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THE ROAD TO REFORM IN THE WAKE OF *KIOBEL*: MULTINATIONAL CORPORATIONS AND SOCIALLY RESPONSIBLE BEHAVIOR

Sarah Coleman*

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INTRODUCTION

*The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence to be borne with resignation.*¹

On December 3, 1984, a tank housed in a pesticide plant in Bhopal, India exploded, unleashing forty tons of deadly gas. The explosion killed 3,500 people within days and has killed more than 15,000 people over the ensuing thirty years.² The release can be traced back to oversights and defective equipment by U.S.-based Union Carbide Company, which immediately attempted to dissociate itself from legal liability for the tragedy.³ On March 24, 2009, the *Exxon Valdez* breached its hull after striking the Bligh Island Reef, spewing eleven-million gallons of oil into the Pacific Ocean and resulting in widespread destruction to environment, wildlife, and local industry.⁴ The cause of this accident has been attributed, in part, to the helmsman improperly steering the vessel and the vessel having faulty safety equipment.⁵ On April 20, 2010, BP's inadequate safety measures resulted in the largest offshore oil spill in history. Its oil drilling rig, the *Deepwater Horizon*, exploded and was "transformed into a column of fire," burning for almost two days and causing the oil well to "vomit tens of thousands of barrels of oil daily."⁶ While the *Exxon Valdez* and BP oil spills were catastrophic in their own rights, they do not compare to the destruction caused by oil-production activities in Nigeria, where a group of nationals still await justice for decades of

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¹ *Liggett Co. v. Lee*, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting in part).

² *Bhopal Trial: Eight Convicted Over India Gas Disaster*, BBC NEWS (June 7, 2010, 16:39 GMT), http://news.bbc.co.uk/2/hi/south_asia/8725140.stm (indicating that those campaigning for relief allege that the death toll is closer to 25,000 and claim that the terrible effects of the gas release—including birth defects, growth deficiencies, cancer, and other chronic illnesses—continue to this day).

³ Edward Broughton, *The Bhopal Disaster and its Aftermath: A Review*, ENVTL HEALTH, May 10, 2005, at 1,3, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/pdf/1476-069X-4-6.pdf>.

⁴ Dan Fletcher, *A Brief History of the Exxon Valdez Disaster*, TIME, http://content.time.com/time/photogallery/0,29307,1887217_1860791,00.html.

⁵ See *id.*; Stefan Lovgren, *Exxon Valdez Spill, 15 Years Later: Damage Lingers*, NAT'L GEOGRAPHIC NEWS (Mar. 24, 2004), http://news.nationalgeographic.com/news/2004/03/0318_040318_exxonvaldez.html.

⁶ LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 1 (2012).

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environmental, social, and human rights violations.⁷ *Kiobel v. Royal Dutch Petroleum Co.* is the result of a highly publicized conflict between Nigerian citizens and the Nigerian government over the oil extracting practices of Royal Dutch Petroleum, Co.⁸

The rise of multinational corporations (“MNCs”)⁹ has introduced many benefits such as the creation of local jobs, the economic development of impoverished nations, and advances in production and technological capabilities.¹⁰ But the proliferation of MNCs is not without costs, some of which include gross environmental degradation and violations of domestic labor standards abroad.¹¹ While these abuses are committed by MNCs in developed countries throughout the world,¹² some of the largest MNCs in the world are incorporated or headquartered in the United States,¹³ and many foreign corporations conduct a substantial

⁷ See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 124 (2d Cir. 2010), *aff’d*, 133 S. Ct. 1659 (2013). In September 2002, Nigerian nationals filed suit under the Alien Tort Statute (“ATS”), against Royal Dutch Petroleum Co. “alleg[ing] that defendants...aided and abetted the Nigerian government in committing human rights violations.” *Id.* at 124. In 2010, the Second Circuit Court of Appeals affirmed the lower court’s dismissal, holding that corporations could not be held liable for human rights abuses under the ATS. *Id.* at 149. The plaintiffs appealed to the Supreme Court, which held that foreign victims may not bring ATS claims against corporations for human rights violations committed outside the territory of the United States. *Kiobel*, 133 S. Ct. at 1669.

⁸ See Estelle Shirbon, *Shell to Negotiate with Nigerians Over Oil Spill Compensation*, REUTERS (Sept. 5, 2013, 7:08 PM), <http://www.reuters.com/article/2013/09/05/us-britain-nigeria-shell-idUSBRE98416920130905> (referring to the conflict as “one of the company’s worst public relations disasters”). Estimates indicate that over the past 50 years, 1.5-million tons of oil have been spilled in the Niger Delta ecosystem, resulting destruction to biodiversity, and contributing to the impoverishment of local communities. Jonathan Brown, *Niger Delta Bears Brunt After 50 Years of Oil Spills*, INDEPENDENT (U.K.) (Oct. 26, 2006), <http://www.independent.co.uk/news/world/africa/niger-delta-bears-brunt-after-50-years-of-oil-spills-421634.html>. Local activists protested the environmental deterioration engendered by these oil production enterprises, admonishing Shell and the Nigerian Government. *Analysis, Nigeria*, EIA, <http://www.eia.gov/countries/cab.cfm?fips=NI> (last updated Oct. 16, 2012). These efforts were met with deadly force; during 1993 and 1994 Nigerian soldiers, with Shell’s assistance and financing, committed acts of violence against the Ogoni people, including “shooting, killing, beating, raping, and arresting residents, as well as destroying and looting property.” *Corporate Court Grants Cert. in Human Rights Cases*, ALLIANCE FOR JUST. (Oct. 17, 2011), <http://www.afj.org/blog/corporate-court-grants-cert-in-human-rights-cases>. In 1995, nine Ogoni leaders were falsely accused of murder and arrested. Karen McGregor, *Ogoni Nine Hanged as Indifferent West Failed to Respond*, INDEPENDENT (U.K.) (Sept. 19, 2000), <http://www.independent.co.uk/news/world/africa/ogoni-nine-hanged-as-indifferent-west-failed-to-respond-699325.html>. Following a controversial trial, which was “widely reported to be a legal farce,” these activists were convicted and hanged. *Id.*

⁹ An MNE is defined as follows: A combination of “companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways.” JEROLD A. FRIEDLAND, UNDERSTANDING INTERNATIONAL BUSINESS FINANCE 283 (3d ed. 2010). “MNEs produce more than 10 percent of the world’s gross domestic product, conduct nearly two-thirds of global trade and engage in more than three-fourths of worldwide research and development activities.” *Id.* Relatively few corporate conglomerates control a majority of the world’s corporate power; fewer than 500 companies conduct more than seventy percent of global trade. *Id.* at 284.

¹⁰ *Id.*

¹¹ *Id.*; see also Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 403 (2002) (attributing most instances of large-scale environmental damage to MNC operations).

¹² See FRIEDLAND, *supra* note 9, at 284.

¹³ See Anup Shah, *Corporate Power Facts and Stats*, GLOBAL ISSUES, <http://www.globalissues.org/article/59/corporate-power-facts-and-stats> (last updated Nov. 12, 2011) (indicating that, of the top 200 corporations worldwide, 82 are U.S. companies).

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amount of business in the United States.¹⁴ The *Kiobel* decision is a hot topic¹⁵ for legal scholars and the law governing MNCs, but, while there has been an influx of legal research in light of *Kiobel*, most of the debate concerns redress for victims of MNC misconduct. A focus on remedies, however, does not address the fact that these problems require proactive resolution and avoids the question, “What is it about the nature of MNCs that induces them to behave so badly?”

This Note examines the factors encouraging MNCs to commit egregious social, environmental, and human rights violations. In doing so, it will address the nature of the corporation, review current perspectives on corporate structure, and propose solutions for healing the systemic ails of domestic corporate law. In analyzing the controversy surrounding U.S. corporations, this Note posits that corporate conduct—whether good or bad—is a byproduct of the law regulating firms incorporated in the United States. It takes the position that corporate socially responsible behavior is implausible where laws and market forces both empower and induce corporations to act in ways contrary to public policy, particularly in an international setting where challenges to social responsibility are exacerbated. In response to this analysis, this Note proffers a framework for reforming the modern view of corporate purpose—wealth maximization and shareholder primacy—to a model of wealth maximization for all stakeholders by way of combining long-term shareholder-wealth and social-value maximization.

This Note is organized as follows: Part I provides a brief overview of the origins and history of the corporation with a focus on the transition of corporate purpose from social welfare to shareholder profit-maximizing engine. Part II outlines the corporate form and its subsequent shortcomings with specific reference to how the current model induces irresponsible behavior by domestic MNCs abroad. Part III examines the prominent models of the corporate form: the shareholder primacy model and the stakeholder primacy model, contemplating recent attempts to combine the two. Part IV analyzes the ideological challenges of implementing reforms in line with the model accepted in Part III. Part V proposes reforming internal and external regulation in such a way that will grant MNC executives the necessary discretion to behave socially responsible while preserving a regulatory element necessary to check corporate conduct in an imperfect market. The conclusion advances the argument that domestic corporate law has been led astray by the modern interpretation of the shareholder profit-maximizing norm, and that reformation geared

¹⁴ Robin Sabransky, Note, *Barclays Bank Plc v. Franchise Tax Board: California's Taxation of Foreign-Based Multinational Corporations*, 31 CAL. W. L. REV. 317 (1995).

¹⁵ Prior to the Supreme Court's decision in *Kiobel*, there was a circuit court split on the jurisdictional issue raised in the case. In 2011, the Ninth Circuit held that corporations are not immune to liability under the Alien Torts Statute (ATS). *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013). That same year, the Seventh Circuit Court of Appeals, though dismissing plaintiff's claims, held that corporations may be held liable under the ATS. *Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011), 2011 U.S. App. Lexis 18605 (2011). Corporate liability under ATS had also been upheld in the Circuit Court of Appeals for the District of Columbia. *Doc v. Exxon Mobile Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 Fed. Appx. 7 (2013). In April 2013, the Supreme Court held that the ATS was inapplicable to violations of the law of nations in foreign territories. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Some commentators predict that victory for the defendants means that foreign victims who are denied justice in their own courts may not seek redress for their injuries in the United States under the ATS. See Keri Borkoski, *Kiobel v. Royal Dutch Petroleum: What's at Stake and for Whom?*, SCOTUSBLOG.COM (Sept. 30, 2012, 9:36 PM), <http://www.scotusblog.com/2012/09/kiobel-v-royal-dutch-petroleum-whats-at-stake-and-for-whom/>.

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towards requiring executives to consider the impact of their decisions on other stakeholders can render social irresponsibility an unattractive option.

I. The History of the Corporation: From Public Purpose to Profit-Maximizing

An understanding of what businesses are is fundamental to appreciating corporate behavior.¹⁶ The following discussion will describe the origins of the corporate form in the United States and the events leading to the current shareholder profit-maximizing norm.

In the United States, the power to grant corporate charters and establish corporations is reserved by the individual states.¹⁷ Each corporate charter is granted on a case-by-case basis by actions of the state legislature, outlining the specific public purposes being promoted.¹⁸ The concept of corporations existing as creatures of the state is rooted in colonial history.¹⁹ The corporation in colonial America “was first and foremost a political expression performing a public economic function.”²⁰

Originally, the predominant characteristic of these corporations was this inherently public purpose²¹—these entities were “conceived as . . . agenc[ies] of the government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function for the State.”²² The act of incorporation bestowed special privileges upon the entity such as limited liability.²³ The privileges of the corporate form were, however, “premised on the social services they rendered: the dedication of private capital and entrepreneurial effort to the public interest.”²⁴ The grant of corporate privileges was not deemed justifiable without conferring the benefit of needed public service in return.²⁵

As the nineteenth century progressed, and the industrial revolution reached full swing, states were overwhelmed with requests for incorporation.²⁶ In recognition of the

¹⁶ See UNSW Australia, *Corporate Governance—What Do Shareholder Really Value?*, YOUTUBE (Dec. 12, 2011), <http://www.youtube.com/watch?v=s5Eoy988728> (featuring Professor Lynn Stout).

