FALSE PROFITS: REVIVING THE CORPORATION'S PUBLIC PURPOSE

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For much of the twentieth century, corporations pursued a simple strategy: maximize shareholder wealth. This strategy led to significant gains for shareholders, but too often came at the expense of the public. This dynamic was on display in the past two years, as high-risk financial instruments brought down the global economy. These instruments, including credit default swaps and mortgage-backed securities, offered significant profit potential, but as we now know, they also posed a serious risk to the economy. Indeed, many of these instruments failed, doomed numerous firms, and contributed to a recession. As world economies seek to rebound, the time is right to reform corporate law to address the singular focus on profits that has imperiled so many corporations and economies.

In this Essay, I propose that directors and officers reaffirm a duty to consider the public impact of corporate decisions. In doing so, they must refrain from corporate acts that impose a significant risk on the public. Aside from specific regulations, nothing in corporate law forces corporations to consider the negative macroeconomic consequences of their decisions. True to corporate law history and doctrine, I propose a corporate public duty that maintains commercial pursuits as the primary purpose of the corporation, but restrains the corporation from acts detrimental to the public. Under this conception, many of the destructive acts of recent years may have been averted.

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INTRODUCTION

As the worst economic downturn since the Great Depression persists, institutions such as American International Group (AIG), Citigroup, and the now-defunct Lehman Brothers deserve blame for the crisis. To boost short-term gains, these firms engaged in overleveraging, irresponsible lending, poor hedging, and risky securitization, all without accounting for the downside risk to the firm and to the economy.

Yet this "sloth-like risk management,"[1] a concern shared by Federal Reserve Chairman Ben Bernanke,[2] is merely a symptom of a larger problem that has been brewing for decades. Corporate America has been fixated on share price, blinding corporate leaders from the macroeconomic effects of their decisions. Many firms increased leverage and made risky investments. All the while, they did not adequately account for the possibility that their investments might fail. Not only did corporations fail to consider the damaging impact their hyperleveraged investments would have on the firm, but they also failed to appreciate the damage that could be done to the entire economy. As we now know, many of these investments did fail, and a serious recession resulted.

I contend that corporations should be required to consider the inherent social and economic risks of their business decisions. In short, I argue that corporations have a public duty and responsibility to consider the macroeconomic and public impact of their decisions. This corporate public duty recognizes that a commercially motivated purpose is good for society. However, this commercial function should also be balanced by a public function whereby the corporation pursues profits without contravening the public interest.

1. MICHAEL MAYO ET AL., CLSA ASIA-PACIFIC MARKETS, SEVEN DEADLY SINS OF BANKING 1 (2009); *see also* Charlie Gasparino, *Banking Sector's Debt Problems Are Far From Resolved: Mayo*, (CNBC television broadcast Apr. 6, 2009), *available at* http://www.cnbc.com/id/30066933.

2. Ben Bernanke, Chairman, Fed. Reserve Bd., Speech at the Council on Foreign Relations: Financial Reform to Address Systematic Risk, (Mar. 10, 2009), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20090310a.htm.

Historically, this is how corporations have operated; this simple concept should be revisited.[3]

Today no such corporate law exists. Nothing says that corporations *shall* consider the public in their financial and corporate decisionmaking, and, as result, the public frequently bears the burden in times of crisis. A corporate public duty would fill this void. It would serve as an internal check, forcing directors and officers to consider the risk that their decisions pose to the public. This Essay proposes such a corporate duty.

In Part I, a brief survey of corporate history reveals that although a corporation is a commercial enterprise, it was traditionally one that also served public goals. Part I.B then follows the development of corporate law in the United States, discussing how, in the nineteenth century, corporations became a mainstay of American business and gradually ceded their public fiduciary-like functions. Part II considers twentieth century scholarship and jurisprudence. In particular, it focuses on two dominant corporate theories: the maximization of shareholder wealth, and a more socially responsible corporate paradigm. Part III looks at more recent history. As the shareholder-focused conception has gained favor, corporations have continued to move further from a public purpose, leading to a focus on short-term gains without regard to the public impact. Finally, Part IV proposes and defines a new corporate public duty. Under this conception, corporate managers and directors would be required to increase firm (and shareholder) value, but at the same time avoid placing large amounts of risk on the public. This revived corporate public duty would force corporations to consider how corporate activities impact the public and to appropriately adjust their decisions when a negative public impact is anticipated.

I. ORIGINS OF THE CORPORATION

Although the corporate structure dates back as far as the Greek and Roman Empires, characteristics of the modern corporation began to appear in England in the mid-thirteenth century.[4] "Merchant guilds" were loose organizations of merchants "governed through a council somewhat akin to a board of directors," and organized to "achieve a common purpose"[5] that was public in

3. *See* Adam Davidson, *How AIG Fell Apart: The Dastardly Deeds of the Credit Default Swap*, BIG MONEY, Sept. 18, 2008, http://www.thebigmoney.com/articles/explainer/2008/09/18/how-aig-fell-apart.

4. *See* Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 26 (2002).

5. *Id.* at 26.

nature. Indeed, merchant guilds registered with the state and were approved only if they were "serving national purposes."[6]

A. Precursors to the Modern Corporation

Gradually, two corporate forms emerged in England: the regulated company and the joint-stock company, the latter of which was likely the first iteration of the modern corporation. Wealthy investors pooled capital for a common venture, with the goal of earning a return on capital, especially a dividend, while deflecting individual risk. The emergence of the joint-stock company "reflected the general expansion of markets and an increasing use of capital as the basis of business."[7] Despite this increase in commercial enterprise, joint-stock charters still were only "granted in exchange for the public benefits."[8] The joint-stock structure was merely a device for the public to be served by "large combinations of capital."[9] Indeed, because corporate behavior was regulated "primarily from the charter of the corporation itself,"[10] a corporation's mandate came from the chartering entity: the state.

While the joint-stock model fostered economic activity, it also exposed the vulnerability of the corporate model. In 1720, for example, a financial crisis hit Great Britain when executives from the South Sea Company were able to manipulate stock prices while hiding beneath their corporate shell.[11] They misled the public and practiced clever financial engineering, causing a buy-up of the company's stock. The stock value rose from about one hundred pounds per share in 1719 to one thousand pounds per share in August 1720.[12] However, the frenzy soon gave way to a massive sell-off, causing the South Sea Company's stock to plummet to 150 pounds in September 1720. Many people lost huge sums of money, savings were wiped out, and debts went unpaid, shocking the British economy and causing a severe economic downturn.

