

2011

## **The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy**

Donald J. Smythe  
*California Western School of Law, dsmythe@cwsl.edu*

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/fs>



Part of the [Business Organizations Law Commons](#)

---

### **Recommended Citation**

50 Washburn Law Journal 635 (2011)

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu).

# The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy

Donald J. Smythe \*

*All contributions by corporations . . . for any political purpose  
should be forbidden by law . . . . Not only should both the National  
and . . . State Legislatures forbid . . . using the money of the corporation  
in . . . any election, . . . they should also forbid . . . [its] . . . use in connection  
with any legislation . . . .*

—President Theodore Roosevelt<sup>1</sup>

*[T]o exclude or impede corporate speech is to muzzle the principal agents of  
the modern free economy. We should celebrate . . .  
the addition of this speech to the public debate.*

—Associate Justice Anthony Scalia<sup>2</sup>

## I. INTRODUCTION

Justice Scalia's remarks from his concurring opinion in *Citizens United v. Federal Election Commission*<sup>3</sup> reflect a widespread modern acceptance of the important role that corporations play in our economy, society, and everyday life. As the quote from President Theodore Roosevelt suggests, however, scarcely more than 100 years ago there was widespread skepticism about corporations and their influence on American politics.<sup>4</sup> Roosevelt spoke in the wake of the Great Merger Movement, a wave of industrial consolidations that resulted in the largest discrete increase in industrial concentration in American history.<sup>5</sup> The Great Merger Movement had been possible because of changes in corporate law in the late nineteenth century that allowed the consolidations to occur through incorporations under general state statutes and because the Sherman Act, as interpreted by the U.S. Supreme Court, had not prevented it.<sup>6</sup> It helped to reduce the risks that companies faced in making significant investments in important new technologies and paved the way for

---

\* Professor of Law, California Western School of Law.

1. President Theodore Roosevelt Annual Address to Congress (Dec. 5, 1905).

2. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 929 (2010) (Scalia, J., concurring).

3. 130 S. Ct. 876.

4. See *infra* Part III.G.

5. It was notably larger than any of the subsequent merger waves. See *infra* Part II.B.

6. See *infra* Part II.C.

the modern industrial economy of the twentieth century.<sup>7</sup> But it was also the final step in the emergence of a new era in American life, an era in which large corporations played a central role in the economy and society.

Not coincidentally, President Roosevelt also spoke in the wake of a campaign financing scandal, one that had impugned his own integrity.<sup>8</sup> A public inquiry into suspicious dealings in the insurance industry revealed that large insurance corporations had surreptitiously made comparatively huge donations directly into the campaign coffers of several politicians in the early 1900s, including Roosevelt's in the presidential election campaign of 1904.<sup>9</sup> Roosevelt, no doubt, was stung by the revelations of the inquiry and wanted to allay any concerns that he had been bought by corporate interests. But his remarks went beyond the need for campaign finance reform and suggested the need for more sweeping curbs on corporations' political influence. Indeed, there was widespread alarm at the turn of the twentieth century about the growing economic and political power of the corporations.<sup>10</sup> Many worried that corporate influences were subverting democracy and that the United States was becoming plutocratic.<sup>11</sup>

The economic and social transformation that began in the late nineteenth century created a number of stresses and strains in American society. As the nation made the transition from a rural, agrarian economy to an urban, industrial one, many of the traditional nineteenth-century ways of life, and the Victorian values that sustained them, were disrupted or challenged. Local communities became less important, occupations became more professional, work became more routine and hierarchical, racial and ethnic conflicts were heightened, and gender stereotypes came under attack.<sup>12</sup> The changes and disruptions wrought myriad strains of discontentment manifested among farmers, the working class, the middle class, racial and ethnic minorities, and women.<sup>13</sup> These strains of discontentment created pressures for reform that fueled the Populist Movement in the late nineteenth century and the Progressive Movement at the turn of the twentieth century. These political movements created strains and divisions within the Democratic and Republican Parties and contributed to an important political realignment during the period from 1896 to 1916.<sup>14</sup>

The explosive growth in the number of large corporations and the related increase in market concentration that culminated in the Great Merger

---

7. See *infra* Part II.D.

8. See *infra* Part IV.B.

9. Charles Evans Hughes, a future Chief Justice of the U.S. Supreme Court, headed the inquiry. Ironically, Hughes was known primarily as a corporate attorney at the time. See *infra* Part III.H.

10. See *infra* Part III.G.

11. The word "plutocracy" was used commonly in newspaper and magazine articles to denounce the political influence of the large corporations and their wealthiest stockholders. See *infra* Part III.G.

12. See *infra* Parts III.A-F.

13. See *infra* Parts III.A-F.

14. This was arguably when the contours of the modern American political spectrum with a liberal Democratic Party and a conservative Republican Party first began to emerge. See *infra* Part III.H.

Movement at the turn of the twentieth century was an integral part of the economic and social changes that disrupted late nineteenth century America and drove the Progressive Movement. Although the Progressive Movement had many impulses, its prevalent concern was about the growing economic and political power of the “trusts.”<sup>15</sup> The corporations themselves initially did little to lessen those concerns and defuse reformist pressures. The ruthless dealings of the “Robber Barons” in the late nineteenth century, and the “conspicuous” consumption of wealthy industrialists at the turn of the twentieth century, exacerbated the tensions.<sup>16</sup> When the corporations’ surreptitious attempts to influence election outcomes with comparatively huge campaign contributions were revealed, this only confirmed, for many people, that they were a danger to democracy and strengthened the reformist pressures.<sup>17</sup>

At the turn of the twentieth century, corporate speech had no constitutional protections. The First Amendment did not protect a corporation’s speech against the federal government, and the First Amendment had not been incorporated to the states under the Fourteenth Amendment. Thus, the corporation’s speech obviously had no federal constitutional protections against the state governments.<sup>18</sup> Moreover, there were no free speech rights under the state constitutions for corporations. Corporations were regarded at the time as creatures of state law whose rights and activities were controlled by their charters. State courts could, and occasionally did, use the *ultra vires* doctrine to construe corporations’ charters so narrowly as to prohibit them from engaging in certain kinds of speech.<sup>19</sup> Indeed, as shareholder derivative suits became more prevalent, the *ultra vires* doctrine could have inhibited many corporations from making political contributions or engaging in other forms of political speech. But that did not happen. Instead, courts increasingly declined to apply the *ultra vires* doctrine and deferred to the decisions of corporate directors under the business judgment rule.<sup>20</sup>

Given the political pressures during the Progressive Era, it is striking that corporate speech and related behavior was not subjected to much more severe limitations. Some states did enact campaign finance laws that prohibited corporate political contributions, and, in 1907, the federal government enacted the Tillman Act to prohibit corporations from making direct campaign contributions in federal elections, but it is not clear whether any of these measures were very effective.<sup>21</sup> The larger corporations soon came to understand that the public’s concerns could not be redressed simply by influencing particular

---

15. Indeed, many worried more about the corporations’ political power than about monopoly pricing or anti-competitive behavior. *See infra* Part III.G.

16. *See infra* Part IV.A.

17. *See infra* Part III.H.

18. The U.S. Supreme Court’s early treatment of the corporation’s legal status was often muddled, but the Court did not apply the First Amendment to corporate political speech until 1978, and it did not incorporate the First Amendment against the states until 1926. *See infra* Part IV.B.

19. *See infra* Part IV.C.

20. *See infra* Part IV.C.

21. *See infra* Part III.G.

election outcomes. They faced a bigger problem: their public images.<sup>22</sup> As corporations learned that public opinion and public attitudes could be manipulated, and that their public images could be repaired, they began to invest in public relations programs. In the first half of the twentieth century, the modern public relations industry was born. American corporations sought not only to humanize their companies and integrate them into the American public's sense of community but also to rationalize and legitimize the market system within which they flourished, and inculcate into the public an ideology that would institutionalize a role for the corporation.<sup>23</sup>

The public relations campaigns worked. Most Americans now probably would agree that corporations are an integral part of a modern capitalist economy. Moreover, while many might not agree with Justice Scalia and the majority of the U.S. Supreme Court about how far corporate speech rights should be extended, there is little, if any, public pressure for the kind of sweeping restrictions on corporate political activities that President Roosevelt suggested in his Annual Address to Congress in 1905. The fact that the corporation plays a central role in our modern economy and the fact that it has achieved widespread social and political legitimacy are not unrelated. It was inevitable that the central actor in our modern economy would seek some kind of social acceptance and legitimacy. If the corporation had not achieved a significant measure of social acceptance and legitimacy it probably would have been subjected to much more restrictive regulations and it would not have become so important to our economy. If courts and legislatures had not allowed corporations to engage in the kinds of speech that contributed to their public relations campaigns in the early twentieth century, the American economy—and American society—would have developed in fundamentally different ways.

Part II of this Article provides an overview of the "Second Industrial Revolution," a period of unprecedented growth and technological change in American business that wrought related changes in the organization of business firms and markets. Part III provides an overview of the Progressive Movement, a loosely coordinated campaign for reform that resulted in part from the dislocations and discontentment caused by the underlying economic and social changes. Part IV elaborates on the corporate response, focusing first on the legal preconditions and then elaborating on the rise of corporate public relations programs and a corporate "welfare work" movement.

## II. THE SECOND INDUSTRIAL REVOLUTION

The period from 1870 to 1920 was a transitional period in American his-

---

22. At the turn of the twentieth century, it was said commonly that the corporation had "no pants to kick or soul to damn." See *Ray v. United States*, 374 F.2d 638, 641 (5th Cir. 1967). This reflected a concern about the corporations' lack of a moral compass and sense of social responsibility and undermined the legitimacy of the corporation's role in American society. See *infra* Part IV.D.

23. See *infra* Parts IV.G-I.

tory.<sup>24</sup> It was during this time that electricity became the dominant source of industrial power, the automobile first appeared on American roads, the high-rise building appeared on the American city skyline, inexpensive, mass-produced consumer goods became available across the country, occupations such as law, medicine, engineering, and management began to acquire the modern attributes of professions, and, perhaps most significantly, the modern corporation emerged.<sup>25</sup> These dramatic changes were a direct consequence of the transportation revolution of the nineteenth century and myriad technological innovations in its wake.<sup>26</sup> The transformation touched every region of the country, all racial, religious, and ethnic groups, and all levels of society.<sup>27</sup> It also had enormous implications for law, politics, and American culture.

### *A. The Transportation Revolution*

The transportation revolution in the United States began with the construction of a system of canals in the early nineteenth century.<sup>28</sup> The canals connected the interior of the North American continent to the important markets and shipping harbors on the coasts through the Great Lakes and the Mississippi River.<sup>29</sup> The canal system left many parts of the continent outside of the emerging transportation network, but with the advent of the railroad and in the wake of major investments in new railroads during the middle and later parts of the nineteenth century, the American transportation network became truly national in scope.<sup>30</sup> Although the railroads may have duplicated some of the transportation capabilities of the canals, they augmented them in ways and significantly reduced transportation costs in many parts of the country.<sup>31</sup>

The construction of the canals and railroads and the development of a national transportation network raised a number of problems for private investors and public officials. It also created many conflicts between the railroads

24. There are many ways in which the course of American history changed at the turn of the twentieth century and many perspectives on the causes and consequences. For an overview of the economic changes, see generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977); THOMAS P. HUGHES, *AMERICAN GENESIS: A CENTURY OF INVENTION AND TECHNOLOGICAL ENTHUSIASM 1870-1970* (1989); DAVID C. MOWERY & NATHAN ROSENBERG, *TECHNOLOGY AND THE PURSUIT OF ECONOMIC GROWTH* (1989). For alternative perspectives on the social and political changes, see generally RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955); MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920* (2003); ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967). For perspectives on the legal changes, see generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* (1988). For an interesting discussion of the impact of the corporation on American culture, see ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* (1982).

25. See, e.g., HUGHES, *supra* note 24 for an overview.

26. See generally CHANDLER, *supra* note 24.

27. MCGERR, *supra* note 24, at xiv-xv.

28. CHANDLER, *supra* note 24, at 34-36.

29. *Id.*

30. By the 1870s, the United States had a national transportation network. *Id.* at 88.

31. In fact, the railroads had so many advantages, that they began to replace the canals altogether. *Id.* at 83.

and their employees and customers, which in turn added to the pressures on private investors and public officials.<sup>32</sup> One of the early problems was that competing railroads tended to make duplicative investments.<sup>33</sup> In many cases, a single railroad through some part of the country was highly lucrative; this encouraged new railroads to invest in that region and compete for a share of the profits. Unfortunately, in competing for railroad customers, the railroads often undercut one another's prices after making large, fixed investments in new tracks and supporting facilities.<sup>34</sup> This pushed their prices below average costs and they ended up not being able to cover their fixed costs.<sup>35</sup> The problem often motivated the railroads to consolidate and seek respite from further competition. The consolidations, however, often resulted in accusations that the railroads were charging monopoly prices.<sup>36</sup>

The railroad consolidations and accusations of monopolistic pricing helped to foment the populist pressures that preceded the Progressive Movement.<sup>37</sup> The Populist Movement was largely agrarian in its origins, driven by farmers and other rural customers of the railroads who often felt aggrieved by the railroads' allegedly anti-competitive behavior.<sup>38</sup> Ultimately, progressive-minded reformers, blue-collar workers, and unionists joined the farmers, and the reformist pressures took on a broader scope and new directions.<sup>39</sup> Nonetheless, the early discontent with the railroads and the resulting pressures for federal regulation to bring order to the railroad industry and to reduce the railroads' monopoly power prompted Congress to enact the Interstate Commerce Act in 1887.<sup>40</sup> This was the first federal statute to regulate interstate commerce. It was the harbinger of modern American business regulation.

---

32. See *infra* Part III.C. for a discussion of the Pullman strike, one of the most disruptive and violent conflicts between management and labor in the nineteenth century, that virtually paralyzed the national railroad system. Farmers increasingly depended heavily on the railroads to ship their crops to distant markets, and they often felt they were charged unfair rates. For a discussion of the farmers' discontent, see MCGERR, *supra* note 24, at 104–07, 150–55.

33. See generally Michael Perelman, *Fixed Capital, Railroad Economics, and the Critique of the Market*, 8 J. ECON. PERSPECTIVES 189 (1994).

34. See *id.* at 190.

35. See *id.* at 192–94.

36. See *id.* at 193–94. Many sympathized, however, with the railroads. As Perelman observes, the problems endemic to the railroad industry in the late-nineteenth century contributed to a new “corporatist” school of political economy, which included some of the founding members of the American Economic Association. *Id.*

37. The pressures for reform that began in the late nineteenth century unfolded in three distinct stages: “the agrarian uprising that found its most intense expression in the Populism of the 1890’s and the Bryan campaign of 1896; the Progressive movement, which extended from about 1900 to 1914; and the New Deal, whose dynamic phase was concentrated in a few years of the 1930’s.” HOFSTADTER, *supra* note 24, at 3.

38. Although many farmers felt aggrieved by the railroads’ allegedly extortionate rates, and these grievances no doubt contributed to Populist rhetoric, they may have been more imaginary than real. *Id.* at 58; see also DOUGLAS C. NORTH, *GROWTH AND WELFARE IN THE AMERICAN PAST* 15–34 (1966). Hofstadter attributes agrarian Populism to the transition that American agriculture was making from its self-sufficient tradition to the commercial realities of the modern era. HOFSTADTER, *supra* note 24, at 58–59.

