NOT JUST PROFITS: THE DUTY OF CORPORATE LEADERS TO THE PUBLIC, NOT JUST SHAREHOLDERS

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Corporate officers and directors currently owe duties only to the corporation's shareholders. This blindered focus on maximizing shareholder value ignores historical precedent. Corporations originally, in the early 19th century, had a duty to serve the public: the grant of limited liability to a corporation was conditioned on the corporation's achieving some public purpose, such as building a canal or railroad. However, starting in the mid-nineteenth century, corporate apologists began conveniently overlooking this traditional public duty. Populists in the early twentieth century revived this duty by regulating corporations so that they acted in the public interest. However, the deregulation movement of the 1970s ended regulation's focus on the public interest. Although corporations can now enjoy the corporate form's benefits, they no longer must bear its traditional responsibilities. A corporation's duty to serve the public interest should be restored. In exchange for receiving limited liability, corporations, and their officers and directors, should be required to serve the public purpose. This change would be efficient and would protect non-shareholder stakeholders, such as workers and the surrounding community, from inevitable vulnerability to corporate decisions.

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INTRODUCTION

"Great corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with these institutions."[1]

"Neither this people nor any other free people will permanently tolerate the use of the vast power conferred by vast wealth, and especially by wealth in its corporate form, without lodging somewhere in the government the still higher power of seeing that this power, in addition to being used in the interest of the individual or individuals possessing it, is also used for and not against the interests of the people as a whole."[2]

It has become a commonplace in recent decades that a corporation's officers and directors owe duties only to the corporation's shareholders: for a corporate leader, professionalism means maximizing shareholder value.

1. President Theodore Roosevelt, First Annual Message, MILLER CENTER (Dec. 3, 1901), https://millercenter.org/the-presidency/presidential-speeches/december-3-1901-first-annual-message [https://perma.cc/KQ4W-PCFM].

2. President Theodore Roosevelt, Remarks at the Forty-Second Anniversary Banquet of the Union League Club in Philadelphia, Pennsylvania, USCB THE AMERICAN PRESIDENCY PROJECT (Jan. 30, 1905), https://www.presidency.ucsb.edu/documents/remarks-the-forty-second-anniversary-banquet-the-union-league-club-philadelphia [https://perma.cc/9GFB-HZW4] (explaining why it is in the best interest of the United States to allow the Federal government to control interstate commerce). *See also* DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM 446 (1905) (outlining Roosevelt's return to private life after).

As developed by conservative commentators such as Milton Friedman, current legal doctrine suggests that the corporation's leaders should comply with existing substantive laws and contractual obligations, such as environmental laws, laws designed to protect workers' health, and labor contracts.[3] However, as long as the leaders comply with background legal requirements and contractual obligations, they may single-mindedly pursue profits.[4] For example, suppose that a corporation is considering closing a large factory, and that doing so would comply with background law and labor contracts. The corporation is permitted to close the factory, even if the closing would devastate the vulnerable surrounding community. Indeed, if the closing would increase the corporation's profits, the corporation's leaders might have a fiduciary duty to close it.

I here show that this view of what professionalism requires of corporate leaders is unsound. The requirement that corporate leaders focus only on shareholder value is flawed for two reasons. First, it permits corporations to exploit vulnerable individuals and communities. For example, corporate leaders can devastate a community by closing a factory, even though the surrounding community has magnified the dangers of its vulnerability by devoting itself for generations to the factory. Corporate ghost towns near Detroit are examples.

Indeed, the rise of recent populist movements in the U.S. may be due substantially to the freedom of corporations to abandon their vulnerable workers and communities. The stereotypical populist voter lost his job when his corporate employer closed his workplace, whether it be a coal mine in Kentucky or steel plant in Pittsburgh. In 2016, these workers blamed Democratic politicians for their suffering. Instead, the workers might have blamed the corporate leaders who caused their employers to abandon them.

Second, the doctrine that corporate leaders must focus solely on profits is not only bad policy, but it also ignores historical precedent. Instead, the history of the development of the corporate form suggests that corporate officers and directors should have an enhanced duty to obey the law and serve the public good. Lawyers have such a duty, as "officers of the court."[5] Corporate officers and directors should too, as "officers of the public."

Corporations originally had such a duty: two centuries ago, the grant of limited liability to a corporation was conditioned on the corporation's

3. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html updated [https://perma.cc/7J6A-SE4U].

4. *Id.*

5. *See infra* Part I (asserting that as officers of the legal system, lawyers are required to pursue goals that are in the public interest).

achieving some public purpose, such as building a canal or railroad. However, starting in the mid-19th century through the Gilded Age and continuing to today, corporate apologists such as Milton Friedman began conveniently overlooking this traditional duty of corporations to promote a public purpose.[6]

For a half a century, populists and New Dealers attempted, in effect, to resuscitate this duty by creating administrative agencies that would regulate corporations to force them to behave in the public interest.[7] However, the deregulation movement of the 1970s ended this attempt.[8] At that point, corporations had shaken off both their duty to serve the public and meaningful regulation. They were now free to focus only on serving shareholders.

The duty to serve the public should be restored. In exchange for enjoying limited liability, corporations, and their officers and directors, should have a duty to serve the public purpose. Just as some criminal acts disqualify a person from serving as a lawyer, acts that harm the public interest should disqualify people from serving as directors and officers of corporations. If a corporate leader harms the public interest, the government should have the authority both to remove them from their corporate position and to eliminate their corporation's limited liability.

In the last decades, and even more recently, there have been halting suggestions that corporations assume obligations to more than shareholders. First, some companies have chosen to become "benefit corporations," sometimes called B corporations.[9] Second, a group of corporate leaders have recently suggested that corporations should have duties to more than shareholders.[10]

These initiatives are insufficient because they are voluntary and unenforceable. In contrast, I propose mandatory duties that are fully enforceable.

This proposal is conservative. It would conserve the duties that traditionally accompanied the corporate form when it developed in the 18th century. This reformed approach to what professionalism requires of a corporate leader is necessary to ensure the flourishing not only of

6. *See infra* Part III (relating that for the first decades after the U.S. was founded, corporations were required to promote the public interest).

7. *See infra* Part IV (recounting how a number of states and the federal government attempted to reduce corporations' harmful impacts through external regulation).

8. *See infra* Part V (examining the post-WWII movement toward deregulation).

9. *See infra* Part A. (discussing the thought and process behind a corporation's decision to incorporate as a B corporation).

10. *See infra* Part VII.B. (recounting the Business Roundtable's 2019 statement urging corporate leaders to consider a broader group of stakeholders).

corporations and their shareholders, but also of the vulnerable communities that surround and support the corporations.

As discussed further in the bibliographical appendix below, over the past decades in an ebb and flow of scholarly interest, various writers have proposed other reasons that corporations should serve the public interest. One approach is to argue that serving the public interest is also in the corporation's interest, so that an individual corporation should choose to serve the public interest. For example, some papers argue that a corporation's acting in the public interest benefits the corporation's employees, causing the employees to be more productive for the corporation—in turn increasing the corporation's profits. Corporations performing duties to stakeholders, including employees, can satisfy employees' psychological needs,[11] solidify employees' loyalty to the corporation,[12] deepen employee's engagement,[13] and inspire employees' creativities,[14] as well as appealing to prospective employees[15] and improving employee retention.[16]

11. *See* Ruth V. Aguilera, et al., *Putting the S back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 ACAD. OF MGMT. REV. 836, 836 (2007) (explaining how the authors' "model integrates theories of organizational justice, corporate governance, and varieties of capitalism to argue that organizations are pressured to" serve various stakeholders "by many different actors, each driven by instrumental, relational, and moral motives." The authors do not mention limited liability).

12. *See* Bradley R. Agle, et al., *Who Matters to CEOs? An Investigation of Stakeholder Attributes and Salience, Corporate Performance, and CEO Values*, 42 ACAD. OF MGMT. REV. 507, 507 (1999) (outlining how the authors "found strong support for the attribute-salience relationship and some significant relationships among CEO values, salience, and corporate social performance but found no support for a salience-financial performance link. [Their] findings suggest a need for continued emphasis on the development of normative stakeholder theory." The authors do not mention limited liability).

13. *See* Ante Glavas & Sandy K. Pidetit, *How Does Doing Good Matter? Effects of Corporate Citizenship on Employees*, 36 J. OF CORP. CITIZENSHIP 51, 51 (2009) (discussing how the authors "present a model of how corporate citizenship would affect employee engagement, high-quality connections and creative involvement. . . . Findings from regression analyses and structural equation modelling support the hypotheses that employees who perceive higher levels of corporate citizenship will report higher levels of engagement, high-quality connections and creative involvement." The authors do not mention limited liability).

14. *Id.*

15. *See* Daniel B. Turban & Daniel W. Greening, *Corporate Social Performance and Organizational Attractiveness to Prospective Employees*, 40 ACAD. OF MGMT. J. 658, 658 (1997) (concluding that the author's "[r]esults indicate that independent ratings of corporate social responsibility are related to firms' reputations and attractiveness as employers, suggesting that a firm's corporate social responsibility may provide a competitive advantage in attracting applicants." The authors do not mention limited liability).

16. *See generally* David A. Jones, *Does Serving the Community also Serve the Company? Using Organizational Identification and Social Exchange Theories to Understand Employee*

Other papers argue that serving the public interest increases the corporation's profits by pleasing the corporation's customers. Duties to stakeholders can benefit customers' favorable evaluations of the company and its products[17] and increase customers' loyalty.[18] Serving stakeholders can improve a corporation's reputation,[19] goodwill,[20] and organizational identification.[21]

Other papers propose a duty to stakeholders grounded in social-contract theory, based on the approach of Emanuel Kant. These papers suggest that directors need to consider the stakeholder's interests throughout the exercise of their duties[22] and organizational citizenship behavior, which are positively

Responses to a Volunteerism Programme, 83 J. OF OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 857 (2010) (suggesting that some employees reciprocate the benefits they receive from a volunteerism program. The author does not mention limited liability).

