEPTICISM ABOUT INSTITUTIONAL INVESTOR ACTIVISM

There were very few gainsayers. Virtually everyone in academe jumped
on the institutional investor activist bandwagon. Institutional investor
activism was the new vision on the mountaintop. But one legal academic, Ed
Rock of the University of Pennsylvania, had misgivings which he expressed
in an article on the "Uncertain Significance of Institutional Shareholder
Activism."59

Rock reminded his readers that institutional investor managers have
"prudent person" and other fiduciary responsibilities imposed not only by
state law but, in the case of pension funds, by the 1974 federal Employee
Retirement Income Security Act (ERISA). There is only so much room for
managers to engage in do-good activity. And there is only so much desire.

Many pension funds are indexed. That is, the managers invest in a broad
basket of stocks intended to match the performance of some broad based
market indicator, often the Standard & Poors 500. Very little managerial
focus is on individual portfolio companies. If a portfolio company’s
performance falters, the institution has an extremely diversified portfolio. Its
analysis, and resulting broad diversification, has already factored in sub par
performances by some companies and above average performance by others.

Other pensions have higher but very focused goals. Rather than indexing,
the managers attempt to best overall market performance but only by a

59. Edward B. Rock, The Logic and (Uncertain) Significance of Institutional Shareholder Activism,
percentage point or two. The idea is not to concentrate on hitting home runs but incrementally to improve the portfolio's return. The reason is that most large pension plans are "defined benefit" as opposed to "defined contribution" plans. In the latter type of scheme, a small business person puts away, say, the equivalent of 15 percent of salary for herself and for each employee. The contribution each year is fixed but the resulting pension amount is not; it is dependent upon the employee's years of service and performance of the investments the pension fund makes.

By contrast, larger corporations have defined benefit plans. Each year the corporation contributes a varying amount, that is, the amount actuarially necessary to fund "X" pension for employees A, B, C, D, etc., when they retire in various years in the future. If the pension fund portfolio performs well, however, that relieves the sponsoring corporation from making as large a contribution as otherwise would be the case. If a five billion dollar pension fund returns eleven rather than ten percent in a given year, that performance relieves the corporation from making five million dollars in contributions that year. Thus it is that sponsoring corporations and the managers of pension funds have on their shoulders great pressure to improve portfolio performance. They have little time to devote to improved corporate governance or otherwise to intermeddling in the affairs of portfolio companies.

If they did, they might well get fired. Most pensions funds are trusts set up by large corporations to benefit their employees. The corporation's board of directors names the trustees, who often are themselves directors or senior executives of the corporation. In turn, the trustees hire the managers. If the trustees hear that the managers are waging war on corporate America, or engaged in a good corporate governance jihad of some kind, the trustees will quickly relieve those managers of their duties. It is quite easy to hire new ones, as tens of thousands of investment firms compete for that business. Corporate sponsored pension plans have not been, and never will be, significant players in the good corporate governance movement or activists in any real sense.

If more and more corporations adopt confidential voting at shareholders' meetings, a top agenda item of groups such as the Council of Institutional Investors, corporate sponsored plan managers may be able to nibble around the edges, quietly voting for governance reform or social responsibility measures in individual portfolio companies. But a bit of nibbling is as good as it ever will get.

The universe of potential investor activists is much smaller, by and large limited to managers of public employee and labor union pension funds. Those managers answer to politicians or labor leaders conscious of responsibilities
to a much broader array of constituencies than shareholders or pension fund beneficiaries alone. Inspired by CALPERS remarkable endeavors, other very active funds include the New York City Employees’ Retirement System (NYCERS), the Wisconsin State Retirement System, the Amalgamated Clothing & Textile Workers (ACTW) pension scheme, and TIAA-CREF. These pensions funds can and do with impunity critique corporate performances and call for the resignation of badly performing corporate CEOs.

