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## The Historical and Political Origins of the Corporate Board of Directors

Franklin A. Gevurtz

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## THE HISTORICAL AND POLITICAL ORIGINS OF THE CORPORATE BOARD OF DIRECTORS

*Franklin A. Gevurtz\**

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\* Professor of Law, University of the Pacific, McGeorge School of Law. I want to thank Richard Buxbaum, Michael Malloy, Stephen Bainbridge and the participants at the 2002 U.C.L.A.-U.S.C. Corporate Law Roundtable for their helpful comments. I also wish to thank my research assistants, Daniel Del Rio and Thomas Clark, for their tremendous efforts.

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## I. INTRODUCTION

Over the years, considerable legal scholarship has focused on the liabilities of corporate boards of directors.<sup>1</sup> The composition and procedures of corporate boards, and innumerable proposals to reform the same, have spawned countless books and articles.<sup>2</sup> No doubt recent cor-

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1. See, e.g., DENNIS J. BLOCK ET AL., 1 *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* (5th ed. 1998); Norwood P. Beveridge, Jr., *The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction*, 41 DEPAUL L. REV. 655 (1992); Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1 (1989); Stuart R. Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule*, 62 TEX. L. REV. 591 (1983); Alfred F. Conard, *A Behavioral Analysis of Directors' Liability for Negligence*, 1972 DUKE L.J. 895 (1972); Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945 (1990); Charles Hanson, *The ALI Corporate Governance Project: Of the Duty of Care and the Business Judgment Rule, a Commentary*, 41 BUS. LAW 1237 (1986); Peter Letsou, *Implications of Shareholder Diversification on Corporate Law and Organization: The Case of the Business Judgment Rule*, 77 CHI.-KENT L. REV. 179 (2001); Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Interest Transactions and the ALI's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 954 (1993); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001); Larry D. Soderquist, *The Proper Standard for Director's Negligence Liability*, 66 NOTRE DAME L. REV. 37 (1990). I confess I have contributed my small share to the literature treating corporate directors primarily as a target for legal liability. See, e.g., FRANKLIN A. GEVURTZ, *CORPORATION LAW*, §§ 4.1-4.4 (2000); Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287 (1994).

2. See, e.g., ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 203-10 (2d ed. 2001); AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* §§ 3.02, 3A.01-3A.05 (1994) [hereinafter *PRINCIPLES OF CORPORATE GOVERNANCE*]; MELVIN A. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 149-85 (1976); Robert W. Hamilton, *Corporate Governance in America 1950-2000: Major Changes but Uncertain Benefits*, 25 J. CORP. L. 349 (1999); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999); Laura Lin, *The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence*, 90 NW. U. L. REV. 898 (1996); Charles M. Elson, *The Duty of Care, Compensation, and Stock Ownership*, 63 U. CIN. L. REV. 649 (1995); ABA Committee on Corporate Laws, *Corporate Direc-*

porate scandals will once again produce the question “Where were the directors?” and lead to still more lawsuits against directors, and more calls for reform.<sup>3</sup> Yet, given the constant interest in, and litany of complaints about, corporate boards, perhaps more scholars should ask why corporation laws in the United States, and, indeed, around the world, generally call for corporate governance by or under a board of directors.<sup>4</sup> After all, there are other governance models for a business.<sup>5</sup>

This Article seeks to add to the literature on why boards exist. Moreover, it does so by taking a very different approach in searching for an answer. Instead of theorizing, this Article examines historical sources in order to look at how and why an elected board of directors came to be the accepted mode of corporate governance. The story of how and why corporate boards arose turns out not only to be interesting in its own right, but it shows that the original purpose for having boards was quite different from the purposes argued based upon current economic and organizational theory. This insight, in turn, may help explain the frustrating dissonance between what corporate law currently expects of boards, and what boards, in fact, do.

This examination of the historical and political origins of the corporate board of directors will proceed in four parts. To provide a starting point against which to address the history of corporate boards, Part II of this Article explores the current puzzle presented by the board of direc-

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tor's Guidebook, 49 BUS. LAW. 1243 (1994); Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991); Arthur J. Goldberg, *Debate on Outside Directors*, N.Y. TIMES, Oct. 29, 1972, at 1.

3. See, e.g., Douglas M. Branson, *Enron—When All Systems Fail: Creative Destruction or Roadmap to Corporate Governance Reform?*, 48 VILL. L. REV. 989, 1014-21 (2003); James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077, 1093-95 (2003); Charles M. Elson & Christopher J. Gyves, *The Enron Failure and Corporate Governance Reform*, 38 WAKE FOREST L. REV. 855 (2003); Luca Enriques, *Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms*, 38 WAKE FOREST L. REV. 911, 927-32 (2003); Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1234-35 (2002); Klaus J. Hopt, *Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron* (ECGI, Working Paper No. 05/2002, 2002).

4. For a discussion of the leading scholarship addressing this subject, see *infra* text accompanying notes 6-7, 15.

5. See, e.g., REV'D UNIF. P'SHIP ACT § 401(f) (2001) (providing for equal partner rights in the management of a partnership); Uniform Partnership Act § 18(e) (1914) (providing for governance of a partnership by all partners in the absence of agreement to the contrary); UNIF. LTD. P'SHIP ACT, Prefatory Note (2003) (purpose of the new Uniform Limited Partnership Act is to provide a form of business for people who want strong central management, strongly entrenched, and passive investors with little control). See also *infra* text accompanying notes 70-72 (showing that boards commonly do not do much to govern corporations anyway).

tors as an institution. The puzzle arises because of a clash between the model of the corporate board as the supreme body elected by the shareholders to ensure governance of the company on the shareholders' behalf, and the reality of the minor role that corporate boards actually play in the governance of most companies. With this background in place, Part III of this Article traces the historical roots of corporate boards. This will entail a reverse chronological tour all the way back to the antecedents of today's corporate board in fourteenth through sixteenth century companies of English merchants engaged in foreign trade. In Part IV, this Article turns from when and how corporate boards developed, to address the underlying concepts and purposes behind the adoption of the antecedents of today's corporate boards. This part shows how the antecedents of today's corporate boards found their genesis in the political theories and practices of medieval Europe that, although hardly democratic, often called for the use of collective governance by a body of representatives. Finally, this Article concludes in Part V with some thoughts as to what this history tells us about the role and purpose of a corporate board. Specifically, the historical and political origins of the corporate board suggest that the current frustration with corporate boards may arise from confusing an institution of political legitimacy with goals of business efficiency.

## II. THE CURRENT PUZZLE OF CORPORATE BOARDS

### A. *The Board-Centered Model of Corporate Governance*

American corporation statutes provide, with minor variations in language, that a corporation shall be managed by or under the direction of its board of directors.<sup>6</sup> This board-centered model of corporate governance is not only the universal norm in American corporate law, it is also the prevailing model of corporate governance around the world.<sup>7</sup>

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6. See, e.g., MODEL. BUS. CORP. ACT § 8.01 (2002); DEL. GEN. CORP. LAW. § 141(a).

7. See, e.g., RICHARD M. BUXBAUM & KLAUS J. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE: CORPORATE AND CAPITAL MARKET LAW HARMONIZATION POLICY IN EUROPE AND THE U.S.A. 182-84 (1988) (describing the role of boards of directors in Europe); Christopher L. Heftel, *Survey, Corporate Governance in Japan: The Position of Shareholders in Publicly Held Corporations*, 5 U. HAW. L. REV. 135, 138-40, 153-54 (1983) (explaining the Japanese requirement that each stock company have at least three directors); Howard Gensler, *Company Formation and Securities Listing in the People's Republic of China*, 17 Hous. J. INT'L L. 399, 420-21 (1995) (discussing the requirements for boards in China). An important caveat to this statement comes from the German two-tier board model under which there is both a supervisory board and a management board. See Thomas J. André, Jr., *Some Reflections on German Corporate Governance:*

Yet, viewed in a literal and narrow manner, to say that a corporation shall be managed by or under the direction of a board of directors does not say that much. After all, someone must manage a corporation. The substance of this model of corporate governance comes from three underlying concepts. These concepts involve the relationship of the directors to the shareholders, the relationship of the directors to each other, and the relationship of the directors to the corporation's executives.

The first underlying concept of the board-centered model of corporate governance is that shareholders elect (normally annually) the directors.<sup>8</sup> To see the significance of this concept, one can compare it with other models. Under the partnership law default rule, the owners of the firm (the partners), simply by virtue of being owners, manage the partnership.<sup>9</sup> By contrast, the corporation's owners (the shareholders), by virtue of being shareholders, have no right to manage the corporation.<sup>10</sup> Their only right is to elect directors, and to vote on matters the directors submit (either under compulsion of statute<sup>11</sup> or voluntarily<sup>12</sup>) for shareholder approval. Another extremely common governance model in partnerships, and in other non-corporate forms of business,<sup>13</sup> is for an agreement among the owners to specify who shall be the managers of the business.<sup>14</sup> Yet another scheme would be management by a self-

*A Glimpse at German Supervisory Boards*, 70 TUL. L. REV. 1819, 1823-26 (1996). For a discussion of how and why the corporate board of directors spread around the world, see Franklin A. Gevurtz, *The European Origins and Spread of the Corporate Board of Directors*, 33 STETSON L. REV. 925 (2004).

8. See, e.g., MODEL BUS. CORP. ACT § 8.03(c); DEL. GEN. CORP. LAW § 211(b). An important exception to the world-wide acceptance of this concept is the German invented system of co-determination, under which employees elect up to half of the corporation's directors. See Klaus J. Hopt, *New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards*, 82 MICH. L. REV. 1338, 1346 (1984).

9. See, e.g., REV'D UNIF. P'SHIP ACT § 401(f) (1997); UNIF. P'SHIP ACT § 18(e) (1914).

10. See FRANKLIN A. GEVURTZ, CORPORATION LAW § 3.1.3a (2000).

11. See, e.g., MODEL BUS. CORP. ACT § 11.04(b) (1994) (requiring shareholder approval for a merger); DEL. GEN. CORP. LAW § 251(c) (2001) (same).

12. As, for example, when directors submit conflict-of-interest transactions for shareholder approval. See, e.g., MODEL BUS. CORP. ACT § 8.63(d) (2002) (dealing with the impact of shareholder approval in conflict-of-interest transactions); DEL. GEN. CORP. LAW § 144(a)(2) (2001) (same).

13. And often attempted in derogation of the board-centered model of governance in corporations as well. See discussion *infra* Parts II.A., II.B.2.

14. See, e.g., FRANKLIN A. GEVURTZ, BUSINESS PLANNING 239, 245-46 (2d ed. 1995) (discussing and giving examples of agreements designating managing partners or managers of an LLC). The traditional limited partnership encompasses this approach as part of its basic governance model. In this model, some owners (general partners) manage and face unlimited liability, while other owners (limited partners) agree to relinquish a role in management in exchange for limited liability. See UNIF. LTD. P'SHIP ACT § 303(a) (2003).

perpetuating oligarchy of managers.<sup>15</sup> The corporate scheme of periodic elections is obviously different, in theory if not in fact, from contractually designated or self-perpetuating managers.

The second concept underlying the board-centered model of corporate governance is that a group composed of peers acting together makes the decisions. Again, the significance of this concept becomes clear if one compares it to other governance schemes. Many businesses have one person who single-handedly makes at least the ultimate decisions.<sup>16</sup> By contrast, the historic rule, and still prevailing norm, is that corporate boards consist of more than one director.<sup>17</sup> As businesses or other organizations grow, group decision-making commonly replaces the solitary decision-maker. Nevertheless, this is often a hierarchical group.<sup>18</sup> In such a group, all members might have input, and the group often strives toward consensus, but, at least as a legal matter, one person has the ultimate power to make the decision.<sup>19</sup> By contrast, the corporate board norm is that all directors have an equal vote, and majority rule prevails in the event of differences.<sup>20</sup> Another alternative, often employed in conjunction with hierarchical group decision-making, is to subdivide authority among individuals.<sup>21</sup> By contrast, the longstanding corporate law rule is that directors lack any authority to act as individual directors; rather, the directors only have authority when they act as a group through board meetings.<sup>22</sup>

15. Many Dutch corporations follow this scheme (except insofar as qualified by the right of employees to object to the labor representatives selected by the board). See JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 53 (6th ed. 2004).

16. This, of course, is the way a sole proprietorship typically operates.

17. See, e.g., MODEL BUS. CORP. ACT § 8.03 cmt. 1 (2002) (indicating that before 1969 the Model Act required three or more directors); Edwin J. Bradley, *Toward a More Perfect Close Corporation—The Need for More and Improved Legislation*, 54 GEO. L.J. 1145, 1151 (1966). More recently, amendments to corporation statutes have allowed single-person boards. See MODEL BUS. CORP. ACT § 8.03 (2002); CAL. CORP. CODE § 212(a) (1990) (allowing less than three board members if the corporation has less than three shareholders).

18. See VICTOR A. THOMPSON, MODERN ORGANIZATION 190 (2d ed. 1977).

19. See Alan L. Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171, 180 (1986). The famous anecdote of President Lincoln and his cabinet provides an illustration. The story goes that Lincoln put a decision to his cabinet, all of whom voted no. Lincoln voted aye. Lincoln then announced that the “ayes have it.” *Id.*

20. See MODEL BUS. CORP. ACT § 8.24(c) (2002).

21. This, in fact, describes the typical corporate management structure below the board level. See Robert W. Hamilton, *Reliance and Liability Standards for Outside Directors*, 24 WAKE FOREST L. REV. 5, 9-11 (1989).

22. See *Baldwin v. Canfield*, 1 N.W. 261, 270 (Minn. 1879). A minor variation on this rule exists under common corporate statutes which allow board action through unanimous written consent. See MODEL BUS. CORP. ACT § 8.21 (2002). Also, directors might be allowed to act through committees. See MODEL BUS. CORP. ACT § 8.25 (2002).

The third concept embedded in the board-centered model of corporate governance is that the board has the ultimate responsibility for selecting and supervising the corporation's senior executives (especially its chief executive officer). Actually, corporation statutes often allow, and a rare corporation's bylaws might provide, for shareholder election of the corporation's president or other senior officers.<sup>23</sup> Nevertheless, the overwhelming practice is for the board to appoint the chief executive officer and other senior corporate officials.<sup>24</sup> Moreover, courts have held that arrangements, which deprive boards of the ultimate power to control officers or other individuals in managing the corporation, violate the statutory provision commanding that corporations be managed by or under the direction of the board.<sup>25</sup>

### *B. Rationalizations for the Board-Centered Model of Corporate Governance*

Most literature dealing with the corporate board of directors takes the existence of this institution as a given.<sup>26</sup> Nevertheless, a number of writers have suggested various rationales for this governance structure.

#### 1. The Need for Central Management

A simple-minded rationale often expressed for the board-centered model of corporate governance is that businesses with numerous owners need "central management."<sup>27</sup> The basic notion is that it is impractical to have numerous owners—especially if they own freely tradable interests—constantly meet together to make decisions for the firm. This certainly explains why firms with numerous owners might not wish to follow the partnership law default rule under which all owners participate in managing the firm. Indeed, writers typically list the desirability of

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23. See DEL. GEN. CORP. LAW § 142(b) (2001) (providing that officers may be appointed by the board or as provided in the bylaws). *But see* MODEL BUS. CORP. ACT § 8.40(b) (2002) (the board appoints officers; albeit officers can appoint other officers if authorized by the board or bylaws).

24. See, e.g., EISENBERG, *supra* note 2, at 162-63.

25. See *Kennerson v. Burbank Amusement Co.*, 260 P.2d 823, 823, 830-33 (Cal. Dist. Ct. App. 1953); *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 77 N.E.2d 633, 635 (N.Y. 1948). See also *Grimes v. Donald*, 673 A.2d 1207, 1214 (Del. 1996) (acknowledging the rule, but not finding an impermissible delegation). An obvious exception to this exists if the statute allows a specific sort of arrangement which deprives the board of authority.

26. See generally *supra* notes 1-3. *But see* Robert A. Kessler, *The Statutory Requirement of a Board of Directors: A Corporate Anachronism*, 27 U. CHI. L. REV. 696 (1960) (questioning the need for a board of directors in all corporations).

27. See ROBERT C. CLARK, *CORPORATE LAW* § 1.2.4 (1986).



central management as one reason why persons establishing a business anticipated to have numerous owners might prefer to operate through a corporation rather than a partnership.<sup>28</sup> Yet, this rationale fails to justify most of the concepts that underlie the board-centered model of corporate governance.

The need for central management fails to explain why shareholders should annually elect the board. As stated above,<sup>29</sup> agreements governing many non-corporate business organizations with numerous owners specify who will be in charge of the business, rather than providing for periodic elected terms. Alternately, a self-perpetuating oligarchy would provide for central management. More fundamentally, the need for central management does not explain why this management should take the form of a group acting together as peers. A sole decision-maker would provide central management. More realistically in a large business, why not provide for decision-making through a hierarchy leading to a chief executive officer?

## 2. Group Decision-making

A recent article by Stephen Bainbridge<sup>30</sup> moves beyond the need for central management in asking why corporate law calls for a board, rather than just a chief executive officer, to be at the apex of the corporation's management. He points to behavioral psychology studies which suggest that groups, such as corporate boards, often produce better decisions than can single individuals when it comes to matters of judgment.<sup>31</sup>

Presumably, it was not Professor Bainbridge's intent to justify all aspects of the board-centered model of corporate governance in pointing to better decisions from groups versus individuals. For example, he does not explain why shareholders annually should elect the group (as opposed to some agreed designation of the managing group or the use of a self-perpetuating oligarchy). Even as to the central thesis, however, the question remains whether the evidence Professor Bainbridge cites to is sufficient to establish that peer group decision-making, as contemplated by the board-centered model of corporate governance, is superior to hierarchical group decision-making. In other words, while the multiple in-

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28. See Thomas L. Hazen, *The Decision to Incorporate*, 58 NEB. L. REV. 627, 628 (1979).

29. See *supra* text accompanying notes 13-14.

30. Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1 (2002).

31. The notion that groups might reach better decisions than individuals is hardly new or unique to corporate law scholarship. Proponents of the jury system often point to this rationale. See Michael J. Saks, *Book Review: Blaming the Jury*, 75 GEO. L.J. 693, 706-07 (1986) (reviewing Valerie P. Hans & Neil Widmar's *Judging the Jury* (1986)).

put found in groups often leads to superior decisions than made by a single individual, it is less clear from experimental studies of group decision-making whether this requires the group to act as peers, with disagreements ultimately resolved by majority rule, rather than as a “cabinet” to a single person who has the final say. This is not an abstract quibble, since most observers of the large corporation assert that the predominant decision-making mode, in reality, is hierarchical group decision-making.<sup>32</sup> Indeed, even the sort of fundamental strategic decisions normally thought of as within the board’s purview, in fact, typically are made by a group consisting of the chief executive officer and the senior executives in charge of the major divisions or responsible for key functions.<sup>33</sup> To the extent directors, as such, provide input for such decisions, this commonly occurs through informal conversations with a few more influential members of the board, rather than at a board meeting.<sup>34</sup> Later, this Article shall address why, in a publicly held corporation, hierarchical group decision-making tends to replace peer group decision-making regardless of existence of a corporate board—thereby rendering this attempt to justify boards rather theoretical.<sup>35</sup>

### 3. Representation of Corporate Constituents and Mediating Claims to Distributions

Yet a different explanation for the use of corporate boards focuses on the need to mediate the competing claims of those who have an interest in distributions from the corporation. Proponents of this explanation vary in terms of which claimants the board exists to mediate between, and whether the need for a board arises from the desirability of the various claimants having representation on the decision-making body, or the need for a decision-making body to be independent from the various claimants.

Probably the most traditional variation of this rationale suggests that boards exist so that large shareholders<sup>36</sup> can elect themselves or their nominees as directors in order to protect their interests in distributions. Empirical support for this variation purportedly arises out of a recent

32. See Eisenberg, *supra* note 2, at 140-41.

33. See Interview with John Scriven, former General Counsel of The Dow Chemical Corporation (Oct. 8, 2002).

34. See Bayless Manning, *The Business Judgment Rule and the Director’s Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477, 1483 (1984).

35. See *infra* text accompanying notes 68-79.

36. A shareholder with only a small percentage of the outstanding stock lacks the power, even with techniques such as cumulative voting, to elect oneself or one’s nominee to a corporate board. See GEVURTZ, *supra* note 1, at § 5.2.1 a.

study conducted by Morten Bennedsen of Denmark.<sup>37</sup> Professor Bennedsen attempted to look at the motives for using boards of directors by studying a large sample of Danish firms formed as *anpartsselskaber* (an "AN"). The Danes modeled this business form on the German GmbH.<sup>38</sup> Danish law does not require ANs to possess a board of directors, but, nevertheless, Professor Bennedsen's study of such firms found that a little less than one-fifth of his sample used a board governance structure, including more than half of the firms with three to five owners, and two-thirds of the firms with more than five owners. Based upon highly indirect statistical evidence,<sup>39</sup> Professor Bennedsen argues that a motive for using boards in the closely held companies he studied was to protect non-controlling shareholders from exploitation by controlling shareholders, particularly in regard to distributions from the company.

It is impossible to assess Professor Bennedsen's study without much more information about the specific control arrangements in the firms he studied. It is true that boards provide a means by which non-controlling owners might obtain some say in firm management, including regarding corporate distributions. Nevertheless, the traditional wisdom from the experience of closely held corporations in the United States is that the board-centered model of corporate governance is far more likely to allow controlling shareholders to exploit non-controlling shareholders, than are other modes of management, such as provided by the partnership default rules, or might be found in a well-drafted shareholders agreement.<sup>40</sup> Consider, for example, the impact of the underlying concept of the board-centered model of corporate governance that the shareholders periodically elect the directors. This has been a recipe for controlling shareholders to bounce non-controlling shareholders off of the board of closely held corporations whenever controlling shareholders feel like squeezing non-controlling shareholders out of any say in corpo-

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37. Morten Bennedsen, *Why Do Firms Have Boards?* (SSRN, Working Paper available on the SSRN database, 2002), available at <http://ssrn.com/abstract=303680>.

38. *Id.* at 5 n.2. "GmbH" is short for *Gesellschaft mit beschränkter Haftung*, which means company with limited liability. Henry P. De Vries & Friedrich K. Juenger, *Limited Liability Contract: The GmbH*, 64 COLUM. L. REV. 866, 867 (1964). The basic idea is to allow limited liability, but without all the requirements imposed on publicly held corporations. *See id.* at 867-68.

39. Professor Bennedsen draws inferences regarding the probable motives for use of boards from certain statistical correlations (as, for example, the relationship between the dispersion of stock and the use of a board). The validity of these inferences is well beyond the scope of this Article.

40. *See* F. HODGE O'NEAL & ROBERT THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS: PROTECTING MINORITY RIGHTS IN SQUEEZE-OUTS AND OTHER INTRACORPORATE CONFLICTS § 2.10 (2d ed. 1996).

rate governance.<sup>41</sup> Of course, there are mechanisms, to which all parties can agree before any dissension, for ensuring non-controlling shareholders remain on the board.<sup>42</sup> By comparison, however, even without special preplanning, partnership law ensures all owners a say in management, since (barring other agreement) partners, simply by virtue of being partners, are entitled to participate in managing a partnership.<sup>43</sup> Moreover, even if non-controlling shareholders remain on the board, the underlying concept that corporate boards act by majority rule (as opposed to following an advance agreement, as in a partnership contract) serves to allow the majority shareholders in a closely held corporation to gain disproportionate distributions at the expense of non-controlling shareholders.<sup>44</sup> Again, there are agreements that shareholders can make before dissension, through which minority shareholders can protect their rights to distributions from the corporation.<sup>45</sup> Yet, such agreements act in derogation of the concept that the board, acting through majority rule, manages the corporation. Indeed, in earlier years, courts often struck down such agreements for this reason.<sup>46</sup> By contrast, the laws governing partnerships and other non-corporate business forms, not only contemplate, but encourage, agreements with respect to distributions and the like.<sup>47</sup>

A broader variation of this sort of rationale asserts that boards exist to mediate claims not just among shareholders, but also between shareholders and other corporate constituencies, such as managers, other employees, creditors, and perhaps even the community at large. While strains of this notion go back in the United States at least to the famous Berle-Dodd debate in the pages of the *Harvard Law Review*,<sup>48</sup> a recent

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41. See *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 659 (Mass. 1976) (holding the majority shareholders breached their fiduciary duty to the minority shareholder).

42. See GEVURTZ, *supra* note 14, at 477-87.

43. See *supra* text accompanying note 9.

44. See, e.g., *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 520 (Mass. 1975) (but holding the majority shareholders breached their fiduciary duty to the minority shareholder).