17. *See* Tom J. Brown & Peter A. Dacin, *The Company and the Product: Corporate Associations and Consumer Product Responses*, 61 J. OF MARKETING 68, 68 (1997) (arguing that "what consumers know about a company can influence their beliefs about and attitudes toward new products manufactured by that company . . . ." The authors do not mention limited liability).

18. *See* Isabelle Maignan, et al., *Corporate Citizenship: Cultural Antecedents and Business Benefits*, 27 J. OF THE ACAD. OF MARKETING SCI. 455, 455 (1999) (explaining why the authors "suggest that market-oriented cultures as well as humanistic cultures lead to proactive corporate citizenship, which in turn is associated with improved levels of employee commitment, customer loyalty, and business performance." The authors do not mention limited liability).

19. *See* Stephen J. Brammer & Stephen Pavelin, *Corporate Reputation and Social Performance: The Importance of Fit*, 43 J. OF MGMT. STUD. 435, 435 (2006) (emphasizing "the need to achieve a 'fit' among the types of corporate social performance undertaken and the firm's stakeholder environment. For example, a strong record of environmental performance may enhance or damage reputation depending on whether the firm's activities 'fit' with environmental concerns in the eyes of stakeholders." The authors do not mention limited liability).

20. *See generally* Marc Orlitzky et el., *Corporate Social and Financial Performance: A meta-analysis*, 24 ORG. STUD. 403 (2003) (outlining the use of a meta-analysis to evaluate how corporate social responsibility affects corporate financial performance. The authors do not mention limited liability).

21. *See* Abraham Carmeli, *The Role of Perceived Organizational Performance in Organizational Identification, Adjustment and Job Performance*, 44 J. OF MGMT. STUD. 972, 972 (2007) (finding that "when compared to perceived market and financial performance, perceived social responsibility and development had a larger effect on organizational identification, which in turn resulted in enhanced employees' work outcomes – adjustment and job performance." The author does not mention limited liability).

22. *See* Samuel Mansell, *Shareholder Theory and Kant's 'Duty of Beneficence'*, 117 J. BUS. ETHICS 583, 583 (2012) ("This article draws on the moral philosophy of Immanuel Kant to explore whether a corporate 'duty of beneficence' to non-shareholders is consistent with the orthodox 'shareholder theory' of the firm. . . . The article concludes that it is possible within the ethical framework of shareholder theory for managers to pursue directly the happiness of non-shareholders. Furthermore, shareholders have a duty to hold management

influenced by perceived legal citizenship and perceived ethical citizenship, while negatively influenced by perceived discretionary citizenship.[23] Specifically, some scholars contend that it is essential to use the citizenship model and the compliance model together to achieve corporate social responsibility.[24]

Likewise, some articles ground enhanced duties to stakeholders on higher-order moral arguments,[25] or a sense of stewardship.[26]

However, none of those papers uses this paper's approach of grounding the corporation's duty to serve the public interest in reviving the historical duty that corporations originally had to serve the public interest. There was originally a quid of serving the public interest that the corporation had to provide in order to receive the quo of limited liability.[27] That quid pro quo

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to account for the moral consequences of the firm's activities on non-shareholding stakeholders." The author does not mention limited liability.).

23. *See* Chieh-Peng Lin, et al., *Modeling Corporate Citizenship and its Relationship with Organizational Citizenship Behaviors*, 95 J. OF BUS. ETHICS 357, 357 (2010) (outlining the author's research "from the perspectives of social identity and resource allocation, by examining the influence of corporate citizenship on organizational citizenship behaviors (OCBs). . . . OCBs are positively influenced by perceived legal citizenship and perceived ethical citizenship, while negatively influenced by perceived discretionary citizenship." The authors do not mention limited liability).

24. *See* Lisa Whitehouse, *Corporate Social Responsibility as Citizenship and Compliance: Initiatives on the Domestic European and Global Level*, 11 J. CORP. CITIZENSHIP 85, 85 (2003) (contending that "corporate social responsibility consists of two related but distinct models. . . . [T]he citizenship model, which views the company as an individual that should be encouraged to exceed its minimum legal obligations. . . . [and] the compliance model, which views the company as a public enterprise capable of exercising significant power that can only be legitimated through the use of compulsory schemes. . . . [T]he citizenship model has found favor with policy-makers . . . [but] when used in isolation, it will fail to achieve consistent and broad-based reform of corporate activity. It is essential, therefore, if CSR (corporate social responsibility) is to be achieved, that the citizenship and compliance models be used in partnership." The author does not mention limited liability).

25. *See* Aguilera et. al, *supra* note 11, at 836 (designing a model which "integrates theories of organizational justice, corporate governance, and varieties of capitalism to argue that organizations are pressured to engage in corporate social responsibility by many different actors, each driven by instrumental, relational, and moral motives." However, the authors do not mention limited liability).

26. *See* James H. Davis, et al., *Toward a Stewardship Theory of Management*, 22 ACAD. MGMT. REV. 20, 20 (1997) (stating that "[e]conomic approaches to governance such as agency theory tend to assume some form of homo-economicus, which depict subordinates as individualistic, opportunistic, and self-serving. Alternatively, sociological and psychological approaches to governance such as stewardship theory depict subordinates as collectivists, pro-organizational, and trustworthy. . . . [They] attempt to reconcile the differences between these assumptions by proposing a model based upon the subordinate's psychological attributes and the organization's situational characteristics." However, the authors do not mention limited liability).

27. *See infra* Part III (relating that for the first decades after the U.S. was founded,

should be restored.

I proceed as follows. In Parts I and II, I discuss public duties in other professions, and how, surprisingly, there is currently no such duty for corporate officers. In Part III, I describe how, during the United States' first 80 years, corporate charters required corporations to act in the public interest. In Part IV, I explain how, when general incorporation laws supplanted individual chartering, the government shifted to imposing external corporate regulations that protected the public interest. In Part V, I discuss the decline after World War II in corporate civic responsibility. Next, in Part VI, I suggest that corporate officers should have a duty to manage corporations in the public interest. After showing in Part VII that recent developments such as benefit corporations and the recent statement by the Business Roundtable are inadequate to create an appropriate duty, I discuss in Part VIII how my proposed duty would increase the resiliency of vulnerable corporate stakeholders. In Part IX I provide conclusions.

I. PUBLIC DUTIES IN OTHER PROFESSIONS

In professions other than business, professionals are required to work not only for their own interests, but also for the public interest. For example, lawyers in the United States are subject to the Model Rules of Professional Conduct, which prescribe three duties, only one of which promotes the lawyer's personal interest. The first sentence of the Rules, which summarizes all that follows, indicates: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."[28]

The first duty, that the lawyer "is a representative of clients," permits the lawyer to pursue their own personal interest. This is, after all, how most lawyers earn their livings: by representing clients.

However, the two other duties require lawyers to pursue goals that are in the public interest, and they may conflict both with the lawyer's self-interested objectives and with the interests of the client. As "an officer of the legal system and a public citizen having special responsibility for the quality of justice," the lawyer is required to look out for the interests of the public and the poor. The Rules require that:

> [A] lawyer should seek improvement of the law, access to the legal

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corporations were required to promote the public interest).

28. AMERICAN BAR ASSOCIATION, *Model Rules of Professional Conduct: Preamble &* Scope, para. 1 (2017), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ [https://perma.cc/G637-W7VS] (last visited Feb. 27, 2021).

> system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.[29]

The lawyer is not free to pursue their own self-interest. Instead, the lawyer must balance their self-interest with public service. Sometimes, conflicts exist between the lawyer's self-interest and these duties of public service:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. . . . In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.[30]

These requirements apply not only in the lawyer's professional life, but also in the lawyer's private affairs. The Rules require that "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."[31]

These requirements are not merely aspirational but are enforced—at least at the beginning of lawyers' careers. In applying for a license to practice law, a person must reveal to the bar examiner any criminal arrests, convictions, or other antisocial behavior that might suggest flawed character. If any of these exist, the bar examiner can deny the person the license to

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29. *Id.* para. 6.
30. *Id.* para. 8–9.
31. *Id.* para. 5.

practice law, excluding them from the profession.

The existence of the lawyer's duty to serve the public interest makes sense. Being a lawyer is a privilege. The requirement of a legal license provides lawyers who have one with a great benefit. They have a monopoly on providing legal services. Anyone without a license who attempts to compete with them is punished. In effect, the state gives lawyers a benefit—the right to practice law—but requires something in return. Lawyers must both behave better than others, and act to some degree, as officers of the court, in the public interest.

This same requirement exists in most other professions where licensing is required, such as for physicians and accountants. For example, the first sentence of the leading international ethics code for accountants' states: "A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest."[32] Again, this public-interest requirement makes sense. Accountants are given the monopoly of providing certain accounting services. In exchange, they must behave in the public interest.

To sum up, we see that when the government provides benefits to members of professions, it usually requires that, in return, the members of that profession act, at least to some extent, in the public interest. As I now discuss, this is not the current expectation for corporations and those who manage them.

II. CORPORATE LEADERS' CURRENT NARROW FOCUS ON ONLY PROFIT

Unlike with other professions, there is currently no requirement that corporate officers act in the public interest. Instead, as I now discuss, current doctrine generally requires corporate officers to focus instead on maximizing shareholder value. Indeed, a corporate officer who sacrificed profits in order to promote the public interest might well be violating his fiduciary duty to the corporation and its shareholders. Instead, the corporate officer's duty is to use any legal means to enrich the corporation's shareholders.