Even among this limited universe, however, only a subgroup has an activist agenda. For example, managers of the public employees’ pension trust in Washington State set for themselves the goal of an annualized twenty-four percent return. They nearly achieved it by investing with Kohlberg Kravis & Roberts (KKR) in leveraged buyout deals and astute real estate investments, achieving an annualized twenty-two percent return over a ten-year period. Those managers have no activist good governance or social responsibility agenda. Because the pension is a defined contribution scheme in which improved portfolio performance redounds to the benefit of the beneficiaries rather than the plan sponsor, Washington State employees applaud those non-activist managers with unrestrained enthusiasm.

To reverse paraphrase Hillary Clinton, however, it doesn’t “take a village.” If several institutions take a long term interest in corporate governance and social responsibility in some, or all, portfolio companies, their presence in the wings may be enough to get management’s attention. In other instances, a more activist agenda, including, perhaps, a shareholder sponsored resolution at the annual meeting or direct communication with management along CALPERS lines, will be necessary.

An Australian academic has examined the prospect of institutional investor activism with open eyes, much less as a cheerleader. Examining institutional investors and their attitudes toward activism, Professor Geoffrey Stapledon of the University of Melbourne concluded that often a critical mass cannot be assembled within a particular company. Institutional investment managers may pick up the telephone to coordinate strategy with another institutional investor. Coordination among three, or four, institutional investors becomes much rarer and exponentially more difficult, for a variety of reasons. Managers often feel that confidentiality will more likely be breached if they participate in a larger “cabal.” Any attempt at coordinated effort will be hamstrung by free riders. Focused as they are on investment performance, and under considerable stress to produce, managers simply have neither the time nor the patience for more than one telephone call.
The findings in Stapledon's 1996 book, "Institutional Shareholders and Corporate Governance," would seem to hold true in the United States as well. In 1992, the American SEC amended its rules to make it easier for institutions and other investors to communicate with each other. Investors who do no more than communicate how they intend to vote on a particular matter will not be deemed by the SEC, and therefore by any court if challenged, to be engaged in a proxy solicitation. The latter finding triggers all sorts of onerous regulatory requirements. The classic method corporate managers utilized to stop activist shareholders in their tracks was to allege, in a court proceeding, that the activists were engaged in an "illegal solicitation," and obtain an injunction stopping their activity.

Removal of that one obstacle by the SEC does not vitiate Stapledon's analysis. It may not take a village, but it may take more than a single institution speaking out to reform a particular company's management. That is certainly true when the reform sought is removal of an underperforming or badly behaving CEO.

Institutional investor activism has certainly increased. Today there is no doubt that activism, or the threat thereof, is a factor in the good governance movement and, from time to time, in the forced removal of a CEO by a board of directors. There is also no doubt, however, that the promise of institutional investor activism was the oversold idea of the early 1990s. Most advocates of improved corporate governance welcome the prospect, but institutional investor activism never has been and never will be the panacea that legal and other academics made it out to be.

THE STAKEHOLDER VERSUS STOCKHOLDER DEBATE

Is the modern corporation more than a form of ownership by shareholders of the means of production? Should corporations be recognized as "public

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institutions with public responsibilities?" The debate has ebbed and flowed since the 1930s under headings such as "For Whom are Corporate Directors Trustees?" 62

The difference today is that many corporate managements have wrapped themselves in the banner of corporate social and public responsibility. They have done so, though, with a mixed or hidden agenda.

This extraordinary development began, as many things began, in the takeover boom in the 1980s. When AT&T Corporation made a hostile bid for National Cash Register (NCR), one NCR response was to publish a series of high profile, high brow image advertisements addressed to "our stakeholders." The gist of the advertisements was that, in crafting responses to the AT&T bid, the NCR board of directors had to take into account a takeover's effects on NCR's workers, customers, long time suppliers, communities in which it had plants, and ambient regional economies in regions in which NCR had a large presence. Shareholders were still important but they were now to be referred to as stakeholders as well. Shareholder welfare was but one variable in an equation with many stakeholder groups' welfare as equivalent variables.

