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# Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law

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FAITH STEVELMAN

## Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law

ABOUT THE AUTHOR: Faith Stevelman is a professor of law and director of the Center on Business Law & Policy at New York Law School. This article is dedicated to her daughters Zoe and Allegra, to Denise Morgan's Sylvan, and to Pam Champine's Isabella, with the hope that they will each find good work they are passionate about doing, as their mothers have.

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## I. INTRODUCTION

In fifteen years of teaching Corporations and Securities Regulation, and various seminars on business law, I have failed to give the subject of corporate social responsibility its due. This is surprising because my interest in corporate social responsibility issues was a significant part of what led me to become a law professor. This interest in corporate social responsibility (“CSR”) took hold notwithstanding that I do not recall hearing much about the subject during law school.<sup>1</sup> The omission is especially startling because I went to a self-consciously liberal law school committed to using law as an instrument of progressive social change. But social welfare concerns were not manifest in my business law courses. They were not then, and I would be surprised if they are now. To paraphrase what Duncan Kennedy once told me, after the 1980s the public law curriculum inherited critical theory; the private law curriculum—markets. Hence, even twenty years after my graduation, it is still unlikely that law students learn much about corporate social responsibility in the basic business law courses.

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1. What led me to the CSR question was not my law studies, but my graduate studies. Unlike many future business law professors, I did not head for a graduate economics department. Instead, I completed three years of post-graduate study in a Ph.D. program in Yale University's Department of Renaissance Studies. As even a brief survey of the period reveals, these were formative years in the development of banking and trade, cities and markets, and power struggles between commercial, political, and religious institutions. This graduate work has led me to a socio-economic perspective on corporate law and market regulation—a perspective in which firms and market participants are appropriately analyzed through a broad cultural lens.

This article considers the explanations for this omission and its significance for American legal education, future corporate lawyers, and society. It begins with a discussion of practical impediments to teaching CSR as part of the law school curriculum. It then provides a brief history of CSR—which is increasingly being referred to as corporate social “accountability.”<sup>2</sup> Next it discusses the traditional Corporations and Securities Regulation courses, noting where CSR issues could easily be integrated into each course’s traditional framework. Its final section proposes that the subject of corporate disclosure or “corporate transparency” can be used as a bridge between the traditional curriculum and the study of CSR. The article’s thesis is that curricular reform in the area of CSR is crucially important to the future of legal education, as well as our society’s broader wellbeing.

As successful corporate lawyers appreciate, we live in a world where hard laws and regulations operate in tandem with softer, more eclectic forms of setting standards. At the same time, corporations operate in an environment of increasingly global competition and constant media exposure. In this complex environment, the penalties arising from reputational damage are increasing, and the financial rewards from running a genuinely disciplined, principled enterprise are likely to increase. Corporate lawyers will have an increasingly central role in promoting the benefits companies can garner from CSR in terms of supporting ethical leadership, greater corporate transparency, and civil society capacity building. Facing these challenges, corporate leaders will increasingly need their legal advisors to help them build wealth for the long term.

For twenty-five years, law schools have been gearing up to meet this challenge. Perhaps because law is so technical, business law education has remained essentially micro-analytic in its orientation. And while law schools are struggling to keep their students up-to-date with the growing technical detail in the law, they have also been criticized for falling short in skills development—in relation to fact-finding, negotiating, and drafting, for example.<sup>3</sup> Helping law students synthesize different areas of law and cultivate judgment and vision, are even larger challenges. But these challenges are ones law schools must take seriously in order to help future corporate lawyers prepare for their role in counseling ethical corporations.

## II. PRACTICAL IMPEDIMENTS TO TEACHING CORPORATE SOCIAL RESPONSIBILITY

Limited time is the first challenge to teaching CSR. In the basic Corporations and Securities Regulation courses, I feel a significant responsibility to help my students prepare for the nuts and bolts of corporate and securities law practice.

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2. I use the term corporate social responsibility herein because corporate social accountability is of such recent vintage. However, the latter term is probably more appropriate because CSR is about companies taking full responsibility for their costs and the resources they consume/depend upon. “Accountability” reflects this concern nicely; it also captures the emphasis on transparency in CSR studies.
  3. *See, e.g.*, AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, at ch. 7 (Robert MacCrate ed., 1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

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Corporate law is especially doctrinally challenging because it incorporates and builds upon several areas of law—contract, property, tort, trust, civil procedure, professional responsibility, and federal securities law, for example. Furthermore, corporate legal rules and judicial opinions make little sense to students unfamiliar with basic principles of corporate finance. Absent such financial understanding, students cannot appreciate the judicial analysis of mergers, assets sales, financings, and recapitalizations set forth in the case law.<sup>4</sup> Hence a review of basic financial principles is part of the syllabus. It seems essential to proceed slowly in the basic business law courses, to involve students in sifting through the legal doctrines as applied to precise transactional settings. In this fashion students can begin to prepare themselves for the live version. Nevertheless, this immersive approach to the basic Corporations and Securities Regulation courses leaves little time for bigger policy discussions, including those relevant to CSR.

The traditional answer is to leave broader synthesis and in-depth analysis to seminars. Along these lines, in the spring of 2008 I developed a seminar focusing on W.R. Grace & Co. (“Grace”). The course focused on Grace’s problems with disclosure and legal compliance across a broad range of subject areas, including the company’s dealings with the SEC, the EPA, OSHA, and the Department of Justice.<sup>5</sup> It also focused on the relative roles of private litigation and civil and criminal enforcement.

But seminars present their own, distinct problems for legal education. Most law students focus principally on preparing themselves for the professional challenges they foresee upon graduation. Rather than taking seminars, which would deepen their understanding of the law, they often prefer to expand their knowledge base in the hope of lighter lifting come bar time. Second, students may shy away from taking seminars because they fear the additional work or the closer scrutiny associated with them, or that the success they have had on traditional short-answer exams may not carry over to seminar work, which typically requires not only consistent class participation but also the completion of a research paper. If many law students do not take seminars, then leaving crucially important subjects to be covered in them is problematic. What is and is not included in the basic business law courses is therefore of great importance for legal education and future corporate lawyers.

Another impediment to teaching CSR-related seminars is the absence of innovative, up-to-date course materials. This is a general problem in the business law area, but a more acute problem with respect to CSR, because less attention has been devoted to the subject. Of course, the development of new course materials and pedagogical approaches takes substantial time. But law schools do not encourage professors to invest substantial time in developing new teaching materials. Research grant funding is rarely made available for this purpose. Teaching materials, no

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4. For an excellent casebook in this area, see WILLIAM W. BRATTON, *CORPORATE FINANCE: CASES AND MATERIALS* (6th ed. 2008).

5. See Indictment ¶¶ 185–190, *United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007) (No. CR 05-07-M-DWM); Lisa Heinzerling, *Knowing Killing and Environmental Law*, 14 N.Y.U. ENVTL. L.J. 521, 524 (2006).

matter how innovative, are not regarded as having the importance or prestige attributed to scholarship. This inhibits innovation in the law school curriculum as it relates to CSR. In sum, the absence of CSR-related course materials remains a problem for legal education, especially given law schools' commitment to training the next century's global corporate legal advisors.

Nevertheless, market forces, including the market for law degrees, may lead to greater attentiveness to CSR.<sup>6</sup> Law schools are reckoning with globalization both at the curricular and the institutional level, and the two are related. In an increasingly mobile, interconnected world, law students are becoming more sensitive to the need to think globally. In this respect, CSR (perhaps under the rubric of "sustainability") may become a hot issue that law schools will use to distinguish themselves. Workers' demands for fair wages and safe conditions; public outcry over climate change; tradeoffs between privacy rights, information possessed by corporations, and national security; competing free speech claims on the part of corporate employers, employees, and investors—all of these issues are part of the CSR analysis. And lawyers familiar with corporate law will be at the center of all these controversies. Companies like Google, Yahoo!, and Microsoft, and their lawyers, have learned hard lessons about the relationship between profits, human rights, and politics from doing business in China.<sup>7</sup> Mining and extractive industries, and their lawyers, have grappled with these issues, across the globe, for decades.<sup>8</sup> The challenges for multinational enterprises and their legal advisors are increasing exponentially; so will the costs for lawyers who are unprepared to address them. These forces should lead law schools to promote the study of CSR as part of their curricula.

### III. FROM CSR TO CORPORATE SOCIAL ACCOUNTABILITY

#### A. Academic Boundaries

Another challenge to CSR's flourishing as a subject of study is that it has not been recognized as a discrete academic field—neither in law schools or more generally. Many academic and graduate programs touch upon the subject of businesses' and business leaders' status in the broader, socio-political environment. Such academic programs include management, economics, finance, sociology, history, philosophy, cultural studies, and law. But each of these areas has an alternative focus. The discussion of CSR is peripheral in each case.

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6. For a wonderful history of the development of legal education, see generally WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994).

7. See Public Statement, Amnesty Int'l, Amnesty International Joins Multi Stakeholder Initiative on Internet and Human Rights (Jan. 23, 2007), available at [www.amnestyusa.org/document.php?lang=e&cid=ENGPOL300012007](http://www.amnestyusa.org/document.php?lang=e&cid=ENGPOL300012007).

8. See, e.g., Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331 (2004).

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Reflecting its cross-disciplinary nature and “belated” academic status, CSR-oriented scholarship has yet to reach its full academic maturity.<sup>9</sup> Its topical boundaries are fluid and its methodologies are still evolving—and acceptance of change in the academy is slow. Senior scholars in the area of CSR are not sufficiently numerous as to be readily available as mentors. Younger scholars, laboring without tenure (and hence needful of the approval of their academic superiors) might still be taking a risk by focusing on CSR-related issues.<sup>10</sup>

Outside of the legal academy, there is more interest in CSR studies. After the serial financial crises of the last decade, business schools are giving greater attention to the subject of “ethical leadership.”<sup>11</sup> Accelerating signs of climate change; continued instances of high profile, international corporate corruption; and consumers’ expressed preference for products that are less exploitative of the environment, for example, are fostering a reorientation in business schools’ curricula towards greater attentiveness to CSR issues.<sup>12</sup>

In addition, many universities are establishing new academic centers focusing on “sustainability.” These centers typically offer some combination of engineering, design, architecture, environmental science, consumer behavior, and public policy.<sup>13</sup> As such, they are likely to fuel academic innovation in areas related to CSR. The

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9. For an exceptional review of developments in the CSR area, written by academics in different fields, see Michael Bradley et al., *Challenges to Corporate Governance: The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 L. & CONTEMP. PROBS. 9 (1999).

10. For an extraordinarily innovative critique from one of the leading scholars in the field, see, for example, Claire Moore Dickerson, *Ozymandias As Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035, 1062 (2003); Theresa A. Gabaldon, *The Story of Pinocchio: Now I’m a Real Boy*, 45 B.C. L. REV. 829 (2004); Marleen O’Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1258 (2004); Kellye Y. Testy, *Capitalism and Freedom For Whom? Feminist Legal Theory and Progressive Corporate Law*, 67 L. CONTEMP. PROBS. 87 (2004).

11. The efforts of the Aspen Institute’s Program on Business and Society are targeted at this challenge. See The Aspen Institute, Business and Society Program, <http://www.aspeninstitute.org/policy-work/business-society/about-business-society/program> (last visited Mar. 4, 2009). Their mission statement asserts:

The Business and Society Program is dedicated to developing leaders for a sustainable global society. Through dialogues and path-breaking research, we create opportunities for executives and educators to explore new pathways to sustainability and values-based leadership. BSP’s websites, [www.CasePlace.org](http://www.CasePlace.org) and [www.beyondgreypinstripes.org](http://www.beyondgreypinstripes.org), are the leading sources of innovative curriculum in top business schools around the world.

*Id.*

12. *Id.* Notably, there is no equivalent within the legal academy at this time.

13. See The Aspen Institute Center for Business Education, Sustainability Center Research Initiative, Phase I, <http://www.aspenbce.org/teaching/sustainability.html> (last visited Mar. 4, 2009) (providing a recent catalogue of such centers); THE ASPEN INSTITUTE, A CLOSER LOOK AT APPLIED SUSTAINABILITY CENTERS (2008), available at <http://www.aspenbce.org/documents/Applied%20Sustainability%20Centers%20Final.pdf> (discussing the rise in the number of centers focused on applied sustainability); Claudia H. Deutsch, *A Threat So Big, Academics Try Collaboration*, N.Y. TIMES, Dec. 25, 2007, at A1 (discussing growing collaboration between graduate school programs on issues of sustainability).

Obama administration's expressed commitment to using environmentally friendly technologies to rebuild infrastructure will also contribute to this greater awareness and cross-disciplinary academic flourishing.

The United Nations is also taking action in areas related to CSR.<sup>14</sup> In July 2005, Kofi Annan appointed John Ruggie to serve as the Special Representative to the Secretary General in the area of Business and Human Rights.<sup>15</sup> (The business and human rights framework is occupying a significant part of the CSR agenda in the international sphere.) This initiative on the part of the United Nations is having an influence on American universities in the area of CSR. For example, together with Oxfam, Harvard's Kennedy School of Government recently co-hosted a consultation with Mr. Ruggie on the subject of non-judicial dispute resolution for human rights claims against international businesses.<sup>16</sup>

### B. Legal History

In developing an understanding of CSR, a brief look at legal history is in order.<sup>17</sup> This history sheds light on the relative under-emphasis on CSR in corporate law.