This duty of officers and directors to run a company so as to benefit

32. INTERNATIONAL FEDERATION OF ACCOUNTANTS, *Handbook of the International Code of Ethics for Professional Accountants*, (July 31, 2018), https://www.ifac.org/system/files/publications/files/IESBA-Handbook-Code-of-Ethics-2018.pdf [https://perma.cc/J7HF-Y5CU]; *see also* Jörgen Holmquist, Chair, IESBA, Speech at Accounting Professional & Ethical Standards Board (APESB) Dinner | Sydney, Australia: Professional Accountants: A Legacy of Serving the Public Interest (Sept. 18, 2013), https://www.ethicsboard.org/news-events/2013-09/professional-accountants-legacy-serving-public-interest [https://perma.cc/KC56-M8PU] (expressing the accounting profession's commitment to serving the public).

shareholders was articulated over a century ago in the leading case of *Dodge v. Ford Motor Company*.[33] In the *Dodge* case, shareholders of Ford Motor Company complained that the company was not providing large dividends. Instead, the shareholders complained, the company was paying unnecessarily high wages to its workers, while selling its cars at unnecessarily low prices. Henry Ford, the head of Ford Motor Company, admitted that he was paying high wages and charging low prices, claiming that he was not trying to maximize profits, rather he was helping workers and consumers. The court held that this was improper, ordering that additional dividends be given to shareholders.[34]

Continuing in the line from *Dodge,* the current view that a corporate officer's sole duty is to maximize shareholder value was championed by Milton Friedman, who won the Nobel Prize in Economics in 1976 and was the leader of the so-called "Chicago School" of economics. He described his views on the duties of corporate leaders:

> In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.
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> . . . [T]he key point is that, in his capacity as a corporate executive, the manager is the agent of the individuals who own the corporation . . . and his primary responsibility is to them. . . .
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> Of course, the corporate executive is also a person in his own right. As a person, he may have many other responsibilities that he recognizes or assumes voluntarily—to his family, his conscience, his feelings of charity, his church, his clubs, his city, his country. . . . If we wish, we may refer to some of these responsibilities as "social responsibilities." But in these respects he is acting as a principal, not an agent; he is spending his own money or time or energy, not the money of his employers or the time or energy he has contracted to devote to their purposes. If these are "social responsibilities," they are the social responsibilities of individuals, not of business. . . .
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> . . . [T]he doctrine of "social responsibility" [is] . . . a "fundamentally subversive doctrine" in a free society, and [I] have

33. Dodge v. Ford Motor Co., 170 N.W. 668 (1919) (deciding that while the goal of a corporation is to make a profit, courts will not interfere with decisions that come under the business judgment of directors).

34. *Id.* at 685.

> said that in such a society "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[35]

This approach permits, and even requires, a corporation's leaders to focus intently on benefiting shareholders and to ignore the interests of the corporation's other vulnerable stakeholders. For example, suppose that a corporate officer managed a corporation that employed 15,000 workers in a small town with no other major employers, but that the factory had become less profitable than the company's other factories. The duties created by corporate law might require the corporation's leaders to close the factory, even though that decision would destroy the lives of 15,000 workers and their families. If they decided to continue with the factory to help the workers, the corporation's leaders might be violating their legal duties to their shareholders.

Likewise, suppose that manufacturing cigarettes was a corporation's most profitable line of business. The law would probably require the corporation's leaders to continue manufacturing the cigarettes, despite cigarettes' harms.

Currently, it is generally accepted that corporate leaders should not sacrifice profits to help society. Milton Friedman's views have prevailed.

The Delaware courts have often reaffirmed this approach. The Delaware courts are centrally important to corporate law because most large corporations are incorporated in Delaware,[36] and the law of a corporation's state of incorporation governs its internal affairs, including the relationship between it and its shareholders.[37] For example, in *eBay Domestic Holdings, Inc. v. Craig Newmark, et al.*, the Delaware Court of Chancery held that a non-financial mission that "seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders" is inconsistent with directors' fiduciary duties.[38] That is, the directors and officers of a corporation that is incorporated in Delaware cannot legally pursue goals other than furthering the interests of the corporation's shareholders.

35. Friedman, *supra* note 3.

36. DAVID EPSTEIN, RICHARD FREER, MICHAEL ROBERTS & GEORGE SHEPHERD, BUSINESS ASSOCIATIONS 155 (5th ed. 2019) (discussing proportion of large corporations that are incorporated in Delaware).

37. *Id.* at 173.

38. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (finding that directors breached their fiduciary duties to minority shareholder).

Normally, an officer or director would not be sued for failing to maximize shareholder wealth. This is because a doctrine called the "business judgement rule" prevents a lawsuit from succeeding against an officer or director unless they have a conflict of interest or are otherwise attempting to steal from the corporation.[39] However, the protections of the business judgement rule are weak in the context of a merger or takeover.[40] Therefore, a director or officer who pursued objectives other than shareholder maximization would face substantial legal risk.

In addition, focusing on the public interest might cause the CEO to lose their job. When the CEO failed to fulfill their duty to maximize profits for shareholders, unhappy shareholders would have them fired. Or the resultant declining stock price would make the corporation an enticing takeover target, which again would result in the CEO being fired.

III. CORPORATE LEADERS' EARLIER DUTY TO PROMOTE THE PUBLIC INTEREST

It was not always this way. Instead, for the first decades after the U.S. was founded, corporations were required to promote the public interest. A leading history of the development of the corporation indicates that the law governing corporations "consisted, from the very beginning, of a more affirmative objective: that is, holding corporations to higher standards of action, purpose, accountability, and public responsibility."[41]

At the time of the country's formation, the government strictly limited the number of corporations. This contrasts with today's general incorporation laws, under which anyone can incorporate their business as long as they submit the required forms to the secretary of state, choose an acceptable name, and pay the required fees. In the country's early years, a group could incorporate only if the group obtained from the legislature a special corporate charter. The legislature had to pass special legislation awarding the group the corporate form.

The country's earliest corporate charters went to groups that were viewed as acting squarely in the public interest. Some were corporations that pursued religious goals. Other groups that obtained charters provided

39. EPSTEIN ET AL., *supra* note 36, at 236

40. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (stating that if a purchase of shares with corporate funds to remove a threat to corporate policy is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed).

41. NAOMI LAMOREAUX & WILLIAM NOVAK, CORPORATIONS AND AMERICAN DEMOCRACY 16 (2017).

education; during this period, state legislatures offered corporate charters to Yale, Harvard, and other leading universities.[42] Other corporate charters went to charities.[43]

Legislatures then began to award corporate charters to groups of people that promised to undertake projects that served the public interest in other ways. In the late 18th century, the country needed many expensive physical infrastructure improvements, such as roads, bridges, canals, and wharves.[44] However, the country was averse to the government's collecting taxes and undertaking these projects itself.[45] So instead of the government building the roads, bridges, and canals, the government allowed groups of private citizens to incorporate and undertake the projects themselves.[46]

The legislature's grant of the charters was always an implicit, or even explicit, quid pro quo. The legislatures induced the groups to undertake projects that benefitted the public by offering the groups various benefits. For example, a group that promised to build a canal, bridge, or road might receive a monopoly right to collect tolls and would be entitled to use the government's power of eminent domain to acquire necessary land.[47] A charter for a textile company included tax exemptions and the right to raise money through a public lottery.[48]

Importantly, starting in the early 1800s, all of the corporate charters provided the group with limited liability. In a corporation with limited liability, the corporation's owners are not liable for the corporation's obligations.[49] This limited liability is essential to the business's ability to assemble the large amounts of money that are necessary to fund large projects. Only if a business has limited liability will the necessary large numbers of people be willing to invest in the business. In contrast, if liability is unlimited, as with a partnership, there is a substantial risk that even a small investment will lead to financial ruin for the investor. For example, assume that a partnership, which lacks limited liability, sought to raise the $100 million that would be necessary to build a bridge. Suppose also that a

42. *See generally* Bruce A. Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY. L.J. 643 (1982) (discussing the Supreme Court's formulation of the *Dartmouth College* doctrine).

43. LAMOREAUX & NOVAK, *supra* note 41, at 7.

44. LAMOREAUX & NOVAK, *supra* note 41, at 7–8.

45. LAMOREAUX & NOVAK, *supra* note 41, at 8.

46. LAMOREAUX & NOVAK, *supra* note 41, at 48–49 (illustrating that most incorporations at the time were to provide transportation infrastructure).

47. Margaret Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights*, *in* LAMOREAUX & NOVAK, *supra* note 41, at 214.

48. *See* LAMOREAUX & NOVAK, *supra* note 41, at 8.

49. *See infra* Part III (discussing the development of limited liability in the United States).

wealthy investor, with assets of $40 million, was considering investing $10,000 for a part ownership interest in the partnership. The investor would have a large incentive not to make the investment. This is because, if the partnership failed, the investor might lose not only their $10,000 investment, but also all of their other wealth. The owners of a partnership are generally jointly and severally liable for all of a partnership's obligations. Suppose that the partnership went bankrupt with obligations of $40 million. The partnership's creditors could seek to recover all of the $40 million from the investor who had invested only $10,000. That is, the investor's $10,000 investment could cause the investor to lose their entire $40 million fortune. Accordingly, the investor would not make the investment.

In contrast, the investor might make the investment if the business was a corporation with limited liability, rather than a partnership. With its limited liability, the corporation would allow the investor to put at risk only the $10,000 that they invested, not their whole fortune.

Thus, limited liability is essential for the corporation to succeed. Without limited liability, the corporation has no chance of assembling the large amounts of funding that would be necessary to achieve a large project. Without limited liability, a business could not build a road, bridge, or canal.

The quid-pro-quo deal that the government struck with the business was that the government would provide various benefits to the corporation, an important example of which was limited liability. In return, the corporation would agree to create some project in the public interest that the government desired, such as a road, bridge, or canal. That is, the government always received something important in return for its grant of limited liability: the corporation's commitment to behave in the public interest to build the road, bridge, or canal.

Such civic-minded behavior was essential because corporations could become immensely powerful. If corporate leaders led their corporations in the public interest, then corporations could be a powerful force for good. If not led in the public interest, then corporations could create great harms.

Starting in the early 19th century, abuses of the chartering process began to become apparent.[50] The process was subject to monopoly and corruption. Businesspeople would bribe legislators to grant them monopoly charters. The monopolies would permit the corporations to exclude competitors and to raise prices to consumers.

