The Mediating Function of Corporate Boards of Directors: Lessons from Corporate History for Corporate Social Responsibility

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Introduction

One of the most compelling arguments that shareholder-rights advocates have given in support of the idea that corporate boards and managers should focus solely on maximizing share value, and eschew the pursuit of other social agendas, is the idea that a person cannot serve two masters. If a person – a manager or board member – is responsible to two or more constituencies, that person will be accountable to none, according to this view (e.g. Stout, 2012, p.45; Bainbridge, 1993, p. 1427; Brandeis, 1914, p. 38).[1] This argument sounds good on the surface, and is easy for scholars trained in the use of mathematical optimization to understand, model and interpret. But for many problems that arise in the management of business enterprises, optimization in a single dimension is not really possible, and would not produce the greatest social value even if it were. There are a variety of reasons for this, most having to do with the effect that one-dimensional management has on the people who work in an organization.

In this chapter, I review several economic arguments in support of the idea that, to reach the socially best outcomes, managers and directors may often need to mediate or arbitrate among competing interests, rather than fixate on one goal. Then I examine the history of boards of directors to show that mediating among competing interests has long been an important function of corporate directors. Finally, I conclude by speculating about some additional ways that a mediating approach to corporate management can create value.

I. The mediating role of corporate boards

The corporate form of organization has come to be widely used for many types of businesses and other activities, such as educational and charitable organizations, membership clubs and advocacy groups. One feature that is common to almost all corporations (other than single-person businesses) is that nearly all corporations have boards of directors in whom all legal authority to operate the corporation is vested.[2]

What do boards of directors do? Why does the law generally require that corporations be governed by boards, and why, even in situations in which organizing parties could opt out, do they so commonly choose board governance? The evidence we have about the history of corporate boards, discussed below, suggests that, for at least several hundred years, board governance has been the preferred way of organizing firms whenever there are multiple, competing interests at stake in the institution or venture being undertaken by the firm.

The competing interests at stake in business firms vary from one corporation to another, but may include:

1. the interests of the government that granted a corporation's charter versus the interests of private investors;
2. the interests of different classes of investors, such as creditors versus shareholders or preferred shareholders versus common shareholders;
3. the interests of an entrepreneurial founder versus that of outside investors;

4. the interests of inside managers generally versus that of outside investors;
5. the interests of investors who contribute financial capital versus those who invest human capital;
6. the interests of shareholders versus the interests of other stakeholders such as employees, customers, and communities;
7. the potential conflict between short-term gains for some investors, and the long-term health and productivity of corporations (see, e.g., Mayer, 2013; Lipton et al. 2016);
8. and the interests of shareholders versus the social responsibilities of corporations.[3]

Conflict and competing interests, in fact, are endemic in any enterprise that involves multiple parties. Law and finance scholarship has for the most part focused on one set of conflicts, those between shareholders and managers, arguing that the primary job of corporate directors is to monitor management to make sure that managers stay focused on maximizing share value. As a result, the literature is filled with discussions of the monitoring role of directors.[4] But this is not the only job, nor even the most important job boards do in many situations.[5] Directors must often mediate among competing interests to overcome sources of dispute and conflict that arise in order to keep the resources in the corporation together and productive. When the board succeeds at this function, it may not be obvious because things will generally be going well, most disputes will be settled before they reach the board, and all of the constituents of a corporation will be enjoying benefits.

But at times, effective balancing of competing interests breaks down. When a board fails to maintain balance, the results can be quite costly. Excessive focus on one goal, such as profits, or cost cutting, for example, to the exclusion of necessary attention to complementary goals, such as safety or risk mitigation, can lead to catastrophic failures. We saw this in the financial crisis of 2008-2009, and in the BP/Deepwater Horizon oil spill in 2010, to cite just two examples.[6] In both of these cases, the boards of directors of the corporations that experienced disasters had been under substantial pressure from financial markets, and from business norms that had become widespread in the early twenty-first century, to focus exclusively on increasing share value by meeting market expectations for profits. (Fahlenbrach and Stulz, 2011; Deepwater Horizon Study Group, 2011, p. 9; U.S. Bureau of Ocean Energy Management Regulation and Enforcement, 2011, p.199). This focus on share value led to excessive risk-taking that ultimately destroyed substantial share value.

In this section, I review the "team production theory of corporate law," which helps explain one way that a board of directors can create value by acting as independent mediators or arbitrators, who have the task of making decisions when competing interests are at stake. Then I show that arbitration theory offers a second, closely-related way that a mediating board can create value. And finally, I also show how corporate law actually supports this function in many ways better than it supports the idea that directors are supposed to monitor managers to ensure share value maximization.

A. The "Team Production" Problem.

The governance of most corporations presents a classic "team production" problem.[7] The "team production" problem arises when some productive activity requires inputs from a number of different individuals that are complex, highly specialized, and difficult to specify in advance or to contract over (Alchian and Demsetz, 1972). In such situations, it can be difficult or impossible for the participants to organize their activities using ordinary contracts – it may be hard to write down in advance what each person is supposed to do, how her contribution is to be measured and rewarded over time, how decisions are going to be made, and how the relationships should be adjusted when something unexpected happens. Thus economic actors have developed an array of organizational structures to govern the relationships among team members involved together in a production process that has these characteristics.

One simple structure is an individual proprietorship, in which a single individual owns the business, makes all the major decisions, instructs the team members and monitors their performance, captures the benefits and bears the risks associated with the business. This is the form that Alchian and Demsetz (1972) highlighted as a way to solve the team production problem.[8] It is an elegant solution in some cases, but doesn't work for large enterprises that require substantial financial and human capital investment from many people.

An alternative structural solution to the problem is to form a corporation, in which participants in the enterprise can invest either by contributing financial capital or by contributing some form of "human capital".[9] Incorporating a business gives it four characteristics that make it easier it to attract and hold specialized human and physical capital that is committed to the business (Blair, 2013). These are:

1) Indefinite life: A corporation can continue in existence for decades or even centuries. Corporations can therefore invest in and hold long-lived specific assets necessary for some businesses, such as railroads, canals, bridges, water works, or large-scale manufacturing.

2) Corporate persona: The law recognizes a corporation as a legal "person," separate from any of its individual organizers, investors, or managers. As such, it can buy, sell, and hold

property, enter into contracts with other parties, and sue and be sued in its separate name. This provides continuity for transactions, contracts, and relationships, even as individual persons involved in the business come and go. It can also provide a stable “persona” around which intangible assets such as goodwill, brand, reputation and “core competencies” can be acquired and held.

3) Capital lock-in: Corporations have the feature that, once an investor contributes equity capital to a corporation, that investor cannot decide unilaterally to get out of the business and demand the return of her share of the capital (Blair, 2003).[10] Instead, investors are given shares of stock in exchange for their capital contributions. Individual shareholders may generally sell their shares to other investors if they need to get their capital out. But distributions of earnings or capital from the corporation to shareholders may be made only by authority of the board of directors, and then generally only on a pro-rata basis to all shareholders.

These three features provide the legal framework necessary for long-term investments in a business venture, but by themselves they do not provide a decision-making structure necessary for governing those assets over time. The fourth attribute addresses this.