Because CSR focuses on the conduct and influence of larger, public companies, it was not a meaningful concept before the late nineteenth century. Until then, almost all business transacting was essentially local in nature and generally thinly capitalized. This meant that companies were more susceptible to local law and regulation. The early pattern of incorporation or "chartering" also limited the potential for corporate abuse. At first corporations were created by special acts (concessions) of the state's legislature. Corporations routinely requested a charter from the state where they were principally located and doing business. These charters were typically granted only where an enterprise's commercial objectives coincided with the state's larger public-regarding ones.<sup>18</sup> These natural and legal limits constrained the growth of

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14. See Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, delivered to the Human Rights Council and the General Assembly*, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007); Memorandum from Martin Lipton and Kevin S. Schwartz, Wachtell, Lipton, Rosen & Katz, A United Nations Proposal Defining Corporate Social Responsibility for Human Rights, to clients (May 1, 2008), available at [http://amlawdaily.typepad.com/amlawdaily/files/wachtell\\_lipton\\_memo\\_on\\_global\\_business\\_human\\_rights.pdf](http://amlawdaily.typepad.com/amlawdaily/files/wachtell_lipton_memo_on_global_business_human_rights.pdf).
  15. Press Release, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Doc. SG/A/934 (July 29, 2005).
  16. See CAROLINE REES, CORPORATE SOC. RESPONSIBILITY INITIATIVE, HARVARD KENNEDY SCH., ACCESS TO REMEDIES FOR CORPORATE HUMAN RIGHTS IMPACTS: IMPROVING NON-JUDICIAL MECHANISMS (2008).
  17. For an overview of the ebb and flow of attention to the CSR field, see C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 KAN. L. REV. 77 (2002).
  18. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 390-400 (3d ed. 2005); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970) (providing seminal discussions of early corporate legal history).



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power in the corporate form. Leaving aside the railroads and large oil trusts, through this period corporations posed little threat to states' ability to regulate in the public interest.

By the late nineteenth and early twentieth century, industrialization had progressed substantially, and the states enacted general laws of incorporation that fostered the conduct of business in the corporate form. The earliest incorporation laws limited the scope of legitimate corporate activity, corporations' ability to raise capital, and corporations' ability to hold stock in other corporations.<sup>19</sup> But these limits were quickly abandoned once the states realized the revenue generating potential of collecting franchise fees from companies that incorporated in their state. Indeed, the lure of franchise fees motivated the states to allow incorporation even by businesses that were neither located in nor doing significant business within their state. When New Jersey (the early front runner) proved indecisive about the direction of its corporate laws, Delaware took the lead. As a small state it had much to gain from franchise fees, especially the larger ones payable by public companies. Furthermore, because Delaware had few public companies concentrated in the state, its lawmakers could craft corporate laws without pressure from powerful, potentially adverse in-state constituencies. In this respect, the specialization of corporate law—the separation between corporate issues and ones relating to third parties' interests—was an indelible feature of its early development. The areas of concern identified with CSR were relegated to other areas of law. With Delaware's ascendancy, the political power base that pushed for loose, open-ended corporate laws (principally corporate managers) was divorced from politically enfranchised, in-state interests.<sup>20</sup>

This historical development of what is deemed "corporate law" has proven to be sticky. It remains true to this day, and it has had a substantial normative influence on the study of corporate law and CSR. Atomization of different areas of law relevant to CSR (laws and regulations governing shareholder voice, labor organization, workers' safety, environmental quality, creditors' rights, and corporate political conduct) has forestalled the evolution of CSR teaching and scholarship within law schools. Atomization and specialization within law have made it much harder to piece together the CSR puzzle.<sup>21</sup>

Returning to early corporate legal history: necessity sometimes pushed businesses where the law had not. As large enterprises such as railroads struggled to expand rapidly, they became sensitive to the necessity of supporting their workforce's basic needs. To meet these needs, the railroads were early contributors to the development

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19. See Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81 (1999) (documenting the early history of corporate form).

20. For discussion of Delaware's stake in corporate law, see Faith Stevelman, *Regulatory Competition, Choice of Forum and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57 (2009).

21. For further discussion of this theme, that complexity obfuscates vital questions within corporate law, see Reza Dibadj, *Delaying Corporate Law*, 34 HOFSTRA L. REV. 469 (2006); Faith Stevelman Kahn, *Legislatures, Courts and the SEC: Reflections on Silence and Power in Corporate Law*, 41 N.Y.L. SCH. L. REV. 1107 (1997). For further background, see KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW, FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2007).

of the YMCA.<sup>22</sup> And Henry Ford's efforts to "raise up" his workers' quality of life—extraordinarily intrusive and paternalistic as they were—are well documented.<sup>23</sup>

After the stock market crash in 1929 and in the years of the Great Depression, large businesses were hardly in a position to address the needs of their workers, creditors, or local communities. The rise of New Deal era legislation (and its ultimate acceptance by the federal courts) validated the federal government's role in protecting workers' and consumers' safety.<sup>24</sup> In the 1930s, Adolph A. Berle and Gardiner C. Means's seminal book *The Modern Corporation and Private Property* discussed the status of large businesses in the rapid modernization and industrialization of the United States.<sup>25</sup> Their work openly asked whether the growing ranks of publicly held companies were properly conceived of as the private property of their owners or, rather, as socio-economic institutions capable of shaping their financial and political environment to their private advantage, and sometimes the public's disadvantage. Berle and Means's writing has had a seminal impact on the modern field of corporate law. But academic corporate law has focused principally on the economic implications of separating ownership (equity investment) from control (boards and senior executive officers). Far less attention has been paid to the authors' expressed concern that massive capital accumulation in the corporate form might pose a threat to democratic social order in the United States.<sup>26</sup>

The 1950s has been described as the "era of managerialism."<sup>27</sup> In this period, economic growth and prosperity were sufficiently widespread and sustained to defer debate over businesses' broader responsibilities to society. But by the mid-1970s,

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22. See F. EMERSON ANDREWS, *CORPORATION GIVING* 23–26 (Russell Sage Foundation 1952) (1903) (providing an account of the relationship between the development of the railroads and the YMCA movement). See generally Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 *UCLA L. REV.* 579, 594–600 (1997) (discussing early corporate giving laws from the perspective of corporate governance).
23. For discussion of Ford's "benevolent" intrusion into the personal lives of his employees, see STUART BRANDES, *AMERICAN WELFARE CAPITALISM 1880–1940*, at 88–89 (1976) (describing how Ford conditioned a \$5 per day wage on his employees being made subject to intense home inspection for wholesomeness and adherence to middle class values); DOUGLAS G. BRINKLEY, *WHEELS FOR THE WORLD: HENRY FORD, HIS COMPANY, AND A CENTURY OF PROGRESS* (2003); ALLAN NEVINS, *FORD: THE TIMES, THE MAN, THE COMPANY* 553–54 (1954).
24. See generally EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 197–216 (2000).
25. See ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933).
26. For example, this was evident from the tenor of most of the papers presented at a Columbia Conference celebrating the 75th Anniversary of Berle and Means's Groundbreaking Book on Business Law. See Press Release, Columbia Law School, *CLS Hosts Conference Celebrating 75th Anniversary of Berle Book* (Dec. 3, 2007), available at [www.law.columbia.edu/media\\_inquiries/news\\_events/2007/December07/berle\\_75th](http://www.law.columbia.edu/media_inquiries/news_events/2007/December07/berle_75th) (providing a description of the conference).
27. See Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 *COLUM. L. REV.* 1931, 1982 (1991) (describing 1950s as the "high tide of benevolent managerialism").

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concern over corporate abuses once again erupted. Against the background of the Vietnam War (and corporate support for the war), there were discoveries of widespread corporate bribery and other unlawful payments at home and abroad, early concerns about corporate water and air pollution, and a growing awareness of multinationals' involvement (alongside the CIA) in the violence and political tumult in Latin America's southern cone. Debate over the power and responsibilities of public companies was reignited.<sup>28</sup>

It was in the 1970s that CSR was born as a discrete movement within corporate law. Its greatest expression was shareholder "social" activism through the corporate proxy.<sup>29</sup> As a matter of law, it was shaped, chiefly, by the SEC's shareholder proposal rule, but the SEC did not welcome this creative form of shareholder-based social activism. Nevertheless, given the Commission's mandate to act not only to protect investors but also to act "in the public interest,"<sup>30</sup> the SEC could not go too far in squelching shareholder activism without risking even more vocal backlash. Dr. Leon Sullivan's proxy activism connecting corporate leadership issues with equal rights issues was the most famous example in these early years.<sup>31</sup> Such shareholder proxy activism spurred corporations to increase diversity and limit racial and gender bias in the workplace. It also spurred social initiatives such as divestment from South Africa (where apartheid persisted).<sup>32</sup>

CSR has also pushed in favor of greater attention to institutional integrity and accountability. The corporate bribery and illegal campaign contribution scandals mentioned above gave rise to Congress's enactment of the Foreign Corrupt Practices Act of 1977.<sup>33</sup> The Act not only prohibited such bribery,<sup>34</sup> but also raised the standards for accuracy and reliability in corporate reporting through federal books

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28. For evidence within the corporate case law, see *Theodora Holding Co. v. Henderson*, 257 A.2d 398, 404 (Del. Ch. 1969) (describing social tensions pushing in the direction of a greater showing of corporations' legitimacy).
  29. See generally Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals As a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L.J. 365 (2006) (addressing the "building blocks" of the allocation of power between shareholders and management); Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419 (1971) (offering a general survey of the phenomenon).
  30. Securities Exchange Act, 15 U.S.C. § 78n(a) (2006).
  31. See Dr. Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265 (2004) (illustrating the continued influence of Dr. Sullivan's proxy activism).
  32. See Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1134 (1993) (discussing the development of the shareholder proposal rule); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879 (1994) (describing the history of shareholder activism and setting forth the argument that the SEC's gatekeeping role over shareholder proposals was ill conceived).
  33. 15 U.S.C. §§ 78dd-1 to -3 (2006).
  34. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2006) (setting forth prohibited foreign trade practices by issuers and domestic concerns).

and records and internal controls requirements.<sup>35</sup> In 1987, this initiative was supplemented by the publication of the Committee of Sponsoring Organization's influential Treadway Report ("Treadway"), which fleshed out the nature of "good corporate governance" in terms of internal controls.<sup>36</sup> These efforts have been combined with ongoing securities law reforms, which have raised the standards for accurate and timely corporate reporting, as expressed recently and most dramatically in Congress's enactment of the Sarbanes-Oxley Act of 2002.<sup>37</sup>

Social action shareholder proposals are still a significant phenomenon in the CSR area, though more traditional "shareholder value" related proposals have also become a constant.<sup>38</sup> With respect to the latter, for example, shareholder proposals calling for the repeal of anti-takeover charter and bylaw provisions have become commonplace.<sup>39</sup> Furthermore, there is overlap between "social action" and "shareholder value" proxy proposals, as is evident in recent proposals focusing on executive compensation.<sup>40</sup>

### C. CSR as a Social Movement and Business Strategy

CSR appears to be gaining traction as a grassroots social movement; hence, corporations are increasingly sensitive to the need to manage consumer, investor, and popular concern about CSR issues.<sup>41</sup> The growth of ethically motivated investing is

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35. See 15 U.S.C. § 78m(b) (2006).

36. See REPORT OF THE NAT'L COMM'N ON FRAUDULENT FIN. REPORTING 31-48 (1987); Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237 (1997).

37. See discussion *infra* Part V.B.

38. See, e.g., *Am. Fed'n of State, County, and Mun. Employees v. Am. Int'l Group*, 462 F.3d 121 (2d Cir. 2006) (involving a shareholder proposal regarding procedural aspects of placing shareholder nominated candidates on a corporate ballot); Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,914, 92 SEC Docket 256 (Dec. 6, 2007) [hereinafter Exchange Act Release 56,914] (the SEC's most recent pronouncement on shareholder proposals).

39. See, e.g., Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

40. See, e.g., "Say on Pay" Shareholder Advisory Votes on Executive Compensation: The New Frontier of Corporate Governance Activism, M&A COMMENTARY (Latham Watkins, New York, N.Y.) Nov. 2007, available at [http://www.lw.com/upload/pubContent/\\_pdf/pub2039\\_1.pdf](http://www.lw.com/upload/pubContent/_pdf/pub2039_1.pdf).

41. See Kellye Y. Testy, *What Is the "New" Corporate Social Responsibility?: Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002). In a recent study, consumers favored support of community philanthropy but cared even more about employee benefits and human rights in manufacturing, which are core business issues as well as social issues. See Press Release, Cone LLC, 2004 Cone Corporate Citizenship Study Results: Multi-Year Study Finds 21% Increase in Americans Who Say Corporate Support of Social Issues Is Important in Building Trust (Dec. 8, 2004), available at <http://www.metronewyork.childrensmiracletnetwork.org/radio/radio.php?view=45>.

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one example of this increased interest and concern.<sup>42</sup> Increased consumer preference for recyclable products is another example.<sup>43</sup>

There are many strategies that businesses use to improve their appeal to socially conscious consumers and investors.<sup>44</sup> The most traditional strategy is corporate donations to nonprofits—commonly known as corporate philanthropy or corporate charitable giving.<sup>45</sup> Corporate philanthropy encompasses not only direct financial contributions, but also the gifting of products and employee time to nonprofits. As is true with respect to all forms of corporate civic action, corporate philanthropy remains controversial. Because there are foreseeable public relations benefits arising from such donations, some commentators view them as being fundamentally self-serving—in essence another form of corporate advertising. Furthermore, corporate giving is still not subject to a comprehensive legal disclosure requirement, a fact that undermines the legitimacy of this form of corporate civic action.<sup>46</sup> Although the motivation for corporate giving will always remain murky, a mandatory SEC disclosure requirement would go far in promoting the legitimacy of corporate philanthropy programs. Companies should also be pressed to go on record with the criteria that govern which gifts they make. Companies that have well run philanthropy programs will likely continue to garner consumer benefits from them.

