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HUMAN FREEDOM AND TWO FRIEDMEN: MUSINGS ON THE IMPLICATIONS OF GLOBALIZATION FOR THE EFFECTIVE REGULATION OF CORPORATE BEHAVIOUR†

In this essay, which was delivered as the Torys Lecture, Vice Chancellor Strine considers the implications of globalization for the effective regulation of corporate behavior affecting interests other than those of stockholders against the backdrop of the West's political and economic experience. He concludes that consistent with prior experience, the globalization of corporate markets will require a corresponding expansion of the polity to protect those aspects of human freedom that are affected in important ways by corporate behavior. As a practical matter, this means that if the U.S. and other Western nations wish to limit the ability of corporations to generate externalities and impair rights the West has embraced as important to individuals' ability to lead the good life, they will have to give up some of their sovereignty to international institutions in exchange for regulation that is co-extensive with the sphere in which corporations conduct their activities.

Key words: Globalization/corporate governance/corporate social responsibility/labor/economic liberty

Thank you, Dean Moran, for that gracious introduction. I find it daunting to be here, a lowly colonial invited to the seat of cultural empire, intimidated that he is on the home soil of Mitchell, Young, McLachlan, Atwood, Shields, Bellow, Arcade Fire, and, of course, Aykroyd. But, quite coincidentally, the discomfort many Americans feel abroad actually has relevance to the major topic of my speech.

For those of you who came to hear me speak about deal-protection measures, the proper way to go about considering a leveraged buyout in which management will participate, the backdating of stock options, the benefits and costs of Sarbanes-Oxley, or Conrad Black, now would be a good time to exit. Of course, I'll be happy to take questions about

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those subjects later – well, all but one of them. But those issues are not my focus.

Rather, I am going to devote the precious moments I have with you to a subject of importance to both Canadians and Americans – the effects of globalization on corporate behaviour and accountability. Somewhat whimsically, I've entitled this address 'Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour.' But the title has some pedagogical utility.

Let's start with the human freedom part of the equation. Much of what makes up the most worthy of what can be called the 'Western Tradition' rests in an evolving intellectual and moral struggle that involves, in very simplified terms, the following related elements. Crucially, the struggle begins with an effort to define what constitutes a human life well and fulfillingly lived, a good and happy life in the deepest sense. The effort then turns to the articulation of the type of polity that is most conducive to that good life – the just society, if you will.

A great deal of what is appalling about human history, but what is also most inspiring, involves the debate over eligibility to live the good life, or, to put it in plainer terms, the question of who is fully human and who is something lesser. For example, Aristotle would have deemed it intolerable for himself – a philosopher by nature – to be enslaved and treated as the property of another. But he rationalized that there were people naturally fitted for slavery. He struggled over the question of how to shape a society in which those persons possessing what he regarded as higher-order virtues and talents could be given the freedom and authority that was their natural entitlement, when it was possible that, by happenstance of birth, they could end up as slaves to dullards, in a cruel reversal of what nature had fitted them for.[1]

Aristotle was, of course, hardly alone in grappling over the eligibility issue. Many of those whom we justly regard as important soldiers in the cause of human freedom did likewise. Could a woman live the good life? Could a man without property? Could a person of a different religion? Could a person of a different ethnic background? Could a person from a different racial group? The shrinking of the 'other' in the West over the last 250 years has been one of the major achievements of human existence.[2] That it took so long, and that the struggle continues, remains a source of enduring shame.

1 Aristotle, *Politics* at bk. I, c. 1–7.

2 The US experience is illustrative. In the early days of our Republic, the franchise was increasingly extended to all white males. See generally Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005). The post–Civil War constitutional amendments purportedly extended full citizenship to black males, U.S. Const. amends. XIV & XV, but, as a practical matter, that task was not

Along with the question of who constituted those eligible for the good life came the vexing issue of what a fully realized vision of human freedom conducive to the good life meant. Did it mean leaving humans as close to the state of nature as possible? And what was the state of nature, anyway, given that wealth and security flowed as much from the social position into which a person was born as from any native ability?[3] Over time, it became a subject of almost universal agreement that governments are to freedom, as the saying goes, 'can't live with them, can't live without them.'

Initially, government was viewed as necessary simply to ensure that one man's liberty did not result in another's senseless murder and that society didn't descend into brutal discord. For example, the oft-maligned Thomas Hobbes appears in a very different light when read in view of the current situation in Iraq.[4] In a society where crossing the street to go to work or buy food is a life-risking adventure and where one's mere religious identity marks one as an enemy to others of different faiths, freedom is a hollow concept. Put simply, anarchy is not freeing, it is enslaving, and it relegates human life to the most basic of purposes, mere survival.

Of course, at the same time, it was recognized that government was itself a historic threat to human freedom. Therefore, carving out the personal space upon which government could not intrude at all, or could

accomplished until 1965, *Voting Rights Act of 1965*, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973, *et seq.* (2000)); *Civil Rights Act of 1964*, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.). Voting rights for women were not secured nationally until 1920, see U.S. Const. amend. XIX, and protection against employment discrimination until 1964, the *Civil Rights Act of 1964*, ibid. at tit. VII (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2000)). Now, the United States is grappling with the questions of whether and to what extent to ban discrimination based on sexual orientation. Those questions are far from settled.

3 'In fact, the government is "implicated" in everything people own. If rich people have a great deal of wealth, it is because the government furnishes a system in which they are entitled to have and to keep that wealth. . . . People work very hard for what they earn. But without government, people would face a free-for-all, a kind of test of strength. Who knows what would emerge from that test? The people who most loudly object to "government intervention" depend on it every day of every year; they have the most to lose if government really got "off their backs."' Cass R. Sunstein, 'Economic Security: A Human Right; Reclaiming Franklin Delano Roosevelt's Second Bill of Rights' *The American Prospect* (October 2004) 24, online: University of Chicago Law School < http://www.law.uchicago.edu/news/sunstein-economicsecurity.html> [Sunstein, 'Economic Security'].

4 See Thomas Hobbes, *Leviathan*[1651], ed. C.B. MacPherson (London: Penguin, 1968) at 186 (famously describing life in a state of nature without a strong state as involving 'no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short').

intrude only with strong justification and due process, has deservedly been a preoccupation of many enlightened thinkers and a dominant theme of the school of thought that may be denominated as liberal.[5] Freedom of speech, religion, and association and the rights to own property and to labour for personal gain and fulfilment have therefore been central objects of protection from unwarranted government intrusion.

Much of what has been interesting in this discussion over the last 250 years or so has involved the tension between constricting government's power to trample on the freedom of citizens to do certain things, whether it be to speak, worship, or engage in certain activities, on the one hand, and expanding government's role in ensuring that social conditions do not, as a matter of fact, if not of legal mandate, restrict the ability of large swaths of the community to live the good life. As capitalism emerged as the Western mode of economic development, it was increasingly recognized that the legal abolition of slavery did not in fact mean that the operations of markets freighted with historical baggage did not continue to subjugate many. After all, slavery and related conditions, such as indentured servitude, endured not only because the state legitimated the concept that a human being could be the legal property of another but because economic necessity often created irresistible incentives for communities, and even parents, to sell their children. Sadly, in too many places in the world, what can only be regarded as actual slavery still persists, and employment arrangements resembling indentured servitude are even more common.[6]

In the West writ large – the United States, Europe, Canada, Australia, New Zealand, Japan, etc. – just how completely to prevent *de facto* economic slavery remains an ongoing subject of debate. But what we can confidently say is that a general consensus exists in the West that humans cannot live a good life without an active role for government in ensuring their freedom from, among other things, working a seventy-hour work week, being employed during childhood, labouring under unsafe conditions, breathing air and drinking water polluted by manufacturing concerns, suffering injuries from unsafe products, and providing for themselves in their golden years without any societal help.[7] Put simply,

5 *E.g.*, John Locke, *The Second Treatise of Government* (1689); The Declaration of Independence (U.S. 1776); U.S. Const. amends.I–X; see also *Universal Declaration of Human Rights*, GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 ['Universal Declaration'].

6 US Department of State, *Trafficking in Persons Report 2007* (June 2007) at 8, online: US Department of State <http://www.state.gov/g/tip/rls/tiprpt/2007/> (citing UN figures estimating '12.3 million people in forced labor, bonded labor, forced child labor, and sexual servitude at any given time').

7 For example, the Charter of Fundamental Rights of the European Union includes protections on the topics of maximum working hours, child labour, workplace safety,

it is now widely accepted that the precious freedoms upon which government cannot intrude are of little or no utility to those who, by the necessity to eat and find shelter, are forced to spend their lives in ceaseless, bone-grinding, dangerous, and life-shortening toil, leaving them little time for family life, study, prayer, relaxation, or hedonic pleasure.

As we all know, there has been a wide range of views regarding what government should do about the rise of capitalism. There was, of course, that guy named Karl Marx and his later followers Lenin, Stalin, and Mao. They had a rather thoroughgoing program to address capitalist excess, one that ultimately involved something far worse. There was also the – putatively anti-communist – fascist tradition, which involved the xenophobic and nightmarish apotheosis of a mercantilism directed to serve a sick vision of national glory and historical destiny. On the other side of the debate were those who viewed virtually any governmental involvement in the economy as an unjustified inhibition of liberty and nature itself, believing that, if a mill worker was not legally compelled to labour seventy hours a week, it was no business of government to prevent her from doing so, and conflating the issue of who had what wealth with that of who had talent and virtue.[8]

environmental concerns, consumer protection, social security, and social assistance. *Charter of Fundamental Rights of the European Union*, 2000/C 364/01, 364/8 (2000) arts. 31–32, 34–38 [CFREU]. Canada, having acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR), has a framework of federal, provincial, and territorial laws addressing social policy issues, employment, poverty, homelessness, health care, disability issues, early childhood development and child care, and family violence. See, *e.g.*, Department of Canadian Heritage, *International Covenant on Economic, Social and Cultural Rights: Fifth Report of Canada* (2005), online: Depository Services Program <http://dsp-psd.pwgsc.gc.ca/Collection/CH37-4-6-2005E.pdf> (collecting the 1999 to 2004 changes in Canadian law that advance Canada's implementation of the ICESCR).

8 *E.g.*, Herbert Spencer, *The Man Versus the State*, introd. Albert Jay Nock (Caldwell, ID: Caxton, 1940) (opposing government interference in the lives of individuals based on natural rights philosophy and social Darwinism). In the infamous case of *Lochner v. New York*, 198 U.S. 45 (1905) at 61, the US Supreme Court declared unconstitutional a New York State statute limiting bakers from working in excess of sixty hours in a week or ten in a day. In so ruling, the Court stated,

> [t]he act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts.