¹⁷ Lucian Aryc Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1442-43 (1992).

¹⁸ NEIL W. CHAMBERLAIN, *SOCIAL STRATEGY AND CORPORATE STRUCTURE* 1, 2 (1982).

¹⁹ *Id.* at 1.

²⁰ *Id.* In contrast to projects of public concern, “[t]he purely private business affairs of the colonists, more restricted in scale and scope, were carried on chiefly by individuals or by unincorporated joint-stock companies of a local nature.” *Id.*

²¹ Thomas B. Byrne, *False Profits: Reviving the Corporation's Public Purpose*, 57 UCLA L. REV. 25, 27 (2010) (“a brief survey of history of corporate history reveals that although a corporation is a commercial enterprise, it was traditionally one that also served public goals”).

²² CHAMBERLAIN, *supra* note 18, at 2 (quoting Oscar Handlin) (internal quotation marks omitted).

²³ See Ronald Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 252 & n.29 (2008) (“The attractiveness of the corporate form stemmed largely from (and continues to stem largely from) the limited liability protection it affords investors.”).

²⁴ CHAMBERLAIN, *supra* note 18, at 2.

²⁵ JOHN P. DAVIS, *CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND THEIR RELATION TO THE AUTHORITY OF THE STATE* 269 (1961) (“[I]t was not considered justifiable to create corporations for any purpose not clearly public in nature; each application was considered by itself, and if favorably was followed by a legislative act of incorporation.”).

²⁶ See CHAMBERLAIN, *supra* note 18, at 2.

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social value of increasing private enterprise²⁷ and in order to ease complaints of favoritism in the corporate charter process,²⁸ states began to adopt general incorporation statutes.²⁹ As a result, anyone who satisfied the procedural requirements was now allowed to organize a corporation, but the statutes continued to impose many restrictions on corporate financing and structure.³⁰ Furthermore, “the notion that public purpose was served by private profit seeking gave ample rationale to this more open access to the corporate form, with its attendant advantages.”³¹

Prior to general incorporation statutes, the corporate form was considered to be a privilege bestowed by the state, and, consequently, the role of the state as a rightful regulator of the corporate entity it created was not questioned.³² Towards the end of the nineteenth century, however, the view that states create corporations was “eroded by those who argued that the corporation was a ‘natural’ mode of business organization.”³³

II. The Modern Corporation: Current Framework, Benefits, and Shortcomings

Today, “[e]ven though it would seem obvious that corporations should be created only if they, on balance, create more benefit than harm, this principle is largely absent from corporate law doctrine, judicial opinions, corporations casebooks, and business courses in both law and business schools.”³⁴ For the most part, public concerns and interests are ignored unless they are taken into consideration for marketing or public relation reasons in order to maximize long-term shareholder profits.³⁵

For many reasons, challenges to inducing corporate social responsibility can largely be attributed to the modern corporate form. There are several ways to organize a business: the corporation is only one of them. As modern business activity grows in both scale and complexity, the corporate form has become something of a necessity.³⁶ In large, public corporations individuals come together, each bringing something different to the table.

²⁷ See *id.* at 3 (acknowledging that all businesses serve the public interest in the sense that they are capable of increasing the aggregate wealth of society).

²⁸ See *id.* (pointing out “the practice of issuing corporate charters by special legislative act came to be viewed with suspicion and distaste . . . it smacked of privilege: individuals with well-placed contacts, favorable social standing, and economic advantage clearly had an inside track on a state’s grant of corporate rights.”).

²⁹ *Id.* at 3. For example, in 1889 New Jersey adopted liberal corporation statute, which allowed corporations to exist “for any lawful business or purpose whatever.” KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 29, 35 (2012). Other states soon followed New Jersey’s lead, which led to what some commentators describe as a “race to the bottom” ultimately resulting in the disbandment of many previous limitations on corporations. *Id.*

³⁰ GREENFIELD, *supra* note 29, at 35.

³¹ CHAMBERLAIN, *supra* note 18, at 3 (pointing out that “every business was of public importance in the respect that it might increase the aggregate wealth of society [indicating] private enterprise had become public purpose.”).

³² See GREENFIELD, *supra* note 29, at 35.

³³ *Id.*

³⁴ *Id.* at 128 (noting that “occasionally one will come across a resource that does consider the corporation’s responsibility to the societal good, but for the most part, judges and mainstream corporate law scholars take shareholder supremacy as the lodestar.”).

³⁵ *Id.*

³⁶ DETLEV F. VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* 98 (David L. Shapiro et al. eds., 1986) (indicating that over 90% of the industrial production in the United States are corporations).

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Investors bring capital to fund operations, managers bring experience and judgment, and workers make the product or provide the service. This combination makes the organization much more effective than each individual would be operating on his own. For these reasons, when the intricacies of production require a combination of specialized skills and large quantities of capital, the corporation is the optimal form of organization.³⁷

A. Corporate Personhood

An important characteristic of the corporation under U.S. law is its status as a legal person. Many feel that the corporation is a separate legal person distinct from its managers and shareholders.³⁸ As Justice Rutledge observed in *United States v. Scophony Corp. of America*, this forces our law to analyze some elements of corporations in the way it reviews the behaviors of natural persons, which could be viewed as an attempt to drive a square peg into a round hole.³⁹ The doctrine of corporate personhood takes its root in a case nearly two hundred years old in which the Supreme Court held that corporations share with natural persons the rights to enter and enforce contracts.⁴⁰ Corporate personhood was more properly established decades later when the Supreme Court heard a case involving a railroad company's refusal to comply with new state tax law.⁴¹ The court reporter included Chief Justice Waite's commentary prefix to the court record, where he stated: "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."⁴² Because the remark was in a headnote,⁴³ however, it did not have the force of law.⁴⁴ This was changed two years later by a case in which the Supreme Court held that "[u]nder the designation of person there is no doubt that a private corporation is included . . . 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.'"⁴⁵ The holding secured for corporations the protections of the Fourteenth Amendment,⁴⁶ and has been affirmed on numerous occasions

³⁷ Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 93-94 (1985).

³⁸ See *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) (acknowledging that separate legal personhood is "an almost indispensable aspect of the public corporation.").

³⁹ See 333 U.S. 795, 803 (1948).

⁴⁰ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 650 (1819).

⁴¹ *Santa Clara Cnty. v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886).

⁴² *Id.* at 396.

⁴³ Critics maintain that this ruling never occurred: "The 'corporations are persons' ruling was a fiction created by the court's reporter. He simply wrote the words into the headnote of the decision. The words contradict what the court actually said." Thom Hartmann, *Dinosaur War*, ECOLOGIST, Dec./Jan. 2002, at 21, 23; see also Josh Clark, *Why Do Corporations Have the Same Rights as You?*, HOWSTUFFWORKS (Apr. 1, 2008), <http://money.howstuffworks.com/corporation-person1.htm>. The source notes that the court reporter's inclusion of this remark is suspicious because this was not how the court ruled in the case at all. *Id.* The source also indicates that the court reporter was a former railroad president, which makes the inclusion of the headnote even more suspicious. *Id.*

⁴⁴ Clark, *supra* note 43.

⁴⁵ *Pembina Consol. Silver Mining & Milling Co. v. Com. of Pa.*, 125 U.S. 181, 189 (1888) (quoting Chief Justice Marshall).

⁴⁶ Clark, *supra* note 43.

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ever since.⁴⁷ It has been argued that application of this principle, particularly in light of the Supreme Court's holding in *Citizens United v. Fed. Election Comm'n.*,⁴⁸ has permitted corporations to use their influence in obtaining political representation that best suits their interests to the detriment of natural persons.⁴⁹

B. *Limited Liability*

In other forms of business organizations, such as a general partnership, those who invest in the enterprise expose themselves to unlimited liability for its conduct.⁵⁰ The individual partners in a partnership are responsible for any debts incurred by the partnership entity.⁵¹ By contrast, shareholders are not responsible for the obligations of the corporation: the corporate entity itself is.⁵² Those who invest in a corporation are liable to its creditors only to the extent of their investment.⁵³ This means that a person who wishes to invest \$500 in a company risks only that money and no more in the event that the company becomes liable to a creditor for a much larger sum.⁵⁴ Subject to a few exceptions,⁵⁵ limited liability ensures that such creditors can enforce their claims only against the company's assets, even if the amount to which they are entitled exceeds the value of those assets.⁵⁶ Additionally, and again, subject to exceptions, those directly involved in the firm's operations (managers, employees) are not vicariously liable for its conduct.⁵⁷ Under the protection of limited liability, no one puts at risk any more than he or she invests,⁵⁸ and it is for this reason that limited liability is necessary for large, public corporations to exist.⁵⁹

Limiting the liability of investors allows corporations to aggregate the large amounts of capital necessary to fund operations of their size. It achieves this task by first limiting risk, a universal element of businesses, big or small. Without limited liability, any investment in a

⁴⁷ See *Liggett Co. v. Lcc*, 288 U.S. 517, 536 (1933) ("Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons."); *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26 (1889) ("[W]e admit the soundness of his position, that corporations are persons within the meaning of the clause [the Fourteenth Amendment] in question.").

⁴⁸ 558 U.S. 310 (2010), *overruling* *McConnell v. FEC*, 540 U.S. 93 (2003), and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). In *Citizens United*, the court held that restrictions on political spending by corporations were unconstitutional violations of corporations' First Amendment rights of free expression. *Id.*

⁴⁹ See Robert Kochler, *Corporate Personhood*, HUFFINGTON POST (Jan. 22, 2010, 5:15 PM), http://www.huffingtonpost.com/robert-kochler/corporate-personhood_b_433615.html (posting a press release issued by the Alliance for Democracy).

⁵⁰ See Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L., 479, 490 n.45 (2001). But see Easterbrook & Fischel, *supra* note 37, at 90 (positing that, in all forms of business organizations, limited liability is actually the rule and that cases of unlimited liability are rare).

⁵¹ Bainbridge, *supra* note 50, at 490 n.45.

⁵² David H. Barber, *Piercing the Corporate Veil*, 17 WILLIAMETTE L. REV. 371, 371 (1981).

⁵³ See Easterbrook & Fischel, *supra* note 37, at 89.

⁵⁴ *Id.* at 90.

⁵⁵ See *Sca-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519 (7th Cir. 1991).

⁵⁶ David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1346 (2007).

⁵⁷ 51 AM. JUR. 2D *Limited Liability Companies* § 16 (2013) (indicating that, in corporations and limited liability companies, limited liability applies to those who manage the organization's affairs).

⁵⁸ Easterbrook & Fischel, *supra* note 37, at 89-90.

⁵⁹ Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967).

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company, regardless of how big or small, could expose an investor to unlimited liability. Suppose a wealthy individual wanted to invest a few hundred thousand dollars in an oil-production business venture. This investment, though only a small portion of this person's total assets, would place at risk the millions of dollars in assets that she has not invested in the company. If, by some accident (oil spill, factory explosion, nuclear meltdown), the company's operations caused millions of dollars in damage, those who could pursue a claim against the oil company would also be able to pursue their claims against the individual's personal assets if the company's assets were unable to fully compensate the victims. The investor might also be personally pursued by a vendor to whom the company owes money or to creditors in the event that the company goes bankrupt. Such scenarios make it prohibitively risky for those with large amounts of wealth to make the sort of investments large-scale companies need to fund their operations. This puts those capable of funding enterprises in the position of having to choose between two extremes: investing everything they own in a business or not investing at all. With the protection of limited liability, people are motivated to invest in companies in the hopes that their investment will pay off without being deterred by the prospect of staking everything they own to that investment.