45. See GEVURTZ, *supra* note 14, at 477-87.

46. See, e.g., *McQuade v. Stoneham*, 189 N.E. 234, 236 (N.Y. 1934). Corporate law now generally allows such agreements.

47. See, e.g., Franklin A. Gevurtz, *Squeeze-outs and Freeze-outs in Limited Liability Companies*, 73 WASH. U. L.Q. 497, 504-05, 508-09 (1995). This discussion suggests that majority or controlling shareholders might actually prefer board governance. Yet, if the majority or controlling shareholders desire to cut off the minority from either distributions or a voice in running the business, a system under which owners, by majority vote, dictate distributions and elect senior officers to run the corporation (as in *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 659 (Mass. 1976)) would accomplish the majority or controlling shareholders' objective even without a board.

48. See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

article by Lynn Stout<sup>49</sup> attempts to find empirical evidence that shareholders grant power to the board for this reason. In this modern iteration, the argument is that various groups—equity investors, lenders, managers, other employees, and the like—all make contributions necessary to corporate revenues, and all expect some distribution from those revenues. Indeterminacy in the ultimate value of all these contributions toward producing revenue makes it extraordinarily difficult to come up with ex ante contracts that will adequately compensate, but not over-compensate, each claimant. This, in turn, suggests the need for a mediating body with the power to make ex post decisions about distributions. Professor Stout argues that shareholder acquiescence in devices, such as poison pills, that insulate boards from shareholder control evidence that shareholders themselves have concluded that boards exist for this purpose.

The question of whether directors should have either a duty or a right to look out for the interests of contributors to the corporate enterprise other than the shareholders (except insofar as doing so advances the interests of the shareholders) has been a subject of considerable legal and economic policy debate.<sup>50</sup> This article is not the occasion to replay the various arguments.<sup>51</sup> For present purposes, it is sufficient to ask whether the rationale that the board exists in order to mediate between corporate constituents explains all of the attributes of the board-centered model of corporate governance. It would if boards were composed of representatives of the various constituents. In that event, one could understand why there should be an elected group at the apex of corporate management. Hence, this rationale seems to explain the existence of the supervisory board with some representatives elected by the shareholders and other representatives elected by the workers under the German system of co-determination.<sup>52</sup> Yet, for the United States, and most of the world, the board-centered model of corporate governance assumes a board elected by the shareholders.<sup>53</sup> If the board is not to have elected representatives of each of the constituencies, what is the point of having

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49. Lynn A. Stout, *The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance*, 152 U. PA. L. REV. 667 (2003).

50. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919); *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, 1991 WL 277613 (Del. Ch. Dec. 30, 1991); ABA Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (1990); Morey W. McDaniel, *Stockholders and Stakeholders*, 21 STETSON L. REV. 121 (1991).

51. For the author's view, see GEVURTZ, *supra* note 1, at § 4.1.5.

52. See, e.g., Hopt, *supra* note 8, at 1343-44.

53. See *supra* text accompanying notes 6-8.

a board? Professor Stout's answer is to view the board as an independent, rather than a representative, body, perhaps in the nature of a neutral arbiter. Still, the norm that shareholders elect the directors seems inconsistent with this rationale. After all, it is difficult to imagine that various corporate constituencies would have designed a system in which one body of claimants has the legal right to select whomever it desires to act as arbiter of distributions between the claimants.<sup>54</sup>

#### 4. Monitoring of Management

The final rationale for the board-centered model of corporate governance represents the prevailing view. This rationale is that boards elected by shareholders exist as a necessary tool to monitor corporate management.<sup>55</sup> Typically, this view starts with the assumption that corporate hierarchy exists to gain the advantage of team production, while minimizing agency costs (shirking and disloyalty) by having higher-level agents monitor lower-level agents.<sup>56</sup> The problem becomes, however, who monitors the highest level monitors. The traditional economics answer is that the shareholders, as the residual claimants, have the best incentives to monitor the highest-level agents.<sup>57</sup> This answer, however, faces a practical difficulty in the publicly held corporation, since there are too many scattered shareholders to allow for efficient monitoring directly by the shareholders. This, in turn, leads to the argument that the corporate board, elected by the shareholders, provides a solution to the practical difficulty of shareholders monitoring on their own behalf.<sup>58</sup>

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54. Professor Stout points out that collective action problems effectively blunt shareholder control over the composition of the board in public corporations. Instead, as discussed below, management traditionally has had control over the proxy machinery and chosen the directors. See *infra* text accompanying notes 63-66. Yet, this still does not show that boards can act as independent arbiters; even if boards in public corporations may be more likely to favor senior management as opposed to the shareholders. Moreover, the fortuitous happenstance that collective action problems undercut the norm of shareholder selection of directors applies only to public corporations without a controlling shareholder (or controlling shareholder group). Hence, Professor Stout fails to explain the existence of boards in corporations other than publicly held corporations without controlling shareholder(s). More significantly, the fact that controlling shareholders dictate the composition of the boards in most corporations fundamentally undercuts Professor Stout's rationalization for boards even in public companies, since it shows that firms can and do overcome the *ex ante* contracting problems between different contributors without an independent mediating body.

55. See, e.g., PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 2, at § 3.02; EISENBERG, *supra* note 2, at 169-70.

56. See Bainbridge, *supra* note 30, at 5-7.

57. See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 782-83 (1972).

58. See Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 311 (1983).

The monitoring rationale provides an elegant answer to why the shareholders should elect the board and why the board should appoint the senior executives. Interestingly, however, the rationale does not explain the need for a board, so long as the shareholders elect whoever stands at the apex of corporate management. In other words, one might achieve the same monitoring effect by having the shareholders elect the corporation's chief executive officer. Yet, there is an even more fundamental problem with the monitoring of management rationale for the board-centered model of corporate governance. The monitoring rationale rests upon a rather curious assumption. The assumption is that shareholders, who are too numerous and disengaged to monitor management on their own behalf, will become sufficiently engaged and organized to select vigilant directors to perform the monitoring for the shareholders.

*C. The Board-Centered Model Of Corporate Governance Meets Reality*

The reality of corporate governance differs in subtle, but important, ways from a model that posits that shareholders select directors, who select and supervise senior officers, who, in turn, carry out the board's will. The nature of this difference depends upon whether one is dealing with a corporation with very few shareholders (a closely held corporation) or a corporation with very many shareholders (a publicly held corporation).

*1. Closely Held Corporations*

In closely held corporations, reality diverges from the board-centered model of corporate governance because the shareholders, directors and officers are the same people.<sup>59</sup> In other words, instead of having a large group of passive shareholders elect directors (who may or may not be shareholders) to manage the company, in a corporation with few shareholders, all or most of those shareholders will elect themselves as the directors of the company. Similarly, instead of having the board select officers who may or may not be directors and shareholders, in the closely held corporation, the shareholder-directors typically also will select themselves to be the officers. Under these circumstances, the shareholders often simply view themselves as running the business as owners—much as partners operate. As a result, having a board serves little evident purpose.

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59. See F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCs § 1.9 (rev. 3d ed. 2004).

The reaction of corporate law to the divergence between the board-centered model of corporate governance and the realities of practice in the closely held corporation increasingly has been to give up on any attempt to preserve the board-centered model of corporate governance as anything other than a default rule. This is most evident in statutes that allow shareholders in close corporations to dispense with the board.<sup>60</sup> Even without dispensing with the board altogether, modern corporation statutes commonly allow shareholders to make agreements which dictate who will be directors and what decisions the directors shall make.<sup>61</sup>

## 2. Publicly Held Corporations

The divergence between the board-centered model of corporate governance and reality in a publicly held corporation does not involve the melding of shareholders, directors and officers into the same few people, but, instead, involves the flow of power between these three groups. Specifically, the board-centered model of corporate governance perceives power to flow from shareholders, who decide who will be the directors, to the directors, who select the corporate officers and set policy, to the officers. In large measure, the reality in the publicly held corporation has been almost the reverse. The officers, particularly the chief executive officer, commonly decide who will be the directors and what policies the corporation will pursue.<sup>62</sup> To understand why this inversion has taken place, we need to examine the incentives which impact decision-making at the shareholder level and at the director level.

Shareholders in the publicly held corporation typically are “rationally apathetic”; in other words, the rational shareholder in a publicly held corporation normally will conclude that it is not worthwhile to spend much time or effort worrying about control over the corporation.<sup>63</sup> After all, the cost of trying to change corporate management is quite high—since the dissatisfied shareholder must seek support from numerous scattered other shareholders—while the rewards are relatively low, since the other shareholders will reap most of the gains. In economics lingo, there is a huge “free rider” problem. Of course, one might respond that the same problem exists when dealing with federal, state and local government elections. A significant difference, however, exists between the op-

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60. See MODEL BUS. CORP. ACT § 7.32(a)(1) (2002); DEL. GEN. CORP. LAW § 351 (2001).

61. See MODEL BUS. CORP. ACT § 7.32(a)(3) (2002); DEL. GEN. CORP. LAW §§ 218(c) (validating agreements regarding who shareholders will vote for as directors), 350 (validating agreements dictating actions of the board of a statutory close corporation).

62. See THOMAS L. HAZEN & F. HODGE O'NEAL, CORPORATIONS § 9.2 (1997).

63. See CHOPER ET AL., *supra* note 15, at 560.



tions open to dissatisfied shareholders and the options open to dissatisfied citizens. The shareholder who is displeased with management in a publicly held corporation can quickly and easily sell his or her shares. This self-help remedy of selling out is often referred to as following the "Wall Street rule." It is much less practical for the dissatisfied citizen to pack up and move out of the jurisdiction.

Compounding the rational apathy phenomenon is the incumbent directors' control over the corporate proxy machinery. Almost invariably, the corporation will pay for the incumbent directors' (or their nominees') solicitation of proxies.<sup>64</sup> This is certainly the case if the election is uncontested, and normally is the case even in a contested election. By contrast, challengers will need to foot their own solicitation expenses unless (at the very least) they win.<sup>65</sup> This imbalance creates a significant financial disincentive for anyone to challenge the incumbent board. The end result is that, unlike federal, state and local government elections, elections of corporate directors rarely are contested.<sup>66</sup>

The observation that shareholders in publicly held corporations do not really control the corporation by selecting the directors is known as the "Berle-Means thesis" after the two professors who wrote a book in 1932 that recognized this phenomenon.<sup>67</sup> The discussion so far, however, only explains why shareholders do not control the composition of the board. It does not explain why the officers do have such control, nor have we explained why officers, rather than directors, control corporate decisions.

To understand why officers, rather than directors, control the public corporation, it is useful to divide directors into two types: "inside" directors and "outside" directors. "Inside" directors refers to directors who also work full time for the corporation, in other words, directors who are also officers. "Outside" directors refers to directors who are not full time employees of the corporation.

A number of practical constraints traditionally have operated to curb the control that outside directors can exercise over the corporation. Some of these constraints are obvious. For example, outside directors have limited time to devote to the corporation. After all, these are indi-

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64. See GEVURTZ, *supra* note 1 at § 3.1.3(b)(3).

65. See, e.g., *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 128 N.E.2d 291, 293 (N.Y. 1955).

66. See MELVIN ARON EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS* 336 (8th ed. 2000) (citing SEC and Georgeson & Co. data).

67. See generally ADOLF A. BERLE JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

viduals who, by definition, might have full time employment somewhere else.<sup>68</sup> Closely related to the lack of time is the quality of information available to the outside directors in making corporate decisions. As a practical matter, the outside directors must rely on information presented to them by the corporation's officers when making decisions.<sup>69</sup> True, directors have a legal right to inspect corporate records.<sup>70</sup> Yet, time constraints generally render this right more theoretical than actual. Given these constraints of time and information, the board can hardly initiate much of any corporate strategy or decisions. Instead, the board's role largely falls to approval of such strategies and decisions as officers bring before the board.<sup>71</sup> Even in the context of approving strategies and decisions made by the corporation's officers, however, the board's effective control tends to be marginal. This is so not only because most corporate decisions never come before the board, but also because a number of factors make it a rare case in which a board will veto an action proposed by the officers. A couple of these factors we have just seen: Lack of time and lack of independent information make it difficult for outside directors to second guess the corporation's officers. In addition, there are various biases that work against the outside directors second-guessing the corporation's officers. For example, outside directors might have relationships with the corporation or its officers that would make outside directors think twice about challenging the officers.<sup>72</sup> Most fundamentally, however, inside directors, and particularly the chief executive officer, have controlled the corporate proxy machinery and decided who sat on the board.<sup>73</sup> This may simply be the consequence of the normal tendency of those with the greater stake—in this event, the insiders whose jobs are on the line—to be more assertive in exercising control over the key levers of power. At any event, if the officers, especially the chief ex-

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68. Among the sorts of individuals who commonly serve as outside directors on corporate boards are chief executive officers of other companies, bankers and lawyers. See WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 131 (8th ed. 2002). Even academics and former government officials who sometimes sit on boards have other things to do.

69. See EISENBERG, *supra* note 66, at 204.

70. See MODEL BUS. CORP. ACT § 16.05(a) (2002).

71. See Manning, *supra* note 34, at 1483-84.

72. The board of directors at Enron provided a good illustration of this problem. See Gordon, *supra* note 3, at 1241-42.

73. See James D. Westphal & Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60, 78 (1995) (describing how powerful boards tend to appoint new directors who are demographically similar to them).

ecutive officer, pick directors, the normal human instinct will be to select directors who are likely to defer to the officers.<sup>74</sup>

What about the inside directors? Since they work full time for the corporation, presumably they do not face the same time or information constraints as the outside directors. Yet, in evaluating the ability of the inside directors to manage the corporation in their role as directors, we must take cognizance of the two inconsistent realms in which the inside directors operate. As board members, the inside directors operate in what is supposed to be a collegial decision-making process among equals, with differences resolved, if necessary, by majority vote.<sup>75</sup> As officers, however, the inside directors operate in a hierarchical setting in which the chief executive officer has the last word. Moreover, the chief executive officer traditionally has dictated the junior officers' prospects for retention and promotion.<sup>76</sup> Ultimately, it is probably too much to expect that directors who are subordinate to the chief executive officer all but a few days per year are suddenly going to switch gears and second guess the chief executive officer at the board meeting. Instead, while subordinate officers of the corporation may have a significant voice in developing policy—indeed, effective chief executive officers often work by seeking consensus,<sup>77</sup> and much corporate policy originates within the various divisions<sup>78</sup>—the input of inside directors comes in their role as officers rather than co-equal board members.<sup>79</sup>

All told, the result has been to reduce the board of directors to an institution which, despite its formal role as the supreme governing body of the corporation, in fact, does very little.<sup>80</sup> This dissonance between the

74. See MYLES L. MACE, *DIRECTORS: MYTH AND REALITY* 108 (1971).

75. See *supra* text accompanying note 30.

76. See Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1491-92 (1989).

77. See Interview with John Scriven, *supra* note 33.

78. This is particularly the case in the "M-form" management structure. See Oliver E. Williamson, *Organization Form, Residual Claimants, and Corporate Control*, 26 J.L. & ECON. 351, 366 (1983).

79. See MACE, *supra* note 74, at 119-20.

80. See, e.g., MONKS & MINOW, *supra* note 2, at 209 ("The primary conclusion of this chapter is that America's boards of directors have, more often than not, failed to protect shareholders' interests."); Rita Kosnik, *Greenmail: A Study of Board Performance in Corporate Governance*, 32 ADMIN. SCI. Q. 163, 166-67 (1987) (modern board is a "co-opted appendage institution"); Myles L. Mace, *Directors: Myth and Reality—Ten Years Later*, 32 RUTGERS L. REV. 293 (1979) (study reaffirmed results of earlier study as to director passivity); MACE, *supra* note 74, at 107 (study finding that directors rarely challenged or monitored CEO performance, but often served as little more than "attractive ornaments on the corporate Christmas tree"); ROBERT A. GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* 143 (1961) ("the board of directors in the typical large corporation does not actively exercise an important part in the leadership function").

expected role for the board, and the realities of corporate governance, appears to be inherent in the nature of the institution. One piece of evidence for this conclusion comes from the fact that complaints about director inaction go back through the history of corporate boards, appearing in sources ranging from classic articles of legal scholarship,<sup>81</sup> to nineteenth century literature.<sup>82</sup> Nor are such complaints limited to boards in the United States.<sup>83</sup> Moreover, despite claims of improvements in corporate board governance, recent scandals again have produced complaints about passive boards.<sup>84</sup> Of course, the fact that large corporations have prospered, and have contributed to modern economic prosperity, suggests that there must be something right about the management structure of corporations—withstanding complaints arising from periodic corporate meltdowns. Still, it is difficult to read the work of economic historians without coming to the conclusion that the managerial developments which made corporations work are those—like the development of the U-form and M-form organizational structure—that occurred below the level of the board of directors.<sup>85</sup>

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81. See, e.g., William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305 (1934) (pointing out in 1934 that a popular theme had become that directors should assume the responsibility of directing).

82. See, e.g., ANTHONY TROLLOPE, *THE WAY WE LIVE NOW* 298-309 (1875) ("Melmotte [the chief executive officer of the company, and perpetrator of a fraudulent promotion,] would speak a few slow words . . . always indicative of triumph, and then everybody would agree to everything, somebody would sign something, and the board . . . would be over").

83. See *Corporate Governance in Japan: A Report by Oxford Analytica*, in MONKS & MINOW, *supra* note 2, at 267 (explaining that in Japan, formal authority is held by the company president and the board of directors, but board meetings are infrequent and decisions are rubber stamped; real authority is held by the president and the operating committee composed of the president's immediate subordinates); *id.* at 292 (explaining that the president director-general (PDG) of French companies wields almost unchecked control over the enterprise without the counter power of the board, whose composition and agenda the PDG controls; indeed, it is regarded as "'bad manners' for the board to vote on a management decision"); Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 568 (2000) (noting that German corporate supervisory boards meet infrequently and their informational base has been weak).

84. See, e.g., *The Way We Govern Now*, ECONOMIST, Jan. 11, 2003, at 59 (discussing poor board governance in light of corporate scandals involving Enron); Michael C. Jensen & Joseph Fuller, *What's a Director To Do?*, (Oct. 2003), at <http://ssrn.com/ABSTRACT=357722> ("The recent wave of corporate scandals provides continuing evidence that boards have failed to fulfill their role as the top-level corporate control mechanism"); Gordon, *supra* note 3, at 1241-42 (noting that Enron's board was a "splendid board on paper," but its failure reveals a certain weakness with the board as a governance mechanism).

85. See RICHARD S. TEDLOW, *THE RISE OF THE AMERICAN BUSINESS CORPORATION* 13-24, 56-60 (1991). While the universal adoption of board governance for public corporations makes it difficult to perform an empirical study on the impact of proceeding without a board, various recent studies attempt to assess the impact of board composition and other corporate governance practices on corporate performance. Many of the results have been inconclusive. See Hamilton, *supra* note 2,

### III. THE HISTORICAL ROOTS OF CORPORATE BOARDS

Given the dissonance between the norm that corporations are supposed to be managed by, or under the direction of, an elected board, and the realities of corporate governance, it is fair to ask when and how the norm of board governance developed. With the readers' indulgence, this section will not address this subject by using the traditional forward narrative of a history book. Instead, it will trace the roots of corporate boards in the manner in which the researcher discovers such things—which is to begin with the more recent and work one's way backwards in time until one cannot find earlier examples of the use of corporate boards. In other words, we will follow the method of an archeological dig.

#### A. American Corporate Legislation

The norm that the ultimate power over corporate management resides in an elected board has always existed in American corporation statutes. The law commonly considered to be the first general incorporation statute, New York's 1811 act,<sup>86</sup> provided that "the stock, property and concerns of such company shall be managed and conducted by trustees, who, except those for the first year, shall be elected at such time and place as shall be directed by the by laws of the said company . . ."<sup>87</sup> Of course, current corporate statutes typically refer to "directors," rather than "trustees,"<sup>88</sup> attempt to recognize reality by calling for corporate

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at 364-73 (studies have not produced consistent positive results from changes in corporate governance, such as increased use of independent directors); Bhagat & Black, *supra* note 2, at 945 (reviewing over 100 studies and finding no convincing evidence that independent directors improve firm performance). Studies in less developed economies suggest perhaps a greater impact. See Mark Mobius, *Issues in Global Corporate Governance*, in *CORPORATE GOVERNANCE: AN ASIA-PACIFIC CRITIQUE* 47-48 (Low Chee Keong ed., 2002) (explaining that recent studies in emerging markets show better stock performance of companies with so-called better corporate governance, including more independent boards). Nevertheless, it is difficult to say how much of this result comes from having a board versus other so-called good corporate governance practices, how much of improved market returns reflect a current desire by investors for stock of companies with so-called better corporate governance practices, and how much reflect actual improved performance by such corporations.

86. Before New York's statute, a couple of states had enacted narrow corporations laws addressing turnpikes or the like. See HARRY C. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* § 12 (3d ed. 1983). For the most part, however, prior to this time, corporations came into existence by special legislation, which granted charters to individual corporations. See GEVURTZ, *supra* note 1, at § 1.1.3 a.

87. 1811 N.Y. Laws LXVII.

88. See, e.g., MODEL BUS. CORP. ACT § 8.01 (2002); DEL. GEN. CORP. LAW § 141(a) (2001). Some types of corporations, such as mutual associations, however, often still use the term trustee. See MICH. COMP. LAWS ANN. § 500.6834 (West 2002).

management “by or under the direction of” the board, rather than “by” the board,<sup>89</sup> and specify annual election by shareholders, rather than leave this to the bylaws.<sup>90</sup> Still, New York’s statute shows that the basic norm of corporate board governance existed from the beginning of general incorporation laws.

The New York legislature was not being particularly creative in providing for board governance in 1811. In fact, this provision seems simply to have codified the common governance pattern established under the individual legislatively granted charters through which corporations had previously come into existence.<sup>91</sup> Take, for example, the 1791 charter of the Bank of the United States (often known as the first Bank of the United States<sup>92</sup>). This charter provided for a board of twenty-five directors to be elected annually by the shareholders.<sup>93</sup> The bank’s board, in turn, under the charter, annually appointed one of its members to be the bank’s president, and could appoint such other officers as the board deemed necessary.<sup>94</sup> This governance structure was not unique to banking. As an illustration, look at The Society for Establishing Useful Manufactures, which received its charter from the New Jersey legislature in 1791. Alexander Hamilton (who also had a hand in the formation of the first Bank of the United States the same year) formed this nobly named corporation “to produce paper, sail linens, women’s shoes, brass and ironware, carpets, and print cloth.” The affairs of this corporation were under the management of thirteen directors elected by the shareholders. Interestingly enough, the collapse of this corporation provides an early American example of the failure of outside directors to monitor management.<sup>95</sup>

89. See, e.g., MODEL BUS. CORP. ACT § 8.01(b) (2002); DEL. GEN. CORP. LAW § 141(a) (2001). The purpose of the “under the direction of” language is to make it clear that the statute does not command the board to engage in day-to-day running of the corporation. See MODEL BUS. CORP. ACT § 8.01(b) cmt. (2002).

90. See, e.g., MODEL BUS. CORP. ACT § 8.03(c) (2002); DEL. GEN. CORP. LAW § 211(b) (2001).

91. This pattern of governance continued to be found in the special charters granted corporations even after general incorporation laws first became available. See JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 121 (1832).

92. The charter of the first Bank of the United States expired in 1811. A subsequent charter created the second Bank of the United States in 1816. See MICHAEL P. MALLOY, BANK REGULATION § 1.3 (1999).

93. Bank Act, ch. 10, § 4 (1791).

94. *Id.* §§ 4, 6.

95. See STANLEY C. VANCE, CORPORATE LEADERSHIP: BOARDS, DIRECTORS, AND STRATEGY 3-5 (1983).

## B. English Antecedents

### 1. The Bank of England

Not surprisingly, the use of boards of directors by the early American corporations finds its apparent roots in similar provisions of English corporate charters. The 1694 charter of the Bank of England provides one of the clearest examples of English influence on American practice. The Bank of England's 1694 charter provided for a board of twenty-four directors.<sup>96</sup> Indeed, this charter seems to have pioneered the term "director."<sup>97</sup> A "court of proprietors" (what we would now refer to as a shareholders meeting) annually elected the Bank of England's directors.<sup>98</sup> Several facts show the influence of this charter on American practice. An obvious fact is the borrowing of the term "director." Another fact is the similarity in the size of the Bank of England's twenty-four-person board and the first Bank of the United States' twenty-five-person board (which appears simply to have added one to the size of the English bank's board in order to avoid tie votes). Finally, in a provision which demonstrates influence because of its unusual nature, both the Bank of England and the first Bank of the United States imposed term limits on directors: The charter of the Bank of England prevented one-third of the directors of the bank from seeking reelection,<sup>99</sup> while the charter of the First Bank of the United States prevented one-quarter of the directors from seeking reelection.<sup>100</sup>

In one important respect, however, American charters, including that of the first Bank of the United States, typically differed from the governance structure used by the Bank of England. Unlike the common American practice as embodied in the charter of the first Bank of the United States, the charter of the Bank of England provided for election of the bank's president by the court of proprietors, instead of appoint-

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96. See Cyril O'Donnell, *Origins of the Corporate Executive*, 26 BULL. BUS. HIST. SOC'Y 55, 61 (1952).