39. See generally MCGERR, *supra* note 24, at 3–76.

40. HOFSTADTER, *supra* note 24, at 164.

*B. The Rise of Mass-Production Manufacturing*

The development of a national transportation network had dramatic implications for the American economy.<sup>41</sup> The canals and railroads significantly reduced transportation costs and opened up new opportunities for the shipment of goods and travel of people well before the national transportation network was complete.<sup>42</sup> Manufacturing firms responded to the increase in the size of their potential markets by expanding their productive capacity and increasing their output levels.<sup>43</sup> They began to invest in larger, more capital-intensive production facilities and to implement innovations in production methods.<sup>44</sup> Although most of the innovations were incremental, the cumulative effects were significant, and manufacturing costs declined while manufacturing capacity exploded.<sup>45</sup> In many industries, the new opportunities created problems that were similar to those that were being experienced in the railroad industry.<sup>46</sup> Manufacturing firms made significant investments in new capital facilities and then attempted to spread their fixed costs over a larger output of goods.<sup>47</sup> In many cases, however, they had to reduce their prices to increase their sales. They often ended up engaging in vigorous price competition with other firms.<sup>48</sup> In some cases, the price competition was so vigorous that they were unable to cover their fixed costs.<sup>49</sup>

Manufacturing firms typically responded to these competitive pressures first by attempting to collude.<sup>50</sup> Generally, their attempts to collude failed. In an industry characterized by rapid technological innovation, in which the laggards tend to fail, firms' attempts to collude rarely succeed.<sup>51</sup> In the face of their inability to restrain competition through arms-length collusive agreements, the firms generally turned to tighter forms of consolidation to alleviate the competitive pressures.<sup>52</sup> These initially took the form of trusts in which

41. It is not clear whether the railroads played a crucial role. Robert Fogel used a counterfactual econometric analysis to evaluate their impact and concluded they only marginally reduced the social cost of transportation, given the existing networks of canals and rivers. See generally ROBERT W. FOGEL, *RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY* (1964). Fogel's argument bucked the conventional wisdom at the time he first made it, but it has largely prevailed today. See, e.g., Robert Whaples, *Where Is There Consensus Among Economic Historians? The Results of a Survey on Forty Propositions*, 55 J. ECON. HISTORY 139, 149 (1995).

42. Douglas North argues that railroad rates fell rapidly from 1865 to 1900. See NORTH, *supra* note 38, at 137–42.

43. NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904*, at 28 (1985).

44. Donald J. Smythe, *A Schumpeterian View of the Great Merger Movement in American Manufacturing*, 4 CLIMETRICA 141, 149–57 (2010).

45. *Id.*; see also LAMOREAUX, *supra* note 43, at 14–45.

46. Smythe, *supra* note 44, at 149–53.

47. LAMOREAUX, *supra* note 43, at 14–45.

48. *Id.*

49. *Id.*

50. In a series of lectures delivered at Massachusetts Institute of Technology after the turn of the twentieth century, Justice Louis Brandeis observed that trusts typically attempted to restrain competition first through cartels or trade association agreements. See THOMAS MCCRAW, *PROPHETS OF REGULATION* 94–101 (1984). When these failed, they turned to tighter forms of cooperation and usually ended up merging. *Id.*

51. Smythe, *supra* note 44, at 146.

52. *Id.*



competing firms would transfer their stock to a board of trustees who then could control the firm's investment, pricing, and production decisions and reduce competition among them.<sup>53</sup> The trust device soon encountered legal obstacles, however, and so firms sought to find some other mechanism for controlling industry competition.<sup>54</sup> Mergers were the only viable alternative.<sup>55</sup> In the wake of new general incorporation laws in New Jersey and then Delaware, scores of manufacturing firms consolidated in dozens of mergers during the Great Merger Movement of 1895 to 1904.<sup>56</sup> The mergers were typically financed through the sale of stock in a holding corporation, which then used the cash to buy out the parties to the consolidation.

The consolidations began in the 1880s, as many manufacturing firms first faced new competitive pressures, but they increased rapidly toward the turn of the century and reached a crescendo during the Great Merger Movement.<sup>57</sup> From 1895 to 1904, several hundred manufacturing firms were gobbled up by more than 150 new consolidations.<sup>58</sup> This was the most significant discrete increase in industrial concentration in American history and the consolidations reduced competition in many industries.<sup>59</sup> They also caused considerable consternation.<sup>60</sup> The public's alarm was probably due in part to the novelty of the trend. The consolidations gave birth to big business as we know it today and thus inaugurated a new stage in American history. People at the time were well aware that they were living through an important transitional period.<sup>61</sup>

### C. *The Political Response to the Trust Problem*

The public's concerns were initially motivated by the new corporations' economic power.<sup>62</sup> These new corporations were much larger than the firms that had predominated during the nineteenth century when high transportation costs largely precluded mass production.<sup>63</sup> Their size usually translated into significant market power, both in the markets for the goods they sold to their customers and the markets in which they hired their employees. The public's

---

53. *Id.* at 153.

54. *Id.*

55. MCCRAW, *supra* note 50, at 96–97.

56. LAMOREAUX, *supra* note 43, at 1–2.

57. Smythe, *supra* note 44, at 153.

58. More than 1,800 firms disappeared in consolidations from 1895 to 1904. LAMOREAUX, *supra* note 43, at 2.

59. The Great Merger Movement was significantly larger, relative to the size of the economy at the time, than any of the subsequent merger waves in American history. Devra L. Golbe & Lawrence J. White, *A Time-Series Analysis of Mergers and Acquisitions in the U.S. Economy*, in CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 273–75 (Alan J. Auerbach ed., 1988).

60. Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from Knight to Swift*, 39 U.C. DAVIS L. REV. 85, 87 (2005).

61. Smythe, *supra* note 44, at 149–53.

62. David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1256, 1276–77 (1988).

63. See, e.g., LAMOREAUX, *supra* note 43, at 42–44 (documenting the significant increase in the size of eastern newsprint mills in the relatively short period from 1892 to 1900).

concerns about their market power placed significant pressure on political leaders to implement some kind of policy response.<sup>64</sup> The common law did regulate certain kinds of anti-competitive behavior, at least to certain degrees, but it proved inadequate to the task of regulating the trusts.<sup>65</sup> Very few cases were brought against the trusts under the common law and they had no appreciable effect on their behavior.<sup>66</sup>

Congress eventually responded by enacting the Sherman Act in 1890.<sup>67</sup> This was another signal event in the federal government's assertion of its powers to regulate business, but the Sherman Act proved to have little more bite than the common law, at least for several years.<sup>68</sup> The statute was not drafted clearly and did not initially appear to proscribe any conduct that was not already proscribed under the common law.<sup>69</sup> The ambiguities may have been intentional: the language may have reflected a compromise between proponents of the statute, who were anxious to respond to the public pressures for new restraints on the trusts, and opponents of the statute, who were concerned about shackling the free enterprise system. The ambiguities meant that the difficult task of defining federal antitrust law would be left to the courts.<sup>70</sup>

The first serious challenge to any trust under the Sherman Act was in a suit brought by the federal government against the American Sugar Company.<sup>71</sup> The case was appealed to the U.S. Supreme Court, which held that the Sherman Act did not reach manufacturing activities conducted entirely within a state because these activities were not a matter of interstate commerce.<sup>72</sup> At the end of the nineteenth century, the federal government's regulatory powers were still severely circumscribed by the Court's narrow reading of the interstate commerce clause.<sup>73</sup> By 1905, however, the Court had adopted the "stream of commerce" doctrine, and the modern basis for the federal government's regulatory powers was established.<sup>74</sup> Well-informed

64. Smythe, *supra* note 60, at 138.

65. For an overview of the English common law antecedents to the Sherman Act, see WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 18–52* (1965). By 1890, the common law limitations on monopoly had become quite weak. *Id.* at 51.

66. Letwin observes:

It was true that in at least three prominent instances between 1887 and 1890 courts judging private suits refused to uphold agreements in restraint of trade. Such results were comforting indications of "the tendency of the judicial mind," as one contemporary law journal put it, but they were clearly not enough to put an end to the trust problem.

*Id.* at 82.

67. This is the conventional view of Congress' motivations. See, e.g., Millon, *supra* note 62, at 1276–77. Not everyone agrees. Werner Troesken, for instance, contends that the Sherman Act was motivated in part by small businesses seeking protection from larger competitors. Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust*, 15 *REV. AUSTRIAN ECON.* 275, 291 (2002).

68. The Sherman Act was enacted in 1890 in response to pressing concerns, but the first important anti-trust case was not until *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). Smythe, *supra* note 60, at 98.

69. *Id.* at 96–97.

70. See *id.*

71. *Id.* at 98.

72. *Id.* at 100–01.

73. *Id.* at 100.

74. Justice Oliver Wendell Holmes used the term "current of commerce." *Swift & Co. v. United States*, 196 U.S. 375, 399 (1905). Nonetheless, his opinion expanded the scope of federal interstate commerce pow-

observers understood that this was an important development and would have far-reaching implications.<sup>75</sup>

*D. A Technological Revolution and  
the Birth of Modern Corporate Capitalism*

The economic forces that drove the consolidations around the turn of the twentieth century had other far-reaching effects. The new corporate behemoths made enormous investments in new plants and equipment that embodied new technologies.<sup>76</sup> Many of the new machines, for instance, were manufactured with “high-speed steel.”<sup>77</sup> This lighter, harder metal allowed machines to be calibrated for more precise manufacturing standards. Moreover, because many of the firms’ products were themselves manufactured with high-speed steel, they were also lighter and more durable.<sup>78</sup> The most important technological development at the turn of the twentieth century, however, was the supply of electricity through an alternating current.<sup>79</sup>

The supply of electricity through an alternating current helped electric power utilization diffuse much more widely among manufacturing firms.<sup>80</sup> Electricity not only proved to reduce their energy costs directly, it also helped to generate myriad other technological innovations.<sup>81</sup> Under the “drive system” that had prevailed with the use of steam and water power, for instance, all the machines in a plant had to run at the same time. Because they all relied on the same power source, they were operated through belts and pulleys that limited the flexibility of their design.<sup>82</sup> Electric power allowed individual machines to run separately, and, with the advent of smaller electric motors, it allowed the machines to be designed in ways that were better suited to their

ers. As he explained:

[C]ommerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another . . . the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.

*Id.* at 398–99.

75. Smythe, *supra* note 60, at 129–30.

76. Smythe, *supra* note 44, at 149–53.

77. *Id.* at 149–50.

78. *Id.*

79. *Id.* at 150–51. It turned out that electricity could be transmitted much farther through an alternating current than a direct current. Although the uses of electric power had been discovered and electric power had been made available earlier in the nineteenth century, the shorter transmission capabilities of electricity supplied through a direct current had limited its uses in manufacturing because it meant that if plants and equipment were to be run on electricity they had to be constructed close to a major source of electric power. *Id.*

80. The diffusion of electric power utilization also may have been helped by the rise of big business. To utilize electric power, manufacturing firms had to make significant investments in retooling existing plants or entirely new plants. These investments were not only risky, they required financial capital. The newly merged manufacturing corporations at the turn of the twentieth century, which could finance the investments through stock issues rather than through debt or retained earnings, and which generally had the market power necessary to reduce the risks, may have accelerated the electrification of American industry. See generally Donald J. Smythe, *The Great Merger Movement and the Diffusion of Electric Power Utilization in American Manufacturing, 1899-1909*, 27 E. ECON. J. 253 (2001).

81. Smythe, *supra* note 44, at 150.

82. *Id.*

purposes.<sup>83</sup> The diffusion of electric power among manufacturing firms from about 1890 to 1920 required firms to make significant investments in new plants and equipment and to retool existing plants and equipment so that it would not become obsolete.<sup>84</sup>

There were many other important technological innovations around the turn of the twentieth century.<sup>85</sup> These also required significant investments in new plants and equipment. But the investments were often risky, especially if they were made in highly competitive industries.<sup>86</sup> Individual entrepreneurs rarely had the personal wealth or the intestinal fortitude to undertake such large investments on their own. The corporation offered a more secure and effective means of raising the requisite capital and thus appears to have played a key role in the dramatic economic transformation.<sup>87</sup> The transformation was so significant and complete that it has come to be called the “Second Industrial Revolution.”<sup>88</sup> Other developed economies underwent similar transformations around the same time, but the United States emerged and remained the world’s technological leader through much of the twentieth century.<sup>89</sup>

It would be difficult to assess what role the law played in the United States’ emergence as the world’s technological leader. It is clear that the economic forces that unleashed the Second Industrial Revolution were facilitated and influenced by important changes in the law, especially corporate law.<sup>90</sup> It is also clear that the same forces had enormous social and political consequences, and that they were facilitated and influenced by contemporary political developments.<sup>91</sup> It is no coincidence that the Second Industrial Revolution coincided with the Progressive Movement. The turn of the twentieth century not only featured the most important economic transformation in American history; it was also the time of an important realignment in American politics and society.<sup>92</sup>

83. *Id.*

84. *Id.* at 150–51.

85. See generally HUGHES, *supra* note 24.

86. NATHAN ROSENBERG & L.E. BIRDZELL, JR., HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD 215 (1986).

87. As Rosenberg and Birdzell explained:

[B]etween 1880 and 1920, the United States was increasing its industrial capacity and altering manufacturing technology in ways that required extensive replacement of obsolete plants, often with plants of considerably greater size. . . . There was a serious need for new forms of enterprise better able to attract capital. . . . [T]he plausible expedients were . . . incorporation, the formation of trusts, and . . . mergers. . . . Although these produced many enterprises that failed, they also produced a number of large enterprises that proved able[,] . . . and a burgeoning American economy emerged from the merger movement ready to take off on a second industrial revolution.

*Id.* at 215–16.

88. *Id.*

89. See generally Richard R. Nelson & Gavin Wright, *The Rise and Fall of American Technological Leadership: The Postwar Era in Historical Perspective*, 30 J. ECON. LITERATURE 1931 (1992).

90. See generally Smythe, *supra* note 60.

91. See generally HOFSTADTER, *supra* note 24.

92. *Id.*

### III. THE PROGRESSIVE MOVEMENT

#### *A. Agrarian Discontent*

The social transition from a predominantly agricultural economy with small and moderately sized family-owned manufacturing firms to a modern industrial economy dominated by large corporations was not an easy one. The late nineteenth century was a period during which many Americans grew discontented with their lives and prospects as traditions began to clash with emerging modern values.<sup>93</sup>

The discontent manifested itself first among farmers.<sup>94</sup> Although the canals and railroads opened new markets for agricultural products, they also opened up new opportunities for farming.<sup>95</sup> Remote parts of the country became accessible, and new farms sprouted up throughout the nineteenth century, especially in the Midwest.<sup>96</sup> At the same time, technological innovations were making the agricultural sector more productive.<sup>97</sup> These innovations were largely the result of better farm machinery and land improvements, such as irrigation systems.<sup>98</sup> Nonetheless, credit was often difficult to negotiate and the real price of land rose throughout the period, making farming increasingly expensive.<sup>99</sup>

The agrarian discontent that developed during the nineteenth century may have owed something to the growing gulf between the agrarian myth of idyllic individualism and egalitarianism that had become so deeply entrenched in nineteenth century American culture and the grim commercial realities of agrarian life.<sup>100</sup> In the face of increased competition and rising costs,

93. See generally MCGERR, *supra* note 24, at 3–39.

94. Agrarian discontent fueled the Populist Movement, which preceded and ultimately was absorbed into the Progressive Movement. See HOFSTADTER, *supra* note 24, at 46–51, 133; WIEBE, *supra* note 24, at 84–90.

95. As Hofstadter noted: “During the decade 1890-1900, in which . . . [agrarian] discontent was most acute, 1,100,000 new farms were settled, 500,000 more than the number in the previous decade.” HOFSTADTER, *supra* note 24, at 52.

96. McGerr wrote:

Well into the nineteenth century, many farmers, distant from the market, had lived fairly self-sufficient lives; they raised what they needed on their land, and bartered for much of the rest. By 1900, that self-sufficiency had largely ended. Whether they wanted to or not, most farmers now produced cash crops for the market.

MCGERR, *supra* note 24, at 27.

97. “The rate of investment in farm machinery and implements increased rapidly from 1850 to 1880.” Wayne D. Rasmussen, *The Impact of Technological Change on American Agriculture, 1862-1962*, 22 J. ECON. HIST. 578, 581 (1962).

98. Yair Mundlak, *Economic Growth: Lessons from Two Centuries of American Agriculture*, 43 J. ECON. LITERATURE 989, 992–93 (2005).

99. *Id.* at 992.

100. Richard Hofstadter observed:

Writers like Thomas Jefferson . . . admired the yeoman farmer not for his capacity to . . . make money but for his honest industry, his independence, his frank spirit of equality . . . . The farmer himself . . . was in fact inspired to make money, and such self-sufficiency as he actually had was usually forced upon him . . . . The more farming as a self-sufficient way of life was abandoned for farming as a business, the more merit men found in what was being left behind.

HOFSTADTER, *supra* note 24, at 23–24.