The abuses were especially frequent with banks and transportation companies. Monopoly banks would control the currency and credit to

50. *See* LAMOREAUX & NOVAK, *supra* note 41, at 42–43.

consumers' disadvantage.[51] Monopoly transportation companies would raise tolls to excessive levels.[52]

During the Jacksonian period in the 1820s and 1830s, anger at the special charters grew sufficiently that many state governments eliminated their legislatures' right to grant special charters.[53] The possible substitutes for special charters that states contemplated were either eliminating incorporation or expanding it to anyone who sought it. Some argued that the corporate form itself caused harms, not merely the opportunities for corruption in the process for awarding special charters.[54] The reform that these people sought was to eliminate the corporate form completely.

Others argued instead that only the process for special charters was defective, rather than the corporate form itself. They argued that the corporate form should be provided to anyone who asked for it; the legislature would no longer involve itself in deciding to whom it should be awarded.

The second group prevailed. State after state began passing "general incorporation laws." By 1865, general incorporation laws had spread throughout most of the nation. Anyone who wanted to incorporate could do so by filing forms with the secretary of state and paying fees.[55]

Some legislators initially were worried that wide availability of the corporate form would lead both to abuses and to corporate conduct that was not in the public interest. Thus, many of the first general incorporation laws included limits on corporate conduct to prevent abuses.[56] That is, general

51. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 53–64 (1957) (discussing the repeal of the Bank of North America's charter for showing favoritism to select consumers); Pauline Maier, *The Revolutionary Origins of the American Corporation*, THE WILLIAM & MARY Q. 51, 67 (1993) (relating how bank charters bestowed upon banks privileges that "the great mass of people cannot exercise").

52. *See generally* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1990) (examining how a company raised tolls for the Charles River Bridge); Bruce A. Campbell, *John Marshall, the Virginia Political Economy, and the Dartmouth College Decision*, 19 AM. J. OF LEGAL HIST. 40 (1975) (discussing a corporations' ability to set toll rates).

53. *See* LAMOREAUX & NOVAK, *supra* note 41, at 9–11 (providing examples of restrictions to different corporations' charters).

54. LAMOREAUX & NOVAK, *supra* note 41, at 12.

55. *See* LAMOREAUX & NOVAK, *supra* note 41, at 392 n.36–38 (listing charter petitions in the non-business context from the states of Pennsylvania and New York).

56. LAMOREAUX & NOVAK, *supra* note 41, at 10; *see generally* Ruth H. Bloch & Naomi R. Lamoreaux, *Voluntary Associations, Corporate Rights, and the State: Legal Constraints on the Development of American Civil Society, 1750– 1900* (Nat'l Bureau of Econ. Research, Working Paper No. 21153, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2604834 [https://perma.cc/9Z6L-ZRXR] (providing a general overview of the restrictions imposed by states); Naomi R. Lamoreaux, *Revisiting American Exceptionalism: Democracy and the Regulation of Corporate Governance: The Case of Nineteenth-Century Pennsylvania in*

incorporation statutes continued the requirement that had existed in special charters that corporations act in the public interest. As the leading history of the development of corporate law notes:

> The dominant American legal tradition involving corporations was not only one of restricting corporations to a more limited set of rights than humans. It also consisted, from the very beginning, of a more affirmative objective: that is, holding corporations to higher standards of action, purpose, accountability, and public responsibility. The early American corporation regime just discussed, in both its special charter and general incorporation guises, was not merely concerned with creation, proliferation, and access. . . . [C]harters and general incorporation statutes were filled with legislative conditions, political reservations, and special regulatory mandates.[57]

This meant that corporations were not initially private profit-making machines, as they are viewed today. Instead, the state permitted a corporation to exist only if it and its leaders furthered the public interest. As the leading history concludes about the first 90 years of the corporation's existence after the country's founding: Such special regulatory provisions for bridge, turnpike, canal, railroad, insurance, and banking corporations were the basis for Willard Hurst's influential observation that *most early American corporations were essentially public service franchises.*[58]

Comparative Context, *in* ENTERPRISING AMERICA: BUSINESSES, BANKS, AND CREDIT MARKETS IN HISTORICAL PERSPECTIVE 25 (William J. Collins & Robert A. Margo eds. 2015) (arguing that the reason that until the late twentieth century, businesses in the United States had a narrower range of forms from which to choose than their counterparts in other countries, resides in the interplay between the early achievement of universal (white) manhood suffrage and elite efforts to safeguard property rights); Eric Hilt, *Corporation Law and the Shift Toward Open Access in the Antebellum United States* (Nat'l Bureau of Econ. Research, Working Paper No. 21195, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610492 [https://perma.cc/E28M-HALX] (analyzing the general incorporation statutes for manufacturing firms adopted by American states up to 1860).

57. LAMOREAUX & NOVAK, *supra* note 41, at 16.

58. LAMOREAUX & NOVAK, *supra* note 41, at 16 (emphasis added); *see also infra* notes 108-109 and accompanying text (discussing the history of corporate duties).

IV. THE TRANSITION FROM INTERNAL DUTIES FOR CORPORATE LEADERS TO EXTERNAL REGULATION

The requirements of "holding corporations to higher standards of action, purpose, accountability, and public responsibility" so that "most early American corporations were essentially public service franchises" soon faded away as states began to compete to attract businesses to incorporate in their states.[59] Corporate law's "internal affairs rule" specifies that what goes on inside a corporation is governed by the law of its state of incorporation, not the law of where it does business.[60] As general incorporation laws spread among the states, corporations began choosing to incorporate in the states that imposed the fewest restrictions. In turn, the states with substantial restrictions had no choice but to eliminate their restrictions, for fear of losing more incorporations to states that were more lenient.[61]

This meant that, beginning in the Gilded Age in the 1890s, corporations shed the requirements of acting in the public interest that had, until then, been imposed either by special charters or by the earlier general incorporation statutes. But the corporations still enjoyed a main benefit that the corporate form provided: limited liability. Corporations kept the quo, but no longer needed to provide the quid.[62]

Supporting corporate interests in the movement away from requiring corporations to act in the public interest was the relentless legal pressure that corporations applied, aided by elite lawyers. With tireless persistence, both corporations and groups representing corporate interests would seek to protect their interests through litigation. In these lawsuits, the corporations were represented by the country's best lawyers, such as Daniel Webster.[63] As a leading history notes:

> With equal accuracy, Webster could also have been called the Defender of the Corporation. Throughout his career, Webster's clients were among the wealthiest businesses in the nation. They

59. LAMOREAUX & NOVAK, *supra* note 41, at 16.

60. EPSTEIN ET AL., *supra* note 36, at 173.

61. *See* LAMOREAUX & NOVAK, *supra* note 41, at 12 (discussing the impact on competition among states for corporate charters on the nature of the states' corporate law); William Carney & George Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. OF ILL. L. REV. 1 (analyzing the dominance of Delaware corporate law).

62. *See generally* Daniel A. Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, *in* LAMOREAUX & NOVAK, *supra* note 41, at 109–138 (examining the results of the liberalization of corporate chartering).

63. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 71 (2018) (exploring the role played by elite lawyers and litigation in securing advantages for corporations).

> included manufacturers, mercantile companies, insurance companies, railroads, banks, and shipping houses; "businessmen of every type engaged his services." Webster was the Corporation's Lawyer, and in many of the cases that made him famous he argued for broad protections for corporations under the Constitution.[64]

The escape of corporations from strict incorporation laws did not end attempts to constrain corporations' harmful impacts. Because states' incorporation laws no longer required corporations to act in the public interest, states and the federal government attempted to reduce corporations' harmful impacts through external regulation. In the 40 years from 1890 until the beginning of the Great Depression, the federal government and most states passed antitrust laws;[65] the Federal Trade Commission was created in 1914, and modern corporate regulatory tax policy was developed.[66] That is, under leaders such as populist Theodore Roosevelt, external regulation replaced the state's initial internal regulation of corporations that had occurred through chartering and restrictive general incorporation laws. As noted by the leading history:

> it would be a historical mistake to suggest that corporate regulation in America began in the late nineteenth or early twentieth century. To the contrary, it has always been there. Nonetheless, it is important to recognize and explain the significant shifts in legal and political technology that occurred as the United States moved from a corporate regulatory regime focused primarily on state special charters and general incorporation laws to the brave new world launched by the emergence of public utilities, antitrust law,

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64. *Id.* at 71–72.

65. *See generally* U.S. BUREAU OF CORPORATIONS, TRUST LAWS AND UNFAIR COMPETITION (Washington, DC: Government Printing Office, 1916) (discussing the FTC's role in enforcing federal antitrust laws); HENRY R. SEAGER & CHARLES A. GULICK JR., TRUST AND CORPORATION PROBLEMS (New York: Harper & Brothers, 1929) (examining antitrust laws at the state level); *A Collection and Survey of State Anti-trust Laws*, 32 COLUM. L.R. 347 (1932) (surveying state antitrust laws); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 UNIV. PA. L.R. 495 (1987) (analyzing the judicial treatment of constitutional challenges to state antitrust enforcement in the era prior to the end of WWI); *see also* LAMOREAUX & NOVAK, *supra* note 41, at 14 (discussing the Supreme Court's support for state antitrust efforts).

66. Adam Winkler, *Citizens United, Personhood, and the Corporation in Politics*, *in* LAMOREAUX & NOVAK, *supra* note 41, at 16 n.66 (listing works that discuss modern corporate regulatory policy in a number of different contexts such as: public utilities, antitrust and competition and taxation).

modern competition policy, and regulatory taxation.[67]

As corporations' influence in society grew, Theodore Roosevelt emphasized the central lesson from this paper: that because corporations existed only because the government allowed them to, corporations had a duty to act in the public interest. If corporations strayed from this duty, then it was appropriate for the government to step in and force the corporations back in line.