97. See, e.g., RONALD RALPH FORMOY, *THE HISTORICAL FOUNDATIONS OF MODERN COMPANY LAW* 21 (1923). While the 1618 charter of the Africa Company called for a board of twelve "directors," this terminology for board members did not catch on until the 1694 charter of the Bank of England. See 1 WILLIAM ROBERT SCOTT, *THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720*, at 51-52 (1912); 3 WILLIAM ROBERT SCOTT, *THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720*, at 205 (1912).

98. See O'Donnell, *supra* note 96, at 61.

99. See 5-6 W. & M., c. 20 (Eng.).

100. See Bank Act, *supra* note 93, at § 7(2).

ment by the directors.<sup>101</sup> In fact, it is somewhat ironic that American corporate governance has followed a sort of English parliamentary model under which the board appoints the company's chief executive, whereas early English corporations often followed a model closer to American political practice of having the members directly elect the company's chief executive.<sup>102</sup> In any event, by the close of the eighteenth century, the Bank of England's court of proprietors would simply approve the "house list" of candidates for directorships prepared by the existing directors<sup>103</sup>—thus establishing the historical roots of the separation of ownership and control. While, in this regard, the Bank of England's practice provided an early harbinger of the divergence of the board-centered governance model from the realities that prevail in the publicly held corporation, in another way, the Bank of England's board followed the model. At its inception, the Bank of England's board met weekly to participate in running the bank, and, throughout the bank's history, committees of Bank of England directors remained actively involved in the bank's management.<sup>104</sup>

## 2. The Companies Established to Colonize America

The English corporations chartered to establish colonies in what became the United States of America probably also influenced early American corporations to adopt board governance. In this case, however, the influence would have been subtler, since these companies had passed from the scene by the time Americans formed business corporations. Still, it is likely that the pattern of board governance established by these colonizing companies—which continued to reverberate in the political institutions of the thirteen states—made Americans comfortable with the notion of corporate governing boards.

In 1606, James I granted a charter to two companies for purposes of trade and colonization in North America. This charter granted what was earlier referred to as the London Company, and later became known as the Virginia Company, the right to plant a colony at any place between the thirty-fourth and forty-first parallels, while what was typically referred to as the Plymouth Company could plant a colony between the thirty-eighth and forty-fifth parallels. Each company consisted of certain "knights, gentlemen, merchants and other adventurers" named in the charter, plus any other persons whom the original members of the com-

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101. See O'Donnell, *supra* note 96, at 61.

102. See *infra* text accompanying note 226.

103. See O'Donnell, *supra* note 96, at 62-63.

104. See *id.* at 61, 66.



pany allowed to join the company. The charter provided for governance through two types of councils. Each colony would have a local resident council of thirteen members appointed by the king. At the same time, the king would appoint a "Council of Virginia" of thirteen members in England for "superior managing and direction."<sup>105</sup> Notice that, while these companies followed a governance model based on boards, they did not at this point follow the model of a board elected by the members of the company.

James I's attempt to deprive the members of the London Company of the power to select the council, however, proved unsatisfactory in the aftermath of the disappointing results from the Jamestown colony. As a result, in 1609, a new charter was issued for the London Company, now called the "Treasurer and Company of Adventurers and Planters of the City of London for the First Colony of Virginia." This new charter placed the executive power over the company in the hands of a treasurer and deputy treasurer,<sup>106</sup> and also established a new governing council in England. Significantly, the company's council was elected by the members of the company, rather than appointed by the king.<sup>107</sup> Membership in the company, in turn, was available to persons who contributed money towards the colony.<sup>108</sup> Hence, at this point, the London Company had adopted common features of the board-centered model of corporate governance. As far as local governance at the colony, the 1609 charter eliminated the local council and provided for control by a governor appointed by the company's council in England.<sup>109</sup>

Three years later, yet another iteration occurred in the governance scheme for the London Company. Interestingly, the new charter issued for the London Company in 1612 represented something of a move away from board governance, and an additional flow of power directly to the members of the company. The 1612 charter limited the authority of the council, on its own, to handling "matters of less consequence and weight as shall from time to time happen touching and concerning" the

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105. 2 JOHN P. DAVIS, *CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO AUTHORITY OF THE STATE* 158-59 (1905).

106. The odd designation of the chief executive officer as the "treasurer" suggests that the principal contemplated focus for the company's activities involved raising and spending money in support of the colonization.

107. See William C. Morey, *The Genesis of a Written Constitution* 1 ANN. AMER. ACAD. POL. & SOC. SCI. 538-39 (1890).

108. The charter called for all persons who contributed money to the venture to be admitted to membership by action of the treasurer and any three existing members. See 2 DAVIS, *supra* note 105, at 162.

109. See Morey, *supra* note 107, at 539.

colony. To handle “matters and affairs of greater weight and importance,” such as the manner of government to be used, the disposition of land and possessions, and the settling and establishing of trade, the 1612 charter called for quarterly assemblies comprised of the council and members of the company sitting as one body. These assemblies, which the charter entitled “The Four Great and General Courts of the Council and Company of Adventurers of Virginia,” also were empowered to elect members of the council and officers of the company. At this point, control of the local situation at the colony lay in the hands of a governor appointed by the assembly.<sup>110</sup> In the end, however, this governance structure contributed to, or at least did not prevent, the company’s undoing. In 1624, James I obtained the dissolution of the London Company through a *quo warranto* proceeding.<sup>111</sup>

Meanwhile, back at the Plymouth Company, the company received a new charter in 1620 under the name “The Council established at Plymouth, in the County of Devon, for the planting, ordering, and governing of New England, in America.” As suggested by this name, the membership in the company became synonymous with membership in the governing council.<sup>112</sup> The charter limited membership to forty members, who were named in the charter and held memberships for life, and who filled vacancies by vote of the existing members. Needless to say, this represents a substantial deviation from the model of governance through a board of representatives elected by the owners of the company. After an unsuccessful effort to establish a colony at the mouth of the Kennebec River in 1607, the Plymouth Company largely confined its activities to granting other groups the license to establish colonies or trade in parts of the territory to which the Plymouth Company had received the exclusive rights in its charter.<sup>113</sup>

While the Plymouth Company itself did little to establish the model of corporate governance through elected boards, it indirectly played a role in spreading this model. In 1628, John Winthrop and others secured from the Plymouth Company a grant of land from a point three miles north of the Merrimac River to a point three miles south of the Charles River. The next year, after obtaining confirmation of this grant from Charles I, Winthrop and his associates obtained a charter to form a corporation named the “Governor and Company of the Massachusetts Bay

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110. See *id.* at 540-41.

111. See 2 DAVIS, *supra* note 105, at 169 (noting that James I opposed grants of free and popular government).

112. See *id.* at 170.

113. See *id.* at 169-71.

in New England” (typically referred to as the Massachusetts Bay Company). The governance scheme set out in the charter of the Massachusetts Bay Company borrowed from the London Company and exhibited features of the board-centered model of corporate governance missing from the Plymouth Company. The charter called for a governor, deputy governor, and eighteen so-called “assistants.” As we shall see later,<sup>114</sup> the term “assistants” is one of the earliest English designations for what we now would call directors. The charter named the first governor, deputy governor and assistants for the Massachusetts Bay Company, but called for the subsequent election of persons to hold these positions by the members of the company. The charter called for at least monthly meetings of the governor (or deputy governor) and assistants to direct the affairs of the company. Copying from the London Company, the charter of the Massachusetts Bay Company also called for four “great and general courts” attended by the governor or deputy governor, at least six assistants, and the members of the company, to take place every year. These general courts had the power to elect officers for the company.<sup>115</sup>

There was one key difference, however, between the governance provisions of the charter of the Massachusetts Bay Company and the governance provisions of the charter of the London Company from which the Massachusetts Bay Company copied. Unlike the London Company’s charter, the charter for the Massachusetts Bay Company did not specify that the company’s general courts and council had to meet in England. Accordingly, the members of the Massachusetts Bay Company—who were using the company structure to further a religious and political agenda—met in Massachusetts.<sup>116</sup> As a result, the elected governing board of the Massachusetts Bay Company became, in effect, the Massachusetts colonial legislature. The corporate charter for the Massachusetts Bay Company remained the governing constitution for the Massachusetts colony until 1691, when a new royal charter for the colony replaced the Massachusetts Bay Company’s corporate charter. The 1691 charter, however, preserved the existing governance structure, except that the king thereafter appointed the colony’s governor.<sup>117</sup>

The upshot was that the Massachusetts Bay Company had even more influence on the structure of American government than it did on the governance of American business. The same is true of the London Company, whose members, in 1621, adopted an “Ordinance and Consti-

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114. See discussion *infra* Parts III.B.3, IV.B.2-3.

115. See 2 Davis, *supra* note 105, at 173.

116. See GEORGE CAWSTON & A.H. KEANE, *THE EARLY CHARTERED COMPANIES* 210 (1896).

117. See Morey, *supra* note 107, at 550.

tution” for the government of Virginia, which, copying from their own charter, called for the governance of the colony by a governor, council of assistants, and a general assembly at the colony.<sup>118</sup> The governance structure established by the London Company for the Virginia colony in 1621 provided the model for other colonies in Maryland and the Carolinas, while the governance structure established by the Massachusetts Bay Company’s 1628 charter provided the model for other colonies in Connecticut, Rhode Island and New Hampshire.<sup>119</sup> In the end, as the American states began to charter corporations, the notion of an elected board may well have been comfortable because of its similarity to the governance scheme of the state legislatures—the irony being that the governance scheme of the state legislatures stemmed from the board governance of the corporations formed to colonize North America.

### 3. The Trading Companies

While both the Bank of England, and the companies established to colonize America, apparently influenced American acceptance of corporate board governance, it was the English trading companies that developed board governance as a model for a business corporation.

#### a. The Joint Stock Trading Companies

The charters of the famous English trading companies, such as the East India Company, the Russia Company, the Eastland Company, the Levant Company, the Hudson’s Bay Company, and the South Sea Company, evidence the consistent use of governing boards.<sup>120</sup> For example, at the outset of the seventeenth century, Queen Elizabeth I granted a charter to 216 knights, aldermen and merchants to become “a body politic and corporate” by the name of the “Governor and Company of Merchants of London, trading into the East Indies.” The result was to create what came to be known as the East India Company. The East India Company’s charter committed the direction of the voyages, and the management of all other things belonging to the company, to a governor<sup>121</sup> and twenty-four persons called “committees.” Hence, the title “committees” (like the title “assistants” encountered in the Massachusetts Bay Company) predated the title “director” or “trustee” as the label

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118. *Id.* at 542.

119. *Id.* at 544, 550.

120. For a tabular listing of the governance structures of English joint stock companies until 1720, showing predominately board governance, see 3 SCOTT, *supra* note 97, at 462-480.

121. The chief executive officer of such early corporations commonly had the title “governor,” rather than “president” or the more modern “CEO.”

attached to the elected members of a corporation's governing board. The charter named Sir Thomas Smith as the first governor, but provided that the members of the company annually would elect the committees, who would choose from among themselves a governor.<sup>122</sup>

The charter of the East India Company was following well-established precedent in calling for the use of a governing board. In 1554, Philip and Mary granted a charter to what came to be known as the "Russia" or "Muscovy" Company.<sup>123</sup> The charter named Sebastian Cabot as governor for life, and provided for four "sad,<sup>124</sup> discreet and honest" members to be consuls,<sup>125</sup> and twenty-four members to be assistants. Members of the Russia Company annually elected the consuls and assistants.<sup>126</sup> Interestingly, while most records were lost in a fire, the extant records of the Russia Company suggest a familiar deviation between the role of the board called for in the charter of the Russia Company and the more limited role the board actually took. For example, the members (stockholders), acting as a whole, seem to have taken a more extensive role in managing the company than suggested by the charter (which only empowered the members to elect the consuls and assistants). Records show that the members at general meetings selected "factors" (agents) to represent the Company in Russia, approved contracts and statements of account, and resolved disputed charges of private trading leveled against servants of the Company. At the opposite extreme, on many occasions, the governor, perhaps with the input of a few of the major members, seems to have acted for the company. By contrast, despite receiving broad powers in the charter, there is little in the records as far as actions by the board of assistants.<sup>127</sup>

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122. See, e.g., CAWSTON & KEANE, *supra* note 116, at 87; O'Donnell, *supra* note 96, at 67.

123. The unbelievably long and convoluted official name of this company was "The Merchants Adventurers for the Discovery of Lands, Territories, Isles and Seigniories unknown, and not by the Seas and Navigations, before this said late Adventure or Enterprise by Sea or Navigation, commonly frequented." 2 DAVIS, *supra* note 105, at 98.

124. *Id.* As in steadfast, trustworthy and wise, rather than unhappy. See THE OXFORD ENGLISH DICTIONARY 2617 (1989).

125. As discussed later (see *infra* text accompanying notes 252-54), the title "consul" comes from medieval Italian municipal governments, from whence it migrated to municipal governments elsewhere in medieval Europe. The term also migrated into Italian business-related entities when, for example, the organization of the Bank of Saint George in Genoa included four consuls, nominated by the chief officials, to superintend its finances. See 1 SCOTT, *supra* note 97, at 20.

126. See O'Donnell, *supra* note 96, at 60.

127. See T.S. WILLAN, THE EARLY HISTORY OF THE RUSSIA COMPANY 1553-1603, 22-24 (1959).

In 1579, Elizabeth I granted a charter to the “Fellowship of Eastland Merchants” (commonly referred to as the Eastland Company).<sup>128</sup> Under the charter, the government of the Eastland Company consisted of a governor, one or more deputy governors, and twenty-four assistants. Members of the Eastland Company annually elected the governor and deputy governor(s), but, in an unusual provision, the assistants held office on good behavior.<sup>129</sup>

The Levant Company started life with a different governance structure. This company came into official existence in 1581 when Elizabeth I granted a charter to Sir Edward Osborn, Thomas Smith, Richard Staper and William Garret to become “The Company of Merchants of the Levant.” The charter named Osborn as the Company’s first governor, but, with only four initial members, the charter did not reflect any need for assistants. The charter authorized Osborn and Staper to admit up to twelve other English subjects into the company, while the queen retained the right to admit two more into the company. In 1592, Elizabeth I granted a new charter to the company. This new charter named fifty-three members, and authorized the company to admit additional members without the numerical limitations of the old charter.<sup>130</sup> With more members, the governance structure now changed. The new charter called not only for a governor, but also for the members to elect annually twelve assistants. Growth in the company produced a new charter in 1605. Admission into the company was now open to all merchants upon payment of a fee. In terms of governance, the new charter increased the number of assistants to eighteen.<sup>131</sup>

English trading companies founded after the East India Company also had charters calling for governing boards. For example, in 1670, the English government granted a charter creating the Hudson’s Bay Company—officially titled “The Governor and Company of Adventurers of England trading into Hudson’s Bay”—for the purpose of trade in what is now Canada. Under the charter, the proprietors of the company elected annually a governor, deputy governor, and a board of seven committees.<sup>132</sup> In 1711, the infamous South Sea Company—officially named “Governor and Company of Merchants of Great Britain Trading to the South Seas and other parts of America, and for Encouraging the Fish-

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128. The name Eastland comes from the English reference to the Baltic as the “East Sea.”

129. See O’Donnell, *supra* note 96, at 65.

130. The expanding membership apparently was an attempt to accommodate merchants whose trade in the Mediterranean fell victim to the war with Spain. See 1 SCOTT, *supra* note 97, at 85.

131. See 2 DAVIS, *supra* note 105, at 90-91.

132. See CAWSTON & KEANE, *supra* note 116, at 279-80.

ery”—received its charter. The principal business of the South Sea Company seems to have included equal parts holding British government debt and encouraging an ill-fated speculation in its own stock (the so-called South Sea Bubble).<sup>133</sup> The South Sea Company had a governor, sub-governor, deputy governor, and a board of thirty directors.<sup>134</sup> Sadly, the plea of ignorance asserted by many of the company’s directors during the investigation and prosecution following the company’s collapse in 1720<sup>135</sup> is eerily reminiscent of the response of directors to scandals ever since.

These English trading companies not only evidence the use of corporate governing boards going back almost half a millennia, they played a critical role in establishing the use of boards as the governance mechanism for the business corporation. For example, the East India Company appears to have pioneered various aspects of modern board practice. As discussed earlier in this Article,<sup>136</sup> a key power of the typical modern corporate board—which is especially important if one views the principal role of the board to be monitoring the performance of corporate management—is the power to hire and fire the chief executive officer. The initial charter of the East India Company may have been the first (or at least the first well documented) corporate charter to grant the power to the governing board to elect the corporation’s governor, rather than leave this power in the hands of the company’s members.<sup>137</sup> Interestingly, as mentioned above,<sup>138</sup> American corporations were quicker to adopt this practice than other English corporations. Over the years, various further changes occurred in the governance of the East India Company, by successive charter or otherwise. For example, during the eighteenth century, the committees elected a chairman and deputy chairman to preside over their meetings, thereby establishing an office of chair separate from that of governor<sup>139</sup>—something pushed for by reformers of boards today.<sup>140</sup> Another example of governance practices introduced

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133. See generally EDWARD CHANCELLOR, *DEVIL TAKE THE HINDMOST: A HISTORY OF FINANCIAL SPECULATION* ch. 3 (1999).

134. 3 SCOTT, *supra* note 97, at 295-96.

135. Among the South Sea Company’s thirty directors was an inner group, who were behind the company’s fraudulent activities, and a passive outer group. See JOHN G. SPERLING, *THE SOUTH SEA COMPANY: AN HISTORICAL ESSAY AND BIBLIOGRAPHICAL FINDING LIST* 27 (1962). Not surprisingly, the passive board members sought to shift the blame to the directors who were active in the fraud. See JOHN CARSWELL, *THE SOUTH SEA BUBBLE* 230 (1960).

136. See *supra* text accompanying notes 23-25.

137. O’Donnell, *supra* note 96, at 62.

138. See *supra* text accompanying notes 101-02.

139. See O’Donnell, *supra* note 96, at 65-66.

140. See Branson, *supra* note 3, at 1015.

into the East India Company that remains common today comes from an act of Parliament in 1773. This act introduced staggered terms to the company's board of what were by then referred to as directors, with one-quarter of the directors elected every year.<sup>141</sup>

The most critical innovation that occurred with these trading companies, however, did not involve a change in the structure of the governing board. Instead, it involved what was going on around the board. These companies were undergoing a metamorphosis from so-called regulated companies—essentially guilds whose membership consisted of merchants conducting independent operations under the company's franchise—into joint stock companies, in which voting power and economic return came from investing in a common enterprise. While this evolution did not alter the structure of the governing board, it fundamentally changed what the board was supposed to do. The board turned from a regulatory body, which preserved an exclusive franchise on behalf of a group of merchants who conducted individual businesses, into a supervisory body, which had overall responsibility for running a business.<sup>142</sup>

The Eastland Company provides a good example of a regulated company. The charter of the Eastland Company granted the merchants in the company the exclusive right among English subjects to trade with Scandinavia and the Baltic region (but not Russia).<sup>143</sup> Such exclusive rights were typical of the English trading company charters, which attempted to carve up the world into a series of franchises. So, the charter of the Russia Company granted the Company exclusive rights as far as English subjects to trade in Russia, as well as in "lands of infidels" discovered by merchants in the Company.<sup>144</sup> The charter of the Levant Company granted members of this Company exclusive trading rights with Turkey.<sup>145</sup> Perhaps most generous of all, the charter of the East India Company granted its members exclusive trading rights in a territory described as encompassing all of Africa, Asia and America from the Cape of Good Hope to the Straits of Magellan.<sup>146</sup>

As a regulated company, the Eastland Company did not conduct operations as a corporation. Instead, the merchants who were the mem-

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141. See O'Donnell, *supra* note 96, at 60. In one respect, the board of the East India Company seems to have been unusual when compared with modern practice. The board purportedly met every day during 1615 to deal with the growth of the Company's business. 1 SCOTT, *supra* note 97, at 163 (citing a resolution granting the board members a £ 1000 honorarium).

142. See WILLAN, *supra* note 127, at 19-21.

143. See CAWSTON & KEANE, *supra* note 116, at 61.

144. See 2 DAVIS, *supra* note 105, at 98.

145. See *id.* at 88.

146. See CAWSTON & KEANE, *supra* note 116, at 87-88.



bers of the company conducted trading operations, either individually or in ad hoc partnerships.<sup>147</sup> This fact, in turn, leads to a critical question from the standpoint of the history of board governance: If a regulated company did not conduct operations as a corporation, what was the purpose of having a governing board? The answer is that the board adopted ordinances to govern the activities of the members of the company.<sup>148</sup> For example, the board of the Eastland Company adopted a prohibition on “colouring” goods.<sup>149</sup> Colouring referred to selling goods of a non-member merchant as a member’s own. By operating in this fashion as undisclosed principals, non-members attempted to circumvent the company’s exclusive franchise. As this example illustrates, the role of a board of a regulated company was not to have overall responsibility for operating a business, but, rather, to impose rules on individual merchants in order to preserve a monopoly.

The Russia Company may have been the first joint stock company.<sup>150</sup> In the joint stock company, instead of each merchant trading in his own stock (merchandise), the merchants subscribed to a fund that financed a combined or joint stock of merchandise for trading by agents of the company—hence, the title “joint stock company” from which derives the current label of stockholder.<sup>151</sup> There were a couple of motivations for the evolution from the regulated company to the joint stock company. The obvious motivation is the greater need for financing, and greater risk of failure, as trading voyages went from the close (the Baltic) to the far. (The members of the Russia Company originally hoped to find a northeast passage to Asia.<sup>152</sup>) The joint stock principle raised more money, and spread the risk among more participants, than did individual operations in the regulated company.<sup>153</sup> There may have been another motivation. Limiting operations to trading under the company’s direc-

147. See WILLAN, *supra* note 127, at 19-20.

148. *Id.* at 20.

149. See, e.g., M. Schmitthoff, *The Origin of the Joint-Stock Company*, 3 U. TORONTO L.J. 74, 82 (1939).

150. See 1 SCOTT, *supra* note 97, 17. The discerning reader may have noticed that the Russia Company predated the Eastland Company, despite the fact that the Russia Company started as a joint stock company, while the Eastland Company was a regulated company. This shows that the evolution from regulated to joint stock companies was an erratic, rather than a linear, process. Indeed, the Russia Company itself regressed into a regulated company later in its life. See *infra* note 162.

151. For a discussion of the meanings ascribed to the word “stock” in the early joint stock companies, see 1 SCOTT, *supra* note 97, at 158.

152. See *id.* at 18.

153. See, e.g., *id.* at 17; Meir Kohn, *Business Organization in Pre-Industrial Europe*, 27, (SSRN, Working Paper No. 03-09, 2003).

tion financed through a joint stock fund could serve as a way to combat practices such as colouring.<sup>154</sup>

At its inception, the East India Company seems to have straddled the worlds of the regulated and the joint stock companies—so much so that historians disagree over whether the East India Company started as a regulated company and evolved into a joint stock company, or whether the East India Company was a joint stock company from the outset.<sup>155</sup> The conflict arises from the fact that the original charter of the East India Company preserved the right of the members to trade individually under the company's franchise, much as in a regulated company, and the fact that not all of the members in the East India Company subscribed to the early voyages financed on a joint stock basis.<sup>156</sup> In any event, historians agree that during the first half of the seventeenth century, in lieu of having permanent capital, members of the East India Company subscribed to joint stock funds that would finance a certain number of trading voyages to India. These funds then were supposed to be wound up and the proceeds distributed among the subscribers. In the middle of the seventeenth century, a combination of accounting confusion caused by this system,<sup>157</sup> and the continuing need to justify its monopoly,<sup>158</sup> led to a restructuring in which a permanent joint stock fund replaced the earlier funds.<sup>159</sup> Beyond moving to a permanent capital, two critical changes occurred in the rights of the members—historians disagree whether these occurred in the middle or toward the end of the seventeenth century. Voting rights began to depend upon the amount each member invested in the permanent joint stock, instead of being available to all members.<sup>160</sup> In addition, the company no longer granted members the right to

154. See Schmitthoff, *supra* note 149, at 91.

155. Compare 2 DAVIS, *supra* note 105, at 118-19 (discussing how the East India Company conducted voyages through individual merchants and merchant groups until 1612, when it began trading voyages as a corporation), with SCOTT, *supra* note 97, at 92-101 (stating that from its inception, the East India Company conducted its voyages on a joint stock basis, even though the members invested on a per voyage basis rather than into a permanent capital or joint stock of the company).

156. See Schmitthoff, *supra* note 149, at 90-91.

157. The confusion developed when the company began to raise later joint stock funds without winding up the earlier joint stocks. Also perplexing was how to account for the permanent facilities the company had acquired in India and England (often referred to as "dead stock," as opposed to the trading or "quick stock").

158. Several competing groups were able to obtain licenses from English kings to trade in the East India Company's territory. These licenses were sometimes rationalized on the ground that the East India Company had not made settlements or established trade as promised.

