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Robert N. Strassfeld
*Case Western Reserve University - School of Law*, robert.strassfeld@case.edu

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# 2008 LAW REVIEW SYMPOSIUM: CORPORATIONS AND THEIR COMMUNITIES

## INTRODUCTION: CORPORATIONS AND THEIR COMMUNITIES

*Robert N. Strassfeld*[†]

For a few years during the late 1970s and early 1980s, the Mahoning Valley in Northeast Ohio was at the front line of debates about the obligations, if any, that corporations owed to their communities. During those years owners of three of the Valley's largest steel plants ceased production and shut their doors. The decisions to shut down resulted in approximately 10,000 lost jobs and devastated the economies and social fabric of Youngstown, Ohio, and its neighboring communities.[1] The struggle to keep the steel plants from closing took place in many venues. Eventually, as is so often true, the battle ended up in the courts.

Briefly during that battle, Judge Thomas Lambros considered the possibility in *United Steel Workers of America, Local No. 1330 v. U.S. Steel Corp.*[2] that the U.S. Steel Corporation had obligations to stakeholders beyond its shareholders and those persons or entities to

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† Professor of Law, Case Western Reserve University School of Law.

1 For a history of the shutdowns, see generally STAUGHTON LYND, THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS (1983). For the number of affected employees, see *id.* at 6.

2 492 F. Supp. 1 (N.D. Ohio), *aff'd in part, vacated and remanded in part*, 631 F.2d 1264 (6th Cir. 1980)

which it had bound itself by contract. Through his musings on the topic, he invited the litigants to consider whether the long relationship between the Mahoning Valley communities and the steel companies had given rise to a property right held by those communities and the steel workers who lived there that might limit the rights of U.S. Steel to close shop.[3]

In the end Judge Lambros ruled that the steel workers had neither a contractual right nor a property right that might impede U.S. Steel's decision to close the plants.[4] Such a property right would be a judicial invention with no basis either in statute or in prior common law, Judge Lambros concluded. He believed the court was unable to create such a right from whole cloth.[5]

In the Mahoning Valley, the steel companies were typically viewed as the villain (or at least a villain, since fault was assigned to others, as well) in the story. Yet under another vision of a corporation's responsibility, the steel companies behaved appropriately by focusing on the best interests of their shareholders without regard for the impact of their decisions on the Mahoning Valley communities. Ten years before the *Local No. 1330* decision, economist Milton Friedman argued that the only social responsibility of corporate managers was to further the goals (typically making money) of their employers: the shareholders. Any expenditure of corporate resources to fulfill a manager's sense of "social responsibility" that did not ultimately serve the goal of more profits, by, for example, generating good-will or attracting better workers to a particular community, misspent shareholders' money and was the height of irresponsibility.[6]

The argument over how to characterize the corporation and describe its obligations will doubtless continue for as long as we have corporations. Both its friends and its critics focus on the corporation's power, whether as a generator of economic growth and wealth or as a careless wrecker of the people and things around it, in the singular pursuit of profit. The New York Court of Appeals struck a typically positive tone in calling them, "great engines for the promotion of the public convenience, and for the development of public wealth."[7]

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[3] *Id.* at 9–10; LYND, *supra* note 1 at 162–67. For another interesting discussion of the case, see Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989).

[4] *Local No. 1330*, 492 F. Supp. at 11.

[5] *Id.* at 10.

[6] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine), at 17.

[7] Leslie v. Lorillard, 18 N.E. 363, 366 (N.Y. 1888). The court went on to note, however, that a corporation that acted outside of their charters or sought to monopolize their trade became a "public menace." *Id.*

Nicholas Murray Butler, the President of Columbia University rhapsodized about the corporation in saying that: "'I weigh my words when I say that in my judgment the limited liability corporation is the greatest single discovery of modern times. . . . Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it.'"[8]