The very concept of limited liability, however, creates a moral hazard that is at odds with Corporate Social Responsibility ("CSR").⁶⁰ On the one hand, principles of tort and product liability exist to deter risky behavior and to induce corporate actors to exercise the proper amount of care in preventing harm to others.⁶¹ If one can expect to be held fully accountable for the consequences of her actions, she will be less likely to risk acting in a way that could cause harm to others. On the other hand, limited liability functions as an incentive for people to invest in risky ventures. By being an attractive feature for those who specifically want to avoid liability for behavior that is likely to cause damage to others, limited liability creates both the incentive and the means to do so. Thus, eliminating shareholder liability beyond the extent of investment allows managers to make riskier business decisions, which tend to result in either reaping great rewards or causing severe damage to others, by making such a risk worth taking.⁶²

For these reasons, a principle such as limited liability, if unchecked, would give rise to some serious concerns regarding corporate conduct. After all, some enterprises involve a degree of danger, and accidents not only occur, but they may be very expensive to remedy. Unlike those who choose to transact with a particular corporation, one who sustains an injury in the course of operations is an involuntary creditor. Limited liability has the potential to remove the social costs of these accidents from the calculations of corporate decision-makers.⁶³ These individuals may also protect themselves from their obligations to parties who have voluntarily contracted with the corporation. Unrestrained, limited liability would permit a group of natural persons to shield themselves behind a corporate entity to which they have contributed no assets and then conduct business in such a way that harms others, leaving their victims with nothing more than a judgment against an entity whose insolvency renders it judgment proof. Likewise, a large parent-corporation could create or buy a subsidiary and transfer all of the subsidiary's assets into the parent, reducing the subsidiary to nothing more

⁶⁰ See David W. Loebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1565 (1991).

⁶¹ *Id.*

⁶² Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 616 (1986).

⁶³ Loebron, *supra* note 60, at 1568.

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than an asset-deficient, corporate shell. If limited liability extended to this situation, parties that subsequently transact with the subsidiary would have no recourse against it in the event its debts became outstanding and its owner, the parent corporation, would be shielded from liability for those debts.⁶⁴ Indeed this is precisely what some corporations have attempted to do in an effort to avoid accounting for their obligations.⁶⁵

The laws of the United States prevent this sort of exploitation by refusing to extend the protective shield of limited liability to corporations who conduct business irresponsibly. Under the doctrine of "Piercing the Corporate Veil," courts have the equitable power to disregard the legal fiction that is the corporation's entity status and hold its owners personally liable where the facts demonstrate that the corporation is merely the "alter-ego" of its owners and circumstances are such that "adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice."⁶⁶ Courts have defined "alter-ego" to represent that situation where there is "such unity of interest and ownership that the separate personalities of the corporation and the individual [or other corporation] no longer exist."⁶⁷ The court in *Sea-Land Services, Inc. v. Pepper Source* highlighted four factors to be considered in determining whether disregard of corporate identity is justified. These factors are: "(1) the failure to maintain adequate corporate records or to comply with corporate formalities, (2) the commingling of funds or assets, (3) undercapitalization, and (4) one corporation treating the assets of another corporation as its own."⁶⁸

The doctrine of corporate veil piercing flows in the vein of requiring responsible corporate conduct—it is the law's recognition that there is a point at which the benefit of having corporations is outweighed by the competing factor of fairness to those who incur damages in dealing with them. This line is drawn because the courts will not condone conduct that inflicts uncompensated harm on others by extending the incentive to continue doing so. Rather, corporate veil piercing provides a strong incentive for corporations to consider the costs of their accidents in their operations, as opposed to permitting these externalities to be absorbed by others.⁶⁹

However, the doctrine has never been applied to a publicly held corporation. As a practical matter, it does not affect the conduct of large corporations and is functionally irrelevant to MNCs.⁷⁰

⁶⁴ See *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519, 520 (7th Cir. 1991).

⁶⁵ See *id.*

⁶⁶ *Id.* (piercing the corporate veil of limited liability where defendant's asset-deficient corporation owed plaintiff-carrier expenses for shipping services); see *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569-70 (7th Cir. 1985) (piercing the veil of limited liability where a corporation with no assets purchased cans and labels from plaintiff-vendor to be used by another corporation, dominated by the same individual).

⁶⁷ *Sea-Land Servs., Inc.*, 941 F.2d at 520; *Van Dorn Co.*, 753 F.2d at 569-70.

⁶⁸ *Sea-Land Servs., Inc.*, 941 F.2d at 520.

⁶⁹ But see Barber, *supra* note 52, at 373 ("Given the purpose of promoting commerce by providing limited liability for shareholders in state corporate law, courts have been reluctant to pierce the corporate veil, even when the express purpose of incorporation was to limit the liability of the incorporators." (citing *Burns v. Norwesco Marine, Inc.*, 535 P.2d 860, 862 (1975))).

⁷⁰ The doctrine has only been applied to closely held corporations and parent-subsidiary corporations, where the roles of ownership and control intertwined, and the factors giving rise to a "unity of interest and ownership" are likely to exist. Barber, *supra* note 52, at 372-73.

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C. *Corporations and the States: The Race to the Bottom and the Internal Affairs Doctrine*

As a result of the economic benefits attendant with corporate activity, the states compete with one another for corporate charters.⁷¹ Moreover, states whose laws fail to attract corporations forsake the measure of social and economic stability—and taxes and the franchising fees associated with corporations. This could give rise to a snowball effect, as people generally prefer to live in places of social and economic stability and—if they are able to do so—may move to one when they find that they do not.⁷² Put simply, companies incorporate where the laws favor them and people follow. Under the “race to the bottom” theory of state competition for corporate charters, states are pressured into adopting relaxed laws⁷³ that encourage companies to incorporate within them in order to prevent the exodus of corporations, and thus its citizens.⁷⁴ While this theory has been criticized for failing to consider the impact that market forces have in discouraging companies from incorporating in states with relaxed laws,⁷⁵ the market forces on which race to the top theorists rely do not entirely curtail management’s pursuit of corporate law rules that are undesirable to shareholders.⁷⁶ Though states are not entirely helpless against corporate influence, their laws must be flexible enough to permit a degree of corporate encroachment on society, and may

⁷¹ Bebchuk, *supra* note 17, at 1438.

⁷² See Katherine Q. Seelye, *Detroit Census Confirms a Desertion Like No Other*, N.Y. TIMES, Mar. 22, 2011, http://www.nytimes.com/2011/03/23/us/23detroit.html?_r=1& (reporting that in the past decade residents of Detroit have been deserting the failing city at an unprecedented rate, and attributing these losses to “the travails of the auto industry and the collapse of the industrial-based economy”); see also Liu Dan, *Economic, Social Stability Key to China’s Development*, NEWS.XINHUANET.COM (Dec. 19 2011), http://news.xinhuanet.com/english/indepth/2011-12/19/c_131314562.htm (suggesting that social and economic stability improves peoples’ livelihoods in general).

⁷³ More specifically, the laws that states are pressured to adopt “are too lax with respect to managers and controlling shareholders” whose decisions govern how the company operates and who also benefit by exploiting shareholders. Bebchuk, *supra* note 17, at 1444. The competing “race to the top” theory holds that state competition actually induces states to establish laws that benefit shareholders. *Id.* at 1445. Under this theory, shareholder and manager interests align because lax laws that permit shareholder exploitation render corporations vulnerable to hostile takeovers, which can result to management losing their jobs. *Id.* Thus, this threat to management discourages managers from incorporating under legal regimes that permit exploitation of shareholders. *Id.*

⁷⁴ *Id.* at 1443; see also Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL’Y REV. 381, 387 (2005).

⁷⁵ Bebchuk, *supra* note 17, at 1444-45.

⁷⁶ See *id.* at 1446 (pointing to state antitakeover rules to illustrate this position). Many race to the top proponents deem antitakeover statutes to be inefficient. *Id.* However, many states have adopted antitakeover statutes. *Id.* This frustrates the principle on which race to the top theorists rely—that competition leads states to create “presumptively efficient” corporate law—because antitakeover statutes are popular among states despite their alleged inefficiency. *Id.* at 1445-46. While some scholars argue that antitakeover statutes are an anomaly, Bebchuk takes the position that they are “a manifestation of a more general problem,” *id.* at 1469 n.116, and that, in order to remain competitive, states will adopt rules, such as antitakeover statutes, that “weaken the disciplinary force of the market for corporate control,” *id.* at 1469.

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not represent how they would otherwise govern;⁷⁷ failure to do so will result in the loss of valuable corporate dollars, as businesses will choose to incorporate elsewhere.⁷⁸

Because a corporation, like a natural person, is free to domicile in the state of its choice, it will select the state harboring the legal regimes most favorable to its operations.⁷⁹ This freedom to shop for a favorable domicile raises obstacles for CSR, as it creates major incentives for companies to incorporate in states whose laws least conflict with their business. This means that states adhering to stricter corporate regulations in order to prevent exploitation of its citizens, resources and environment will deter those companies whose operations may conflict with those ideologies.⁸⁰

To exacerbate this issue, the affairs of a corporation are regulated by the state in which it is incorporated: states have the power to define the internal structure of entities incorporated under their laws.⁸¹ Furthermore, as is the case with other choice of law questions in domestic courts, the incorporating state's law will be applied to issues concerning the internal structure of the corporation no matter where an action against it is brought.⁸² This doctrine is largely justified by the ideology of territorial sovereignty, indicating that it is solely within the jurisdiction of the incorporating state make decisions concerning its corporations' internal affairs.⁸³ State courts have accepted the internal affairs doctrine ("IAD") as a given,⁸⁴ yet the Supreme Court has never ruled on its constitutionality and has only addressed the IAD in dicta.⁸⁵

Critics of the IAD have pointed to three flaws in this doctrine in corporate law.⁸⁶ First, the IAD eliminates choice of law rules where states would normally apply their own law to actions arising from citizens and economic activity within its jurisdiction.⁸⁷ Second, it allows a corporation to cherry-pick the laws by which it wishes to abide, unlike natural

⁷⁷ See Greenfield, *supra* note 29, at 35 (indicating that in response to New Jersey's relaxation of corporate laws in 1889, states "were forced to remove many of their own restraints on corporations... doing away with more and more regulatory limitations on the corporate form intended to protect the public.").

⁷⁸ *Id.*; see also, Bebchuk, *supra* note 17, at 1443 (noting that New Jersey's adoption of liberal corporation statutes in 1896 attracted several large corporations and that subsequent restrictive amendments made in 1913 caused New Jersey to lose the role as home to the largest businesses of the time).

⁷⁹ See *id.* at 1442 (noting that this analysis pertains to publicly traded companies; close corporations adhere to a different decision-making process and require a different analysis).

⁸⁰ See Greenwood, *supra* note 74, at 387 (explaining how New Jersey fell out of favor with corporations in the early 1900s because of the reform movement's influence on the state's legislature).

⁸¹ See Bebchuk, *supra* note 17, at 1438.

⁸² Deborah DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161 (1985); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 36 (2006) ("The widespread acceptance of this doctrine enables a firm to incorporate under the law of any state, knowing its choice will be respected elsewhere.").

⁸³ Tung, *supra* note 82, at 48.

⁸⁴ See *McDermott, Inc. v. Lewis*, 531 A.2d 206, 215-16 (Del. 1987) ("[A]pplication of the internal affairs doctrine is not merely a principle of conflicts of law. It is also one of serious constitutional proportions . . .").