A more recent CSR phenomenon is the adoption of Corporate Codes of (Ethical) Conduct (“Corporate Codes”).<sup>47</sup> These Codes address many concerns associated with CSR, including commitments to accurate reporting; prohibitions on self-dealing and other unlawful payments; responsibility to workers, communities, and the

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42. See, e.g., Calvert Investments, <http://www.calvertgroup.com> (last visited Mar. 6, 2009) (providing a prominent example of a mutual fund family devoted to creating wealth through socially responsible investing); Social Investment Forum, <http://www.socialinvest.org> (last visited Mar. 6, 2009) (maintaining a website functioning as a clearinghouse of information on the subject).

43. See, e.g., NAT'L POLLUTION PREVENTION CTR., POLLUTION PREVENTION IN CORPORATE STRATEGY (2005), available at <http://www.umich.edu/~nppcpub/resources/compendia/CORPpdfs/CORPcaseA.pdf> (providing a case study assessing McDonald's commitment to environmentally friendly operations).

44. See John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 IOWA J. CORP. L. 1, 8–23 (2005).

45. See CURT WEEDEN, CORPORATE SOCIAL INVESTING: THE BREAKTHROUGH STRATEGY OF GIVING AND GETTING CORPORATE CONTRIBUTIONS 1–11 (1998); Jayne W. Barnard, *Corporate Philanthropy, Executives' Pet Charities and the Agency Problem*, 41 N.Y.L. SCH. L. REV. 1147, 1153–54 (1997); Kahn, *supra* note 22.

46. There have been efforts to adopt such a rule. In 1997, Rep. Paul Gillmor (R-Ohio) proposed two bills requiring corporate disclosure and shareholder participation in charitable giving. See H.R. 944, 105th Cong. (1997); H.R. 945, 105th Cong. (1997). Rep. Gillmor introduced a similar bill in 2002 targeting donations to organizations affiliated with corporate officers and directors. See H.R. 3745, 107th Cong. (2002). An initial draft of the Sarbanes-Oxley Act in the House included a disclosure requirement for a corporation's charitable gifts and its board members' charitable organization affiliations, H.R. 3763, 107th Cong. § 7(a)(2) (as passed by House, Apr. 24, 2002), but the adopted legislation failed to do so. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 & 18 U.S.C.).

47. See 15 U.S.C. § 7264 (2006).

environment; and the supervision of supply chains.<sup>48</sup> There was a vast movement in favor of public companies' adoption of the Corporate Codes in the late 1990s. The popular phenomenon was given further force by the Federal Sentencing Guidelines, which promised lighter penalties if corporate transgressors demonstrated they had established a bona fide institutional framework for promoting legal compliance.<sup>49</sup> Corporate law firms also pushed the adoption of Corporate Codes, as lawyers increasingly recognized that helping corporations respond to CSR concerns presented valuable new practice opportunities.<sup>50</sup>

As is true of corporate philanthropy programs, Corporate Codes of conduct have proven controversial. It has been difficult to distinguish the lip service paid to ethical corporate conduct from more genuine, deeply embedded institutional commitments. But it is clear that consumers' and investors' expectations of ethical business conduct are rising. And it is also clear that these rising expectations are fueling even greater corporate and academic interest in the subject of CSR. Over time, this increased attention and analysis should add clarity to what is surface and what goes deeper in CSR programs.<sup>51</sup>

Another sign of the growing public, investor, and consumer interest in CSR is evident in the phenomenon of public companies' increasingly publishing "social responsibility reports." These are typically distributed as part of companies' annual communications to shareholders, but it is obvious that they are written with a broader audience in mind.<sup>52</sup> Once again, there is concern that these reports may be superficial

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48. See Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 *Vt. L. Rev.* 253 (2005).

49. Melissa Ku & Lee Pepper, *Corporate Criminal Liability*, 45 *Am. Crim. L. Rev.* 275, 297 (2008).

50. See Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 *J. Corp. L.* 267, 285, 311 (2004) (discussing law firms' stake in helping implement formal systems to address various risks to the corporation, including reputation and political risk). The American Bar Association recently created a Committee on Corporate Social Responsibility. The Committee's mission statement is illuminating:

The Corporate Social Responsibility (CSR) Committee is a national leader for attorneys working in this rapidly growing practice area. The rise of transnational business has created new challenges for corporations and their counsel. Companies in nearly every industry—from technology, to apparel, to mining and extractive industries—have come under scrutiny from governments, human rights groups, and their shareholders as they navigate the challenges of investing and operating in foreign nations, with vastly different standards of human rights, environmental protections, and corruption standards that are expected of them at home. Companies face lawsuits in the U.S. courts for alleged violations of the Alien Tort Statute and a host of other laws for their conduct abroad. At home, corporations seek guidance in seeking to remain profitable industry leaders, while fulfilling their obligations as good corporate citizens.

American Bar Association Section of International Law: Corporate Social Responsibility Committee, <http://www.abanet.org/dch/committee.cfm?com=IC634100> (last visited Mar. 6, 2009).

51. See Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 *Iowa J. Corp. L.* 675, 680 (2006).

52. Even a cursory Internet search turns up a virtual treasure trove of CSR reports by public companies. Most companies post these reports on their corporate web pages. See, e.g., TARGET, CORPORATE

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public relations campaigns; even worse, they could be intended to smooth over legal compliance problems or companies' exploitation of market externalities.

On the bright side, however, even if companies adopt CSR statements and Corporate Codes for merely defensive or public relations purposes, once progressive social objectives are codified as part of the corporation's mission statement, they are likely to be absorbed more deeply into the company's culture.<sup>53</sup> After publishing CSR reports or adopting CSR related Corporate Codes or mission statements, companies have more to lose in terms of consumer and investor good will if they are exposed as being hypocritical. Employee morale suffers if there is a disconnect between the company's stated goals and its actual operations. Such loss of morale can be costly for organizations. Enhanced political risk is also a factor. If notable failures are exposed after a company has launched a high profile CSR campaign, politicians may be more motivated to push for mandatory rules and restrictions. Such legal rules are likely to be more costly for companies than self-regulation would have been. In these respects, Corporate Codes and CSR publicity campaigns may gain more institutional traction than cynics might believe.

The power of the Internet is also driving CSR's increasing influence. The Internet provides a low cost, highly effective tool for galvanizing consumers' and investors' opinions and helping them to take collective action. The Internet is also forcing more information relevant to CSR out into public view. In the age of cell phone cameras, YouTube, and blogging, it is much harder for companies to cover up accidents and abuses.<sup>54</sup> The better run ones situate themselves to be proactive rather than reactive. The power of the Internet has also reduced corporate senior officers' ability to hide behind a veil of ignorance. Plausible deniability is less plausible in a world where information flows so freely. Accordingly, improved information technology is promoting more rigorous fiduciary standards of oversight and good faith in relation to corporate boards and senior executive officers.<sup>55</sup>

The dynamics of group behavior may also work in favor of CSR. Business conduct of this kind appears to be highly mimetic ("isomorphic"). Companies often conform their formal guidelines and Corporate Codes of best practices (and efforts

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RESPONSIBILITY REPORT (2008), available at <http://sites.target.com/site/en/company/page.jsp?contentId=WCMP04-031084>.

53. See Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 786 (2007).
54. See generally Michele Micheletti & Dietlind Stolle, *Mobilizing Consumers to Take Responsibility for Global Social Justice*, 611 ANNALS 157 (discussing how various activist organizations, including "Internet spin doctors," have reached consumers and forced socially irresponsible companies (citing specifically sweatshop targets such as Nike) to alter their conduct).
55. See, e.g., *Stone v. Ritter*, 911 A.2d 362 (Del. 2006) (defining the duty of good faith as a component of the duty of loyalty specifically in the context of a derivative complaint); *Ryan v. Lyondell Chem. Co.*, No. 3176-VCN, 2008 Del. Ch. LEXIS 105, at \*48 (Del. Ch. July 29, 2008) (discussing duty of care in the context of approving a merger); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (articulating the standards by which director liability and oversight are measured). For an excellent analysis of the recent good faith cases, see Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719 (2007).

to adhere to them) to those of their peers or leaders in the industry. Public companies seem remarkably responsive to the pressure of emerging norms and industry best practices. This is visible in regard to the adoption of Corporate Codes of ethical conduct, commitments to sustainability, the observance of labor and employment standards, and the monitoring of supply chains.<sup>56</sup> Even though CSR may only recently have achieved critical mass, this does not mean that the changes it is producing will not have staying power.<sup>57</sup> As was true in regard to racial and gender discrimination in the workplace, practices that were once part of the status quo have become fundamentally unacceptable, through a process of gradual social and institutional evolution. A growing body of empirical evidence suggests that investors', consumers', and workers' commitments to CSR are more than mere lip service.<sup>58</sup> The election of Barack Obama as America's forty-fourth president may signal a tipping point in favor of more social solidarity, and successful corporations will realize the benefits of promoting this positivity.<sup>59</sup>

#### D. CSR and the Regulatory State

In American law, the work of CSR happens in separate, specialized areas of law, especially in federal regulation. These include regulations governing the workforce (including health and safety requirements and pension and health care requirements), environmental regulations, consumer safety regulations, specialized food and drug safety regulations, regulations protecting investors from fraud, and regulations requiring accountability regarding corporate lobbying and other corporate political activity.

The scope of federal (and state) regulations has expanded dramatically over the past fifty years. Nevertheless, there is widespread concern that the regulations are not operating to yield greater corporate responsibility and improved social welfare. The reasons for this gap are too complex to be addressed herein. But it is obvious that politicians and legislatures have a strong incentive to make promises and even pass laws that promise broad social welfare reforms, but at the same time have an

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56. See generally Stuart Cooper, *Corporate Social Performance: A Stakeholder Approach*, CORPORATE SOCIAL RESPONSIBILITY SERIES (David Crowther ed., 2004) (discussing what influences societal pressures have on corporate governance).

57. See Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75 (2005).

58. For scholarship demonstrating concern for CSR issues, see LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* (2001); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroad*, 62 LAW & CONTEMP. PROBS. 9 (1999); Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431 (2002); Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611 (2001); Fairfax, *supra* note 53; O'Connor-Felman, *supra* note 10.

59. Time and again in his inauguration address, the forty-fourth president called for a new embrace of responsibility in every sector of American society. Inaugural Address, DAILY COMP. PRES. DOC. DCPD200900001 (Jan. 20, 2009).



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incentive to please corporate industry by giving the nod to implementing regulations that are toothless.

In this vein, Americans have become increasingly worried about the content and safety of a broad range of products manufactured by multinational corporations. Laxity, carelessness, and underfunding appear to be significant problems at the Consumer Products Safety Commission.<sup>60</sup> The Food and Drug Administration has also come under recent fire for inadequately policing the safety of medicines sold by American pharmaceutical corporations.<sup>61</sup> The quality of OSHA's oversight of workplace safety has been subject to increased criticism.<sup>62</sup> And despite some increased rigor on the EPA's part, industry has succeeded in resisting heightened emissions controls and more rigorous air pollution limits which would effectively reduce toxic smog.<sup>63</sup> And the SEC appears to have been shockingly slow in responding to signs of massive investor fraud, as exemplified by the recent multi-billion dollar Madoff fraud (an estimated \$50 billion loss)<sup>64</sup> and Stanford fraud (an estimated \$8 billion loss).<sup>65</sup> In early February 2009, the head of the SEC's enforcement division resigned under heavy criticism.<sup>66</sup> In fact, the SEC's regulatory and oversight failures seem alarmingly widespread. The Commission itself conceded that its lax oversight contributed to the recent, grave financial turmoil of 2008–2009.<sup>67</sup> This laxity is evident in the SEC's waiver of net capital requirements (which had limited the leverage banks could assume),<sup>68</sup> its failure to regulate better credit rating agencies (whose failed ratings contributed to the recent securitization debacle),<sup>69</sup> and shortfalls

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60. See Eric Lipton, *Safety Agency Faces Scrutiny Amid Changes*, N.Y. TIMES, Sept. 2, 2007, § 1, at 1. In 2007, Mattel had to recall more than one million toys that had been made in China because they were covered in lead paint. David Barboza, *Why Lead in Toy Paint? It's Cheaper*, N.Y. TIMES, Sept. 11, 2007, at C1.
  61. Gardiner Harris, *Study Condemns F.D.A.'s Handling of Drug Safety*, N.Y. TIMES, Sept. 23, 2006, at A1.
  62. See Stephen Labaton, *OSHA Leaves Worker Safety Largely in Hands of Industry*, N.Y. TIMES, Apr. 25, 2007, at A1.
  63. See Associated Press, *E.P.A. Urges Tougher Rules on Smog*, N.Y. TIMES, June 22, 2007, at A14.
  64. Alex Berenson & Diana Henriques, *S.E.C. Issues Mea Culpa on Madoff*, N.Y. TIMES, Dec. 17, 2008, at B1.
  65. On February 17, 2009, the SEC filed civil charges against R. Allen Stanford and three of his companies in a federal district court in Dallas. Press Release, Sec. & Exch. Comm'n, SEC Charges R. Allen Stanford, Stanford International Bank for Multi-Billion Dollar Investment Scheme (Feb. 17, 2009), available at <http://www.sec.gov/news/press/2009/2009-26.htm>. The SEC itself has gone on record with the observation that Stanford's bank promised improbable, if not impossible returns to investors, which certainly raises questions about why the SEC did not act sooner. Complaint at 2, Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd., No. 09-CV-00289N (N. Dist. Tex. Feb. 16, 2009).
  66. See Gretchen Morgenson, *Top Enforcer at the S.E.C. Steps Down*, N.Y. TIMES, Feb. 10, 2009, at B1.
  67. Stephen Labaton, *S.E.C. Concedes Oversight Flaws Fueled Collapse*, N.Y. TIMES, Sept. 27, 2008, at A1.
  68. See *id.*
  69. See Gretchen Morgenson, *Debt Watchdogs: Tamed or Caught Napping?*, N.Y. TIMES, Dec. 6, 2008, at A1.

in disclosure requirements, which allowed financial risk-taking and corporate leverage to spiral out of control.<sup>70</sup>

Surveying the landscape, it would appear that there are fundamental shortcomings in the system of regulatory oversight in the United States, and that corporations have been able to take advantage of these shortfalls in regulation. Perhaps industry has grown too powerful in influencing regulation and minimizing enforcement. Perhaps administrative agencies have been inadequately funded, poorly organized, or complacent. The important point here is that critics of CSR cannot, in good faith, counter that a corporation's job is merely to conform to the existing regulations, because it is apparent that regulations and regulators cannot keep up with corporations determined to outrun them.