See also *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (declaring unconstitutional a Congressional statute prohibiting interstate trafficking of goods manufactured or mined by children under the age of fourteen or by children between the ages of fourteen and sixteen who work more than eight hours per day, six days per week); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (declaring unconstitutional a

Emerging as the most successful and enlightened approach to balancing the human need for freedom to pursue happiness without undue government restraint and the human need for freedom from economic oppression was a far less doctrinaire and far messier philosophy, that which we in the United States associate with Franklin Roosevelt and regard as the current standard-bearer for the tradition known as 'liberalism.'[9] In Europe, this strain of thought is often termed 'social democracy.'

For present purposes, it is useful to concentrate on my own nation's experience for a moment. When the Great Depression hit, Americans suffered, and an opening existed for the temptations presented by communism and fascism. Too many of us in the United States today are ignorant of the reality that these more extreme remedies for market failure were appealing to many Americans in the 1930s.[10]

The New Deal, in very simplified terms, represented the liberal answer to capitalist market failure.[11] That answer was multifaceted. One

minimum-wage law for women and children in the District of Columbia).

In fairness, some of the later adherents of this school of thought were also powerfully influenced by their horror at the actual experience of communism and fascism and by their fear that any major role for the state risked totalitarianism: *e.g.*, Friedrich A. von Hayek, *The Road to Serfdom* (London: Routledge, 1944); see also Adolf A. Berle, 'Modern Functions of the Corporate System' (1962) 62 Colum.L.Rev. 433 at 435 n.6 ('[Hayek] ha[s] more than a theoretical attachment to *laissez-faire*. [He] saw the [N]azi government reduce Germany to an autocracy partly through control of the economic processes of the country'); Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 7.

9 There is a historical fork in the liberal road, of course. Some – for example, Milton Friedman – described themselves as liberals because they were advocates of free markets and private enterprise. In the United States, liberalism is now associated with that school of thought which champions generally free markets whose participants, as producers and consumers, play the primary role in capital investment and spending decisions but which also believes there is a need for a strong regulatory state that checks capitalist externalities, economic inequality, and economic downturns while also vigorously protecting civil and human rights. The so-called *laissez-faire* philosophy, which involves allowing companies (based on pre-existing ownership interests established by prior legal arrangements) to proceed with economic activity and practices virtually without interference from the state in any respect, is now more associated with folks who would call themselves 'conservative,' or perhaps 'libertarian.' The predominant conservative party in the United States does not advocate *laissez-faire* and, indeed, may have closer to a mercantilist bent than a *laissez-faire*, nineteenth-century liberal one.

10 For a provocative historical imagining of what might have happened had the United States embraced the fascist sympathizer Charles Lindbergh as an alternative to Roosevelt, see Philip Roth, *The Plot Against America* (Boston: Houghton Mifflin, 2004).

11 There was, of course, a rich nuance to the New Dealers' views regarding the appropriate shape of the regulatory structures required to address corporate excesses and capital market failures. See generally William W. Bratton & Michael L. Wachter, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern

important element was charging the government with the task of helping to ameliorate unemployment and poverty, particularly when the economic cycle was on the downturn. Related was the recognition that government could help smooth economic cycles through fiscal and regulatory policies that tempered booms and busts.[12] As important was the enactment of federal legal requirements protecting workers from being coerced into unfair conditions of employment. Maximum work weeks and minimum-wage laws were federally mandated.[13] Workers were given the right to join unions and bargain collectively for wages.[14] Worker safety protections were eventually implemented.[15]

There is a geographic component to these protections that is important and that bears highlighting. Many of the New Deal enactments – such as maximum-hours legislation – had been the subject of legislation in some, but not all, American states.[16] The New Deal represented, in some ways, a new founding for the United States, in which our national government was charged with primary regulation over economic policy for the first time.[17] It took a crisis like the Depression to overcome an

Corporation' (2007) [unpublished] [Bratton & Wachter, 'Shareholder Primacy'] (focusing on Adolf Berle's precise place in these debates); Dalia Tsuk, 'From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought' (2005) 30 Law & Soc.Inquiry 179 [Tsuk, 'From Pluralism'] (presenting a richly detailed examination of Berle's thinking). But it is fair to say that virtually all called for a strong regulatory state that would constrain various aspects of corporate and capitalist behaviour that they thought were a danger to the public interest.

12 This recognition was, of course, inspired in large measure by the work of John Maynard Keynes.

13 *E.g., Fair Labor Standards Act of 1938*, Pub. L. No. 75-719, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201, *et seq.* (2000)) (establishing maximum hours and minimum wages for employees).

14 *E.g., National Industrial Recovery Act*, tit. 2, Pub. L. No. 73-67, 48 Stat. 200(1933) (held unconstitutional by *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 at 537–8 (1935), repealed 1966) (guaranteeing the right to collective bargaining); *National Labor Relations Act*, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151, *et seq.* (2000)) (strengthening the NIRA protections for collective bargaining).

15 *E.g., Walsh-Healey Act*, ch. 881, 49 Stat. 2036 (1936) (codified as amended at 41 U.S.C. §§ 35–45 (2000) (imposing requirements for worker safety on contractors doing business with the federal government); *Occupational Safety and Health Act of 1970*, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 651, *et seq.* (2000)) (establishing the Occupational Safety and Health Administration to prevent work-related injuries, illnesses, and deaths by issuing and enforcing standards for workplace safety and health).

16 As noted, these local measures also faced judicial invalidation at the hands of federal jurists who believed that market regulations of this kind were unconstitutional. See note 8, supra.

17 See, *e.g.*, Bruce Ackerman, *We the People*, vol. 2, *Transformations* (Cambridge, MA: Belknap Press, 1998) (describing the New Deal's role in transforming the United

ingrained strain in the United States, a nation in which many viewed themselves more as citizens of a particular state – for example, as South Carolinians or as Texans – than as Americans. The credo of 'states' rights' hadn't been killed in the Civil War, it had just been prevented from entirely destroying the national union.

But the New Dealers convinced the nation that if the economy was national in scope, it was necessary that the regulations that protected citizens from market failure and excesses be national in scope, too. If, for example, there was a societal consensus that employers should be restricted from hiring children or from making workers labour for seventy hours a week, that consensus would be undermined without the establishment of a national floor. Otherwise, hungry capitalists would simply migrate to states that tolerated such practices, putting pressure on workers who needed jobs to follow and generally undermining the overall clout of workers to extract better conditions of employment.

In this geographical calculus, the emergence of the corporation as the dominant instrument of capital was central. Through the corporate form, powerful aggregations of capital had been amassed, increasingly under the control of managers who were themselves little constrained even by stockholders, who were thought to be dispersed, rationally apathetic, and poorly positioned to take collective action. Corporate law scholars obsessed with protecting the economic interests of stockholders from corporate managers tend to forget that the classic treatise of American corporate law, *The Modern Corporation and Private Property* by Adolf Berle and Gardiner Means,[18] was as focused on the broad range of dangers that unconstrained corporate power posed to the citizenry as it was on the victimization of stockholders by faithless managers.[19] Berle and Means feared that large corporations had outgrown the capacity of existing governmental structures to constrain them.[20] The weakness of disaggregated

States from a states-centred governmental system to an activist national regulatory state).

18 Adolf A. Berle, Jr., & Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Commerce Clearing House, 1932).

19 Tsuk, 'From Pluralism,' supra note 11 at 179, makes this point well.

20 As an incisive new article points out, Justice Brandeis of the US Supreme Court echoed their sentiments:

> Justice Brandeis, in 1933, built on the empirical case [Berle and Means] set out, deriding acceptance of 'the evils attendant upon the free and unrestricted use of the corporate mechanism' following the advent of general incorporation statutes, 'as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation.' In his view, availability of the corporate form for general business purposes had been restricted for centuries 'because of fear.' Brandeis detected in the history 'a sense of some insidious menace inherent in large

stockholders, combined with the weakness of government regulatory structures, threatened the creation of a dangerous managerial class, governing huge and powerful entities and accountable to no one.[21]

In particular, Berle and Means and others of their viewpoint realized that corporations that conducted business throughout the United States could not effectively be regulated by individual American states.[22]

> aggregations of capital, particularly when held by corporations,' and interpreted the advent of general incorporation as a rejection of 'favoritism' rather than an indication 'that the apprehension of corporate domination had been overcome.' Observing the size to which corporations had grown, as well as their social and economic significance – and citing to Berle and Means' work – Brandeis argued that the separation of ownership and control had 'removed many of the checks which formerly operated to curb the misuse of wealth and power.'
>
> Such descriptions of the modern public corporation reflect deep misgivings about the corporate form not unlike those identified in Coke's and Blackstone's writings. References to 'absentee owners,' 'absentee stockholders,' 'absentee landlords,' and the like often appeared in arguments that corporations were not sufficiently answerable to the public, over which they held enormous sway – be it as consumers, employees, or communities – and that stockholders were effectively enabling their activities by financing them, without accepting responsibility to monitor how, and to what ends, their money was being used.

Christopher M. Bruner, 'The Enduring Ambivalence of Corporate Law' (9 August 2007) at 6–7, online: Social Science Research Network [SSRN] <http://ssrn.com/abstract=1005729> [Bruner, 'Enduring Ambivalence'] (citing *Louis K. Ligget Co. v. Lee*, 288 U.S. 517 at 548–9 (1933) (Brandeis J. dissenting)).

21 Some scholars have recently questioned whether US stock ownership ever really reflected as great a separation of ownership of stock from managerial control as Berle and Means and their many adherents assume. Clifford G. Holderness, 'The Myth of Diffuse Ownership in the United States' Rev. Fin. Stud. [forthcoming 2007], online: SSRN <http://ssrn.com/abstract=991363>. Regardless of whether or not that is so, the arguably larger question would remain whether corporations, even if more influenced by stockholders than previously assumed, would present dangers to the social good if left unregulated. In fact, one can argue that the greater the influence of profit-seeking stockholders, the more pressure managers would feel to externalize corporate costs so as to deliver a return pleasing to their employers, the stockholders. Stephen M. Bainbridge, 'The Politics of Corporate Governance' (1995) 18 Harv.J.L.& Pub. Pol'y 671 at 703 ('Reforms that make management more directly accountable to shareholders increase the pressure on management to promote shareholder wealth at the expense of employees and other social responsibility concerns').

22 'The growing weight of publicly traded companies raised an alarm for Berle and Means. They argued that the modern corporation "has brought a concentration of economic power which can compete on equal terms with the modern state." The potential social damage that could be done by the new institution was sharply highlighted by the collapse of the capital markets in 1929. For these New Deal intellectuals this triggered the need for a "constitutional" approach to the governance of the corporation that would re-generate legitimacy to the decision-making processes of what was to them as much a sociopolitical institution as an economic one.' Stephen F. Diamond, 'Private Equity and Public Good' *Dissent* (Winter 2008) 52 at 54 [Diamond, 'Private Equity'].

