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Public Values and Corporate Fiduciary Law

William Wilson Bratton

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Politics have returned to a leading role in corporate law discussions. A few years ago they hardly mattered at all. In the mid-1980's, when takeovers and high leverage restructurings were still gathering momentum, it briefly looked as if market discipline might have the determinant role in corporate governance. It also briefly looked as if a microeconomic paradigm would determine the future shape of corporate law. Since corporate law is about wealth maximization, it seemed to follow that its framework would be set by reference to economics, the discipline that tells us how to maximize.

The point did not carry in the long run, however. The economy turned down, and, as credit tightened, takeovers and restructurings stopped abruptly. Meanwhile, state governments enacted antitakeover legislation[1] that was *prima facie* inefficient under the economic paradigm. The states, serving the interests of management and labor (but mostly management), thereby opted to ignore a decade of law review articles. The economic paradigm, as a result, failed to manifest itself in the law on the critical governance point. The legal corporation emerged looking a bit less like a nexus of contracts and a bit more like a contract failure. The failure was political. Absent an effective politics of corporate governance, even the most economically correct policies do not find their way into the law.

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1. See *infra* note 28.

Commentary on the politics of corporate law has appeared in response.[2] Much of this work is strategic, addressing the question of how to get the politics to follow the economics.[3] But other work pauses to explain the political forces at work in recent years and to describe how politics interacts in the law with economic concerns.[4] This Article pursues the latter line of inquiry. It considers the extent to which public values that are not consonant with the normative dictates of a microeconomic paradigm legitimately can be integrated into corporate law. Toward this end, this Article takes up a specific question: can fiduciary constraints legitimately be imposed on corporate actors, when those constraints do not serve the expectations and values of the corporate actors themselves, and instead vindicate values important only to society at large?[5] Or, restating the question in economic terms: Can corporate fiduciary rules that realize either no cost savings or increased net costs be justified? Stated either way, this is the hard political question respecting corporate fiduciary law.

To concretize the question with a hypothetical, imagine a pair of fiduciary rules. The first tightens the corporate opportunity constraint to bar all outside business pursuits by officers and directors of public corporations.[6] The second

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2. The leading work is historical. *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991) (political diminution of the power of financial institutions).

3. The commentary articulating new paths for investor control of management in the absence of takeovers is most prominent. *See, e.g.*, Ronald J. Gilson & Reiner Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990).

4. *See* Jeffrey N. Gordon, *Corporations, Markets and Courts*, 91 COLUM. L. REV. 1931 (1991) (socio-historical account of Delaware lawmaking); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865 (1990) (Delaware takeover law viewed in wider social and political context).

5. As used in this Article, the term "corporate actors" encompasses both managers and shareholders.

6. The traditional corporate opportunity restraint prohibits directors and officers from wrongfully appropriating a corporate opportunity. *See* PRINCIPLES OF CORP. GOVERNANCE § 5.04 (Am. Law Inst. Tentative Draft No. 5, 1986). For a proposed "tightening" of this constraint, such as that set forth in the hypothetical, see Victor Brudney & Robert C. Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997, 1022-42 (1981) (recommending categorical prohibition of full-time executives of public corporations from taking any other active business

applies the majority to minority fiduciary duty so as to impose a "business purpose" standard that discourages a small class of cost saving mergers.[7] Both rules have been imposed as a matter of public policy to protect investors. Either one could be modelled as wealth maximizing to the corporation and its actors, given the right assumptions. But in this exercise, different assumptions will be made. Assume that although neither rule significantly impairs the conduct of business, neither follows from the values or transactional expectations of the average manager or investor.[8] The first regulation is stipulated to be cost neutral; the second is stipulated to have a slight cost. Can one, the other, or both be justified under any legal theory plausible at this time?

The question takes us to the frontier of corporate fiduciary law. This Article explores possibilities for an affirmative answer. It experiments with arguments for regulating internal corporate conduct based on community values and process,[9] drawing in particular on the concept of communicative action.[10] In so doing, it projects a framework for public justification of fiduciary constraint that avoids reliance on the moribund notion of the corporation as a delegation of sovereign authority.[11]

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opportunities).

7. Although the "business purpose" rule is no longer the law of Delaware, Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977), *overruled by* Weinberger v. UOP, 457 A.2d 701, 704 (Del. 1983), the hypothetical concerns the cost implications of the rule, and not its doctrinal soundness. *Cf.* Victor Brudney & Marvin A. Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 313-25 (1974) (suggesting that gains resulting from mergers of parent into subsidiary corporations be divided equally between the parent and subsidiary as a percentage of pre-merger values).

8. With respect to the cost neutral regulation, discussed *infra*, this assumption must eventually be relaxed. *See infra* text accompanying notes 23-24.

9. See *infra* text accompanying notes 21-24 for the meaning of "process" as used in this Article.

10. Jürgen Habermas has articulated the importance of communicative action. *See infra* notes 39-44 and accompanying text.

11. Concession theory asserts that corporations must derive positive authority from the state. Sovereigns have made this claim since Roman times. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 666 (1926). The theory enjoyed vitality in the United States during the first half of the nineteenth century. Thereafter, the practice of ministerial incorporation by states caused the theory's imagery to lose plausibility. *See* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407,

I. STRATEGIES FOR JUSTIFYING COST NEUTRAL AND COSTLY FIDUCIARY LAW

A. *The Contract Paradigm and the Traditional Concept of the Fiduciary*

Both of the proposed hypothetical regulations are difficult to justify. Certainly, no support can be found under the "contract paradigm" that dominated corporate legal theory in the 1980's.[12] The paradigm justifies fiduciary regulation only on proof of wealth maximizing consequences,[13] and requires a showing of contract failure to make the proof. In a thick stack of articles, commentators make this proof, and thus "contractually" justify the traditional fiduciary bar against management self-dealing.[14] But the hypothetical facts as stated here include no contract failure between management and investors that would support the hypothetical regulations. Nor do the facts stipulate any externality reducible to dollars and cents that might justify intervention on behalf of economic interests outside of the corporation.[15] In short, neither

433-36 (1989) [hereinafter Bratton, *Nexus of Contracts Appraisal*]. *But cf.* ROBERT HESSEN, IN DEFENSE OF THE CORPORATION 3-33 (1979) (explaining the historical background of the concession theory of corporate authority).