American farmers experienced decreases in their incomes and wealth. They consequently felt less independent and life seemed less egalitarian. In short, the gulf between the agrarian myth and the reality of their lives became more pronounced.<sup>101</sup> Moreover, with the advent of the railroads and the telegraph, they were increasingly connected to the rest of American culture and they began to adopt its more commercial values.<sup>102</sup> Because these new commercial values came at a time when the farmers' incomes were declining and the material quality of their lives was growing more difficult to sustain, they only contributed to their dissatisfaction.<sup>103</sup>

### *B. Urban Working Class Discontent*

Between 1870 and 1900, young people migrated from rural areas to the cities to work in plants, factories, mines, and other businesses.<sup>104</sup> By 1900, the United States had become a predominantly urban society and the agrarian myth that had animated Thomas Jefferson's conception of democracy began to fade from memory.<sup>105</sup> The growing ranks of industrial workers became more vocal about their own discontent. While they never may have aspired to live the idyllic life of pastoral isolation and individualism that characterized the agrarian myth, they had growing material wants and aspired for better lives.<sup>106</sup> Many of the workers in the new factories were immigrants, especially in the larger cities such as New York, Boston, and Philadelphia.<sup>107</sup> They not only had to negotiate their way into the American workforce, they often had to learn a new language and adjust to new customs and ways of living.<sup>108</sup> Meantime, the industrial workplace itself was undergoing important changes that increased tensions between the workers and industrialists.

Earlier in the nineteenth century, skilled tradesmen performed factory work, and firms' production processes were small and non-routine.<sup>109</sup> The workers generally had some control over the pace of their work and manner in which it was undertaken.<sup>110</sup> Certain customs and norms proliferated in particular industries that derived from the trades and crafts of the workers that

101. Hofstadter wrote: "For the farmer it was bewildering, and irritating too, to think of the great contrast between the verbal deference paid him by almost everyone and the real status, the real economic position, in which he found himself." *Id.* at 35.

102. *See id.* at 58–59.

103. *See id.*

104. The total amount of labor in farming continued increasing throughout the late nineteenth century, peaking only in 1910. Mundlak, *supra* note 98, at 992. Young people frequently left their families' farms for the cities. MCGERR, *supra* note 24, at 32.

105. *Id.* at 30. The total population was obviously growing, so this explains how the proportion of labor in agriculture could fall while the total amount of labor in agriculture was still rising.

106. *Id.* at 13–21.

107. *Id.* at 33.

108. McGerr suggested that the ethnic diversity of the industrial working class impeded the growth of the union movement. *Id.*

109. *Id.*

110. DAVID MONTGOMERY, *WORKERS' CONTROL IN AMERICA* 17 (1979). As Montgomery explained, craftsmen typically worked according to a "moral code" that helped to facilitate their cooperation with one another. *Id.*

were employed in them, and these customs and norms often regulated the workplaces.<sup>111</sup> As firms invested in larger, more capital-intensive facilities near the turn of the century, they needed to assert more control over their production processes and establish more clearly defined work routines.<sup>112</sup> The firms initially focused primarily on the control of production and increasing the intensity of work effort. This emphasis on work effort defined what became known as the “drive system” of production.<sup>113</sup> Later, as firms adopted increasingly sophisticated technologies, they also became interested in new management techniques and began to implement the precepts of the scientific management movement.<sup>114</sup>

### C. *The Union Movement and Labor Strife*

Industrial workers often responded to their employers’ efforts to wrest control of the workplace by seeking to organize.<sup>115</sup> Their employers frequently opposed their unionization and this often added to the tensions in the industrial workplace. Nonetheless, the union movement grew in scope and strength throughout the late nineteenth century. Unfortunately, so did strife between the unions and their industrial employers.<sup>116</sup> The Haymarket riot of 1886, for example, began after a period of upheaval in American labor relations and a rally in support of striking workers at a McCormick Harvesting Co. plant in Chicago at which a number of workers were shot and killed.<sup>117</sup> At a rally organized in response to the incident the next day, an anarchist threw a pipe bomb that killed a policeman.<sup>118</sup> The police opened fire and at least some workers responded with gunfire of their own. Several people died and scores were injured.<sup>119</sup> Although the incident contributed to the establishment of the first international May Day celebration,<sup>120</sup> it was a setback for the American union movement, and it was a reflection of the growing labor tensions in America.<sup>121</sup>

The Pullman strike in 1894 brought labor tensions to a head.<sup>122</sup> The

---

111. *Id.*

112. *Id.* at 113.

113. SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE AMERICAN INDUSTRY, 1900–1945*, at 20 (1985). The “drive system” was not always humane; the workers were sometimes subject to “abuse, profanity, and threats.” *Id.*

114. The most notable figure in this trend was Frederick Winslow Taylor, the founder of the scientific management movement. HOFSTADTER, *supra* note 24, at 241; *see generally* JACOBY, *supra* note 113, at 29–48.

115. The employers generally attempted to rationalize production by investing in further mechanization and making the workers’ tasks less skilled and more routine. DAVID M. GORDON, RICHARD EDWARDS, & MICHAEL REICH, *SEGMENTED WORK, DIVIDED WORKERS* 113 (1982). “Much of this was resisted by labor unions as an attempt to set up a system of paternalistic control, and much was indeed associated with a fostering of company unions.” HOFSTADTER, *supra* note 24, at 241.

116. MCGERR, *supra* note 24, at 119–20.

117. *See generally* JAMES GREEN, *DEATH IN THE HAYMARKET* 145–73 (2006).

118. *Id.* at 185–87.

119. *Id.* at 186.

120. *Id.* at 286.

121. *Id.* at 318–20.

122. The Pullman strike was “more extended and convulsive” than any of the previous ones in the late

strike began after the Pullman Palace Car Co. had taken many of its workers off straight wages and put them on a piece rate compensation scheme.<sup>123</sup> Like many other American workers at the time, Pullman employees had been pressing for an eight-hour day and regarded this as an attempt by the company to squeeze even more work out of them.<sup>124</sup> In the wake of rising tensions, most Pullman employees walked off the job and Pullman shut down its factory.<sup>125</sup> The Pullman workers were soon joined by members of the American Railway Union who, to show their solidarity with the Pullman workers, refused to work on trains with Pullman cars.<sup>126</sup> Because railroad workers across the country refused to switch Pullman cars, the nation's railroad system was paralyzed.<sup>127</sup> In the wake of growing unrest and fears of increasing violence, President Cleveland ordered the federal government to intervene and ultimately ended the strike using federal troops.<sup>128</sup> Although the strike probably damaged Pullman,<sup>129</sup> it also did little to help the union movement.<sup>130</sup> It was another signal event reflecting the growing malaise between industrial workers and their employers at the turn of the twentieth century.

#### *D. Middle Class Progressives*

The ranks of the farmers and workers who were discontented with their prospects in the emerging modern corporate economy were joined by growing numbers of middle-class Americans, primarily from the ranks of small business owners, professionals, and white-collar supervisors and managers.<sup>131</sup> These groups also felt threatened by the growing power of the trusts and often worried that their social status was deteriorating in the emerging new economic order.<sup>132</sup> Small business owners, for instance, often struggled to

---

nineteenth century and serves as "our best window on law's interaction with capital and labor in industrializing America." DAVID RAY PAPKE, *THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIALIZING AMERICA*, at xiii (1999).

123. *Id.* at 16.

124. *Id.*

125. *Id.* at 18–19.

126. *Id.* at 24–25.

127. In quick order, almost 100,000 men were on strike and more than 20 railroads were tied up or shut down altogether. *Id.* at 26.

128. The strikers did not always relent without a fight, and dozens of men were killed in clashes with federal troops across several states. *Id.* at 29–35.

129. A commission appointed by President Cleveland to investigate the strike described Pullman as "unyielding" and suggested it might have been able to avert the strike if it had been willing to make concessions. *Id.* at 83.

130. The commission appointed by President Cleveland also characterized some of the union's demands as unreasonable. *Id.* at 99. The American labor movement never again was able to muster a general strike. *Id.* Some scholars have marked the Pullman strike as a turning point, after which the labor movement retreated from radical ambitions and set narrower goals. *Id.* at 98–99.

131. MCGERR, *supra* note 24, at 42–43.

132. Until about 1870, the small merchant, distinguished lawyer, or preacher was often a person of local eminence. HOFSTADTER, *supra* note 24, at 135. After that, their wealth and power were dwarfed increasingly by the wealth and power of those who owned and managed the large corporations. *Id.* at 135–37. Members of occupations with professional aspirations, such as law, medicine, and economics came to form a "new" middle-class. WIEBE, *supra* note 24, at 112.



compete with the large corporations and not infrequently failed.<sup>133</sup> This then pushed them into the labor market, and they sometimes ended up working in the managerial ranks of larger businesses.<sup>134</sup> Professions, such as law and medicine, were undergoing changes of their own. Lawyers, for instance, increasingly worked for the railroads or the manufacturing corporations, and their traditional professional values often conflicted with the new demands on their services.<sup>135</sup> Many felt that their practices were becoming more businesslike and that the standards of conduct and ethics in the legal profession were deteriorating.<sup>136</sup>

Middle-class women occupied a unique place in late nineteenth century America. They were generally neither beholden to employers for salaries or wages, like many working class women, nor were they entirely independent because of the role they were expected to play in the management and upkeep of their homes.<sup>137</sup> Many middle-class women were well-educated and dissatisfied with their domestic roles.<sup>138</sup> Many were dissatisfied with the middle-class men to whom they were married, in many cases because of the Victorian values and habits of their middle-class husbands.<sup>139</sup> In some cases, women avoided marriage because they feared becoming trapped in dull and meaningless lives of domesticity.<sup>140</sup> It is no surprise, therefore, that middle-class women were often at the forefront of reform.<sup>141</sup> Middle-class women increasingly sought political and economic equality with men.<sup>142</sup> The suffragette movement, for instance, was largely driven by middle-class women, and younger middle-class women increasingly broke down the resistance of their families and entered the workforce, often in white collar clerical jobs or teaching.<sup>143</sup> Sometimes the women even continued working after they married, although marriage usually meant the end of their careers.<sup>144</sup>

### E. Racial Division

The late nineteenth century was also a time of growing racial tensions and violence.<sup>145</sup> At the turn of the twentieth century, ninety percent of African Americans lived in the South.<sup>146</sup> More than thirty percent of the

---

133. MCGERR, *supra* note 24, at 54–55.

134. *Id.* at 55.

135. HOFSTADTER, *supra* note 24, at 157–59.

136. *Id.*

137. MCGERR, *supra* note 24, at 45–46.

138. *Id.* at 47.

139. *Id.* at 47–48.

140. *Id.* at 52.

141. *Id.* at 52–53. This may have been partly because of the way in which prevailing stereotypes limited women's opportunities. WIEBE, *supra* note 24, at 122. Social work was one of the occupations that comported with the Victorian image of women as "tender mothers, angels of mercy, and keepers of the morals." *Id.*

142. MCGERR, *supra* note 24, at 52.

143. *Id.*

144. *Id.*

145. *Id.* at 185.

146. *Id.*

Southern population was African American.<sup>147</sup> Increasing numbers of African Americans had been born after the Emancipation Proclamation and never had experienced slavery first-hand. There was talk among white southerners of “New Negroes”—younger African Americans who they considered to be less deferential than their parents and grandparents because they never had been slaves.<sup>148</sup> There was a growing African-American middle class, comprised of business owners and professionals, whose manner of dress and lifestyles often irritated some poorer white people.<sup>149</sup>

The confidence and success of the emerging African-American middle class probably contributed to an increase in racism and violence against African Americans in the late nineteenth century, particularly in the South.<sup>150</sup> Many whites were among those disgusted by the violence.<sup>151</sup> Nonetheless, although some white progressive reformers did truly support complete social and political equality for African Americans, the sad fact is that most progressive reformers were racists who commonly thought that segregation was the best answer to the nation’s racial problems.<sup>152</sup> Many southern progressives at the turn of the century continued to assert that the United States was a “white man’s country.”<sup>153</sup> It is no surprise, therefore, that the Progressive Movement never had the enthusiastic support of African Americans.<sup>154</sup>

#### *F. A Growing Chorus*

Although members of all these discontented groups hardly spoke with one voice, many of the threads of late nineteenth century discontent found expression in a growing chorus of calls for reform. Because the Progressive Movement was a product of all these diverse voices, this was reflected in the many, sometimes conflicting, directions it took. Progressive reformers sought to improve the lives of the poor through new forms of welfare, achieve greater equality between the sexes by gaining voting rights for women, end the evils wrought by alcohol consumption by ushering in prohibition, forestall the growing divorce rate, and, most paradoxically of all, reduce racial tensions and conflict by increasing racial segregation.<sup>155</sup> But even though the Progressive Movement often took aim at social problems, such as alcoholism, divorce, and racial violence, the main thrust of the Progressive Movement was

147. *Id.*

148. *Id.* at 186.

149. *Id.*

150. Michael McGerr, for instance, recounted a racist diatribe by Sen. Benjamin Tillman on the floor of the U.S. Senate in 1907. *Id.* The available data indicates that the number of lynchings across the nation rose in the late nineteenth century, peaking at 230 in 1892. *Id.* at 187. African Americans were subjected to increasing amounts of other forms of violence as well. *Id.* There was a resurgence of Jim Crow in the South after the elections in 1896. WIEBE, *supra* note 24, at 107–10. In Wiebe’s view, the “viciousness” of Southerners’ attacks reflected the failures of their communities. *Id.* at 110.

151. MCGERR, *supra* note 24, at 187.

152. *Id.* at 187–94.

153. WIEBE, *supra* note 24, at 108.

154. MCGERR, *supra* note 24, at 201–02.

155. *See generally* MCGERR, *supra* note 24, at 77–218.

always to redress the rising power of the corporations and the growing dangers of plutocracy.<sup>156</sup> At the turn of the twentieth century, the Progressive Movement thus posed a challenge to the owners and managers of the new corporations, one they scarcely could ignore.

The enormous wave of consolidations at the turn of the century no doubt heightened concerns about big business and strengthened the Progressive Movement.<sup>157</sup> Some of the concerns were obviously about the economic power wielded by the corporations, because the consolidations caused a significant and rather sudden increase in industrial concentration.<sup>158</sup> Moreover, the Sherman Act had done little, if anything, to impede the merger wave nor had the U.S. Supreme Court's early antitrust decisions.<sup>159</sup> Many worried that the new corporations would abuse their market power by raising prices or impeding competitors.<sup>160</sup> These were legitimate concerns, but they were hardly the only concerns many progressives had about the consolidations and the rise of big business. Many contemporaries, both progressives and otherwise, were concerned about the sheer size of the new corporations and the threat that they posed to American democracy.<sup>161</sup>

Louis D. Brandeis, for instance, who has been described as "[t]he most influential critic of trusts during his generation," frequently railed against the "curse of bigness."<sup>162</sup> Brandeis' aversion to the trusts may have derived in some part from his own sense of social exclusion as well as his professional experiences. Although he was a brilliant law student at Harvard, he was Jewish and from the South, and he sought to make his career at a time in the legal profession when social connections may have mattered more than ability.<sup>163</sup> Perhaps in part as a response to his sense of social alienation, when he graduated from law school, he formed a partnership with Samuel D. Warren, who

156. As Richard Hofstadter explained:

While Progressivism would have been impossible without the impetus given by certain social grievances, it was not nearly so much the movement of any social class, or coalition of classes, against a particular class or group as it was a rather widespread and remarkably good-natured effort of the greater part of society to achieve some not very clearly specified self-reformation. Its general theme was the effort to restore a type of economic individualism and political democracy that was widely believed to have existed earlier in America and to have been destroyed by the great corporation and the corrupt political machine.

HOFSTADTER, *supra* note 24, at 5.

157. MCGERR, *supra* note 24, at 150-58.

158. LAMOREAUX, *supra* note 43, at 1-6.

159. The U.S. Supreme Court's early antitrust decisions actually may have caused the mergers. George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J.L. & ECON. 77 (1985). *But see* Smythe, *supra* note 60, at 96-131 (providing an analysis of the U.S. Supreme Court's early antitrust decisions and concludes otherwise).