Others have been less enthusiastic. Justice Joseph P. Bradley is purported to have described corporations as "'Modern Shylocks and Railroad Smashers.'"[9] Professor Joel Bakan describes them as a "psychopathic creature."[10] Justice Louis Brandeis, noting the growing wealth and power of corporations, described them as a "Frankenstein monster."[11] Professor Lawrence E. Mitchell compares modern corporations to the monster-like creature of Jewish folklore, the Golem, which unstoppably follows the orders of its creator, no matter how destructive.[12] Finally, in its 2001 release, *1600 Transylvania Avenue*, the San Francisco Mime Troupe, a radical theatrical group, also drew on horror film and literature imagery and likened the corporation to a vampire, given immortal personality by the *Santa Clara County v. Southern Pacific Railroad Co.*[13] decision and living on the blood of its victims.[14]

This Symposium is intended to broaden the discussion of the relationship between corporations and their communities. The first panel focuses on the continuing debate regarding stakeholder theory: the idea that corporate law defines the obligations of corporate managers too narrowly to the detriment of other stakeholders in the

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8 JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 9 (1970) (quoting 1911 remarks by Nicholas Murray Butler, President of Columbia University, *quoted in* Bernard F. Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations*, 18 LAW & CONTEMP. PROBS. 473, 473 (1953) (citation omitted)) (omission in original). Butler originally made this comment in November 1911 in an address to the 143rd Annual Banquet of the Chamber of Commerce of the State of New York. WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 21, at 43 (1917).

9 ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877–1920, at 81 (1967) (quoting Justice Joseph P. Bradley).

10 JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 60 (2005). Bakan asked Dr. Robert Hare, a psychologist with expertise in psychopathy, to diagnose the corporation. Hare concluded that corporations demonstrate most standard psychopathic traits. *Id.* at 56–57.

11 Louis K. Liggett Co. v. Lee, 288 U.S. 517, 564–67 (1933) (Brandeis, J., dissenting in part). Justice Brandeis was borrowing the phrase from a book by I. Maurice Wormser, FRANKENSTEIN, INCORPORATED (1931).

12 LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 46–47 (2001). The folkloric Golem, by contrast, could be stopped by its creator.

13 Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

14 SAN FRANCISCO MIME TROUPE, *Legal People*, *on* 1600 TRANSYLVANIA AVENUE (BMI 2001).

corporation. The relationship between corporations and their communities raises other questions, as well. What may a community do to attract a corporation to relocate in that community or to induce a corporation to resist the temptation to relocate elsewhere? Our second panel examines these questions. Finally, what may a community do when it regards a corporation as a bad neighbor? In some cases, communities have gone so far as to attempt to prohibit certain big box stores, often, but not exclusively, Wal-Mart, from opening a store in their location. More typically, they have sought to limit the behavior of such corporations in a variety of ways ranging from aesthetics and environmental impact to labor practices. Our third panel examines the limits of a community's ability to restrict their corporate neighbors in those ways.

In a keynote address, Professor Joseph Singer identifies two assumptions that underlie the theory that limits corporate responsibility to the well-being of shareholders.[15] First, corporations are constrained only by existing statutes and regulations in their pursuit of wealth. Second, whether or not current regulatory restraints are adequate to protect the public good and stakeholders other than shareholders does not matter because the market will correct for the law's imperfections. In support of a theory of corporate responsibility that couples wealth production with conformance "with minimum standards compatible with the contours of a free and democratic society," Professor Singer argues that both of those assumptions are wrong.[16]

He counters the first assumption, that only statute and regulation limit the responsibility of corporations to pursue the production of wealth single mindedly for their shareholders by reference to the "other-regarding obligations" of tort, contract, and property law that have long curbed the appetite to do all that the law does not expressly prohibit in the marketplace.[17] Professor Singer more quickly dispenses with the second assumption as "demonstrably incorrect."[18] Events have shown, he argues, that the market alone has not adequately protected other stakeholders (or, for that matter, defrauded shareholders), safeguarded the environment, or fostered equality of opportunity and outcome.[19]

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[15] Joseph William Singer, *Corporate Responsibility in a Free and Democratic Society*, 58 CASE W. RES. L. REV. 1031 (2008).