159. See 2 DAVIS, *supra* note 105, at 119-22.

160. See, e.g., SCOTT, *supra* note 97, at 465 (noting that voting rights in the East India Company were limited in 1650 to one vote for each £ 500 contribution); 2 DAVIS *supra* note 105, at 129-

trade on their own under the company's franchise.<sup>161</sup> The result of these two changes was to tie the benefits of membership in the English East India Company—both in terms of voting control and in terms of any economic return—entirely to a subscription into a common fund for the company's activities, and thereby complete the transformation of the company from a confederation of merchants into a vehicle for passive investment by the general public.<sup>162</sup>

The development of the joint stock company, by setting the stage for transferable ownership interests in which voting power can depend upon the number of interests purchased and in which voting power might become widely dispersed among passive investors, obviously has tremendous implications for corporate governance. It laid the groundwork for the separation of ownership from control, but also created the ability for today's hostile takeovers. For purposes of this Article, however, dealing as we are with the historical and political origins of corporate board, the development of the joint stock company has another impact. The same board structure that existed to enact and enforce rules governing the conduct of independent merchants in the regulated company (such as the Eastland Company) found itself pressed into service to manage a large business venture in the joint stock company (such as the Russia and East India Companies). This occurred without any evident consideration as to the different nature of these tasks, or whether an institution developed for one task best fit the needs of the other function.

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30 (noting that the new charter of 1693 gave one vote in the general court for each £ 1000 in contribution, up to a maximum of ten votes).

161. See, e.g., Samuel Williston, *The History of the Law of Business Corporations before 1800*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 195, 200 (1909) (noting that members lost the right to trade independently under the East India Company's franchise toward the end of the seventeenth century); William Mitchell, *Early Forms of Partnership*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 183, 194 (1909) (noting that members lost the right to trade independently under the East India Company's franchise in 1654).

162. Interestingly enough, the Russia Company evolved in the opposite direction. It started with permanent capital, but disappointing results during later years led the members to demand a repayment of their capital. Thereafter, the company began operating through subscriptions and periodic redistributions. This practice, in turn, resulted in fewer members having a greater share in the company, and more complaints about the company's monopoly becoming concentrated in the hands of a few. These complaints, as well as the accounting confusion resulting from the lack of a permanent capital, finally led to the company becoming a regulated, instead of a joint stock, company. See WILLAN, *supra* note 127, at 269-73. The Levant Company followed a somewhat similar regression from joint stock to regulated company. *Id.* at 273.

## b. The First English Trading Companies

The use of boards of “assistants” or “committees” by the sixteenth and seventeenth century English trading companies appears to derive from a pattern set by two of the earliest companies of English merchants engaged in foreign trade: The Company of the Merchants of the Staple, and the Company of Merchant Adventurers. The history of these two organizations is even fuzzier than is the case with the joint stock and regulated corporations discussed thus far. For purposes of this Article, however, it is sufficient to focus on several facts about these two companies. In each case, the company adopted governance by a board coupled with a chief executive officer. Further, these two companies apparently were the first companies of English merchants organized for foreign trade with at least some degree of the sort of exclusive rights from the crown that would motivate the later English trading companies to seek charters. As such, the inevitable inference is that the board governance structure adopted by the Company of the Merchants of the Staple and the Company of Merchant Adventurers provided the model followed by the later English trading companies when the later English trading companies drafted charters calling for board governance.<sup>163</sup> The other point worth noting is that neither the Company of the Merchants of the Staple, nor the Company of Merchant Adventurers, was anything remotely like a joint stock company. Instead, these were regulated companies, like the Eastland Company, in which the role of the board was to enact and enforce rules governing the activities of individual merchants, rather than manage a business.

Broadly speaking, the Merchants of the Staple engaged in the export of English raw wool, while the Merchant Adventurers engaged in the export of English cloth, as well as other English manufactured goods.<sup>164</sup> The Merchants of the Staple take their name from the fixed place (the staple) to which, at various times, English law limited all sales of raw wool exports.<sup>165</sup> The system began with voluntary efforts at the

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163. Reinforcing this inference are the similarities in the composition of the boards of the Merchant Adventurers and the Russia and Eastland Companies (twenty-four “assistants” in each case), as well as the fact that many of the founding members of the Russia Company were members of the Merchants of the Staple or the Merchant Adventurers. WILLAN, *supra* note 127, at 21.

164. Not surprisingly, this demarcation between the two companies was subject to some dispute, particularly once a decline in the wool trade motivated members of the Merchants of the Staple to sell cloth. See SIR PERCIVAL GRIFFITHS, *A LICENSE TO TRADE: THE HISTORY OF ENGLISH CHARTERED COMPANIES* 10 (1974).

165. The interest of the Merchants of the Staple in such a limitation, particularly insofar as it could reduce competition and allow control over prices, is obvious enough. The English kings saw

end of the thirteenth century by Edward I to encourage all wool exports to go through one market (first at Dordrecht and then at Antwerp). It appears that the English merchants handling these wool sales obtained a charter from the duke of Brabant (now part of Belgium) allowing them to hold assemblies, and, later, to elect a "mayor," in order to govern the merchants' affairs.<sup>166</sup> The result seemingly was to establish something of an organized merchant society or company, but apparently with a simple governance structure built around an executive officer and decisions by all of the members. The staple system became compulsory in 1313, with the establishment of a Mayor and Council of the Merchants of the Staple, who were empowered to choose a staple town for all wool exports.<sup>167</sup> They first chose Saint-Omer (in Flanders), but tussles over where the constantly moving staple would be, and who would be allowed to trade, occupied the next half-century. After the Ordinance of the Staple of 1353 brought the whole thing for a few years to fifteen English towns (each of which had its own Mayor of the Staple and supporting officers),<sup>168</sup> the staple gravitated toward Calais (which was then under English control). As a result, the Merchants of the Staple became the Company of the Staple of Calais.<sup>169</sup> Significantly for purposes of this Article, a council of twenty-four governed the company in Calais (and, interestingly enough, for the two years between 1363 and 1365 also governed the town).<sup>170</sup> Hence, the Merchants of the Staple, to some extent as early as 1313, and certainly by 1363, had adopted a system of board governance.

Despite its somewhat swashbuckling sound, "merchant adventurers" was a label used by merchants who engaged in the export trade of manufactured goods. The early history of the merchant adventurers as an organized company is murky. English merchants trading in Antwerp obtained a pair of charters from the dukes of Brabant in the thirteenth century, which allowed them to establish a mayor and a court (an assembly).<sup>171</sup> It is unclear, however, whether the Company of Merchant

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this as a device to extract revenues from the wool merchants. See EILEEN POWER, *THE WOOL TRADE IN MEDIEVAL HISTORY* 87-90 (1941).

166. See *id.* at 95-96.

167. See L.F. SALZMAN, *ENGLISH TRADE IN THE MIDDLE AGES*, 289-290 (1931).

168. See *id.* at 293.

169. See POWER, *supra* note 165, at 97-99.

170. See GRIFFITHS, *supra* note 164, at 7. According to some historical sources, there were initially twenty-six merchants in charge of the company at Calais, but this probably comes from adding the two mayors (one for the company and one for the town) to the twenty-four member council. See SALZMAN, *supra* note 167, at 295.

171. See GRIFFITHS, *supra* note 164, at 9.

Adventurers, as it ultimately became known, bore enough of a relationship to these earlier expatriate English merchants to support the later company's efforts to claim this lineage, particularly insofar as the Merchants of the Staple also laid claim to at least the later of these charters. Early in the fifteenth century, Henry IV of England granted a charter to English merchant exporters trading outside England (mostly in the Low Countries), which allowed the merchants to elect a governor over themselves.<sup>172</sup> The role of the governor under the charter was to resolve disputes among the English merchants and to aid the English merchants in their claims against foreign merchants. The governor, with the assent of the merchants (presumably through an open assembly), could also establish ordinances for the group and impose reasonable punishments upon merchants disobeying these ordinances.<sup>173</sup> During the fifteenth century, merchant exporters operating from England, unlike their countrymen operating abroad, had no formal separate organization. Instead, many of them apparently were members of the Mercers Company, a London merchant's guild, where, by the middle of the century, they seem to have begun meeting as a separate group. By the late fifteenth century, the London merchant exporters had come to view themselves as a distinct fellowship with the title "Merchant Adventurers," and evidently were operating in connection with the English merchants in the Low Countries. This is evidenced by a 1485 petition to the English crown, in which the London merchant exporters designated themselves "Merchant Adventurers, Citizens of the City of London, into the parts of Holland, Zealand, Brabant and Flanders."<sup>174</sup>

In 1505, Henry VII took a critical step in bringing together the merchant adventurers as a coherent company. He granted a charter to The Company of Merchant Adventurers, giving the Company a monopoly on trade in export of English manufactures; albeit, membership in the company had to be open to any English merchant who paid a fee. More significantly for purposes of this Article, this charter authorized the company (which would be headquartered on the Continent, rather than in England) to elect "Four and Twenty of the most sodd [sic] discreet and honest Persons of divers [sic] fellowships" to be "Assistants" to the governor.<sup>175</sup> The function of the governor and the assistants was to resolve disputes among merchants and to enact ordinances for the regulation of the members of the company.<sup>176</sup> During the first half of the

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172. See EDWARD P. CHEYNEY, AN INTRODUCTION TO THE INDUSTRIAL AND SOCIAL HISTORY OF ENGLAND 165 (1901).

173. See 2 DAVIS, *supra* note 105, at 74-75.

174. GRIFFITHS, *supra* note 164, at 10.

175. See CAWSTON & KEANE, *supra* note 116, at 249-54.

the members of the company.<sup>176</sup> During the first half of the sixteenth century, merchant adventurers in English cities that perhaps were jealous of the London merchants' dominance created their own companies of Merchant Adventurers. These companies often also employed a board governance structure, with elected governors and twelve or eighteen assistants.<sup>177</sup> In 1564, however, Elizabeth I issued a new charter to the Merchant Adventurers. This charter confirmed governance of the company in a governor, his deputy, and, again of most significance to this Article, twenty-four assistants, to be headquartered abroad, and who had jurisdiction over merchant adventurers wherever they operated.<sup>178</sup>

All told, both the Company of Merchant Adventurers and the Company of the Merchants of the Staple had governing boards whose structure matches, and evidently provided the model for, the governing boards of trading companies, such as the Russia, Eastland, and East India, companies. As suggested by the charter of the Merchant Adventurers, the boards of the Company of Merchant Adventurers and the Company of the Merchants of the Staple existed to resolve disputes and to pass ordinances regulating the conduct of the members.<sup>179</sup> The upshot is that the corporate board of directors did not develop as an institution to manage the business corporation. Rather, it is an institution the business corporation inherited when the business corporation evolved out of societies of independent merchants. These earlier merchant societies or companies, in turn, apparently adopted boards to replace less structured governance under a combination of officers and decision-making by assemblies of the entire membership.

### C. Continental European Antecedents

While American use of corporate boards evidently traces to English practice, it would be a mistake to give the English sole credit for developing the board-centered model of corporate governance that is used around the world. Rather, it appears that board-centered corporate gov-

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176. Among the ordinances imposed on the members of the Merchant Adventurers was a prohibition on marrying women born outside of England. See 2 DAVIS, *supra* note 105, at 80.

177. See *id.* at 79. Sometimes, however, these non-London companies of Merchant Adventurers, following older patterns of guild governance, elected so-called masters and wardens, instead of governors and assistants.

178. See CAWSTON & KEANE, *supra* note 116, at 255-77.

179. The fact that the Company of Merchant Adventurers collected admission fees and fines meant that there was some need for auditing, but this does not seem to have been a function of the board of assistants. See Ross L. Watts & Jerold L. Zimmerman, *Agency Problems, Auditing, and the Theory of the Firm: Some Evidence*, 26 J.L. & ECON. 613, 620-21 (1983).

ernance, even in its early stages,<sup>180</sup> was developing in continental Europe on a roughly parallel track to its development in England.

One nice example of the parallel development of corporate boards in England and in continental Europe comes from the East India companies. Two years after the formation of the English East India Company, the Dutch government chartered the Dutch (or “United”) East India Company. The charter (or *octroi*) of the Dutch East India Company provided for governance by a general council of governors (*bewindhebbers*).<sup>181</sup> This council had sixty members, broken down into a certain number of representatives from each of the various “chambers” which had come together to form the Dutch East India Company. These chambers consisted of smaller groups of merchants in Amsterdam (which had twenty representatives on the council), Rotterdam and Delft (which had fourteen representatives), Hoorn and Enkhuizen (which had fourteen representatives), and Zealand (which had twelve representatives).<sup>182</sup> These merchant groups already had formed shipping companies for trade with the East Indies, and, at least at the inception of the Dutch East India Company, actually may have conducted the voyages (while the overall Dutch company, much like the English regulated companies, served to create a cartel and to present a united face when dealing with outsiders).<sup>183</sup> Evidently, a sixty-member board turned out to be unwieldy, and so the Dutch East India Company established a second smaller board (the *Collegium*) with seventeen members. This board, too, also had a certain number of representatives from each of the chambers—in this case, Amsterdam received eight, and Zealand four, and the other four chambers each received one. The seventeenth position rotated.<sup>184</sup>

Working backwards, the governance structure of some overseas communities of Hanseatic merchants displayed a parallel to the board governance of the Merchant Adventurers and Merchants of the Staple. In medieval Europe, the term “hanse” referred to associations of traveling merchants frequenting a foreign country. These merchants banded together for protection, to secure trading privileges, and to police the trad-

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180. There are, of course, significant continental European contributions to corporate boards after the advent of general incorporation laws in the United States and elsewhere. These contributions include, most notably, the German invention of the two-tier board and co-determination. See *supra* notes 7-8, see *infra* note 399.

181. See Schmitthoff, *supra* note 149, at 93-94.

182. See HOLDEN FURBER, *RIVAL EMPIRES OF TRADE IN THE ORIENT 1600-1800*, at 188 (1976).

183. See Schmitthoff, *supra* note 149, at 94.

184. See Winfried van den Muijsenbergh, *Corporate Governance: The Dutch Experience*, 16 *TRANSNAT'L LAW* 63, 64 (2002).



ing practices of their fellow merchants. While there were hanse of various nationalities (such as a Flemish hanse of London), during the fourteenth and fifteenth centuries, German merchants had important hanse in London, Novgorod, Bergen and Bruges. Cooperation, initially on trade issues, between the towns from which these German merchants came, produced what is known as the Hanseatic League. In London, the Hanseatic merchants had living quarters and worked in a compound bordering the Thames, called the Steelyard. The Steelyard hanse elected an alderman and a committee of twelve (one-third elected by the Rhinelanders, one-third elected by merchants from Westphalian, Saxon and Wendish towns, and one-third elected by the Prussians and German Balts) to govern the community. Similarly, an alderman and a council governed the German merchants in Bergen. The Hanseatic community in Bruges had a board of six aldermen until 1472; after which three aldermen, advised by a committee of twelve, administered the hanse. Like the governors (or mayors) and the boards of the Merchant Adventurers and Merchants of the Staple, these governing institutions of the Hanseatic merchants acted to preserve the group's trade privileges, to enforce rules of trade, and to adjudicate disputes among the merchants.<sup>185</sup>

It is important to note, however, that innumerable business organizations in medieval Europe did not have boards. While this is obvious for sole proprietorships and small partnerships, even some relatively large-scale business organizations in continental Europe of the Middle Ages did not have anything like a board. For example, large Italian mercantile and banking companies, such as the Peruzzi and Medici companies, lacked a board. Instead, these were partnerships operated under the domination of a family leader or trusted manager. The Peruzzi company (which existed from around 1275 to 1343) operated as a single partnership with branch operations. Partners in the company managed the major branches (Avignon, Bruges, London, Naples, Palermo and Paris), while factors (salaried employees) managed lesser branches. All partners residing in Florence (the company's home city) had the right to participate in management, but, as a practical matter, one partner, who gained the confidence of the others, largely ran the business. For almost a century (from 1397 to 1494) the Medici conducted banking and manufacturing operations. Instead of operating as one large partnership, the Medici established the equivalent to a holding company arrangement in which separate partnerships conducted operations in various locales, while the

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185. See R. de Roover, *The Organization of Trade*, in *THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE* 111-15 (M.M. Postan et al. eds., 1963).

main partnership in Florence retained majority control over the local partnerships. As the family members became distracted with Florentine politics, a principal administrator (called a *ministro*) provided overall supervision from Florence.<sup>186</sup> Overall, the development of corporate boards in Continental Europe is consistent with the English experience: corporate boards developed as a governance mechanism for merchant societies (like the hanse) or merchant cartels (like the Dutch East India Company), and only later evolved into the governance mechanism for large business ventures with passive investors.

#### IV. THE CONCEPTUAL ORIGINS OF CORPORATE BOARDS

The previous section of this Article looked at when and how corporate governance through elected boards developed and came to the United States. This section asks why such a governance scheme originated. In other words, from what sources did the early corporations get the idea of using elected governing boards? What purpose was this governance structure supposed to achieve? Why was this form of governance employed versus other alternatives?

In fact, corporate governance by a representative board, working with a chief executive officer (a “governor” in the typical parlance of the early corporate charters), is a reflection of political practices and ideas widespread in Western Europe in the late Middle Ages. Specifically, while fictional literature often pictures medieval Europe as a place of autocratic governance by kings,<sup>187</sup> European political ideology and practice in the late Middle Ages, although hardly democratic, often called for the use of collective governance by a body of representatives. Examples of such representative governance ideas and practices are found in the assemblies or parliaments of medieval European kingdoms, in town councils, in governing councils for guilds, and in the Church. Given this prevalent practice, and the ideology that underlay this practice, it was natural for the early corporations to utilize board governance.

##### *A. Parliamentary Assemblies*

###### 1. The Growth of Parliamentary Assemblies

European kingdoms in the late twelfth through fourteenth centuries widely undertook the development and use of representative assemblies,

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186. See *id.* at 76-87.

187. See, e.g., WILLIAM SHAKESPEARE, *RICHARD III*.

which are precursors of today's parliaments.<sup>188</sup> The English Parliament, because of its survival and ultimate influence, is the most noted example.<sup>189</sup> The English Parliament emerged in the thirteenth century out of several pre-existing practices. Early English kings, like kings elsewhere in Western Europe during the early Middle Ages, commonly had councils of advisors.<sup>190</sup> Power struggles in the thirteenth century between the kings and the barons created an impetus toward broader assemblies with heads of the clergy and the barons.<sup>191</sup> During the final third of the thirteenth century, attendance at English parliaments began to expand beyond the King's council, the senior clergy, and the barons, to include representatives of counties and towns.<sup>192</sup> The summonses issued by Edward I to the so-called Model Parliament of 1295 provide a good example. These summonses ordered the sheriffs of the counties to cause to be elected to attend the parliament, with full power to do the business of the parliament, two knights to represent each county, and two citizens to represent each city and two burghers to represent each borough within a

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188. See THOMAS N. BISSON, *MEDIEVAL REPRESENTATIVE INSTITUTIONS: THEIR ORIGINS AND NATURE* 1 (1973).

189. See generally WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT* (3d ed. 1888) [hereinafter STUBBS, *CONSTITUTIONAL HISTORY*].

190. See SUSAN REYNOLDS, *KINGDOMS AND COMMUNITIES IN WESTERN EUROPE 900-1300*, at 302-03, 305 (1984). Anglo-Saxon kings referred to such a council as a *witen* or *witenagemot* (as in "meeting of the wise"). See JOHN CANNON, *THE OXFORD COMPANION TO BRITISH HISTORY* 994 (1997).

191. For example, King John's reluctant agreement to the Magna Carta in 1215 codified a prohibition on "aid" (loosely speaking, taxes), except to ransom the king, knight his eldest son, or marry his eldest daughter, unless consented to by "common counsel" (*commune consilium*) composed of archbishops, bishops, abbots, counts, greater barons, and the king's tenants-in-chief, summoned on at least forty days' notice. See *MAGNA CARTA OF 1215, reprinted in WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY: FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 33-34* (1913) [hereinafter STUBBS, *SELECT CHARTERS*]. In 1258, Henry III agreed with the barons to a set of reforms commonly labeled the "Provisions of Oxford." See H.G. RICHARDSON & G.O. SAYLES, *PARLIAMENTS AND GREAT COUNCILS IN MEDIEVAL ENGLAND 1-3* (1961). These provisions mandated holding three "parliaments" per year, at which both the fifteen members of the king's council, and twelve "honest men" elected by "the commonality" (presumably the barons), would be present. See *PROVISIONS OF OXFORD, reprinted in STUBBS, SELECT CHARTERS, supra* at 387.

192. English kings, at least as far back as Richard I, periodically issued summons for one or more counties to send representatives to appear before the king's court to discuss particular business. See D. PASQUET, *AN ESSAY ON THE ORIGINS OF THE HOUSE OF COMMONS* 223 (R.G.D. Laffan trans., 1925). Beginning in 1265, English kings went beyond such isolated appearances by county representatives, and would, at times, summon all counties and towns to send representatives to a parliament. See *Summons to the Parliament of 1265, reprinted in STUBBS, SELECT CHARTERS, supra* note 191, at 398. Actually, writers often credit the "parliament" assembled by Simon de Montfort during his struggle with the king in 1264 as being the first "parliament" in England to include representatives of the towns and counties. See MICHAEL A.R. GRAVES, *THE PARLIAMENTS OF EARLY MODERN EUROPE* 18 (2001).

county.<sup>193</sup> Eventually, the knights and the town representatives began to meet together in a chamber separately from the barons, thereby establishing what became the House of Commons, while the barons meeting together became the House of Lords.<sup>194</sup>

While the English parliament provides the most noted example of the development of European parliamentary institutions in the Middle Ages, England was not the only, or even likely the first, medieval European country to develop a parliament. Instead, many historians credit several Spanish kingdoms, such as Leon and Aragon-Catalonia, with establishing the first parliaments, which the kingdoms called "Cortes."<sup>195</sup> In the end, however, the unification of Spain did not produce a unification of the Cortes, and the power of the Cortes seems to have receded, following the fifteenth century, in the face of the growing authority of the Spanish monarchy.<sup>196</sup>

Aragon-Catalonian Cortes spread into Sicily, Sardinia and southern Italy,<sup>197</sup> while elsewhere in Italy, a variety of parliaments and similar assemblies came into being, beginning as early as the mid-thirteenth century assemblies between nobles, clergy and town representatives convened by the Holy Roman Emperor, Frederick II.<sup>198</sup> Ultimately, however, the medieval Italian parliaments waned in the face of the grow-

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193. See *Summonses to the Parliament of November 1295*, reprinted in STUBBS, *SELECT CHARTERS*, *supra* note 191, at 478. After 1327, English kings summoned knights and town representatives to every parliament. See RICHARDSON & SAYLES, *supra* note 191, at 44.

194. See PASQUET, *supra* note 192, at 224-30.

195. See GRAVES, *supra* note 192, at 14-15. For example, in 1188, King Alfonso of Leon summoned representatives of the clergy, nobility and towns together into a Cortes at which he agreed not to "make war or peace or treaty unless with the counsel of bishops, nobles and good men . . ." *Royal Engagements to a Cortes Including Town Deputies at Leon*, reprinted in BISSON, *supra* note 188, at 143. In the combined kingdom of Aragon and Catalonia, Cortes appear to have included representatives of towns as early as 1163 and 1214 (see Gaines Post, *Roman Law and Early Representation in Spain and Italy, 1150-1250*, 18 *SPECULUM* 211, 212, 219-21 (1943)), which is well before this occurred in England. In 1283, Peter III of Aragon confirmed, if not established, the constitutional power of the Aragon-Catalan Cortes, when he summoned together clerics, nobles, and town representatives for a Cortes at which he promised annual assemblies and no new laws without the assembly's assent. See GRAVES, *supra* note 192, at 15.

196. See BRUCE LYON, *Medieval Constitutionalism: A Balance of Power*, in *STUDIES OF WEST EUROPEAN MEDIEVAL INSTITUTIONS*, at 176 (1978). But see Jean Nicolas et al., *The Monarchic State and Resistance*, in *RESISTANCE, REPRESENTATION, AND COMMUNITY*, at 73-74 (Peter Blickle ed., 1997) (challenging the traditional view that the Cortes declined as a consequence of the increasing power of the Spanish monarchs).