12. The "contract paradigm" views the corporation as a "nexus of contracts" between and among investors and management, investors and investors, suppliers and the entity, and consumers and the entity. *See* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1403 (1985).

13. The "contract" is microeconomic. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

14. This "contractually" justified bar is, however, a narrowly construed version of the traditional fiduciary bar. Information imbalances and barriers to collective action prevent dispersed shareholders from substituting a more effective contractual set of conflict of interest regulations. *See, e.g.*, Lucian A. Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989); John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989); Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989).

15. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88-89 (1989) (noting an academic consensus respecting intervention for paternalistic reasons and in respect

hypothetical regulation serves an economic welfare function.

Moreover, the traditional doctrinal conception of fiduciary duty provides little support for the hypothetical regulations. Corporate fiduciary law, as traditionally conceived, rests on an ethical case against abuses of position by self-interested managers. But, at the same time, it recognizes that the self-interested pursuits of corporate actors are necessary and legitimate in many circumstances.[16] Tensions arise between these concomitant considerations. Traditional corporate fiduciary doctrine mediates these tensions with a rule-and-exceptions approach. It thereby pursues the generally-shared goal of wealth maximization, while simultaneously attempting to protect and perpetuate the trust and good will that suffuses complex economic relationships.[17]

We can describe a conceptual tie between the hypothetical regulations and the ethic that motivates traditional fiduciary doctrine: the hypothetical regulations impose business sacrifices on managers for the benefit of shareholders in order to protect the trust reposed in managers by the shareholders.[18] This description lacks justificatory force, however. Under our assumptions, the shareholders do not expect or rely on the particular constraint the regulations impose.[19] Traditional doctrine only protects the interests of

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of externalities).

16. For example, a contract between a director or officer and the corporation can be an optimal investment for both parties, when the corporation's rate of return is commensurate with what it would receive from a third party.

17. I set out this mediative description of traditional fiduciary law in detail in William W. Bratton, Welfare and Good Will in Corporate Fiduciary Law, (March 1, 1992) (unpublished manuscript, on file with author) [hereinafter Bratton, Welfare and Good Will].

18. The different hypothetical regulations benefit different groups of shareholders. The entire class of shareholders is protected by the first hypothetical regulation, and a more narrowly defined class of minority shareholders by the second.

19. In contemporary commentary in the conventional mode, strong, antimanagerialistic fiduciary regulations tend to be justified as protections of shareholder expectations, based on casual empirical assumptions. *See* PRINCIPLES OF CORP. GOVERNANCE § 2.01 cmt. h (Am. Law Inst. Tentative Draft No. 2, 1984) (management may not take ethical considerations into account if doing so "would be likely to violate the fair expectations of the corporation's shareholders taken as a group"). *See also* David M. Phillips, *Managerial Misuse of Property: The Synthesizing Thread in Corporate Doctrine*, 32 RUTGERS L. REV. 184, 219-20 (1979);

actors inside the corporation, looking to those actors to define their own interests. The hypothetical regulations, in contrast, follow from outside ethical instructions as to appropriate conduct inside corporations. Furthermore, a justificatory base in traditional fiduciary good will would be debatable even if the regulations' origins in outside values presented no problem. Ethical considerations do not support fiduciary constraint under the traditional conception without reference to economic welfare.[20] When outside ethics and economics conflict, traditional doctrine offers no program to direct and legitimize results.

B. *Community Standards and Process*

Absent support from traditional fiduciary doctrine, the hypothetical regulations' proponent must fall back on the values of members of the outside community. This public justification presupposes a consensus behind the values that motivate the regulations. The argument proceeds as follows. Corporate affairs are not conducted as a matter of juridical right; therefore, corporate behavior may be restricted even in the absence of a concrete economic externality. In such cases, the externality that prompts the regulation is one of values. Sordid business practices, enforced in law, inflict nonpecuniary injury. If prominent business people pursue self-interest according to values materially different from those held outside of the corporation, legal endorsement of their conduct injures the community's wider sense of itself.

This public justification view is problematic, since corporate wealth maximization is also a community value. We only suffer corporations to benefit from low cost production in the first place.[21]

At this point, a distinction opens between cost neutral and costly regulations. The community consensus assertion is more plausible empirically and carries more justificatory force with respect to the cost neutral regulation. All other things being

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Victor Brudney, *Fiduciary Ideology in Transactions Affecting Corporate Control*, 65 MICH. L. REV. 259, 299 (1966). Here, the stipulated facts block these assumptions.

20. *See* Bratton, Welfare and Good Will, *supra* note 17.

21. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

equal, the community will support vindication of its values. With a cost neutral regulation, we can even expect the acquiescence of actors inside the corporation. We can ascribe to them a desire to "harmonize"[22] their relationships with values prevalent outside. With the costly regulation, however, all other things are not equal. The insiders' urge to harmonize diminishes as constraints become costly. Impairing the wealth of those inside the corporation solely to vindicate outside values comes across as a weak exercise of distributive justice. Thus, the "external," community justification must be stronger than the mere desire to harmonize.