Imagine if an individual American state – say, Michigan across the river – had decided to regulate all the key aspects of corporate behaviour in isolation – treatment of labour, the environment, and consumers. As a mere matter of institutional capacity, its state government would have faced the problem of regulating institutions often larger and wealthier than it was.[23] More importantly, unless a national floor was set that corporations could not escape, corporations could have engaged in a form of regulatory arbitrage to shift their operations from Michigan to states that, by dint of poverty or a corrupt political culture, would tolerate conditions of employment inconsistent with enlightened thought. Therefore, if corporate power was to be channelled in a positive direction consistent with society's interest, a strong national regulatory regime was required.

Unavoidably, the enactment of such standards involved a governmental restriction on economic liberty. The argument was made, for example, that national minimum-wage and maximum-hour laws prevented employment opportunities for persons in poverty who were willing to work for less than the minimum wage for eighty hours a week.[24] But the vast majority of our citizens came to view that sort of restriction on liberty as more than justified, given that this form of liberty was more a matter of theory espoused by moneyed interests than one actually desired by the working poor. What was deemed preferable was to temper the excesses of capitalism by establishing national standards ensuring that workers received a minimally decent wage, had work hours that left them time to enjoy life, and laboured in safe environments.

Beginning during the New Deal and accelerating in the post-war era, the federal government also took steps to ensure greater economic equality and to alleviate poverty.[25] Large federal programs were created to increase access to health care,[26] provide housing and food

23 I slight, for today's purposes, the legal constraints flowing from Supreme Court jurisprudence hostile to state regulation protecting workers from onerous terms or unsafe conditions of employment. See note 8 supra.

24 'Press Comment on Wages and Hours Bill' *The New York Times* (14 June 1938) 4 (mentioning the prediction of Alfred P. Sloan, Jr., chairman of General Motors, 'that enactment of the [Wages and Hours Bill] will lead to further unemployment and will penalize the very group that it is supposed to help').

25 Steven A. Ramirez, 'The Law and Macroeconomics of the New Deal' (2003) 62 Md.L.Rev. 515 at 547 ('FDR signed the Social Security Act into law with the aim of enhancing macroeconomic stability. The Act provided unemployment insurance, pensions for retired workers, aid to dependent children, and other social insurance programs').

26 See, *e.g.*, the programs better known as Medicare and Medicaid: *Health Insurance for the Aged Act*, Pub. L. 87-97, 79 Stat. 291 (1965) (codified at 42 U.S.C. § 1395, *et seq.* (2000)) (providing health benefits to the aged); *Social Security Act*, tit. XIX, Pub.L. 89-97, 79 Stat. 343 (1965) (codified at 42 U.S.C. § 1396, *et seq.* (2000)) (providing health benefits to the poor).

for the working poor,[27] and deliver transitional assistance to the unemployed.[28] Consistent with the political strength and popularity of private enterprise in the United States, many of these measures – particularly in the areas of health care, unemployment insurance, and pensions – were designed so that benefits would be delivered to recipients as an emolument of their employment by a particular corporation. Although these programs were far from perfect in design or scope, when combined with a robust post-war economy, they were successful in creating much greater economic equality and in reducing poverty in the United States.

The expansion of the federal government's role in regulating corporate conduct went beyond protecting workers and curbing poverty and economic inequality. Recognition that the profit motives of corporations gave them incentives to pollute and to produce unsafe products led to federal regimes protecting the environment and consumers.[29] The environmental legislation again emphasized the recognition that national standards were needed because poorer states would tolerate environmentally egregious behaviour as a cost of securing job-creating facilities within their borders. Like the programs addressed to poverty and inequality, those federal measures were hardly ideal, but they inarguably improved the safety of products and the quality of our nation's air and drinking water.

At the same time that the United States was putting in place a full regime of regulation for corporate behaviour, Europe was essentially doing the same thing, albeit in a necessarily somewhat less uniform way. For today's purposes, though, it is sufficient to note that the evolution of the European Union can in many ways been seen as Europe's New Deal. To enjoy the full benefits of EU membership, nation-states are expected to comply with a host of minimum standards in a range of areas considered

27 *Social Security Act of 1935*, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. § 602 (2000)) (providing assistance to families with needy children by establishing the Aid to Dependant Children); *U.S. Housing Act of 1937*, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437f, *et seq.* (2000)) (establishing a housing allowance program); *Food Stamp Act of 1964*, Pub. L. No. 88-525, 78 Stat. 703 (codified at 7 U.S.C. §§ 2011–30 (2000)) (providing food vouchers for needy families).

28 *Social Security Act*, ibid. (replaced by the *Federal Unemployment Tax Act*, 26 U.S.C. § 3301, *et seq.* (2000)) (establishing temporary unemployment insurance).

29 Federal regulation expanded greatly in the 1970s with the establishment of the Environmental Protection Agency in 1970 and the Consumer Product Safety Commission in 1972. Reuel E. Schiller, 'Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s' (2001) 53 Admin.L.Rev. 1139 at 1148; see also Joseph M. Polito *et al.*, 'The Effect of Environmental Regulation on Business Transactions in the United States' (1992) 18 Can.-U.S.L.J. 331 at 331–8 (detailing the history of environmental regulation in the United States, including the fundamental environmental protection acts passed in the 1970s such as the Clean Water Act, the Clean Air Act, and the Comprehensive Environmental Response, Compensation and Liability Act).

important to the maintenance of just societies in which the many, and not the few, can live the good life.[30] These standards set a floor beneath which nations cannot allow corporate behaviour to sink.

For a while, the West writ large seemed capable of having it all. We could maintain economic dynamism and promote economic equality. We could make profits while improving product safety and reducing environmental degradation.

At this point, it might be helpful to observe something you likely already know about how the United States regulates corporations. In the United States, so-called corporate law is a narrow domain, almost entirely focused on the internal affairs of the corporation.[31] Corporate law enforcement is largely a function of the American state that charters a corporation. Its role is to ensure that the managers of the corporation honour the corporation's charter and by-laws and that they fulfil their equitable fiduciary duties to the corporation and its stockholders. State enforcement of corporate law interacts closely with federal regulation of the national securities markets, regulation that subjects a public company to a regime of federally mandated disclosure and financial accounting standards. The Securities and Exchange Commission (SEC) is the primary federal agency responsible for this function and was a creation of Roosevelt's New Deal.[32] Notably, the roles of state corporate law and the SEC largely centre on the question of protecting investors in their capacity as investors. Unlike in some European nations, so-called company law in the United States does not include other important bodies of law regulating corporate behaviour. The regulation of corporate

30 In the latest round of accessions to the European Union, the ten new member countries in Central and Eastern Europe were required to meet three broad criteria for admission. Needed reforms were categorized into political reforms, economic reforms, and a final category relating to social criteria and infrastructure, which included regulation 'in the fields of agriculture, environmental, transport, social policy' and other related reforms. Roger J. Goebel, 'Joining the European Union: The Accession Procedure for the Central European and Mediterranean States' (2005) 1 Loy.U.Chi.Int'l L.J. 15 at 29–30; see Conclusions of the Presidency, European Council in Copenhagen (21 June 1993) at 12–6 (listing the Copenhagen Council Criteria); see also CFREU, supra note 7.

31 For a succinct discussion of the standard American approach to corporate law, see generally Leo E. Strine, Jr., 'The Delaware Way: How We Do Corporate Law and Some of the Challenges We (and Europe) Face' (2005) 30 Del.J.Corp.L. 673 at 674–9 [Strine, 'Delaware Way']. For the reader interested in an authoritative take on America's historical approach to corporate law, see Robert C. Clark, *Corporate Law* (Boston: Little, Brown, 1986).

32 *Securities Act of 1933*, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a, *et. seq.* (2000)) (regulating the original issuance of securities); *Securities Exchange Act of 1934*, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a, *et. seq.* (2000)) (creating the Securities and Exchange Commission and regulating the financial markets and their participants).

conduct that threatens the interests of workers, consumers, or the environment is governed by other laws, which are not thought of as corporate law.

This legal context is critical to grasp in approaching a debate that pervades American corporate law. That debate is over the basic question of whether for-profit corporations are to be governed solely for the benefit of stockholders or whether corporate managers may give equal weight to the interests of other constituencies, such as the corporation's workers.[33] As one might expect, the longstanding corporate law debate in the United States regarding whether directors could consider other constituencies was always influenced – but not necessarily as much as it should have been – by the reality that our corporate law only gave stockholders any ability to sue the directors for breaching duties to the corporation. Likewise, under American corporate law, stockholders were the only constituency granted the right to vote for directors and on other corporate matters.

For this reason, before the New Deal, commentators who believed that directors, in an ideal world, should take into account the public interest were worried that giving directors the ability to justify their actions in reference to other constituencies would leave them accountable to no one. Indeed, Adolf Berle himself, a key New Dealer, famously made this case at the time when President Herbert Hoover was still in office, believing that disaggregated stockholders were too weak and poorly incentivized to constrain managerial misbehaviour and that the existing governmental institutions were inadequate to ensure that managers would act consistently with the social good.[34] Berle's academic debating partner, Harvard professor E. Merrick Dodd, countered with the more optimistic view that empowering managers to pursue ends other than profit maximization would speed progress toward a more just society. Capitalism would better serve everyone if managers could manage corporations not simply to increase the wealth of the stockholders but in order to pursue broader ends consistent with the public interest, such as full employment and higher living standards for workers.[35] Dodd therefore contended that corporate resources could be devoted to endeavours that, while not profit maximizing, were consistent with the national interest, as understood by corporate managers. Berle was more sceptical of managerial good faith. Better for corporate law to at least hold directors accountable for advancing stockholder interests, Berle said, than to let directors justify their action by reference to so many interests

33 See generally William T. Allen, 'Our Schizophrenic Conception of the Business Corporation' (1992) 14 Cardozo L.Rev. 261 at 268–9.

34 Adolf A. Berle, 'Corporate Powers as Powers in Trust' (1931) 44 Harv.L.Rev. 1049.

35 E. Merrick Dodd, Jr., 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harv.L.Rev. 1145.

that they effectively could do whatever they wished, regardless of whether it was injurious to the investors' interests.[36]

Once the United States had successfully weathered the Great Depression and World War II, and the New Deal regulatory regime was finally in place, Berle and others grew more comfortable with allowing corporate managers to consider other interests, because they believed that the new regulatory state, and not simply corporate law, now cabined the room managers had to abuse the power they wielded.[37] In an economic era in which all American interest groups seemed to be thriving and in which a strong social consensus supported the New Deal structures and reforms, it seemed less of a threat to stockholders that directors could consider other interests. As a matter of formalism, the most important corporate law, that of Delaware, gave rhetorical emphasis to the primacy of stockholder interests. But the business judgement rule gave directors wide leeway to consider other corporate constituencies, when such consideration could be justified as being in the long-term interests of stockholders.[38] Given prosperous times, then-prevailing political norms, and

36 'When the fiduciary obligation of the corporate management and "control" to stockholders is weakened or eliminated, the management and "control" become for all practical purposes absolute.' Adolf A. Berle, Jr., 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 Harv.L.Rev. 1365 at 1367 [Berle, 'For Whom']. Berle's argument continues: 'you can not 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.' Ibid.