Crises such as these led some of the most important commentators, including Adam Smith, to criticize the idea of the corporation. In *The Wealth of Nations*, published in 1776, Smith noted that the corporation undermined an

6. *Id.*
7. *Id.* at 27.
8. *Id.* at 28.
9. *Id.*
10. *Id.* at 29.
11. *See* Ron Harris, *The Bubble Act: Its Passage and Its Effects on Business Organization*, 54 J. ECON. HIST. 610 (1994).
12. Richard Dale, *A Madness and a Distemper: What We Didn't Learn From the South Sea Bubble*, FORBES, Oct. 21, 2008, http://www.forbes.com/2008/10/21/south-sea-bubble-markets-bubbles08-cx_rd_1021dale.html.

ideal market economy composed of small, owner-managed companies, and expressed concern that corporations suppressed market forces by consolidating power.[13] He also commented that the lack of personal accountability undermined the corporate decisionmaking process, imagining that directors would not "watch over [shareholder money] with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own."[14]

B. The American Corporation

1. Revolutionary War to the Industrial Revolution

While the English conception of the corporation was replicated in the American colonies, "corporations were relatively rare" in pre-Revolutionary America.[15] However, after the Revolution, the prevalence and influence of corporations in American society grew rapidly. In the early United States, government-issued corporate charters gave merchants the legal protection, incentives, and sector control that led them to construct America's schools, turnpikes, and canals.[16] Government frequently provided companies with monopolies through charters, which "outlined the corporation's terms and conditions, such as authorized capital and permitted activities, applicable to that individual corporation, and in certain circumstances granted special privileges such as monopoly and eminent domain rights."[17] With so many charters granted to incentivize development, by the end of the eighteenth century, corporations were commonplace in the United States.

As corporations grew in number, so did judicial scrutiny. In one of the earliest corporate law cases, *Dartmouth College v. Woodward*,[18] the U.S. Supreme Court considered whether a state could unilaterally amend a corporate charter. Writing for the Court, Chief Justice Marshall noted that the "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

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13. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 149 (Edwin Cannan ed., Modern Library 1994) (1776).
14. *Id.* at 800.
15. Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 84 (1999).
16. *See* HARLAND PRECHEL, BIG BUSINESS AND THE STATE: HISTORICAL TRANSITIONS AND CORPORATE TRANSFORMATION, 1880S–1990S, at 25–26 (2000).
17. Hamill, *supra* note 15, at 83.
18. 17 U.S. 518 (1819).

its very existence."[19] It did not inherently "share in the civil government of the country, unless that be the purpose for which it was created."[20] More importantly, corporations were not inherently state entities. As such, the state did not have the power to amend, in this case, Dartmouth College's charter without the college's consent.

That a state could not unilaterally amend a corporation's charter was not obvious in 1819. Traditionally, corporations were viewed through their charters as extensions of the state. However, *Dartmouth College* began the process of severing the corporation from the government and, eventually, the charter system altogether. *Dartmouth College* is widely viewed as "the starting point for the developing law of corporations."[21] Although "some predicted that the *Dartmouth College* case signified a sweeping change in the relationship between the state and the corporation,"[22] this was not immediately the case. States were able to maintain control over corporations by expressly reserving authority in the charter.[23] Corporate charters soon included provisions that allowed states to amend and rescind charters. As a result, states maintained a good deal of say in corporate operations.

In addition, the ultra vires doctrine, which makes it "illegal for a corporation to apply its capital to objects not contemplated by its charter,"[24] provided another means for states to challenge activities not authorized in the charter. The ultra vires doctrine "had served to protect the public's interest in preventing corporate usurpations of powers not specifically delegated."[25] *Dartmouth College*, however, marked a breaking point, and laid the foundation for future corporate law reforms in favor of corporate individuality.

Even with state authority over corporations, financial crises were common throughout the nineteenth century. Similar to the South Sea Company bubble, the singular focus on turning a profit contributed to the various "panics": the Panic of 1837, the Panic of 1857, the Panic of 1873, the Panic of 1893, and others.[26] Before there was Lehman Brothers, Jay Gould's financial scheming cornered the gold market and spawned Black Friday in 1869, along with the

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19. *Id.* at 636–37.

20. Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate "Conscience,"* 42 VAL. U. L. REV. 1129, 1134 (2008) (quoting *Dartmouth College*, 17 U.S. at 626–27).

21. *Id.* at 1135.

22. *Id.*

23. *See id.*

24. Dodge v. Woolsey, 59 U.S. 331, 342 (1855).

25. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 218.

26. For in-depth coverage of each financial crisis, see ROBERT SOBEL, PANIC ON WALL STREET (1999). A chapter is devoted to each of these financial crises.

depression that followed.[27] In 1873, banking giant Jay Cooke & Company went bankrupt when it was unable to issue bonds to finance a government railroad project, leading to a run on the banks and the Panic of 1873.[28] The results of these crises were similar to what we see today—bank failures, loan defaults, and increased unemployment.

2. Reconsidering the Charter System

For centuries, the corporate charter was the foundation of corporate law. State legislatures created corporations by granting charters on a case-by-case basis, subordinating the corporate enterprise to state interests. Although it was not the solution to corporate recklessness, on balance, "the special charter system was a good way to control corporations."[29] It also clearly set forth the dynamic between the state and corporations: corporations were public entities, operating under the authority of the state, for a public purpose.