⁸⁵ See, e.g., *Kamen v. Kemper Fin.*, 500 U.S. 90, 106 (1991); *Edgar v. MITE Corp.*, 457 U.S. 624, 645-46 (1982);

⁸⁶ See Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41, 62 (2005) [hereinafter *Markets and Democracy*].

⁸⁷ *Id.* at 62.

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persons, regardless of location or relationship.⁸⁸ Third, the IAD forces state legislators to compete with one another to attract corporate charters.⁸⁹

D. *Fiduciary Duties and the Shareholder Profit-Maximizing Norm*

While corporations were originally conceived for the purpose of serving public benefits, modern corporations are managed in order to satisfy shareholder interests, simply because they are the owners of the corporation.⁹⁰ “Under this view, directors are trustees of the shareholder’s property, and, therefore, have a duty, first and foremost, to increase shareholder wealth.”⁹¹ Public corporations are not “public” in the sense of having responsibilities to society, or of being owned by the community, or of being subject to particularly stringent public oversight. “In fact, managers of most large, ‘public’ companies are *prohibited by law* from taking into account the interests of the public when making decisions, if in so doing those of the company’s shareholders are harmed.”⁹²

Among the greatest challenges to corporate social responsibility in the United States is the law’s basic position on the purpose of the corporation and how the fiduciary duties of corporate directors must adhere to this principle. This was most famously articulated in the case of *Dodge v. Ford Motor Co.*,⁹³ which established what is known as shareholder-value or the wealth-maximization norm.⁹⁴ At the beginning of the 20th century, Ford Motor Company was one of the dominant manufacturers of automobiles in the United States.⁹⁵ The company had a policy of reducing automobile prices to make the vehicles more affordable for customers.⁹⁶ The company issued quarterly dividends to its shareholders, and, in 1911, it also began to issue special dividends to shareholders.⁹⁷ In July 1916, Ford, addressing the financial condition of the company, altruistically⁹⁸ stated that it would stop paying these

⁸⁸ *Id.* at 62-63. Professor Greenwood has analogized this privilege of corporations as the equivalent of families choosing to follow whichever state’s family law is most favorable: “No American state allows families to choose to follow the child protection law of another state just because the family decision maker thinks that law better. By accepting the internal affairs doctrine [states] give corporations precisely that right.” *Id.*

⁸⁹ Tung, *supra* note 82, at 41. The ability of corporations to shop for favorable laws has been considered the “genius of American corporate law.” *Id.* The system of state charter competition encourages corporations to “circumvent or minimize the effect of political constraints on economic development . . . [this system] reduces the number of extraneous regulations that must be bypassed.” *Id.* The IAD, therefore, can be viewed as a predictable result of allowing the free market to be left to its own devices and the byproduct of uninterested market participants’ “inexorable march to efficiency.” *Id.*

⁹⁰ Marshall M. Magaro, Note, *Two Birds, One Stone: Achieving Corporate Social Responsibility Through the Shareholder-Primacy Norm*, 85 IND. L.J. 1149, 1154 (2010).

⁹¹ *Id.* at 1149.

⁹² GREENFIELD, *supra* note 29, at 1.

⁹³ 170 N.W. 668 (Mich. 1919).

⁹⁴ Throughout this note, terms such as “wealth-maximization,” “profit-motive,” and “shareholder-centric” are used interchangeably in reference to this concept of shareholder value.

⁹⁵ See generally *Ford Motor Company Incorporated*, HISTORY, <http://www.history.com/this-day-in-history/ford-motor-company-incorporated> (last visited Jan. 8, 2014).

⁹⁶ See *Dodge*, 170 N.W. at 670. The car manufactured by Ford Motor Company originally sold for more than \$900. *Id.* This selling price was periodically reduced and improvements were made to the car, which sold for only \$440 in July 1916. *Id.*

⁹⁷ *Id.*

⁹⁸ Commentators note that Henry Ford’s motives were not entirely “altruistic.” Randall K. Justice, *The Duty of Corporate Directors to Pay Dividends*, 87 KY. L.J. 231, 247 (1999) (noting the court’s finding that Ford was

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special dividends and that the company's resources would be used instead to expand its business so as to benefit employees and customers.⁹⁹ In Henry Ford's own words, "My ambition is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business."¹⁰⁰ True to his word, Henry Ford pursued costly opportunities aimed at expanding Ford's operations and sharing the rewards of his enterprise with employees and customers.¹⁰¹ Ford also ceased paying out dividends to its shareholders.¹⁰²

Brothers John F. Dodge and Horace E. Dodge—owners of ten percent of Ford Motor Co.'s capital stock—filed suit in the circuit court in the county of Wayne, Michigan against the company.¹⁰³ Their complaint sought to enjoin defendant, Ford Motor Company, from pursuing its proposed expansions and asked the court to order the company to resume issuing dividends to its shareholders.¹⁰⁴ The complaint alleged that the proposed expansions were reckless, and that they threatened to seriously jeopardize plaintiff-stockholders' interests.¹⁰⁵ Henry Ford defended his position; showing that the operational expenditures were great and that the company's requirement for cash was enormous, Ford demonstrated that, if the company were to experience a sudden collapse of business, a significant amount of money would need to be available just to remain in business.¹⁰⁶ The court noted that:

This defendant is opposed to any policy which would necessitate the discharge of large number of employ  s [sic] in case there should be a sudden depression of business if there be any way to avoid it, and . . . believes that the latter methods and policies ultimately redound to the best financial interests of the

motivated to withhold dividends to prevent shareholders from profiting from their investment). A lesser-known fact about the issues in *Dodge v. Ford* is that the Dodge brothers, original shareholders in the Ford Motor Company, had decided to go into businesses in competition with Ford Motor Co. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 316 (1998). They attempted to sell their shares in Ford to finance their business, but Ford refused to purchase them. *Id.* The shares in Ford Motor, however, continued to supply the Dodge brothers with capital to finance their operations. *Id.* Ford's refusal to declare special dividends in 1916, a year in which the company experienced record profits, was a measure taken, in part, to deprive the Dodge brothers of revenue necessary to fund their business. *Id.* at 315.

⁹⁹ See *Dodge*, 170 N.W. at 671.

¹⁰⁰ *Id.* (internal quotations omitted).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 670-71.

¹⁰⁴ *Id.* at 673.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 676-77. The great depression hit years later, and many people were laid off. See Philip Scranton, *Henry Ford's Depression Car*, BLOOMBERG (Apr. 2, 2012, 11: 07 AM), <http://www.bloomberg.com/news/2012-04-02/henry-ford-s-depression-car.html>. Pressured by competition, Ford sought to create models with more powerful engines while keeping prices significantly lower than his competitors. *Id.* Auto experts indicated that manufacturing a reliable, inexpensive eight-cylinder vehicle would be impossible, particularly in light of parts and labor costs. *Id.* Nonetheless, in 1932 Henry Ford told *Time* that he was ready to "risk everything we've got to create useful work for just as many people as possible." *Id.* The new models were rushed hastily to the market, and Ford's production was overwhelmed. *Id.* Due to delays and breakdowns, the company lost about \$75 million that year. *Id.* Unfazed, Henry Ford was reported to have said that the money was not wasted because it went towards paying workers and taxes. *Id.* "We didn't lose it—we used it," he said. "If we had dropped it on the stock market, that would have been losing it." *Id.*

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company and its stockholders. [He] is not in favor of paying out in dividends the surplus of the company to the danger point or any point where it could be regarded as risky in the least degree . . . [and] further shows that he is not in favor of keeping up the price of the car to the highest possible point that the public will apparently stand for the time being, but he is in favor of the policy of reducing the price of the car from time to time as the safety and welfare of the company and stockholders will dictate, since he believes such to be a better, permanent policy for the company. Such always has been the policy adopted in the past, and he believes that such has been one of the causes of the unexampled success of the company.¹⁰⁷

The court, however, agreed with the plaintiff's contention that defendant's altruism was improper, declaring that "a business corporation is organized and carried on primarily for the profit of the stockholders. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, the reduction of profits, or the nondistribution of profits among stockholders in order to devote them to other purposes."¹⁰⁸ Furthermore, the court stated, "[I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others."¹⁰⁹ Ford was ordered to resume paying dividends to its shareholders for failing to pursue shareholder wealth maximization.¹¹⁰ The holding in *Dodge* stands for the proposition that the purpose of a corporation is to maximize its profits for its investors, and that a director breaches his fiduciary duties to shareholders when his priorities are otherwise.¹¹¹

In many ways, this shareholder-centric view on corporate purpose loses sight of the goals that states sought to achieve by granting corporate charters in the first place, as listed in Part I of this Note. As discussed, states are motivated to seek corporate charters to promote social as well as economic stability within its borders—these benefits are not merely incidental from the states' point of view. A state and its citizens are stakeholders in corporate activity. Those employed by the corporation tend to be citizens of the state in which it is incorporated; in many situations, the corporation harvests local resources and transacts with local businesses. Furthermore, the consequences of corporate activity are often realized by those living within the proximity of where such activity is conducted. Ford recognized this when he defended his actions by arguing that catering to customer and employee interests better served the corporation, and its shareholders, in the long run.

¹⁰⁷ *Dodge*, 170 N.W. at 676-77.

¹⁰⁸ *Id.* at 684.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 685.

¹¹¹ See *id.* It should be noted that the court did not enjoin Ford from his proposed expansions. *Case Law on the Fiduciary Duties of Directors to Maximize the Wealth of Corporate Shareholders*, PROFESSORBAINBRIDGE.COM (May 5, 2012), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/case-law-on-the-fiduciary-duty-of-directors-to-maximize-the-wealth-of-corporate-shareholders.html#_ftn1. The decision does not hold that directors breach their fiduciary duties to shareholders by merely considering the social impact of the corporation's conduct, nor that court's will interfere with director judgments so as to ensure that each decision is geared towards wealth-maximization. *Id.* Such decisions are protected under the Business Judgment Rule. *Id.* The holding does, however, stand for the proposition that directors may not use their judgment in directing corporate actions for the purpose of social benefits at the expense of shareholder wealth maximization. *Id.*

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In later holdings, courts appeared to indicate that director decisions geared towards enhancing social benefits might be protected if they were likely to directly benefit the corporation and its shareholders. In *Shlensky v. Wrigley*,¹¹² the plaintiff filed a stockholder derivative suit against the directors of Chicago National League Ball Club, Inc., owner of the Chicago Cubs and operators of their home stadium, Wrigley Field. The complaint charged defendants with negligence and mismanagement in refusing to schedule games at night, which affected shareholder profits.¹¹³ The defendant had argued that night games could lead to the deterioration and decrease in property values of the neighborhoods surrounding Wrigley Field.¹¹⁴ The court held that, “in the absence of a clear showing of dereliction of duty on the part of specific directors,” courts will not “require [directors] to forego their business judgment because of the decisions of directors of other companies.”¹¹⁵ In *A.P. Smith Manufacturing Co. v. Barlow*,¹¹⁶ the court was presented with a shareholder challenge to a corporate decision to donate money to Princeton University. The court held that charitable donations are a permissible exercise of director authority, provided that the donation benefits the corporation in some way,¹¹⁷ and the amount donated is reasonable.¹¹⁸

While these holdings demonstrate that courts will protect the altruistic conduct of a director under the business judgment rule, there must be some indicia that the decision also benefits the corporation, and thus shareholders.¹¹⁹ Because these decisions must be justified as a benefit to the corporation, the wealth-maximization or “profit-motive” prevails in state corporate law today. This view illustrates the law’s perspective that shareholder interests take priority over stakeholder interests wherever the two are at odds with one another.