37 See Adolf A. Berle, Jr., *The 20th Century Capitalist Revolution* (New York: Harcourt Brace, 1954) at 169; Adolf A. Berle, 'Modern Functions of the Corporate System' (1962) 62 Colum.L.Rev. 433 at 444–5 ('For the present, the system as a whole functions successfully; the public consensus moves in fairly rapidly when trouble becomes apparent; the government supervisory system does reasonably well at making situations apparent, and there seems to be no cause for alarm. But, in the name of straight thinking, honest academic description and the Queen's English, let us not bedevil ourselves by calling this a "management market." It is a variety of non-statist politics which, at the moment, is giving a quite respectable account of itself'); ibid. at 437 ('I have been accused of (and plead guilty to) believing that the businessmen constituting managements in general are more trustworthy and that their standards are higher, than was the case at the close of the twenties'); see also Bratton & Wachter, 'Shareholder Primacy,' supra note 11 at 41–2 ('Corporate managers emerged as quasi-public servants in [Berle's later writings], as advocated by Dodd in 1932. Whether they liked it or not, they were accountable to the regulatory state on the one hand and the public consensus on the other. Failure to satisfy the public meant new regulation; avoidance of new regulation meant satisfying the public. It followed that public duties were unavoidable as a practical matter').

38 Einer Elhauge, 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 N. Y. U. L. Rev. 733 at 739 [Elhauge, 'Sacrificing'] ('The very reason for the business judgment rule is precisely that courts cannot reliably figure out what maximizes profits – that is, that a legal duty to maximize profits is too hard to monitor. And

the weakness of disaggregated stockholders still facing pre-Internet-era barriers to collective action, as a practical matter, management had a good deal of room to balance the interests of all corporate constituencies without tilting heavily in the direction of the stockholders.

And, in their own words, American CEOs in the post-war era embraced Dodd's side of his debate with Berle, articulating their own role as one involving service to the various interests affected by the corporation, interests that included stockholders, to be sure, but also included the nation itself, the corporation's home communities, its workers, and the consumers of its products and services.[39]

the profit-sacrificing discretion created by business judgment deference suffices to cover the lions' share of profit-sacrificing discretion that exists').

39 Jeffrey N. Gordon, 'The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices' (2007) 59 Stan.L.Rev. 1465 [Gordon, 'Independent Directors'] (an excellent summary of the historical evolution from a broader view of the corporation's purpose in the 1950s and 1960s to the more stockholder-focused view now prevailing); Herman E. Kross, *Executive Opinion: What Business Leaders Said and Thought on Economic Issues, 1920s–1960s* (New York: Doubleday, 1970) at 50–3 ('[T]he old concept that the owner of a business had a right to use his property as he pleased to maximize profits, has evolved into the belief that ownership carries certain binding social obligations'); Robert A. Wright, 'Beyond the Profits: Business Reaches for a Social Role' *The New York Times* (3 July 1966) 59 (quoting George S. Moore, president of First National City Bank, as stating that a business organization's 'social responsibility is, instead, inseparable from its response to the kind of world in which we live. For today's institutions – banking, public or private – cannot exist in modern society without reacting constructively to (1) the goals of society, and (2) the economic, technological, social and political forces that mold society'); Robert A. Wright, 'Steel Producers Are Optimistic' *The New York Times* (26 May 1966) 69 (noting that Edmund F. Martin, chairman of the Bethlehem Steel Corporation, 'urged businessmen to take an active role in developing an effective partnership with Government and the use of managerial skills and advanced technology in the solution of social problems'); 'American Capitalism Today' *The New York Times* (5 December 1952) 26 (summarizing the three speakers at the National Association of Manufacturers Congress of American Industry as calling 'for "industrial statesmanship" which would operate our economic machine with a sense of social responsibility and for the benefit not only of stockholders but also of customers and employees both here and elsewhere in the free world'); 'Management Seen Facing Challenges' *The New York Times* (23 January 1949) F8 (quoting Harold B. Maynard, president of Methods Engineering Council, as stating that '[t]he trend is definitely toward greater emphasis on social matters and the manager of 1949 must bring a greater sense of social responsibility to his work if he is to be successful'); see also C.A. Harwell Wells, 'The Cycles of Corporate Social Responsibility: An Historical Perspective for the Twenty-First Century' (2002) 51 U.Kan.L.Rev. 77 at 99–101, 111 ('By the mid-1960s, it was conventional wisdom that public corporations owed some responsibility to society beyond making profits'); Gordon, ibid. at 1512 (noting that 'a 1961 Harvard Business Review survey of 1700 executives revealed that approximately 83% of the respondents agreed that "[f]or corporation executives to act in the interests of shareholders alone, and not also in the interests of employees

In 1970, the Nobel-winning economist Milton Friedman said all this high-falutin', high-minded talk was hooey.[40] The value that society received from for-profit corporations was the creation of wealth for

and consumers, is unethical"') (citing Raymond C. Baumhart, 'How Ethical Are Businessmen?' *Harvard Business Review* (July–August 1961) 6 at 10).

This philosophy has continued to be given rhetorical lip service. See Adi Ignatius, 'Meet the Google Guys' *Time* (20 February 2006) 40 (quoting Google CEO Eric Schmidt as stating that '[t]he company isn't run for the long-term value of our shareholders but for the long-term value of our end users'); John Mackey, 'Putting Customers Ahead of Investors, in Rethinking the Social Responsibility of Business' *Reason* (1 October 2005) 28 ('At Whole Foods, we measure our success by how much value we can create for all six of our most important stakeholders: customers, team members (employees), investors, vendors, communities, and the environment'). Interestingly, both these companies have taken actions to maximize profits that can be seen as involving socially irresponsible conduct. In the case of Google, aiding the Chinese government in preventing free speech: Clive Thompson, 'Google's China Problem (and China's Google Problem)' *The New York Times* (23 April 2006) 64; in the case of Whole Foods, using a fake identity to cast doubt on a competitor's prospects: Janet Whitman, 'Whole Foods Probes Wacky Mackey' *The New York Post* (18 July 2007) 33.

Although the Business Roundtable now squarely adopts stockholder wealth maximization as the primary corporate objective, it tries to soften that emphasis by stressing the common interests of investors and other societal constituencies. Compare Business Roundtable, *Principles of Corporate Governance 2005* (2005) at 31, online: Business Roundtable <http://www.businessroundtable.org/pdf/CorporateGovPrinciples.pdf> ('Corporations are often said to have obligations to shareholders and other constituencies, including employees, the communities in which they do business and government, but these obligations are best viewed as part of *the paramount duty to optimize long-term shareholder value*. The Business Roundtable believes that shareholder value is enhanced when a corporation treats its employees well, serves its customers well, fosters good relationships with suppliers, maintains an effective compliance program and strong corporate governance practices, and has a reputation for civic responsibility') [emphasis added] and Business Roundtable, *Statement on Corporate Governance* (September 1997) at 3, online: Business Roundtable <http://www.businessroundtable.org/pdf/11.pdf> ('In The Business Roundtable's view, the paramount duty of management and of boards of directors is to the corporation's stockholders; the interests of other stakeholders are relevant as a derivative of the duty to stockholders. The notion that the board must somehow balance the interests of stockholders against *the interests of other stakeholders fundamentally misconstrues the role of directors*') with Business Roundtable, 'The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation' (1978) 33 Bus.Law. 2083 at 2099 (identifying 'corporate social responsibility' as a 'major board responsibility'). See also Henry Blodget, 'The Conscientious Investor' *The Atlantic* (October 2007) 78 at 82 (noting that so-called socially responsible investors have to deal with the difficulty of screening, because 'beauty may be only skin-deep. As corporate social responsibility has gone mainstream, companies have spotted a juicy marketing and PR opportunity, and corporate America is now falling all over itself to show how enlightened it is. . . . Don't fall for those heart-warming hybrid ads until you're sure the car company isn't also lobbying against emission reductions').

40 Milton Friedman, 'The Social Responsibility of Business Is to Increase its Profits' *The New York Times* (13 September 1970) § 6 (magazine).

stockholders. If the corporation generated such a surplus, it was likely that workers and communities would benefit incidentally, of course. But Friedman believed that managers were not well positioned, either as a matter of competence or as a matter of legitimacy, to pursue ends other than corporate profit.[41] If they did so, they risked undermining the most obvious utility of the corporate form – its capacity to increase social wealth – and perverting the democratic process by having corporate managers use other people's money (in Friedman's conception) for social purposes of their own choosing. Far better, Friedman believed, for these managers – who were hardly representative of the general populace – to stick to their knitting. If they ran profitable operations, the wealth that was created could be, if government chose, redistributed to temper economic inequality. But it was not the job of corporate managers to be agents for their idiosyncratic visions of the overall social good. Rather, they were to vigorously pursue profits for stockholders, tempered only by the requirement to comply with laws and generally accepted business norms.

Friedman's views were controversial at the time. Moreover, his normative arguments seemed to be largely aspirational, as many thought that the positive facts regarding the behaviour of corporate managers were more consistent with the proposition that the corporation could be managed with the objective of serving various corporate constituencies in a balanced way.[42] Certainly, public opinion in the United States was soundly against

41 Friedman argued that corporate managers spending funds on social purposes were, in effect, taxing stockholders Ibid. To force or expect corporate fiduciaries to decide where to spend public funds was an impermissible manner of circumventing the political process, and transformed them into civil servants. Ibid. 'On the level of political principle, the imposition of taxes and the expenditure of tax proceeds are governmental functions,' he wrote, arguing that it was 'intolerable' that managers presumably selected for their ability to operate businesses profitably, rather than their policy wisdom and sense of justice, would make morally and ethically freighted decisions about the allocation of scarce resources to advance the public interest. Ibid.

See also Adolf A. Berle, 'Modern Functions of the Corporate System' (1962) 62 Colum.L.Rev. 433 at 444 ('If we assume, as I think we must, that elections of directors by stockholders has become, in large corporations, a ritual rather than a reality, its legitimacy-bestowing function becomes extremely weak').

42 For example, Martin Lipton argued that the 'system of corporate governance places the directors at the center of corporate decisionmaking and has expanded the corporation's responsibilities to safeguard interests broader than those of shareholders alone.' Martin Lipton, 'Takeover Bids in the Target's Boardroom' (1979) 35 Bus.Law. 101 at 106. Lipton believed that it was 'well-settled' by 1979 that 'corporations must protect the environment, must protect the health and safety of employees, must protect the pensions of employees, must produce safe products and replace products found to have defects, may make charitable contributions from corporate funds, may spend corporate funds, or assign employees to engage in activities, for the betterment of communities in which the corporation operates.'