4) Self-governance by a board of directors: Governance by a board provides a unique, but flexible solution to the many team production problems that would otherwise plague a business venture with long-term committed capital and complex, evolving relationships. Corporate law, from its earliest days, provided that corporations must be governed by boards, and this characteristic of corporations has been universally adopted around the world (Kraakman et al. 2004; Gevurtz, 2004).[11]

Governance by a board of directors can help to solve team production problems. One theory about why, explored by Blair and Stout (1999), is based on a theoretical model by Rajan and Zingales (1998) in which they show that, in the context of a team production process, if a single individual "owns" the assets that must be used by a team in a production process (as in an individual proprietorship), this can create perverse incentives. If A has ownership and control rights over the project's assets and output, B might not be willing to make investments that are necessary to the venture but specific to the enterprise.[12] And vice versa. But both may be incentivized to invest if a third party, say D, who is not a member of the team and does not need to make specific investments, has decision rights over use of the joint assets, but, importantly, does not have "ownership" rights (Rajan and Zingales, 1998). This counterintuitive result calls attention to a perverse effect that property rights can have in a pure contracting relationship in which the decision-maker also "owns" the assets – if A owns the assets, she can decide to sell the assets, exit the venture, and capture surplus value without committing to making her own specialized investment. Knowing this, B will be reluctant to invest in assets that are specific to the business. Thus a "team" in which one team member owns the assets used by all the team members and calls all the shots, may have trouble eliciting full cooperation from other team members.

Blair and Stout (1999) interpret the Rajan and Zingales (1998) model as providing a theoretical rationale for the peculiar role played by boards of directors in corporations. Corporate law places ultimate decision rights over the business activities of a corporation in the hands of its board of directors. Directors are not necessarily involved in the day to day activities of the firm, and may not even have significant personal investments at risk in the firm. Moreover, corporate law provides that, individually, board members have no authority to act for the corporation, and have no direct property rights in corporate assets. But they do have fiduciary duties to put aside their personal interests and act in the best interest of the corporation.[13] Acting together as a board, directors have total authority to exercise ‘all corporate powers’ (MBCA, §8.01(b)). They are, thus, in a position to act as the third-party decision-makers modeled by Rajan and Zingales (1998; Blair and Stout, 1999).[14]

In practice, boards of directors often delegate fairly wide authority over their corporations to internal management teams headed by Chief Executive Officers (CEOs). Successful CEOs often gain substantial power in corporations, and may, over time, have significant influence over boards. This has caused many management scholars and social responsibility advocates over the years to focus attention on CEOs, rather than on boards. But boards always retain the authority to fire a CEO if things are not going well. The board of British Petroleum, for example, did this when it moved Tony Hayward aside in July, 2010, after it became clear that he was not handling the oil spill crisis well enough (Mason, 2010). The board of Apple at one point famously removed Steve Jobs as CEO, then a few years later, reversed itself and brought him back (Siegel, 2011).

B. Arbitration theory

Broughman (2010) has explored a second economic rationale, based on arbitration models, for how independent directors can create value, applying the lessons to the case of boards of venture capital firms. In Broughman’s model, two individuals, an “entrepreneur” (E), who holds common shares, and a “venture capitalist” (VC), who holds preferred shares, may have different views about what strategy the corporation should pursue. E will likely prefer a high-risk strategy that has a high payout for E, but imposes the risk of a low payout on VC if it fails; VC, by contrast, will likely prefer a lower-risk strategy that protects VC's prior claim on the assets, but does not offer the possibility of a high return for E.

Suppose there is an intermediate strategy that yields an intermediate expected value for each party, but higher total social value. If E controls the choice of strategy, VC might not invest because VC cannot be sure that E will choose even the intermediate strategy, let alone the low-risk strategy. Likewise, E will not be willing to invest if VC has control over the strategy. [15]

But if E and VC both yield decision-making authority over the choice of strategy to an "independent" director charged with choosing between the proposals of the two parties, an interesting thing happens. Now both parties are very likely to propose the intermediate strategy. This is because they both have an incentive to moderate their demands, knowing that the independent director will likely choose the more "reasonable" proposal. Broughman (2010, p. 482) explains this insight:

> "There is no point in proposing a strategy that will be rejected by the independent director, as this would effectively let the other party select the firm's course of action. Instead, the parties have an incentive to offer a strategic compromise – a proposal that is likely to be endorsed by the independent director and yet is still acceptable to the proposing party."

Broughman (2010) offers substantial empirical evidence that independent directors on boards of venture capital firms play this function. Boards of such firms are often explicitly structured as "mediating" boards, with one or two members who represent the interests of the entrepreneurs, two or three members who represent the interests of the venture capitalists, and three members who are not aligned with either side, but who are widely respected members of the business community in the same industry as the firm. Broughman refers to this arrangement as an ‘ID-arbitration’ board.[16]

Elizabeth Pollman (2015) reviews journals, surveys and blogs that address people who serve on boards of start-up firms and venture capital firms. In these circles, it is widely understood that one of the roles board members will play is to mediate among the competing interests at stake in the firm. Similarly, Puchniak and Lan (2015) observe that a similar phenomenon occurs on the boards of family-controlled corporations in Singapore where independent directors often perform the function of mediating and resolving disputes among members of the controlling family.

Moreover, in countries around the world where corporations are typically dominated by a controlling shareholder, corporate governance norms have been adopted that stress the role of directors who are independent of the *controlling shareholder*, rather than independent of management, as independence is typically interpreted in the U.S. and other Anglo countries (Ferrarini and Filippelli, 2015). And in countries that explicitly recognize that corporations must be run in the best interest of the “enterprise,” encompassing roles for shareholders, employees, and other stakeholders in corporate governance, boards are often structured to reassure these various stakeholders that their interests will not be systematically suppressed (Enriques et al. 2009).

In other words, it is a common pattern around the world for boards of directors to be structured so that they can rein in whoever the dominant force is in a corporation, and thereby signal to the other team members that their interests will be taken into consideration.

C. The role of corporate law

The team production and arbitration theories explain how mediating boards may create value by offering some protection to other competing interests in the corporation. Boards of directors can, thus, act as "commitment devices" (Brocas et al. 2003; North, 1993; Mayer, 2013).[17] Investors, suppliers, employees, and communities all contribute resources to the common enterprise, and all yield extensive control rights over those resources to the board of directors who is charged, under the law (MBCA, §8.30(a)), with acting in the best interest of the corporation.

Corporate law (in the U.S.) supports this function of boards of directors by requiring that the most divisive and controversial questions that arise in the life of a corporation must be decided by the board of directors (Blair, 2015). Under corporate law in the U.S., boards of directors are responsible for the hiring and firing of a CEO (MBCA, §8.40(b)); compensation of the CEO (MBCA, §8.01(c)(iii)); compensation of the board itself (MBCA,` §8.11); declaring and paying dividends (MBCA §6.40); developing a plan for a merger or acquisition (MBCA, §11.40(a)), or for a sale of all or substantially all of the assets of a corporation (MBCA, §12.02(b)); dissolution of the company (MBCA, §14,02(b)); issuing new stock (MBCA, §6.21(b)); reviewing and approving any transaction in which the CEO or a board member has a conflict of interest (MBCA, §8.61(b)); responding to a derivative action initiated by a shareholder (MBCA, §7.44); and selecting an auditor and approving the audit (17 C.F.R. §240.10A-3 (2014)).[18] Courts also refrain from second-guessing the decisions directors make unless a plaintiff can show that the board decision was tainted by fraud, conflict of interest, or illegality,[19] a decision-rule that has come to be called the "business judgment rule."