[16] *Id.* at 1034.

[17] *Id.* at 1035–38.

[18] *Id.* at 1040.

[19] *Id.* at 1040–41.

The first set of articles focus on stakeholder theory. The authors engage the ongoing public and academic debate and each other regarding the desirability of changing corporate governance rules to give greater say to a broad array of stakeholders.

Professor Kent Greenfield argues for a revised approach to corporate governance that would give a voice to such stakeholders as employees, creditors, and communities.[20] Characterizing these stakeholders as "investors" in a corporation, Professor Greenfield argues that neither current corporate law nor market mechanisms adequately protect their interests.[21] As a result, he argues, corporations contribute to growing disparities in wealth and increased rates of poverty.[22]

In response to critiques of stakeholder theory, and in dialogue with his other panelists, Professor Greenfield argues that the contention that shareholder primacy is justified by their status as owners of the corporation presupposes its conclusion in its characterization of shareholders. Nor is he persuaded by the argument that as the primary residual claimants on the assets of the corporation, shareholders are best situated to safeguard the well-being of the corporation. Rather, he argues, shareholder primacy encourages managers to take greater risks than other stakeholders, most notably employees, might prefer. Because of limited liability and the likelihood that any shareholder holds stock in many companies, shareholders will be risk-preferers. While this might lead to greater firm profits, it also exposes the corporation to greater risk of failure, with all of its attendant social costs.[23] Finally, he contests the arguments that changes in corporate governance rules are either unnecessary or counterproductive because employees and others who deal with the corporation can protect themselves contractually or by encouraging legislators to constrain corporations with tougher labor or environmental laws.[24]

As Professor Timothy Glynn notes, "[w]ho makes corporate law matters."[25] He therefore mostly turns his attention away from the substantive law of corporate governance to how that law is produced. He finds that the law gives corporate managers control over the production of corporate law. This significantly shapes corporate law to the benefit of managers and to the detriment of other stakeholders.

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[20] Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043 (2008).

[21] *Id.* at 1043.

[22] *Id.* at 1043–44.

[23] *Id.* at Part II.

[24] *Id.* at Parts III & IV.

[25] Timothy P. Glynn, *Communities and Their Corporations: Towards a Stakeholder Conception of the Production of Corporate Law*, 58 CASE W. RES. L. REV. 1067, 1069 (2008).

Congress has chosen to leave much of the content of corporate law to the states. Consequently, a number of states that compete for corporate charters, especially Delaware, offer a corporate law that defers to managers and places the interests of managers and, secondarily, shareholders, ahead of other stakeholders. Delaware has triumphed in this competition, and its corporate law predominates. An important reason for its predominance is the internal affairs doctrine, a choice-of-law rule that says that one looks to the law of the state of incorporation to determine the rules governing a corporation's internal governance. Professor Glynn criticizes this doctrine as an impediment to adoption of more stakeholder-friendly laws in those states where groups other than shareholders may have the incentives and political power to reform corporate governance law.[26]

The vampire returns in Professor George Dent's response to Professors Greenfield and Glynn.[27] Here, however, the undead is not the corporation, but stakeholder theory, which, according to Professor Dent, though given a proper internment in the past, seems to repeatedly return to haunt us.[28] Professor Dent responds broadly to the arguments for a greater stakeholder role in corporate governance, as well as to the specific arguments raised by Professors Greenfield and Glynn.

Professor Dent disputes the arguments that a rule of shareholder primacy leads to an inefficient emphasis on short-term gains and to greater disregard for the harmful externalities that a corporation might impose on others. He notes that the empirical basis for such arguments is lacking and suggests that experience has shown that stakeholders are not clamoring for a seat at the board of directors' table. He further argues that in many instances other stakeholders are likely to be as happy to see the corporation impose negative externalities as would be shareholders. Moreover, there are more effective checks on corporate irresponsibility than the addition of a small number of representatives of other stakeholders on a corporation's board of directors where they might have difficulty monitoring corporate misconduct, or might be happy to indulge it if it does not adversely affect their constituencies. Corporate behavior is also constrained by the external legal regime, including such things as labor and occupational safety laws and environmental laws, by the corporation's desire to maintain a good reputation, and, at least in some instances, by the ability of other stakeholders to discipline a

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[26] *See id.* at Part II.