Friedman, with most Americans believing that for-profit corporations not only could but should give heavy weight to the interests of their workers and consumers, even when that came at a cost to stockholders.[43]

But over time, Milton Friedman's vision of the appropriate focus of corporate management has won out where it really counts: in the marketplace. The reason for Milton's victory brings me to the other Friedman, Thomas Friedman. Thomas Friedman is a prominent opinion columnist for the *New York Times.* More recently, his provocative book *The World Is Flat* has sold millions of copies and helped educate Americans about the transformation the globalization of commerce will have on the United States and its Western allies.[44] As Friedman points out, predictions that capitalism would break down national barriers and create a global marketplace are hardly new. As he notes, Karl Marx – the least humorous of the Marx brothers – argued something similar in the nineteenth century.[45] Although Marx may have been ahead of his time in that regard, Thomas Friedman stresses that information and transportation

Ibid.; see also ibid. at 119 ('After five decades of continuous efforts both to raise the consciousness of directors with respect to issues of national policy, and to impose on corporations and their directors obligations to employees, customers and communities, it is impossible to contemplate a [legal] rule' that would require a board to accept a takeover simply to profit stockholders if that threatened harm to these other constituencies).

43 This is illustrated by the fact that a majority of American states have adopted so-called constituency statutes authorizing corporate directors to resist a takeover if the takeover threatens the interests of non-stockholder constituencies such as the corporation's workers. See Timothy L. Fort, 'The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes' (1997) 73 Notre Dame L.Rev. 173 at 173 [Fort, 'Corporation'] (noting that constituency statutes have been enacted in more than half of American states); see, *e.g.*, N.Y. Bus. Corp. Law § 717(b) (McKinney 2007); 15 Pa. Cons. Stat. §§ 1715–6 (2007). Although, in my view, stockholder wealth maximization is now clearly the emphasis of corporate management, the continuing public appeal of the idea that corporations should protect their other constituencies has resulted in corporate communications emphasizing corporate social responsibility. Lisa M. Fairfax, 'The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms' (2006) 31 J.Corp.L. 675 at 691–2 ('In recent years stakeholder rhetoric has permeated official corporate documents. . . . Since 2000, corporate discourse reflects a shift from the traditional shareholder rubric to an embrace of rhetoric focused on stakeholders').

44 Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (New York: Farrar, Straus & Giroux, 2004).

45 Citing Michael J. Sandel, a noted Harvard political theorist, Thomas Friedman writes that '[w]hile the shrinking and flattening of the world that we are seeing today constitute a difference of degree from what Marx saw happening in his day . . . it is nevertheless part of the same historical trend Marx highlighted in his writings on capitalism – the inexorable march of technology and capital to remove all barriers, boundaries, frictions, and restraints to global commerce.' Ibid. at 202.

systems have now reached the stage where the key barriers to constant, speedy, and frictionless international commerce have effectively been torn down.[46] Not only that, these systems have facilitated the performance for Western corporations of high-end product design and research work by well-educated but extremely low-cost workers in developing nations, putting under pressure the notion that only the unskilled faced competitive threats from the developing world.

Discomfort with globalization is widespread in the United States. Discomfort, I think, is the right word. We're not shutting the borders any time soon, but unease is widespread, across the political spectrum. There is a sense that we are losing control of our own destiny and the ability to provide economic security and stability to our citizens, but we seem to lack the political vocabulary and maturity to discuss what is facing us in any but the crudest of terms. Thus, cartoonish debates between straw-man concepts – like free trade versus protectionism, and closed versus open borders – abound, with simplistic nostrums substituted for hard thought.

To someone from Delaware steeped in the evolution of corporate behaviour during the last forty years, what is interesting about the current hoo-ha in the United States regarding globalization is how quaint it seems. The reality is that the pressures of international competition have, within the domain of what constitutes corporate law in the United States, rendered the historical debate regarding the purpose of the for-profit corporation increasingly irrelevant. Milton Friedman's view of the obligation of corporate management – that is, to maximize profits for stockholders – has won a sweeping victory.

There is a complex history beyond this triumph, to be sure.[47] But the simple outlines of the story go like this. When the United States faced stagflation in the 1970s and the threat posed by that decade's China – that would be Japan – American industry faced strong pressure to rationalize and become more efficient. A president, Jimmy Carter, who seemed constitutionally unable to make decisions in the face of daunting circumstances was followed by a bold and confident leader, Ronald Reagan, who, although capable of adroit compromise, rhetorically embraced a vision of markets comparable to that of Milton Friedman.

A wave of takeovers swept the United States in the 1980s.[48] There was, of course, a political pushback. Consistent with the public's view that

46 Ibid. at 176–7, 202.

47 For a fuller, but still general, telling of this story, see William T. Allen & Leo E. Strine, Jr., 'When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton's Vision of the Corporate Law' (2005) 60 Bus.Law. 1383.

48 'In the 1980s, about 30 percent of America's Fortune 500 companies received takeover bids. This is an extraordinary number, indicating that shareholder power via takeover

corporations should benefit all their constituencies, not just stockholders, a majority of American states passed statutes permitting corporate boards to resist a takeover if it would impair the interests of a non-stockholder constituency.[49] States as politically diverse as Massachusetts and Georgia passed other statutes giving corporate boards power to resist takeovers.[50] Although Delaware did not go to these extremes, our case law did give corporate directors broad authority to make their own decisions about whether a takeover was good for stockholders and to resist it if the board believed in good faith that the stockholders would be better off if the bid were thwarted.[51] But what was critically different about Delaware – a state in which a majority of major American corporations are domiciled – is that Delaware law was clear that directors were charged with managing the corporation for the benefit of stockholders, with any consideration of other constituencies required to be incidental to the end of maximizing stockholder wealth.[52]

Although many corporate law scholars continue to obsess over the few cases in which corporate boards were able to keep their stockholders from accepting premium acquisition bids, the realities of the marketplace and the pressure that case law put on directors to act faithfully toward stockholders led to a huge increase in mergers and acquisitions activity.[53] As a practical matter, corporate decisions did not turn on whether a deal

bids had to be on the minds of all large firm managers. The 1980s were also, consistent with the thesis here, arguably one of the periods of strongest product market competition. Not only were American manufacturing markets workably competitive, but international competition was, for essentially the first time, pounding every manufacturer that could not perform. Hostile takeovers were, and despite the rise of the poison pill still are, an engine of shareholder wealth maximization. . . . Only recently, as European governments have been moving to the right economically and product markets have become more competitive, have hostile offers appeared; historically they occurred in continental Europe at a rate far lower than that prevailing in the United States.' Mark J. Roe, 'The Shareholder Wealth Maximization Norm and Industrial Organization' (2001) 149 U.Pa.L.Rev. 2063 at 2074–5 (comparing US merger activity with historically lower merger activity in continental Europe due to concern for other corporate constituencies).

49 See Fort, 'Corporation,' supra note 43.

50 Massachusetts adopted a statute mandating a staggered board for its corporations. See Marcel Kahan & Edward B. Rock, 'Corporate Constitutionalism: Antitakeover Charter Provisions as Precommitment' (2003) 152 U.Pa.L.Rev. 473 at 506 ('In 1990, Massachusetts legislatively imposed staggered boards on all Massachusetts public companies, even if the charters of these companies provided for annual elections of the whole board'). Georgia adopted a set of statutes authorizing directors to adopt a dead-hand poison pill. See *Invacare v. Healthdyne Technologies.*, 968 F. Supp. 1578 at 1580–1 (N.D. Ga. 1997) (upholding the use of a dead-hand pill under Georgia law).

51 *E.g.*, *Unitrin v. American General*, 651 A.2d 1361 at 1383–4 (Del. 1995).

52 *E.g.*, *Revlon v. MacAndrews & Forbes Holdings*, 506 A.2d 173 at 182 (Del. 1986).

53 See, *e.g.*, Marcel Kahan & Edward B. Rock, 'How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law' (2002) 69 U.Chi.L.Rev. 871 at 873–80

or management move was good for a particular community or for the corporation's workers. A race to take steps that would increase corporate stock prices ensued.[54] Plant closings, downsizing, outsourcing, and wage and benefits cuts became common. CEOs knew that they had to stay ahead of the curve, lest they find their corporations the object of unwanted attention from hungry bidders or dissatisfied institutional investors.[55] CEOs realized that independent directors would cashier them if push came to shove, and stockholder unrest became commonplace.[56] Therefore, rhetoric about focusing sharply on 'stockholder value' became standard for CEOs, who obsessed over ensuring that the financial markets were happy with their performance.[57] With these waves of corporate mergers came shrinkage in the number of corporate headquarters, hollowing out the civic leadership in many communities by converting business leaders from the CEOs of independent, locally run corporations into branch managers for national organizations with no particular interest in the cities where they made acquisitions.

Speeding the changes worked by international pressures was the emergence of activist institutional investors as powerful influences on corporate behaviour. In a perverse irony, the rise of these institutions was attributable in no small measure to funds they received from American workers. As corporations stripped their employees of accessed to guaranteed pensions, workers were increasingly forced to provide for their own

(detailing the huge increase in mergers and acquisitions activity during the period from 1980 to 2000).

54 See, *e.g.*, Judith H. Dobrzynski, 'Push Comes to Reform' *Business Week* (1 February 1993) 26.

55 See, *e.g.*, Robert H. Malott, 'Directors: Step Up to Your Responsibilities' *Directors & Boards* 16 (22 June 1992) 72 at 71 ('CEOs *are* becoming more sensitive to shareholders' interests and concerns. Managers *are* focusing on shareholder value, and those who aren't are losing their jobs to successors who will').

56 See, *e.g.*, J.P. Donlon, 'CEOs on the Block; CEO Turnover; The CEO in Transition' *Chief Executive* (April 1993) 22.

57 *E.g.*, John A. Byrne, 'The Making of a Corporate Tough Guy' *Business Week* (31 January 1996) 61 ('Dunlap bristles at the notion that a business should be run for such stakeholders as employees and communities. "Stakeholders are total rubbish," he says. "It's the shareholders who own the company. Not enough American executives care about the shareholders"'); Robert Moran & Ira Sager, 'Keen Edge, Dull Vision – IBM CEO Gerstner's Massive Cuts Please Wall Street But Do Nothing to Appease Customers' *Information Week* (2 August 1993) 10 ('The last thing IBM needs is a vision . . . IBM needs a series of very tough-minded, highly effective strategies that deliver performance in the marketplace and shareholder value. If you are going to have a vision for the company, the first frame of that vision better be that you are making money'); Alison L. Sprout, 'America's Most Admired Corporations' *Time* (11 February 1991) 52 ('Says Coca-Cola CEO Roberto Goizueta: "Increasing shareholder value over time is the bottom line of every move we make"').

retirement through investments in the stock market.[58] Most employees were not given the choice to, nor could they rationally, invest in particular companies. Instead, they gave their money to mutual funds and other investment funds, which made the decisions about what shares to buy and how to vote those shares.