While corporate law creates a context in which directors can mediate among the interests at stake in a corporation, it, admittedly, does not mandate that directors must do this. Nonetheless, I argue that boards often play the role of balancing competing interests because of other social and economic pressures. The history of corporate boards in the U.S. suggests that, in fact, boards often play such a role. In Part II below, I review this history.

II. The History of Governance by Boards.

The corporate form of organization evolved out of legal forms first used for religious organizations such as churches or monasteries, or civil units such as townships and villages (Harris, 2000; Davis, 1905, vol. II, p. 236). Though there is very little research focusing on early boards, [20] the legal institution of the board of directors appears to have been a common feature of corporations from early on. Important prominent predecessors of corporations, the trading companies of the sixteenth and seventeenth centuries, were governed by board-like institutions whose duties included dispute resolution. In 1601, for example, John Wheeler of the Company of Merchant Adventurers in England described the duties of the "governor," a "deputy," and 24 "assistants" who had been granted authority from "her Majesty" 'to end and determine all civil cases, questions, and controversies arising between or among the brethren, members, and supports of the said company, or between them and others' (Davis, 1905, vol. II: 78; citing Wheeler, 1601, p. 19, 24). The Merchant Adventurers were not a fully-formed "joint stock" company, but were more like an association of merchants that, collectively, had been given monopoly trading rights over certain regions of the world. Member merchants invested separately in individual trading ventures, sometimes competing with each other for certain business. The governance structure described in their charter was designed to resolve disputes that arose among the members.

The British East India Company, chartered in 1600 by Queen Elizabeth, was among the first of such associations to try to operate as a single entity. The company included 216 merchants, forming "one body corporate and politic" (Davis, 1905, vol. II p. 115).[21] Management of the company was delegated to a governor, deputy governor and twenty-four "committees" or directors (Davis, 1905, vol. II, p. 115; Foster 1933, p. 150). Initially, individual member merchants or small groups of merchants continued to trade separately, but in 1610, the members first combined their "stocks" to send out a single fleet. Individual members could still subscribe to each separate "joint-stock" venture at various levels, or not at all, however, which led to conflicts when the ships returned over who was entitled to what portion of the proceeds of each venture (Davis, 1905, vol. II p. 119). This approach to investing continued until late in the seventeenth century (Davis, 1905, vol. II pp. 126-132). Thus, initially, the job of the governor and "committees" involved hearing disputes among its members, in addition to planning and overseeing common trade missions.

The London Company, chartered in 1606 to establish a colony in Virginia (later known as the Virginia Company), originally had two governing councils, one a local resident council of thirteen members in the colony to deal with disputes among the colonists, and the other, the "Council of Virginia" in England, consisting of thirteen members appointed by the king to represent the interests of the king and government of England in activities of the company (Davis, 1905, vol. II, p. 159). The charters of settlement companies such as The London Co. functioned as self-governing arrangements for the colonists. In fact, the corporate charter for the Massachusetts Bay Company, established in 1628, provided for one of the first colonial legislatures, and served as the governing constitution for the Massachusetts colony until 1691 (Gevurtz, 2004, p. 114; Davis, 1905, p. 198).

In the British Colonies in North America, and later in the new United States, very few charters were granted for business corporations prior to about 1800.[22] But charters were granted more liberally for religious, educational, and charitable organizations. Charters for colleges such as Harvard and Dartmouth generally provided for colonial officers to serve on the boards of trustees, to ensure that the government maintained a continuing role in the governance of the colleges (Trow, 2003; Flower and Haddad, 2014, p. 59). Such organizations had no “members” or “shareholders,” but had been granted charters to serve a specific public purpose. So the people who served on the boards were generally government officials or leading merchants or other citizens of the community who expected to help ensure that the organizations served the purpose for which they were formed.[23] They were self-perpetuating, empowered to appoint replacements when vacancies occurred. It was to these types of organizations that legislatures likely looked when they began creating and granting charters to businesses more liberally late in the eighteenth century.

The original charter for Dartmouth College was granted in 1769. Then in 1807, the New Hampshire legislature amended Dartmouth’s charter to enhance the state’s authority over the board, so that the state could protect its interests when the board was deliberating issues having to do with public funding (Flower and Haddad, 2014, p. 66). In 1816, the legislature further amended the charter to essentially make Dartmouth a public school, controlled by a state-appointed governing board. The “old board” filed suit to reverse this action. This case culminated in the Supreme Court’s decision in Trustees of Dartmouth College v. Woodward,[24] which determined that a corporate charter is a contract between the incorporators and the state that grants the charter, and is thus protected under the Contract Clause, article 1 section 10, of the U.S. Constitution. The legislature, thus, could not interfere with the terms of the charter, unless the state had reserved the right to do so in the original charter. The decision returned the governance of the college, including its policy decisions, to the Board of Trustees (Flower and Haddad 2014, p. 66), thereby helping establish the principle that governance boards of private corporations have full (and exclusive) legal authority for the internal governance of corporations.

The earliest business corporations in the U.S. were banks, insurance companies, or infrastructure projects, such as bridges, canals, turnpikes, and waterworks (Davis, 1917).[25] Many of these corporations were seen as having at least a quasi-public purpose (Chandler, 1977, p. 28; Smythe, 2006, p. 1416). Legally organized as private corporations, they raised capital through the sale of equity securities, and were entitled to earn profits and pay dividends to their investors as a way to attract private investment. They were also generally granted some sort of franchise along with their charter, and the grants came with limitations on the prices or fares that the corporations could charge. Not infrequently, the state or municipality also invested in these enterprises (Heckelman and Wallis, 1997, pp. 79–80; Goodrich, 1960; McCurdy, 1975). Hansmann and Pargendler (2014) tell us that profit was not considered a primary purpose of these early corporations – their shareholders and other investors were typically wealthy or middle class merchants and other citizens who wanted the services that the corporation would offer, and seemed to be more concerned about being sure that the corporations would not exploit their monopoly positions at the expense of its customers than they were about earning profits (Hansmann and Pargendler, 2014, p. 954; Chandler 1977, p. 28).[26] Moreover, voting rights of shareholders in these early corporations were often allocated in ways designed to restrain the power of the largest shareholders relative to the small shareholders, especially in the transportation infrastructure companies and in banks and insurance companies (Hansmann and Pargendler, 2014, p. 951); Hilt, 2013, p. 629).[27]

We do not know much about who served on the boards of directors of most of these early corporations and what role they played, although Hilt (2014, p. 6) tells us they were typically wealthy and prominent members of the local business community. It seems reasonable to believe that board seats may have been allocated in a way consistent with the allocation of votes, with people on the board who might not have been major shareholders, but whose businesses were major users of the services the corporation would provide (Hansmann and Pargendler, 2014, pp. 951–952).[28]