[27] George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 CASE W. RES. L. REV. 1107 (2008).

[28] *Id.* at 1107.

corporation by exit. Stakeholder theory, he argues, inadequately explains why these mechanisms will not suffice to constrain corporate misbehavior.[29]

Turning to Professor Glynn's recommendations, Professor Dent criticizes a number of Professor Glynn's suggestions regarding substantive corporate governance law.[30] Professor Dent is less critical of Professor Glynn's primary argument that courts should abandon the internal affairs doctrine in favor of applying the law of the primary contact state. Nevertheless, he questions whether such a doctrinal switch would accomplish much, since he argues that states that now were able to exercise greater muscularity in the law of corporate governance would, instead, largely mimic the Delaware code.[31]

In the end, Professor Dent argues that the problem is not too much solicitude for shareholders, but too little. He argues, as he has done more fully elsewhere,[32] for a more robust regime of shareholder protection.[33]

In a time of easy capital mobility and global economic competition, states and local communities struggle to attract and to retain firms. The second set of articles addresses such strategies as tax abatement and subsidies, including condemnation for private economic development that communities turn to either to exploit or to deter capital mobility.

Professor Edward Zelinsky writes as a reformed promoter of tax inducements to corporations for economic development.[34] Professor Zelinsky rejects two opposing views of tax incentives: that as tax cuts they are always good; or that as violations of the dormant Commerce Clause they are always unconstitutional. Instead, he occupies a middle ground that they pass constitutional muster and might sometimes be useful "signaling devices" to firms.[35] Nevertheless, he now views them with skepticism. While he regards tax competition among states and localities as beneficial, he believes that targeted tax incentives, by contrast, "are generally inefficient and unfair."[36]

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[29] *See id.* at Part I.

[30] *See id.* at Part II.B.

[31] *Id.* at Part V.

[32] George W. Dent, Jr., *Corporate Governance: Still Broke, No Fix in Sight*, 31 J. CORP. L. 39 (2005).

[33] Dent, *supra* note 27, at Part VI.

[34] Edward Zelinsky, *Tax Incentives for Economic Development: Personal (and Pessimistic) Reflections*, 58 CASE W. RES. L. REV. 1145 (2008). Professor Zelinsky promoted targeted tax incentives not only in academic debate, but also in his capacity as a New Haven city official. *Id.* at 1145–46.

[35] *Id.* at Part I.

[36] *Id.* at 1147.

The inefficiency of targeted tax inducements flows from a number of problems that Professor Zelinsky analyzes, including the asymmetry of knowledge about corporations' real preferences, which enhances their ability to bluff, and the short time horizons of politicians, who may opt for immediate gains that are costly long into the future. The unfairness obviously results from the uneven distribution of tax burden, which, in turn, will lead to clamoring from other corporations for similarly favorable treatment.[37] Given the incentives that Professor Zelinsky identifies to give tax abatements, and the collective action problem—that each local community must fear that even if their neighbors would jointly agree not to compete through tax incentives, some community, somewhere, would—he sees little hope for self-discipline as a check on continuing reliance on tax incentives.[38] He concludes by suggesting the possibility that Congress and state legislatures might impose such discipline from above. His skepticism, however, reaches this solution, as well.[39]

Professor Morgan Holcomb and Nicholas Smith focus not on the strengths or weaknesses of targeted tax incentives, but on the perils of litigating their legality.[40] Plaintiffs in *DaimlerChrysler Corp. v. Cuno*[41] learned how hard it is to litigate this issue when the United States Supreme Court rejected their dormant Commerce Clause Doctrine challenge to Ohio tax incentive legislation on standing grounds, thereby never reaching the merits. The Court held that the challengers to the Ohio tax incentive system lacked standing either under basic standing doctrine or as state taxpayers.[42]

In the wake of *Cuno*, opponents of tax incentive systems have turned to state courts and relied, primarily, on state constitutional grounds. Professor Holcomb and Smith examine the fate of such

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[37] *Id.* at Part II.