For obvious reasons, these institutions were primarily focused on generating impressive current returns. They fixated on eliminating barriers to takeovers and turbo-charging managerial incentives to pump up stock prices as their corporate governance agenda.[59] They sought to populate boards with super-majorities of independent directors who would be more responsive to their demands for measures that would increase stock prices.

As the twentieth century ended, institutional investors controlled well over half of the stock in American corporations, and the percentage is continuing to rise.[60] This separation of 'ownership from ownership' made the triumph of Milton Friedman's vision even more complete. As a matter of fiduciary duty, these institutions have a clear responsibility to take steps to increase the value of the funds they manage.[61] Thus, they can rightly be expected to use their influence as stockholders to

58 *E.g.*, Edward A. Zelinsky, 'The Defined Contribution Paradigm' (2004) 114 Yale L.J. 451 at 469–71 (discussing the shift in the dominant paradigm for the provision of retirement income from defined benefit plans, in which the employer controls the underlying investments, to defined contribution plans, in which the employee controls the underlying investments).

59 See Gordon, 'Independent Directors,' supra note 39 at 1520–35 (providing an insightful account of the developing focus on shareholder value and independent directors during the 1980s and 1990s).

60 See Franklin R. Edwards & R. Glenn Hubbard, 'The Growth of Institutional Stock Ownership: A Promise Unfulfilled' (2000) 13 J.Ap.Corp.Fin. 92 at 92, 94 tbl.1 (reporting percentage ownership of US stocks by banks, insurance companies, independent advisors, public and non-profit entities, and mutual funds: 36 per cent in 1980, 45 per cent in 1985, 51 per cent in 1990, 56 per cent in 1995, and 60 per cent in 1997); Justin Fox, 'Herd on the Street: Why Professional Investors Have Turned Out to Be as Prone to Manias and Panics as the Rest of Us' *Time* (17 September 2007) 59.

61 *E.g.*, *Employee Retirement Income Security Act* § 404, 29 U.S.C. § 1104 (2000) [ERISA] (requiring ERISA fiduciaries to discharge their duties 'for the exclusive purpose of ... providing benefits to participants and their beneficiaries'); *Interpretive Bulletin Relating to Written Statements of Investment Policy, Including Proxy Voting Policy or Guidelines*, 29 C.F.R. § 2509.94-2 (2007) ('The fiduciary duties described at ERISA § 404(a)(1)(A) and (B), require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives'); Daniel J.H. Greenwood, 'Essential Speech: Why Corporate Speech Is Not Free' (1998) 83 Iowa L.Rev. 995 at 1046 ('The managers of pension funds or other institutional investors, for example, have a fiduciary duty to maximize their own beneficiary or shareholder value').

pursue an increase in stockholder wealth.[62] Although one can question whether their agenda for achieving that goal has been or is well designed for that purpose, one cannot quibble with the basic proposition that an investment fund should seek to maximize the long-run return for its investors.

But this separation has also extended the legitimacy problem that Milton Friedman identified as plaguing corporate managers who sought to use corporate funds to pursue ends other than stockholder wealth. Unless he is managing an investment fund that is explicitly premised on some vision of social responsibility, what is the moral entitlement of a fund manager to use the fund's shares to encourage more benevolent corporate behaviour toward its workers or the environment, or to encourage greater corporate giving to charity? Who chose him to make such decisions? What about his training at the Wharton School or the Harvard Business School or the Rotman School of Management[63] prepared him to opine on these issues? An individual who owns stock in Exxon-Mobil might vote his conscience over his pocketbook, but how can an investment manager do that?

Although more Americans than ever are invested in equities, most of them invest in equity securities through intermediaries and are therefore entirely disconnected from decisions about which operating company's shares to buy or how to vote those shares. The ordinary investor, I dare say, does not view her retirement investment portfolio as a reflection of her moral and ethical values. Which Vanguard or Fidelity mutual funds should hold her 401(k) dollars is simply a confusing economic choice she has to make.

Of course, there are a number of investment funds affiliated with labour unions or religious institutions that regularly make non-binding proposals to corporations about issues of social responsibility.[64] But they are the exception that proves the rule. The bulk of the institutional money is run by money managers whose investors have not charged

62 Interestingly, we are now at a time when it is demonstrably possible for equity investors to shrink the gap between ownership and control and to exercise more direct control over managerial behaviour. See Diamond, 'Private Equity,' supra note 22 (expressing an optimistic view about the potential utility of this phenomenon). Such corporations may well protect their investors better; but, precisely because they are investor dominated and non-public, it is difficult to see how they will be less, rather than more, susceptible to the temptation to generate externalities in order to increase profits.

63 Joseph L. Rotman School of Management, University of Toronto.

64 Martin Lipton & Steven A. Rosenblum, 'Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come' (2003) 59 Bus.Law. 67 at 79–80.

them with having a social conscience.[65] These money managers control most of the vote, and they are focused on profits. That focus leads them regularly to support activist investors who pressure corporations to reduce operating costs, increase leverage, or accept takeover bids. Put bluntly and summarily, the agenda of the institutional investor community is to make and hold management accountable for increasing stockholder wealth. In particular, the institutional investor community has sought to put itself in a position to direct the determination of corporate policy by improving its capability to replace the board if the board does not take action favoured by the stockholders. Having illustrated its muscle to replace corporate management when it is unhappy, the institutional investor community has made corporate managers even more focused on stockholder value.[66]

As a practical matter, the American corporate law question of the corporation's purpose has been settled in favour of stockholders. The fight that goes on is really about the appropriate form of agency to achieve maximal returns for investors. Would stockholders be better off if directors and managers were given some insulation from stockholder influence and were therefore better able to pursue capital-intensive strategies designed to generate long-term returns? Or would they be better served by a system that enables them to replace management

65 According to a recent article, only 9 per cent of professionally managed assets were in so-called socially responsible investments. Blodget, 'Conscientious Investor,' supra note 39 at 82. To be fair, many workers are given only a limited choice of investment funds into which to place their retirement savings. As a result, they may not have the option to choose a socially responsible investment fund.

66 'If investors are insulated from the consequences of corporate production in public corporations in which they own stock directly, then one might reasonably expect those same individuals to be even more insulated from what is going on in companies the stock of which they own only indirectly through mutual funds, pension funds, and the like. As Elhauge has observed, "they are [now] twice removed from knowledge and responsibility" . . .The structure of the public corporation "insulates . . . shareholders from social and moral sanctions and processes," both by rendering them "largely anonymous" to the public, as well as by virtue of their "relative lack of information about how corporate operations may impact the public interest." Consequently, [Elhauge] argues, shareholders could push all that much harder for profit maximization "untempered by social consequences," and a management team focused on their interests would indeed render the corporation "soulless" for lack of the "social and moral processes" that constrain individuals acting on their own.' Bruner, 'Enduring Ambivalence,' supra note 20 at 8, 47 (citing Elhauge, 'Sacrificing,' supra note 38 at 814); see also Blodget, 'Conscientious Investor,' supra note 39 at 86 (noting that 80 per cent of investors in so-called socially responsible funds say they would not buy them unless they produced returns equal to or greater than conventional funds and that these investors 'may be delusional' because 'finance theory' suggests that investors are unlikely to 'get the best of both worlds – responsible practices and superior returns').

easily if management is not following current stockholder sentiment regarding the company's policies? This debate is not about the object of corporate activity but about the best way to get there.[67]

Even this narrower debate is of questionable relevance. With the ease of information flow facilitated by the Internet, the huge voting positions held by institutional investors, and the desire of institutional investors to lock in short-term gains from premium-generating transactions, stockholders are finding it easier than ever to directly influence corporate decision making. The capital markets are driving managers, not the other way around.[68]

The amoral content of the current conversation between managers and institutional investors should not surprise anyone steeped in history. A dialogue between top executives (one capitalist instrumentality) and money managers (another) is not likely to include the serious and high-minded consideration of issues like economic equality or environmental responsibility.

As the investor class itself globalizes in search of higher returns, this dialogue is likely to focus even more narrowly on issues of stockholder return. With cross-border merger activity, more and more corporations are losing any national identity. Just as domestic merger activity has converted many former headquarters into mere shrunken outposts that can be closed in short order, so too is cross-border activity rendering the concept of an American, Canadian, French, or British corporation quaint. The pressures for performance compel these corporations to move operations and focus where the most gain can be made, even if that requires diminishing beneficial activity in the corporation's traditional 'home.'

Within the foreseeable future, corporate stockholder bases could also lose a clear national identity. This will put pressure on an old foundational element of the arguments made by the Milton Friedman school, which is that increases in stockholder wealth will increase national

67 The recent debate between two professors who both believe for-profit corporations should be managed to maximize stockholder wealth, Lucian Arye Bebchuck and Stephen Bainbridge, in the *Harvard Law Review* is a good example of a debate about means between contestants who believe in the same end. Lucian A. Bebchuk, 'Letting Shareholders Set the Rules' (2006) 119 Harv.L.Rev. 1784; Stephen M. Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2006) 119 Harv.L.Rev. 1735; Lucian Arye Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118 Harv.L.Rev. 833.

68 Independent directors are best seen, in my view, as an instrument of market forces rather than as a genuinely independent power centre. In other words, their self-interested dependence upon and sensitivity to stockholder sentiment makes them prone to following market whims rather than acting as Burkean leaders. An excellent historical piece can be read as supporting this intuition about independent director behaviour. See generally Gordon, 'Independent Directors,' supra note 39.

wealth for the good of the citizenry as a whole.[69] Already, there are problematic data indicating that what has been good for stockholders during the last forty years has not necessarily benefited the average worker. Returns to equity have been more lucrative than those to labour,[70] as reflected in very slow growth in the median income of Americans but a robust increase in economic inequality.[71] The haves have far more than ever, and the gap between them and others has ballooned.

As the investor class globalizes, we face the reality that increases in returns to equity will increasingly flow not to domestic investors but to investors abroad. If those returns result from corporate operations mostly conducted abroad, a so-called American corporation could mostly be American in name only, deriving most of its profits from international operations and paying out most of those profits to foreign investors.

The ability of any nation, even mine, to address these emerging circumstances in isolation is, in my view, minimal. In the long run, capital's ability to move freely across borders will swamp domestic regulation's effectiveness. Ironically, it can be argued that the comparative strengths of the London and New York Stock Exchanges reflect this reality. As you know, the United States recently faced scandals that arose entirely from frauds premised on exploiting institutional investors' ardour for short-term returns. The instrument of the frauds was the publication of

69 See, *e.g.*, Richard A. Posner, *Economic Analysis of Law*, 3d ed. (Boston: Little, Brown, 1986) at § 14.11.

70 An admittedly rough comparison between the average annual growth rate in the median real wage and the average annual real return on the S&P 500 over approximately the last forty years underscores this point. The average annual growth rate in median real wage from 1966 to 2001 was only 0.03 per cent. Ian L. Dew-Becker & Robert J. Gordon, 'Where Did the Productivity Growth Go? Inflation Dynamics and the Distribution of Income' (Nat'l Bureau of Econ. Research, Working Paper No. 11842, December 2007), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870604>. In comparison, the average annual real return on the S&P 500 from 1970 to 2007 was 6.5 per cent. Michael Mandel, 'The Real Stock Chart' *Business Week* (19 March 2007), online: Business Week <http://www.businessweek.com/the_thread/economicsunbound/archives/2007/03/the_real_stock.html>.