197. See GRAVES, *supra* note 192, at 16.

198. See LYON, *supra* note 196, at 168-69.

ing authoritarian power of the heads of the city-states, so that, by the height of the Renaissance, only three Italian parliaments remained.<sup>199</sup>

In medieval Germany, parliament-like assemblies occurred both on a national or imperial level (a Reichstag or diet) and on the level of the principalities (a Landtage).<sup>200</sup> The extent to which the Reichstag, with a few historic exceptions, constituted a real parliament is in doubt, however, not because of too much sovereign control, but, ironically, because of too little. As the Holy Roman Emperor became increasingly powerless, control shifted to the local princes and towns acting individually rather than through the Reichstag.<sup>201</sup> Hence, the Landtage, which were assemblies of local nobles and town representatives in a principality, constituted the more significant representative assemblies in medieval Germany. These assemblies frequently played a role of arbitrator in resolving dynastic disputes involving either succession to the throne or partition of territory, and often used the occasion to extract concessions, such as control over taxes.<sup>202</sup>

French assemblies with participants from the nobility, the clergy and the towns became known as the Estates, as they included representatives of the three estates (or classes) which, under the view of the time, comprised medieval society.<sup>203</sup> As with medieval Germany, medieval France had both national assemblies, the Estates General,<sup>204</sup> and local assemblies, the provincial Estates, and, as in Germany, the local assemblies became the more important. In France, however, this phenomenon stemmed from the growing power of the monarchy over the local lords, rather than vice versa. French kings (perhaps fearing the example set by the growing power of the English parliaments) by and large declined to call for Estates General, and, instead, sought consent to increased aid

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199. See H.G. Koenigsberger, *The Parliament of Piedmont During the Renaissance, 1460-1560*, 11 *ETUDES* 69, 70 (1952).

200. See LYON, *supra* note 196, at 166.

201. *Id.* at 166-67.

202. In the late fourteenth century, a strong Landtage emerged in the principalities of Hesse, Bavaria, Saxony, Brandenburg, and Bohemia. See GRAVES, *supra* note 192, at 23-24.

203. See JOSEPH BILLIQUOD, *LES ETATS DE BOURGOGNE AUX XIVE ET XVE SIECLES* 328-29 (1922). Interestingly, France also had institutions labeled "parlements," but these institutions were composed of magistrates and their function was judicial. See NICOLAS *et al.*, *supra* note 196, at 78-80.

204. Historians generally consider the Estates General to begin with the assembly convened in Paris in 1302 by the French king, Phillip the Fair, who was seeking support in his dispute with the Pope. In order to obtain the necessary revenues, Phillip went beyond the traditional assembly of lords who owed a direct feudal obligation to the king, and also summoned representatives of villas (towns) to appear with the full power to consent to grant aid. See CHARLES H. MCILAWIN, *Medieval Estates*, 7 *THE CAMBRIDGE MEDIEVAL HISTORY* 683-87 (1932).

from the provincial Estates.<sup>205</sup> At the same time, French nobles did not combine to force the king to call national assemblies, as had the English barons.<sup>206</sup> As a result, Estates in provinces negotiated over and consented to taxes, and played what turned into an ever-decreasing role as a constitutional check on the growing power of the French monarchy.<sup>207</sup>

## 2. Parliamentary Assemblies and Corporate Boards

To what extent did these medieval assemblies and parliaments inspire, or else reflect common thinking with, the earliest corporate boards? One difficulty with answering this question arises from the fact that historians have engaged in seemingly endless interpretation, revised thinking and debate as to the nature, origins and impact of these medieval assemblies and parliaments.<sup>208</sup> For example, while a pioneering historian in the field, William Stubbs, argued that the essential elements of a parliament, as recognized in late thirteenth century England, were: (1) the existence of a central or national assembly; (2) that included representatives of all classes of people (nobility and commons); (3) the classes being present or having freely elected their representatives; and (4) which possessed powers of taxation, legislation and general political deliberation,<sup>209</sup> the legal historian, Frederic Maitland, argued that the core of a parliament, as understood in the thirteenth century, was a session of the king's council, and that much of the business of a parliament was judicial (hearing petitions and resolving grievances and the like).<sup>210</sup>

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205. See ROBERT FAWTIER, *Parlement d'Angleterre et Etats Generaux de France au Moyen Age*, in *COMPTE RENDU DE L'ACADEMIE DES INSCRIPTIONS* 276-84 (1953).

206. See LYON, *supra* note 196, at 173-75.

207. See Gustave Dupont-Ferrier, *De Quelques Problemes Historiques Relatifs aux Etats Provinciaux*, J. DES SAVANTS 315 (1928). There were a variety of assemblies and parliaments in medieval European kingdoms beyond those in England, Spain, Italy, Germany and France. See GRAVES, *supra* note 192, at 14-25. One of these, that in Brabant (now part of Belgium), bears special mention. In a series of charters, culminating in the so-called *Joyeuse Entree* (often referred to as the Belgian Magna Carta), the dukes of Brabant (who were in serious financial trouble) granted to a council composed of nobles and representatives of wealthy towns, control over war, alliances, ducal appointments, legislation and taxes. See LYON, *supra* note 196, at 179-80.

208. For a good overview of the principal streams of thought involved in these interpretations, revisions and debates, see BISSON, *supra* note 188, at 1-5.

209. See generally STUBBS, *CONSTITUTIONAL HISTORY*, *supra* note 189.

210. See FREDERIC W. MAITLAND, *RECORDS OF THE PARLIAMENT HOLDEN AT WESTMINSTER*, ix-xxi (1893). Historians writing more recently have continued this debate. Compare RICHARDSON & SAYLES, *supra* note 191, at 2 (stating that the function of thirteenth century English parliaments was essentially judicial), with BERTIE WILKINSON, *STUDIES IN THE CONSTITUTIONAL HISTORY OF THE THIRTEENTH AND FOURTEENTH CENTURIES* 14-29, 50-54 (2d ed. 1952) (stating that the function of medieval English parliaments was essentially to make political decisions).

Historians have propounded various theories as to why parliaments developed in Europe in the late twelfth through fourteenth centuries. Some suggest that such assemblies were a natural outgrowth of medieval ideas concerning the need for consultation and consensus decision-making, which held that both custom and common law required the king to consult with, and obtain the acquiescence of, the broader community when making decisions.<sup>211</sup> Other historians emphasize the Roman and Canon Law doctrines of *quod omnes tangit ab omnibus approbetur* ("what touches all is to be approved by all"), and *plena potestas* (the "full power" of a representative to bind a corporate body to decisions) as providing the legal basis for the development of medieval parliaments.<sup>212</sup> Many historians see fiscal needs providing a critical impetus for the development of parliaments, as growing demands for revenue increasingly forced kings to seek consent from assemblies for taxes.<sup>213</sup> Yet other historians argue that parliaments may have been an outgrowth of military assemblies in which the king sought counsel regarding, and support for, decisions regarding war.<sup>214</sup> The traditional history of the English parliament, as recited earlier, emphasizes the demands of nobility for consultation as providing an impetus for the development of parliaments; but other historians argue that parliaments were a burden imposed by the kings, much like typical attitudes toward a present-day summons for jury duty.<sup>215</sup> A theory often associated with German historians views medieval parliaments as an outgrowth of medieval corporatism—not in the sense of business corporations, but in the sense that medieval society was organized into various collectives or corporate groups (churches, guilds, towns, etc.), each one of which possessed various rights and privileges. Under this theory, medieval parliaments developed as a compromise through which the king dealt with the representatives of the more powerful corporate groups in society.<sup>216</sup> Of course, many of these

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211. See, e.g., REYNOLDS, *supra* note 190, at 302-305. This custom and common law may, in turn, have been a product of a fusion between Germanic tribal traditions and Christian ideas regarding community. See *infra* notes 314-16 and accompanying text.

212. See Brian Tierney, *Medieval Canon Law and Western Constitutionalism*, 52 CATH. HIST. REV. 1, 13 (1966).

213. See JOHN B. MORRALL, *POLITICAL THOUGHT IN MEDIEVAL TIMES* 60 (1962).

214. See Thomas N. Bisson, *The Military Origins of Medieval Representation*, 71 AM. HIST. REV. 1199 (1966).

215. See PASQUET, *supra* note 192, at 223-30.

216. See Emile Lousse, *Parlementarisme ou corporatisme? Les origines des assemblées d'états*, 4 Revue Historique de Droit Français et Etranger 684-706 (1935). Just as there are different theories for the origins of medieval parliaments, there are also different explanations as to why the English parliament survived when other medieval European parliaments withered. While some nineteenth century historians attributed the survival of the English parliament to innate characteris-

theories as to the nature, origins and impact of medieval European parliaments are not mutually inconsistent, but rather, much like the blind persons' descriptions of the elephant, are simply emphasizing different aspects of a multi-faceted phenomenon.

Needless to say, there is not the space here to explore all of the varying theories and debates about medieval European parliaments. Instead, what is important for purposes of this Article is the extent to which the use of boards in early business corporations resulted from imitating medieval European parliaments, or, more likely, whether the underlying ideas that produced medieval European parliaments also promoted the use of boards in early business corporations. In the absence of direct evidence of linkage, we must examine the similarities and differences in practices and concepts between the two institutions. At first glance, there is an obvious similarity between early corporate boards and medieval parliaments in that both seemingly involve collective decision-making by a representative group. Yet, on closer scrutiny, it is not simple to say whether medieval parliaments embodied all, or even most, of the underlying concepts discussed earlier in this Article<sup>217</sup> which define the board-centered model of corporate governance; i.e., decision-making by a group of peers, elected to represent (rather than themselves constituting all of) the owners, and who have the ultimate authority over the executive officers.

To begin with, the mere assembly of nobles, clergy and town representatives with the king did not mean that there was collective or peer group decision-making in the medieval "parliaments." After all, even the most autocratic medieval monarch might wish to call an assembly of nobles, clergy and perhaps town representatives in order to announce decisions or as an audience for major events in the kingdom (coronations or the like). Alternately, monarchs with absolute authority might seek advice from, and the support of, a council or a broader assembly, but nevertheless retain power to make the ultimate decision. Nevertheless, while

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tics of the English people, see, e.g., STUBBS, *CONSTITUTIONAL HISTORY*, *supra* note 189, at 1-11, more recent historians find the explanation in a balance of power between the English kings, nobles, and towns, which prevented the withering of parliaments at the hands of absolute monarchs (as later occurred in France and Spain) on the one hand, or the fracturing of parliaments as a result of conflicts between overly powerful local lords and towns (as occurred in Germany and Italy) on the other hand. See, e.g., LYON, *supra* note 196 at, 157-183. Geography that was not too large (as in France), or too small (as in various city states), also may have given the English parliament a "Goldilocks" like survival advantage. See, e.g., Robert Fawtier, *Parlement d'Angleterre et Etats Generaux de France au Moyen Age*, in *COMPES-RENDUS DE L'ACADEMIE DES INSCRIPTIONS ET BELLES-LETTRES* 276-84 (1953).

217. See *supra* notes 8-25.



many medieval assemblies—even ones to which a medieval chronicler might attach the label “parliament” or an equivalent term—no doubt fit within these two possibilities, many medieval parliaments did entail real collective or peer group decision-making.<sup>218</sup> For example, it would not seem to have made much sense for the English barons to press the king to agree in Magna Carta to obtain consent of “common counsel” to “aid,” (taxes) or to agree in the Provisions of Oxford to hold three parliaments per year,<sup>219</sup> if such assemblies could only give non-binding advice to the king, but otherwise must approve or carry out the king’s decisions. Other assemblies for which there seems to be good evidence of real decision-making power include the council of nobles and town representatives in Brabant, which had control over war, alliances, ducal appointments, legislation and taxes; the Aragon-Catalan Cortes, which had a veto over new laws; and the Landtage of some of the German principalities.<sup>220</sup> Beyond the evidence of specific practice, the Roman or Canon Law doctrine of *quod omnes tangit ab omnibus approbetur* (what touches all is to be approved by all) would not seem to be met by a parliament that had no choice about consenting to the king’s decisions.<sup>221</sup>

Whether the concept of representation embodied in the board-centered model of corporate governance (that shareholders elect a group of directors, rather than manage the firm themselves) is anything like the “representative” nature of medieval parliaments is an even more complex question. The complexity arises from the different meanings encapsulated within the overall idea of representation. At its simplest level, both corporate boards and medieval parliaments are “representative” in the sense that a smaller group makes decisions binding upon a larger group, instead of having the entire body of shareholders (in the corporation), or the entire body politic (in the kingdom) make decisions. Indeed, many historians attach great significance to the Roman or Canon Law

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218. See ANTONIO MARONGIU, *MEDIEVAL PARLIAMENTS: A COMPARATIVE STUDY* 45-67 (1968).

219. See *supra* note 191.

220. See *supra* notes 195-207 and accompanying text.

221. But see MORRALL, *supra* note 213, at 65. The fact that many medieval parliaments exercised real collective decision-making authority does not necessarily mean that they operated through formal votes and majority rule, as would a modern legislature. Instead, medieval political philosophy typically placed a high value on consensus-based decisions. See REYNOLDS, *supra* note 190, at 319. Still, this fact might not distinguish medieval political thought from current board-centered corporate governance, since corporate boards also typically operate, in practice if not in law, through consensus-based decisions. See Manning, *supra*, note 34, at 1483. In any event, as remains true both in legislatures and corporate boards today, the theoretical right to refuse consent does not mean that, as a matter of practical politics, a board or legislative body will say no to a strong or popular chief executive.

doctrine of *plena potestas* (the full power of a representative to bind a corporate body to decisions) in turning feudal assemblies into parliaments. It was through this doctrine that representatives of the towns bound the towns to the decisions (particularly regarding taxes) of the parliaments, rather than the king having to negotiate tax collection or the like with each town.<sup>222</sup> On the other hand, the concept of representation seemingly embodied in *plena potestas*, as well as encompassed within the corporatist view of medieval society, was that individuals represented particular groups—for example, the burgher represented the particular town that sent him—rather than the whole kingdom.<sup>223</sup> This is different from the representative capacity of the board members of the early English business corporations, who typically did not represent any particular group of owners.<sup>224</sup> In fact, this difference in the nature of representation between legislatures (in which members represent particular states or districts) and corporate boards (at least in the absence of articles creating classified boards) carries through to the present time.<sup>225</sup> Yet another interpretation within the concept of representation stems from the fact that the modern mind tends to equate “representation” with democratic election, and, both today, and in the early business corporations, shareholders generally have elected members of the board.<sup>226</sup> By contrast, despite the romantic views of earlier historians like Stubbs, town

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222. See MORRALL, *supra* note 213, at 64-65.

223. See *Summonses to the Parliament of November 1295*, *supra* note 193 (stating that the knights sent to parliament are to have “full and sufficient power for themselves and the community of aforesaid shire,” and the citizens and burghers sent to parliament are to have such power “for themselves and the community of cities and boroughs separately,” to do the business of parliament (emphasis added)).

224. Actually, this seems to have been more true in English versus continental European corporations, as witnessed by a comparison of the English East India Company (which, for most of its history, seems to have had a board elected at large by all voting members) with the Dutch East India Company—whose board consisted of a defined number of representatives for each of the various “chambers” (merchant groups in different Dutch cities) which made up the company. See *supra* text accompanying notes 181-84. It is also worth noting that the 1505 charter of the Company of Merchant Adventurers called for the election of persons of “divers [sic] fellowships.” See *supra* text accompanying note 175. This may suggest an intent that the board members, even if elected at large, should come from, and thereby represent, different factions or groups within the Merchant Adventurers.

225. There is some difference in this regard, however, between Anglo-American corporations, and those German and other continental European corporations that operate under a system of co-determination in which the supervisory board has representatives of the shareholders and representatives of labor. See *supra* note 52 and accompanying text.

226. See *supra* text accompanying notes 8-14. Boards of early corporations, however, provide some noteworthy exceptions to shareholder election of directors. As discussed earlier, the initial charter of the London and the Plymouth Companies empowered the king to name the members of the governing council, while “assistants” on the governing board of the Eastland Company retained their positions on good behavior. See *supra* text accompanying notes 105-15.

citizens may not have elected, in any democratic sense, their representatives to medieval parliaments.<sup>227</sup> Indeed, there may have been little demand for democratic elections at a time when people naturally assumed that older, wealthier and more powerful members of the community should speak for the community,<sup>228</sup> and when acting as a representative to parliament was a significant unpaid burden.<sup>229</sup> Gradually, more and more residents of the counties and towns gained the right to vote in the election of representatives to the English Commons; yet it was to be centuries before such elections typically involved any choice between competing candidates.<sup>230</sup> On the other hand, the lack of competing candidates remains typical of corporate board elections today.<sup>231</sup>

The most striking difference between medieval parliaments and corporate boards, however, may go to relations with the chief executive. While the corporate board of directors is at least theoretically supreme over the chief executive, the question of parliaments' supremacy versus the kings' arose in centuries of European disputes<sup>232</sup> (of which the English Civil War constitutes one dramatic example). Indeed, the relationship of medieval monarch with parliament (or the equivalent assembly) provided the most visible, but by no means the only, example of an underlying tension running throughout medieval political thinking—this being how to resolve the value medieval society placed on hierarchy and respect for authority with the value it placed on collective decision-making.<sup>233</sup> Hence, even if a medieval parliament had real collective decision-making, as opposed to solely advisory, power (for instance to refuse a request for aid or taxes), this does not mean that such a parliament had the same ultimate power presently entailed in the board-centered model of corporate governance. Most especially, there would appear to be a major difference between the power of the corporate board to select and remove the chief executive, and the medieval parliaments' general lack of power to do the same with the king.<sup>234</sup> Still, this difference may

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227. See REYNOLDS, *supra* note 190, at 310.

228. See *id.* at 251.

229. See generally, e.g., PASQUET, *supra* note 192.

230. See Nicolas et al., *supra* note 196, at 120-21 (describing growth of the franchise, but the lack of choice between candidates, in elections to the English Commons from the fifteenth through seventeenth centuries).

231. See *supra* text accompanying notes 64-66.

232. See OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 30-48 (Frederick William Maitland trans., 1938).

233. See REYNOLDS, *supra* note 190, at 51-52.

234. See MARCIA L. COLISH, *MEDIEVAL FOUNDATIONS OF THE WESTERN INTELLECTUAL TRADITION 400-1400*, at 348-49 (1997). But see GIERKE, *supra* note 232, at 45-46 (discussing me-

be less dramatic than one initially might assume. As discussed earlier,<sup>235</sup> the boards in the early corporations typically lacked the power to select or remove the corporation's governor (whom typically the members directly elected). Moreover, medieval assemblies apparently had a say in selecting the king on a number of instances.<sup>236</sup> For example, some historians claim that Anglo-Saxon kings required the consent of the witan (council of advisors) to choose a successor,<sup>237</sup> and, as stated earlier, German parliaments arbitrated succession disputes between competing claimants to the throne.

All in all, even though there are important differences between corporate boards and medieval parliaments, there are enough similarities to suggest a common conceptual heritage based upon ideas of collective decision-making by representatives of a broader community. This is well illustrated by the invocation of the Roman or Canon Law doctrines of *quod omnes tangit ab omnibus approbetur* (what touches all is to be approved by all) and *plena potestas* (the full power of a representative to bind a corporate body) as the legal basis for medieval European parliaments. Significantly, these two Roman or Canon Law doctrines were by no means solely, or even particularly, applicable to parliaments and kingdoms. Rather, they originated in very different contexts. Medieval Canon Law jurists and scholars originally developed the doctrine of *quod omnes tangit ab omnibus approbetur* from a Roman law technical rule involving co-tutorship into a rationale for allowing lay representatives to attend General Councils of the Church,<sup>238</sup> while *plena potestas* originally involved the power of agents to represent corporations in civil suits.<sup>239</sup> The transposition of these two doctrines into a legal basis for medieval parliaments then occurred when summonses for attendance at medieval parliaments (which lawyers trained in Canon Law probably drafted) started invoking the two principles in describing the purpose and nature of the representation commanded.<sup>240</sup> Yet, there is no reason to suppose that doctrines so conveniently transposed into a legal basis for

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dieval jurists' claims that representative assemblies might remove a sovereign who neglected his duties).

235. See *supra* text accompanying notes 101-09.

236. See GIERKE, *supra* note 232, at 42.

237. See SIMON SCHAMA, 2 A HISTORY OF BRITAIN: THE WARS OF THE BRITISH 1603-1776, at 80 (2000).

238. See generally Tierney, *supra* note 212.

239. See Post, *supra* note 195, at 211.

240. See *Summonses to the Parliament of November 1295*, *supra* note 193 (reciting the doctrine that "what touches all is to be approved by all" in setting forth the purpose of the summons, and commanding that the county and town representatives have "full power" to do the business of the parliament).

representative parliaments might not also serve, even without express restatement, the same function for the boards of early business corporations. Indeed, the 1505 charter of the Company of Merchant Adventurers grants the board “full power and authority” to rule and govern over the merchants.<sup>241</sup> This suggests a common legal basis for corporate boards and medieval parliaments, since both institutions served as vehicles to obtain the consent required by the doctrine of *quod omnes tangit ab omnibus approbetur* through representatives with full power (*plena potestas*) to give the consent on behalf of the broader community.

It is also worth keeping in mind that some of the apparent differences between medieval parliaments and corporate boards may wane when one compares medieval parliaments to boards in the early, rather than in today's, corporations. For example, while the judicial function of medieval parliaments (for whom, as mentioned above, a significant, if not primary, task was resolving legal disputes) seems very different from the role of a modern corporate board, much of the function of the board of the Company of Merchant Adventurers was, as discussed earlier,<sup>242</sup> to resolve mercantile disputes involving members of the company.

### B. Town Councils

Town councils constitute a second example of medieval European collective decision-making by representative bodies, and, indeed, provide an example that is highly relevant in searching for the conceptual origins of the corporate board of directors. There is stronger evidence that the use of governing boards in the early corporations was either an imitation of town councils, or at least based upon a common intellectual foundation, than is available to establish such linkage with medieval parliaments. Moreover, since the creation of medieval European town councils often constituted a departure from either a hierarchical governance of the municipality solely by executive officials, at one extreme, or a sort of direct democratic governance under which all enfranchised members of the community participated, at the other extreme, understanding the motivations behind the use of town councils might provide insight into why the early corporations chose to employ a board structure, rather than leaving a chief executive in charge or following the partnership style system of all owners managing the company.

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241. See CAWSTON & KEANE, *supra* note 116, at 250.

242. See *supra* note 179 and accompanying text.

## 1. The Growth of Town Councils

Across Western Europe during the Middle Ages, representative town councils became a common feature of municipal governance.<sup>243</sup> As with medieval parliaments, the English experience provides a noted example. The first documented municipal council in medieval English history is found in Ipswich in the year 1200.<sup>244</sup> On May 25, 1200, King John granted a charter to Ipswich.<sup>245</sup> The Ipswich charter empowered the town to elect two bailiffs and four coroners, who then became the executive officials of the town.<sup>246</sup> For our purposes, however, what is most important is something that was not in the charter. According to a chronicle apparently made by the town clerk,<sup>247</sup> on June 29, 1200, an assembly of the town occurred in the churchyard of St. Mary's Tower in order to carry out the election of the bailiffs and coroners as commanded by the charter. After completing this election, the gathered townsfolk then decided that "henceforth there should be in the said borough twelve sworn chief portmen,<sup>248</sup> as there are in other free boroughs of England, and that they should have full power, for themselves and for the whole town, to govern and maintain the said borough and all its liberties, to render judgments of the town and also to keep, ordain, and do in the said

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243. See FRITZ RORIG, *THE MEDIEVAL TOWN* 26 (1967).

244. See HEATHER SWANSON, *MEDIEVAL BRITISH TOWNS* 80 (1999). This is not to suggest that Ipswich was a particularly important or innovative burg, even in medieval times. Rather, Ipswich's prime place in the history of English municipal government is the result of its good fortune in making a chronicle of the relevant events and in having that record survive the subsequent centuries.

245. See CARL STEPHENSON, *BOROUGH AND TOWN, A STUDY OF URBAN ORIGINS IN ENGLAND* 174 (1933). In large part, the Ipswich charter is a fairly typical example of the charters granted by John and other kings to boroughs in the Middle Ages. Indeed, a charter granted earlier the same year to Northampton apparently served as the model for the Ipswich charter, as well as for the charters granted to Gloucester, Lincoln and Shrewsbury. *Id.* at 174 n.6. The Ipswich charter granted the burgesses of the town a "fee farm," in other words, the right to collect their own taxes and remit to the king his share, as opposed to having a royal appointee (a "reeve") collect the taxes (and presumably keep a bit for himself). The charter also granted certain other rights and privileges that had the effect of removing the burgesses of Ipswich from feudal status, such as exemptions from tolls, and the right to try disputes in their own courts rather than in the court of the local noble. See COLIN PLATT, *THE ENGLISH MEDIEVAL TOWN* 130 (1976).

246. The bailiffs had the function of the former reeve, while the coroners, who had broader duties than entailed in our current notion of the office, handled judicial and various other matters pertaining to the crown, and were also responsible for supervising the bailiffs. See STEPHENSON, *supra* note 245, at 175.

247. There has been some argument about the authenticity of this chronicle as being, in fact, a contemporary account, as opposed to a later interpolation. *Id.* at 177 (discussing the basis for the challenge and rejecting the argument).