However, the charter system was a slow, bureaucratic process. As applications increased, "economic necessity altered the limited grant of the corporate privilege in the nineteenth century."[30] In other words, the sluggish pace of the approval process inhibited economic growth. As the Industrial Revolution picked up steam, the number of corporate charter applications overwhelmed legislatures—"[t]ime was wasted in the drudge work of issuing, amending, and extending hundreds of charters."[31]

Additionally, the "legislative prerogative to grant corporate charters presented the potential for corruption."[32] In the early 1800s, charter applications were frequently approved on the basis of political favoritism. In response to this "encouragement of legislative bribery, political favoritism, and above all, monopoly,"[33] a movement began advocating for "the creation of general incorporation laws, which would allow equal access to the corporate form to all those meeting the statutory requirements."[34] The movement's proponents believed that incorporation should be available to all citizens, not just those with political access.[35] The reason was simple, though novel at the time: propo-

27. *See* MAURY KLEIN, THE LIFE AND LEGEND OF JAY GOULD 1–6, 99–100 (1986).
28. *See* JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES 293 (2002).
29. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 134 (3d ed. 2005).
30. Marks, *supra* note 20, at 1132.
31. FRIEDMAN, *supra* note 29, at 134.
32. Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 21 (1994).
33. MORTON J. HORWITZ, TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 73 (1992).
34. Hamill, *supra* note 15, at 100–01.
35. *See* Knauer, *supra* note 32, at 21.

nents of reform believed that corporations were formed by people and, therefore, should not require state approval.[36]

States were receptive to the reformers' argument and soon began replacing the charter system with general incorporation codes. By the 1850s, more than twenty states had general incorporation codes. These new codes, "which became the norm between 1850 and 1870," made it easier to form a corporation.[37] As long as the statutory procedures were followed, everyone had access to the corporate form.[38] The state did not substantively review applications; instead, a simple procedural process determined approval. By the early 1900s, general incorporation codes had completely replaced the charter system.

3. Emergence of the Natural Entity Theory

In 1886, general incorporation supporters found favor with the Supreme Court in the form of a brief note atop its decision in *Santa Clara County v. Southern Pacific Railroad*.[39] The note had a far-reaching impact, stating that corporations enjoyed constitutional protections. It proclaimed:

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[40]

With this pronouncement, the Court gave credibility to a theory that the corporation was independent of the state and its owners and deserving of its own constitutional protections. Thus, the corporation became a legal person separate from both the state and shareholders. To the theory's opponents, the proclamation was symbolic of the "subservience of the Supreme Court during the Gilded Age to the interests of big business."[41]

Not coincidentally, a new "natural entity theory" emerged around the same time that commentators were arguing to free the corporation from state control, and around the same time that *Santa Clara* individualized the corpora-

36. *See id.* at 22.
37. Hamill, *supra* note 15, at 101.
38. *See id.* at 100–01, 103.
39. 118 U.S. 394 (1886).
40. *Id.* at 396. Since *Santa Clara*, a number of reputable judges have expressed their disbelief with the extension of constitutional protections to corporations. For example, Justice Douglas said, "There was no history, logic, or reason given to support that view." Wheeling Steel Corp. v. Glander, 337 U.S. 562, 577 (1949) (Douglas J., dissenting).
41. HORWITZ, *supra* note 33, at 66.

tion. The natural entity theory challenged the artificial entity theory expressed by Chief Justice Marshall in *Dartmouth College*.

The natural entity theory was premised on a belief that the corporation was simply an "aggregate of individual property owners" formed naturally by contracting individuals.[42] With the "rise to prominence in the late nineteenth century of the business corporation as the dominant form of economic enterprise,"[43] the natural entity theory sought to remove public control over corporations. Natural entity theorists "sought an anti-regulatory conception of corporate law that protected the financial interests of shareholders from any special restrictions on their property rights."[44]

Continued industrialization in the early 1900s and the rapid growth of big business led business owners and capitalists to further advocate for a least restrictive means of capitalizing on the growth.[45] They sought "a vocabulary that would enable them to describe the corporation as a real or natural entity whose existence was . . . separate from the state."[46] The natural entity theory became part of their vernacular.

In contrast to the artificial entity theory, natural entity theory posits that the corporation is not created by the state—via a charter or otherwise—but is instead a creation of its owners, the shareholders. Natural entity theory further views the corporation as possessing the same rights as a citizen to freely contract, to pursue its own interests, and "to acquire property as . . . an individual."[47] Under this theory, those seeking to start a business need not seek the blessing of the state. They simply have to contract with the various stakeholders, such as creditors, shareholders, employees, and suppliers. Assuming the necessary contracts are in place, incorporation merely becomes a state formality, akin to car registration.

Under the natural entity theory, neither state nor public interests motivate the corporate purpose; rather, the corporation defines its own purpose. It is

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42. Knauer, *supra* note 32, at 22.
43. HORWITZ, *supra* note 33, at 71.
44. Millon, *supra* note 25, at 202.
45. *See* HORWITZ, *supra* note 33, at 94–98. Until 1890, the country's largest companies were comprised of railroad companies, ten of which had a net worth of more than $100 million. To put that in perspective, a company was considered a large company if it had a net worth of more than $5 million. Most other companies had a net worth of $2 million or less at the time. However, in the 1890s, more companies began listing on the New York Stock Exchange and publicly selling securities. "Between 1896 and 1907, the number of shares traded on the Stock Exchange soared from 57 million to 260 million." *Id.* at 95.
46. *Id.* at 101.
47. ARTHUR J. EDDY, THE LAW OF COMBINATIONS § 617 (1901).

an "autonomous, self-sufficient, and renewing body" that can "determine and enforce [its shareholders'] common will."[48] As described by Morton Horwitz:

> The main effect of the natural entity theory of the business corporation was to legitimate large-scale enterprise and to destroy any special basis for state regulation of the corporation that derived from its creation by the state. Indeed, the demise of the ultra vires doctrine . . . was an expression of the triumph of natural entity theory.[49]

From approximately 1900 to 1930, the natural entity theory found favor among policy- and decisionmakers. Corporations were accepted as natural, self-interested entities restrained only by the law.[50] While the natural entity theory did not cause the boom in big business during this period, it was its theoretical justification.[51]

The natural entity theory found similar support in the courts. Famously, in *Dodge v. Ford Motor Co.*,[52] the Michigan Supreme Court held that "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[53] The case arose when, instead of issuing dividends, Henry Ford wanted to increase employee wages, reduce the cost of the automobile, and "'spread the benefits of this industrial system to the greatest possible number'"[54] of people—and not just shareholders. The Dodge brothers, shareholders and future competitors, argued that Ford was violating his duty to the shareholders of the company by diverting profits.[55] The court agreed, and embraced the idea that the corporation was an entity all its own, born to maximize the interests of the shareholders who created it.[56] On the eve of the Great Depression, then, the natural entity model was the primary corporate conception in both the courts and corporate boardrooms.