C. *Possibilities for Cost Neutral Regulation under the Trust Model*

The question regarding cost neutral regulation, thus justified in theory, is whether cost neutral fact patterns ever show up in practice. The economic paradigms insist that they do not. These paradigms include a presumption that regulation is always materially costly, absent a strong and precise showing to the contrary.[23]

But the point can be argued the other way, given the usual absence of empirical proof. First, we look behind the stipulated cost neutrality of the hypothetical corporate opportunity prohibition. It turns out that a "cost neutral" prohibition cannot exist without some consonance with the interests of actors inside the corporation. Since regulation is intrinsically costly, cost neutrality implies a cost/benefit stand off; thus, some economic benefit must result. Such a stand off is easily posited for a corporate opportunity bar. On the one hand, the regulation causes costs in cases where managers otherwise would pursue individual entrepreneurial projects about which

22. *Cf.* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 67-69 (1980) (describing harmonization of relational conflict).

23. *See* Ronald J. Gilson, *Evaluating Dual Class Common Stock: The Relevance of Substitutes*, 73 VA. L. REV. 807, 843 (1987) (proposing that new corporate law should be formulated only if the regulator has complete positive command of the agency cost picture); Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 64 (1990) (asserting an explicit normative presumption against regulation throughout the law of contract).

their investors would be indifferent.[24] But benefits would follow to the extent that the rule caused managers to pursue investor-beneficial results in a more single-minded way. Arguably, this actualized professionalism would result in improved production and a lower cost of capital, and so, would be supported by the traditional conception of fiduciary duty. The point carries even if shareholders do not expect the protection *ex ante*. Shareholder expectations have an inchoate aspect. The law helps shape them, and can have cost beneficial consequences as it does so.

Since we now have plausible arguments both for and against the regulation, the matter comes down to the usual contest between regulatory and antiregulatory burdens of proof. Today, more so than at any time in the last decade, a strong case can be made for stepped up fiduciary regulation under a trust model of the corporation, and against the economic presumption opposing regulation. The failure of market mechanisms to adequately control management conduct is once more widely acknowledged.[25] Academic policy talk, however, remains in a deregulatory mode. Current work looks to institutional investor self-help for solutions[26] while avenues toward less costly legal regulation remain unexplored. Yet such avenues exist. Corporate fiduciary law has always had a tentative, experimental pattern of application;[27] today, it can even have a conditional pattern.

A decade of contractual thinking about corporate law has left us with the tools to create statutes that regulate corporate conduct while leaving open paths for contractual innovation within particular corporations. Conditional regulation, subject to opting out in particular corporations by shareholder vote,

24. Also, some talented people, discouraged by the directive to serve others, might avoid executive positions in public corporations, and instead pursue careers only in closely-held corporate enterprises.

25. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 217-23 (1991) (management opportunism as an influence on the development of state law); Gilson & Kraakman, *supra* note 3; Black, *supra* note 3.

26. *See* Gilson & Kraakman, *supra* note 3 (privately sponsored corps of independent directors); Black, *supra* note 3 (cost beneficial model of independent action by large institutional holders).

27. *See* Bratton, Welfare and Good Will, *supra* note 17.

has become everyday business.[28] Indeed, opting out is the great gift to regulation from the "nexus of contracts." Unfortunately, up to now, it has been used to legitimate protective management innovation; however, this device would be better used in the service of a more professionalized model of management conduct. The regulatory improvements pursued piecemeal by today's institutional investor activists—such as secret ballots, independent director majorities on compensation committees, constraints on golden parachutes,[29] and limits on

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28. The most dramatic and widespread legislative movement toward opting out concerns the duty of care. This reform movement began in 1986 when Delaware amended its corporation law to permit corporations to amend their certificates to exclude directors' liability for breaches of the duty of care. DEL. CODE ANN. tit. 8, § 102(b)(7) (1983 & Supp. 1990). By now at least thirty-five states have followed. For a list of citations, see Douglas M. Branson, *Assault on Another Citadel: Attempts to Curtail the Fiduciary Standard of Loyalty Applicable to Corporate Directors*, 57 FORDHAM L. REV. 375, 381 n.30 (1988). Additional states include: ALASKA STAT. § 10.06.210(1)(N) (1989); HAW. REV. STAT. § 415-48.5 (1988 & Supp. 1991); N.H. REV. STAT. ANN. § 293-A:54(Ia) (1987 & Supp. 1991); TENN. CODE ANN. § 48-12-102(b)(3) (1988).

These amendments respond not to the contractarian law review commentary, but to a controversial decision of the Delaware Supreme Court, Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985). There the court took the duty of care in an unexpected and potentially expensive direction, finding a board of directors liable for negligent approval of a corporate control transaction. Coming at a time when insurance markets were already in a state of disruption due to expanding legal liabilities, *Van Gorkum* precipitated a minor corporate insurance crisis. *See* R. Link Newcomb, Note, *The Limitation of Directors' Liability: A Proposal for Legislative Reform*, 66 TEX. L. REV. 411 (1987). No similar legislative movement against the duty of loyalty portends. The duty of care amendments employ the opting out device in order to solve the problem created by *Van Gorkum*.

Opting out shows up in other venues as well. Mechanisms for opting out of mandatory provisions of federal securities laws have been proposed but not promulgated. *See* Concept Release on Takeovers and Contests for Corporate Control: Advance Notice of Possible Commission Actions, Exchange Act Release No. 23,486 [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,018, at 88,199 (July 31, 1986) (discussing permitting companies substantial freedom to opt out of federal tender offer rules). The opting out device is also widely used in state tender offer defense statutes, presumably as part of a strategy to bolster the statute's constitutionality. Typically, the board has a stated number of days after the statute's effective date to resolve not to be governed by the statute. *See* DEL. CODE ANN. tit. 8, § 203(b)(2) (1983 & Supp. 1990). Opt out provisions appear in all three of the current models of takeover statute: fair price (acquirer must offer the same consideration in a subsequent merger as in acquisition of control block), asset freeze (prohibition of business combination with acquirer for stated number of years) and control share (voting rights denied to control shares until disinterested shareholders vote to grant them).