Historians have not explored the question of what functions early boards performed, except to note that the lines between those who managed the business of early corporations on a day to day basis, and those who were "directors," were not sharply drawn. A contemporary writer confirms that bank shareholders and directors were also regular borrowers from the banks (Gibbons, 1858). Banks typically had large boards of directors (compared with other types of corporations), with ten to thirteen directors on average, and sometimes as many as 50 (Hilt, 2013, p. 7, table 4; Wright and Sylla, 2009, p. 242, table 11.3). Gibbons (1858) tells us that bank boards met very frequently (sometimes twice a week), especially in smaller bank corporations that did not have full-time professional management. At these meetings, they participated in decisions about who should be awarded credit and whose notes should be discounted by the bank. 'Bank directors are chosen for their wealth, commercial experience, and influence in attracting to the institution a good class of dealers. . . They own, in the aggregate a considerable portion of the stock, and they hold the proxies of personal friends who take no direct part in the elections,' according to Gibbons (1858, p. 21). Similarly, insurance companies also had large boards (Hilt, 2013, p. 7) and shareholders and board members were likely to also be customers (Hansmann and Pargendler, 2014, p. 982-983).

Hilt reports that early business organizers faced considerable opposition to their petitions to state legislatures for charters. 'Early American newspapers and pamphlets are replete with charges that monopoly among business corporations would produce "fraud", "prey upon society", "destroy liberty", and create a power "unfriendly to human happiness," "controul [sic] the freedom of popular suffrage", and was "adverse to the spirit of republicanism,"' Hilt says (2013, p. 11). So it would make sense that the entrepreneurs and investors who wanted their businesses to be granted corporate charters would seek out individuals with strong ties to the communities, and reputations for public spiritedness to serve on their boards of directors (Hilt, 2014, p. 9).

Sylla and Wright (2013, p. 657, table 1) count 22,419 business corporations formed by special acts of state legislatures in the U.S. between 1790 and 1860 (plus as many as 4,000 more formed under new general incorporation acts), more than 80 percent of these after 1829. In 1811, the state of New York passed the first general incorporation act, which made it possible for business people in certain manufacturing industries to obtain corporate charters simply by applying for them rather than having to petition the state legislature to grant them a charter by special act. Such statutes became widespread in the 1840s and 1850s.[29] Once business people could incorporate without petitioning the legislature, it seems likely that they would be under less pressure to demonstrate that their corporation would not be harmful to the community. Except for banks, railroads, and infrastructure firms, which typically had large numbers of shareholders, the corporate form came to be widely used even by small and closely-held firms not very different from partnerships.[30] Yet, what we know of such firms suggests that their boards were not composed entirely of shareholders or of insiders.

Hilt (2015a; 2015b) has assembled data on the boards of directors of 573 Massachusetts non-financial corporations in existence in the 1870s. Hilt (2015a, p. 35, table 3) shows that 55 per cent of these corporations had at least one banker on their boards, 32 per cent had at least one insurance company manager on their boards, and 64 per cent had at least one board member who was an executive of some other non-financial corporation. These outsider board members may have been shareholders but we know it was not uncommon for some board members to hold little or no stock.[31] Such board members probably had other reasons for being on the boards (Hilt, 2015, p. 35). Historian Ron Chernow says that investment bankers who underwrote and invested in railroad bonds, for example, joined corporate boards to help protect the interests of bondholders.[32] ‘When investors boycotted an Erie bond issue in 1871,’ he says, notorious banker Jay Gould ‘proposed to bring in outside coal, railway, and banking interests to run the railroad as “voting trustees” who would control a majority of Erie stock’ (Chernow, 1990, p. 38). J. Pierpont Morgan, similarly, served on voting trusts of a number of railroads to protect the interests of bondholders.[33] Chernow (1990, p. 53) asserts that Pierpont Morgan ‘became an arbiter as well as a financier of railroads’ with his personal yacht serving as a meeting place ‘to settle disputes’ and head off rate wars among different railroads.

The law, at the time, did not recognize boards of directors as having absolute authority over the corporations (Horowitz, 1985, p. 214).[34] As late as 1896, the Supreme Court noted that, ‘when the charter was silent, the ultimate determination of the management of the corporate affairs rests with its stock holders.’[35] But even when shareholders had ultimate legal authority, it appears that they wanted outsider board members, perhaps especially individuals who helped to settle disputes among shareholders, and balance the other competing interests at stake in the corporate enterprise.

The merger movement of 1895 – 1905 changed the character of the corporate world dramatically. In the short span of few years, Lamoreaux (1985, P. 2) identifies over 1800 industrial corporations that disappeared into larger firms, forming monopolies and oligopolies in their industries. Chernow (1990, p. 81) tells us that, often, the monopolies or 'trusts' 'were cobbled together from family-owned or closely held firms that had a visceral contempt for competitors' joining the same trust.' Investment bankers often served on the boards of the combined firms, he adds, to be 'the honest brokers who arbitrated the disputes among them' (Chernow, 1990, p. 82). After the 1902 merger of McCormick Harvesting Machine Company and Deering Harvester Company (plus three smaller companies) to form International Harvester, for example, the Deering and McCormick families feuded over control of the combined firm, Chernow says. The solution was ultimately to give total control, including control of the board of directors, to investment bankers at J. P. Morgan (Chernow, 1990, p.109).

Investment bankers, however, may have succeeded too well at combining entrepreneurial firms, getting the proprietors to cooperate, and creating huge corporations that controlled whole industries.[36] To critics, their actions amounted to collusion in restraint of trade. When the merger wave ended in the Panic of 1907, public concern about monopoly and 'concentration in control of money and credit'[37] helped fuel the Progressive Movement, and eventually led Congress to pass the Clayton Antitrust Act, and form the Federal Trade Commission to expand the enforcement of antitrust. In 1912, Congress also formed the "Pujo Committee" to investigate the control that investment bankers had come to exercise over the largest corporations. The Pujo Committee Report, submitted to Congress in early 1913, contains the earliest systematic study of the people who served on corporate boards, and the roles that they played in these corporations and in the larger economy. The Report showed that, as of 1912, 103 investment bankers, from five different investment banking firms, held a total 1754 board seats on the 110 largest corporations, including 34 banks, 10 insurance corporations, 32 transportation systems, 24 producing and trading companies, and 12 utilities (Pujo Committee Report,1913, Exhibit 134B). These "interlocking" directorates, as the study called them, were strongly criticized for the effect they had of creating a 'money trust' that concentrated control of broad swathes of the U.S. economy (see, e.g., Pujo Committee Report, pp. 55-106; Brandeis, 1914, pp. 35-47).[38]

The merger movement thus introduced a new element into what society demanded from corporations, and therefore what it expected of boards of directors. The largest corporations were now more likely to have three distinct classes of participants: passive investors such as shareholders and bondholders who invested anonymously through public securities markets; managers who were professional managers rather than entrepreneurial owners, and who did not own large equity interests in the companies they managed; and boards of directors that had extensive ties to financial houses in New York rather than to the local communities where the corporations had their operations. A few observers raised concerns about whether the new professional management class, who were not necessarily substantial shareholders, would manage in the best interest of the shareholders.[39] But a more widespread public concern was whether the massive resources of the largest corporations would be collectively managed by a moneyed elite to control prices, minimize competition, and concentrate wealth and power to the detriment of society at large.[40]

These fears receded somewhat to the background during the 'roaring' 1920s, when the economy seemed to be booming and many people were becoming wealthy by investing in securities issued by large corporations. But they became burning social questions again after the economy collapsed into the Great Depression in 1929-1930.