Of course, the advertising campaign was an attempt to condition public and perhaps even judicial thinking at a time when NCR was engaged in high stakes litigation to stop the AT&T bid. Neither the campaign nor the litigation succeeded. AT&T took over NCR and has, in fact, since spun it back out as an independent company. The NCR effort in the 1980s stands out as the moment in history when the "stakeholder" terminology appeared in the national press.

Later, in thirty or more states, large corporations and their lobbyists went to state capitol s to lobby legislatures to pass amendments to state corporations laws. These statutes were captioned "corporate constituency statutes." Some academics described them more accurately as "nonshareholder constituency statutes." 63

These statutes expressly mention the various groups of stakeholders described above. The intent of the statute is to permit corporate directors to consider ("may" consider) interests other than shareholder interests in

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62. The subject of to whom corporations should be responsible—to shareholders alone or to other constituencies such as labor, consumers and society—was the subject of the Berle-Dodd debates in the 1930s. See, e.g., Adolf A. Berle, Jr., Corporate Powers As Powers in Trust, 44 HARV. L. REV. 1049 (1931); Adolf A. Berle, Jr., For Whom Corporate Managers Are Trustees: A Note, 45 HARV. L. REV. 1365 (1932); E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 (1932); E. Merrick Dodd, Jr., Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?, 2 U. CHI. L. REV. 194 (1935).

63. See, e.g., BRANSON, supra note 31, § 8.03 ("Non-Shareholder Constituency Statutes").
decisions the directors make, but most particularly in adopting takeover defenses and taking other steps to thwart an unfriendly takeover bid. A central intent is to change what had previously been perceived to be the law, namely, that directors’ duty of loyalty to act in the “best interests of the corporation” requires directors to act, if not exclusively, then primarily, for the benefit of shareholders. Only one statute, Connecticut’s, is mandatory (“shall” consider). 64

Indiana passed a statute that attempts to negate the use of influential Delaware takeover cases in interpreting what Indiana law requires when corporate directors face a takeover. 65 Although overall pro management, Delaware requires that, in adopting takeover defenses, directors take action that is “reasonable in relation to the threat posed.” 66 This proportionality requirement ratchets upward once it becomes clear that sale or breakup of the corporation is inevitable. Then, holds a leading decision by the Supreme Court of Delaware, the best interests of the corporation become congruent with the best interests of shareholders. 67 When the corporation is clearly for sale, under the *Revlon* decision, the “directors’ role [changes] from defenders of the corporate bastion to auctioneers charged with getting the best price for stockholders” and any defensive measure, say, favoring one bid over another, must be “rationally related to shareholder benefit.” 68

The effect of a statute such as Indiana’s is to protect stupid decisions. If directors overreact on news that an investor has acquired, for instance, six percent of the corporation’s stock, and in a panic sell off the corporation’s “crown jewel” subsidiary in a scorched earth defense, the statute will protect those directors’ actions from close scrutiny. This protection exists even

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64. See Conn. Gen. Stat. § 33-313(e) (1994). Corporations’ lawyers and lobbyists had to be careful in drafting such statutes lest they become a sword rather than a shield. Directors of a Connecticut corporation *must* consider the interests of employees, customers, creditors, suppliers, “community and societal considerations,” as well as long term and short term interests of the corporation and its stakeholders, “including the possibility that those interests may be best served by the continued independence of the corporation.” A mandatory corporate constituency statute such as Connecticut’s could well backfire. Labor interests and a local community could, for example, invoke the statute and directors’ alleged failure to comply with it in litigation to stop a plant closing or relocation.

65. See Ind. Code Ann. § 23-1-35-1(f) (2000) (“Certain judicial decisions in Delaware . . . are inconsistent with the proper application of the business judgment rule under this article.”).

66. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); see also Branson, supra note 31, § 7.19 (discussing Unocal Corp. v. Mega Petroleum Co.).


68. See id.; see also Branson, supra note 31, § 7.20 (discussing Unocal Corp. v. Mega Petroleum Co.).
though the measure taken can in no way be considered proportionate to the threat posed.