Accordingly, in his first annual message to congress, Roosevelt noted, "[g]reat corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with these institutions."[68] Likewise, Roosevelt noted:

> It is no limitation upon property rights or freedom of contract to require that when men receive from Government the privilege of doing business under corporate form, which frees them from individual responsibility, and enables them to call into their enterprises the capital of the public, they shall do so upon absolutely truthful representations as to the value of the property in which the capital is to be invested. Corporations engaged in interstate commerce should be regulated if they are found to exercise a license working to the public injury.[69]

Because the corporation existed only because of the privilege created by the government, the government appropriately could compel the corporation to act in the public interest:

> Neither this people nor any other free people will permanently tolerate the use of the vast power conferred by vast wealth, and especially by wealth in its corporate form, without lodging somewhere in the government the still higher power of seeing that this power, in addition to being used in the interest of the individual or individuals possessing it, is also used for and not against the interests of the people as a whole.[70]

Thus, Roosevelt emphasized: "The great corporations which we have grown to speak of rather loosely as trusts are the creatures of the State, and the State not only has the right to control them, but it is duty bound to control them wherever the need of such control is shown."[71]

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67. LAMOREAUX & NOVAK, *supra* note 41, at 16.

68. Roosevelt, First Annual Address, *supra* note 1.

69. Roosevelt, First Annual Address, *supra* note 1.

70. Roosevelt, Remarks at the Forty-Second Anniversary Banquet of the Union League Club, *supra* note 2; *see also* KEARNS GOODWIN, *supra* note 2, at 446 (2013) (outlining Roosevelt's return to private life after his presidency).

71. President Theodore Roosevelt, Speech at Kennedy Plaza, Providence, Rhode Island

External regulation of corporations increased still further during the New Deal. By 1937, the administration of Franklin Roosevelt had completed the creation of the modern administrative state for controlling corporations. Corporations were regulated by a host of administrative agencies and initiatives, from the Interstate Commerce Commission, the Sherman Antitrust Act, new systems for corporate taxation, the Federal Reserve, the Federal Trade Commission, the Federal Power Commission, and the Securities and Exchange Commission.[72] During the 20th century's first three decades, progressive reformers also convinced the courts that many corporations were "public utilities" that were required to operate in the public interest.[73]

During the New Deal, the country's zeal for regulating corporations reflected and reinforced the understanding that corporate leaders should manage their corporations in the public interest. "[A]t the height of the New Deal, many large corporations like General Foods and General Electric themselves adopted progressive reform rhetoric, 'describing themselves not so much as a competitive business entity but as an 'institution' infused with all of the connotations of civic beneficence characteristic of other non-market entities, including hospitals, foundations, and even government agencies.'"[74] As before, it was appropriate that corporations further the public interest, as a quid pro quo for their enjoyment of limited liability.

In the two decades after World War II, corporations continued with the norm that corporations were not to focus solely on profits for shareholders. Instead, corporate leaders frequently indicated that they had a duty to lead their corporations in a way that also served the broad public interest. Corporate leaders recognized that the corporation's interests and the interests of the country went together.

For example, in 1953, Charles Wilson had been nominated to be President Eisenhower's Secretary of Defense. Wilson, the president of General Motors, had earlier led his company's shift to war production during World War II. During his confirmation hearings, he was asked if, as Secretary of Defense, he would be willing to make a decision that was bad for General Motors. He responded by saying that there would never be such a conflict "because for years I thought what was good for our country was

(Aug. 23, 1902) in 17 PRESIDENTIAL ADDRESSES AND STATE PAPERS 103 (1910).

72. *See* LAMOREAUX & NOVAK, *supra* note 41, at 19 (reviewing the history of the rise of government regulation of business).

73. William Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* LAMOREAUX & NOVAK, *supra* note 41, at 139.

74. LAMOREAUX & NOVAK, *supra* note 41, at 23.

good for General Motors, and vice versa."[75] That is, he was saying that he would serve his company best by serving the public interest. He recognized that corporations can flourish only when their countries also flourish.[76]

V. THE POSTWAR DECLINE OF CORPORATE CIVIC RESPONSIBILITY

Starting in the decades after World War II, the understanding that corporations had civic responsibility came under attack. Friedrich Hayak argued that excessive regulation of corporations would destroy democracy.[77] Gary Becker and colleagues in the new "Chicago School" of law and economics argued that regulation of corporations should be eliminated because it did more harm than good.[78] Shareholder primacy should govern the decisions of corporate leaders, not civic responsibility. The magic of markets would ensure that a focus on maximizing shareholder value would also benefit society. As Milton Friedman famously said, "The Social Responsibility of Business is to Increase Profits."[79]

During recent decades, this view has prevailed. Leading textbooks on the law of business associations feature Friedman's approach.[80] It is now widely believed that corporate leaders have no duty to promote the public interest.[81] Instead, as long as they comply with existing laws, corporate leaders should single-mindedly pursue maximum profits, in order to maximize shareholder value. If closing a factory will increase a corporation's profits, then the corporation's leader should close the factory, even if the closing destroys the vulnerable community that surrounds the factory. If cigarettes are profitable, then the corporation's leader should cause the corporation to make them and advertise them heavily to vulnerable youth to get them addicted.

The extreme to which this approach now dominates is seen in the

75. Gautam Makunda, *'What's Good for GM is Good for America' — What Should You Do During a National Crisis?*, FORBES (June 5, 2020, 3:29 PM), https://www.forbes.com/sites/gautammukunda/2020/06/05/whats-good-for-gm-is-good-for-americawhat-should-you-do-during-a-national-crisis/?sh=5d5aff96d3bd [https://perma.cc/UV7R-MCXL].

76. *Id.*

77. *See generally* FRIEDRICH HAYEK, THE ROAD TO SERFDOM (1944) (warning of the dangers that result from governmental control of economic decision-making); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (arguing that economic freedom is a precondition for political freedom).

78. Gary S. Becker, "Competition and Democracy," 1 J.L. & ECON. 105, 109 (1958).

79. Friedman, *supra* note 3.

80. *See, e.g.*, EPSTEIN ET AL., *supra* note 36, at 15 (discussing Milton Friedman's economic theories).

81. Friedman, *supra* note 3.

Supreme Court's recent decisions in *Citizens United* and *Hobby Lobby*, both of these which hold that a corporation has the same rights as an individual, with no additional civic duties or responsibilities.[82]

Strengthening this shaking off of corporate responsibility to the public was the deregulation movement of the 1970s and 1980s.[83] Responding to the theories of Chicago-School economists, state and federal governments ceased regulating many industries. Examples, among many others, were the airlines and railroads.[84]

The end result was that neither inherent duties nor government regulation required corporations to act in the public interest any longer.

VI. CORPORATE LEADERS' CIVIC RESPONSIBILITIES SHOULD BE REVIVED

The currently dominant view of the corporation ignores history, is harmful and unfair, and should be rejected in favor of the view that existed for the United States' first 150 years. Corporate leaders should be required to manage their corporations in the public interest as compensation for the state's granting their corporations limited liability. Without limited liability, the corporation could not exist. Only because of limited liability can a corporation raise sufficient sums from equity investors to complete its projects.[85] Limited liability is a valuable resource that the government controls. As it did in the United States' early decades, the government should distribute this resource to corporations only on the condition that corporations compensate the government for the valuable resource by operating in the public interest.

A way to assure that corporations implement this duty to serve the public interest would be to impose the duty not only on the corporation itself, but also on the corporation's officers and directors. In other situations where the government distributes benefits to professionals, the professionals are required to promote the public interest.[86] For example, state governments

82. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010) (recognizing that "First Amendment protection extends to corporations . . . [in] the context of political speech"); Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682, 688–91, (2014) (holding that owners of a closely held for-profit corporation are exempt from a federal regulation that they find objectionable pursuant to the Religious Freedom Restoration Act).

83. LAMOREAUX & NOVAK, *supra* note 41, at 25–26.

84. LAMOREAUX & NOVAK, *supra* note 41, at 26.

85. *See supra* Part III (discussing the development of limited liability).

86. *See supra* Part I (discussing how in some professions other than business, professionals are required to work not only for their own interests, but also for the public interest).

provide lawyers with the valuable monopoly right to sell legal services; no one other than lawyers can provide such services. In return, lawyers are required to act as "officers of the court," and to act in the public interest.[87] Furthermore, they are held to a higher standard of behavior than non-lawyers: the state will deny a legal license to a person who has been convicted of a serious crime.[88]

Similarly, certified public accountants have a duty to act in the public interest.[89] Again, this is appropriate because the government has provided the accountants with the large benefit of the monopoly right to perform certain accounting services.[90]

Corporate officers and directors too should have a duty to lead their corporations in the public interest. The states have provided corporations with the valuable benefit of limited liability. Like lawyers and accountants, corporate officers should be required to reciprocate by acting in the public interest. Because the state has provided the corporation with the benefit of limited liability, the corporation's leader has a duty to run the corporation to benefit the public.

Perhaps this duty should be described in a way that resembles how the duty for lawyers is described. A lawyer is called an "officer of the court." A corporate officer or director might be called an "officer of the public."

This duty for corporate leaders to manage their corporations as officers of the public would help protect groups that are vulnerable to corporations' behavior. A corporation might protect communities that surround its factories by not immediately closing less-profitable factories. Cigarette manufactures might choose to leave the cigarette business, even if the business were profitable.

The penalties for violating this duty would be the same penalties that punish lawyers and accountants who violate their respective ethical duties. Just as some criminal acts disqualify a person from serving as a lawyer, a person's acts that harm the public interest should disqualify said person from serving as a director or officer of a corporation. If a corporate leader causes their corporation to harm the public interest, the government should have the authority both to remove them from their corporate position and to eliminate their corporation's limited liability.

Although federal or state courts, especially Delaware courts, might impose this duty as part of the common law, the duty might be best imposed at the federal level, by federal statute. Otherwise, state courts and state

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87. *See supra* Part I.
88. *See supra* Part I.
89. *See supra* Part I.
90. *See supra* Part I.

legislatures have a strong economic interest not to impose such a requirement. A state that did impose such a requirement would be at a disadvantage in the market for incorporations in which states compete to attract corporations to incorporate there. For example, Delaware might fear that it would lose its dominance in this market if it imposed a requirement that corporations promote the public interest. Corporations would reincorporate in other states that did not impose the requirement. To assure that the requirement governs all corporations in all states, federal legislation might be necessary.[91]

This is not an extreme proposal. Instead, the proposal would return corporate governance to the requirements that existed for the United States' first 150 years.[92] Until the mid-1950s, it was understood that corporations should operate in the public interest.[93] The current prevailing approach of hard profit maximization is extreme, deviating from a system that had existed for almost 200 years. My proposal is conservative: it would return corporate governance to its moderate mainstream.