[38] *Id.* at Part III.

[39] *Id.* at 1154.

[40] Morgan L. Holcomb & Nicholas Allen Smith, *The Post-*Cuno *Litigation Landscape*, 58 CASE W. RES. L. REV. 1157 (2008).

[41] 547 U.S. 332 (2006).

[42] Regarding traditional standing doctrine, the Court concluded that the plaintiffs' assertions of injury in fact, causation, and redressability were all too speculative to sustain standing. *Id.* at 342–46. Regarding taxpayer standing, the Court reaffirmed its position that assertions of taxpayer standing against a state would be analyzed under the same narrow rules that apply to assertions of taxpayer standing against the federal government. *Id.* That doctrine, which saw brief light in *Flast v. Cohen*, 392 U.S. 83 (1968), was significantly circumscribed in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Indeed, while the Court refused to overrule *Flast* in its most recent encounter with taxpayer standing, *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), there is reason to believe that nothing really remains of taxpayer standing, or that, at any rate, trying to get into federal court on the basis of taxpayer standing in a claim against the federal government or a state is much like trying to pass a camel through the eye of a needle.

challenges in Minnesota and North Carolina state courts, where claims have, again, mostly crashed on the rocks of standing, though there have been adverse merit rulings on some claims that survived standing challenges. They criticize the application of state standing doctrine in these cases as too stringently applied.[43]

Professor Ilya Somin examines the susceptibility of private economic development takings to capture by rent-seeking special interest groups and the failure of most post-*Kelo v. City of New London*[44] legislation to deal effectively with the rent-seeking problem.[45] Both problems, he argues, stem in significant part from the deliberate (and rational) ignorance of the electorate regarding the intricacies of economic development takings.[46]

Given the broad reach of "economic development," the opportunities for rent-seeking in takings on behalf of private owners for economic development purposes are plentiful. Voters and the political process are inadequate monitors of this tendency because the costs of determining the benefit of a taking are high while the value of such information to the individual voter is low. Information costs are high because these plans are often complex and any economic benefit occurs over a long time horizon. The value of such information, a collective good, on the other hand, is low to any individual voter, who recognizes that his or her potentially disciplining vote will have limited impact or personal benefit.

For the same reason, the prospect for much effective post-*Kelo* legislation that would limit economic takings abuse is slim. While polls indicate that there was widespread hostility to *Kelo*, they also demonstrate that people are unaware of and uninterested in the details (and typically even the existence) of anti-*Kelo* legislation for the same reasons that they are not active monitors of economic development takings. Professor Somin suggests that, consequently, most state legislatures have contented themselves with enacting ineffective "position-taking" legislation that satisfies their constituents' desire for a response, while causing little offense to powerful developer and other business groups, who are satisfied with the toothlessness of the

[43] As Holcomb and Smith show in Minnesota and North Carolina, post-*Cuno* challenges initially raised the dormant Commerce Clause Doctrine claim. Holcomb & Smith, *supra* note 40, at Part IV. In a subsequent round of litigation in both states, the plaintiffs abandoned the dormant Commerce Clause issue. Presumably, they did so in order to render their suits unremovable to federal court in the hope of encountering more favorable standing doctrine based on state law. *Id.* at Part V.

[44] 545 U.S. 469 (2005).

[45] Ilya Somin, *The Politics of Economic Development Takings*, 58 CASE W. RES. L. REV. 1185 (2008).