29. *See* Leslie Wayne, *Seeking to Stay out of Proxy Battles*, N.Y. TIMES, April

compensation schemes lacking ties to corporate performance results[30]—should also be pursued as law reform suggestions under the fiduciary rubric. Liberal use of the opting out device can minimize the risks attending such regulatory experiments and put the burden of justification on management, where it belongs under the traditional fiduciary concept.

D. *The Process Case for Costly Fiduciary Regulation*

Returning to the hypothetical costly rule, we find it in some trouble due to independent ethical objections. Under the facts as stated, corporate actors do not want the regulation. When the state imposes a fiduciary rule on unwilling subjects, its sentimental grounding becomes attenuated. Here, outsiders want to impose their conception of appropriate business relationships, even though their conception entails wealth constraining effects. As the motivating values are transformed into legal constraints, their sentimental roots atrophy noticeably. The values become a construct—a reified ethic of good will toward other corporate participants operating as law. Imposition of the construct can even mask an expression of ill will from one group to another. Therefore, what started as an aspiration for the ethical conduct of business becomes not only a construct, but an oppressive one.

A related political objection also arises. Without a manifest and compelling consensus behind it, the costly rule looks elitist because it makes its subjects worse off in order to vindicate values important to a subgroup of actors with power in the lawmaking process.[31] Such elitism prompts democratic opposition. We tend to find open pursuit of self-interest in business contexts more consonant with democratic values than business regulation designed to vindicate ethical values, at

8, 1991, at D1.

30. *See* Gilson & Kraakman, *supra* note 3, at 891 (citing Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. ECON. 225, 227 (1990)) (noting the low correlation between the compensation of managers and the economic performance of their companies).

31. Anthony T. Kronman, *A Comment on Dean Clark*, 89 COLUM. L. REV. 1748, 1754-55 (1989) (positing that elitist practices serve the interests of the institution and its principal custodians, without regard to the effect of such practices on those who must live under them).

least absent the cleansing effect of a democratic process.[32]

These ethical and political objections can be answered, however, if not categorically rebutted. On the ethical point, it can be noted that state-imposed morality is more tolerable in business contexts than in other contexts. The stakes only go to small amounts of wealth and not to significant components of other people's identities. A strong political consensus, therefore, may ameliorate the ethical objection. In short, we may, as a community, decide to be less well-off in order to pursue a notion of the good.

The political objections require an inspection of the regulatory process. Let us assume that the costly regulation is judge-made law that carries no opt out privilege. It is imposed by a state court acting within our existing institutional system of corporate lawmaking. This system, despite its bad reputation,[33] carries process guarantees—particularly in the rare case where it rouses itself to constrain self-interested management conduct. In the system, state and federal authorities interact with one another and with the various communities inside and outside of business.[34] Delaware lawmakers pay special heed to management and capital interests,[35] subject to the implied constraint of federal preemption for the wider public interest. Management and capital also make their interests felt in federal lawmaking processes. Professional organizations, scholars and other commentators all provide a background of discussion. All quarters accord considerable respect to economic welfare concerns.

Viewed cumulatively, this lawmaking process supports a

32. *Cf.* John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1026-35 (1982) (the assumption of public functions by lawyers is undemocratic; social decisions should be made by individuals pursuing self-interest in the market and by elected officials).

33. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 705 (1974) (suggesting that a lack of federal standards for corporate governance encourages states to participate in a "race for the bottom," thereby allowing corporate standards to deteriorate).

34. *See* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U.L. REV. 542, 564-66 (1990) (noting stronger political limits on federal interference with corporate governance than on similar state interference).

35. Symposium, *State Competition: Panel Response*, 8 CARDOZO L. REV. 779, 783-86 (1987) (remarks of Bayless Manning).

positivist defense of the costly regulation. As a practical matter, it is unlikely that any regulation emerging from this system could present a cognizable threat to democratic concerns or to long-term economic welfare. So long as the underlying conflict between welfare and the competing ethic is controverted and discussed, it cannot be said that the regulation's cost is imposed in disregard of anyone's material needs. The existence of controversy and discussion also imply the presence of legitimating "consensus" views. Finally, given the historic pattern of experimental applications of legal constraint in corporate fiduciary law,[36] the regulation implies no permanent, universal theoretical assertion of right. Born of controversy, the regulation amounts to a judgment made at a given moment in reference to perspectives particular to that moment. It remains subject to revision.

Although problematic in the abstract, the costly regulation has ties to a system and, through the system, to a wider consensus. In effect, the regulation manifests a mediation of a conflict of values within the system. If we see it as a mediation rather than as a wider assertion of the primacy of values conflicting with economic welfare, its legitimacy need not depend on a perfect fit with a welfarist theoretical construct.

II. PUBLIC FIDUCIARY LAW AS COMMUNICATIVE ACTION

A. *Instrumental and Communicative Action*

The foregoing lawyerly appeal to the mediative force of process in the defense of the costly regulation carries weight. But, taken alone, it looks uncompetitive as an intelligible justification when compared to today's well-articulated theories

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36. For example, courts have imposed strong fiduciary bars, only to retrench later, in cases involving: exercises of call rights, *compare* Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947), *with* Speed v. Transamerica Corp., 235 F.2d 369 (3d Cir. 1956) (damages phase of same case); sales of control blocks at premium prices, *compare* Pearlman v. Feldman, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955), *and* Jones v. H.F. Ahmanson & Co., 460 P.2d 464 (Cal. 1969), *with* Zetlin v. Hanson Holdings, Inc., 397 N.E.2d 387 (N.Y. 1979); and takeout mergers, *compare* Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977) *with* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

For a discussion of judicial experimentation with the duty of care, see *supra* note 28 and accompanying text.

of welfare and contract.[37] We can, however, strengthen the process case by reference to dialogic theory,[38] and its constituent concept of communicative action, as articulated in the work of Jürgen Habermas.