VII. CURRENT RESPONSES ARE INADEQUATE

In the last decades, and even more recently, there have been halting suggestions that corporations assume obligations to more than shareholders. As discussed in the introduction and bibliographical appendix, scholars have made various proposals.[94] Two other approaches have arisen from industry itself. First, some companies have chosen to become "benefit corporations," also called B corporations. Second, a group of corporate leaders has suggested that corporations should have duties to more than shareholders. I discuss each in turn and explain why both are inadequate to achieve the goal of appropriate corporate responsibility.

A. Benefit Corporations

Benefit Corporations are normal corporations that have voluntarily

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91. For a related proposal, *see generally* RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976) (advocating for the federal chartering of corporations that employ at least 10,000 individuals or sell a minimum of $250 million worth of goods and services per annum).

92. *See supra* Parts III-IV (discussing the development of corporate governance in the United States).

93. *See supra* Part IV (discussing the prevailing notion in the pre-WWII world that corporations should operate in the public interest).

94. *See supra* notes 11–26 and accompanying text (discussing the existing literature concerning corporations serving the public interest).

committed to serving interests other than those of shareholders. Indeed: Just what is a benefit corporation? A for benefit corporation has the same structure as a traditional for-profit corporation. Each has a board of directors, officers, and shareholders who own shares in the company. The officers and directors run the business, yet the shareholders can hold them accountable for the decisions they make. Shareholders have several means to do this, including filing a shareholder lawsuit.

The difference between a traditional corporation and a benefit corporation is in its purpose. A traditional for-profit corporation's purpose is to make profits for shareholders. This means that corporate managers are judged based on the company's financial performance. They may face shareholder action if they make decisions that sacrifice profits to achieve nonmonetary goals.

A benefit corporation still has a profit-making goal, but it also has a broader public benefit purpose: to make a material positive impact on society and the environment. Managers must work to achieve this purpose and therefore they have flexibility to make decisions that balance profits with social causes and environmental responsibility.

The first benefit corporation law was enacted in Maryland in 2010, and currently about 30 states allow them. A benefit corporation is best suited to a company that has an important social or environmental mission but also wants to generate profits. For example, Yonkers, NY-based Greyston Bakery was founded in the early 1980s to give hard-to-employ people a new chance in life. It is profitable, has stayed true to its mission, and has developed new community programs. It reorganized as New York's first benefit corporation in 2012.[95]

Additionally, while it may vary from state to state, forming a benefit corporation is no more difficult than forming a normal C corporation:

> Benefit corporation laws vary somewhat from state to state but, in general, a benefit corporation must have a general benefit purpose stated in its articles of incorporation. A B corporation is formed by filing articles of incorporation with the state—the same as with a traditional corporation.
>
> In most states, a BENEFIT ORGANIZATION must demonstrate that it is upholding its public benefit purpose by publishing an annual benefit report that assesses social and environmental performance using a third-party standard. The report must be sent to shareholders and published on the company's website. State

95. Jane Haskins, *What is a Benefit Corporation?*, LEGAL ZOOM (last updated Feb. 18, 2021), https://www.legalzoom.com/articles/what-is-a-benefit-corporation [https://perma.cc/CXM9-VAL6].

> law also may require it to be filed with the state.
>
> Because they may sacrifice profits in order to achieve social goals, for-benefit companies may not be as popular with investors as traditional profit-centered corporations. Owners of benefit corporations may have to develop a strategy to attract investors that value contributions to social or environmental causes as highly as they value profits.[96]

Whether a given benefit corporation achieves the goals that it establishes for itself is based on the honor system; by itself, registering as a benefit corporation does not require the corporation to achieve these goals. However, the corporation may also agree to monitoring by an outside entity. For example, the corporation may not only become a benefit corporation, but also become certified by an outside organization as a certified B Corporation:

> Another way to show that a business is focused on environmental and social goals is to apply for B CORP. CERTIFICATION through the nonprofit organization B Lab. Certification is available to all types of businesses, including traditional corporations and LLCs. Some businesses, like King Arthur Flour Company and Greyston Bakery, are organized as benefit corporations and also are B Lab certified B corporations.
>
> Certification involves completing an assessment that evaluates the company's overall impact on its stakeholders. The assessment is then reviewed by B Lab staff members, who may require supporting documentation. Some companies must amend corporate formation documents or bylaws to include a general benefit purpose. B Lab also offers a free tool that can assist companies in meeting their annual benefit corporation reporting requirements.
>
> Forming a benefit corporation can help a company fulfill a social purpose without risking shareholder action for placing social good ahead of profits. Certification and reporting requirements help business managers assess progress and set new goals. And, in an era where so many are trying to be authentic and sustainable, becoming a BENEFIT COMPANY helps you stand out from the crowd by demonstrating your commitment to your employees, your community, and the environment.[97]

That some corporations may choose to become benefit corporations is admirable. However, the existence of benefit corporations does not achieve the goal of imposing a duty to serve the public interest on all corporations.

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96. *Id.*
97. *Id.*

A corporation becomes a benefit corporation only if its organizers choose to do so. The large majority of companies that do not choose to become a benefit corporation have no enhanced duty to the public.[98]

B. The Business Roundtable's Statement

The Business Roundtable is an association whose members are CEOs of major U.S. corporations.[99] For decades, the group indicated that the goal of a corporation should be to promote the interests of the corporation's shareholders.[100] However, in 2019, the group issued a statement that suggested that corporations should consider the interests of a broader group of stakeholders. The "Statement on the Purpose of a Corporation" provided:

> Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of

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98. Other scholars have noted the limited benefits of B corporations in achieving the public interest. For example, scholars note that the ability of stakeholders to control a B corporation's directors is rather limited, inevitably resulting in the excessive decision-making freedom of B corporation directors. Additionally, the expansion of director duties to consider the shareholder and non-shareholder interests often cause conflicts in the course of making corporate decisions. *See* Roxanne Thorelli, Note, *Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit*, 101 MINN. L. REV. 1749, 1751–53, (2017) ("However, while benefit corporations may be growing in popularity, they do not come without a set of risks and complications, specifically relating to the expanded director duties. . . . As many scholars have rightly recognized, current benefit corporation legislation lacks guidance for director duties regarding how to make decisions based on the divided loyalties to shareholders and stakeholders. . . . Regrettably, existing legal scholarship has failed to address this problem in a systematic way. . . . Due to the requirement for pursuing a public benefit, directors of benefit corporations must understand their duties so they can fulfill their obligations to company stakeholders and promote the greater good. . . . With novel fiduciary duties for directors and no current case law for breach of benefit corporation fiduciary duty or benefit corporation governance, it is important to clarify director duty and provide guidance; otherwise, the new corporate entity may ultimately prove unsuccessful. This Note seeks to overcome the gap in the legal literature by providing a novel solution that will guide benefit corporation directors as they navigate this complicated terrain. . . . [The author] explores and analyzes five important shortcomings of the current director duty provisions within several state benefit corporation statutes. . . ." The author does not mention limited liability).

99. BUSINESS ROUNDTABLE (last visited Feb. 27, 2021), https://www.businessroundtable.org [https://perma.cc/8X6X-CP3G].

100. BUSINESS ROUNDTABLE, *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'* (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/H9QS-X6DC].

generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all.

Businesses play a vital role in the economy by creating jobs, fostering innovation and providing essential goods and services. Businesses make and sell consumer products; manufacture equipment and vehicles; support the national defense; grow and produce food; provide health care; generate and deliver energy; and offer financial, communications and other services that underpin economic growth.

While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:

Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.

Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.

Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.

Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.

Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders.

Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.[101]

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101. The press release for the statement indicated:

Since 1978, Business Roundtable has periodically issued Principles of Corporate Governance. Each version of the document issued since 1997 has endorsed principles of shareholder primacy – that corporations exist principally to serve shareholders. With today's announcement, the new Statement supersedes previous statements and outlines a modern standard for corporate responsibility.

"The American dream is alive, but fraying," said Jamie Dimon, Chairman and CEO of JPMorgan Chase & Co. and Chairman of Business Roundtable. "Major employers are investing in their workers and communities because they know it is the only way to be successful over the long term. These modernized

As with the benefit corporation, the Business Roundtable's statement is merely aspirational. It does not require corporations to do anything. It is a suggestion by some powerful CEOs that they might consider the interests of stakeholders other than shareholders. It does not require the CEOs to consider these other interests.

Moreover, the statement is unenforceable. If a CEO were to ignore other stakeholders' interests and continue to focus solely on shareholders' interests, neither the CEO nor their corporation could be punished. No one would be able to sue to enforce any rights of other stakeholders.

Looked at most favorably, the statement is a statement of aspiration that might inspire some corporate leaders to think more broadly beyond shareholder maximization. A more cynical view would be that the statement is public relations hot air, which is designed to make corporations seem more appealing, while requiring them to do nothing.

The statement does not appear to have marked a dramatic turning point in corporate behavior. Indeed, a recent study shows that, more than a year after the statement was issued, those companies whose executives signed the statement have done no better in serving the public interest than those whose

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> principles reflect the business community's unwavering commitment to continue to push for an economy that serves all Americans."
>
> "This new statement better reflects the way corporations can and should operate today," added Alex Gorsky, Chairman of the Board and Chief Executive Officer of Johnson & Johnson and Chair of the Business Roundtable Corporate Governance Committee. "It affirms the essential role corporations can play in improving our society when CEOs are truly committed to meeting the needs of all stakeholders."
>
> Industry leaders also lent their support for the updated Business Roundtable Statement, citing the positive impact this commitment will have on long-term value creation:
>
> "I welcome this thoughtful statement by Business Roundtable CEOs on the Purpose of a Corporation. By taking a broader, more complete view of corporate purpose, boards can focus on creating long-term value, better serving everyone – investors, employees, communities, suppliers and customers," said Bill McNabb, former CEO of Vanguard.
>
> "CEOs work to generate profits and return value to shareholders, but the best-run companies do more. They put the customer first and invest in their employees and communities. In the end, it's the most promising way to build long-term value," said Tricia Griffith, President and CEO of Progressive Corporation.
>
> "This is tremendous news because it is more critical than ever that businesses in the 21st century are focused on generating long-term value for all stakeholders and addressing the challenges we face, which will result in shared prosperity and sustainability for both business and society," said Darren Walker, President of the Ford Foundation.