248. The word "port" at this time could be used synonymously with borough, so that, for example, the borough court was often referred to as the "portmanmoot." See SWANSON, *supra* note 244, at 75.

borough whatever should be done for the well-being and honor of the said town.”<sup>249</sup>

While we only have the word of the burgesses of Ipswich for the assertion that town councils were already the norm among free boroughs of England in 1200, it was not long before other documented examples of English town councils appeared.<sup>250</sup> The evidence shows that among English free boroughs after the twelfth century, a town council of twelve or twenty-four members was the norm.<sup>251</sup>

Just as the case with medieval parliaments, England was not the first medieval European country to have widespread town councils. Rather, documents show increasing use of such councils already occurring in other medieval European countries during the century before the events at Ipswich. Not surprisingly in view of their rapid growth, Italian medieval cities provide some of the earliest evidence of the use of town councils.<sup>252</sup> In the twelfth century, groups composed of so-called “consuls”—typically numbering from four to twelve, or a multiple thereof<sup>253</sup>—governed many Italian cities.<sup>254</sup> Because of continued strife

249. See STEPHENSON, *supra* note 245, at 175 (translating from the original Latin).

250. See PLATT, *supra* note 245, at 132 (stating that records reflect the election in 1206 of a council of twenty-four for London).

251. See STEPHENSON, *supra* note 245, at 174 n.4. Later, as municipal governance in England evolved into the sixteenth century, a bicameral council system replaced the single council in many English cities. This commonly entailed an inner council of twelve or twenty-four members (that was often self-perpetuating, rather than elected), and an elected outer council of some greater number (often a multiple of twelve). See PETER CLARK & PAUL SLACK, *ENGLISH TOWNS IN TRANSITION 1500-1700*, at 29, 128-29 (1976).

252. There are suggestions of the existence of some sort of town council in Pisa by 1081, when the Holy Roman Emperor, Henry IV, issued a charter to Pisa, promising various liberties, and agreeing not to appoint any marquis in Tuscany unless twelve representatives of Pisa gave their consent in an assembly summoned by the town bells; albeit it is unclear whether these twelve persons were a permanent council. See REYNOLDS, *supra* note 190, at 169.

253. See JOHN H. MUNDY & PETER RIESENBERG, *THE MEDIEVAL TOWN* 50 (1958).

254. See REYNOLDS, *supra* note 190, at 169-70. At first, the local bishop or viscount (who represented the Holy Roman emperor) appointed these consuls, see SUMMERFIELD BALDWIN, *BUSINESS IN THE MIDDLE AGES* 52 (1937), but eventually they became either self-perpetuating or else elected by a body of the leading citizens of the city. See RORIG, *supra* note 243, at 26. For example, in Florence during the twelfth century, the assembly which elected the consuls was known as the “*parlamentum*.” See R.W. CARSTENS, *THE MEDIEVAL ANTECEDENTS OF CONSTITUTIONALISM* 18 (1992). As the Italian cities developed and internal dissension grew, their municipal governments evolved. Whereas the consuls seemed to have performed representative, executive and judicial functions, see REYNOLDS, *supra* note 190, at 170, the new municipal constitutions often reposed the executive function in a single office, the “*podesta*,” see JAMES W. THOMPSON, *ECONOMIC AND SOCIAL HISTORY OF THE MIDDLE AGES (300-1300)* 784 (2d ed. 1966) [hereinafter THOMPSON, *ECONOMIC AND SOCIAL HISTORY*], while the representative function might lie with a combination of a twelve or twenty-four member lesser council, and broader assemblies. See ANTONY BLACK, *GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO*

between various classes and factions, however, Italian cities, after a period of increasingly democratic governance during the thirteenth and early fourteenth centuries, often ended up in the Renaissance governed by magistrates and princes with dictatorial powers.<sup>255</sup>

In the north, municipalities in Flanders also provide very early evidence of the use of town councils; albeit, this apparent precociousness may simply reflect an accident of greater documentation. A succession dispute in 1127 over who would become the count of Flanders has left for later historians a written charter granted to Saint-Omer, the provisions in which might be typical of the rights of towns in Flanders at the time. In addition to confirming the burgesses of the town's exemptions from obligations of feudalism, the Saint-Omer charter, significantly for our purposes, grants the burgesses the right to be tried by their own "echevins."<sup>256</sup> While this suggests solely a judicial function for the so-called "echevins," it appears from later evidence that during the twelfth century in Flanders the echevins had become a locally elected commission, normally numbering twelve persons, who handled all of the executive, as well as judicial, governance functions of the town.<sup>257</sup> Such councils with combined judicial and executive functions—sometimes called echevins and sometimes called "jures"—can be found governing towns throughout northern France by the middle to late twelfth century, while in the south of France, similar institutions, but whose members possessed the Italian influenced name of consuls, were in charge of the foremost towns by 1150.<sup>258</sup> In the end, however, just as the growing autocratic control by town princes doomed most Italian parliaments and town councils alike, the growing power of the French monarchy caused a decline in the power of both the Estates and the French town councils. By the middle of the fifteenth century, royal officials were taking over control from the consular government of the town burgesses in France.<sup>259</sup>

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THE PRESENT 48 (1984). These constitutions also sometimes adopted fairly elaborate schemes for selecting members of the councils. See MUNDY & RIESENBERG, *supra* note 253, at 79-80.

255. See MUNDY & RIESENBERG, *supra* note 253, at 79, 82-83.

256. STEPHENSON, *supra* note 245, at 34-35.

257. *Id.* at 37.

258. *Id.* at 40-41. There were eight consuls in the governing group for Avignon, twelve in Marseilles, and twenty-four in Toulouse. See THOMPSON, *supra* note 18, at 784.

259. See R.H. HILTON, ENGLISH AND FRENCH TOWNS IN FEUDAL SOCIETY: A COMPARATIVE STUDY 51 (1992).



During the twelfth and thirteen centuries, the town council continued to spread throughout Western Europe.<sup>260</sup> The end result was that town councils, commonly numbering twelve or some multiple thereof, became a prevalent feature of medieval European municipal government.<sup>261</sup>

## 2. Town Councils and Corporate Boards

The earlier comparison of medieval European parliaments and corporate boards produced some, but admittedly only mixed, evidence of imitation or a common conceptual underpinning. By contrast, there is much stronger evidence of such commonality between early corporate boards and medieval European town councils. To begin with, medieval municipalities were often "corporations" themselves, and, hence, would have provided a logical template for governance provisions in the charters of the early trading companies. Actually, medieval towns were corporations under a couple of different meanings of the term—both of which, in fact, are significant in suggesting a linkage between town councils and the early trading company boards.

The definition of a "corporation" that is more familiar to the lawyer is that it is a fictitious legal entity or person, created by an act of the state, which possesses rights such as the ability to hold property and to sue and be sued, and can continue to exist despite the death of its members.<sup>262</sup> Many English towns, starting in the fifteenth century, sought and received charters making them corporations in this sense.<sup>263</sup> The typical explanation for this action given by historians focuses on certain practical advantages that resulted from such status—especially, the ability of a town to avoid application of the legislation on mortmain by becoming a royally chartered corporation empowered to hold property.<sup>264</sup> The same concerns with owning property despite the legislation on mortmain also inspired a number of English guilds to seek royal grants of corporate charters at this time.<sup>265</sup> Hence, it is entirely plausible that lawyers draft-

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260. For example, presumably copying from Italy and France, members of German town councils during the thirteenth century began to refer to themselves as consuls. See REYNOLDS, *supra* note 190, at 174.

261. *Id.* at 191.

262. See *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

263. See PLATT, *supra* note 245, at 142.

264. *Id.* at 143-44. The fact that the rapid growth in corporate charters for English towns began after the extension, in 1391, of mortmain legislation to reach towns and guilds supports this explanation.

265. See SUSAN REYNOLDS, *IDEAS AND SOLIDARITIES OF MEDIEVAL LAITY* ch. VI, pp. 12-13 (1995) [hereinafter REYNOLDS, *IDEAS*].

ing charters for towns, guilds, and, later, trading companies, would have borrowed ideas, including with respect to governance, from the charter of one type of corporation in order to include in the charter of another type—particularly insofar as one aspect of the trend toward formal town incorporation was the inclusion in the new charters of governance provisions formalizing and refining the reliance on town councils.<sup>266</sup>

There is another meaning of corporation, however, which would have encompassed more towns, at an earlier stage, and could have had an even more profound linkage to the governance of early trading companies. This meaning comes from a sort of realist theory of the corporation often associated with German legal philosophers.<sup>267</sup> Under this approach, a corporation is not some fictitious legal person created by an act of the state, but rather the law's recognition that some groups can engage in such a degree of collective action and have such a collective identity that the collective itself starts to exist as an independent reality, and, as such, possesses rights and liabilities. Medieval corporations in this sense included guilds, universities, the Church or some of its components, and, of importance here, towns.<sup>268</sup> We encountered this notion before as one explanation of the development of medieval parliaments—specifically, that such parliaments arose as a mechanism through which representatives of the more powerful corporations dealt with the monarch.<sup>269</sup> While this consequence of the corporate nature of medieval society impacted political institutions external to the corporations themselves, the corporate nature of medieval society could also have had an impact on the nature of political or governing institutions within the corporations. This internal impact, which, if present, would establish an extraordinarily strong link between town councils and corporate boards, arises from the possibility that the widespread existence of corporate collectives in medieval Europe produced overarching ideas about the governance of corporate collectives, no matter in what context the collective arose—town, guild, or trading company—and that these overarching ideas naturally led to the introduction of councils and boards.<sup>270</sup> We shall return to the

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266. *Id.* at ch. XIII, pp. 49-50 (giving the example of Gloucester, which adopted a charter following the "London model" of a mayor, a council of aldermen, and a broader common council); CLARK & SLACK, *supra* note 251, at 128 (asserting the new charters were designed to promote control by the oligarchy).

267. See Frederic William Maitland, *Translator's Introduction*, POLITICAL THEORIES OF THE MIDDLE AGE xxv-xxvii (1900).

268. See BLACK, *supra* note 254, at 18-24.

269. See *supra* text accompanying note 216.

270. One example of this transposition of governance ideas between types of corporations so as to create an overarching ideology of corporate (in the broadest sense of the word) governance, is

prospect shortly when considering why medieval European towns developed councils.

In addition to providing a logical source for governance ideas for the early trading corporations, medieval town councils had a practical linkage to such corporations. This linkage comes through the merchant guilds. As discussed above,<sup>271</sup> the early trading companies (as exemplified by the Company of Merchant Adventurers) were in large measure little more than merchant guilds, which then morphed into the joint stock companies. Guild leadership, in turn, substantially overlapped with membership on medieval town councils. Once again, we can thank the Ipswich chronicler for convenient evidence of this relationship. The Ipswich charter, like many similar charters, granted the burgesses the right to have a guild merchant.<sup>272</sup> The Ipswich chronicler relates how, during the course of their organizing assemblies, the Ipswich townsfolk selected one of the twelve chief portmen to be the alderman (or head) of this guild, and named three other chief portmen, as well as one of the coroners, to be the four assistants to the alderman.<sup>273</sup> In many instances, the overlap between town council and the leadership of the merchant guild went beyond common members. In Cologne, the managing committee of the merchant guild became the town's first government,<sup>274</sup> while, in Calais, the governing council of the Merchants of the Staple ran the town for two years.<sup>275</sup> Florentine town councils for some time were composed of representatives selected by the various guilds.<sup>276</sup> In

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found in the works of the medieval jurist, Bartolus. Dealing with the issue of whether consent for action by a city required an assembly of the populace, Bartolus applied the earlier work of the medieval scholar of Canon Law, Hostiensis, who wrote that the consent required of the members of ecclesiastical colleges could only be given in a public assembly. See BLACK, *supra* note 254, at 84.

271. See *supra* text accompanying notes 163, 176-77.

272. HILTON, *supra* note 259, at 93. Along similar lines, the 1127 charter for Saint-Omer contains various provisions supporting the town's guild. See STEPHENSON, *supra* note 245, at 35. The charter granted to Gloucester in the same year as Ipswich's provides an interesting variation. Instead of granting the various liberties to the town's burgesses, who are then empowered to have a guild merchant, the Gloucester charter, for the most part, simply granted the liberties associated with a borough franchise to the "burgesses of Gloucester of the gild merchant," i.e., to the members of the guild. See HILTON, *supra* note 259, at 93.

273. See HILTON, *supra* note 259, at 93. Even more dramatically, a comparison of a mid-thirteenth century membership list of the Leicester town council, with the membership list at the same time of the governing council of Leicester's merchant guild (both with twenty-four members), shows that they were composed of virtually the same persons. PLATT, *supra* note 245, at 133. During the sixteenth century, many of the English municipal leaders were closely identified with the Merchant Adventurers, see CLARK & SLACK, *supra* note 251, at 129, whose charter, as discussed above, helped establish the use of a board among English trading companies.

274. BLACK, *supra* note 254, at 56.

275. See *supra* text accompanying note 170.

276. See CARSTENS, *supra* note 254, at 18-22.

many towns, the guildhall served as, and ultimately became, the town hall.<sup>277</sup> All told, given the connections between town councils and merchant guilds, and between merchant guilds and early trading companies, it is difficult to believe that similarities between town councils and early corporate boards are coincidental.

Additional evidence that early corporate boards were either imitating medieval town councils, or were based upon ideas held in common, comes from the comparing the composition of the two bodies. To begin with, one strikingly common feature of the medieval town councils, themselves, is the tendency of such councils to contain twelve, twenty-four, or some other multiple or fraction of twelve, members. This is not a coincidence. Instead, it appears to derive from the twelve-person princely court of Charlemagne and his successors—with its six “scabini” or judgment-finders, four judges who read the law, and two advocates who protected the church.<sup>278</sup> Significantly, twelve, twenty-four, or some multiple or fraction of twelve, also turns out to be a common number of board members in the earliest corporations.<sup>279</sup> The council of the Company of the Merchants of the Staple in Calais had twenty-four members, while the 1505 charter of the Company of Merchant Adventurers authorized the election of twenty-four assistants.<sup>280</sup> Twenty-four was also the number of assistants in the Russia Company, the number of assistants in the Eastland Company, the number of committees in the East India Company, and the number of directors of the Bank of England.<sup>281</sup> Beyond the similarities in numbers, there is also similarity in the descriptions of the sort of persons who were to serve on these governing groups. The earlier discussion of the 1505 charter of the Company of Merchant Adventurers pointed out how this charter called for the election of “the most sadd [sic] discreet and honest persons.”<sup>282</sup> Similar language calling

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277. See H.W.C. DAVIS, *MEDIEVAL ENGLAND* 310-11 (1924).

278. See MUNDY & RIESENBERG, *supra* note 253, at 50. It would also not seem to be a coincidence that there are twelve members traditionally on a jury, and that these medieval town councils often had a judicial function.

279. 1 SCOTT, *supra* note 97, at 151.

280. See *supra* text accompanying note 170.

281. See *supra* text accompanying notes 96, 121. The 1592 charter of the Levant Company called for twelve assistants, while both the 1605 charter of this company and the charter of the Massachusetts Bay Company called for eighteen (one and one-half times twelve) assistants. Even outliers, such as the seven board members of the Hudson's Bay Company, or the thirteen members of the “Council of Virginia” originally governing the London Company, see *supra* text accompanying notes 105, 132, may simply have come from taking the traditional numbers of twelve or six and adding one extra member to avoid tie votes.

282. See *supra* text accompanying note 175. Similar language exists in the charter of the Russia Company. See *supra* text accompanying note 125. Interestingly, the charter of the Russia Com-

for the more "discreet," "honest" and "sad" persons was often found in descriptions of appropriate members for English town councils.<sup>283</sup> In addition, the chief executive of the Company of the Merchants of the Staple was called the mayor.<sup>284</sup>

### 3. The Motivations for Town Councils

Given the strong evidence that early corporate boards were either an imitation of town councils, or at least must have stemmed from similar ideas about governance, examining the reasoning behind the use of town councils could provide an insight into the motivations for the early corporations selecting governance through boards. Unfortunately, it turns out that the motivations behind the use of town councils are themselves subject to considerable uncertainty. The problem is that town councils arose during a period for which records are scarce.<sup>285</sup> What is generally accepted is that early medieval towns typically were run under a representative of the king,<sup>286</sup> a local noble,<sup>287</sup> or the clergy.<sup>288</sup> We also know, as detailed above, that towns in the thirteenth and fourteenth centuries increasingly had councils. Unfortunately, the evidence is limited as to exactly how and why municipal government traveled from this beginning point to this end point.

As discussed above, the creation of the Ipswich council gives us an example for which documentation is relatively complete as compared with other towns. The Ipswich chronicler mentions three organs of town government: the officers (the two bailiffs and four coroners); the council of twelve chief portmen; and the assembly of the town acting as a whole, which elected the officers and decided to have a council of chief portmen. The existence of these three organs of town government suggests

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pany, in addition to establishing a board of twenty-four assistants, also called for the election of four "consuls." As discussed earlier, the title "consul" comes from Italian municipal governments. See *supra* text accompanying notes 253, 258.

283. PLATT, *supra* note 245, at 119 (quoting language which called for the "more honest and discreet," the "more discreet and fit," or the "wiser and sadder" to serve on town councils).

284. See *supra* text accompanying note 166.

285. THOMPSON, ECONOMIC AND SOCIAL HISTORY, *supra* note 254, at 766.

286. English towns, as mentioned above, commonly had an official called a reeve, who was responsible to the king for collecting taxes and had the chief voice in the town. PLATT, *supra* note 245, at 132. Incidentally, when such an official was appointed for a shire, he was known as the shire reeve, or sheriff.

287. Medieval nobles commonly exercised control over villages by having jurisdiction in the noble's court to hear almost all criminal and civil cases involving the inhabitants of villages within the noble's territory. See SWANSON, *supra* note 244, at 74.

288. In Germany, bishops typically were the lord of the town. See Rorig, *supra* note 243, at 19, 22.

that the burgesses of Ipswich had, generally speaking, three evident choices for municipal governance. They could simply have had the officers (which was all that the charter commanded).<sup>289</sup> They could have had the officers coupled with assemblies of the whole town. Instead, they chose a third alternative—officers coupled with a town council. Using the language of corporate or business governance, the burgesses chose governance by a board, rather than governance solely by managing executives, or a partnership style scheme of all members of the community participating in management. The principal reason the Ipswich burgesses gave for making this choice is that other free boroughs had such councils; but this rationale simply forces us to ask why other towns had created councils. As illustrated by the alternatives facing Ipswich, the broad question, in turn, breaks down into two subsidiary inquiries: Why have a council rather than assemblies of the whole town? And, why have a council rather than having governance solely by executive officials?

Historians have propounded a number of explanations for towns choosing a council over assemblies of all of the burgesses. One set of explanations consists of relatively benign practicality concerns. These include the lack of interest by all of the burgesses in attending town assemblies,<sup>290</sup> the notion (which is rather elitist) that many of the burgesses lacked the knowledge or judgment necessary to make quality decisions,<sup>291</sup> and the simple logistical problems entailed in holding meetings with increasing numbers of participants.<sup>292</sup> Needless to say, these concerns remain the reasons often still expressed for centralized versus part-

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289. At first glance, one might be tempted to equate the four coroners of Ipswich as being something of a board. Later sources suggest, however, that the purpose of having a number of persons as coroners (or in similar positions) was not to have group action, as in a board, but rather to allow busy burgesses (who might need to travel out of town on trade) to rotate who among the four would carry out the responsibilities of the office. SWANSON, *supra* note 244, at 91.

290. See LORRAINE ATTREED, *THE KING'S TOWNS: IDENTITY AND SURVIVAL IN LATE MEDIEVAL ENGLISH BOROUGHES* 18 (2001). Support for this rationalization comes from some of the medieval documents establishing town councils, which contain passages that explain such action was necessary because of poor attendance at assemblies, and that adopt requirements for council members to take an oath that they will attend meetings. See REYNOLDS, *supra* note 190, at 191-92.

291. See CLARK & SLACK, *supra* note 251, at 128 (quoting complaints by the magistrates of Gloucester about the difficulties of dealing in any matter "where the multitude of burgesses have voice"); PLATT, *supra* note 245, at 120 (quoting complaints directed at assemblies in Leicester and Northampton where "great trouble" ostensibly resulted "by reason of the multitude of the inhabitants being of little substance and of no discretion, who exceed in the assemblies the other approved, discreet, and well disposed persons").

292. See 1 JOHN P. DAVIS, *CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO AUTHORITY OF THE STATE*, 112 (1905). The fact that smaller towns retained open assemblies supports this as a factor. REYNOLDS, *supra* note 190, at 196.

nership style management in the modern business corporation with numerous shareholders.<sup>293</sup> Other historians take a less benign view, finding the use of councils to be a mechanism for oligarchies of wealthier merchants to freeze lower classes out of power.<sup>294</sup>

The other question is why the burgesses did not just leave the executive officials (the bailiffs and coroners) in charge of the town. After all, such an action both would have avoided the practicality problems with assemblies, and would have allowed an oligarchy of wealthier burgesses to cut others out of power. Perhaps the explanation is simply that all the wealthier burgesses, while desiring to cut the poorer townsfolk out of power, wished to preserve their own voice in municipal governance. If true, this would be consistent with the notion that boards (if they have the same motivation as town councils) exist so that larger shareholders can elect themselves to a position in which they can protect their interests.<sup>295</sup> Yet, if the town councils existed solely to provide a direct voice for the powerful members of the community, then one might expect the number on the council to equal the number of persons with both influence and a desire to have such a voice. In this event, the size of the councils ought to be all sorts of numbers reflecting the random number of persons of influence in various communities. Instead, what one finds,

293. See *supra* text accompanying notes 27-43.

294. See PLATT, *supra* note 245, at 119-24; see also REYNOLDS, *supra* note 190, at 191 (stating that until recently almost all historians had viewed the replacement of assemblies with town councils as a "ploy designed by the dominant patriciate to entrench its power," a thesis Professor Reynolds rejects). While such debates over motivations are typical, and often irresolvable, grist for historical scholarship, an added complication with the establishment of town councils is that it is often unclear precisely what form of governance the medieval town council replaced. A traditional, and perhaps romantic, narrative views councils as representing a deviation from earlier governance in which the towns operated through assemblies of the whole. *Id.* In a way, the Ipswich chronicle supports this story, as an assembly of the town created the council, as well as took a variety of other steps to get the borough organized. Moreover, unless one assumes that the idea of calling an assembly of the town occurred to the Ipswich burgesses out of thin air, one might imagine that governance through such assemblies could have been occurring before the town received its charter (at least insofar as the matters addressed by the assembly did not intrude into topics (taxes) of interest to the reeve or local noble). See REYNOLDS, IDEAS, *supra* note 265, at ch. VII, p. 6. If one accepts this narrative, then the choice by the burgesses of Ipswich (as well as other such towns) to shift from governance by officials and open assemblies, to governance by officials and town councils, presaged the much later decisions by the Merchants of the Staple and the Merchant Adventurers similarly to shift from having a mayor (for the Merchants of the Staple) or governor (for the Merchant Adventurers), plus assemblies of the whole membership, to having a mayor or governor, plus a council or a board of assistants. An alternate narrative, however, views the council as having taken over directly from the previous control by noble, king or clergy. See STEPHENSON, *supra* note 245, at 40, 174. Under this view, the assembly of the town in Ipswich simply would have been an convocation to provide formal acceptance of a governing council whose existence may well have predated the charter.

295. See *supra* text accompanying notes 36-41.

as pointed out before, is that town councils commonly consisted of twelve, or some multiple or fraction of twelve, members. This use of symbolically significant numbers suggests that town councils, like medieval parliaments, were a reflection of medieval European political ideas concerning the need for collective governance by representatives (even if the representatives are not from the entire town, but only from the wealthier inhabitants).

One plausible explanation for having a town council, rather than just executive officials, comes from the tasks assigned to the council. In the middle of empowering the council to govern and maintain the borough and to do whatever should be done for the well-being and honor of the town—all quite undefined—the one specific function assigned the Ipswich council, according to the chronicler, is to “render judgments” for the town. This parallels the initial task of the echevins of Saint-Omer, which was to judge cases involving the burgesses of the town. As reflected in these two examples, one of the primary roles of the early town councils was to adjudicate disputes (especially mercantile disputes).<sup>296</sup> Accordingly, an underlying philosophy behind the establishment of town councils in lieu of governance solely by executive officials was a preference for collective determinations of contested matters in adjudication.<sup>297</sup> This, of course, is still the preference reflected in the continuing right to trial by jury. To the extent that some of the function of the parliaments in medieval European kingdoms was adjudication of disputes,<sup>298</sup> this philosophy also partially explains the establishment of such parliaments. To what extent then does this function pertain to the corporate board of directors? The medieval preference for adjudicative decisions by a group rather than an individual seems to support Professor Bainbridge’s rationalization of corporate boards as justified by the superiority of group decisions in matters of judgment<sup>299</sup>—even if medieval European societies had not formally studied psychology. On the other hand, the question of whether a group is better able to evaluate evidence presented in an adjudication (say to determine whether the evidence proves O.J. killed Nicole, just to give an example) may or may not be the same as whether a group is better able to evaluate a prospective

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296. See Rorig, *supra* note 243, at 161.