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48. John P. Davis, *The Nature of Corporations*, 12 POL. SCI. Q. 273, 294 (1897).
49. HORWITZ, *supra* note 33, at 104.
50. *See id.* at 103–07 (discussing how the natural entity theory prevailed over alternative corporate theories).
51. *See* Millon, *supra* note 25. Professor Millon aptly states that it is unimportant to determine whether the natural entity caused big business to emerge, or whether big business caused the natural entity theory to emerge. He cites Professor Horwitz for the former point of view, and Professor Bratton for the latter.
52. 170 N.W. 668 (Mich. 1919).
53. *Id.* at 684.
54. *Id.* at 683 (quoting Mr. Henry Ford).
55. *See id.* at 670–71.
56. *See id.* at 684.

II. THE MODERN DEBATE

A. The Berle-Dodd Debate

In 1929, with the "economy in severe crisis, it was reasonable to conclude that free competition carried with it a destructive curse."[57] In stepped Professors Adolph Berle and E. Merrick Dodd to address that curse. For both, "the normative issue was the appropriate policy response to the crisis of the Great Depression."[58] They both saw systemic flaws in the corporate form that contributed to the Great Depression, and both presented new corporate conceptions to solve them.

In 1932, Professor Dodd published *For Whom Are Corporate Managers Trustees?*, which challenged "the view that business corporations exist for the sole purpose of making profits for their stockholders."[59] He felt that corporations failed in their role as public institutions with public obligations. Professor Dodd cleverly embraced the natural entity theory, agreeing that "managers of the [corporation] are fiduciaries for it and not merely for its individual members."[60] Dodd's vision of the corporation took direct aim at the shareholder-focused corporation that was born out of the natural entity theory, and "threatened the legitimacy of single-minded accumulation and the primacy of shareholder financial interests."[61]

In essence, Dodd said the corporation was like a citizen, and therefore had to conform to public notions of citizenship.[62] Because the public viewed "the business corporation as an economic institution which has a social service as well as a profit-making function,"[63] management was expected to balance these functions. Consequently, corporations could benefit other constituencies, such as employees, creditors, and the community, even at the expense of the shareholders.

To illustrate the point, Dodd quoted General Electric's then-CEO, Owen D. Young, who said that a corporation "shall meet its public obligations and perform its public duties—in a word, vast as it is, that it should be a good

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57. William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. LAW 99, 120 (2008).
58. *Id.* at 102.
59. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932).
60. *Id.* at 1160.
61. Millon, *supra* note 25, at 218.
62. *See* Dodd, *supra* note 59, at 1148.
63. *Id.*

citizen."[64] Further, Young said he had a duty to make sure General Electric functioned "in the public interest . . . performing its duties as a great and good citizen should."[65] While a remarkable statement in the post–Milton Friedman world, this sentiment was quite popular in the Depression era. As a consequence, however, those who supported the "corporation's freedom from a legal regime responsive to public interest concerns turned instead to an entirely different theory of the corporation."[66]

In the same year as Dodd's publication, Professor Berle offered an opposing view.[67] According to Berle, diverging interests of management and ownership cause shareholder alienation.[68] Specifically, the lack of accountability and legal controls at the management level compromise the capitalist conception of private property, spawning mismanagement.[69] Shareholders want to increase the value of their shares, but management has an interest in perpetuating their employment and improving their own image. To protect shareholders, a new mechanism was thus needed to assure that managers pursue, above all, the financial interests of the shareholders.[70]

Berle's answer to the diverging interest was simple: "[A]ll [corporate] powers granted to a corporation or to the management of a corporation . . . whether derived [by] statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders."[71] To this end, Berle equated corporate managers to shareholders' trustees, who satisfied their duty by increasing shareholder wealth.[72] The concept became known as "shareholder primacy," whereby the corporation served no public purpose—aside from abiding by the law—unless such purposes furthered the financial interests of the shareholders. The shareholder-primacy model constructed a wall between the corporation and the public, seriously curtailing—if not eliminating—any notion of social responsibility.

Interestingly enough, both Professor Berle and Professor Dodd would no doubt view the current financial crisis with great consternation. Just as the

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64. *Id.* at 1154.
65. *Id.*
66. Millon, *supra* note 25, at 220.
67. *See* ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (photo. reprint 2000) (1932).
68. *See id.* at 8–9, 78–86.
69. *See id.* at 247.
70. *See id.* at 35–40.
71. A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).
72. *See* A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L REV. 1365 (1932).

"shock and dislocation of the Great Depression gave rise to"[73] their scholarship, both Berle and Dodd would likely view recent excesses as contrary to their understanding of the corporation. On the one hand, Professor Berle might criticize reckless risktaking that endangered shareholders. As we now know, AIG, and Bear Stearns, became worthless. Similarly, Berle would likely view the singular obsession with short-term profits as counterproductive to the long-term goals of shareholders. Professor Dodd, on the other hand, would likely argue that firms making bets with high-risk financial instruments—such as credit default swaps or mortgage-backed securities—without hedging or conducting sound risk management is out of step with good citizenship. He likely would view such decisions as purely self-interested, and not made with the public in mind.

B. Shareholders (Sort of) Gain Favor With the Courts

Although post–*Santa Clara* courts progressively erred on the side of shareholders, they refused to foreclose a corporation's public responsibility. In *A.P. Smith Manufacturing Co. v. Barlow*,[74] the New Jersey Supreme Court upheld a donation from a private corporation to Princeton University, declaring that corporations "ought not to be permitted to close their eyes to present-day realities and thwart the long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure."[75] In *Shlensky v. Wrigley*,[76] shareholders brought suit against the board of directors of the Chicago Cubs for their refusal to install lights at Wrigley Field out of "concern for the neighborhood."[77] An Illinois court held for the defendants, reasoning, "[I]t appears to us that the effect on the surrounding neighborhood might well be considered by a director who was considering the patrons who would or would not attend the games if the park were in a poor neighborhood."[78]

Taken together, *Dodge*, *Wrigley*, and *A.P. Smith*, staples in corporate law classes, apparently establish a somewhat gray area of corporate governance that has prevailed for half a century. For many, this jurisprudence "was grossly inadequate" because it failed "to respond to those who believed that the

73. MARINA VON NEUMANN WHITMAN, NEW WORLD, NEW RULES: THE CHANGING ROLE OF THE AMERICAN CORPORATION 92 (1999).
74. 98 A.2d 581 (N.J. 1953).
75. *Id.* at 590.
76. 237 N.E.2d 776 (Ill. App. Ct. 1968).
77. *Id.* at 778.
78. *Id.* at 780.

corporation's responsibility was to the larger society, and was morally offensive to those who continued to think of the corporation as the private property of its stockholders."[79] Nonetheless, as this Essay argues, when stripped down, the cases support a corporate conception with both a commercial purpose and a social responsibility.