The emergence of giant publicly-traded corporations as important institutions in the U.S. economy had a number of implications for the role of corporate directors. First, although the new corporations were generally understood to be private enterprises, not public enterprises like the canals and bridges of the early nineteenth century, or even the railroads of the late nineteenth century, their sheer size and ability to influence prices, markets, employment conditions and communities caused many thoughtful people to believe they should still, somehow, be accountable to and/or regulated by the larger society (Brandeis, 1914, p. 45). Second, with ownership separated from control, shareholders were no longer in a position to directly manage corporations. Thus the law evolved to make it clear that directors held all authority over the actions of corporations.[41] Third, most corporations came to be managed by professional managers (Chandler, 1977). This meant that they could not necessarily be counted on to be accountable even to shareholders (Berle and Means, 1930). And fourth, with professional managers carrying out the day-to-day operations of the corporations, it was no longer obvious what the board of directors was supposed to do, even as they were understood to have all corporate powers.[42] To whom were managers and boards supposed to be accountable?

The legal issues were laid out in the 1930s in a debate between Adolf A. Berle and E. Merrick Dodd in the *Harvard Law Review* (Berle, 1931; Dodd, 1932). Berle began by making the case that widely-dispersed shareholders in publicly-traded corporations were unable to manage corporations directly, or even to adequately supervise the people who were managing them. This had the effect of giving corporate managers “the power of confiscation,” Berle argued (Berle and Means, 1930, p. 65). To protect shareholders’ interests, and to ensure that corporate managers did not plunder the assets and wealth they controlled, he argued that corporate directors should be regarded as trustees, and held to the higher standard of fiduciary duties that a trustee would have in managing the corporation for the benefit of shareholders.[43]

Dodd, in response, focused less on the problem of protecting shareholders and more on the problem of protecting society as a whole from the predations of corporations (Dodd, 1932). He observed that a growing number of people were coming to accept the idea that ‘the business corporation is an economic institution which has a social service as well as a profit-making function’ (Dodd, 1932, p. 1148). Dodd quoted Owen D. Young, the chairman of General Electric Corp., speaking about the ‘growing sense of trusteeship’ he felt as a corporate leader. ‘One no longer feels the obligation to take from labor for the benefit of capital, nor to take from the public for the benefit of both, but rather to administer wisely and fairly in the interest of all,’ Young said (Dodd, 1932, pp. 1154-1155; citing Young, 1929). He argued that corporate directors should be understood as ‘trustees for an institution rather than attorneys for the stockholders’ (Dodd, 1932, p. 1160).[44] Those through whom a corporation acts, Dodd said, may ‘employ its funds in a manner appropriate to a person practicing a profession and imbued with a sense of social responsibility without thereby being guilty of a breach of trust’ (Dodd, 1932, p. 1161). Dodd’s article represented the first clear articulation of a legal argument for corporate social responsibility.

Berle responded, in turn, that ‘you cannot abandon emphasis on “the view that business corporations exist for the sole purpose of making profits for their stockholders” until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else’ (Berle, 1932, p. 1367). Indeed, he went so far as to argue that if Dodd’s proposal were followed, there would be a ‘massing of group after group to assert their private claims by force or threat – to take what each can get' leading to 'a process of economic civil war' (Berle, 1932, pp. 1368-1369). Berle's views evolved rather quickly however, so that, by the time he completed his famous work with economist Gardiner Means (Berle and Means, 1932), they adopted a view remarkably close to Dodd's:

> The property owner who invests in a modern corporation so far surrenders his wealth to those in control of the corporation that he has exchanged the position of independent owner for one in which he may become merely recipient of the wages of capital. . . . The owners of passive property . . . have surrendered the right that the corporation should be operated in their sole interest, -- they have released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights. At the same time, the controlling groups . . . have in their own interest broken the bars of tradition which require that the corporation be operated solely for the benefit of the owners of passive property . . . . The control groups have, rather, cleared the way for the claims of a group far wider than either the owners or the control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control, but all of society (Berle and Means, 1932, pp. 3, 355-560).

Thus the two poles of the modern debate about corporate social responsibility and the role of boards of directors were clearly articulated more than 80 years ago. Intriguingly, the party who argued the 'shareholder primacy' position in this earliest round of the intellectual and legal debate subsequently adopted the corporate responsibility position.[45] The view that corporations, especially large, publicly-traded corporations, have social responsibilities in addition to their goals of earning profits for shareholders became a dominant view over the next four decades, expressed off-handedly in management scholarship and in pronouncements from leading organizations representing the interests of corporate leaders. In 1940, for example, an article in the *Harvard Business Review* focusing specifically on the role of the board of directors, noted that, prior to the experience of the Depression in the 1930s ‘few corporate managers fully grasped the fact that divorce from direct ownership control meant that their responsibilities were decidedly to be increased. . . . the major task of directors, that of directing the enterprise. . . should, as an incident to that performance also provide the greatest assurance of fair dealing among the various parties at interest’ (Bates, 1940, pp. 73–74).

Detailed academic studies of the actual operations of corporate boards of directors began appearing in the mid-1940s (Baker, 1945; Gordon, 1945; Copeland and Towl, 1947; Mace, 1948).[46] These studies explored the problem of how directors could rein in the group that had become the most powerful group in corporations – the management – and how they could exercise their responsibilities as ‘trustees’. Baker (1945) stressed repeatedly in his study that directors saw their responsibilities as including being ‘trustees’ for the whole organization. ‘Throughout the study of directors in management two streams of thought recur,’ he said at one point. ‘One of these has to do with the part directors play in *administration*. . . . The other stream of thought has to do with the part directors play in *trusteeship*, that is, in keeping a balance among the interests of stockholders, employees, customers, and the public’ (Baker, 1945, p. 9, emphasis in original). Gordon stated his view that ‘the board reports to the stockholders and – though its responsibilities here are very nebulous – to the community at large’ (Gordon, 1945, p. 116). Gordon (1945, p. 120) also observed that boards had come to be dominated by executives, which meant that they no longer served as an ‘independent supervisory body.’ Nonetheless, he said the importance of this should not be ‘overstressed,’ because ‘officers may, despite their lack of ownership, take their responsibilities to stockholders quite seriously,’ and ‘the executive group is in a better position to recognize and protect the interests of other groups – for example, workers or customers – than are directors elected by and owing allegiance to particular stockholding and other interests’ (Gordon, 1945, pp. 122-121). Copeland and Towl (1947, p. 8) went even further in this vein:

> The board of directors potentially is in a strategic position among the elements which make up a corporate enterprise. Since it is not, or at least should not be, involved in operating details, the board has an opportunity to keep a broad perspective and to serve somewhat as a balance wheel. Within its purview come not only the internal affairs of the company but also its broad relations with a whole network of interests with which the welfare of the corporation is bound up, including dealers and distributors, suppliers, transportation and other service companies, banks and investment firms, and by no means least the local, state, and federal governments. If the board of directors is properly constituted, furthermore, it can bring to the enterprise an appraisal of public needs and opinions which is valuable for a true balance in the corporation’s activities.