160. LAMOREAUX, *supra* note 43, at 159.

161. As Richard Hofstadter wrote:

The Progressive case against business organization was not confined to economic considerations . . . . Still more widely felt was a fear founded in political realities—the fear that the great business combinations, being the only centers of wealth and power, would be able to lord it over all other interests and thus to put an end to traditional American democracy.

HOFSTADTER, *supra* note 24, at 225.

162. MCCRAW, *supra* note 50, at 82.

163. *Id.* at 82-85.

had the social connections that he did not, and chose to focus on the practice of law rather than moving in the right social circles.<sup>164</sup> Although Brandeis practiced commercial law, most of his clients were small- or moderate-sized businesses—firms that generally competed with the large corporations.<sup>165</sup> His reputation as the “people’s lawyer” and his aversion to the large corporations may have been a consequence, in part, of having represented clients whose interests often conflicted with those of large corporations.<sup>166</sup>

Brandeis was hardly alone in his distrust of large corporations. The Progressive Movement fostered an era of “muckraking” journalism, a journalistic genre that typically sought to illuminate the abuses and iniquities of big business and draw attention to related social ills.<sup>167</sup> Renowned writers, such as Upton Sinclair and Ida Tarbell, contributed to a flood of glaring exposés of big business in the early twentieth century.<sup>168</sup> Many of the muckraking articles also sought to expose political corruption.<sup>169</sup> Numerous articles expressed concerns about the growing political influence of the trusts and the dangers of plutocracy.<sup>170</sup> There were frequent allegations that big business was buying political influence through campaign contributions. In an article published shortly after the election of 1900, William Jennings Bryan reflected on the growing importance of fundraising in political campaigns and noted that political contributions from corporations had become increasingly significant—and biased in favor of the Republicans—since the election of 1896.<sup>171</sup> Perhaps even more significantly, in a series of articles published in

164. *Id.* at 84–85.

165. *Id.* at 86–87.

166. *Id.* at 87.

167. HOFSTADTER, *supra* note 24, at 185–96. As Hofstadter explained, from a journalistic perspective there was nothing new about “muckraking.” *Id.* at 186. What was new was the huge circulation of the magazines and newspapers. *Id.* Moreover, only a fraction of the journalism at the time was of this “muckraking” type, and even that was not necessarily motivated by hostility towards big business. *Id.* at 193.

168. MCGERR, *supra* note 24, at 157–58, 161–62.

169. With larger circulations, the newspapers became less tied to the political parties. HOFSTADTER, *supra* note 24, at 188.

170. See, e.g., *Plutocracy vs. Democracy: Millionaires in Office Endangering Our Republican Institutions*, N.Y. TIMES, Sept. 10, 1890, at 14 (letter to the editor that asked, “Who can longer doubt . . . that the present tendency is to the establishment of a plutocracy and the destruction of the democracy?”); *Tending to Plutocracy*, N.Y. TIMES, Mar. 23, 1892, at 1 (article reporting on former Sen. Thomas F. Bayard’s warnings about the growing dangers of plutocracy); *W.B. Hornblower on the Constitutions of 1795 and 1895, the Public Service, and Centralizing Plutocracy*, N.Y. TIMES, Oct. 3, 1895, at 7 (article reporting comments made by William B. Hornblower of the New York bar: “There can be no doubt that the tendency of the present decade is in the direction of the centralizing plutocracy.”); *Militarism and Plutocracy*, N.Y. TIMES, July 4, 1899, at 7 (article on the National Political and Social Conference in Buffalo in 1899 that debated an address to the public on the “two great evils of militarism and plutocracy which now menace the existence of the Republic”).

171. As Bryan explained:

[I]t is worth while [sic] to consider why such large campaign funds are now used by Republicans . . . . The magnitude of the fund which can be collected depends upon the interest which the great corporations feel in the result, and upon the imminence of the danger to the privileges which they are enjoying. Prior to 1896, the moneyed element of the country was divided between the two leading parties; but, even then, the Republican party had a considerable majority among the bankers, railroad magnates and manufacturers. In 1896, the Republican party secured the support of practically all of those capitalists who thrive through governmental favoritism, or in the absence of necessary restraining legislation . . . . Since 1896, the consolidation of wealth has gone on with a rapidity never before known.

William Jennings Bryan, *The Election of 1900*, 170 N. AM. REV. 788, 791 (1900).

*Cosmopolitan* in 1906, David Graham Phillips wrote a scathing exposé of the way big business had used its influence in the U.S. Senate to obstruct many progressive reforms.<sup>172</sup> Educated observers understood that the “trust problem” was not merely about the concentration of economic power; it was about the concentration of political power in the hands of a wealthy class of corporate industrialists.<sup>173</sup>

### G. Legislative Reforms

The muckraking and other pressures did lead to some important reforms. There was the Interstate Commerce Act of 1887 and the Sherman Act of 1890.<sup>174</sup> Some states had established agencies to regulate railroads long before the Interstate Commerce Commission was established,<sup>175</sup> and others had enacted their own antitrust laws and even filed suits against combinations under them well before the Sherman Act was enacted.<sup>176</sup> By the turn of the twentieth century, some states had tried to force the corporations to share their wealth, in some cases by enacting corporate taxes and in others by enacting laws requiring corporations to make local investments.<sup>177</sup> In 1903, the federal government created the U.S. Bureau of Corporations, which served to illuminate the role of the corporations without regulating them directly.<sup>178</sup> And in the years following that, the federal government prosecuted high profile antitrust cases against powerful corporate defendants, such as Northern Securities Co. and Standard Oil Co.<sup>179</sup> In the wake of Sinclair’s novel, *The Jungle*, the federal government enacted The Pure Food and Drug Act in 1906.<sup>180</sup>

Perhaps most significant of all—largely because it presaged the modern debate about campaign finance reform—there was a wave of electoral reforms at both the state and federal levels beginning in the late nineteenth century.<sup>181</sup> Kentucky prohibited direct corporate campaign spending through an amendment to its state constitution in 1891.<sup>182</sup> By 1897, Florida, Missouri, Nebraska, and Tennessee also had prohibited direct corporate campaign spending.<sup>183</sup> The trend continued well into the twentieth century, and by 1937, thirty-eight states had restricted direct corporate campaign spending.<sup>184</sup> The federal government was not to be left out of the game. With the passage of

---

172. MCGERR, *supra* note 24, at 175.

173. *Id.*

174. HOFSTADTER, *supra* note 24, at 164.

175. MCCRAW, *supra* note 50, at 17–19.

176. MCGERR, *supra* note 24, at 153.

177. *Id.* at 154.

178. HOFSTADTER, *supra* note 24, at 245.

179. See MCGERR, *supra* note 24, at 157–59; Smythe, *supra* note 60, at 118–26.

180. MCGERR, *supra* note 24, at 160–64.

181. Robert E. Mutch, *Before and After Bellotti: The Corporate Political Contribution Cases*, 5 ELECTION L.J. 293, 293 n.1 (2006).

182. *Id.*

183. *Id.*

184. *Id.* at 298 n.19.

the Tillman Act in 1907, which also prohibited direct corporate campaign contributions, Congress enacted its first campaign finance reform law.<sup>185</sup>

The impetus for electoral reform, particularly at the federal level, received a significant boost from a scandal in the insurance industry that began with a series of articles exposing the insurance companies' treatment of their small shareholders and their ties to Wall Street's big financiers.<sup>186</sup> A struggle for control between two leading insurance magnates drew further bad press.<sup>187</sup> In response to growing public pressures, the New York State Assembly initiated an investigation.<sup>188</sup> Charles Evans Hughes, then a corporate attorney but eventually to be a Chief Justice of the U.S. Supreme Court, headed the public inquiry.<sup>189</sup> Under Hughes' sharp questioning, insurance company executives revealed the high costs of their policies, the low dividend payments for shareholders, their own huge salaries, and their attempts and success at buying political influence in state governments.<sup>190</sup> Perhaps most damning of all, Hughes' interrogations uncovered the insurance companies' secret contributions to President Roosevelt's campaign in the preceding presidential election campaign of 1904.<sup>191</sup>

In candid testimony, Sen. Thomas Collier Platt (R-N.Y.) revealed not only that he had received campaign contributions from insurance companies but that he understood that such contributions put the recipient under a moral obligation not to attack the interests of those who made them.<sup>192</sup> Through the hearings, the public discovered not only that Sen. Chauncey DePew (R-N.Y.) received a retainer from the Equitable Life Insurance Company for serving on its Board but that he had received a large loan from the company through a real estate firm that he owned.<sup>193</sup> The insurance companies would have liked to seize the chance to have the insurance industry regulated federally, rather than by the states, but the push for federal regulation foundered, even though it was supported by President Roosevelt.<sup>194</sup> Many states responded quickly, however, by imposing new state regulations.<sup>195</sup>

185. *Id.* at 293 n.1 (citing 34 Stat. 864 (Jan. 26, 1907)).

186. MCGERR, *supra* note 24, at 170.

187. *Id.*

188. *Id.* at 171.

189. *Id.*

190. *Id.* at 171-72.

191. *Id.* at 172. The public response was unequivocal and negative. An editorial in the *New York Times* stated:

Considered from the point of view of public morality and public interest, the gift of this great sum for use in a political campaign was an act so manifestly immoral and censurable that an attempt to justify it or palliate it would quickly exhaust the resources of sophistry. And this condemnation applies with just as much force to the contributions made in 1896 and 1900. It is, of course, no part of the business of life insurance companies to take a hand in politics or to attempt by any means whatever to sway the decision of the electorate.

*The Campaign Fund Scandal*, N.Y. TIMES, Sept. 17, 1905, at 8.

192. MCGERR, *supra* note 24, at 172; see also *Campaign Funds and Moral Obligations*, N.Y. TIMES, Nov. 23, 1905, at 8.

193. MCGERR, *supra* note 24, at 172.

194. *Id.* at 173.

195. *Id.* at 174.

Congress responded to the scandal by enacting the Tillman Act, which prohibited direct campaign contributions by corporations in national elections. Not surprisingly, the Tillman Act had the full support of President Roosevelt, whose reputation had been damaged by the public's discovery that he had received significant campaign contributions from insurance companies in the election of 1904.<sup>196</sup> The Tillman Act, however, had more bark than bite. While it prohibited corporations from making direct campaign contributions in national elections, it did not prohibit or limit the officers of corporations from making direct campaign contributions.<sup>197</sup> Nor did it establish any agency or other body to oversee campaign contributions or investigate alleged violations.<sup>198</sup> As a practical matter, therefore, it probably did little, if anything, to reduce corporate political influences on elections. It did, however, respond to the public's concerns and may have helped to alleviate pressures for more efficacious reforms.

#### H. An Important Political Realignment

Some scholars argue that one of the Progressive Era's most enduring legacies was to initiate a major realignment in American politics.<sup>199</sup> Important political developments during this period restructured the American political spectrum and framed the contours of political debates throughout the twentieth century.<sup>200</sup> It is always difficult to identify causality in politics, and so it is impossible to know how much progressive pressures contributed to the realignment as opposed to exogenous factors and happenstance. Regardless, it is clear that the election of 1896 was a pivotal event.<sup>201</sup> It was fought in the trough of a depression, and, as one would expect, the primary issue in the

---

196. See President Theodore Roosevelt, Annual Message to Congress (Dec. 5, 1905). According to the *New York Times*, the final version of the bill passed with little opposition. See *To Bar Corporation Cash in Campaigns: House Passes Gaines Bill with Little Opposition*, N.Y. TIMES, Jan. 22, 1907, at 6. Sen. Gaines introduced the final version of the bill even though the statute has come to be called the Tillman Act. *Id.*

197. As Herbert Alexander wrote:

Occasionally, corporate executives were given bonuses with the explicit understanding that the after-tax balance would be contributed to campaign funds. Some few executives were assigned to work on campaigns while remaining on corporate payrolls. More often, slush funds were set up under various facades, and money was secretly dispensed from them, frequently in cash, to candidates. In general, the public did not know precisely what was going on, but the business executives and politicians did . . . .

Herbert E. Alexander, *Corporate Political Behavior*, in CORPORATIONS AND THEIR CRITICS: ISSUES AND ANSWERS TO THE PROBLEMS OF CORPORATE SOCIAL RESPONSIBILITY 34, 35 (Thornton Bradshaw & David Vogel eds., 1981).

198. *Id.*

199. See, e.g., SHELTON STROMQUIST, REINVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM (2006); Thomas G. West, *Progressivism and the Transformation of American Government*, in THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE 30 (John A. Marini & Ken Masugi eds., 2005).

200. Shelton Stromquist, for instance, argued that the Progressive Movement laid the foundations for modern American liberalism, including its rejection of platforms and programs based on social class. STROMQUIST, *supra* note 199. Thomas West concurred, contending that the theories of the Progressive Movement, which rejected the principles of the "Founders' Constitution," provided the basis for the liberal view that came to predominate after 1965. West, *supra* note 199 at 30.

201. See generally R. HAL WILLIAMS, REALIGNING AMERICA: MCKINLEY, BRYAN, AND THE REMARKABLE ELECTION OF 1896 (2010).

election campaigning was economic policy.<sup>202</sup> Until the 1890s, the Democratic Party had adhered to traditional concepts of Jeffersonian democracy and classical liberalism, such as free trade, a limited government, and a gold standard for money.<sup>203</sup> Thus, Grover Cleveland, the sitting Democratic President, had been elected on a platform that emphasized the gold standard and a sound but tight money base, free trade, and private property rights.<sup>204</sup> The Republican Party, on the other hand, stood for protective tariffs, legislative intervention to protect public morals, and, to a lesser degree, monetary expansion.<sup>205</sup>

The severity of the depression in the 1890s contributed to pressures for change within the Democratic Party. William Jennings Bryan and an assortment of allies led an insurgency within the party in an attempt to alter its platform.<sup>206</sup> They succeeded, and Bryan won the Democratic Party's nomination that year.<sup>207</sup> He campaigned on a platform that promised to switch to a silver standard, which would have meant a looser, more expansionary monetary policy, to curb the growing economic and political power of the trusts, and implement other policies that would have encroached on private property.<sup>208</sup> The Republican Party platform adhered to the gold standard and the Party's traditional support of protectionist tariffs.<sup>209</sup> Many Democrats, including President Grover Cleveland, were unhappy about Bryan's nomination.<sup>210</sup> Some, in fact, bolted the Democratic Party and formed a new party. The New Democratic Party ("NDP") was thus born, if for only a short life. The NDP stood for the traditional Democratic Party positions, including adherence to the gold standard, free trade, and the rights of private property.<sup>211</sup>

The NDP failed at the ballot box and did not seem to influence the outcome of the election.<sup>212</sup> Some Democrats may have feared that if they voted for the NDP they would be throwing their votes away, because the real contest was clearly between the Democrats and the Republicans.<sup>213</sup> Some may have been more averse to the Republicans' support of protectionism than they were to the Democrats' support of freer money. Others simply may have thought the election was not worth the bother of voting. In any case, the Republicans won, and it does not appear that the NDP tilted the outcome in their favor.<sup>214</sup> Bryan, in the end, may have appeared too radical for a majority of voters. The realignment within the Democratic Party, however, was

---

202. *Id.* at xii.

203. David T. Beito & Linda Royster Beito, *Gold Democrats and the Decline of Classical Liberalism, 1896-1900*, 4 INDEP. 555, 570 (2000).

204. *Id.* at 555-56.

205. *Id.* at 557.

206. WILLIAMS, *supra* note 201, at 67-92.

207. *Id.*

208. *Id.* at 102-09.

209. *Id.* at 139-43.

210. *Id.* at 67-74.

211. *Id.* at 110-128.

212. Beito & Beito, *supra* note 203, at 566.

213. The real choice was between voting for Palmer or McKinley or staying home. *Id.* at 566-67.

214. *Id.* at 567.



important, and it proved to be permanent.<sup>215</sup> The Democratic Party never again stood on a platform that so closely reflected principles of classical liberalism.<sup>216</sup> The election of 1896 was arguably when the modern Democratic Party was born, with a liberalism defined by a propensity to support government intervention and regulation.