Habermas[39] employs a more capacious concept of action and

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37. *See* David E. Van Zandt, *The Relevance of Social Theory to Legal Theory*, 83 NW. U. L. REV. 10, 13 (1989) (doubting that law contains an "inner rationality" independent from social theory).

38. Ethical theory centered on dialogue is surprisingly well-suited to legal theory. Like most legal theory, it presupposes a skeptical view of substantive ethical theory.

Observe the competing substantive claims made by the several philosophical paradigms operating today. The ideal of rational justification can be pursued within the utilitarian paradigm. It can also be pursued in the Rawlsian paradigm—that is, rationality as guided by the principles that rational and self-interested persons in a hypothetical situation of equal liberty would agree to accept. *See* JOHN RAWLS, A THEORY OF JUSTICE 11-12 (1971). It can be pursued in other paradigms as well. *See* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 2-3 (1988); Bruce A. Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 12-15 (1989). In legal theory today, the other paradigms are essentialist. They employ what Ackerman characterizes as the "trumping" strategy—isolating a single generally accepted value and focusing on its political implications so as to solve our disagreements. *Id.* at 14-15.

No agreement results from the discourse between and among all these paradigms. In the end, therefore, the paradigms provide a means "for a more accurate and informed definition of disagreement rather than for progress toward its resolution." MACINTYRE, *supra*, at 3. Nor does any theory seem to answer practical ethical questions—we are unable "within our culture to unite conviction and rational justification." *Id.* at 6.

Dialogism accepts the shortcomings of the competing substantive theories and turns to the process of discussion. It posits participants taking roles in an ideal conversation. It then constructs theoretical pictures of these actors as they disagree about ethical principles and nevertheless, through dialogue, derive bases of agreement. We get a variety of ideal conversations because different dialogic theorists shape the roles in ideal conversations with different norms.

39. According to Habermas, moral theory should "clarify the universal core of our moral intuitions"; it cannot make any substantive contribution. Jürgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, *in* MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (1989), *reprinted in* 83 NW. U. L. REV. 38, 53 (1989) [hereinafter Habermas, *Morality and Ethical Life*]. *See also* Albrecht Wellmer, *Reason, Utopia, and the "Dialectic of Enlightenment,"* *in* HABERMAS AND MODERNITY 35, 53 (Richard J. Bernstein ed., 1985)

> This is a reflexive conception of human communication according to which validity claims, because they can only *emerge* from the sphere of communication, can also only be *redeemed* in the sphere of human discourse: there are no possible *external sources of validity*, since the sphere of validity is—conceptually is—identical with the sphere of human speech.

power than the concept that informs most American legal theory. The usual "instrumental action" model is teleological—an individual or group pursues a set purpose wherein power derives from the possibility of forcing one's will on others.[40] Habermas, drawing on Arendt,[41] identifies a different source of power—power as the capacity to agree in uncoerced communication on some community action. This power may also be realized in action, but the model of action is different.[42] In this "communicative action," the participating subjects voluntarily agree. Habermas articulates a theory of rationality based on this communicative action. He argues that instrumental or strategic action and rationality intermix in society with action and rationality based on reciprocal understanding, shared knowledge and mutual trust.[43] Within this framework, he sets out a procedural ethical theory. He posits an ideal ethical discussion that includes the identities and perspectives of all sorts of people, in which valid norms must meet a strict standard of acceptance by all participants.[44]

Id. (emphasis in original).

The writings of Bruce Ackerman offer a different statement of the basic dialogic point. According to Ackerman, "moral truth" is what we conclude in an "ideal speech situation." Ackerman, *supra* note 38, at 7. *See also* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 355-59 (1980).

40. JÜRGEN HABERMAS, *Hannah Arendt: On the Concept of Power*, *in* PHILOSOPHICAL-POLITICAL PROFILES 173, 173-74 (Frederick G. Lawrence trans., 1985).

41. HANNAH ARENDT, THE HUMAN CONDITION 199-205 (1958).

42. Arendt notes that:

> Power is actualized only where word and deed have not parted company, where words are not empty and deeds not brutal, where words are not used to veil intentions but to disclose realities, and deeds are not used to violate and destroy but to establish relations and create new realities.

Id. at 200.

43. Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1067 (1988).

44. First, all concerned must consent to the valid norms in their role as participants in the discourse. Second, the consequences and side effects of the general observance of the norm for the satisfaction of each person's particular interests must be accepted by all participants. Habermas, *Morality and Ethical Life*, *supra* note 39, at 40.

American legal theory offers contrasting pictures in this dialogic mode. For example, Cornell discards Habermas' procedural limits. The result is dialogue in pursuit of an ideal of the good. *See, e.g.*, Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 CARDOZO L. REV. 1687, 1696-1700, 1709, 1711-12 (1990) (arguing that the "Good, or the Law

B. *Communicative Action and Corporate Law*

The distinction between instrumental and communicative action can be brought to an everyday legal subject like corporate law with instructive results. This exercise justifies and helps explain the doctrine's diverse substance and mediative operation.

Corporate law guides and constrains instrumental action. It directs corporate actors and makes available a structure in which they can exercise directive power over one another. Corporate law also includes, and results from, conversations. In our society, corporate power depends to some extent on ongoing consent. This approving consensus continues as corporations' many constituents make and deal with corporate law. When people talk about how corporations should be governed and what the duties of corporate actors should be, they take part in the ongoing endorsement of corporate power.[45] Corporate law, viewed as a result of this conversation,

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of Law," should be understood as being universal and open to possible ethical reinterpretation); Drucilla Cornell, *The Poststructuralist Challenge to the Ideal of Community*, 8 CARDOZO L. REV. 989, 992, 1017-1022 (1987) [hereinafter Cornell, *Poststructuralist Challenge*] (discussing what Adorno and Derrida are telling us about the ethical and political significance of difference, the dangers of violent closure and the logic of identity). Ackerman describes an ideal conversation with a practical imperative behind it. His actors disagree on ethical questions but nevertheless seek to solve problems of living together. Ackerman, *supra* note 38, at 8. Ackerman makes dialogism an obligation of the citizen in the liberal state. This obligation to talk about moral disagreements arises precisely because the liberal state avoids imposing moralities. *Id.* at 10. The participants exercise conversational restraint; they stick to the available public premises and filter out inappropriate personal moralities. *Id.* at 19. Habermas' participants, says Ackerman, look to ultimate conversational victory in some far-distant ideal speech situation. His participants, on the other hand, concentrate on getting things done in this world without compromising their moral beliefs. *Id.* The result is an ideal of dialogue with a direct tie to the juridical, political and economic conversations familiar to American law teachers.