III. PRIVATE INTERESTS VERSUS PUBLIC RESPONSIBILITY

One commentator noted that "[t]he main issues in the current debate [over corporate purpose can be traced to the] Berle-Dodd debate,"[80] pitting shareholder proponents against social responsibility proponents. Yet the tug-of-war between these two camps has left the corporate purpose largely undefined. Indicative of this, Lawrence E. Mitchell says, "[W]hile on one level Berle could see Dodd as victorious, on a more important level, the level at which the debate would focus in the 1990s, Berle had won."[81]

For the Berle camp, Milton's Friedman's *The Social Responsibility of Business Is to Increase Its Profits* is the de facto manifesto of shareholder wealth maximization. Friedman wrote that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits."[82] He criticized those who believed that "business is not concerned 'merely' with profit but also with promoting desirable 'social' ends; that business has a 'social conscience' and takes seriously its responsibilities for providing employment, eliminating discrimination, avoiding pollution and whatever else may be the catchwords of the contemporary crop of reformers."[83] For Friedman, directors and officers had but one task: increase shareholder wealth. Any contrary diversion of shareholder profits was inappropriate.

Not surprisingly, Friedman's view gained favor with the Business Roundtable, comprised of CEOs of America's leading corporations. At one time, the Roundtable professed that "managers of corporations are expected to serve the public interest as well as private profit."[84] Yet more recently, the Roundtable has shifted its vision of the corporation, drawing closer to Friedman's

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79. Lawrence E. Mitchell, *Private Law, Public Interest?: The ALI* Principles of Corporate Governance, 61 GEO. WASH. L. REV. 871, 877 (1993).

80. William W. Bratton, *Never Trust a Corporation*, 70 GEO. WASH. L. REV. 867, 868 (2002).

81. Lawrence E. Mitchell, *Talking With My Friends: A Response to a Dialogue on* Corporate Irresponsibility, 70 GEO. WASH. L. REV. 988, 990 (2002).

82. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

83. *Id.*

84. BUS. ROUNDTABLE, STATEMENT ON CORPORATE RESPONSIBILITY 5 (1981).

vision, proclaiming that "the paramount duty of management and of boards of directors is to the corporation's stockholders."[85]

Nonetheless, the public-responsibility conception has a strong following. In his book *Corporate Irresponsibility: America's Newest Export*, Professor Mitchell notes that corporations often behave irresponsibly because of their drive to maximize short-term stock price.[86] As a result, managers are discouraged from acting morally and responsibly.[87] Professor Mitchell believes corporations need to "balance the needs of business with the legitimate demands of society."[88] To do so, he imagines "reforms within the existing corporate and capital structure" that lead directors and officers to consider the societal impacts of corporate activity.[89] Professor Mitchell concludes that "corporate law should create incentives for moral behavior and eliminate the incentives for immoral behavior."[90] While Professor Mitchell does provide some reform proposals, the more important point of his scholarship is to critique corporate law's tolerance of socially detrimental acts.

Similarly, business ethicist Kenneth Goodpaster attributes irresponsible decisionmaking in the corporate setting to "the unbalanced pursuit" of short-term gains and increased stock prices.[91] He says that the fixation on short-term goals, stock prices, and quarterly performance detaches corporate managers from the adverse impact of their decisions. In short, he contends, there is a "suspension of ethical awareness as a practical force in the decision-making process."[92] Directors and officers have a "condition" that leads them to ignore the totality of their decisions.[93] Like Mitchell, Goodpaster contends that we "must focus on ways to discourage moral blindness and thoughtlessness in the competitive environment of corporate decision-making."[94] Ultimately, Goodpaster prescribes a remedy similar to Dodd's, explaining that corporations need to carry out their activities just as citizens should: with an ethical foundation.

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85. BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 3 (1997).

86. *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 3–11 (2001).

87. *See id.*

88. Mitchell, *supra* note 81, at 992.

89. *Id.*

90. *Id.* at 998.

91. Kenneth E. Goodpaster, *Ethics or Excellence?: Conscience as a Check on the Unbalanced Pursuit of Organizational Goals*, IVEY BUS. J., March/April 2004, at 35 [hereinafter Goodpaster, *Ethics or Excellence*]; *see also* KENNETH E. GOODPASTER, CONSCIENCE AND CORPORATE CULTURE (2007) [hereinafter GOODPASTER, CONSCIENCE AND CORPORATE CULTURE] (further discussing this issue).

92. Goodpaster, *Ethics or Excellence*, *supra* note 91, at 5.

93. *Id.*

94. GOODPASTER, CONSCIENCE AND CORPORATE CULTURE, *supra* note 91, at 9.

Although the Milton Friedman conception remains dominant today, it is not the law of the land. In addition to *Dodge*, *Wrigley*, and *A.P. Smith*, discussed above, case law since the Berle-Dodd debate has resisted the blind profit-maximizing model. In the 1939 Supreme Court *Pepper v. Litton*[95] decision, Justice Douglas stated that the "standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation."[96] In 1969, in *Theodora Holding Co. v. Henderson*,[97] the Delaware Supreme Court held similarly in considering a $528,000 donation by a controlling shareholder directed toward a youth group.[98] Citing *A.P. Smith*, the court said that charitable gifts were "reasonable corporate acts,"[99] and that the "rehabilitation and education of deprived but deserving young people is peculiarly appropriate in an age when a large segment of youth is alienated even from parents who are not entirely satisfied with our present social and economic system."[100] In order then for shareholders to successfully challenge a corporate gift, the court said that the "'proponents must show a failure of corporate purpose.'"[101] The court viewed the charitable contribution as within the corporate purpose—an endorsement of greater public responsibility.[102]

During the takeover craze of the 1980s, courts continued to breathe life into the public purpose doctrine. In the seminal hostile takeover case, *Unocal Corp. v. Mesa Petroleum Co.*,[103] the Delaware Supreme Court held that directors could consider the impact of a takeover on many constituencies, including "even the community generally."[104] In fact, the court said that the "basic stockholder interests at stake" were "not a controlling factor" in the board's decisionmaking process.[105] A year later, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[106] the same court said that "concern for various corporate constituencies is proper" as long as there is "some rationally related benefit accruing to the stockholders."[107] Although the *Unocal* and *Revlon* decisions relate to takeovers, they shed light on corporate decisionmaking as a whole. Moreover, because they are important cases in the development of corporate

95. 308 U.S. 295 (1939).
96. *Id.* at 307.
97. 257 A.2d 398 (Del. Ch. 1969).
98. *See id.* at 405.
99. *Id.* at 406.
100. *Id.* at 405.
101. *Id.* at 406 (quoting Warshaw v. Calhoun, 221 A.2d. 487 (Del. 1966)).
102. *See id.* at 405.
103. 493 A.2d 946 (Del. 1985).
104. *Id.* at 955.
105. *Id.* at 955–56.
106. 506 A.2d 173 (Del. 1986).
107. *Id.* at 176.

law, their assertion that a corporation does not exist solely to maximize shareholder wealth cannot be ignored.