Presidential elections remained tumultuous throughout the Progressive Era. In 1912 there was a schism within the Republican Party that was, in many ways, redolent of the rift between Democrats in 1896.<sup>217</sup> President Theodore Roosevelt had tapped William Howard Taft to be his successor within the Republican Party.<sup>218</sup> Taft won the presidential election that year, but Roosevelt quickly became disenchanted with Taft's presidency.<sup>219</sup> He had the support of the progressive wing of the Party, and Taft emerged as the leader of the conservative wing. Roosevelt challenged Taft for the Republican nomination in the election of 1912, even though Taft was the sitting President. President Taft won the Republican nomination, with the support of conservative Republicans, but Roosevelt and many progressive Republicans were unhappy with the way the chairman had managed the convention and were unwilling to rally behind him.<sup>220</sup> Roosevelt and his progressive allies formed the Progressive Party and ran against Taft and Woodrow Wilson, the Democratic Party nominee, in the election of 1912.

The traditional Republican vote appears to have been split between the Party's conservatives, who voted for Taft, and its progressives, who voted for Roosevelt.<sup>221</sup> Wilson was the clear winner, but Roosevelt won more popular votes than Taft.<sup>222</sup> Although Taft apprehended that he had little chance of winning, he wanted to ensure that the Republican Party would remain committed to a conservative agenda.<sup>223</sup> In 1916, when the Progressive Party

215. David and Linda Beito argued that the Democratic Party thereafter lost its support for principles of classical liberalism. *Id.* at 568. Hal Williams argued that that the election shifted power in the Democratic Party to the South and that the Democratic Party subsequently reflected the views of southern whites for several decades. WILLIAMS, *supra* note 201, at 153.

216. Beito & Beito, *supra* note 203, at 568.

217. See JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 11–19 (2004). Roosevelt became more progressive after leaving office in 1908. *Id.* He was therefore unhappy when he saw Taft courting the more conservative wing of the Republican Party. *Id.* Although Presidents Roosevelt and Taft tried to repair the rift in the Republican Party, their efforts were to no avail. *Id.* at 55–60.

218. Roosevelt worried that he would be blamed for foisting President Taft on the Party. *Id.* at 19.

219. Roosevelt intentionally absented himself from the political scene while Taft began his first term in office. *Id.* at 11–12. When Roosevelt was on his return from a trip abroad, he received a letter from Taft and was immediately troubled. *Id.*

220. Among other things, under Elihu Root's chairmanship of the convention, the Republican Party refused to credential many of Roosevelt's supporters. *Id.* at 118–23.

221. *Id.* at 238–39.

222. *Id.* at 238.

223. In a September 1912 campaign speech, that sounded like it could have been delivered by Ronald Reagan almost seventy years later, Taft said:

A National Government . . . cannot create good times. It cannot make the rain to fall, the sun to shine, or the crops to grow, but it can, by pursuing a meddling policy, attempting to change economic conditions, and frightening the investment of capital, prevent a prosperity and a revival of business, which otherwise might have taken place.

*Id.* at 221–22.

nominated Roosevelt for the presidential election, Roosevelt, to many of the Progressive Party members' shock and dismay, declined the nomination.<sup>224</sup> Instead, he urged the Progressive Party to throw its support behind the Republican Party's nominee, Charles Evan Hughes, even though Roosevelt never had liked Hughes.<sup>225</sup> Hughes declared that he was committed to progressivism, even though he had the backing of most conservative Republicans, such as Taft, and that was enough to win Roosevelt's support, possibly in part because Roosevelt felt that the Democratic Party already had hijacked many of the Progressive Party's ideas.<sup>226</sup> The schism within the Republican Party that manifested itself in the election of 1912 thus effectively ended in the election of 1916. But the Republican Party emerged from the episode in its modern guise, as the champion of conservatism rather than progressivism. The Progressive Party, in the meantime, all but died.<sup>227</sup>

Any concise summary of the complex developments and changes in American politics during the Progressive era inevitably will prove simplistic. Nonetheless, it is important to draw as many lessons from the period as possible, and we would be remiss not to attempt to at least limn the contours of the most important changes. Given that heuristic purpose, and with the caveat in mind, one might be emboldened to conjecture that between the presidential elections of 1896 and 1916, the modern American political spectrum began to congeal around a liberal Democratic Party and a conservative Republican Party. The Democratic Party never again adhered to principles of "classical liberal ideas," such as individual liberty, freedom of trade, and freedom of contracts,<sup>228</sup> and the Republican Party emerged from the period as the closer allies, if not always the champions, of big business.<sup>229</sup> Along the way, the American Socialist Party peaked in popularity in 1912 and the American socialist movement ebbed thereafter, never to factor into any important national elections again.<sup>230</sup> The radical strain of the Progressive Movement had been eviscerated, and American politics was thereafter essentially centrist.

---

224. *Id.* at 252.

225. *Id.*

226. *See id.*

227. *Id.*

228. *See generally* Beito & Beito, *supra* note 203, at 568.

229. Even Theodore Roosevelt was at core a conservative, in spite of his tendency to rally around progressive causes.

Historians have long been aware how T.R., while enjoying the support and indeed even on occasion whipping up the sentiments of the insurgent forces in American life, turned for advice in the solution of his problems to the great conservative leaders in the Senate and to the great spokesmen of Eastern industry and finance capital; and how much support he accepted for his campaigns from the financial interests whose custodians these men always were.

HOFSTADTER, *supra* note 24, at 251.

230. *Id.* at 238–39.

## IV. THE CORPORATION REINVENTS ITSELF

A. *The Corporations Respond*

At the turn of the twentieth century, the corporation occupied an important, but insecure, place in American life. Many Americans were concerned about the growing economic and political power of big business, and there was a growing radical movement in American politics, centered around Eugene Debs and the Socialist Party.<sup>231</sup> The movement also was reflected by the strong support within the Democratic Party for William Jennings Bryan, who was a product of the early Populist Movement and a strident critic of the trusts.<sup>232</sup> The movement even garnered support within the Republican Party for Theodore Roosevelt, who may have been a conservative at heart, but who carved a reputation for himself as a great “trust-buster” and was much less friendly toward big business than many other prominent Republicans at the time.<sup>233</sup> Concerns about big business led to important federal and state regulatory reforms well before the end of the twentieth century.<sup>234</sup> The Great Merger Movement and a cacophony of muckraking newspaper and magazine articles increased the resonance of calls for further checks on big business. Some worried that the political power of the trusts was a threat to democracy and that the United States was already on the road to plutocracy.<sup>235</sup>

Business leaders knew they needed to respond to the public’s concerns and forestall any new legislation that might curtail their opportunities or impede business growth.<sup>236</sup> Some business leaders learned during the Gilded Age that arrogance or perceived indifference to the public good—even ostentatious lifestyles—might cause a public backlash and risk exposing their business practices to closer scrutiny and regulation.<sup>237</sup> As the twentieth century dawned, the country’s wealthy business owners generally exhibited much less extravagance than the builders and scions of the great railroad fortunes had in the nineteenth century.<sup>238</sup> While this alone may not have repaired their public images, at least they were doing them no further harm. But sophisticated

231. See CHACE, *supra* note 217, at 67–90, for a description of the “Debs Rebellion.”

232. See generally Beito & Beito, *supra* note 203.

233. HOFSTADTER, *supra* note 24, at 251.

234. See *supra* Part III.G.

235. William Jennings Bryan put the matter succinctly in 1900 when he wrote, “The issue presented in the campaign of 1900 is the issue between plutocracy and democracy.” William Jennings Bryan, *The Issue in the Presidential Campaign*, 170 N. AM. REV. 753, 753 (1900). As he elaborated: “Surely, the rapid development of plutocracy during the last few years will arouse the people to the dangers which threaten our Republic . . . . Corporate capital exerts an influence over government more potent than ever before.” *Id.* at 770.

236. ROLAND MARCHAND, *CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS* 1–5 (1998).

237. MCGERR, *supra* note 24, at 4–6 (describing the public backlash against Cornelia Bradley Martin’s outrageously lavish costume ball in 1897). Thorstein Veblen famously lampooned the rich of the Gilded Era and coined the term “conspicuous consumption” to describe their extravagances. THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 68 (1899).

238. This was in response to some of the bad publicity their “conspicuous consumption” had generated. See VEBLEN, *supra* note 237, at 68–101.

business leaders increasingly knew it was not enough. Their concerns were significant enough to overcome some of the typical impediments to collective action and some important business interest groups were formed.<sup>239</sup> The National Civic Federation, the National Association of Manufacturers, the U.S. Chamber of Commerce, and several similar pro-business groups were formed between 1890 and World War I.<sup>240</sup> These groups, however, did not speak with one voice and often were divided internally over their strategies and objectives.<sup>241</sup>

### *B. The Constitution and the Corporation*

Until the Tillman Act in 1907, corporations routinely made significant donations directly into the campaign funds of political candidates who supported the corporations' interests, or were at least less opposed to them than the candidates' campaign opponents. The imbalance in corporate campaign contributions was striking. In some elections, pro-business candidates received several times the amount of funding of their campaign opponents. The difference was invariably attributable to the disproportionate donations from the candidates' corporate supporters.<sup>242</sup> Direct campaign contributions may have helped to elect William McKinley rather than William Jennings Bryan in 1896 and 1900 and Theodore Roosevelt rather than Bryan in 1904.<sup>243</sup> The contributions also may have helped to elect scores of pro-business politicians to other federal and state offices.<sup>244</sup> When the size and nature of these contributions became known to the public, however, there was a severe backlash.<sup>245</sup> Many felt that the contributions were immoral, and the public's alarm about the growing dangers of plutocracy was heightened.<sup>246</sup> Even Roosevelt, who had won the presidential election of 1904 with significant corporate donations, spoke out strongly in support of not only of the need for limits on corporations' direct campaign contributions but also for limits on corporate spending that might indirectly influence political outcomes.<sup>247</sup> Congress responded by enacting the Tillman Act in 1907. This only prohibited direct corporate campaign contributions and, in any case, could be easily circumvented.<sup>248</sup>

Corporations at the time did not have any First Amendment rights to protect them from campaign spending limits under federal or state election laws.

---

239. Business interests were not always uniform. Moreover, sometimes corporate leaders preferred the idea of relatively benign regulations administered by an agency they could influence to the rigors of competition. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 59–60 (2002).

240. HOFSTADTER, *supra* note 24, at 257–58; WIEBE, *supra* note 24, at 123.

241. FRIEDMAN, *supra* note 239, at 59–60; SKLAR, *supra* note 24, at 16.

242. MCGERR, *supra* note 24, at 172, 174–78.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 175–76.

247. See *supra* note 1.

248. Alexander, *supra* note 197, at 35.

Neither the First Amendment nor the concept of the corporation as a legal person had been sufficiently defined by the U.S. Supreme Court for anyone to be able to infer that corporations had constitutionally protected speech rights. The U.S. Supreme Court did not apply the First Amendment to protect corporations against federal regulations until well into the twentieth century, and it did not incorporate the First Amendment to the states until 1925.<sup>249</sup> It was not clear that the Court would apply the Fourteenth Amendment to corporations until even later than that. Although many have interpreted *County of Santa Clara v. Southern Pacific R.R.*<sup>250</sup> in 1886 to impute personhood to the corporation under the Equal Protection Clause of the Fourteenth Amendment,<sup>251</sup> the opinion itself does not actually refer to the legal personhood of the corporation. In fact, the Court decided it did not want to address the matter. Many scholars, judges, and even U.S. Supreme Court Justices have erroneously interpreted the case as affirming the concept of corporate personhood because of a headnote in the published version of the opinion, which actually was written by the court reporter, J.C. Bancroft Davis.<sup>252</sup> Because Davis was exercising his own discretion as to what the Court's opinion stated, his headnote had no precedential value, and it did not reflect a change in constitutional doctrine.<sup>253</sup>

To add to the confusion, in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*,<sup>254</sup> Justice Field in his majority opinion addressed the scope of the word "person" under the Fourteenth Amendment and wrote that "[u]nder the designation of a 'person' there is no doubt that a private corporation is included."<sup>255</sup> Interestingly, in support of that position, Justice Field quoted Justice Marshall's opinion in *Providence Bank v. Billings*,<sup>256</sup> which stated: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."<sup>257</sup> But in that case, Justice Marshall was addressing whether a corporation should be regarded as having any special freedoms from the usual burdens placed on natural persons. His position was that they should not unless such special privileges were stated in the corporations' charters. As he explained: "Any privileges which may exempt it from the burthens [sic] common to individuals, do not flow necessarily from the charter, but must be expressed in

249. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

250. 118 U.S. 394 (1886).

251. SKLAR, *supra* note 24, at 49. Gregory Mark argued that many historians have erroneously attributed too much significance to *Santa Clara*. See Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1463 n.62 (1987).

252. Mark contends that the Court intended nothing more than to uphold its own precedents protecting corporate property as property of the corporation's owners. *Id.* at 1463-64.

253. *Id.*

254. 125 U.S. 181 (1888).

255. *Id.* at 189.

256. 29 U.S. 514 (1830).

257. *Id.* at 562. Justice Field slightly misquoted Justice Marshall as writing, "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men." *Pembina Consol.*, 125 U.S. at 189.

it, or they do not exist.”<sup>258</sup> This was consistent with Justice Marshall’s long-standing approach to the corporation. As he had written in *Trustees of Dartmouth College v. Woodward*<sup>259</sup> in the first U.S. Supreme Court case addressing a corporate legal issue in 1819: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>260</sup> As a matter of logic, it is quite consistent to think that a corporation bears all of the usual burdens of a natural person incidental to its creation but not necessarily all of the usual rights of a natural person.

Justice Field clearly recognized that a corporation did not bear all the rights of a natural person because he also wrote in *Pembina* that corporations are not citizens under the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>261</sup> Presumably, corporations had some of the rights of natural persons under the Equal Protection Clause of the Fourteenth Amendment but not all of the rights of natural persons under the Privileges and Immunities Clause. Because the Privileges and Immunities Clause has become virtually irrelevant, it is not clear what Justice Field may have meant. Some scholars, however, believe that the Privileges and Immunities Clause of the Fourteenth Amendment was intended to incorporate the first eight—or perhaps even all ten—articles of the Bill of Rights against the states.<sup>262</sup> Justice Field appeared to have accepted this view.<sup>263</sup> As it turns out, the U.S. Supreme Court has incorporated most of the Bill of Rights against the states under the Fourteenth Amendment instead, but it seems likely that Justice Field would have denied to the corporation many of the rights enjoyed by natural persons under the Bill of Rights. Thus, in *Minneapolis & Saint Louis Ry. v. Beckwith*,<sup>264</sup> when Justice Field acknowledged the “soundness of [the] position[] that corporations are persons within the meaning of the clause in question,”<sup>265</sup> and erroneously

258. *Providence Bank*, 29 U.S. at 562.

259. 17 U.S. 518 (1819).

260. *Id.* at 636.

261. *Pembina Consol.*, 125 U.S. at 187.

262. See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

263. According to Professor Akhil Amar, in *Spies v. Illinois*, John Randolph Tucker had argued to the U.S. Supreme Court,

Though originally the first ten Amendments were adopted as limitations on Federal power, yet *in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as citizen of the United States, and [those privileges] cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power . . .*

*Id.* at 1270–71. Amar noted that Justice Field embraced Tucker’s argument five years later when he wrote, “[A]fter much reflection I think the definition given at one time before this court by a distinguished advocate—Mr. John Randolph Tucker, of Virginia—is correct.” *Id.* at 1271.

264. 129 U.S. 26 (1889).

265. *Id.* at 28.

claimed that the Court had “so held”<sup>266</sup> in *Santa Clara*, he probably did not mean to imply that the Court had interpreted corporations as having all the rights of natural persons.

Justice Black eventually challenged the idea that the corporation is a person in his dissenting opinion in *Connecticut General Life Insurance Co. v. Johnson*,<sup>267</sup> in which he bluntly stated, “I do not believe the word ‘person’ in the Fourteenth Amendment includes corporations.”<sup>268</sup> Justice Black, however, like Justice Field many years before him, also erroneously believed that the Court had held otherwise in *Santa Clara*.<sup>269</sup> The U.S. Supreme Court did not discuss the issue again until *Wheeling Steel Corp. v. Glander*<sup>270</sup> in 1949. In that case, Justice Jackson also erroneously interpreted *Santa Clara*.<sup>271</sup> He was of the opinion that the Court had consistently held that the corporation is a person since *Santa Clara*.<sup>272</sup> In the dissenting opinion, however, Justice Douglas wrote a scathing criticism of the majority’s interpretation of *Santa Clara*, and although he absurdly attributed court reporter Davis’ wording in the headnote to Chief Justice Waite, he observed that “[t]here was no history, logic, or reason given to support that view.”<sup>273</sup> That is correct because the Court did not actually express that view in that case.