Scholars who studied this new business ‘creed’ observed that ‘the whole system is moving toward a new kind of homogeneity – of large professionally managed, socially oriented corporations’ (Sutton et al. 1956, p. 36). The role of managers and directors, under this creed, is ‘the statesman’s function of mediating among the groups dependent on the enterprise’ (Sutton et al. 1956, p. 58). Organizations such as the Business Roundtable (1978), whose members are chief executive officers of large corporations adopted the view of the board as a mediating institution in a 1978 publication: ‘The board of directors then is located at two critical corporate interfaces – the interface between the owners of the enterprise and its management, and the interface between the corporation and the larger society. The directors are stewards – stewards of the owners interest in the enterprise and stewards also of the owners’ legal and ethical obligation to other groups affected by corporate activity’ (Business Roundtable, 1978, p. 8).

William T. Allen (1992, pp. 271-272), Chancellor of the Delaware Court from 1985 to 1997, observed about this period that, even though this view was never officially adopted in either statutory or case law, ‘this view appears to have been the dominant view among business leaders for at least the last fifty years.’ Moreover, throughout those years, the Delaware courts quietly assented to this view. It smoothed over the possibility of conflict between shareholders’ interests and the interests of the larger community by adopting the argument that, while directors’ duties run to shareholders, the board and management had the authority to take actions that benefited other constituencies if these actions were expected to create value for shareholders in the ‘long run.’ Chancellor Allen said this conception of business corporations, which he observes held sway in the Delaware Courts for much of the middle of the twentieth century, was “schizophrenic”. Courts nominally affirmed boards’ responsibilities to shareholders, yet granted them broad discretion to allocate resources toward charitable purposes or community needs (Allen, 1992). The courts accepted the proposition that ‘it is corporate management, with its special organizational skills, that knows how to balance the claims made on the corporation in order to make large scale enterprise productive over the long term,’ Allen (1992, p. 272) wrote.

The corporate world changed dramatically again in the 1980s, putting this ‘long-run/short-run’ rationale for deference to directors to the test. With the advent of the ‘hostile takeover' movement, shareholders of public corporations were being presented the opportunity to sell their shares immediately at substantial premiums relative to the prior trading prices of the shares. Efforts by existing corporate managers to convince shareholders that they would be better off in the 'long run' if they held on to their shares and allowed existing management to carry out their plans and strategies were generally unpersuasive. So managers and boards devised other tactics to try to prevent or defeat hostile offers. When such tactics were challenged, Delaware courts were compelled to reconsider their deference to boards.

Hundreds of books and articles have been written about the changes wrought by the takeover movement, so I offer only the most cursory of summaries. As the earliest takeover fights played out, the Delaware courts at first seemed to impose somewhat higher standards on boards of directors,[47] requiring boards to justify their defensive actions by identifying how the offer represented a 'threat to corporate policy and effectiveness.'[48] And, if it became inevitable that the corporation would be taken over, requiring them to 'get the best price for stockholders at a sale of the company.'[49] But in subsequent decisions, the court expanded the circumstances under which the board could justify their defensive actions.[50] Since the beginning of the current century, the courts have become more deferential again, approving a wide variety of tactics used to fend off not only hostile takeovers, but proxy fights and other efforts by activist shareholders to influence or get control of corporations. Steven Davidoff Solomon and Randall Thomas (2016) interpret these shifting currents, arguing that the court in the 1980s was responding to the fact that boards of directors had come to be almost completely controlled by corporate management. So it put its thumb on the scale to tip the balance of power between management and shareholders back in the direction of shareholders. Since 2000, however, shareholders, especially institutional shareholders and shareholder activists, have significantly improved their ability to influence corporate management, using a variety of legal and market tactics. So the courts may be less concerned about boards and managers acting in their own self-interest, and more willing to allow the balance to be worked out through market forces and private ordering (Davidoff Solomon and Thomas, 2016). The result is that courts are again giving great deference to boards of directors.[51] The board, thus, remains the mechanism through which competing visions, goals, and claims on the productive potential of corporations are worked out.

III. The Value Creating Potential of a Mediating Board

The law governing boards of directors is not the only aspect of corporate governance that has evolved since the 1980s. Perhaps even more transformative has been the changes in the common rhetoric about what it is that corporations, and corporate boards are supposed to do. While the idea that corporations have a social function as well as a function of earning profits for shareholders was taken for granted in the early nineteenth century, and quite broadly accepted for publicly-traded corporations throughout most of the twentieth century, finance theorists, economists, and many legal scholars flatly rejected this idea in the 1980s. They argued that hostile takeovers were evidence that the 'market for corporate control' was working to ensure that corporate management focused exclusively on maximizing share value (Jensen and Ruback, 1983). The language in which the duties of directors were described shifted to emphasize the idea that directors should act as "agents" of shareholders, whose job is to "monitor" managers to make sure that they always acted in the best interest of shareholders (Jensen and Meckling, 1976; Easterbrook and Fischel, 1991). This language, and the norms that go with it, became pervasive in describing the function of boards of directors, making it difficult for advocates of corporate social responsibility to be taken seriously in financial and some legal circles. More importantly, the idea that corporate managers and directors are supposed to focus exclusively on maximizing share value gave impetus to a transformation in the compensation arrangements for corporate executives. Now CEOs and other corporate officers are nearly always paid in stock options and other equity-related securities. These securities often have no downside risk, but pay off with enormous sums if the stock price increases while the executive is in office (Murphy, 1999; Bebchuk and Fried, 2004; Martin and Thomas, 2005). This can reward executives for outsized risk taking, and punish them for expenditures to reduce their carbon footprint or to make their workplaces safer that raise operating costs.

Here too, however, the pendulum may be swinging back. The Financial Crisis of 2007-2008 demonstrated how high-powered financial incentives can lead corporate actors to take excessive risks, and undermined the credibility of a pure finance view of the world. Even some leading shareholder rights advocates have conceded that banks and other financial institutions have social responsibilities not to engage in risky behavior that imposes externalities on the rest of the economy (Bebchuk et al. 2010; Armour and Gordon, 2014). Similarly, corporate failures such as the collapse of Enron (FBI, 2006; CNN, 2016), the accounting fraud at Worldcom (Hancock, 2002), the credit default swap crisis at AIG (McDonald and Paulson, 2015), the emissions deceit scandal at Volkswagen (Gates et al. 2016), and the consumer products fraud at Wells Fargo (Egan, 2016), remind us of the problems that can occur when corporate management focuses too much on meeting and beating the numbers in an effort to enhance share price, and not enough on the larger social and systemic implications of the corporation's actions.

Leading business scholars and business organizations are now looking for language and strategies that can help them to create more total social value over time (Mayer, 2013; Kurucz et al. 2008, Bratton and Wachter, 2010; Carroll and Shabana, 2011; Business Roundtable Principles of Corporate Governance, 2016; World Economic Forum, 2016). As boards of directors consider how to do this, it is important to realize that corporations that carefully evaluate and effectively balance the many competing interests at stake in the corporate enterprise, are likely to be more stable and resilient over time (Stout, 2014; Mayer, 2013; Cheng et al. 2014). Value creation that is 'sustainable' requires a context in which the various stakeholders with legitimate interests in the corporation are all taken into account.