The view that the primary purpose of corporations is shareholder wealth maximization has been a source of controversy and major challenge to inducing corporations to act socially responsible. Indeed, the popular conception that “corporations are evil” may very well be traced to this profit-motive standard, as there are those who reason that, corporate personhood, driven by the profit-motive, creates an institution “untouched by . . . moral reasoning.”¹²⁰ After all, it is conceivable that the situations that gave rise to the egregious human rights violations in *Kiobel* or the oil spills in the Gulf Coast would be less frequent if the priorities were structured in such a way that placed the interests of corporate stakeholders on equal or greater footing as those who have invested money in the venture. Because the law has enforced the profit-motive standard, advocates of this position argue, “The problem isn’t when corporations go wrong. The problem is when they go *right*.”¹²¹

¹¹² 237 N.E.2d 776 (Ill. App. Ct. 1968).

¹¹³ *Id.* at 777-78. Plaintiff alleged that the Chicago Cubs were the only team that did not schedule night games and that other teams scheduled night games so as to maximize attendance and revenue. *Id.*

¹¹⁴ *Id.* at 778.

¹¹⁵ *Id.* at 776.

¹¹⁶ 98 A.2d 581 (N.J. 1953).

¹¹⁷ The court accepted the president’s argument that the contributions were a sound investment; the public expects corporations to aid philanthropic institutions and that corporations obtain good will by doing so. *Id.* at 590.

¹¹⁸ *Id.* In approving the donation, the court noted that it was “modest in amount.” *Id.*

¹¹⁹ See Jay Michaelson, *Are Corporations Evil?*, JEWISH DAILY FORWARD (July 28, 2010), <http://forward.com/articles/129678/are-corporations-evil/#ixzz2J5IB8HXG> (“Even when corporations give money to charity, or choose an ethical way of doing business, they are required to justify the decision by saying that it’ll ultimately pay off financially, perhaps in the form of increased sales or of realizable goodwill.”).

¹²⁰ *Id.*

¹²¹ *Id.*

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Some critics point out that the shareholder-value norm, in prioritizing shareholder interests over all else, actually harms investors. In her new book Lynn Stout, Professor of Corporate and Securities Law at UCLA, argues that emphasis on shareholder value causes corporate executives to abandon long-term performance goals for quick, short-term profits. She writes that this focus, in addition to undermining social interest, “causes companies to indulge in reckless, sociopathic, and socially irresponsible behaviors . . . threaten[ing] the welfare of consumers, employees, communities, and investors alike.”¹²² Using the 2010 BP oil-spill as a case study, she points out that, in addition to the eleven fatalities and the widespread pollution, the spill was a tragedy for the corporation and its investors as well:

By June of 2010, BP had suspended paying its regular dividends, and BP common stock (trading around \$60 before the spill) had plunged to less than \$30 per share. The result was a decline in BP’s total stock market value amounting to nearly \$100 billion. BP’s shareholders were not the only ones to suffer. The value of BP bonds tanked as BP’s credit rating was cut from a prestigious AA to the near-junk status BBB. Other oil companies working in the Gulf were idled, along with BP, due to a government-imposed moratorium on further deepwater drilling in the Gulf. Business owners and workers in the Gulf fishing and tourism industries struggled to make a living. Finally, the Gulf ecosystem itself suffered enormous damage, the full extent of which remains unknown today.¹²³

Professor Stout reports that the executive decision to forego adequate safety procedures was saving BP one million dollars per day.¹²⁴ This risky decision, however, ended up costing the shareholders alone nearly \$100 billion.¹²⁵ The book argues, much like Henry Ford, that shifting the focus of corporate purpose to serve stakeholder interests would benefit corporations, shareholders, and society in general in the long run.¹²⁶

Conversely, there are those who take the position that “the idea that companies have a responsibility to act in the public interest and will profit from doing so is fundamentally flawed,” and support this argument by pointing out that, when public social interests conflict with private profit-maximization interests, corporations will pursue the latter.¹²⁷ Furthermore, even when corporations do act socially responsible, it is not out of consideration or obligation to public interests but, rather, the result of public and corporate interests aligning.¹²⁸ In such cases, some people argue, corporate social responsibility becomes irrelevant because the corporation is still operating under the profit-seeking motive.¹²⁹ A good example is the hybrid car, which came into existence largely in response to environmental concerns engendered by

¹²² STOUT, *supra* note 6, at vi.

¹²³ *Id.* at 1-2.

¹²⁴ *Id.* at 2.

¹²⁵ *Id.*

¹²⁶ *See id.* at 6.

¹²⁷ Ancel Kamani, *The Case Against Corporate Social Responsibility*, WALL ST. J., Aug. 23, 2010, <http://online.wsj.com/news/articles/SB1000142405274870338004575230112664504890>.

¹²⁸ *Id.*

¹²⁹ *Id.*

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greenhouse gas emissions from automobiles.¹³⁰ When the Toyota Prius, a type of hybrid car,¹³¹ was first introduced into U.S. markets in 2000, ownership of the vehicle was perceived as more of a novelty, and sales paled in comparison to larger, less fuel-efficient vehicles.¹³² Over the past decade, however, with the emergence of greater environmental consciousness and rising gas prices, demand for the vehicle has increased drastically.¹³³ In addition to fuel-economy incentives, nations set on reducing greenhouse gas emissions such as the United States and Japan offer government subsidies and tax credits for Prius owners.¹³⁴ In the first quarter of 2012, the Toyota Prius sold 247,230 units.¹³⁵ In that year, nearly 50,000 Priuses were registered in California alone.¹³⁶ Between 2008 and 2010, before natural disasters in Japan disrupted Toyota's global production and deliveries, the company ranked as the world's number one automaker.¹³⁷

The convergence of factors such as environmental consciousness, rising costs of fuel,¹³⁸ tax incentives, and tighter budgets has initiated an industry trend towards more eco-friendly vehicles.¹³⁹ Toyota's success with the Prius has inspired other automobile manufacturers to follow suit; many now offer multiple forms of hybrid vehicles.¹⁴⁰ A recent survey indicated that two-thirds of consumers expect that the next vehicle they buy will offer

¹³⁰ See generally Bradly Berman, *When Old Things Turn Into New Again*, N.Y. TIMES (Oct. 24, 2007), http://www.nytimes.com/2007/10/24/automobiles/autospecial/24history.html?_r=0.

¹³¹ Unlike vehicles with conventional power trains, Toyota's Prius combines electricity and gas-powered engines to optimal fuel economy. David Schepp, *Toyota Prius Hits Million-Sale Milestone in U.S.*, DAILY FIN. (Apr. 6, 2011, 4:15 PM), <http://www.dailyfinance.com/2011/04/06/toyota-prius-hits-million-sale-milestone-us/>.

¹³² See Brad Tuttle, *Toyota Prius: Niche Car No More*, TIME, May 29, 2012, <http://business.time.com/2012/05/29/toyota-prius-niche-car-no-more/> (indicating that, while the U.S. sold out of its initial production run of 12,000 cars in 2000, that number was small in comparison to the amount of SUVs being sold at the time).

¹³³ *Id.*

¹³⁴ Schepp, *supra* note 131.

¹³⁵ Alan Ohnsman & Yuki Hagiwara, *Toyota Prius Escapes Niche Surge Into Global Top Three*, BLOOMBERG (May 29, 2012, 4:07 PM), <http://www.bloombrg.com/news/2012-05-29/toyota-prius-escapes-niche-to-surge-into-global-top-three.html>.

¹³⁶ Justin Ewers, *Climbing Gas Prices Can't Slow Down California's Auto Sales*, CAL. ECON. SUMMIT (Oct. 19, 2012), <http://www.caeconomy.org/rcporting/entry/climbing-gas-prices-cant-slow-down-californias-auto-sales> (noting that high gas prices in California explained consumer preference for the hybrid).

¹³⁷ Ohnsman & Hagiwara, *supra* note 135.

¹³⁸ The authors of this Note point out that, domestically, gas prices in 2008 were at record highs and the United States had just entered a recession. See *Weekly U.S. All Grades All Formulations Retail Gas Prices*, EIA, http://www.eia.gov/dnav/pct/hist/LcafHandler.ashx?n=PET&s=EMM_EPM0_PTE_NUS_DPG&f=W (last visited Dec. 26, 2013).

¹³⁹ See Schepp, *supra* note 131 (noting that, with the success of the Prius, Toyota has "put the stake in the ground that everyone else is now scrambling around."). Nonetheless, the Ford F-Series pick-up truck once again topped sales charts in the United States, and the demand for vehicles with high greenhouse gas emissions is still in force. Cars.com, *Kicking the Tires, Top 10 Best-Selling Cars: August 2012*, WASH. POST, Sept. 4, 2012, http://www.washingtonpost.com/blogs/kicking-tires/post/top-10-best-selling-cars-august-2012/2012/09/04/e3c7031c-f6c5-11e1-a93b-7185c3f88849_blog.html.

¹⁴⁰ Brad Tuttle, *Hybrid-Car Competition Heats Up: Does the Toyota Prius Finally Have a Worthy Challenger?*, TIME, Feb. 5, 2013, <http://business.time.com/2013/02/05/hybrid-car-competition-heats-up-does-the-toyota-prius-finally-have-a-worthy-challenger/>.

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better fuel economy,¹⁴¹ and even non-hybrid vehicles are being developed with this in mind.¹⁴²

While use of vehicles with lower green house gas emissions may have been the socio-environmental result desired, to say that Toyota and other manufacturers were motivated to create them primarily by environmental concerns would likely be a misconception. The same could be said of consumer's motivation to buy these vehicles, which created the demand for them. At least one consumer report indicated that on a list of reasons why consumers would buy a hybrid vehicle, lower fuel costs ranked number one, outranking the environmentally friendly responses by at least 27%.¹⁴³ Additionally, sales of hybrid vehicles—which tend to have a higher price tag than strictly gas-powered vehicles¹⁴⁴—tend to rise and fall with the price people pay at the pump.¹⁴⁵ This demonstrates that people, like corporations, are also driven by the profit motive and will prioritize their own welfare above the collective. Given these facts, it requires no leap in logic to justify the conclusion that rising gas prices and tighter budgets were major factors contributing to the success of the hybrid vehicle.

Those who claim that corporate social responsibility is an illusion attribute the success of the hybrid vehicle to the profit-maximizing incentive that motivates most successful companies. They view the rise of the hybrid car as a response to an economic demand that fortuitously coincided with environmental benefits.¹⁴⁶ This argument supports the notion that corporations are not, in fact, evil. They are merely amoral and highly responsive to market forces. Under this line of reasoning, corporate conduct is a mirror image of consumer behavior. When consumers, who are driven by their own profit-motive, value something, the company that offers it to them will be rewarded for doing so. From this perspective, corporate decisions made in consideration of social benefits are merely a fortunate byproduct of a system that typically goes the other way. Advocates of this position point out that, when corporate profits and public social interests are in opposition to one another, directors are unlikely to act against the interests of their shareholders. In fact, they may risk legal sanctions or even their jobs by doing so.¹⁴⁷

¹⁴¹ Jeff Bartlett, *Survey: Car Shoppers Want Better Fuel Economy, Here's Why*, CONSUMERREPORTS.ORG. (Feb. 4, 2013, 12:23 PM), <http://news.consumerreports.org/cars/2013/02/2013-car-brand-perception-survey-car-shoppers-want-better-fuel-economy-heres-why.html>.

¹⁴² See Brad Tuttle, *How the Heck are SUV Sales Hot Again?*, TIME, May 18, 2012, <http://business.time.com/2012/05/18/how-the-heck-are-suv-sales-hot-again/> (noting that fuel inefficient models such as the Hummer and the Excursion are no longer being manufactured and that "[t]he fastest-growing SUVs are what might be called anti-Hummers: small, remarkably fuel-efficient SUVs such as the Honda CR-V, Ford Escape, and the new Mazda CX-5).