A. Public Betrayal in the Financial Crisis of 2008–2009

Examples abound of ethical unawareness in the current financial crisis, demonstrating the need for a reaffirmation of public responsibility in Corporate America. The downfalls of Lehman Brothers, Bear Stearns, AIG, and others reflect a functional problem in America's capitalist economy. These pillars of American capitalism endangered the economy by stretching their risk profiles; they absorbed significant risk, increased leverage, and did not hedge. As one banker described it, "[T]wo things happened. They took more and more leverage, and they reached for riskier asset classes."[108] The motto was, "Give me yield, give me leverage, give me return."[109] In good years, the model worked, and the companies and their employees reaped the benefits. In the past two years, however, the model failed, and the public, not just the companies, paid as a result.

In this case, complex financial instruments, including mortgage-backed securities (MBSs) and credit default swaps, were the root of the problem. At heart, all of these securities were investments in loans, and often were subprime mortgage loans. Firms borrowed money to purchase MBSs, and then pocketed the difference between the interest earned on the MBSs and the cost of borrowing money. For years, these securities yielded huge returns. However, in 2007, when subprime mortgages defaulted at unexpectedly high rates, the credit ratings of MBSs were lowered, forcing lenders to make collateral calls. Firms then had to sell assets, including many of the MBSs on their books, to cover the collateral calls, causing the value of the securities to plummet, and the cycle to then repeat.[110] This downward spiral left major firms—Bear Stearns, Merrill Lynch, Lehman Brothers, AIG, Citigroup, among others—with more outstanding obligations than incoming revenue.

Many firms and traders were unaware of the potential downfall of these transactions, exemplifying the singular focus that concerned Professor Goodpaster. As one banker said of Merrill Lynch, "there was a distinct possibility that they didn't understand fully their own risk profile."[111] Indeed, it was reported that Merrill Lynch abandoned standard risk-management procedures

108. Gretchen Morgenson, *How the Thundering Herd Faltered and Fell*, N.Y. TIMES, Nov. 9, 2008, at BU1.
109. *Id.*
110. *See id.*
111. *Id.*

to engage in more high-risk trades.[112] AIG similarly failed to consider potential downsides. AIG's CEO said that while they "'had risk-management practices in place[, the risk-management professionals] generally were not allowed to go up into the financial-products business"[113] in which the high-risk instruments were dealt. As foreshadowed by Professor Mitchell, such "highly risky transactions that [held] the (remote) possibility of significant gains for stockholders" reflected the disconnect between the corporation and the public impact.[114] Indeed, the failure of these firms to adequately monitor their internal affairs meant that consideration of the public was not even on their radar.

What was the public impact? Each firm's individual acts—such as those involving credit default swaps at AIG or collateralized debt obligations at Merrill Lynch—certainly had a downside risk to the economy. But the collective acts of these firms posed a much larger risk, both to themselves and the global economy: Major firms took huge losses; fear spread on Wall Street; lending ceased; the stock market lost more than 50 percent of its previous high; and unemployment soared. Simply put, the creation and misunderstanding of novel financial instruments undercut the entire financial industry.

The demise of the financial industry was significantly borne by individual citizens. First, the American taxpayer, via the Federal Reserve, loaned JP Morgan approximately $29 billion[115] to acquire Bear Stearns, which resulted in Bear Stearns shareholders being crushed and numerous employees being laid off. At risk of losing nearly $100 billion, Merrill Lynch took major writedowns and was sold, under pressure from the government, to Bank of America in September 2008.[116] As a direct result of the Merrill acquisition, taxpayers had to inject $45 billion into Bank of America to stabilize it.[117] Merrill Lynch subsequently laid off more than 5,000 employees, while Bank of America announced that 35,000 people would lose their jobs over the course of three years.[118] Lehman Brothers filed for bankruptcy on September 15, 2008, claiming almost $800 billion in debt, but only $600 billion in assets; its share price went from a peak above $60 to $4 just before

112. *See id.*

113. Liam Pleven, *Top Risk Officers Remain at Insurer's Helm*, WALL ST. J., Mar. 27, 2009, at C1.

114. Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1289 (1992).

115. *See* Press Release, JP Morgan Chase, *JP Morgan Chase and Bear Stearns Announce Amended Agreement*, *available at* http://www.jpmorgan.com/cm/cs?pagename=JPM_redesign/JPM_Content_C/Generic_Detail_Page_Template&cid=1159339104093&c=JPM_Content_C (last visited Nov. 4, 2009).

116. *See* Morgenson, *supra* note 108.

117. *See* Eric Dash, Louise Story & Andrew Ross Sorkin, *Bank of America to Receive $20 Billion More*, N.Y. TIMES, Jan. 16, 2009, at B1.

118. *See* Dan Fitzpatrick & Susanne Craig, *BofA to Cut 35,000 Jobs as It Absorbs Merrill Lynch*, WALL ST. J., Dec. 12, 2008, *available at* http://online.wsj.com/article/SB1229014489714 98505.html.

bankruptcy filing on September 15, 2008.[119] When Lehman failed, the entire industry—commercial paper markets, bank financing, consumer credit, credit lines, and so on—stopped functioning. No bank was deemed trustworthy, and no banks wanted to lend. The channels of global finance came to a standstill.

The financial crisis reminds us how entwined some corporations—notably large financial corporations—are with the economy and society. Although a number of factors contributed to the downturns of the past century, corporate disregard for the greater public interest played a role. As such, we must acknowledge the failures of the current corporate conception that permitted such corporate recklessness, and we must develop ways to rectify them.