The U.S. Supreme Court’s early pronouncements on the legal status of the corporation emerge upon careful scrutiny as a comedy of errors. It is clear, however, that, regardless of whether the corporation was a person within the meaning of the Fourteenth Amendment, at the turn of the twentieth century corporations did not have all of the constitutional rights of natural persons, and they certainly did not have the constitutional right to engage in speech or to make political contributions.<sup>274</sup> In *McConnell v. Combination Mining & Milling Co.*,<sup>275</sup> for instance, the Supreme Court of Montana ruled that the mining company’s political expenditures, including lobbying expenses, were ultra vires because the statute under which it was incorporated did not authorize the creation of corporations for political purposes.<sup>276</sup> In *People ex rel. Perkins v. Moss*<sup>277</sup> in 1907, in the direct wake of the insurance scandals, the Court of Appeals of New York held that while the political contributions of the insurance company were not crimes, they were “foreign to

---

266. *Id.*

267. 303 U.S. 77 (1938).

268. *Id.* at 85.

269. *Id.* at 87.

270. 337 U.S. 562 (1949).

271. *Id.* at 574.

272. *Id.*

273. *Id.* at 577.

274. They did have some Bill of Rights protections against the federal government. They received some protections under the Due Process Clause of the Fifth Amendment as early as 1893. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 590–91 (1990).

275. 76 P. 194 (Mont. 1904).

276. *Id.* at 199.

277. 80 N.E. 383 (N.Y. 1907).

the chartered purposes of the corporation.”<sup>278</sup>

Neither of these cases, however, raised any Fourteenth Amendment issues. It was not until *Michigan v. Gansley*<sup>279</sup> that a corporation attempted to use its status as a legal person under the Fourteenth Amendment to nullify a state statute. The corporation had made political expenditures in violation of a state statute and it challenged the statute, arguing that it had a right to do so by virtue of being a person under the Fourteenth Amendment.<sup>280</sup> The Michigan Supreme Court rejected the argument on the grounds that the expenditure of monies for political purposes could not be “deemed to be a property right within the meaning of the Fourteenth Amendment” because corporations had no rights to make political expenditures under Michigan’s incorporation statute, nor were they deprived of any of their other rights or privileges under the statute under which they were created.<sup>281</sup> The Court noted that the corporation—the Lansing Brewing Co.—was created for the purpose of manufacturing beer and that the state legislature probably sought to prohibit corporations from using their funds to influence elections when it enacted the statute under challenge.<sup>282</sup> In the Court’s view, the state legislature acted within its powers when it sought to prohibit political expenditures by a corporation that was created under state law to make beer.<sup>283</sup>

*Gansley*, however, did not directly raise any First Amendment issues. At the time the Michigan Supreme Court handed down its decision in *Michigan v. Gansley*, the First Amendment did not apply to the states. *Gitlow v. New York*<sup>284</sup> in 1925 was the first U.S. Supreme Court decision to incorporate the First Amendment. In *Gitlow*, the Court actually incorporated the First Amendment under the Due Process Clause rather than the Privileges and Immunities Clause as some, such as Justice Field, might have expected.<sup>285</sup> This later made the Court’s almost fortuitous definition of the corporation as a legal person a central issue in the debate about the scope of corporations’ right to speech. In the first two decades of the twentieth century, however, there were clearly no federal constitutional constraints on the states’ regulation of any forms of speech, corporate or otherwise.

Moreover, until well into the twentieth century, there were no federal constitutional protections for commercial speech, whether by corporations or natural persons.<sup>286</sup> The Court, in fact, still interprets the First Amendment to

---

278. *Id.* at 387.

279. 158 N.W. 195 (Mich. 1916).

280. *Id.* at 196.

281. *Id.* at 200.

282. *Id.* at 201.

283. *Id.*

284. 268 U.S. 652 (1925).

285. *Id.* at 666.

286. In *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Court stated, “We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising.” The Court did not clearly reject *Valentine*’s sweeping statement of a commercial speech exception to the First Amendment right to free speech until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). The Court acknowledged in *Virginia State Board*, however, that “[t]here can



provide less protection for commercial speech than for political speech.<sup>287</sup> Thus, there were no real federal constitutional restrictions on the federal or state governments' regulation of corporate advertising or any other forms of corporate communications intended to promote the sale of their products until after the middle of the century. The Court did not hold that First Amendment protections apply to corporate political speech, either, until *First National Bank of Boston v. Bellotti*<sup>288</sup> in 1978. *Bellotti* arose from a challenge to a federal statute that prohibited corporations from making political expenditures.<sup>289</sup> Some state governments had enacted similar statutes as early as the turn of the century.<sup>290</sup> It is a simple fact that for most of the twentieth century there were no federal constitutional restraints on the power of either the federal or state governments to limit corporate speech. There were no state constitutional restraints either.

At the turn of the twentieth century, courts had not yet fully elaborated on the legal definition of speech. It was not yet clear, for instance, that political expenditures were a form of political speech, or that there was a legal distinction between political speech and commercial speech.<sup>291</sup> What is perhaps most significant about the first half of the twentieth century, therefore, is that neither the federal nor state legislatures implemented more sweeping prohibitions on corporate speech. Most of the statutes directed at what today would be considered corporate political speech only prohibited corporations from making direct campaign contributions.<sup>292</sup> Corporations were generally free to influence political outcomes indirectly, and there were no restrictions on direct campaign contributions from corporate directors or executives acting in their personal capacities.<sup>293</sup> This allowed corporations to find ways of circumventing the restrictions on their direct contributions. Moreover, there

---

be no question that in past decisions the Court has given some indication that commercial speech is unprotected." *Id.* at 758.

287. *Id.* at 762. As a general matter, the U.S. Supreme Court has defined commercial speech as speech that is intended to "propose a commercial transaction." *Id.* at 760.

288. 435 U.S. 765 (1978). Some caution is in order in stating what the Court held in *Bellotti*. Justice Powell, in delivering the opinion of the Court, wrote:

The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the Massachusetts statute in question] abridges expression that the First Amendment was meant to protect. We hold that it does.

*Id.* at 775-76. Thus, in *Bellotti*, the Court held that the First Amendment applies to corporations but not that corporations have First Amendment rights.

289. *Id.*

290. Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361, 362 (2004).

291. The U.S. Supreme Court did not hold that political expenditures are a form of speech until *Buckley v. Valeo*, 424 U.S. 1, 17-19 (1976). The Court drew the distinction in *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

292. Alexander, *supra* note 197, at 35.

293. *Id.*

were no restrictions on corporations' commercial speech, even though some commercial speech clearly was intended to serve political goals.<sup>294</sup>

### C. *The Short and Dull Life of the Ultra Vires Doctrine*

There were, of course, many other ways in which corporations could influence political outcomes. Corporations did not initially have the wisdom to use their freedoms to take advantage of many of the opportunities. But given their growing concerns about public attitudes, corporate leaders began to recognize the importance of public opinion and to think of ways of refurbishing their corporations' tarnished reputations.<sup>295</sup> One of the most important ways in which corporations attempted to redress the poor regard in which they were held was by investing in public relations.<sup>296</sup> Broadly construed, their public relations efforts involved conscious attempts to influence public opinion through the media, charitable or philanthropic donations, and even internal bureaucratic forms of corporate welfare. Although the federal and state governments could have regulated all of these kinds of public relations activities, they did not. In some important cases, shareholders of the corporations objected to the use of corporate funds for such purposes.<sup>297</sup> This led to some early shareholder derivative suits challenging the activities under the ultra vires doctrine.

In these suits, courts did apply the ultra vires doctrine to restrain corporate directors from expending corporate funds for purposes that were not narrowly within the scope of their charters. In *McConnell v. Combination Mining & Milling Co.*, for example, the Supreme Court of Montana held that donations by a corporation for "strictly political purposes" were ultra vires because the statute under which the corporation was created did not enumerate any political purposes.<sup>298</sup> As a general matter, though, courts were inclined to construe the scope of corporate charters broadly. In *Hawes v. City of Oakland*,<sup>299</sup> for instance, the U.S. Supreme Court rejected a suit by a shareholder who sought to restrain a corporation, the Contra Costa Waterworks Company, from giving free water to the city of Oakland on the grounds that the company's charter did not forbid such gifts.<sup>300</sup> As the Court explained, the city had the power to confer valuable franchise rights on the company, and it may have been "the highest wisdom to let the city use the water . . ."<sup>301</sup>

---

294. See *infra* Part IV.G.

295. See generally STUART EWEN, *PR! A SOCIAL HISTORY OF SPIN* (1996); MARCHAND, *supra* note 236.

296. See generally EWEN, *supra* note 295; MARCHAND, *supra* note 236.

297. Adam Winkler, "Other People's Money": *Corporations, Agency Costs, and Campaign Finance Law*, 92 *GEO. L.J.* 871, 879 (2004). Winkler argues that it was primarily these objections, rather than the public's concerns about corporate political power, that drove early campaign finance laws. *Id.* at 873.

298. 76 P. 194, 199 (Mont. 1904).

299. 104 U.S. 450 (1881).

300. *Id.* at 461.

301. *Id.* at 462.

And in *Steinway v. Steinway & Sons*,<sup>302</sup> the New York Supreme Court held that “the very moderate expenditures or contributions of the company towards church, school, library, and baths” for its employees and their families were not ultra vires.<sup>303</sup> As the court explained, “taken as a whole” the expenditures were “directly related to the legitimate objects of the corporation.”<sup>304</sup>

In these early cases, the courts were foreshadowing the contours of the business judgment rule. *Dodge v. Ford Motor Co.*,<sup>305</sup> which is often cited as one of the earliest precedents for the business judgment rule, also involved a challenge to the use of corporate funds for purportedly philanthropic purposes.<sup>306</sup> The Dodge brothers, who were minority shareholders in Ford Motor Company, challenged the directors’ decision to use the corporation’s earnings for new investments instead of additional dividends.<sup>307</sup> Henry Ford, the majority shareholder and president of the company, explained his strategy was “to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes.”<sup>308</sup> The Michigan Supreme Court asserted that a “business corporation is organized and carried on primarily for the profit of the stockholders” and “[t]he discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself.”<sup>309</sup> It affirmed the lower court’s decree ordering a dividend payment but reaffirmed its previous deference to the discretion of a corporation’s directors by quoting from an earlier opinion:

Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when [it] would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders.<sup>310</sup>

As corporate law developed further in the twentieth century, the business judgment rule was more clearly articulated and refined, and the ultra vires doctrine receded into virtual insignificance.<sup>311</sup>

#### D. The Genesis of Corporate Public Relations

Even in the early twentieth century, therefore, there were no important legal impediments to corporations’ attempts to use public relations campaigns

302. 40 N.Y.S. 718 (N.Y. Sup. Ct. 1896).

303. *Id.* at 721.

304. *Id.*

305. 170 N.W. 668 (Mich. 1919).

306. *Id.* at 683–84.

307. *Id.* at 683.

308. *Id.*

309. *Id.* at 684.

310. *Id.* at 682.

311. The modern business judgment rule was stated concisely in *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), in which the Delaware Supreme Court explained: “It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Id.*

to sway public opinions and attitudes. The modern public relations industry emerged when corporations discovered that expenditures on public relations provided a profitable return on investment.<sup>312</sup> As the twentieth century proceeded, corporations expended increasing amounts of resources in efforts to improve both the general public's and their own employees' attitudes toward them.<sup>313</sup> The power of corporate public relations and its impact on American politics, law, and society is difficult to assess. Some radical scholars, such as Edward Herman and Noam Chomsky, believe that it has facilitated a kind of corporate hegemony, in which corporate leaders are able to "manufacture consent" for corporate avarice and misdeeds.<sup>314</sup> In truth, there is little evidence upon which to sustain such an extreme view. Nonetheless, even more moderate scholars, who have recognized important limits on the efficacy of corporate public relations programs and have argued that they necessarily have had much more modest goals, have attributed to them great success.<sup>315</sup>

There is little question that corporations' initial efforts to influence public opinion were a direct response to the Progressive Movement and related public pressures for restraints on the "trusts" at the turn of the twentieth century.<sup>316</sup> The Robber Barons, the Second Industrial Revolution, the Great Merger Movement, and myriad articles and stories in the newspapers, magazines, and even novels had contributed to a growing perception that the corporation was evil and that it was beginning to control not only the economy but government. As Roland Marchand explained:

[A]s major corporations expanded at a bewildering pace at the end of the nineteenth century, the notion of corporate powerlessness became untenable. Many companies, through mergers and other forms of vertical integration and horizontal consolidation, so dominated their industries that they now controlled their market as much as they were ruled by it. And they threatened to control much more than that. The pure size of many corporations—their number of employees, the magnitude of their production, their capital resources, their national scope in distribution, and their capacity for political influence—persuaded many Americans . . . that the nexus of social institutions within which they lived had been radically transformed. The traditional potency of the family, the church and the local community suddenly seemed dwarfed by the sway of the giant corporations. This momentous shift in the balance of social forces created a crisis of legitimacy for the large corporations.<sup>317</sup>

Initially, most corporations responded to their poor public images with public relations programs directed at their immediate political and marketing objectives.<sup>318</sup> Their public relations efforts thus attempted to "provide factual arguments and, at times, palpable actions that would answer antibusiness arguments and enunciate a commonality between the private enterprise system

---

312. See generally EWEN, *supra* note 295; MARCHAND, *supra* note 236.

313. See generally EWEN, *supra* note 295; MARCHAND, *supra* note 236.

314. See generally EDWARD HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* (1988).

315. See, e.g., MARCHAND, *supra* note 236, at 362.

316. *Id.* at 2–4.

317. *Id.* at 2.

318. *Id.* at 4.

and the public interest.”<sup>319</sup> But they soon recognized the need for more than factual arguments and philosophical defenses of free markets. Critics of the corporations and big business at the turn of the twentieth century frequently spoke and wrote of the corporation as having no soul.<sup>320</sup> People recognized that the corporation had the legal status of a person, for many purposes, but they emphasized that it was an artificial person, created for the exclusive purpose of making profits, rather than a natural person with all the moral attributes of a human being. Thus, “in the late nineteenth and early twentieth centuries, both advocates and critics of the giant corporation spoke of [public relations efforts] as quests for a corporate soul.”<sup>321</sup>

Corporate public relations efforts in the early twentieth century were aided by changes in the way people acquired information. Many of the same changes that were transforming the nexus of social institutions within which people lived—the relative demise in importance of the church and local community, for instance—also were changing patterns of communication.<sup>322</sup> People began to depend less on their personal and local contacts as sources of information and more on newspapers and magazines, which, by the turn of the twentieth century, had circulations that were enormous by nineteenth century standards.<sup>323</sup> Ironically, the success of the muckrakers had been a product of the new power of the media. But people had read the muckraking articles more like spectators and less like participants. As Stuart Ewen explained:

Behind the sensationalization of Progressive publicity lay signs that the public had changed in consequential ways. If the public had once been active in shaping the political life and social intercourse of the nation, the new public was defined increasingly by its vulnerable condition of isolation and spectatorship. Readers of mass-circulation newspapers and magazines were witnesses to society, no longer within the public square but from the sanctuary of their parlors.<sup>324</sup>

### *E. The Corporate Control of the Media*

Not only were people becoming more reliant on newspapers and magazines for information and acculturation, the newspapers and magazines were becoming increasingly dependent on corporate advertising revenues.<sup>325</sup> As in the manufacturing industries, the media industries also had invested in new machinery and equipment around the turn of the twentieth century.<sup>326</sup> Printing became much more capital intensive and required much larger investments.<sup>327</sup> At the same time, with improved transportation, the potential

319. EWEN, *supra* note 295, at 401.

320. MARCHAND, *supra* note 236, at 7.

321. *Id.* at 4.

322. *Id.* at 2.

323. See EWEN, *supra* note 295, at 53, 59.

324. *Id.* at 59.

325. *Id.* at 53.