No one knows how courts will interpret more run-of-the-mill nonshareholder constituency statutes. Pennsylvania enacted the first such statute in 1983. It remains one of the more extreme statutes, relieving the board of directors of a Pennsylvania corporation of any obligation "to regard any corporate interest or the interests of any particular group affected by [director] action as a dominant or controlling interest or factor." 69

In 1997, however, Conrail, the owner of the freight systems of the old New York Central and Pennsylvania railroads, and the owner of the most important rail networks in the Northeast, was about to be sold. Conrail's directors proposed that the rail system be sold to the old Chesapeake & Ohio, which had become CSX Corp. A competing railroad, the Norfolk & Southern, made a clearly superior cash bid to Conrail shareholders. Throwing shareholder welfare to the wind, the Conrail directors invoked the Pennsylvania non shareholder constituency statute to try to make the inferior CSX bid stick. Norfolk & Southern, they said, would close a major switching yard near Pittsburgh, putting hundreds of Conrail employees out of work, and so on, and so on. It did not work. Ultimately, CSX and Norfolk & Southern both bought Conrail, splitting its assets between them.

Nonshareholder constituency statutes, and "stakeholder" advocacy may represent the apex of hypocrisy for corporate America, when viewed in light of corporate managers' actions fifteen or so years previously. Following Earth Day in 1970, the corporate social responsibility movement and then, briefly, the federal chartering movement, blossomed, as recounted in previous sections of this essay. Earnest reformers attempted to push upon the senior executives and directors of large U.S. corporations the notion that, as a matter of general corporate law, those managers had responsibility for the welfare of workers, to make products safe, to be good citizens in the communities in which their corporations operated, to protect and promote clean air and clean water, and so on.

Uniformly in the 1970s, corporate executives' response to corporate social responsibility advocates was a Calvin Coolidge's retort that "the business of business is business." Corporations, said their managers, have one overriding objective, to maximize profits for their shareholders. Corporate America's spokespersons would frequently trot out the assertions of Milton Friedman, the Nobel Prize winning economist from the University of Chicago.

69. 15 PA. CONS. STAT. § 1715(b) (2000).
In the early 1970s, Friedman repeatedly asserted that markets (the invisible hand of Adam Smith being at work) were so accurate in their allocation of capital and pricing of inputs that a corporation which had funds to spend on corporate social responsibility activities must be reaping monopoly profits, at the expense of consumers and many others in our society. 70

Ten years later, when their high price jobs were potentially at stake in the takeover wars, U.S. corporate managers sang a different tune. In defending against takeover bids, they pompously intoned that they had a grave responsibility to consider all of the stakeholder interests bundled together in the large modern corporation. If it was necessary to expend corporate funds to lobby for a change in the law, so be it.

Stakeholder advocacy wasn’t the first, nor will it be the last, time in which corporate America has been hypocritical but this particular hypocrisy stands out for its clarity.

THE BEGINNINGS OF THE NEW CORPORATE SOCIAL RESPONSIBILITY AND PROGRESSIVE CORPORATE LAW MOVEMENTS

What goes around comes around. U.S. corporate managers may switch their tune yet again. In the late 1990s, a new corporate social responsibility movement has gained considerable momentum. The progressive corporate law movement is a reaction to the corporate law and economics and contractarian movements of the 1980s, recounted in another section of this article. Those movements “treated the corporation as the private contractual arrangements of its statutory constituents [stockholders, directors and officers], governed largely by market forces.” In 1995, a volume of essays, Progressive Corporate Law, was published to some acclaim by a George Washington University Professor, Lawrence Mitchell, who served as its editor. 71

A subgroup of participants in the progressive corporate law movement advocate a “communitarian” model of the corporation, which “focuses on the sociological and moral phenomenon of the corporation as a community, in contrast to the individualistic, self-reliant” group of purely economic actors

70. See, e.g., John McIaughry, Milton Friedman Responds: A Business and Society Interview, 1 BUS. & SOC’Y REV. 5 (1972) (discussion of corporate social responsibility is “utter hogwash”); Milton Friedman, The Social Responsibility of Business Is To Increase Its Profits, N.Y. TIMES, Sept. 13, 1970, § 6, at 32 (corporate social responsibility “could thoroughly undermine the very foundations of our free society” and “is a fundamentally subversive doctrine”).

71. PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).
who are the only significant players in the Milton Friedman view of the corporation.72 Others advocate in particular, as a matter of general corporate law, a legal responsibility of corporate managers to workers and their families.73 The "new" corporate social responsibility, or progressive corporate law, movement promises to grow and occupy center stage in the coming decade.

Around the globe, too, governments and good governance advocates are taking up the stakeholder model, not in the hypocritical fashion of American corporate executives in the 1980s, but in earnest. New corporate governance codes of best practices for corporate managers in Korea and Indonesia call for specific responsibilities to, and contain separate chapters on, stakeholders.74 The new nation of Slovenia rejected the U.S. corporate model of shareholder primacy, adopting instead a variant on the German two tiered board and co-determination model.75 In that model, worker representatives comprise half of the supervisory board which oversees the managing board of the corporation.

In Progressive Corporate Law, Professor Lawrence Mitchell may have stated well what many around the globe feel about large corporations and their growing presence in our lives:

[N]o institution other than the state so dominates our public discourse and our private lives. . . . [C]orporations make most everything we consume. Their advertising and products fill almost every waking moment of our lives. They give us jobs, and sometimes a sense of identity. They define communities, and enhance both our popular and serious culture. They present the investment opportunities that send our children to college, and provide for our old age. They fund our research.

Individually and collectively, though, large corporations' presence may also harm us:

They pollute our environments. They impoverish our spirits with the never-ending messages of the virtues of consumerism. They provide a living, but often not a meaning.

And sometimes they destroy us; our retirement expectations are unfunded, our investment hopes are dashed, our communities are left impoverished. The very power that corporations have over our lives means that, intentionally or not, they profoundly affect our lives.\textsuperscript{76}

With the stakes so high, and feelings and emotions running both ways. The shareholder versus stakeholder debate is very central to the current discourse and will be so for many years to come.

**RENEWED CALLS FOR CORPORATE SOCIAL ACCOUNTING AND DISCLOSURE**

In the 1970s, federal chartering of large corporations, and the competing alternative, federal corporate law minimum standards, rose to the fore. Although quite a few large corporations engaged in various forms of social accounting and disclosure, social responsibility disclosure was not the darling of the reformer community. Only one academic wrote about it.\textsuperscript{77} The reform was probably too modest for firebrands like Ralph Nader who favored drastic intrusion by the federal government into corporations’ lives. In addition, in 1974 there existed only a handful of institutional investors who openly proclaimed their use of a social responsibility yardstick. These principally were social responsibility mutual funds such as the Dreyfus Third Century Fund, the Pax World Fund, and the Social Dimensions Fund, which had a modest 18.6 million dollars under management.\textsuperscript{78}

In the 1990s, all of that has changed. In selecting and then monitoring their investments, the large activist institutional investors have placed corporate social responsibility on their agendas. TIAA-CREF, CALPERS, NYCERS, as well as the labor union pension funds such as the textile workers (Amalgamated Clothing & Textile Workers, or ACTV) or the carpenter’s union pension funds, have become up front socially responsible investors. Today, according to one authority, there are 144 “socially and environmentally responsible” mutual funds, with ninety-six billion dollars under management in 1997.\textsuperscript{79}

\textsuperscript{76} Lawrence E. Mitchell, Preface, in PROGRESSIVE CORPORATE LAW, supra note 71, at xiii (Lawrence E. Mitchell ed., 1995).

\textsuperscript{77} See generally BRANSON, supra note 31.