71 See Dew-Becker & Gordon, ibid. ('[O]ver the entire period 1966–2001, as well as over 1997–2001, only the top 10 percent of the income distribution enjoyed a growth rate of real wages and salary income equal to or above the average rate of economy-wide productivity growth. . . . Growth in median real wage and salary income barely grew at all . . . because half of the income gains went to the top 10 percent of the income distribution, leaving little left for the bottom 90 percent'); see also Les Picker, 'Inflation Dynamics and the Distribution of Income,' online: National Bureau of Economic Research <http://www.nber.org/digest/aug06/w11895.html> (summarizing 'Where Did the Productivity Growth Go?'); David Cay Johnston, "05 Incomes, on Average, Still Below 2000 Peak' *The New York Times* (21 August 2007) C1 (reporting government data that the inflation-adjusted average income in 2005 was nearly 1 per cent less than in 2000).

financial statements showing paper profits based on hokum. In response, our Congress hastily adopted Sarbanes-Oxley. An admixture of reality and exaggeration about the burdens of compliance with that act has, it has been argued, led to a decline in initial public offerings on the NYSE and a concomitant increase in offerings on other exchanges, particularly the London Exchange.[72] Whether the posited causal relation is correct or not, what is indisputable is that there is nothing so special about an American listing that gives American policy makers the ability to set regulations that cannot be effectively sidestepped.

Instead, we are at the beginning of an era in which regulatory arbitrage will be a regular corporate tactic. Credible hints that corporations will move operations, or even the corporation's legal domicile, to another jurisdiction that lacks burdensome regulation will weaken the leverage individual nation-states have over corporations. Corporations will play nations off against each other, and put their less-than-edifying behaviour (think of huge American software concerns helping the Chinese track down dissidents)[73] down to business necessity.

72 See Luigi Zingales, 'Is the U.S. Capital Market Losing Its Competitive Edge?' (European Corporate Governance Institute, Finance Working Paper No. 192/2007, November 2007) at 6, 7, 17, online: SSRN <http://ssrn.com/abstract=1028701>; Joseph D. Piotroski & Suraj Srinivasan, 'The Sarbanes-Oxley Act and the Flow of International Listings' (January 2007) at 32, online: SSRN <http://ssrn.com/abstract=956987> ('The average probability of a firm listing its shares on a U.S. exchange (versus a U.K. exchange) is significantly lower in the post Act period after controlling for firm, industry, country, and exchange-specific factors that would influence listing decisions'); Leonce Bargeron, Kenneth Lehn, & Chad Zutter, 'Sarbanes-Oxley and Corporate Risk-Taking' (2007) at 4–5, online: American Enterprise Institute <http://www.aei.org/docLib/20070615_LehnSOX.pdf> (studying more than 9 000 initial public offerings conducted from 1990 to 2006 and finding that 'the probability that an IPO was conducted in the U.K. as opposed to the U.S. increased sharply after SOX'); *Interim Report of the Committee on Capital Markets Regulation* (30 November 2006) at x, 47 (arguing that the difference in the US listing premium in public markets after SOX increased either because the degree of SOX regulation is 'particularly harmful' or because it is 'beneficial but too costly'); Kate Litvak, 'Sarbanes-Oxley and the Cross-Listing Premium' (2007) 105 Mich.L.Rev. 1857 at 1857 (finding empirical results 'that investors expected SOX to have greater costs than benefits' for foreign firms cross-listed in the United States). But see Nomi Prins, 'Paulson's Deregulatory Mission' *The American Prospect* (April 2007) 11 (arguing that the relative decline of US capital-raising activities is due not to SOX compliance, but instead to a weak dollar and national debt); John Coffee, 'It's the Litigation, Stupid' *The New York Sun* (23 January 2007) 9 ('[T]o say the whole story is a "Sox story" is misleading. . . . [T]he American share of IPOs fell to 8% from 60% between 1996 and 2001, a year when Ken Lay was still viewed as a national hero').

73 See*, e.g.*, Miguel Helft, 'Chinese Political Prisoner Sues in U.S. Court, Saying Yahoo Helped Identify Dissidents' *The New York Times* (19 April 2007) C1 (reporting a lawsuit under the Alien Tort Claims Act and the Torture Victims Protection Act in which a Chinese prisoner accuses Yahoo of 'abetting the commission of torture by

Admittedly, if one were Milton Friedman himself, this development could be thought of as a welcome one. If one is of the view that the unregulated pursuit of profit by corporations is likely to grant the greatest number access to the good life, the downward pressure that globalizing capital and product markets is exerting on the ability of governments to regulate corporate behaviour is a welcome development.

But for those who believe that history teaches a different and more complex lesson, that social welfare is optimized by ensuring that corporations compete vigorously but within boundaries requiring the exercise of responsibility toward workers, the environment, and consumers, this prospect is less enthralling. As much that is of durable value seems to be threatened as good is promised. Magnifying the worry is the very scale of human activity. There are many more of us now than there were in the nineteenth century.[74] Only the most stubborn or foolish can fail to harbour doubts as to whether Earth or humanity can weather without irreparable injury a lengthy period of comparable irresponsibility toward the environment and labour, given the greater impact that will flow from the behaviour of billions and billions of people using modern machines and consuming precious resources.[75]

In other words, just as individual American states in the 1930s could not temper the excesses of corporations acting on a national scale, the globalization of capital and product markets is eviscerating the strength of even the United States to effectively regulate corporate behaviour and promote economic equity.

The problems Adolf Berle put on the table in the 1930s regarding the need to regulate corporate conduct have not gone away, they've gone global. To address this need in isolation is to risk job and capital flight. The political maturity of Americans about these realities has suffered because we have not had a candid discussion about the following unavoidable truth: once you have decided on a world of generally free capital flows and trade, you have already made a decision about the effectiveness of domestic regulation, whether you wish to admit it or not.

helping Chinese authorities identify political dissidents who were later beaten and imprisoned').

74 As an interesting new paper observes, China has already surpassed the United States in its emission of carbon and continues to increase its emissions at an explosive rate. Eric A. Posner & Cass R. Sunstein, 'Climate Change Justice' (University of Chicago Law School John M. Olin Law & Economics Working Paper Series (2d) No. 354 & Public Law & Legal Theory Working Paper No. 177, August 2007) at 10–2, online: University of Chicago Law School <https://www.law.uchicago.edu/files/354.pdf>.

75 *E.g.*, Edward O. Wilson, *Consilience: The Unity of Knowledge* (New York: Knopf, 1998) at c. 12 (making the point that human populations have such substantial impact that they threaten earth's survival and that '[t]o raise the whole world to the U.S. level with existing technology would require two more planet Earths').

In my view, the traditional ambivalence of Americans toward the world partly explains our reluctance to speak about these issues more frankly. The stereotype of the cocky, swaggering America, believing itself to know better and having the capacity to have its way whenever it wants, is, like most stereotypes, rooted in some truth. But so too is an older American stereotype, which portrays Americans as a tad frightened of the world and desiring nothing more than to retreat within our own borders, to shape our own destiny, untainted by influence or contact from the outside world. Our friends might say these images actually consist with each other, in that our insularity is reflected even in our international endeavours, that we interact externally mainly out of self-interest and mostly by attempting to impose our own solutions and values on others, without expressing any reciprocal willingness to be subject to international norms. Certainly there is some truth in that.

But there is also a more idealistic streak that runs through the United States' international relations, one premised on the notion that there are, in fact, certain rights that are of universal appeal, which all humans desire and to which all humans are entitled. Although I recognize that there is a basis for cynicism about America's motives, I believe that a genuine desire to extend the blessings of freedom to others has inspired many of my nation's foreign-policy initiatives.[76]

But the purpose of my address today is not to win over those of you who harbour doubts about the good faith and wisdom of your southern neighbours. Rather, it is to highlight the economic realities that should motivate self-interested Americans in seeking closer relations with your nation and with others of its Western allies.

The body of law that I apply every day – American corporate law – has no answer to the challenges facing Americans as a result of globalization. American corporate law will continue its important, but very discrete, role of ensuring that corporate managers are faithful to the legal and fiduciary duties they owe to their corporations' stockholders. That law will no doubt continue to protect the ability of directors – during their term of office – to undertake corporate strategies even if those strategies are not favoured by the stockholders. But it will do little, if anything, to give managers the ability to consider the interests of other corporate constituencies that rival those of the stockholders. That is a naïve and unrealistic hope.

Rather, the realities of the marketplace and the power of institutional investors will guarantee that corporations are governed for the primary purpose of increasing returns to equity. Indeed, the controversies over

76 For an accessible piece taking this more optimistic view and relating an important American foreign-aid initiative, the Marshall Plan, to current circumstances, see Nicolaus Mills, 'A Globalism for Our Time' *The American Prospect* (July/August 2007) 35.

executive compensation are, in large measure, a direct result of the increasing focus on stock-price returns, as CEOs seek rents to compensate them for the increased riskiness of their tenures and the callousness of the cost-cutting measures they are regularly asked to undertake, as well as for what they perceive as their rightful share of the equity value they've created for stockholders. Indeed, if it were not a serious subject, the sight of institutional investors complaining about levels of executive compensation their own policy proposals have fuelled would be amusing.[77]

The internecine battles among the haves of corporate governance – that is, CEOs, independent directors, institutional investors, and those who make up the emergent corporate governance industry itself – do not focus on the economic questions most relevant to ordinary people. Will the economy continue to produce well-paying, decent jobs in the face of international competition? Is there consistent and affordable access to health care? Can the nation afford to honour the promises made to retirees as the percentage of the population that is elderly markedly increases? How can citizens of Western nations maintain their current lifestyles while reducing their disproportionate consumption of the Earth's natural resources? Without being too bold, I think I can safely venture that it is simply silly to believe that questions like these will be fairly and justly considered within the corporate polity itself, in which the only constituency with a vote is capital and in which the only other constituency with real power are the directors and top managers.[78]

77 Between 1980 and 2003, inflation-adjusted CEO pay for Fortune 500 companies increased six-fold and tracked a similar six-fold increase in stock prices. Robert B. Reich, 'Don't Count on Shareholders' *The American Prospect* (April 2007) 52. Over that same period, CEOs of companies took home an increasing multiple of the pay earned by their median workers. Ibid. In 1980, CEO pay was forty times a median worker's salary, a ratio that increased to 100 times in 1990 and again to approximately 300 times in 2006. Ibid.