IV. RECONSIDERING AND RECONCEIVING CORPORATE RESPONSIBILITY

The problem with the dominant conception today—shareholder primacy and wealth maximization—is that "directors are encouraged, through legal duty and self-protection, to demonstrate their allegiance to stockholder interests, which (as has been observed) is most effectively accomplished by attention to the bottom line. This behavior leads to an unremitting focus on the short term."[120] By the turn of the twentieth century, corporations had become so fixated on increasing profits that they paid little attention to the public impact of their actions. Corporations and executives made decisions that imperiled their firms, the economy, and the public more broadly. Donald Langevoort observed that "the obsession with using short-term earnings numbers . . . produced severe social dislocation."[121] Like Goodpaster, Langevoort blamed the behavior on a corporate environment that encourages the singular pursuit of profits, blind greed, and self-interest.

Therefore, the starting place for any proposed reform is simple acknowledgment that corporations should be restrained by public responsibility. This is barely a hurdle, since most jurists and commentators acknowledge that corporations have ethical duties, and a public purpose has historically guided corporate activity, as discussed below. Moreover, the corporate conception has been constantly redefined throughout history—from an artificial to a natural

119. *See* David Cho, et al., *U.S. Helps Lehman Go Up For Sale*, WASH. POST, Sept. 12, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/11/AR2008091102580.html.

120. Mitchell, *supra* note 114, at 1290. Professor Mitchell believes this problem is heightened by the involvement of institutional investors, like pension funds, that have an urgent need for cash flow to meet their obligations. *Id.* at 1290–91.

121. Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition:* Corporate Irresponsibility *and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 968 (2002).

entity; and from a chartered to naturally contracted organization. From this evolution, there is an historical framework upon which to reconceive the modern corporation as a publicly responsible institution.

A. The Preexisting Notion of Corporate Public Responsibility

In medieval England, corporations were created to maximize the resources of investors while providing a public service, such as developing infrastructure or streamlining commerce. Over time, the relationship between the corporation and the state grew more attenuated. While states continued to charter corporations throughout the 1800s, state oversight diminished. Eventually, corporations operated with little, if any, state compulsion. Nonetheless, until the late 1800s, the state remained in the backdrop and corporations were not solely profit machines. As Judge Spencer Roane stated in 1809, "associated individuals [want] to have the privileges of a corporation bestowed upon them; but if their object is merely *private* or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege."[122] Corporations were still answerable to the state through much of the 1800s, and if they acted beyond their charter, they could be reeled in by the ultra vires doctrine. Throughout history, the basic conception of a corporation was that it had a commercial and public role.

Commentators have supported this conception. Adam Smith adhered to a corporate conception that was a self-interested, commercial enterprise on the one hand, but an entity restrained by morality and social norms on the other.[123] Smith believed business was restrained by a "sense of duty . . . derived from our perception of others' expectations,"[124] in particular, the expectations of the "general public." Or, as Dodd stated, "the business corporation [is] an economic institution which has a social service as well as a profit making function."[125] Others noted that even "Berle took a leaf from Dodd: for managers, as for politicians, violation of community values implied a loss of prestige and esteem that undermined their place in the organization."[126]

Even Milton Friedman recognized certain social restraints. He said that corporate managers and directors are "to conduct the business in accordance

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122. Currie's Adm'rs v. Mutual Assurance Soc'y, 14 Va. (4 Hen. & M.) 315, 347–48 (1809).
123. *See* SMITH, *supra* note 13.
124. Lawrence E. Mitchell, *The Human Corporation: Some Thoughts on Hume, Smith, and Buffett*, 19 CARDOZO L. REV. 341, 346 (1997).
125. Dodd, *supra* note 59, at 1148.
126. Bratton & Wachter, *supra* note 57, at 141.

with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom."[127] He also believed that pursuing profits was responsible "so long as it stay[ed] within the rules of the game."[128]

More recently, courts have been unwilling to unambiguously endorse the sole primacy of shareholder wealth maximization, as was apparent in the *Dodge*, *Wrigley*, *A.P Smith*, *Unocal*, and *Revlon* cases. In addition to their acceptance of socially responsible acts, courts seem to acknowledge that the corporation has a public responsibility.

B. The Need for Legally Cognizable Corporate Responsibility

Agreeing that corporations simply have a public duty is not enough to prevent future abuse. Rather, this public duty must be defined and codified. Managers and directors need to know how their public duty affects the decisionmaking process, so they can correctly exercise that duty and avoid liability. After all, one manager's ethical custom may be another's social disregard. Milton Friedman's "ethical custom" is likely quite limited in scope, while Professor Dodd's "public duty" is likely to be more broad. This simply reflects the differing conceptions of Friedman and Dodd. However, once we establish that there is some social restraint on corporate activity, the question is simply a matter of degree.

There are examples of corporations exercising public responsibility. For example, around 1950, Motorola was in negotiations with a South American government to sell microwaves ovens. The only way for Motorola to make money in this particular transaction, however, was by dealing with a military regime with a questionable human rights record. Motorola's management decided against the transaction, and therefore "forfeited profits based upon principles of integrity and respect for other people."[129] Colin Marks, commenting on the Motorola example, notes that "clearly, corporations do make choices that have an impact, positive or negative, on society."[130] When confronted with a profitable deal that was morally problematic, ethical restraint prevented Motorola's directors from closing the deal.

Unfortunately, corporations are not *required* to perform acts that are beneficial to society, and in some regards the Motorola example seems an outlier. As supported by the jurisprudence and commentary already

127. Friedman, *supra* note 82.
128. *Id.*
129. Marks, *supra* note 20, at 1163–64.
130. *Id.* at 1144.

discussed, the corporate public duty does not require directors and officers to "exercise discretion for the good of society";[131] rather, they merely need to refrain from acts that harm society. Seen in this light, Motorola's decision may not have been that unusual; it did not conform to ethical customs through action, but by its inaction—by refusing business it deemed morally problematic. Moreover, though many corporations make decisions similar to Motorola's, many others do not abide by this "inaction" standard. For example, it has been well reported that Unocal did business with a Burmese government engaged in gross human rights violations.[132] Similar allegations have been made against Del Monte in Guatemala[133] and ExxonMobil in Indonesia,[134] among others. And, of course, the inaction standard has been violated in the recent spate of financial gaming within the U.S.