This claim is a variant on the observation that cooperative agreements among members of a team can, in many situations, both create value, and divide value (Lax and Sebenius, 1986). Managers and directors who listen to and pay attention to all of the competing interests at stake are less likely to see problems and challenges as zero-sum in nature, and more likely to try to find solutions and strategies that create additional value for all parties (Lax and Sebenius, 1986; Mackey and Sisodia, 2013). Moreover, more decisions will be worked out before they even reach the board for resolution because participants in a corporate enterprise who know that a decision about how to proceed will be made by the board if it is not resolved at a lower level in the organization will be motivated to resolve their differences, moderate their demands, and find a value creating path that makes all stakeholders better off (Blair and Stout, 1999; Broughman, 2010).

III. Conclusions

For centuries, governance by boards of directors has been a primary mechanism by which complex and competing interests involved in joint production are reconciled. Even in contemporary corporations, where so much attention is paid to the goal of 'maximizing share value,' the board of directors is the institution in which this goal is interpreted and worked out in light of conflicts between management and shareholders, or between different groups of shareholders. In this context, competing interests are often balanced by appealing to the idea that *long-term* share value must be the focus rather than short-term share value. As soon as directors turn their attention to the long-term, they must recognize that a corporation's business model and strategies require inputs and participation from numerous stakeholders, and that the relations with those stakeholders must be nurtured over time for the corporation to continue to create value, or, to use a current business buzzword for long-term thinking in business, for it to be 'sustainable' over time. This is by no means a perfect mechanism, nor is it the only means by which the interest of different corporate participants are protected. But the idea that an important function of boards of directors of publicly-traded corporations is to mediate among competing interests to maintain a balance among those interests, needs to re-enter the corporate governance conversation.

[1]. This view is also associated with the claim that shareholders should be regarded as the "owners" of corporations, and boards of directors as their "agents" (Jensen and Meckling, 1976; Easterbrook and Fischel, 1991). For the biblical roots of this argument, see Luke 16:13.

[2] The leading corporate law jurisdiction in the United States, Delaware, provides that "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ." (Delaware General Corporate Law (DGCL), §141(a)). The Model Business Corporation Act (MBCA) is similar (MBCA. §8.01(a),(b)). Both rules provide that only organizations that qualify for "close corporation" status are entitled to dispense with the board (MBCA, §7.32; DGCL, §342). Modern business entity law also permits business people to use alternative forms, such as the Limited Liability Corporation (LLC), under which the organizers can opt to govern themselves as if they were partnerships (Uniform Limited Liability Company Act, 2006).

[3] The literature on corporate social responsibility is huge. For a good overview, see Wang et al. (2016).

[4] Mel Eisenberg (1975) is often credited with first articulating the monitoring model of the corporate board.

[5] Some scholars have studied other roles for corporate directors (see, e.g., Dalton et al. 1998; Daily et al. 2003). In the legal literature, Jill Fisch (1997) argues that directors also advise management, and that legal scholars err to overemphasize the monitoring job of directors. Stephen Bainbridge (2002) argues that the function of board governance is to economize on information gathering and processing. Lynne Dallas (1996, 2003) argues that boards are supposed to monitor relationships between corporations and all stakeholders. Business Roundtable (1983) identified five types of boards: 'legitimating, advisory, participating (monitoring or overseeing), judicial, and dominating.' Gevurtz (2004) identifies four basic functions of boards of directors: centralizing management; group decision-making; representation of corporate constituents and mediating claims to distributions; and monitoring of management. He largely rejects the third reason, but I believe he rejects it too readily, and explore this function in this chapter. There is also a large literature which asserts that directors, in fact, do very little (see, e.g., Lorsch and MacIver, 1989).

[6]. On the financial crisis causes, see, e.g., French et al. (2010); Thomas et al. (2011); Economist (7 September 2013). On the oil spill, BP and its contractors had, among other things, made 'cost or time saving decisions without considering contingencies and mitigation,' and failed 'to ensure all risks associated with operations on the Deepwater Horizon were as low as reasonably practicable,' both of which were regarded as contributing causes of the accident (U.S. Bureau of Ocean Energy Management Regulation and Enforcement, 2011, p. 199).

[7] In other work that I have done alone and with Prof. Lynn Stout, we have analogized productive coalitions in firms to "teams" and have built on the economic theory of team production to shed light on corporate law and governance rules and practices (Blair and Stout, 1999).

[8] Literature on the "property rights" theory of the firm (e.g. Grossman and Hart,1986); Hart and Moore, 1990), also suggests that the problem can be solved by making sure that the individual team member whose input is most important to the team is the "owner" of the assets used in the business.

[9] See Blair (2011) for an introduction to the economic theory of human capital. For some types of enterprises, the partnership organizational form might also be effective. Blair (2003) explores why the partnership form was not adequate for large scale business enterprises that emerged in the late nineteenth century.

[10] In contrast, the default rule for general partnerships is that a partner can get out of her investment at any time, and compel the partnership to pay out her share of the assets (see, e.g., Uniform Partnership Act, §601). Capital lock-in holds for corporations with multiple investors. Nineteenth century corporations were always formed by groups of individuals, and the law of corporations was developed to organize multi-person firms. In modern times, a single individual can form a corporation. If there is only one shareholder in a corporation, that individual could, of course, decide at any time to end the business and take her equity capital back out of the corporation, as long as creditors are paid off first.

[11] Davis (1905, vol. I: 20) says that one of the key characteristics of corporations is that they were '(a) autonomous, (b) self-sufficient and (c) self-renewing.' New organizational forms became available in the U.S. late in the twentieth century that allowed organizers to make use of some of the features of corporations, while still being governed like a partnership.

[12] Rajan and Zingales (1998) position their theory as an extension of models by Oliver Hart with various co-authors (see Grossman and Hart 1986); Hart and Moore, 1990).