Id.

executives did not sign it.[102] Corporations whose executives signed the statement did not change their objectives beyond shareholder primacy.[103]

This failure is easy to understand. As before, a CEO who focused on something other than profits might soon be out of a job. Disgruntled shareholders would have them fired. Alternatively, the resultant declining stock price would make the corporation an enticing takeover target, which again would result in the CEO being fired.

As with the benefit corporation, the statement allows corporate leadership to continue on as before, but with a new public relations halo.

VIII. CORPORATE RESPONSIBILITY AND VULNERABILITY

Various stakeholders of corporations are uniquely unprotected from their vulnerability to the corporations.[104] Often, a corporation holds large power over the workers and surrounding community, and they are at the corporation's mercy. Workers and the surrounding community must make large investments in the corporation, which, under traditional law, the corporation can destroy at its whim, with no recourse for the workers and community.[105]

102. KKS ADVISORS, *COVID-19 and Inequality: A Test of Corporate Purpose* (Sept. 2020), https://337827c9-ebc5-4704-b7bd-0ba2e859ee47.filesusr.com/ugd/f64551_cad4d1c1808343258f2b57fb8fff90d9.pdf [https://perma.cc/6M5A-RA3W] ("Since the pandemic's inception, BRT Signatories did not outperform their S&P 500 or European company counterparts on this test of corporate purpose."); Peter S. Goodman, *Stakeholder Capitalism Gets a Report Card. It's Not Good.*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/business/business-roudtable-stakeholder-capitalism.html?searchResultPosition=2 [https://perma.cc/A9MB-KVSG].

103. *Id.*

104. This section draws on vulnerability theory, created by Martha Fineman. Vulnerability theory offers an alternative approach to state responsibility and social justice. *See generally* PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE (Martha Albertson Fineman, Ulrika Andersson & Titti Mattsson eds., 2017) (examining how privatization and globalization impact contemporary feminist and social justice approaches to public responsibility); VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK (Martha Albertson Fineman & Jonathan W. Fineman eds., 2018) (analyzing individuals and institutions in the context of the employment relationship via the concepts of vulnerability and resilience); VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Albertson Fineman & Anna Grear eds., 2014) (considering how the concept of vulnerability might provide a new ethical foundation for law and politics).

105. *See supra* Part II (discussing the modern corporation's focus on benefiting shareholders while simultaneously ignoring the interests of its other vulnerable stakeholders).

A. Employees of the Corporation

Employees of a corporation must often make large investments in the corporation, the value of which the corporation can easily destroy. For example, workers often must move to a new community when the corporation hires them, cutting off valuable ties with their former communities.

Likewise, workers must invest in the specific skills that the corporation requires, skills which often will not be transferable to another corporation.

The workers and their families establish valuable social ties with institutions in the community, such as schools and churches.

The workers buy houses in the community.

The value of all of these investments will decline or even be completely lost if the corporation decides to close its local plant. If the workers are forced to move, the workers' ties to the community will be lost. The value of the workers' non-transferable employer-specific skills will be destroyed. Likewise, if the corporation closes, this will cause the value of the real estate in the surrounding area to decline, decimating the value of the former workers' homes.

Examples of this are the many workers in the industrial middle of the United States, whose lives were shattered when corporations closed manufacturing plants.

B. The Surrounding Community

Apart from the workers, the community surrounding a major corporate employer is also unprotected from its vulnerability. Families and businesses invest in the community. If the corporation leaves, the whole community is devastated.

Likewise, if the corporation begins emitting larger amounts of pollution, the community is often defenseless. Because the community depends so deeply on the corporation, the community can neither confront the corporation nor defend itself against the corporation, for fear that the corporation will leave.

Examples of communities that have been devastated by corporate decisions are present through the U.S.'s industrial middle.

C. The Environment

Because the corporation holds power over the surrounding community, the surrounding community cannot effectively demand that the corporation reduce pollution. The community fears that environmental activism will cause the corporation to leave for another area or another country. Accordingly, the environment enjoys few protections against its vulnerability.

D. Unions

Because the corporation can threaten to leave, the corporation has effective power to destroy unions. Unions have declined as corporations have moved their factories from union areas in the U.S.'s north to non-union areas in the south. Workers have gotten the message: if you try to organize a union, the corporation will leave and destroy your community.

This is what happened when Amazon suddenly revoked its commitment to build a large headquarters near New York City. The community had made various requests that Amazon protect workers and the environment. Rather than agree to them, Amazon left. To workers and communities, the message is clear. If you request protections from a corporation, your jobs and community are at risk.

The duty that I propose in this paper would permit corporations' workers and communities to enjoy some resilience and to be protected to some degree from their vulnerability to corporations. Corporate law presently provides many protections to shareholders who have invested in a corporation. My proposal provides protections to the workers and communities who have invested in a corporation not just with money, but with their lives. My proposal would require a corporation to consider the interests of all investors in it, including workers and the surrounding community, not just shareholders.

The proposal would also be fair and efficient. Just as it is fair and efficient for shareholders to expect a reliable return on their money investment in the corporation, the corporation should be required to attempt to provide its workers and the surrounding community with a similar reliable return on their nontransferable investment—or, at minimum, to consider in the corporation's decision-making the workers' and community's interests.

IX. CONCLUSION

Over the past century, corporations have freed themselves of a duty that they previously had: the duty to promote the public interest. The recent development of the benefit corporation does not change this. Any public-spirited acts that corporations take as benefit corporations are purely voluntary. A corporation can choose not to be a benefit corporation. If it chooses to be a benefit corporation, it still has complete discretion whether to act in the public interest.

Likewise, the recent statement by the Business Roundtable does not impose any new duties. It merely suggests that corporate leaders might aspire to promote the interest of "stakeholders" other than stockholders. However, the statement does not specify how exactly the leaders should do this. Nor does it provide any enforcement or penalties if they don't.

Instead, a new duty should be created for corporate leaders to act in the public interest. Just as lawyers are required to be "officers of the court," corporate leaders should be "officers of the public." Just as some criminal acts disqualify a person from serving as a lawyer, acts that harm the public interest should disqualify people from serving as directors and officers of corporations. If a corporate leader harms the public interest, the government should have the authority both to remove them from their corporate position and to eliminate their corporation's limited liability.

Furthermore, if corporations violate this duty to act in the public interest, limited liability should be eliminated for that corporation's shareholders. If the corporation fails to provide the quid, then the corporation and its shareholders should no longer receive the quo.

This new duty could be created by the courts. For example, the Delaware courts could hold that corporate directors and officers have a fiduciary duty that runs not only to the corporation, but also to other stakeholders. Just as lawyers and accountants have duties beyond serving their clients, corporate leaders would also have duties to serve the public interest.

Alternately, this public duty could be achieved through legislation. It could be done at the state level. For example, the Delaware legislature could pass a statute that imposes the new duty.

The duty could also be imposed by federal legislation.[106] There would be benefits of this. With federal legislation, the duty would be consistent across all jurisdictions. In contrast, market forces would probably prevent this duty from arising in the states, either in state legislatures or state courts.

106. Other papers have proposed modifications at the federal level. *See* Margaret Ryznar & Karen E. Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667, 1679 (2015) ("There are two primary but different methods of controlling behavior, whether it is the behavior of individuals or corporations: to incentivize it or to regulate it. Governments are in a unique position to employ either or both options because of their ability to pass regulatory schemes and to extend tax incentives. . . . Given the fact that the conflict minerals provision is a mere 'name and shame' statute, the market, rather than the government, is the force asserting pressure on companies to responsibly source the four minerals listed in the conflict minerals provision of Dodd-Frank." The authors do not mention limited liability.).

No state would act individually to impose such a duty for fear of losing incorporations to other states that do not impose the duty. Accordingly, the best way to impose the duty would be through federal legislation, which applies to all states, and which gives no state an advantage in the market for incorporations.

However, there would also be harms to federal legislation. The development of the law would not enjoy the benefits of competitive federalism, where each state attempts to improve its law to attempt to attract businesses to incorporate in the state. Up to now, the federal courts and federal legislature have chosen not to create national corporate law. Yet this might be a situation that nonetheless requires federal legislation.

The new duty would introduce complications for courts. The existing duty only to shareholders is easy to administer. In contrast, if duties were extended to other groups, courts would need to develop rules regarding how to balance a corporation's duties to its shareholders and its duties to the public. It will not be simple to decide a corporation's duty where a corporate decision would help shareholders but harm the public, or vice versa. An example would be a corporation's decision whether to close an unprofitable factory. Likewise, a corporate leader might camouflage the leader's self-interest in the cloak of the interests of workers. For example, the leader might explain a decision not to close a factory on the beach in San Diego as being to protect the workers, while the real reason is that the corporate leader likes to live near the beach.[107]

But the easy route is not always the best route. The complicated rule is sometimes the better rule. In many areas, the Supreme Court employs complicated balancing tests because a simple rule would create injustice. A simple rule can be grossly unjust. Centuries ago, an earlier simple rule provided that parents could completely control their children, including the right with impunity to beat their children, or even kill them. Fortunately, this simple, easy-to-administer rule has yielded to the present, more-complicated system where the rights of parents to control a child must be balanced against the child's independent rights.

Similarly, the main virtue of the rule that creates a duty for a corporation only to shareholders is simplicity. But the virtue of the rule's simplicity of administration is dwarfed by the harms of the rule's flaws and injustices. Even though the rule that I propose will be harder to administer, the effort will be worth it, eliminating stark injustices that the present rule creates.

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107. *See* Stephen Bainbridge, *A Duty to Shareholder Value*, N.Y. TIMES (Apr. 16, 2015 6:46 AM), https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/a-duty-to-shareholder-value [https://perma.cc/8HW2-6EDN] (discussing a board's duties to its shareholders).