C. A Reconceived Corporate Public Duty

A revised conception of the corporate public duty must follow a single guiding principle: When a corporate pursuit requires a socially irresponsible act—be it a human rights violation, economic endangerment, or otherwise—corporations must simply avoid that pursuit. Further, the conception must address those who deride "the notion that the corporation should apply its assets for social purposes rather than for the profit of its owners,"[135] and convince corporate managers that some actions are in fact socially unacceptable (and as a result likely unprofitable). The corporate public duty must also dispel the notion that corporations' mere existence sufficiently serves the public interest—by providing employment, goods and services, innovation, and so on. Thus, the reconceived corporate public duty imagines a corporation that pursues commercial interests in a manner that minimizes the risk to public. In practice, corporate decisionmakers must consider the downside risk to the public before executing a decision. Nothing in this conception inhibits commercial activity; rather, it simply inhibits irresponsible behavior.

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131. George W. Dent, Jr., *Toward Unifying Ownership and Control in the Public Corporation*, 1989 WIS. L. REV. 881, 893.

132. *See US Firm Sued Over Burma 'Abuse,'* BBC NEWS, Jun. 12, 2002, http://news.bbc.co.uk/2/low/business/2040140.stm. In *Doe I v. Unocal Corp.*, 395 F.3d 932, 936–37 (9th Cir. 2002), the plaintiffs used the Alien Torts Claims Act of 1789, 28 U.S.C. § 1350 (2006).

133. *See* Matt Pacenza, *Strange Fruit*, VILLAGE VOICE, Sept. 30, 2003, *available at* http://www.villagevoice. com/2003-09-30/news/strange-fruit/1.

134. *See* Kirsty Alfredson, *ExxonMobil Rejects Aceh Human Rights Claims*, CNN, June 22, 2001, http://edition.cnn.com/2001/WORLD/asiapcf/southeast/06/22/indonesia.exxon.mobil.

135. Betsy S. Atkins, *CSR: Is It Corporate "Irresponsibility?"*, BOARDROOM BRIEFING, Winter 2006, at 8, 8, *available at* http://www.directorsandboards.com/DBEBRIEFING/December2006/Winter06BB.pdf.

D. Enacting the Corporate Public Duty

Despite the benefits and efficiency of the free market, lawmakers must respond when the public is endangered by unregulated corporate activities. As stated best by Adam Smith:

> [R]egulations may, no doubt, be considered as in some respect a violation of natural liberty. But those exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be, restrained by the laws of all governments; of the most free as well as of the most despotical. The obligation of building party walls, in order to prevent the communication of fire, is a violation of natural liberty, exactly of the same kind with the regulations of the banking trade which are here proposed.[136]

We have recently witnessed a number of these "fires," and American political leaders seem committed to building walls to prevent the next one. Federal Reserve Chairman Ben Bernanke has said that in order to prevent "excessive risk taking . . . policymakers must insist that the large financial firms that they supervise be capable of monitoring and managing their risks in a timely manner and on an enterprise-wide basis."[137] Similarly, in a recent press release, Treasury Secretary Timothy Geithner commented that "the crisis of the past 18 months has exposed critical gaps and weaknesses in our financial regulatory system" that have caused "catastrophic losses," a "dramatic loss of confidence in our financial institutions and have contributed to severe recession."[138] Geithner further stated that it is now clear that "firms and markets need to be under a more consistent and more conservative regulatory regime."[139]

At this uncertain juncture, corporate America may actually be receptive to reforms requiring some sort of base public responsibility. In a recent article, Gary Hamel surveyed notable executives to formulate a "road map for reinventing management."[140] Like former General Electric CEO Owen D. Young,[141] they in fact agreed that in order to survive and succeed, the modern

136. SMITH, *supra* note 13, at 353.
137. Bernanke, *supra* note 2.
138. Press Release, Treasury Department, Treasury Outlines Framework for Regulatory Reform (Mar. 26, 2009), *available at* http://www.ustreas.gov.
139. *Id.*
140. Gary Hamel, *Moon Shots for Management*, HARV. BUS. REV., Feb. 2009, at 91, 91. A supplement to this article is also available, *see* Gary Hamel's Management 2.0, http://blogs.wsj.com/management (Mar. 2, 2009, 16:55 EST).
141. *See supra* page 35.

corporation must achieve "socially significant and noble goals" and fully embed "ideas of community and citizenship in management."[142]

With both the Obama Administration and corporate insiders receptive to change, some sort of regulatory reform seems destined to pass. Since judges may be reticent to take the aggressive move of creating new legal duties, legislative reforms are more likely. But what might this legislation look like? Such a law was recently enacted in the United Kingdom, and thus could offer guidance. Traditionally, corporate law in both the U.K. and the United States was derived largely from case law, which defined a set of corporate duties and responsibilities—such as the duty to avoid conflicts of interest and the duty to use reasonable skill, diligence, and care. Building on this jurisprudence, and with the goal of more clearly defining the duties of a corporate director, British lawmakers decided to codify them. In 2006, Great Britain enacted the Companies Act,[143] which codified both preexisting and new director duties.[144] Of particular interest, Section 172 of the Act requires corporate directors "to promote the success of the company"[145] and, more importantly, that "in doing so have regard" to: "(a) the likely consequences of any decisions in the long term . . . [and] (d) the impact of the company's operations on the community and the environment."[146] While the Act's success has yet to be seen, its language, particularly Section 172, is relevant to an American attempt at reform and duty codification.

CONCLUSION

Whether or not this formulation of the corporate public duty ever sees the light of day, its principles still have value as legislators consider reform. The notion that the corporation is merely an entity with no connection to the public interest is simply mistaken and has proven quite destructive. Too often, this conception of the corporation has resulted in activities—such as those recently undertaken by AIG, Lehman, Merrill Lynch, and others—whose repercussions extend beyond individual corporations and harm the greater economy. These acts of financial impropriety have rippled throughout the world, leaving businesses underwater and millions of people out of work and out of their homes. In the wake of the financial meltdown, imposing upon

142. Hamel, *supra* note 140, at 92.
143. *See* Companies Act, 2006, c. 46 (U.K), *available at* http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf.
144. *See id.*
145. *Id.* § 172(1).
146. *Id.*

corporations a duty to consider the macroeconomic and social impact of their actions is wholly appropriate.