¹⁴³ Bartlett, *supra* note 141.

¹⁴⁴ See *Hybrids and Diesels: Do They Save Money?*, CONSUMERREPORTS.ORG, <http://consumerreports.org/cro/2012/01/hybrids-diesels-do-they-save-money/index.htm> (last updated Feb. 2012).

¹⁴⁵ See *id.*; Ohnsman & Hagiwara, *supra* note 135 (quoting independent analyst, John Wolkonowicz, who specializes in automotive history, as saying that Toyota Prius sales rise and fall in tandem with gas prices).

¹⁴⁶ See Kamani, *supra* note 127.

¹⁴⁷ See *id.* (noting that corporate executives are elected to their office by shareholders who hire them to maximize profits and that "[t]he movement for corporate social responsibility is in direct opposition, in such cases, to the movement for better corporate governance, which demands that managers fulfill their fiduciary duty to act in the shareholders' interest or be relieved of their responsibilities").

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The modern corporation is largely the result of two events: first, the adoption of general incorporation statutes, and, second, the widespread acceptance of the shareholder profit-maximizing norm. As mentioned above, the decision of state legislatures to stray away from independent and specific grants of corporate charters was largely the result of the belief that private enterprise is good for society.¹⁴⁸ In addition, the shift to the profit-maximizing norm was founded largely on the acceptance of the Milton Friedman's belief that, the free market, the foundation of our economic system, depended on the protection of shareholders' proprietary interest in the corporation.¹⁴⁹

E. *The Unique Dynamics of Multinational Corporations*

From a historical perspective, globalization began when the first movement of people left Africa for other parts of the world, bringing their customs and ideas with them.¹⁵⁰ The trade of goods and services, if not the purpose for these migrations, was often a byproduct of them. Indeed, the European colonization of North America can be traced back to Christopher Columbus' royally sanctioned search for greener pastures and trade opportunity.¹⁵¹ Transnational business is nothing new. Though the basic concept has not changed over time, modern modes of transportation and communication allow for quicker, more effective trade of ideas and goods. While some view the increase of transnational business interactions as facilitating a destructive interdependence among nations, others see great potential in the transnational exchange of goods and ideas.¹⁵² While both positions are amply supported, the fact remains that globalization is a practice as old as man and business is booming on the transnational stage. Furthermore, the corporation's role is growing: "Increasingly, the scale and complexity of modern business activity demand that it be conducted in corporate form rather than by individual entrepreneurs. . . . On an international level, business activity tends to be even more complex and to demand even larger aggregations of capital, equipment and skill."¹⁵³

Indeed, the challenges to corporate law are exacerbated when placed in the international context, where what may seem commonplace domestically may be handled differently abroad. Take, for example, the rights of domestic firms incorporated in one state

¹⁴⁸ See *supra* Part I. See CHAMBERLAIN, *supra* note 18, at 3, for a discussion on the rationale for the social value of increasing private enterprise, namely that "every business was of public importance in the respect that it might increase the aggregate wealth of society."

¹⁴⁹ MILTON FRIEDMAN & ROSE FRIEDMAN, CAPITALISM AND FREEDOM 133 (40th Anniversary ed. 2002) ("Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for stockholders as possible.").

¹⁵⁰ *History of Globalization*, YALE GLOBAL ONLINE, <http://yaleglobal.yale.edu/about/history.jsp> (last visited Dec. 30, 2013).

¹⁵¹ See Valeric I.J. Flint, *Christopher Columbus*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/127070/Christopher-Columbus> (last visited Dec. 26, 2013) (indicating that the journey that led Christopher Columbus to the Americas was primarily motivated by the "Christian missionary and anti-Islamic fervour . . . the lust for gold, the desire for adventure, the hope of conquests, and Europe's genuine need for a reliable supply of herbs and spices for cooking, preserving, and medicine.").

¹⁵² *Globalization*, *supra* note 150.

¹⁵³ VAGTS, *supra* note 36, at 98.

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to sue in other states. In *Bank of Augusta v. Earle*,¹⁵⁴ the defendant in error argued that a corporation must “necessarily be incapable” of contracting outside of the limits of the state of its incorporation because (1) the “laws of a state can have no extra-territorial operation” and (2) “a corporation is the mere creature of a law of the state.”¹⁵⁵ Rejecting this argument, the Court held that a corporation of a foreign state is permitted to file a legal action outside of the limits of its state of incorporation due to the applicability of the doctrine of comity—traditionally a principle of international law—to the domestic dispute.¹⁵⁶

While U.S. domestic law eventually developed to recognize the legal existence of foreign corporations, whether from other states or from other countries, for the purpose of bringing a law suit, the same cannot always be said of foreign nations.¹⁵⁷ For example, France will only permit a foreign corporation to file suit in France provided that the corporation’s country of incorporation grants that right, or a treaty grants that right.¹⁵⁸ But where no such treaty exists or comity is lacking, a foreign corporation may experience difficulty in having its rights recognized by the nation in which it wishes conduct business.¹⁵⁹

An international setting complicates internal corporate regulation and the source of and goals for CSR. Even though MNCs can be credited for creating local jobs and taxable revenues, any attempt to measure the true impact of MNCs on local economies must also include other factors that the influx of jobs and tax revenues often overshadow. For example, profits from MNC activity are rarely kept in the host country but, rather, are brought into the country in which the MNC is headquartered.¹⁶⁰ This is problematic where a number of large MNCs generate more revenue than the GDP of some major nations,¹⁶¹ gained by activity that imposes large social and environmental costs on host nations and the people who live there. Using *Kiobel* as an example, the fact that opposition by locals affected by oil-production efforts in Nigeria has become militant may be good evidence that the socio-environmental burdens imposed on a host nation are not justified by the economic benefits brought by MNCs.

The economic status of host nations, some of which are developing third-world countries, also frustrates attempts to encourage corporate social responsibility. Here, the race-to-the-bottom theory has dire implications for nations desperate for economic growth. In nations where minimum wages are much lower than the domestic average, MNCs are in a

¹⁵⁴ 38 U.S. 519 (1839) (action on a bill of exchange brought by a Georgia corporation against an Alabama defendant).

¹⁵⁵ *Id.* at 588.

¹⁵⁶ *Id.* at 590 (“The intimate union of [the States], as members of the same great political family . . . [and] the deep and vital interests which bind them so closely together . . . should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness toward one another, than we should be authorized to presume between foreign nations.”).

¹⁵⁷ See VAGTS, *supra* note 36, at 101.

¹⁵⁸ *Id.* (“Modern treaties of friendship, commerce and navigation typically guarantee that right [to sue].”).

¹⁵⁹ Notably, even where nations have such agreements, the laws of the nation in which the MNC operates often differ from the laws of the nation that granted its corporate charter, bringing it into existence.

¹⁶⁰ BRETT LEE BILLET, INVESTMENT BEHAVIOR OF MULTINATIONAL CORPORATIONS IN DEVELOPING AREAS 66 (1991).

¹⁶¹ See Vincent Trivett, 25 US Mega Corporations: Where They Rank If They Were Countries, BUS. INSIDER (June 27, 2011, 11:27 AM), <http://www.businessinsider.com/25-corporations-bigger-than-countries-2011-6?op=1#ixzz2L7boHiHh> (indicating that Wal-Mart’s revenues are “on par with the GDP of the 25th largest economy in the world [] surpassing 157 smaller countries”).

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position to save large sums of money in operational expenses.¹⁶² Furthermore, MNCs can use their economic influence to exploit relaxed social and environmental regulations enacted by corrupt governments desperate to retain their business.¹⁶³ Finally, the physical distance between the nations where MNCs manufacture goods and the nations where the goods are sold reduces local consumer awareness of the magnitude of these problems or, worse yet, that these problems even exist.¹⁶⁴ As a result, behavior that might otherwise be checked at the cash register is reinforced by consumerism instead.

III. Re-examining the “Purpose” of the Corporation

Private enterprise, if wielded appropriately, offers tremendous value; “[c]orporations are so powerful that ‘[n]o social program can rival the business sector when it comes to creating the jobs, wealth, and innovation that improve standards of living and social conditions over time.’”¹⁶⁵ Economically, corporations have the capital and purchasing power to reduce production costs.¹⁶⁶ Consumers are the beneficiaries of these savings, which are reflected in lower market prices.¹⁶⁷ Large corporations directly employ thousands of people in the communities in which they operate. Indirectly—as large consumers of legal, financial, and other services—corporations keep other firms in business.¹⁶⁸ Furthermore, those who work for larger corporations are more likely to receive fringe benefits and enjoy higher salaries than those who work in smaller firms.¹⁶⁹ The sheer number of jobs offered by corporations alleviates the social burdens of unemployment and strengthens the economy. Additionally, corporations are sources of fee revenues and franchise taxes which may be distributed for the benefit of the state and its citizens.¹⁷⁰ The corporation’s ability to address state social and economic issues more effectively than other types of organizations derives from the internal structure and legal privileges bestowed upon it.¹⁷¹ While the potential of the

¹⁶² GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM* 25 (2007).

¹⁶³ *Id.* at 26-27.

¹⁶⁴ Lois A. Mohr, Deborah J. Webb, & Katherine E. Harris, *Do Consumers Expect to be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, 35 J. CONSUMER AFF. 1, 48 (2001).

¹⁶⁵ Magaro, *supra* note 90, at 1149 (quoting Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78, 83).

¹⁶⁶ See Thaddeus Herrick, *ChevronTexaco's Merger Savings Could Be as Much as \$2.2 Billion*, WALL ST. J., Nov. 20, 2001, <http://online.wsj.com/article/SB1024517949553199000.html>. Chevron’s 2001 (and 35.1 billion dollar) acquisition of Texaco reportedly cut the firms’ combined costs by greater than \$1.8 billion annually. *Id.* “The[se] savings came from consolidating operations and eliminating redundant costs.” RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, *PRINCIPLES OF CORPORATE FINANCE* 873 (8th ed. 2006) (discussing economies of scale, and how they reduce the operational costs of large, multinational enterprises).

¹⁶⁷ Brian Roach, *Social and Environmental Responsibility of Corporations*, in ENVIRONMENTAL AND SOCIAL ISSUES IN ECONOMICS (2007), http://www.cocarth.org/article/Social_and_environmental_responsibility_of_corporations.

¹⁶⁸ See Bebchuk, *supra* note 17, at 1443 (“Incorporations . . . provide patronage for local law firms, corporation service companies, and other businesses.”).

¹⁶⁹ Roach, *supra* note 167.

¹⁷⁰ Bebchuk, *supra* note 17, at 1443.

¹⁷¹ See Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL’Y REV. 1, 6 (2008) (“These public supports of corporations are important and valuable. . . . Corporations provide one of

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corporate form to create “prodigious social wealth”¹⁷² was the fundamental justification for states’ decision to create these entities by bestowing the special privileges on them,¹⁷³ the potential harm a corporation can impose upon society may have been considered with haste.¹⁷⁴ Indeed, the modern corporation often undermines its ability to produce social value, the very quality rendering it worthy of its special privileged status in the first place.¹⁷⁵ Corporations frequently fall short of society’s expectations:

They produce costly externalities; they are amoral; they fail to sustain implicit or explicit commitments to communities; they privilege some stakeholders (shareholder) at the expense of others (for example, employees). They manipulate regulatory oversight and exert disproportionate political power; they compete with other firms to their collective detriment by over-utilizing resource or fouling the environment; they provide cover for managerial self-dealing of various kinds. They privilege the short-term at the expense of the long-term.¹⁷⁶

The harm corporations impose upon society indicates that, perhaps, these pivotal decisions to transform corporate law in the interest of increasing social value should have included necessary procedural protections of the public interest.