Dialogic theory has been applied to a number of legal subjects. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (constitutional law); Handler, *supra* note 43 (administrative law); Drucilla Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575 (1989) (labor law); Jonathan M. Hyman, Three Ethics of Lawyering: Discretionary Ethics in the Contexts of Lawyer's Tasks (Paper for UCLA-Warwick Second International Clinical Conference, Sept. 1989) (unpublished manuscript, on file with author) (lawyer's ethics).

45. The objective of this conversation, ultimately, is general assent to a vision

is a residuum of communicative actions. Thus it may be conceived as a dialogue in part.

Since assent to corporate institutions manifests itself through communication over time, in practice such assent never coalesces around a permanent and universal set of ideas. Accordingly, the law and legal theory connected with the consensus cannot be expected to wholly take the form of tight and consistent deductions from first principles. The law does, nevertheless, contain extended sequences meeting the standards of instrumental rationality. These sequences follow from the ever-present corporate marching order to go out and produce cheaply. This basic order is executed in a multitude of contexts, however, among a multitude of participants. In a democratic environment, therefore, we expect to see routine departures from the instrumental pattern which may be justifiable with standards of communicative rationality.

We begin to see why diverse principles persist in corporate law and theory. In practice, corporations have a complex of foundations. They are welfarist instruments. They are also nexuses of interpersonal relationships with ethical implications. They advance each participant's self-interest, but they also demand individual sacrifices to effectuate collective goals. They are nexuses of contract relationships. At the same time, corporations are separate entities with identifiable, albeit reified, contents and a cognizable social presence. They encompass relational contracts and discrete contracts. They result from free contract and yet entail empowerment and dependence. They amount to hierarchical power structures in some respects, and artifacts of arms length contracting in others.

Corporate law's mediative aspect follows from sensitivity to this complexity, and draws on all of the foregoing conceptual bases. In so doing, it avoids the foundationalist error of excluding one basis as a function of respecting another. Instead, it mediates between the various components and norms in the complex, toward the end of mediating between and among the people involved with corporations. Corporate law's mediative aspect thereby accepts disagreement on norms

of appropriate corporate conduct.

as an integral part of social and economic life, and helps us live with institutions despite disagreement. Accordingly, an unexpected aspect of consequentialist urgency attends this acceptance of diversity—corporate law *must* encompass entity and contract, fiduciary and contract, state and contract, trust and agency, self-interest and cooperation, welfare and good will, and mandate and facilitation, if it is to serve as a nexus of communicative action contributing to corporate institutional stability.[46]

This dialogic justification of conventional corporate law has obvious limitations. Perfect consensus occurs only in theory. Legal conversations, moreover, are a far from ideal vehicle even for an imperfect consensus, and proceed subject to substantial restraints. First, participants in doctrinal conversations take limited, tradition-bound roles. They assume a posture of neutrality, treat reifications as realities, and so on.[47] Although ethics operate in these conversations, they show up only indirectly.[48] Second, the stylized and professional nature of legal conversation limits opportunities for participation. Despite the constraints, however, the talk nevertheless includes a range of perspectives and goes on in a number of venues. We have a proliferation of lawmaking agencies, governmental and quasi-governmental. In academic venues, corporate legal theory now includes much economics. In other venues, we seem to have a lot of corporate lawyers

46. Reference to communicative action also reinforces the traditional conception of fiduciary duty, which amalgamates welfarism and an ethic of good will. This picture of instrumental and communicative action presupposes a human actor oriented toward both agreement with others and pursuit of self-interest. *See* HABERMAS, *supra* note 40, at 179. Conventional fiduciary duty presupposes a similarly modelled person.

47. *Cf.* Ackerman, *supra* note 38, at 12 (describing the liberal tradition as a series of efforts to provide conversational models that enable political discussants to talk in neutral terms). *See also* ACKERMAN, *supra* note 39, at 61-62, 333-34. By "neutrality," Ackerman refers to the character of the conversation and not to that of the consequences. *Id.* at 61.

48. Thus the corporate law judge making an ethical assertion will probably cite to Cardozo's "punctilio of an honor the most sensitive" language before sermonizing directly. *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

Our ambivalence toward business morality results in a division of function. Sermonizing about the good is professionalized and assigned to places of worship. There, moralizing proceeds without the force of positive law and without immediate financial consequences for dereliction of duty.

talking to clients about corporate law. Corporate matters also figure into popular politics.

C. *Primary and Supplemental Elements of Doctrine*

Return to the hypothetical costly fiduciary constraint and assume that, for most people most of the time, economic welfare determines the appropriate regulatory decision. In nine out of ten such cases the welfarist result obtains and no noticeable controversy follows. Given the normative power of consensus, therefore, a question arises—why not change the result in the tenth case and erase all elements of fiduciary law that do not work as instruments in the production of maximum wealth? We thereby achieve consistency. And, even though the result in the tenth case now fails to garner a consensus, in the long run views may change.