Compared to public companies, government regulators will always be understaffed and underfunded. Furthermore, companies spend substantial sums to shape the regulations that will govern them (and their corporate speech is protected by the First Amendment of the U.S. Constitution). Despite the apparent expansion of federal regulation in the past half century, corporations have carved out room to maneuver under the rubric of "self regulation." But this system of industry self regulation has too often failed. There has been too little corporate transparency and too much arrogance. (The role of unregulated financial derivatives in the current financial crisis provides an example of this.) Corporate irresponsibility has been fostered by agency under-enforcement. The present economic turmoil in the financial markets, which has triggered a broader and profound economic downturn, reflects the public's loss of confidence in corporate America and Wall Street at many levels. The flight from CSR and responsible regulatory oversight has cost America dearly at the bottom line, and harmed its reputation in the world.

#### *E. Globalization, CSR, and Contemporary Political Philosophy*

As Michael Sandel has observed, although Americans are disinclined to discuss political philosophy, this does not mean we do not have one.<sup>71</sup> Indeed, America's embrace of pro-market ideology has played an enormous role in political and economic affairs domestically and internationally over the past thirty years.<sup>72</sup> This is evident in the triumph of "Reaganomics" in the United States, and our exporting of the Washington consensus in favor of free market ideology around the globe. This ideology has been unfavorable to CSR. Even the Supreme Court has often looked unfavorably upon plaintiffs' allegations of corporate trespasses against the

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70. See Joe Nocera, *Risk Mismanagement*, N.Y. TIMES, Jan. 2, 2009, § MM (Magazine), at 24. The true intricacies of quantitative metrics of risk were not made clear to investors; they may not even have been clear to the financial institutions and investment bankers who relied upon them. *Id.*

71. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

72. See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PENN. L. REV. 1823, 1888–917 (2008) (discussing "market fundamentalism" and ideological "panmarketry," along with the impact of globalization, as they relate to the development of the civil justice system in the United States).

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environment, workers' and consumer's rights, and investors' complaints of fraud and unfairness.<sup>73</sup> Shareholder primacy has been the guiding light in contemporary corporate law; deregulation has been the mantra in securities law.<sup>74</sup> Throughout these decades, the economy has grown rapidly enough to provide cover for growing inequality and stagnating wages in the United States. While there have been downturns in the financial markets and the broader economy, until the most recent one, they had been relatively brief and mild. In flush times, business regulation has been tarred as unnecessary.<sup>75</sup> In hard times, it has been resisted as too costly or dangerous to growth. The increasing interest in CSR evident among consumers and investors may reflect the growing perception that laws and regulations cannot get the job done without more widespread popular support.

The mobilization of politically conservative think tanks, policy programs, and academic centers within law schools had fostered this right-leaning momentum that has prevailed for over twenty-five years.<sup>76</sup> The Olin Foundation has had an enormous influence in moving the private law side of legal education in a conservative direction. The United States Chamber of Commerce has influenced the composition of the federal judiciary and even the jurisprudence of the U.S. Supreme Court.<sup>77</sup>

In contrast, within academia, social scientists (sociologists, political scientists, historians, etc.) whose research would be relevant to CSR issues have remained largely cut off from one another and from academics at professional schools. They speak a different language not only from economists,<sup>78</sup> but also from corporate law

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73. In this period, for example, the Supreme Court's jurisprudence has moved staunchly in the direction of favoring big business. For discussion of the Court's business-related jurisprudence in this period and also the role of the United States Chamber of Commerce in mobilizing public and judicial opinion, see Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2008, § MM (Magazine), at 38.

74. See Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 IOWA J. CORP. L. 637 (2006).

75. The tarring of Sarbanes-Oxley significantly reflects the post-2002 stock market recovery. For commentary on the backlash against Sarbanes-Oxley, see Faith Stevelman, *Foreword, Corporate Governance Five Years After Sarbanes-Oxley: Is There Real Change?*, 52 N.Y.L. SCH. L. REV. 475, 480 (2008).

76. See NAOMI KLEIN, *THE SHOCK DOCTRINE* (2007) (providing an extraordinarily well-researched, if partisan, critique of the influence of the Chicago School on late twentieth century American political economy and international relations); MICHAEL TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008) (providing a general account of this trend); Robert C. Ellickson, *Symposium on Post-Chicago Law and Economics: Bringing Culture and Human Frailty to Rational Actors*, 65 CHI.-KENT L. REV. 23 (1989) (providing an early critique of the so-called "Law and Economics" school of thought); George W. Hicks, Jr., *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 HARV. J.L. & PUB. POL'Y 623 (2006); Douglass T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust*, 25 HARV. ENVTL. L. REV. 405 (2001) (offering an example of the conservative movement's mobilization to influence the judiciary).

77. See Rosen, *supra* note 73.

78. For a lucid account of the contemporary concerns of economists that notes the opacity of the field, see DIANE COYLE, *THE SOULFUL SCIENCE: WHAT ECONOMISTS REALLY DO AND WHY IT MATTERS* (2007).

and business professors. This is an almost unbelievably strange occurrence. Presumably it has been driven by the ever increasing technical specialization of academic research in each of these fields, and the highly competitive nature of academic progress. Almost all scholars prefer to stay in the established channels, where they know the waters and can navigate without risk. In this respect, the tenure system may not be functioning optimally. It protects academics from being dismissed on account of their views, but it may not be stimulating appropriate cross-disciplinary analysis. Hence, it is likely that the atomization spurred by technical specialization, along with academics' fear of intellectual embarrassment, has dramatically hindered CSR's development as a field of study. Even in an area like business and human rights, for example, there has been too little collaboration between academics and nonprofit leaders in international relations, corporate law, economics, and sociology. For example, nonprofit leaders have worked tirelessly to promote transparency regarding multinationals' payments to foreign governments for natural resource rights; they can point to the global Extractive Industries Transparency Initiative as evidence of their ongoing success. But their efforts have gone mostly unnoticed by the corporate law professoriate, which has remained aloof.<sup>79</sup>

Leaving aside ideology, the limits of sovereignty and unrestrained international capital flows pose a fundamental challenge to meaningful business regulation in areas relevant to CSR.<sup>80</sup> It has become clear that corporations can reorganize to exploit the cost advantages of doing business in countries with little or no regulation of workers' rights, environmental standards, or enforceable limits on bribery and corruption.<sup>81</sup> In many instances, domestic laws and restrictions do not reach business conducted abroad. Foreign companies accessing the American capital markets, or even foreign subsidiaries of U.S. reporting companies, may be able to organize themselves to avoid SEC disclosure requirements. Only international cooperation on a vast scale can limit multinational enterprises' ability to trespass on human rights, environmental integrity, and rule of law values. We are only beginning to see the development of international institutions capable of taking on these challenges.

#### IV. THE CORPORATIONS COURSE

##### A. *The Traditional Course*

How does the content of the traditional Corporations course relate to CSR issues?<sup>82</sup> Most professors begin by discussing the mechanics of corporate formation

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79. Extractive Industries Transparency Initiative: EITI Summary, <http://eititransparency.org/eiti/summary> (last visited Mar. 6, 2009); *see also* testimony *infra* Appendix A.

80. For an important contribution to the emerging literature on corporate governance and regulatory arbitrage, see Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour*, 58 U. TORONTO L.J. 1710 (2008).

81. *See, e.g.*, Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 TRANSNAT'L LAW. 121 (2002).

82. My conclusions are based on a survey of the available casebooks and my conversations with colleagues at many other law schools.

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and the essential legal attributes of the corporate form of business organization.<sup>83</sup> As for legal attributes, this means centralized decision making in the board. (Typically, boards delegate ordinary business authority to the senior executive officers.) Shareholders, and only shareholders, vote in director elections, on bylaw amendments, and exceptional transactions such as mergers, but on little else. The corporation enjoys separate legal personhood, which encompasses a presumption that shareholders will be held harmless for unpaid corporate debts. (This is the concept of the “limited liability” of corporate shareholders.) Shareholders make a permanent commitment of equity capital in exchange for their shares, but this illiquidity is offset by their right to sell or otherwise transfer their shares. The right to receive profits while the business is ongoing (i.e., dividends) lies solely in the board’s discretion. In a nutshell, these are the basic legal attributes of the corporate form. Variations are generally permitted, but at least in larger or public companies they are the exception.

Next, the judicially crafted fiduciary duties applicable to directors, officers, and controlling shareholders must be added to the picture. With these, the essential features of the corporate law universe come into view. Yet once fiduciary duties are added to the mix, even these clear principles yield to greater complexity. The three basic fiduciary duties of care, loyalty, and good faith run to the corporation and the shareholders only. In the name of *promoting* director accountability, the courts have declined to expand these fiduciary duties to bondholders, creditors, or employees. The force of fiduciary obligation, furthermore, is offset by a compelling respect for board autonomy in corporate law. Reflecting the preeminent authority afforded boards in the states’ corporate statutes, the courts have established a so-called “business judgment rule” (“BJR”). The BJR operates, in effect, as a rule of judicial abstention. So long as a company’s directors have acted in a passably informed manner, in good faith, and in the absence of having an immediate self-interest in the outcome of their decision, the BJR protects them from being second-guessed by shareholders or the courts.

Hence, the American framework of corporate governance is fundamentally about the allocation of rights and decision-making authority among a corporation’s board, officers, and shareholders. Consistent with this focus, in the mainstream account, corporate law is about reducing the agency costs arising from the separation of ownership (equity holders) and control (directors and senior officers).<sup>84</sup> In colloquial terms, this means that corporate laws are intended to encourage entrepreneurial, wealth-enhancing risk taking, while discouraging directors and officers from

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83. In a significant number of law schools, the basic Corporations course has been supplanted by a Business Associations course, which covers partnerships and other business entities as well as corporations. These courses generally include more discussion of agency law. Once they commence discussion of the corporate form of business organization, their course work is as described herein. However, there is some variation in the number of credits allocated to the introductory Corporations or Business Associations course, and this affects the scope of coverage of the course.

84. In this regard, corporate law has developed not only from the roots established by Berle and Means, *see supra* notes 25–26 and accompanying text, but also from economics-oriented scholarship. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

engaging in secret profit taking. This pattern of corporate law is deemed maximally efficient—a concept at once breathtakingly powerful and elusive (as described further below).

Beyond shareholders' limited voting rights, their powers are mostly restricted either to selling their shares or suing to enforce fiduciary duties and their basic voting rights. Of course, shareholders will take a hit in selling their shares once bad news or underperformance is widely disclosed (which limits the efficacy of selling as a remedy for mismanagement). Furthermore, corporate law imposes substantial constraints on shareholder litigation. Shareholders are often deterred from proceeding not only by virtue of the BJR, but also by the "demand requirement." The latter requires plaintiff shareholders to ask the board itself to proceed against the defendant directors or officers, before proceeding with their claim.<sup>85</sup>

It is clear that the most influential corporate legal standards are the fiduciary duties of care, loyalty, and good faith. But it is also obvious that the content and practical import of these duties is fluid, even opaque at times. First, the duty of care operates at two distinct dimensions. It has a transactional strain which mandates that directors inform themselves of all information reasonably available to them prior to approving a corporate act or transaction.<sup>86</sup> Second, due care imports a duty of oversight that requires the board to implement a reasonably efficacious system of internal controls sufficient to yield reliable corporate reporting and assess the company's success in complying with the law.<sup>87</sup> That said, as an enforceable legal standard, as opposed to an essentially hortatory, normative one, the duty of care is essentially moribund.<sup>88</sup> Charter exculpation provisions, corporate indemnification, and corporate-funded directors' and officers' insurance have generally limited, or eliminated, the potential for holding these managers personally liable in suits alleging breach of due care.<sup>89</sup>

In recent years, some of the most interesting jurisprudential developments have been in the area of good faith. This duty has been reinvigorated and somewhat expanded, especially in contrast to the duty of care. Bad faith acts by directors or officers fall outside charter exculpation provisions, and perhaps also corporate indemnification and insurance. Hence, the stakes for corporate defendants are much higher than with shareholder due care claims. Nevertheless, despite the recent

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85. See *Aronson v. Lewis*, 473 A.2d 805, 808 (Del. 1984) (holding that "demand can only be excused where facts are alleged with particularity which creates a reasonable doubt that the directors' action was entitled to the protections of the business judgment rule"); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 (Del. 1981) (finding that a stockholder may retain the right to sue in his derivative action, without prior demand on the board of directors, only if (s)he can prove that a demand would have been futile).

86. See *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985).

87. This duty was first given modern expression in 1996 by the Delaware Chancery Court. See *In re Caremark*, 698 A.2d 959.