326. *Id.*

327. *Id.*

circulation of the newspapers and magazines was vastly greater.<sup>328</sup> They needed to earn more revenues to make a return on their heavy capital investments, so they actively sought to increase their circulations, usually by charging low prices.<sup>329</sup> The increase in their circulations made advertising in the newspapers and magazines more effective because it reached a much wider audience. Thus, the newspapers and magazines could charge higher rates for advertising space the more they increased their circulations.

The newspapers quickly became much more dependent on advertising revenues than on their newsstand prices for their profits.<sup>330</sup> Competition only tended to force newsstand prices even lower. Because their circulations were centrally important to their advertising revenues, they generally stood ready to match any competitors' price cuts. At the same time, readership of newspapers was increasing dramatically so that, even though their individual circulations were growing, so were the number of newspapers overall.<sup>331</sup> By the late nineteenth century, the newspaper industry was big business. As Frank Luther Mott described, "[i]n circulations, in the number of pages per issue, and in volume of advertising, the great newspapers grew to sizes scarcely dreamed of before, while figures representing investments, costs, and revenues reached astonishing totals."<sup>332</sup> At a time when people were becoming more dependent on newspapers for information about the world around them, the newspaper industry was changing so that more and more people received their information from the same sources.

The economic incentives and imperatives that transformed the newspaper industry also transformed the magazine industry. Beginning in the 1890s, mass-circulation magazines began reaching national audiences.<sup>333</sup> They had unprecedented circulations. As Ewen explained:

Starting with *McClure's* and *Munsey's Magazine*—then *Hampton's*, *Everybody's*, *Colliers*, *Cosmopolitan*, *Scribner's*, and *The American Magazine*—a new generation of magazines began to emerge. With cover prices of ten to fifteen cents, circulations grew exponentially. If 50,000 people was considered an enormous readership prior to 1890, between 1900 and 1912, some magazine circulations soared to 1 million.<sup>334</sup>

The developments in the magazine industry thus reinforced the trends established by the newspaper industry. People were more dependent on the media than ever before, but, because of the huge circulations of the newspapers and magazines, more Americans were dependent on identical information sources.

---

328. *Id.*

329. See HOFSTADTER, *supra* note 24, at 190–91. The same economic forces were evident at the same time in Great Britain. See, e.g., JAMES CURRAN & JEAN SEATON, *POWER WITHOUT RESPONSIBILITY: THE PRESS AND BROADCASTING IN GREAT BRITAIN* 32–41 (5th ed. 1997).

330. HOFSTADTER, *supra* note 24, at 194.

331. *Id.* at 187.

332. EWEN, *supra* note 295, at 53.

333. *Id.* at 53–54.

334. *Id.* at 54.

The changes in the media industries presented corporations with new opportunities for managing their public images. First of all, they were able to have some influence over the issues the media chose to address as well as how the media addressed them. Newspapers and magazines that published articles critical of specific corporations, or even business generally, might expect to lose an important source of advertising revenues.<sup>335</sup> Ironically, the growth of the newspapers and magazines had initially encouraged the wave of muckraking journalism around the turn of the twentieth century.<sup>336</sup> The newspapers and magazines were in the business of making profits, and sensationalist exposés of corporate transgressions helped them to sell their newspapers.<sup>337</sup> Most of the media magnates had little concern for what they published, so long as it helped their newspapers and magazines earn a good profit.<sup>338</sup> But they eventually learned that some kinds of articles might hurt their bottom line even if they did sell the newspapers. As Richard Hofstadter explained:

Advertisers did not hesitate to withdraw orders for space when their own interests or related interests were touched upon. Bankers adopted a discriminatory credit policy, so that modest loans could not be secured even for the maintenance of a business of great value and proved stability.<sup>339</sup>

The dependence of the newspapers and magazines on corporate advertising expenditures, and the implicit threat of advertising boycotts, probably helped to filter out of the media many articles and editorials that would have been critical of big business, especially when newspapers and magazines began to be absorbed into large media chains, and the media were further drawn into the corporate web themselves after the turn of the century.<sup>340</sup> Some radical scholars have emphasized the corporate filter on the news in their critiques of corporate capitalism. For instance, Berman and Chomsky list the concentration and dominance of the media industries and the fact that their primary revenue source is corporate advertising revenues number one and two on their summary of the five essential ingredients in their "propaganda model."<sup>341</sup> They list "flak" as a means of disciplining the media number four.<sup>342</sup> It is difficult to evaluate how much the implicit threat of corporate advertising boycotts has shaped the news, but it is clear that American corporations at the turn of the twentieth century did not rely exclusively, or even primarily, on

---

335. HOFSTADTER, *supra* note 24, at 194.

336. *Id.* at 186-87.

337. *Id.* at 188.

338. Hofstadter describes the muckraking journalism that was popular at the turn of the twentieth century as "more or less accident[al]." *Id.* at 193.

339. *Id.* at 194.

340. According to Stuart Ewen, the period from the end of the nineteenth century to the 1920s saw "momentous expansion and consolidation of media industries." EWEN, *supra* note 295, at 176. Moreover, "[t]he impact . . . was considerable . . . [A] society once defined by its remarkable variety of cultural backgrounds . . . was being melded into generic ways of seeing, shaped by the priorities of modern commercial enterprise." *Id.*

341. HERMAN & CHOMSKY, *supra* note 314, at 2.

342. *Id.*

their power to censor the news to achieve their public relations objectives. They were far more proactive.

#### *F. The Birth of Corporate Publicity Campaigns*

Beginning in the early 1900s, a small number of corporations hired public relations experts to initiate and coordinate systematic efforts to improve their companies' images.<sup>343</sup> It was then that the public relations profession emerged. Ironically, the first public relations experts were usually former journalists who knew how the news was collected and reported and could use their inside knowledge to help their clients influence what was written.<sup>344</sup> They were typically hired when a large corporation was in the throes of a public relations crisis. Ivy Lee, for instance, arguably the first American public relations manager, was hired by a group of coal companies in 1906 in anticipation of a strike.<sup>345</sup> The coal miners' union leaders had cultivated strong relationships with the press during a previous strike in 1902, and they had been able to rally public opinion to their cause and win many of their demands.<sup>346</sup> This time the companies were determined not to let that happen again.<sup>347</sup> Lee previously worked as a journalist and knew how to curry their favor. In contrast to the policy the coal companies adopted during the previous strike, he chose to be more open with the press, although he was careful to make sure that he was always the conduit for any communications.<sup>348</sup> His efforts were successful, and the coal companies received more favorable coverage.<sup>349</sup>

One of the first major corporations to establish an in-house public relations department was AT&T. In the first decade of the twentieth century, AT&T was aggressively pursuing a strategy to dominate the national market for telephone services.<sup>350</sup> AT&T's strategy was based on pricing below costs, building its network ahead of demand, and encouraging local governments to grant exclusive franchises.<sup>351</sup> Needless to say, their efforts drew intense criticism from the independent telephone companies and raised significant suspicions among the general public.<sup>352</sup> AT&T was particularly concerned about the trend at the time towards public ownership and control of the telephone industry in some Canadian provinces and most European nations.<sup>353</sup> AT&T began a public relations program just after the turn of the

---

343. EWEN, *supra* note 295, at 77.

344. *Id.* at 76.

345. *Id.* at 77.

346. *Id.* at 76.

347. *Id.* at 76–77.

348. *Id.* at 76.

349. *Id.* 77–78.

350. See generally David F. Weiman & Richard C. Levin, *Preying for Monopoly? The Case of Southern Bell Telephone Company, 1894–1912*, 102 J. POL. ECON. 103 (1994).

351. *Id.* at 106.

352. MARCHAND, *supra* note 236, at 50.

353. *Id.*



twentieth century, but it was not especially ambitious.<sup>354</sup>

After a financial panic in 1907 that almost drove the company bankrupt, AT&T significantly expanded its public relations efforts.<sup>355</sup> AT&T's new president, David Vail, recognized that the company's objective of achieving national domination faced serious public opposition but felt that a systematic program of public relations could convince the public of the virtues of a private, national monopoly.<sup>356</sup> In a series of breakthrough advertisements that were characterized by the industry journal, *Printer's Ink*, as a "new way to lobby," AT&T condemned the wastefulness of "telephone duplication" and received supportive editorials from a number of major newspapers.<sup>357</sup> An AT&T report afterwards concluded that the effort "indicated the possibilities of a broad policy of publicity."<sup>358</sup>

AT&T committed itself to building a new public image and proceeded to experiment with new public relations techniques.<sup>359</sup> It hired one of the nation's first advertising agencies, N.W. Ayer & Son, to devise a national advertising campaign. Ayer changed the tone of AT&T ads.<sup>360</sup> Where the ads formerly had been didactic, and even defensive, Ayer's ads were stirring and inspirational. They glorified AT&T's role in the advancement of human civilization and promoting national unity and interpersonal connections.<sup>361</sup> One of Ayer's strategies was to launch a continuous stream of ads, from one month to the next, and make them attractive so that people would actually anticipate them, perhaps even with some eagerness.<sup>362</sup> AT&T encouraged its associated Bell companies to adopt the same advertising policies and sought to coordinate the advertising campaigns nationally.<sup>363</sup>

In spite of its public relations efforts, though, AT&T still feared regulation.<sup>364</sup> Instead of attempting to fight what may have been inevitable, AT&T moderated its strategy. Rather than seeking national dominance as a stand-alone company, it sought to position itself at the center of a national network in support of its Bell associates with regional monopolies.<sup>365</sup> Despite all its early public relations successes, AT&T nonetheless realized that it could not control public opinion and political pressures completely. Instead, it sought to influence how the regulatory regime in the telephone industry was developed.<sup>366</sup> It lobbied to ensure that regulations would be implemented by state legislatures so that it would be regulated by state telephone commissions

---

354. *Id.* at 51.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at 52.

360. *Id.*

361. *Id.* at 54.

362. *Id.* at 55.

363. *Id.* at 56.

364. *See id.* at 57.

365. *Id.*

366. *Id.*

rather than federal agencies.<sup>367</sup> Regulation by state commissions enabled AT&T to have more ongoing influence with the regulators. The AT&T story thus reflects not only the power of corporate publicity campaigns to influence public opinion and legislation but also the limitations on corporations' abilities to control their political environments.

### *G. Public Relations Humanizes the Corporation*

Other corporations soon recognized that they also could use public relations to good ends and jumped on the bandwagon.<sup>368</sup> An infant public relations industry was born, and a new breed of public relations professionals who developed the precepts of modern public relations campaigns emerged.<sup>369</sup> These public relations pioneers often knew that they were not only manipulating public opinion but changing the nature of democracy—they saw that not only as their objective but as a responsibility. Edward Bernays, for instance, who helped to engineer the U.S. government's public relations campaign during World War I, wrote:

The conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society. Those who manipulate this unseen mechanism of society constitute an invisible government which is the true ruling power of our country.<sup>370</sup>

Bernays was not alone in recognizing the tremendous power of public relations or the role it would play in modern life. As Walter Lippmann wrote:

The creation of consent is not a new art. It is a very old one that was supposed to have died out with the appearance of democracy. But it has not died out. It has, in fact, improved enormously in technic, because it is now based on analysis rather than on rule of thumb. And so, as a result of psychological research, coupled with modern means of communication, the practice of democracy has turned a corner. A revolution is taking place, infinitely more significant than any shifting of economic power.<sup>371</sup>

The new public relations experts quickly surmised that it was not enough to simply sell their corporations' products—they needed to humanize the corporations. When people spoke at the turn of the twentieth century of the corporation having “no pants to kick and no soul to damn,” they were making a point about the impersonality of the corporation and its lack of moral integrity

367. *Id.*

368. In his autobiography, one of the pioneers in the public relations industry, Edward Bernays, listed his former corporate clients, and it included, among others: American Cigar Company, American Distilling Company, American Tobacco Company, Dodge Brothers, Inc., General Electric, General Motors, Proctor & Gamble Company, United Fruit Company, and Westinghouse Corporation. EDWARD BERNAYS, *BIOGRAPHY OF AN IDEA: MEMOIRS OF PUBLIC RELATIONS COUNSEL EDWARD L. BERNAYS* 817–18 (1965).

369. Some of the first public relations experts were highly educated and knowledgeable about the social sciences, especially psychology. They also considered public relations a true profession, complete with professional responsibilities. Bernays, for instance, referred to himself as a “public relations counselor.” He was, in fact, a nephew of Sigmund Freud and particularly well versed in the predominant psychological theories of his time. See EWEN, *supra* note 295, at 3–18. Walter Lippmann, another public relations pioneer, was a well-known public intellectual. See *id.* at 60–64.

370. EDWARD L. BERNAYS, *PROPAGANDA* 37 (1928).

371. WALTER LIPPMANN, *PUBLIC OPINION* 248 (1922).

and sense of social responsibility.<sup>372</sup> As Seth Low explained in 1898:

The impersonality of the corporation lends itself readily to many abuses from which the sense of personal responsibility saves individual men . . . . The fundamental evil in the corporate form of management, undoubtedly, is the loss of personal responsibility. It is a common remark that as directors men will do things which as individuals they would not think of doing. Indeed, the evil lies deeper than this. Because they are directors, and therefore, as they say, trustees for others, they feel constrained to do for the benefit of the stockholders what as individuals they abhor.<sup>373</sup>

Thus, large corporations increasingly sought to give themselves a human face. While AT&T's early ads emphasized the efficiency and social utility of a national telephone network, later ads tended to display a more human, and frequently feminine, face.<sup>374</sup> Other corporations followed suit.<sup>375</sup> Some corporations, such as National Cash Register and Western Electric, began to emphasize the people behind their companies.<sup>376</sup> Many corporations produced ads that projected warm images of wholesome communities and suggested that they too, somehow, were their customers' neighbors within these communities.<sup>377</sup> Some corporations produced ads that tried to project images of their stockholders, usually as ordinary, middle-class Americans, sometimes bordering on the absurd.<sup>378</sup> Many companies also recognized that their employees were an important audience for their ads, not only because they were concerned about employee morale and labor relations but also because they knew that their employees were an important and growing part of the general public. Thus, some corporations established company magazines and produced ads for these magazines or other publications that depicted happy employees leaving their factories or returning home from a hard day at work.<sup>379</sup>

People were not mindless and they never came to think of corporations as human or anything other than business entities. The sophisticated professionals who came to manage their public relations campaigns knew people were not that mindless, so they set much more realistic objectives.<sup>380</sup> The

372. See *supra* note 22.

373. Seth Low, *The Trend of the Century*, 490 ATLANTIC MONTHLY 153, 160 (1898).

374. See, e.g., MARCHAND, *supra* note 236, at 64-65 ("The Spirit of Service" ad showing a brave lineman fixing a downed line in a ferocious storm; "Weavers of Speech" ad showing an attractive young woman earnestly connecting callers at a switchboard).

375. See, e.g., *id.* at 171, 195 (Heinz ad, "The Homelike Kitchens of Heinz," showing a woman in apron carrying food in a bowl in a domestic-looking setting; Du Pont ad, "today's Prometheus," showing a bespectacled man in an apron examining a test tube).

376. See, e.g., *id.* at 106, 112 ("The people and plant that stand behind every National Cash Register"; Western Electric ad "Some of the 37,000 workers in the world's telephone workshop").

377. See, e.g., *id.* at 85, 155, 243 (AT&T ad "Friend and Neighbor"; General Electric ad "The initials of a friend"; General Motors ad "Home Address, Main Street, U.S.A.").

378. See, e.g., *id.* at 76, 78 (AT&T ad, "Our Stockholders," showing a young woman with two children at her sides; Bell Telephone ad, "She's a Partner in a Great American Business," illustrating a smiling, grandmotherly woman preparing a meal at a table).

379. See, e.g., *id.* at 228, 238, 240 (cover of *U.S. Steel News* for July 1940, showing a blue-collar employee returning from work to a scene of domestic tranquility; General Motors ad, "What Happens to General Motors Happens to Me!"; cover of *GM Folks* from October 1938, showing three happy blue-collar workers leaving a plant).