A number of responses meet this proposition. For one thing, dialogue remains valuable in all ten cases. The members of the hypothetical welfarist consensus may need to participate in the dialogue in order to reconfirm their position as times change and events occur. Furthermore, those outside of the consensus are nevertheless members of the polity that makes this welfarist law. Like a judge rendering a written, reasoned opinion, the consensus must explain and justify its position to the outsiders through this conversation. In so doing, it recognizes the legitimacy of the outside position and those who hold it.[49]

In addition, people may have inner conflicts that need sorting out through conversation. Law, to the extent that it stems from political communication, has a wide base of values and principles. Participants on both sides of a legal issue may subscribe to all of the principles that diverge over it. In the case of corporate duties, for example, cost does not become the sole guiding value because of the constant political possibility that the public may choose to sacrifice wealth in favor of some other value. By thus opening law to the whole body of public

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49. *See* Habermas, *Morality and Ethical Life*, *supra* note 39, at 45 (the degree of solidarity and growth of welfare are not the only indicators of the quality of communal life; giving equal consideration to the interests of each person is also important).

values, we sacrifice its inner consistency, but we do so in order to make law cohere with the values at play in the outside political community.

The result of such opening is that a complex of primary and secondary, or "supplemental," normative elements can now combine to make up an area of law. The supplemental elements accompany the law's primary norms. Although they do not often determine results, they do cause many dialogues and these dialogues have consequences.[50]

Corporate law has several notorious and problematic supplemental strains. One such strain is its internal public interest component. This component has only two generally accepted zones of outcome determination: the charitable contribution privilege,[51] and the duty to obey the law.[52] Otherwise, it is cited in the outcome of only a handful of famous cases.[53] Because it performs a critical function, however, it persists and draws substantial attention in the commentary. Another supplemental strain is corporate law's persistent but ineffectual creditor protection doctrine.[54] The duty of care can also be cited in this vein. A negligence directive, this duty works well in its accepted sphere only to the extent that it almost never results in liability.[55] In effect, then, it operates as a legal formality that imposes a negligence

50. Constancy of enforcement is not a cogent normative standard. *Cf.* Handler, *supra* note 43, at 1026 (administrative agencies prosecute only occasionally for the symbolic reason of enhancing their credibility as a law-enforcement mechanism).

51. *See, e.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J.), *appeal dismissed*, 346 U.S. 861 (1953); PRINCIPLES OF CORP. GOVERNANCE § 2.01(c) (Am. Law Inst. Tentative Draft No. 2, 1984).

52. *See* Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law of Compliance Obligation in Section 2.01(a) of the American Law Institute's* Principles of Corporate Governance, 66 WASH. L. REV. 413 (1991).

53. *See* Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968); Herald Co. v. Seawell, 472 F.2d 1081, 1094-95 (10th Cir. 1972). The "Time culture" argument in Paramount Communications v. Time, Inc., 571 A.2d 1140 (Del. 1989) is persuasively cast in this mold in David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 251-61.

54. *See* William W. Bratton, Jr., *Corporate Debt Relationships: Legal Theory in a Time of Restructuring*, 1989 DUKE L.J. 92, 106.

55. When the Delaware Supreme Court made an experimental move in the direction of seriously imposing the duty of care as a negligence doctrine in the merger and acquisition area, the result was widespread opting out. *See supra* note 23.

liability principle in a supplemental, largely rhetorical position.

In the case of fiduciary duties, ethical values assume this supplemental posture in the subgroup of situations in which no easily articulated cooperative wealth maximization story supports restraint of self-interested pursuits. Sovereign enforcement of an ethic of good will is problematic in these situations. But, if the ethical value is left in a supplemental posture, only a legal conversation is mandated: The law makes us talk about the good, but does not force us to impose it.[56] The regulatory "consequence" is that lawyers become ministers to a congregation of business persons. The business actor who turns around and engages in questionable maximizing on Monday morning is culpable in the eyes of the law, even though no one imposes the violent apparatus of legal enforcement.

The anti-business activist makes an understandable objection to all of this—fiduciary sermons without enforcement consequences are pointless. Two responses are possible. First, the supplemental doctrine lends normative legitimacy to the activist's cause. In business contexts it takes a very strong consensus about the culpability of conduct to support enforcement. Such a consensus supports most applications of corporate fiduciary law. The ongoing presence of ethical values in fiduciary law, albeit in a posture short of enforcement, serves the activist by making change conceivable and legitimate. If the activist builds a new consensus, the law's normative structure easily accommodates it. Second, doctrinal conversations can be seen as nascent events of sovereign constraint. Where the law has a complex texture, the cautious, self-serving actor who approaches its edge must consult a lawyer. Depending on the actor's aversion to legal risk, actual constraint may occur at this point. Even if the actor is counseled to go forward, the attorney-client encounter has resulted in a dialogic playing out of the ethical problem, albeit one couched in terms of legal uncertainty.[57] The maximizing

56. The proxy rule on shareholder proposals might also be discussed at this point and in this framework. *See* Proposals for Security Holders, 17 C.F.R. § 240.14a-8 (1991). This rule mandates access to proxy statements for purposes of encouraging dialogue on ethical and policy questions. It does so at a cost, with no immediate beneficial consequences. *See* 47 Fed. Reg. 47,420 (1982).

57. An analogy can be drawn to the division of lawyers' rules of professional

actor, forced to suffer this conversation in order to get a full risk-return projection, is thus disempowered.

III. PUBLIC VALUES AND PRIVATE BUSINESS

The hypothetical costly fiduciary restraint presupposes a conflict of values inside and outside of the corporation. Such conflicts arise because corporate relationships tend to be informed by different values than are relationships in outside communities. Corporate actors share common ends, and corporate associations give rise to feelings of good will with ethical implications. For the most part, however, corporations are instrumental associations. They do not produce strong community ties constitutive of the member's self-understanding. Very little of anyone's personal identity is staked in investor-manager relationships, for example.[58] In contrast, relationships in stronger communities do define the participant's identity,[59] at least to some extent.[60] We should

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conduct into disciplinary rules and ethical considerations. Simon notes that ethical considerations perform the valuable function of acknowledging the appropriateness of conduct left within the zone of autonomy. William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1133 (1988).