[46] *Id.* at 1185–86, Part I.

legislative response.[47] He suggests that while a small number of states have responded more aggressively, the most effective responses to *Kelo* will have to come from the courts.[48]

Attorney Steven Kaufman considers the obstacles to regional economic development in the aftermath of *Kelo*.[49] Kaufman argues that many regional economies, especially those in metropolitan areas whose economies relied in the past on heavy industry, face economic obsolescence if they are unable to plan and implement competitive regional strategies for economic development.[50]

Kaufman contends that critical to regional economic success is elimination of intra-regional community competition. Also critical is the availability of eminent domain for the purpose of economic development whether by government entities or private developers. Community competition is a continuing challenge that often vexes regional solutions. In the aftermath of *Kelo* many state legislatures and courts have curtailed the ability of communities to use eminent domain for economic development done by private developers, and Kaufman examines some examples of this backlash.[51]

Kaufman calls for greater clarity in the law regarding the level of deference due to legislative decisions regarding economic development takings. He asks that the legislative and judicial reaction to *Kelo* not undermine the powerful tool of economic development takings, while focusing, instead, on greater protections against the abuse of legislative power in these matters.[52]

The final panel turned to the question of local regulation of corporations perceived to be bad or unwelcome neighbors. In the most extreme instances, communities have sometimes organized to bar big box stores, often Wal-Mart, from locating in their communities. Short of that, communities have wrestled with what sort of restrictions they may legally place on big box stores and other corporations whose presence they might perceive as a mixed blessing.

Professor Patricia Salkin examines the variety of tools available to communities that seek to restrict "formula businesses" from locating within them, or to control the behavior of those businesses when they do establish a presence in a particular community.[53] Formula

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[47] *Id.* at Part II.B.2.

[48] *Id.* at 1197–98.

[49] Steven S. Kaufman, *Regional Economies and the Constitutional Imperative of Eminent Domain*, 58 CASE W. RES. L. REV. 1199 (2008).

[50] *Id.* at Part I.

[51] *Id.* at Part II.

[52] *Id.* at 1232.

[53] Patricia E. Salkin, *Municipal Regulation of Formula Business: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251 (2008).

businesses are not only the prototypical big box stores, but all businesses, including restaurants, banks, hotels, and other retail stores, that through their business plans and contracts require uniformity in such features as décor, architecture, standardized products or service, and methods of operation.

Communities may seek to restrict or regulate such enterprises for a variety of reasons, some legal and others legally problematic. Communities act out of a desire to retain community character and aesthetics, especially in unique communities that are dependent on the tourist trade. They may also act out of concern about various environmental impacts including storm water runoff from large parking lots, light pollution, increased traffic, and urban sprawl. Some formula businesses have prompted community reactions based on social equity concerns, generally related to an enterprise's labor practices, either domestically or internationally, or environmental practices. Finally, and importantly, communities act out of concern about economic impact, both on the community as a whole, and on local businesses that may find it difficult to compete with large chain stores.

Professor Salkin surveys and analyzes a large array of tools available to communities seeking to restrict or restrain formula businesses. Many of these are traditional and newer mechanisms of land use control ranging from zoning to comprehensive land use plans to historic district regulations to limitations on the ability of big box stores to abandon their property without providing for its sale, upkeep, or demolition, with many stops in between.[54] In addition to these methods, she also analyzes a variety of economic and social controls including economic impact reviews and private agreements between community groups and developers known as community benefits agreements. She notes that motive can be critical when a community restricts or restrains formula businesses and that regulation for the purpose of economic protectionism might be deemed an unlawful interference with out of state commerce under the dormant Commerce Clause Doctrine.[55] She concludes that careful planning and consensus building within a community can produce workable checks on formula businesses.[56]

Professor Brannon Denning explores further the dormant Commerce Clause Doctrine's limits on the regulation of big box and other formula stores.[57] He notes that, to date, the dormant Commerce

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[54] *Id.* at Part II.

[55] *Id.* at Part III.

[56] *Id.* at 1287.