[13] See Meinhard v. Salmon, 164 N.E. 545 NY (Court of Appeals, 1928), for a classic statement of fiduciary duties. But see Shlensky v. Wrigley, 237 N.E.2d 776 (Ill., 1968), for a classic statement of the "business judgment rule."
[14] Holmstrom (1982) also modeled the team production problem and concluded that an outsider to the team should make decisions about allocating surpluses from team activity; Broughman (2010) similarly models the interaction between a start-up entrepreneur and a venture capitalists to show how granting a tie-breaking vote on the board of directors to someone who is independent of both parties can resolve team production problems, and prevent some problems from occurring in the first place. See infra ___.
[15] This dilemma is a variant on the team production problem, and is the same basic dilemma that Rajan and Zingales (1998) explored.
[16] Liebeskind (2000) previously made a similar empirical observation about the structure of new biotechnology firms, offering a similar intuition, but did not provide a model explaining why this would be the case.
[17] Colin Mayer (2014) stresses the importance of long-term commitment by investors for corporations to be innovative and sustainable.
[18] This list is taken from Blair (2015, p. 311). While the state of Delaware is the most important state in the U.S. for corporate law, I have cited the Model Business Corporation Act for most of these legal rules for boards of directors because it is representative of all of the other states, and is generally very similar to Delaware law.
[19] Shlensky v. Wrigley, 95 Ill. App. 2d 173 (App. Ct. 1968).
[20] Gevurtz (2004) is an exception.
[21] The company was identified in its charter as the 'Governor and Company of Merchants of London, trading into the East Indies.' (Davis, 1905, vol. II, p. 115)
[22] Davis (1917, vol. II: Appendix B, pp. 331-345) identified only 322 chartered business corporations in existence in the entire U.S. as of 1800. Sylla and Wright (2013, pp. 653-654) say "only a handful" of business corporations were created in the colonial period, 20 to 30 were created in the 1780s, and, from 1790 to 1800, 247 business corporations were chartered by the states.
[23] According to Flower and Haddad (2014, p. 62) Dartmouth College's 1769 charter named twelve people to the provincial Board of Trustees (prior to independence, the college also had a board of overseers in England): the founder, Eleazar Wheelock, plus six 'ministers of the gospel' from New Hampshire and Connecticut, the New Hampshire Provincial Governor, the president of the Provincial Council, two members of the Council, and the Speaker of the House of Representatives.
[24] Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).
[25] Wright and Sylla (2011) identify all of the charters issued by special action of the legislatures of all of the states for business corporations from 1790 through 1860, and categorize them by industry or type of business. They found that 49.95 per cent of them were for transportation infrastructure or transportation services; 20.08 per cent were for banks, insurance companies, thrifts, and trading companies; 5.1 per cent were utilities or other infrastructure companies. The rest were for other businesses such as manufacturing, breweries, mining or other resource extraction, mixed commercial companies, and hotels (Wright and Sylla, 2011, table 3).
[26] Konefsky (2009, p. 169; citing to Kutler, 1971, pp. 10–13) tells us that the investors in the Charles River Bridge, chartered in 1785, 'conceived of their enterprise as a combination of civic virtue, serving the community and providing for its needs, and an opportunity to make a fair but

not exorbitant profit.' A number of historians (Dodd, 1954; Seavoy, 1982; Sommer, 2001; Hansmann and Pargendler, 2014; Lamoreaux, 1984) have commented on the fact that merchants, farmers, and other business people invested in early banks because they wanted access to credit, not because they expected to earn a rate of return on their shares.

[27] The allocation of votes in those corporations was likely not to be one-share-one-vote, but followed other, more regressive, patterns: "graduated" voting, in which a shareholders' votes increased with larger shareholdings, but at less than a one-to-one ratio; "capped voting", in which no shareholder could get more than a certain number of votes no matter how many shares he held, and "per capita" voting in which each shareholder got one vote, no matter how many shares he held.

[28] The charter for the Farmers' and Mechanics' Bank of Philadelphia, incorporated in 1809, for example, required that a majority of the directors must be "farmers, mechanics, or manufacturers actually employed in their respective professions" (Blair, 2003, p. 436, n. 196; citing An Act to Incorporate the Farmers' and Mechanics' Bank, 1809 Pa. Laws, 973-74).

[29] Evans(1948, p. 11,table 5) documents the adoption date for general incorporation statutes in 44 states.

[30] Hilt (2015b, p. 19, table 2), finds that the median number of shareholders in manufacturing corporations in Massachusetts in 1875 was only 18. Horowitz (1985, p. 209) says that 'before 1890, only railroads constituted large, well-established, widely known enterprises . . . while industrials, though numerous, were small, scattered, closely-owned, and commonly regarded as unstable.'

[31] Hilt (2014, pp. 13-14, table 2) shows that directors of Boston Stock Exchange traded manufacturing firms in 1870 collectively held an average of only 6.8 per cent of shares.

[32] See also Frydman and Hilt (2010) for a discussion of the role that investment bankers played on the boards of railroad companies, protecting the interests of creditors and encouraging the railroads to collude to end the rate wars.

[33] One of the implications of 'protecting the interests of bondholders', however, was preventing rate wars among competing railroads that would drive down revenues and dividends. In other words, 'collusion' among railroads to control rates.

[34] Wheeler v. Pullman Iron & Steel Co. 32 N.E. 420, 423 (Ill. 1892).

[35] Union Pacific R.R. v. Chicago R.R., 163 U.S. 564 596 (1896).

[36] Lamoreaux (1985, p. 88, n. 1) lists 52 industries that significantly consolidated.

[37] Report of the Committee Appointed Pursuant to House Resolutions 429 and 504 to Investigate the Concentration of Control of Money and Credit, Report No. 1593 (1913), p. 13 (hereafter cited as "Pujo Committee Report").

[38] U.S. Congress, Committee on Banking and Currency, 1913, p. 1566 (defining 'money trust').

[39] This concern is raised in Louis Brandeis's series of essays in response to the Pujo Committee Report (see Brandeis, 1914, pp. 40-46; although the focus of concern at the time was whether controlling shareholders and banker directors would operate corporations to the detriment of minority shareholders).

[40] This was the primary concern of the Pujo Committee, and of Brandeis. Lawrence Mitchell (2005, pp. 12-13) observed of this period that '[t]alk abut the board was not so much about corporate governance and shareholder matters as it was a proxy for larger public issues like antitrust and railroad regulation.'

[41] Spellman (1931, p. 4) wrote the first treatise focusing entirely on the law governing boards of directors. 'Acting as a board,' he wrote, 'the directors of a corporation exercise, in its behalf, all

the powers the entity possesses. When the board of directors acts, the corporation is acting. . . . Their power is sole and exclusive.'

[42] Chandler (1977, p. 433) says that the board of directors at General Electric in the early 1900s consisted mostly of financiers, who were not involved in day to day management at all, although they 'continued to have a powerful veto power similar the that of comparable boards on the large railroad systems.' By 1917, he says, none of the large shareholders in Standard Oil still served on the board of directors (Chandler, 1977, p. 451).

[43] Brandeis (Brandeis, 1914, p. 39) had made a similar argument. Legal historian C.A. Harwell Wells (2002, pp. 88-91) claims that this proposal was a significant innovation in the law because, until then, shareholders could rely only on legal rules to protect them from theft or misappropriation by officers and directors. Berle's proposal, if adopted by courts, would mean that shareholders would also be able to appeal to equity, so that a judge could evaluate the fairness of director actions, not just their legality.

[44] As Wells (2002, p. 92) puts it, Dodd believed that "the growth of corporate power, in his eyes, had elevated corporate leaders to a new ethical level" that required them to be sure that such power was exercised responsibly.

[45] 'The argument has been settled . . . squarely in favor of Professor Dodd's contention,' Berle (1955, p. 169) said.

[46] Baker, Bates, and Copeland were all at Harvard Business School in the late 1930s and early 1940s collaborating on the underlying research that went into these publications (see Baker 1945, p. x, preface).

[47] Unocal v. Mesa Petroleum, 493 A.2d 946 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[48] Unocal, 493 A.2d at

[49] Revlon, 506 A.2d at

[50] Paramount Communications Co. v. Time, Inc., 571 A.2d 1140 (Del. 1989).

[51] Airgas, Inc. v. Air Products and Chemicals, Inc., 8 A.3d 1182 (Del. 2010).

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