297. See Reynolds, *supra* note 190, at 23-34. The reintroduction of Roman law in the twelfth century led to the increasing use of single presiding judges in lieu of adjudication by collective groups, as had been characteristic of earlier medieval Europe. Resistance to this trend occurred in the preservation of trial by jury in England, and, significantly for purposes of this Article, in mercantile matters, where assemblies or groups of merchants continued to try disputes. *Id.* at 51-58.

298. See *supra* text accompanying note 210.

299. See *supra* text accompanying notes 30-31.



merger. Yet, the question raised in this Article is not why current corporations hypothetically might have chosen board governance if writing on a clean slate divorced from the forces of history and tradition. Rather, the question is why did the early trading corporations, such as the Company of Merchant Adventurers, choose this institution, thereby setting the pattern others followed. In answering this question, it seems very useful to keep in mind that a major function of the board of assistants of the Company of Merchant Adventurers was, like the early town councils, the adjudication of mercantile disputes.<sup>300</sup>

The Ipswich chronicle also provides a significant clue as a second purpose behind establishing a town council. The chronicle states that the council members are to have full power to act for themselves and the town. We encountered the concept of full power (*plena potestas*) before when discussing medieval European parliaments.<sup>301</sup> It went along with the Roman or Canon Law doctrine of *quod omnes tangit ab omnibus approbetur* (what touches all is to be approved by all). In other words, the reason that representatives to a medieval parliament, or the members of the Ipswich town council, required full power was because the law required consent of all members of the community to actions impacting the community.<sup>302</sup> This meant that if town decisions were not going to be approved in open assemblies, there should be a council composed of representatives with the power to approve such actions.

As with medieval parliaments, the idea of representation by a town council in medieval Europe differed in some ways from what we often now think of by representation. For example, as with medieval parliaments, the idea of representation in the medieval town council did not necessarily equate with democratic election. Numerous town councils in England and elsewhere were self-perpetuating (in other words, the existing members selected new members as vacancies arose).<sup>303</sup> Indeed, the Ipswich council itself was elected through a process in which the bailiffs and coroners selected four persons from each parish, who, in turn, chose the twelve chief portmen.<sup>304</sup> Of course, as discussed earlier in this Article,<sup>305</sup> such self-perpetuation, or selection of board members by officers, remains the reality, even if not the theory, in the modern widely-held

300. See *supra* text accompanying note 296.

301. See *supra* text accompanying notes 222-23.

302. See BLACK, *supra* note 254, at 73 (medieval jurists applied the doctrine of "what touches all is to be approved by all" to civic government).

303. See PLATT, *supra* note 245, at 120.

304. See STEPHENSON, *supra* note 245, at 175.

305. See *supra* text accompanying note 24.

corporation. The earlier discussion of medieval European parliaments also noted that each member of the parliament represented and bound the particular corporate group (such as a town) that sent the representative.<sup>306</sup> This is different from the concept of representation entailed in a corporate board elected at large by all the owners. Interestingly, the medieval European town councils straddled both concepts of representation. Members in many medieval town councils were chosen by, and presumably represented, geographic divisions of the town (wards) or the particular corporate groups within the town (individual guilds).<sup>307</sup> The Ipswich chronicle, however, describes the chief portmen, although selected from different parishes, as having full power to represent the entire town, rather than each representing his individual parish. Since there is no indication that the portmen (rather than the bailiffs and coroners) were the agents of the town in dealing with outsiders, the representation by the chief portmen of the entire town is the same concept as the representation of the entire shareholders by a board elected at large. All told, whether democratically elected or not, whether representing different parts of the town or not, the town council was representative insofar as it existed to fulfill the function of providing consent on behalf of the whole town when assemblies became impractical.

Significantly, the need for this concept of representation appears to flow in substantial measure from medieval ideas of collectives as corporations. As discussed earlier, medieval towns operated in such a fashion and assumed such an identity that they became a corporate entity (what medieval jurists referred to as a "*universitates*"), even before fifteenth century towns in England sought formal status as a "corporation."<sup>308</sup> Both in popular conception, and in juristic theory, this existence as a

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306. See *supra* text accompanying note 223.

307. See MUNDY & RIESENBERG, *supra* note 253, at 79-80.

308. See BLACK, *supra* note 254, at 24, 49-53. Just as there are different concepts of the corporation, as discussed earlier, there are also differences in terminology. The term "corporation" stems from a metaphor to a human body. See REYNOLDS, IDEAS, *supra* note 265, at ch. VI, p.12. Indeed, the charter of the East India Company referred to the company as a "body corporate." See *supra* text accompanying notes 137-39; CAWSTON & KEANE, *supra* note 116, at 87. This metaphor of a group as a body assumed greater significance as late- and post-medieval lawyers and judges started viewing rights, such as holding property or appearing in court, as only being available to persons (including state-created corporate persons), and not simply to groups. See REYNOLDS, IDEAS, *supra* note 190, at ch. VI, p.12. It was this view that provoked late medieval municipalities to seek charters making them corporations in the sense of a fictitious person created by an act of the state. *Universitates* comes from the Roman Law *universitas*, which encompassed a variety of associations known as *collegia* (colleges), *corpora* (bodies) and *sodalitates*, and reflected the Roman Law and earlier medieval European tradition that groups, and not just persons, could hold property and have legal rights. ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE § 65 (1976).

corporate entity carried within it certain norms as to governance. One norm, which formed a basis for the towns' claims to self-government, was that the members of a corporative collective were entitled to make their own rules as to the internal affairs of the collective.<sup>309</sup> The other norm, which is central to the present discussion, is that such collectives made decisions by common consent, in other words, by the consent of all of the members of the collective.<sup>310</sup> Ideally, this meant unanimous consent of all of the members of the collective.<sup>311</sup> Practicality, however, dictated compromise with this ideal. Hence, there could be majority rule in case of irreconcilable disagreement,<sup>312</sup> and, critically here, there should be a council of representatives if open assemblies become impractical.<sup>313</sup>

This leads to the question of what was the origin of these corporate norms, particularly regarding consent through representation. The political historian, Antony Black, traces the medieval European corporate norm of common consent through a council of representatives, to three sources.<sup>314</sup> One source consists of Roman ideas of republican rule. Of course, a skeptic might wonder how much influence of Roman republican writers, such as Cicero, could have had on medieval thinking, since Rome itself had not been a republic for five hundred years before its fall. Still, especially for Italian cities, Roman republican sources could have provided a handy reinforcement in support of those seeking governance through representative councils. Germanic traditions provide a second possible source. On the tribal level, early German tribes operated through popular assemblies in which all members had a duty to attend. As suggested earlier,<sup>315</sup> this tradition presumably also played a role in leading to the medieval parliaments. Another Germanic tradition involved the guilds. Because the early guilds constituted entirely voluntary associations unable to coerce dissenting members, they were almost of necessity governed by common consent. Christian ideas of community, as practiced by Church organizations, provided a third source for the

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309. BLACK, *supra* note 254, at 25 (citing the medieval jurist, Bartolus, for the proposition that any universitates 'can make rules about its own affairs'); *see id.* at 52 (applying this proposition to the towns' claims for self government). Ironically, while towns might point to their corporate status as universitates in order to justify their claims to self-government, guilds also could point to their status as universitates in order to claim a right to regulate their trade in contravention of city laws. *Id.* at 25 (citing the medieval jurist, Baldus).

310. *See id.* at 53.

311. *See* REYNOLDS, *supra* note 190, at 190.

312. *See* BLACK, *supra* note 254, at 61.

313. *See id.* at 25.

314. *See id.* at 53-65.

315. *See supra* note 216.

norm of common consent. We shall look at the guilds and Church organizations in some detail below.

If town councils incorporate notions of collective decision-making and representation, do they also embody the supremacy over executive officers called for under the current board-centered approach to corporate governance? Medieval European municipalities varied as far as whether the council appointed town officials, such as the mayor.<sup>316</sup> In any event, municipal constitutions calling for the appointment of the mayor or other executive officials by town councils may have been more a means to cut broader assemblies out of the process than a means to ensure council control over executive officials.<sup>317</sup> Indeed, there seems to be little evidence that medieval Europeans viewed the role of the town council in a manner parallel to the current notion that corporate boards exist principally as a tool to monitor management. Interestingly, for example, the Ipswich chronicle states that one of the tasks of the four coroners (rather than the chief portmen) was to “superintend the acts of the bailiffs.”<sup>318</sup> Finally, it is worth noting that if monitoring town officials against corruption was one of the purposes of town councils, the evidence suggests that town councils were not very successful in the undertaking.<sup>319</sup> In fact, perhaps the early failures of town councils to prevent corruption by municipal officials should have been seen as a harbinger of the perennial failure of corporate boards as a monitoring tool, all the way to Enron.

### C. Guilds

Medieval Europe had numerous fraternal organizations referred to by a variety of labels, among the most common of which is “guild.”<sup>320</sup> Many were simply social or religious fraternities organized for communal feasting and drinking and mutual defense and support.<sup>321</sup> Of greater

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316. See REYNOLDS, IDEAS, *supra* note 265, at ch. XIII, p. 50; SWANSON, *supra* note 244, at 80.

317. See PLATT, *supra* note 245, at 120.

318. STEPHENSON, *supra* note 245, at 175. On the other hand, the notion that the coroners themselves were acting as some sort of monitoring board would seem undermined by the fact that the two bailiffs were also two of the four coroners.

319. See CLARK & SLACK, *supra* note 251, at 132-33. The complaint that management often controls current corporate boards by limiting the directors' access to information, see *supra* text accompanying note 54, finds its parallel in the observation that secrecy by the mayor and other civic officials kept the city councils of seventeenth century England in the dark. See *id.* at 131.

320. See REYNOLDS, *supra* note 190, at 72. The term “guild” (also spelled “gild”) probably comes from the German “geld” as in money paid in for dues. BALDWIN, *supra* note 254, at 55.

321. See H.W.C. DAVIS, *supra* note 277, at 300-01.

relevance here are guilds with more of an economic focus. Historians typically divide these economically oriented, or trade, guilds into two types: craft guilds and merchant guilds.<sup>322</sup>

There is a direct relationship between the governance of medieval European guilds and of the early trading companies. This is because the early trading companies, such as the Merchant Adventurers, were in large measure little more than merchant guilds themselves, which then evolved into the joint stock companies, all the while continuing the tradition of board governance. Moreover, working backwards even further, the precedent setting adoption of board governance by the Company of Merchant Adventurers in its 1505 charter seems to have been an outgrowth of the Merchant Adventurers' relationship with a merchant guild known as the Mercers Company.

The Mercers Company was a guild of London merchants.<sup>323</sup> In the mid-fourteenth century, an assembly of London merchants adopted a code of rules for the Mercers Company, which, among other things, provided for the annual selection of four masters to govern the group. The Mercers received their first royal charter in 1393. The charter granted the Mercers the corporate attributes of perpetual existence and the right to hold property.<sup>324</sup> The 1393 charter also empowered the membership to elect annually four wardens to supervise the company.<sup>325</sup> It is unlikely, however, that either the four masters or the four wardens constituted a board as such. Instead, it is likely that these masters or wardens functioned as executive officers, with the multiple number allowing a rotation of responsibilities in order to avoid overburdening merchants busy with their own business,<sup>326</sup> and with significant decisions left for assem-

322. See *id.* Reality, however, often belied the notion of a neat division between guilds of craftsmen or artisans, who made things, and guilds of merchants, who bought and sold things. For example, the so-called guild merchant of the early English towns may have included butchers, bakers, carpenters, masons, and all sorts of other craftsmen, who later formed craft guilds. See SALZMAN, *supra* note 167, at 71.

323. Indeed, the name "mercator," comes from the Latin, "mercator," meaning merchant. Evincing the close relationship between merchant guilds and medieval town government, the Mercers boast that the first two mayors of London in the early thirteenth century were Mercers. See P.H. DITCHFIELD, *THE CITY COMPANIES OF LONDON AND THEIR GOOD WORKS: A RECORD OF THEIR HISTORY, CHARITY AND TREASURE* 18 (1904).

324. As discussed earlier, see *supra* text accompanying note 264, the purpose of seeking this charter was probably to allow the company to hold property despite the prohibition on mortmain, which legislation, in 1391, extended to reach towns and guilds that lacked charters expressly empowering property ownership in perpetuity.

325. See DITCHFIELD, *supra* note 323, at 19.

326. See *supra* note 289 (discussing the practice of medieval towns electing four coroners in order to allow burgesses, who were busy with travel and business, to rotate who would carry out the duties of the office).

blies of the general membership whenever needed. One reason for reaching this conclusion is because, in 1463, the Mercers changed their governance structure to introduce what is clearly a board. Declaring that it was “odious and grievous” to hold many meetings of the membership, especially “for matters of no great effect,” the membership of company passed a resolution that called for the election every year of twelve “sad and discreet” members to be assistants to the wardens.<sup>327</sup> The function of the assistants was to make decisions jointly with the wardens that all members of the guild would follow—in other words, to replace general assemblies with representative group decision-making.

Two facts establish the connection between the Mercers’ action in 1463 and the board governance provision found four decades later in the charter of the Merchant Adventurers.<sup>328</sup> One is the obvious similarity in the two boards: Members of both boards had the title of assistants. While the Mercers board contained twelve members, and the Merchant Adventurers had twenty-four, twelve or twenty-four, as discussed earlier,<sup>329</sup> were the traditional numbers of members on medieval town councils. Further, in both cases, we see the same sort of language about the nature of persons to serve (“sad and discreet”). The second fact is even more telling. As discussed earlier,<sup>330</sup> at the time of the 1463 Mercers’ resolution, the London merchants engaged in export of manufactured goods (merchant adventurers) were a part of the Mercers Company, insofar as they formed any group at all.<sup>331</sup> Hence, in establishing board governance, the 1505 charter of the Company of Merchant Adventurers was simply continuing to use a structure under which the London-based merchant adventurers, as part of the Mercers, already operated.<sup>332</sup>

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327. See DITCHFIELD, *supra* note 323, at 20; O'Donnell, *supra* note 96, at 63.

328. For a discussion of the 1505 charter of the Merchant Adventurers, see *supra* text accompanying notes 179, 241, 280.

329. See *supra* text accompanying notes 251.

330. See *supra* text accompanying note 174.

331. In fact, despite the 1505 charter, the Merchant Adventurers kept their minutes in the same book with the Mercers’ until 1526. See CHEYNEY, *supra* note 172, at 166.

332. A somewhat similar connection may exist between the London-based Grocers Company, the Levant Company, and, in turn, the East India Company. The Grocers—which probably began as a guild of merchants that dealt at wholesale (*en gros*), see Ditchfield, *supra* note 323, at 34, elected a board of six assistants as early as 1397. See LUJO BRENTANO, *ON THE HISTORY AND DEVELOPMENT OF GILDS AND THE ORIGIN OF TRADE-UNIONS* 62 (1870). The Levant Company appears to have been related to the Grocers, as evidenced by the Levant Company’s use of the Grocers’ hall for the Levant Company’s meetings until 1666. 1 DAVIS, *supra* note 292, at 224. The East India Company, in turn, used the books of the Levant Company for the East India Company’s initial organizational meetings. *Id.* Indeed, the origins of the East India Company in earlier guilds reverberated for many years in the continuation by the East India Company of various guild traditions,

Given that the guilds are the most direct source for the use of boards in the early trading companies, the question becomes why did the guilds themselves adopt the use of boards. As suggested by the earlier discussion of medieval town councils,<sup>333</sup> municipal government probably influenced guild government.<sup>334</sup> Nevertheless, it would oversimplify the origins of corporate boards to view the guilds simply as a conduit that imitated town councils, and then, by turning into the early trading companies, established the pattern for later corporate boards. This is because, as also mentioned earlier,<sup>335</sup> it is possible as well to view the guilds as one of the sources leading to the medieval European towns' use of councils. In other words, guilds and towns were inexorably linked in a relationship in which ideas and practices traveled both ways, and that, in turn, reflected a broader set of political ideas and practices also spurring the use of parliaments in medieval Europe.

To understand the development of boards in the medieval guilds, it helps to start by asking what sort of decisions and tasks were involved in the governance of the guilds. Probably the most important decisions were the admission of new members<sup>336</sup> and the adoption of ordinances governing the members' conduct.<sup>337</sup> Collection and appropriate use of funds from the members meant that there was a need for financial administration.<sup>338</sup> Significantly, guilds also commonly sought to resolve disputes involving their members, which, in turn, led the merchant guilds often into performing the role of a sort of mercantile court.<sup>339</sup>

In their early years, the guilds made these decisions and carried out these tasks through a governance structure consisting of a combination of executive officers and general meetings of all the membership.<sup>340</sup> Significant decisions, including admission of new members and the adop-

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including calling shareholders "brothers" and requiring they take oaths of membership. 1 SCOTT, *supra* note 97, at 152.

333. See *supra* text accompanying notes 271-77, 303-07.

334. See BLACK, *supra* note 254, at 58 ("craft guilds not infrequently used the pattern of city government as a model").

335. See *supra* text accompanying notes 266, 307.

336. See 1 DAVIS, *supra* note 292, at 152-53.

337. Such ordinances often addressed personal behavior so as to promote the members' living a virtuous life. See BALDWIN, *supra* note 254, at 56-57. In the craft and merchant guilds, the ordinances typically regulated the quality of goods and honesty in dealings. 1 DAVIS, *supra* note 292, at 310.

338. See 1 DAVIS, *supra* note 292, at 304.

339. See SWANSON, *supra* note 244, at 77.

340. Along similar lines, medieval European universities, such as at Bologna, Paris and Oxford, followed a governance model based upon general assemblies of students (the Bologna model) or masters (the Paris model), who elected officers (rectors and the like). See LOWRIE J. DALY, *THE MEDIEVAL UNIVERSITY 1200-1400*, at 30-75 (1961).

tion of ordinances to regulate the guild, occurred at meetings of all the membership. These meetings, often called a “morgensprache” (morning speech), occurred at least annually and often were accompanied by ceremonies and festivities.<sup>341</sup> Commonly, the guild members at the annual morgensprache elected officers for the guild.<sup>342</sup> Among the tasks of the chief officer(s) of the guild would be presiding over the morgensprache, caring for the guild’s property, collecting fees due the guild, enforcement of the guild’s ordinances, and attempting to settle disputes between members of the guild.<sup>343</sup> On the other hand, if the enforcement of an ordinance, or the resolution of a dispute, required adjudication, then the matter commonly went before the whole membership at the morgensprache.<sup>344</sup>

While, at the early stage, the guild governance structure contained nothing like a board of directors, this early governance structure is nevertheless significant to the history of the corporate board. To begin with, the early guild governance structure, consisting of general membership meetings and elected executive officials, appears to parallel the governance structure of both the Company of the Merchants of the Staple and the Company of Merchant Adventurers before these two early trading companies adopted board governance.<sup>345</sup> In other words, these two early trading companies evolved in their governance in same manner as many guilds evolved in the guilds’ governance. This further evidences the link between the development of board governance in guilds and its development in the early trading companies.

In addition, the early guild tradition of decisions by general assemblies made an important contribution to the ultimate development of boards. This is because, as mentioned earlier when discussing the motivations for the development of town councils,<sup>346</sup> guild practices were one of the sources for the idea that decisions impacting an entire collective group required the consent of all in the group. At the earliest time, when guilds were probably more fraternal organizations for drinking and

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341. See BLACK, *supra* note 254, at 24.

342. See 1 DAVIS, *supra* note 292, at 152. Guilds varied in the titles and roles of such officers. The Ipswich chronicle describes the election of an alderman to head the guild merchant for the town, with four others to assist. See *supra* text accompanying notes 273-77. As discussed above, the Mercers elected four individuals, at first called masters, and later called wardens, to be the executive officers for the guild. The Calimala Guild (the guild of the cloth merchants) in Florence had four consuls and a treasurer as its senior executive officers. See EDGCUMBE STALEY, *THE GUILDS OF FLORENCE* 117 (1906).

343. See 1 DAVIS, *supra* note 292, at 152.

344. See *id.* at 153.

345. See *supra* text accompanying note 163.

346. See discussion *supra* Part IV.B.3.



mutual aid and defense, than for coordinated economic activity, the principle of unanimous consent may have been the result of simple practicalities—if someone did not like the decision, they could leave.<sup>347</sup> Moreover, the basic notion of a brotherhood, whose members shared festivities and looked out for each other, seems intuitively more conducive to collective and consensus-based decision-making, than it is to a command-oriented hierarchical governance.<sup>348</sup> Over time, however, what started as simple practicality, or intuitive notions of brotherhood, became embedded in custom and norm—and even could influence Canon Law jurists to turn a Roman Law doctrine of *quod omnes tangit ab omnibus approbetur* (“what touches all is to be approved by all”) from a technical rule into a broad principle of governance. This, in turn, meant that when general assemblies became impractical in guilds or towns, some institution was needed to step in and give consent on behalf of the overall community. In the case of towns, this institution was the town council. As suggested by the discussion of the Mercers Company, in the case of the guilds, this institution was also a council or a board of assistants.

The switch by guilds to using boards occurred gradually across Europe. In Italy, fourteenth century Florentine guilds provide examples of the use of complex systems of councils that mirrored the complexity of Florentine city government.<sup>349</sup> Guilds in some German cities had six or eight person councils by the fourteenth century.<sup>350</sup> In England, a merchant guild council of twenty-four members (who were virtually the same persons who served on the twenty-four member town council) existed at Leicester in the mid thirteenth century.<sup>351</sup> Documents of London’s Grocers Company record the selection in 1397 of six persons to aid the wardens in the discharge of their duties.<sup>352</sup> By and large, however, the move by the guilds toward the use of boards of assistants occurred in the fifteenth (as illustrated by the Mercers Company) and sixteenth centuries.<sup>353</sup>

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347. In a rough way, this is John Locke’s social contract theory writ small and in a real world context.

348. See BLACK, *supra* note 254, at 57.

349. See STALEY, *supra* note 342, at 119 (discussing the two councils in the Calimala guild).

350. See BRENTANO, *supra* note 332, at 62 (giving the examples of the Spinwetter guild at Bale and the Tailors guild of Vienna).

351. See PLATT, *supra* note 245, at 133.

352. See *supra* note 332.

353. See BRENTANO, *supra* note 332, at 62. Indeed, the guild merchant at Ipswich appears to have had a familiar looking board of twenty-four by the time of James I. See 1 SCOTT, *supra* note 97, at 7.

As with the development of town councils, there are different theories as to what prompted the guilds to switch to the use of boards. The Mercers' resolution suggests that the motive lay in the burden on the members entailed by holding assemblies for less important matters.<sup>354</sup> Yet, this raises the question of what were these less important matters that produced burdensome meetings. Since the matters that went before the morgensprache were admission of new members, adoption of ordinances, election of officers, and adjudication of disputes, and since admission of new members, adoption of ordinances, and election of officers generally occurred at the annual morgensprache—which, as an occasion of festival and ceremony, would take place anyway and presumably would be well attended—it seems that the principal matters that called for overly frequent meetings would have been the adjudication of disputes. Hence, it appears that a primary reason for the board of assistants would have been to hear disputes. The parallel with the early town councils, such as the Ipswich chief portmen or the echevins of Saint-Omer, for whom adjudication was a primary task,<sup>355</sup> is obvious. Similarly, adjudication of disputes was a function of the board of assistants of the Merchant Adventurers.<sup>356</sup> In all of these cases, the common ideology producing boards, which remains reflected in the jury system, is the desire for collective judgment in adjudications.

The alternate explanation for the development of boards of assistants in the guilds also finds a parallel in town councils. Many historians contend that the boards in the guilds, like the town councils, represented an attempt by the wealthier members to cut other members out of governance.<sup>357</sup> However, given the custom and norm of collective consent, it presumably would not have been acceptable to place entire control in the guild officers. The solution is the creation of boards of assistants with, as illustrated by the Mercers' resolution, a symbolically significant number of twelve (or a multiple or fraction of twelve) members, and with agreement by the membership to accept the decisions of the board.

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354. One can find a reflection of such a burden in the apparent difficulty the guilds had in obtaining attendance at general meetings, as evidenced by the adoption of quorum requirements, *see* BRENTANO, *supra* note 332, at 61-62, and penalties for non-attendance, *see* O'Donnell, *supra* note 96, at 63.

355. *See supra* text accompanying notes 296-97.

356. *See supra* text accompanying note 300.