380. As Earl Newsom, who worked for Standard Oil, explained at a public relations conference in 1946: The clear, noteworthy image thrown upon the screen must be one of portraying our company as

relentless onslaught of favorable corporate imagery, however, did change public attitudes. People became much more accepting of the role of the corporation in American society and much less cynical about its character. As Roland Marchand explained:

[T]he giant corporation, arising after the mid-nineteenth century, demolished all balance in size and power between the framers of the new corporate images and their audiences. Over time a cadre of those most talented in devising verbal and visual imagery came to dominate such discourse on behalf of the largest, richest organizations. Although individuals, and occasionally those united in voluntary groups, did not lack all capacity to counter or even undercut the flood of imagery from the corporations, the encounters became increasingly disproportionate as the twentieth century wore on. The citizen incessantly addressed as favorite, friend, neighbor, and even family member of the corporation had to develop a prickly, discriminatory wariness in order to resist acquiescence and maintain a realistic sense of conflicting interests.<sup>381</sup>

#### *H. The Ideology of Corporate Capitalism*

Beyond humanizing the corporation, some of the public relations efforts were devoted to rationalizing the market system in which the corporations thrived, presumably to forestall new regulations. Some corporations both supported the war effort and took advantage of the opportunity to propagate the ideology of the free market during World War II.<sup>382</sup> Some of these ads, and others, were overtly ideological. General Motors, for instance, in an ad titled, "Know-How," proclaimed that although "[t]hey said that America was unprepared for war[,] . . . [t]hey forgot that in America free enterprise had for years been encouraging—stimulating—urging men to learn how to make things better and better—in greater volume—at constantly lower costs."<sup>383</sup> Republic Steel, in an ad titled, "Boys, I'll tell you what Free Enterprise really is!" used the image of a professional middle-aged man speaking to a group of other men in a shop around a wood stove to describe and praise free enterprise.<sup>384</sup> As the narrator explained:

[I]t's our right to live our own lives, run our own jobs and our own businesses in our own way—without needless interference . . . to criticize the government, bawl out the umpire . . . make a speech on the public square . . . . It offers

---

*wanting the things that people want.* There must be a merging of image and audience if people are to say "That is my kind of company—that is good—let us keep and preserve and extend that institution." The image cannot be one of human exploitation, of ruthlessness, of greed, of selfishness. The image must be a *human* image. For it must reveal a company as an organization of human beings. For, you see, we are asking people to "join our crowd"—they who want so much to join a crowd.

EWEN, *supra* note 295, at 380.

381. MARCHAND, *supra* note 236, at 362.

382. *See, e.g., id.* at 325, 327, 329 (Republic Steel ad, "Leatherneck Joe Mechanic," in which "Joe," writing from a marine's perspective, noted that the "radical stuff . . . always hits us little guys the hardest"; General Motors ad, "Victory is Our Business," that referred to GM as "partners in production" with farmers in the war effort; Du Pont ad, "Soldiers of the Soil," honoring farmers and showing empathy for those who made sacrifices for the war without receiving any public recognition).

383. *Id.* at 337.

384. *Id.* at 352.

*opportunity* to anyone who really wants it. It rewards thrift, hard work and ingenuity.<sup>385</sup>

The ad ends in rousing fashion when the narrator proclaims, “Frankly, I don’t like the name Free Enterprise . . . . I’d rather call it *American Enterprise*, because it’s the most American thing we have . . . . Let’s *keep it*.”<sup>386</sup>

The irony, of course, is that a large corporation—the kind of institution that many progressive reformers worried was a threat to American society because it would destroy democracy and replace it with plutocracy—was now equating free enterprise, an economic system in which the corporation thrived, with democracy and all things American. The fact that Republic Steel could even think of publishing such an ad was itself testimony to the dramatic change in public attitudes during the first half of the twentieth century. As Lippmann explained earlier in the century, the corporation had succeeded in embedding a corporate ideology into the public mind in part by using the precepts of neoclassical economic theory to rationalize and legitimize the way that corporate capitalism worked. He began by elegantly describing neoclassical economic theory:

[The older economists] set out to describe the social system under which they lived, and found it too complicated for words. So they constructed what they sincerely hoped was a simplified diagram, not so different in principle and in veracity from the parallelogram with legs and head in a child’s drawing of a complicated cow. The scheme consisted of a capitalist who had diligently saved capital from his labor, an entrepreneur who conceived a socially useful demand and organized a factory, a collection of workmen who freely contracted, take it or leave it, for their labor, a landlord, and a group of consumers who bought in the cheapest market those goods which by the ready use of the pleasure-pain calculus they knew would give them the most pleasure.<sup>387</sup>

He then explained how this positive theory of a private exchange economy was used to provide a normative justification of the free market system:

The kind of people, which the model assumed, living in the sort of world the model assumed, invariably coöperated [sic] harmoniously in the books where the model was described. With modification and embroidery, this pure fiction, used by economists to simplify their thinking, was retailed and popularized until for large sections of the population it prevailed as the economic mythology of the day . . . . The buildings which rose, and the bank accounts which accumulated, were evidence that the stereotype of how the thing had been done was accurate. And those who benefited most by success came to believe they were the kind of men they were supposed to be.<sup>388</sup>

### I. Corporate Welfare Work

It is notable that so many corporations targeted some part of their public relations directly at their own employees. Labor relations were often strained,

---

385. *Id.*

386. *Id.*

387. LIPPMAN, *supra* note 371, at 117.

388. *Id.* at 117–18.

and this was one way of improving employee morale and loyalty. The Progressive Movement motivated many corporations to go beyond their rhetoric and implement in-house programs for their employees' moral and spiritual edification and general welfare.<sup>389</sup> At the time, these programs often were referred to as "welfare work."<sup>390</sup> Sanford Jacoby traces the origins of welfare capitalism to three influences on some larger corporations that began in the late nineteenth century.<sup>391</sup> First, there was the scientific management movement that sought to systematize and rationalize corporations' production processes and administrative practices.<sup>392</sup> Second, there was a movement to establish programs for the employees' direct benefit, such as worker compensation schemes, savings plans, and even some educational and recreational programs.<sup>393</sup> Third, there was a movement among social workers to establish vocational guidance programs, particularly to improve young peoples' integration into the labor market.<sup>394</sup>

These separate influences ultimately merged into the personnel management movement. Although the personnel management movement only had any widespread influence beginning in the 1910s, some corporations were at the forefront of welfare work long before then.<sup>395</sup> As early as 1882, for instance, the Colorado Fuel and Iron Company provided hospital and nursing services for its employees.<sup>396</sup> In the 1890s, it established kindergartens for its employees' young children, as well as reading rooms and music and recreational programs for its employees themselves.<sup>397</sup> The National Cash Register Company was probably the first large corporation to experiment with corporate welfare programs in the early 1900s.<sup>398</sup> It established a "Labor Department" in 1901.<sup>399</sup> Other major corporations followed suit, and by 1908, one contemporary observed that one and a half million workers in the United States were covered by at least some kind of corporate welfare program.<sup>400</sup> Although welfare capitalism was never prevalent in the United States, well-known corporations such as Eastman Kodak, U.S. Steel, General Electric, and International Harvester, all had corporate welfare programs in the early twentieth century.<sup>401</sup>

There was a spike in interest in corporate welfare programs in the late

---

389. See generally JACOBY, *supra* note 113; MARCHAND, *supra* note 236, at 15–26; Edward Berkowitz & Kim McQuaid, *Businessman and Bureaucrat: The Evolution of the American Social Welfare System, 1900–1940*, 38 J. ECON. HIST. 120 (1978).

390. MARCHAND, *supra* note 236, at 16.

391. JACOBY, *supra* note 113, at 39–73.

392. *Id.* at 40–44.

393. *Id.* at 48–74.

394. *Id.* at 66–74.

395. MARCHAND, *supra* note 236, at 16.

396. *Id.*

397. *Id.*

398. Berkowitz & McQuaid, *supra* note 389, at 123.

399. *Id.*

400. *Id.*

401. *Id.*

1910s, especially during and immediately after World War I, when there was a labor shortage and labor relations deteriorated.<sup>402</sup> Many corporations during the period from 1915 to 1920 first established personnel departments.<sup>403</sup> Although the personnel managers often hoped to implement sweeping new programs and reform labor management practices, they rarely succeeded.<sup>404</sup> Their companies typically had little interest in welfare work that was not directed at improving the bottom line.<sup>405</sup> After the war, there was a period of sustained prosperity, and labor relations were relatively good. The personnel management movement was no longer a high priority.<sup>406</sup> Nonetheless, many corporations did implement significant corporate welfare programs during the first two or three decades of the twentieth century. These proved to have subtle, but possibly important, consequences.

Of course, in many cases corporate welfare programs helped to improve labor relations. They improved employee morale and loyalty, reduced employee turnover and related costs, and they may have contributed to labor productivity through an efficiency-wage incentive—an incentive for workers to maintain high productivity so as to ensure they kept their good jobs with good wages and benefits.<sup>407</sup> But they probably also had important political consequences. First, they improved corporations' images with their own employees, and because the corporate sector was growing in size relative to the rest of the economy, corporate employees became a sizable part of the general public.<sup>408</sup> Beyond that, however, the fact that the corporate welfare programs existed, and in the forms that they took within the private sector, may have influenced the way some public welfare programs developed, or, as may have been the case, did not develop. Indeed, corporate leaders sometimes had adopted their own welfare programs to preempt government programs and they subsequently resisted "statist 'interference.'"<sup>409</sup>

The structure of some government welfare programs also may have been influenced by the corporate welfare precedents. Edward Berkowitz and Kim McQuaid, for instance, contend that when the social security system was implemented, corporate leaders were extensively consulted, and the system that was adopted was modeled, in some ways, on similar corporate welfare plans.<sup>410</sup> For example, the social security scheme was devised so that social security benefits would be paid only to those who had been employed and had made social security contributions, much like in a private retirement plan.<sup>411</sup>

---

402. See generally JACOBY, *supra* note 113, at 99–123.

403. *Id.* at 102.

404. *Id.* at 121–26.

405. See *id.*

406. See *id.* at 124–53.

407. See, e.g., Janet L. Yellen, *Efficiency Wage Models of Unemployment*, 74 AM. ECON. REV. 200, 200 (1984).

408. See MARCHAND, *supra* note 236, at 15–16.

409. Berkowitz & McQuaid, *supra* note 389, at 129.

410. *Id.* at 133.

411. *Id.*

Moreover, the amount of social security benefits someone could receive would be in some crude proportion to the amount they had contributed, again much like in a private retirement plan.<sup>412</sup> And the social security system was to be financed by contributions and not by general tax revenues.<sup>413</sup>

Finally, the early corporate welfare programs of the Progressive Era laid the foundations for corporations' modern-day benefits packages, including private health insurance plans and dental care plans. If corporations had not offered the benefits, employees may have been more eager to support similar public plans. Private health and dental benefits have never been treated as taxable income, and so they provide tax advantages that may benefit employers and employees.<sup>414</sup> If, for instance, the employer paid the employee the same amount in salary, instead of benefits, the employee would be taxed. Presumably, the employer and employee can split the tax savings.<sup>415</sup> Under a public health insurance program that covered costs directly through general tax revenues, both employers and employees would stand to lose some of the tax advantages and possibly face greater tax liabilities to cover the costs of extending benefits to those whose tax contributions are too low to cover their benefits.<sup>416</sup> Whether corporate employees are that calculating or not, the mere fact that most, if not all, are covered by private benefits plans probably means there is less political pressure for public plans. In a perverse sense, the private sector may have "crowd[ed] out" the public sector in the provision of some kinds of welfare programs and may continue to do so to this day.<sup>417</sup>

This crowding out effect, and, for that matter, the efficacy of corporate public relations programs and corporate welfare work in general, no doubt increased as the corporate sector grew in size and became more concentrated during the twentieth century. The largest corporations quickly grew to comparatively enormous proportions. By the middle of the twentieth century, the largest 200 corporations accounted for about a third of the value added in United States manufacturing, and, when ranked by volume of sales, accounted for more than a third of all manufacturing employment.<sup>418</sup> By the 1970s, the largest 200 corporations accounted for more than forty percent of the value added in United States manufacturing and more than sixty percent of all manufacturing employment.<sup>419</sup> Corporations knew that their own employees and

---

412. *Id.*

413. *Id.*

414. This is one of the well-known advantages of nontaxable fringe benefits for employers and their employees. See generally Ellen O'Brien, *Employers' Benefits from Workers' Health Insurance*, 81 *MILBANK Q.* 5 (2003) (discussing the idea and the literature).

415. *Id.* at 9–13.

416. O'Brien concludes that, although there are gaps in the literature, there is evidence that private health insurance plans benefit both employers and their employees. *Id.* at 29.

417. This reverses the usual way of looking at the relationship between the public and private sector. See, e.g., M. Susan Marquis & Stephen H. Long, *Public Insurance Expansions and Crowd Out of Private Coverage*, 41 *MED. CARE* 344, 345 (2003).

418. William N. Leonard, *Mergers, Industrial Concentration, and Antitrust Policy*, 10 *J. ECON. ISSUES* 354, 355–56 (1976).

419. *Id.*



stockholders were an increasingly important part of the public, and they targeted some of their advertising and public relations efforts at their own stakeholders.<sup>420</sup> As the twentieth century progressed, the famous aphorism, "What's good for General Motors is good for America," became true, in some part, because it was increasingly true that General Motors *was* America.

## V. CONCLUSION

The rise of the modern corporation was an integral part of the Second Industrial Revolution. The Second Industrial Revolution would not have occurred if business firms had been unwilling to make the large investments necessary to implement the important new technologies that drove the industrial growth and development. Business firms may have been reluctant to make the investments without the shield of limited liability and the ability to spread their risks across diversified portfolios of corporate stocks. The emergence and growth of the large corporations, however, created significant public alarm and led to calls for controls on the corporations. The changes wrought by the economic and social transformation at the turn of the twentieth century already had disrupted traditional ways of life and contributed to a growing discontentment across many segments of American society. When large corporations began to acquire unprecedented economic and political power, this exacerbated the underlying discontentment and created widespread concerns about the dangers of plutocracy.

There were no federal or state constitutional protections for corporate speech in the early twentieth century. Although the U.S. Supreme Court stated that the corporation was a person under the Fourteenth Amendment as far back as the late nineteenth century, it is clear that the Court at the time did not intend to extend all of the rights of natural persons to corporations. In any case, the First Amendment was not incorporated against the states until 1925. At the turn of the twentieth century, corporations were regarded as creatures of state law whose powers were defined by their charters under state incorporation statutes. The federal and state governments could have enacted sweeping regulations on corporations' speech and related corporate behavior. But they did not. Some forward-thinking corporations took advantage of the opportunities and began to redress their poor public images with systematic public relations campaigns and welfare work programs that anticipated corporations' modern benefits plans. The public never came to think of the corporation as a person or anything other than a business entity. But, by publicizing the people behind the companies and the role that the companies

---

420. Some of the ads were no doubt motivated to improve employee morale and productivity. *See, e.g.,* MARCHAND, *supra* note 236, at 99 ("Let us put our own House in Order."). Others, however, seem to have been motivated to indoctrinate the employees with a corporate culture and make them recognize that their interests coincided with the company's. *See id.* at 123, 238 ("An Advertisement to Our Employees" and "What Happens to General Motors Happens to Me!").

played in the public's day-to-day lives, the public relations campaigns succeeded in humanizing the corporation and integrating it into the American public's sense of community. More importantly, perhaps, the public relations campaigns succeeded in inculcating into the American public an ideology that rationalized and legitimized the market system within which the corporation flourished and institutionalized a role for the corporation in the modern economy.

The U.S. Supreme Court's recent decision in *Citizens United* ignited a firestorm of criticism. In hindsight, this is ironic. Although the scope of corporate speech rights has important political implications, from a historical perspective, *Citizens United* merely tinkers at the margins. The larger debate already has been won by the corporations. Most Americans now accept that corporations inevitably will play an important role in politics as well as the economy. If the corporation had not succeeded in gaining widespread social acceptance, then, for good or ill, it probably would have been subjected to much more severe legal restrictions. The American economy, as well as American law and politics, would have developed in fundamentally different ways. If the courts and legislatures at the turn of the twentieth century had prevented corporations from engaging in the various kinds of speech and related behaviors that allowed them to legitimize and institutionalize their role in American life, they might not have become, in Justice Scalia's words, "the principal agents of the modern economy."<sup>421</sup>

---

421. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 929 (2010) (Scalia, J., concurring).