88. See Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 464–67 (1993).

89. See E. Norman Veasey, Jesse A. Finkelstein & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399 (1987).

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judicial attention to the duty of good faith, the chance of directors or officers actually being held liable in damages for breach of good faith remains remote.<sup>90</sup> Good faith has become significant as a framework for evaluating directors' conduct in approving conflicted transactions (for example, executive compensation awards), as well as their vigor in responding to signs of corporate illegality.<sup>91</sup> Nevertheless, state corporate law has lagged behind federal law in requiring boards to be vigilant regarding the accuracy of their companies' public reports.<sup>92</sup>

The fiduciary duty of loyalty is a more trenchant force in corporate law. Most fundamentally, it prohibits directors, officers, and controlling shareholders from engaging in self-dealing transactions that injure the corporation and/or the shareholders.<sup>93</sup> Nevertheless, although fiduciary loyalty is the core of corporate law, its prohibition on self-dealing is also often unenforceable. If a conflicted transaction has been ratified by a disinterested majority of shares, or not-too-directly-self-interested directors,<sup>94</sup> the transaction will be largely immune from judicial review.<sup>95</sup>

A limit on breach of loyalty exculpation via independent ratification exists in relation to controlling shareholders' transactions with minority shareholders—for example, freezeout transactions where the controller acquires the minorities' shares for cash. At least in Delaware, these transactions—even seemingly independent director ratification—only effectuates a shift in the burden of proof. The Delaware

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90. For a thoughtful recent proposal advocating reversing allowing full exculpation of duty of care liability for corporate directors, see Elizabeth A. Nowicki, *Stockholder Litigation Under the Delaware General Corporation Law: Director Inattention and Director Protection Under Delaware General Corporate Law Section 102(b)(7): A Proposal for Legislative Reform*, 33 DEL. J. CORP. L. 695 (2008).
  91. This trend was initiated by the seminal case *In re Caremark*, 698 A.2d 959, and followed in numerous cases. See, e.g., *In re Abbott Labs. Derivative Shareholders Litig.*, 325 F.3d 795 (7th Cir. 2003); *Stone*, 911 A.2d 362 (affirming *Caremark* as the law of Delaware and elaborating on the link between the duty of care and the duty of good faith).
  92. From the late 1970s onward, various SEC enforcement actions affirmed directors' and officers' roles in crafting and supervising firms' public disclosures. See, e.g., Report of Investigation *In re Stirling Homex Corp. Relating to Activities of the Board of Directors of Stirling Homex Corporation*, Exchange Act Release No. 11516 (July 2, 1975); *In re the Cooper Companies*, Exchange Act Release No. 11,516, 7 SEC Docket 298 (July 2, 1975); Report of Investigation *In re the Cooper Companies, Inc. As it Relates to the Conduct of Cooper's Board of Directors*, Exchange Act Release No. 35,082, 58 SEC Docket 591 (Dec. 12, 1994); Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Concerning the Conduct of Certain Former Officers and Directors of W.R. Grace & Co., Exchange Act Release No. 39,157, 65 SEC Docket 1240 (Sept. 30, 1997). For an insightful review of the accounting and auditing literature elaborating corporate internal control structures and their incorporation into corporate law standards, see Eisenberg, *supra* note 88.
  93. See *Ryan v. Gifford*, 918 A.2d 341 (Del. Ch. 2007) (providing an evolving interpretation of the duty of loyalty in the context of the stock options backdating scandals).
  94. For discussion of the rise of independent directors in corporate law that seeks to provide a justification for their role independent of their accountability to shareholders, see Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465 (2007).
  95. See, e.g., *Cooke v. Oolie*, 23 DEL. J. CORP. L. 775 (1998) (Del. Ch. June 23, 1997); see also J. Robert Brown, Jr., *Disloyalty Without Limits: "Independent" Directors and the Elimination of the Duty of Loyalty*, 95 KY. L.J. 53 (2006) (critiquing the law's movement in this direction).

courts have steadfastly applied the rigorous “entire fairness” standard of review to freezeouts and other self-dealing transactions by controllers—instead of the deferential BJR standard of review. But once again, even this seemingly hard and fast principle is not unyielding. The Delaware Chancery Court is attempting to distinguish the Delaware Supreme Court’s established framework for freezeouts and is advocating allowing deferential review where a freezeout has been ratified by disinterested directors or a majority of the (disinterested) minority shareholders.<sup>96</sup> In this shift one can see corporate law’s own infatuation with self-regulation, as was discussed earlier in regard to federal regulation.<sup>97</sup>

Most introductory courses include some discussion of the basic rules and standards applied to mergers and acquisitions (“M&A”) transactions. Notwithstanding a panoply of relevant federal securities laws and regulations, corporate fiduciary standards—i.e., variations on the same duties of care, loyalty, and good faith—are often the most trenchant ones in these transactions. These fiduciary standards often have dispositive importance in affecting the outcomes of these transactions, especially where the relief sought is additional disclosure or an injunction stopping the deal’s progress (as is often the case).<sup>98</sup> In this respect Delaware’s rich M&A case law provides deal planners and principals a detailed “transactional choreography”: a trove of best practices relevant to the conduct of boards, officers, controlling shareholders, investment bankers, and corporate general counsel.<sup>99</sup>

## B. *Going One Step Further to Discuss CSR Concerns*

### 1. *CSR, Director Primacy, and the Limits of Shareholder Voting*

Shareholder voting provides one framework for considering the pervasive ambiguity in corporate law. First there is the curiosity of who does and does not have a right to vote in corporate law. As stated earlier, it is only shareholders who have voting rights in the election of directors. When it comes to fundamental transactions, the states’ statutes vary on whether holders of preferred stock have distinct class voting rights. Delaware is sufficiently “deal loving” that its corporate code does not provide for a separate class voting right for holders of preferred stock,

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96. For a review of the entire fairness standard and an argument against applying the BJR to going private transactions (except where there has been a genuine market check or auction of the company as a going concern), see Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, 62 BUS. LAW. 775 (2007).

97. The SEC’s “pulling” the net capital rule for the five largest investment banks provides a recent glaring example. See Stephen Labaton, *Agency’s ’04 Rule Let Banks Pile Up New Debt, and Risk*, N.Y. TIMES, Oct. 3, 2008, at A23. The FASB’s allowing Enron to determine its own valuations for many of its most important contracts was another experiment gone awry. See Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001*, 76 TUL. L. REV. 1579, 1589 n.28 (2002).

98. See Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133 (2004) (providing a discussion of the high proportion of investor class actions in M&A transactions, as a proportion of the Court of Chancery’s docket).

99. For elaboration of the concept of “transactional choreography,” see Stevelman, *supra* note 96.



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even when the transaction could disadvantage the preferred holders financially.<sup>100</sup> Debenture holders possessing rights to convert to equity are held to have no voting rights prior to conversion.<sup>101</sup> Even though bondholders commonly provide long term capital to the enterprise, corporate law affords them neither voting rights nor fiduciary duties. They are relegated to protecting themselves, where possible, through their indenture contracts. Corporate law also contemplates no voting rights for employees, even where layoffs are a probable outcome of a merger or sale of substantially all assets—notwithstanding that employees make firm-specific investments of human capital.

The narrow scope of these voting rights is not easy to explain. Perhaps it reflects the outdated notion that (only) holders of common stock are the owners of the firm—a concept that was problematic by the time of Berle and Means's *The Modern Corporation and Private Property*.<sup>102</sup> Perhaps the narrow scope of voting in corporate law reflects the equally contestable notion that as the residual claimants, shareholders' interests operate as a surrogate for all stakeholders' best interests—corporate law's version of trickle down economics. Perhaps it reflects the successful domination of labor by capital, consistent with the basic pattern of capitalism. And Delaware's failure to afford class voting rights to holders of preferred stock, even in recapitalization mergers that might compromise the preferred shareholders' interests, reflects Delaware corporate law's zeal for corporate transactions.<sup>103</sup>

Even if one accepts the restrictions in the scope of voting rights described above, there are basic problems even in the matter of *common shareholders'* voting for directors. State corporate law stops short of supporting a system that would fully enfranchise shareholders. This is evident in the fact that shareholders have no right to have a say in who will be nominated for election to the board. The task of nominating the next slate of directors is delegated to the sitting board. If the shareholders wish to nominate a separate slate then, consistent with the SEC's proxy rules, they must bear the considerable expense and risk of mounting a separate proxy solicitation, distributing it to their cohorts, and filing it with the SEC.<sup>104</sup> Second, state corporate law provides little room for insurgent shareholders to be reimbursed for their efforts in mounting a separate slate in a director election (whereas the sitting board's slate, which will be voted on via the corporate proxy, is funded by the corporation).<sup>105</sup>

100. See, e.g., *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005) (discussing the absence of a class voting requirement in recapitalization mergers in Delaware and providing a discussion of California's alternative scheme).

101. See *Simons v. Cogan*, 549 A.2d 300, 302 (Del. 1988).

102. BERLE & MEANS, *supra* note 25.

103. See, e.g., *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 624 (Del. Ch. 2005). The court expressed its zeal in supporting corporate transactions by presuming that freezeout transactions contribute to economic efficiency and the creation of wealth, without adequately taking into account the potential unfairness to minority shareholders. See *id.*

104. See Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 479 (2008).

105. *Rosenfeld v. Fairchild Engine and Airplane Corp.*, 309 N.Y. 168, 173 (1955).

Hence, outside of contests for control in takeovers, the (non)reimbursement rule enshrined in corporate law strongly inhibits real director elections.<sup>106</sup> The net result is that although it is axiomatic in corporate law that boards are elected by shareholders, it is more realistic to think of the incumbents as selecting their successors.<sup>107</sup>

In this regard, corporate law has radically reinforced the status quo of clubby, demographically homogeneous boards—a reality which has contributed to the detrimental impact of “group think.” This is more troublesome still because modern corporate law is praised as enabling shareholder choice. Clearly this enabling of shareholder choice does not encompass enabling shareholders to have a meaningful role in nominating directors for election, hence voting for directors of their own choosing.

From the above discussion it might seem that enhancing the shareholder franchise would produce better, more accountable, less despotic corporate enterprises. Yet, for proponents of director primacy, a more robust shareholder franchise would limit the board’s compass to run the company in the interest of the broader range of corporate constituencies: shareholders and non-shareholders. These commentators criticize reforms that would give more control to shareholders in director elections. They see such reforms as threatening the corporation’s best interests and capacity to produce maximum returns beneficial to all.<sup>108</sup> The competing claims of “shareholder primacy” and “director primacy” go back to the early beginnings of corporate law. For example, they are evident in a series of essays exchanged between Adolph Berle and E. Merrick Dodd in the 1930s.<sup>109</sup> At times the proponents of shareholder primacy recast their claims as being stakeholder neutral, on the rationale that shareholders (as residual claimants) cannot be enriched *before* third-party claims have been satisfied.<sup>110</sup> The

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106. See *Am. Fed’n of State, County & Mun. Employees Pension Plan*, 462 F.3d 121 (describing the SEC’s recommended changes to the shareholder nomination process in relation to the use of the corporate proxy statement); Exchange Act Release 56,914, *supra* note 38.

107. See generally *Blasius Indus. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) (holding that a board of directors may not take unilateral action to impede shareholder voting without a compelling justification for such action).

108. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. REV. 547 (2003); Margaret M. Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

109. Compare A.A. Berle, Jr., *Corporate Powers as Powers Held in Trust*, 44 HARV. L. REV. 1049 (1931) (arguing that corporations exist to increase shareholder wealth), with E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48 (1932) (arguing that the corporation owes responsibilities to all corporate constituents and to society as a whole).

110. See, e.g., Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 125 n.2 (1994) (“This illustrates the point that the maximization of social welfare is not necessarily inconsistent with using the shareholder wealth maximization criterion as the lodestar for corporate governance. Indeed, the ultimate defense of the shareholder wealth criterion must be cast in social welfare terms: that the sum of payouts by the firm—wages, supplier payments, dividends, interest, and taxes—will be maximized by a system that assigns the residual claim to shareholders and empowers them to select managers who will act responsibly. This is not an uncomplicated point, however, since good management of a declining firm may decide, for example, that plant closings and

opposing camp sees shareholder primacy as unfairly and arbitrarily privileging the providers of equity capital.

As a matter of positive law, the present model of corporate governance validates board primacy—it gives boards enough re-electability and discretion in the exercise of their office to make decisions that balance the interests of shareholders with those of extra-shareholder constituencies. In the dialectic of one-dimensional shareholder interests and unaccountable boards, director primacy has the better claims; nevertheless, in its naked form the dialectic is a tired one. Real progress in corporate governance will come when corporate leaders and their counsel embrace a new paradigm of economics in which scarcity takes into account human beings' brief time on the planet, the claims of later generations, and the problem of nonrenewable resources. In this regard, the burgeoning literature on sustainability offers new promise to corporate governance and professors seeking new paths in teaching it.

## 2. *The Limited Liability of Corporate Shareholders*

Another area of the Corporations course that can serve as a platform for discussing the CSR issue is the limited liability of corporate shareholders. A central tenet of corporate law is that only the firm itself is responsible for its obligations. This is true not only with respect to a company's contractual obligations, but also for tort damages. The fact that tort victims—such as the employees and local citizens in Libby, Montana, devastated by Grace's wanton mishandling of asbestos—can be left uncompensated through the corporate bankruptcy process is a remarkably socially salient feature of contemporary corporate law.<sup>111</sup>

The limited liability of corporate shareholders is valorized as a major driver of wealth creation. Judges Easterbrook and Fischel have argued that in public companies limited liability is essential to the uniform pricing of corporate shares, which facilitates trading and hence efficient investor diversification.<sup>112</sup> Nevertheless, a scheme of proportionate liability could be adopted that would be compatible with uniform pricing, broad liquidity, and the creation of wealth by public companies. In addition, the "market trading" rationale is irrelevant to shareholders in closely held firms, even though limited liability is still the rule in closely held firms. The rationale in this setting is that limiting shareholders' liability (to the capital they have in the corporation) facilitates entrepreneurship through the creation of small businesses.

The famous case of *Walkovsky v. Carlton* illustrates the CSR concerns raised by the limited liability of corporate shareholders.<sup>113</sup> The defendant in the case was a natural person who established a taxi cab enterprise with ten corporations each

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other disruptions are necessary." (citing Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1953–54 (1991)).

111. See, e.g., Anita Huslin, *W.R. Grace to Settle Asbestos Claims for \$1.8 Billion, Start New Chapter*, WASH. POST, Apr. 8, 2008, at D01.

112. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 41–44 (1991).

113. *Walkovsky v. Carlton*, 18 N.Y.2d 414, 416 (1966).

owning two cabs and possessing \$10,000 worth of liability insurance (the legally acceptable minimum for a taxi cab company at the time). By dividing the tiny equity capital he had into ten separate corporations, the defendant, Mr. Carlton, achieved the maximum degree of bankruptcy remoteness for his personal wealth. (Public companies mirror this strategy in setting up many series of subsidiaries and subsidiaries of subsidiaries.) Apparently, even at that time, \$10,000 worth of insurance was clearly an insufficient amount to cover foreseeable injuries and damages that would arise in the course of the taxis' operation. Nevertheless the court claimed that the plaintiff had presented no reason to depart from the rule of limited liability, because Carlton had done nothing wrong in dividing his enterprise into separate, liability-remote bits.<sup>114</sup>

To understand the implications of shareholders' limited liability, more context is required. First, there is no minimum capital requirement in setting up a corporation. Second, corporate dividend laws and fraudulent conveyance laws are almost entirely ineffective in keeping capital within a corporation, even where the company has earned profits. Nor can tort victims look to national health insurance if they are injured by a corporation that has declared bankruptcy. Creditors and tort victims can appeal to courts and ask them to pierce the corporate veil where the shareholders have committed some kind of fraud, but piercing is the rare exception. These legal rules all need to be factored into the analysis of limited shareholder liability because they each contribute to a shortfall in corporate accountability for consumer injuries, environmental hazards, and mass torts.<sup>115</sup>

Indeed, after fifteen years of reflecting on cases in which the courts are called upon to pierce the corporate veil, I can find little depth of legal reasoning in them, beyond the policy goals of incentivizing capital formation and encouraging investment in the corporate form. In essence, the legal rule quite nakedly embraces a policy judgment that even tort creditors' claims will be subordinated to those goals. There appears to be no deeper intellectual coherence in the limited liability case law. The fact that corporate law privileges the goal of capital formation over the compensation of tort victims is certainly a topic of social relevance.<sup>116</sup>

### 3. CSR, Regulatory Competition, and "Efficient" Corporate Laws

The open-ended, enabling nature of the states' corporate statutes and the loose enforcement of fiduciary constraints have been justified as being maximally efficient. This rationale permeates the corporate case law and academic commentary, although few texts or authorities explain what is meant by "efficient." The basic notion seems to be most conducive to profit maximization, without regard to distributional effects

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114. *Id.* at 421.

115. See, e.g., MITCHELL, *supra* note 58, at 53–54, 98, 182.

116. See Theresa Gabaldon, *Experiencing Limited Liability: On Insularity and Inbreeding in Corporate Law*, in *PROGRESSIVE CORPORATE LAW* 111 (Lawrence E. Mitchell ed., 1995); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 *VAND. L. REV.* 1387, 1413 (1992).

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(that is, issues of inequality). In this regard, CSR discourse runs counter to the mainstream, efficiency rationales of corporate law, because the former presumes that increasing inequality is inherently problematic, and the latter does not.

But even accepting the growth-above-all rationale, it is not clear whether corporate law is efficient. The debate is a very longstanding one in the corporate law literature. The earliest claim, as presented by Professor William Carey, was for the inefficiency of corporate law. Writing in the mid-70s, Carey found ample room in the structure of Delaware law to condemn the lax, modern, enabling approach as destructive of wealth.<sup>117</sup> For example, in these years there were many high-profile examples of controlling shareholders taking firms public at high valuations and then quickly buying back the shares as the market prices dropped dramatically. Carey and other scholars decried the phenomenon as exemplary of corporate law's excessive permissiveness. Widespread dissatisfaction with Delaware's laxity even provoked the SEC to respond. The Commission proposed, but then backed off from, a substantive fairness requirement for these transactions.<sup>118</sup> In sum, Carey initiated the "race for the bottom" critique of modern corporate law's laxness and inefficiency.

As contemporary market theory was brought to bear on corporate law concepts, the "race for the bottom" view was countered by a "race to the top" counterpart. The latter was articulated most famously by Ralph Winter.<sup>119</sup> "Race to the top" theorists believe that the capital markets punish firms operating in suboptimal (inefficient) governance regimes. Because the states benefit from chartering, they can be expected to compete to offer more efficient corporate laws. In this account, Delaware corporate law is the winner because its law is maximally productive of corporate wealth.

Much is at stake for CSR in this debate. If state corporate law panders to managers' self-interest, and undermines broader wealth creation, then the entire corporate legal apparatus is subject to indictment and should be reformed. In the alternative, if state corporate law is honed by efficient capital market forces, then regulatory tampering may destroy financial wealth and potentially lead to a poorer society. For decades this debate has been ongoing, with evidence being marshaled on both sides.

But recently the polemic has taken a different turn. Professor Mark Roe, an expert on political economy, has argued persuasively that the persistent threat of federal disfavor or even preemption has prevented anything like a persistent movement towards efficient state corporate laws.<sup>120</sup> According to Roe, the pattern of state corporate laws that has emerged is indeterminate from an efficiency perspective.

In sum, efficiency claims for the status quo in corporate legal regulation are eroding. The more recent accounts present a portrait of corporate law that is

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117. See William L. Carey, *Federalism and Corporate Law: Reflections on Delaware*, 83 *YALE L.J.* 663 (1974).

118. See Stevelman, *supra* note 96, at 795–97 (discussing the dual regulation of going private transactions and the origins of the SEC's rule 13e-3A).

119. See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. LEGAL STUD.* 251, 254–62 (1977).

120. Mark J. Roe, *Delaware's Competition*, 117 *HARV. L. REV.* 588 (2003).

fundamentally path dependent, i.e., historically embedded and the product of enabled interest groups.<sup>121</sup>

## V. THE SECURITIES REGULATION COURSE

### A. *The Traditional Course*

Traditionally, the Securities Regulation course first focuses on the legal requirements attaching to companies' raising capital in public sales and/or private placements of securities. The aforesaid transactions are governed principally by the Securities Act of 1933 ("the '33 Act").<sup>122</sup> The theme of supporting investors' trust through disclosure is amplified as the course turns to the Securities Exchange Act of 1934 ("the '34 Act"). The '34 Act governs disclosure to investors in connection with tender offers and proxy voting (that is, shareholder voting for directors and in fundamental transactions like mergers). It also establishes a system of periodic, calendar-driven reporting, and the disclosure of specified unusual events on Form 8-K.<sup>123</sup> All of these disclosure mandates are matched by prohibitions on material misstatements or omissions. The antifraud prohibitions, including those arising under the '33 Act, may be enforceable either through private litigation, SEC enforcement, or criminal enforcement by the Department of Justice—or some combination of them. The '34 Act reaches more broadly into various forms of investor protection and market regulation. It provides for the creation of the SEC, the regulation of the securities exchanges, and the regulation of broker dealers, for example.

A novice encountering these two principal securities acts would assume that they reflected the legal status quo of 1933 and 1934, but the opposite is true. Congress is constantly amending, supplementing, and partially repealing the terms of these acts. The same is true of the implementing regulations promulgated by the SEC. Given the dynamic nature of the financial markets, the changing needs of investors, as well as the accretion of historic layers of law and regulation, the result is nearly unintelligible to novices. This is a fundamental challenge in the teaching of Securities Regulation, one that becomes more formidable every year. For example, at present—in the spring of 2009—there are calls for a complete overhaul of financial regulation. Persistent

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121. For commentary on the indeterminacy of the empirical evidence on corporate law's efficiency, see William J. Carney and George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 9–11 (collecting and analyzing decades of empirical studies about efficiency effects from Delaware chartering and concluding that "[t]he results of over twenty-five years of empirical work thus remain inconclusive"); Michal Barzuza, *Price Considerations in the Market for Corporate Law*, 26 CARDOZO L. REV. 127, 129 (2004) (presenting evidence for and theories of efficiency in corporate law and concluding that "[n]otwithstanding the extensive theoretical and empirical literature on this question, there is no consensus as to the desirability of the current system"); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795 (2002) (finding mixed empirical data in study of whether corporate managers migrate to or away from states with strong anti-takeover laws).

122. 15 U.S.C. §§ 77a–77aa (2006).

123. 15 U.S.C. §§ 78a–78mm (2006).

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tinkering and periodic overhaul is the norm in the securities regulation area, just as it is in relation to the federal income tax code.

The dense statutory language and complex and oblique cross-referencing between the statutes and regulations make the Securities Regulation course exceptionally challenging. In addition, students need to conceptualize their future work as lawyers in terms of both counseling (for example, in helping companies raise funding in securities offerings) and litigation strategy (for example, in bringing or defending against claims of securities fraud). As is true in Corporations, the scope and complexity of the subject matter in the Securities Regulation course poses a fundamental challenge to students developing a comfort level with the material; this complexity threatens to crowd out discussion of broader themes and policy matters. For example, the answer to a seemingly straightforward question like whether the SEC is a credible monitor of fraud becomes shockingly elusive, and it is almost impossible to lead a discussion of the issue based on the materials in the standard casebooks and statutory supplements. But without these broader issues, the course is almost intolerably dry and intellectually barren. More thoughtful students would be driven elsewhere in the curriculum.

### *B. Using Sarbanes-Oxley to Ask Broader Questions*

So much has been written about the Sarbanes-Oxley Act of 2002 (“SOX” or the “Act”), that I will not attempt to discuss its individual provisions here.<sup>124</sup> SOX was aimed, most fundamentally, at restoring investors’ and the public’s trust in the systems of corporate auditing and financial reporting. The financial frauds exposed in the months and years after Enron’s collapse triggered deep concern about the integrity of corporate governance and financial regulation in the United States.<sup>125</sup> Of course this is the most elementary of CSR challenges.

SOX includes wide ranging investor protections but departs from a narrow understanding of shareholder profit maximization. Many of the Act’s provisions are not justifiable based on short term shareholder profit maximization.<sup>126</sup> SOX’s aims

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124. For discussion of SOX, its accomplishments, and its limitations and citation to the literature, see Stevelman, *supra* note 75.

125. See Kahn, *supra* note 97 (providing a discussion of the market and social conditions concurrent with SOX’s enactment); Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003) (focusing on the structure of Enron’s board of directors to discuss the broader theme of corporate culture).

126. The greatest backlash to SOX has surrounded the expense associated with section 404 compliance. Section 404 requires that an issuer’s annual report include a report by management on internal controls, including: (i) a statement of management’s responsibility for establishing and maintaining adequate internal controls over financial reporting; (ii) a statement identifying the framework used by management to evaluate the effectiveness of internal controls over financial reporting; (iii) management’s assessment of the effectiveness of internal controls over financial reporting as of the end of the most recent fiscal year; and (iv) a statement that the company’s auditor has issued an attestation report on the management’s assessment of the internal controls over financial reporting. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7762 (2006).

are broader: it targets the essential framework supporting investors' trust in investing in U.S. publicly traded corporations and Wall Street.

In this sense, SOX represents securities law enacted in the public interest. Greater coherence in regard to valuation, enhanced transparency, and heightened managerial accountability may not produce immediately quarterly gains, but they portend longer term benefits both to investors and all the constituencies dependent on the sustained health of Main Street and Wall Street.<sup>127</sup> This is one reason why shareholder advocates and business law professors accustomed to thinking in terms of shareholder primacy and shareholder profit maximization have characteristically been critical of the Act.<sup>128</sup> The longer-term benefits of better auditing and enhanced trust may be too difficult to measure, whereas the costs of implementing new regulations are apparent. Still, there is reason to believe that SOX's new, heightened standards for internal controls will yield greater shareholder value. After all, how can corporations achieve optimal productivity if they cannot measure their inventory, costs, revenues, profits, risk exposure, and legal compliance with speed and accuracy?<sup>129</sup> Hence, SOX's emphasis on improvements in internal controls is likely to generate core efficiency benefits for shareholders over the longer term. Companies and their advisers probably will need time to learn to leverage the investment in information technology, which was hastened by new laws and regulations.<sup>130</sup>

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127. It is not the first time that Congress has signaled the need for securities laws and market regulations "in the public interest." In the Securities and Exchange Act, for example, Congress grants the SEC authority to promulgate disclosure provisions and other rules "in the public interest or for the protection of investors." Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (2006). For the argument that SOX responded to a crisis of both governmental and extra governmental (i.e., corporate) legitimacy, see Cary Coglianesi, *Legitimacy and Corporate Governance*, 32 DEL. J. CORP. L. 159 (2007); Kahn, *supra* note 97.

128. *But see* John C. Coates IV, *The Goals and Promise of the Sarbanes-Oxley Act*, 21 J. ECON. PERSP. 91 (2007); James Fanto, *A Social Defense of Sarbanes-Oxley*, 52 N.Y.L. SCH. L. REV. 517, 522-25 (2008) (discussing the legal and business community's reception of the Act); Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (2007).

129. *See* Gordon, *supra* note 94 (arguing that stock prices—assumedly as the result of accurate information disclosed to the market—yield absolutely crucial information relevant to managerial decision-making).

130. For a pre-SOX analysis of the value added by corporate and securities laws' focus on boards' oversight of internal controls and systems of information technology, see Faith Stevelman Kahn, *Transparency and Accountability, Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 507 (2000) ("[T]he doctrines of fiduciary care and loyalty are both concerned fundamentally with directors' and officers' stewardship over their firms' information. These doctrines obligate managers to oversee the gathering, internal and public reporting, and the 'deployment' of corporate information consistent with their firms' and their shareholders' best interests."); *id.* at 510 ("The production of high quality data and the ability to organize and present such data accurately and coherently to the relevant corporate decisionmakers is essential to promoting optimal decisionmaking and, thus, value creation in the firm's and its shareholders' best interests.").