The growth rate of mutual funds that, while not organized solely around a theme of social or environmental responsibility, utilize various "social screens" in making investments, is three times the growth rate of funds generally. Thus "socially screened" mutual funds' assets grew 227 percent from $162 billion to $529 billion between 1995 and 1997. Altogether, it is said that "$1.185 trillion of the $13.7 trillion in funds under professional management in the United States (or about 9%) are invested using social 'screens' for either products to be avoided (tobacco, alcohol, and military hardware lead the list) or practices to be encouraged (intelligent environmental stewardship, for instance)."

The number of third party monitors, whether journalists or organizations, has spread beyond the investment community. The Forest Stewardship Council (FSC) has a worldwide program for monitoring the environmental and harvesting practices of the forest products industry. The FSC has obtained the support of Home Depot, Wickes, Lowes, and Anderson Windows, among others. Those corporations have agreed to sell only products bearing the FSC seal of approval. The FSC imprimatur has become influential from an investment standpoint as well.

Core worker protection and welfare standards have become a concern of several monitoring agencies. Child labor, sweatshop and so-called plantation production issues, especially in newly industrializing and less developed nations, such as Indonesia, Honduras, or Vietnam, have become concerns for companies who manufacture or assemble products there.

Monitors who measure corporate performance on multiple fronts also exist. The Coalition for Environmentally Responsible Economies (CERES), a coalition of activist shareholders and environmental organizations, has developed a reporting format for companies to measure their overall

80. Id. at 1268.
82. One is the Workers' Rights Consortium (WRC) which includes in its membership forty-six universities who sell logo merchandise as an adjunct to intercollegiate athletic programs. See The Wall Street Journal Taste—Review & Outlook: Labor 101, WALL ST. J., May 12, 2000, at W17 (Nike and its founder withdraw support from University of Oregon because Oregon joined WRC). The other is the Fair Labor Association, favored by producers such as Nike and GAP. See, e.g., Nike, Inc.: Second University to Lose License, Funding Contract, WALL ST. J., Apr. 28, 2000, at B6 (Nike withdraws funding from University of Michigan for joining WSC).
83. See, e.g., Mattel Creates System to Monitor Conditions in Overseas Factories, WALL ST. J., Nov. 21, 1997, at B9A (Mattel joins Nike, Levi Strauss, Reebok, Walt Disney and Gap to enact "a code of conduct for its overseas factories and independent audit and monitoring system to ensure compliance with its work standards worldwide").
stewardship of the environment. A number of major U.S. companies (Sun Oil, Bethlehem Steel, General Motors, Polaroid, Coca-Cola, ITT Industries) have endorsed the CERES principles, which formerly were known as the "Valdez Principles." They have begun reporting on the environmental effects of their operations and their efforts to abate them.

More ambitious yet are the "Social Accountability" (SA) 8000 standard and audit procedures. The S.A. 8000 standard is a "uniform auditable standard for third party verification" concerning labor practices, designed to be used across countries and industries." It sets forth "social accountability requirements" on a number of issues such as child labor, forced labor, worker health and safety, freedom of association, the right to collective bargaining, discrimination, worker discipline, and compensation. Those standards are based upon conventions of the International Labor Organization (ILO) already in place. The ILO, of course, is the longest standing of the United Nations' specialized agencies.

The information revolution and the Internet have added to the corporate social responsibility data that are available to monitors of social performance, whether they be third party monitors or investors themselves. The Nuclear Regulatory Commission has comprehensive reports of safety incidents per nuclear facility available on its web site. Community Reinvestment Act data on banks' local lending is available on-line. Through another web site, monitors may make Freedom of Information Act requests for worker safety records from the Occupational Health and Safety Administration (OSHA), which, after a delay, will provide facility-by-facility safety records.

All of these initiatives in monitoring of social performance nonetheless result in a patchwork. The array of information available thus is incomplete and is also dependent upon the sophistication, industriousness and research

84. See CERES World Wide Web Homepage, available at http://www.ceres.org/. Members of the coalition include the AFL-CIO, the Natural Resources Defense Council, the Sierra Club, and the Union of Concerned Scientists.