As Professor Colombo correctly observes:

The business corporation ‘is not inherently bad, although experience has taught that it can be employed in ways that detract from the common good.’ [Therefore the] challenge of corporate law today—and especially for those who advocate corporate government reforms and greater social responsibility—is to find ways to rein in corporate abuses without sacrificing the tremendous benefits of the corporate form.¹⁷⁷

The ability, and appropriate means, for corporate abuses to be reigned in is directly dependent upon the relationship between the corporation and society, which is informed by corporate purpose. Thus, tinkering with corporate purpose can curb corporate abuse.

society’s most powerful engines of wealth creation, and the nation as a whole enjoys more abundance because of them.”).

¹⁷² Magaro, *supra* note 90, at 1150.

¹⁷³ See Bebchuk, *supra* note 17, at 1443.

¹⁷⁴ See Magaro, *supra* note 90, at 1150.

¹⁷⁵ *Id.* (“While corporations are powerful machines capable of creating prodigious societal wealth, they can also run off course and cause great societal harm.”).

¹⁷⁶ Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L. J. 948, 951 (2008) [hereinafter *Proposition: Saving the World with Corporate Law*]. See STOUT, *supra* note 6, for examples of the economic, social, and environmental harm caused by corporate shortcomings. Particularly, “The past dozen years have seen a daisy chain of costly corporate disasters, from massive frauds at Enron, HealthSouth, and Worldcom in the early 2000s, to the near-failure and subsequent costly taxpayer bailout of many of our largest financial institutions in 2008, to the BP oil spill in 2010.” *Id.* at 5.

¹⁷⁷ Colombo, *supra* note 23, at 289.

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A. *The Relationship Between Corporations and Society: Why Corporate Purpose Matters*

The purpose of a corporation directly relates to its role in society. The need to establish the extent of corporations' obligations to society is grounded in the reality that their actions are essentially tied to the inner workings of society, the economy, and government.¹⁷⁸ Therefore, the purpose of incorporation must be precisely defined before a state, by means of corporate law, or the federal government, by means of regulatory legislation, can properly implement a framework to induce the desired effects of the corporate endeavor—namely, to induce corporate behavior in line with its perceived role in society.

These questions concerning the role of the corporation in society refer to questions about corporations' "social responsibility." This Note refers to CSR as the inherent obligations of corporations, whether voluntarily satisfied or mandated by law, as a result of corporations' relationship to society. This concept of CSR refers to *all duties owed beyond the sale of goods and services* by corporations.¹⁷⁹ This definition is in stark contrast to the typical attempts to define CSR in the academic field, which usually define "some" of the duties owed based on various points of reference. (The most common sources used to validate lists of "partial duties" are voluntary moral obligation, long-term profit maximization, and even arguments for government regulation.) This take on the concept of CSR excludes the additional variable of the source of the obligation (moral, self-interested profit maximizing, or legal) to more socially responsible behavior. Questions concerning from where a corporation's obligation of socially responsible behavior is often a source of intense debate and confusion. Removing this variable is therefore immensely valuable to the present discussion, which examines the nature of the corporation's relationship with society as opposed to discussing the best means for enforcing that duty.

To begin, any theory concerning what responsibilities a corporation owes to society will be upon a scholar's fundamental belief of the nature of state corporate law—in particular, the question of whether or not corporate law is public or private law. This Part will, therefore, discuss the public versus private debate of state corporate law and the most relevant theories (and their attendant justifications and flaws) arising from this distinction, namely the shareholder primacy model, the stakeholder model, and new perspectives advanced by scholars recently attempting to reconcile the two aforementioned models.

B. *Corporate Law: Public or Private Law?*

As explained above, the historical context surrounding the development of the corporate form suggests that the original purpose of creating the corporate form was based upon a corporation's ability to contribute social value and promote the public interest.¹⁸⁰

¹⁷⁸ See *Saving the World with Corporate Law*, *supra* note 176, at 948 ("Large, multinational corporations are immensely powerful—affecting investors, workers, governments, communities, and ecosystems the world over—and the law that governs them creates, channels, and cabins that power."); see also RICHARD N. FARMER & W. DICKERSON HOGUE, *CORPORATE SOCIAL RESPONSIBILITY* 5 (2d ed. 1985) (pointing out that corporations are becoming increasingly powerful and, the bigger they become, the greater their influence they have on society).

¹⁷⁹ See HENRY C. WALLICH, *Second Lecture*, in *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY* 37, 39–40 (1972).

¹⁸⁰ See *supra* Part I.A.

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Presently, however, the mainstream conception of the corporation is to advance one purpose and one purpose alone: maximizing shareholder profits.¹⁸¹ The debate over whether state corporate law is private or public in nature offers insight into how these two conceptions of corporate purpose have evolved. In the corporate-law-is-private-law camp, corporate law is considered the result of private citizen contracts that is constitutionally protected and, therefore, beyond the reach of the government to impose restrictions on purpose (and, in particular, restrict the corporate purpose to purposes serving the public interest).¹⁸² In contrast, the corporate-law-is-public-law camp argues that corporations are “artificial social constructions that owe their existence entirely to positive acts of legislation” and, as a result, a state legislature possesses the power to define the internal structures of the entity it grants special privileges to and modify those rules as it sees necessary to align it with the public welfare.¹⁸³

Ironically, “[t]he ideological fronts are curiously inverted on this issue.”¹⁸⁴ “The conservative side, usually willing to pay tribute to tradition and history, here leans on the abstract reasoning of the law of contract. The liberal side, usually no great admirer of the paraphernalia of the past, acknowledges a line of reasoning that has strong historical overtones.”¹⁸⁵

The private law of contract is currently the dominant conception of corporate law.¹⁸⁶ According to Daniel Fischel, corporations are “nothing more than an arena in which suppliers of capital, labor, services, materials, and other necessary contributions come together to pursue their own interests through bargain and exchange.”¹⁸⁷ Accordingly, the corporation is considered to be a product of “private contract” instead of a “creature of the state.”¹⁸⁸ This result obviates arguments for CSR because “corporations were only an embodiment of private arrangement, they were seen as ‘incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.’”¹⁸⁹

Proponents for contract views of the corporation justify the transformation of corporate law from public to private in nature with examples such as reduced state involvement in incorporation procedures, the broad powers expressed in charters, and the

¹⁸¹ Lynn Stout, *HBR Blog Network, Why Do Corporations Need a Single Purpose*, HARV. BUS. REV. (May 29, 2012, 5:14 PM), http://blogs.hbr.org/cs/2012/05/why_do_corporations_need_a_sin.html (arguing that the conception that corporations must exist only for maximizing shareholder profits is misguided).

¹⁸² See GREENFIELD, *supra* note 29, at 29-30 (explaining the dominant, and, in Greenfield's opinion, erroneous view of corporate law which is premised on the Supreme Court's decision in *Lochner*).

¹⁸³ William Bradford, *Beyond Good and Evil: The commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J. L. ETHICS & PUB. POL'Y 141, 189 (2012).

¹⁸⁴ WALLICH, *supra* note 179, at 37.

¹⁸⁵ *Id.*

¹⁸⁶ See GREENFIELD, *supra* note 29, at 30. This is known as the “nexus-of-contracts” interpretation of corporate law, which is founded on the belief that corporations are simply the result of many contracts between the participating parties. *Id.* This view can be considered a “vehemently private view of the corporation” stripping it of all public qualities. *Id.* (“The contractual model sees the corporate form not as a juridical legal person created by the legislature but a legal form created through a multitude of private contractual relationships.”).

¹⁸⁷ Daniel Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273-74 (1982).

¹⁸⁸ See *id.* (“Because the corporation is a particular type of firm formed by individuals acting voluntarily and for their mutual benefit, it can far more reasonably be viewed as the product of private contract than as a creature of the state.”).

¹⁸⁹ GREENFIELD, *supra* note 29, at 30.

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widely utilized and accepted manipulation of different organizational forms for tax and limited liability purposes.¹⁹⁰ “The very term ‘corporation’ is no longer descriptive of the uncorporeal shell that is being brought into the world,”¹⁹¹ but simply, a “private transaction or set of transactions in the market, to which only restitutive, non-distributive, justice issue apply.”¹⁹²

With regard to the CSR of the corporation, the creation of private contractual relationships within the corporation “occupy a prelegal, prepolitical, and perhaps even super-constitutional status[.]”¹⁹³ which insulates the corporation from politics and concerns of the public interest.¹⁹⁴ Instead, the responsibility of the corporation is limited to the “rights and responsibilities contained within the ‘contract’ between management and shareholders.”¹⁹⁵ A corporation’s decision to act in a way that benefits society should only be born from a self-interested desire to improve its own status—for example, boosting its reputation.¹⁹⁶ To provide an example of the extent of this ‘insulation’ from political influence, corporations searching all corners of the planet for the cheapest (and likely child) labor is considered to be none of their concern¹⁹⁷ because, as proponents of this view suggest, decisions of the private company are subject to the market and the market only.¹⁹⁸

In contrast to the private-contract model of corporate law, many legal scholars argue that corporate law is inherently public in nature.¹⁹⁹ These critics, like Professor Kent Greenfield, criticize the private-contract conception of corporate law as an archaic approach to free market capitalism.²⁰⁰ He argues that corporate law theorists who attempt to “shield corporate law from the concerns of the public make the same mistake that the famous—and famously wrong—1905 Supreme Court case of *Lochner v. New York*²⁰¹ made in constitutional law.”²⁰² *Lochner*, and the laissez-faire approach, relied on the assumption that markets are perfect and the government is overstepping its constitutional boundaries by regulating private contract.²⁰³

¹⁹⁰ WALlich, *supra* note 179, at 37.

¹⁹¹ *Id.*

¹⁹² *Markets and Democracy*, *supra* note 86, at 44.

¹⁹³ GREENFIELD, *supra* note 29, at 32 (explaining proponents of private-contract model believe that “[t]he internal affairs of corporations are not, and should not be, subject to the political process.”).

¹⁹⁴ *Id.* at 30.

¹⁹⁵ *Id.* at 29.

¹⁹⁶ See HENRY G. MANNE, *First Lecture*, in *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY* 1,1 (1972).

¹⁹⁷ See, e.g., GREENFIELD, *supra* note 29, at 32 (describing the contractarian view, with which Greenfield disagrees).

¹⁹⁸ See *Markets and Democracy*, *supra* note 86, at 52.

¹⁹⁹ See, e.g., GREENFIELD, *supra* note 29.

²⁰⁰ See *id.* at 29-39.

²⁰¹ 198 U.S. 45 (1905) (holding that a state statute limiting how many hours an employer could allow an employee to work in a bakery was unconstitutionally intrusive on citizens’ right to enter into private contracts). *Lochner* was famously overturned by *Ferguson v. Skrupa* in 1963 and is now accepted as a catastrophically incorrect assumption that “the common law and the laissez-faire marketplace are prepolitical, neutral, and insulated from government regulation.” GREENFIELD, *supra* note 29, at 29.

²⁰² See GREENFIELD, *supra* note 29, at 29; see also *Markets and Democracy*, *supra* note 86, at 44 (“For much the same reasons that have led us to reject *Lochner* and laissez-faire generally, the claim that the market for corporate law is fair or non-coercive must fail.”).

²⁰³ GREENFIELD, *supra* note 29, at 29.