Moreover, that the difficulties will not be insuperable is shown by the fact that my proposed rule is merely a return to a system that earlier functioned well. Mine is a conservative proposal. I seek merely to reimpose on corporations the public duties that governed them until the Gilded Age. The brutally simple rule that conservative corporate apologists and their high-paid lawyers have pushed through is an aberration from the moderate, fairer approach that prevailed earlier.

My proposed duty would provide non-shareholder corporate stakeholders with some resilience from their unique vulnerability to corporate decisions. Like shareholders, a corporation's workers and the surrounding community make large investments in the corporation. Rather than the investments being in money, the workers and communities invest in the corporation their whole selves. They build their lives around corporation, and they learn the nontransferable skills that are necessary to serve the corporation.

Under present law, a corporation, with impunity, can destroy these investments that workers and the community have made. The U.S.'s industrial mid-west is evidence of the devastation that corporations cause when they are permitted to focus only on the interests of shareholders and to ignore the interests of vulnerable shareholders and communities. My proposal would extend legal protections not only to investors who are shareholders, but also to the workers and communities who have invested in the corporation, not with money, but with their lives.

BIBLIOGRAPHICAL APPENDIX

In addition to the sources discussed in the introduction, other papers employ the following theories to demonstrate that a corporation has direct duties to stakeholders:

1. *Social/Corporate Contract Theory*. Some scholars have tried to construct and analyze the social responsibility of corporations from the perspective of a social contract, human rights, and the political social contract.[108] In addition, they argue that the fiduciary duty can be used to fill

108. Olufemi Amao, *Corporate Social Responsibility, Social Contract, Corporate Personhood and Human Rights Law: Understanding the Emerging Responsibilities of Modern Corporations*, 33 AUSTL. J. LEG PHIL. 100, 100 (2008) ("Business ethicists and philosophers have tried to construct and analyze the social responsibility of corporations from a social contract perspective without linking it to human rights or the political social contract. . . . [T]here is no need for a separate social contract between society and business and that a proper understanding of the legal status of today's corporation would recognize them as new entrants into the existing social contract. The consequence of this for international human rights law will be that corporations as 'persons' will stand in the same position as natural

gaps in corporate contracts. The substance of this gap-filling principle should be maximizing value of diversified portfolio, rather than shareholder value maximization.[109]

2. *Distributive Justice*. Some scholars argue that corporate directors might exercise their social duties through distributive justice, which enables the stakeholders to participate in the dissemination of value according to their contributions to the benefits and their adoption of risk.[110]

3. *Fairness*. Some articles challenge whether corporate managers should focus on profits. The articles' arguments are based on fairness, rejecting libertarian or conservative tenets.[111]

4. *Kant's "Duty of Beneficence*." Other articles suggest that shareholders have a duty to hold management to account for the moral consequences of the firm's activities on stakeholders. They add pursuing the happiness of non-shareholders to the ethical framework of shareholder theory.[112]

5. *Theories Based on Strategies to Maximize Long-Term Profit*. Some articles argue that directors' duties to the public are a strategy to pursue substantial benefit for corporations and particularly to achieve stated short-term or long-term goals.[113]

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persons under the law." The author does not mention limited liability.).

109. *See generally* Thomas A. Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty*, 98 MICH. L. REV. 214 (1999) ("A hypothetical contract analysis of fiduciary duty requires a corporate law norm that the total value of financial claims against the firm be maximized. . . . The analysis shows some inadequacies in the 'shareholder value maximization' norm that is assumed in most corporate law literature. The norm of maximizing firm value fits best with an abstract conception of fiduciary duty in which the duty is owed to the corporation, rather than to shareholders or any other particular class of security holders. Adopting this conception dissolves many of the fiduciary duty puzzles posed by derivative securities." The author does not mention limited liability.).

110. *See generally* Charlotte Villiers, *Controlling Executive Pay: Institutional Investors or Distributive Justice*. 10 J. CORP L STUD. 309 (2010) (seeking to offer an alternative proposal for setting and monitoring executive pay. The author does not mention limited liability).

111. Alan R. Palmiter, *Corporate Governance as Moral Psychology*, 74 WASH. & LEE L. REV. 1119, 1119 (2017) (propounding that "Corporate governance is best seen not as a subset of economics or even law, but instead as a subset of moral psychology." The author does not mention limited liability.)

112. *See generally* Samuel Mansell, *Shareholder Theory and Kant's 'Duty of Beneficence'*, 117 J. BUS. ETHICS. 583 (2013) (concluding that it is possible within the ethical framework of shareholder theory for managers to pursue directly the happiness of non-shareholders).

113. *See* AUGUSTINE CHENNATTU, MANAGING WITH INTEGRITY: AN ETHICAL INVESTIGATION INTO THE RELATIONSHIP BETWEEN PERSONAL AND CORPORATE INTEGRITY 75 (2020) (identifying four different theories regarding corporate social responsibility, namely

6. *Social Responsiveness Theories*. Some scholars define corporate social responsiveness as whether a corporation is able to respond to various social pressures. This in turn depends on its ability to manage its relations with various social groups.[114]

7. *Normative Stakeholder Theory*. Other authors argue that stakeholder and shareholder theories are not in conflict with one another. They advocate stakeholder-focused management as profit-maximizing. Acting in this way achieves overall cooperation between various stakeholder groups, increasing the corporation's profits, because "those whom the corporation affects, will affect the corporation back."[115]

8. *Sustainable Corporate Vision*. Likewise, some papers argue that, in the long-term, corporate sustainability requires corporations to satisfy stakeholders' economic, environmental, and social needs.[116]

Some scholars argue that corporate managers should have profit sacrificing discretion even if the law generally requires corporate profit-maximization. Total agency costs require giving managers a business-judgment-rule deference that necessarily confers such discretion.[117]

"profit motivated theories, power motivated theories, socially motivated theories, and ethical theories. Profit motivated theories hold that corporate social responsibility is to increase shareholder value. Power motivated theories perceive that since corporations enjoy social power in society, they have to be responsible to society. Socially motivated theories say that since the existence, continuity, and growth of business depend on society, business must consider and fulfill social demands. Ethically motivated corporate social responsibility theories concentrate on ethical principles that determine the link between business and society. [The author] conclude this section with a suggestion that we need more powerful individual and corporate centered corporate socially responsible theories rather than corporate centered socially responsible theories." The author does not mention limited liability).

114. *Id.* at 32.

115. *Id.* at 92.

116. *Id.* at 94.

117. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N. Y. U. L. REV. 733, 733–34 (2005) (arguing against the canonical law and economics' view holding that "corporate managers do and should have a duty to profit-maximize because such conduct is socially efficient given that general legal sanctions do or can redress any harm that corporate or noncorporate businesses inflict on others." This "canonical view is mistaken both descriptively and normatively. In fact, the law gives corporate managers considerable implicit and explicit discretion to sacrifice profits in the public interest. They would have such discretion even if the law pursued the normative goal of corporate profit-maximization. . . . Pure profit-maximization would worsen corporate conduct by overriding these social and moral sanctions. In addition to being socially inefficient, pure profit-maximization would harm shareholder welfare whenever shareholders value the incremental profits less than avoiding social and moral sanctions . . . in public corporations, optimizing corporate conduct requires giving managers some operational discretion to sacrifice profits in the public interest even without shareholder approval because, unlike shareholders, managers are sufficiently exposed to social and moral sanctions. . . . Managerial discretion to sacrifice profits is further

In contrast to this paper's emphasis on the importance of courts and legislatures to broadening the scope of fiduciary duties of directors, some papers suggest that stakeholders should instead be benefitted by strengthening stakeholder bargaining power. Rather than focusing on the law of corporate governance, the scholars argue that states should strengthen unions and collective bargaining, tighten environmental laws, and provide safety nets for communities affected by downsizing. [118]

In contrast to this paper's recommendation that corporations' duties to stakeholders should be mandatory, some papers argue that the law should be able to choose: corporations should begin as stakeholder-centered but then have a choice to focus on the shareholder.[119] This is in accord with the benefits corporation movement, discussed above. Also, some scholars prefer a mandated corporate social responsibility structure, which is a hybrid model of both legislature and market force. They contend that if the law conflicts with corporations' purpose of profit maximization, corporations would seek to circumvent it and be able to undermine the intent of the law.[120]

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constrained by legal limits on the amount of profit sacrificing, which become much tighter when market constraints are inoperable because of last-period problems. Managers should have donative discretion because courts cannot distinguish profit-enhancing donations from profit sacrificing ones. . . . This explains the legal requirement that corporate donations have a nexus to corporate operations. Antitakeover laws can partly be explained as necessary to preserve sufficient managerial discretion to consider social and moral norms." The author does not mention limited liability).

118. Robert John Schulze, *Review: Can This Marriage Be Saved? Reconciling Progressivism with Profits in Corporate Governance Laws*, 49 STANFORD L. REV. 1607, 1607 (1997) ("Robert Schulze examines a collection of critiques of the corporate law theory paradigm. Although the current paradigm focuses on maximizing shareholder profits to optimize societal wealth, these critique essays argue that this focus ultimately fails to meet societal needs. According to these authors, corporate law should concomitantly protect other corporate constituents, such as labor, consumers, the environment, local communities, and unsophisticated investors. Although Schulze finds that some of these critiques powerfully challenge the current paradigm, he argues that their reforms would not ameliorate the concerns highlighted and would probably fail in practice. He concludes that other policy interventions may more effectively answer the authors' criticisms." The author does not mention limited liability.).

119. Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L. J. 1085, 1085–86 (2000) ("Both legal and economic changes result from redefining the duties of corporate directors, ultimately transforming American business. . . . An opt-out statute would create a default rule that makes consideration of non-shareholder interests mandatory upon incorporation, but allows shareholders to amend the articles to favor themselves if they so choose." Authors do not mention limited liability.).

120. *See* Ryznar & Woody, *supra* note 106, at 1693 ("Corporations seek to circumvent regulations if the regulations conflict with profit maximization, as they often do. When corporations are effective in dodging regulations, they are able to undermine the intent of the regulations.").