[57] Brannon P. Denning, *Dormant Commerce Clause Limits on the Regulation of Big*

Clause claims have not fared well in challenges to local ordinances that restrict or effectively exclude big box and formula stores. He begins by critically examining the two most recent decisions involving dormant Commerce Clause challenges to such local ordinances: *Wal-Mart Stores, Inc. v. Turlock*[58] and *Island Silver & Spice, Inc. v. Islamorada.*[59]

Professor Denning then ponders why dormant Commerce Clause claims have had so little success in challenges to local ordinances regulating big box stores and other formula businesses. He posits that one reason is simply the confusing signals that the Supreme Court has itself sent in this area. Consequently, federal judges find this area confusing and fail to understand that proof of protectionist purpose in and of itself is sufficient to invalidate a zoning ordinance, just as they fail to make appropriate use of evidence of discriminatory effects. More than mere confusion is at work, however. Drawing on recent work by Professor James Whitman that contrasts a "producerist" impulse in European law and a "consumerist" impulse in U.S. law, Professor Denning argues that deference to box store restrictive ordinances represents a producerist hold-over in the landscape of American law.[60] Why then should such a sport survive dormant Commerce Clause challenges? Professor Denning hypothesizes that the difference between a more robust application of the dormant Commerce Clause to producerist legislation on the state level and a more deferential approach to local regulation may reflect judicial deference to local land use regulation and reluctance to second guess local interests.[61]

Finally, attorney Catherine LaCroix considers mechanisms by which states and local governments can help to mitigate the environmental impacts of big box and other formula businesses.[62] Among these mechanisms are environmental impact statements (EIS) pursuant to the requirements of State Environmental Policy Acts (SEPAs).

LaCroix examines the implementation of SEPAs in New York, Washington, and California and describes their potential power in reshaping the impact of formula businesses on local communities.

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*Boxes and Chain Stores: An Update*, 58 CASE W. RES. L. REV. 1233 (2008).

[58] 483 F.Supp. 2d 987 (E.D. Cal. 2006).

[59] 475 F. Supp. 2d 1281 (S.D. Fla. 2007).

[60] Denning, *supra* note 57, at Part III.

[61] *Id.* at 1249.

[62] Catherine J. LaCroix, *SEPAs, Climate Change, and Corporate Responsibility: The Contribution of Local Government*, 58 CASE W. RES. L. REV. 1289 (2008).

She notes that through the process of determining the environmental impact of siting and other decisions relating to businesses, state environmental agencies and local zoning and land use boards may be able to identify and mitigate environmental impacts that might not otherwise be regulated by federal or state environmental laws.[63] This may be particularly true regarding land uses that contribute to global climate change. She also argues that even in the absence of a SEPA local governments might be able to require an environmental impact inquiry pursuant to either their powers to regulate land use or their home rule power. Finally, she offers the hopeful expectation that state and local EIS requirements may foster greater corporate social responsibility.[64]

We have witnessed a series of dramatic and troubling events since the participants in this Symposium presented their papers. In the words of billionaire investor Warren Buffet, the economy has "'fallen off a cliff.'"[65] In the wake of this deep recession and the failure or near collapse of a number of prominent financial institutions, there is a growing distrust in the ability of loosely regulated or unregulated markets to self-correct. Further, in the face of growing economic distress, Americans, once again, appear to be taking a populist turn against what are often seen as irresponsible and greedy corporations. To date, that populist sentiment has focused primarily on issues of executive compensation, especially within corporations that have received federal financial bailouts. It is too soon to tell whether or not that sentiment will also result in a broader willingness to reconsider fundamental questions of corporate governance. The financial crisis and recession have, in turn, threatened the viability of numerous corporations. As a result, questions of what might local communities and the nation do, not only to retain but to sustain weakened corporations have come to the fore, again.

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[63] *Id.* at Part II.

[64] *Id.* at Part III.

[65] Warren Buffett to CNBC: Economy Has "Fallen Off a Cliff," Posting of Alex Crippen to Warren Buffett Watch, http://www.cnbc.com/id/29592831 (Mar. 9, 2009) (quoting Warren Buffett's statement during an appearance on CNBC's *Squawk Box*); Jonathan Stempel, *Buffet Says Economy Fell Off Cliff*, REUTERS, Mar. 9, 2009, http://www.reuters.com/article/newsOne/idUSTRE5282J820090309.