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The analogy between *Lochner* and proponents of the private-contract model is based on the assertion that the market participants, who voluntarily participate in the creation of the “contractual web” that is the corporation, will negotiate for law that protects their interests.²⁰⁴ This assumption suggests “the economic markets in which corporations participate will generate the appropriate legal regulation or guidance by their own processes.”²⁰⁵ Since the era of *Lochner*, markets have been heavily mediated by market regulation; paradoxically, however, the proponents of contract theory suggest that firms—acting as markets for contracts—should be beyond the reach of government interference.²⁰⁶ The days of *Lochner* are long in the past, but the arguments for the private contract model are alive and well,²⁰⁷ and its critics argue that it can only be seen as a veiled attempt to revitalized archaic and long-debunked interpretation of how the free market functions. In sum, “[t]o allow a market—or a firm recharacterized as a market—to set its own rules is unlikely to reach results satisfactory to self-governing people. Or so we have presumed since the demise of *Lochner*.”²⁰⁸ Accordingly “[o]ne cannot protect corporate governance from politics on the ground that it belongs in the private realm any more than *Lochner* could protect contract law from politics because it was private law.”²⁰⁹ These attempts, as in *Lochner*, “exaggerate the importance of property and contract . . . [and] exaggerate private right at the expense of the public interest.”²¹⁰

Advocates for the recognition of corporate law as public law argue “corporate law, just like every other area of common and statutory law, is predicated upon our collective political decisions about what we want our society to look like.”²¹¹ The view that corporations have a social responsibility has “deep roots” in the history of corporate law.²¹² Furthermore, “the widespread belief that corporations have a special responsibility to society draws nourishment from the assertion that corporations are creatures of the state, originally

²⁰⁴ *Markets and Democracy*, *supra* note 86, at 52. This assertion assumed that markets are perfect and parties entering into contracts possess equal bargaining power.

²⁰⁵ *Id.* at 52.

²⁰⁶ *Id.*

²⁰⁷ See generally Colombo, *supra* note 23, at 252.

²⁰⁸ *Markets and Democracy*, *supra* note 86, at 42. Professor Wallich emphasizes the shortcomings of the marketplace in the following excerpt:

In evaluating the role of the market, the critical issue is not only “how perfect” it is in a technical sense. Externalities need to be considered. And even in their absence, the workings of the market may not be what society considers optimal, for instance with respect to the distribution of income. Through the political process, people may establish a hierarchy of values different from that which their market behavior brings about. To take another example, the valuation placed on the future may not be correctly expressed by the market rate of interest, which, employed as a discount factor, would make the world of our great-grandchildren worth a great deal less than we may intuitively believe it to be.

WALLICH, *supra* note 179, at 44.

²⁰⁹ GREENFIELD, *supra* note 29, at 35.

²¹⁰ *Id.* (internal quotation marks omitted).

²¹¹ *Id.* at 37.

²¹² WALLICH, *supra* note 179, at 37; see also GREENFIELD, *supra* note 29, at 35. (“In exchange for receiving the special benefits of incorporation, including limited liability for shareholders, corporations were chartered for some public purpose.”).

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created by act of the sovereign.”²¹³ As a result, “[i]f under existing law corporations do not function to benefit society in an equitable fashion, or if corporations impose too many externalities upon stakeholders, then the law must yield in the interest of social welfare, and new laws must be instituted to attenuate corporate pathologies.”²¹⁴ Public-law theorists of corporate law refer to the current model of private-contract as a “mythology” and must be adapted to the function it in fact performs in the real world.²¹⁵ To render corporate law a reflection of reality, the public corporation must be recognized for what it truly is: “a public institution with public obligations.”²¹⁶

IV. The Road To Reform

In adopting a model of corporate purpose that will lead to more socially responsible corporations, a system should be geared towards aligning public social interests with private corporate interests. Such a mechanism involves change in two areas. First, there must be a degree of external federal regulation of MNC conduct. Second, there must be a change in the way corporations operate internally, via reform of state corporate law. A workable implementation of this proposal involves reformation in both areas, as each functioning independently will not succeed in accomplishing this goal.

In the following discussion, we will first examine the pros and cons of external regulation as a means to enforce the social responsibilities of corporations. Next, we will examine that feasibility of reforming state corporate law to alter the internal decision-making structure in such a way that aligns director and executive decisions with the corporation’s social responsibilities. Finally, we will briefly examine the voluntary compliance system that can be adopted by corporations as a means of creating all stakeholder—including shareholder—wealth.

A. External Regulation

External regulation, sometimes referred to as “command and control, is the imposition of legal obligations on corporations to coerce behavior that is in the public interests.”²¹⁷ Advocates for regulation argue that without any legal accountability, corporations have no incentive to act in the public interest when doing so undermines profit maximization. They argue “corporations will not, through their own generosity, internalize

²¹³ WALLICH, *supra* note 179, at 39 (“In any event, the issue is not whether the private corporation can or cannot legitimately be required by society to perform certain functions. In an age when the corporate income tax rate is 48 percent, it should be obvious that society can make corporations do anything it wants.”).

²¹⁴ Bradford, *supra* note 183, at 189.

²¹⁵ *Preface to PROGRESSIVE CORPORATE LAW*, at xiii, xiii (Lawrence E. Mitchell ed., 1995) (“Our historical treatment of the corporation as a public good in the private service can no longer be sustained. Whatever might have been true in the earlier days of industrialization now clearly is mythology.”).

²¹⁶ *Id.* (“As we turn to a new century, the second century of corporate law, it is necessary to begin to evaluate the extent to which corporate invention must be adapted to the task it now in fact performs.”).

²¹⁷ JENNIFER A. ZERK, *MULTATIONALS AND CORPORATE SOCIAL RESPONSIBILITY* 36 (James Crawford & John S. Bell eds., 2006) (“Command and control refers to the imposition of a minimum legislative standard, which is the backed up by legal sanctions.”).

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the external costs of their decisions or keep an eye on the social harms they produce.”²¹⁸ Here, the only forces likely to induce CSR are deterrents such as negative publicity, which undermines profit maximization. In such a situation, any socially responsible behavior is the result of the self-interested pursuit of corporate profits—for example, garnering a better reputation or attracting the capital of socially responsible investors (“SRIs”). Congress currently employs external regulation via labor laws, including minimum wage and anti-discrimination practices,²¹⁹ as well as securities regulation,²²⁰ and environmental regulation.²²¹

Those who oppose external regulation argue “the corporation does not stand apart from society and functions best when it gets back to basics, when it is freed of government regulation and constraints and discards social engineering in favor of just plain engineering.”²²² Furthermore, some critics of regulation say that imposing legal standards turns directors’ and executives’ focus from implementing voluntary programs to attempting to circumvent the laws.²²³ However, in light of the catastrophic events outlined in the introduction of this Note, the results of a system lacking external regulations can clearly be seen.

While particular external regulation exceeds the scope of this Note, suggestions for future scholarly research include: (1) recognizing criminal liability for legal entities, (2) sanctions for green-washing,²²⁴ (3) increasing mandatory disclosures under the SEC for topics such as long-term social and environmental plans and annual CSR disclosures, among others.

B. Internal Regulation

Internal regulation is the manipulation of corporate decision-making mechanisms by reforming the structural framework of the corporate entity imposed by state corporate law.²²⁵ Advocates for the internal regulation of corporate entities suggest “if we believe that non-shareholder stakeholders need more regulatory protection than they now receive, then it is foolish and inefficient as a matter of public policy to leave corporate law as an untapped resource.”²²⁶ Internal regulation is arguably more efficient than external regulation because,

²¹⁸ GREENFIELD, *supra* note 29, at 134. Professor Greenfield claims the idea that the law is “the proper vehicle to make sure corporations both generate broad social wealth and compensate for negative externalities borders on the obvious.” *Id.*

²¹⁹ See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2012); Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e to -17 (2011).

²²⁰ See generally Securities Act of 1933, 15 U.S.C. § 77a-mm (2012).

²²¹ See, e.g., Clean Air Act of 1963, 42 U.S.C. §§ 7401–7671q (2012).

²²² PETER SCHWARTZ & BLAIR GIBB, WHEN GOOD COMPANIES DO BAD THINGS 96 (1999) (proponents of this view argue “that shareholder value is the only value that matters”).

²²³ See Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 18-23 (2012).

²²⁴ “A play on ‘whitewashing—using white paint to cover over dirt in a superficial or transparent way—the term ‘greenwashing’ . . . signif[i]es insincere, dubious, inflated, or misleading environmental claims.” Miriam A. Cherry & Judd F. Sncirson, *Chevron, Greenwashing, and the Myth of “Green Oil Companies,”* 3 WASH. & LEE J. ENERGY, CLIMATE, & ENV’T 133, 140-41 (2012) (pointing out the term greenwashing was first coined by Jay Westerveld in 1986 in response to a hotel’s campaign encouraging guests to be environmentally friendly by reusing towels despite the probable ulterior motive of saving money); see also Miriam A. Cherry & Judd Sncirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983 (2011).

²²⁵ GREENFIELD, *supra* note 29, at 127.

²²⁶ *Proposition: Saving the World with Corporate Law*, *supra* note 176, at 974.

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unlike external regulation, which is mostly reactive, internal regulation is “proactive in addressing issues of social concern. . . .”²²⁷ Since state corporate law mandates the framework that corporate decision makers function within, reforming state law can be an efficient means of inducing CSR from the inside instead of the outside.²²⁸ Depending on the standards imposed by corporate law, “corporate managers would make different decisions. If they were told they should consider other values, they would do so more often. If they were told to treat employees (or customers, pensioners, local governments, creditors or the biosphere) as partners rather than opponents, they would do so more often.”²²⁹ Opponents of internal regulation are those adopting the private-contract model of corporate law.²³⁰ As discussed, this school of thought adheres to the notion that the internal structure of the corporation is inherently private and thus beyond the reach of governmental manipulation.

Examples of proposed internal regulatory reform are as follows: (1) extending directors and executives fiduciary duties to non-shareholder stakeholders who are currently unprotected by the shareholder profit-maximizing norm, (2) requiring representation of non-shareholder stakeholders on the corporate board of directors, (3) requiring economic, social and environmental mission statement in corporate charters as a requirement to the documents that bring corporations into existence, (4) and most importantly, disbanding the internal affairs doctrine, which otherwise renders these alterations irrelevant.

CONCLUSION

On today’s corporate stage, public concerns play second fiddle to wealth maximization, and a string of precedent supports the theory that socially responsible behavior is not the primary consideration of corporate actors. Over the past century, the role of the corporate entity in society has transformed from public benefit to short-term shareholder primacy—i.e., short-term stock price maximization. With this transformation, corporate structure and the law that regulates it has left room for the corporation to pose moral and societal hazards that are at odds with the original purpose of corporations. In most instances, the degeneration of the corporate form is the result of an exploitation of the special privileges inherent in the corporate form, which were extended at a time when the corporate form was designed to serve and advance a social function that benefited the state and its citizens. To make matters worse, managers, by focusing on short-term stock price, are likely to severely deter shareholder profit in the long term.

A system of law that fails to adequately punish and even creates incentives for MNCs to commit egregious environmental and human rights violations is demonstrative of the present state of social values and priorities. Yet to call the events outlined at the introduction of this Note tragedies fails to acknowledge that these are the result of adverse incentives created by consumer choices and deliberate legislation. Where such forces induce corporate misconduct, an appeal to CSR becomes an unlikely resolution. Instead, a regulatory regime that incorporates the progressive view that the purpose of the corporation is to maximize value, not wealth, of all stakeholders would effectively build “public purpose” into the internal governance of corporations. This would incorporate socially responsible

²²⁷ *Id.*

²²⁸ See *Markets and Democracy*, *supra* note 86, at 48.

²²⁹ *Id.*

²³⁰ See *supra* Part III.B.

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decision making into the process of doing business and would also do a better job at maximizing shareholder value than the current shareholder primacy regime.