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Also promoting CSR, SOX enacts anti-corruption and heightened ethics standards for auditors<sup>131</sup> and auditing firms,<sup>132</sup> corporate boards and audit committees,<sup>133</sup> CEOs and CFOs,<sup>134</sup> and corporate general counsel.<sup>135</sup> The Act's most sweeping innovation is the creation the Public Company Accounting Oversight Board (subject to the SEC's authority), which is intended to be more independent of industry in its oversight of public company auditing practices.<sup>136</sup> In this respect SOX represents a partial rejection of the paradigm of industry self regulation that has facilitated destructive corporate conduct in recent years.<sup>137</sup>

SOX has been controversial, also, because in enacting the federal securities laws, Congress has generally sought to avoid trespassing in areas of corporate governance identified with state law.<sup>138</sup> These areas include, for example, the regulation of

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131. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 78j-1(j) (2006) (requiring audit partner rotation every five years).
  132. *Id.* § 7212 (requiring accounting firms that audit public companies to register with the Public Company Accounting Oversight Board ("PCAOB")); *see also id.* § 7211(c) (authorizing the PCAOB to set standards for public company audits and to enforce auditing rules for such firms).
  133. *See id.* § 78j-1(m) (requiring that audit committee members be independent directors; requiring that audit committee have direct responsibility for appointment, compensation and oversight of the firm's public auditor and requiring company to indicate whether at least one member of the audit committee meets the standard of being a "financial expert").
  134. *Id.* § 7241(a) (requiring the CEO and CFO to certify the accuracy and completeness of their company's publicly filed financial statements in annual and quarterly reports, as well as the absence of known deficiencies in the company's systems of internal control); *see also* Lisa M. Fairfax, *Form over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1 (2002).
  135. *Id.* § 7245 (requiring the SEC to promulgate minimum standards of professional responsibility for attorneys appearing before it and to require such attorneys to report to the company's senior-most body evidence of a material violation of securities law or breach of fiduciary duty); *see also* Peter Kostant, *From Lapdog to Watchdog: Sarbanes-Oxley Section 307 and a New Role for Corporate Lawyers*, 52 N.Y.L. SCH. L. REV. 535, 548-49 (2008) ("Sarbanes-Oxley is important as a social response to the overreaching and greed of corporate executives and financiers . . . . [M]y focus has long been on changing the culture of corporate lawyering, which section 307 has begun to accomplish."); Giovanni Prezioso, Fiana Kwasnik & Lee S. Richards III, *Obligations and Liabilities of Attorneys Representing U.S. Public Companies: Trends and Developments*, 1691 PLI/Corp 329 (2008) (providing practitioners' perspectives, regarding the developing federal requirements relevant to an attorney's representation of public companies).
  136. *Id.* § 7211 (replacing the existing system of self-regulation with a new body responsible for overseeing public company auditing, publicizing auditing standards, and investigating and disciplining noncompliant auditing firms). The private, nonprofit status of the PCAOB is a legal curiosity and was recently challenged as being unconstitutional. *See* John C. Coffee, Jr., *Is the PCAOB Unconstitutional?*, 235 N.Y. L.J. 5 (2006); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975 (2005).
  137. For an account of how faith in "self regulation" on the part of the SEC contributed to deregulation and, ultimately, the major investment houses' massive losses from investments in mortgage backed securities, *see* Labaton, *supra* note 97.
  138. *See, e.g.*, Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 GA. ST. U. L. REV. 251 (2005); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005); Robert B. Thompson, *Corporate Governance After Enron*, 40 HOUS. L. REV. 99 (2003).

boards, general counsel, internal reporting lines, and the responsibilities of CEOs and CFOs to shareholders. In one of its more innovative strokes, SOX established bright line responsibilities for corporate general counsel and, in effect, elevated the general counsel's stature to its rightful place among corporate senior officers. In so doing, Congress signaled that legal compliance must be a first-order consideration in corporate strategy. In a similar vein, SOX gave the audit committee clear, front-line responsibility for monitoring the quality of corporate disclosures. In SOX, Congress also sought to reduce unseemly conflicts of interest on the part of corporate senior executives and, in so doing, has reinforced state corporate law's duty of loyalty.<sup>139</sup> In sum, in expanding the role of federal mandatory standards in corporate governance, and in promoting transparency and accountability, SOX is a congressional expression of CSR concerns.<sup>140</sup>

This is not to suggest that SOX is flawless; indeed there are individual provisions in the Act that are readily susceptible to criticism. Ultimately, SOX's influence—its success or failure (as really is always true in law)—will depend on the spirit in which it is received by business leaders, their legal counsel, financial advisers, and auditors, as well as the broader community of popular opinion. Will they carp on the Act's shortcomings or accept it, despite its flaws, as an opportunity to promote greater corporate integrity, transparency, and accountability?<sup>141</sup> Business law professors are positioned to be influential in this respect. We educate the community of future corporate lawyers—lawyers who will shape norms in the corporate environment. If business law professors adopt a disparaging attitude towards law and regulation, business leaders can hardly be expected to rise to the challenge of conforming to the best spirit of the law.

Another word on the present financial crisis is warranted. The current financial crisis has illuminated the interconnectedness of markets and economies, in the United States and globally. Unchecked greed and arrogance erode the basic framework of financial transacting, the provision of services and manufacturing, and also the broader social structure. The financial, economic, and social structures that make up civil society are inextricably linked, as CSR studies recognize. Meaningfully stringent, enforceable investor protections promote trust and integrity in financial

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139. See, e.g., Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7244 (2006) (preventing insider trades during blackout periods); *id.* § 78m (prohibiting loans or extensions of credit to directors or officers); 18 U.S.C. § 1514A (2006) (creating whistleblower protection for employees).

140. In a recent *New York Times* article, SEC Chairman Christopher Cox described the Commission's reliance on investment banks' self-regulation as a failure. See Labaton, *supra* note 97 ("The last six months have made it abundantly clear that voluntary regulation does not work."). To be fair, there is criticism that self-regulation has fostered the politicization of corporate governance. See, e.g., Steven A. Ramirez, *The Special Interest Race to CEO Primacy and the End of Corporate Governance Law*, 32 DEL. J. CORP. L. 345 (2007).

141. See Lynne L. Dallas, *Enron and Ethical Corporate Climates*, in ENRON: CORPORATE FIASCOES AND THEIR IMPLICATIONS 187, 201–06 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (providing an insightful analysis of the relationship between law and corporate ethics); Langevoort, *supra* note 128; Cheryl L. Wade, *The Sarbanes-Oxley Act and Ethical Corporate Climates: What the Media Reports; What the General Public Knows*, 2 BROOK. J. CORP. FIN. & COM. L. 421 (2008) (discussing the reception of SOX).

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markets and institutions; hence they are likely to make a positive contribution to other institutions of civil society.

### VI. CORPORATE TRANSPARENCY AS A UNIFYING THEME

In the mid-1990s, when I first began to study the scope and practice of mandatory corporate reporting, the term “corporate transparency” was not in use. Even the core presumption inherent in the term corporate transparency was not conventionally accepted. State corporate law was inexact, at best, in requiring companies to report to their shareholders. Public companies made the reports required by federal law at the times required by federal law. In closely held firms, shareholders were relegated to negotiating for disclosure of corporate information. The scope of public company reporting was driven by the SEC’s line item provisions in Regulation S-K and the requirement that what companies did report could not be materially misleading or incomplete. SEC reporting was merely another form of legal compliance. It was not conceived of as an ethical expectation or norm implicating broader institutional values. Corporations owned their information, and like the firm itself that information was conceived of as being essentially private.

My writing, along with some other legal scholars’, criticized the narrowness and normative (politically conservative) bias in the SEC’s disclosure requirements implemented through Regulation S-K.<sup>142</sup> As part of this, we criticized the contours of the reasonable investor—who, as reflected in the SEC’s reporting system—cared little or nothing about corporate conduct that did not impact the corporation’s immediate bottom line.<sup>143</sup>

In an article published in 1997, I highlighted the absence of required disclosure regarding corporate charitable contributions—especially the problematic features of donations to politically active nonprofits intent on moving law and policy in a conservative direction.<sup>144</sup> In a separate article, I focused more broadly on the SEC’s minimal interest in corporate disclosure of socially significant information, including corporate disclosures relevant to companies’ environmental impact, their treatment of employees, and expenditures on lobbying and politically significant litigation.<sup>145</sup>

To this day, the SEC’s scheme of mandatory reporting allows companies to omit most of the information about its political and charitable expenditures and its compliance history regarding workers’ safety, consumer safety, and adherence to

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142. See, e.g., Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715 (1997); Cynthia A. Williams, *The Securities Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1998).

143. This may be changing gradually in response to the SEC’s development of the concept of qualitative materiality. See SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (1999) (requiring consideration of disclosure of information that affects compliance with regulatory requirements even if it does not meet a five percent of earnings or revenues test).

144. See Kahn, *supra* note 22.

145. See Kahn, *supra* note 21, at 1132–45.

environmental standards.<sup>146</sup> In most instances, only if gross problems develop in these areas, or if the problems yield large-scale litigation or penalties, is disclosure required.

The intellectual history of the concept and expectation of corporate transparency remains to be written. But it is clear that the term corporate transparency and the broad concerns it implies were imported from discussions of international law and the efforts of nongovernmental organizations in achieving greater clarity about the conduct of international bodies. It is also clear that there has been a paradigm shift in domestic expectations regarding corporate reporting—one which favors corporations' making fuller disclosure of their socially-salient conduct. Scholars of international law and activists in the field had to accommodate themselves to the gaps in regulation arising from the limits of state sovereignty—limits which have grown more salient and significant to the conduct of multinational corporations. In the international arena, pressure was earlier brought to bear on promoting disclosure, based on the perceived necessity of stemming corruption and promoting economic development. As the pace of global financial transacting has accelerated, so too have concerns about corporate and financial transparency. Hence these concerns are receiving greater attention in American corporate and securities law.

The SEC would have preferred otherwise based on its history, but the public reports and filings mandated by the SEC are becoming the accepted vehicle for expanding corporate transparency. This is true in regard to financial, operating, legal, and governance-related corporate information—and increasingly CSR-related information. Indeed, the continuum between socially significant and economically significant corporate conduct is becoming more obvious and widely accepted. Leaving aside voluntary, hence inevitably selective reporting on companies' websites and in social responsibility reports, SEC-mandated corporate reports are increasingly becoming a primary information resource for employees, creditors, regulators, the media, corporate consultants (such as RiskMetrics), and nongovernmental organizations. Based on past practice, the SEC would have preferred to define its disclosure mandate more narrowly. But its framework for corporate reporting is expanding investors and activists, and companies themselves, increasingly appreciate the link between profitability and CSR concerns.

In just this vein, there are several, ongoing legislative initiatives to expand socially relevant corporate disclosure. For example, both the House Financial Services Committee and the Senate Committee on Banking, Housing, and Urban Affairs have been working on bills that would require multinational corporations active in natural resource extraction to go on record about the payments they make to foreign governments for natural resource rights.<sup>147</sup> In support of this effort, on June 26,

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146. With respect to crucially important environmental reporting and disclosure, there is no other reliable mechanism of accessible public reporting and accountability. *See generally* WENDY WAGNER, COMMONS IGNORANCE: THE FAILURE OF ENVIRONMENTAL LAW TO PROVIDE THE INFORMATION NEEDED TO PROTECT PUBLIC HEALTH AND THE ENVIRONMENT (2007).

147. *See* Extractive Industries Transparency Disclosure Act, H.R. 6066 110th Cong. (introduced May 15, 2008); Extractive Industries Transparency Disclosure Act, S. 3389 110th Cong. (introduced July 31,

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2008, I testified before the House Financial Services Committee in favor of the Extractive Industries Transparency and Disclosure Act ("EITDA"). (My written testimony appears as Appendix A.) The EITDA would provide a better basis for evaluating the payments that corporations make to foreign governments for natural resource rights. Disclosure of these payments would help investors and other constituencies gain a better appreciation of the financial, political, and reputational risks inherent in international mining and extractive projects. The disclosures would also benefit international nongovernmental organizations in identifying whether corporate payments for natural resource rights have been appropriated by corrupt officials and diverted from socially productive uses.

There is also a movement afoot to expand SEC mandated corporate reporting of payments to politically exposed persons, consistent with the Foreign Corrupt Practices Act's requirements and prohibitions. The anti-money laundering and anti-terrorism initiatives adopted under the USA Patriot Act, as well as various amendments to international bank secrecy laws, would also be fostered by such an expansion of SEC-mandated corporate reporting.<sup>148</sup>

### VII. CONCLUSION

In this article I have endeavored to describe certain salient historical, social, and legal developments in the field of CSR. In addition, I have attempted to describe the gulf between the traditional business law curriculum and CSR concerns, and have offered some new strategies and insights for incorporating CSR issues within the traditional business law curriculum.

The contemporary policy landscape is rife with examples of corporate greed and corruption, and many of the best scientists believe that the planet's temperature is rising as a result of corporate manufacturing and global consumption. The status of international human rights is increasingly of concern not only to governments, but also to consumers and investors, and hence to businesses. Changes in information technology are making it virtually impossible for companies to cover up major accidents or instances of abuse, which means that the direct and indirect costs of such conduct will escalate for companies.

Business schools have become more aware of the need to help future corporate leaders be better prepared to confront these challenges. And as CSR is attaining critical mass as a social movement, there is likely to be sustained pressure from consumers and investors for businesses to take fuller account of what had been deemed externalities. Law schools that fail to prepare their students for this new environment—fail to alert them to this broader dimension of corporate counseling—will fall behind.

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2008).

148. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 243 (codified as amended in scattered sections of 18 U.S.C.). See generally Securities and Exchange Commission, Spotlight on Anti-Money Laundering Rulemaking, <http://www.sec.gov/spotlight/moneylaundering.htm> (last visited Mar. 6, 2009).