78 Precisely because capital has the only real power in the corporate polity, I have long been dubious about the realism of expecting corporate boards to be an effective force for ensuring so-called 'corporate social responsibility, in the absence of a legal structure prohibiting corporate misbehavior and protecting the interests of other constituencies.' See Strine, 'Delaware Way,' supra note 31 at 691–2 ('Without appropriate regulation by the citizenry's duly elected representatives, the least ethical of businessmen will trash the environment, exploit workers, and steal from investors – thereby creating inexorable pressures for others to follow suit in order to survive'); Leo E. Strine, Jr., 'The Social Responsibility of Directors and Stockholders in Charge of Control Transactions: Is There Any "There" There?' (2002) 75 S.Cal.L.Rev. 1169 at 1186 ('In the end . . . institutions whose governing bodies are elected solely by the stockholders will, when conflicts become unavoidable, tend to act in ways that put the interests of those with the most clout at the forefront. This means that the interests of stockholders and high-level managers will come first'). A respected economic commentator and former US labour secretary, Robert Reich, has now come to essentially the same

Capital will not protect labour; that is not its purpose. Capital will not protect the environment; that is not its purpose. Capital will not protect consumers; that is not its purpose. Capital's purpose is the ruthless one of increasing its own wealth.[79] And the idea that top corporate managers, who owe their tenure to capital, are a bulwark against capital's tendency to overreach is equally ludicrous.[80]

Being somewhat bolder, I will go into more adventurous territory and reiterate my view that no single nation, not even the United States, can address economic and social questions like these in isolation.[81] And, as in prior periods, questions of this kind bear importantly on the capacity of our citizens to live the good life as we now conceive it. Nations such as Canada, the United States, France, Germany, and Japan have all come to the conclusion that unregulated corporate power will generate poor answers to questions like these. We have all, therefore, sought to temper the freedom-impairing tendency of profit-seeking corporations, a step that necessarily involved impinging on the economic liberty of corporations (and, yes, even workers) in order to ensure that workers were free from unreasonable conditions of employment, that the environment was free from despoilment, and that consumers were free from dangerous products.

The United States and its Western allies now face a historically familiar moment. As discussed, during the New Deal, citizens of particular American states, by necessity, risked a society in which a national

conclusion. Robert Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (New York: Alfred A. Knopf, 2007).

79 This is illustrated by the relative lack of success of corporate social responsibility shareholder proposals. During the 2007 proxy season, less than one-quarter of shareholder proposals on social and environmental issues received more than 15 per cent of the shares voted, and only two of the 174 proposals won majority support. Meg Voorhees & Carolyn Mathiasen, '2007 Review: Social Proposals' *Risk & Governance Weekly* (14 September 2007), online: Risk Metrics Group <http://www.riskmetrics.com/governance_weekly/2007/118.html>. In contrast, 2007 shareholder proposals for issues of traditional corporate governance received significantly greater support – 73 per cent for proposals to eliminate super-majority voting requirements, 69 per cent for proposals to repeal a classified board structure, and 46 per cent for proposals to redeem or vote on a poison pill. 'Support for Pay Proposals Marks 2007 Proxy Season' *The Corporate Governance Bulletin* (June 2007) 3.

80 In being sceptical that managers with an incentive system tilted toward stockholders are likely to be good at protecting other corporate constituencies, I echo Adolf Berle himself. See Berle, 'For Whom,' supra note 36; Bratton & Wachter, 'Shareholder Primacy,' supra note 11 at 32 (describing Berle as holding the view that the 'idea that managers could be trusted to use discretionary power for the welfare of others [w]as the naïve and out-of-touch thinking of an ivory tower academic').

81 *Cf.* 'Overweight But Underpowered; Charlemagne' *The Economist* (8 September 2007) 56 (arguing that even a more unified European Union is likely to have diminishing influence over global economic and energy issues).

government, over which they had by definition less influence, rather than their own state government, over which they wielded comparatively greater clout, would regulate the most important aspects of corporate behaviour. But they gave up a form of local power that was increasingly more powerful in name than in reality so as to gain the protective benefits of an effective national government. They did so in order to create a form of capitalism worth saving, in the sense that it served well the many rather than just the few. Similarly, the emergence of the European Union and its establishment of European-wide standards for corporate behaviour and the fair treatment of workers represented a similar kind of moment, in which it was recognized that the advance of human freedom, in its broadest sense, required citizens of particular nation-states to risk giving important aspects of their nation's sovereignty over to something larger.

The concept of the United States joining together with its Western allies to globalize enforceable standards of responsible corporate behaviour is a difficult one for Americans to fathom. Such an endeavour would require the United States to subject itself more fully and diversely to enforceable international standards, standards that would therefore not exactly match America's own preferences. But we must give in order to receive.

Figuring out how to build on the imperfect international institutions that now exist and to use them as a means to progress toward the globalization of an enlightened capitalism will be a daunting and patience-challenging endeavour.

But anyone committed to the progress of human freedom knows that we have little choice but to try, and to do so with much greater urgency. Such an endeavour will admittedly involve a concerted effort to globalize Western values and standards, notions like decent minimum wages, maximum work weeks, the right to unionize, and proper regard for the environment and consumers. But, having already decided to allow our corporations to globalize their operations, and, therefore, to globalize the Western tradition of private, for-profit enterprise, it hardly seems a logical moral dividing line to pull back from globalizing the regulatory framework Western nations have developed to ensure that corporate behaviour advances social welfare. Indeed, I can think of few beliefs more immoral than assuming that our brethren in the developing world desire to work for, and live in communities dominated by, capital but to do so under the conditions that prevailed in the West in the nineteenth century rather than in the prosperous and more decent post-war era.

There is nothing natural about the scope of product and capital markets. If such markets have been, as I consider them to have been, effectively extended beyond the control of any nation-state, then corporate behaviour will be effectively regulated only if the regulatory sphere is coextensive with those markets. And the only way to build effective regulatory structures of this kind is to begin with international cooperation among nations that share similar values and traditions.

Whether we are comfortable with it or not, we are already economic citizens of the globe. Capital is taking good care of itself, have no doubt, as Milton Friedman would have it. But, contrary to what Milton Friedman might desire, the very fact that corporations are now being governed obsessively for profit provides a strong justification for the strengthening of governmental institutions regulating corporate behaviour that affects workers, the environment, and consumers. The global scale of corporate operations logically requires the formulation, adoption, and enforcement by international institutions of minimum standards of labour, environmental, and consumer protection that are also global. The rights of capital seem well secure, but what of the rights of men and women?

In 1944, Franklin Roosevelt essentially called for a New Deal for the Globe in his State of the Union address, which amplified his earlier 1941 Four Freedoms speech.[82] Roosevelt believed that we had 'come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence.'[83] He articulated various aspects of this form of freedom – which he deemed more generally 'freedom from want' – and made clear that these rights should be the preserve not only of Americans but of all citizens of the world. Notably, many of these rights required for their fulfilment that the conduct of corporations be subjected to effective regulation.[84]

82 'The best interests of each nation, large and small, demand that all freedom-loving nations join together in a just and durable system of peace. . . . And an equally basic essential to peace – permanent peace – is a decent standard of living for all individual men and women and children in all nations.' Franklin Delano Roosevelt, State of the Union Address (11 January 1944), online: Franklin D. Roosevelt Presidential Library and Museum [FDR Library] <http://www.fdrlibrary.marist.edu/011144.html> [Roosevelt, State of the Union 1944].

83 Ibid.

84 As a provocative new historical paper points out, Adolf Berle played a key role in convincing Roosevelt to premise his presidency in large measure on the protection of the economic rights of individuals, but rights in a new sense, including the right to be free from unwarranted exploitation by corporations and market externalities. See Bratton & Wachter, 'Shareholder Primacy,' supra note 11 at 12–4 (describing the role of Berle in drafting Roosevelt's important 'New Individualism' speech of September 1932, which presaged his later articulation of the freedom from want); Franklin Delano Roosevelt, 'The New Individualism: Address before the Commonwealth Club' (23 September 1932), online: TeachingAmericanHistory.org <http://www.teachingamericanhistory.org/library/index.asp?document=447> ('[T]he exercise of property rights might so interfere with the rights of the individual that that the government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism, but to protect it. . . . [T]he responsible

Roosevelt's speech soon found resonance in the Universal Declaration of Human Rights, which echoes and extends his conception of freedom from want.[85] To those of us in the West whose societies have largely implemented this vision of the good and who now find it under pressure, Roosevelt's words should be even more relevant now. Having globalized the world's economy, we now face more directly a challenge akin to that Roosevelt articulated in the 1940s, that of implementing 'economic understandings which will secure to every nation a healthy peace time life for its inhabitants – everywhere in the world.'[86] Although Roosevelt's emphasis was then on the *what* – what was freedom from want – the arguably more urgent challenge now are the *how*s of globalizing the regulatory structures necessary, first, to address the externalities resulting from corporate profit-seeking behaviour and, second, to protect the economic and social rights the West has long recognized as vital to human freedom.[87] In other words, the polity – in some effective manner – must expand to the global scope of markets in which corporate power is influential, in order to protect the freedom of its citizens, all of humanity.

In my judgement, history demonstrates that there is little doubt whether action of that kind will ultimately be required to protect the ability of humans to live the good life, to enjoy freedom in its fullest sense. A mature reflection of human experience might also suggest that the wisest answer to the question of when to begin would have been some time ago but is presently a very clear and certain *right now*.

heads of finance and industry . . . must, where necessary, sacrifice this or that private advantage; and in reciprocal self-denial must seek a general advantage. It is here that formal government . . . comes in. Whenever in the pursuit of this objective the lone wolf, the unethical competitor, the reckless promoter . . . declines to join in achieving an end recognized as being for the public welfare, and threatens to drag the industry back to a state of anarchy, the government may properly be asked to apply restraint').

85 A comparison between Roosevelt's 1944 State of the Union Address and the Universal Declaration of Human Rights itself makes clear just how influential the former was on the latter. Compare Roosevelt, State of the Union 1944, supra note 82, with Universal Declaration, supra note 5. See also Cass R. Sunstein, 'Economic Security,' supra note 2 ('The Universal Declaration of Human Rights, written in the shadow of FDR and accepted by the U.N. General Assembly in 1948, explicitly includes social and economic guarantees'); Cass R. Sunstein & Randy E. Barnet, 'Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue' (2005) 53 Drake L.Rev. 205 at 210 (detailing the influence of Roosevelt's 'Second Bill of Rights' on the constitutions of various nations).

86 Franklin Delano Roosevelt, State of the Union Address (6 January 1941), online: University of San Diego <http://history.sandiego.edu/gen/WW2Text/wwt0047>.

87 Ibid.