87. On the subject of the ILO and SA 8000, see Williams, supra note 79, at 1202-03 & n.11.

88. See Williams, supra note 79, at 1290.


90. See Williams, supra note 79, at 1290 (reviewing Internet sources of social responsibility information).
tools available to the investor or monitor. A differential disclosure problem of significant proportions exists.

The differential disclosure issue is one ground upon which advocates urge the SEC to adopt some social auditing and disclosure requirements.91 In the 1970s, activists urged the SEC to adopt regulations requiring corporate disclosure on environmental compliance and civil rights records. The activists went twice to court. After nearly a decade of resistance the SEC prevailed.92

Today the same argument is being made again to the Commission which, against the background of the data just discussed about social screens and other interests in corporate social responsibility disclosure, may be more receptive. A recent issue of the Harvard Law Review featured a lengthy lead article calling for a "corporate social transparency" regulation or statute that would mandate a fairly high degree of corporate social accounting and disclosure.93 Other recent works also explore the issue.94

Calls for corporate social accounting are more muted and thus more sustainable than cries for more drastic, intrusive social responsibility reforms such as federal chartering or mandatory public interest directors. They are at the core of the new corporate social responsibility movement. Their muted and sustainable character forms a basis for concluding that the new corporate social responsibility movement may be with us for some years to come and, indeed, may become a fixed part of the corporate governance Landscape.

THE GREEN MOVEMENT—A PRINCIPAL COMPONENT OF THE NEW SOCIAL RESPONSIBILITY

In turn, the green movement has what may be viewed as three components of its own: green advertising, green product manufacture and competition,

91. See, e.g., Branson, supra note 23, at 617 ("Another Parity As a Goal of Disclosure—Equality of Access To Information for Investors or Categories of Investors").


and green management. The three components should correlate with one another, but do not necessarily do so.

Green advertising is driven, at times, by consumer preference rather than any strong corporate social responsibility mission. "American consumers now consistently rank environmental protection as one of our country's most important issues." In 1995, a "Gallop poll found that 76% of Americans consider themselves environmentalists." Other surveys indicate that consumers claim they are willing to pay 7% to 20% more for environmentally friendly products."^95

Consumers, of course, can to a certain extent be duplicitous. While 74% claim they consider a product's environmental reputation in purchasing decisions, only 54% select more expensive products because of the products' environmental benefits.^96 In addition, consumers may be environmentally "penny wise and pound foolish," using recycled paper and composting coffee grounds while driving a Ford Expedition or some other environmentally unfriendly SUV.^97

Green advertising and green product competition have occupied center stage in Europe for some time now. The European Union now awards eco-labels (a small flower) to twenty to thirty percent of a product group based upon the lowest environmental impacts in the group. The EU staff reviews award status every three years.^98

The green advertising and product movement has been percolating along through the late 1980s and into the 1990s in the United States and other developed nations as well as in the European Union. The number of green product introductions climbed steadily, reaching a plateau in 1990 and 1991. In the United States, for example, green product introductions went from 4.5 percent of new product introductions in 1989 to 11.4 percent in 1990 and 13.4 percent in 1991. The comparable figures for Canada are 4.6 percent in 1989, 16.4 percent in 1990, and 33.9 percent in 1991.^99

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^96. Id. at 253.
^97. "[T]he lemming-like movement from cars to SUVs has resulted in some 200 million more tons of carbon-dioxide emissions every year than if everyone had stayed with his nice little Taurus. But individuals can exert a greater force for environmental good by pressuring corporations and governments than by lecturing their Navigator-driving friends. Or by spending two years in a tree [sic]." Sharon Begley, The Battle for Planet Earth, NEWSWEEK, Apr. 24, 2000, at 50.
Green advertising may be misleading because the product is not as green as the claims made. Several states sued Mobil Oil for marketing Hefty trash bags as bio-degradable despite knowledge that the bags would not degrade in landfills.\textsuperscript{100} Other states sued American Enviro Products for similarly misleading claims about disposable diapers.\textsuperscript{101} Regulators sued Alberto-Culver for misleading "ozone friendly" and "environmentally safe" claims regarding aerosol hair spray products.\textsuperscript{102} On the federal level, the Federal Trade Commission has prosecuted Cliffdale Associates for "gas mileage reducer" claims; Standard Oil of California and Chevron for pollution free exhaust claims; Union Carbide Corp. for pesticide safety claims; and Zipatone, Inc. for "ozone friendly" aerosol spray can claims.\textsuperscript{103}