## APPENDIX A

*Prepared Testimony Before the United States House of Representatives  
Committee on Financial Services  
Faith Stevelman, Professor of Law, New York Law School  
June 26, 2008*

Members of Congress, Ladies and Gentleman, I am honored you have invited me to express my views on H.R. 6066, the Extractive Industries Transparency Disclosure Act (the EITDA). I am eager to answer any questions you may ask me as a Professor of Law specializing in corporate governance and securities regulation.

As you know, the Act you are vetting today would require enhanced informational disclosure by international extractive enterprises having a sufficient U.S. presence so that they or their affiliates fall under the SEC's periodic reporting requirements. In particular, the Act calls for such firms to make annual, publicly searchable reports to the SEC of all payments they've made to foreign governments for natural resources and extraction rights, with the exception of payments less than \$100,000.

Such enhanced informational reporting would allow current and prospective investors in covered companies better to evaluate the natural resources and rights which their firms have obtained, as well as the costs and potential risks, legal as well as economic, incurred in obtaining them. In this manner, the Extractive Industries Transparency Disclosure Act would empower individual shareholders and the securities market in general better to evaluate the risk/reward profile of individual extractive projects, and better to compare different projects within and among companies covered by the Act. In addition, the Act would enhance covered companies' incentives to comply with the existing legal prohibitions against off-the-book payments and bribes, and would enhance law abiding covered companies' ability to attest to the legitimate, genuinely negotiated, market-based terms of the natural resource rights in foreign countries.

The Act is consistent with Congress' broader objectives in regulating interstate commerce and overseeing the system of public reporting to investors—viz., enhancing market efficiency, sustaining current levels of market liquidity and empowering and protecting U.S. investors. As would the Act, the SEC's periodic reporting requirements extend to U.S. and also foreign corporations which have raised capital in SEC-registered public offerings, have listed securities on any U.S. exchange or have surpassed minimum numbers of record shareholders and asset values in the U.S. In regard to the Act's substance, the disclosures it would require are, in effect, precise applications of already existing, more generalized disclosure mandates arising under the headings of "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations," as well standards of "quantitative materiality" endorsed by the SEC (as defined in SEC Staff Accounting Bulletin No. 99 (dated August 12, 1999)).

The Act would benefit investors by facilitating their ability to value the covered companies' natural resources rights and contracts, and the financial and legal risks

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attaching to them. In addition, increasing investors' confidence that they have the information reasonably necessary to price such natural resource rights and contracts should help lower covered companies' costs of capital. As it would foster U.S. investors' confidence in investing in international extractive industries, Congress' enactment of the EITDA would help to sustain the valuable liquidity present in this area of the U.S. securities markets. And the additional disclosures contemplated in the EITDA would contribute to the markets' ability more rationally to price the securities of covered companies.

Furthermore, the Act would help to reinforce corporate senior executive officers' fulfillment of their duties of care, loyalty and good faith—that is, their fiduciary obligations arising under state corporation law. To clarify, by enacting the EITDA into law, Congress would encourage senior corporate executives to exercise their utmost diligence, loyalty and good faith in negotiating for and capitalizing on the value of their companies' natural resources rights—since it's logical that managers most efficiently and faithfully manage resources which they are obliged to account for publicly.

The disclosure which would be mandated by the Act would enhance investors' ability to judge whether a covered companies' executives have endeavored to hide or obscure legal and financial risks related to their foreign natural resource rights. In cases where evidence of some questionable transactions or questionable reporting practices was evident, investors could make informed judgments about their risk tolerance, and the securities markets would (consistent with the concept of efficient markets) impound such new information into the price of the covered companies' securities. Investors who concluded that their securities were overpriced or vulnerable to future losses could resolve to sell and “cut their losses.” In addition, by fostering early detection of questionable natural resource related payments or transactions, the Act would allow shareholders to agitate for corporate reform early on—before the company's overall reputation and financial health was impaired. Furthermore, the disclosures mandated by the Act would help investors to evaluate the overall quality of the business judgment and professional integrity of covered companies' senior executive officers—which should be a material factor influencing investors' decisions to buy, sell or hold securities.

Recent domestic and international legal developments raise the litigation-related costs for extractive firms implicated in illicit transactions with foreign governments. In this regard, the Act would shed light on a facet of international corporate transacting that increasingly exposes U.S. investors to substantial, difficult to quantify litigation-related financial risk and costs. Faithful reporting under the EITDA would help law abiding covered companies immunize themselves from serious legal claims. By allowing for better verification that covered companies have obtained their rights to foreign-based natural resources through lawful, market-based negotiations and agreements with the foreign country's officials, the EITDA would enhance investors' confidence about the enforceability of their firms' foreign-based natural resource rights and contracts. To clarify, the reports which would be mandated by the EITDA would help investors better evaluate whether their company's rights

are unassailable and safe from expropriation by foreign governments claiming illegality, fraud or other serious abuses. Once again, the disclosure contemplated by the Act would foster investors' opportunities to make informed investment choices. In addition, it would foster law abiding, "market-transacting" firms' ability to profit from the enhanced investor confidence they would foreseeably garner from complying with high ethical standards and legally mandated reporting requirements in regard to their foreign transactions in natural resources rights.

Furthermore, because covered companies' could use good faith reporting under the EITDA to help attest to the propriety of their foreign transactions in natural resource rights, these reports might represent a low cost means of protecting these companies against "globalization backlash" and the wide ranging, heightened conduct-based regulatory requirements it might inspire. Such expanded regulatory requirements would foreseeably exceed the minimal administrative and reporting costs which would arise under the EITDA. By negative comparison with covered, reporting firms, if enacted, the Act would stigmatize extractive companies which refused to or failed to make credible, comprehensive, verifiable disclosures of the data called for thereunder. Again by negative implication, investors would become sensitized to the greater risks associated with investing in firms which refused to or failed to make the disclosures contemplated by the EITDA.

The EITDA is well drafted—it should broadly accomplish its goals at low cost. First, in terms of its efficacy, the Act would be extraordinarily comprehensive in its coverage. According to data compiled by Publish What You Pay, it would reach at least 90% of the major companies active in international natural resource extraction—that is, very few major extractive enterprises doing business internationally would fall outside of the Act's mandatory disclosure requirements. Hence, only a very small population of major international extractive firms would be in a position even to attempt to garner a comparative advantage from maintaining the confidentiality of their foreign transactions in natural resource rights. (The comparative advantage/disadvantage issue is addressed further below in this Testimony's concluding remarks.)

In regard to the burdens it would impose, most importantly, apart from its newly expanded disclosure requirement, the Act proposes no new conduct requirements or conduct prohibitions on extractive enterprises. Corporate acts and transactions which were already unlawful remain unlawful. And leaving aside (non)disclosure, corporate acts and transactions which were lawful remain lawful.

Nor, even, would the additional mandatory disclosures contemplated by the Act give rise to new information gathering costs for U.S. reporting firms—since any reasonably efficient international business would presumably have the relevant information called for by the Act readily at hand. For the most part, the Act would not even require new oversight or compliance measures or systems of verification. This is because the accurate reporting of transactions and maintenance of internal controls procedures sufficient to produce accurate corporate books and records was made mandatory for SEC reporting companies more than thirty years ago by Congress' enactment of the books and records provisions of the Foreign Corrupt



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Practices Act (as codified in Section 13(b) of the Securities and Exchange Act). And Congress has consistently reinforced this emphasis on accurate corporate reporting and effective corporate auditing—for example by enacting the Sarbanes-Oxley Act, and the USA Patriot Act.

You will undoubtedly consider certain superficially worrisome but ultimately insubstantial critiques of the Act. You may ask why, if disclosure is good for companies and shareholders, we cannot rely on corporate managers voluntarily to provide it to shareholders? The answer—as we are more mindful after the fall of Enron and WorldCom—is that managers may fail to disclose corporate information for self-serving reasons. They may be inclined to use material nonpublic information to profit from trading on undisclosed or selectively disclosed good or bad news. (The limited budgetary resources of the SEC ensures that not all illicit trading by senior executives will be detected or redressed.)

Even more importantly, corporate senior executives would naturally prefer to minimize and obscure the importance of unfavorable events and transactions which would cast doubt on the quality of their leadership and business judgment. This insight points to the EITDA's relationship to the basic architecture of corporate and securities law. The American corporate governance bargain is that managers and not shareholders get to make business decisions and investors cannot second-guess managers' lawful business judgments made in good faith. The flip side of this bargain however, as enforced by the federal securities laws and regulations, is that shareholders must be afforded detailed, accurate information about the firm's assets, operations and financial condition—information illustrative of the quality of their managers' decision making and professional integrity—so that they can make informed choices about buying, selling or holding their securities. In this regard, the informational disclosure contemplated by the EITDA fits neatly into the broader scheme of U.S. corporate and securities laws.

Voluntary disclosure has several other essential defects. First, of course, companies can simply ignore voluntary disclosure mandates. Furthermore, an informational environment filled with spotty, unreliable and incomplete disclosures undermines the usefulness of even reliable reports which investors might voluntarily receive. Disclosure that is voluntary will inevitably be uneven and ad hoc—in essence, impressionistic. For this reason, it will not allow for meaningful comparability—which is to say will not accomplish meaningful transparency—among and between extractive companies and projects.

In addition, investors and the marketplace will inevitably discount the credibility and accuracy of disclosures which are merely voluntary in nature. The marketplace cannot adequately distinguish between earnest voluntary disclosure and self-serving, potentially misleading corporate “spin.” For this reason, companies cannot use voluntary publicity to garner the full financial benefits which would accrue from their making systematic, legally mandated disclosures. Furthermore, by enacting the EITDA into law, Congress can signal to companies and investors, as well as broader constituencies, the seriousness of the principles at stake in achieving greater transparency in regard to international natural resource transactions.

It is also crucially important to consider the enforcement mechanisms contemplated—and not contemplated—by the Act. In particular, the Act does not contemplate a private cause of action for companies' failure to supply the information mandated thereunder. In this regard it is consonant with recent Acts of Congress which have reflected concern about the costs which may be imposed on businesses by vexatious private suits.

Nor would the broader framework of private remedies for securities fraud afford a basis for suits by investors. In particular, the limits and safeguards which Congress, the SEC and the federal courts have imposed on private investor suits for fraud—for example, heightened pleading requirements and proof of loss causation and scienter—would effectively preclude investors from using the existing antifraud prohibitions under the federal securities laws to bring claims alleging deficient EITDA reporting.

In the alternative, enforcement of the Act's disclosure requirements would fall to the discretion of the SEC, under the oversight, in most cases, of the federal courts. Most notably (leaving aside cases of notorious, repeated, material disclosure deficiencies, gross financial frauds and instances of market manipulation and insider trading), SEC enforcement actions rarely have resulted in substantial corporate fines or penalties. In responding to perceived shortcomings in the kind of reporting contemplated under EITDA, the SEC has most commonly sought civil injunctions or obtained consent decrees prohibiting future disclosure violations. Moreover, even if the SEC succeeds in proving a claim of materially deficient reporting in federal court (monetary fines against reporting companies are unavailable in administrative actions), Section 21(d) of the Securities Exchange Act of 1934 establishes a three tiered system of fines and penalties which caps the remedies which the SEC may obtain—again, absent egregious facts or fraudulent or repeated reckless disclosure deficiencies—at \$50,000 per corporate violation.

One final important critique of the Act should be addressed—that is, the issue of whether the EITDA would confer a comparative advantage on companies falling outside its reach. Certain features of this critique have been addressed previously—most importantly, that very few major, international extractive enterprises would fall outside of the Act's disclosure requirements. Secondly, the above discussion highlighted how investors—and hence companies seeking to raise capital at efficient prices and the securities markets in general—stand to benefit from the disclosures which would be legally mandated by the Act's passage. Furthermore, that certain firms might fall outside of the EITDA—even that certain firms fall outside of the scope of the U.S. securities laws in general—is a poor rationale for endorsing lax U.S. standards and requirements. That is, the United States has long been a leader in advocating standards of good corporate governance, and systems of accurate corporate reporting—and these standards and requirements have helped keep our markets strong and stable, have supported capital formation and protected investors' faith in investing.

As it turns out, moreover, the comparative disadvantage argument is inherently shaky. Its fatal flaw is that truly repressive foreign governments are unlikely to make

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decisions about which businesses to transact with based on the presence or absence of the kind of reporting requirements contemplated by the EITDA. Governments which have histories of high levels of corruption and which are likely to demand off-the-books payments in connection with the sale of resource rights are unlikely to be substantially affected by whether the terms of such transactions are subject to a publicly searchable filing with the SEC.

Second, regarding the issue of comparative disadvantage, if companies subject to U.S. reporting requirements pay bribes to foreign officials or engage in off-the-books transactions in obtaining natural resource rights, they are breaking U.S. federal laws which predate the EITDA. If companies cannot do business in conformity with the limits and standards established by Congress, then they should address this broader issue directly, rather than under cover of opposing the EITDA. Congress' consideration of the EITDA should not become a tacit vehicle for backing away from the anti-bribery, anti-money laundering and anti-corruption/national security laws which it has previously enacted.

This testimony has described how the passage of the EITDA might afford companies who embrace its disclosure mandates a comparative advantage in attracting publicly traded equity capital. Indeed, such companies should be more likely not only to attract public equity capital at favorable rates, but also private equity capital and debt financing, private and public. The reporting requirements contemplated by the Act are consonant with Congress' and the SEC's longstanding commitment to enhancing market efficiency and the rule of law underpinnings of free markets in general. In conclusion, the enactment of the Extractive Industries' Disclosure and Transparency Act would advance the welfare of U.S. investors and the market for securities of SEC reporting companies involved in international natural resource extraction, while imposing little cost on the firms it governs.



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