Couching the lesson in doctrinal terms may lessen its momentary force as an ethical performance while enhancing the power of the operative ethic. Lodged as a presupposition to a "legal" conversation, the ethic avoids the debilitating effects of lying on the moral side of the law/morality distinction. *Cf. id.* at 1114 (conventional and unconventional responses in legal ethics categorized as legal and moral).

58. The particular "community" relationship operating within a corporation will depend on the position of the particular participant. Bondholders and stockholders of public corporations, looking for return on investment and nothing else, will see their participation as instrumental. Stockholders or creditors of close corporations may have personal ties that transform the relationship into one of common endeavor.

Officers and employees of public corporations presumably have a shifting combination of instrumental and sentimental ties. Here, the question arises as to whether the employment relationship is constitutive in the strong sense. Assumptions along these lines inform the movement to constrain employment at will. *See, e.g.*, Cornell, *Poststructuralist Challenge*, *supra* note 44, at 1017-22. A normative individualist might respond that no one should permit so much self-respect to be tied to a particular position so as to permit the relationship to become constitutive. At least since the disappearance of the "realist" theory of corporate existence current during the first three decades of this century, *see* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1490-91 (1989), corporate law and theory have remained close to the individualist norm.

59. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 146-50

therefore expect participants in these stronger communities to value solidarity more highly than participants in less closely intertwined associational situations. The upshot is that the same standards of loyalty that operate outside corporations may not operate inside. Moreover, outsiders not fully conversant with the differences between corporations and outside communities easily might overreact to self-interested behavior by corporate actors.

It does not follow, however, that corporate law should proceed only from inside values. Corporate law is not an entirely "private" proposition, even though it tends to lie on the private side of the broader continuum of public and private law. No corporate legal matter is "inside" in an absolute sense. Corporate actors ask for public endorsement of their arrangements when they turn to courts for enforcement. Corporate law conversations, like all legal conversations, are public events.[61] The legal context and public audience transform the discourse, even if the substance may plausibly be characterized as contractual. This public aspect triggers evaluation, even of the insular Delaware-based corporate law system, in terms of public values.

Viewed from this public perspective, corporate law exists for its participants as regulation and dialogue, and for the rest of society as performance. It is at this performative level that corporate law either does or does not integrate smoothly with the fabric of life in the stronger communities outside. Corporate cases, statutes, litigation documents, law review articles, and legislative discussions interplay with the values of actors outside. When people look at law, any law, they expect it to confirm their sense of the right and the good. A performance of corporate law producing this effect has enhanced legitimacy. Contrariwise, the proponent of corporate legal performance that offers no recognition to strongly held outside values bears an additional burden of persuasion. The

(1982).

60. *See* Handler, *supra* note 43, at 1071-72. Relationships define identity dialogically—the individual finds himself or herself through dialogue with others.

61. And, of course, we continue to hold to the formality of state creation. On the "public/private" distinction and corporate law, see Bratton, *Nexus of Contracts Appraisal*, *supra* note 11, at 436-38.

ethic of good will may survive in corporate doctrine in part due to outside community notions of loyal behavior in cooperative situations. On this theory, the mandatory aspect of fiduciary rules contributes to a harmony of values which, in the long run, enhances the political legitimacy of corporate ventures.

Of course, acknowledging that the law recognizes public values does not "decide the case" of a particular costly constraint. But the acknowledgment assists the analysis. The welfarist position against the regulation also draws on public values. The implicit assertion is that people want wealth; therefore, any value-laden regulation that inhibits wealth creation subverts the public choice for wealth. And it does so in order to recognize the values of an elite group,[62] because if we block action that maximizes wealth, we deny recognition to those who lack wealth. This connection between wealth, public values and production insures that most internally generated corporate norms do not conflict with outside community values.

But noting a connection between wealth and public values only begins discussion of the matters of identity and recognition at stake in the public law of corporations. In a world of scarcity, we each lack wealth in different degrees. Therefore, distributional questions arise whenever wealth maximization is advanced as a public value. Economic welfarism, pursued in the institutional context of American corporate law, accords full recognition only to those situated inside the structure of corporate production as beneficiaries, and to others identified with those thus situated. This leaves, potentially, a large population of people on the outside of a purely welfarist corporate law system. Many outsiders still might hold values which privilege maximization, exclusive of distributional concerns. Many outsiders may also be satisfied with the present structure of distribution. But obvious room for discussion remains. Depending on the distribution and, importantly, the public's sense of the distribution, an outside consensus could plausibly coalesce for a constraint that disempowers corporate insiders over a contrary rule that maximizes wealth.[63]

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62. *See* Kronman, *supra* note 31, at 1754 (describing an "elitist" justifying a rule that makes people worse off by reference to values from which the elitist derives special meaning and happiness).

63. Disempowerment may be one of the "public" values. Those outside

CONCLUSION

Tensions between corporate values and outside values will persist. So long as wealth creation depends on peoples' drive for self-maximization, and so long as distribution remains uneven, the business corporation will not be an institution fully satisfactory to those outside it. Corporate law mediates this difference. As it does so, it accords considerable respect to those who invest their financial and human capital in corporations by giving corporate actors a substantial zone of discretion. Occasional costly reductions of this discretion do not necessarily negate the base of respect.

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experience an enhancement of their freedom when they watch insiders being constrained.

Significantly, "freedom" and "autonomy" do not come up as values in many contemporary corporate law discussions. *See* Kronman, *supra* note 31, at 1753. But they have an implied presence. Sufferance of corporations implies an acceptance of diminished freedom in producing relationships in exchange for more wealth. The alternatives set forth in corporate jurisprudence offer different concepts for integrating the constraints of organizational participation with political values, democratic or liberal, as the case may be.