357. *See* Brentano, *supra* note 332, at 87-88. Evidence that an oligarchic power grab, rather than general membership complaints about burdensome meetings, may have been behind the establishment of boards of assistants includes the eventual replacement of elected boards by self-perpetuating boards (in which existing board members selected new board members), and protests by members in some of the guilds, such as London's Weavers, about the changes. *See id.*

This just leaves the question of the extent to which the boards in the guilds served to monitor and control the guild's officers. Particularly in the sixteenth century, the boards of assistants of many of the London guilds acquired the power to appoint officers in lieu of appointment by the membership at the annual meeting.<sup>358</sup> Yet, as suggested by the roughly parallel developments involving English town councils,<sup>359</sup> transfer of the power to elect the guild's officers from general assemblies to boards of assistants may have been more an effort to shut out the general membership, than it was an effort to establish monitoring by the boards. Also, as with town councils, when the guilds wanted to delegate monitoring of their officers, they often did this by assigning the task to a smaller group, rather than to the board of assistants. For example, records of the London-based Grocers guild show the selection of four auditors "to superintend the accounts and delivery of the wardens."<sup>360</sup> Similarly, monitoring of the consuls and treasurer (the senior executive officers) of Florence's Calimala guild was the function of three "Sindacatori" (general inspectors), rather than the responsibility of either the twelve person general council or the eighteen person special council of the guild.<sup>361</sup>

#### D. Church Councils

No discussion of representative bodies in Europe of the Middle Ages would be complete without reference to the councils in various institutions of the Church. Admittedly, there is not the extensive evidence of linkage between the Church councils and the boards of the early trading companies that one discovers when dealing with the councils of towns and guilds. Still, given the central role of the Church in medieval European life and thought, it would be surprising if no intellectual commonality existed between Church councils and trading company boards.

Councils existed on a variety of levels in the western European Church during the Middle Ages. Provincial synods and local church councils met fairly frequently in some parts of medieval Europe.<sup>362</sup> Of

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358. See I DAVIS, *supra* note 292, at 213.

359. See *supra* text accompanying note 294.

360. BRENTANO, *supra* note 332, at 62.

361. See STALEY, *supra* note 342, at 121.

362. See ANTONY BLACK, COUNCIL AND COMMUNE: THE CONCILIAR MOVEMENT AND THE FIFTEENTH-CENTURY HERITAGE 9 (1979). The degree to which institutions affiliated with the Church of medieval Western Europe followed a representative governance structure varied. The Dominican Order, which received papal approbation in 1216, provides an example of representative governance by an organization within the medieval Church. The constitutions of the Dominican Order contained regulations for daily life and for the government of the Order. There were three

more far reaching influence were the general councils of the Church. From the first ecumenical council convened at Nicaea in 325, councils occurred among representatives of some or all of the five patriarchal sees (Constantinople, Rome, Alexandria, Antioch and Jerusalem). These councils were chiefly concerned with religious doctrine, and recognition of their pronouncements as authoritative established councils as the highest authority within the Church on questions of doctrine.<sup>363</sup> An important development in using councils as a tool of governance occurred in the middle of the eleventh century, when the College of Cardinals obtained the power to elect the Pope. Originally, cardinals were simply certain Roman clergy who performed liturgical functions in the great basilicas, but, in the eleventh century, the College of Cardinals became the Pope's close counselors, and, in 1059, Nicholas II issued a decree granting the College the power to elect the Pope.<sup>364</sup> The immediate motivation for this development was to remove the intervention of lay officials (such as the Holy Roman Emperor) in the selection of Popes.<sup>365</sup> The long-range impact, however, was to advance a model of group selection of a chief official (as in boards and CEOs). It also inevitably raised the question of whether the power to elect gave the power to remove.

The implications of the power of the College of Cardinals to elect the Pope came to roost in the so-called Great Schism. A decision of the College of Cardinals in 1378 to recant their election of Urban VI, and to elect Clementine VI instead, led to the embarrassing spectacle of two

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levels of government—the local convent, the provincial chapter, and the general chapter. The members of each convent elected a prior, who governed along with the friars (members) in accordance with the constitution and the rules of the Order. The prior and two delegates from each convent in the province elected the provincial prior and provincial chapter (a governing council). The provincial chapters, in turn, elected the members of the general chapter (the governing council for the overall Order). The general chapter had the power to enact legislation changing the regulations governing the Order. The general chapter met annually until 1370, and continued to meet every two or three years thereafter. Interestingly, in light of later disputes over supremacy of councils versus Popes, each chapter had the power to remove officials at its level. See CARSTENS, *supra* note 254, at 25-28. By contrast, the Benedictine monasteries elected an abbot for life, who was supposed to consult with the monks, but who had the final say in all decisions. See 1 DAVIS, *supra* note 292, at 51; BISSON, *supra* note 188, at 141-42. The Franciscans also placed greater authority in their executive officials (particularly the general minister at the head of the order) than the Dominicans, but subjected the officials to reelection at a set term and to removal for cause. See 1 DAVIS, *supra* note 292, at 64.

363. See COLISH, *supra* note 234, at 340-41. Following the schism between the Roman and Greek Churches, councils of the Roman Church, starting with the First Lateran council of 1123, typically occurred without representatives of the Greek Church.

364. See BRIAN TIERNEY, *FOUNDATIONS OF THE CONCILIAL THEORY: THE CONTRIBUTION OF THE MEDIEVAL CANONISTS FROM GRATIAN TO THE GREAT SCHISM 69-70* (reprint 1968) (1955).

365. See COLISH, *supra* note 234, at 341.

competing lines of Popes (one in Avignon and the other in Rome).<sup>366</sup> After several earlier efforts failed, the Council of Constance in 1414 through 1418 resolved the schism with decrees that appeared to establish the supremacy of councils within the Roman Church. Not only did the Council of Constance depose the contenders and arrange for the election of a new Pope under a procedure designed by the council, it set forth a decree announcing that, as a legitimately assembled general council, everyone of whatever standing or office within the Church, including the Pope, was bound to obey its order eradicating the schism. Moreover, the Council of Constance promulgated a second decree calling for regular councils.<sup>367</sup> Constance turned out, however, to be the high point for the supremacy of councils within the Roman Church. After a later council at Basel came to naught, Popes failed to call regular councils and effectively reduced the decree from Constance claiming supremacy for councils to cover only the special circumstance of resolving the Great Schism.<sup>368</sup>

Despite its ultimately limited impact on the governance of the Church itself, the Council of Constance remains important because it represented a culmination of thought and writings concerning the power of councils versus Popes (and, inferentially, other governing officials). Some of this writing and thought deals with issues unique to Christianity and the constitution of the Church.<sup>369</sup> Other writing and thought raises issues whose political importance could transcend Church governance. One example is whether election of a governing official by a group meant that the group also had the power of removal, which, in turn, raises the question of what is the source of a governing official's authority.<sup>370</sup> More narrowly, recognizing that human fallibility could afflict even the highest governing officials, medieval scholars explored the grounds and procedure for removing an errant Pope.<sup>371</sup> Given that these considerations of Church governance occurred as medieval European

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366. See TIERNEY, *supra* note 364, at 1-2.

367. See BLACK, *supra* note 362, at 17-18.

368. See JOHN N. FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS: 1414-1625*, at 40-42 (2d ed. reprint 1956) (1907).

369. Such as whether statements attributed to Christ delegated authority to the heirs of Saint Peter (the Popes) or to the whole Church, and the relationship of the Roman See to the whole Church. See TIERNEY, *supra* note 364, at 25-36.

370. See *id.* at 56 (citing the writing of the medieval scholar of Canon Law, Laurentius, who drew a distinction between the divine origin of the powers of the offices of Pope or Emperor, and the selection by human electors of which individuals occupied the offices).

371. This meant laboring to reconcile the doctrine that a heretic could not be Pope, with the doctrine that only the Pope could judge what was heresy. See *id.* at 57-64 (discussing the effort of the medieval scholar of Canon Law, Huguccio, to reconcile the conflict).

kingdoms had been experimenting with the power of parliamentary assemblies versus kings, historians have debated whether the medieval scholars of Church governance were drawing upon the political events occurring around them, or whether the political events were emanating from ideas developed as part of Church governance under Canon Law.<sup>372</sup>

For purposes of this Article, what is most important about the ruminations of scholars in medieval Europe on the powers of Church councils versus Popes lies in the efforts of these scholars to draw upon medieval ideas of corporation law—not in the sense of a business corporation, but, as discussed before, in the sense of a collective society, including towns, guilds, and the Church. Here, we encounter the conflict between the authoritarian views of Pope Innocent IV—who drew upon the concept of the Church as a corporation to argue that the power of decision rested in the head (i.e. the bishop for the local church, or the Pope for the overall Church)—and the views of the noted thirteenth-century scholar of Canon Law, Cardinal-bishop Henricus de Segusio (Hostiensis), who argued that power over a corporation resided both in the head and in the membership.<sup>373</sup> Amusingly, some of the debate between proponents of the two schools of thought wanders off into the metaphor of the corporation as a body. (Indeed, the word “corporation” derives from the Roman “corpus” as in “body.”<sup>374</sup>) So, those supporting Innocent IV’s position sometimes talk of the power of the head to rule the body.<sup>375</sup> The arguments of Hostiensis, however, were not metaphorical. Speaking, for example, of the power of a local bishop to alienate property, Hostiensis noted that this decision could produce a loss from which the whole of the corporation (the local church) would suffer. Since this action, therefore, impacted the common welfare, it required the consent of the entire corporation, not just its head.<sup>376</sup> In other words, we are back to the Roman and Canon Law doctrine of *quod omnes tangit ab omnibus approbetur* (“what touches all is to be approved by all”).

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372. Compare *id.* at 18-20 (Canon Law provided the source for conciliar ideas in the Church); Tierney, *supra* note 212, at 8-13, 15 (showing that Canon Law principles influenced development of medieval European parliaments), with FIGGIS, *supra* note 368, at 33-36 (medieval European parliaments influenced conciliar ideas in the Church).

373. See TIERNEY, *supra* note 364, at 106-108.

374. See *supra* note 308.

375. See GIERKE, *supra* note 232, at 28-29.

376. See TIERNEY, *supra* note 364, at 49, 122-24. The concern that bishops, if not required to gain consent, might alienate local church property to the prejudice of the local church suggests a monitoring function behind the idea of consent. Indeed, the notion that the corporate group, or its representatives, needed to keep an eye on potentially misbehaving officials seems to have received a stronger expression in the Church than with parliaments, town councils, guild councils or trading company boards. See *id.* at 123-24.

The crisis of the Great Schism brought to the fore the role of a representative group, in other words a council, as the means by which the entire corporate body could act upon a matter that concerned all. As stated above, long practice had recognized the authoritative nature of the pronouncements of general councils of the Church on matters of doctrine. Medieval scholars of Canon Law provided a doctrinal explanation for this recognition by stating that action of general councils provided the "universal consent" necessary to make decisions on matters touching "the general state of the Church."<sup>377</sup> This is reminiscent of the summonses, discussed earlier,<sup>378</sup> which called upon English towns and shires to send representatives to parliaments with *plena potestas* ("full power") to consent to actions of the parliaments, so as to meet the requirement of *quod omnes tangit ab omnibus approbetur* ("what touches all is to be approved by all").<sup>379</sup> Also, as seen before when dealing with medieval parliaments and town councils, the concept of representation employed by the proponents of Church councils did not necessarily entail democratic election. For example, the principal proponents of conciliar power at Constance—Zabarella, d'Ailly and Gerson—asserted that the power of acting as a council for the whole Church rested upon those with individual authority, i.e., the bishops.<sup>380</sup>

Overall, what emerges from Church councils is additional evidence for an overarching medieval theory of corporate governance applicable to kingdoms, the Church, towns and guilds. Under this theory, decisions impacting the entire corporate collective require consent of the collective. In circumstances in which an assembly of the entire corporate body is impractical, consent from a group, who are representative in a symbolic, even if not a democratically elected, sense, becomes necessary. The early trading companies applied this overarching ideology in adopting governing boards.

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377. See *id.* at 47-53.

378. See *supra* text accompanying note 193.

379. The full power entailed in the concept of *plena potestas* should be distinguished from the concept of *plenitudo potestatis* ("fullness of power") accorded to the Pope. At least as the later term grew to be understood, *plenitudo potestatis* went beyond the notion that an individual had authority to represent a broader group, and entailed being both the source of all authority and even above the law. See TIERNEY, *supra* note 364, at 146-48.

380. See BLACK, *supra* note 362, at 19-22.

## V. CONCLUDING THOUGHTS ON THE PURPOSE OF CORPORATE BOARDS

Having traced the historical and political origins of the corporate board of directors, the question becomes what can this tell us about the purpose of corporate boards today. In fact, the history of corporate boards provides conflicting evidence with respect to the purposes claimed by modern scholars for the board-centered model of corporate governance.

The development of corporate boards, as well as the development of other representative institutions in the Europe of the Middle Ages, is consistent with the notion that the use of boards (like other representative institutions in medieval Europe), in part, arose out of problems with direct governance by groups that have large numbers of members (in other words, the central management rationale). This is nicely illustrated by the example of the Levant Company, which had no board when the company started with four members, but received a new charter providing for a board of twelve assistants when the membership increased.<sup>381</sup> Along the same lines, the apparent evolution in some medieval municipalities from governance involving assemblies of all townsfolk, to governance by town councils, occurred as medieval towns grew in population.<sup>382</sup> Yet, if practicalities ruled out governance by the general membership once the organization reached a certain size, this does not explain why either trading companies, or towns, guilds, kingdoms or institutions of the Church, would employ a board, council or parliament, rather than an autocratic governance structure under just executive officials. Indeed, representative institutions declined, and autocratic rule increased, in kingdoms, towns and the Church in much of Europe following the Middle Ages.<sup>383</sup>

The origins of the corporate board also provide some support for Professor Bainbridge's argument that the reason for boards lies in the superiority of groups in making decisions involving judgment. As discussed earlier, a common task for town councils, guild councils, parliaments, and early trading company boards was the adjudication of disputes.<sup>384</sup> This seems to reflect the notion that groups are more likely to get the correct result in ferreting out truth than would an individual

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381. See *supra* text accompanying notes 130-31.

382. See *supra* note 292 and text accompanying notes 289-92.

383. See *supra* text accompanying notes 259.

384. See *supra* text accompanying notes 185, 242, 296, 300, 339.



judge.<sup>385</sup> Also, the tradition of consultation and consensus that formed part of the basis for the development of medieval parliaments<sup>386</sup> seems to have arisen not just out of ideas of consent, but also out of the feudal obligation of nobles to provide advice to the king.<sup>387</sup> Underlying the obligation to provide advice must be some notion of the superiority of groups over individuals in making decisions. Nor was the idea that groups might reach superior decisions over individuals merely implicit in medieval political thinking. Rather, this concept was a central tenet in the writings of the noted medieval political philosopher, Marsiglio of Padua. For example, in his work, *Defender of the Peace*, Marsiglio argued that the best laws came from the entire collective (*universitas civium*) because “when the whole corporation of citizens is directed towards something with its intellect and sympathy, the truth of that object is judged more certainly and its common utility weighed more carefully.”<sup>388</sup> Still, despite all this being said, it is critical to keep in mind that the proposition that groups, such as boards, make decisions superior to those made by an individual leader (with, of course, advice) was a highly contested claim in medieval Europe, as it remains to the present.<sup>389</sup> Indeed, Marsiglio of Padua was condemned as a heretic, and was not that influential at the time he wrote.<sup>390</sup>

It is clear that some representative institutions in medieval Europe had the purpose, at least in part, of mediating between various constituencies, thus supporting the notion that corporate boards exist in order to mediate between various corporate claimants.<sup>391</sup> Yet, the medieval representative institutions that had a mediating role, such as the parliaments and some town councils, contained representatives from various constituencies.<sup>392</sup> So, for example, the French Estates General and provincial Estates take their name from the presence of representatives of three classes—nobility, clergy, and burghers—that made up medieval society (at least in the view of the time).<sup>393</sup> By contrast, solely the members of

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385. See *supra* text accompanying notes 297, 299.

386. See *supra* text accompanying note 211.

387. See COLISH, *supra* note 234, at 345.

388. See BLACK, *supra* note 254, at 93 (quoting MARSIGLIO, THE DEFENDER OF THE PEACE, DICTIO I).

389. See generally MACHIAVELLI, THE PRINCE, chs. 5, 6, 10, 12 (Quentin Skinner & Russell Price eds., 1988); THOMAS HOBBS, LEVIATHAN, chs. 19-20 (1976 ed.) (1651).

390. See BLACK, *supra* note 254, at 86, 95.

391. Albeit, these political institutions would have been more focused on mediating over who would pay how much taxes or the like, than over who would receive how much distributions from a venture.

392. See *supra* text accompanying notes 187, 216, 223.

393. See *supra* text accompanying note 203.

the company typically elected trading company boards,<sup>394</sup> and there is no suggestion that such boards represented anyone else. Moreover, the active role often taken by the general membership in the early corporations—as seen in the examples of the Russia Company,<sup>395</sup> and the Virginia Company (with its quarterly meetings of the general membership)<sup>396</sup>—is inconsistent with the notion that early boards had any power to act as neutral arbiters in order to protect various stakeholders in the corporate enterprise from the shareholders. Finally, while shareholders with a larger stake in the venture may well have ended up on the early boards, the fact that voting in proportion to ownership arose only later<sup>397</sup> suggests that early boards were not primarily vehicles to ensure that large, albeit non-controlling, shareholders could elect themselves or their nominees to protect their interests.

Significantly, the rationale for corporate boards most favored by modern scholars—that boards exist to monitor management on behalf of passive investors—is the rationale that finds the least support in the historical origins of the corporate board. This is because the board-centered model of corporate governance did not originate in the joint stock company with its passive investors. Instead, it was a form of governance that the joint stock company inherited when it evolved out of the regulated companies, like the Merchant Adventurers or Merchants of the Staple. In such regulated companies, the members each conducted their own businesses, and, hence, hardly needed the protection of a board to monitor the managers running the company. Instead of having an oversight function, the role of the board in these earliest trading companies was legislative (passing ordinances to regulate the membership) and adjudicative (hearing disputes involving the members).<sup>398</sup>

Of course, the fact that the original boards did not have a monitoring function on behalf of passive investors does not mean that the board did not evolve into this primary responsibility as the regulated companies evolved into the joint stock companies. History and biology are replete with institutions and organisms that originated with one purpose and then successfully migrated into a different function. Yet, as discussed at the beginning of this Article, the record of the board as an in-

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394. See *supra* text accompanying note 107.

395. See *supra* text accompanying notes 123-27.

396. See *supra* text accompanying notes 105-11.

397. For example, in the case of the East India Company, voting in proportion to ownership arose a half century, or perhaps even a century, after the company began. See *supra* text accompanying notes 155-62.

398. See *supra* text accompanying note 179.

stitution to monitor management on behalf of passive shareholders has not been one of unmitigated success.<sup>399</sup> Perhaps the historical origin of the corporate board helps explain why. Specifically, since the board was not designed originally as a monitoring tool, one should not be totally surprised if boards turn out not to be all that effective as a means to monitor management. Moreover, the political origins of the corporate board suggest a further problem boards faced when they evolved into a tool to monitor management. Medieval political thinking contained an unresolved tension between preferences for hierarchical versus collective decision-making.<sup>400</sup> Most especially, as witnessed in the events before and after the Council of Constance, the issue of whether a representative body could call the Pope, king or other chief official to account, was highly contested.<sup>401</sup> Of course, the legal issue of the corporate board's power over the CEO is now resolved beyond all doubt in the board's favor.<sup>402</sup> Nevertheless, the norm of deference to the CEO that pervades corporate board culture renders boards reluctant to assert their supremacy.<sup>403</sup> Might it be fair to speculate that at least some of this hesitancy reflects the awkward melding of hierarchical and representative ideas lingering still from the medieval political heritage of the corporate board?

While the historical and political origins of the corporate board of directors provide conflicting evidence regarding the various purposes modern commentators claim for the board, these origins suggest a critical function which modern commentators seem to have overlooked. This function is providing political legitimacy. The unifying theme behind medieval parliaments, town councils, guild councils, councils of the Church, and the boards of the trading companies, is that they provided the means to comply with the "corporate law" rule that "what touches all shall be consented to by all," in circumstances when consent by assembly of the entire group was impractical.<sup>404</sup> While the rationale for this rule of consent may have included the notion that wiser decisions result from consent of the entire group (or at least from a group of representatives), or that the requirement of consent by all (or the representatives of all) allowed various constituents to protect their interests, or that the requirement of consent served as a check on possible misdeeds of the

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399. See *supra* text accompanying notes 55-58.

400. See *supra* text accompanying note 233.

401. See *supra* text accompanying notes 366-72.

402. See *supra* text accompanying notes 24-25.

403. See *supra* text accompanying notes 68-80.

404. See *supra* text accompanying notes 238-41.

ruler, there also seems to be the notion that legitimate authority requires consent, regardless of the impact of consent on the quality of decisions and governance.

Indeed, once we start looking at the role of the board in terms of political legitimacy, it is possible to identify the achievements of the institution, and the reasons for its continued existence, despite a rather modest record in terms of achieving goals of wealth maximization and business efficiency. An irony of the development of the trading company boards is that this occurred as representative political institutions were waning in Europe. At the end of the Middle Ages, parliamentary assemblies receded in the face of the growing power of monarchs in Spain and France, and princes in Italy and Germany.<sup>405</sup> After Constance, Papal authority grew triumphant over councils in the Church.<sup>406</sup> Town councils fell in favor of princes in Italian cities, and royal bureaucrats in France.<sup>407</sup> Hence, an unheralded achievement of corporate boards may have been to help preserve medieval traditions of representative institutions at a time when those institutions were under siege elsewhere. Moreover, not only did the trading company boards help preserve medieval political ideas of governance involving representative institutions, the trading companies also spread those ideas into new political venues. Of particular importance for an American law review article, it is worth recalling the discussion earlier of the role of the Massachusetts Bay and Virginia companies in transplanting a board governance model into colonial political institutions.<sup>408</sup>

It is also possible to recognize the importance of the political legitimacy provided by the corporate board of directors when one considers the nineteenth century history of American corporate law. One of the common themes of this history is the concern of state governments and political leaders about the power of corporations.<sup>409</sup> For example, in contrast to worrying about undercapitalized corporations, New York's pioneering general incorporation law limited the maximum amount of capital corporations could raise to \$100,000.<sup>410</sup> In this light, the reaction of legislatures asked to enact general incorporation statutes had the governance model for such entities explicitly provided that un-

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405. See *supra* text accompanying notes 195-207.

406. See *supra* text accompanying notes 367-68.

407. See *supra* text accompanying notes 255, 259.

408. See *supra* text accompanying notes 117-18.

409. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-56 (1933) (Brandeis, J. dissenting); LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 188-99 (2d ed. 1985).

410. *Liggett Co.*, 288 U.S. at 551 (Brandeis, J. dissenting).

elected, unaccountable, managers would have control over this economic power.<sup>411</sup>

In an era, like the present, in which it is popular to talk of the corporation as nothing more than a “nexus of contracts,”<sup>412</sup> commentators might dismiss a role for the board in providing political legitimacy, as mistakenly treating corporations like little “republic[s].”<sup>413</sup> Yet, to dismiss the goal of political legitimacy is to ignore the history of the corporation and of the board of directors. The question thus becomes: Have attitudes toward corporations and corporate boards so changed that the goal of political legitimacy is no longer relevant. If so, then one might conclude that the corporate board of directors is a largely useless, if mostly harmless, institution carried on out of inertia (in other words, the corporate equivalent of tonsils). Indeed, the original draft of this Article, presented at a corporate law roundtable jointly sponsored by U.C.L.A. and the University of Southern California, suggested this conclusion. Yet, in presenting the paper at the roundtable, I found myself viscerally uncomfortable with this position. In asking myself why, I realized that it is because I am a product of a culture which includes, among its values, the ideas of consent and representation that arose in medieval European political institutions and are still reflected in the corporate board of directors today. I confess that, as a shareholder, I practice rational apathy and trash proxy statements. Yet, I favor proposals (even broader than those recently floated by the Securities Exchange Commission<sup>414</sup>) to require corporate proxies to include the name of director candidates nominated by shareholders—not because I expect any improvement in corporate performance, but because this is more consistent with democratic ideals.<sup>415</sup> What this suggests is that the reason the board of directors endures is because human beings, even in the business context, do not divorce their notions of how to run a business from their broader political

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411. I must thank my research assistant, Thomas Clark, who had been a professor of American history before deciding to come to law school, for raising the question of whether the legitimating function of the corporate board might have been particularly important during the move to general incorporation acts.

412. Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290 (1980); see also William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521, 1521 (1982).

413. Henry G. Manne, *Citizen Donaldson*, WALL ST. J., Aug. 7, 2003, at A10.

414. See Security Holder Director Nominations, Proposed Rule Release No. 34-48626, 68 Fed. Reg. 60784 (Oct. 23, 2003).

415. Admittedly, the ideas of representation utilized in medieval political institutions are not consistent with current notions of representative democracy. This simply shows how the norm of political legitimacy through representative governing institutions becomes measured against evolving ideas of representation.

and cultural ideas,<sup>416</sup> and that the idea of consent through elected representatives is so ingrained in our culture that shareholders expect it even if they do not take advantage of it.

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416. For a recent attempt to document statistically the relationship between cultural values and business governance, see Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001).

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