Green product introductions and green product competition form a bridge between green advertising and green management. Green management is a wider subject than green product production alone, including such subjects as "protection of the biosphere, sustainable use of natural resources, reduction and disposal of waste, wise uses of energy" and directors and managers with specific environmental responsibilities. Green management can range from observance of some of those standards to actual subscription to the CERES Principles, an excerpt of which comprises the foregoing list.\textsuperscript{104}

The green movement has shown some growth and considerable staying power through the 1990s and into the new century. One proxy for its staying power may be the appearance in the legal periodicals of a steady stream of cross over articles dealing with environmental subjects and corporate responsibility.\textsuperscript{105} The green movement forms a principal part of the new corporate social responsibility movement. My prediction is that it will be with us and with corporate directors and senior executives on a permanent basis through the decades ahead.

\begin{footnotesize}
\begin{enumerate}
\item See generally Church, supra note 95, at 305-06.
\item Id.
\item See generally Church, supra note 95, at 305-06.
\item See Valerie Ann Zondorak, A New Face in Corporate Environmental Responsibility: The Valdez Principles, 18 B.C. Envtl. Aff. L. Rev. 457, 481-82 (1991) (in their earlier incarnation the CERS Principles were known as the "Valdez Principles").
\item See, e.g., Elizabeth Glass Gelman & Andrew E. Skroback, Environmental Activism and the Ethical Investor, 22 J. Corp. Law. 465 (1997).
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CONCLUSION

It is different this time around, "it" being the "new" corporate social responsibility movement. Ralph Nader is still crusading, this time for a unilateral withdrawal by the United States from the World Trade Organization instead of federal chartering of corporations. Nader, of course, is now more of a politician than he ever was, railing against corporate social irresponsibility and the World Trade Organization, even though he must know that the WTO may be the best hope for solving the collective action problems that affect nation states in their attempts to bring social responsibility to large multinational corporations.106

The corporate social responsibility movement is different this time around for two reasons. One is its more muted, less shrill, and therefore more sustainable, tone. Advocacy of some level of social accounting and disclosure and for the greening of the corporate world seems a far cry from the 1970s shrill calls for federal chartering, federal minimum standards, mandatory public interest directors, and "power to the people."

The second is that the new corporate social responsibility movement is converging with, rather than diverging from, broader trends in corporate governance. The "good governance" and stakeholder versus shareholder movements are not apart from but may be viewed as yet another element of the new corporate social responsibility movement. Looking through the lens the other way, the new corporate social responsibility movement is but an element of good corporate governance.

That convergence of good governance and social responsibility is a vast difference from the 1970s when the theory was at one antipode (social responsibility over everything else) and the reality was at the other (corporate governance the way "we've always done it," according to corporate directors and senior executives). The convergence, indeed, significant overlap, between "good governance" and corporate governance reforms, on the one hand, and the more muted "new" corporate social responsibility movement, on the other, bodes well for the new century.

106. I recently wrote that, in attempting to regulate far flung multinationals, nation states face some of the same collective action problems, such as the free rider problem, that dispersed shareholders face in public corporations. Whatever their shortcomings, international organizations such as the WTO are the best hope for solving these collective action problems. See Douglas M. Branson, Teaching Comparative Corporate Governance: The Significance of "Soft Law" and International Institutions, 34 GA. L. REV. 669, 680-81, 693-95 (2000).